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The Anatomy of Products Liability in Minnesota: Principles of Loss Allocation

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The Anatomy of Products Liability in Minnesota: Principles of Loss Allocation

Abstract

In this article, Professor Steenson continues the discussion that began in *The Anatomy of Products Liability in Minnesota: The Theories of Recovery*, appearing in the last Issue of the *William Mitchell Law Review*, by shifting the analytical focus to the problems involved in allocating awards among the parties in Minnesota products liability cases. Professor Steenson analyzes defenses, contribution and indemnity, and the impact of Minnesota's comparative fault act on products liability law.

Keywords

strict liability, negligence, warranty, loss allocation, comparative fault, chain of distribution, torts, *Springrose v. Willmore*

Disciplines

Torts

THE ANATOMY OF PRODUCTS LIABILITY IN MINNESOTA: PRINCIPLES OF LOSS ALLOCATION

by MICHAEL K. STEENSON†

In this Article, Professor Steenson continues the discussion that began in The Anatomy of Products Liability in Minnesota: The Theories of Recovery, appearing in the last issue of the William Mitchell Law Review, by shifting the analytical focus to the problems involved in allocating awards among the parties in Minnesota products liability cases. Professor Steenson analyzes defenses, contribution and indemnity, and the impact of Minnesota's comparative fault act on products liability law.

I.	INTRODUCTION	245
II.	DEFENSES	246
	A. <i>Negligence</i>	246
	B. <i>Strict Liability</i>	251
	1. <i>The Defenses Under Busch</i>	256
	a. <i>Contributory Negligence and Assumption of the Risk</i>	257
	b. <i>Misuse</i>	260
	c. <i>The Merger of Defenses</i>	261
	d. <i>The Busch Exception</i>	261
	e. <i>A Suggested Jury Instruction</i>	269
	2. <i>The Method of Loss Allocation</i>	271
	C. <i>Warranty</i>	280
	D. <i>Summary</i>	283
III.	CONTRIBUTION AND INDEMNITY	285
	A. <i>Contribution Outside the Chain of Distribution</i>	285
	1. <i>Non-Workplace Injury Contribution Claims</i>	285

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2.	<i>The Workplace Injury</i>	287
a.	<i>The Policy</i>	287
b.	<i>The Method of Allocation</i>	289
i.	<i>The Pre-1976 Statute</i>	291
ii.	<i>The Post-1976 Statute</i>	293
c.	<i>Contribution</i>	297
i.	<i>Contribution Prior to the 1976 Amendment</i> .	298
ii.	<i>Contribution after the 1976 Amendment</i>	299
d.	<i>Implications and Alternatives</i>	302
e.	<i>Application to Strict Liability Claims</i>	307
f.	<i>Summary</i>	308
B.	<i>Contribution and Indemnity in the Chain of Distribution</i>	309
1.	<i>Tolbert v. Gerber Industries, Inc.</i>	313
a.	<i>The Majority Opinion</i>	314
b.	<i>The Dissenting Opinions</i>	315
2.	<i>Frey v. Montgomery Ward & Co.</i>	317
a.	<i>The Majority Opinion</i>	318
b.	<i>The Concurring Opinion</i>	318
3.	<i>To What Types of Cases Will Tolbert Apply?</i> ...	319
a.	<i>Retailer Negligent; Manufacturer Strictly Liable</i>	319
b.	<i>Retailer Strictly Liable; Manufacturer Strictly Liable</i>	321
c.	<i>Retailer Liable on Express Warranty; Manufacturer Strictly Liable</i>	322
4.	<i>Classification Problems</i>	323
C.	<i>Summary</i>	324
IV.	A SYNTHESIS OF LOSS ALLOCATION PRINCIPLES	326
A.	<i>Jury Standards</i>	326
B.	<i>Indemnity</i>	328
C.	<i>Aggregation</i>	328
D.	<i>The Comparative Fault Act</i>	333
1.	<i>Section 604.01</i>	334
a.	<i>Subdivision 1</i>	334
b.	<i>Subdivision 1a</i>	335
2.	<i>Section 604.02</i>	339
a.	<i>Subdivision 1</i>	339
b.	<i>Subdivision 2</i>	343
c.	<i>Subdivision 3</i>	345
3.	<i>Summary</i>	350

<i>E. The 1980 Legislation</i>	351
V. CONCLUSION.....	356

I. INTRODUCTION

Recently, the most significant changes in the law of products liability in Minnesota have occurred with respect to defenses, contribution, and indemnity.¹ The law in these areas developed along traditional lines until 1977 when a series of Minnesota Supreme Court decisions radically altered the law.² The first decision rejected settled rules governing indemnity between parties in the chain of distribution; the court favored contribution with responsibility allocated according to the percentages of negligence of the parties.³ In the second decision, the court determined that the remedy of contribution would be available to a third party manufacturer against an injured plaintiff's employer.⁴ The third opinion applied the comparative negligence statute to claims based upon strict tort liability.⁵

Although this trilogy of decisions has left many questions unanswered, at least some of the future problems of interpretation will be put to rest by the recently adopted comparative fault act.⁶ Adoption of the act simplifies matters in some respects; however, it also raises new and different problems of interpretation.

As a preliminary matter, it should be noted that the principles governing loss allocation are a function of the date the cause of action arises. Because of the position taken by the supreme court on the retroactivity of its civil decisions,⁷ the recent changes in the law may have only prospective application. In addition, because the comparative fault act applies to causes of action arising after April 15, 1978,⁸ the possibility exists that there will be three groups of legal principles from which to choose in attempting to resolve

1. See Note, *Contribution and Indemnity—An Examination of the Upheaval in Minnesota Tort Loss Allocation Concepts*, 5 WM. MITCHELL L. REV. 109 (1979).

2. *Busch v. Busch Constr., Inc.*, 262 N.W.2d 377 (Minn. 1977), noted in 5 WM. MITCHELL L. REV. 517 (1979); *Tolbert v. Gerber Indus., Inc.*, 255 N.W.2d 362 (Minn. 1977); *Lambertson v. Cincinnati Corp.*, 312 Minn. 114, 257 N.W.2d 679 (1977).

3. *Tolbert v. Gerber Indus., Inc.*, 255 N.W.2d 362 (Minn. 1977).

4. *Lambertson v. Cincinnati Corp.*, 312 Minn. 114, 257 N.W.2d 679 (1977).

5. *Busch v. Busch Constr., Inc.*, 262 N.W.2d 377 (Minn. 1977).

6. Act of Apr. 5, 1978, ch. 738, §§ 6-8, 1978 Minn. Laws 836, 839-41 (amending MINN. STAT. § 604.01-.02 (1976)).

7. For a recent analysis of the supreme court's position, see Note, *The Retroactivity of Minnesota Supreme Court Personal Injury Decisions*, 6 WM. MITCHELL L. REV. 179 (1980).

8. Act of Apr. 5, 1978, ch. 738, § 11, 1978 Minn. Laws 836, 842.

questions relating to contribution, indemnity, and defenses.⁹

This Article first analyzes the defenses to products liability claims.¹⁰ The Article then discusses contribution and indemnity.¹¹ Building on these analyses, the next part suggests a method of loss allocation for products liability cases.¹² Finally the comparative fault act and its impact on the Minnesota Supreme Court's 1977 loss allocation decisions are examined.¹³

II. DEFENSES

The theory of recovery advanced by the plaintiff will be determinative of the available defenses. Different defenses, ranging from contributory negligence to assumption of the risk and misuse, may be applicable, depending on whether the plaintiff's claim is based on negligence, strict liability, or breach of warranty. For purposes of sorting out the applicable defenses in products liability litigation, the defenses to each of these theories will be considered in the next three sections.

A. Negligence

Prior to the adoption of the comparative negligence statute in Minnesota,¹⁴ contributory negligence and secondary assumption of the risk were viewed as separate, complete defenses to a negli-

9. If the supreme court continues to adhere to the position it has recently taken on the retroactivity of its civil decisions, *see* Note, *supra* note 7, at 190-99, the recent decisions concerning loss allocation would be given only prospective application. The new rules, however, will again be changed by the comparative fault act. If, for example, the court's decision in *Busch v. Busch Constr., Inc.*, 262 N.W.2d 377 (Minn. 1977) is applied only prospectively, one set of defenses would apply to cases arising before the date of decision in *Busch*, another set of defenses would apply after the effective date, and yet a third set of defenses would apply to cases arising on or after April 15, 1978, the effective date of the comparative fault act. *See* Act of Apr. 5, 1978, ch. 738, § 11, 1978 Minn. Laws 836, 842. The same would be true with respect to the court's decision in *Tolbert v. Gerber Indus., Inc.*, 255 N.W.2d 362 (Minn. 1977). For a discussion of *Tolbert*, *see* notes 262-321 *infra* and accompanying text. Because the comparative fault act should not change the basic rule established in *Lambertson v. Cincinnati Corp.*, 312 Minn. 114, 257 N.W.2d 679 (1977), the date of decision in *Lambertson* would be the only critical date. For a discussion of *Lambertson*, *see* notes 196-206, 225-37 *infra* and accompanying text.

10. *See* notes 14-188 *infra* and accompanying text.

11. *See* notes 189-321 *infra* and accompanying text.

12. *See* notes 322-51 *infra* and accompanying text.

13. *See* notes 352-420 *infra* and accompanying text. In addition, the Article discusses and extensively analyzes a new statute enacted by the Legislature on the last day of the 1980 session. *See* notes 421-28 *infra* and accompanying text.

14. Act of May 23, 1969, ch. 624, 1969 Minn. Laws 1069 (current version at MINN. STAT. § 604.01 (1978)).

gence action,¹⁵ whereas misuse was not considered as a defense independent from contributory negligence.¹⁶ While the supreme court acknowledged the overlap of the defenses of contributory negligence and secondary assumption of the risk,¹⁷ the court consistently maintained that the defenses had two distinguishable elements: contributory negligence consisted of the failure to exercise ordinary care for one's own safety; secondary assumption of the risk necessitated a showing that the plaintiff had knowledge and appreciation of the risk, a choice to avoid the risk or encounter it, and that he voluntarily chose to encounter it.¹⁸ The reasonable-

15. *See, e.g.*, *Knutson v. Arrigoni Bros.*, 275 Minn. 408, 413-14, 147 N.W.2d 561, 565-66 (1966).

16. *See, e.g.*, *Johnson v. West Fargo Mfg. Co.*, 255 Minn. 19, 22-23, 95 N.W.2d 497, 500-01 (1959).

17. *See, e.g.*, *Parness v. Economics Laboratory, Inc.*, 284 Minn. 381, 385, 170 N.W.2d 554, 557 (1969); *Knutson v. Arrigoni Bros.*, 275 Minn. 408, 412-13, 147 N.W.2d 561, 565 (1966); *Zuber v. Northern Pac. Ry.*, 246 Minn. 157, 172, 74 N.W.2d 641, 652 (1956).

18. *See Knutson v. Arrigoni Bros.*, 275 Minn. 408, 413, 147 N.W.2d 561, 565-66 (1966).

To understand assumption of the risk, it is important to distinguish primary from secondary assumption of the risk. In *Springrose v. Willmore*, 292 Minn. 23, 192 N.W.2d 826 (1971), the court said that:

Primary assumption of risk, express or implied, relates to the initial issue of whether a defendant was negligent at all—that is, whether the defendant had any duty to protect the plaintiff from a risk of harm. It is not, therefore, an affirmative defense. The limited duties owed licensees upon another's property, . . . or patrons of inherently dangerous sporting events, . . . are illustrative. The classes of cases involving an implied primary assumption of risk are not many and, because this is not such a case, we have no occasion to determine the method by which such issue should be presented to a jury.

Id. at 24, 192 N.W.2d at 827 (citations omitted).

In *Armstrong v. Mailand*, 284 N.W.2d 343 (Minn. 1979), a case involving the death of firemen resulting from the explosion of a large liquid propane storage tank, the court further elucidated the distinction:

The doctrine of primary assumption of the risk technically is not a defense, but rather a legal theory which relieves a defendant of a duty which he might otherwise owe to the plaintiff with respect to particular risks. . . . The doctrine is sometimes confused with secondary assumption of the risk. Secondary assumption of the risk occurs when the plaintiff voluntarily encounters a known, appreciated risk *without* an attendant manifestation by the plaintiff that he consents to relieve the defendant of his duty. . . . Primary assumption of the risk, therefore, is a doctrine which defines the limits of the defendant's duty. Its application is dependent upon the plaintiff's manifestation of consent, express or implied, to relieve the defendant of a duty. Its application is not dependent upon the wisdom or reasonableness of the plaintiff's consent.

Id. at 351 (emphasis in original) (citations omitted).

The doctrine of primary assumption of the risk was applied to bar recovery against Mailand, the owner of the apartment complex where the LP storage tank was located, for the deaths of the firemen. It also applied to the plaintiffs' claims against the other defendants in the suit, even though the theories of recovery were negligence *per se*, strict liability for an abnormally dangerous activity, and strict products liability. *See id.*

ness of the plaintiff's conduct did not enter into the contributory negligence determination.¹⁹ Either or both of these defenses could apply, depending on the case.²⁰

The harshness of contributory negligence as a complete defense was acknowledged in 1938 by the Minnesota Supreme Court when it suggested that a comparative negligence statute would provide a more just approach.²¹ While the impact of the defenses was at times softened,²² it was not until 1969 that the Legislature enacted a comparative negligence statute.²³

With the enactment of the statute, contributory negligence was no longer a complete defense unless the plaintiff's negligence was equal to or greater than the negligence of the person against whom recovery was sought.²⁴ Although the court had a pre-statute opportunity to merge the defenses of contributory negligence and secondary assumption of the risk,²⁵ it preferred to wait for a case arising under the comparative negligence statute. That opportunity came in *Springrose v. Willmore*,²⁶ in which the court recast secondary assumption of the risk as an aspect of contributory negligence: "[T]he only question for submission in the usual case, we think, will be whether the particular plaintiff was, under the circumstances, negligent in regard to his own safety, for under that general issue counsel may fully argue that issue in all its respects."²⁷ A separate instruction on secondary assumption of the

19. See *Springrose v. Willmore*, 292 Minn. 23, 24, 192 N.W.2d 826, 827 (1971) (court abandoned 4 MINNESOTA PRACTICE JIG II, 136 G-S (2d ed. 1974), which instructed that "[a]ssumption of risk does not involve a failure to use reasonable care").

20. See authorities cited note 17 *supra*.

21. See *Haeg v. Sprague, Warner & Co.*, 202 Minn. 425, 431-32, 281 N.W. 261, 263 (1938).

22. The court has indicated a willingness to consider inexperience of a product user in determining if contributory negligence exists. See *Miller v. Macalester College*, 262 Minn. 418, 431, 115 N.W.2d 666, 674 (1962). The doctrine of last clear chance would also avoid the defense of contributory negligence. See *Gardner v. Germain*, 264 Minn. 61, 64, 117 N.W.2d 759, 761 (1962). In special situations in which the defendant has breached a statute designed to protect a specific class of individuals, contributory negligence will not be a defense. See *Zerby v. Warren*, 297 Minn. 134, 140, 210 N.W.2d 58, 62 (1973) (selling glue to minors; case decided after enactment of comparative negligence statute, but court held the statute had no impact).

23. Act of May 23, 1969, ch. 624, 1969 Minn. Laws 1069 (current version at MINN. STAT. § 604.01 (1978)).

24. *Id.* § 1, 1969 Minn. Laws at 1069.

25. See *Parness v. Economics Laboratory, Inc.*, 284 Minn. 381, 386, 170 N.W.2d 554, 557-58 (1969) (cause of action arose prior to adoption of statute).

26. 292 Minn. 23, 192 N.W.2d 826 (1971).

27. *Id.* at 26, 192 N.W.2d at 828.

risk should no longer be necessary. The only question should be whether, based upon what the plaintiff knew or should have known, he exercised reasonable care for his own safety.²⁸

28. The general statement, however, has to be qualified. The court said that in "the usual case" there would be no need to submit a separate question on assumption of the risk. Leaving open this possibility means that it could be expected to arise as a potential defense in the "unusual case." Furthermore, the *Springrose* court stated that the standard jury instruction governing assumption of risk would remain an appropriate instruction. *Id.* at 24, 192 N.W.2d at 827. The instruction states:

Assumption of risk is voluntarily placing (oneself) (one's property) in a position to chance known hazards. To find that a person assumed the risk you must find:

1. That he had knowledge of the risk.
2. That he appreciated the risk.
3. That he had a choice to avoid the risk or chance it and voluntarily chose to chance it.

4 MINNESOTA PRACTICE JIG II, 135 S (2d ed. 1974).

The explanation offered in JIG indicates that when the defenses are to be submitted separately, "the percentage of fault attributable to plaintiff's secondary assumption of risk and the percentage of fault attributable to plaintiff's other negligence shall be added together and the total percentage compared with the percentage of fault attributable to the defendant." *Id.*, 135 G, at 107.

Just exactly how a jury could separate defenses that are indistinguishable is puzzling. The reason for the hedge in *Springrose* is unclear and it has continued to raise appealable issues, with the court expressing an ambivalent attitude toward assumption of the risk as a defense. Three decisions of the court illustrate the problem. In *Lambertson v. Cincinnati Corp.*, 312 Minn. 114, 257 N.W.2d 679 (1977), a personal injury case arising out of injuries sustained by the plaintiff when his arm was caught in a press brake that double cycled, Cincinnati alleged error in the trial court's failure to submit assumption of the risk to the jury. The supreme court found no error. The court first stated that assumption of the risk would not have been submitted because the injury occurred after *Springrose* was decided. Second, the court noted its prior approval of the instruction on assumption of the risk, finding that the elements of assumption of the risk had not been satisfied because of an absence of evidence in the record indicating that the plaintiff voluntarily chose to encounter a known risk. The court indicated that without such evidence "a line of recent decisions of this court holds that submission of or a finding of assumption of risk is improper." *Id.* at 119, 257 N.W.2d at 683.

The fact that the court indicated initially that assumption of the risk would not have been submitted as a separate defense in any event, yet went on to indicate that the standard jury instruction would still be an appropriate definition of assumption of the risk, but that the elements had not been met, is somewhat confusing. Perhaps the court was saying only that assumption of the risk should not have been submitted as a separate defense, but that even if it had, the elements would not have been met. If so, there is no problem with the court's decision.

In *Gaston v. Fazendin Constr., Inc.*, 262 N.W.2d 434 (Minn. 1978), the plaintiff was injured while installing telephone wires in a bedroom wall. The defendant alleged error in the trial court's failure to give jury instructions on assumption of the risk. The supreme court cited *Springrose*, holding that it was a proper application of the standard by the trial court.

In *Beckman v. V.J.M. Enterprises, Inc.*, 269 N.W.2d 37 (Minn. 1978), the plaintiff was injured when he fell down some stairs in the defendant's supper club. The jury found the plaintiff 68.4% negligent and the defendant 31.6% negligent. The trial court gave a

Fitting misuse into the defenses of contributory negligence and assumption of the risk should create no problem. Two of the potential applications of the misuse concept relate to the elements of the plaintiff's case. If an unforeseeable misuse is made of a product, the manufacturer will owe no duty to make the product safe for that use.²⁹ Misuse may also be important in determining if a product is defective at the time it leaves the control of the manufacturer.³⁰

As a defense matter, misuse has not been treated separately from contributory negligence. The point is illustrated in *Johnson v. West Fargo Manufacturing, Inc.*,³¹ a wrongful death action that arose out of the collapse of a Westgo Auger Elevator, an auger-type portable grain elevator, while the plaintiff's decedent was assisting in changing a cable on the machine. The elevator collapsed because stop hooks on the elevator were being improperly used to support the elevator while the cable was being changed.³² The foreseeability of the misuse related to the manufacturer's duty to anticipate and guard against that use and it also related to the defense of contributory negligence: "Whether the decedent in restringing the cable should have in the exercise of ordinary care found some other means of supporting the auger and tube and negligently assumed that the stop hooks would serve the purpose of support was a question of fact for the jury."³³ Even though the decedent may have misused the product, the court evaluated his conduct in terms of negligence, rather than treating misuse as a separate de-

separate instruction on assumption of the risk. The plaintiff argued that by submitting an instruction on contributory negligence and assumption of the risk his negligence was over-emphasized. The plaintiff urged the court to eliminate assumption of the risk in all jury instructions. The court did not respond to the argument, finding that the elements of assumption of the risk had not been satisfied. The court reiterated its statement in *Springrose* that JIG 135 remains an appropriate definition of assumption of the risk and that assumption of the risk must be unreasonable.

Given the absence of any apparent justification for the retention of assumption of the risk terminology, further confusion could readily be eliminated by scrapping the concept as a separate defense.

29. *See, e.g.*, *Westerberg v. School Dist. No. 792*, 276 Minn. 1, 7-8, 148 N.W.2d 312, 316 (1967); *Hofstedt v. International Harvester Co.*, 256 Minn. 453, 460-61, 98 N.W.2d 808, 813 (1959); *Lovejoy v. Minneapolis-Moline Power Implement Co.*, 248 Minn. 319, 326, 79 N.W.2d 688, 693-94 (1956); *Curwen v. Appleton Mfg. Co.*, 133 Minn. 28, 32-33, 157 N.W. 899, 901 (1916) (opinion couched in terms of proximate cause).

30. *See Hofstedt v. International Harvester Co.*, 256 Minn. 453, 98 N.W.2d 808 (1959).

31. 255 Minn. 19, 95 N.W.2d 497 (1959).

32. *Id.* at 22-23, 95 N.W.2d at 500-01.

33. *Id.* at 24, 95 N.W.2d at 501.

fense.³⁴ In the defense context, therefore, the issue is not whether the plaintiff's use of the product can be labeled a misuse, but whether the plaintiff's use of the product was negligent.

Thus, in post-*Springrose* negligence cases, the defenses of secondary assumption of risk, misuse, and contributory negligence can be distilled to a single issue: did the plaintiff exercise reasonable care for his own safety?

B. *Strict Liability*

At least as initially formulated, the defenses to strict tort claims deviated significantly from negligence defenses. The reason for the variance in treatment of defenses under the two theories is a function of the origins of strict tort liability. Superficially, the formulation of a new theory with broad social and economic justifications seemed to warrant a different view of defenses, one consistent with other strict tort theories rather than negligence law.³⁵ This development, coupled with an initial absence of a comparative fault mechanism to allocate loss in such cases, justified separation of defenses that would not logically be separated under negligence law.³⁶

The position taken in the comments to section 402A in the *Restatement (Second) of Torts*³⁷ (*Restatement*) has influenced the formulation of defenses in most jurisdictions.³⁸ Under the *Restatement* approach, contributory negligence in the sense of failure to discover a product defect or an unreasonable failure to guard against its existence is not a defense.³⁹

On the other hand, the *Restatement* makes assumption of the risk

34. *Id.* at 22-24, 95 N.W.2d at 500-01.

35. *See, e.g.*, Epstein, *Plaintiff's Conduct in Products Liability Actions: Comparative Negligence, Automatic Division and Multiple Parties*, 45 J. AIR L. & COM. 87, 92-94 (1979); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 838-40 (1966).

36. *See* *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 734-36, 575 P.2d 1162, 1167-68, 144 Cal. Rptr. 380, 385-86 (1978). The *Daly* court rejected the concept of separation and merged the concepts of strict liability and comparative fault, thereby removing the bar to recovery in strict tort liability presented by negligent assumption of the risk. *Id.* at 738, 575 P.2d at 1169-70, 144 Cal. Rptr. at 387-88.

37. *See* RESTATEMENT (SECOND) OF TORTS § 402A, Comment n (1965).

38. *See, e.g.*, *Hawkeye Security Ins. Co. v. Ford Motor Co.*, 199 N.W.2d 373, 380 (Iowa 1972); *Brooks v. Dietz*, 218 Kan. 698, 704-05, 545 P.2d 1104, 1110 (1976); *Hawkins Constr. Co. v. Matthews Co.*, 190 Neb. 546, 566-67, 209 N.W.2d 643, 655 (1973); *Suter v. San Angelo Foundry & Mach. Co.*, — N.J. —, —, 406 A.2d 140, 149 (1979); *Ernest W. Hahn, Inc. v. Armco Steel Co.*, 601 P.2d 152, 158 (Utah 1979); *Morningstar v. Black & Decker Mfg. Co.*, — W. Va. —, —, 253 S.E.2d 666, 683-84 (1979).

39. RESTATEMENT (SECOND) OF TORTS § 402A, Comment n (1965).

a complete defense.⁴⁰ It requires a showing that the plaintiff voluntarily and unreasonably encountered a known danger.⁴¹ It requires discovery of the defect, awareness of the danger, and unreasonable use of the product in spite of that awareness.⁴²

Although not specifically mentioned as a defense in the *Restatement*,⁴³ misuse arose as a third potential defense in strict tort cases in reaction to the restrictive position on defenses taken by the *Restatement*.⁴⁴ Judicial acceptance of the misuse defense has varied. Some courts, adhering to the *Restatement* position on defenses, have over generalized, refusing to consider anything other than assumption of the risk as a defense to a strict liability claim.⁴⁵ Other courts have considered misuse to be a defense, but only in the sense of negating a plaintiff's proof of defect or causation.⁴⁶ Still others have accepted misuse as a defense, but without distinguishing it from contributory negligence.⁴⁷

With the enactment of comparative fault statutes,⁴⁸ the judicial application of comparative negligence statutes to strict tort

40. *Id.*

41. *Id.*

42. *Id.*

43. Comment g of the *Restatement* states that a seller will not be liable if the product is delivered in a safe condition and "subsequent mishandling or other causes make it harmful by the time it is consumed." *Id.*, Comment g. The Comment makes it clear that the plaintiff bears the burden of proof of showing that the product was defective when it left the hands of the seller.

Comment h states that a product is not in a defective condition if it is safe for normal handling or consumption. *Id.*, Comment h.

44. See Vargo, *The Defenses To Strict Liability In Tort: A New Vocabulary With An Old Meaning*, 29 MERCER L. REV. 447, 457-59 (1978); Wade, *Products Liability and Plaintiff's Fault—The Uniform Comparative Fault Act*, 29 MERCER L. REV. 373, 384 (1978).

45. See *Suter v. San Angelo Foundry & Mach. Co.*, — N.J. —, —, 406 A.2d 140, 144-45, 147 (1979) (contributory negligence in strict liability may exist only when plaintiff "voluntarily and unreasonably proceeded to encounter the known risk"); *Ernest W. Hahn, Inc. v. Armco Steel Co.*, 601 P.2d 152, 158 n.5 (Utah 1979).

46. See *McDevitt v. Standard Oil Co.*, 391 F.2d 364, 369-70 (5th Cir. 1968) (applying Texas law; misuse is a defense to strict liability action only when it constitutes a proximate cause of the injury). In *Hughes v. Magic Chef, Inc.*, 288 N.W.2d 542 (Iowa 1980), the Iowa Supreme Court, reversing its earlier position that misuse is a defense, took the position that misuse relates only to the elements of the plaintiff's case. The reversal was based on the court's recognition that misuse does not become an affirmative defense simply because the defendant offers proof on the misuse issue. *Id.* at 546.

47. See *Codling v. Paglia*, 32 N.Y.2d 330, 343, 298 N.E.2d 622, 629, 345 N.Y.S.2d 461, 470-71 (1973); *Kirkland v. General Motors Corp.*, 521 P.2d 1353, 1366 (Okla. 1974) (misuse constituted complete defense to motorist's action to recover on theory of strict liability in action against manufacturer for injuries sustained when seat collapsed and plaintiff fell backwards).

48. See, e.g., ARK. STAT. ANN. §§ 27-1763 to -1765 (1979); ME. REV. STAT. ANN. tit.

claims,⁴⁹ and the judicial development of comparative fault procedures,⁵⁰ new pressures have been created to make strict tort defenses conform to the treatment of negligence defenses.⁵¹ Even with the availability of comparative fault mechanisms, however, there is no clear uniformity in the treatment of strict tort defenses. This lack of consistency in strict tort defenses is reflected in the Minnesota cases.

Prior to the Minnesota Supreme Court's decision in *Busch v. Busch Construction, Inc.*,⁵² in which the court applied the comparative negligence statute to claims based on strict liability, the status of strict liability defenses in Minnesota was unclear, as the court itself acknowledged.⁵³ The strongest indication was that the court would follow the lead of the *Restatement*.

14, § 156 (1964); MINN. STAT. §§ 604.01-.02 (1978); N.Y. CIV. PRAC. LAW §§ 1411-1413 (McKinney 1976).

49. See *Busch v. Busch Constr., Inc.*, 262 N.W.2d 377, 393-94 (Minn. 1977); *Baccelleri v. Hyster Co.*, — Or. —, —, 597 P.2d 351, 354-55 (1979); *Dippel v. Sciano*, 37 Wis. 2d 443, 459-62, 155 N.W.2d 55, 63-64 (1967).

50. See, e.g., *Butaud v. Suburban Marine & Sporting Goods, Inc.*, 555 P.2d 42 (Alaska 1976) (defense of comparative fault in products liability extends beyond cases involving use with knowledge of defect to those cases when plaintiff misuses product and misuse is proximate cause of injuries alleged), *modified*, *Caterpillar Tractor Co. v. Beck*, 593 P.2d 871, 890 (Alaska 1979) (under *Butaud*, consumer who uses product as it was intended cannot be deemed to have misused product irrespective of knowledge of defect); *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 731-43, 575 P.2d 1162, 1165-73, 144 Cal. Rptr. 380, 383-91 (1978); *Thibault v. Sears, Roebuck & Co.*, 118 N.H. 802, 395 A.2d 843 (1978); *Suter v. San Angelo Foundry & Mach. Co.*, — N.J. —, 406 A.2d 140 (1979); *General Motors Corp. v. Hopkins*, 548 S.W.2d 344 (Tex. 1977).

51. In *Suter v. San Angelo Foundry & Mach. Co.*, — N.J. —, —, 406 A.2d 140, 149 (1979) (not reasonably fit for its intended or reasonably foreseeable purposes) and in *General Motors Corp. v. Hopkins*, 548 S.W.2d 344, 351 (Tex. 1977), the courts held that foreseeable misuse would not be a defense to a strict liability claim. *Suter* further held that only contributory negligence would be a defense subject to apportionment and that even contributory negligence would not be available in industrial accident settings. See — N.J. at —, 406 A.2d at 148.

In *West v. Caterpillar Tractor Co.*, 336 So. 2d 80, 90 (Fla. 1976), the court apparently took the position that misuse and assumption of the risk would be defenses, but that contributory negligence in the sense of failure to discover a product defect would not be a defense. A similar position was taken by the Alaska Supreme Court in *Caterpillar Tractor Co. v. Beck*, 593 P.2d 871 (Alaska 1979), in which the court held that, "when the design defect is the lack of a safety device, the jury may be instructed that the plaintiff may be comparatively negligent in the knowing use of a defective product only if he voluntarily and unreasonably encounters the known risk." 593 P.2d at 892. In other situations, the court's decision in *Butaud v. Suburban Marine & Sporting Goods, Inc.*, 555 P.2d 42 (Alaska 1976), *modified*, *Caterpillar Tractor Co. v. Beck*, 593 P.2d 871 (Alaska 1979), would control, with no distinction made between apportionable defenses.

52. 262 N.W.2d 377 (Minn. 1977).

53. See *id.* at 393.

The court leaned toward the *Restatement* approach in *Magnuson v. Rupp Manufacturing, Inc.*⁵⁴ In *Magnuson*, the plaintiff was injured in a snowmobile accident when his leg struck a spark plug protruding from the snowmobile engine. The plaintiff was an experienced mechanic, had worked on his snowmobile, and was well aware of the position of the spark plug. The evidence in the case did not establish, however, that the plaintiff was aware of the specific risk of injury arising from the defect. The supreme court reversed the trial court's order for a new trial and reinstated a jury verdict adverse to plaintiff.⁵⁵ Although a clear treatment of defenses is difficult to glean from the majority opinion,⁵⁶ Justice Rogosheske, in a concurring opinion, concluded that the plaintiff should be barred from recovery as a matter of law because he should have been aware of the risk of injury.⁵⁷ The elements of assumption of the risk as defined by the *Restatement*⁵⁸ were present, except that defendant had not shown that plaintiff was aware of the risk of injury from the defect.⁵⁹ Thus, the defense, which is subjective in the *Restatement*, was apparently made partially objective upon its application in Minnesota.⁶⁰

Although Justice Rogosheske intimated in *Magnuson* that the *Restatement* position on contributory negligence and assumption of the risk would be followed, no clear position was taken concerning misuse as a defense;⁶¹ it remains an open question. However, the Minnesota strict liability cases do illustrate the treatment of misuse in two of its applications, both relating to the elements of the strict liability case.

First, in *Kerr v. Corning Glass Works, Inc.*,⁶² a case involving an exploding baking dish, recovery was denied because the plaintiff was unable to establish that the flaw in the baking dish that led to

54. 285 Minn. 32, 171 N.W.2d 201 (1969).

55. *Id.* at 46, 171 N.W.2d at 210.

56. In his concurring opinion, Justice Rogosheske said, "[w]hile I agree with the disposition reached, I fail to comprehend the basis thereof." *Id.* (Rogosheske, J., concurring).

57. *Id.* at 50, 171 N.W.2d at 212 (Rogosheske, J., concurring).

58. See notes 40-42 *supra* and accompanying text.

59. See 285 Minn. at 50, 171 N.W.2d at 212 (Rogosheske, J., concurring).

60. See *id.* (Rogosheske, J., concurring).

61. Misuse was discussed in the majority opinion in connection with the elements of a strict liability case. The court stated that the plaintiff had the burden of proving proper use of the machine as part of his case, but, "being aware of the condition and voluntarily doing what he did, he has not sustained this burden . . ." *Id.* at 45, 171 N.W.2d at 209.

62. 284 Minn. 115, 169 N.W.2d 587 (1969).

the explosion existed at the time the product left the defendant's control. Because the dish had been out of the defendant's control from seven to forty-six months, the possibility of intervening misuse made it unlikely that the flaw existed at the time the dish left the defendant's control.⁶³ In this context, it was necessary for the plaintiff to negate intervening misuses in order to create the inference that the baking dish was defective at the time it left the control of the defendant. Failure to do so resulted in a judgment for the defendant.⁶⁴

Second, to prove a defect it must be shown that the product in question is dangerous to an extent beyond that which would be anticipated by the ordinary user or consumer or, to use the standard in *Farr v. Armstrong Rubber Co.*,⁶⁵ that the product is not safe for the uses to which a manufacturer should reasonably anticipate the product will be put.⁶⁶ If the manufacturer has no reason to anticipate the use that is made of the product, it is not defective. To illustrate, in *Olson v. Village of Babbit*,⁶⁷ a child was injured while igniting an unexploded rocket from a Fourth of July fireworks display. Because the use made of the product was not a use that the fireworks manufacturer was required to anticipate, the product was determined not to be defective.⁶⁸

Another question relating to strict tort defenses concerned the applicability of Minnesota's comparative negligence act to strict tort claims. A matter of speculation since the comparative negligence act was adopted in 1969, this question was answered by the supreme court in *Busch v. Busch Construction, Inc.*,⁶⁹ in which the court took specific positions on the defenses to strict tort claims, the applicability of the comparative negligence statute to strict tort claims, and the method of loss allocation in such cases.

Busch arose out of a single vehicle accident involving a vehicle manufactured by defendant General Motors and driven by Lando Busch, plaintiff and codefendant in the action. The accident was caused in part by a plastic yoke of the turnsignal switch lodging in the steering column of the vehicle and in part by the negligence of Lando Busch in driving the vehicle. The jury found Busch to be

63. *Id.* at 118-19, 169 N.W.2d at 589.

64. *Id.*

65. 288 Minn. 83, 179 N.W.2d 64 (1970).

66. *See id.* at 89-90, 179 N.W.2d at 69.

67. 291 Minn. 105, 189 N.W.2d 701 (1971).

68. *See id.* at 108-11, 189 N.W.2d at 704-05.

69. 262 N.W.2d 377 (Minn. 1977), *noted in* 5 Wm. MITCHELL L. REV. 517 (1979).

fifteen percent at fault and General Motors eighty-five percent at fault.⁷⁰

Although Minnesota's comparative negligence statute did not mention strict tort liability, the court avoided the problem by relying on the presumption that Minnesota's adoption in 1969 of a comparative negligence statute patterned after Wisconsin's, included Wisconsin judicial constructions of that statute up to the time of the Minnesota enactment.⁷¹ Because Minnesota's adoption of comparative negligence followed the Wisconsin Supreme Court's 1967 decision in *Dippel v. Sciano*,⁷² applying the Wisconsin statute to strict liability claims, the presumption gave the Minnesota Supreme Court a ready basis for application of Minnesota's statute to strict liability claims.⁷³

A brief but critical portion of the *Busch* opinion specifies the defenses applicable to strict liability claims and provides a rough indication of how loss will be allocated between a plaintiff and defendant in the strict liability context.

1. *The Defenses Under Busch*

To avoid eroding the policy of consumer protection underlying the adoption of strict tort liability, the *Busch* court held that "a consumer's negligent failure to inspect a product or to guard against defects is not a defense and thus may not be compared with a distributor's strict liability."⁷⁴ This follows the position taken by the *Restatement*, but only to the extent that negligent fail-

70. *Id.* at 393.

71. In a case involving multiple parties, Minnesota followed the lead of the Wisconsin Supreme Court in deciding that the plaintiff's percentage of negligence should be compared to the percentage of negligence of the defendants individually, rather than in the aggregate. *See Marier v. Memorial Rescue Serv., Inc.*, 296 Minn. 242, 246, 207 N.W.2d 706, 709 (1973). The court in *Olson v. Hartwig*, 288 Minn. 375, 180 N.W.2d 870 (1970), although not cited by the *Marier* court, also used Wisconsin law to construe Minnesota's comparative negligence statute.

72. 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

73. Although the Minnesota Supreme Court used the statutory presumption to justify application of the comparative negligence statute to strict liability claims, the court stated that, because no question of statutory construction was involved, it would not be bound by the Wisconsin Supreme Court's approach to defenses to strict liability claims. In particular, the court emphasized that it did not adopt the Wisconsin approach indicating that a strictly liable distributor could avoid liability by proving it was not negligent. 262 N.W.2d at 393 n.13. This refusal represents more of a disagreement with the Wisconsin Supreme Court's peculiar rationalization of strict tort theory than a disagreement over the application of other defenses.

74. *Id.* at 394.

ure to discover a defect is removed from consideration as a defense.⁷⁵

The court then held that “[a]ll other types of consumer negligence, misuse, or assumption of risk must be compared with the distributor’s strict liability under the statute.”⁷⁶

a. Contributory Negligence and Assumption of the Risk

The *Busch* court’s separation of these defenses for purposes of specifying what types of plaintiff misconduct will be legitimate defense matters in strict liability cases does not mean that the defenses should receive separate definition for submission to the trier of fact. Separation of the defenses to strict liability but not negligence claims would create unnecessary practical⁷⁷ and theoretical problems.⁷⁸ The *Busch* court did not specifically hold that the merger of secondary assumption of the risk and contributory negligence in the negligence context, effected by *Springrose v. Willmore*,⁷⁹ would carry over to strict liability cases.⁸⁰ In the subsequent case of *Armstrong v. Mailand*,⁸¹ however, it was made clear that the court intended such a result.

The litigation in *Armstrong* arose out of the deaths of three West St. Paul firemen who were killed when an 11,000 gallon liquid propane tank exploded while they were attempting to extinguish a fire that had spread to the tank from a fuel truck filling the tank. Suit was brought against multiple defendants, including the owner

75. Following a suggestion made in Note, *A Reappraisal of Contributory Fault in Strict Products Liability Law*, 2 WM. MITCHELL L. REV. 235, 251 (1976), the court stated:

[A]ny solution to this issue [of strict tort defenses] must be tailored to protect the consumer’s reliance on the product’s safety. To insure protection of this interest, we hold that a consumer’s negligent failure to inspect a product or to guard against defects is not a defense and thus may not be compared with a distributor’s strict liability.

262 N.W.2d at 394.

76. 262 N.W.2d at 394 (footnote omitted).

77. In *Busch* a single theory of recovery, strict liability, was submitted to the jury. *See id.* at 384. If both negligence and strict liability theories are submitted, attempts to distinguish between defenses are likely to lead to confusion. For an attempt to explain how both theories may be submitted without confusion, see *Thibault v. Sears, Roebuck & Co.*, 118 N.H. 802, 810-14, 395 A.2d 843, 848-50 (1978).

78. *See Epstein, supra* note 35, at 94, 108-09.

79. 292 Minn. 23, 192 N.W.2d 826 (1971).

80. In *Busch* the court cited *Springrose*, but only for the proposition that “[t]he use of the term ‘negligence’ in the [comparative negligence] statute is not a bar to its application in strict liability cases.” 262 N.W.2d at 393 n.12.

81. 284 N.W.2d 343 (Minn. 1979) (in wrongful death action court held assumption of risk a bar to strict liability action).

of the property on which the tank was located, the seller and installer of the tank, the company responsible for the delivery of the liquid propane at the time of the fire, and the companies responsible for an improperly installed meter and broken relief valve on the delivery truck. The theories of recovery ranged from negligence and negligence per se to strict liability for an abnormally dangerous activity and strict products liability.

The claims against all defendants were resolved on the basis of primary assumption of the risk.⁸² Because the firemen were familiar with the possibility of explosion in such a situation, and because they had received training in fighting such fires, the court

82. *Id.* at 350, 352-53. In *Armstrong* the court followed *Springrose v. Willmore*, 292 Minn. 23, 192 N.W.2d 826 (1971), in distinguishing between primary and secondary assumption of the risk:

In *Springrose v. Willmore* . . . this court held that primary assumption of the risk remains an absolute bar to the plaintiff's recovery, whereas secondary assumption of the risk becomes a question of comparative negligence. Primary assumption of the risk is not really an affirmative defense; rather, it indicates that the defendant did not even owe the plaintiff any duty of care On the other hand, secondary assumption of the risk is a type of contributory negligence where the plaintiff voluntarily encounters a known and appreciated hazard created by the defendant without relieving the defendant of his duty of care with respect to such hazard.

284 N.W.2d at 348-49.

The use of primary assumption of the risk to bar the plaintiff's recovery on a strict liability claim may seem somewhat curious in light of the court's statement in *Springrose* that the cases involving primary assumption of the risk would be few in number. 292 Minn. at 24, 192 N.W.2d at 827. In *Springrose*, however, the court stated that cases involving owners' and occupiers' duties would be appropriate for use of the concept. *See id.*

The use of primary assumption of the risk terminology in the strict products liability context should not by any means be taken as a general extension of the concept to all products liability cases. First, *Armstrong* involved a unique issue: the duty owed to firemen. The court's initial application of primary assumption of the risk was in the context of the obligation owed by owners and occupiers of land to firemen. The court held that a property owner would not be liable except when "injury is caused by a hidden or unanticipated risk attributable to the landowner's negligence and such negligence is the proximate cause of the injury." 284 N.W.2d at 350. The court felt compelled to extend this holding to the other defendants in the case, including those against whom strict products liability claims were made. In so doing, the court adopted the reasoning of a dissenting judge in an Illinois Supreme Court case, *Court v. Grzelinski*, 72 Ill. 2d 141, 152, 379 N.E.2d 281, 286 (1978) (Ryan, J., dissenting):

The majority appears to be willing to apply the firemen's rule only in the 'limited context of landowner/occupier liability.' This implies that the majority would not permit a fireman to recover for injuries he receives in extinguishing a fire in my automobile which I caused by negligently pouring gasoline on the hot manifold if the automobile is parked in my driveway, but that he would be permitted to recover if my automobile is parked in the street. This appears to me not only to be extremely illogical but also to possibly present some constitutional questions. . . .

. . . The majority opinion is in error . . . in equating assumption of risk as used in the firemen's rule with the affirmative defense in negligence and products

held that the landowner owed no duty to the firemen.⁸³ This holding was extended to the remaining defendants in the suit, even though the theories of recovery asserted against those defendants were based on negligence per se and strict liability.⁸⁴ The court said, however:

If the issue in this case concerned the applicability of secondary assumption of the risk to strict liability actions, we would feel compelled to follow our decision in *Springrose v. Willmore* . . . and *Busch v. Busch Const., Inc.* . . . and hold that such conduct of the plaintiff should be treated as a type of contributory negligence and compared with the defendant's fault under our comparative fault statute⁸⁵

liability cases. Under the fireman's rule assumption of risk is not an affirmative defense. It, instead, defines the duty that is owed to a fireman.

It is not important in the application of the fireman's rule to determine what caused the particular danger which brought about the injury. Of critical importance is whether the particular danger is one that the fireman would anticipate in the performance of his duties.

284 N.E.2d at 352 n.2.

Second, to the extent that a parallel is drawn between primary assumption of the risk as it is discussed in *Armstrong*, and the duty issue in products liability cases in general, it should be noted that establishing that a particular danger was obvious will not automatically avoid the defendant's duty. See Steenson, *The Anatomy of Products Liability in Minnesota: The Theories of Recovery*, 6 WM. MITCHELL L. REV. 1, 42 n.190 (1980). Obviousness, in the context of owners' and occupiers' duties, as in products liability cases, is not preclusive on the duty issue. Other decisions of the supreme court, such as *Adee v. Evanson*, 281 N.W.2d 177 (Minn. 1979) and *Gaston v. Fazendin Constr., Inc.*, 262 N.W.2d 434 (Minn. 1978), make the point clear. In *Adee*, for example, the court held in a slip and fall case that the trial court erred in holding that the store owner had no duty to warn the plaintiff of risks of which the customer had present knowledge and realization. The trial court instructed the jury that there is "no duty to warn a customer who comes upon the store owner's premises of risks of which the customer himself or herself had present knowledge and present realization." 281 N.W.2d at 179.

By contrast, section 343(A)(1) of the RESTATEMENT (SECOND) OF TORTS (1965), provides that "A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness." *Id.* Following this approach, the supreme court held that despite the obviousness of the danger, a defendant may nonetheless owe a duty to an invitee if harm should be anticipated, despite the obviousness of the danger. 281 N.W.2d at 179-80; see *Gaston v. Fazendin Constr., Inc.*, 262 N.W.2d 434, 435 (Minn. 1978) (construction company liable to telephone installer for injuries sustained on company premises).

The rule in products liability cases, although not ordinarily couched in terms of primary assumption of the risk, is directed to the duty element, just as primary assumption of the risk is in discussing negligence liability. The term should not be given undue meaning because of the court's decision in *Armstrong*.

83. *Armstrong v. Mailand*, 284 N.W.2d at 350.

84. *Id.* at 352-53.

85. *Id.* at 351.

The intent of the court to merge contributory negligence and assumption of the risk as strict liability defenses is clear.

b. Misuse

In *Busch* the court took the position that all types of contributory negligence, assumption of the risk, and misuse would be valid strict liability defenses. However, because the court had not previously taken a clear position on misuse as a defense⁸⁶ it is not clear exactly what the court meant in holding that misuse is a defense to strict liability claims. As a starting proposition, misuse as it relates to the elements of a plaintiff's strict liability claim can be eliminated. If a plaintiff is unable to establish a product defect or a causal relationship between the defect and the injury, misuse as a defense becomes irrelevant.

Assuming that the plaintiff has established a prima facie case, the use made of the product may be highly relevant in determining if the plaintiff's recovery should be reduced or barred. Arguably, it is inconsistent to find that a manufacturer should have made a product safe for a particular use and nevertheless allow the plaintiff's use to be the subject of an affirmative defense.⁸⁷ Understanding the origins of the misuse defense, however, may be of assistance in understanding what it is that makes misuse proper defense matter.

The origins of misuse demonstrate that when it is accepted as a defense it is simply contributory negligence with a different label. A good example of the treatment of the defense of misuse in a comparative fault jurisdiction appears in *Schuh v. Fox River Tractor Co.*,⁸⁸ a 1974 Wisconsin Supreme Court case. In *Schuh* the plaintiff, an experienced farm worker, suffered a traumatic amputation of his right leg in the fan of a crop blower. The plaintiff had climbed on top of the machine to make repairs after he had pulled the clutch lever disengaging the auger. The plaintiff assumed from the position of the clutch lever on the machine that the fan had also been disengaged. The fan was hidden from view by a housing and noise from tractors being used to run the crop blower and other machines made it difficult to determine by sound if the fan was running.

Although the misuse, climbing on top of the machine, was fore-

86. See Steenson, *supra* note 82, at 15-19.

87. See Vargo, *supra* note 44, at 460-611.

88. 63 Wis. 2d 728, 218 N.W.2d 279 (1974).

seeable and should have been anticipated and guarded against by the defendant, Schuh's misuse of the machine was also negligent because he should have been aware of the defect. The court in discussing the misuse question stated that "under certain circumstances misuse may constitute contributory negligence and thus be a factor in the comparison of negligence."⁸⁹ Because Schuh's misuse of the machine apparently was a negligent misuse, the court determined as a matter of law that he was barred from recovery because his negligence equalled or exceeded the negligence of the defendant.⁹⁰

If properly viewed, the defense of misuse is simply another label for contributory negligence and has no meaning apart from contributory negligence.⁹¹ If the plaintiff's use of the product is not a negligent use, labeling it a misuse is irrelevant.

c. *The Merger of Defenses*

With the adoption of comparative fault in Minnesota, the reasons for making any distinction between the defenses of contributory negligence, secondary assumption of the risk, and misuse disappear. Both secondary assumption of the risk and misuse should be treated as aspects of contributory negligence. The supreme court's position following the merger of contributory negligence and assumption of the risk in *Springrose* is equally apposite to misuse: "The only question for submission in the usual case, we think, will be whether the particular plaintiff was, under the circumstances, negligent in regard to his own safety, for under that general issue counsel may fully argue that issue in all its respects."⁹² By making the treatment of strict tort defenses consistent with the defenses to negligence claims, the pigeonholing tendencies prompted by the *Restatement's* restrictive position on defenses are avoided and a more equitable allocation of loss will be achieved, consistent with the function of the comparative negligence statute.

d. *The Busch Exception*

The exception established in *Busch* that excludes failure to discover a product defect from the contributory negligence determi-

89. *Id.* at 741, 218 N.W.2d at 286.

90. *Id.* at 744, 218 N.W.2d at 287.

91. *See* *Shields v. Morton Chem. Co.*, 95 Idaho 674, 677, 518 P.2d 857, 860 (1974).

92. 292 Minn. 23, 26, 192 N.W.2d 826, 828 (1971).

nation gives rise to several questions concerning the specific application of the exception, the scope of its application, and finally, its justification.

The facts in *Busch* provide a good example of the problems involved in applying the exception in specific cases. There was testimony that Lando Busch, the driver of the vehicle, could have braked the vehicle but failed to do so.⁹³ Thus, the jury could have inferred that he was negligent in failing to avoid the accident after the danger created by the locked steering wheel became apparent to him.⁹⁴ Although his misconduct may have included failure to discover the defect, it went further because of his additional failure to exercise reasonable care after the danger arose.⁹⁵

Another example, roughly similar to *Schuh v. Fox River Tractor Co.*,⁹⁶ is *Parks v. Allis-Chalmers Corp.*⁹⁷ *Parks* involved a farm machinery accident in which the plaintiff lost his right hand in a forage harvester while attempting to unclog corn stalks that had caught in the harvester. There were warnings on the machine telling the operator to “[k]eep hands, feet and clothing away from power-driven parts.”⁹⁸ The warnings and instructions were repeated in the operator’s manual.⁹⁹

Because unclogging the machine with the power off took longer than unclogging while the power was connected, the plaintiff had been cleaning the machine with the power on. The plaintiff was familiar with the operation of the harvester and was aware of the warnings on the harvester and in the manual. On the day of the injury, the plaintiff had unclogged the machine four or five times with the power connected. On the last occasion, as he reached in to unclog the machine, he felt a quick jerk and had his arm drawn into the machine.

The plaintiff’s theory of the case was negligent design and failure to warn. The jury found the defendant fifty-one percent and the plaintiff forty-nine percent negligent.¹⁰⁰ A hotly disputed issue in the case concerned the plaintiff’s knowledge of the danger:

Defendant argues that plaintiff “deliberately encountered a

93. 262 N.W.2d at 390.

94. *See id.* at 394.

95. *See id.*

96. 63 Wis. 2d 728, 218 N.W.2d 279 (1974).

97. 289 N.W.2d 456 (Minn. 1979).

98. *Id.* at 458.

99. *Id.*

100. *Id.* at 457.

known and obvious risk in conscious disregard of defendant's warnings." The evidence does not prove that alleged fact as a matter of law. There was credible testimony that plaintiff did not know that the speed of the rolls could vary and might suddenly increase so that he could not let go of a stalk before his hand was in the rollers. His prior use of the machine had not made him aware of that danger.¹⁰¹

Although *Parks* was a pre-*Busch* negligence case, it is interesting to speculate on the impact of *Busch* had it been applied. It seems clear that reasonable minds could differ on the classification of the plaintiff's conduct. The plaintiff's conduct seemed to stop short of secondary assumption of the risk because he was not aware of the specific danger created by the harvester. He may have misused the machine in attempting to unclog it without disconnecting the power, but his misuse, like that of the plaintiff in *Schuh*, cannot be considered apart from his negligence, which may have consisted solely of a failure to discover the defect.

Even assuming that the plaintiff was negligent in some respect other than in failing to discover the defect, obvious difficulties would be presented in attempting to distill the plaintiff's misconduct into separate categories of misconduct, and then assess a percentage of negligence to the plaintiff after *Restatement* section 402A comment n¹⁰² contributory negligence is excised.

These problems of application may be illustrated, but it is not

101. *Id.* at 460 (footnotes omitted). A large portion of the briefs was devoted to a discussion of the impact of the plaintiff's awareness. See Brief and Appendix of Appellant Allis-Chalmers Corporation at 10-12, 18-23; Brief of Respondent Dwight Parks at 3-21.

102. A final example of the confusion over the application of the *Busch* exception arises in the court's recent decision in *Wegscheider v. Plastics, Inc.*, 289 N.W.2d 167 (Minn. 1980). In *Wegscheider* plaintiff was injured when he fell from a tanker trailer owned by defendant, while using a piece of new clothesline rope to lift a flexible chute used to transfer plastic pellets from a truck to a tanker on which he was working. Although plaintiff was generally aware of the risks in the procedure, the record contained little evidence concerning plaintiff's knowledge that jagged edges on the tanker could sever the rope. He knew that the ropes could become frayed through such use, but there was no evidence that he knew a new rope would be so severed. The jury found plaintiff 10% negligent, defendant 90% negligent, and that plaintiff assumed the risk.

The supreme court held in this case, which arose prior to *Springrose v. Willmore*, 292 Minn. 23, 192 N.W.2d 826 (1971), that the evidence was insufficient to support a finding of assumption of the risk. Plaintiff also argued that the trial court should have instructed the jury on strict liability and that plaintiff's only negligence consisted of failing to inspect the tanker for jagged edges, misconduct that could not be considered under *Busch*. The supreme court found, however, that the jury could have decided plaintiff's negligence consisted of more than failure to inspect. "It could have found he was negligent in using a clothesline to hoist the heavy chute or in continuing to pull upon the chute when he felt

likely that they can be cured. The best that can be done is to set forth clearly the excepted type of conduct in a jury instruction and leave it to the trier of fact to apply the standard.¹⁰³

Aside from the problems of classification, *Parks* also prompts questions concerning the scope of the *Busch* exception. The principal question is whether it will apply to negligence as well as strict liability claims. A certain irony would exist in not applying the exception to negligence claims, whether the plaintiff's claim is based on a manufacturing or design defect or failure to warn.¹⁰⁴ If the cause of action involves negligent design or warning, the close similarity if not exact duplication of the elements of strict liability would logically compel the same application of defenses to the negligence theories.¹⁰⁵ If the case involves a manufacturing defect, in which the difference between negligence and strict liability is more pronounced, the illogic of making a strictly liable defendant's exposure greater than a negligent defendant's is apparent.

This potential lack of symmetry in products liability defenses should be addressed and resolved in order to promote conceptual consistency in the treatment of defenses, thereby avoiding the con-

the rope scraping against the struts on the tanker." *Wegscheider v. Plastics, Inc.*, 289 N.W.2d at 170.

As with the conduct of the plaintiff in *Schuh*, it is difficult to separate plaintiff's failure to discover the defect from his other conduct. If the *Busch* exception is avoided this easily it will become largely meaningless, given the ability to find some plaintiff misconduct going beyond the mere failure to discover the defect. Short of completely passive behavior, it is difficult to imagine situations in which the *Busch* exception might apply.

In *Wegscheider* the court found that even if *Busch* applied it would not have affected the outcome of the case. Even assuming plaintiff's misconduct consisted solely of failure to discover the defect, plaintiff failed to request an instruction based on *Busch*. The court thus found no reversible error in the trial court's refusal of the plaintiff's strict liability instruction. *See id.*

103. For an examination of how the loss allocation question may be submitted to juries, see notes 120-59 *infra* and accompanying text.

104. *See* Epstein, *supra* note 35, at 108-09. If separate defenses to negligence and strict liability theories are allowed, with comment n contributory negligence a legitimate defense to negligence but not strict liability claims, it would be necessary for the jury to assign a separate percentage of fault to the plaintiff's failure to discover the defect. Assuming that the jury finds the plaintiff 40% at fault (with 10% of that fault consisting of failure to discover the defect) and the defendant 60% at fault, the plaintiff would be entitled to recover 60% of his damages on the negligence claim. On the strict liability claim, however, *Restatement* section 402A comment n negligence cannot be considered. This would call for a reassignment of the 10% fault assigned to the plaintiff for failure to discover the defect. Because the fault determination must total 100%, that 10% would have to be reassigned to the defendant, making the defendant 70% at fault on the strict liability claim and 60% at fault on the negligence claim. Such a result would seem indefensible.

105. For a discussion of the similarity between theories, see Steenson, *supra* note 82, at 14-63.

fusion that necessarily will arise if separate defenses are established for strict liability and negligence claims. A single set of defenses for both theories will then avoid the problems that otherwise will result when a jury is instructed on both theories¹⁰⁶ or when a case is submitted on negligence theory alone.

In addition, if the *Busch* exception is applied to negligence claims in the products liability context, there seems to be no reason why it should not be applied in other negligence contexts.¹⁰⁷ If the negligent failure of a consumer to discover a product defect is not taken into consideration in the contributory negligence determination, then no reason appears why the failure of a shopper to discover the icy condition of a merchant's sidewalk should be considered in the contributory negligence determination of a basic negligence case.¹⁰⁸

A final question concerns the conceptual justification for the *Busch* exception. The exception is subject to question for a variety of reasons, including the weakness of the historical antecedents supporting the exception and the policies supporting the exception.

The exception is based in part on analogies to strict tort liability for abnormally dangerous activities and dangerous animals,¹⁰⁹ as

106. One possibility is that of an inconsistent verdict, in which a jury might find negligence, but not strict liability. *Cf. id.* at 38-49.

It could be argued that even though the defenses to strict tort liability and negligence are distinct, only the strict defenses should be submitted to a jury, even if a jury is instructed on both negligence and strict liability theories. Because the strict tort defense position is more favorable to the plaintiff than the negligence defense position, the findings on the strict tort defenses would necessarily control. This would not cure the problem, however, when the jury arrives at an inconsistent verdict by finding a defendant negligent but not strictly liable.

107. *See* Epstein, *supra* note 35, at 102.

108. *See id.*

109. Professor Prosser justified the strict liability position on defenses as follows:

It frequently is said that the contributory negligence of the plaintiff is not a defense in cases of strict liability. This involves the seemingly illogical position that the fault of the plaintiff will relieve the defendant of liability when he is negligent, but not when he is innocent. The explanation must lie in part in the element of wilful creation of an unreasonable risk to others by abnormal conduct which is inherent in most of the strict liability cases; and in part in the policy which places the absolute responsibility for preventing the harm upon the defendant, whether his conduct is regarded as fundamentally anti-social, or he is considered merely to be in a better position to transfer the loss to the community.

W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 79, at 522 (4th ed. 1971) (footnotes omitted); *see* RESTATEMENT (SECOND) OF TORTS § 515, Comment b, § 524, Comment a (1977).

well as warranty law.¹¹⁰ The analogy to abnormally dangerous activities and animals seems particularly inappropriate given the justification for the elimination of the defense of ordinary contributory negligence (failing to discover the defect) in those contexts. Based at least in part upon the presumption that an individual who is subjected to a risk of injury from an unusual or highly dangerous activity or vicious animal should not have to bear the consequences of failing to discover that risk, it is arguably fair to place the burden of the unexpected on the defendant who engages in that activity or harbors the animal.¹¹¹ The risks created by product distributors, while not insubstantial, hardly seem to be in the same category with the activities such as blasting. In addition, the direct contact the consumer or user has with the product provides him with a better means of self protection than an individual subjected to a risk of injury from an abnormally dangerous activity.

The analogies to warranty law, while appropriate, raise the question whether the initial justification for refusing to consider ordinary contributory negligence has been overextended. Formulation of the exception in cases involving the sale of food and drink may have been justifiable, given the expectation of the consumer that such products would be safe for consumption without examination.¹¹² Application of the exception to all products liability cases extends the justifiable reliance concept to situations in which it is not warranted. The basis for extending the exception, that consumers and users of products are less likely to be able to cope with increasingly sophisticated products,¹¹³ does not satisfactorily explain why consumers and users should not bear the burden of discovering product hazards that, with the exercise of reasonable care, would be discoverable.

In effect, the argument in favor of excepting ordinary contributory negligence as a defense rests upon the inconsistency that would be involved in first finding a product defective because it failed to protect against user inadvertence, yet allowing the de-

110. See Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1147-48 (1960); Prosser, *supra* note 35, at 838-40.

111. See RESTATEMENT (SECOND) OF TORTS § 515, Comment a, § 524, Comment a (1977); Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 542-43 (1972).

112. See Epstein, *supra* note 35, at 92-93.

113. See *Busch v. Busch Constr., Inc.*, 262 N.W.2d 377, 394 (Minn. 1977). The exception seems to flow logically from the policies justifying the adoption of strict tort liability in Minnesota. See *McCormack v. Hanksraft Co.*, 278 Minn. 322, 338, 154 N.W.2d 488, 500 (1967).

defendant to use that inadvertence as a defense. Allowing such a defense would arguably dilute the manufacturer's duty.¹¹⁴

In a jurisdiction in which the plaintiff wins all or nothing, the argument carries greater weight than in a comparative fault jurisdiction. Once a comparative fault mechanism exists, however, it is no longer necessary to separate plaintiff misconduct into discrete categories. Because of comparative fault, responsibility can be shared, without the danger that a manufacturer will consistently avoid liability through use of the complete defense of contributory negligence.

Although the *Busch* exception could have been drawn more narrowly,¹¹⁵ it is questionable, given the general unpredictability of

114. See *Caterpillar Tractor Co. v. Beck*, 593 P.2d 871, 891 (Alaska 1979); *Suter v. San Angelo Foundry & Mach. Co.*, — N.J. —, —, 406 A.2d 140, 148 (1979).

115. In *Suter v. San Angelo Foundry & Mach Co.*, — N.J. —, 406 A.2d 140 (1979), the New Jersey Supreme Court, in the context of an industrial accident, held the New Jersey Comparative Negligence Act applicable to strict liability actions. *Id.* at —, 406 A.2d at 147. However, the court limited its application to contributory negligence that constitutes assumption of the risk as defined in Comment n to the *Restatement*.

Even assumption of the risk may be limited, depending on the circumstances. The *Suter* plaintiff was injured when he inadvertently tripped the gear lever of a metal rolling machine while he was attempting to remove a piece of slag from the machine. *Suter* had purchased the machine for his company and had operated it numerous times over a period of eight years. He was familiar with the operation of the machine and knew that pushing the lever would activate the rollers. In spite of this knowledge, the court held that his conduct would not constitute assumption of the risk:

The imposition of a duty on the manufacturer to make the machine safe to operate whether by installing a guard or . . . by making it inoperable without a guard, means that the law does not accept the employee's ability to take care of himself as an adequate safeguard of interests which society seeks to protect. The policy justification for *Bexiga* [referring to *Bexiga v. Havir Mfg. Corp.*, 60 N.J. 402, 290 A.2d 281 (1972)] is sound. We see no reason to depart from *Bexiga's* elimination of contributory negligence where an employee is injured due to a defect (whether design or otherwise) in an industrial accident while using a machine for its intended or foreseeable purposes. The defendant manufacturer should not be permitted to escape from the breach of its duty to an employee while carrying out his assigned task under these circumstances when observance of that duty would have prevented the very accident which occurred.

— N.J. at —, 406 A.2d at 148 (footnote omitted).

In *Caterpillar Tractor Co. v. Beck*, 593 P.2d 871 (Alaska 1979), a case arising out of the death of the decedent due to the lack of a roll-over protective shield on a front-end loader manufactured by defendant, the court held as follows:

We do not believe that a consumer who uses a product as it was intended to be used, and who knows or should know of the lack of a safety device, can be deemed to have misused the product within the meaning of *Butaud II*. If the jury finds that a product is defective by virtue of its lack of a safety feature, plaintiff's failure to install such a device will not reduce his recovery based upon his mere knowledge of the inadequate safety features on the product.

Id. at 890-91. The court used the following reasoning to justify its decision:

First, the general policy of strict liability demands that responsibility for placing

comparative fault determinations, whether any additional deterrence will be achieved or that a manufacturer's duty will be diluted if ordinary contributory negligence becomes a legitimate defense matter. The problems involved in identifying ordinary contributory negligence and isolating it in any meaningful way from other plaintiff misconduct heightens the unpredictability of products liability law. In addition, given the difficulties that will arise in attempting to classify plaintiff misconduct, it is questionable whether any determination that plaintiff misconduct constitutes ordinary contributory negligence or some other type of misconduct is likely to lead to an increase in product safety.¹¹⁶

When the exception is applied, the result may be deemed to be substantially unfair from the manufacturer's perspective. In a case such as *Parks*, the jury's apportionment of forty-nine percent of the negligence to the plaintiff is an obvious indication of disapproval of the plaintiff's conduct in that case. Application of the *Busch* exception would erase that determination, allowing the plaintiff to recover 100% of his damages. In terms of the desirability of compensating a seriously injured individual, the result is perhaps justifiable, but the law of products liability has not yet moved to the point in which the fact of injury is sufficient to justify compensation.

Finally, the very inability to logically limit the *Busch* exception to strict liability claims in the products liability context subjects the exception to question. There seems to be no discrete justification for confining the exception to strict products liability

the defective product on the market should not be shifted to those in no position to realistically assess the danger. If the focus is on the nature of the product as defective, and the jury has found the lack of safety device to render the product defective, it is inconsistent to turn around and reduce the user's recovery merely because he bought and used the product as marketed. . . . Second, accidents are inevitable costs, and it is better to place the burden of such costs on the party best able to spread the losses. Third, the public interest in reducing the level of accidents makes it reasonable to put the cost burden on the party best able to prevent accidents.

Id. at 891 (citation omitted).

Beck differs from *Suter* in that secondary assumption of the risk as defined by the *Restatement* would be a defense. Both decisions have in common, however, a limitation on the range of defenses available in a strict tort action. Both suggest that it is inconsistent to hold a manufacturer liable for failing to incorporate a safety device, yet allow the manufacturer to use the very conduct that it should have anticipated as an affirmative defense. The cases suggest one potential application of the *Busch* exception.

116. See *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 736-37, 575 P.2d 1162, 1168-69, 144 Cal. Rptr. 380, 386-87 (1978); Epstein, *supra* note 35, at 106.

claims.¹¹⁷ Once it is recognized that there is no logical limitation on the exception, however, the weaknesses of the underpinnings of the exception are exposed.

In summary, assuming the continued existence of the *Busch* exception, it will be critical to determine whether it applies to negligence claims as well as to claims based on strict liability theory. Resolution of these scope problems will determine the proper reach of the exception, but problems involved in its application will not be resolved. The price of the *Busch* exception is the resulting difficulty of application, even given a clear definition of the standard by which the trier of fact must decide whether the plaintiff's conduct consists of a negligent failure to discover a product defect or something more.

As a final matter, it should be noted that the life of the *Busch* exceptions depends on the position the supreme court takes on the retroactivity of its decision.¹¹⁸ If *Busch* is prospective only, then it will be applicable only to causes of action arising after December 9, 1977, the date of decision, but before April 15, 1978,¹¹⁹ the effective date of the comparative fault act, which overrides the *Busch* exception.

e. A Suggested Jury Instruction

A proposed jury instruction recognizing the merger of contributory negligence, assumption of risk, and misuse, and including the *Busch* exception is as follows:

The defendant has raised the defense of contributory fault.
Fault consists of a failure on the part of the plaintiff to exercise

117. See Epstein, *supra* note 35, at 102.

118. It is not clear what position the court will take on the retroactivity of *Busch*. In *Wegscheider v. Plastics, Inc.*, 289 N.W.2d 167 (Minn. 1980), discussed in note 102 *supra*, the supreme court seemed to assume the applicability of *Busch* to a cause of action that arose prior to *Busch*. Assuming this to be the case, a curious result arises. Assumption of the risk, which would have been a complete defense to a negligence action in this case, because the cause of action arose prior to the court's decision in *Springrose v. Willmore*, 292 Minn. 23, 192 N.W.2d 826 (1971), would not be a complete defense to the strict liability claim, because of the merger of contributory negligence and assumption of the risk accomplished in *Busch*. The odd result is that in cases arising before *Springrose*, assumption of the risk would be a complete defense to negligence actions, but not to strict liability actions arising before *Springrose* and coming to trial after *Busch*. See Note, *supra* note 7, at 198 n.99.

Curious as the result might be, the retroactivity problem should not be aggravated by making *Busch* prospective only. To insure future consistency in the law, *Busch* should be applied to all cases coming to trial after the date of decision in that case.

119. Act of Apr. 5, 1978, ch. 738, § 11, 1978 Minn. Laws 836, 842.

reasonable care for his own safety. You are to determine whether under all the circumstances, the plaintiff exercised reasonable care for his own safety. In order to find the plaintiff to be at fault, you must find that the plaintiff's fault was a direct cause of his injuries.

You are instructed that you may not take into consideration the fault of the plaintiff if it consists of a failure to discover the defect or an unreasonable failure to guard against its existence. To find the plaintiff at fault you must find that his fault went beyond a failure to discover the defect or an unreasonable failure to guard against its existence.

The instruction appropriately simplifies what could otherwise be a confusing inquiry if specific instructions were given covering each potential type of plaintiff misconduct.¹²⁰ The instruction allows for a full consideration of the contributory fault of the plaintiff yet makes it clear that contributory fault consisting of a failure to discover a defect may not be considered. Finally, because the instruction is consistent with negligence defenses and the *Busch* exception, no differentiation between strict tort and negligence defenses need be made in cases in which the plaintiff relies upon both theories.¹²¹

120. One suggested special verdict form would separate the defenses into a number of categories:

- Was the plaintiff negligent with respect to his own safety with respect to:
- (a) Using the product despite full knowledge of its condition?
ANSWER _____
- (b) Failure to discover a condition rendering the product unsafe?
ANSWER _____
- (c) Using the product in the manner or for a purpose other than it was intended to be used?
ANSWER _____
- (d) Abuse of the product?
ANSWER _____
- (e) Alteration of the product?
ANSWER _____
- (f) _____

Kircher, *The Impact of Comparative Negligence on Products Liability*, app. A, at 55, in PRODUCTS LIABILITY . . . COMPARATIVE NEGLIGENCE (Minn. Continuing Legal Education 1970). Following these questions, the illustrative special verdict form asked other questions regarding the causation of plaintiff's negligence, again separating plaintiff misconduct into the same categories. *See id.*

121. In *Busch* a single theory of recovery, strict liability, was submitted to the jury. *See* 262 N.W.2d at 384. If both negligence and strict liability theories are submitted, attempts to distinguish between defenses are likely to lead to confusion. For an attempt to explain how this confusion might be avoided, see *Thibault v. Sears, Roebuck & Co.*, 118 N.H. 802, 811-12, 395 A.2d 843, 849 (1978).

2. *The Method of Loss Allocation*

Merging strict tort defenses and making those defenses consistent with the treatment of negligence defenses will resolve some of the problems of interpretation that might be created by *Busch*. One problem remains: that of determining the method of loss allocation.

Unlike the situation in negligence cases, in which the common denominator for comparison is the negligent conduct of the plaintiff and defendant, application of the comparative negligence statute to claims based on strict liability alters the comparison, in effect requiring plaintiff negligence to be compared to defendant strict liability. The question of whether comparative negligence principles should be applied in strict liability cases has generated substantial controversy.¹²² Much discussion of the question is devoted to an analysis of the difficulties involved in making such a comparison, or, if the application of comparative negligence principles is accepted, what the best method of loss allocation is.¹²³

Two related policy goals operate as a framework for determining the most appropriate method of loss allocation: the conceptual means of resolving the "apples and oranges" problem of comparing incomparables,¹²⁴ and developing the clearest method of submitting the complicated apportionment question to a jury.¹²⁵ To this might be added a third factor, the need for adopting an approach that will encompass not only strict tort theory, but negligence as well.¹²⁶

122. See, e.g., Brewster, *Comparative Negligence in Strict Liability Cases*, 42 J. AIR. L. & COM. 107, 109-17 (1976); Epstein, *Products Liability: Defenses Based on Plaintiff's Conduct*, 1968 UTAH L. REV. 267, 284; Feinberg, *The Applicability of a Comparative Negligence Defense in a Strict Products Liability Suit Based on Section 402A of the Restatement of Torts 2d*, 42 INS. COUNSEL J. 39, 52 (1975); Fischer, *Products Liability—Applicability of Comparative Negligence*, 43 MO. L. REV. 431 (1978); Levine, *Buyer's Conduct as Affecting the Extent of Manufacturer's Liability in Warranty*, 52 MINN. L. REV. 627, 662-63 (1968); Levine, *Strict Products Liability and Comparative Negligence: The Collision of Fault and No-Fault*, 14 SAN DIEGO L. REV. 337, 346-51 (1977); Noel, *Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk*, 25 VAND. L. REV. 93, 117-18 (1972); Schwartz, *Strict Liability and Comparative Negligence*, 42 TENN. L. REV. 171, 179-81 (1974); Twerski, *The Use and Abuse of Comparative Negligence in Products Liability*, 10 IND. L. REV. 797 (1977); Wade, *supra* note 44.

123. Some authors have had difficulty with the application of comparative principles to strict tort claims. See, e.g., Fischer, *supra* note 122, at 443. Others have recognized the dilemma but assumed that the comparison problems should be ignored. See, e.g., Twerski, *supra* note 122, at 805-06.

124. See Fischer, *supra* note 122, at 443-44; Wade, *supra* note 44, at 376-79.

125. See Fischer, *supra* note 122, at 443-44.

126. Cf. *Thibault v. Sears, Roebuck & Co.*, 118 N.H. 802, 811-12, 395 A.2d 843, 849

There are three major approaches to the allocation of loss in strict liability cases under comparative type statutes:¹²⁷ the comparative cause approach,¹²⁸ the comparative fault approach,¹²⁹ and what might be termed the equitable reduction approach.¹³⁰ The first compares the relative contributions, in a causal sense, of the parties to the litigation. The second compares the plaintiff's fault to the defendant's. The third attempts to avoid the problem involved in comparing incomparable conduct by ignoring the comparison process and, focusing solely on the plaintiff's misconduct, reducing the plaintiff's recovery according to the jury's perception of the degree to which the plaintiff's misconduct contributed to his injuries. A closer examination of these approaches, and some of the criticisms directed toward them, raises a

(1978) (indicating the problems involved when both strict liability and negligence theories are used).

127. The Draft Uniform Product Liability Law contained a comparative fault provision, but it did not consider "the extent of the causal relationship between the conduct and the damages claimed" . . . in apportioning responsibility." U.S. DEP'T OF COMMERCE DRAFT UNIFORM PRODUCT LIABILITY LAW § 111, Analysis, *reprinted in* 44 Fed. Reg. 2995, 3011 (1979). *See generally* U.S. DEP'T OF COMMERCE MODEL UNIFORM PRODUCT LIABILITY ACT §§ 100-122, *reprinted in* 44 Fed. Reg. 62,714-50 (1979) [hereinafter cited as MODEL ACT] (successor to Draft Uniform Product Liability Law). This position was presumably based upon a reaction to the Uniform Comparative Fault Act, which considers both fault and causation in apportioning responsibility. *See* UNIFORM COMPARATIVE FAULT ACT § 1(a). The apparent problem was based upon a perception that cause-in-fact would be apportioned. *See* Twerski & Weinstein, *A Critique of the Uniform Product Liability Law—A Rush to Judgment*, 28 DRAKE L. REV. 221, 247-48 (1978-1979).

The Model Act considers both fault and causation, following the approach of the Uniform Comparative Fault Act: "In determining the percentages of responsibility, the trier of fact shall consider, on a comparative basis, both the nature of the conduct of each person or entity responsible and the extent of the proximate causal relation between the conduct and the damages claimed." MODEL ACT § 111(B)(3), *reprinted in* 44 Fed. Reg. at 62,735.

Following the adoption of the Law Reform Act of 1945, which adopted comparative negligence, the English courts promptly recognized the need for considering both fault and causation in determining how much a plaintiff's damages should be reduced. *See* R. DIAS & B. MARKESINIS, *THE ENGLISH LAW OF TORTS* 241 (1976); P. JAMES, *GENERAL PRINCIPLES OF THE LAW OF TORTS* 199-200 (3d ed. 1969).

128. *See* Sun Valley Airlines, Inc. v. Avco-Lycoming Corp., 411 F. Supp. 598, 603 (D. Idaho 1976) (applying Idaho law); Jensvold, *A Modern Approach to Loss Allocation Among Tortfeasors in Products Liability Cases*, 58 MINN. L. REV. 723, 725 (1974).

129. *See* Wade, *supra* note 44, at 376-81.

130. *See* Pan-Alaska Fisheries, Inc. v. Marine Constr. & Design Co., 565 F.2d 1129, 1139 (9th Cir. 1977) (recovery reduced in proportion to plaintiff's contribution to loss); Butaud v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42, 45-47 (Alaska 1976) (same), *modified*, Caterpillar Tractor Co. v. Beck, 593 P.2d 871 (Alaska 1979); Daly v. General Motors Corp., 20 Cal. 3d 725, 736, 575 P.2d 1162, 1168, 144 Cal. Rptr. 380, 386 (1978) (court uses term "equitable apportionment or allocation of loss"); Fischer, *supra* note 122, at 449.

question of whether there is, in theory or practice, any significant distinction among the approaches.

The comparative cause approach has been criticized for a variety of reasons. The arguments against comparative cause seem to be predicated on the irrationality and inaccuracy of the comparison that comparative cause requires. Because it does not take into consideration all of the causes of a particular accident, it is argued, any allocation of cause will necessarily be distorted because it will take into consideration only the contributions of the parties to the lawsuit.¹³¹ Comparative cause has also been criticized because it does not focus on any particular causal element that would provide a valid basis for comparison.¹³²

Comparative causation, however, requires more than a comparison of causation in the abstract. In *Sun Valley Airlines, Inc. v. Avco-Lycoming Corp.*,¹³³ which has been cited as adopting a comparative cause approach, the United States District Court for the District of Idaho evaluated the comparison process as follows: "Upon a finding of blameworthy conduct, the jury in this case was asked, consistent with Idaho law, to assign a percentage to the causative conduct of the parties to this lawsuit."¹³⁴ In an explanatory footnote, the court made the following statement:

Once culpability, blameworthiness or some form of fault is determined by the trier of fact to have occurred, then the labels denoting the "quality" of the act or omission, whether it be strict liability, negligence, negligence per se, etc., becomes unimportant. Thus, the underlying issue in each case is to analyze and compare the causal conduct of each party, regardless of its label.¹³⁵

Taken in context, the *Sun Valley Airlines, Inc.* court was concerned about the difficulty in comparing different types of misconduct of a plaintiff and a defendant. To avoid the conceptual problems in the comparison, the court adopted a comparative cause approach. This does not mean that fault is ignored or that the conduct of a party giving rise to that fault is irrelevant. The court's statement means that the labels are unimportant once a fault basis of liability is established for a plaintiff and a defendant.

Recognizing the nature of the comparison advocated by the *Sun*

131. See Fischer, *supra* note 122, at 444-47.

132. See *id.*

133. 411 F. Supp. 598 (D. Idaho 1976).

134. *Id.* at 603.

135. *Id.* at 603 n.5.

Valley Airlines, Inc. court may resolve part of the criticism of comparative causation since cause in the abstract is not being compared; the comparison is between causally related conduct.¹³⁶ Other criticisms remain, however. Even assuming that causal conduct is being compared, the approach has been criticized because the wide-open inquiry engendered by comparative conduct bears no relationship to the policies strict liability is meant to serve.¹³⁷

The comparative fault approach attempts to avoid the comparison of conduct or cause problem by recognizing that fault is being compared. Professor Wade, in justifying the comparative fault approach adopted in the Uniform Comparative Fault Act, has argued that the sale of a defective product, like breach of a statute, constitutes a kind of fault. In his opinion, the closeness of the relationship to negligence *per se*, which is apportionable under a comparative negligence statute points up the lack of distinction between comparative fault and comparative negligence, and the ability of a fact finder to apportion such conduct.¹³⁸

Because marketing a defective product is conduct that can prop-

136. *Cf.* Fischer, *supra* note 122, at 446 (criticizing comparative causation because there is no relationship between physical causation and personal culpability).

137. The argument is based on the assumption that if conduct other than negligence is considered, the amount of the loss a defendant is required to bear will not be rationally related to his fault, thereby undermining the risk spreading and deterrence functions or making them more difficult to achieve. It also raises the question whether or not non-negligent conduct of the plaintiff should be considered. *See id.* at 446-47.

138. *See* UNIFORM COMPARATIVE FAULT ACT § 1, Comment; Wade, *supra* note 44, at 377-78. The discussion of the application of the Uniform Comparative Fault Act to strict liability claims is instructive in indicating the difficulty some of the Commissioners had with the concept. The following exchange between Professors Wade and Dickerson from the transcript of the proceedings of the Committee of the Whole is instructive:

Mr. Dickerson: I wonder if the chair would indulge me by allowing me to refer briefly to subsection (b).

Now, you may have answered this question in connection with Section 1, and in that regard I apologize for missing that discussion. But what I'm wondering about is how you determine percentages of fault, which suggests to me degrees of fault in a case where the fault does not involve any sort of culpability, but consists of strict liability.

Now, we have been speaking, I think, most of the time about fault in its conventional sense of culpability, and we can compare the carelessness of the plaintiff with the defendant's, but suppose one of them has done nothing that would subject him to any possible criticism, but nevertheless he is liable under some such doctrine as negligence *per se*, or noncompliance with a warranty of wholesomeness or merchantability.

Now, I have difficulty comparing greater or lesser; let's say, a plaintiff is grossly negligent, but the only thing you can say about the defendant is that he is liable otherwise because he violated a food statute not requiring *mens rea*, where no one could possibly criticize him or criticize any employee.

In other words, how do you compare heavy carelessness on the part of the

erly be labeled fault, it is conduct that can be considered in making the fault apportionment. Factors such as the degree of danger presented by the product and the likelihood that it will cause injury will be relevant in making the apportionment of fault.¹³⁹ The conduct of a manufacturer leading up to the marketing of a product would also be relevant in Wade's analysis.¹⁴⁰ In developing

plaintiff with an either/or situation of a defendant, who either is strictly liable or isn't? There can't be degrees of strict liability, can there?

Mr. Wade: There is some logical difficulty here, but the fact of the matter is that in many states today this is being done. It is being done, for example, in Wisconsin, which has more experience than most states in this regard, and it has not given trouble in connection with the actions of the jury.

In a measure, saying that this is strict liability really doesn't eliminate the aspect of fault, because what is happening is that the manufacturer is putting out on the market an article which is unreasonably dangerous, which will be dangerous to a good number of people. And when that comes to the jury for its consideration, the experience in three or four states that have had this is that it can be handled, and is handled properly, by the jury.

The only state I think of right off that has disagreed with this is Colorado, and Colorado has said that their Comparative Fault Act will not apply to strict liability. It is a decision of the Court of Appeals, rather than the Supreme Court.

Mr. Dickerson: What kind of a percentage can you put on strict liability? Do you make it 25%, or can you go all the way and make it 50%, is it automatically 50, or what?

Mr. Wade: It is not automatically 50. It is appropriate to consider how dangerous this thing is, how many people would be jeopardized, matters of that sort. And the juries have been able to work it out.

Mr. Dickerson: I don't want to press on this too far, but I am mystified, because it goes not only to the quality of the product which you referred to, but the quality of the conduct, and I can't see how, if they are doing it, it would remain a mystery to me how you can make a comparison there.

Now, it's interesting to know that it's being done, but can you give any understandable explanation of how you can do it, how you can instruct the jury on it?

Mr. Wade: What we are doing is speaking of the conduct of the manufacturer—

Mr. Dickerson: Right.

Mr. Wade: [Continuing] . . . in putting this on the market, when it is in this unreasonably dangerous condition. So it's conduct against conduct.

Mr. Dickerson: Well, there's no way—

Mr. Wade: One other thing I would like to say in this connection—

Mr. Dickerson: I'll stop now, but I think the Conference ought to know that this Act stretches—and it's all right; I won't quarrel with that—the concept of fault into the area which we associate with a lack of fault. And I think we have to take account of the fact that this is going to be applied in the more difficult cases, where you don't have these much easier chances to make nice horseback distinctions about degrees of carelessness.

Uniform Comparative Fault Act of the National Conference of Commissioners on Uniform State Law, Proceedings in Committee of the Whole 66-69 (Aug. 3-4, 1977).

139. See UNIFORM COMPARATIVE FAULT ACT § 1, Comment; Wade, *supra* note 44, at 378.

140. According to Professor Wade:

On the matter of inspecting the products as they come off the assembly line, for example, even though a system of spot-checking may be regarded as sufficiently

guidelines for analyzing the defendant's conduct, the same standards used to determine whether a product is defective would be relevant.¹⁴¹

The comparative fault approach differs little, if at all, from the comparative cause or conduct approach. Comparative fault may facilitate the avoidance of the theoretical criticisms of the application of comparative principles to strict liability cases by establishing that it is really fault that is being compared. But comparative fault is still subject to the same criticisms as the comparative conduct approach.¹⁴²

Some courts have suggested that the best approach to allocation is to ignore the comparison problem and focus on the plaintiff's misconduct, asking a jury to determine how much the plaintiff contributed to his own injury. This is the equitable reduction method. The Ninth Circuit decision in *Pan-Alaska Fisheries, Inc. v. Marine Construction & Design Co.*¹⁴³ is illustrative.

[W]hether we use the term comparative fault, contributory negligence, comparative causation, or even comparative blameworthiness, we are merely beating around the semantical bush seeking to achieve an equitable method of allocating the responsibility for an injury or loss. It comes down to this: the defendant is strictly liable for the harm caused from his defective product, except that the award of damages shall be reduced in proportion to the plaintiff's contribution to his own loss or injury.¹⁴⁴

This approach presumably avoids the comparison problem because the focus is on the plaintiff's misconduct measured against the objective reasonable prudent person standard, without requiring a comparison of that conduct to a defendant's conduct.¹⁴⁵

The equitable reduction method at first glance appears to avoid the comparison problem. In reality, however, it is difficult to understand how a jury will be able to decide how much the plaintiff's

thorough to keep the manufacturing process from being characterized as negligent, if the particular product was dangerously defective, the nature of the spot-checking would still be relevant in determining the respective percentages of fault.

Wade, *supra* note 44, at 378.

141. See Steenson, *supra* note 82, at 28 n.131.

142. See Fischer, *supra* note 122, at 444-45.

143. 565 F.2d 1129 (9th Cir. 1977) (applying RESTATEMENT (SECOND) OF TORTS § 402A and comparative fault in the context of an admiralty claim).

144. *Id.* at 1139.

145. See Fischer, *supra* note 122, at 449.

recovery should be reduced without taking into consideration the conduct of the other parties involved in the lawsuit. Invariably, a jury would be prompted to think that the more egregious a defendant's conduct, the less a plaintiff's recovery should be reduced. If the equitable reduction method prohibits taking a defendant's misconduct into consideration it takes from a jury a means of placing the plaintiff's misconduct in the proper context. If the defendant's misconduct is considered, the equitable reduction method is a comparative conduct or fault approach without labeling it as such.

Designed to avoid the comparison problem when strict tort liability is involved, the equitable reduction method has the disadvantage of failing to take into account a defendant's negligence or strict liability.¹⁴⁶ This creates a potential problem if two distinct methods of loss allocation are adopted in cases in which a plaintiff relies on both negligence and strict liability theories. The potential for confusion should be apparent.¹⁴⁷

Overall, one has difficulty in escaping the conclusion that whatever method is chosen the differences between the approaches are insubstantial, both in the nature of the comparison that must be made and in the clarity of the approaches. The real advantage of the comparative fault or conduct approaches, in relationship to the equitable reduction method, is that the former approaches are broad enough to encompass other theories of liability, including negligence, so that consistency may be achieved in the method of loss allocation irrespective of the plaintiff's theory of recovery.

In *Busch* the court used varying terms, such as "comparative cause" and "comparative fault" to describe the loss allocation process.¹⁴⁸ In fact, there seem to be no significant distinctions flowing from the use of those terms as they are used in the court's opinion.

146. It seems clear that the equitable reduction method is designed to overcome the problem of lack of a basis for comparing plaintiff negligence with strict liability. *See id.*

147. *See* Thibault v. Sears, Roebuck & Co., 118 N.H. 802, 811-12, 395 A.2d 843, 849 (1978). Given the fact that negligence is ordinarily pleaded along with strict liability, there would be difficulty in instructing a jury on separate standards for loss allocation as to each of the theories. Because of the continued and justifiable use of negligence theory along with strict liability theory, and because of the impact a finding of negligence will have on loss allocation, *see* Owen, *The Highly Blameworthy Manufacturer: Implications on Rules of Liability and Defense in Products Liability Actions*, 10 IND. L. REV. 769, 788-89 (1977), the assumption should not be made in considering methods of loss allocation that cases will be decided solely on a strict liability basis.

148. *See* 262 N.W.2d at 393-94.

In discussing loss allocation, the court first made reference to a law review article advocating the use of comparative principles in allocating loss: "[T]he comparative negligence statute becomes more than a comparative *negligence* or even a comparative *fault* statute; it becomes a comparative *cause* statute under which all independent and concurrent causes of an accident may be apportioned on a percentage basis."¹⁴⁹ Although the portion of the Article cited by the court seems to indicate that something more than fault is being compared, the analysis in that Article is consistent with the comparative fault approach suggested by Professor Wade.¹⁵⁰ The only difference is that conduct that Wade would label "fault" is called "faultless conduct" by the Article's author.¹⁵¹

Further indications that causal fault is being compared are found in the *Busch* court's reference to *Sun Valley Airlines, Inc. v.*

149. *Id.* at 394 (quoting Jensvold, *supra* note 128, at 725).

150. The rule advocated by Jensvold was intended to apply specifically to determine loss allocation among multiple defendants, although the suggested standards could be used just as easily as guidelines for determining how loss should be allocated between a plaintiff and defendant.

The rule advocated by Jensvold is as follows:

One held liable for personal injury resulting from a defective product manufactured or sold by him in the ordinary course of business may not recover indemnity from anyone if:

- (a) he was negligent with respect to the product, breached an express warranty or misrepresented, intentionally or innocently, the product and such conduct was a direct cause of the injury; or,
- (b) his independent conduct with respect to the product, apart from any conduct directly related to the defect itself, was a direct cause of the injury.

A party so denied indemnity may recover contribution from all other persons *legally responsible* for the injury, contributions to awards being in proportion to the percentage of causal conduct attributable to each such person responsible.

Jensvold, *supra* note 128, at 741 (emphasis in original). In making the determination whether a party's "independent conduct" is a direct cause of the injury suffered by the plaintiff, Jensvold suggests the following criteria would be relevant:

- (a) the extent to which conduct of a defendant induced the plaintiff to purchase the product which caused his injury; (b) the extent to which the conduct of the defendant was motivated by a justifiable reliance upon the proper conduct of others; (c) the economic gain derived by each defendant as a result of his conduct in comparison to such gains derived by other defendants; and (d) the likelihood of the accident not happening at all in the absence of the defendant's conduct.

Id. at 742. Of these factors, the first and second seem clearly to be "fault" criteria. *See* Wade, *supra* note 44, at 377-78. The fourth factor makes it clear that causation is required. The only potential distinction is in the third factor, requiring a consideration of the economic gain derived by each defendant from the sale of the product. Any consideration of economic gain would seem to inject a largely collateral issue into the lawsuit, a factor that has a significant possibility for improperly influencing a jury's verdict.

151. *See* Jensvold, *supra* note 128, at 741.

*Avco-Lycoming Corp.*¹⁵² and *Winge v. Minnesota Transfer Railway*,¹⁵³ a Minnesota Supreme Court case. In *Winge* the plaintiff was injured when the vehicle he was driving collided with a train that had come to rest on a grade crossing.¹⁵⁴ The plaintiff's contributory negligence would have been a complete defense absent a comparative negligence statute because of prior supreme court decisions holding that failure to observe a train at a crossing constitutes contributory negligence as a matter of law. With the advent of comparative negligence, however, the *Winge* court indicated that the plaintiff would be entitled to have his negligence compared with the causal negligence of the defendant railroad:

While the statute speaks of a comparison of negligence, in application what is really compared, upon a consideration of all relevant facts and circumstances, is the relative contribution of each party's negligence to the damage in a causal sense. Thus, while cases bearing on the liability issue decided before the enactment of § 604.01 may continue to have precedential value where the railroad's failure to give statutory warnings is not a proximate cause of the collision, recovery is not barred by plaintiff's contributory negligence and he is now entitled to have such negligence compared with any other causal negligence of defendant railroad.¹⁵⁵

The emphasis on causally related negligence apparently was made to ensure that no misunderstandings would arise over the impact of the comparative negligence statute. In cases involving grade crossing accidents, the plaintiff would still be required to establish that the negligence of the railroad is causally related to the accident.¹⁵⁶

It becomes quite clear that the court is not advocating comparative causation in the abstract, but rather is requiring a comparison of negligence, emphasizing the need for establishing a causal relationship between the defendant's negligence and the plaintiff's injury.¹⁵⁷ Thus, both fault and causation must be considered in determining liability and in comparing fault.¹⁵⁸ In asking a jury

152. 411 F. Supp. 598 (D. Idaho 1976), *cited in* *Busch v. Busch Constr., Inc.*, 262 N.W.2d at 394.

153. 294 Minn. 399, 201 N.W.2d 259 (1972), *cited in* *Busch v. Busch Constr., Inc.*, 262 N.W.2d at 394.

154. 294 Minn. at 400, 201 N.W.2d at 261.

155. *Id.* at 403-04, 201 N.W.2d at 263.

156. *Id.* at 404, 201 N.W.2d at 263.

157. *See id.* at 405-06, 201 N.W.2d at 264.

158. The Uniform Comparative Fault Act provides that "the trier of fact shall con-

to make a fault determination, the term "fault" should be defined. Instructing a jury that "fault" consists of both failure to exercise reasonable care (negligence), and placing a defective or unsafe product on the market (strict liability), provides a jury with the basic factors to consider in making the fault apportionment. Attempts to provide further definition of the term involve the same problems that exist in attempting to give a jury detailed instructions to assist them in deciding if a product is defective.¹⁵⁹ An instruction that fault consists of placing a defective product on the market as well as the negligence if any, surrounding the manufacture and sale of the product, establishes a framework for the fault determination, but it does not overload the jury with unquantified factors to be considered in making the determination. As is the case with the comparative negligence determination, much is left to the jury. Use of comparative principles in the strict liability context, however, necessitates recognition of the latitude jurors will have in apportioning fault according to their subjective judgments. The determination may be neither precise nor predictable, but it is the logical outcome of applying comparative fault principles in strict liability cases.

C. Warranty

If strict tort instructions are given it should be unnecessary to instruct on implied warranty of merchantability. If implied warranty is used as an alternative theory of recovery in cases to which strict tort applies, however, the defenses should be the same as the defenses to strict liability, a conclusion supported by the supreme court's consistent recognition of the common conceptual bases of strict tort and implied warranty theories.¹⁶⁰

In *Nelson v. Anderson*,¹⁶¹ a case involving property damage caused by a defective furnace, the Minnesota Supreme Court took the position that contributory negligence would be a defense to a war-

sider both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed." UNIFORM COMPARATIVE FAULT ACT § 2(b). The Comment explains that "[d]egrees of fault and proximity of causation are inextricably mixed, as a study of last clear chance indicates." *Id.*, Comment.

159. See Steenson, *supra* note 82, at 57 n.218.

160. See notes 161-81 *infra* and accompanying text. In *Gardner v. Coca-Cola Bottling Co.*, 267 Minn. 505, 127 N.W.2d 557 (1964), the court stated that the action for breach of implied warranty has its roots in tort law, and that contributory negligence is a defense to such an action. *Id.* at 511, 127 N.W.2d at 562.

161. 245 Minn. 445, 72 N.W.2d 861 (1955).

ranty action. The court recognized the conflict in the authorities but took the position adopted by New York in *Razey v. J.B. Colt Co.*¹⁶² as stating the relevant law for Minnesota.¹⁶³ The *Razey* court stated:

Where the plaintiff seeks to recover damages for a breach of a general warranty, which are usually the difference between the value of the thing as it is in fact and as it was warranted to be, the question of negligence does not enter, but where he seeks to recover consequential damages he should not be permitted to recover for his own negligence. It has frequently been said that such damages are recoverable as may reasonably be said to have been within the contemplation of the parties. Warranty is not insurance, and there is nothing in this contract to indicate that either party supposed the defendant was to answer for the plaintiff's carelessness. If it is impossible to separate the consequences of the plaintiff's negligence from the consequences of the defendant's breach of warranty, then the plaintiff must be limited to general damages, for otherwise he is permitted to recover for his own fault. We can discover no reason why he should be permitted to recover any damages which his own negligence has contributed to produce, and no authority has been cited by the respondent in support of such a proposition.¹⁶⁴

The *Razey* court also indicated that the seller would not be liable for consequential damages if the buyer continues to use the product after he has discovered it is not functioning properly.¹⁶⁵

In *Goblirsch v. Western Land Roller Co.*,¹⁶⁶ the Minnesota court held that secondary assumption of the risk, which in a pre-*Springrose* case would be a complete defense to a negligence action, was also a defense to a breach of implied warranty action. Again emphasizing the tort origins of implied warranty, the court concluded that the defenses to implied warranty should be the same as the defenses to negligence.¹⁶⁷ Because the case arose prior to *Springrose*,

162. 106 A.D. 103, 94 N.Y.S. 59 (1905).

163. 245 Minn. at 450-51, 72 N.W.2d at 865.

164. 106 A.D. at 106, 94 N.Y.S. at 61, *quoted in* Nelson v. Anderson, 245 Minn. at 451, 72 N.W.2d at 865.

165. *See* 245 Minn. at 451, 72 N.W.2d at 865 (citing *Razey v. J.B. Colt Co.*, 106 A.D. 103, 94 N.Y.S. 59 (1905)).

166. 310 Minn. 471, 246 N.W.2d 687 (1976).

167. *See id.* at 477, 246 N.W.2d at 691 (citing *Gardner v. Coca-Cola Bottling Co.*, 267 Minn. 505, 127 N.W.2d 557 (1964)); *cf.* Nelson v. Anderson, 245 Minn. 445, 451, 72 N.W.2d 861, 865 (1955) (allowing contributory negligence defense to breach of warranty action).

the court was not required to decide whether the comparative negligence statute would be applied to implied warranty claims in post-*Springrose* cases.

That question was presented in two recent cases, *Wenner v. Gulf Oil Corp.*¹⁶⁸ and *Chatfield v. Sherwin-Williams Co.*,¹⁶⁹ but the court declined to reach the issue. *Wenner* involved a claim against a herbicide manufacturer based upon damage to a farmer's wheat crop caused by application of the herbicide.¹⁷⁰ The defendant's requested comparative negligence instruction was denied by the trial court.¹⁷¹ On appeal, following entry of judgment for the plaintiff, the supreme court agreed that the evidence supported the defendant's request for an instruction on comparative negligence, but it found no error because an instruction less favorable to the plaintiff was actually given.¹⁷² The instruction stated that if the plaintiff's reliance on Gulf Oil's representations was unreasonable the plaintiff would be entitled to no recovery whatsoever.¹⁷³

Chatfield involved an action by a painter against Sherwin-Williams for direct and consequential damages caused by the fading of paint purchased from Sherwin-Williams and applied by the plaintiff on a number of jobs.¹⁷⁴ The trial court gave a comparative fault instruction to the jury.¹⁷⁵ Although the jury found the plaintiff to be fifteen percent and the defendant eighty-five percent at fault, the trial court entered judgment for the plaintiff for the full amount of direct and consequential damages awarded by the jury.¹⁷⁶ The supreme court declined to decide whether *Busch* would be applicable to implied warranty actions because the question had been raised for the first time on appeal.¹⁷⁷

The difficulty in continuing the trend toward full assimilation of tort defenses in the implied warranty context is a function of the type of loss involved in those cases coupled with the lack of statutory authority for applying comparative negligence to such cases. Crop losses of the type sustained in *Wenner* traditionally have been

168. 264 N.W.2d 374 (Minn. 1978).

169. 266 N.W.2d 171 (Minn. 1978) (per curiam).

170. 264 N.W.2d at 376.

171. *See id.* at 377.

172. *See id.* at 383.

173. *See id.*

174. *See* 266 N.W.2d at 172-73.

175. *See id.* at 174.

176. *Id.* at 173.

177. *Id.* at 176.

litigated in Minnesota under implied warranty theory,¹⁷⁸ and the economic loss sustained in *Chatfield* would seem clearly to fall outside the coverage of strict liability theory as applied in Minnesota.¹⁷⁹

In *Busch* the supreme court relied on Wisconsin judicial constructions of its comparative negligence statute to mold Minnesota's comparative negligence statute to strict liability cases, but the statute applies only to "damages . . . resulting in death or injury to person or property."¹⁸⁰ The application of the comparative negligence statute to claims involving economic loss does not fit within the statute.

Although the statute does not apply to cases that ordinarily fit within the Uniform Commercial Code, the Code seems to provide latitude for the adoption of comparative principles to apportion loss.¹⁸¹ The motivation for adopting a comparative negligence statute, the desire to avoid the all-or-nothing common-law approach to defenses, applies equally to cases involving economic loss.

Even if comparative fault is not applied to warranty claims involving economic loss, there should be no impediment to its application in cases involving personal injury and property damage that traditionally fall within the scope of negligence and strict tort liability. The very closeness of negligence, strict liability, and warranty in these cases mandates such a result.¹⁸²

D. Summary

The defenses to a negligence cause of action were merged in the supreme court's decision in *Springrose v. Willmore*.¹⁸³ Following *Springrose*, the sole issue is whether the plaintiff exercised reason-

178. See, e.g., *Kleven v. Geigy Agricultural Chems.*, 303 Minn. 320, 227 N.W.2d 566 (1975).

179. See *Farr v. Armstrong Rubber Co.*, 288 Minn. 83, 90-94, 179 N.W.2d 64, 69-71 (1970) (discussing distinction between strict liability in tort and breach of express or implied warranty).

180. Act of May 23, 1969, ch. 624, § 1, 1969 Minn. Laws 1069, 1069-70 (current version at MINN. STAT. § 604.01(1) (1978)).

181. Candid recognition of the judicial power to formulate comparative fault in strict tort cases should compel the conclusion that comparative principles can readily be applied in the economic loss context. See *Fischer*, *supra* note 122, at 449.

182. See *Levine, Buyer's Conduct as Affecting the Extent of Manufacturer's Liability in Warranty*, *supra* note 122, at 662-63.

183. 292 Minn. 23, 192 N.W.2d 826 (1971).

able care for his own safety.¹⁸⁴ In the strict liability context, defenses have become more complicated. New terminology and classification problems have created difficulties that do not exist under negligence law.¹⁸⁵ The court's decision in *Busch*, applying the comparative negligence statute to claims based on strict liability, should resolve much of the confusion.

Busch has substantially standardized the defenses in products liability cases. By applying the comparative negligence statute to strict liability claims, the treatment of negligence and strict liability defenses becomes uniform, with the single exception carved out by *Busch*—negligence consisting of a failure to discover the defect or an unreasonable failure to guard against its existence.

Although the exception is subject to criticism for a variety of reasons, and although it will be difficult to administer in practice, the exception should be uniformly applied to both negligence and strict liability claims to avoid the inconsistencies that will otherwise occur in consideration of defenses. The defenses to warranty actions should also be subject to *Busch*, at least when the claim is for property damage or personal injury. The rationale of the court's decisions commencing with *Nelson v. Anderson*¹⁸⁶ seems to mandate a tort treatment of warranty defenses in such cases.

Although the exact method of loss allocation is not as important as acceptance of the concept of comparative fault, the fault allocation procedure adopted in *Busch* seems to require a comparison of conduct labeled as fault. Fault consists of negligence, strict liability, and breach of warranty; conduct giving rise to liability under any of those theories will be compared to the plaintiff's contributory fault.

Fault allocation creates some potential for confusion. Several alternatives have been suggested for allocating fault in products liability cases,¹⁸⁷ but it appears that no matter which method is suggested, all methods will invariably involve a comparison of the conduct of the involved parties, if that conduct can be labeled "fault." "Fault" includes failure to exercise reasonable care as well as the conduct of a product seller in placing a defective product on the market.¹⁸⁸

184. See notes 26-28 *supra* and accompanying text.

185. See notes 35-121 *supra* and accompanying text.

186. 245 Minn. 445, 72 N.W.2d 861 (1955).

187. See notes 127-30 *supra* and accompanying text.

188. See UNIFORM COMPARATIVE FAULT ACT § 1(b) & Comment.

The fault allocation process is not a predictable one, but comparative fault should be no more unpredictable or difficult to administer than the comparative negligence procedure administered in Minnesota over the last ten years.

III. CONTRIBUTION AND INDEMNITY

In addition to the problems in determining how loss will be allocated between a plaintiff and defendant, similar problems arise in determining how to allocate loss among multiple defendants. Questions concerning contribution or indemnity¹⁸⁹ may arise in several contexts. One party in the chain of manufacture and distribution may seek contribution or indemnity from another party in the chain, or a party in the chain may seek contribution from a party outside the chain. This may arise when the seller seeks contribution from a product user or consumer whose negligence contributed to the plaintiff's injuries or the claim may arise in the context of workplace injuries when the product seller seeks contribution from a negligent employer.

A. *Contribution Outside the Chain of Distribution*

1. *Non-Workplace Injury Contribution Claims*

Contribution outside the workplace injury context may involve claims by product users or consumers who seek contribution from a product seller. Conversely, a party in the chain of distribution may seek contribution from the user or consumer or other contributing party.

In cases involving contribution claims between negligent users or consumers, contribution would seem to present no problem. The question seems to be more complicated, however, when a strictly liable party in the chain seeks contribution from a negligent user or consumer.¹⁹⁰ As a matter of common sense it would seem that the result should not differ. If contribution is available to a negligent party in the chain it should also be available to a less culpable party, one held liable solely on the basis of strict liability.¹⁹¹

189. For an explanation of how the theories of contribution and indemnity operate, see Note, *supra* note 1, at 110-18.

190. See II U.S. DEP'T OF COMMERCE, INTERAGENCY TASK FORCE ON PRODUCT LIABILITY: FINAL REPORT OF LEGAL STUDY 142-44 (1977) [hereinafter cited as LEGAL STUDY].

191. Cf. *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 738, 742-43, 575 P.2d 1162,

In *Busch v. Busch Construction, Inc.*,¹⁹² the Minnesota Supreme Court held that contribution would be available to General Motors Corporation against Lando Busch, the driver of the vehicle, even though Busch's liability was predicated on negligence and General Motor's on strict liability.¹⁹³ There was one qualification on the right of contribution, however: "[A] user or consumer who fails to discover a defect cannot be liable for contribution to a strictly liable distributor."¹⁹⁴ Because Lando Busch was a plaintiff as well as a codefendant in the suit, the court held that consistency dictated that the negligent failure to discover a defect, which was not a legitimate defense matter, could not be the basis for the manufacturer's contribution claim.

Because of the special qualification in *Busch*, when a contribution claim is asserted against a product user or consumer, the assumption can be made that *Busch* would be inapplicable to prevent contribution claims asserted against parties other than users or consumers. For example, in cases in which an individual's intoxication is a contributing factor, a contribution claim against the dram shop would lie without the *Busch* restriction,¹⁹⁵ as would a contribution claim against a negligent intervening party, such as a driver of another involved motor vehicle.

In addition, although the particular concern of the court in *Busch* was the contribution claim of the manufacturer against the product user, contribution would also work against the manufacturer. Thus, any party from whom contribution could be claimed by a manufacturer should be able to assert a contribution claim against the manufacturer.

1169-70, 1172, 144 Cal. Rptr. 380, 387-88, 390 (1978) (merger of strict liability into comparative fault obviates absurd result allowing plaintiff who assumed risk to recover under negligence theory but not strict liability).

192. 262 N.W.2d 377 (Minn. 1977).

193. *See id.* at 393-94.

194. *Id.* at 394 n.17.

195. Although common liability will be necessary to support a claim of contribution, the basis of liability may differ. *See Milbank Mut. Ins. Co. v. Village of Rose Creek*, 302 Minn. 282, 284-85, 225 N.W.2d 6, 8-9 (1974). *Busch* was not specifically concerned with dram shop claims, but legislative application of comparative negligence to dram shop claims, *see* MINN. STAT. § 340.95 (1978), coupled with *Busch*, should make comparative fault principles applicable to contribution claims between dram shops and manufacturers.

2. *The Workplace Injury*

a. *The Policy*

Until the supreme court's 1977 decision in *Lambertson v. Cincinnati Corp.*,¹⁹⁶ the right of a third party to claim contribution from a plaintiff's employer was barred because of the lack of common liability between the employer and the third party, based on the employer's immunity from suit by an injured employee granted by the workers' compensation act.¹⁹⁷ The only remedy available to a third party to shift loss to an employer was a limited right to indemnity.¹⁹⁸ At one point, the Legislature amended the workers' compensation act to circumscribe even the right to indemnity,¹⁹⁹ but the supreme court found the amendment unconstitutional.²⁰⁰ Although the court had questioned the fairness of the no-contribution rule,²⁰¹ it remained intact until *Lambertson* was decided.

In deciding whether contribution should be allowed, the *Lambertson* court delineated the conflicting interests involved:

196. 312 Minn. 114, 257 N.W.2d 679 (1977).

197. The workers' compensation act is the exclusive source of the employee's right to recover against his employer. See MINN. STAT. §§ 176.021(1), .031 (1978). Because the employer is not liable to the employee in tort there can be no common liability of the employer and third party to the employee, thus precluding a contribution claim by the third party against the employer. See *Hendrickson v. Minnesota Power & Light Co.*, 258 Minn. 368, 371-72, 104 N.W.2d 843, 847-48 (1960), *overruled in part on other grounds*, *Tolbert v. Gerber Indus., Inc.*, 255 N.W.2d 362, 368 n.11 (Minn. 1977).

198. See *Keefer v. Al Johnson Constr. Co.*, 292 Minn. 91, 100, 193 N.W.2d 305, 310-11 (1971) (general contractor held vicariously liable allowed indemnity against subcontractor); *Lunderberg v. Bierman*, 241 Minn. 349, 364-65, 63 N.W.2d 355, 365 (1954) (automobile owner held liable on basis of financial responsibility act allowed indemnity against employer). In *Lambertson* Cincinnati Corporation sought indemnity from Hutchinson, the plaintiff's employer, on the basis that had Hutchinson purchased the safety devices offered to it by Cincinnati the accident would have been avoided. The supreme court found indemnity to be inappropriate:

The difficulty with this argument lies in the jury's unchallenged finding that Cincinnati was 25-percent negligent in the first instance, when it placed its press brake in the stream of commerce without certain kinds of safety devices. Since the independent acts of negligent manufacture and sale by Cincinnati and refusal of safety devices by Hutchinson combined to produce plaintiff's injury, liability should be apportioned between them, not shifted entirely to one or the other.

312 Minn. at 127, 257 N.W.2d at 688.

Given the fact that active fault will always be involved when a manufacturer places a defective product into the stream of commerce, the remedy of indemnity would be particularly restricted in the products liability context.

199. See Act of June 4, 1969, ch. 936, § 4, 1969 Minn. Laws 1804, 1806 (repealed 1976).

200. See *Carlson v. Smogard*, 298 Minn. 362, 369, 215 N.W.2d 615, 620 (1974).

201. See *Haney v. International Harvester Co.*, 294 Minn. 375, 382-83, 201 N.W.2d 140, 144-45 (1972).

If contribution or indemnity is allowed, the employer may be forced to pay his employee—through the conduit of the third-party tortfeasor—an amount in excess of his statutory workers' compensation liability. This arguably thwarts the central concept behind workers' compensation, i.e., that the employer and employee receive the benefits of a guaranteed, fixed-schedule, nonfault recovery system, which then constitutes the exclusive liability of the employer to his employee. . . . If contribution or indemnity is not allowed, a third-party stranger to the workers' compensation system is made to bear the burden of a full common-law judgment despite possibly greater fault on the part of the employers. This obvious inequity is further exacerbated by the right of the employer to recover directly or indirectly from the third party the amount he has paid in compensation regardless of the employer's own negligence. . . . Thus, the third party is forced to subsidize a workers' compensation system in a proportion greater than his own fault and at a financial level far in excess of the workers' compensation schedule.²⁰²

Stating the varying interests of the parties served to identify the problem, but two questions remained: whether contribution should be allowed in spite of the common liability impediment and if so, how much contribution?

The *Lambertson* court disposed of the common liability impediment on two bases. The court first noted that although there is no common liability between the employer and third party in tort, both are responsible for the employee's injuries, the employer through the workers' compensation system and the third party through the tort system.²⁰³ More importantly, relying on the flexibility and equitable nature of the remedy of contribution, the court held that contribution "should be utilized to achieve fairness on particular facts, unfettered by outworn technical concepts like common liability."²⁰⁴

The court perceived the second problem, deciding just how far

202. 312 Minn. at 120, 257 N.W.2d at 684 (citations omitted).

203. *Id.* at 128, 257 N.W.2d at 688. The court's ready disposition of the common liability impediment gave rise to speculation that common liability would no longer be an impediment to contribution in any case. The court has subsequently made clear, however, that common liability is still a requirement for contribution. See *Conde v. City of Spring Lake Park*, 290 N.W.2d 164, 165-66 (Minn. 1980); *Hart v. Cessna Aircraft Co.*, 276 N.W.2d 166, 168-69 (Minn. 1979), discussed in Comment, *Intervention, Joinder, and Issue Preclusion: A New Look at Tort Claim Procedures*, 6 WM. MITCHELL L. REV. 361 (1980). See generally Note, *supra* note 1, at 146-49.

204. 312 Minn. at 128, 257 N.W.2d at 688.

to extend the right of contribution, to be the most difficult. The court recognized the superiority of a legislative solution to the problem,²⁰⁵ but it nonetheless decided to allow limited contribution by the third party against the employer:

While the opinions of other jurisdictions must be read with caution on this issue because of different statutes and concepts of recovery in negligence cases, we have found direction in the approach taken by the Pennsylvania Supreme Court. That court has allowed contribution from the employer up to the amount of the workers' compensation benefits. This approach allows the third party to obtain limited contribution, but substantially preserves the employer's interest in not paying more than workers' compensation liability. While this approach may not allow full contribution recovery to the third party in all cases, it is the solution we consider most consistent with fairness and the various statutory schemes before us.²⁰⁶

Following the decision in *Lambertson*, a petition for rehearing and clarification was filed by one of the defendants. The rehearing was denied, leaving open the question of the exact formula for loss apportionment.

b. The Method of Allocation

Although there are several potential methods for allocating loss among an employer, employee, and third party, the supreme court ended speculation on the matter when it decided *Johnson v. Raske Building Systems, Inc.*²⁰⁷ In *Johnson* the court established a three-step procedure for allocating loss. The procedure requires the third party to first pay the full amount of the verdict to the plaintiff.²⁰⁸ Second, the employer is required to contribute to the third party tortfeasor an amount proportionate to its fair share of the judgment, as determined by its percentage of negligence, but not to exceed its workers' compensation liability.²⁰⁹ Third, the employee is required to reimburse the employer according to the scheme set out in section 176.061, subdivision 6(c) of the Minnesota Statutes.²¹⁰

205. *Id.* at 129, 257 N.W.2d at 688.

206. *Id.* at 130, 257 N.W.2d at 689 (citations omitted).

207. 276 N.W.2d 79 (Minn. 1979).

208. *Id.* at 81.

209. *Id.*

210. *Id.* It is possible that the employer's reimbursement right could be completely avoided in a settlement. In *Naig v. Bloomington Sanitation*, 258 N.W.2d 891 (Minn. 1977), the supreme court established that:

Because this procedure hinges in large part on the method of

If an employee settles only those claims not subject to subrogation by the employer, the employer in no way is prejudiced by the settlement. It possesses not only the right to intervene in the employee's suit but also the right to maintain actions in its own name to enforce its subrogation rights and recover expenses for medical treatment Crediting part of such a settlement to the employer effectively precludes the employee from seeking a settlement of his own claims. So long as the employer is notified of negotiations leading to such a settlement so that it can appear or intervene to protect its interest and so long as the employee demonstrates that the settlement concerns only damages not recoverable under workers' compensation, or allocates the settlement into recoverable and nonrecoverable claims, the employer cannot credit the nonrecoverable portion of the settlement against compensation payments. By pursuing this course, however, the employee waives his statutory right to one-third of the employer's net recovery from the third-party.

Id. at 894 (footnote and citations omitted); *cf.* *Sutley v. North Central Airlines*, 30 Minn. Workers' Comp. Dec. 294 (1978) (employer can settle its claim against third party, avoiding employee's statutory claim).

If the claim against the third party is settled only for those losses not recoverable in workers' compensation, the third party should be unable to claim contribution from the employer. Although the employer, if negligent, is responsible in part for causing the injuries giving rise to the claim against the third party, the third party's contribution claim exists only to the extent of the employer's workers' compensation liability. If the contribution claim by the third party is allowed against the employer, the employer, deprived of any reimbursement right under section 176.061, subdivision 6, would be held liable for an amount far exceeding its workers' compensation liability. Given the evil the supreme court wished to avoid in *Lambertson*, disallowing the contribution claim while allowing a negligent employer reimbursement, the contribution remedy should not exist when the employer has no reimbursement right in the proceeds of the tort settlement.

If the claim is settled pursuant to *Naig*, however, the possibility exists that the employer will have a separate claim against the third party. Even without the *Naig* release, the employer retains a separate cause of action against the third party for medical expenses paid to the employee. *See Travelers Ins. Co. v. Springer*, 289 N.W.2d 131 (Minn. 1979) (action created by MINN. STAT. § 176.061(7) (1978)). This right creates the possibility that the at-fault employer may seek to obtain reimbursement from the at-fault third party who would ordinarily have a contribution claim against the employer. There are at least two possible solutions to this problem. First, the employer could be allowed reimbursement, with the amount reduced by the employer's percentage of negligence. However, this would allow the employer to be reimbursed in situations in which the third party claim, if asserted following the statutory distribution of the proceeds of a tort judgment or settlement, would completely avoid the employer's claim for reimbursement. This makes the second alternative preferable: the employer should be allowed reimbursement only to the extent that the amount of reimbursement would exceed the employer's fair share of the judgment as determined by its percentage of negligence.

The *Naig* case also raises the possibility that, aside from settlement, the same formula could be applied to a judgment, if the special verdict form distinguishes between workers' compensation and non-workers' compensation losses. In effect, *Naig* rewrites the statute insofar as the employer's reimbursement right can be avoided by specifying that a settlement is for non-workers' compensation losses. There would seem to be no reason why the same could not be done with a judgment. If the special verdict form provides for breaking the tort award into losses recoverable and non-recoverable under workers' compensation, the statutory method of distribution would be altered. While the exact amount of money available for distribution would depend on how attorney's fees and costs are assessed as to each type of loss, *see Bradt, Third Party Actions*, in *WORKERS' COMPENSATION, SKILLS AND*

allocating the proceeds of a third party action established in section 176.061, subdivision 6,²¹¹ that section must be examined before the impact of the procedure set out in *Johnson* can be understood. Both *Lambertson* and *Johnson* were decided under a version of the workers' compensation statute that did not provide for the proportionate sharing of fees and expenses by the employer. In 1976 the statute was amended to require the employer to share a proportionate amount of fees and expenses.²¹² Once both versions are understood, the statute may be integrated with the procedures established in *Johnson* to determine how the contribution claim will be enforced and what its impact will be on the rights of the employer and third party.²¹³

i. The Pre-1976 Statute

Prior to the 1976 amendment the statute read as follows:

The proceeds of all actions for damages or settlement thereof under section 176.061, received by the injured employee or his dependents or by the employer as provided by subdivision 5, shall be divided as follows:

PRACTICE 74-75 (Minn. Continuing Legal Education 1979), the apportionment could have an impact on the third party's claim against the employer. The amount might be more or less than if no differentiation between types of losses is made.

211. MINN. STAT. § 176.061(6) (1978 & Supp. 1979).

212. Act of Apr. 3, 1976, ch. 154, § 2, 1976 Minn. Laws 449, 449-50 (current version at MINN. STAT. § 176.061(6) (1978 & Supp. 1979)).

213. A 1979 amendment to the workers' compensation act raises yet further complications:

(b) If an employer, being then insured, sustains damages due to a change in workers' compensation insurance premiums, whether by a failure to achieve a decrease or by a retroactive or prospective increase, as a result of the injury or death of his employee which was caused under circumstances which created a legal liability for damages on the part of a party other than the employer, the employer, notwithstanding other remedies provided, may maintain an action against the other party for recovery of such premiums. This cause of action may be brought either by joining in an action described in clause (a) or by a separate action. Damages recovered under this clause shall be for the benefit of the employer and the provisions of subdivision 6 shall not be applicable to such damages.

MINN. STAT. § 176.061(5)(b) (Supp. 1979).

One can only speculate how the employer's right relates to the third party's contribution claim. If the employer's negligence has contributed to his employee's injuries, along with the negligence or fault of the third party, the employer could have a claim for increased premiums against the third party while the third party will have a contribution claim against the employer. The only way the two rights could be balanced is to offset the amount of the employer's claim from the third party's claim. To the extent that the employer's claim exceeds the third party's claim, the third party would have an additional obligation to pay the employer for the amount the employer's claim exceeds the third party's contribution claim.

(a) After deducting the reasonable cost of collection, including but not limited to attorneys fees and burial expense in excess of the statutory liability, then

(b) One-third of the remainder shall in any event be paid to the injured employee or his dependents, without being subject to any right of subrogation.

(c) Out of the balance remaining, the employer shall be reimbursed for all compensation paid under Minnesota Statutes, Chapter 176.

(d) Any balance remaining shall be paid to the employee or his dependents, and shall be a credit to employer for any compensation which employer is obligated to pay, but has not been paid, and for any compensation that such employer shall be obligated to make in the future.²¹⁴

The following hypothetical illustrates the operation of the section:

ILLUSTRATION I

Employee receives \$100,000 as the proceeds of a tort judgment against the Third Party. The fees and costs are \$40,000. The Employee has previously received \$20,000 in workers' compensation benefits.

The statute requires the following steps:

- a. $\$100,000$ (Proceeds) - $\$40,000$ (Fees and Costs) = $\$60,000$.
- b. One-third (Employee's share) \times $\$60,000$ = $\$20,000$.
- c. $\$40,000$ (remainder) is available for reimbursement of the employer. Because the employer has paid $\$20,000$ in benefits, it will be reimbursed in full.
- d. The balance remaining, $\$20,000$, is a credit to the employer for future compensation benefits.

The employer would have no additional obligation to pay workers' compensation benefits until the credit is exhausted.

There are situations, however, in which the employer will not be fully reimbursed for workers' compensation benefits paid. To illustrate assume the following hypothetical:

ILLUSTRATION II

Employee receives \$100,000 as the proceeds of a tort judgment against the Third Party. The fees and costs are \$40,000. Workers' compensation benefits have been paid in the amount of \$60,000.

The statute would dictate the following distribution:

- a. $\$100,000$ (Proceeds) - $\$40,000$ (Fees and Costs) = $\$60,000$.
- b. One-third (Employee's share) \times $\$60,000$ = $\$20,000$.

214. Act of Apr. 25, 1969, ch. 199, § 2, 1969 Minn. Laws 307, 309 (current version at MINN. STAT. § 176.061(6) (1978 & Supp. 1979)).

- c. \$40,000, the remainder, is available for reimbursement.
- d. Because the full \$40,000 is taken up by the employer's reimbursement right, there is no credit.

The employer has thus paid \$60,000 in workers' compensation benefits to the employee, but has been reimbursed only in the amount of \$40,000.

ii. *The Post-1976 Statute*

The statute was amended in 1976 to remedy the inequity involved in allowing an employer to be reimbursed for workers' compensation benefits paid without sharing the fees and costs expended in obtaining that recovery. The amendment reads as follows:

(c) Out of the balance remaining, the employer shall be reimbursed in an amount equal to all compensation paid under chapter 176 to the employee or his dependents by the employer less the product of the costs deducted under clause (a) divided by the total proceeds received by the employee or his dependents from the other party multiplied by all compensation paid by the employer to the employee or his dependents.²¹⁵

The statutory formula for sharing fees and expenses is as follows:

$$\frac{\text{Fees and Costs}}{\text{Proceeds}} \times \text{Benefits} = \text{Employer's share.}$$

As applied to the first illustration, the employer's share of the fees and expenses would be \$8,000:

$$\frac{\$40,000 \text{ (Fees and Costs)}}{\$100,000 \text{ (Proceeds)}} \times \$20,000 \text{ (W.C. benefits)} = \$8,000.$$

With the amendment the statutory apportionment yields a different result:

ILLUSTRATION III

Employee receives \$100,000 as the proceeds of a tort judgment against the Third Party. The fees and costs are \$40,000. The Employee has previously received \$20,000 in workers' compensation benefits.

The statute requires the following distribution:

- a. \$100,000 (Proceeds) - \$40,000 (Fees and Costs) = \$60,000.
- b. One-third (Employee's share) \times \$60,000 = \$20,000.
- c. \$40,000 remains. Out of this amount the employer is reimbursed in an amount equal to its workers' compensation benefits paid (\$20,000) less its proportionate share of fees

215. Act of Apr. 3, 1976, ch. 154, § 2, 1976 Minn. Laws 449, 449-50 (current version at MINN. STAT. § 176.061(6)(c) (1978 & Supp. 1979)).

and costs (forty percent of \$20,000 = \$8,000). The employer thus receives \$12,000.

- d. \$20,000, the balance remaining, constitutes a credit against future benefits.²¹⁶

Before the amendment, the employer would have been reimbursed in full for workers' compensation benefits paid. After the amendment, the right of reimbursement is reduced by the employer's proportionate share of fees and expenses.

ILLUSTRATION IV

Employee receives \$100,000 as the proceeds of a tort judgment against the Third Party. The fees and costs are \$40,000. Workers' compensation benefits have been paid in the amount of \$60,000.

The following distribution would result:

- a. \$100,000 (Proceeds) - \$40,000 (Fees and Costs) = \$60,000.
- b. One-third (Employee's share) × \$60,000 = \$20,000.
- c. \$40,000 remains. Out of this amount the employer is reimbursed in an amount equal to either: (1) workers' compensation benefits paid less its proportionate share of fees and costs (forty percent of \$60,000 = \$24,000) or \$36,000, or (2) the amount remaining for reimbursement, \$40,000, less its proportionate share of fees and costs based on the amount remaining for reimbursement (forty percent of \$40,000 = \$16,000) or \$24,000.²¹⁷
- d. No credit remains.

216. The employer's share of the fees and costs should not become part of the credit. Because the employer is entitled to reimbursement in the amount of \$20,000, less its proportionate share of fees and costs, making the fees and costs part of the credit would enable the employer to avoid its statutory obligation. A contrary position is taken in Bradt, *supra* note 210, at 73.

217. The illustration establishes two potential ways of computing the employer's obligation to bear a portion of fees and costs. If the employer's obligation to bear a portion of the fees and expenses is tied to the amount of workers' compensation benefits paid, irrespective of the amount actually available for reimbursement, the net result is that whenever the workers' compensation benefits paid exceed the remainder available for reimbursement, the employer will be entitled to reimbursement in a greater amount than if the employer's obligation were based on the amount left for reimbursement.

This question arose in a recent workers' compensation court of appeals case, Kealy v. St. Paul Hous. & Redev. Auth., No. 475-66-5184 (Minn. Workers' Comp. Ct. App. Feb. 15, 1980). The accident involved took place on December 10, 1976, after the effective date of the 1976 amendment to the workers' compensation act providing for the sharing of fees and expenses by the employer. The relevant facts upon which the distribution of the proceeds of the tort settlement was made were as follows:

Compensation paid prior to third party recovery	\$30,283.49
Third party proceeds (settlement)	\$49,000.00
Legal costs	\$16,787.69

See id., slip op. at 2. The statutory method of apportioning the proceeds of the tort settlement yielded the following results:

Irrespective of which method of computing the employer's share of fees and costs is used, the problem of the employer receiving less than the workers' compensation benefits paid is aggravated.

-
1. \$49,000 (settlement) — \$16,787.69 (legal costs) = \$32,212.31
 2. One-third (employee's share) X \$32,212.30 = \$10,737.44
 3. Remainder = \$21,474.87

See id. The principal issue in the case concerned the treatment of attorney's fees and costs. If the statute were adhered to strictly, the employer would be entitled to reimbursement in the amount of workers' compensation benefits paid (\$30,283.49) less its share of the legal costs

$$\left(\frac{\$16,787.69}{\$49,000.00} \times \$30,283.49 = \$10,375.03 \right).$$

The employer would thus be entitled to reimbursement in the amount of \$19,908.19, an amount close to the amount of the remainder of \$21,474.87. *See id.* Instead of following this method, the workers' compensation division made the statutory obligation to bear a percentage of the fees and costs turn on the amount available for reimbursement, rather than on the amount of workers' compensation benefits paid. The method of computation utilized by the Division was as follows:

1. Legal Costs
Total Third Party Recovery
$$\frac{\$16,787.69}{\$49,000.00} = 34.2606\%$$
2. \$21,474.87 less (34.26% X \$21,474.87) = \$14,117.58

The Division then held that the total and maximum reimbursement to the insurer was the sum of \$14,117.58 and that the insurer would in the future have to pay to the employee 100% of the compensation benefits that might be payable in the future beyond the \$30,283.49 previously paid and utilized in its determination. Thus, the Division in its computation held that the dollar amount of the "balance remaining" less the insurer's proportionate share of attorney's fees was a limiting factor or "cap" or a "ceiling" on the dollar amount of "all compensation paid" in applying paragraph c of Subd. 6.

Id. (footnote omitted). The court also noted that:

An implied corollary to the Division's formula, of course, was that if the figures had been such that after an application of their formula technique, the insurer would have been left with a credit of "any balance remaining" under Subd. (d) the insurer would have had to pay to the employee a proportionate share of attorneys fees as their future compensation liability accrued.

Id., slip op. at 5 n.2 (citing *Cronen v. Wegdahl Coop. Elevator Ass'n*, 278 N.W.2d 102 (Minn. 1979)).

If adhered to, the court of appeals' opinion establishes a number of critical points in the interpretation of *Lambertson*. First, it makes clear that the computation of the employer's share of attorney's fees and expenses ultimately depends not on workers' compensation benefits paid, but rather on the amount of the remainder available to satisfy the employer's reimbursement right. To avoid disadvantage to either the employee or employer, the statutory percentage of fees and costs

$$\left(\frac{\text{Fees and costs}}{\text{Benefits paid}} \right)$$

should be applied to the workers' compensation benefits paid, unless the amount available for reimbursement is less. In that event, the statutory formula would be applied to the amount of the remainder, with the fees and costs subtracted from the remainder. In effect, subdivision 6(c) would read as follows:

Out of the balance remaining the employer shall be reimbursed in an amount equal to all compensation paid (or, if the amount is less, the balance remaining) to the employee or his dependants by the employer less the product of the costs deducted under clause (a) divided by the total proceeds received by

Although in absence of the provision requiring sharing of fees and expenses by the employer the employer might not be reimbursed in an amount sufficient to cover workers' compensation expenses, in cases to which the amendment applies insufficient reimbursement will be the usual result.

The final question that arises in the construction of section 176.061, subdivision 6 concerns the impact of the amendment on future losses. In the third illustration, the employer received a credit in the amount of \$20,000 against workers' compensation benefits that otherwise would be payable but for the credit. If the assumption is made that following the apportionment, the employee incurs additional expenses for which workers' compensation benefits would have been paid but for the credit, a problem arises with respect to the employer's obligation to share fees and costs. While section 176.061, subdivision 6(d) gives the employer a credit for proceeds of the tort judgment or settlement, it does not provide for any future sharing of fees and costs by the employer. To illustrate, assume the same facts as in the third illustration except that the workers' compensation benefits paid at the time of the judgment were \$40,000, rather than \$20,000. If \$40,000 in benefits had been paid, the employer's share of the fees and costs would have been \$16,000:

$$\frac{\$40,000 \text{ (Fees and Costs)}}{\$100,000 \text{ (Proceeds)}} \times \$40,000 \text{ (Benefits)} = \$16,000.$$

In contrast, under the third illustration, only \$20,000 in workers' compensation benefits had been paid at the time of judgment; the employer would have paid \$8,000 as its share of fees and costs, and the employer would receive a credit of \$20,000. Assume that the employee then incurs additional expenses in the amount of \$20,000, for which workers' compensation benefits would be paid but for the credit. The statute does not directly provide for the sharing of fees and costs by the employer. Thus, if the employer's credit is not reduced by the same percentage of fees and costs used to determine the "price" to the employer of reimbursement in the case in which \$40,000 in benefits had been paid at the time of judgment, an arbitrary result occurs. The advantage to the em-

the employee or his dependents from the other party multiplied by all compensation paid by the employer to the employee or his dependents (or, if it is less, the balance remaining).

Second, the opinion establishes that the employer's share of the fees and costs does not become part of the credit, but rather is paid to the employee.

ployer is the same as if reimbursement were available for the full \$40,000, but the "price" for the benefit is only one-half.

To avoid the arbitrary result that would occur if the employer's obligation to bear a proportionate share of fees and costs does not extend to the credit, the supreme court, in *Cronen v. Wegdahl Cooperative Elevator Association*,²¹⁸ held that the employer's credit will be reduced by the same formula used to determine the employer's share of fees and expenses at the time of judgment.²¹⁹ In illustration three, that figure is forty percent.

If the full credit of \$20,000 were reduced by forty percent, however, the credit would still be \$12,000. The employer would thus avoid bearing any additional portion of the fees and costs until that credit was exhausted. To avoid this result and to ensure that the employer continues to bear a proportionate share of fees and expenses, the reduction should be applied as expenses are incurred by the employer.²²⁰ For each dollar of expenses for which workers' compensation benefits would be payable, the employer should receive a one dollar credit. That credit of one dollar should be reduced by forty percent, requiring the employer to pay forty cents to the employee for each dollar of expenses incurred by the employee, until the credit is exhausted.

c. Contribution

Having established the method of allocating the proceeds of a judgment or settlement between an employee and employer, the discussion can proceed to a consideration of the third party's contribution claim against the employer. To illustrate the impact of

218. 278 N.W.2d 102 (Minn. 1979).

219. *Id.* at 105. In *Cronen* the plaintiff's decedent died in a car-truck collision. At the time of the accident, the workers' compensation insurer for Wegdahl Cooperative paid to the decedent's wife \$2,345.80, including benefits for statutory burial expenses and ten weeks of dependency benefits, covering the period from October 31, 1977 to January 8, 1978. In early January of 1978, the wrongful death claim against the estate of the driver of the automobile was settled for \$100,000. The case was submitted to the Workers' Compensation Division for calculation of the credit. The attorney's fees were agreed upon at the rate of 24%.

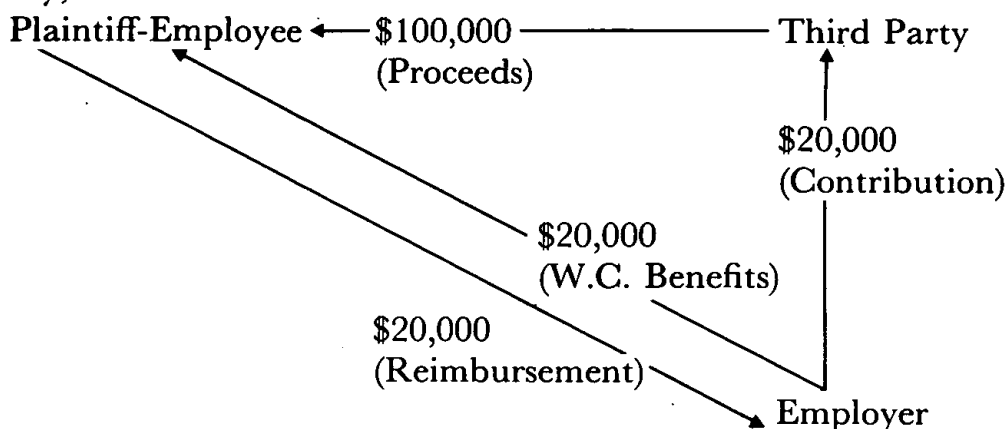
The distribution resulted in a credit to the employer of \$47,272.49. The Workers' Compensation Division determined that the insurer would be required to "pay 24% of the benefit entitlement until additional fees and costs in the sum of \$11,345.40 in relation to additional benefit entitlement in the sum of \$47,272.49 shall have been paid, at which time the insurer shall pay 100% of all subsequent benefit entitlement." Relator's Brief and Appendix at A-13, *Cronen v. Wegdahl Coop. Elevator Ass'n*, 278 N.W.2d 102 (Minn. 1979) (reprinting Workers' Compensation Division determination of third-party credit).

220. *See* 278 N.W.2d at 105.

Johnson, the right of contribution must be considered in each of the contexts previously discussed.

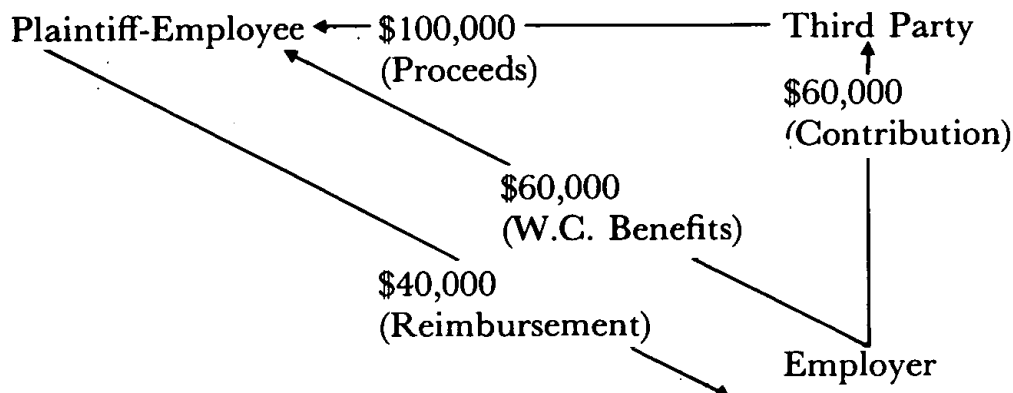
i. Contribution Prior to the 1976 Amendment

First, as to illustration one, assume the employer is twenty percent at fault and the third party is eighty percent at fault. Graphically,²²¹ the result would be as follows:



The employer's liability is limited by its workers' compensation liability or its fair share of the judgment as determined by its percentage of negligence. In the hypothetical both figures are the same. If, however, the third party was sixty percent negligent and the employer forty percent negligent, the employer's contribution liability would still be limited to \$20,000, the amount of its workers' compensation liability, even though its fair share of the judgment according to its percentage of negligence would be \$40,000.

If the facts of illustration two are utilized, and it is assumed that the employer is sixty percent and the third party forty percent negligent, the following result would be achieved:

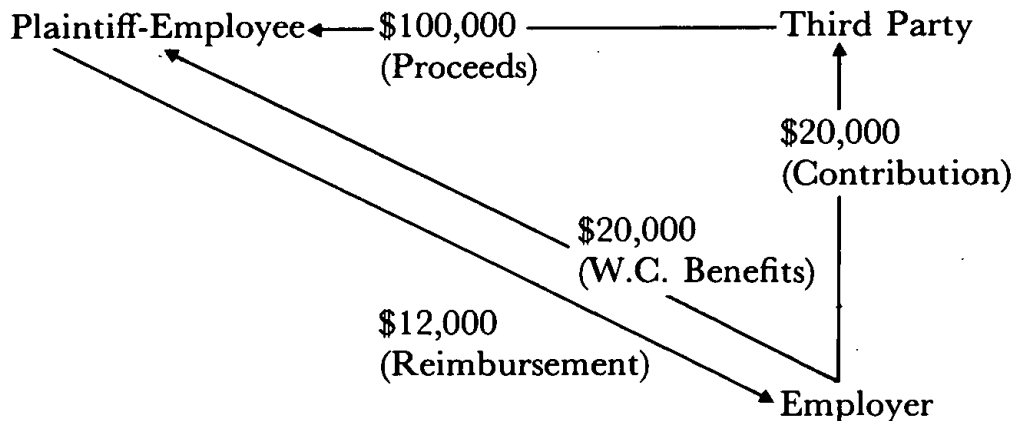


221. The method of illustration is borrowed from Professor Davis. See Davis, *Third-Party Tortfeasors' Rights Where Compensation—Covered Employers are Negligent—Where Do Dole and Sunspan Lead?* 4 HOFSTRA L. REV. 571 (1976).

The employer has paid \$60,000 in workers' compensation benefits, and \$60,000 in contribution to the third party. However, the employer has been reimbursed only in the amount of \$40,000. The employer's total liability thus exceeds its workers' compensation liability by \$80,000.

ii. Contribution after the 1976 Amendment

In virtually all cases decided after the effective date of the 1976 amendment, the impact on the employer will be the same as in the last example, insofar as the employer will have to pay the third party an amount equal to its workers' compensation liability, but will not be reimbursed in an amount equal to its workers' compensation liability. To illustrate, assume the facts in illustration three, in which the tort judgment is \$100,000, fees and costs are \$40,000, and workers' compensation benefits paid are \$20,000. Also assume that the third party is eighty percent and the employer is twenty percent negligent. The following result would be achieved:



The employer's total liability is thus \$40,000, consisting of \$20,000 in workers' compensation benefits and \$20,000 on the contribution claim. The employer is only reimbursed in the amount of \$12,000. The net loss to the employer is thus \$28,000, which is \$8,000 more than its workers' compensation liability. As applied to the second illustration, in which the reimbursement right without the 1976 amendment does not equal workers' compensation benefits paid, the right to reimbursement would be reduced further with the sharing of fees and costs, making the employer's total

exposure even greater.²²²

The court in *Johnson* recognized in a footnote to its opinion that by operation of the amendment the employer would not be reimbursed in an amount equal to its workers' compensation liability.²²³ Even though the total loss exposure of the employer exceeds its workers' compensation liability, this result occurs only by payment of its fair share of the fees and costs expended in obtaining the tort judgment.

The third illustration raises a problem concerning the employer's credit. Assuming that the employer is forty percent and the third party sixty percent negligent, application of the facts in illustration three would require the employer to pay to the third party \$20,000, the amount of its workers' compensation liability as of the time of judgment. The employer's fair share of the judgment is \$40,000, but its liability on the contribution claim is limited to \$20,000, its workers' compensation liability. The problem arises when additional expenses are incurred by the employee for which benefits would have been paid by the employer, but for the credit.

When additional expenses are incurred by the employee, *Cronen* has established that the employer bears a continuing obligation to pay to the employee an amount equal to its percentage of fees and expenses, until the credit is exhausted. The question is whether the principle established in *Cronen* should also require the employer to bear a continuing obligation to the third party on the contribution claim.

Because there is no additional workers' compensation liability on the part of the employer until the \$20,000 credit is exhausted, it could be argued that the employer would owe no additional obligation to the third party. If there is no additional workers' compensation liability, there can be no additional contribution.

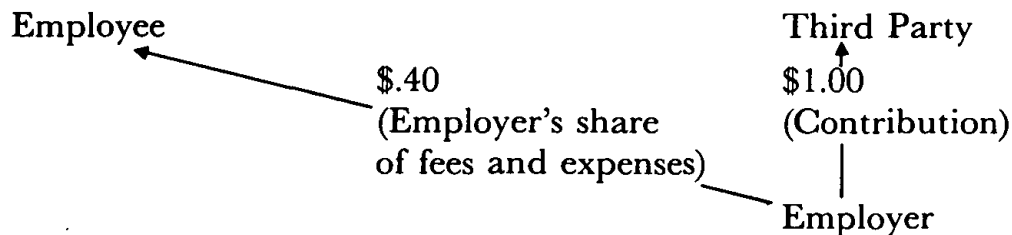
Application of this reasoning, however, would lead to the same arbitrary result that the supreme court sought to avoid in *Cronen*. The third party's right to contribution would be dependent on the

222. In situations such as illustration four, the problem is aggravated. Not only is the amount remaining for reimbursement insufficient to reimburse the employer, but application of the sharing provision further reduces the amount available. This, in turn, increases the employer's loss exposure on the third party contribution claim. See note 217 *supra* and accompanying text.

223. "In future cases the amount of reimbursement will not equal the benefits actually paid because of the 1976 amendment to § 176.061, subd. 6 (c)." *Johnson v. Raske Bldg. Sys., Inc.*, 276 N.W.2d at 81 n.5.

benefits paid at the time of judgment. If \$40,000 in workers' compensation benefits had been paid at the time of judgment, rather than \$20,000, the third party's contribution claim would have been fully satisfied. If *Cronen* is not applied, however, and the employer has paid only \$20,000 in benefits at the time of judgment, the third party's contribution claim would be limited to \$20,000, even though additional expenses in the amount of \$20,000 are later incurred by the employee.

Just as the employer's obligation to share in fees and costs should not depend on workers' compensation benefits paid as of the time of judgment, the right of contribution should not be controlled by the benefits paid at the time of judgment, but should extend to the credit. To be consistent with *Cronen*, the employer should have continuing liability to the third party on the contribution claim. For each dollar of expenses incurred by the employee for which workers' compensation benefits would be payable but for the credit, the third party should be entitled to one additional dollar of contribution. Therefore, the result in *Cronen* appears to mandate a continuing obligation on the part of the employer to share fees and expenses with the employee and a continuing obligation to respond to the third party's contribution claim. Assuming the facts in the third illustration, with the additional fact that the employee has incurred one dollar of expenses after judgment, the employer's obligation would be as follows:



Presently, the employer's obligation to respond to the contribution claim is not dependent on the benefits paid at the time of judgment. To achieve such a result, the term "workers' compensation liability" should, for purposes of the contribution claim, be construed to include the credit when expenses are incurred for which workers' compensation benefits would be payable but for the credit.

It could be argued that this result does not necessarily flow from the *Cronen* decision, because *Cronen* involved a statutory construction while extending the contribution claim to the credit does not. The distinction is of potential significance because the statutory obligation to pay fees and expenses as the "price" of the credit is covered by coverage A of the workers' compensation insurance policy, whereas the payment on the contribution claim would be covered only by coverage B, the employer's liability portion of the policy, if it is covered at all.²²⁴

However, that factor would not seem to be critical given the court's decision in *Johnson*. If there is no difficulty in creating a new liability for the employer in situations in which the employer's reimbursement does not equal the workers' compensation benefits paid because of the employer's obligation to pay a portion of the plaintiff's attorney's fees and expenses, there should be no problem in extending the third party's right of contribution to the employer's credit. In principle, it is difficult to distinguish the two situations from a policy perspective.

d. Implications and Alternatives

Following the procedures established in *Johnson* and *Cronen* to their logical conclusion creates the possibility that the liability of the employer may in fact exceed its workers' compensation liability. This can occur in several ways: when the 1976 amendment applies so that reimbursement will not equal workers' compensation benefits paid; when the amount of workers' compensation benefits paid approximates the amount of the tort recovery; or when the employer has a credit and the employee incurs additional expenses after settlement or judgment. In addition, new costs in the form of attorney's fees incurred in defending contribution claims will be added to the employer's costs. The new liability is likely to be significant in terms of the expected frequency and magnitude of third party claims.²²⁵ The difficulty is in determin-

224. See 4 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 94.40 (1980).

225. A closed claims study by the Insurance Services Office covering 1976 and the early part of 1977 has indicated that in slightly more than one-half of the claims for which payment was made to employees, insureds would have impleaded the employer but for the sole source remedy rule. In terms of dollars of payment, the percentage was 56%. See INSURANCE SERVICES OFFICE, PRODUCT LIABILITY CLOSED CLAIM SURVEY 64-65 (1977). In cases in which the employer would have been impleaded, the economic loss tended to be greater than in those cases in which there would have been no impleader. See *id.* at 66.

ing if the new liability and costs can be justified.

Given the variety of interests involved in structuring a method of distributing losses flowing from workplace injuries it is apparent that no simple solution exists. A number of proposals for modification of the existing system have been made, and some have been accepted. The proposals range from complete abolition of the third party action,²²⁶ to allowing contribution to the full extent of the employer's fair share of the judgment or only to the extent of the employer's workers' compensation lien,²²⁷ to a limitation or elimination of the employer's subrogation interest in the employee's claim against the third party. The method of reallocation adopted in *Lambertson* and refined in *Johnson* and *Cronen* has characteristics of the last two proposals.

The Interagency Task Force on Product Liability considered a variety of such proposals in its survey of products liability law.²²⁸

226. The proposals for elimination of third party actions are varied. They may range from elective no-fault insurance, see O'Connell, *Harnessing the Liability Lottery: Elective First-Party No-Fault Insurance Financed by Third-Party Tort Claims*, 1978 WASH. U.L.Q. 693, to elimination of the third party suit, with the savings used to finance higher workers' compensation benefits, see Bernstein, *Third Party Claims in Workers' Compensation: A Proposal to Do More With Less*, 1977 WASH. U.L.Q. 543, to the elimination of the third party claim without making any adjustments in the system at all, as was proposed by Senator Davies in the 1978 tort reform bill.

Section 1 of H.F. 338, as introduced by Senator Davies, would have amended Minnesota Statutes section 176.061, subdivision 4 to read as follows:

The provisions of subdivision 1, 2, and 3 apply only where the employer liable for compensation and the other party legally liable for damages are insured or self-insured and engaged in the due course of business, (a) in furtherance of a common enterprise, or (b) the accomplishment of the same or related purposes in operation on the premises where the injury was received at the time thereof. For purposes of this subdivision a person is deemed to be engaged in furtherance of a common enterprise with an employer if the person is in the chain of manufacture and distribution of a product sold to, used or consumed by an employer in the due course of business and if the liability of the person to the employee arises from the manufacture, sale, use or consumption of that product.

H.F. 338, § 1, 70th Minn. Legis. 1978 Sess. (underscoring in original). The effect would have been to eliminate third party suits, but without any *quid pro quo* to the employee. Section 1 of the bill was stricken in the Senate Judiciary Committee Subcommittee on Judicial Administration. See *Minutes of Meeting on H.F. 338 Before the Minnesota Senate Judiciary Subcommittee on Judicial Administration*, 70th Minn. Legis., 1978 Sess. (Feb. 3, 1978).

For other analyses of these proposals, see VI LEGAL STUDY, *supra* note 190, at 65-71; Comment, *A Critique of the Justifications for Employee Suits in Strict Products Liability Against Third Party Manufacturers*, 25 U.C.L.A. L. REV. 125 (1977).

227. See U.S. DEPT OF COMMERCE, INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, FINAL REPORT VII-92 (1977) [hereinafter cited as FINAL REPORT]; Comment, *The Effect of Workers' Compensation Laws on the Right of a Third Party Liable to an Injured Employee to Recover Contribution or Indemnity from the Employer*, 9 SETON HALL L. REV. 238, 300-03 (1978).

228. See FINAL REPORT, *supra* note 227, at VII-85 to -113.

Surprisingly, the Final Report of the Task Force lacks any clear information concerning the impact of the proposals. There is no indication that allowing third party claims will have any real impact in the cost of products liability insurance.²²⁹ There is no indication that employer incentives to provide greater safety in the workplace will be increased if contribution is allowed or subrogation is disallowed.²³⁰ It is also questionable whether imposition of liability in excess of an employer's workers' compensation liability will be covered by the employer's liability insurance coverage in the workers' compensation insurance policy.²³¹ If there is coverage, it is questionable whether the amount will be sufficient to insure an employer in cases in which the tort judgment and workers' compensation benefits paid are high.²³² Even assuming coverage is provided, the likelihood of increased claims against employers make it likely that the cost of insurance will be increased.

Based in part on the Task Force Report, the Department of Commerce has proposed a Model Uniform Product Liability

229. *See id.* at VII-90.

230. *See id.* at VII-90 to -91; VI LEGAL STUDY, *supra* note 190, at 56-57. A major question concerns whether the rating structure for workers' compensation insurance will be able to reflect the increased liability of the employer, whether through the contribution claim by the third party or through elimination of the employer's interest in the third party recovery by the employee. If experience rating does not exist, it is questionable whether either remedy will have any impact on the employer's incentive to make the workplace safer. The theory underlying experience rating "states that the more immediate economic stake the employer has, the greater is the incentive for that employer to reduce his employees' exposure to injury." MINNESOTA WORKERS' COMPENSATION STUDY COMMISSION, A REPORT TO THE MINNESOTA LEGISLATURE AND GOVERNOR 152 (1979).

The Study Commission Report points out that in Minnesota, nearly 50,000 employers, constituting 70% of Minnesota employers, are not experience rated. *Id.* at 153. In order to be experience rated, the annual policy premium must be larger than \$750. *See id.* at 153. The figure might be misleading, however, since only small employers would not be experience rated. The proportion of employees working for businesses that are experience rated would constitute the vast majority of employees in the state.

The critical question, even assuming experience rating, is whether the mechanism will be able to take into consideration an employer's losses in the form of contribution claims or through elimination of the employer's reimbursement right. For a discussion of workers' compensation insurance rating in Minnesota, *see id.* at 136-91.

Based upon the study the commission made, a number of recommendations, several of which related to insurance rating, were made. *See id.* at 42-49. Many of the recommendations were enacted by the Legislature in 1979. *See* Act of June 7, 1979, ch. 3, 1979 Minn. Laws Ex. Sess. 1256 (amending scattered sections of MINN. STAT. chs. 79, 176 (1978)).

231. *See* 4 A. LARSON, *supra* note 224; FINAL REPORT, *supra* note 227, at VII-92 to -93.

232. Coverage B is written in the standard amount of \$100,000 per occurrence.

Act²³³ (Model Act). Section 114 of the Model Act, dealing with the problem of workplace injuries, provides for an offset from the tort recovery of any workers' compensation benefits paid or payable and, in addition, eliminates any right of subrogation by the employer.²³⁴ There would be no need to have the employer involved in the lawsuit, thus avoiding the increase in transaction costs that would be produced by the litigation of third party claims.²³⁵ According to the Department of Commerce: "The purpose of the solution adopted in Section 114 is to sharpen employer incentives to keep workplace products safe without undermining

233. U.S. DEP'T OF COMMERCE MODEL UNIFORM PRODUCT LIABILITY ACT §§ 100-122, reprinted in 44 Fed. Reg. 62,714-50 (1979).

234. *Id.* § 114, 44 Fed. Reg. at 62,740. The section reads as follows:

(A) In the case of any product liability claim brought by or on behalf of an injured person entitled to compensation under a state Worker Compensation statute, damages shall be reduced by the amount paid as Worker Compensation benefits for the same injury plus the present value of all future Worker Compensation benefits payable for the same injury under the Worker Compensation statute.

(B) Unless the product seller has expressly agreed to indemnify or hold an employer harmless for harm caused to the employer's employee by a product, the employer shall have no right of subrogation, contribution, or indemnity against the product seller when the harm to the employee constitutes a product liability claim under this Act. Also, the employer's Worker Compensation insurance carrier shall have no right of subrogation against the product seller.

(C) When final judgment in an action brought under this Act has been entered prior to the determination of Worker Compensation benefits, the product seller may bring a subsequent action for reduction of the judgment by the amount of the Worker Compensation benefits, or for recoupment from the employee if the product seller has paid a judgement [*sic*] which includes the amount of such benefits.

235. According to the Analysis:

The principal benefit of the approach adopted in Subsections (A) and (B) is a reduction in litigation transaction costs. Subrogation actions are not allowed. Furthermore, proceedings under this Act will be streamlined because in cases of employer negligence, there will be no three-party litigation as to the relative percentages of fault of employers and manufacturers.

Id. Analysis, reprinted in 44 Fed. Reg. at 62,741.

The approach taken by the supreme court in *Lambertson* was considered but rejected: The court in that case held that the product manufacturer would be allowed limited contribution up to the amount of the Worker Compensation lien. This reduces the inequity against the product manufacturer, but preserves the employer's interest in not paying more than its Worker Compensation liability. The principal disadvantage of the "Lambertson" approach, as compared with Section 114, is that "Lambertson" does not reduce transaction costs.

Id. Although approving the result of *Lambertson*, if not the method, the drafters of the Model Act made the assumption that the employer's liability would be limited to its workers' compensation lien, an erroneous assumption in light of the court's subsequent decision in *Johnson v. Raske Bldg. Sys., Inc.*, 276 N.W.2d 79 (Minn. 1979).

The Model Act also differs from the Minnesota procedure in that third parties will be able to reduce their liability for workplace injuries even when the employer is not at fault. See MODEL ACT, Analysis, reprinted in 44 Fed. Reg. at 62,741.

the limited-liability concept that is central to the Worker Compensation system."²³⁶

In light of the uncertain impact of allowing a contribution claim in excess of workers' compensation liability, the cautious approach of the Model Act is instructive. The critical point in the proposal appears to be the preservation of the limited liability that lies at the heart of workers' compensation acts. Contribution is allowed to the extent it is consistent with that principle. Although the Model Act may adopt a more streamlined procedure than the more cumbersome method adopted by the supreme court in *Johnson*, the *Johnson* procedure ensures that the employee will receive the full benefit to which he is entitled by the Act.

In order to bring the Minnesota procedure into line with the balance achieved by the Model Act, however, only a slight modification of the Minnesota procedure adopted in *Johnson* would be necessary. This could readily be accomplished by adhering to the apparent intent of the Minnesota Supreme Court in *Lambertson* to limit the liability of the employer to that imposed on it by the workers' compensation act. The best way to achieve that result is to limit the third party's contribution claim not to the workers' compensation liability of the employer but by the reimbursement right of the employer. This would ensure that the basic workers' compensation insurance "bargain" would not be disrupted, yet it would limit the right of the employer to obtain reimbursement for workers' compensation benefits paid to the injured employee. The suggested approach seems most consistent with the apparent intent of the court in *Lambertson* to do the least violence possible to the statute, while allowing a limited form of contribution by the third party against the employer.

The result of limiting the third party's contribution claim would be to preclude contribution in any situation in which the net effect on the employer would be to increase its loss exposure beyond its workers' compensation liability. It would mean that in the four illustrations mentioned at the beginning of this section, no contribution would exist for the excess liability of the employer. In any case in which the employer is reimbursed in an amount less than the workers' compensation benefits paid, or in which the employer is granted a credit and the employee incurs additional expenses for

236. MODEL ACT, *Analysis*, reprinted in 44 Fed. Reg. at 62,741.

which benefits would be payable but for the credit, no additional liability on the contribution claim would exist.

There may, arguably, be arbitrary results with respect to the credit because the employer's liability will depend on the benefits actually paid at the time of the tort recovery. Although the results may be characterized as arbitrary, there is a significant distinction between making an employer statutorily liable to the employee for a continuing proportion of the fees and expenses and creating a new nonstatutory liability to the third party that may not be covered by workers' compensation insurance.

In addition, in cases in which the employer is required to bear a proportionate share of the plaintiff-employee's fees and expenses, it is arguable that the third party should not be required to bear those expenses by having its contribution claim limited. It must be remembered, however, that it is the function of the statute to ensure that the employee is reimbursed for the share of fees and expenses properly attributable to the potential or actual benefit received by the employer. If the employer's share of fees and expenses are not paid to the employee it becomes clear that the recovery the statute intends to guarantee to the employee will be reduced.

Under the circumstances, the preferable approach appears to be the cautious approach; the superiority of a legislative solution to the problem becomes apparent given the uncertainty of the implications of a judicially created contribution remedy that expands the liability of the employer. Until greater certainty exists, or until the implications of such an approach are better understood, a limitation of contribution so as to do the least violence possible to the statutory scheme seems advisable.

e. Application to Strict Liability Claims

In *Lambertson* both the employer and third party were negligent. A final question is whether the third party's claim for contribution would extend to cases in which the third party is held strictly liable, but not negligent. Because of the court's decision in *Busch v. Busch Construction, Inc.*,²³⁷ there seems to be no reason why a strictly liable manufacturer would be precluded from obtaining contribution from a negligent employer. Although the basis for fault allocation may change, application of comparative fault in *Busch*

237. 262 N.W.2d 377 (Minn. 1977).

cannot logically be limited to contribution claims against product users or consumers.

f. Summary

As a result of the supreme court's decision in *Lambertson*, a negligent third party may obtain contribution from an employer. Following the court's decision in *Busch*, the right would also extend to a strictly liable third party.

Lambertson was grounded in the court's desire to avoid requiring the third party to bear the full burden of the tort judgment in situations in which the employer's negligence has contributed to the employee's injury, and to avoid the employer's statutory right to obtain reimbursement in spite of its fault. The basic approach adopted in *Lambertson* thus allows contribution, limited by the workers' compensation liability of the employer. Although the exact manner of allocating loss among the parties in a third party action was not specified in *Lambertson*, the supreme court subsequently clarified the method of allocation in *Johnson*, which requires the third party to pay the full tort award to the plaintiff, the employer to pay to the third party the amount of the employer's fair share of the judgment limited by its workers' compensation liability, and the employee to reimburse the employer according to the statutory method for apportioning tort proceeds between employer and employee.

The basic policy of *Lambertson* seems sound. As a result of the formula the court adopted for allocating loss in a third party action, however, it becomes possible for an employer to be subjected to liability that is actually in excess of its workers' compensation liability. This can occur in a number of ways, with varying degrees of impact on the employer. In such cases, however, the increased liability of the employer does not flow from the workers' compensation act. Because this raises unresolved questions of insurance coverage and costs, with only a speculative increase in deterrence, the approach advocated in this section has simply been a return to the fundamental position taken by the supreme court in *Lambertson*—that the employer's net liability should not exceed its workers' compensation liability. To ensure that result, the third party's right to contribution should be limited to the value of the employer's reimbursement interest.

Any further modification of the right to contribution in workplace injuries should, ideally, be a matter for legislative solution, a

preference that the *Lambertson* court indicated. Although the contribution right established in *Lambertson*, if appropriately limited, is probably not the best approach, it is the one that, given creation of the right to contribution, does the least violence to the workers' compensation act pending legislative resolution of the problem.

B. Contribution and Indemnity in the Chain of Distribution

When a party in the chain of distribution is held liable for a product defect, the preferred remedy is to seek indemnity from the party next highest in the chain.²³⁸ Indemnity provides superior relief from a retailer's perspective because it results in a full shifting of the loss, whereas contribution shifts only part of the loss.²³⁹ In *Hendrickson v. Minnesota Power & Light Co.*,²⁴⁰ the Minnesota Supreme Court explained the circumstances under which indemnity would be appropriate:

(1) Where the one seeking indemnity has only a derivative or vicarious liability for damage caused by the one sought to be charged.

(2) Where the one seeking indemnity has incurred liability by action at the direction, in the interest of, and in reliance upon the one sought to be charged.

(3) Where the one seeking indemnity has incurred liability because of a breach of duty owed to him by the one sought to be charged.

(4) Where the one seeking indemnity has incurred liability merely because of failure, even though negligent, to discover or prevent the misconduct of the one sought to be charged.

(5) Where there is an express contract between the parties containing an explicit undertaking to reimburse for liability of the character involved.²⁴¹

The Minnesota Supreme Court, in its attempts to do substantial justice in individual cases without being bound by "any hard-and-fast rules," has expanded indemnity as an equitable means of reallocating losses beyond the basic rules established in *Hendrickson*.²⁴²

238. See 3A L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 44.02[2] at 15-16 to -17 (1979).

239. See *id.* at 15-10.

240. 258 Minn. 368, 104 N.W.2d 843 (1960), *overruled in part*, Tolbert v. Gerber Indus., Inc., 255 N.W.2d 362, 367-68 (Minn. 1977) (abrogating rule 4).

241. *Id.* at 372-73, 104 N.W.2d at 848. The five *Hendrickson* rules are also examined in Note, *supra* note 1, at 135-40, 150-58.

242. *Sorenson v. Safety Flate, Inc.*, 298 Minn. 353, 361, 216 N.W.2d 859, 864 (1974).

A few examples will illustrate the operation of the indemnity concept in Minnesota products liability cases. In *Farr v. Armstrong Rubber Co.*,²⁴³ plaintiffs were injured when the truck in which they were riding overturned after one of its tires blew out. Plaintiffs brought suit against the manufacturer of the tire, Armstrong, and the retailer, Elmer N. Olson Company. The case was submitted to the jury on theories of breach of warranty as to Olson only, strict liability in tort as to Olson and Armstrong, and negligent failure to warn as to Armstrong only. The jury returned a general verdict against both defendants.²⁴⁴

The trial court awarded Olson indemnity from Armstrong.²⁴⁵ In upholding the indemnity award, the supreme court emphasized the derivative nature of Olson's liability and the lack of any active misconduct by Olson:

In the instant case, Olson's liability is predicated on or derived from Armstrong's wrongful act. According to the court's instructions, Olson could be found liable only if it breached an express or implied warranty, or if it were strictly liable in tort. There is no evidence of an express warranty given by Olson. The only statement made by the agent of Olson is that the tires would be adequate, and this statement is nothing more than a reaffirmance of what is required under an implied warranty of merchantability, that is, fitness for the ordinary purposes for which such goods are used.

Thus, Olson was found liable either on the grounds of breach of implied warranty or of strict liability in tort. In neither instance did Olson perpetrate any active wrong upon plaintiffs. Olson could not have found the defect with reasonable inspection, and it was not Olson's responsibility to alter the product in any way before it was sold. Thus . . . Olson's liability stems solely from its passive role as the retailer of a defective product furnished to it by the manufacturer, and it therefore is entitled to indemnity.²⁴⁶

Indemnity may have been appropriate even in cases in which the retailer was negligent. In *Bjorklund v. Hantz*,²⁴⁷ the plaintiff sustained injuries in a snowmobile accident due to a defective throttle

243. 288 Minn. 83, 179 N.W.2d 64 (1970).

244. *Id.* at 87, 179 N.W.2d at 67.

245. *Id.* at 87, 179 N.W.2d at 68.

246. *Id.* at 96-97, 179 N.W.2d at 72 (footnote omitted).

247. 296 Minn. 298, 208 N.W.2d 722 (1973) (per curiam), *overruled in part*, Tolbert v. Gerber Indus., Inc., 255 N.W.2d 362, 367-68, 368 n.11 (Minn. 1977).

on the snowmobile²⁴⁸ that struck the snowmobile on which the plaintiff was riding. The jury attributed forty-five percent of the negligence to Bombardier, the snowmobile manufacturer, thirty percent of the negligence to Grover Marine Sales, the retailer, and twenty-five percent of the negligence to Hantz, the operator of the snowmobile that struck the plaintiff's snowmobile. The trial court then granted Grover indemnity from Bombardier. Because Grover's negligence consisted solely of a failure to discover the defect in the snowmobile, the Minnesota Supreme Court determined that the trial judge's award of indemnity was appropriate.²⁴⁹

In cases in which the retailer's negligence consists of more than failing to discover the defect, however, indemnity might not be appropriate, unless the retailer's negligence could be labeled passive as compared to the active negligence of the party against whom indemnity is being sought. In *Kenyon v. F.M.C. Corp.*,²⁵⁰ the plaintiff was injured in a riding lawnmower accident caused by a malfunction of the lawnmower's clutch mechanism. The jury found both the retailer and the manufacturer of the lawnmower negligent. The sole question on appeal was based upon the trial court's denial of the retailer's claim for indemnity against the manufacturer.²⁵¹ Because the record supported a finding that the retailer's negligence consisted of more than a failure to discover the defect, in particular, a failure to warn of dangers of which he was aware and a failure to properly lubricate the lawnmower prior to delivery, the court determined that the retailer's acts of negligence were independent of and concurrent with the manufacturer's negligence, justifying the denial of indemnity.²⁵²

Even in cases in which the retailer's or distributor's conduct goes beyond a failure to inspect a product, indemnity might be appropriate, as in *Sorenson v. Safety Flate, Inc.*²⁵³ Sorenson sustained injuries when the rim of a tire he was changing flew off a tire changing apparatus, striking him. At the time, the plaintiff was using a device called a "Safety-Flater" which was designed to prevent just such an occurrence. The device was marketed by Safety Flate, Inc., a corporation that was formed to market the device. The

248. *Id.* at 299-300, 208 N.W.2d at 723.

249. *See id.* at 301, 208 N.W.2d at 724.

250. 286 Minn. 283, 176 N.W.2d 69 (1970).

251. *Id.* at 285, 176 N.W.2d at 70.

252. *See id.* at 287, 176 N.W.2d at 71-72.

253. 298 Minn. 353, 216 N.W.2d 859 (1974).

device was fabricated by Standard Metal and was distributed and sold by Hennessey-Three Star. The Safety-Flater in question was purchased by Standard Oil from Hennessey-Three Star and was ultimately purchased from Standard Oil by plaintiff's employer.²⁵⁴

Hennesey-Three Star, in making its sales presentation to Standard Oil, used a flyer that illustrated and described the Safety Flater. It contained the following language:

Whether you change one or fifty tires a day, the danger of exploding lock rings always exists. Everyone knows the damage or serious injury that may occur. It only has to happen once. THE THREE STAR SAFETY FLATER will protect your man and enable you to meet insurance underwriters specifications for safety.²⁵⁵

The plaintiff's employer had seen and relied upon the flyer in making the purchase of the Safety Flater.²⁵⁶

At the close of the trial, the trial judge ruled that Safety Flate, Inc. and Standard Metal were manufacturers of the product and that Hennesey-Three Star and Standard Oil were distributors. The jury found all defendants to be strictly liable. Standard Metal and Safety Flate were also found to be negligent. Hennesey-Three Star and Standard Oil were determined to have made and breached an express warranty. The jury apportioned seventy-five percent of the fault to Safety Flate, five percent to Standard Metal, and ten percent each to Hennesey-Three Star and Standard Oil. The trial court awarded indemnity to Hennesey-Three Star and Standard Oil from Safety Flate and Standard Metal. The primary question on appeal concerned the propriety of the trial court's award of indemnity to Hennesey-Three Star and Standard Oil.²⁵⁷

Because the express warranty in the brochure made no representations encouraging the use of the Safety-Flater in a manner other than for which it was intended, the supreme court concluded that the conduct of the distributors was secondary (passive) in relation to the primary (active) conduct of the manufacturers.²⁵⁸ Indemnity was thus determined to be appropriate.²⁵⁹

The Minnesota Supreme Court's decisions in *Tolbert v. Gerber In-*

254. *Id.* at 355, 216 N.W.2d at 860-61.

255. *Id.* at 355, 216 N.W.2d at 861.

256. *Id.*

257. *Id.* at 357, 216 N.W.2d at 861.

258. *Id.* at 360-61, 216 N.W.2d at 863-64.

259. *Id.* at 361, 216 N.W.2d at 864.

*dustries, Inc.*²⁶⁰ and *Frey v. Montgomery Ward & Co.*²⁶¹ require a re-consideration of the indemnity principles established in cases such as *Farr*, *Bjorklund*, and *Sorenson*. The next sections of this Article will examine the Minnesota court's decisions in *Tolbert* and *Frey* to determine their impact on the law of indemnity in the products liability context.

1. Tolbert v. Gerber Industries, Inc.

In *Tolbert* the plaintiff was injured when a trackside loading leg on which he was working collapsed, causing him to fall to the ground.²⁶² The grain handling equipment, of which the loading leg was a part, was ordered by Schuler, plaintiff's employer, from Voldco, Inc., a corporation engaged in the construction of grain elevators and the installation of grain handling equipment. Schuler specified its needs to Voldco and Voldco decided what equipment was necessary, selected Gerber as the supplier, and obtained and installed the equipment. Based on information supplied by Voldco, Gerber determined the specific components necessary for the system.²⁶³

One of the components, an A-valve, which was designed to carry the grain out toward a hopper car at an angle below horizontal to allow for the gravity loading of grain, was designed to be installed at a thirty-five degree angle. Gerber's shipping department sent a forty-seven degree angle A-valve by mistake. The improper angle of the A-valve allowed the loading leg to slip out and fall.²⁶⁴

The jury found Gerber and Voldco liable on theories of strict liability, implied warranty, and negligence; 100% of the negligence was attributed to Gerber and Voldco jointly.²⁶⁵ The trial court, relying on two Minnesota Supreme Court cases in which the court had held that submission of the comparative negligence question to the jury under such circumstances would be improper, awarded Voldco full indemnity from Gerber.²⁶⁶

260. 255 N.W.2d 362 (Minn. 1977).

261. 258 N.W.2d 782 (Minn. 1977).

262. 255 N.W.2d at 365.

263. *Id.* at 364.

264. *Id.* at 365.

265. *Id.* at 364.

266. *Id.* The trial court relied on *Sorenson v. Safety Flate, Inc.*, 298 Minn. 353, 216 N.W.2d 859 (1974) and *Hillman v. Ellingson*, 298 Minn. 346, 215 N.W.2d 810 (1974). *Hillman* involved a suit against a school bus driver and two students whose negligent acts

a. *The Majority Opinion*

The Minnesota Supreme Court commenced its opinion with an analysis of the indemnity rules established in *Hendrickson v. Minnesota Power & Light Co.*²⁶⁷ The court determined that the facts fell within category four of *Hendrickson*, "Where the one seeking indemnity has incurred liability merely because of failure, even though negligent, to discover or prevent the misconduct of the one sought to be charged."²⁶⁸

The *Tolbert* court isolated categories one through three of *Hendrickson*.²⁶⁹ Those categories involve derivative or vicarious liability imposed on the person seeking indemnity²⁷⁰ when the person seeking indemnity has incurred liability "by action at the direction, in the interest of, and in reliance upon the one sought to be charged,²⁷¹ and where the person seeking indemnity has incurred liability because of a breach of a duty owed to him by one sought to be charged."²⁷² The basis for the separation was as follows:

resulted in injury to the plaintiff. The plaintiff's right eye was injured when a length of plastic tubing that was being stretched by the two students broke, striking the plaintiff in the eye. The trial judge submitted the apportionment question to the jury. The jury found the school bus driver to be 76% at fault and the students each 12% at fault. Because the school bus driver's negligence was determined to be passive or secondary in relationship to the active, primary negligence of the students, the supreme court determined that indemnity rather than contribution was the appropriate form of relief for the driver. 298 Minn. at 352, 215 N.W.2d at 814. The interesting aspect of the decision is the contrast between the jury's perception of loss allocation under which the bus driver would have borne the greatest share of the judgment, and the court's, under which the entire loss would be shifted to the students. *See id.*

267. 258 Minn. 368, 104 N.W.2d 843 (1960), *overruled in part*, *Tolbert v. Gerber Indus., Inc.*, 255 N.W.2d 362, 367-68 (Minn. 1977) (abrogating rule 4); *see text accompanying notes 240-41 supra.*

268. *Id.* at 373, 104 N.W.2d at 848.

269. 255 N.W.2d at 366.

270. *Id.* This category of indemnity encompasses cases in which an automobile owner is held liable for the negligent conduct of a user, *see Lunderberg v. Bierman*, 241 Minn. 349, 63 N.W.2d 355 (1954), or in which a general contractor is held liable for the negligent acts of a subcontractor. *See Keefer v. Al Johnson Constr. Co.*, 292 Minn. 91, 193 N.W.2d 305 (1971).

271. 255 N.W.2d at 366. This second category of indemnity includes cases in which the person seeking indemnity has acted tortiously, but in which the act on its face appears to be proper. An example is a case in which a sheriff wrongfully attaches property because of the misdirection of the person against whom indemnity is sought. *See Henderson v. Eckern*, 115 Minn. 410, 132 N.W. 715 (1911).

272. 255 N.W.2d at 366. The third category involves cases in which the person seeking indemnity is held liable on the basis of a non-delegable duty. As an example, it includes cases in which a landlord is held liable for failure to keep property free of obstructions although the tenant has assumed that obligation. The landlord, held liable on the basis of breach of a non-delegable duty to keep the premises safe, would be entitled to indemnity

Cases which fall under Rule 4 are of a very different type from the others. Aside from cases of contractual indemnity, the other rules concern parties seeking indemnity who are without personal fault, but who nevertheless are liable in tort. Rule 4, however, concerns parties who are themselves culpably negligent but who nevertheless seek to avoid responsibility for the injury they have caused. The typical example of this is where the party seeking indemnity has failed to discover or prevent the negligence or misconduct of another when an ordinarily prudent person would have done so. Previously, the rule has been interpreted to apply where the negligence of the party seeking indemnity was merely 'passive' or 'secondary' as contrasted with the 'active' or 'primary' negligence of the other tortfeasor.²⁷³

In the court's opinion, category four indemnity cases present a trial judge with a "bewildering array of issues" to resolve.²⁷⁴ A court is required to determine whether the negligence of the party seeking indemnity is passive or secondary²⁷⁵ and whether the party's negligence is concurrent with the negligence of the party from which indemnity is sought.²⁷⁶ Finally, the *Tolbert* court noted that indemnity cannot be determined by any hard and fast rules, a qualification that complicates the indemnity inquiry.²⁷⁷ Abrogating the rule of indemnity in category four cases, the *Tolbert* court held that in such cases liability must be apportioned according to the relative fault of the parties, a result that is tantamount to contribution.²⁷⁸

b. The Dissenting Opinions

Justices Kelly and Rogosheske, joined by Justices Todd and Yetka, dissented. Justice Kelly's dissent was based on two points.

from the tenant, who breached a duty to the landlord. *See Minneapolis Mill Co. v. Wheeler*, 31 Minn. 121, 16 N.W. 698 (1883).

273. 255 N.W.2d at 366-67 (footnote omitted).

274. *Id.* at 367.

275. *Id.* The court noted that the active/passive or primary/secondary distinctions may have emerged from dicta rather than from holdings in cases such as *Keefer v. Al Johnson Constr. Co.*, 292 Minn. 91, 193 N.W.2d 305 (1971) and *Lunderberg v. Bierman*, 241 Minn. 349, 63 N.W.2d 355 (1954). 255 N.W.2d at 367 n.6.

276. 255 N.W.2d at 367. The determination that a party's conduct is concurrent emphasizes that his liability is neither derivative nor prompted by the party from whom indemnity is sought. *See White v. Johnson*, 272 Minn. 363, 137 N.W.2d 674 (1965), *overruled on other grounds*, *Tolbert v. Gerber Indus., Inc.*, 255 N.W.2d 362, 367-68, 368 n.11 (Minn. 1977); *Thill v. Modern Erecting Co.*, 272 Minn. 217, 136 N.W.2d 677 (1965).

277. 255 N.W.2d at 367.

278. *See id.* at 367-68.

First, he expressed the opinion that fundamental fairness and sound economic principles required full indemnity when the negligence of the installer consisted only of the failure to discover a product defect that was not obvious in the process of installation and directly resulted from the manufacturer's breaches of contract and warranty to deliver a specified product for a known purpose.²⁷⁹ Second, and somewhat paradoxically, he felt that the flexibility inherent in the common law indemnity approach had been destroyed by the majority opinion.²⁸⁰

In support of his opinion that indemnity should have been granted, Justice Kelly emphasized the jury's findings that both defendants were strictly liable to the plaintiff and that both defendants had breached warranties to the purchasers.²⁸¹ In cases in which a defendant's liability is based on strict liability and breach of warranty as well as on negligence, Justice Kelly would have held that the policies underlying strict liability theory required the manufacturer, Gerber, to bear the full loss caused by the plaintiff's injuries.²⁸²

As a final matter, Justice Kelly illustrated the difficulties with the majority opinion by raising a number of potentially perplexing questions that could frustrate the comparative negligence inquiry:

In this case, both the manufacturer and the installer were found liable under theories of negligence, breach of implied

279. *See id.* (Kelly, J., dissenting). In arguing that indemnity is the appropriate form of relief in cases such as *Tolbert*, Justice Kelly relied on *Liberty Mutual Ins. Co. v. Williams Mach. & Tool Co.*, 62 Ill. 2d 77, 338 N.E.2d 857 (1975), in which the Illinois Supreme Court, emphasizing the strict tort purpose of ensuring that a loss is ultimately borne by the manufacturer, allowed a product manufacturer to obtain indemnity from a component part manufacturer. 255 N.W.2d at 370-71 (Kelly, J., dissenting). Subsequent Illinois Supreme Court opinions appear to have established that responsibility for product-caused injuries should be borne by the defendants according to their relative degrees of fault. This would allow the manufacturer to obtain contribution from either an employer or a party lower in the chain of distribution, at least in cases in which the conduct constitutes misuse or assumption of the risk. *Stevens v. Silver Mfg. Co.*, 70 Ill. 2d 41, 44, 374 N.E. 2d 455, 457 (1978) (partial indemnity allowed based on relative degree of employer's misuse of product that caused plaintiff's injury); *Skinner v. Reed-Prentice Div. Package Mach. Co.*, 70 Ill. 2d 1, 13, 374 N.E.2d 437, 442 (1978) ("there is no valid reason for the continued existence of the no-contribution rule and [there are] many compelling arguments against it").

It is not clear whether these cases provide support for Justice Kelly's opinion. Rather than disagreeing with *Liberty Mutual*, these subsequent cases provide more liberal rules of loss allocation.

280. *See* 255 N.W.2d at 371-72 (Kelly, J., dissenting).

281. *Id.* at 370 (Kelly, J., dissenting).

282. *Id.* at 368-72 (Kelly, J., dissenting).

warranty, and strict liability, and the majority holds that only contribution is allowed. What if the case had been submitted on strict liability alone? What if one or both parties had breached an express warranty? What if breach of an express written contractual provision were involved? Regardless of any problems posed by such questions, the majority would presume to do justice in all future cases by allowing a jury discretion in allocating losses, a result, I predict, which will cause a greater spreading of loss among tortfeasors at the expense of economic and social policies favoring complete shifting of liability.²⁸³

Justice Rogosheske dissented for similar reasons. He agreed with the majority opinion as to the desirability of apportionment when liability is predicated solely on negligence; however, given the facts of *Tolbert*, Justice Rogosheske suggested that the findings of strict liability and breach of implied warranty should result in the granting of full indemnity to Voldco against Gerber.²⁸⁴ He assumed that the majority opinion would be confined to cases in which both the manufacturer and retailer or installer are found to be negligent: "If my assumption is incorrect and apportionment is to be extended to defective product cases where liability is based on breach of warranty or strict liability, apportionment of fault would require a wholly different comparison of the fault-producing relationship between the parties."²⁸⁵ Justice Rogosheske seriously questioned whether an intelligible rule or jury instruction could be fashioned that would permit a jury rationally to apportion liability. In such cases, the question of indemnity would, in his opinion, be one for the court.²⁸⁶

2. *Frey v. Montgomery Ward & Co.*

The Minnesota court had an opportunity to reconsider its *Tolbert* decision in *Frey v. Montgomery Ward & Co.*²⁸⁷ In *Frey* the plaintiffs brought suit against Montgomery Ward to recover for damages to their chinchilla herd allegedly caused by the overheating of a space heater purchased from Montgomery Ward for use in a house trailer where the chinchillas were bred and raised for commercial purposes. Plaintiffs received no warnings or instructions concerning operation of the heater in a confined space. Montgom-

283. *Id.* at 371-72 (Kelly, J., dissenting).

284. *Id.* at 372 (Rogosheske, J., dissenting).

285. *Id.* (Rogosheske, J., dissenting).

286. *Id.* (Rogosheske, J., dissenting).

287. 258 N.W.2d 782 (Minn. 1977).

ery Ward initiated a third-party action against McGraw-Edison, the manufacturer of the space heater, and McGraw-Edison impleaded Robertshaw Controls Co., manufacturer of the space heater control unit. The trial court granted a motion for a directed verdict in favor of McGraw-Edison and a motion for dismissal in favor of Robertshaw, in addition to directing a verdict against Montgomery Ward on the negligence issue.²⁸⁸

a. The Majority Opinion

The supreme court reversed the directed verdict as to McGraw-Edison and held that the determination of McGraw-Edison's negligence for failure to warn of the dangers of using a space heater in a confined area was properly a question for the jury.²⁸⁹

One of the additional issues before the court concerned the proper allocation of responsibility between McGraw-Edison and Montgomery Ward.²⁹⁰ Because the liability of both parties might be predicated on negligence, should the jury so find, the court left it to the trial court to determine whether category four indemnity was applicable, in which case *Tolbert* would be dispositive²⁹¹ or, as suggested by Justice Kelly in his concurring opinion, whether the case fell within category three, "Where the one seeking indemnity has incurred liability because of a breach of duty owed to him by the one sought to be charged."²⁹²

b. The Concurring Opinion

Justice Kelly concurred in the result reached by the majority, but attempted to provide some guidance for the trial court if it would be required to apportion negligence between Montgomery Ward and McGraw-Edison. Although Justice Kelly had no problems equating the negligence of Montgomery Ward with that of McGraw-Edison in failing to warn of the danger, at least with respect to the plaintiffs, he was of the opinion that the analysis would differ when the question involved the apportionment of

288. *Id.* at 784.

289. *Id.* at 788.

290. *Id.*

291. *Id.* at 788-89.

292. *Id.* at 791 (Kelly, J., concurring specially) (quoting *Hendrickson v. Minnesota Power & Light Co.*, 258 Minn. 368, 373, 104 N.W.2d 843, 848 (1960), *overruled in part on other grounds*, *Tolbert v. Gerber Indus., Inc.*, 255 N.W.2d 362, 367-68, 368 n.11 (Minn. 1977)).

negligence among the defendants.²⁹³

On appeal Montgomery Ward argued that McGraw-Edison breached an implied warranty of merchantability of fitness for the ordinary purposes for which such goods are sold by failing to warn of the dangers of using the space heater in a confined space.²⁹⁴ Justice Kelly assumed that because the majority opinion contained no statement to the contrary, Montgomery Ward would be entitled on remand to prove a breach of implied warranty by McGraw-Edison. He also stated that because of reliance on the expertise of McGraw-Edison, Montgomery Ward should be able to prove that, as between McGraw-Edison²⁹⁵ and itself, little or no culpability was attributable to Montgomery Ward, even though Montgomery Ward did participate to some extent in the design process.²⁹⁶ Justice Kelly commented further that were it not for *Tolbert*, he would have held that Montgomery Ward was entitled to indemnity from McGraw-Edison as a matter of law.²⁹⁷

Justice Kelly noted that although a retailer might be liable to a consumer for failing to inspect a product, the retailer might not be similarly liable to the manufacturer because the retailer may have reasonably relied on the manufacturer's warranties and expertise.²⁹⁸ In such situations, Justice Kelly was of the opinion that category three indemnity would be appropriate.²⁹⁹

Justice Kelly's concurring opinion was joined in by Justices Todd and Yetka, as in *Tolbert*, but not Justice Rogosheske, one of the *Tolbert* dissenters. There are important points about the opinions of Justice Kelly in *Tolbert* and *Frey* and Justice Rogosheske's opinion in *Tolbert* that must be considered.

3. *To What Types of Cases Will Tolbert Apply?*

a. *Retailer Negligent; Manufacturer Strictly Liable*

Tolbert abrogated indemnity in category four cases, but only when both the retailer and manufacturer are negligent. This holding has the effect of overruling cases such as *Bjorklund v. Hantz*,³⁰⁰ as

293. 258 N.W.2d at 790-91 (Kelly, J., concurring specially).

294. *Id.* at 789 (Kelly, J., concurring specially).

295. *Id.* at 790 (Kelly, J., concurring specially).

296. *Id.* (Kelly, J., concurring specially).

297. *Id.* (Kelly, J., concurring specially).

298. *Id.* at 790-91 (Kelly, J., concurring specially).

299. *Id.* at 791 (Kelly, J., concurring specially).

300. 296 Minn. 298, 208 N.W.2d 722 (1973) (per curiam), *overruled in part*, *Tolbert v. Gerber Indus., Inc.*, 255 N.W.2d 362, 368 n.11 (Minn. 1977).

the court made clear in its opinion. Less certain is its impact on other combinations of liability, including the situations presented in *Farr v. Armstrong Rubber Co.*³⁰¹ and *Sorenson v. Safety Flate, Inc.*³⁰²

The key inquiry raised by *Tolbert* is whether the rules of contribution or indemnity will be applied when the manufacturer is strictly liable and the retailer is negligent. This issue was raised by Justice Rogosheske's dissenting opinion in *Tolbert*, in which he assumed that the majority opinion would be limited to cases in which both the retailer and manufacturer are negligent.

In spite of the dissent, there are several reasons why the *Tolbert* court's abrogation of category four indemnity should be extended to such cases. First, the result seems to be dictated by the court's subsequent opinion in *Busch v. Busch Construction, Inc.*³⁰³ In *Busch* the strictly liable manufacturer, General Motors, was allowed contribution from Busch, a negligent plaintiff and codefendant.³⁰⁴ Because the claim was for contribution it seems clear the contribution would have worked in favor of Busch as well as General Motors. If a strictly liable manufacturer is able to obtain contribution from a negligent party outside the chain of distribution, or a negligent party outside the chain can obtain contribution from the strictly liable manufacturer, there is no reason why contribution would be inappropriate to adjust losses between a negligent retailer and a strictly liable manufacturer.

Although the assumption was made in Justice Rogosheske's dissent in *Tolbert* that the nature of the fault comparison would be substantially different if theories other than negligence were involved, *Busch* seems to have resolved that problem by recognizing that strict liability and negligence can be compared. The comparison of fault between a negligent retailer and strictly liable manufacturer should be no more difficult than comparing the fault of a negligent plaintiff and a strictly liable manufacturer.

A second reason for extending *Tolbert* to such cases is the policy underlying abrogation of category four indemnity. Indemnity in category four cases was abolished in *Tolbert* because the court perceived a significant distinction between that category of indemnity and the first three indemnity categories; unlike those seeking indemnity in the first three categories, the retailer is culpably negli-

301. 288 Minn. 83, 179 N.W.2d 64 (1970).

302. 298 Minn. 353, 216 N.W.2d 859 (1974).

303. 262 N.W.2d 377 (Minn. 1977).

304. *Id.* at 393-94.

gent. In addition, the court was concerned with the difficulty involved in making the indemnity determination, which presented the trial judge with "a bewildering array of issues" to consider. The same reasons should apply in cases in which the manufacturer is strictly liable. The negligent retailer is just as culpable and the indemnity determination is just as difficult, whether the manufacturer is strictly liable or negligent.

Finally, as a matter of logical consistency, the rule of *Tolbert* should be extended to such cases. If *Tolbert* is not applied, thus preserving category four indemnity in cases in which the retailer is negligent and the manufacturer strictly liable, a curious result would arise. A greater burden would be imposed on the manufacturer even though it is less culpable than if found negligent.

In summary, the court's decision in *Busch*, the policy of *Tolbert*, and logical consistency would seem to compel the extension of *Tolbert* to cases in which the retailer is negligent and the manufacturer strictly liable.

b. Retailer Strictly Liable; Manufacturer Strictly Liable

The *Tolbert* rationale in eliminating category four indemnity is to preclude the shifting of the full loss, as a matter of law, from a retailer to a manufacturer when the retailer has been negligent in causing the plaintiff's injury, either in failing to discover the defect or in some other respect. In a case such as *Farr v. Armstrong Rubber Co.*,³⁰⁵ in which there has been no negligent misconduct on the part of the retailer, the justification for eliminating the right of indemnity, at least as specified in *Tolbert*, disappears. The justification for eliminating category four indemnity when the retailer is negligent is based upon a dislike of the rule of indemnity when it allows a retailer who has been negligent to recover and a dislike of complex determinations involved in making the indemnity determination. The first reason for eliminating category four disappears when the retailer is not negligent. The second reason, the complexity of that determination, is also eliminated when there is no negligence or active misconduct on the part of the retailer.

There are good reasons from the majority's opinion in *Tolbert* to believe that it was not intended to cover situations in which the retailer or installer is not negligent. First, in criticizing the

305. 288 Minn. 83, 179 N.W.2d 64 (1970). For a discussion of *Farr*, see text accompanying notes 243-44 *supra*.

problems created by the active-passive dichotomy, the *Tolbert* court referred only to cases that have drawn the distinction when the party seeking indemnity has been determined to be negligent.³⁰⁶ Second, in referring to cases that are overruled by *Tolbert*, the court made no reference to chain of distribution cases in which the retailer was not negligent.³⁰⁷ The specific omission of cases such as *Farr* from that listing provides further support for the conclusion that indemnity continues to apply in such cases.

c. Retailer Liable on Express Warranty; Manufacturer Strictly Liable

Tolbert provides no clear guidelines as to the propriety of granting a retailer indemnity in cases in which the retailer is held liable on the basis of breach of an express warranty, in addition to implied warranty or strict liability, and the manufacturer is determined to be strictly liable or negligent. In criticizing the difficult distinctions that must be made in deciding if indemnity is appropriate, the *Tolbert* court cited *Sorenson v. Safety Flate, Inc.*,³⁰⁸ in which distributors who were held liable on the basis of breach of express warranty were allowed indemnity against strictly liable and negligent manufacturers because of the secondary nature of the distributors' liability in relationship to that of the manufacturers.³⁰⁹

If indemnity is allowed in such situations, the result that is reached is somewhat anomalous because the standards used to determine the propriety of indemnity are the same standards the court criticized in *Tolbert*. In a case in which a retailer is held liable on the basis of express warranty, the indemnity determination turns on whether the retailer's conduct can be labeled secondary in relationship to the conduct of the manufacturer.

In light of the apparent limitation of *Tolbert* to cases in which the retailer has been negligent, however, there is no reason to believe that the rule of indemnity would be abrogated in such cases. This leaves cases in which breach of express warranty is determined to be primary or concurrent with the manufacturer's fault. In such cases, contribution would be the appropriate remedy. Although *Tolbert* on its face does not extend to such situations, logic again compels the conclusion that contribution would be appro-

306. See 255 N.W.2d at 367 & n.6.

307. See *id.* at 368 n.11.

308. 298 Minn. 353, 216 N.W.2d 859 (1974).

309. *Id.* at 361, 216 N.W.2d at 864.

priate, and that the fair shares of the parties would be determined on a comparative fault basis.³¹⁰

In summary, the key factor in deciding if comparative fault principles apply should be the nature of the retailer's liability. The basis of the manufacturer's liability may be important in allocating loss, but it should be irrelevant in deciding if comparative fault principles apply. If a retailer is negligent, in whatever respect, or if the retailer has breached an express warranty and that breach is determined to be concurrent with the manufacturer's liability, contribution would be appropriate and the shares of the parties should be determined on the basis of comparative fault principles. If the retailer is not negligent, but is held liable on the basis of strict liability or implied warranty, or express warranty when the breach is not concurrent with the manufacturer's liability, indemnity should be the appropriate remedy.

4. Classification Problems

Justice Kelly's dissenting opinion in *Tolbert*³¹¹ and his concurring opinion in *Frey*³¹² raise further complications in the interpretation of the majority opinion in *Tolbert*. In *Tolbert* Justice Kelly took the position that Gerber's breach of warranty with respect to Voldco should justify an award of indemnity, despite Voldco's negligence.³¹³ The negligence finding was labeled superfluous by Justice Kelly in light of the breach of warranty by Gerber.³¹⁴ In *Frey* Justice Kelly again raised the implied warranty, this time running from McGraw-Edison to Montgomery Ward, as a justification for an award of indemnity.³¹⁵ In addition, he indicated that the presence of a breach of warranty plus the potential breach of a duty to warn by McGraw-Edison would place the case in category three indemnity.³¹⁶

Justice Kelly's analysis was apparently accepted by the majority

310. The feasibility of apportioning fault in cases in which some of the parties are held liable on the basis of breach of express warranty is illustrated in *Sorenson v. Safety Flate, Inc.*, 298 Minn. 353, 216 N.W.2d 859 (1974). It would be anomalous to find contribution appropriate in cases in which the retailer is negligent or has breached an express warranty, but to determine the fair shares of the parties in the former situation on the basis of comparative fault and the latter on a pro rata basis.

311. 255 N.W.2d at 368-72 (Kelly, J., dissenting).

312. 258 N.W.2d at 789-92 (Kelly, J., concurring specially).

313. 255 N.W.2d at 369 (Kelly, J., dissenting).

314. *See id.* (Kelly, J., dissenting).

315. 258 N.W.2d at 789 (Kelly, J., concurring specially).

316. *Id.* at 791 (Kelly, J., concurring specially).

in *Frey* because of the statement that on remand the trial court, assuming McGraw-Edison was found to be negligent, would have to determine whether the case fit within category three "as suggested by Mr. Justice Kelly,"³¹⁷ or within category four in which case *Tolbert* would apply.³¹⁸

The difficulty with this analysis is that in most cases, including one such as *Tolbert*, there usually will be reliance on the expertise of the manufacturer. It is arguable that the non-delegable duty concept embodied in category three indemnity cases fits the products liability context. However, that duty would exist in virtually all cases. Even in cases in which the retailer is negligent, as in *Frey*, that reliance may be justifiable. Application of the non-delegable duty concept transforms category four cases into category three cases. If the analysis suggested by Justice Kelly is followed it seems clear that the majority opinion in *Tolbert* could be significantly limited.

Following Justice Kelly's analysis, a judge must first determine whether the facts establish that the retailer's reliance on the warranties and expertise of the manufacturer is reasonable. If so, the case would fall within the third category of indemnity, even though the retailer is negligent. If not, the jury would apportion fault and that apportionment would determine the fair shares of the parties on the contribution issue.

In effect, the same determination that the *Tolbert* majority indicated would present courts with a "bewildering array" of factors to consider would be utilized. It is the exact sort of analysis the court sought to avoid. If the rule announced in *Tolbert* is to remain viable, the position advocated by Justice Kelly will have to be rejected. If not, the *Tolbert* rule will have to be reconsidered.

C. Summary

The Minnesota court's decisions in *Lambertson* and *Tolbert* give rise to a number of interpretive problems. The problems of the workplace injury can be given separate consideration because of the peculiar problems involved in the interplay between products liability law and the workers' compensation statute. The primary problem involved in interpreting *Lambertson* concerns the method to be used in determining to what extent contribution will be al-

317. *Id.* at 788 (majority opinion).

318. *Id.* at 789.

lowed to a third party. The court's decisions in *Johnson v. Raske Building Systems, Inc.*,³¹⁹ and *Cronen v. Wegdahl Cooperative Elevator Association*³²⁰ should resolve most of those problems, although those decisions must be scrutinized to determine if their implications are consistent with the basic policy of limitation established in *Lambertson*.

The decision in *Tolbert* was clear: the rule of indemnity in category four cases was rejected. The problem is in determining what the implications of the decision are. The court's decision in *Busch* seems to mandate an extension of *Tolbert* because of the inability to restrict the logical implications of the *Busch* decision. What this means is that the court has come close to adopting comparative fault principles for purposes of determining contribution between multiple defendants, whether those defendants are inside or outside the chain of manufacture and distribution.³²¹

Other problems, such as those raised by Justice Kelly in his separate opinions in *Tolbert* and *Frey*, are more difficult to resolve. Because his opinions, if followed, create the possibility that indemnity will prevail, even in situations in which *Tolbert* would otherwise appear clearly to apply, the views of Justice Kelly will have to be scrutinized carefully to determine whether they are consistent with the majority opinion in *Tolbert*.

It also seems to be the case that indemnity, even without Justice Kelly's opinions, will be the appropriate remedy in some situations, such as when the conduct of the party lower in the chain of distribution can appropriately be labeled passive or nonculpable. The means of making the distinctions necessary to isolate those cases in which indemnity will be appropriate were, to an extent, discredited in *Tolbert*, but only in situations in which the retailer's or installer's conduct was negligent. It would seem, therefore, that indemnity will continue to prevail, except in those cases in which

319. 276 N.W.2d 79, 81 (Minn. 1979) (procedure for apportionment requires third-party tortfeasors to pay entire verdict to plaintiff; employer then contributes amount in proportion to its negligence, not exceeding amount of workers' compensation benefits, to third-party tortfeasor, and plaintiff reimburses employer pursuant to workers' compensation statute).

320. 278 N.W.2d 102, 104 (Minn. 1979) (employer's no-fault insurer entitled to be subrogated to claim of employee's survivors against third parties' amount paid to insurer properly deducted from total third-party recovery).

321. The Minnesota Legislature adopted a comparative fault act partially in response to the Legislature's perception that comparative fault principles already had been adopted judicially. See *Tape of Hearing on H.F. 338 Before the Minnesota Senate Judiciary Subcommittee on Judicial Administration*, 70th Minn. Legis., 1978 Sess. (Feb. 1, 1978).

the retailer or installer has been negligent, or when breach of express warranty is deemed to be concurrent with the fault of the manufacturer.

IV. A SYNTHESIS OF LOSS ALLOCATION PRINCIPLES

Loss allocation has previously been considered in isolated contexts. *Busch v. Busch Construction, Inc.*³²² concerned the apportionment of fault between a negligent plaintiff and a strictly liable manufacturer;³²³ *Lambertson v. Cincinnati Corp.*³²⁴ involved contribution between a negligent manufacturer and a negligent employer;³²⁵ and *Tolbert v. Gerber Industries, Inc.*³²⁶ involved contribution between parties in the chain of distribution.³²⁷

In previous sections of this Article, these decisions and their ramifications have been analyzed. Integrated, the decisions indicate that Minnesota has moved close to a full comparative fault procedure that permits the allocation of negligence, strict liability, and breach of implied and express warranties as components of "fault." In this section, the three decisions are placed in a more practical context—submission of the comparative fault question to juries. This section also deals with the resolution of indemnity claims following the comparative fault determination, and a new issue in comparative fault cases; the problem of aggregation.

A. Jury Standards

If the Minnesota court's decisions concerning loss allocation in the products liability context are viewed in isolation, special factors important to allocation may be distilled. The factors relevant to apportioning fault among parties in the chain of distribution were detailed by Justice Kelly in his concurring opinion in *Frey v. Montgomery Ward & Co.*³²⁸ Justice Kelly focused on the degree of reliance by a retailer on a manufacturer's skill and expertise as demonstrated by inquiries into whether the manufacturer fulfilled its obligation to warn of dangers associated with the use of the product and whether implied warranties were given to the retailer

322. 262 N.W.2d 377 (Minn. 1977).

323. *Id.* at 393.

324. 312 Minn. 114, 257 N.W.2d 679 (1977).

325. *See id.*

326. 255 N.W.2d 362 (Minn. 1977).

327. *See id.*

328. 258 N.W.2d 782, 789-91 (Minn. 1977) (Kelly, J., concurring specially).

by the manufacturer.³²⁹ An additional factor is the degree to which the retailer may have encouraged use of the product apart from the manufacturer, such as through the giving of an express warranty to the purchaser of the product.³³⁰

The comparison of the fault of users and consumers or employers to the fault of parties in the chain of distribution is based on similar factors. The degree of knowledge of the product's characteristics and performance may differ between the ordinary consumer and an employer, but the degree of justifiable reliance on the manufacturer's skill and expertise is important as is the ability of the consumer or employer to avoid the injury by exercising reasonable care to prevent injuries from occurring. In addition, there will have to be a focus on the product and the conduct of parties in the chain of distribution with respect to that product. Aside from the negligence inquiry, the strict liability inquiry involves the same factors that are considered in determining if the product is defective.³³¹

Irrespective of the specific context, whether employer-manufacturer, retailer-manufacturer, or consumer-manufacturer, the factors involved in fault apportionment are substantially similar. But in asking a jury to apportion fault it is questionable whether detailing the factors that a jury may legitimately rely on in making their apportionment will be of any meaningful assistance to the jury without complicating the process.³³²

Given the subjective nature of the determination involved in apportioning fault it should be recognized that attempts to provide detailed guidance for juries are likely to be illusory.³³³ Drawing the jury's attention to specific facts influencing the comparative fault determination is more legitimately a function of closing argument rather than jury instruction.

The comparative fault inquiry should be no more complicated than that involved when negligence alone is being apportioned. The only necessary addition would be to define for the jury the term "fault" so that conduct constituting strict tort liability or

329. *See id.* at 790 (Kelly, J., concurring specially).

330. *See Sorenson v. Safety Flate, Inc.*, 298 Minn. 353, 216 N.W.2d 859 (1974).

331. *See Steenson*, *supra* note 82, at 28 n.131.

332. As is the case with establishing detailed guidelines for a jury in deciding if a product is defective, *see id.* at 57 n.218, it is questionable whether the factors could be quantified for a jury.

333. *See id.*

breach of warranty may be taken into consideration in making the apportionment.

The following suggested instruction adopts a comparative fault approach and is presented with the idea of simplifying the comparative fault determination for jury submission:

The law requires that fault be apportioned among those parties found to be at fault in causing the plaintiff's injuries. Fault consists of negligence, strict tort liability, and [breach of warranty]. If by your answers to questions — and — you have determined any of the parties to be at fault and that their fault was a direct cause of plaintiff's injuries, you must apportion fault among those parties.

Assuming that the jury has affirmatively answered the special verdict questions covering the theories of liability that have been asserted against every defendant, and that fault has been allocated, two additional problems remain. One concerns indemnity and the other the problem of aggregation.

B. Indemnity

Although the comparative fault question would be submitted to a jury, a judicial determination would still have to be made whether indemnity is appropriate. At least in cases in which the retailer or other party lower in the chain of distribution is found to be liable solely on the basis of strict liability in tort, indemnity may be appropriate. The jury's answer to the fact question would be conclusive. But if the jury finds that the retailer has made and breached an express warranty, the determination would have to be made by the trial judge whether the warranty representations were inconsistent with those implicit in the product itself. As in *Sorenson v. Safety Flate, Inc.*³³⁴ that determination would control the indemnity issue.³³⁵

C. Aggregation

When multiple parties are involved in a lawsuit and fault is apportioned among those parties, the question arises whether the plaintiff's fault will be compared to the fault of each individual defendant or to the combined fault of the defendants. As an example, assume that a plaintiff is determined to be forty percent at

334. 298 Minn. 353, 216 N.W.2d 859 (1974).

335. See notes 253-59 *supra* and accompanying text.

fault, a defendant retailer and manufacturer are each thirty percent at fault, and that the findings as to the retailer and manufacturer are based upon the jury's conclusion that they were strictly liable. Will the plaintiff be entitled to recover against the retailer and manufacturer, or will he be denied recovery?

The comparative negligence statute provided as follows:

Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, *if the contributory negligence was not as great as the negligence of the person against whom recovery is sought*, but any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person recovering.³³⁶

The aggregation question has not arisen in the products liability context in Minnesota, in part due to the rule of indemnity ordinarily applicable to products liability cases premised on strict liability,³³⁷ and in part because of the absence of a comparative fault procedure applicable to strict liability cases.³³⁸ The court's deci-

336. Act of May 23, 1969, ch. 624, § 1, 1969 Minn. Laws 1069, 1069 (emphasis added) (current version at MINN. STAT. § 604.01 (1978)).

337. Because indemnity would be the ordinary remedy in cases involving the apportionment of loss among parties in the chain of distribution, there would be no necessity of making a comparative fault apportionment. *See Sorenson v. Safety Flate, Inc.*, 298 Minn. 353, 359-61, 216 N.W.2d 859, 862-64 (1974); *Bjorklund v. Hantz*, 296 Minn. 298, 301-02, 208 N.W.2d 722, 724 (1973) (per curiam), *overruled in part on other grounds*, *Tolbert v. Gerber Indus., Inc.*, 255 N.W.2d 362, 368 n.11 (Minn. 1977).

338. Strict liability and comparative negligence have developed independently. *See Daly v. General Motors Corp.*, 20 Cal. 3d 725, 733, 575 P.2d 1162, 1167, 144 Cal. Rptr. 380, 385 (1978). Only recently have mergers of the two separate theories taken place. In a pure comparative fault system, such as that adopted by the California Supreme Court in *Daly*, the aggregation issue becomes important for purposes of deciding contribution questions, but not for purposes of deciding whether the plaintiff will be entitled to recover.

In *Franklin v. Badger Ford Truck Sales, Inc.*, 58 Wis. 2d 641, 207 N.W.2d 866 (1973), the Wisconsin Supreme Court intimated that an aggregation rule would be adopted in products liability cases. The case involved damage to a fire truck that overturned because of a defective wheel. Suit was brought by the city against the company that handled the sale of the truck chassis, Badger Ford, the manufacturer of the chassis, Ford Motor, and the manufacturer of the truck wheels, Gunitite Division of Kelsey Hayes. Taking 100% as the total negligence involved in the case, the jury was asked what percentage of negligence should be assigned to the city and to the defective product. The jury determined that the city was negligent but that its negligence was not causally related to the accident. One hundred percent of the negligence was thus attributed to the defective product. Only after negligence is apportioned between the plaintiff and the defendant would questions concerning the apportionment of negligence among multiple defendants in the chain of distribution become relevant, and then only for purposes of contribution. *See id.* at 649, 207 N.W.2d at 871. The controlling finding in deciding if the plaintiff will be entitled to recover is the comparison of the plaintiff's negligence to the negligence attributed to the

sions in *Busch v. Busch Construction, Inc.*³³⁹ and *Tolbert v. Gerber Industries, Inc.*³⁴⁰ now directly present the problem.

The Minnesota Supreme Court has considered the aggregation problem twice, in *Krengel v. Midwest Automatic Photo, Inc.*³⁴¹ and in *Marier v. Memorial Rescue Service, Inc.*³⁴² In *Krengel* the plaintiff was injured when she tripped on the riser of an automatic photo booth in a dime store. Suit was brought against the dime store, the photo booth distributor, and the servicer of the machine. The jury determined that the plaintiff was forty percent at fault, and that the dime store, distributor, and servicer were thirty, twenty, and ten percent negligent respectively. Because the defendants were engaged in a joint venture, with shared control over the profits from the photo booth enterprise, their percentages of negligence were aggregated and compared to the plaintiff's negligence, allowing the plaintiff to recover sixty percent of her damages.³⁴³ Had her negligence been compared against each defendant individually, she would not have been entitled to recover because her negligence was greater than the negligence of the individual defendants.

In *Marier* the plaintiff was injured in a truck-ambulance collision. The plaintiff brought suit against the ambulance service and the truck driver. The jury found the plaintiff and defendants each to be one-third at fault. Because the plaintiff's negligence was equal to the negligence of each of the two defendants, recovery would be denied unless aggregation was permitted. The Minnesota Supreme Court distinguished *Krengel*, stating that the aggregation rule would be limited to situations in which joint ventures

defective product. *See id.* The Wisconsin procedure thus accomplishes aggregation among parties in the chain of distribution.

With the Wisconsin Supreme Court's decision in *May v. Skelly Oil Co.*, 83 Wis. 2d 30, 264 N.W.2d 574 (1978), abolishing the rule of aggregation will, of course, have an impact on products liability cases, as illustrated in the context of a workplace injury in *Soeldner v. White Metal Rolling & Stamping Corp.*, 473 F. Supp. 753 (E.D. Wis. 1979). In *Soeldner* a ladder manufacturer found to be eight percent negligent as compared to the plaintiff who was found to be 32% negligent, was held liable. The manufacturer's liability, however, was limited to its percentage of liability, but only in the context of this workers' compensation/third party action. *See* 473 F. Supp. 753, 756-57 (E.D. Wis. 1979). The decision is not the result of any peculiar products liability aggregation rule, as in *Franklin*, but the general rule allowing aggregation, which the court in *May* indicated it would adopt.

339. 262 N.W.2d 377 (Minn. 1977).

340. 255 N.W.2d 362 (Minn. 1977).

341. 295 Minn. 200, 203 N.W.2d 841 (1973).

342. 296 Minn. 242, 207 N.W.2d 706 (1973).

343. 295 Minn. at 208, 203 N.W.2d at 846.

are involved.³⁴⁴

Products liability cases will fit somewhere between *Krengel* and *Marier*. The usual marketing arrangements will not involve joint ventures. Yet, the nature of the marketing relationship distinguishes products liability cases from *Marier* based upon two factors. First, in products liability cases, the actions of two or more parties in the chain of distribution are not likely to be the unrelated, concurrent acts of negligence that existed in *Marier*. Second, the law of strict liability, with its broad social and economic poli-

344. 296 Minn. at 246, 207 N.W.2d at 709.

Minnesota's comparative negligence statute, Act of May 23, 1969, ch. 624, § 1, 1969 Minn. Laws 1069, 1069-70 (current version at MINN. STAT. § 604.01 (1978)), was based on the Wisconsin comparative negligence statute up to the time of the adoption of the Minnesota comparative negligence act in 1969. See *Marier v. Memorial Rescue Serv., Inc.*, 296 Minn. 242, 245, 207 N.W.2d 706, 708 (1973). Wisconsin has traditionally refused to aggregate percentages of negligence of defendants, see *Chille v. Howell*, 34 Wis. 2d 491, 500, 149 N.W.2d 600, 604 (1967); *Walker v. Kroger Grocery & Baking Co.*, 214 Wis. 519, 535, 252 N.W. 721, 727 (1934), absent some sort of joint duty. See *Reber v. Hanson*, 260 Wis. 632, 51 N.W.2d 505 (1952) (joint duty of supervision of parents over child justified aggregating parents' negligence).

The Wisconsin Supreme Court has indicated its intent to abandon the rule against aggregation in an appropriate case. See *May v. Skelly Oil Co.*, 83 Wis. 2d 30, 264 N.W.2d 574 (1978). In *Soeldner v. White Metal Rolling & Stamping Corp.*, 473 F. Supp. 753 (E.D. Wis. 1979), the United States District Court for the Eastern District of Wisconsin followed the court's ruling in *May* and allowed the plaintiff to recover against a defendant found to be less negligent than the plaintiff. In *Soeldner* the plaintiff, an employee of Sears, Roebuck & Co. was injured when he fell from a ladder manufactured by defendant White Metal. The jury found the plaintiff 32% negligent, Sears 60% negligent, and White Metal eight percent negligent. Because Wisconsin law made workers' compensation the employee's exclusive remedy against his employer, the employer could not have been held liable for contribution by White Metal. See 473 F. Supp. at 754. An untempered application of *May* would have obligated White Metal to pay 68% of the plaintiff's damages, even though it was only eight percent negligent. In the interest of fairness, the court held that White Metal's liability would be limited to eight percent of the plaintiff's damages. However, the court limited its holding "to those instances in which a plaintiff has a separate remedy against his employer via the workman's compensation process." 473 F. Supp. at 756.

May, of course, would not be controlling in Minnesota. The rationale for the use of Wisconsin law set out by the Minnesota Supreme Court in *Marier* is inapplicable to cases decided by the Wisconsin courts after the date of the adoption of the Minnesota comparative negligence act. This does not detract from the persuasiveness of the decision in *May*, however. In fact, *May* provides support for judicial latitude in construing the Minnesota act. For a criticism of *May*, see Comment, *Change of the Wisconsin Comparative Negligence Statute in Multi-Defendant Suits: May v. Skelly Oil Co.*, 62 MARQ. L. REV. 227 (1978).

In cases arising after the effective date of the Minnesota comparative fault act, see Act of Apr. 5, 1978, ch. 738, § 6, 1978 Minn. Laws 836, 839-40, *May* would be irrelevant given the clear legislative intent to deny the rule of aggregation. See notes 352-420 *infra* and accompanying text.

cies, was obviously inapplicable in the *Marier* situation.³⁴⁵

Although technical arguments may be made that would support aggregation by analogizing products liability cases to other cases involving joint duties,³⁴⁶ the question is ultimately one of policy. Indemnity in products liability cases has traditionally considered the liability of a party lower in the chain of distribution to be derivative, secondary, or passive.³⁴⁷ Thus characterizing the distributor's conduct allows the distributor to obtain indemnity from the manufacturer. Part of the justification for the adoption of strict liability in tort as applied to product manufacturers is based upon a recognition of the rule of indemnity that allows the loss to be shifted through the chain of distribution until the manufacturers ultimately become responsible for the loss.³⁴⁸ The rule of strict liability is made applicable to retailers and other parties lower in the chain of distribution, with the recognition that the retailer may not be able to shift the loss to the manufacturer.³⁴⁹ The obligation of the parties in the chain of distribution is a special responsibility to bear the loss arising from injuries due to defective products. It is, in effect, a joint obligation to market safe products.

Following *Tolbert* there now exists a mechanism for apportioning loss among parties in the chain of distribution in most situations.³⁵⁰ The fact that the Minnesota Supreme Court has adopted a method of loss allocation does not mean, however, that the fundamental nature of the relationship of parties in the chain of distribution to injured users and consumers is altered. The supreme court has developed a more equitable means of loss allocation between those parties, not a means of fragmenting what seems to be a dual or joint responsibility to manufacture and sell non-defective products.³⁵¹

345. *Cf.* *Hammontree v. Jenner*, 20 Cal. App. 3d 528, 532, 97 Cal. Rptr. 739, 742 (1971) (rejecting strict liability in the automobile accident context).

346. *See, e.g.*, *Reber v. Hanson*, 260 Wis. 632, 51 N.W.2d 505 (1952) (parental obligation to protect child held to be a joint duty); *Wold v. Grozalsky*, 277 N.Y. 364, 14 N.E.2d 437 (1938) (in party wall collapse, joint obligation imposed on two owners of one of the adjoining buildings).

347. *See* Prosser, *supra* note 110, at 1123-24.

348. *See id.*

349. *See* *Sorenson v. Safety Flate, Inc.*, 298 Minn. 353, 216 N.W.2d 859 (1974); *Farr v. Armstrong Rubber Co.*, 288 Minn. 83, 179 N.W.2d 64 (1970).

350. *See* notes 303-18 *supra* and accompanying text.

351. In cases in which indemnity is appropriate, as in vicarious liability cases, it would be inappropriate to split into two shares what should be a single responsibility. *See* *Martindale v. Griffin*, 233 A.D. 510, 253 N.Y.S. 578 (1931) (automobile driver and owner held liable for a single share). Following *Tolbert*, indemnity would continue to be the appropri-

If a plaintiff's liability is compared to the fault of each individual defendant, then recovery will depend on the complexity of the marketing arrangements made for selling the product. The more complex the chain of distribution, the greater the dispersion of fault among the defendants, and the less likely that a plaintiff who is partially at fault will be entitled to recover for his injuries.

It is questionable whether loss allocation should be structured so as to disallow recovery in such a situation. The objective of strict liability, encouraging greater manufacturer and seller responsibility and providing compensation for those injured by defective products, will be diluted to the extent that losses that should ordinarily be borne by those profiting from the sale of defective products are shifted to the consumer.

D. *The Comparative Fault Act*

Although the Minnesota Supreme Court's decisions in *Busch*, *Tolbert*, and *Lambertson* moved Minnesota close to a comparative fault approach, reservations in those decisions placed Minnesota law just short of a full comparative fault procedure.³⁵² Because of those limitations, the impact of the recently adopted comparative fault act³⁵³ (Minnesota Act) on loss allocation principles is likely to

ate remedy in vicarious liability cases, which the court regards as encompassing the first three categories of indemnity. In these situations it would seem that fault would not be apportioned among the defendant whose active fault caused the accident and the defendant who is vicariously responsible. The defendants would be jointly responsible for a single share. Strictly speaking, percentages of fault are not being aggregated. Rather, fault is not being apportioned among defendants who in fairness are jointly responsible for a single share of liability.

In post-*Tolbert* products liability cases in which indemnity is appropriate, such as cases similar to *Sorenson v. Safety Flate, Inc.*, 298 Minn. 353, 216 N.W.2d 859 (1974), the same rationale might apply. Because indemnity would be appropriate, the liability of distributor and manufacturer would be joint for purposes of comparison to the plaintiff's fault.

The nature of the relationship between distributors and manufacturers that prior to *Tolbert* caused the supreme court to apply the rule of indemnity would not seem to be altered solely because the court decided that fault could be apportioned among parties in the chain of distribution. If fault would not be apportioned in a case such as *Sorenson*, because the rule of indemnity applies, but would be apportioned in a case such as *Bjorklund v. Hantz*, 296 Minn. 298, 208 N.W.2d 722 (1973) (per curiam), *overruled in part on other grounds*, *Tolbert v. Gerber Indus., Inc.*, 255 N.W.2d 362, 368 n.11 (Minn. 1977), when the retailer is negligent, then the plaintiff's right to recover could well depend on the degree of culpability of the retailer. In either case the relationship of the parties in the chain should be treated the same.

352. See notes 319-21 *supra* and accompanying text.

353. See notes 355-420 *infra* and accompanying text.

be substantial.

The section-by-section analysis of the Minnesota Act that follows will explain the general operation of the Minnesota Act and specifically analyze the impact of the Minnesota Act on the court's decisions in *Busch* and *Tolbert*. Before beginning, however, a brief word on the derivation of the Minnesota Act is in order. The Minnesota Act was modeled in part on the Uniform Comparative Fault Act³⁵⁴ (Uniform Act). The Uniform Act and the Senate floor debates over the Minnesota Act were relied upon heavily in the analysis that follows.

1. Section 604.01

a. Subdivision 1

Contributory fault shall not bar recovery in an action by any person or his legal representative to recover damages for fault resulting in death or in injury to person or property, if the contributory fault was not greater than the fault of the person against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of fault attributable to the person recovering. The court may, and when requested by any party shall, direct the jury to find separate special verdicts determining the amount of damages in proportion to the amount of fault attributable to the person recovering.³⁵⁵

Subdivision 1 of section 604.01 makes two significant changes in the comparative negligence statute. First, the statute provides for the comparison of "fault" rather than "negligence." Second, it changes the cutoff point for determining liability. Under the comparative negligence statute, a plaintiff would be entitled to recover so long as his negligence was not *equal to* the negligence of the party against whom recovery was sought.³⁵⁶ The Minnesota Act bars recovery only if the plaintiff's fault is *greater than* the fault of the person against whom recovery is sought. Otherwise, the Minnesota Act retains the comparative negligence approach requiring a comparison of the fault of the claimant to the fault of the person against whom recovery is sought. The impact of this lan-

354. See *Tape of Hearing on H.F. 338 Before the Minnesota Senate Judiciary Subcommittee on Judicial Administration*, 70th Minn. Legis., 1978 Sess. (Feb. 1, 1978).

355. Act of Apr. 5, 1978, ch. 738, § 6, 1978 Minn. Laws 836, 839-40 (amending MINN. STAT. § 604.01(1) (1976)).

356. See Act of May 23, 1969, ch. 624, § 1, 1969 Minn. Laws 1069, 1069-70 (current version at MINN. STAT. § 604.01 (1978)).

guage on the important question of aggregating the fault of multiple defendants will be reserved until the statutory provisions governing loss allocation in section 604.02, subdivision 3 of the act are discussed.³⁵⁷

b. Subdivision 1a

The term "fault" is defined in subdivision 1a of section 604.01:

"Fault" includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an express consent, misuse of a product and unreasonable failure to avoid an injury or to mitigate damages. Legal requirements of causal relation apply both to fault as the basis for liability and contributory fault.³⁵⁸

The breadth of the definition of fault raises a number of questions concerning the impact of the definition on the allocation of fault among a plaintiff and defendant. The effect of the Minnesota Act on the court's decision in *Busch v. Busch Construction, Inc.*³⁵⁹ must be analyzed and, since the Minnesota Act goes significantly beyond *Busch*, the implications of the statute for loss allocation must be analyzed.

Because the definition of fault includes "acts or omissions that are in any measure negligent or reckless" including "unreasonable assumption of risk not constituting an express consent" and "misuse of a product and unreasonable failure to avoid an injury or to mitigate damages" it becomes apparent that the Minnesota Act, although consistent with *Busch*, expands the definition of apportionable plaintiff misconduct. The inclusion of assumption of the risk in the Minnesota Act is consistent with *Busch*, but there is no provision in the statute for the preservation of the *Busch* exception preventing consideration of contributory negligence consisting of failure to discover a defect.³⁶⁰ The inclusion of "acts or omissions

357. See notes 405-17 *infra* and accompanying text. In addition, subdivisions 2-5 of the comparative negligence statute, dealing with settlements, are retained without change. Compare *id.* with MINN. STAT. § 604.01 (1978).

358. Act of Apr. 5, 1978, ch. 738, § 7, 1978 Minn. Laws 836, 840 (codified at MINN. STAT. § 604.01(1)(a) (1978)).

359. 262 N.W.2d 377 (Minn. 1977).

360. Although it is clear the Legislature was aware of *Busch*, see *Tape of Hearing on H.F. 338 Before the Minnesota Senate Judiciary Subcommittee on Judicial Administration*, 70th Minn. Legis., 1978 Sess. (Feb. 6, 1978), there is no express provision precluding consideration of negligent failure to discover a defect. An argument for preservation of the *Busch* exception

that are in any measure negligent or reckless" seems to override the *Busch* exception, allowing for the consideration of any plaintiff negligence, even if it consists of failure to discover a product defect.

By including "misuse of a product" as a defense, the same distinctions concerning misuse already adopted by the Minnesota Supreme Court seem to be continued.³⁶¹ The Uniform Act provides a clear indication of how misuse is to be treated. Although the Uniform Act varies slightly from the Minnesota Act by including as a defense "misuse of a product for which the defendant otherwise would be liable," the variance is insignificant as the comment to the Uniform Act indicates:

The meaning in this Section is confined to a misuse giving rise to a danger that could have been reasonably anticipated and guarded against. The Act does not apply to a misuse giving rise to a danger that could not reasonably have been anticipated and guarded against by the manufacturer, so that the product was therefore not defective or unreasonably dangerous.³⁶²

When an unforeseeable misuse is made of the product a manufacturer will owe no duty to the product user. Misuse as a defense thus encompasses misuses that the manufacturer should reasonably have anticipated.

The Minnesota Act seems to anticipate a merger of the defenses of contributory negligence, assumption of the risk, and misuse.³⁶³ Specific enumeration of those defenses in the statute is designed to

could, however, be constructed by reference to the Uniform Comparative Fault Act. Section 1(a) of the Uniform Act provides as follows:

In an action based on fault seeking to recover damages for injury or death to person or harm to property, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery. This rule applies whether or not under prior law the claimant's contributory fault constituted a defense or was disregarded under applicable legal doctrines, such as last clear chance.

UNIFORM COMPARATIVE FAULT ACT § 1(a). The Comment makes it clear that the Uniform Act is intended to reach conduct that would not previously have been a bar, including "ordinary contributory negligence in an action based on strict liability." *Id.*, Comment.

Section 1(a) of the Uniform Act was not included in the Minnesota Act. One may argue that because this section was excluded from the Minnesota Act, ordinary contributory negligence is not a defense, preserving that aspect of the *Busch* holding.

361. See notes 29-34, 86-91 *supra* and accompanying text.

362. UNIFORM COMPARATIVE FAULT ACT § 1(b), Comment.

363. See Wade, *supra* note 44, at 383 nn.38 & 39, 394.

ensure that they will be considered as aspects of a plaintiff's contributory fault. The Minnesota Act does not seem to anticipate that the defenses would be given separate consideration. Up to this point, the treatment of defenses under the Minnesota Act appears to be consistent with the approach under the court's decision in *Busch*, with the exception of the treatment of negligent failure to discover a product defect.

The Minnesota Act goes beyond existing law in including breach of warranty in the definition of fault.³⁶⁴ With this inclusion, the statute resolves the question left open in *Chatfield v. Sherwin-Williams Co.*³⁶⁵ and *Wenner v. Gulf Oil Corp.*,³⁶⁶ in which the supreme court reserved decision on the applicability of the comparative negligence statute, as interpreted in *Busch*, to breach of warranty claims.³⁶⁷ However, the Minnesota Act is limited to claims involving personal injury or property damage, excluding actions involving solely economic loss.³⁶⁸

Because of the breadth of the definition of fault under the Minnesota Act, the question arises as to how claims based on the breach of a statute are to be treated. Under the comparative negligence statute, the supreme court excluded the defense of contributory negligence in cases involving the breach of statutes designed to protect a particular class of individuals. In *Zerby v. Warren*,³⁶⁹ a case involving the sale of toxic glue to a minor in violation of a Minnesota criminal statute, the court held that the defendant could not raise the defenses of contributory negligence or assumption of the risk, the comparative negligence statute notwithstanding, and that contribution against the minor purchaser of the glue would not be permitted.³⁷⁰ Although the Minnesota Act provides no guidance as to how breach of a statute is to be treated, the

364. See MINN. STAT. § 604.01(1)(a) (1978).

365. 266 N.W.2d 171 (Minn. 1978).

366. 264 N.W.2d 374 (Minn. 1978).

367. See 262 N.W.2d at 393-94.

368. The Comment to Section 1 of the Uniform Comparative Fault Act provides in part as follows:

An action for breach of warranty is held to sound sometimes in tort and sometimes in contract. There is no intent to include in the coverage of the act actions that are fully contractual in their gravamen and in which the plaintiff is suing solely because he did not recover what he contracted to receive. The restriction of coverage to physical harm to person or property excludes these claims, however.

UNIFORM COMPARATIVE FAULT ACT § 1, Comment.

369. 297 Minn. 134, 210 N.W.2d 58 (1973).

370. *Id.* at 140-43, 210 N.W.2d at 62-64.

Uniform Act appears to resolve the question. The applicability of the Uniform Act to cases involving statutory breaches has been acknowledged.³⁷¹ The comments indicate, however, that courts will still have latitude in deciding if defenses to a statutory breach will be permitted: "A tort action based on violation of a statute is within the coverage of the Act if the conduct comes within the definition of fault and *unless the statute is construed as intended to provide for recovery of full damage irrespective of contributory fault.*"³⁷²

The final inclusion in the Minnesota Act's definition of "fault," "unreasonable failure to avoid an injury or to mitigate damages,"³⁷³ may create problems in application. It is intended to encompass the doctrine of avoidable consequences that will justify barring or reducing the plaintiff's recovery for damages that he could, in the exercise of reasonable care, have avoided. Professor Wade's example illustrates the intended operation of the section in the Uniform Act:

[S]uppose the plaintiff was driving a new car with due care, when due to a defect the left front wheel locked, causing him to swerve and hit a tree. Plaintiff had not buckled his seat belt and as a result his head hit the windshield and his face was damaged. His leg was broken, but this would have happened even if the seat belt had been buckled. He would not consent to medical treatment of the broken leg and the bone has not knit together. His recovery for both the facial injury and the untreated leg will be diminished, but for separate reasons (avoidable injury, and failure to mitigate damages). The damages to his car will not be mitigated.³⁷⁴

One of the primary purposes of the section appears to be to ensure that the "seat belt defense" will be considered in apportioning damages.³⁷⁵ While seat belt evidence is inadmissible in Minnesota,³⁷⁶ the principle of avoidable consequences set out in the Minnesota and Uniform Acts will have other applications. The intent is to reduce the plaintiff's damages according to the percentage of

371. See *Satterlee v. Orange Glenn School Dist.*, 29 Cal. 2d 581, 177 P.2d 279 (1947). See also *Martin v. Herzog*, 228 N.Y. 164, 126 N.E. 814 (1920).

372. UNIFORM COMPARATIVE FAULT ACT § 1, Comment (emphasis added).

373. MINN. STAT. § 604.01(1a) (1978).

374. Wade, *supra* note 44, at 386.

375. See *id.*

376. See MINN. STAT. § 169.685(4) (1978) ("Proof of the use or failure to use seat belts, or proof of the installation or failure of installation of seat belts shall not be admissible in evidence in any litigation involving personal injuries or property damage resulting from the use or operation of any motor vehicle.").

contributory fault chargeable to the particular injury the plaintiff could have avoided.³⁷⁷

The defendant would carry the burden of proof of establishing that the plaintiff's fault contributed to each element of damage sustained by the plaintiff. Proof that the plaintiff's misconduct contributed to the damage would require the application of comparative fault principles. Administration of the rule would require the use of special verdict forms that would, when appropriate, ask for a separate fault determination as to each type of damage, at least when it reasonably appears that there is a basis for distinguishing between types of damages.³⁷⁸

2. Section 604.02

a. Subdivision 1

“When two or more persons are jointly liable, contributions to awards shall be in proportion to the percentage of fault attributable to each, except that each is jointly and severally liable for the

377. The Uniform Act contains a provision stating that: “In an action based on fault seeking to recover damages for injury or death to person or harm to property, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery” UNIFORM COMPARATIVE FAULT ACT § 1(a). The intent of the quoted language is to ensure that there is a requirement of a causal relation between the plaintiff's conduct and the particular damage suffered.

Although this section was not made part of the Minnesota Act, there is no reason to expect that the requirement of a causal relation between the plaintiff's damage and the particular damage would be inapplicable.

The distinction between contributory negligence and avoidable consequences has been questioned by Prosser. *See* W. PROSSER, *supra* note 109, § 65, at 423. The distinction drawn is that contributory negligence is plaintiff negligence arising before any injury or damage occurs, whereas avoidable consequences comes into being after the wrong has taken place, but while there is still time to limit damages. *See id.* Prosser has suggested that the reason for the distinction is the difficulty, in the avoidable consequences situation, of assigning a part of the damages to the defendant's negligence. *See id.* Making the rule of avoidable consequences part of the comparative fault determination precludes the use of that rule as a complete bar to recovery by supplying a means of apportioning responsibility for a particular injury. Given the reason for the development of the rule, its absorption by the comparative fault act seems to be logical.

378. In cases in which the rule of avoidable consequences applies, it has been held that the plaintiff has the burden of establishing that the damages can be apportioned. If no basis for apportionment could be established, the plaintiff's fault would bar all recovery. *See* W. PROSSER, *supra* note 109, at 473 n.70. Even in pre-comparative fault cases, it is difficult to understand why the plaintiff would bear the burden of proving separability. If the plaintiff is at fault it would seem that the defendant should bear the burden of proving that the plaintiff's fault contributed to the separate elements of damages.

whole award."³⁷⁹

Subdivision 1 makes it clear that the general rule that contributions to awards shall be made in proportion to the percentage of fault attributable to each of the parties when there is joint liability, but that each individual defendant remains jointly and severally liable for the whole award has been preserved. This continues the practice under the comparative negligence statute³⁸⁰ by ensuring that the responsibility of a defendant will not be limited to his percentage of fault and that each defendant will bear the burden of the uncollectibility from the other, except in cases covered in subdivision 2, in which the claimant (plaintiff) is at fault, and must bear part of that risk.³⁸¹ As an example, if two defendants are found to be at fault, the first twenty percent and the second eighty percent at fault, and if the defendant who is eighty percent at fault is insolvent, the defendant who is twenty percent at fault will be responsible for the entire award to the plaintiff.

Subdivision 1 also requires contributions to an award to be determined on the basis of the percentages of fault assessed against the defendants. From a products liability defendant's perspective, fault will include negligence, strict liability, and breach of warranty. The broad definition of fault directly raises the question of how the comparative fault act will affect the court's decisions in *Lambertson*,³⁸² *Tolbert*,³⁸³ *Frey*,³⁸⁴ and *Busch*.³⁸⁵ More specifically, the issue is whether indemnity will be appropriate under the Minnesota Act, and if so, under what circumstances. There is no express provision in the Minnesota Act stating how indemnity claims are to be treated, raising a question whether any of the rules of indemnity as summarized in *Hendrickson*³⁸⁶ and modified in *Tolbert*³⁸⁷ are still valid.

The Uniform Act, like the Minnesota Act, provides that contributions to awards shall be made according to the percentage of

379. Act of Apr. 5, 1978, ch. 738, § 8, 1978 Minn. Laws 836, 840 (codified at MINN. STAT. § 604.02(1) (1978)).

380. See Act of May 23, 1969, ch. 624, § 1, 1969 Minn. Laws 1069, 1069 (current version at MINN. STAT. § 604.01 (1978)).

381. MINN. STAT. § 604.02(2) (1978).

382. 312 Minn. 114, 257 N.W.2d 679 (1977).

383. 255 N.W.2d 362 (Minn. 1977).

384. 258 N.W.2d 782 (Minn. 1977).

385. 262 N.W.2d 377 (Minn. 1977).

386. 258 Minn. 368, 104 N.W.2d 843 (1960), *overruled in part*, *Tolbert v. Gerber Indus., Inc.*, 255 N.W.2d 362 (Minn. 1977).

387. 255 N.W.2d 362 (Minn. 1977).

fault of the parties but that the rule of joint and several liability is retained.³⁸⁸ The comment to section 2 of the Uniform Act, providing for loss allocation, further indicates that “[i]n situations such as that of principal and agent, driver and owner of a car, or manufacturer and retailer of a product,”³⁸⁹ the court may “under appropriate circumstances find that the two persons should be treated as a single party for purposes of allocating fault.”³⁹⁰

The Uniform Act does not provide specifically for the treatment of indemnity claims, other than in this comment. But the comment illustrates at least two situations in which indemnity should be appropriate. In the case of an automobile owner and driver, or of principal and agent, the liability of the automobile owner and the principal is vicarious. Because of the derivative nature of the liability of those parties, there is no basis for apportioning fault among a principal and agent or an automobile owner and driver.³⁹¹ Because the illustrative situations in the comment are not meant to be exclusive, the first three rules of *Hendrickson* could still be preserved, given the supreme court’s interpretation of those rules as involving derivative liability on the part of persons who are without personal fault.³⁹²

Because the comments to the Uniform Act describe situations in which indemnity is appropriate, the inclusion of the products liability case involving a retailer and manufacturer might seem puzzling. However, the comment, in addition to describing situations in which indemnity might be appropriate, as in the case of principal and agent or automobile owner and driver, also describes situations in which loss, if it must be reallocated in the event of uncollectibility of a judgment from one of the responsible parties, such as the automobile owner or the principal, should be borne by the remaining party, such as the automobile driver or the agent. Loss will be shifted from the automobile owner/driver combination, or principal/agent, only if the judgment is uncollectible from either party. Because of the inability to separate the fault of the

388. Compare MINN. STAT. § 604.02(1) (1978) with UNIFORM COMPARATIVE FAULT ACT § 2(c).

389. UNIFORM COMPARATIVE FAULT ACT § 2, Comment.

390. *Id.*

391. See *Hendrickson v. Minnesota Power & Light Co.*, 258 Minn. 368, 104 N.W.2d 843 (1960) (rule 1), *overruled in part on other grounds*, *Tolbert v. Gerber Indus., Inc.*, 255 N.W.2d 362 (1977).

392. See *Tolbert v. Gerber Indus., Inc.*, 255 N.W.2d 362, 367 (Minn. 1977).

parties, they are jointly responsible for their share of the judgment, as determined by the comparative fault allocation.

Although the liability of a manufacturer and retailer may not be deemed to be derivative or vicarious, the inclusion of such a case in the comment indicates that the liability of the retailer and manufacturer should be considered joint. Treating the retailer/manufacturer combination like the principal/agent or automobile owner/driver combinations, then, leads to the conclusion that loss will be reallocated to other parties in the litigation only if neither the retailer nor the manufacturer are able to satisfy their joint portion of the judgment. This concept is embodied in section 604.02, subdivision 3 of the Minnesota Act, which provides that in the event a portion of a judgment is uncollectible from a party in the chain of distribution or manufacture, that portion shall be reallocated to the other parties in the chain.

The comment, if it were read as an intent in the Uniform Act to provide for indemnity in chain of distribution cases, would be inconsistent with the statute's express purpose of apportioning loss, according to the percentages of fault assessed against the parties, whether the fault consists of negligence, strict liability, or breach of warranty. The intent of the Uniform Act to abrogate the rule of indemnity in products liability cases is bolstered by reference to Professor Wade's comments indicating that one of the purposes of the Uniform Act is to ease a manufacturer's burden by providing for the shifting of loss from the manufacturer to other responsible parties.³⁹³ As applied to the Minnesota Act, this rationale would seem to make clear the intent to override the rule of indemnity in products liability cases. In the end, the argument rests upon the inconsistency between a true comparative fault act and the rule of indemnity, which, if applied, would of necessity override the comparative fault determination.

If indemnity is preserved following *Tolbert* it would be limited to cases such as *Sorenson*³⁹⁴ and *Farr*,³⁹⁵ in which the liability of the retailer is based solely on strict liability or breach of an express warranty, and in which the warranty is not inconsistent with the representation of safety inherent in the product. Because the definition of fault reaches all bases of liability, however, including strict liability and breach of warranty, the clear implication of the

393. See Wade, *supra* note 44, at 389.

394. *Sorenson v. Safety Flate, Inc.*, 298 Minn. 353, 216 N.W.2d 859 (1974).

395. *Farr v. Armstrong Rubber Co.*, 288 Minn. 83, 179 N.W.2d 64 (1970).

Minnesota Act would seem to be that even the limited reservation of indemnity following *Tolbert* would have to give way.

The court's decision in *Lambertson*, abrogating the employer's workers' compensation immunity from contribution claims, however, remains unchanged. In *Lambertson* the third party manufacturer and employer were both negligent. The Minnesota Act makes it clear that a third party held liable on the basis of strict liability or breach of warranty would also be entitled to contribution, a result that the supreme court made apparent by its decision in *Busch*.

b. Subdivision 2

Upon motion made not later than one year after judgment is entered, the court shall determine whether all or part of a party's equitable share of the obligation is uncollectible from that party and shall reallocate any uncollectible amount among the other parties, including a claimant at fault, according to their respective percentages of fault. A party whose liability is reallocated is nonetheless subject to contribution and to any continuing liability to the claimant on the judgment.³⁹⁶

Subdivision 2 of section 604.02 is a new provision providing for loss reallocation in the event of uncollectibility of a judgment. If it is determined, upon motion made not later than one year after judgment is entered, that all or part of a party's equitable share of the obligation is uncollectible from that party, the portion that is uncollectible will be reallocated among the remaining parties to the lawsuit, including the plaintiff.³⁹⁷ The loss reallocation provision overrides the principle of joint and several liability to the extent that the uncollectible share of a defendant will not be borne solely by the remaining defendant or defendants. An example will clarify the operation of the section:

Assume that a plaintiff is found to be ten percent at fault, defendant one is forty percent at fault, and defendant two is fifty percent at fault.

396. Act of Apr. 5, 1978, ch. 738, § 8, 1978 Minn. Laws 836, 840 (codified at MINN. STAT. § 604.02(2) (1978)).

397. This provision of the Minnesota Act is based on section 2(d) of the Uniform Comparative Fault Act. The Uniform Act does not state how the determination of uncollectibility is to be made. It would seem to require a showing of more than nonpayment of the defendant's share of the judgment. More probably, it would require a showing that the usual creditors' remedies are ineffective because the defendant lacks assets that can be reached.

Further assume that the damages sustained by the plaintiff are \$10,000. Assume also that defendant two is insolvent and his portion of the judgment is uncollectible, as established by motion of defendant one. Under prior law, the plaintiff would be entitled to collect \$9,000, the total damages reduced by his percentage of fault, from defendant two because of the effect of joint and several liability.³⁹⁸ Because of the loss reallocation provision, however, defendant two's portion of the judgment, fifty percent of the damages (\$5,000), must be reallocated among the plaintiff and defendant one.

The plaintiff's and defendant one's equitable shares would be ten percent and forty percent, respectively, providing a common denominator of fifty percent. Defendant one would thus bear four-fifths of the uncollectible \$5,000, or \$4,000. The remaining \$1,000 would be reallocated to the plaintiff.³⁹⁹ Should defendant two become solvent, he is subject to a contribution claim by defendant one and to continuing liability to the plaintiff on the judgment.⁴⁰⁰

The reallocation provision, however, does not have any impact on the principles governing liability at the outset. In order for a defendant to be held liable, it will still be necessary to establish, as required by section 604.02, subdivision 1, that the plaintiff's fault was not greater than the fault of the defendant against whom recovery is sought. For example, if a plaintiff is found to be twenty-five percent at fault, defendant one is twenty percent at fault, and defendant two is fifty-five percent at fault, the plaintiff will not be entitled to recover against defendant one because the plaintiff's fault is greater than the fault of defendant one.⁴⁰¹ Defendant two will be required to pay the plaintiff seventy-five percent of plaintiff's damages, even though he is only fifty-five percent at fault.⁴⁰²

398. See Act of May 23, 1969, ch. 624, § 1, 1969 Minn. Laws 1069, 1069 (current version at MINN. STAT. § 604.01(1978)).

399. For other examples of how the reallocation provision would work, see UNIFORM COMPARATIVE FAULT ACT § 2, Comment.

400. See MINN. STAT. § 604.02(2) (1978).

401. See *id.* § 604.01(1).

402. In light of the reallocation provision, see *id.* § 604.02(2), it might seem anomalous that defendant one's share of the judgment is not reallocated to the plaintiff as well as defendant two. This would be the result under section 2(d) of the Uniform Comparative Fault Act if the judgment could not be collected from defendant one. If there is reallocation in the event of uncollectibility, it would seem that there should be reallocation when defendant one is not liable. It must be noted, however, that the Uniform Act is a pure comparative fault act, and that defendant one would not escape liability because his fault

No right of contribution would exist against defendant one because there is no common liability.⁴⁰³ The only exception would be when aggregation is allowed. At least in the context of non-products liability cases, there will be no aggregation absent a joint adventure or joint duty.⁴⁰⁴

In considering the impact of the reallocation provisions, it should be remembered that in some cases, such as principal/agent or automobile owner/driver, two defendants may in combination be treated as a single party. Loss would be reallocated to the other parties in the lawsuit only in the event that the percentage of the judgment allocated to those combinations is not collectible from either of the defendants in the combination.

c. Subdivision 3

In the case of a claim arising from the manufacture, sale, use or consumption of a product, an amount uncollectible from any person in the chain of manufacture and distribution shall be reallocated among all other persons in the chain of manufacture and distribution but not among the claimant or others at fault who are not in the chain of manufacture or distribution of the product. Provided, however, that a person whose fault is less than that of a claimant is liable to the claimant only for that portion of the judgment which represents the percentage of fault attributable to him.⁴⁰⁵

Subdivision 3 of section 604.02 provides special rules for loss al-

is less than the fault of the plaintiff. Under MINN. STAT. § 604.01(1) (1978), defendant one cannot be held liable because his fault is less than the fault of the plaintiff. Although it could be argued that "uncollectibility" in *id.* § 604.02(2) includes cases in which the judgment is not collectible because of nonliability, the argument is invalid. The reallocation provision in the Minnesota Act was taken virtually verbatim from section 2(d) of the Uniform Comparative Fault Act. As previously explained, under the Uniform Act the problem of nonliability does not arise because it is a pure comparative fault act. "Uncollectibility" obviously was not intended to encompass nonliability. Thus, although it would be equitable for defendant one's 20% of the judgment to be reallocated to the plaintiff as well as defendant two, the reallocation provision does not seem to be designed to encompass uncollectibility because of nonliability.

403. *See* *Marier v. Memorial Rescue Serv., Inc.*, 296 Minn. 242, 207 N.W.2d 706 (1973).

404. *See* *Krengel v. Midwest Automatic Photo, Inc.*, 295 Minn. 200, 203 N.W.2d 841 (1973); notes 341-45 *supra* and accompanying text.

405. Act of Apr. 5, 1978, ch. 738, § 8, 1978 Minn. Laws 836, 840 (codified at MINN. STAT. § 604.02(3) (1978)). Subdivision 3 does not have a direct parallel in the Uniform Act. However, it appears that the Uniform Act does anticipate such a procedure, as indicated by the Comment to section 2 of the Act, providing that the liability of a retailer and manufacturer can be considered together.

location among defendants in the chain of manufacture and distribution in a products liability lawsuit. It differs from subdivision 2 in that any portion of a judgment that is uncollectible from a party in the chain will be reallocated among other parties in the chain, but not among parties outside the chain. To illustrate, assume the following example:

Plaintiff is twenty percent at fault. Defendant retailer is thirty percent at fault and defendant manufacturer is fifty percent at fault. Damages are in the amount of \$10,000.

If the judgment against either the retailer or manufacturer is uncollectible, that part of the loss would be reallocated to the other party in the chain of distribution. The purpose of this unique rule is to ensure that all parties in the chain of manufacture and distribution will insure against risks legitimately attributable to their enterprises.

The most difficult issue in construing subdivision 3 is whether it will be permissible to aggregate the fault of parties in the chain of distribution. To illustrate, assume the following example:

Plaintiff is thirty percent at fault. Defendant retailer is twenty percent at fault and defendant manufacturer is fifty percent at fault. Damages are in the amount of \$10,000.

If section 604.01, subdivision 1 is applied without qualification, the defendant retailer would not be liable because his fault is less than that of the plaintiff. Unlike subdivision 2 reallocation in non-products liability cases, however, subdivision 3 contains language indicating that the retailer will be held liable.

Following the general rule on reallocation in products liability cases, the last sentence of subdivision 3 states that a person whose fault is less than that of the claimant will be held liable only for that portion of the judgment representing the percentage of fault attributable to him. This seems to encompass the situation in the hypothetical in which the claimant's fault is greater than the retailer's.

Since, as a matter of statutory construction, a statute should be read so as to give effect to all its provisions,⁴⁰⁶ it can be argued that subdivision 3 creates a limited exception to the general rule, established in subdivision 1 of section 604.01, that a defendant cannot be held liable if his fault is less than the fault of the plaintiff.

The legislative history of the Minnesota Act, however, makes

406. *See* MINN. STAT. § 645.17 (1978).

the argument spurious. Subdivision 3 of section 604.02 was constructed in stages. At the time the comparative fault bill came to the floor of the Senate, subdivision 3 contained only the first sentence and subdivision 1 of section 604.01 was in a very different form than the bill that passed. Instead of requiring a comparison of the fault of the plaintiff to the fault of the *person* against whom recovery is sought, the bill provided that a plaintiff would not be barred from recovery so long as his fault was not equal to or greater than the fault of the *persons* against whom recovery was being sought.⁴⁰⁷ The bill thus would have required a comparison of the plaintiff's fault to the aggregate fault of all defendants involved, rather than to the fault of each individual defendant. In the products liability context, as well as in tort cases in general, a defendant whose fault was less than that of the plaintiff would have been held liable.

With the bill in this form, the last sentence of subdivision 3 of section 604.02 was added by an amendment introduced by Senator Coleman.⁴⁰⁸ The amendment was a direct response to the impact the aggregation provision in the bill would have had on products liability cases.⁴⁰⁹ Senator Coleman's amendment would not have avoided the liability of any such party in the chain of distribution whose fault was less than the fault of the plaintiff, but it would have limited it to no more than the party's percentage of fault.

The Coleman amendment touched only products liability cases. The aggregation principle in subdivision 1 of section 604.01 would still have applied to the other torts cases. It was in response to this problem as well as the problem of aggregation in the products liability context that Senator Sieloff offered to amend the aggregation language of subdivision 1 of section 604.01⁴¹⁰ by substituting the language that appears in the statute as enacted.⁴¹¹ It requires a comparison of the fault of the plaintiff to the fault of the *person* against whom recovery is sought.

The Sieloff amendment, which was adopted, made the Coleman amendment (the last sentence of subdivision 3) irrelevant because

407. See 4 MINN. S. JOUR. 5178 (1978).

408. See *id.*

409. See *Tape of Debate on H.F. 338 Before the Minnesota Senate*, 70th Minn. Legis., 1978 Sess. (Mar. 16, 1978).

410. See *id.*

411. See 4 MINN. S. JOUR. 5178 (1978).

it eliminated the possibility that a defendant whose fault is less than that of the plaintiff could be held liable. Although it is not likely that the Sieloff amendment will always require a comparison of the plaintiff's fault to the fault of each individual defendant, it does eliminate the possibility that the last sentence of subdivision 3 can be used as an argument that aggregation should usually be permitted in the products liability context.

Following the Sieloff amendment, the bill was amended once more. Senator Davies moved to amend section 604.01, subdivision 1, to provide that a plaintiff could recover as long as his fault was not *greater than* the fault of the person against whom recovery is sought.⁴¹² The amendment ensures that a plaintiff whose fault is equal to the fault of a defendant will be entitled to recover.

As constituted, it becomes apparent that the Minnesota Act tugs in opposite directions. The broad definition of fault in subdivision 1a of section 604.01 ensures that parties lower in the chain of distribution will bear a greater part of the responsibility in products liability cases through elimination of the usual rule of indemnity, and subdivision 3 ensures that all parties in the chain of manufacture and distribution will be responsible for any portion of a judgment uncollectible from any other party in the chain. On the other hand, the Sieloff amendment limits the liability of parties in the chain of distribution and manufacture when a party's fault is greater than the fault of the plaintiff.

The exact impact of the Sieloff amendment is difficult to assess. The amendment induced a substantial amount of debate.⁴¹³ A reference to some of the perceived problems justifying the amendment may have a bearing on how the amendment should be read. In illustrating the impact of the aggregation rule in the products liability context, Senator Sieloff used examples that did not involve exclusively products liability actions.⁴¹⁴ As the debate wore on, however, there was a strong sense of support for a nonaggregation rule specifically in the products liability context;⁴¹⁵ the paradigm for discussion became the small retailer, less at fault than the plaintiff, held liable for a small portion of a large judgment.⁴¹⁶

412. *See id.*; notes 355-57 *supra* and accompanying text.

413. *See Tape of Debate on H.F. 338 Before the Minnesota Senate, 70th Minn. Legis., 1978 Sess. (Mar. 16, 1978).*

414. *See id.*

415. *See id.*

416. *See id.*

Even if the retailer's liability was limited in accordance with the last sentence of subdivision 3 of section 604.02, it was recognized that requiring the retailer to pay one or two percent of a large judgment would impose a substantial burden on the retailer.⁴¹⁷

The limited scope of the evil addressed provides some insights into the aggregation issue. In the first place, it is not likely that the Sieloff amendment would disturb situations involving vicarious liability when the nature of the liability of two or more defendants is such that there is no logical basis for dividing responsibility. The obvious examples are cases involving master/servant or automobile owner/driver.

The Sieloff amendment should not be held to apply to situations involving joint ventures, the substance of the supreme court's decision in *Krengel v. Midwest Automatic Photo Supply, Inc.*⁴¹⁸ This conclusion is supported by the discussion in the Senate floor debates on the amendment. On several occasions there were indications of a desire to maintain the law of aggregation as it was under the comparative negligence act.⁴¹⁹ Because aggregation was then permitted in cases involving joint ventures,⁴²⁰ there is no reason why such decisions should not stand.

The Sieloff amendment will not affect situations in which the retailer is held liable but is responsible for only a small portion of the total judgment. If the retailer's fault is equal to or greater than the fault of the plaintiff, the retailer will be jointly and severally liable with the other defendants in the case. In addition, the first sentence of subdivision 3 would be unaffected. It provides that loss will be shifted from the parties in the chain of distribution only when none of the parties in the chain can absorb the portion of the judgment that the chain of distribution combination is liable for.

Other problems were not considered, including the problem of the plaintiff who is denied recovery because of the complexity of the marketing chain. Nor was consideration given to the case in which there is an integral relationship between manufacturer and distributor or dealer.

While it must be recognized that the aggregation problem in the products liability context was considered in the floor debates, it

417. *See id.*

418. 295 Minn. 200, 203 N.W.2d 841 (1973).

419. *See Tape of Debate on H.F. 338 Before the Minnesota Senate, 70th Minn. Legis., 1978 Sess. (Mar. 16, 1978).*

420. *See notes 336-51 supra and accompanying text.*

also must be recognized that the remedy in the form of the Sieloff amendment was not based on a consideration of the variety of situations in which the problem will likely be presented. Given the evil to be remedied by the legislation, it is arguable that it would be inappropriate to expand the remedy beyond the problem of the independent retailer being held liable for a small percentage of a large judgment.

Although as a general rule aggregation will not be permitted, there should be latitude in creating exceptions. Certainly, there should be an exception in cases in which there is a joint adventure. Less certainly, cases involving intimate tie-ins of parties in the chain should be covered. Beyond that, the nonaggregation rule should control, given the absence of any principled basis for limiting the rule.

3. Summary

The Minnesota Act makes significant changes in the comparative negligence law, even as modified in *Busch* and *Tolbert*. With its expanded definition of fault, the Minnesota Act takes into consideration all forms of negligent or reckless misconduct. It includes strict liability and breach of warranty.

The impact of the Minnesota Act on *Busch* is apparent. The statute overrides the *Busch* exception of contributory negligence consisting of failure to discover a defect. Aside from the impact on that specific exception, the Minnesota Act seems to be consistent with the approach to defenses taken by the court in *Busch*. The Minnesota Act also changes the law of contribution and indemnity. Implied indemnity in products liability cases is no longer the rule. To the extent that *Tolbert* can be read as preserving indemnity in cases involving nonnegligent, passive conduct on the part of a party lower in the chain of distribution, that exception would be overridden.

Aside from adopting a broad approach to fault allocation, the Minnesota Act makes new changes in the law governing the reallocation of loss in cases in which judgments are uncollectible from one or more defendants. Although the rule of joint and several liability is maintained in the statute, in cases involving the uncollectibility of a judgment from one or more defendants, the defendant's share will be reallocated among all parties to the litigation, including the plaintiff. Because fault irrespective of the theory of recovery is now compared under the Minnesota Act, the statute

attempts to ensure the fairest allocation of loss by requiring all responsible parties to the litigation to bear the risk of uncollectibility of a judgment according to their percentages of fault.

In products liability cases, the rule differs. If a portion of a judgment is uncollectible from a party in the chain of manufacture and distribution, that portion of the judgment will be reallocated only among other parties in the chain.

In the products liability context, one of the principal questions raised by the Minnesota Act is whether the fault of parties in the chain of distribution can under any circumstances be aggregated. The legislative history does not provide a clear answer to that question. The answer will be worked out in individual cases, keeping in mind not only the purposes of strict tort liability but the intent to limit the responsibility of product sellers.

E. The 1980 Legislation

At the end of the most recent session of the Legislature, a statute was enacted limiting the liability of nonmanufacturers in products liability suits.⁴²¹ In order to understand just exactly what impact the statute will have on loss allocation it is necessary to understand the operation and effect of the statute. The statute reads as follows:

Subdivision 1. In any product liability action based in whole or in part on strict liability in tort commenced or maintained against a defendant other than the manufacturer, that party shall upon answering or otherwise pleading file an affidavit certifying the correct identity of the manufacturer of the product allegedly causing injury, death or damage. The commencement of a product liability action based in whole or part on strict liability in tort against a certifying defendant shall toll the applicable statute of limitation relative to the defendant for purposes of asserting a strict liability in tort cause of action.

Subd. 2. Once the plaintiff has filed a complaint against a manufacturer and the manufacturer has or is required to have answered or otherwise pleaded, the court shall order the dismissal of a strict liability in tort claim against the certifying defendant, provided the certifying defendant is not within the categories set forth in subdivision 3. Due diligence shall be ex-

421. See Act of Apr. 24, 1980, ch. 614, § 156, 1980 Minn. Sess. Law Serv. 1256, 1323 (West) (to be codified as MINN. STAT. § 544.41). The effective date of the statute was the day following enactment, April 25, 1980. See *id.* § 192, 1980 Minn. Sess. Law Serv. at 1337 (West).

exercised by the certifying defendant in providing the plaintiff with the correct identity of the manufacturer and due diligence shall be exercised by the plaintiff in filing a law suit and obtaining jurisdiction over the manufacturer.

The plaintiff may at any time subsequent to dismissal move to vacate the order of dismissal and reinstate the certifying defendant, provided plaintiff can show one of the following:

(a) That the applicable statute of limitation bars the assertion of a strict liability in tort cause of action against the manufacturer of the product allegedly causing the injury, death or damage;

(b) That the identity of the manufacturer given to the plaintiff by the certifying defendant was incorrect. Once the correct identity of the manufacturer has been given by the certifying defendant the court shall again dismiss the certifying defendant;

(c) That the manufacturer no longer exists, cannot be subject to the jurisdiction of the courts of this state, or, despite due diligence, the manufacturer is not amenable to service of process;

(d) That the manufacturer is unable to satisfy any judgment as determined by the court; or

(e) That the court determines that the manufacturer would be unable to satisfy a reasonable settlement or other agreement with plaintiff.

Subd. 3. A court shall not enter a dismissal order relative to any certifying defendant even though full compliance with subdivision 1 has been made where the plaintiff can show one of the following:

(a) That the defendant has exercised some significant control over the design or manufacture of the product, or has provided instructions or warnings to the manufacturer relative to the alleged defect in the product which caused the injury, death or damage;

(b) That the defendant had actual knowledge of the defect in the product which caused the injury, death, or damage; or

(c) That the defendant created the defect in the product which caused the injury, death or damage.

Subd. 4. Nothing contained in subdivisions 1 to 3 shall be construed to create a cause of action in strict liability in tort or based on other legal theory, or to affect the right of any person to seek and obtain indemnity or contribution.⁴²²

422. *Id.* The statute was passed as section 156 of a 192 section appropriations bill, on April 11, 1980, without benefit of Senate hearings. *See* MINN. H.R. JOUR. 7278 (1980);

The obvious purpose of the Act is to limit the liability of nonmanufacturer defendants in products liability cases.⁴²³ The Act applies to product liability actions based in whole or in part on strict liability in tort. A nonmanufacturer defendant against whom a strict liability claim is asserted is entitled to dismissal of the strict liability claim upon certifying by affidavit in a responsive pleading the name of the product manufacturer.⁴²⁴

MINN. S. JOUR. 6828 (1980). The manner in which the bill was enacted puts the constitutionality of the bill in question under MINN. CONST. art. IV, § 17, which provides that "No law shall embrace more than one subject, which shall be expressed in its title."

423. The Minnesota statute was taken virtually verbatim from Illinois. *See* Act of Sept. 24, 1979, Pub. Act. No. 81-1056, 1979 Ill. Legis. Serv. 2753 (West) (to be codified as ILL. ANN. STAT. ch. 110, §§ 801-804 (Smith-Hurd)). The underlying concept is similar to statutes in Nebraska, *see* NEB. REV. STAT. § 25-21, 181 (Cum. Supp. 1978) and Tennessee. *See* TENN. CODE ANN. § 23-3706(b) (Cum. Supp. 1979). The concept is also integrated in the Model Act:

(A) A product seller, other than a manufacturer, is subject to liability to a claimant who proves by a preponderance of the evidence that claimant's harm was proximately caused by such product seller's failure to use reasonable care with respect to the product.

Before submitting the case to the trier of fact, the court shall determine that the claimant has introduced sufficient evidence to allow a reasonable person to find by a preponderance of the evidence that such product seller has failed to exercise reasonable care and that this failure was a proximate cause of the claimant's harm.

In determining whether a product seller, other than a manufacturer, is subject to liability under Subsection (A), the trier of fact shall consider the effect of such product seller's own conduct with respect to the design, construction, inspection, or condition of the product, and any failure of such product seller to transmit adequate warnings or instructions about the dangers and proper use of the product.

Unless Subsection (B) or (C) is applicable, product sellers shall not be subject to liability in circumstances in which they did not have a reasonable opportunity to inspect the product in a manner which would or should, in the exercise of reasonable care, reveal the existence of the defective condition.

(B) A product seller, other than a manufacturer, who makes an express warranty about a material fact or facts concerning a product is subject to the standards of liability set forth in Subsection 104(D).

(C) A product seller, other than a manufacturer, is also subject to the liability of manufacturer under Section 104 if:

(1) The manufacturer is not subject to service of process under the laws of the claimant's domicile; or

(2) The manufacturer has been judicially declared insolvent in that the manufacturer is unable to pay its debts as they become due in the ordinary course of business; or

(3) The court determines that it is highly probable that the claimant would be unable to enforce a judgment against the product manufacturer.

(D) Except as provided in Subsections (A), (B), and (C), a product seller, other than a manufacturer, shall not otherwise be subject to liability under this Act.

MODEL ACT § 105, *reprinted in* 44 Fed. Reg. 62,726.

424. *See* Act of Apr. 24, 1980, ch. 614, § 156, 1980 Minn. Sess. Law Serv. 1256, 1323 (West) (to be codified as MINN. STAT. § 544.41(2)).

It seems clear from the Act that certification of the name of the product manufacturer only entitles the certifying defendant to dismissal of the strict liability claim, not necessarily dismissal of the entire suit. If, in addition to the strict liability claim, the plaintiff alleges negligence or breach of express warranty or implied warranty of fitness for a particular purpose, only the strict liability claim should be dismissed.

If there is a dismissal of the strict liability claim, the plaintiff may "at any time subsequent to dismissal move to vacate" the dismissal order and reinstate the certifying defendant, if the plaintiff establishes one of five conditions: (1) that the applicable statute of limitations has run on the strict liability claim against the manufacturer; (2) that the certifying defendant has provided the plaintiff with the wrong manufacturer's name, although dismissal would again be appropriate if the right name is provided; (3) if the manufacturer no longer exists, is not subject to jurisdiction in Minnesota, or if the manufacturer is not amenable to service of process, despite the exercise of due diligence by the plaintiff; (4) if the manufacturer is unable to satisfy any judgment as determined by the court; or (5) if the court determines that the manufacturer would not be able to satisfy a reasonable settlement or other agreement with the plaintiff.⁴²⁵

Subdivision 3 provides that a dismissal order shall not be entered, despite compliance by the certifying defendant with subdivision 1, if the plaintiff can show one of three specified conditions: (1) "the defendant has exercised some significant control over the design or manufacture of the product, or has provided instructions or warnings to the manufacturer relative to the alleged defect in the product"; (2) the defendant had actual knowledge of the defect; or (3) the defendant created the defect.⁴²⁶

The most plausible construction of subdivision 4 is that other substantive rights are not to be affected by the Act. The statute should, however, have an impact on contribution claims asserted by a manufacturer. Under the Minnesota Act, contribution is the usual vehicle for the allocation of loss among parties in the chain of distribution, irrespective of the theory of recovery under which those parties are held liable. To the extent that the 1980 statute limits the liability of nonmanufacturers, however, the broad prin-

425. *Id.*

426. *Id.* (to be codified as MINN. STAT. § 544.41(3)).

principle of comparative responsibility established in the Minnesota Act will be narrowed. If, in situations in which a manufacturer is joined or is subject to suit, the nonmanufacturer is not subject to liability under a strict liability theory, a manufacturer should be precluded from obtaining contribution against the nonmanufacturer if the sole basis for the contribution claim is that the nonmanufacturer is strictly liable to the plaintiff. Because a nonmanufacturer cannot be held liable on a strict liability theory, the common liability impediment would preclude contribution.⁴²⁷ If the contribution right is not limited, so as to allow a manufacturer to obtain contribution upon establishing the liability of the nonmanufacturer on a strict liability claim, the legislative intent to limit the liability of those defendants would be subverted. Accordingly, the new Act should be an impediment not only to the assertion of strict liability claims by plaintiffs against nonmanufacturer defendants but also to the assertion of such claims by manufacturers seeking to establish contribution claims against those defendants.⁴²⁸

427. See *Conde v. City of Spring Lake Park*, 290 N.W.2d 164, 165 (Minn. 1980); *Hart v. Cessna Aircraft Co.*, 276 N.W.2d 166, 168-69 (Minn. 1979).

428. Although the concept underlying the statute may be sound, it is a procedural nightmare. There are a variety of problems created by the statute. Subdivision 2 states that once the plaintiff has filed a complaint against a manufacturer and the manufacturer has or is required to have answered or otherwise pleaded, the court shall order the dismissal of a strict liability in tort claim against the certifying defendant, provided the certifying defendant is not within the categories set forth in subdivision 3. See Act of Apr. 24, 1980, ch. 614, § 156, 1980 Minn. Sess. Law Serv. 1256, 1323 (West) (to be codified as MINN. STAT. § 544.41(2)). Subdivision 2 goes on to say that the plaintiff may at any time "subsequent to dismissal" move to vacate the order of dismissal and reinstate the certifying defendant, provided plaintiff can show one of the specified conditions. *Id.* The plaintiff bears the burden of proof of establishing the conditions. *Id.* Problems will invariably arise in determining just exactly what kind of showing the plaintiff must make in order to justify reinstatement.

Proof that the statute of limitations has run against the manufacturer should be relatively easy to satisfy. Proof of the other conditions will undoubtedly be more complicated. Establishing that the manufacturer no longer exists appears to be a relatively simple requirement, but it does not take into consideration the problem of the liability of successor corporations. See, e.g., *Leannais v. Cincinnati, Inc.*, 565 F.2d 437 (7th Cir. 1977); *Ray v. Alad Corp.*, 19 Cal. 3d 22, 560 P.2d 3, 136 Cal. Rptr. 574 (1977); *Turner v. Bituminous Cas. Co.*, 397 Mich. 406, 244 N.W.2d 873 (1976). If a successor corporation would be held liable on a strict liability claim would the statute apply if the original manufacturer has ceased to do business, or would the presence of the successor be sufficient to bar the plaintiff from asserting a strict liability claim against the nonmanufacturer?

Deciding whether the manufacturer is subject to jurisdiction in Minnesota is also likely to present problems. Will the plaintiff be able to satisfy the burden short of serving the manufacturer and waiting for the manufacturer to move to dismiss for lack of personal jurisdiction? If it will not be necessary for the plaintiff to actually serve the manufacturer,

IV. CONCLUSION

The principles of loss allocation in Minnesota have been the

the plaintiff will be placed in the curious position of attempting to establish facts sufficient to disprove personal jurisdiction, something the plaintiff is ordinarily required to prove affirmatively. If, for tactical reasons, the plaintiff has determined that the claim against the manufacturer does not justify suit against the manufacturer it would seem unreasonable to require the plaintiff to serve the defendant and await a motion to dismiss as a condition to reinstatement of the certifying defendant.

The due diligence aspect should present fewer problems. If service cannot be obtained after reasonable efforts, the plaintiff should readily be able to establish the efforts expended in attempting to obtain service on the manufacturer.

The final two factors are likely to present the greatest difficulty. The certifying defendant will be reinstated if the plaintiff can show "[t]hat the manufacturer is unable to satisfy any judgment as determined by the court" or "that the manufacturer would be unable to satisfy a reasonable settlement or other agreement with plaintiff." See Act of Apr. 24, 1980, ch. 614, § 156, 1980 Minn. Sess. Law Serv. 1256, 1323 (West) (to be codified as MINN. STAT. § 544.41(2)(d)-(e)). Can the plaintiff establish by pretrial motion that the manufacturer would be unable to satisfy any judgment or must the case be litigated and an attempt made to collect on the judgment before the condition is satisfied? If a pretrial resolution is allowed it will be necessary not only for the plaintiff to discover information concerning the financial status of the defendant but the likely damages to be awarded. Because of the problems likely to arise in obtaining discovery of information concerning the manufacturer's financial status, and the uncertainty involved in predicting the amount of plaintiff's damages, pretrial resolution would be difficult and time consuming. If the plaintiff fails to establish that the manufacturer is not able to satisfy any judgment, the case would have to be litigated. If, after judgment, the manufacturer is in fact not able to satisfy the judgment the plaintiff would, at that point, be entitled to have the certifying defendant reinstated. In all likelihood, several years will have passed. In addition, because the certifying defendant has been dismissed, the plaintiff would have to reprove his case against the retailer. The result is suspect in light of the supreme court's decision in *Haugen v. Town of Waltham*, No. 49964 (Minn. March 28, 1980), holding unconstitutional a portion of the Minnesota No-Fault Automobile Insurance Act because it failed to satisfy MINN. CONST. art. I, § 8, which provides that "Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive to his person, property or character, and to obtain justice freely and without purchase, completely and without denial, promptly and without delay, conformable to the laws." In *Haugen* the court referred in particular to the requirement that there be "a certain remedy in the laws" which shall "completely" allow a person to obtain justice. No. 49964, slip op. at 5. The specific provision of the Minnesota No-Fault Automobile Insurance Act at issue was MINN. STAT. § 65B.51(1) (1978), which required an offset from any tort recovery not only for basic economic loss benefits paid or payable, but also for benefits "which will be payable in the future." *Id.* As the supreme court noted:

the no-fault carrier of the successful plaintiff in this case is not a party to the action. Thus, the plaintiff has no assurance that his insurance carrier will accept the amount of damages awarded, let alone that it will accept responsibility for such damages. If the no-fault carrier contests these matters, then the successful plaintiff must relitigate his claim under the arbitration provisions of his policy.

No. 49964, slip op. at 5. Finding that "the constitution seems to contemplate a single remedy and not a series of remedies," *id.*, the court held the provision unconstitutional. *Id.*, slip op. at 5-6. Suffice it to say that similar problems appear to exist with the products liability legislation.

A potential remedy for the problem through construction may exist. The Model Act

subject of recent judicial and legislative modification. The controlling principles depend on whether the cause of action arose before the passage of the comparative fault act. If before, the principles depend on the supreme court's position on the retroactivity of its decisions.

Although there are important differences between pre-comparative fault act and post-act loss allocation principles, the Minnesota

takes the position that the nonmanufacturer will be subject to a strict liability claim if "[t]he manufacturer has been judicially declared insolvent in that the manufacturer is unable to pay its debts as they become due in the ordinary course of business." MODEL ACT § 105(C)(2), *reprinted in* 44 Fed. Reg. at 62,726. If the Minnesota statute is similarly interpreted, at least some of the pretrial uncertainty would be removed and the plaintiff would be presented with a more objective standard that could be more readily satisfied.

The same problems are presented with respect to the final condition of subdivision 2, that the manufacturer would be unable to satisfy a reasonable settlement or other agreement with the plaintiff. The vagueness of the standard is a good argument for a more certain standard. Again, the Model Act could provide a potential solution.

If the plaintiff is able to show that one of the conditions set forth in subdivision 3 of the statute is met, the strict liability claim against the certifying defendant would not be dismissed. All of the conditions are likely to present factual issues that will be difficult to resolve in a pretrial proceeding. It is clear that the plaintiff has the burden of showing one of the conditions. It is unclear just exactly what the burden entails. Does the plaintiff have to prove the conditions by a preponderance of the evidence? If so, it is difficult to see how the burden could be met in a hearing without violating plaintiff's constitutional right to trial by jury. *See* MINN. CONST. art. I, § 4. It would be absurd to require a virtual pretrial trial on the merits to determine if the plaintiff can assert a strict liability claim against the certifying defendant. If pretrial trial on the merits would not be feasible, as it most certainly would not be, the statute poses a dilemma. If there is uncertainty as to the conditions, the plaintiff should be given the benefit of the doubt. In a sense, a reverse summary judgment standard would be workable. If there is a genuine dispute as to a material fact, which would be sufficient to defeat a motion for summary judgment, then the case should proceed to trial on the strict liability issue.

Application of any other standard is likely to lead to additional problems. If a stricter standard is imposed on the plaintiff, so that the strict liability claim, and perhaps the entire claim against the defendant, is dismissed, the plaintiff could well be placed in a position in which it would be impossible to establish his case against a manufacturer. As an example, in a case in which it is not clear which of the parties in the chain of distribution introduced the defect into the product, the absence of the nonmanufacturer defendant may make it difficult for the plaintiff to prove the critical fact of where the defect arose. At the very least, the plaintiff's burden would be complicated by the absence from the suit of the nonmanufacturer defendant, because of discovery limitations.

In response to this problem, the Model Act has suggested that "[t]he non-manufacturer product seller be treated as a party for the purposes of discovery under the applicable procedural code. If this step is not taken, the Act may place an undue burden on the claimant in his or her attempt to prove the case." MODEL ACT § 105, Analysis, *reprinted in* 44 Fed. Reg. at 62,727.

Overall, it seems clear that the procedures required by the statute will be cumbersome and time consuming. If the procedures are judicially interpreted in a fashion consistent with the treatment in the Model Act, however, at least some of the major problems can be minimized.

Supreme Court took the law to the brink of a full comparative fault system with its decisions in *Busch v. Busch Construction, Inc.*,⁴²⁹ *Tolbert v. Gerber Industries, Inc.*,⁴³⁰ and *Lambertson v. Cincinnati Corp.*⁴³¹ Each of the decisions introduces new rules of loss allocation and each creates new problems of interpretation.

The critical questions left open by *Busch* concern the interpretation of the specified defenses to strict liability claims, the method of loss allocation in strict liability cases, the interpretation of the *Busch* exception, and the relationship of strict liability defenses to the defenses to negligence and warranty theories. In understanding the treatment of the separate defenses set out by the court, reference to the treatment of those defenses under negligence theory provides assistance. The same merger of defenses that has taken place under the court's decision in *Springrose v. Willmore*⁴³² should be applied to strict liability defenses. This has the virtue of providing a consistent treatment of defenses for two of the potential theories of recovery. The similarity of strict tort and warranty, when the damage consists of personal injury or property damage, leads to the easy conclusion that the defenses to all three theories should be the same. For purposes of consistency, the *Busch* exception should also be applicable irrespective of which theory of recovery the plaintiff relies upon. A consistent approach to the defenses to products liability claims also points toward the method of loss allocation to be used. Although there are a variety of potential approaches to that question, it is difficult to escape the conclusion that it really is fault that is being compared, no matter how the process is characterized. The comparison should prove to be workable, just as the comparison of negligence has worked in Minnesota over the past decade.

The final question, that of interpreting the *Busch* exception, is not readily answerable, at least if the search is for some definitive means of resolving cases in which the exception will arise. The important point is to understand how the exception operates in relation to other types of plaintiff misconduct. Beyond that, the only thing that can be done is to set out clearly the exception and leave it to the trier of fact to resolve.

The contribution and indemnity decisions of the court also cre-

429. 262 N.W.2d 377 (Minn. 1977).

430. 255 N.W.2d 362 (Minn. 1977).

431. 312 Minn. 114, 257 N.W.2d 679 (1977).

432. 292 Minn. 23, 192 N.W.2d 826 (1971).

ate interpretive problems. The principal question involved in interpreting *Tolbert* is to decide just how far the decision goes in abrogating indemnity in favor of contribution. On its face, *Tolbert* extends only to situations in which the retailer and manufacturer are negligent. *Tolbert* and *Busch*, read in tandem, take the majority rule one step further, to situations in which the retailer is negligent and the manufacturer strictly liable. The rationale of the opinion does not, however, extend beyond such situations. When the contribution rule applies, the same comparative fault principles applied in apportioning loss among a plaintiff and defendant should be equally applicable in apportioning loss among defendants.

The primary question raised by the court's opinion in *Lambertson* is whether the court intended for its opinion to be read so as to create the possibility that an employer will be subjected to liability beyond its actual workers' compensation liability. Although the basic concept established in *Lambertson* is defensible, the apparent extension of that concept by *Johnson v. Raske Building Systems, Inc.*⁴³³ may not be. Because the employer's right to share in the proceeds of a tort judgment must be filtered through the statute governing the distribution of tort judgments between an employer and employee, it is possible for an employer to receive less than it is required to pay out on the third party's contribution claim, thus creating the likelihood that in most situations, the employer will be required to pay more than its workers' compensation liability.

The approach suggested in this Article has been to avoid the undesirable consequence of such an extension by adopting a rule that would restrict the employer's net liability to its workers' compensation liability, an approach that the supreme court seemed to adopt initially in *Lambertson*. It is an approach that does the least violence to the workers' compensation act, pending legislative resolution of the problem of third party claims.

The comparative negligence act and the new law established by the supreme court in its recent loss allocation decisions are in turn altered by the comparative fault act. The Minnesota Act changes the percentage of fault necessary to block a plaintiff's recovery. Under the comparative negligence act a plaintiff would not be barred from recovery unless his negligence was equal to or greater than the negligence of the defendant. Under the Minnesota Act, a

433. 276 N.W.2d 79 (Minn. 1979).

plaintiff's fault must be greater than the fault of the defendant in order to bar his recovery.

The Minnesota Act should not alter the method of loss allocation adopted in *Busch*. It would, however, eliminate the exception carved out in *Busch* for plaintiff misconduct consisting of failure to discover a product defect. The broad definition of fault set out in the statute also makes it likely that whatever vestiges of the indemnity rule remain following *Tolbert* will be eliminated, imposing increased responsibility on parties lower in the chain of distribution. Consistent with this purpose, the Minnesota Act's provision on loss reallocation in products liability cases ensures that greater responsibility will be borne by parties in the chain of manufacture and distribution by imposing the risk of uncollectibility of the judgment from any of the parties in the chain on the remaining parties in the chain. That principle is modified to a limited extent by the 1980 products liability legislation limiting the liability of nonmanufacturer defendants to theories of recovery other than strict liability, unless the manufacturer is not subject to suit or is not financially responsible.

Both the court's loss allocation decisions and the Minnesota Act create potentially perplexing problems of interpretation. Some of the apparent complexity in the decisions and statute are due to new terminology. The newness of the idea rubs off quickly, however, if it is recognized that the defenses to strict liability claims and the methods of loss allocation among all parties to products liability litigation are not radically different from what has already been done in warranty and negligence law.