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Peter Zablotsky
Touro Law Center, pzablotsky@tourolaw.edu

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THE APPROPRIATE ROLE OF PLAINTIFF MISUSE IN PRODUCTS LIABILITY CAUSES OF ACTION

Hon. George C. Pratt:

Thank you, Professor Phillips. Our last scheduled speaker, before we throw things open for wild discussion, is Professor Peter Zablotsky.

Professor Peter Zablotsky:*

Perhaps the most significant issue raised in connection with section 402A is whether two of the three major products liability causes of action, those for defective design and failure to warn, should lie in strict liability or in negligence (fault). This issue of fault-based liability versus strict liability¹ is often at the forefront of the discussion of the revision of section 402A.²

* Associate Professor of Law, Touro College Jacob D. Fuchsberg Law Center. B.A., Pennsylvania State University, 1977; J.D., Columbia University School of Law, 1980.

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1. See, e.g., RICHARD A. EPSTEIN, *MODERN PRODUCTS LIABILITY LAW* 103-04 (1980) (discussing the "recurrent tension between negligence and strict liability theories" in causes of action for inadequate warning and design defects); David A. Fischer, *Role of Misuse in Products Liability Litigation*, 17 *LAW NOTES*, Spring 1981, at 49, 50-51 (analyzing design defects under strict liability and failure to warn with respect to manufacturers' conduct); James A. Henderson, Jr. & Aaron D. Twerski, *A Proposed Revision of Section 402A of the Restatement (Second) of Torts*, 77 *CORNELL L. REV.* 1512, 1515-17, 1530-32 (1992) (taking no "explicit position" on "whether design and warning defects are governed by strict liability" but suggesting that "some sort of risk-utility test" which may be "synonymous with a negligence standard" should be applied in actions for design and warning defects); Knox D. Nunnally & B. Lee Ware, *Defenses in Personal Injury Product Liability Cases: Assumption of Risk and Misuse with a View Towards Comparative Fault*, 20 *S. TEX. L.J.* 221, 229-31 (1980) (attaching failure to warn cases to strict liability); Christopher H. Toll, *The Burden of Proving Misuse in Products Liability*

The position of prominence assumed by this issue is well earned. From one perspective, the majority of other issues that have engendered discussion regarding the revision of section 402A flow from this issue. For example, on the issue of the continuing utility of the consumer expectation test, there seems to be universal agreement that the test is appropriately applied in the context of a manufacturing defect cause of action, which is almost without exception thought to be fairly grounded in strict liability.³ It is only in the context of the issue of whether design defect and failure to warn liability should be with or without fault that the utility of the consumer expectation test is called into question.⁴ Similarly, the significance and nature of the risk-utility test changes in accordance with whether it is applied to the product or the manufacturer's conduct, a distinction traditionally used to define the difference between strict liability and fault-based liability.⁵ And perhaps the most obvious issue is whether

Cases, 20 COLO. LAW. 2307, 2307 (1991) (noting that "strict liability focuses on the product rather than on the manufacturer's conduct," unlike in negligence); *Knowing Misuse Defense in Product Liability Cases*, 31 BOSTON B.J., May-June 1987, at 16, 17 (stating that "negligence and strict liability are separate concepts").

2. RESTATEMENT (SECOND) OF TORTS § 402A (1965). This provision provides in relevant part:

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

Id.

3. Henderson & Twerski, *supra* note 1, at 1516.

4. Henderson & Twerski, *supra* note 1, at 1515-17, 1532-34.

5. Henderson & Twerski, *supra* note 1, at 1544-45.

the question of when to apply the appropriate test, at the time of manufacture or time of trial, turns on the theory of fault.⁶

With the hope of ultimately relating the discussion to the preeminent issue of the appropriate theory of liability, this article addresses two discrete sub-issues raised by the revision of section 402A: (1) the burden of proof regarding plaintiff misuse; and (2) the treatment of misuse in a comparative fault-based analytical framework for products liability actions. This article concludes that misuse is most appropriately treated as an affirmative defense, and that such treatment is generally most compatible with the appropriate role of negligence in this products liability context and the ascendancy of comparative fault in tort law.

THE BURDEN OF PROOF REGARDING PLAINTIFF MISUSE

Turning first to the burden of proof regarding plaintiff misuse, by way of background, plaintiff conduct has always been relevant to the cause of action for products liability.⁷ Although not

6. Henderson & Twerski, *supra* note 1, at 1544-45.

7. *See* *Dooms v. Stewart Bolling & Co.*, 241 N.W.2d 738, 744 (Mich. Ct. App. 1976) ("If the proximate cause of the plaintiff's injury is found to have stemmed from his own conduct, such as misuse of a product . . . he may not recover" (citing *Casey v. Gifford Wood Co.*, 232 N.W.2d 360 (Mich. Ct. App. 1975))); *see also* *Cleveland v. Piper Aircraft Corp.*, 890 F.2d 1540, 1544 (10th Cir. 1989) (affirming court's denial of judgment notwithstanding the verdict where there was sufficient evidence at trial to determine that plaintiff's conduct was "objectively reasonable to expect"), *cert. denied*, 114 S. Ct. 291 (1993); *O'Gilvie v. International Playtex, Inc.*, 821 F.2d 1438, 1443 (10th Cir. 1987) (stating that product liability defenses such as assumption of the risk and product misuse all "depend on the reasonableness of plaintiff's conduct" (quoting *Prince v. Leeson Corp.*, 720 F.2d 1166, 1171) (10th Cir. 1983) (citing *Kennedy v. City of Sawyer*, 618 P.2d 788, 796-97 (1980))), *cert. denied sub nom. Playtex Holdings, Inc. v. O'Gilvie*, 486 U.S. 1032 (1988); *Schwartz v. American Honda Motor Co.*, 710 F.2d 378, 381 (7th Cir. 1983) (holding issue of misuse properly submitted to jury where plaintiff presented no evidence that his improper conduct was reasonably foreseeable); *Mitchell v. Fruehauf Corp.*, 568 F.2d 1139, 1146

specifically addressing misuse, comment n to section 402A of the Restatement (Second) states that contributory negligence (i.e., the failure to discover a defect in a product) is not a defense in a products liability action, while assumption of risk (i.e., continuing to make use of a product after having discovered its defect and becoming aware of its danger) is a defense.⁸ On a related point, the text of the Restatement (Second) limits seller liability to those products that reach consumers "without substantial change,"⁹ and elaborates on this point in comment g.¹⁰ Over the past thirty years, the issues of misuse and substantial change have been discussed extensively by commentators¹¹ and judges,¹² and ultimately categorized under

(5th Cir. 1978) (affirming court's decision not to give jury instructions on product misuse where plaintiff's conduct was held to be improper but not unforeseeable); *Zahrte v. Sturm, Ruger & Co.*, 498 F. Supp. 389, 393 (D. Mont. 1980) (denying plaintiff's request for judgment notwithstanding the verdict where the court gave jury instructions on both comparative fault principles and assumption of the risk as "it was only plaintiff's conduct falling short of assumption of risk which could be considered in applying the comparative fault principles . . ."), *cert. denied*, 464 U.S. 961 (1983). *But see* *Dillinger v. Caterpillar, Inc.*, 959 F.2d 430, 440-42 (3d Cir. 1992) (rejecting the admission of plaintiff's conduct to rebut the "causation" prong of defendant's claim as such conduct was not the cause of the accident).

8. RESTATEMENT (SECOND) OF TORTS § 402A cmt. n (1965). Comment n states in pertinent part:

Contributory negligence of the plaintiff is not a defense when such negligence consists merely of 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 voluntary 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.

Id.

9. RESTATEMENT (SECOND) OF TORTS § 402A(1)(b) (1965) provides, "it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold." *Id.*

10. RESTATEMENT (SECOND) OF TORTS § 402A cmt. g (1965) states in pertinent part: "The seller is not liable when he delivers the product in a safe condition, and subsequent mishandling or other causes make it harmful by the time it is consumed." *Id.*

11. *See, e.g.,* John F. Vargo, *The Defenses to Strict Liability in Tort: A New Vocabulary With an Old Meaning*, 29 MERCER L. REV. 447, 455-59

the headings of alteration, modification, and, most importantly for purposes of the present discussion, misuse.¹³

Through the course of analysis of misuse, a further issue has emerged regarding the burden of proof. Specifically, the courts are split on the question of whether misuse is an affirmative defense to be established by the defendant, or part of the *prima facie* case to be established by the plaintiff.¹⁴

(1978) (tracing the origins of the defenses of misuse, abnormal use, and unintended use).

12. *See, e.g., Kelly v. M. Trigg Enters., Inc.*, 605 So. 2d 1185, 1192-93 (Ala. 1992) (holding that when asserting misuse as a defense defendant must show that plaintiff used the product in an unforeseeable manner); *Milwaukee Elec. Tool Corp. v. Superior Court*, 19 Cal. Rptr. 2d 24, 32 (Cal. App. Dep't Super. Ct. 1993) (noting substantial change as one of the factors to be considered under strict liability when misuse by injured plaintiff is foreseeable); *Elliot v. Sears Roebuck and Co.*, 621 A.2d 1371, 1373-76 (Conn. App. Ct. 1993) (stating that unforeseeable misuse defense has been incorporated into product alteration/modification defense); *Gregory v. White Truck & Equip. Co.*, 323 N.E.2d 280, 287-88 (Ind. Ct. App. 1975) (affirming that misuse is a defense in a strict liability action); *Ellsworth v. Sherne Lingerie, Inc.* 495 A.2d 348, 352-57 (Md. 1985) (concluding that carelessness or inattention can constitute contributory negligence without being considered misuse).

13. *See, e.g., Elliot*, 621 A.2d at 1374 (defining alteration and modification for the purposes of determining whether the court properly instructed the jury on the defense of misuse); *see also Henderson & Twerski, supra* note 1, at 1545-46 (categorizing misuse, modification, and alteration as "forms of user and third-party conduct").

14. *See Ellsworth*, 495 A.2d at 354-55; *Toll, supra* note 1, at 2308-11; *see also Marchese v. Warner Communications, Inc.*, 670 P.2d 113, 116 (N.M. 1983) (stating that "[d]efendants have the burden of proving [their] affirmative defenses . . ." and that misuse is one of those "defenses previously allowed to be raised in [that] jurisdiction . . ."); *Kirkland v. General Motors Corp.*, 521 P.2d 1353, 1366 (Okla. 1974) (suggesting that misuse may "as a matter of proof be an affirmative matter . . ."); *Jackson v. Standard Oil Co.*, 505 P.2d 139, 149 (Wash. Ct. App. 1972) (holding that misuse is an affirmative defense and the burden falls on defendant). *But see Schwartz v. American Honda Motor Co.*, 710 F.2d 378, 381 (7th Cir. 1983) (stating that "[the] absence of misuse is part of plaintiff's proof of an unreasonably dangerous condition or of proximate cause . . ."); *Hughes v. Magic Chef, Inc.*, 288 N.W.2d 542, 548 (Iowa 1980) (holding that "misuse is not to be treated in jury instructions as an affirmative defense . . ." but rather the "burden of proof [is] on [the plaintiff] . . ."); *Rogers v. Toro Mfg. Co.*, 522 S.W.2d 632, 637 (Mo. Ct.

The primary argument supporting the position that plaintiff misuse is part of the plaintiff's prima facie case is as follows: generally, in products liability cases, "the plaintiff is able to establish that the product was defective, and the question then becomes whether the harm was within the risk created by the defective product"¹⁵ (i.e., whether the misuse was foreseeable from the point of view of the defendant). Stated in this way, the issue of misuse is really one of proximate cause. Since proximate cause is part of the plaintiff's burden of proof, misuse, like proximate cause, is rightfully part of the plaintiff's burden.¹⁶

The same argument is advanced in the context of cause in fact by those authorities who look at plaintiff misuse as a superseding factual cause.¹⁷

In my opinion, there is a significant problem with this argument. My criticism is as follows: defenses in many cases, when used successfully, relate to cause in fact or proximate cause. Otherwise, the defense is likely to be irrelevant evidence to the damages claimed.¹⁸ Typically, in cases in which defenses are involved, a plaintiff alleges that certain acts of the defendant caused his injury, and the defendant counters by denying the plaintiff's version of events and claiming instead that certain acts

App. 1975) (holding that misuse "is not properly a defense but a necessary element of plaintiff's cause of action . . .").

15. Henderson & Twerski, *supra* note 1, at 1545-46.

16. Henderson & Twerski, *supra* note 1, at 1546. *See also Ellsworth*, 495 A.2d at 356 ("The burden of proof is upon the plaintiff to show that the product was in a defective condition when it left the hands of the seller.").

17. *See, e.g., Ellsworth*, 495 A.2d at 356 (holding that misuse is not an affirmative defense because causation is an element of plaintiff's case). *But see Navarro v. George Koch & Sons, Inc.*, 512 A.2d 507, 515 (N.J. 1986) (concluding that intervening superseding cause must be proven by defendant manufacturer in a products liability case).

18. *See, e.g., McDevitt v. Standard Oil Co.*, 391 F.2d 364, 370 (5th Cir. 1968) (holding that misuse is not a defense unless it relates to proximate cause); *Ellsworth*, 495 A.2d at 355 ("Misuse of a product may also bar recovery where the misuse is the sole proximate cause of damage, or where it is the intervening or superseding cause."); *Singer v. Walker*, 39 A.D.2d 90, 93, 331 N.Y.S.2d 823, 827 (1st Dep't 1972) ("[A] manufacturer need not anticipate that his product will be misused."), *aff'd*, 32 N.Y.2d 786, 298 N.E.2d 681, 345 N.Y.S.2d 542 (1973).

of the plaintiff were the cause.¹⁹ If the foregoing is true, the fact that plaintiff misuse affects cause in fact or proximate cause cannot justify placing on the plaintiff the burden of proof regarding misuse. For if it does, the same principle justifies placing on the plaintiff the burden of proving every defense that affects cause in fact or proximate cause, i.e., most defenses. Clearly, it does not.²⁰

For example, in negligence cases, the plaintiff alleges that the defendant's negligence caused his injury, and the defendant claims that the plaintiff's contributory negligence caused the injury.²¹ In products liability cases, the plaintiff alleges that the product caused his injury, and the defendant alleges that something else, perhaps the plaintiff himself, is the cause of this injury.²² Placing the burden on the plaintiff to prove that he did

19. See, e.g., *Beacham v. Lee-Norse*, 714 F.2d 1010, 1014 (10th Cir. 1983). In *Beacham*, the plaintiff alleged that the lack of a guard shielding the pinch point made the product defective while the defendant manufacturer argued the affirmative defenses of misuse and unreasonable use. *Id.*; *Davidson v. Stanadyne, Inc.*, 718 F.2d 1334, 1337 (5th Cir. 1983). In *Davidson*, the plaintiff alleged that a faucet was defective and unreasonably dangerous while defendant manufacturer argued that the plaintiff misused the product. *Id.*; *Harville v. Anchor-Wate Co.*, 663 F.2d 598, 602-03 (5th Cir. 1981). In *Harville*, a worker who lost an arm argued that a machine was unreasonably dangerous while the manufacturer argued misuse. *Id.*; *General Motors Corp. v. Hopkins*, 548 S.W.2d 344, 346 (Tex. 1977). In *Hopkins*, the driver of a capsized pickup truck claimed his injury was caused by the defective design of the carburetor while the manufacturer claimed the injury was caused by an alteration of the carburetor.; *Mulherin v. Ingersoll-Rand Co.*, 628 P.2d 1301, 1302 (Utah 1981). In *Mulherin*, a miner who lost his leg attributed the injury to the manufacturer defectively designing the throttle control of a winch while the manufacturer attributed the injury to the miner misusing the winch by standing on it. *Id.*

20. See Glen O. Robinson, *Multiple Causation in Tort Law: Reflections on the DES Cases*, 68 VA. L. REV. 713, 728-36 (1982) (stating that burden of proof does not rest entirely on the shoulders of the plaintiff and that defendant carries burden of asserting affirmative defenses to rebut plaintiff's claim).

21. See *supra* note 19 and accompanying text.

22. See, e.g., *Allen v. Chance Mfg. Co.*, 873 F.2d 465, 466 (1st Cir. 1989). In *Allen*, plaintiff who was disassembling an amusement ride claimed a defective pin caused an eye injury while defendant claimed the non-use of recommended safety glasses caused the injury. *Id.*; *Singleton v. Manitowoc*

not misuse the product is no more justifiable than placing the burden on the plaintiff that he was not contributorily negligent; the latter is not the law,²³ and the former should not be either.

Rather, despite the impact of plaintiff misuse on cause in fact and proximate cause, the bulk of authority that holds that the burden of proof regarding plaintiff misuse falls on the defendant offers the appropriate analysis. This conclusion is based on: 1) the meaning and nature of the concept of misuse as it is applied in the products liability context; 2) the way analogous conflicts are resolved in other areas of civil and criminal law; and 3) the necessary perspective that must be kept on the role of negligence in the strict products liability area.

Regarding the meaning of misuse, it becomes immediately clear that, over the decades, the courts have adopted a variety of definitions for this concept. The defenses range from the simple, e.g., "use is not reasonably foreseeable,"²⁴ to the intricate, and even awkward, e.g., "a use of a product where it is handled in a way which the manufacturer could not have reasonably foreseen or expected in the normal and intended use of the product and the plaintiff could foresee an injury as the result of the unintended use;"²⁵ and again, "a use or handling so unusual that the average consumer could not reasonably expect the product to be designed and manufactured to withstand it -- a use which the seller,

Inc., 727 F. Supp. 217, 218 (D.C. Md. 1990). In *Singleton*, plaintiff alleged that his hand was crushed between a crane and a tool box due to the absence of mirrors while the crane manufacturer alleged that the injury was caused by the addition of the tool box to the crane. *Id.*

23. See, e.g., *Jackson v. Stauffer Chem. Co.*, 896 F.2d 915, 917 (5th Cir. 1990) (stating that the defendant has the burden of proving contributory negligence); *Coleman v. Parkline Corp.*, 844 F.2d 863, 867 (D.C. Cir. 1988) (finding that contributory negligence was an affirmative defense and defendant had the burden of proof); *Ozzello v. Peterson Builders, Inc.*, 743 F. Supp. 1302, 1312 (E.D. Wis. 1990) (holding that the defendant must prove contributory negligence by a preponderance of the evidence).

24. See *Harville v. Anchor-Wate Co.*, 663 F.2d 598, 603 (5th Cir. 1981); *Hughes v. Magic Chef, Inc.*, 288 N.W.2d 542, 547 (Iowa 1980).

25. *Simpson v. Standard Container Co.*, 527 A.2d 1337, 1341 (Md. Ct. Spec. App), *cert. denied*, 533 A.2d 1308 (Md. 1987).

therefore, need not anticipate and provide for."²⁶ Regardless of which definition is adopted, the concept of plaintiff misuse is broken down into at least two components -- plaintiff's conduct and manufacturer foreseeability of that conduct.

Looking at misuse in this light would seem to mandate that at least part of the burden of proof regarding plaintiff misuse analysis must fall on the defendant. Although manufacturer foreseeability is arguably part of a proximate cause analysis, establishing what conduct the plaintiff engaged in clearly is not. Rather, establishing plaintiff conduct as a prelude to proving the plaintiff's conduct caused the injury seems to me to be the quintessential burden placed on a defendant seeking to establish an affirmative defense.

With respect to the way analogous conflicts are resolved in other areas of law, perhaps one needs to look no further than contributory negligence. As stated earlier, in negligence cases, the plaintiff alleges that the defendant's negligence caused his injury and the defendant claims that the plaintiff's contributory negligence caused or worsened the injury.²⁷ As part of the prima facie case, the plaintiff bears the burden of proving that the defendant had a duty, that the defendant breached that duty by engaging in conduct that was unreasonable (i.e., defendant exposed the plaintiff to a foreseeable risk when available alternative courses of action would not have), and that the

26. *Id.*; See also W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 102, at 710 (5th ed. 1984). According to Prosser:

negligent conduct or misuse of some kind or character of either an intermediate seller, a claimant, or a third person is, in combination with a product defect, a producing cause of a damaging event, such as a drug mishap, traffic accident, airline crash, or a workplace accident. If this conduct is that of a claimant or chargeable to a claimant then it may constitute a defense that will either diminish or bar recovery.

Id.; RESTATEMENT (SECOND) OF TORTS § 402A cmt. n (1965). According to the Restatement (Second) of Torts, it has been argued that reducing the plaintiff's recovery by the percentage of his fault compromises the policy decision to encourage manufacturers to produce safer products by not imposing primary responsibility on the manufacturers for plaintiff's injuries. *Id.*

27. See *supra* note 19 and accompanying text.

defendant's conduct was the cause of the plaintiff's injury.²⁸ If the plaintiff meets this burden, the defendant may, by way of affirmative defense, show that the plaintiff had a duty toward himself, that the plaintiff breached this duty by engaging in conduct that was unreasonable, (i.e., plaintiff exposed himself to a foreseeable risk when available courses of action would not have), and that the plaintiff's conduct was the cause of his injury.²⁹

In this analytical framework, the plaintiff has the burden regarding the defendant's conduct, the defendant has the burden regarding the plaintiff's conduct, and both parties have the burden regarding cause. The same result should follow in products liability causes of action, to wit: the plaintiff has the burden of proof regarding the status (i.e., a seller engaged in the business of selling the product in issue) and certain activities of

28. See, e.g., *Mortensen v. Memorial Hosp.*, 105 A.D.2d 151, 158, 483 N.Y.S.2d 264, 270 (1st Dep't 1984) ("[I]n any negligence action, the plaintiff has the burden of proving, by a preponderance of the evidence that the defendant's negligence . . . proximately caused the injury claimed."); *Monroe v. City of New York*, 67 A.D.2d 89, 95, 414 N.Y.S.2d 718, 722 (2d Dep't 1979) ("In order to recover on the theory of common-law negligence, it was incumbent upon plaintiff to establish that defendant owed him a duty of care, the breach of which caused his injuries."); *Winter v. Motel Assocs. of LaGuardia*, 127 Misc. 2d 486, 487, 486 N.Y.S.2d 656, 658 (Sup. Ct. Queens County 1985) ("The plaintiff has the burden of proving . . . that the defendant's conduct was unreasonable.").

29. See *Venezia v. Miller Brewing Co.*, 626 F.2d 188, 192 (1st Cir. 1980) (holding that plaintiff's injuries sustained as a result of throwing a glass beer bottle against a telephone pole is a misuse of an otherwise fit product for which manufacturer cannot be held liable); *McDevitt v. Standard Oil Co.*, 391 F.2d 364, 370 (5th Cir. 1968) (holding that plaintiff who was provided with manufacturer's instructions regarding the proper tire size for his vehicle but instead purchased an improper size had misused the product); *Magnuson v. Rupp Mfg., Inc.*, 171 N.W.2d 201, 208 (Minn. 1969) (holding that mechanic who was aware of a spark plug malfunction was not entitled to recover on basis of strict liability from the manufacturer because the direct and proximate cause of the injury was plaintiff's operation of the snowmobile); *Procter & Gamble Mfg. Co., v. Langley*, 422 S.W.2d 773, 775 (Tex. Ct. App. 1967) (denying plaintiff damages for injuries sustained from use of a home permanent hair wave product because buyer's injury was a result of her failure to follow instructions).

the defendant (i.e., not adopting a safer feasible product design, not warning about known non-obvious product related dangers), and the defendant has the burden regarding certain activities of the plaintiff (i.e., his misuse of the product), while both have the burden regarding cause.

If for no other reason than the desirability of finding some neutral ground, two other areas may be worthy of consideration. The first area involves Title VII,³⁰ i.e., a cause of action for discrimination in employment, and the defenses available to a defendant employer. While the resolution of critical issues affecting Title VII actions has changed over time, often in direct relationship to the changing composition of the United States Supreme Court,³¹ there seems to be general agreement on the following: to establish a prima facie case, an employee must show that 1) he is a member of a protected class, and that 2) he

30. 42 U.S.C. § 2000e-2 (1982).

31. In the Supreme Court decision of *Griggs v. Duke Power Co.*, the Court held that a job qualification, which required a high school diploma or passing a generalized intelligence test as a pre-condition for employment or a promotion, to be violative of Title VII. 401 U.S. 424 (1971). The Court stated:

[T]he Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

Id. at 430-31. Four years later, *Griggs* was reaffirmed in *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975). Then, in 1989, with a more conservative majority on the bench, the Supreme Court restricted the *Griggs* holding in *Wards Cove Packing Co., v. Atonio*, 490 U.S. 642 (1989), and held:

A Title VII plaintiff does not make out a case of disparate impact simply by showing that, 'at the bottom line,' there is racial *imbalance* in the work force. As a general matter, a plaintiff must demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack.

Id. at 657 (emphasis supplied); see also Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 203 n.1 (1993).

was disadvantaged in a term or condition of employment relative to another employee who is not within the protected class.³² By establishing these elements, “the plaintiff in a Title VII action creates a rebuttable ‘presumption that the employer unlawfully discriminated against’ him. To rebut this presumption, the ‘defendant must clearly set forth, through the introduction of admissible evidence, the reasons for plaintiff’s rejection.’”³³ Finally, “once a Title VII plaintiff has made out a prima facie case and the defendant employer has articulated a legitimate, nondiscriminatory reason for the employment decision, the plaintiff bears the burden of demonstrating that the reason is pretextual,” i.e., that the proffered legitimate reason is not the real reason for the employment decision.³⁴

All of this burden shifting relates to cause. In *United States Postal Service Board v. Aikens*,³⁵ the Supreme Court provides the most direct example of the applicability of these principles in the context of a causation analysis. In *Aikens*, a black employee alleged that he was passed over for promotions for which he was qualified, and that the promotions went instead to white employees.³⁶ In other words, the employee alleged that his race was the cause of disparate treatment in employment. The employer claimed that the cause of the employee being so treated was his refusal to accept lateral transfers.³⁷ The specific issue faced by the Court was whether the defendant-employer had the burden of proving that its proffered legitimate reason was the cause, or whether the plaintiff-employee had the burden of proving, as part of his prima facie case, that the legitimate reason was not the cause.³⁸ The Court held that negating the defendant-

32. See *United States Postal Serv. Bd. v. Aikens*, 460 U.S. 711, 713 (1982); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Price v. Maryland Casualty Co.*, 561 F.2d 609, 612 (5th Cir. 1977).

33. *Aikens*, 460 U.S. at 714 (quoting *Texas Dep’t of Community Affairs v. Burdine*, 450 U.S. 248, 254-55 (1981)).

34. *Aikens*, 460 U.S. at 717 (Blackmun, J., concurring).

35. 460 U.S. 711 (1983).

36. *Id.* at 713 n.2.

37. *Id.* at 715.

38. *Id.* at 714.

employers reason was not part of the plaintiff's prima facie case, and that the employee need show "only that he was black, that he applied for a promotion for which he possessed the minimum qualifications, and that the employer selected a non-minority applicant" in a way that evinces an intent to discriminate.³⁹

In my view, a direct parallel can be drawn between Title VII actions and products liability actions. That parallel is as follows: the plaintiff has the burden of establishing a prima facie case; and such case does not include misuse as an element but does require the plaintiff to establish that the product (or design or lack of warning) was the cause in fact of his injuries. The burden then shifts to the defendant to offer evidence of plaintiff misuse being the cause, and it is only then that the burden shifts back to the plaintiff to show that misuse was not the real cause of the accident. The fact that all of this burden shifting involves the same issue of causation does not ultimately make it any less necessary or appropriate in the Title VII area; the same should hold in products liability as well.

The mens rea component in the criminal area offers a second analogy. Mens rea, generally, is that component of a criminal offense that defines the required culpable state of mind.⁴⁰ As with all elements of a criminal offense, the prosecution bears the burden of proof with respect to the culpable state of mind.⁴¹ Once the prosecution has met this burden, the defendant may

39. *Id.* at 713.

40. *See Estelle v. McGuire*, 112 S. Ct. 475, 480-81 (1991) (stating prosecution has burden of proving each element of criminal offense, including intent, beyond a reasonable doubt); *see also* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *SUBSTANTIVE CRIMINAL LAW* § 1.8(b), at n.13 (1986) (mental fault is an element of all non-strict liability crimes).

41. *See Patterson v. New York*, 432 U.S. 197, 210 (1977) ("[T]he due process clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged."); LAFAVE & SCOTT, *supra* note 40, § 1.8(b), at n.13 (mental fault is an element in all non-strict liability crimes); *see also* *People v. Kohl*, 72 N.Y.2d 191, 193-94, 527 N.E.2d 1182, 1183, 532 N.Y.S.2d 45, 45 (1988) (culpable mental state is an element of the prosecutor's case).

raise the defense of insanity,⁴² or in some jurisdictions, the lack of capacity.⁴³ While the insanity and lack of capacity defenses are varied and subtle in form, they often come down to the same generic claim that the defendant did not act with the state of mind necessary to satisfy the culpability requirement.⁴⁴

Despite this relationship between insanity, lack of capacity, mens rea, and the fact that the prosecution bears the burden of establishing mens rea, virtually all states have statutes providing that these defenses are affirmative defenses and that the burden of production is on the defendant (i.e., the defendant must come

42. See LAFAVE & SCOTT, *supra* note 40, § 4.5(e) ("On the issue of lack of responsibility because of insanity, the initial burden of going forward is everywhere placed upon the defendant.").

43. See, e.g., N.Y. PENAL LAW § 40.15 (McKinney 1987). Section 40.15 provides that:

In any prosecution for an offense, it is an affirmative defense that when the defendant engaged in the proscribed conduct, he lacked criminal responsibility by reason of mental disease or defect. Such lack of criminal responsibility means that at the time of such conduct, as a result of mental disease or defect, he lacked substantial capacity to know or appreciate either:

1. The nature and consequences of such conduct; or
2. That such conduct was wrong.

Id.

44. See *Longoria v. State*, 168 A.2d 695, 702 (Del.) (stating that a defendant who was mentally ill lacked the mental capacity to distinguish between right and wrong with respect to the act), *cert. denied*, 368 U.S. 10 (1961); *State v. Hathaway*, 211 A.2d 558, 563 (Me. 1965) (holding defendant pleading not guilty by reason of insanity must show that he lacked "the mental capacity to distinguish between right and wrong or know the act was wrong . . ."); *City of Minneapolis v. Altimus*, 238 N.W.2d 851, 857 (Minn. 1976) (holding that a defense of involuntary intoxication will relieve a defendant of criminal responsibility when the intoxication deprives him of the capacity to know the nature of his act or that it was wrong); *State v. Bannister*, 339 S.W.2d 281, 282 (Mo. 1960) (stating that the mental test for criminal responsibility is whether defendant was capable of distinguishing right from wrong as applied to a particular act); *Jones v. Commonwealth*, 117 S.E.2d 67, 71 (Va. Ct. App. 1960) (stating that the test of insanity was whether defendant understood the nature and character of his act and its consequences, and had knowledge that it was wrong and criminal).

forward with evidence showing that he is insane).⁴⁵ Furthermore, half of the jurisdictions place the burden of persuasion on the defendant as well.⁴⁶ The United States Supreme Court has specifically stated that placing the entire burden of proof on the defendant regarding the insanity defense is constitutional.⁴⁷

The defenses of insanity and lack of capacity relate to mens rea as directly as misuse relates to cause. Yet, the fact that this burden sharing between the prosecution and the defense involves the same issue (i.e., state of mind) does not negate the validity, or for that matter, the constitutionality of the analytical framework. The same is true of Title VII, and should be true of products liability.

45. See, e.g., *Longoria*, 168 A.2d at 704 (holding that defendant was presumed sane and had the burden of producing evidence to the contrary); *Evans v. State*, 140 So. 2d 348, 349 (Fla. Dist. Ct. App. 1962) (holding that defendant was presumed sane and had the burden of establishing evidence that he was insane); *Barker v. State*, 4 S.E.2d 31, 33 (Ga. 1939) (holding that burden of producing evidence of insanity was on defendant); *McDonald v. Commonwealth*, 554 S.W.2d 84, 86 (Ky. 1977) (holding that burden of production for insanity defense was on defendant); *State v. Swink*, 47 S.E.2d 852, 853 (N.C. 1948) (holding that an accused must prove his insanity to the satisfaction of the jury); *State v. Hinson*, 172 S.E.2d 548, 554 (S.C. 1970) (holding that defendant must provide sufficient proof of insanity to overcome presumption of sanity); *Nilsson v. State*, 477 S.W.2d 592, 599 (Tex. Crim. App. 1972) (holding that a defendant who pleads insanity bears the burden of proof); *Jones*, 117 S.E.2d at 70 (holding that defendant was presumed sane and had the burden of producing evidence to the contrary).

46. See, e.g., *People v. Bornholdt*, 33 N.Y.2d 75, 85, 305 N.E.2d 461, 466, 350 N.Y.S.2d 369, 376 (1973) (holding that placing burden of persuasion on defendant in criminal case for affirmative defense was constitutional), *cert. denied*, 416 U.S. 905 (1974); *Olivier v. State*, 850 S.W.2d 742, 744 (Tex. Ct. App. 1993) (stating that defendant had burden of proof and persuasion for affirmative defense of insanity); *State v. Box*, 745 P.2d 23, 26 (Wash. 1987) (stating that burden of persuasion for insanity defense was placed on defendant).

47. See *Leland v. Oregon*, 343 U.S. 790, 799 (1952) (placing burden of proof on defendant to determine issue of insanity is constitutional); see also *Rivera v. Delaware*, 429 U.S. 877, 877 (1976) (dismissing an appeal in reliance on *Leland* for not raising substantial federal question); cf. *Patterson*, 432 U.S. at 210 (placing burden of proof for affirmative defense of extreme emotional disturbance on defendant was constitutional).

To appreciate the danger in placing the burden of showing “no misuse” on the plaintiff in products liability actions, we must return to the initial and ultimate issue, i.e., whether products liability actions are based on fault or lie in strict liability. As stated previously, it is beyond dispute that a cause of action for manufacturing defect lies in strict liability.⁴⁸ The danger is that, by placing the burden on the plaintiff to establish “no misuse,” we are placing on the plaintiff the burden of proving that his conduct was foreseeable or reasonable, and consequently turning even causes of action for strict liability manufacturing defect into causes of action for negligence. Regarding causes of action for design defect and failure to warn, placing the burden of “no misuse” on the plaintiff is an indirect, but no less effective, way of grounding these causes of action in negligence. Such a major theoretical change should not be accomplished indirectly.

I do not believe that I am overestimating the danger that mishandling the concept of misuse would risk turning every strict products liability cause of action into one of negligence. This danger has been recognized by other commentators and addressed in the case law.⁴⁹ One of the most revealing and best examples of the danger is the case of *Ellsworth v. Sherne Lingerie*.⁵⁰ This is somewhat paradoxical because *Ellsworth* is one of the seminal cases cited by those who, in arguing that products liability should

48. See *supra* note 3 and accompanying text.

49. See, e.g., *Vannoy v. Uniroyal Tire Co.*, 726 P.2d 648, 651 (Idaho 1985) (“Courts have had to wrestle with various . . . doctrines and to recognize ‘shadowy distinctions between defenses in products cases and negligence cases.’”) (citations omitted); *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 424 (Tex. 1984) (recognizing the difficulty courts have in differentiating between the way defenses are used in products liability cases and negligence cases); see also Mark E. Roszkowski & Robert A. Prentice, *Reconciling Comparative Negligence and Strict Liability: A Public Policy Analysis*, 33 ST LOUIS U. L.J. 19, 68 (1989) (discussing how courts’ confused characterization of misuse in strict liability cases has led to the introduction of comparative negligence principles in products liability actions); David P. Griffith, Note, *Products Liability - Negligence Presumed: An Evolution*, 67 TEX. L. REV. 851, 857 (discussing how due care negligence standard has remained an inherent part of strict products liability doctrine due to inconsistent definitions and applications of misuse defense).

50. 495 A.2d 348 (Md. 1985).

be ruled by negligence, would place the burden of “no misuse” on the plaintiff.⁵¹

In *Ellsworth*, the plaintiff was wearing a flannelette nightgown.⁵² Unfortunately, she was wearing it inside out, with the result that the two side pockets were flapping and protruding.⁵³ The plaintiff placed a kettle on the burner of her stove to make a cup of coffee, and turned the burner on.⁵⁴ She then reached above the stove to get a coffee filter from a cupboard and, as she was reaching, one of the protruding pockets came into contact with the burner, and the gown ignited.⁵⁵ The plaintiff was seriously injured, and brought, *inter alia*, a products liability cause of action.⁵⁶

The defendant argued that the plaintiff’s “use” of the nightgown was to “drape[] it over a hot burner for an appreciable period of time, [which] cannot seriously be considered a reasonably foreseeable manner of use,”⁵⁷ and that misuse of the nightgown was a question for the jury.⁵⁸ The trial judge agreed, and accordingly instructed the jury.⁵⁹ The jury found that the plaintiff misused the nightgown, and returned a verdict for the defendant.⁶⁰

The Court of Appeals of Maryland reversed, holding that the plaintiff’s use of the nightgown, though careless, did not, as a matter of law, constitute misuse.⁶¹ The court concluded that, “[m]omentary inattention or carelessness on the part of the user, while it may constitute contributory negligence, does not add up to misuse of the product”⁶² This holding shows that this court was acutely aware that misuse could be used to turn

51. *Id.* at 356.

52. *Id.* at 351.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 353.

58. *Id.*

59. *Id.* at 352.

60. *Id.*

61. *Id.* at 356-57.

62. *Id.* at 357.

this strict liability cause of action into one for negligence, and that this shift in liability theory was clearly improper (even in those jurisdictions that treat “no misuse” as part of the plaintiff’s prima facie case).⁶³

Although it is not universally agreed that there is danger in misapplying misuse, it cannot be denied that placing the burden of showing “no misuse” on the plaintiff has significant ramifications that can affect the outcome of any particular cause of action. While this has been demonstrated in a plethora of cases,⁶⁴ it might be useful to examine these ramifications with reference to some oft-cited hypotheticals. To take one example, the court in *General Motors Corp. v. Hopkins*⁶⁵ stated that the

63. *Id.* at 356.

64. *See, e.g.,* *Young v. Up-Right Scaffolds, Inc.*, 637 F.2d 810 (D.C. Cir. 1980); *Schmutz v. Bolles*, 800 P.2d 1307 (Colo. 1990). In *Young*, plaintiff was injured when the scaffolding he was disassembling collapsed. 637 F.2d at 812. The trial judge, in refusing to give a jury instruction indicating that contributory negligence is not a defense, erred in failing to recognize that “although contributory negligence is a defense in a negligence action, almost all courts refuse to recognize it is a defense in a strict liability action” *Id.* at 814. The court stated: “Because the plaintiff does not appear to have been conscious of any danger and because his use of the product may have been reasonably foreseeable, it is possible that the jury would have considered him contributorily negligent but not responsible for product misuse” *Id.* at 815. In *Schmutz*, plaintiff instituted a medical malpractice action against defendant doctor, and a products liability action against defendant manufacturer of a drill, which the doctor used on the plaintiff during surgery, causing plaintiff to suffer a stroke. 800 P.2d at 1309. Upon the request of the drill manufacturer, the trial court gave a product misuse instruction because of expert testimony that the hospital’s failure to clean the drill properly was not foreseeable. *Id.* at 1316-17. However, “[b]ecause a single instance of improper cleaning could cause the drill to malfunction and numerous instances of improper cleaning in various hospitals were known [by the manufacturer], . . . [t]here was no evidence to support the product misuse instruction.” *Id.* at 1317; *see also* *American Laundry Mach. Indus. v. Horan*, 412 A.2d 407 (Md. 1980) (manufacturer of an institutional clothes dryer held liable for injuries sustained when the dryer disintegrated while being used to dry a large hot air balloon); *Moran v. Faberge, Inc.*, 332 A.2d 11, 21 (Md. 1975) (court held that reasonably foreseeable use of cologne and liability of manufacturer were questions for the jury).

65. 548 S.W.2d 344 (Tex. 1977). Plaintiff, who was badly injured in an accident where the driver of a truck lost control when the butterfly valves of a

manufacturer of a knife designed to cut meat could not be liable if the plaintiff misused the knife by using it as a toothpick.⁶⁶ But what about a plaintiff who is cut when the blade of the knife breaks, because of a defect in manufacturing, while the plaintiff is using the knife to scrape meat from the bottom of a pan? Or a second example, from *Ellsworth*, citing an article by Mr. Vargo, to the effect that "a high speed electric drill may be defective because a manufacturing defect causes it to short circuit and produce a shock during normal usage,"⁶⁷ but "[a] plaintiff who attaches a brush to that drill and in attempting to clean his teeth suffers injury to his mouth from the high speed of the brush will lose" ⁶⁸ his case because of his misuse of the drill. But what about the plaintiff who is injured because he uses the drill while standing in water? It seems that in these close cases -- those involving a knife used to scrape or a drill used near water -- a trier of fact must decide if misuse is present. In these cases, who bears the burden of proof could make a great deal of difference indeed.

Statistically, of the thirty-one states that to date have addressed the issue of burden of proof with any kind of specificity or certainty,⁶⁹ twenty states view misuse as a defense and place the burden on the defendant,⁷⁰ while the other eleven states view "no

defective carburetor were locked in an open position, brought a products liability action against the defendant manufacturer. The court held that:

[I]f the product is found to have been unreasonably dangerous when the defendant placed it in the stream of commerce, and if that defect is found to have been a producing cause of the damaging event, and if the plaintiff has misused the product in the sense, as defined by the trial court in its charge . . . and if that misuse is a proximate cause of the damaging event, the trier of fact must then determine the respective percentages . . . by which these two concurring causes contributed to bring about the event.

Id. at 352.

66. *Id.* at 349. See also Henderson & Twerski, *supra* note 1, at 1545.

67. *Ellsworth*, 495 A.2d at 356. See also Vargo, *supra* note 11, at 459.

68. *Ellsworth*, 495 A.2d at 356.

69. See *infra* notes 70-71; AMERICAN LAW OF PRODUCTS LIABILITY §§ 42:1, 2 (1987).

70. The courts in the following cases have held or recognized that the defendant bears the burden of proving misuse, either by expressly stating that

view or by characterizing misuse as an affirmative defense in which the defendant ordinarily bears the burden: *Banner Welders, Inc. v. Knighton*, 425 So. 2d 441 (Ala. 1982) (holding that user's misuse constituted a valid defense under the "extended manufacturer's liability doctrine where plaintiff sustained injuries while operating a shuttle welder); *Butaud v. Suburban Marine & Sporting Goods, Inc.*, 555 P.2d 42 (Alaska 1976) (holding the defense of comparative negligence extends to misuse in strict liability where plaintiff sustained injuries while riding a snowmobile); *Daly v. General Motors Corp.*, 575 P.2d 1162 (Cal. 1978) (holding misuse is a defense to strict liability where plaintiff sustained injuries when he was ejected from his car during a collision); *Nelson v. Caterpillar Tractor Co.*, 694 P.2d 867 (Colo. Ct. App. 1984) (holding that misuse which could not reasonably be anticipated is a valid defense where plaintiff was injured while operating a forklift); *Matthews v. F.M.C. Corp.*, 462 A.2d 376 (Conn. 1983) (holding the special defense of misuse is available in strict liability where plaintiff sustained injuries as a result of his hand becoming caught in a sandwich machine); *West v. Caterpillar Tractor Co.*, 336 So. 2d 80 (Fla. 1976) (holding that defense of misuse is adopted as stated in Restatement (Second) of Torts § 402A where plaintiff was run over by a backward moving soil grader); *McBride v. Ford Motor Co.*, 673 P.2d 55 (Idaho 1983) (holding misuse is an affirmative defense to a strict liability action where plaintiff sustained injury while operating a branch chipping machine); *Wells v. Coulter Sales, Inc.*, 306 N.W.2d 411 (Mich. Ct. App. 1981) (holding that misuse is a proper defense to a strict liability action where plaintiff was killed while operating a forklift); *Hancock v. Paccar, Inc.*, 283 N.W.2d 25 (Neb. 1979) (holding misuse is a valid defense to a strict liability action where plaintiff was injured as a result of his tractor colliding with the median in the road); *Thibault v. Sears Roebuck & Co.*, 395 A.2d 843 (N.H. 1978) (holding product misuse is an affirmative defense to strict liability where plaintiff was injured as a result of his foot becoming caught under a power mower); *Marchese v. Warner Communications, Inc.*, 670 P.2d 113 (N.M. Ct. App. 1983) (holding defendant must raise defenses of contributory negligence and misuse of the product where plaintiff was killed as a result of driving in the wrong direction at the Malibu Grand Prix race track); *Sheppard v. Charles A. Smith Well Drilling & Water Sys.*, 93 A.D.2d 474, 463 N.Y.S.2d 546 (3d Dep't 1983) (holding the defense of misuse is adopted as stated in Restatement (Second) of Torts § 402A where plaintiff was injured as a result of a hoist device snapping); *Davis v. Cincinnati, Inc.*, 610 N.E.2d 496 (Ohio Ct. App. 1991) (holding misuse is an affirmative defense to be asserted by defendant manufacturer where plaintiff was injured while using a press brake); *Messler v. Simmons Gun Specialties, Inc.*, 687 P.2d 121 (Okla. 1984) (holding misuse is affirmative defense to be asserted by manufacturer where plaintiff was killed as a result of a gun exploding); *Allen v. Heil Co.*, 589 P.2d 1120 (Or. 1979) (holding misuse of a product is an affirmative defense where plaintiff was

misuse" as part of the plaintiff's prima facie case and place the burden on the plaintiff.⁷¹ While there may have been a trend in

injured as a result of a dryer exploding); *Norman v. Fisher Marine, Inc.*, 672 S.W.2d 414 (Tenn. Ct. App. 1984) (holding misuse is an affirmative defense where plaintiff was killed as a result of being thrown from a fishing boat); *General Motors Corp. v. Hopkins*, 548 S.W.2d 344 (Tex. 1977) (holding misuse is a defense in product liability actions where plaintiff was injured as a result of an explosion of the carburetor in his car); *Mulherin v. Ingersoll-Rand Co.*, 628 P.2d 1301 (Utah 1981) (holding misuse is an affirmative defense to strict liability that should be applied according to comparative principles where plaintiff was injured as a result of standing on a mining winch); *Smith v. Sturm, Ruger & Co.*, 695 P.2d 600 (Wash. Ct. App. 1985) (holding misuse is an affirmative defense); *Star Furniture Co. v. Pulaski Furniture Co.*, 297 S.E.2d 854 (W. Va. 1982) (holding misuse and comparative negligence are affirmative defenses in strict liability where plaintiff's property was damaged as a result of faulty wiring from a clock).

71. The courts in the following cases have either, explicitly or implicitly, held or recognized that the misuse defense in strict products liability cases is not an affirmative defense in which the defendant bears the burden of proof: *Lewis v. Rego Co.*, 757 F.2d 66 (3d Cir. 1985) (using Pennsylvania law to hold misuse is not a separate defense but is related to issues of defectiveness and proximate cause in plaintiff's case where plaintiff suffered severe injuries as a result of an explosion of a propane cylinder); *Trust Corp. of Montana v. Piper Aircraft Corp.*, 506 F. Supp. 1093 (D. Mont. 1981) (applying Montana law to determine conduct by the plaintiff which could be termed misuse shall be used only to compare fault and reduce damages and not as an affirmative defense where plaintiff sustained injuries as a result of an airplane crash); *Amburgey v. Holan Div.*, 606 P.2d 21 (Ariz. 1980) (holding that for a plaintiff to prove that a product was defective he must show that it was being used for its intended use where plaintiff sustained injuries as a result of an electric current coming into contact with the bucket attached to his boom crane); *Gallee v. Sears Roebuck & Co.*, 374 N.E.2d 831 (Ill. App. Ct. 1978) (holding that plaintiff bears the burden of showing that he used the product in a normal and customary manner which was reasonably foreseeable by the defendants where plaintiff sustained injuries as a result of falling from a ladder); *Hughes v. Magic Chef, Inc.*, 288 N.W.2d 542 (Iowa 1980) (holding that misuse of a product is an element of plaintiff's own case and not an affirmative defense where plaintiff was severely burned when his stove exploded); *Ellsworth v. Sherne Lingerie, Inc.*, 495 A.2d 348 (Md. 1985) (holding misuse is related to proximate cause of plaintiff's injury and plaintiff has the burden of proving proximate cause where plaintiff was injured as a result of her fire resistant nightgown catching on fire); *Busch v. Busch Constr., Inc.*, 262 N.W.2d 377 (Minn. 1977) (holding that plaintiff's conduct which can be labeled misuse is not a defense but is part of plaintiff's case

the early 1980's toward treating misuse as part of the prima facie case, the most recent cases and statutes have come down squarely on the side of treating misuse as an affirmative defense.⁷² Thus, by an approximate majority of two to one, jurisdictions still treat misuse as an affirmative defense, with the corresponding burden of proof being born by the defendant.

Given all of the foregoing, the question now becomes what approach should the Restatement take on the issue of plaintiff misuse? To me, the answer is clear; the Restatement (Third) of Torts should, in the appropriate comment, unambiguously state that a majority of jurisdictions place the burden of establishing plaintiff misuse on the defendant. This language could take the format of the proposal for comments e, f, and n recently proffered by Professors Henderson and Twerski.⁷³ The format

where plaintiff sustained injury as a result of a defect in the plastic yoke of a turn-signal switch); *Early-Gary, Inc. v. Walters*, 294 So. 2d 181 (Miss. 1974) (holding misuse is related to proximate cause and plaintiff has the burden of proving proximate cause where plaintiff was injured upon opening a ketchup bottle); *Rogers v. Toro Mfg. Co.*, 522 S.W.2d 632 (Mo. Ct. App. 1975) (holding misuse is not a defense to a strict liability but an element of plaintiff's cause of action where plaintiff sustained injury when he was struck by a lawn mower); *Mauch v. Manufacturers Sales & Serv., Inc.*, 345 N.W.2d 338 (N.D. 1984) (holding plaintiff must prove that his misuse is not the proximate cause of injuries where plaintiff was injured as a result of a nylon rope breaking); *Cepeda v. Cumberland Eng'g Co.*, 386 A.2d 816 (N.J. 1978) (holding plaintiff must prove his conduct was not the proximate cause of his injury where plaintiff was injured by a "palletizing" machine).

72. See *supra* notes 70-71 and accompanying text; Henderson & Twerski, *supra* note 1, at 1546.

73. See Henderson & Twerski, *supra* note 1, at 1518-19, 1525. Professors Henderson and Twerski's proposals for comments e, f, and n in pertinent parts are as follows: Comment e states that "[t]he rule stated in this section sets forth the traditional causation rule as the governing standard. This comment recognizes that digressions from the rules may be called for in unusual circumstances. However, when plaintiff identification is possible, courts should be reluctant to abandon traditional causation principles." *Id.* at 1518. Comment f states:

The rule stated in this section applies to anyone in the business of selling the type of product that injured the plaintiff. The seller's business need not be limited to the sale of such products. However, this rule does not cover occasional sales outside the regular course of

followed in these proposed comments is particularly relevant because they deal with other issues over which the courts are also divided.⁷⁴ Applying this format to the issue of plaintiff misuse may produce language that reads as follows: "A majority of courts (or jurisdictions) take the position that the burden of plaintiff misuse falls on the defendant. Pursuant to this view, misuse is treated as an affirmative defense that may relieve the defendant of liability, but is not part of the plaintiff's prima facie case. A minority of courts (or jurisdictions) place the burden of proving that the product was not misused on the plaintiff. Pursuant to this view, misuse is treated as a causal component, which is traditionally part of the plaintiff's prima facie case."

Along with being a complete, accurate, and straightforward statement of the current state of the law on the misuse issue, this language has several other advantages. First, it avoids putting the Restatement in the awkward position of not taking a position. While there are many open issues regarding products liability, misuse is not among them. The issue may have been open in 1963,⁷⁵ but since then two distinct views have emerged, and each can be clearly articulated.⁷⁶

Second, the language avoids labeling a significant body of case law as immature or undeveloped. Specifically, the Restatement should not suggest that once courts realize that a misuse analysis really amounts to nothing more than a proximate cause analysis, the opposing point of view will disappear.⁷⁷ While we all may be convinced of the correctness of our sometimes diametrically

business (frequently referred to as "casual sales"). Thus, a manufacturer who occasionally sells supplies or used equipment does not fall within the ambit of this rule.

Id. Comment n states in part that "[t]he rule stated in this section accepts the majority view allowing comparative fault to operate as a partial or total defense to a products liability claim depending on the general comparative fault rules in a given jurisdiction." *Id.* at 1525.

74. See Henderson & Twerski, *supra* note 1, at 1525.

75. See Henderson & Twerski, *supra* note 1, at 1527-28 n.10 (listing some of the unresolved or unforeseen issues when § 402A was drafted in 1963).

76. See *supra* notes 70-71; Henderson & Twerski, *supra* note 1, at 1518-19, 1525, 1546.

77. See Henderson & Twerski, *supra* note 1, at 1546.

opposed views, the Restatement in particular does not have the luxury of minimizing significant lines of legal thought.

Finally, the language is consistent with the treatment of comparative fault, the issue to which this discussion now turns.

COMPARATIVE FAULT

Perhaps more than any other concept relevant to section 402A, the concept of comparative fault has the potential to permanently and profoundly alter products liability law. When all is said and done, comparative fault may be the basis for all future products liability causes of action.⁷⁸

Comparative fault is, essentially, the application of principles of comparative negligence to causes of action grounded in other theories of fault. Some courts have refused to acknowledge the doctrine, holding that comparative negligence principles simply do not apply beyond causes of action based in negligence.⁷⁹ Other courts have apportioned fault among the parties regardless of whether fault lay in negligence or another theory of liability, hence the more general doctrine of comparative fault.⁸⁰ This general pattern of development has been replicated in the area of

78. See, e.g., VICTOR E. SCHWARTZ, *COMPARATIVE NEGLIGENCE*, § 1.1, at 1 (1st ed. 1974); Vargo, *supra* note 11, at 460-62 (discussing the application of comparative fault principles in strict liability cases).

79. See, e.g., *Melia v. Ford Motor Co.*, 534 F.2d 795, 802 (8th Cir. 1976) (observing that the application of a comparative negligence statute in a strict liability case would be "extremely confusing and inappropriate"); *Kinard v. Coats Co.*, 553 P.2d 835, 837 (Colo. Ct. App. 1976) (refusing to extend the application of comparative negligence principles to products liability actions under § 402A because such actions are not based upon negligence principles).

80. See, e.g., *Daly v. General Motors Corp.*, 575 P.2d 1162, 1172 (Cal. 1978) (extending comparative negligence principles to strict liability actions and recognizing the broad applicability of comparative fault in both negligence and strict liability); *West v. Caterpillar Tractor Co.*, 336 So. 2d 80, 92 (Fla. 1976) (holding that "comparative negligence is a defense in a strict liability action . . ." and may be a defense in an implied warranty action).

strict products liability. Some courts have refused to apply the doctrine of comparative fault in strict products liability causes of action.⁸¹ These courts point to the theoretical problem of comparing a user's fault with a manufacturer's no-fault liability, the practical problem of comparing a plaintiff's conduct to a product's defect, and the policy problem of reducing the incentive of the manufacturer to produce safer products.⁸² Most courts, however, perhaps attracted by what Prosser has called "the facile simplicity of the doctrine,"⁸³ have applied comparative fault in strict products liability cases.⁸⁴

If the principles of comparative fault are applied to their fullest in the area of strict products liability, the net effect may be neutral. Such application would suggest that, to the benefit of the defendant-manufacturer, the contributory negligence of the plaintiff-user should operate to reduce the plaintiff's recovery,⁸⁵ and to the benefit of the plaintiff-user, his assumption of risk should not completely bar recovery from the defendant-manufacturer.⁸⁶

81. See, e.g., SCHWARTZ, *supra* note 78, § 1.5(B), at 18-19 (discussing courts which have resisted judicial adoption of doctrine of comparative fault).

82. *Id.*

83. See Richard N. Pearson, *Apportionment of Losses Under Comparative Fault Laws—An Analysis of the Alternatives*, 40 LA. L. REV. 343, 372 (1980) ("[W]hat is a relatively simple idea involves a great deal of complexity in translating that concept into a concrete plan for loss apportionment.").

84. See 1A LOUIS R. FRUMER & MELVIN I. FRIEDMAN, PRODUCTS LIABILITY § 3.01(5)(i) (1991) ("In recent years there has been widespread adoption of comparative negligence, either judicially or by statutes, either expressly adopting comparative fault in products liability cases or in statutes construed to include products liability actions.").

85. See *Zavala v. Regents of Univ. of Cal.*, 178 Cal. Rptr. 185, 186-87 (Cal. Ct. App. 1981) (holding that an intoxicated plaintiff is still entitled to partial recovery even though he is 80% at fault and guilty of willful misconduct); *Bradley v. Appalachian Power Co.*, 256 S.E.2d 879, 887 (W. Va. 1979) (holding that a plaintiff's contributory negligence does not bar but merely reduces his recovery unless the plaintiff is "substantially negligent").

86. See *Bradley*, 256 S.E.2d at 885-86.

The same is true with respect to the more specific issue of plaintiff misuse.⁸⁷ In some instances, comparative fault may reduce recovery even in cases where the plaintiff's misuse was foreseeable, but in other instances may allow recovery in cases where the misuse was not foreseeable.⁸⁸ The courts are still struggling with the scope of the doctrine of comparative fault as it applies to the general and specific issues of strict products liability.⁸⁹

For its part, comment n of the proposed section restates both the majority and minority views and concludes by accepting the majority view, which "allow[s] comparative fault to operate as a partial or total defense to a products liability claim depending on the general comparative fault rules in a given jurisdiction."⁹⁰ The comment takes no position on the specific issues of contributory negligence and assumption of risk in this context.⁹¹

As written, comment n seems appropriately drafted so as to be included in the Restatement. While some may prefer that the majority view not be adopted because it presents an opportunity to reduce recovery in cases of simple contributory negligence, it is, nonetheless, the majority view.

Furthermore, comment n also sheds some final light on the appropriate burden of proof regarding plaintiff misuse. Indeed, comment o of the proposed section suggests that the effects of plaintiff misuse "will ordinarily be determined by the rules of comparative fault set forth [in comment n]."⁹² If this is true, comments n and o provide the final two arguments for placing the burden of plaintiff misuse on the defendant. First, with

87. See *General Motors Corp. v. Hopkins*, 548 S.W.2d 344, 352 (Tex. 1977) (holding that plaintiff's misuse acts to reduce his recovery).

88. See, e.g., *id.* at 351; see also *Harville v. Anchor-Wate Co.*, 663 F.2d 598, 602-03 (5th Cir. 1981) (stating that misuse will "reduce plaintiff's recovery by the percentage that his misuse contributed to the injury . . .").

89. See, e.g., *Barker v. Lull Eng'g Co.*, 573 P.2d 443 (Cal. 1978) (altering burden of proof as to risk-utility balancing on grounds of strict liability); *Jacobs v. Technical Chem. Co.*, 472 S.W.2d 191 (Tex. Civ. App. 1971) (altering traditional causation rules on grounds of strict liability).

90. See *Henderson & Twerski*, *supra* note 1, at 1525.

91. See *Henderson & Twerski*, *supra* note 1, at 1525.

92. See *Henderson & Twerski*, *supra* note 1, at 1525-26.

respect to format, it is inconsistent to accept the majority view regarding comparative fault in comment n, and not accept it regarding plaintiff misuse in comment o. Second, with respect to substance, if comment o urges that misuse be treated as comparative fault, and comment n treats comparative fault as a "partial or total defense,"⁹³ the inescapable conclusion is that misuse standing alone must be treated as a defense, and not as an element of the plaintiff's prima facie case.

CONCLUSION

In conclusion, I believe that it is important for the Restatement, in comment o or elsewhere, to stress the majority view regarding plaintiff misuse, i.e., that misuse is an affirmative defense. While perhaps considered a minor or even inconsequential point by some, taking this position achieves three major results. First, it helps distinguish strict products liability claims from those that arise in negligence. Second, it is consistent with the treatment of the ever increasingly important doctrine of comparative fault. And finally, it remains true to the ultimate goal of section 402A--restating the law on products liability.

93. See Henderson & Twerski, *supra* note 1, at 1525-26; see also KEETON ET AL., *supra* note 26, § 67.

