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JURY INSTRUCTIONS CONCERNING MULTIPLE DEFENDANTS AND STRICT LIABILITY AFTER THE PENNSYLVANIA COMPARATIVE NEGLIGENCE ACT

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MANY QUESTIONS OF LAW will undoubtedly arise under the briefly worded Pennsylvania Comparative Negligence Act.[1] Resolution of these legal questions, many of which are not explicitly addressed in the Act, must lie with the courts and ultimately the Pennsylvania Supreme Court. Since cases in which the act is applicable are only now beginning to come to trial,[2] the courts have not yet provided answers.

I. THE IMMEDIATE TASK

An initial concern of the trial courts in the Commonwealth is the avoidance of costly and time-consuming retrials. To this end and in the interest of uniform application of the law, a standard jury instruction avoiding the debatable issues is needed immediately. To implement the instruction, a set of jury interrogatories which can be used in any case without creating error is also essential. The interrogatories should enable a jury to make every factual conclusion necessary to apply the law. At the same time, the issues should be presented to the jury as simply and clearly as possible, with a premium placed upon elimination of sources of confusion and the possibility of inconsistent answers. The goal is to facilitate the entry of a judgment on the basis of the jury's answers irrespective of the law that is ultimately applied. In the absence of guidance from the appellate courts, trial judges will be required to exercise their own best judgment as to the resolution of the questions of law.[3] If the interrogatories are

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1. For purposes of this symposium, references to and quotations from the Pennsylvania Comparative Negligence Act have been made without citation. For the text of the Act, *see* Spina, *Introduction, Symposium: Comparative Negligence in Pennsylvania*, 24 VILL. L. REV. 419, 419 (1979).

2. Shortly after enactment, the Pennsylvania Superior Court held the Act inapplicable to causes of action accruing before the Act's effective date, September 7, 1976. Costa v. Lair, 241 Pa. Super Ct. 517, 363 A.2d 1313 (1976) (per curiam).

3. Other commentators, relying upon precedents from other jurisdictions, have suggested answers to some of the questions which will undoubtedly arise. *See, e.g.*, Hankin, *A Plaintiff's Lawyer Looks at the Pennsylvania Comparative Negligence Act*, in THE PENNSYLVANIA COMPARATIVE NEGLIGENCE ACT (Pa. Bar Inst. 1977); Timby, *Comparative Negligence*, 48 PA.

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properly drawn, however, an appellate court should be able to remold any verdict in light of the answers to the interrogatories to reflect any different resolution of the legal questions.

The focus of this article is upon the drafting of jury instructions and special interrogatories that will fulfill the goal of providing every factual conclusion necessary in applying the Act while minimizing the risk of the commission of reversible error. This will be explored particularly in regard to two frequently arising contexts: cases involving multiple defendants and products liability cases. Before one can cogently consider any recommended instruction, it is necessary to examine the Pennsylvania Comparative Negligence Act. We, therefore, begin with an overview of the Act. This overview is followed by the recommended general instruction, a general explanation of the instruction, and a specific analysis addressed to its use where there are multiple defendants, a strict liability cause of action, and finally both multiple defendants and strict liability claims.

II. AN OVERVIEW OF THE PENNSYLVANIA COMPARATIVE NEGLIGENCE ACT

It should be emphasized at the outset that the Pennsylvania Comparative Negligence Act does not change the definition of negligence, contributory negligence, or legal causation. The Act merely mandates in section (a) that a certain comparison be made in actions "for negligence" between the negligence of the defendant or defendants and the negligence of the plaintiff. The only change in the law made by this section is in the amount of damages recoverable by a plaintiff in a negligence action. Contributory negligence is no longer a complete bar to any recovery, but prohibits recovery only when a plaintiff's negligence is "greater than the causal negligence of the defendant or

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B.A.Q. 219 (1977). It is submitted that such precedents are only helpful in identifying the competing policies involved with an issue. *But see* Hankin, *supra*, at 37.

Competing policy considerations have been accorded such varying weights in other jurisdictions that a decision supporting almost any point of view can be found. The resolution of any conflict in policies, however, is solely a matter of Pennsylvania policy in cases governed by Pennsylvania law. Adding to the difficulty of relying upon the experience of another jurisdiction are the complications created by the language of other comparative negligence statutes. Although the wording of the Pennsylvania Comparative Negligence Act as a whole is similar to that of several other states, it is identical to none. *See id.* A slight change in the statutory language can yield a substantial change in the meaning of an act, as the experience of other jurisdictions with comparative negligence acts has proven. Moreover, the legislative history of the Act does not show that the Pennsylvania General Assembly conducted an extensive review of existing comparative negligence statutes. *See* 1 PA. LEG. J. 1703-07 (Senate 1976). One must therefore rely primarily upon the plain meaning of the language of the Pennsylvania Act. The Act should be considered first in addressing any issue and should be authoritative if it specifically addresses the issue. Only when it does not treat the issue should Pennsylvania decisional law and its underlying policy become the basis of interpretation.

defendants against whom recovery is sought." In addition, recoverable damages are reduced "in proportion to the amount of negligence attributed to the plaintiff." The ostensible purpose of section (a) is to ameliorate the harsh result of a finding that both plaintiff and defendant were negligent as long as most of the fault is not the plaintiff's.[4] Section (a) also has the effect of officially approving the obviously compromised jury verdicts that have been judicially accepted in the past.

Section (b), which provides that contribution be apportioned among joint tortfeasors in regard to their relative fault, leaves the law of contribution intact except with respect to the measurement of percentages of contribution of joint tortfeasors *inter se* in negligence cases. Prior law entitled a defendant to equal contribution from other joint tortfeasors for a judgment executed against him,[5] but the Uniform Contribution Among Tort-feasors Act[6] is otherwise unaffected by section (b). In an action under the Act, a defendant who is "compelled to pay more than his percentage share may seek contribution" such that his ultimate loss is "in the ratio of the amount of his causal negligence to the amount of causal negligence attributed to all defendants against whom recovery is allowed." This serves an equitable purpose similar to that required by section (a)[7] since a slightly negligent defendant is no longer automatically assessed with a fixed percentage of responsibility for money damages, but rather is ultimately liable according to his relative fault. In addition to its major purpose of altering the law of contribution among joint tortfeasors *inter se,* section (b) functions to save the judiciary and the defendants the time and expense of an additional trial or hearing to apportion the damages among the tortfeasors by facilitating the establishment of their relative shares in the trial of the plaintiff's negligence cause of action.

III. A PROPOSED BASIC JURY INSTRUCTION

The following instruction[8] is offered as appropriate for use in cases to which the Comparative Negligence Act applies:

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4. *See* 1 PA. LEG. J. 1704 (Senate 1976) (remarks of Sen. Duffield).

5. Wilner v. Croyle, 214 Pa. Super. Ct. 91, 252 A.2d 387 (1969); Parker *ex rel.* Bunting v. Rodgers, 125 Pa. Super Ct. 48, 189 A. 693 (1937); Stewart v. Uniroyal, Inc., 72 Pa. D. & C.2d 206 (C.P. Allegheny County 1975), *aff'd per curiam,* 238 Pa. Super. Ct. 726, 356 A.2d 821 (1976).

6. 42 PA. CONS. STAT. §§ 8321-8327 (1978).

7. *See* text accompanying note 4 *supra.*

8. The instruction proposed here is largely based upon that recommended to date by the Civil Instruction Subcommittee of the Pennsylvania Supreme Court Committee for Proposed Standard Jury Instructions. *See* PENNSYLVANIA STANDARD JURY INSTRUCTION 3.03A (Civil)

GENERAL COMPARATIVE NEGLIGENCE
JURY INSTRUCTION

The Court has already instructed you about what you may consider in determining whether the defendant(s) was (were) negligent, whether the plaintiff was negligent, and whether such negligence, if any, was a substantial contributing factor in bringing about the plaintiff's harm. If you find, in accordance with these instructions, that the defendant(s) was (were) negligent and such negligence was a substantial contributing factor in bringing about the plaintiff's harm, you must then consider whether the plaintiff was negligent. If you find that the plaintiff was negligent and such negligence was a substantial contributing factor in bringing about his harm, then you must apply the Comparative Negligence Act, which provides in section (a):

> "[T]he fact that the plaintiff [decedent] may have been guilty of . . . negligence shall not bar a recovery by the plaintiff . . . [his legal representative] where such negligence was not greater than the causal negligence of the defendant or defendants against whom recovery is sought, but any damages sustained by the plaintiff shall be diminished in proportion to the amount of negligence attributed to the plaintiff [decedent]."

(Just as the law provides that a plaintiff's damages should be diminished in proportion to the amount of negligence attributable to the plaintiff, so too it provides that an award should be divided among the defendants in proportion to their relative degrees of causal negligence. If you find that more than one defendant is liable to the plaintiff, you must also apply section (b) of the Comparative Negligence Act, which provides:

> "Where recovery is allowed against more than one defendant, each defendant shall be liable for that proportion of the total dollar amount awarded as damages in the ratio of the amount of his causal negligence to the amount of causal negligence attributed to all defendants against whom recovery is allowed.")

Under this Act, if you find that the defendant (any defendant or more than one defendant) was causally negligent and you find that the plaintiff (decedent) was also causally negligent, it is your duty to apportion the relative degree of causal negligence between the defendant (all of the defendants found negligent) and the plaintiff. In apportioning the causal negligence you should use your common sense and experience to arrive at a result that is fair and

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(Subcomm. Draft, November 13, 1977). Although the Subcommittee's work has been distributed to the Pennsylvania judiciary it is still unofficial since the supreme court has yet to take the necessary actions to adopt the standard.

reasonable under the facts of this accident (occurrence) as you have determined them from the evidence.

If you find that the plaintiff's causal negligence was greater than the causal negligence of the defendant (the combined causal negligence of those defendants you find to have been negligent), then the plaintiff is barred from recovery and you need not consider what damages should be awarded.

If you find that the plaintiff's causal negligence was equal to or less than the causal negligence of the defendant (the combined causal negligence of the defendants you find to have been causally negligent), then you must set forth the percentages of causal negligence attributable to the plaintiff and the percentage of causal negligence attributable to the defendant (each of the defendants you find to have been causally negligent). The total of these percentages must be 100 per cent. You will then determine the total amount of damages to which the plaintiff would be entitled if he had not been negligent; in other words, in finding the amount of damages, you should not consider the degree, if any, of the plaintiff's fault. After you return your verdict, the court will reduce the amount of damages you have found in proportion to the amount of causal negligence which you have attributed to the plaintiff.

To clarify these instructions, the court will now distribute to each of you a verdict form containing specific questions. At the conclusion of your deliberations, one copy of this form should be signed by your foreperson and handed to the court clerk; this will constitute your verdict. The verdict form reads as follows:

Question 1:

Was the defendant (any of the defendants) negligent?

Defendant A	Yes _____	No _____
Defendant B	Yes _____	No _____
Defendant C	Yes _____	No _____

If your answer to Question 1 is "no" ("no" as to all defendants) this completes your deliberations and your foreperson should sign these special findings and the jury shall return to the court room. Do *not* answer any remaining questions.

Question 2:

Was the defendant's negligence (the negligence of any of those defendants you have found to be negligent) a (substantial contributing factor as defined in the charge) (legal cause) (proximate cause) in bringing about the harm suffered by the plaintiff?

Defendant A Yes_____ No _____
Defendant B Yes_____ No _____
Defendant C Yes_____ No _____

If your answer to Question 2 is "no" ("no" as to all defendants you have found to be negligent) this completes your deliberations and your foreperson should sign these special findings and the jury shall return to the court room. Do *not* answer any remaining questions. If your answer to Questions 1 and 2 is "yes" ("yes" as to any defendant) proceed to answer Question 3.

Question 3:

Was the plaintiff negligent?

Yes _____ No_____

If your answer is "no" proceed directly to question 5 below. Do *not* answer Question 4.

Question 4:

Only if your answer to Question 3 above is "yes," answer this question: was the plaintiff's negligence a (substantial contributing factor as defined in the charge) (legal cause) (proximate cause) in bringing about his harm?

Yes _____ No_____

Question 5:

Taking the combined negligence that was a (substantial contributing factor as defined in the charge) (legal cause) (proximate cause) in bringing about the harm suffered by the plaintiff as 100 per cent, what percentage of that causal negligence was attributable to the defendant (each of the defendants you have found causally negligent) and what percentage was attributable to the plaintiff?

Percentage of causal negligence attributable to Defendant A (Answer only if you have answered "Yes" to Questions 1 and 2 for Defendant A). ___%

Percentage of causal negligence attributable to Defendant B (Answer only if you have answered "Yes" to Questions 1 and 2 for Defendant B). ___%

Percentage of causal negligence attributable to Defendant C (Answer only if you have answered "Yes" to Questions 1 and 2 for Defendant C). ___%

Percentage of causal negligence attributable to the plaintiff (Answer only if you have answered "Yes" to Questions 3 and 4). ___%

Total 100%

If you find the plaintiff's causal negligence to be greater than 50%, this completes your deliberations and your foreperson should sign these special findings and the jury shall return to the court room, omitting Question 6. If you find the plaintiff's causal negligence to be 50% or less, proceed to answer Question 6.

Question 6:

State the amount of damages, if any, sustained by the plaintiff as a result of the accident (occurrence), without regard to and without reduction by the percentage of causal negligence, if any, that you have attributed to the plaintiff.

$ _____

After your return your answers to these questions on the verdict form, signed by your foreperson, the Court will determine the amount to be awarded to the plaintiff by reducing the amount of damages found by you in proportion to the percentage of the plaintiff's causal negligence, if any. I again caution you that you are not to make this reduction yourselves in reaching the amount of the plaintiff's damages, as set forth by you in answer to Question 6.

IV. A GENERAL EXPLANATION OF THE PROPOSED INSTRUCTION

The instruction and special verdict form address liability and damages issues in terms of negligence, since the Act purports to apply only to "all actions brought to recover damages for negligence resulting in death or injury to person or property." The instruction is not appropriate for causes of action based upon intentional or willful

torts[9] or upon products or strict tort liability.[10] Moreover, section (a) of the Act is not applicable where the trial judge rules as a matter of law that the plaintiff was not contributorily negligent. Nonetheless, if such a case goes to the jury against more than one defendant, the instruction may be used to effectuate the apportionment among joint tortfeasors by removing the questions and parts of questions relating to plaintiff negligence.

Section (b) of the Act does not explicitly compel that the apportionment among the defendants be made during the trial of the plaintiff's action,[11] yet no logical reason appears why the apportionment should not be made at the same time that liability and damages are determined. A jury must of necessity hear the same evidence of a defendant's causal negligence in assessing the proportionate shares of several defendants as it does in making the determinations required by section (a) as to whether those defendants were causally negligent. Any inconvenience suffered by the plaintiff, who ordinarily can have no interest in the section (b) apportionment,[12] or by a defendant whom the jury does not find causally negligent, in terms of the slight amount of extra time needed to apportion the causal negligence of defendants, is more than offset by the savings realized by the court and the other defendants in avoiding a second and basically duplicative proceeding.

A possible alternative to choosing between one full-scale trial and two slightly smaller trials is the bifurcation of jury deliberations during the course of one full-scale trial. Under this procedure, if more than one defendant were found liable in section (a) deliberation, the jury could then proceed to a section (b) deliberation after brief additional argument and instruction during which the attendance and participation of the plaintiff and any defendants found not causally negligent would not be required. This alternative would minimize any possible confusion generated by the juxtaposition of section (a)'s comparison of plaintiff negligence with defendant negligence, and section (b)'s apportionment of defendant negligence among the defendants *inter se*. Any confusion could also be minimized by careful jury in-

9. Under the common law of Pennsylvania, contributory negligence is not a defense to an intentional or willful tort. Kasanovich v. George, 348 Pa. 199, 34 A.2d 523 (1943).

10. Contributory negligence is not a defense to strict liability. McCown v. International Harvester Co., 463 Pa. 13, 342 A.2d 381 (1975). For a detailed discussion of the Act's applicability to strict liability cases, *see* notes 33-108 and accompanying text *infra*.

11. Section (b) is, of course, inapplicable to any case involving a single plaintiff and a single defendant.

12. A plaintiff who is also a defendant can have an interest in the apportionment. The liability under the act of a plaintiff in his role as defendant involves questions largely beyond the scope of this article.

struction. When the jury is focusing on the segregation of plaintiff negligence and defendant negligence in mathematical terms, it should not take much additional effort to subdivide the defendant negligence. Ultimately, the interest in judicial and adversarial economy should dictate a general rule against bifurcation. Such considerations have in fact led the Civil Instruction Subcommittee of the Pennsylvania Supreme Court Committee for Proposed Standard Jury Instructions to combine the two sections of the Act for the purpose of drafting a model instruction.[13]

Similarly, the Act does not explicitly compel the use of special interrogatories in cases in which the Act is applicable. The obvious legislative intent to substitute an equitable procedure for the inconsistent and sometimes harsh results encouraged by the doctrine of contributory negligence can only be assured, however, if precise guidelines for application of the Act to the facts are provided to the jury. Furthermore, if the jury is asked to return only a general verdict, a reviewing court will be faced with the unenviable, if not insoluble, tasks of determining the percentages of causal negligence assigned by the jury and deciding whether any error in the charge, if one or more is made, had a prejudicial effect. It is therefore submitted that special interrogatories are essential to fixing the percentages of the parties' causal negligence in cases involving more than one defendant. The thrust of section (b) simply cannot be given any effect without them.[14] Even where the jury is charged on the liability of only one defendant,[15] a general verdict will usually not provide a

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13. PENNSYLVANIA STANDARD JURY INSTRUCTION, Subcomm. Note 3.03A (Civil) (Subcomm. Draft, November 13, 1977). This note indicates: "[I]t was decided that the benefit of providing one instruction with one set of interrogatories which could be used in any and every case was the single most important factor. The instruction, therefore, combines the two sections of the Act, and the interrogatories provide for every possible contingency." *Id.* at 25.1.

The comparison of plaintiff and defendant negligence and the apportionment of defendant negligence among joint tortfeasors are in fact accomplished in the same numbered interrogatory of the Subcommittee's special verdict form. PENNSYLVANIA STANDARD JURY INSTRUCTION 3.03A, at 25.D (Civil) (Subcomm. Draft, November 13, 1977).

14. Section (b) preserves the plaintiff's right to execute full judgment against any defendant against whom judgment is entered and also the defendant's right to contribution from joint tortfeasors. If the contribution is to be based upon proportional fault, as required by § (b), the proportions must be established in the verdict or in subsequent trials. It is submitted that a rational legislature would not pass an Act mandating that a case be repeatedly tried until all of the issues created by the Act were decided.

15. Unless the plaintiff's total damages were a relatively fixed figure, which is rare, a reviewing court would have to assume that the general verdict accurately reflected a reduction based upon the plaintiff's share of causal negligence. To this extent, its decision can be no less haphazard than the jury's decision. Furthermore, a reviewing court would still be without the guidance provided by answers to special interrogatories in analyzing whether any error in the charge was prejudicial. Additionally, the alternative of granting a new trial limited to certain issues would be substantially eliminated.

reviewing court with the factual conclusions it needs in order to avoid ineffective review.

It should also be noted that the phrases "contributory negligence" and "comparative ngeligence" are not used in the instruction or interrogatories. Although the Act does refer at one point to plaintiff negligence as "contributory negligence," the phrase is used in the sense of a past term of art, the effect of which is being modified by the Act. The existence of negligence and contributory negligence have always been measured by the same standard of how an ordinarily prudent man would act under the same or similar circumstances.[16] The plaintiff's negligence has been referred to as "contributory negligence" in order to connote the legal effect accorded its existence. Since plaintiff negligence and defendant negligence are treated in the same equation, there is no reason to refer to them by different names in front of the jury.

Moreover, the use of different terminology may mislead the jury. The Act compares the causal negligence of the parties, irrespective of whether they are plaintiffs or defendants. The unintended implication from the word "contributory" is that there is a difference in quality based upon status of a party, when in fact one does not exist. The potential for confusion may be further compounded where causation is presented to the jury in terms of the "substantial contributing factor" test.[17] Similar consideration dictates that the word "comparative" be used quite cautiously and solely to explain the process of fixing the percentages in Question 5. Even though one can "compare" the causal negligence of plaintiff and defendant on a percentage basis, one cannot logically speak in terms of the "comparative negligence" of the plaintiff without leaving the same inaccurate impression as is generated by reference to the "contributory negligence" of the plaintiff.

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16. *See* D.M. Bare Paper Co. v. Steward, 205 Pa. Super. Ct. 286, 290, 208 A.2d 890, 892 (1965).

17. The Pennsylvania Supreme Court prefers a jury instruction using the substantial contributing factor formulation for the requirement of causation. Hamil v. Bashline, 481 Pa. 256, 392 A.2d 1280 (1978); Whitner v. Von Hintz, 437 Pa. 448, 263 A.2d 889 (1970). The supreme court, however, still finds the older "proximate cause" terminology an acceptable alternative. Ford v. Jeffries, 474 Pa. 588, 379 A.2d 111 (1977). Error can also probably be avoided if the least descriptive phrase "a legal cause" is used, but the use of this standard may blur the crucial distinction between "factual" and "legal" cause enunciated by the supreme court. *See* Flickinger Estate v. Ritsky, 452 Pa. 69, 305 A.2d 40 (1973) (factual causation is a question of fact; proximate causation is a question of law). Consequently, these three alternatives are included in the proposed interrogatories in descending order of desirability.

V. MULTIPLE DEFENDANTS

The instruction has been drafted so that it may be used regardless of the number of defendants against whom a case is submitted. The portions of the instruction itself that are in parentheses are to be used where the jury is charged on the liability of more than one defendant. The interrogatories have been drafted on the assumption that multiple defendants are present since it is easier to modify them where only one defendant is involved than to adapt interrogatories addressing single defendant cases to cases with several defendants.

The instruction itself and, to a lesser degree, the special interrogatories, take the position that the plaintiff's negligence is compared to the combined negligence of all the defendants for the purpose of ascertaining whether the plaintiff is entitled to recover from *any* defendant. There is no need for the instruction or interrogatories to address whether the plaintiff can recover from a particular defendant whose percentage of causal negligence is less than that of the plaintiff, since as long as the plaintiff's causal negligence does not exceed 50%, he can recover from any causally negligent defendant, who will then have a right to proportionate contribution.

Both the instruction and interrogatories assume that only the negligence of the parties is considered in the assignment of percentages. They presume that values cannot be placed upon the causal negligence of other actors who have not been joined, the so-called phantom defendants. The language of the Act would seem to leave little room for debate on these matters. Nevertheless, it should be anticipated that counsel for defendants will frequently argue the contrary positions. With this in mind, the instruction and interrogatories have been drafted so that a trial judge who disagrees with one of the statutory interpretations presumed in the instruction need only make minor modification in the model.

Section (a) of the Act provides that a plaintiff is not barred by his negligence where it "was not greater than the causal negligence of the defendant or defendants against whom recovery is sought," and further provides for the diminution of damages "in proportion to the amount of negligence attributed to the plaintiff." Given its plain meaning, the word "defendant" would certainly exclude nonparties. The seemingly redundant phrase "against whom recovery is sought" was perhaps appended to make the exclusion of nonparties clearer.[18]

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18. If the phrase "against whom recovery is sought" were interpreted as evidence of an intent to exclude additional defendants joined by an original defendant from the § (a) assessment, the goal of completely apportioning responsibility in one action would be frustrated un-

Although it would have been possible to use more precise language,[19] the logical import of stating the person against whom plaintiff negligence is weighed in the singular *and* the plural is that the plaintiff's conduct and right to recover are not to be measured against each of the multiple defendants individually. There is no other logical explanation for including the words "or defendants." If the General Assembly had intended to condition the plaintiff's right to recover upon his negligence not exceeding that of any single defendant or even to so condition his right to recover against a particular negligent defendant, it surely would not have used the words "or defendants."[20]

This conclusion is supported by the enunciation of the reduction to be made on account of plaintiff negligence. The final clause of section (a) calls for the subtraction from the plaintiff's recovery of an amount of dollar damages proportional to his share of the total negligence. The clause does not provide for the plaintiff to recover the percentage of his damages caused by a particular defendant's or all of the defendants' negligence,[21] as apportionment among the defendants is a separate matter having no effect upon the plaintiff's rights.

This reduction based upon plaintiff negligence rather than recovery in proportion to defendant negligence is necessary to preserve the independence of the operation of section (b) from section (a). At the same time, the establishment in one proceeding of the factual conclusions needed to apply each section of the Act is facilitated. It should be noted that these two sections have been combined in the jury instruction solely in the interest of economy. The first sentence of section (b) establishes a comparative system to replace the division of contribution under the prior law into equal shares. The second sentence reiterates the rights of the plaintiff to collect the full amount of a judgment from any liable defendant[22] and of a defendant paying

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less it were made clear in § (b) that the negligence of additional defendants was to be considered in measuring defendants' rights *inter se*. *See* note 24 *infra*.

19. The phrase "the combined negligence of the defendants" might have clarified the precise meaning of the statute.

20. If the Act had addressed the parties solely in the singular, it would have been unclear whether plaintiff's negligence was to be measured individually against the negligence of each defendant. Such a construction would probably have been reasonable, but the Act could rationally have been considered silent on the issue. At the least, an ambiguity would still have resulted.

21. The absence of a reference in this clause to a calculation of recovery based upon the percentage of defendant negligence further negates the possibility of a legislative intention to include phantom defendants in the determination of the plaintiff's right to recovery.

22. These rights of the plaintiff are not modified or conditioned upon the plaintiff's percentage negligence being less than that of the defendant against whom the plaintiff is going to execute judgment.

more than its share to receive contribution from other liable defendants.[23]

Section (b) contains language that is seemingly extraneous to that found in section (a). In providing that the apportionment among joint tortfeasors be based upon relative fault rather than equal shares, the first sentence in section (b) speaks of the ratio of the percentage of causal negligence attributed to one defendant to the percentage "attributed to all defendants against whom recovery is allowed." The language "against whom recovery is allowed" was apparently intended, as was the case in section (a), to exclude the consideration of the causal negligence of phantom defendants as well as to possibly encourage the joinder of all potentially liable persons in one action.[24] Similarly, the second sentence addresses the plaintiff's right to collect the full judgment from one defendant in terms of "recovery from any defendant against whom such plaintiff is not barred from recovery." In combination with the language of the first sentence, this language may have been used to regulate the rights of several causally negligent defendants where one had settled with the plaintiff and obtained a release. It is more likely that this language was intended to clarify that the Act had no effect upon the law of immunities, such as interspousal immunity.[25] Nevertheless, at least one commentator[26] has lost sight of the fact that both sections of the

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23. Had the legislature neglected to clearly state the perpetuation of these rights, it would have been arguable that the legislature intended a change requiring the plaintiff to execute against each causally negligent defendant for proportionate shares of the judgment. The extra time and expense required under that approach would have been exacted from even the most innocent plaintiff, including one whose percentage of causal negligence was zero, with an attendant risk that the plaintiff would not be compensated for the percentage of his damage assigned to a judgment-proof tortfeasor.

24. The excess language in the first paragraph of § (b) may have been intended to negate the inference created by the excess language in § (a). That language raised the inference that additional defendants joined by an original defendant are not to be included in the apportionment. *See* note 18 and accompanying text *supra*. The legislature may have intended to exclude phantom defendants in both respects and also to exclude additional defendants in measuring plaintiff negligence and the plaintiff's right to recover, on the ground that the plaintiff should have joined them if he wanted to benefit from the assignment of a percentage of the total causal negligence to them. Consistent with this interpretation, additional defendants would be included in apportioning contribution, since an original defendant did in fact join them and thereby signify a desire to have the percentage of their causal negligence considered in the determination of his rights.

25. Under Pennsylvania law, one spouse cannot maintain a negligence action for personal injuries against the other spouse. PA. STAT. ANN. tit. 48, § 111 (Purdon 1965). In addition, one spouse cannot enforce a judgment against the other as an additional defendant. Falco v. Pados, 444 Pa. 372, 282 A.2d 351 (1971). An original defendant, however, is able to join a spouse as an additional defendant. PA. R. CIV. P. 2252(a). Thereafter, the spouse can enforce a right to contribution against the joined spouse. Puller v. Puller, 380 Pa. 219, 110 A.2d 175 (1955).

26. Timby, *supra* note 3, at 231. This commentator also recommended that phantom defendants be included in the apportionment of causal negligence, notwithstanding reference in § (a) to "defendants against whom recovery is sought." *Id.* at 230.

Act address entirely separate rights and liabilities and has apparently suggested that the phrases "against whom recovery is allowed" and "against whom such plaintiff is not barred from recovery" in section (b) negate the plain language of, and logical implications in, section (a). This commentator would maintain that the plaintiff's negligence be measured separately against each individual defendant's negligence.[27]

Any doubts as to the meaning of the statutory language in cases involving multiple defendants dissolve upon examination of the policy behind the Act and the obvious intent of the legislation. The effects of the various possible interpretations are best illustrated by way of example. Let us hypothesize several jury responses to Question 5 of the special interrogatories.[28] First, assume the following responses:

Percentage of causal negligence attributable to Defendant A	30%
Percentage of causal negligence attributable to Defendant B	20%
Percentage of causal negligence attributable to Defendant C	10%
Percentage of causal negligence attributable to the plaintiff	40%

The second part of section (a) calls for plaintiff's damages to be reduced by 40% when the verdict is molded. The first part of that section clearly denies the plaintiff any recovery when his conduct is greater than 50% of the cause of the injury. One must then ask whether it intends to further condition the plaintiff's right to recover upon the number of tortfeasors whose actions combine to produce injury. It is submitted that the law should not reward joint tortfeasors or encourage the exercise of less care where one sees that another is already not exercising due care, yet that is the effect of interpreting the statute to measure the plaintiff's conduct against each defendant individually. If the injury would have resulted without the negligence of the Defendants B and C, whether the plaintiff can recover becomes completely fortuitous under this interpretation.

27. *Id.* at 231.
28. For the text of the special interrogatories, *see* text accompanying notes 8 & 9 *supra*.

Now let us reverse the percentages assigned to Defendant A and the plaintiff:

Percentage of causal negligence attributable to Defendant A	40%
Percentage of causal negligence attributable to Defendant B	20%
Percentage of causal negligence attributable to Defendant C	10%
Percentage of causal negligence attributable to the plaintiff	30%

If the plaintiff cannot recover from Defendants B or C, he then must collect all of the judgment, which is 70% of his damages, from a 40% causally negligent defendant, Defendant A, who is without any right to contribution from Defendants B and C.[29] Imposing 70% of the loss upon a 40% causally negligent defendant does not comport with section (b)'s avowed policy of apportioning contribution upon the basis of relative fault[30] and renders the drafting of the final sentence of section (b) an exercise in absolute futility. Conversely, if effect is given to the policy and intent of both sections, the plaintiff can recover 70% of his damages from any of the three defendants and any defendant paying the full judgment can receive proportionate contribution from the others. Ultimately, assuming all have sufficient financial resources, Defendant A would pay 40% of the damages, or 57% of the judgment, Defendant B 20% of the damages, or 29% of the judgment, and Defendant C 10% of the damages, or 14% of the judgment. If one of the causally negligent defendants is judgment-proof, the others will have to absorb his share proportionately.[31]

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29. Defendants B and C would not be "defendants against whom recovery is allowed."

30. This result more closely resembles that which would be reached under the old common law rule prohibiting contribution among joint tortfeasors. *See* Goldman v. Mitchell-Fletcher Co., 292 Pa. 334, 141 A. 230 (1928). The common law rule was subsequently changed to permit contribution in equal shares by the more equitable Uniform Contribution Among Tort-feasors Act, 42 PA. CONS. STAT. § 8324 (1978). *See* Brown v. Dickey, 397 Pa. 454, 155 A.2d 836 (1959) (right to contribution is an equitable right based on common liability to plaintiff).

31. Any inequity in this result is a lesser of alternative evils. Someone has to suffer if one joint tortfeasor is judgment-proof. Prior law, both before and after the Uniform Contribution Among Tort-feasors Act, 42 PA. CON. STAT. § 8324 (1978), recognized that it was more equitable to force the loss upon the other tortfeasors than the injured victim of the tort. This policy is perpetuated under the Pennsylvania Comparative Negligence Act.

Finally, let us attribute the negligence of Defendants B and C to a phantom defendant in each of the two examples above, or simply make Defendants B and C nonparties. We then have a 40% causally negligent plaintiff and a 30% causally negligent defendant in the first example, with the percentages reversed in the second example. If the nonparties or phantom defendants are considered in the assessment of fault, the same inequitable results are reached as if in the two prior examples it had been assumed that the plaintiff's negligence must be measured against that of each defendant individually. If the nonparties are stricken from consideration, the percentages of plaintiff and defendant negligence must be reevaluated for the total to equal 100%.

Two likely methods of reapportionment by the jury appear. One is to view the plaintiff's percentage of causal negligence as a constant, while the other is to maintain proportional consistency between the plaintiff and the defendant in the case, with the percentage of causal negligence of each increasing proportionately until a total of 100% is reached. The latter is more consistent with the apparent spirit of the Act, yet the former cannot be ruled out as the choice of a significant percentage of juries. Under the circumstances of the hypothetical, the method chosen is determinative of the plaintiff's right to recover in the first example and alters the amount of judgment in the second. Taking the plaintiff's share of negligence as a constant, the plaintiff will be entitled to recover 60% of his damages in the first case and 70% in the second. If proportional consistency is maintained, the plaintiff will be barred from recovery in the first case since he is 57% causally negligent, but not in the second, where the plaintiff is 43% causally negligent. Disposition of whether the plaintiff can recover would be as it was apparently intended, since the plaintiff was more negligent than the sole defendant in the first case and less negligent in the second.

One should realize from the last hypothetical that it is unclear whether plaintiffs or defendants benefit from their respective tactical decisions on whom to sue and whom to join, especially in situations where one person is not patently more negligent than all other persons.[32] This is also in accordance with apparent legislative intent. It is unlikely that the General Assembly intended to place either plaintiffs or defendants at an adversarial disadvantage not based upon the

32. Although the effect of a decision may not be as drastic where one person was obviously primarily at fault, any such tactical decision can have a monetary effect. Furthermore, the merits of the decision remain debatable at least until a verdict is rendered.

facts of an accident or occurrence. Although less than perfect, the striking of phantoms unable to defend themselves at trial avoids the automatic frustration of the policy and intent of the two sections of the Act that occurs when phantom defendants are included in the apportionment of responsibility, or when a plaintiff's right to recover and a defendant's right to contribution are measured by the proportionate causal negligence of each defendant individually.

VI. STRICT LIABILITY

Manufacturing lobbies have made extensive efforts in recent years to eliminate strict liability and return tort law to the total dependence upon negligence theory existing prior to the landmark California decision in *Greenman v. Yuba Power Products, Inc.*,[33] and the passage of section 402A of the Second Restatement of Torts (Restatement) in 1965.[34] These authorities impose liability without a showing of fault upon sellers of products.[35] Quite understandably, one of the principal areas of attack has been upon the unavailability of the opportunity to the defendant to defeat or reduce recovery by asserting the failure of a product user to exercise due care. Critics of strict liability have begun to utilize the equitable notion of comparative negligence as one of the weapons in this attack.[36]

The application of comparative negligence principles to strict liability cases has one obvious effect: where contributory negligence was formerly not a defense in a strict liability case, a manufacturer's financial responsibility for the quality of its products is reduced in direct proportion to the average injured consumer's percentage of causal

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33. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). In *Greenman*, the Supreme Court of California held a manufacturer of a power tool strictly liable in tort to a consumer. *Id.* at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700.

34. RESTATEMENT (SECOND) OF TORTS § 402A (1965). Section 402A 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 enganged 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.

Id.

35. *See* notes 33 & 34 *supra*.

36. For a list of courts and commentators, *see* Daly v. General Motors Corp., 20 Cal. 3d 725, 740-41, 575 P.2d 1162, 1170-71, 144 Cal. Rptr. 380, 388-89 (1978).

negligence if comparative negligence is applied. Detractors of strict liability also hope to obscure and possibly negate the social policy underlying the development of strict liability, which posits that the financial and evidentiary burden of senseless injury to the consumption oriented public should be borne by the enterprise profiting from the consumers because that enterprise is in the best position to bear the risk of injury for product deficiency, to discover inadequacies, and to increase the safety of a product.[37] The avowed policy of comparative negligence to relieve the harsh result of denying compensation to a plaintiff where he is partially responsible for his injuries and of absolving the defendant of all the consequences of his negligent conduct,[38] is already fulfilled under strict liability in tort, which denies any defense based upon merely negligent conduct of the plaintiff. Any other equitable purpose for comparative negligence runs contrary to the fundamental rationale underlying strict liability and can only undermine that rationale if comparative principles are applied.[39] The question therefore becomes which public policy is of paramount importance in the context of product related injuries.

The threat to the existence of strict liability on a practical level goes deeper than any conflict in public policy. Jurors are specifically instructed that those placing products into the stream of distribution may be subjected to liability in the absence of any negligence.[40] To request jurors to ignore defendant conduct in assessing liability, and then to ask them to consider it in assessing damages, may be too much to demand. This is especially true since lawyers themselves experience this trouble. It has been frequently suggested that defendant conduct may be kept out of the apportionment of negligence to the plaintiff by framing the comparison in terms of "causation" rather than "negligence" or "fault."[41] Nevertheless, the temp-

37. *See* Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963); RESTATEMENT (SECOND) OF TORTS § 402A, Comment c (1965).

38. *See* note 4 and accompanying text *supra*. *See also* W. PROSSER, LAW OF TORTS 433 (4th ed. 1971).

39. It is therefore not incongruous to allow damages to be reduced or denied if the plaintiff sues in negligence, but not if he includes an alternative strict liability claim based on the same occurrence. Any inequity in allowing a negligent and thus more culpable defendant to assert the victim's fault, while prohibiting a strictly liable defendant from doing so may be easily remedied by a public policy prohibiting contributory negligence as a partial or total bar in a products liability action based upon any theory of liability.

40. The Restatement rule applies even though "the seller has exercised all possible care in the preparation and sale of his product." RESTATEMENT (SECOND) OF TORTS § 402A(2)(a) (1965).

41. It is even more frequently suggested that the substitution of words such as "fault" or "blameworthiness" for "negligence" in strict liability cases will solve conceptual difficulties. This recommendation, however, only evinces the failure to comprehend that strict liability is liability without fault.

tation to jurors to view defendant conduct as relevant in situations where it is not remains the same. Moreover, the practical difficulty in comparing the causative conduct of the plaintiff based upon fault with the causative effect of the product, for which a defendant is liable without fault, cannot be dismissed lightly.

Perhaps the best judicial discussion of whether or not to apply comparative negligence principles to strict tort liability actions is contained in *Daly v. General Motors Corp.*[42] In *Daly*, the Supreme Court of California announced that comparative fault principles would be extended to strict liability in tort cases because it was "fair to do so."[43] In reaching this conclusion, the court examined many authorities from other states,[44] and concluded that a majority of the jurisdictions passing on the question had decided to extend comparative negligence into strict liability.[45] An examination of this analysis illustrates that there is a need for painstaking research before one is persuaded by any apparent trend in the development of strict liability defenses. Each state must actually decide the question individually in light of its own precedents.

Of the courts in the seven states in which the *Daly* opinion found that comparative negligence principles had been applied to strict liability,[46] the Supreme Court of Texas and the United States District Court for the District of Idaho did so only in connection with a previously absolute defense of unforeseeable misuse of product.[47] Of the remaining five courts, only the Supreme Court of Alaska[48] had

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42. 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978). The majority opinion written by Justice Richardson and the separate opinions written by Justices Clark, Jefferson, and Mosk are recommended.

43. *Id.* at 742, 575 P.2d at 1172, 144 Cal. Rptr. at 390. In *Daly*, the defendant, a car manufacturer, contended that its responsibility for the plaintiff's injuries sustained in an accident should have been reduced due to the failure of the deceased, plaintiff's spouse, to lock the car door and wear the seat belt. *Id.* at 731, 575 P.2d at 1165, 144 Cal. Rptr. at 383. The court stated that the deceased would have suffered only minor injuries had he not been thrown from the car. *Id.* at 730, 575 P.2d at 1164, 144 Cal. Rptr. at 382.

44. *Id.* at 739-42, 575 P.2d at 1170-71, 144 Cal. Rptr. at 388-89.

45. *Id.*at 739, 575 P.2d at 1170, 144 Cal. Rptr. at 388.

46. *Id.* at 739-40, 575 P.2d at 1170-71, 144 Cal. Rptr. at 388-89.

47. Sun Valley Airlines, Inc. v. Avco-Lycoming Corp., 411 F. Supp. 598 (D. Idaho 1976) (Idaho's "not as great as" comparative negligence statute specifically addresses only negligence actions applied to unforeseeable misuse, but not ordinary contributory negligence); General Motors Corp. v. Hopkins, 548 S.W.2d 344 (Tex. 1977) (the "pure" form of causal apportionment adopted with regard to unforeseeable misuse was not to be confused with Texas' "not greater than" comparative negligence statute).

48. Butaud v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42 (Alas. 1976) (judicial adoption of "pure" form of comparative negligence covering all plaintiff conduct). In addition to Alaska, the Ninth Circuit and California have judicially adopted a "pure" form of comparative negligence covering all plaintiff conduct. *See* Pan-Alaska Fisheries, Inc., v. Marine Constr. & Design Co., 565 F.2d 1129 (9th Cir. 1977); Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978).

previously followed the Restatement's position in Comment n[49] that contributory negligence is no defense in a section 402A action.[50] The Supreme Courts of Florida[51] and Wisconsin[52] had never before considered strict liability defenses. Additionally, the United States Court of Appeals for the Fifth Circuit, applying Mississippi law,[53] and the United States District Court for the District of New Hampshire[54]

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49. RESTATEMENT (SECOND) OF TORTS § 402A, Comment n (1965). Comment n provides:

> *Contributory negligence.* Since the liability with which this Section deals is not based upon negligence of the seller, but is strict liability, the rule applied to strict liability cases . . . applies. 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. On the other hand the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.

Id. The introduction by the Comment of an element of unreasonableness into this definition of assumption of risk is curious. Elsewhere, the Restatement suggests that contributory negligence is measured by an objective standard and assumption of risk by a subjective one. *See id.* § 496, Comment d. Hereinafter, where a distinction is helpful, the Comment n form of assumption of risk will be referred to as "objective" assumption of risk and the form not requiring an element of unreasonableness as "subjective" assumption of risk.

50. *Id.* § 402A, Comment n. *See* Bachner v. Pearson, 479 P.2d 319, 329 (Alas. 1970).

51. West v. Caterpillar Tractor Co., 336 So. 2d 80 (Fla. 1976) (judicial adoption of "pure" form of comparative negligence covering all plaintiff conduct except the failure to discover a defect or guard against the possibility of its existence).

52. City of Franklin v. Badger Ford Truck Sales, Inc., 58 Wis. 2d 641, 207 N.W.2d 866 (1973) (comparative negligence statute applicable to contributory negligence and assumption of risk under Wisconsin's "negligence per se" theory of strict liability).

53. Edwards v. Sears, Roebuck & Co., 512 F.2d 276 (5th Cir. 1975) (Mississippi's "pure" comparative negligence statute applies to contributory negligence but not to misuse of product).

54. Hagenbuch v. Snap-On Tools Corp., 339 F. Supp. 676 (D.N.H. 1972) (applying New Hampshire's "not greater than" comparative negligence statute specifically addressing only negligence actions). The United States Court of Appeals for the First Circuit has made some interesting interpretations of New Hampshire law in related areas. For example, the First Circuit has applied the portion of the New Hampshire comparative negligence statute, N.H. REV. STAT. ANN § 507:7-a (Supp. 1977), relating to plaintiff negligence to the strict liability claim of an injured user. Cyr v. B. Offen & Co., 501 F.2d 1145, 1150 (1st Cir. 1974). The *Cyr* court, however, refused to apply the part relating to apportionment among tortfeasors, N.H. REV. STAT. ANN. § 507:7-a (Supp. 1977), on the ground that defendant negligence was irrelevant under strict liability. 501 F.2d at 1155. The First Circuit later held that there was no error in the failure to charge on strict liability where defendant had been found negligent, strongly implying that the injured consumers were better off with negligence theory in the comparative negligence era. Rodrigues v. Ripley Indus., Inc., 507 F.2d 782 (1st Cir. 1974). *But cf.* Greenland v. Ford Motor Co., 155 N.H. 564, 347 A.2d 159 (1975) (rejecting *Rodrigues* as a basis for error in the failure to charge on negligence where defendant was found not strictly liable).

In addition, the Supreme Court of Minnesota has held that state's "not as great as" comparative negligence statute, Act of May 23, 1969, ch. 624, § 1, 1969 Minn. Laws 1069 (amended 1978), which specifically addressed only negligence actions, applicable under strict liability to all plaintiff conduct except the failure to discover a defect or guard against the possibility of its existence, even though by statute contributory negligence was a total bar to strict liability and the burden of proof was arguably upon the plaintiff. Busch v. Busch Constr., Inc., ___ Minn. ___, 262 N.W. 2d 377 (1977). This comparative negligence statute was subsequently amended to apply specifically to strict liability. MINN. STAT. ANN. § 604.01 (West Supp. 1979) (generally effective April 15, 1978).

were faced with decisions of the highest state court holding all forms of unforeseeable contributory negligence and all forms of contributory negligence, respectively, complete defenses to strict liability claims.[55] On the other hand, the basic Restatement position on contributory negligence was followed by the Court of Appeals of Colorado,[56] the United States Court of Appeals for the Eighth Circuit, applying Nebraska law,[57] and the Supreme Court of Oklahoma[58] which had rejected the judicial extension of comparative negligence into the strict liability area.[59]

Comment n had never even been considered in Arkansas, Maine, and Rhode Island, three of the five states in which the *Daly* opinion found comparative negligence statutes that were not limited in their language to negligence actions.[60] In the other two states, Mississippi and New York, the highest state courts had held that all forms of contributory negligence were complete defenses to strict liability.[61] In Connecticut, where there was a specific statutory prohibition against the use of comparative principles in strict liability actions, all forms of contributory negligence, except the failure to

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55. Ford Motor Co. v. Matthews, 291 So. 2d 169 (Miss. 1974); Stephan v. Sears, Roebuck & Co., 110 N.H. 248, 266 A.2d 855 (1970).

56. Kinard v. Coats Co., 37 Colo. App. 555, 557, 553 P.2d 835, 837 (1976) (cert. denied) (§ 402A rests not upon negligence principles but on the concept of enterprise liability).

57. Melia v. Ford Motor Co., 534 F.2d 795, 802 (8th Cir. 1976) (statute is inappropriate where proof of negligence or degree of fault is not required). Subsequent to the decision in *Melia*, the Nebraska comparative negligence statute, NEB. REV. STAT. § 25-1151 (1964) (amended 1978), was modified to encompass strict liability. Act of Apr. 5, 1978, Legis. Bill No. 665, § 6, 1978 Neb. Laws 565 (to be codified as NEB. REV. STAT. § 25-1151).

58. Kirkland v. General Motors Corp., 521 P.2d 1353, 1367 (Okla. 1974) (statute is specifically limited to negligence actions).

59. The strict liability defenses in Colorado and Oklahoma actually approached the Pennsylvania defenses to strict liability more closely than the Comment n position. For the text of Comment n, *see* note 49 *supra*. For a discussion of the Pennsylvania defenses, *see* notes 64-97 and accompanying text *infra*. In Colorado, assumption of risk focused more on a subjective standard than on an objective one. *See* Culp v. Rexnord & Booth-Rouse Equip. Co., 38 Colo. App. 1, 2-3, 553 P.2d 844, 845 (1976) (cert. denied). The only other defense in that state was causative misuse, which is unanticipated misuse that reaches the extent to which the user's conduct, not the defect, caused the accident. *See* Kinard v. Coats Co., 37 Colo. App. 555, 553 P.2d 835 (1976) (cert. denied). This defense has also been defined as the sole proximate cause of the accident. Bradford v. Bendix-Westinghouse Automotive Air Brake Co., 33 Colo. App. 99, 113, 517 P.2d 406, 413 (1973). In Oklahoma subjective assumption of risk and misuse were available defenses. Kirkland v. General Motors Corp., 521 P.2d 1353, 1366 (Okla. 1974). The defense of misuse was later clarified to require that not reasonably foreseeable misuse be the sole proximate cause. Fields v. Volkswagen of America, Inc., 555 P.2d 48, 57 (Okla. 1976).

60. Daly v. General Motors Corp., 20 Cal. 3d 725, 739, 575 P.2d 1162, 1170, 144 Cal. Rptr. 380, 388 (1978).

61. Ford Motor Co. v. Matthews, 291 So. 2d 169, 175 (Miss. 1974) (if user's negligence was reasonably foreseeable); Codling v. Paglia, 32 N.Y.2d 330, 343-45, 298 N.E.2d 622, 629-30, 345 N.Y.S.2d 461, 470-72 (1973) (rejecting comparative negligence on ground that adoption was a legislative function and adopting contributory negligence as a bar to recovery under strict liability).

discover a defect or to guard against the possibility of its existence, had judicially[62] and statutorily been made complete defenses.[63]

Let us turn now to the relevant precedents in Pennsylvania and then to the language of the Pennsylvania Comparative Negligence Act itself. Prior to the Pennsylvania Supreme Court's decision in *Berkebile v. Brantly Helicopter Corp.*,[64] there was a great deal of confusion with respect to whether the Pennsylvania strict liability defense of assumption of risk included the objective element found in the Restatement's Comment n.[65] Although the supreme court continues to refer favorably to Comment n,[66] it now appears reasonably clear that the test of assumption of risk is purely subjective.[67] The *Berkebile* court held that a plaintiff could be precluded from recovery in a strict liability case "only if he knows of the specific defect eventually causing his injury and voluntarily proceeds to use the product with knowledge of the danger caused by the defect."[68] Rejecting the contention that a plaintiff could be barred from recovery by his own negligence,[69] the court emphasized that "a finding of assumption of risk must be based on the individual's own subjective knowledge, not upon the objective knowledge of a 'reasonable man.'"[70]

Defined in this purely subjective form, assumption of risk was the only recognized defense to strict liability. Nonliability through an affirmative defense of misuse or abnormal use of product was precluded by the *Berkebile* court, which stated that "evidence which would be admissible in a negligence case to prove 'abnormal use' is admissible in a strict liability case only for the purpose of rebutting

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62. Hoelter v. Mohawk Serv., Inc., 170 Conn. 495, 365 A.2d 1064 (1976).

63. Act of June 7, 1977, Pub. Act No. 77-335, 1977 Conn. Legis. Serv. 504 (West) (effective as to all actions pending on or brought after June 7, 1977). Connecticut had enacted a comparative negligence statute expressly applicable to negligence actions. CONN. GEN. STAT. ANN. § 52-572h (West Supp. 1978).

64. 462 Pa. 83, 337 A.2d 893 (1975).

65. *See, e.g.*, Bartkewich v. Billinger, 432 Pa. 351, 247 A.2d 603 (1968) (court indicated that actions were obviously dangerous); Ferraro v. Ford Motor Co., 423 Pa.324, 223 A.2d 746 (1966) (apparent injection of the objective element of proceeding unreasonably into the defense). For the text and a discussion of Comment n, *see* note 49 *supra*. For a discussion of the distinction between "subjective" and "objective" assumption of risk, *see id.*

66. *See, e.g.*, McCown v. International Harvester Co., 463 Pa. 13, 342 A.2d 381 (1975); Berkebile v. Brantly Helicopter Corp., 462 Pa. 83, 337 A.2d 893 (1975).

67. A subjective standard does not doom industrial employees, who by acquiring experience on the job usually become aware of the dangers involved in using machinery, since their encounters generally cannot be truly "voluntary." *See* Houston v. Tri-State Mach., 2 Pa. D. & C.3d 796 (C.P. Allegheny County 1977) (en banc).

68. Berkebile v. Brantly Helicopter Corp., 462 Pa. 83, 100, 337 A.2d 893, 901 (1975) (citations omitted).

69. *Id.*

70. *Id.* (citations omitted).

the plaintiff's contentions of defect and proximate cause. It is not properly submitted to the jury as a separate defense."[71]

The *Berkebile* court also rejected any attempt to inject into strict liability such negligence concepts as the "unreasonably dangerous" requirement of section 402A,[72] any form of the "reasonable man" standard, and foreseeability.[73] The court held that

> the "reasonable man" standard in any form has no place in a strict liability case. The salutary purpose of the "unreasonably dangerous" qualification is to preclude the seller's liability where it cannot be said that the product is defective; this purpose can be met by requiring proof of a defect. . . . The plaintiff must still prove that there was a defect in the product and that the defect caused his injury; but if he sustains this burden, he will have proved that as to him the product was unreasonably dangerous.[74]

On the issue of proximate cause, the *Berkebile* court stated that

> [t]o require foreseeability is to require the manufacturer to use due care in preparing his product. In strict liability, the manufacturer is liable even if he has exercised all due care . . . . Foreseeability is not a test of proximate cause; it is a test of negligence. . . . Because the seller is liable in strict liability regardless of any negligence, whether he could have foreseen a particular injury is irrelevant in a strict liability case. In either negligence or strict liability, once the negligence or defective product is shown, the actor is responsible for all the unforeseen consequences thereof no matter how remote, which follow in a natural sequence of events.[75]

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71. *Id.* at 99, 337 A.2d at 901.

72. For the text of § 402A, *see* note 34 *supra*. The Supreme Court of Pennsylvania recently reaffirmed this position in Azzarello v. Black Bros. Co., 480 Pa. 547, 557-58, 391 A.2d 1020, 1026 (1978).

73. Berkebile v. Brantly Helicopter Corp., 462 Pa. 83, 96-97, 337 A.2d 893, 900 (1975).

74. *Id.*

75. *Id.* at 97, 337 A.2d at 900 (citations omitted). The decision in *Berkebile* was based upon Pennsylvania precedents and social policy. *See id.* at 93-95, 337 A.2d at 898-99. The court reasoned:

> The law of products liability developed in response to changing societal concerns over the relationship between the consumer and the seller of a product. The increasing complexity of the manufacturing and distributional process placed upon the injured plaintiff a nearly impossible burden of proving negligence where, for policy reasons, it was felt that a seller should be responsible for injuries caused by defects in his products. . . . We [have] therefore held . . . that the seller of a product would be responsible for injury caused by his defective product even if he had exercised all possible care in its design, manufacture and distribution. We emphasized the principle of liability without fault most recently by stating that the seller is "effectively the guaranter [*sic*] of his product's safety" . . . .
>
> . . . .
>
> The crucial difference between strick [*sic*] liability and negligence is that the existence of due care, whether on the part of seller or consumer, is irrelevant. The seller is

Relying upon the principles in *Berkebile* and an earlier decision in *Salvador v. Atlantic Steel Boiler Co.*,[76] the supreme court unanimously approved the following jury instruction given in *Azzarello v. Black Brothers Co.*:[77]

> The (supplier) of a product is the guarantor of its safety. The product must, therefore, be provided with every element necessary to make it safe for (its intended) use, and without any condition that makes it unsafe for (its intended) use. If you find that the product, at the time it left the defendant's control, lacked any element necessary to make it safe for (its intended) use or contained any condition that made it unsafe for (its intended) use, then the product was defective, and the defendant is liable for all harm caused by such defect.[78]

This instruction, intended as a definition of "defect," was drawn from the work of the Pennsylvania Supreme Court Committee for Proposed Standard Jury Instructions, Civil Instruction Subcommittee,[79] which in turn was drawn from *Berkebile* and *Salvador*, and was referred to in *Azzarello* as "one which expresses clearly and concisely the concept of 'defect,' while avoiding interjection of the 'reasonable man' negligence terminology."[80]

Writing for the unanimous *Azzarello* court, Justice Nix held that any jury instruction using the term "unreasonably dangerous" to

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responsible for injury caused by his defective product even if he "has exercised all possible care in the preparation and sale of his product." . . . [T]he seller "may not preclude an injured plaintiff's recovery by forcing him to prove negligence in the manufacturing process." What the seller is not permitted to do directly, we will not allow him to do indirectly by injecting negligence concepts into strict liability theory.

Id. (citations omitted) (footnote omitted), *quoting* Salvador v. Atlantic Steel Boiler Co., 457 Pa. 24, 32, 319 A.2d 903, 907 (1974); RESTATEMENT (SECOND) OF TORTS § 402(A)(2)(a) (1965).

76. 457 Pa. 24, 319 A.2d 903 (1974). In *Salvador*, the court explained that

> a manufacturer by virtue of section 402A is effectively the guarantor of his products' safety. . . . Our courts have determined that a manufacturer by marketing and advertising his product impliedly represents that it is safe for its intended use. We have decided that no current societal interest is served by permitting the manufacturer to place a defective article in the stream of commerce and then to avoid responsibility for damages caused by that defect.

Id. at 32, 319 A.2d at 907 (citations omitted).

77. 480 Pa. 547, 391 A.2d 1020 (1978).

78. *Id.* at 559 n.12, 391 A.2d at 1027 n.12, *quoting* PENNSYLVANIA STANDARD JURY INSTRUCTION 8.02 (Civil) (Subcomm. Draft, June 6, 1976). In *Azzarello*, the court, dealing with a design defect, did "not consider when the risk of loss is placed upon the supplier in cases where an unavoidably unsafe product is involved or where there is an averment of inadequate or absence of warnings." 480 Pa. at 559 n.11, 391 A.2d at 1026 n.11.

79. *See* PENNSYLVANIA STANDARD JURY INSTRUCTION 8.02 (Civil) (Subcomm. Draft, June 6, 1976). The Subcommittee followed prior state law by not drawing a distinction among the types of defect alleged. *See id.* The rationale and logic of *Azzarello* would therefore readily extend to all types of defects.

80. 480 Pa. at 559 n.12, 391 A.2d at 1027 n.12.

gauge whether the manufacturer of an industrial coating machine would be subject to strict liability for the absence of infeed guards or safety devices on the machine was reversible error, as it was "inadequate"[81] and "misleading."[82] The "unreasonably dangerous" formulation of the Restatement had been "primarily designed to provide guidance for the bench and bar, and not to illuminate the issues for laymen;" that is, for use in considering questions of law where "resolution depends upon social policy."[83] These words had "no independent significance and merely represent[ed] a label to be used where it is determined that the risk of loss should be placed upon the supplier" and were condemned by the court for improperly suggesting "considerations which are usually identified with the law of negligence."[84]

It should be noted that in diversity cases applying Pennsylvania law, the federal courts have failed to give any effect to *Berkebile*.[85] Although the decision to affirm the superior court's reversal of the verdict for the defendant[86] in *Berkebile* was unanimous, only two justices signed the opinion.[87] Since the Pennsylvania Supreme Court does not have to give precedential value to one of its own opinions signed by less than a majority of the court,[88] the federal courts[89] have apparently concluded that they have the authority to assign no precedential value to such an opinion.[90] Even though the *Berkebile* opinion was signed by only two justices, prior to *Azzarello*, the supreme court had not negated *Berkebile*'s effectiveness as the

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81. *Id.* at 558, 391 A.2d at 1026.

82. *Id.* at 560, 391 A.2d at 1027.

83. *Id.* at 557-58, 391 A.2d at 1026.

84. *Id.* at 555, 391 A.2d at 1025.

85. *See, e.g.*, Bair v. American Motors Corp., 535 F.2d 249 (3d Cir. 1976) (per curiam); Bowman v. General Motors Corp., 427 F. Supp. 234 (E.D. Pa. 1977); Schell v. AMF, Inc., 422 F. Supp. 1123 (M.D. Pa. 1976), *vacated and remanded*, 567 F.2d 1259 (3d Cir. 1977); Beron v. Kramer-Trenton Co., 402 F. Supp. 1268 (E.D. Pa. 1975), *aff'd*, 538 F.2d 318 (3d Cir. 1976).

86. 462 Pa. at 104, 337 A.2d at 903.

87. In *Berkebile*, three justices merely concurred in the result. Two other justices wrote separate concurring opinions.

88. *E.g.*, Bata v. Central-Penn Nat'l Bank, 448 Pa. 355, 293 A.2d 343 (1972), *cert. denied*, 409 U.S. 1108 (1973); Commonwealth v. Silverman, 442 Pa. 211, 275 A.2d 308 (1971); Commonwealth v. Little, 432 Pa. 256, 248 A.2d 32 (1968).

89. The trial court judges have shown no hesitancy in rejecting *Berkebile*. *See* cases cited note 85 *supra*. Appellate panels, on the other hand, have avoided discussion of the issue. *But see* Greiner v. Volkswagenwerk Aktiengeselleschaft, 540 F.2d 85, 94-95 (3d Cir. 1976). Recently, a panel studiously omitted the phrase "unreasonably dangerous" and any reference to *Berkebile*, although it did rely upon dictum in a plurality opinion signed by only two justices in Kuisis v. Baldwin-Lima-Hamilton Corp., 457 Pa. 321, 319 A.2d 914 (1974), in discussing foreseeability. Schell v. AMF, Inc., 567 F.2d 1259, 1263 (3d Cir. 1977).

90. *See* Beron v. Kramer-Trenton Co., 402 F. Supp. 1268, 1276-77 (E.D. Pa. 1975), *aff'd*, 538 F.2d 318 (3d Cir. 1976).

expression of state strict liability law. *Berkebile* had in fact been utilized, along with *Salvador*,[91] to support the rejection of contributory negligence and comparative negligence as defenses in strict liability cases in the Pennsylvania Supreme Court decision in *McCown v. International Harvester Co.*[92]

In affirming a judgment for the plaintiff, a truck driver whose misjudgment caused an initial collision and brought a steering wheel defect into question,[93] the *McCown* court unanimously continued to resist injection of a "reasonable man" standard into the realm of strict liability.[94] Chief Justice Jones' opinion, which was signed by four other justices,[95] rejected contributory negligence as an available defense.[96] The *McCown* court also rejected the application of comparative negligence to strict liability, stating that "[t]o initially apply a theory of comparative negligence to an area of the law in which liability is not premised upon negligence seems particularly inappropriate."[97]

Against this analysis of the Pennsylvania Supreme Court's decisions in the area of strict liability, it is necessary to examine the language contained in the Comparative Negligence Act. Section (a) of the Act begins with the language: "In *all actions brought to recover damages for negligence* resulting in death or injury to person or property . . . ." It then proceeds to state: "[T]he fact that the plaintiff may have been guilty of *contributory negligence* shall not bar a recovery by the plaintiff or his legal representative *where such negli-*

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91. For a discussion of *Salvador*, *see* note 76 *supra*.

92. 463 Pa. 13, 342 A.2d 381 (1975). The Third Circuit, relying on *McCown* as part of its guidance to the court below upon retrial of a case involving a single vehicle accident and a manufacturing defect, has concluded that, even in a bifurcated trial where liability and damages are tried separately, admitting evidence of the consequences of the decedent's failure to wear his seat belt on the issue of damages would introduce comparative negligence standards into the assessment of damages and violate the policy of strict liability. Vizzini v. Ford Motor Co., 569 F.2d 754, 766-67 (3d Cir. 1977). The dissenting judge in *Vizzini* favored admission of such evidence solely for the assessment of damages, with the burden of proof placed upon the defendant. *Id.* at 771 (Weis, J., dissenting).

93. 463 Pa. at 15, 342 A.2d at 381-82.

94. *Id.* at 15-16 & 16 n.3, 342 A.2d at 382 & n.3.

95. Justice Roberts, the author of the sole opinion in *Salvador*, did not participate in the *McCown* decision. In a concurring opinion in *McCown*, Justice Pomeroy offered an additional explanation of the court's rationale, consistent with both the majority opinions and the principles of *Berkebile*. *See id.* at 17-20, 342 A.2d at 383-84 (Pomeroy, J., concurring).

96. *Id.* at 16 n.2, 342 A.2d at 382 n.2 (citation omitted). Rejecting contributory negligence as an available defense, the *McCown* majority noted: "Recently, we did suggest our rejection of contributory negligence as a defense to 402A liability in . . . [*Berkebile*] per Mr. Chief Justice Jones with Mr. Justice Eagen, Mr. Justice O'Brien and Mr. Justice Manderino concurring in the result and Mr. Justice Roberts and Mr. Justice Pomeroy filing separate concurring opinions." *Id.* (citation omitted).

97. *Id.* at 16 n.3, 342 A.2d at 382 n.3.

gence was not greater than the causal negligence of the defendant or defendants against whom recovery is sought . . . ." Section (b) of the Act addresses apportionment of damages among defendants "in the *ratio of the amount of his causal negligence to the amount of causal negligence attributed to all defendants* against whom recovery is allowed." The plain language of the Act, in particular the emphasized language,[98] leaves little room for debate. Plaintiff negligence is compared with defendant negligence. If there is no defense based upon plaintiff negligence and defendant negligence is not an element of a *prima facie* case under a cause of action, it would appear that the Act could have no application to that cause of action. As we have seen, contributory negligence is not a defense to strict tort liability in Pennsylvania,[99] and Pennsylvania strict liability is not based upon negligence.[100] For the Act to apply to strict liability actions, contributory negligence would have to be interpreted as meaning assumption of risk, and negligence as meaning strict liability. In the absence of any legislative intent[101] that such a strained interpretation be given to the plain language of the statute, the sole support for construing the Act as applicable to strict liability is that courts in other jurisdictions have so construed their own comparative negligence statutes.[102] This must be tempered by the realization that no other statute is exactly identical to Pennsylvania's, and that prior strict liability law in those states was also different.[103]

One must assume that the draftsmen of the Pennsylvania Act were aware of the Pennsylvania common law and its policies, and further that the legislators voting on the Act at least had general notice. As an aid to statutory interpretation, this assumption may indeed be the strongest reasoning that the Pennsylvania courts will utilize. Another possible assumption is that the legislature knew how to draft a comparative responsibility statute specifically encompassing strict liability.[104]

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98. Emphasis in the portions of the Act quoted in the text has been added by the authors.

99. *See* notes 95-97 and accompanying text *supra*.

100. *See* notes 64-75 and accompanying text *supra*.

101. The only published legislative discussion concerns debate over an amendment to the Act which would have allowed the plaintiff to recover only if his negligence was less than the defendant's negligence. 1 PA. LEG. J. 1703-07 (Senate 1976).

102. *See* notes 42-63 and accompanying text *supra*.

103. *See id.*

104. This assumption is supported by the fact that a bill providing for comparative responsibility in strict liability in tort actions was passed by the Pennsylvania Senate in 1978. Pa. S. Bill 585, 161st Gen. Assembly, 1977 Sess., § 11. Section 11 of the bill, as amended on third consideration, June 26, 1978, and passed and sent to the House on June 27, 1978, provides:

It is submitted that if the Pennsylvania General Assembly had intended the Comparative Negligence Act to apply to strict tort liability actions, or to any other action not premised upon negligence, it would have been a simple matter to so provide. At least one other legislature which initially enacted a comparative negligence statute applicable on its face only to negligence actions has recognized the difference between "to recover damages for negligence resulting in death or injury to person or property" [105] and "to recover damages for death or injury to persons or property." [106] In Oregon, the words "negligence resulting in" were eliminated when the legislature

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Comparative responsibility in product liability actions.

(a) In any product liability action in which recovery is sought on the basis of strict liability in tort or breach of warranty, the responsibility of the person suffering the harm, as well as the responsibility of all others for causing the harm, shall be compared by the trier of fact. The responsibility of the person suffering the harm shall not bar recovery for the harm sustained where it was not greater than the responsibility of the party against whom recovery is sought. However, any damages allowed shall be diminished in proportion to the amount of responsibility attributable to the person recovering.

(b) The court may, and when requested by either party shall, direct the jury to find separate special verdicts determining the amount of damages and percentages of responsibility attributable to each party; and the court shall then reduce the amount of such damages in proportion to the amount of responsibility attributable to the person recovering.

(c) Where the recovery is allowed against more than one defendant, each defendant shall be liable for that proportion of the total dollar amount awarded as damages in the ratio of his responsibility to the amount or responsibility attributed to all defendants against whom recovery is allowed.

(d) As used in this section, "responsibility" means conduct which was a substantial factor in bring[ing] [*sic*] about the harm for which damages are sought.

Id. § 11.

Enactment of the bill would, of course, render the general question of the Comparative Negligence Act's applicability to products liability actions moot, although enactment would raise other questions.

105. Act of June 30, 1971, ch. 668, 1971 Or. Laws 1516 (amended 1975). That statute provided:

> Contributory negligence, including assumption of the risk, shall not bar recovery in an action by any person or his legal representative to recover damages *for negligence* resulting in death or injury to person or property if such negligence contributing to the injury was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of such negligence attributable to the person recovering.

Id. (emphasis added). The Pennsylvania Act uses similar language.

106. OR. REV. STAT. § 18.470 (1977). This section provides:

> Contributory negligence shall not bar recovery in an action by any person or his legal representative *to recover damages for death* or injury to person or property if the *fault* attributable to the person seeking recovery was not greater than the combined *fault* of the person or persons against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the percentage of *fault* attributable to the person recovering. This section is not intended to create or abolish any defense.

Id. (emphasis added). The Oregon legislature further provided that the "doctrine of implied assumption of risk is abolished." *Id.* § 18.475(2).

amended its comparative negligence statute in 1975.[107] Reference to a defendant's conduct as amounting to "negligence" was abandoned in favor of reference to "fault."[108]

VII. PRODUCT LIABILITY JURY INTERROGATORIES

The Oregon experience is interesting if only for the apparent efforts of an Oregon trial judge to draft a special verdict form that would eliminate the need for a retrial if the appellate court disagreed with his decision to avoid charging on the applicability of comparative principles to a strict liability count, while specifically charging on their applicability to a negligence count.[109] The desirability of such a form in Pennsylvania should be evident. It can be anticipated that defendants in most strict liability cases arising after the effective date of the Comparative Negligence Act will raise the question of application of the Act to strict liability actions, and it may be years before the Pennsylvania Supreme Court decides the issue. In the meantime, a premium should be placed upon the practicality of instructions and special interrogatories that will withstand any appellate resolution, with the most drastic possible result being that the appellate court will remold the jury verdict into a judgment. The following form is offered as appropriate for use where causes of action in both strict liability and ordinary negligence are submitted to a jury:

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107. *See id.* § 18.470. For the text of the amended section, *see* note 106 *supra*. No reported case has been found which applied Oregon's comparative negligence statute to a strict liability action accruing prior to the 1975 amendment. The Oregon Supreme Court had in fact repeatedly espoused the position of Comment n to § 402A on contributory negligence and assumption of risk. *E.g.*, Johnson v. Clark Equip. Co., 274 Or. 403, 547 P.2d 132 (1976); Findlay v. Copeland Lumber Co., 265 Or. 300, 509 P.2d 28 (1973). Subsequent to the amendment, the Ninth Circuit held that the first version did not apply to strict liability, but stated in dictum that the 1975 version did so apply. Brown v. Link Belt Corp., 565 F.2d 1107 (9th Cir. 1977). The Oregon court has held that an added section, OR. REV. STAT. § 18.475(2) (1977), abolished the assumption of risk defense in subsequently accruing strict liability cases, presumably implying that the comparative negligence amendment applied to these cases, since otherwise neither contributory negligence nor assumption of risk would defeat or reduce recovery. *See* Hornbeck v. Western States Fire Apparatus, Inc., 280 Or. 647, 572 P.2d 620 (1977).

The 1975 amendment of § 18.470 also removed any ambiguity with respect to the effect of the statute in cases involving multiple defendants.

108. It should be noted that the Oregon doctrine of strict liability, at least in defective design cases, is based upon fault. *See* Phillips v. Kimwood Mach. Co., 269 Or. 485, 525 P.2d 1033 (1974); Roach v. Kononen, 269 Or. 457, 525 P.2d 125 (1974).

109. The form is set out in Hornbeck v. Western States Fire Apparatus, Inc., 280 Or. 647, ____n.2, 572 P.2d 620, 623 n.2 (1977). In *Hornbeck*, the effort was of no avail when the jury returned a verdict for the defendant, because the judge had charged on the abolished defense of assumption of risk and had not given the jury separate interrogatories concerning the issues under the strict liability count. *Id.* at ____, 572 P.2d at 621-23.

COMPARATIVE NEGLIGENCE WHERE STRICT LIABILITY AND NEGLIGENCE CAUSES OF ACTION ARE SUBMITTED TO THE JURY—SPECIAL VERDICT FORM

I. Upon Plaintiff's cause of action in strict liability the jury will answer the following questions:

1. Was the defendant in the stream of distribution of the product?

(a) Yes_____

(b) No_____

2. Was there a defect in the product?

(a) Yes_____

(b) No_____

3. Was a defect in the product a (substantial contributing factor as defined in the charge) (legal cause) (proximate cause) in bringing about the harm suffered by the plaintiff?

(a) Yes_____

(b) No_____

4. Did the plaintiff assume the risk of injury (as that defense was defined in the charge)?

(a) Yes_____

(b) No_____

II. Upon Plaintiff's cause of action in negligence the jury will answer the following questions:

1. Was the defendant negligent?

(a) Yes_____

(b) No_____

2. Was the defendant's negligence a (substantial contributing factor as defined in the charge) (legal cause) (proximate cause) in bringing about the harm suffered by the plaintiff?

(a) Yes_____

(b) No_____

If your answer to Question II–1 or II–2 is "no" *and* your answer to I–1, I–2, or I–3 above is "no," this completes your deliberations and your foreperson should sign these special findings and you should return to the court room. Do *not* answer any remaining questions. If your answer to Questions II–1 and II–2 is "yes," proceed to answer Question III.

III. 1. Was the plaintiff negligent?

(a) Yes_____

(b) No_____

If your answer is "no" proceed to Question V below.

2. *Only* if you answered III–1 above "yes," answer this question: was the plaintiff's negligence a (substantial contributing factor as defined in the charge) (legal cause) (proximate cause) in bringing about his harm?

(a) Yes_____

(b) No_____

If your answer is "no" proceed to Question V below.

IV. If you answered III–1 and III–2 "yes," what percentage of negligence did plaintiff and defendant contribute to cause the injury?

Plaintiff_____%

Defendant_____%

If you find the negligence of defendant contributed *less* than 50% to cause the injury *and* your answer to I–1, I–2, or I–3 is "no," this completes your deliberations and your foreperson should sign these special findings, omitting Question V, and return to the court room.

If you find the negligence of defendant contributed 50% or more to cause the injury *or* your answer to I–1, I–2, and I–3 is "yes," proceed to answer Question V.

V. Regardless of your answers to Questions I, II, III or IV, what are plaintiff's total money damages?

$_____

These interrogatories may be modified to accommodate various factual situations. For example, if a disputed factual issue which cannot be decided as a matter of law is not presented under one of these questions,[110] then the question concerning that issue should be omitted and the remaining questions renumbered accordingly. Question V may have to be supplemented if a spouse is a named party, *i.e.*, if there is a claim for loss of consortium, for a separate award to that spouse must be made.[111] In Questions I–3, II–2, and III–2, it is also suggested that a trial judge select the phrase which best blends in with the charge.[112]

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110. For example, a defendant might not challenge whether it either manufactured or sold the product involved. In such a case, assumption of risk cannot be submitted to the jury unless evidence has been introduced by the defendant to show the plaintiff's subjective knowledge or awareness of the specific defect and that an injury could flow therefrom.

111. *See* Hopkins v. Blanco, 224 Pa. Super. Ct. 116, 302 A.2d 855 (1973), *aff'd*, 457 Pa. 90, 320 A.2d 139 (1974).

112. The phrase "a legal cause" is least desirable since it may cause confusion between "factual" and "legal" cause and blur the distinction between the two enunciated in Flickinger Estate v. Ritsky, 452 Pa. 69, 305 A.2d 40 (1973). Although "a substantial contributing factor" is preferable to "a proximate cause" since it is more descriptive and more likely to be understood by the jurors, either phrase is acceptable. Ford v. Jeffries, 474 Pa. 588, 379 A.2d 111 (1977). The

This special verdict form presupposes that assumption of risk is a defense to strict liability, that the Act applies only to negligence counts, and that oral instructions will be given in accordance with this view. It is submitted, however, that as long as a jury resolves the primary liability issues of causation and defect/negligence in favor of the same party under both strict liability and negligence theories, a verdict can be molded to relfect any position as to the effect of the Comparative Negligence Act without requiring a retrial on any issue. For example, suppose the jury finds that the defendant is strictly liable and negligent and, further, that the plaintiff is 30% causally negligent. The Act mandates a 30% reduction in plaintiff's total money damages under the negligence count unless, for public policy reasons, comparative negligence is held not to apply to any cause of action for product related injuries. If comparative principles do not apply to strict liability, damages under the strict liability count are unaffected, and the additional finding on plaintiff's causal negligence becomes extraneous. If they do apply, it is a simple matter to reduce the strict liability damages also by 30%.[113] As long as the total damages are known, any appropriate reduction can be made in molding the verdict.

Moreover, a jury's answer to the question on assumption of risk, although it may affect the amount of the verdict as molded, cannot negate the utility of the form. Suppose the jury finds as above and additionally answers affirmatively to the assumption of risk question.[114] If the plaintiff assumed the risk of the defect which the jury found to exist under strict liability theory, he necessarily assumed the

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Pennsylvania Supreme Court, however, treats the former as the true meaning of causation. Whitner v. Von Hintz, 437 Pa. 448, 263 A.2d 889 (1970). *See* note 17 *supra*.

Early experience with forms using both the phrases "substantial contributing factor" and "what percentage of negligence did plaintiff and defendant contribute to cause the injury" indicates that jurors may confuse the two concepts involved by wondering whether a substantial factor *must* causally contribute 50% or more to the harm. For this reason it is recommended that if the phrase "substantial contributing factor" is used, it should be qualified with "as defined in the charge."

113. Strictly speaking, § (a) of the statute requires the reduction "in proportion to the amount of negligence attributed to the plaintiff," even though it otherwise addresses the comparison of plaintiff negligence with defendant negligence. Since the causal percentage of plaintiff negligence cannot be measured in a vacuum and plaintiff negligence must be compared with something in the assessment of causal percentage, it does beg the question to phrase the issue of the percentage reduction this way. If any reduction would have to be made under a strict liability count, it appears more likely that a court would make the same reduction as under the negligence count, rather than a presumably greater reduction. This reflects the difference between conduct labeled negligent and the distribution of a defective product, that is, the difference between the defendant being negligent and merely strictly liable in cases where the plaintiff was negligent.

114. A negative answer would obviously leave the result in the above hypothetical unchanged under any interpretation of the law.

risk of this same defect under negligence theory.[115] If assumption of risk remains a complete defense under either theory, judgment is entered for the defendant on that particular count. If it has impliedly been abolished or merged into the conduct calling for the application of comparative principles under either theory, the verdict may be molded accordingly, unless the reviewing court views the conceptual difference between contributory negligence and assumption of risk such that, under the particular facts of the case, the latter was not included in the jury's assessment of the former.[116]

Regardless of the status of the Comparative Negligence Act with respect to strict tort liability, retrial on any issue can probably be avoided through the use of the special verdict form *if* primary liability issues are resolved in favor of the same party under both theories of liability. The most serious drawback to use of the form may arise if a jury finds the defendant strictly liable but not negligent.[117] In this circumstance, an ambiguity occurs as to whether the jury should answer Question III and IV. The form intentionally neither provides nor implies an answer to this question. Directions applying to all other possible combinations of answers to Questions I–1, I–2, I–3, II–1, and II–2 are provided immediately following Question II–2 and preceding Question III–1. If a jury answers Question III, it will then at least consider Question IV if it follows the directions, answering Question IV if it answers "yes" to Questions III–1 and III–2.

The answer to Question IV, even assuming that the causal negligence of plaintiff was responsible for a certain percentage of his damages, is subject to doubt. Suppose, as earlier, that this percentage is 30%. The problem is that Question IV asks what percentage of negligence plaintiff and defendant contributed to cause the injury. Even though the total must equal 100%, it would be entirely consistent with the spirit of the finding that defendant is strictly liable but not negligent for the jury to respond "Plaintiff 30%" and "Defendant 0%." If the jury's thought processes are in fact so strongly evidenced, it is questionable whether the failure to reach a total of 100% would

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115. A problem may arise where different defects are alleged under the two theories of liability.

116. Although the conceptual difference of one defense involving what is objectively reasonable and the other involving a particular person's state of mind is easy to state, years of case law have demonstrated that it is most difficult to apply. *See* PENNSYLVANIA STANDARD JURY INSTRUCTION, Subcomm. Note 3.04 (Civil) (Subcomm. Draft, September 26, 1976).

117. The converse, a jury finding in plaintiff's favor on negligence and against him on strict liability, presents no such drawback. In that instance, the jury would be required by the form to address the comparative negligence issues and there would be no necessity for a reviewing court to consider application of the statute to a strict liability claim.

withstand post-trial attack. An even more literal approach would be for the jury to respond "Plaintiff 100%" and "Defendant 0%." Since the defendant was not negligent, all of the negligence was that of the plaintiff, even though he was only 30% responsible for the damages. On its face, this answer must be interpreted as meaning that plaintiff was completely responsible. One must ask whether the additional finding of strict liability renders the verdict inconsistent, or whether that finding is overriden by the subsequent one. From the plaintiff's standpoint, the best possible appellate resolution is the ordering of a retrial limited to apportionment, since no one could divine from the verdict as a whole that the plaintiff's share of responsibility was 30%.

The most likely jury response to Question IV may be "Plaintiff 30%" and "Defendant 70%." Having initially filled in the first blank with the proper figure, the jury would then follow the portion of the charge requiring that the total equal 100%.[118] Moreover, common sense would favor marking down "Defendant 70%." On its face, this response is undeniably inconsistent with the finding that defendant was not negligent, and a retrial on both issues would appear almost inevitable.

The likelihood of either a retrial no matter what numbers the jury indicates to reflect the plaintiff's 30% responsibility or the entry of a judgment that does not reflect its actual findings appears so great that one might be tempted to alter the wording of Question IV where it asks for the percentage causal negligence of defendant. Any change, however, would run afoul of the conclusions drawn earlier that attempts at synonyms or pseudonyms for negligence, such as "fault," "blameworthiness," and "responsibility," beg the question of the applicability of the Act to strict liability and also violate the fundamental policy of section 402A.[119]

Notwithstanding the concern for Question IV, it is questionable whether a jury finding a defendant strictly liable and not negligent will answer Question III. If the Comparative Negligence Act does not apply to strict liability, it does not matter whether these questions are answered. If the Act does apply, the answers must be provided at some point. It appears that half of the time the questions will be

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118. To omit from the charge that the total must equal 100% creates a more serious problem than it solves. Omission encourages the attribution of percentages to innumerable unstated causes—even bad luck or coincidence—and unnamed parties, the so-called phantom defendants. It is submitted that the language of the Act plainly forbids attribution of percentages to parties other than those at the trial. For a discussion of this problem, *see* notes 18-32 and accompanying text *supra*.

119. *See* note 41 and accompanying text *supra*.

answered and retrial is avoided. With respect to the other half of the time, a retrial limited to comparative negligence issues will at least be mandated *if* the Act applies to strict liability.

The ambiguity can, of course, be easily removed, but not without posing a greater danger to the basic premise of the form. For example, the phrase "*or* your answer to Questions I–1, I–2, and I–3 is 'yes' " could be added to the sentence preceding Question III so that the sentence becomes "[i]f your answer to questions II–1 and II–2 is 'yes' *or* your answer to Questions I–1, I–2, and I–3 is 'yes,' proceed to answer question III." Or alternatively, the phrase "II–1 and II–2 'yes' *and*" could be added to the beginning of Question IV so that it becomes "if you answered II–1 and II–2 'yes' *and* III–1 and III–2 'yes,' what percentage of negligence did plaintiff and defendant contribute to cause the injury?" The clear import of the former to the jury would be that comparative principles apply to the strict liability cause of action, although the countervailing consideration posited by Question IV's calling for the percentage of negligence attributable to the defendant would still remain. If a reviewing court held the Act inapplicable to strict liability, it could ignore any answers to Questions III and IV, but the form would presume that the opposite was the more likely appellate conclusion. The latter addition would not entirely cure the ambiguity since it would create the implication that Question IV was not to be answered if the jury found the defendant not causally negligent. The implication, however, would at least follow an initial encounter with Question III without any guidance as to whether Question III should be answered. This addition might make it more likely that Questions III and IV would be answered following a negative response in Question II, but it could further impair the effort at an air of neutrality crucial to the utility of the form. This would also increase the chance of retrial being required if the Act was considered applicable to strict liability actions. If the primary goal is a special verdict form with the greatest possibility of avoiding relitigation, it is suggested that the ambiguity must be accepted.

In cases submitted to a jury under only one of the two theories of strict liability and negligence, a standard special verdict form cannot be devised which preserves the air of neutrality. The interrogatories must suggest either applicability or nonapplicability of the Comparative Negligence Act to the particular cause of action. It does remain possible that the appellate courts might remold any verdict for a plaintiff less than 50% causally negligent if interrogatories concerning comparative negligence are submitted to the jury and it is subsequently held that the Act does not apply. The trial judge, however,

cannot avoid specifically addressing the issue of applicability. The form for cases submitted under both theories may be adapted with only cosmetic changes, such as renumbering of questions and removal of references to questions not submitted, to fit the trial judge's view. For example, if the trial judge decides that the Act applies to products liability cases under negligence theory but not strict liability, he can submit Questions I and V in strict liability cases and Questions II, III, IV, and V in negligence cases.

VIII. MULTIPLE DEFENDANTS IN STRICT LIABILITY/NEGLIGENCE CASES

In multiple defendant cases in which at least two defendants have been sued under a strict liability theory and under a negligence theory,[120] a set of special interrogatories addressed to each cause of action involving the plaintiff and the defendants should be submitted to preserve the integrity of a plaintiff's strict liability cause or causes of action.[121] This procedure increases the risk of inconsistent jury findings, since consistency may require that the jury put down the same numerical percentage in answer to separate questions. It does, however, avoid the necessity of a new trial in order to apply section (b) of the Act under the following circumstances: 1) one defendant is found strictly liable but not negligent and another defendant is found both strictly liable and negligent; *and* 2) the Pennsylvania appellate courts adopt the position that the contribution of a strictly liable, nonnegligent manufacturer to the plaintiff's judgment be equitably apportioned to the contribution of a negligent and strictly liable supplier who is below the manufacturer in the chain of distribution on a comparative fault basis, rather than on an equitable share basis.[122]

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120. In the majority of cases, it is probably a tactical mistake for a plaintiff to sue more than one defendant under both theories.

121. A defendant sued only in strict liability will usually attempt to destroy this integrity by joining an additional defendant under negligence theory. In a recent Pennsylvania case, an original defendant successfully employed this tactic at the trial court level. *See* Azzarello v. Black Bros. Co., 480 Pa. 547, 550, 391 A.2d 1020, 1022 (1978). For a discussion of *Azzarello*, *see* notes 77-84 and accompanying text *supra*.

122. *See* Safeway Stores, Inc. v. Nest-Kart, 21 Cal. 3d 322, 579 P.2d 441, 146 Cal. Rptr. 550 (1978). The California court reached this conclusion on the basis of "fairness and other tort policies." *Id.* at 330, 579 P.2d at 445, 146 Cal. Rptr. at 554. The court's decision was influenced by the following: 1) in the precomparative negligence era, negligent and strictly liable tortfeasors could be ultimately responsible for a judgment upon a 50-50 basis; 2) a middleman was, unlike the consumer-victim, a tortfeasor; and 3) in the postcomparative negligence era, a contrary holding would leave a negligent manufacturer in a better position to shift responsibility

The factual setting necessary for a problem to arise with the application of section (b) is not uncommon. Suppose, for example, that an injured consumer of a product brings strict liability and negligence actions against both the seller and the manufacturer of the product, and the defendants seek contribution and/or indemnity from each other.[123] Suppose further that the jury finds the manufacturer strictly liable but not negligent and the seller both strictly liable and negligent. If the basic premise that section (a) of the Comparative Negligence Act does not apply to a consumer's strict liability action is accepted, the plaintiff is entitled under the principles of *Berkebile* and *Azzarello*[124] to keep that action free of considerations of negligence law. Furthermore, the defendants are entitled to have any appropriate apportionment made.

The major difficulty in presenting interrogatories to the jury is in maintaining neutrality on the question of the application of section (a) to the seller's strict liability claim against the manufacturer, and yet directing that application of section (b) be made to the manufacturer's negligence claim against the seller. Although this difficulty is analogous to that necessitating the use of the special verdict form recommended where the plaintiff brings strict liability and negligence actions against the same defendant,[125] it cannot be solved by adding multiple defendants to that form in the manner employed in the interrogatories within the recommended General Comparative Negligence Jury Instruction.[126] In these cases, the intentional ambiguity in the juxtaposition of the directions for filling in the strict liability/negligence form cannot be perpetuated. Instead, the strict liability/

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to another tortfeasor than a merely strictly liable manufacturer. *Id.* at 329, 579 P.2d at 444-45, 146 Cal. Rptr. at 553-54.

Prior to *Safeway*, the "pure" form of comparative negligence, which does not condition the right to recover upon a party's causal negligence being "not greater than" or "not as great as" another party's, has been judicially adopted for original actions based upon negligence. *See* Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1266, 119 Cal. Rptr. 858 (1975). This doctrine was extended to actions based upon strict liability. *See* Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978). A pure form of "comparative indemnity" between negligent tortfeasors has also been recognized. *See* American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 574 P.2d 763, 143 Cal. Rptr. 692 (1978). The *Safeway* rationale loses impact to the extent that the law of another jurisdiction does not recognize the comparative principles of the prior California law.

123. One could also suppose that the plaintiff's action is brought under strict liability alone and that the seller then sought contribution and/or indemnity from the manufacturer under strict liability theory, who in turn sought contribution and/or indemnity from the seller.

124. For a discussion of *Berkebile* and *Azzarello*, *see* notes 64-84 and accompanying text *supra*.

125. For the text of the recommended form, *see* text accompanying notes 109 &110 *supra*.

126. For the text of the recommended general form, *see* text accompanying notes 8 & 9 *supra*.

negligence form must be submitted separately for each set of parties whose rights and liabilities involve both negligence and strict liability theory. In the example above, separate sets of interrogatories are required for the plaintiff against the seller, the plaintiff against the manufacturer, and the seller, filling the position occupied by the plaintiff in the first two sets, against the manufacturer.[127]

When the jury returns its special findings that the manufacturer was strictly liable and not negligent and that the seller was both strictly liable and negligent, if it has also answered Question IV in the set of interrogatories addressed to the seller's claim against the manufacturer, the trial court will be able to mold a verdict according to its view of the law. An appellate court will later be able to remold the verdict without the retrial of any issue. If section (a) of the Act does not apply to negligent consumers versus strictly liable sellers and manufacturers, one would expect that section (b) also does not apply to negligent sellers versus strictly liable manufacturers. Accordingly, the negligent seller would be entitled to total indemnification from the strictly liable manufacturer, as where the liability of both was based solely on strict liability.[128] Like section (a), section (b) speaks only in terms of negligence. Much of the policy behind strict liability applies to and protects middlemen as well as consumers. The final seller, the last cog in the stream of commercial distribution of the product, is arguably in as poor a position as a consumer to discover a defect, guard against the possibility of its existence, correct it, or dictate how the product is made. Under these circumstances, the only factors militating against giving the seller any rights against the manufacturer are that it was in the business of profiting upon sales of the product and was in a better position than the consumer to bear the risk of loss. One must nevertheless recognize the possibility that a different resolution may be reached by the appellate courts and further that the position of the seller is not as secure as that of the

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127. Had the consumer's action been brought against the two defendants only under strict liability, with the seller seeking contribution and/or indemnity from the manufacturer under a strict liability theory and the manufacturer seeking contribution and/or indemnity from the seller under a negligence theory, the air of neutrality could not be preserved as to the applicability of either § (a) or § (b) to strict liability. The trial judge would then have to decide whether to submit Questions I and V or Questions II, III, IV, and V in each of the three sets.

A plaintiff may have greater difficulty convincing the trial judge to submit the extra sets of interrogatories required to preserve neutrality if he has created the problem by suing both defendants under both theories of liability. A seller may face similar difficulties if it has sought to shift financial responsibility to the manufacturer under both theories instead of only under strict liability.

128. *E.g.*, Burbage v. Boiler Eng'r & Supply Co., 433 Pa. 319, 249 A.2d 563 (1969); Mixter v. Mack Trucks, Inc., 224 Pa. Super. Ct. 313, 308 A.2d 139 (1973).

consumer. Consequently, the likelihood of an apportionment between seller and manufacturer being required is greater than the likelihood of requiring an apportionment between consumer and supplier. To be safe, the special interrogatories should be submitted in the sets suggested above.

IX. CONCLUSION

Several questions concerning the application of the Pennsylvania Comparative Negligence Act have been identified in this article. These questions involve cases in which there are multiple defendants or in which there is strict tort liability claim. This article has focused upon the drafting of jury instructions which avoid the risk of reversible error and provide as much flexibility as possible while still providing for a jury's resolution of relevant factual issues. Debate over the proper solutions to the many questions of law which will arise under the Act will surely continue until the Pennsylvania appellate courts have resolved them. In the meantime, trial judges and the trial bar must deal with them as pragmatically as possible. The suggested jury instructions and special interrogatories have been suggested to this end.