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# Reconsidering Plaintiff's Fault in Product Liability Litigation: The Proposed Conscious Design Choice Exception

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## I. INTRODUCTION

The Uniform Comparative Fault Act, drafted by the National Conference of Commissioners on Uniform State Laws, was approved by the Commissioners in 1977. Dean John W. Wade was Chairman of the special committee that drafted the Act. The Act is a comparative-fault, rather than a comparative-negligence, act; it applies to all nonintentional torts, including products liability actions, whether they are based on negligence, breach of warranty, or strict tort liability.[1] The Act seeks to address the problem of the relationship between the doctrines of comparative negligence and strict liability for products by permitting plaintiff's fault to effect a proportional reduction in any recovery. There are questions, however, of whether comparative negligence or the several common-law defenses that have developed for strict liability claims should apply at all to a strict liahility action.

The Act, hy adopting the pure form of comparative fault, would permit the manufacturer of a defective product to reduce his financial liability for injuries caused by a defective product by that percentage of the total fault attributahle to the claimant's unreasonable conduct. Prior to the Act several states had adopted comparative fault statutes that expressly apply to a cause of action not based solely on a defendant's negligence.[2] Courts, however, did not

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1. UNIFORM COMPARATIVE FAULT ACT § 1. The Act and comments to the Act have been included in an Appendix to a fine article analyzing its provisions by Dean John Wade. *See* J. Wade, *Products Liability and Plaintiff's Fault—The Uniform Comparative Fault Act*, 29 MERCER L. REV. 373 (1978).

2. Conn. Pub. Act No. 77-335 (1977); NEB. REV. STAT. § 25-1151 (Supp. 1978); N.Y. CIV. PRAC. § 1411 (1976).

begin to vigorously apply the principles of comparative responsibility until the Florida Supreme Court judicially adopted comparative negligence in 1973 and subsequently applied comparative responsibility principles to the strict liability action.[3] More recently, the Model Uniform Products Liability Act, using as its model the Uniform Comparative Fault Act, adopts the principles of comparative responsibility to govern a products liability claim.[4] The trend toward utilization of comparative responsibility principles is intended to mitigate the harshness of the doctrine that a claimant's unreasonable assumption of the risk or unforeseeable misuse of a product constitutes an absolute defense to all types of product defect actions. The Uniform Comparative Fault Act, however, extends beyond the utilization of "fault" apportionment to compromise difficult cause-in-fact problems. All forms of fault chargeable to the plaintiff, including negligence, recklessness, unreasonable assumption of risk, misuse of or failure to inspect a product, or unreasonable failure to avoid an injury or to mitigate damages act to diminish his recovery in all forms of nonintentional fault-based actions.

The fashionability of comparative responsibility principles as a dominant theme in tort reform is reflected in the willingness of courts to determine that liability for product defect is subject to apportionment. This doctrine reflects an attitude that percentage

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3. The Florida Supreme Court adopted comparative negligence in Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973). The principles of *Hoffman* were applied to a strict liability action in West v. Caterpillar Tractor Co., 336 So. 2d 80 (Fla. 1976). *See also* Butaud v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42 (Alaska 1976); Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978). *But see* Melia v. Ford Motor Co., 534 F.2d 795 (8th Cir. 1976); Kirkland v. General Motors Corp., 521 P.2d 1353 (Okla. 1974). *See generally* Annot., 46 A.L.R.3d 240 (1972). Many jurisdictions have interpreted the comparative fault statutes broadly to include comparative fault defenses in a products liability action. *See, e.g.,* Busch v. Busch Constr., Inc., 262 N.W.2d 377 (Minn. 1977); Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967). Although the Texas legislature had adopted a modified comparative negligence statute, the Texas Supreme Court declined to adopt the modified form of comparative fault, adopting instead a pure form for a strict liability action. *See* General Motors Corp. v. Hopkins, 548 S.W.2d 344 (Tex. 1977). *See also* Thibault v. Sears, Roebuck & Co., 118 N.H. 802, 395 A.2d 843 (1978).

4. The text and commentary of the Model Act may be found at 44 Fed. Reg. 62,714 (1979). The Model Act at § 111 provides:

> (A) Comparative Responsibility. All claims under this Act shall be governed by the principles of comparative responsibility. In any claim under this Act, the comparative responsibility of, or attributed to the claimant shall not bar recovery but shall diminish the award of compensatory damages proportionately, according to the measure of responsibility attributed to the claimant.

44 Fed. Reg. at 62,734.

comparisons are a more equitable means of finding justice.[5] As one court noted:

> [O]ur reason for extending a full system of comparative fault to strict products liability is because it is fair to do so. The law consistently seeks to elevate justice and equity above the exact contours of a mathematical equation. We are convinced that in merging the two principles what may be lost in symmetry is more than gained in fundamental fairness.[6]

The decision of the courts and some legislatures to opt for a distinct doctrine of comparative fault in products liability cases provides a mechanism for examining the role of plaintiff's conduct with regard to maintaining product integrity. This author, however, agrees with the position adopted by Professor Aaron Twerski that indiscriminate use of the comparative fault doctrine will partially negate the imposition of duties that the law has placed on manufacturing defendants.[7]

Twerski's thesis is that comparative responsibility should apply only if the plaintiff had a role to perform in maintaining product safety.[8] It is this author's position, however, that basic tort goals should dominate the doctrine of strict liability. Furthermore, the primary goal of tort liability, that of achieving a reduction in the number of injuries, is often not obtained by a consideration of plaintiff's fault. Accordingly, plaintiff's fault should not be a defense, nor should the principles of comparative responsibility apply, in cases in which the product is "defective" due to the existence of a conscious design choice. In order to present the thesis underlying this criticism of the total adoption of comparative fault principles to the products liability cause of action, it will be necessary to review the different categories of product defect as well as the nature of a claimant's conduct as a defense.

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5. *See, e.g.*, Brewster, *Comparative Negligence in Strict Liability Cases*, 42 J. AIR L. & COM. 107 (1976); Davis, *Comparative Negligence, Comparative Contribution, and Equal Protection in the Trial and Settlement of Multiple Defendant Product Cases*, 10 IND. L. REV. 831 (1977); Schwartz, *Strict Liability and Comparative Negligence*, 42 TENN. L. REV. 171 (1974); Wade, *supra* note 1. *But see* Twerski, *The Use and Abuse of Comparative Negligence in Products Liability*, 10 IND. L. REV. 797 (1977).

6. Daly v. General Motors Corp., 20 Cal. 3d 725, 742, 575 P.2d 1162, 1170, 144 Cal. Rptr. 380, 390 (1978).

7. *See* Twerski, *supra* note 5, at 821.

8. Professor Twerski would not permit a claimant's conduct, whether reasonable or unreasonable, to constitute a proportional defense to a strict liability action unless the claimant had a "role to fulfill in maintaining [the] product safety." *See id.* at 821. I agree with Professor Twerski's fundamental assumption that indiscriminate application of comparative fault is inappropriate, but I would focus instead on the nature of product defect with the goal of reducing, through effective application of deterrence principles, the overall risks of injury from defective manufactured products.

## II. CATEGORIES OF DEFECT

A fundamental premise underlying the doctrine of strict liability, as opposed to the concept of absolute liability, is the requirement that in order to establish a prima facie case, the claimant must prove that the product involved fell below the standard of care set for that type of product.[9] This requirement is normally satisfied by establishing that the product contained a defect that rendered it "unreasonably dangerous." In addition, it must be proven that the alleged defect actually caused the injuries for which the claimant seeks recovery. If the claimant fails to prove the product was defective or to make the requisite causal link, there may be no recovery even though the claimant suffered injuries as a result of using the product and has not himself been "at fault."

Describing the parameters of the standard for determining a prima facie case of strict liability has been the subject of considerable controversy.[10] Although there is no consensus,[11] this standard will generally be met if the product contains a "defect"[12] that renders it "unreasonably dangerous."[13] The defect that renders the product "unreasonably dangerous" may be either a manufacturing flaw[14] or a product design defect.[15] A manufacturing flaw involves an unexpected and unintended deviation from the manufacturer's design specifications, performance standards, or expectations derived from the use of otherwise identical units of the same product line. Included within the category of product design defects are

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9. *See* Caplaco One, Inc. v. Amerex Corp., 435 F. Supp. 1116 (E.D. Mo. 1977); Hoffoss v. Ralston Purina Co., 341 So. 2d 605 (La. Ct. App. 1977).

10. *See, e.g.*, Epstein, *Products Liability: The Search for the Middle Ground*, 56 N.C.L. REV. 643 (1978); Keeton, *Product Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30 (1973); Vetri, *Products Liability: The Developing Framework for Analysis*, 54 OR. L. REV. 293 (1975); Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825 (1973); Walkowiak, *Product Liability Litigation and the Concept of Defective Goods: "Reasonableness" Revisited?*, 44 J. AIR L. & COM. 705 (1979).

11. *See* Walkowiak, *supra* note 10, at 713-37.

12. *But see* Chappuis v. Sears Roebuck & Co., 358 So. 2d 926 (La. 1978), in which the court held that if the product that caused claimant's injury was "unreasonably dangerous in normal use," the claimant need not also establish that the product deviated from any other standard. *See also* Seattle-First Nat'l Bank v. Tabert, 86 Wash. 2d 145, 542 P.2d 774 (1975). *Cf.* Lamon v. McDonnell Douglas Corp., 19 Wash. App. 515, 576 P.2d 426 (1978) (defective condition and unreasonably dangerous are essentially synonymous).

13. *But see* Butaud v. Suburban Marine & Sporting Goods, Inc., 543 P.2d 42 (Alaska 1976); Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972).

14. MODEL UNIFORM PRODUCT LIABILITY ACT § 104A, 44 Fed. Reg. 62,721.

15. *See* Walkowiak, *supra* note 10, at 721-37. For a criticism of the adversary system's ability to define a system for evaluating "defect," see Henderson, *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531 (1973).

products whose characteristics fail to warn adequately potential users of dangers presented by foreseeable use of the product.[16] The failure of the manufacturer to include safety devices to protect from injuries that may be caused by foreseeable use of the product also results in strict liability.[17] Strict liability may also be imposed even though the manufacturer did not intend the product to be used in a particular fashion. Thus, the manufacturer may still be liable for injuries caused by a product if the misuse was so foreseeable as to impose the duty to provide safety features or warnings necessary to minimize the risk of injury.[18]

The nature of the defect alleged to be contained in the manufacturer's product should determine whether the manufacturer can be held responsible for the injuries suffered by the plaintiff. An inadvertent design defect may be a design or material choice, involving an unanticipated risk of injury in the foreseeable use of the product, that may be proven by an objective standard. In the case of an inadvertent design defect, the same standards may be uti-

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16. *See* Embry v. General Motors Corp., 115 Ariz. 433, 565 P.2d 1294 (1977); Herman v. Midland AG Serv., Inc., 200 Neb. 356, 264 N.W.2d 161 (1978); Olson v. A.W. Chesterton Co., 256 N.W.2d 530 (N.D. 1977).

17. *See* West v. Caterpillar Tractor Corp., 336 So. 2d 80 (Fla. 1976); Cepeda v. Cumberland Eng'r Co., 76 N.J. 152, 386 A.2d 816 (1978).

18. The concept of intended use as a limitation on the manufacturer's liability was best articulated in Helene Curtis Indus., Inc. v. Pruitt, 385 F.2d 841 (5th Cir. 1967). In *Pruitt*, however, the manufacturer's product was not defective for failure to contain a warning because the manufacturer could not foresee the use of the product by the class of persons who were suing for compensation. *Id.* at 857. As Dean Wade has pointed out, the product may not be defective if the use is unforeseeable:

> A manufacturer is under a duty to make his product reasonably safe not only for the precise purpose for which it was sold but also for other purposes to which he might reasonably anticipate that it would be put. If he meets this duty and makes the product reasonably safe for these purposes, then he is not liable. The fact that the buyer has taken the product and put it to an unforeseeable use cannot have the effect of broadening the manufacturer's duty and making him liable to the buyer for damages, even though they are reduced in amount. The duty not being breached because the product is not dangerously defective, there is no recovery.

Wade, *supra* note 1, at 384. With this statement I am wholely in accord. Thus, I would distinguish "misuse" of a product from plaintiff's fault in determining whether the product was defective. The Uniform Comparative Fault Act, however, would not allow such a distinction. Thus, in Brooks v. Dietz, 218 Kan. 698, 545 P.2d 1104 (1976), the defendant manufactured a defective gas switch on a water heater that permitted gas to build up to a dangerously high level in the area. A repairman, called to investigate the incident, told the homeowner to take her child from the area as a safety precaution. He returned, however, and was injured when the gas flowed toward an open flame. The risk to be prevented by the proper manufacture of the safety valve was prevention of high gas concentration, exactly the risk which caused injury. The repairman, however, was on notice of a gas leak and yet voluntarily encountered that risk. In this type situation, when plaintiff's conduct is unrelated to the proof of defect, I would not reduce plaintiff's recovery due to such conduct.

lized as for a manufacturing flaw. Unanticipated problems with the manufacturer's objectives or expectations in choosing a particular design or in manufacturing a product that deviated from the manufacturer's own design or performance specifications make it unlikely that the manufacturer would have marketed the product had he been aware of the manufacturing flaw or inadvertent design error. This theory of strict liability has as its conceptual base the desirability of secondary loss distribution due to the manufacturer's superior ability to spread the costs of the injuries suffered by product users, combined with a determination of "fault."[19] The "imputed knowledge" test can thus define the standard of care for strict liability in both the manufacturing flaw and inadvertent design defect cases. For example, an automobile, that due to an inadvertent design choice has the tendency to accelerate because of a misdesigned fuel system and therefore creates a possibility of injury,[20] is as defective as if the metal of which the auto was cast contained an excessive amount of impurities.[21] In neither case would the manufacturer have released the product into commerce if he had known of the defect.

A second category of design defects, however, involves conscious design choice, which is directly related to the function of the product. In making design choices the manufacturer understands that there are risks of injury linked to the intended design, but concludes that these risks are overshadowed by the increased benefits or reduced costs that flow from the chosen design. The conscious design choice case presents the greatest difficulty for commentators and courts alike, since it is, in effect, the substitution of a court imposed judgment in place of the "reasonable care" negligence standard to measure the conduct of the manufacturer's design engineers.[22] Thus, while a determination of the traditional manufacturing flaw case can be resolved by an objective comparison of the "defective" product to the manufacturer's intentions, liability is imposed in a conscious design choice case if the social costs of the "unreasonable design" outweigh the "reasonable" evaluation of relative costs and benefits.

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19. As Dean Wade has stated:

> In the case of products liability, the fault inheres primarily in the nature of the product. The product is "bad" because it is not duly safe; it is determined to be defective and (in most jurisdictions) unreasonably dangerous.

Wade, *supra* note 1, at 377 (footnote omitted).

20. *See, e.g.*, Rinker v. Ford Motor Co., 567 S.W.2d 655 (Mo. App. 1978).

21. *E.g.*, Browder v. Pettigrew, 541 S.W.2d 402 (Tenn. 1976).

22. *See* Walkowiak, *supra* note 10, at 722-23.

## III. The Imposition of Strict Liability in Defect Cases

The famous English case of *Vaughan v. Menlove*[23] set forth the standard by which a defendant's conduct would be measured in order to determine if the defendant had been negligent. In *Vaughan,* the court held the defendant to the standard of the reasonable person, regardless of whether the particular defendant being sued had acted in good faith. Indeed, that is the standard to which a defendant is held even though he may not be capable of achieving that standard of care. *Vaughan* articulated as a minimum an objective standard which might have borne little relationship to the attributes of a particular defendant.[24] As between a defendant who had fallen below this standard and a claimant who had suffered injuries as a result of the defendant's failure to measure up to the minimum standard of care, the effect of *Vaughan* is to shift the burden of compensating for the claimant's injuries to the defendant. Similarly, strict liability for a manufacturing flaw in the product also establishes an objective standard through which liability may be imposed upon a manufacturer who has acted in good faith and exercised reasonable (or even utmost) care.[25] In a manufacturing flaw case, it must be established that the defect existed at the time of manufacture and that the defect was a cause of the claimant's injuries. In formulating a standard by which to measure what constitutes a defect in a product, some courts have resorted to familiar negligence language.

By reference to the traditional negligence standard, the fact finder in a manufacturing flaw case must determine not only that

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23. 132 Eng. Rep. 490 (C.P. 1837).

24. *See id.* As Dean Wade has stated in his analysis of the standard of care:

> [T]he landmark case of Vaughan v. Menlove established that the standard to be applied was an objective one. The question was not whether the defendant "had acted honestly and bona fide to the best of his own judgment," but whether he had acted with a measure of "caution such as a man of ordinary prudence would observe." If this imposed a higher standard than he was capable of attaining, he was still liable.

Wade, *supra* note 1, at 376.

25. In this respect, then, there is both similarity and dissimilarity between strict liability and liability based upon negligence. Neither requires evidence that the defendant was subjectively aware of a deviation from an established standard. In negligence, however, the theoretical focus is upon the conduct of the defendant, whereas in strict liability the focus of the analysis is upon the product to determine if it fell below a minimum standard of acceptable safety. Since reduction of the total number of injuries through the imposition of financial liability is a goal of tort law, both strict liability and negligence should have an element of deterrence as one of the goals of imposing liability. It is only conduct that can be deterred. The conduct, however defined, of the parties who are in the best position to reduce overall losses should be carefully examined before total or proportional defenses to their conduct are established.

the product involved falls below the contemplated standard, but also that the product is "unreasonably dangerous" because of the defect.[26] An unreasonably dangerous product may be defined as an article which a reasonable person would not place in the stream of commerce *if* he had knowledge of its harmful character.[27] Thus, one of the principal elements of negligence liability for the manufacture of a defective product, imputation of knowledge, is eliminated. Instead of requiring, as would be true in a typical negligence action, that the plaintiff prove the manufacturer "knew or should have known" of the defect in the exercise of reasonable care, knowledge is imputed to the manufacturer for purposes of determining whether the product is defective.[28] Foreseeability as a test for determining whether the product is defective is also eliminated under the doctrine of strict liability. That is, the reasonable manufacturer need not have foreseen that the manufactured product would result in the claimant's injury in order for the claimant to establish that the product is defective.

Section 402A of the *Restatement (Second) of Torts,* upon which many courts relied in establishing a system of strict liability for products, went one step further in developing a standard to which the manufacturer would be liable for product-related injuries. Under the *Restatement,* the manufacturer could not rely upon the user's failure to discover the defect in order to absolve himself of liability.[29] Thus, liability can be imposed under section 402A

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26. *But see* note 13 *supra.* The court in Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972), eliminated the requirement that the plaintiff prove that the product contained a defect and that the defect rendered the product unreasonably dangerous, since the concept of unreasonable danger rang of negligence, an element that strict liability was intended to eliminate. It was sufficient for the plaintiff to prove that the product was defective. *Id.* at 133, 501 P.2d at 1163, 104 Cal. Rptr. at 442.

27. *See* Phillips v. Kimwood Mach. Co., 269 Or. 485, 525 P.2d 1033 (1974), in which the court stated: "A dangerously defective article would be one which a reasonable person would not put into the stream of commerce *if he had knowledge of its harmful character.* The test, therefore, is whether the seller would be negligent if he sold the article *knowing of the risk involved." Id.* at 492, 525 P.2d at 1036 (footnotes omitted).

28. As Dean Wade succinctly stated this proposition:

> The time has come to be forthright in using a tort way of thinking and tort terminology [in cases of strict liability in tort]. There are several ways of doing it, and it is not difficult. The simplest and easiest way, it would seem, is to assume that the defendant knew of the dangerous condition of the product and ask whether he was then negligent in putting it on the market or supplying it to someone else. In other words, the scienter is supplied as a matter of law, and there is no need for the plaintiff to prove its existence as a matter of fact.

Wade, *supra* note 10, at 834-35. *See also* Walkowiak, *supra* note 10, at 714-16.

29. This section provides in relevant part that "[O]ne who sells any product in a defective condition unreasonably dangerous to the user . . . or to his property is subject to liabil-

even if the plaintiff's failure to inspect might have constituted a defense in a negligence action.

This standard of liability reflects a consumer oriented attitude regarding the role that strict liability for product defect should play in the overall scheme of secondary loss distribution and primary loss deterrence. Strict liability is not a form of absolute liability for product-caused injuries. Instead, it merely sets a minimum standard for product manufacture. If a manufacturer's product falls below the standard, the manufacturer will be assessed for all injuries caused by the defect. The decision to opt for strict liability thus reflects the attitude that manufacturers should be liable for injuries associated with products because they are better able both to limit the number of injuries and, more importantly, to allocate losses.

The application of this form of strict liability to product defects causes little difficulty in the case of an inadvertent design error. Such cases are governed by the rationale stated by the Oregon Supreme Court in *Phillips v. Kimwood Machine Co.*[30] The court in *Kimwood* advocated use of the "unreasonably dangerous" proof requirement by noting that "[a] dangerously defective article would be one which a reasonable person would not put into the stream of commerce *if he had knowledge of its harmful character.*"[31] The test for determining strict liability, therefore, is whether the manufacturer would be negligent if he had known of the risks involved in either (a) releasing into commerce the product with the manufacturing flaw, or (b) releasing into commerce the product with an inadvertent design defect. It was, therefore, totally predictable that in such cases courts would attempt to unify the definition of defect and "unreasonable danger" in a single element. Since the use of the negligence based standard implies an element of unreasonableness of risk, it is also not surprising that some courts equated the notion of strict liability for manufacturing error to negligence per

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ity for physical harm thereby caused to the ultimate user or consumer." RESTATEMENT (SECOND) OF TORTS § 402A (1965). The comments to this section provide:

> *Contributory negligence.* Since the liability with which this section deals is not based upon negligence of the seller, but is strict liability, the rule applied to strict liability cases . . . applies. Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence.

RESTATEMENT (SECOND) OF TORTS § 402A, comment n, at 356 (1965). *See generally* Noel, *Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk*, 25 VAND. L. REV. 93, 106 (1972).

30. 269 Or. 485, 525 P.2d 1033 (1974); *see* note 27 *supra*.

31. *Id.* at 492, 525 P.2d at 1036.

se.[32] The actual revolution in the products liability field occurred when the concept of strict liability for product defect was applied to a product containing a conscious design choice.

In a conscious design choice case, the manufacturer may be responsible to the injured party for negligence if the design decision is unreasonable or in strict liability if the product design fails to meet the minimum legal standard. The manufacturer may still be liable, however, if the manufacturer fails to provide proper warnings or safeguards on an otherwise nondefective product.[33] The definition of the standard for strict product liability includes protection from unreasonable risk of injury, however that risk is created.[34] Thus, when a jury is instructed that in order to find liability they must first determine that the product contains a "defect," it should be recognized that the existence *vel non* of the term "defect" implies in common parlance that the manufacturer has deviated from a standard set for the product.[35]

The factors that should be employed to determine whether the manufacturer's "reasonable decision" has nonetheless resulted in the creation of a defectively designed product have been the subject of considerable debate. Perhaps the most widely cited are the seven criteria compiled by Dean Wade.[36] However, whether these

32. *See, e.g.,* Chappuis v. Sears Roebuck & Co., 358 So. 2d 926 (La. 1978); Seattle-First Nat'l Bank v. Tabert, 86 Wash. 2d 145, 542 P.2d 774 (1975).

33. Stated very generally, the conclusion is that the manufacturer is in the best position to make a determination of the risks presented by foreseeable use of his product and the requisite precautions to be taken to prevent unreasonable injuries from those risks. The manufacturer is not an absolute insurer of all injuries that are suffered by product users, but only for those injuries that product users of "defective" products suffer. Since the manufacturer is in the best position to perform this cost-benefit analysis, the manufacturer should be liable for all injuries from conscious design choice caused defects regardless of wbether the analysis is performed. Since the manufacturer can make the economic decision te market the product in its present condition and risk current damages or invest in further research to "prevent" those risks of injuries, they should bear the burden of financial liability even if that research is unperformed. *See* Calabresi & Hirschoff, *Toward a Test for Strict Liability in Torts,* 81 YALE L.J. 1055, 1071 (1972).

34. *See, e.g.,* Union Supply Co. v. Pust, 583 P.2d 276 (Colo. 1978); Chappuis v. Sears Roebuck & Co., 358 So. 2d 926 (La. 1978). As has been stated by one court:

> [T]he test of the necessity of warnings or instructions is not to be governed by the reasonable man standard. In the strict liability context we reject standards based upon what the "reasonable" consumer could be expected to know, or what the "reasonable" manufacturer *could be expected to "foresee" about the consumers who use his product.*

Berkebile v. Brantly Helicopter Corp., 462 Pa. 83, 101, 337 A.2d 893, 902 (1975) (emphasis added). *See generally* 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY, § 16[4][f][vi] at 38-140 (1979).

35. *See* note 11 *supra.*

36. Wade, *supra* note 10, at 837-38.

factors or some other test is employed,[37] the critical issue to be considered is whether the replacement of the manufacturer's decisions with those of the fact finder through application of these standards will result in a system of liability for product defect that is consistent with the other public policy goals that have been established expressly or implicitly in the adversarial system of liability distribution.

## IV. Primary Loss Reduction and Secondary Loss Distribution

One role for a system of strict liability is to present a framework within which the decision may be made to compensate claimants for injuries caused by a breach of a standard of care. Society undertakes to establish a standard of care by determining the proper allocation of the costs of certain activities. There are two goals to fulfill in setting the standard for imposition of liability through a private tort action. The first goal, primary loss reduction, is intended to cause a total reduction in the number of injury-producing incidents that are the logical consequence of "faulty" conduct.[38] The second goal, secondary loss distribution, promotes an allocation of the costs of compensating for losses caused by fault-related conduct in the most economically efficient fashion.[39] If strict liability for product defect is intended to fulfill its role within the overall scheme of tort loss distribution, then its role must be described within those parameters. An undisciplined approach that fails to rationally allocate product related loss to the manufacturer (and therefore, to the purchasers of subsequent products through price increases) would defeat the primary loss reduction goal of a fault based liability system.[40]

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37. *See, e.g.*, Barker v. Lull Eng'r Co., 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978); Turner v. General Motors Corp., 584 S.W.2d 844 (Tex. 1979).

38. If the parties participating in an activity who are in the best position to reduce or eliminate the number of injuries caused by that activity are deterred from conducting themselves in a manner that falls below the standard of care for that activity, total losses from injuries suffered by persons injured by that activity will be reduced. This deterrence of conduct regulation effect is accomplished through the imposition of financial liability. *See* Walkowiak, *supra* note 10, at 710. In strict liability for product defect, it is the manufacturer of the product who is in the best position to reduce the risks of injury.

39. Once the decision is made to compensate for injuries, the most economically efficient vehicle for compensating for those injuries should be utilized. That vehicle, however, must be consistent with the first goal of loss deterrence. *See* Walkowiak, *supra* note 10, at 711, 740-44.

40. If losses for which there is no deterrence value are compensated through a system as economically inefficient as the tort liability system, there will be little if any incentive on the part of individuals or corporate tortfeasors to effect an overall reduction in losses. Rather, as may be more politically and economically efficient, a reduction in deterrent val-

Several factors are influential in the determination of financial responsibility for the violation of a standard of care. The case of *Olson v. A.W. Chesterton Co.*[41] illustrates that the use to which a product is put by the plaintiff is relevant to the determination of whether that product is defective. The plaintiff in *Olson* was injured while applying the defendant's belt dressing product to a conveyor belt at the pinch point between the conveyor belt and the belt's power pulley. The plaintiff was responsible for maintaining the conveyor belt, which was employed to move sand at an airport construction site.[42] On the day of the accident, the belt began slipping. Neither lightening the load on the belt nor tightening the belt proved effective in curing the slippage. The plaintiff applied the defendant's belt dressing product to the power pulley, which afforded temporary relief. After the belt began to slip again, the plaintiff reapplied the dressing, again with satisfactory results. During the third application, however, the plaintiff's hand was caught in the pinch point causing serious injuries. At the time of the third application the belt was completely stalled. Plaintiff alleged that the product was defective because the product label did not adequately warn the plaintiff of the potential danger of using the product. The defendant contended that the product was not defective since the possibility of danger was obvious.[43]

The *Olson* court sustained the jury's determination that the product was defective and that this defect rendered the product unreasonably dangerous. In rejecting the defendant's contention that the obviousness of the danger constituted a sufficient response to the allegation that the product was defective, the court quoted with approval *Palmer v. Massey-Ferguson, Inc.*[44] on the effect of an obvious danger in an action based on negligence:

> It seems to us that a rule which excludes the manufacturer from liability if the defect in the design of his product is patent but applies the duty if such a defect is latent is somewhat anomalous. The manufacturer of the obviously

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ued losses as well as nondeterrent valued losses will be effected with more salutatory (to the loss distributors) results. *See, e.g.*, AETNA LIFE & CASUALTY, 1977 ANNUAL REPORT, at 6-10.

41. 256 N.W.2d 530 (N.D. 1977).

42. *Id.* at 533.

43. The defendant also alleged that the plaintiff assumed the risk and that the product was misused since the directions explicitly stated that the dressing should be applied solely to moving belts. As to misuse, the court found that the misuse was not only foreseeable but was the expected result of the use of the product under the circumstances. "When a manufacturer places upon the market a product designed to end belt slippage, it must reasonably foresee that an ultimate consumer would not discontinue use of the product simply because the belt slippage has deteriorated into total helt stoppage." *Id.* at 535.

44. 3 Wash. App. 508, 476 P.2d 713 (1970).

> defective product ought not to escape because the product was obviously a bad one. The law, we think, ought to discourage misdesign rather than encourage it in its obvious form.[45]

The *Olson* court insisted that the obviousness of the danger did not automatically preclude liability for the manufacture of a defective product. Indeed, the manufacturer, having knowingly produced a product with a dangerous potential, was burdened with special responsibilities.[46] The duty that the manufacturer owed was the duty to *warn potential users of the risks of use of its product.*

The *Olson* court then proceeded to review the defendant's allegation that the plaintiff had voluntarily and unreasonably assumed the risk of a known danger.[47] That is, the court reviewed the evidence to determine whether the defect was the actual cause of the claimant's injury. The court stated that the definition of "defect" was such that the claimant's knowledge of the possible risk involved could absolve the manufacturer of liability for the existence of the defect. The court found that the obviousness of the danger presented by this product was something that the jury could consider in determining whether the plaintiff "knowingly" and unreasonably encountered a risk.

The jury could thus consider that the product was defective and that this defect rendered the product unreasonably dangerous even though the danger was obvious. In addition, the jury was instructed to evaluate the obviousness of the danger in its determination of whether the plaintiff unreasonably assumed the risk of a known danger. In this fashion, the "obviousness" of the risk of using a product that lacked an appropriate warning was presented to the jury for their consideration twice. First, a determination of whether the product fell below the accepted standard was made. That is, the plaintiff had to establish not only that the product was defective, but also that the defect rendered the product unreasonably dangerous and resulted in the claimant's injuries. The second consideration was whether, even if the product was defective and unreasonably dangerous, the plaintiff had unreasonably assumed a known risk. In the context of an *Olson* situation this element is merely another attack on causation.[48]

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45. *Id.* at 517, 476 P.2d at 718-19.

46. 256 N.W.2d at 537.

47. *Id.* at 538.

48. *See* Bendorf v. Volkswagenwerk Aktiengeselischaft, 88 N.M. 355, 357, 540 P.2d 835, 837 (1975), in which the court held that negligence of the plaintiff that concurs with defect of the product is no defense. For a discussion of the misuse defense as an elemention of causation in the plaintiff's case in chief, see Twerski, *The Many Faces of Misuse: An Injury Into the*

In this type of conscious design choice case, once the plaintiff succeeds in establishing that the defendant's product is defective, that the defect renders the product unreasonably dangerous, and that the defect *caused* injury to the plaintiff, the plaintiff's conduct should not present an absolute or proportional bar to the plaintiff's recovery. The duty of the manufacturer to warn should not be subject to double attack. If the product is defective because it does not contain a proper warning, and that defect caused the claimant's injury, the manufacturer's duty to the claimant has been breached. It is therefore inconsistent that the claimant's assumption of that risk may be a bar to recovery.[49] In this respect, since the fundamental underpinnings of strict liability lie in primary loss reduction, attention should be given to imposing liability on the party in the best position to reduce or eliminate primary losses. It is incongruous to suggest that a plaintiff, undeterred by the risk of serious injuries to himself, would nevertheless be deterred by the probabilistic reduction in financial compensation inherent in a comparative

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*Emerging Doctrine of Comparative Causation*, 29 MERCER L. REV. 403, 419-20 (1978).

49. *See* Bendorf v. Volkswagenwerk Aktiengeselischaft, 90 N.M. 414, 417, 564 P.2d 619, 621 (N.M. 1977) (holding that if product defect and concurring negligence of the plaintiff cause injury to the plaintiff, the plaintiff's conduct does not constitute a defense). *See also* Young v. Tide Craft, Inc., 270 S.C. 453, 457, 242 S.E.2d 671, 676 (1978). In the context of a negligent failure to warn situation, this proposition has heen stated as follows:

> To allow [plaintiff's contributory negligence or assumption of risk as] defenses is to indulge in circular reasoning, since usually the plaintiff cannot be said to have assumed a risk of which he was ignorant or to have contributed to his own injury when he had no way of reasonably ascertaining that the danger of injury existed. On the other hand, if the plaintiff knew of the danger from an independent source, the manufacturer's failure to warn would not be the proximate cause of the injury.

Dillard & Hart, *Product Liability: Directions for Use and the Duty to Warn*, 41 VA. L. REV. 145, 163 (1955). A slightly different result, one more compatible with the ideas expressed in this article, was reached in Comstock v. General Motors Corp., 358 Mich. 163, 99 N.W.2d 627 (1959). In *Comstock*, the plaintiff, an employee of a car dealership, was injured when he was struck by an automobile driven by the service manager. The car had been brought in for servicing as the brakes had failed due to a defective "O" ring sealer. Although there was an issue presented as to whether the defendant had been negligent in the manufacture of the vehicle, the focus of the case was whether the defendant's negligent failure to warn could constitute the basis of plaintiff's claim for injuries or whether it was no longer a cause of plaintiff's injuries due to the superseding negligence of the service manager who had operated the car in a negligent fashion with notice (provided by the owner) of the failure of the brakes on the car. The court concluded that the foreseeable risk of injuries that could occur from the defendant's failure to warn potential users was that the car might injure someone when driven. Thus, the focus of the court's attention is placed correctly, I believe, on the total risk to be controlled. Since the risk sought to be controlled was the risk of injury due to the defendant's failure to warn users, the acts of individuals whose conduct combines with the defendant to cause injury should not cut off the liability of the party who has breached his duty. This should be true in strict liability although that person is the claimant if the manufacturer's duty has been breached.

fault system.[50]

Consideration of a defendant's duty and the effect of plaintiff's fault upon that duty in a more familiar context may be helpful. The circumstances and nature of plaintiff "fault" illustrate the artificiality of the deterrence value in those cases in which it has been a defense. Several courts have attempted to analogize strict liability to negligence per se in order to apply a comparative negligence statute or rule.[51] This analogy is not without merit. It is sound when the statute that constitutes the basic standard of care in the action has as its goal the protection of parties from their own negligence. For example, a reasonable description of liability for violation of a statute that anticipates the plaintiff's negligence is found in *Scott v. Independent School District No. 709.*[52]

In *Scott,* the plaintiff was a thirteen year old seventh grade student who sued his school after being injured when a drill bit broke off and embedded in his eye during a classroom exercise. He was not wearing safety goggles although a state statute required that goggles be worn. A pair of goggles had, however, been assigned to him at the beginning of the school year, and he had been instructed to wear them.[53] The court recognized that a claimant's contributory negligence might constitute a defense in a negligence per se action; the court stated, however, that plaintiff's fault would not be a defense if the legislative intent behind the statute was to protect the claimant from his own inexperience, lack of judgment, inability to resist pressure, or tendency toward negligence.[54]

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50. *See* note 3 *supra.*

51. It should he noted that the ideas presented in this paper are not inconsistent with the construction placed upon a particular jurisdiction's comparative fault statute except insofar as the courts have construed the legislature's intent to permit the plaintiff's fault to constitute a proportional defense to a cause of action for personal injuries for a claim based upon strict liability for a conscious design choice decision. This will require a retreat from the position taken insofar as conscious design choice cases are concerned. *See* Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967). When, however, the legislature has particularly addressed the problem, a legislative change will be necessary. *See* IND. CODE § 33-1-1. 5-4 (Supp. 1979); N.C. GEN. STAT. § 99-B-4 (1979).

52. 256 N.W.2d 485 (Minn. 1977).

53. The statute provided as follows:

> Every person shall wear industrial quality eye protective devices when participating in, observing or performing any function in connection with, any courses or activities taking place in eye protection areas . . . of any school, college, university or other educational institution in the state.

MINN. STAT. ANN. § 126.20[1] (1979).

54. 256 N.W.2d at 488-89. Dean Wade, in his article advocating the adoption of the Uniform Comparative Fault Act, acknowledges the negligence per se exception to the contributory negligence defense. He goes on, however, to note that comparative negligence principles may be consistent with this exception by reducing the recovery of the plaintiff. The

The *Scott* court, in determining whether the plaintiff's fault should constitute a bar, looked to the character of the social problem that the statute intended to address and the particular hazard intended to be eliminated. The defendant argued that applying the statute as the trial court did effectively imposed absolute liability upon it. The Supreme Court of Minnesota, however, noted that the statute imposed a duty upon the defendant to enforce reasonable precautions to insure that safety goggles were worn by students. The defendant's failure to do so would thus constitute negligence. Furthermore, liability could not be abrogated by the failure of the plaintiff to protect himself from the precise risk that the legislature had intended that the *defendant* prevent. If, however, the defendant took reasonable precautions to enforce the statute and the plaintiff nevertheless failed to wear the safety goggles, the court indicated that the defendant could not be found liable for the plaintiff's injuries since the defendant had not breached his duty to the plaintiff.

Comparison of this type of negligence per se action to the products liability action for strict liability for conscious design choice offers interesting parallels. There is some appeal to the proposition that the "fault" of the manufacturer in manufacturing a defective product should be weighed against the "fault" of the user in arriving at a fair allocation of the costs of the injury suffered by the plaintiff. This requires a finding that both parties breached a standard of care which each owed causing a single indivisible injury. By establishing a standard of care, total injuries will be reduced by deterring parties from falling below that standard. In a strict product liability action in which the product is defective due to an unconscious design defect or a manufacturing flaw, the deterrence aspect of financial liability for injuries not caused through the attributed fault of the plaintiff may be sufficient to satisfy basic tort goals of secondary loss distribution since in this "pure" form of strict liability the deterrence value upon the manufacturer is minimal. When a conscious design choice case is being litigated, however, the role of deterrence should be a principal concern. In

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need for protection of the member of the class should also be considered in establishing their proportion of fault. The comparative negligence rule may be applied if consistent with the statutory intent of the legislature. Wade, *supra* note 1, at 386-87. The state of Minnesota had a comparative negligence statute in effect at the time that *Scott* was decided; the court, however, did not apply the statute since the plaintiff could not establish that the defendant breached the standard of care owed to the plaintiff. If, however, the plaintiff were to establish that fact, the defendant would not be permitted to rely upon the plaintiff's contributory negligence as a defense.

such a case, the product is found defective because the manufacturer has adopted a design "knowing" it may cause injury or because it fails to contain an appropriate warning or a safety guard that will protect the user from his own lack of judgment.[55] Thus, in those instances in which the defect was the failure to contain an appropriate warning or safety guard the court is holding in essence that the manufacturer should protect the plaintiff from his own ignorance or lack of judgment. In other types of conscious design choice actions the liability of the manufacturer is limited to the risks of injuries that were accepted as being the costs of the adoption of that particular design. The manufacturer is in the best position to evaluate the risk of loss and to conduct a cost benefit analysis to determine whether to incorporate various design alternatives; therefore, the manufacturer is in the best position to effect a total reduction in primary losses. If the risk of injury is not one caused by such a desigu choice, then there will be no liability since there will have been no breach of duty.

The question yet to be addressed is how to best accomplish the goal of reducing total primary losses and therefore reduce the number of injured parties to whom compensation is owed by manufacturers or whom society must support.[56] A comparative fault act that has the effect of reducing the amount of compensation owed by the manufacturer of defective products without a parallel decrease in the number of injured persons does not reduce primary

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55. Professor Richard Epstein has stated that the manufacturer of a defective product that causes injuries does not have the responsibility to minimize all foreseeable misuses. Epstein prefers to narrow the standard by which a product may be found defective by reducing liability on a fixed proportion basis for such events. *See* Epstein, *Plaintiff's Conduct in Products Liability Actions: Comparative Negligence, Automatic Division and Multiple Parties,* 45 J. AIR L. & COM. 87, 101 (1979). Professor Twerski, however, has argued, quite persuasively, that the basic duty of the manufacturer is to make his product safe. If it is not, it is probable that it will injure someone. To prevent or reduce recovery is to negate the manufacturer's basic duty to make the product safe for negligent claimants as well as non-negligent claimants. Twerski, *supra* note 5, at 821 (1977). As has been stated by one court:

> [Defendant] argues that a manufacturer cannot produce a product incapable of being misused, mismounted, abused, or negligently maintained. But it does not follow from these contentions that a manufacturer is under no duty to consider any of these factors when he is adopting a design for his product.

Thomas v. General Motors Corp., 13 Cal. App. 3d 81, 89, 91 Cal. Rptr. 301, 306 (1970). *See also* Johnson v. American Motors Corp., 225 N.W.2d 57 (N.D. 1974).

56. There is little doubt that the effect of strict liability for product related injuries is to compensate for injuries that would not be compensated under the negligence system. The goal of primary loss deterrence is to reduce the number of parties injured. The costs to society of uncompensated but deterrable injuries from product use are a real although unattributed cost of an inefficient system of primary loss deterrence.

losses.[57] It merely reduces the amount of compensation paid by the producers of defective products. Uncompensated injury losses caused by defective products are primary losses subsidized by individual claimants or society. The gist of the argument behind the use of claimant's fault to reduce or eliminate that claimant's recovery is that greater care exercised by claimants will result in a reduction in total losses. In strict liability the manufacturer is "paying" only for the costs of those injuries caused, either in part or totally, by those products which have been found to fall below established standards. Therefore, there is little "justice" in a system of strict liability for conscious design choices that requires the manufacturer to compensate only partially for injuries caused by the plaintiff's "unreasonable" use of a defective product, unless this too will cause a reduction in primary losses.

The crux of the problem is the issue of whether the manufacturer has a duty to protect the consuming public from its own "fault" by including safety devices, by warning claimants of risks involved in the use of the product, or in adopting other desigu alternatives. In *Cepeda v. Cumberland Engineering Co.*,[58] the plaintiff, an eighteen year old native of Santa Domingo who spoke and read no English, had four fingers amputated when his left hand was drawn into a plastic pelletizing machine. The machine had been manufactured with a bolted guard attachment that could be removed in order to clean the machine when a change in the colors of plastic being pelletized was made or when the machine was jammed by a strand of plastic. Only the job foreman had the authority or tools necessary to remove the guard. The plaintiff stated that when he arrived at work on the night of the accident the guard was not on the machine. When the guard was on the machine, the plastic strands were introduced by a workman into the machine through a horizontal opening in the guard that was too narrow to admit a man's hand. The plaintiff introduced testimony that the machine was "unsafely designed" when sold since it did not utilize an interlock mechanism to prevent operability when the guard was not on the machine.[59] Defendant's design engineer, while conceding that interlocks were known well before the date of manufacture of this machine, testified that their use was limited to hinged guards,

57. *See, e.g.*, Epstein, *supra* note 55, at 104.

58. 76 N.J. 152, 386 A.2d 816 (1978).

59. The machine had been manufactured twelve years before the plaintiff's injury. Plaintiff's expert testified, however, that "interlocks" had been available since the turn of the century. *Id.* at 166-67, 386 A.2d at 823.

rather than those requiring the use of a wrench to remove.

The court first set forth the standard by which the product would be measured in order to determine if it was defective for failure to include the guard. The court then proceeded to determine the effect that the defendant's contention that the product was being abnormally used (since the plaintiff continued to operate the machine, knowing the guard was not in place) should have upon proof of liability for this conscious design choice. The intermediate appellate court had found that such use negated proximate cause as an element of the plaintiff's prima facie case; therefore the plaintiff could not recover.[60] The Supreme Court of New Jersey held, however, that the evidence of the frequent need to remove the finger guard during operation imputed knowledge of the dangerous potentiality of the conscious design choice to the manufacturer. Central to the determination of liability was whether a "reasonably prudent manufacturer" would have put the product into the stream of commerce after considering the hazards as well as the utility of the machine.[61]

Under strict liability for a product defective from a conscious design choice, the manufacturer had the duty to consider the foreseeable consequences of using the pelletizing machine without the guard. In theory, then, while the notion of foreseeability has definite overtones of traditional negligence liability, it is also appropriately applied to a products liability action in which the manufacturer is held to a duty to protect against an unintended risk.[62] Thus, the jury could conclude that a machine would be defective if it was manufactured with a removable guard that would allow the machine to be operated following the guard's removal.

The question of whether the plaintiff's use of the machine was a defense, once the plaintiff established that the machine contained an unreasonably dangerous defect which caused injury, was also discussed by the *Cepeda* court. The court stated that the plaintiff's conduct would be a defense if the plaintiff had unreasonably assumed a known risk. The court seems to be in error, however, since the duty of the manufacturer was to preclude that possibility by providing a machine that could not be operated without a safety guard. Thus, under the doctrine of strict liability adopted by the court in *Cepeda,* the duty of the manufacturer was to protect the plaintiff from his own "unreasonableness." Whether the

60. 138 N.J. Super. 344, 355, 351 A.2d 22, 27 (1976).
61. Cepeda v. Cumberland Eng'r Co., 76 N.J. 152, 163, 386 A.2d 816, 821 (1978).
62. *Id.* at 163, 386 A.2d at 821.

manufacturer should be liable for such conduct is not at issue. When the courts have declared that the manufacturer has a certain duty that will assist in achieving primary loss reduction, considerations that affect that duty should not interfere with its enforcement. In such a case, when the plaintiff's actions consist of mere unreasonable conduct, a manufacturer should remain fully liable for injuries caused by a defective product that fails to meet society's standards by being "unreasonably dangerous" through failure to protect the claimant from the risks that product creates.[63]

By eliminating the proportionality of a comparative responsibility statute, the primary issue of whether manufacturers should have the duty to place safety devices upon equipment may be addressed. Thus, the plaintiff's exposure to a danger rendered by the defective product should not be a defense if the defect in the product was the failure of the manufacturer to protect the plaintiff from exposing himself to that risk of injury. In *Cepeda,* the court quoted with approval from *Bexiga v. Havir Manufacturing Corp.*:[64] "It would be anomalous to hold that defendant has a duty to install safety devices but a breach of that duty results in no liability for the very injury the duty was meant to protect against."[65] In *Cepeda,* however, the court went on to find that the plaintiff was unreasonable in assuming the risk of injury since the plaintiff knew of the purpose of the guard, knew it was off, and knew that it could be replaced by calling it to the attention of the job foreman. Valuable court time was wasted establishing that a product was defective even though the conduct of the person to be protected might foreclose recovery for the injury that was to be protected.[66] As the dissent in *Cepeda* pointed out, the duty which was imposed upon the manufacturer was the duty to produce a machine which would be inoperable without a safety guard. If this duty had not been breached, the plaintiff would not have suffered injury. The dissent reasoned that relieving the manufacturer of the duty to place the guard on the machine by permitting introduction of evidence that the plaintiff had "unreasonably" used the defective product would result in a limitation of the duty otherwise placed upon the manufacturer. The majority's position creates a schizophrenic situation in which the manufacturer has only a limited duty to protect someone that the court has already stated the manufacturer has an ab-

63. *Id.* at 185, 386 A.2d at 832.
64. 60 N.J. 402, 290 A.2d 281 (1972).
65. *Id.* at 412, 290 A.2d at 286.
66. 76 N.J. at 188, 386 A.2d at 839.

solute duty to protect. If the duty of the manufacturer is to design a machine that cannot be operated without a safety guard, then the user's ability to protect himself is a wholly inadequate safeguard of those societal interests that this aspect of strict liability was designed to insure. In this situation, then, the burden of avoiding the risk of accidents has been placed solely upon the manufacturer. This determination reflects the conclusion that as the manufacturer is in the best position to limit total primary losses, a plaintiff's conduct should not affect liability. As the *Cepeda* dissent, referring to language reminiscent of *Olson v. A.W. Chesterton,*[67] stated: "[W]hen the probability of the plaintiff's inadvertence is foreseeable and the manufacturer has the capacity to guard against that contingency, he should not be released from his duty toward plaintiff simply because the danger is obvious."[68] *Cepeda* stood for only one year before its premises were reviewed by the court which rendered that decision.

In *Suter v. San Angelo Foundry & Machine Co.,*[69] a decision that promises to have far reaching impact, the effect of plaintiff's fault on liability was reconsidered. The plaintiff in *Suter* was an employee and part owner of a small industrial fabricator of sheet metal products. The machine that injured the plaintiff was one used to roll sheet steel into a cylindrical shape. The machine was designed to operate so that, when the steel was rolled into a cylinder by means of two fifty-inch steel rollers, a latched drop arm would permit the machine to be opened so that the completed cylinder could be removed. The machine motor could be turned on and off by means of a switch contained on a control box, which was mounted on the machine's motor. The rollers in the machine were not automatically activated by turning on the motor. Instead, the machine's rollers were controlled after the motor was turned on by means of a lever. The machine also contained a yellow treadle switch that would deactivate the motor when depressed. When the machine was in operation, the motor was normally left on and the operator controlled the rollers by means of the lever. The plaintiff was injured while in the process of loading the machine prior to rerolling a steel cylinder when he reached onto the steel cylinder to remove an impurity and activated the rollers by brushing against

67. 256 N.W.2d 530 (N.D. 1977).

68. 76 N.J. at 202, 386 A.2d at 841 (quoting Marschall, *An Obvious Wrong Does Not Make a Right: Manufacturers' Liability for Patently Dangerous Products,* 48 N.Y.U. L. REV. 1065, 1090 (1973)).

69. 81 N.J. 150, 406 A.2d 140 (1979).

the lever. Plaintiff was able to remove his hand only after it had been severely injured.

At trial, plaintiff's expert testified that the machine was defectively designed since the lever did not contain a rotary guard that would prevent this form of accidental contact. Alternatively, the plaintiff claimed that the machine was defective since the lever should have been located on top of the gear housing away from the area where it could be accidentally engaged.[70] The New Jersey Supreme Court, in a majority opinion written by Justice Schreiber, who had written the dissent in *Cepeda,* acknowledged that the plaintiff's conduct in the use of the machine might be relevant in determining whether the product was defective. It is axiomatic that if the defendant's product is used in a manner that was not intended, and the use was so unforeseeable that the defendant had no duty to warn against the risks of injury presented by such use, then the manufacturer will not be liable to parties who use the product in that manner and are injured. Consequently, plaintiffs will be unable to prove that the product was defective. As the *Suter* court noted: "[T]he manufacturer of a knife cannot be charged with strict liability when the knife is used as a toothpick and the user complains because the sharp edge cuts."[71] As has been noted elsewhere, many products liability cases that raise the question of misuse actually involve the issue of whether or not the manufacturer had a duty to design a product that would protect against injuries due to that type of nonintended or abnormal "use."[72]

If society imposes a duty upon the manufacturer to design a product that will prevent injuries when the product is used in an unintended fashion, then a plaintiff's injuries resulting from unintended use are precisely the types of primary losses that the manufacturer has the obligation to prevent. This standard of care will

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70. The court noted that this method had been in use when the defendant manufactured and sold the machine. In addition, the National Safety Council had recommended the use of bar guards as early as 1962. 406 A.2d at 143.

71. *Id.* at 144. Justice Clifford, concurring, amplified this statement by noting that:

> If for instance, a plaintiff undertakes to use his power saw as a nail clipper and thereby snips his digits he will not be heard to complain of the absence of a guard—not because he is barred by any notion of contributory negligence but because the manufacturer has no duty to protect against that type of use of his product. Likewise with respect, say, to the man who decides to trim his beard with motorized hedge clippers not desigued with a protective device to avoid the unintended abbreviation of his nose. Outrageous examples to be sure, but they illustrate the principle.

*Id.* at 162-63.

72. *See* Twerski, *supra* note 55.

approach absolute liability *only* when the manufacturer is held responsible for *all* injuries that result from the use of the product, including uses that the manufacturer could not foresee. That liability is, however, properly limited when the manufacturer's duty to design (or manufacture) the product is circumscribed by an accurate and understandable definition of defect. A definition that involves the "reasonable expectations of the average consumer," or uses an appropriate risk-benefit analysis to determine whether a manufacturer had an obligation to protect against misuse, should sufficiently limit the liability of the manufacturer and consequently effect an acceptable reduction in the number of primary losses.

A plaintiff's conduct may, as the court in *Suter* maintained, have an impact upon liability in the determination of whether a "defect" in the product was the actual cause of the plaintiff's injury. Consider, for example, a plaintiff with a surgical pin inserted in his leg who is instructed not to walk upon the leg. If the plaintiff nevertheless does walk upon the leg with a resultant stress failure of the pin, he will not recover even though the pin was not as strong as intended if a nondefective pin would also have failed.[73] Thus, the *Suter* court points out another important limitation on the plaintiff's cause of action for conscious design choice liability; that is, the plaintiff must prove not only that the product was defective at the time it left the manufacturer, but also that the defect was *a* cause of the injury.

It is the *Suter* court's application of the principles of the New Jersey Comparative Negligence Act that offers the most meaningful hope for legitimate reform in this form of strict liability action. The court noted that the plaintiff had used the machine thousands of times and was totally conversant with its operation. The plaintiff knew that he could deactivate the machine by switching the machine off or by stepping on the foot treadle prior to inserting his hand. Such conduct would not be a defense under the *Cepeda* rationale, however, unless the plaintiff knew of the risks involved in using the machine without shutting down the motor and nonetheless voluntarily encountered them.[74] The anomaly is that in *Cepeda* even careful operation of the machine without the safety guard

73. 406 A.2d at 144 (citing Stewart v. Von Solbrig Hosp., Inc., 24 Ill. App. 3d 599, 321 N.W.2d 428 (1974)).

74. The court noted, however, that the rationale of *Cepeda* might permit sending the issue of the plaintiff's conduct to the jury. Plaintiff's familiarity with and knowledge of the deactivation procedure for the machine might support a contention that he was aware of the risks yet voluntarily and unreasonably exposed himself to them. 406 A.2d at n.4, 147-48.

might have totally or proportionally barred recovery, whereas in *Suter* the plaintiff, although careless, might not be barred or limited in his recovery.

The responsibility of the manufacturer to manufacture a nondefective product should cause the same results whether that responsibility is to prevent a claimant from coming into contact with dangerous machine parts or to prevent a claimant from accidentally setting a dangerous machine in motion. Although the risk in the first instance is that a claimant who knows the machine is on will get his hands caught in the machine, while in the second, the risk is that the machine will start, thereby catching the claimant's hands, the consequences are the same. Often, as the *Suter* court stated, an employee engaged in an assigned task at his machine has no meaningful choice whether or not to encounter a possible risk. Therefore, as a matter of policy, even though it may be contended that the employee voluntarily and unreasonably encountered a known risk, that conduct should not be a defense. This argument draws support from the majority position in *Suter:*

> The imposition of a duty on the manufacturer to make the machine safe to operate whether by installing a guard, or as in *Cepeda,* 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 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.[75]

The court concluded that since the plaintiff's conduct did not constitute a defense to the action, the doctrine of comparative negligence could not apply. The *Suter* court left unanswered the question whether comparative responsibility should ever be applied to an action for injuries caused by a conscious design choice.

## IV. Comparative Negligence and Primary Loss Deterrence

The *Suter* court recognized that a conscious design choice case presents questions that relate to the wisdom of the manufacturer's conduct notwithstanding that the focus is upon the product itself. Indeed, in determining whether a product is used in a foreseeable fashion so that the doctrine of foreseeable misuse will not abrogate the manufacturer's liability, the question put to the fact finder is one *directly* related to the conduct of the manufacturer. Strict liability has as one of its goals the reduction of primary accident costs

75. *Id.* at 148.

by deterrence. Not all injuries will be compensated. Compensation is awarded only when product defect and causation are proved. Therefore, at the policy level a determination must be made of who should bear the cost of compensation for those injuries when compensation is awarded. Ideally, liability will be assessed against those parties that are in the best position to prevent injuries. Clearly, the manufacturer is in the best position not only to judge whether foreseeable accident costs will exceed avoidance costs but also to act upon that judgment. Unanswered is whether a claimant might also be deterred from negligent injury-causing courses of conduct.

The major criticism of disregarding the plaintiff's fault in determining ultimate liability for the use of a defective product is that the claimant might exercise a degree of care that he would not otherwise exercise if he were aware that his recovery would be reduced by the percentage of his own fault.[76] Indeed, commentators such as Professor Epstein have argued that legal incentives that reduce the plaintiff's recovery may actually deter potential claimants from engaging in dangerous conduct.[77] Citing as an example evidence that the reduction of the traffic speed limit to fifty-five miles per hour had led to fewer traffic fatalities, Professor Epstein stated that "[i]f individual drivers were held adequately in check by fear for their own lives, then it would be ironic to assume that the threat of a small fine, coupled with a possible increase in insurance rates, or the suspension of a license would have much influence upon their behavior."[78]

Epstein concludes that a system of comparative fault that reduces a careless plaintiff's recovery will provide the legal incentives necessary to deter certain forms of human conduct even when life and limb are imperiled.[79] Epstein's assumption in the context of reduced speed limits is that although it is ironic to assume that individual drivers, not restrained by fear for their own lives, would be deterred by the threat of a small fine or an increase in insurance

76. *See* Calabresi & Hirschoff, *supra* note 33.

77. Epstein, *supra* note 55, at 103-04. Professor Twerski agrees that some deterrence value is presented by penalizing a plaintiff for the "consequences" of his own conduct. Twerski, *supra* note 55, at 805. It is the value of that deterrent effect, when weighed against the costs of litigating those questions and the impact that these proportional reductions will have upon the deterrent impact of manufacturers, that raises questions regarding its value in a system whose goal is to reduce total primary losses.

78. Epstein, *supra* note 55, at 104.

79. It should be noted that Professor Epstein does not advocate a true system of comparative fault but rather a system of pro rata reduction based upon plaintiff fault. *Id.* at 104.

rates, the marginal effect of those additional sanctions does in fact have a deterrence value.

This analysis, however, ignores the obvious fact that establishing the speed limit at fifty-five miles per hour sets a clearly defined standard for the operator from which deviation is clear and the economic consequences are both apparent and predictable. The economic consequences follow a conscious decision to deviate from the established standard. This is not so, however, when the plaintiff's conduct in the context of a normal personal injury action is measured by the standard of the reasonably prudent person. It is especially difficult to apply such a rationale when the conduct defined as contributory fault may be the only conduct that the plaintiff is capable of achieving under the circumstances.[80]

Indeed, Epstein's analysis may be read to support a conclusion that plaintiff's fault should *not* constitute a defense to a strict products liability action. To the extent that the decision to exceed the speed limit is made consciously, the individual is making a conscious choice with obvious economic consequences for deviation from the established standard. While the risk of deviation may include an increased risk of personal harm, the primary deterrent in this form of conscious deviation is economic since the risk of loss is clear and predictable. The operator of the vehicle is in a position to make that conscious choice. It is, however, disingenuous to suggest that the average user of a product will be more effectively deterred by speculative and unpredictable economic consequences in a subsequent tort action than by the immediate risk of personal harm. Those drivers that would not exceed the speed limit would also operate machinery in a safe fashion. Their incentive, however, would be protection from injury rather than a decrease in financial loss. If, however, the risks of loss created by a product design were considered and accepted by the manufacturer in the design process *and* those products are later held unreasonably dangerous, then in the interests of reducing total primary losses the individual claimant's fault should not be considered separately. The only risk that the manufacturer has in an unsafely designed product is a risk of financial loss.[81]

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80. *See, e.g.*, U.S. DEPT. OF TRANSP., DRIVER BEHAVIOR AND ACCIDENT INVOLVEMENT: IMPLICATIONS FOR TORT LIABILITY 151-69 (1970).

81. I am not unaware of the "risk" of criminal prosecution as evidenced by the prosecution of the Ford Motor Company for design defect in Pulaski County, Indiana. It is to be noted, however, that while a corporation may he tried and convicted of a crime in some jurisdictions, the penalty is exclusively financial. *See, e.g.*, ILL. ANN. STAT. ch. 38, § 1005-5-3(3) (Smith-Hurd Supp. 1979).

The product liability action also presents the question of how to appropriately allocate secondary loss. In the conscious design defect situation, the manufacturer has made a conscious economic decision to manufacture and market a product that falls below the minimum standard society has set for that product. As between the manufacturer of the product and the injured claimant, the manufacturer is in the best position to undertake the cost-benefit analysis necessary to arrive at a decision whether to manufacture a product that contains a conscious design choice defect. The manufacturer is also in the best position to spread the costs of compensation for those injuries as well as to control the number of "defects" contained in products that are placed into the stream of commerce.[82]

Where the defect alleged is a manufacturing fiaw or an objective design defect, defenses based upon the plaintiff's conduct may be considered since the manufacturer has only imputed rather than actual knowledge of defect. Thus, the manufacturing flaw and objective design choice cases represent true examples of strict liability. If the cause of action is based upon a conscious design choice, however, the plaintiff's conduct should not be considered. That case represents a situation in which the issue at trial is the "conduct" of the manufacturer in accepting a potentially dangerous design that falls below the standard set for that product. In the manufacturing flaw and objective design defect cases, the principles of risk-benefit analysis are not present. The manufacturer's "fault" may be established in those cases regardless of his conduct if the finished product is deemed to have been defective and the manufacturer has engaged in marketing the product. The conscious design choice case, however, sets forth quite a different case, and different considerations apply. In conscious design choice cases the manufacturer is deemed to have made a conscious choice, after evaluating the risks, to create a product which falls below the standard set for that type of product. While the analysis the jury un-

82. As Justice Pomeroy, concurring in McCown v. International Harvester Co., 342 A.2d 381 (Pa. 1975), stated, "It is a proper corollary to this principle that the lesser loss-bearing capacity of product users exists independently of their negligence or lack of it." *Id.* at 383. Dean Wade has suggested that allowing a negligent claimant to receive compensation for injuries suffered by a defective product will force innocent users to bear the costs of compensation. Wade, *supra* note 1, at 379 (citing Horn v. General Motors Corp., 17 Cal. 3d 359, 377, 551 P.2d 398, 405, 131 Cal. Rptr. 78, 88 (1976) (Clark, J., dissenting)). The issue upon which I would focus, however, is not only the right of the users who are injured hy the defective products to expect compensation, but also the salutary effects upon total product safety of liability costs when a defective product has caused injury to a claimant.

dertakes to determine whether a product embodies a conscious design choice is not totally free from criticism, this does not justify reducing the claimant's recovery when the manufacturer's choice renders a product defective.

If reform in products liability litigation is to come, that reform should be made either by legitimatizing the products liability cause of action or by seeking alternative forms of compensation for product related injuries. The purpose of a judgment in a products liability action should be in part to deter future conduct. The imperfections that have crept into products liability law, especially in the conscious design choice area, cannot be expected to be remedied by simple modification of the percentages of recovery available to claimants. If reform is to come, it must be consistent with the policies and social goals that are sought to be achieved in a tort system.

Gearing up the very cumbersome tort litigation liability machinery, in which over fifty percent[83] of the insurance premium dollar is spent on administrative costs, to analyze a conscious design choice can be justified only if there is some deterrent value in assessing financial liability. Other types of defect are easily proven by comparison and therefore represent different considerations.[84] If there is reduced deterrent value in conscious design choice litigation, a simpler, more efficient system of compensating injured parties must be proposed for all product related injuries. If the basis of the attack is on the size of lump sum jury awards, then reform should be in the nature of a periodic compensation plan for product caused injuries. If the nature of what is being compensated is at issue, then the nature and role of damages should be reviewed. Comparative responsibility has been used by some courts that are troubled by difficult questions of causation or by the failure to draft an adequate definition of product "defect." This proportional system has permitted a resolution of the difficulty by allowing neither plaintiff nor manufacturer an adequate remedy. To say that juries are competent to perform the difficult percentage alloca-

83. UNITED STATES DEPT. OF COMMERCE, INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, FINAL REPORT OF THE INSURANCE STUDY 2-1 (1977).

84. In a well-reasoned approach to the question of plaintiff's fault in negligence as well as strict liability actions, Professor Jeffrey O'Connell has suggested that plaintiff's fault be eliminated and the collateral source rule abolished. O'Connell, *A Proposal to Abolish Contributory and Comparative Fault with Compensatory Savings by Also Abolishing the Collateral Source Rule*, 1979 ILL. L. FORUM 591 (1979). Professor O'Connell's position is well thought out and documented, but goes further than this author would by advocating the elimination of all considerations of plaintiff fault.

tions required in a strict liability action based upon a conscious design choice when plaintiff's percentage of responsibility is to be considered is disingenuous. It is like praising Alexander for cutting the Gordian knot when he was asked to "untie" it. It has at best removed or weakened the pressure for actual reform. A comparative responsibility rule that responds to the demands of an organized and highly vocal minority ignores the needs of injured consumers who remain ubiquitous and disorganized.

## V. Conclusion

The varieties of product defect permit different conclusions regarding whether plaintiff's conduct should constitute a defense to a manufacturer's liability. Those cases of product liability based upon allegations of manufacturing flaw or objective design defect may be treated as true forms of strict liability. Therefore, traditional negligence analysis may be utilized to establish a standard from which deviation constitutes a basis for a cause of action for injuries. In such cases, primary loss reduction may be effected through imposition of liability for all product-caused injuries subject to consideration of the conduct of the plaintiff. The primary justification for strict liability in these cases is the superior secondary loss distribution capability of the manufacturer of defective products.

Strict liability for conscious design choice, however, has at its base a more substantial foundation in primary loss deterrence. If the acts which constitute a defense in conscious design choice litigation are acts of a claimant that the manufacturer was expected to consider and protect against in the selection of design choice, it is not in the interests of the goal of primary loss limitation to permit foreseeable user conduct to constitute a defense to the action.

Eliminating all consideration of the plaintiff's fault as a further defense in conscious design choice litigation will permit concentration upon elimination of primary losses through the imposition of liability upon those parties who can best bear the burden of compensating for losses, thereby satisfying secondary loss distribution principles as well. To the extent that proportional systems of loss distribution between claimants and defendants decrease the intensity of the need for exploring alternative methods of compensating for and eliminating product caused injuries, such partial "reforms" are inconsistent with progress as well as the dual goals of tort liability.