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Tort Law - Pennsylvania Strict Product Liability - Comparative Negligence

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TORT LAW—PENNSYLVANIA STRICT PRODUCT LIABILITY—COMPARATIVE NEGLIGENCE—The Pennsylvania Supreme Court held that comparative negligence concepts should not be extended to strict product liability.

Kimco Development Corp. v. Michael D's Carpet Outlets, 637 A.2d 603 (Pa. 1993).

On May 10, 1983, a fire occurred at the Springfield Shopping Center in Delaware County, Pennsylvania.[1] The fire started in the basement of Michael D's Carpet Outlets ("Michael D's").[2] As a result of the fire, Michael D's store was completely destroyed and the shopping center, which was owned by Kimco Development Corporation ("Kimco"), was severely damaged.[3] Several of Kimco's tenants in the shopping center also suffered substantial damages to their properties.[4]

Prior to the fire, Michael D's received a large shipment of polyurethane foam padding from the General Foam Corporation ("General Foam").[5] Michael D's stored the foam padding in its basement.[6] Because the foam padding apparently was stored too close to the basement ceiling lights, it ignited.[7]

As a result of the fire, three separate actions were filed in the Delaware County Court of Common Pleas.[8] In the first, Kimco and five of its tenants brought an action in negligence, warranty and strict liability against Michael D's and General Foam.[9] A sixth tenant brought an action in negligence, warranty and strict liability against Kimco, Michael D's and General Foam.[10] Finally, Michael D's brought an action in negligence, warranty

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1. Kimco Development Corp. v. Michael D's Carpet Outlets, 637 A.2d 603, 604 (Pa. 1993).
2. *Kimco*, 637 A.2d at 604.
3. *Id.* Michael D's had not installed a sprinkler system on the premises. *Id.*
4. *Id.*
5. *Id.* General Foam manufactured and sold the polyurethane foam carpet padding to Michael D's. *Id.*
6. *Id.*
7. *Kimco*, 637 A.2d at 604.
8. *Id.*
9. *Id.*
10. *Id.*

and strict liability against Kimco and General Foam.[11] The three actions were combined to the present case.[12]

There was no evidence presented at trial to indicate that General Foam had defectively designed, manufactured or packaged the foam padding.[13] The jury, however, in answering special interrogatories,[14] found General Foam liable for failing to provide warnings indicating that the foam padding was highly inflammatory, and that, once ignited, it would cause the "rapid and uncontrolled spread of fire."[15]

General Foam was found liable to Kimco and all tenant plaintiffs in the first two actions on negligence and strict liability theories.[16] Michael D's was found liable to Kimco and all tenant plaintiffs on a negligence theory.[17] The jury also determined, in response to special interrogatories,[18] that General Foam was twenty percent negligent, and that Michael D's was eighty percent negligent in causing the fire and the resulting damage.[19] The jury, however, did not apportion the overall responsibility for the damages between Michael D's and General Foam.[20] In the strict liability action, Michael D's was awarded a judgment of $597,934.43 against General Foam.[21] The trial court did not reduce Michael D's award by the percentage of responsibility ascribed to Michael D's by the jury.[22]

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11. *Id.*

12. *Kimco*, 637 A.2d at 604.

13. *Id.*

14. *Id.* Special interrogatories are "[w]ritten questions on one or more issues of fact submitted to the jury. The answers to these are necessary to a verdict." BLACK'S LAW DICTIONARY 1397 (6th ed. 1990).

15. *Kimco*, 637 A.2d at 604.

16. *Id.*

17. *Id.*

18. *Id.* In answering the special interrogatories, the jury found General Foam negligent because there was inadequate warning that the foam was inflammatory. *Id.* As a result of the inadequate warning, under strict product liability theory, the foam padding was "defective". *Id.*

19. *Id.*

20. *Kimco*, 637 A.2d at 604.

21. *Id.*

22. *Id.* The first two actions against General Foam and Michael D's were brought under the theories of negligence and strict liability. *Id.* The jury, in returning a verdict in these actions, based their determination on an apportionment of negligence between the two parties. *Id.* In the third action, Michael D's received judgment against General Foam on a strict liability theory for which consideration of the plaintiff's negligence is not permitted. *Id.* Following the verdict, the court denied Michael D's request for delay damages. *Id.* Delay damages are damages added "[a]t the request of the plaintiff in a civil action seeking monetary relief for bodily injury, death or property damage . . . to the amount of compensatory damages awarded against each defendant . . . found to be liable to a plaintiff in the verdict of a jury." PA. R. CIV. P. 238(a)(1).

At the conclusion of the trial, General Foam moved for post-trial relief in the form of a judgment notwithstanding the verdict, a new trial, and a molding of the verdict.[23] Upon denial of these motions, General Foam filed an appeal to the superior court.[24]

The superior court affirmed the trial court's judgments in favor of Michael D's.[25] The court held that: (1) the evidence supported the jury's finding that the fire and subsequent damage occurred as a result of Michael D's and General Foam's negligence, and General Foam's failure to warn consumers of the highly inflammatory nature of the foam padding; (2) failure to instruct the jury to apportion overall liability was harmless error by the trial court;[26] and, (3) the comparative negligence or fault of Michael D's could not be used as a defense by General Foam in the action based upon strict liability.[27]

General Foam appealed the superior court's decision to the Pennsylvania Supreme Court.[28] The supreme court granted allocatur[29] to address the primary issue[30] of whether compara-

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23. *Kimco*, 637 A.2d at 604. In Pennsylvania, in response to a party's motion for post-trial relief, the court may, "(1) order a new trial as to all or any of the issues; or (2) direct the entry of judgment in favor of any party; or (3) remove a nonsuit; or (4) affirm, modify or change the decision or *decree nisi*, or (5) enter any other appropriate order." PA. R. CIV. P. 227.1.

24. Remy v. Michael D's Carpet Outlets, 571 A.2d 446 (Pa. Super. Ct. 1990), *aff'd sub. nom.* Kimco Development Corporation v. Michael D's Carpet Outlet, 637 A.2d 603 (1993). Michael D's also filed a cross-appeal from the trial court's denial of delay damages. *Remy*, 571 A.2d at 448.

25. *Remy*, 571 A.2d at 453. However, the superior court reversed the trial court's denial of delay damages and remanded to the trial court the question of whether the amended Pennsylvania Rule of Civil Procedure 238 entitled Michael D's to delay damages. *Id.*

26. *Id.* at 451. The error occurred as a result of the trial court instructing the jury to apportion negligence and failing to instruct the jury to apportion liability fully for the fire between General Foam and Michael D's as co-defendants in the first two actions. *Id.* at 450-51. This matter was remanded to the trial court to correct the calculation error and apportion overall contribution between the two parties on the basis of the jury's finding that General Foam was twenty percent negligent and Michael D's was eighty percent negligent. *Id.* at 453.

27. *Id.* at 452. The superior court, in refusing to allow the use of comparative negligence concepts to permeate a strict product liability action, relied on the supreme court's ruling in *McCown v. International Harvester Co. Id.* (citing McCown v. International Harvester Co., 342 A.2d 381 (Pa. 1975)). See notes 71-78 and accompanying text for a discussion of *McCown*.

28. Kimco Development Corp. v. Michael D's Carpet Outlets, 637 A.2d 603 (Pa. 1993).

29. Kimco Development Corp. v. Michael D's Carpet Outlets, 592 A.2d 1302 (Pa. 1991). Allocatur is a word which the Supreme Court of Pennsylvania uses to describe allowance of appeals; it means "it is allowed." BLACK'S LAW DICTIONARY 75 (6th ed. 1990).

30. *Kimco*, 637 A.2d at 605. The Pennsylvania Supreme Court also considered two additional issues on appeal: (1) whether the evidence against General Foam was

tive negligence concepts should be used as a defense in strict product liability actions brought under Section 402A of the Restatement (Second) of Torts ("Section 402A").[31]

The court held that comparative negligence concepts should not be extended to cases brought under Section 402A.[32] The court stated that conceptual problems would be created if negligence concepts were intermixed with strict liability concepts.[33] The court also asserted that the application of comparative negligence would undermine the purpose of strict product liability.[34] The court opined that the purpose behind strict liability

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sufficient to hold it liable when the "alleged" product defect (failure to warn) was not the legal cause of the fire and when there was conflicting testimony amongst the various experts at trial; and (2) whether Michael D's was entitled to delay damages pursuant to Pennsylvania Rule of Civil Procedure 238. *Id.* See note 22 for the text of Rule 238. As to the first issue, the court concluded, after reviewing the lower court opinions and the record, that General Foam's argument was without merit. *Kimco*, 637 A.2d at 605. The court further concluded that arguments concerning the second issue were premature because the superior court had remanded the case to the trial court for determination as to whether, under Rule 238, delay damages were justified. *Id.*

31. *Id.* The Restatements of Law are a "series of volumes authored by the American Law Institute that tell what the law in a general area is, how it is changing, and what direction the authors (who are leading legal scholars in each field covered) think this change should take." BLACK'S LAW DICTIONARY 1313 (6th ed. 1990). Section 402A of the Restatement (Second) of Torts provides:

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

RESTATEMENT (SECOND) OF TORTS § 402A (1965).

The supreme court adopted Section 402A in Webb v. Zern, 220 A.2d 853 (Pa. 1966). *Kimco*, 637 A.2d at 606. See notes 41-45 and accompanying text for a discussion of *Webb*. Its effect on Pennsylvania's Comparative Negligence Act, Pub. L. No. 202, No. 53, § 10(89), (codified at 42 PA. CONS. STAT. § 7102 (1982 and Supp. 1994), had not yet been before the court. *Kimco*, 637 A.2d at 605.

32. *Kimco*, 637 A.2d at 606.

33. *Id.*

34. *Id.* In support of this proposition, the court cited *Kinard v. Coats Co.*, wherein the Colorado Court of Appeals determined that the policy considerations behind the establishment of the liability of manufacturer's under Section 402A strict product liability required that negligence concepts be kept out of strict product liability. *Kimco*, 637 A.2d at 605 (citing Kinard v. Coats Co., 553 P.2d 835 (Colo. App. 1976)). The court also cited the following cases in support of the proposition against allowing negligence concepts to infiltrate strict product liability actions: Roy v. Star Chopper Co., 584 F.2d 1124 (1st Cir. 1978), *cert. denied*, 440 U.S. 916 (1979) (applying Rhode Island law); Melia v. Ford Motor Co., 534 F.2d 795 (8th Cir. 1976)

was that the risk of loss for injuries caused by defective products should be borne by the suppliers, who are in better position financially to absorb any losses incurred as a cost of doing business and, if necessary, redistribute these costs to consumers in the form of price adjustments.[35] The court considered that in the present era of nationwide industry, decisions favoring the burgeoning manufacturing industries were no longer of precedential value.[36] As a result, the court concluded that the supplier must bear the risk of loss caused by a defective product without regard to fault or privity of contract.[37] The court also stated that allowing actions based upon strict liability to be defeated or recoveries reduced by negligence concepts, would lessen the deterrent effect gained by imposing strict product liability standards.[38]

Justice Flaherty, in a dissenting opinion, stated that comparative negligence concepts should be applied to product liability actions brought in accordance with Section 402A.[39] He asserted that imposing liability on product manufacturers without regard to fault would amount to an excessive burden on business enterprises to the detriment of society.[40]

The Pennsylvania Supreme Court first adopted Section 402A of the Restatement (Second) of Torts as the law of Pennsylvania in *Webb v. Zern*.[41] In *Webb*, the plaintiff was injured when a beer keg exploded.[42] The supreme court, in addressing the issue of the nature and scope of the liability in trespass[43] of those who produce and market a defective product for use or consumption, extended the law of strict liability in tort to defective products, thereby formally adopting Section 402A.[44] The court, how-

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(applying Nebraska law); Young's Machine Co. v. Long, 692 P.2d 24 (Nev. 1984); Correia v. Firestone Tire and Rubber Co., 446 N.E.2d 1033 (Mass. 1983); Seay v. Chrysler Corp., 609 P.2d 1382 (Wash. 1980); Smith v. Smith, 278 N.W.2d 155 (S.D. 1979). *Kimco*, 637 A.2d at 606.

35. *Kimco*, 637 A.2d at 606 (citing Azzarello v. Black Brothers Co., 391 A.2d 1020 (Pa. 1978)).

36. *Kimco*, 637 A.2d at 606.

37. *Id.*

38. *Id.* at 607.

39. *Id.* (Flaherty, J., dissenting).

40. *Id.*

41. 220 A.2d 853 (Pa. 1966).

42. *Webb*, 220 A.2d at 854. The plaintiff sued the distributor of the keg, the brewer who had filled the keg, and the manufacturer of the keg. *Id.*

43. An action in trespass is a "form of action brought to recover damages for any injury to one's person or property or relationship with another." BLACK'S LAW DICTIONARY 1502 (6th ed. 1990).

44. *Webb*, 220 A.2d at 854. The plaintiff, because he had no knowledge of the cause of the explosion or which party defendant was responsible, brought the action

ever, provided little explanation as to the basis of its decision to adopt Section 402A; instead, it referred to the concurring and dissenting opinions of the court's decision in *Miller v. Preitz*.[45]

Justice Jones' concurring and dissenting opinion in *Miller* provides a background of the status of product liability law in Pennsylvania preceding *Webb v. Zern*.[46] Prior to the formal adoption of Section 402A, a plaintiff injured by an alleged defective product could bring an action: (i) in assumpsit[47] based on a breach of an implied warranty or, (ii) in trespass based upon negligence.[48] In either action, the plaintiff was required to establish privity[49] and, in the case of a negligence action, the plaintiff had the difficult task of attributing specific acts of negligence to the defendant.[50]

Justice Jones, in describing the development of Pennsylvania

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based upon the theory of exclusive control. *Id.* Under this theory, where a product is shown to be under the control of the defendant or his servants and the occurrence of an accident is such that ordinarily the accident would not have occurred had proper care been taken, the occurrence of the accident provides a rebuttable presumption that the accident arose due to carelessness. BLACK'S LAW DICTIONARY 564 (6th ed. 1990) (this theory is also known as *res ipsa loquitur*). The trial court dismissed the complaint on the exclusive control theory because of the plaintiff's failure to join as defendants his father, who had purchased the keg, and brother, who had tapped the keg. *Webb*, 220 A.2d at 854. Since the recognition of Section 402A was determinative of the appeal, the supreme court did not determine whether the lower court had erred in reaching this decision. *Id.*

45. 221 A.2d 320 (Pa. 1966), *overruled by*, Kassab v. Central Soya 246 A.2d 848, 852 (Pa. 1968). In this case, the plaintiff, the administrator of the estate of a young child who died as a result of injuries sustained from a malfunctioning vaporizer-humidifier, brought an action in assumpsit contending breaches of implied warranties of merchantability against the manufacturer, distributor and retailer of the vaporizer-humidifier. *Miller*, 221 A.2d at 321-22. See note 47 for the definition of assumpsit. The court affirmed the judgment of the lower court and held that the actions against the manufacturer and distributor could not be maintained due to lack of privity of contract. *Miller*, 221 A.2d at 325. The court, however, allowed the decedent to maintain an action against the retailer without the necessity of privity. *Id.*

46. *Miller*, 221 A.2d at 328-35 (Jones, J., concurring in part and dissenting in part).

47. *Id.* at 329. Assumpsit is defined as "a common law form of action which lies for the recovery of damages for the non-performance of a parol or simple contract; or a contract that is neither of record nor under seal." BLACK'S LAW DICTIONARY 122 (6th ed. 1990).

48. *Miller*, 221 A.2d at 329 (Jones, J., concurring in part and dissenting in part).

49. *Id.* at 329, 330. Privity is composed of both horizontal and vertical privity. BLACK'S LAW DICTIONARY 1199 (6th ed. 1990). Horizontal privity is defined as referring to "those who are not in the distributive chain of a product but who, nonetheless, use the product and retain a relationship with the purchaser, such as a member of the purchaser's family." *Id.* Vertical privity "refers to the relationship between those who are in the distributive chain of a product." *Id.* at 1200.

50. *Miller*, 221 A.2d at 330 (Jones, J., concurring in part and dissenting in part).

liability law, stated that following the decision in *MacPherson v. Buick Motor Co*,[51] Pennsylvania, along with the rest of the nation, abolished the requirement of privity in a negligence action.[52] In an action based upon assumpsit, however, the requirement of both horizontal and vertical privity remained.[53] As a result of the privity requirement, the liability of a manufacturer in a breach of warranty action was limited to his immediate vendee who, generally, was a retailer who resold the product to the consumer.[54] This retailer was normally only liable to the actual purchaser and not to subsequent users of the product.[55]

Justice Jones recommended the elimination of the privity requirement, the adoption of Section 402A, and that trespass should be the basis of all future product liability actions.[56] He proffered that the adoption of Section 402A would serve the purpose of protecting the consumer by forcing the manufacturers to assume the financial responsibility for all injuries caused by their products.[57]

In *Berkebile v. Brantly Helicopter Co.*,[58] the Pennsylvania Supreme Court provided additional discussion on the development of product liability law.[59] In *Berkebile*, the plaintiff's husband was a pilot who was killed in a helicopter accident.[60] The plaintiff brought wrongful death and survival actions[61] against the manufacturer of the helicopter based upon strict product liability under Section 402A.[62] The defendant contended that the helicopter was not defective and that the accident was caused by the victim's failure to activate the emergency equipment installed on the helicopter and the victim's negligent oper-

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51. 111 N.E. 1050 (N.Y. 1916). *MacPherson* is the seminal opinion written by Judge Cardozo eliminating the requirement of privity in negligence actions. *See MacPherson*, 111 N.E. at 1053.

52. *Miller*, 221 A.2d at 329 (Jones, J., concurring in part and dissenting in part).

53. *Id.* at 330.

54. *Id.* at 332.

55. *Id.* at 332-33.

56. *Id.* at 333.

57. *Miller*, 221 A.2d at 334 (Jones, J., concurring in part and dissenting in part).

58. 337 A.2d 893 (Pa. 1975).

59. *Berkebile*, 337 A.2d at 898.

60. *Id.* at 897.

61. *Id.* A wrongful death action is defined as a "lawsuit brought on behalf of a deceased person's beneficiaries that alleges that death was attributable to the willful or negligent act of another." BLACK'S LAW DICTIONARY 1612 (6th ed. 1990). This is distinguished from a survival action, which is an action "for personal injuries which by statute survives death of [the] injured person." *Id.* at 1446.

62. *Berkebile*, 337 A.2d at 897.

ation of the helicopter.[63] The supreme court affirmed the superior court's reversal of the trial court and held for the plaintiff.[64] The court opined that contributory negligence was not a viable defense in a strict product liability action and that to allow the introduction of an assessment of the seller's or the user's actions would undermine the policy considerations supporting the idea that the manufacturer should guarantee the safety of its product.[65]

The court found that these policy considerations were a result of the increasing complexity inherent in the relationship between the seller and the ultimate user of a product.[66] As a result of intricate manufacturing and distribution processes, the plaintiff incurred the arduous burden of proving negligence on the part of the seller.[67] This task could be insurmountable,[68] and the court recognized that changing societal concerns dictated that a seller should be held liable for the injuries caused by his defective products.[69] The supreme court, therefore, reiterated the holding in *Webb* that the seller of a product was liable for injury caused by his defective product regardless of the fact that he had exercised due care in the manufacture, design and distribution of the product.[70]

In *McCown v. International Harvester Co.*,[71] the Pennsylvania Supreme Court further expounded upon its explanation of the policy considerations behind the acceptance of Section 402A.[72] *McCown* involved a plaintiff who was injured while driving a tractor manufactured by the defendant.[73] The defendant argued that the plaintiff's contributory negligence in colliding with a guardrail should have been taken into consideration

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63. *Id.* at 897-98. The helicopter allegedly ran out of fuel. *Id.*

64. *Id.* at 897.

65. *Id.* at 900.

66. *Id.* at 898.

67. *Berkebile*, 337 A.2d at 898.

68. *Id.* The difficulty in proving negligence arose as a result of the increasingly tangled array of manufacturers and distributors that came between the final purchaser and the initial manufacturer of a product. *Id.* As more and more individuals came in contact with a product, it became difficult for the injured consumer to establish causation. *Id.*

69. *Id. See* RESTATEMENT (SECOND) OF TORTS § 402A cmt. c (1965).

70. *Berkebile*, 337 A.2d at 899.

71. 342 A.2d 381 (Pa. 1975).

72. *McCown*, 342 A.2d at 382.

73. *Id.* at 381. While driving the tractor, the plaintiff struck a guardrail causing the steering wheel to change direction rapidly. *Id.* The spinning wheel's spokes struck the plaintiff's arm, resulting in injuries. *Id.* The force and speed of the counter rotation were determined to have resulted from a defect in the design of the steering system. *Id.* at 381-82.

when determining the extent of the plaintiff's ability to recover damages.[74] The court rejected this contention and held that contributory negligence should not be used as a defense in a product liability action.[75] It reasoned that to do so would serve to eliminate a "theoretical basis" relied on by the court in adopting Section 402A.[76] This "theoretical basis" was that by placing a product on the market, the manufacturer tacitly asserted that its product was safe when used as proscribed, and a consumer could reasonably rely on this assertion when using the product.[77] The court further reasoned that if contributory negligence were allowed to permeate the strict product liability field, the consumer's presumption of safety would be contradicted.[78]

In *Azzarello v. Black Brothers Co.*,[79] a decision echoing and expanding upon *Berkebile* and *McCown*, the supreme court reaffirmed its position that negligence concepts should not be applied to a strict product liability action.[80] In *Azzarello*, the plaintiff was injured when his hand was caught in a machine manufactured by the defendant.[81] The plaintiff subsequently brought an action under Section 402A.[82] The defendant joined the plaintiff's employer and asserted that the negligence of the employer was a factor in bringing about the employee's injuries.[83] At trial, the employer was found liable while the manufacturer[84] was relieved of liability for the plaintiff's injuries.[85] The plaintiff, in appealing the decision, argued that the trial judge's instructions to the jury constituted error because, though the term is delineated in Section 402A, the instructions improperly required the plaintiff to prove that the machine was "unreasonably dangerous."[86] The supreme court affirmed the decision of the superior court and expounded upon its decision in *Berkebile* regarding the "unreasonably dangerous" charge.[87]

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74. *Id.* at 382.
75. *Id.*
76. *Id.*
77. *McCown*, 342 A.2d at 382.
78. *Id.*
79. 391 A.2d 1020 (Pa. 1978).
80. *Azzarello*, 391 A.2d at 1023.
81. *Id.* at 1022.
82. *Id.*
83. *Id.*
84. *Id.* The manufacturer was the defendant in this case. *Id.*
85. *Azzarello*, 391 A.2d at 1022.
86. *Id.* The superior court granted the motion for a new trial stating that, in light of the supreme court's decision in *Berkebile*, using the phrase "unreasonably dangerous" in charging the jury with respect to the manufacturer's liability constituted the requirement of a grant of a new trial. *Id.* at 1023.
87. *Id.*

In examining the propriety of a charge to the jury requiring the product to be "unreasonably dangerous," the supreme court narrowed the issue to whether a charge invoking this requirement constituted the introduction of negligence concepts into a strict product liability action.[88] The supreme court concluded that use of the term "unreasonably dangerous" would result in the introduction of negligence concepts, and endorsed an alternate charge to be given to a jury which eliminated the use of the term.[89]

While the Pennsylvania Supreme Court has continued to adamantly oppose the introduction of negligence concepts into strict product liability actions, other courts around the country have been less hesitant to do so.[90] The California Supreme Court, in *Daly v. General Motors Corporation*,[91] reached a result contrary to the position taken by the Pennsylvania Supreme Court.

In *Daly*, the driver of an automobile was killed when his door inadvertently opened after the car collided with a fence.[92] The plaintiffs brought an action against the manufacturer of the automobile under strict product liability asserting that the design of the door latch was defective and the resulting defect caused the decedent's death.[93]

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88. *Id.* at 1025.

89. *Id.* at 1027. The charge proffered by the court emanated from the court's Committee for Proposed Standard Jury Instructions, Civil Instruction Subcommittee, which provides:

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

Id. at 1027 n.12 (quoting PENNSYLVANIA STANDARD JURY INSTRUCTION 8.02 (CIVIL), SUBCOMMITTEE DRAFT (June 6, 1976)).

90. *Kimco*, 637 A.2d at 606. *See, e.g.*, Coney v. J. L. G. Industries, Inc., 454 N.E.2d 197 (Ill. 1983) (holding that comparative negligence principles could be applied in product liability actions); Sandford v. Chevrolet Division of General Motors Corporation, 642 P.2d 624 (Or. 1982) (holding that the negligence of a driver injured in an auto accident could be used to limit her recovery, in a strict product liability action against a tire manufacturer and tire seller).

91. 575 P.2d 1162 (Cal. 1978).

92. *Daly*, 575 P.2d at 1164. The plaintiffs in this case were the widow and children of the driver who was killed as a result of the automobile accident. *Id.* Evidence was established at trial that had the victim not been ejected from the car he would likely have sustained only minor injuries. *Id.* at 1164-65.

93. *Id.* at 1164. The plaintiffs also sued several other companies in the "manufacturing and distribution chain." *Id.* The defendants introduced evidence demonstrat-

The California Supreme Court determined that the outcome of the case rested on the issue of whether comparative negligence principles should be used to diminish the defendant's liability in a strict product liability action.[94] In resolving this issue, the court examined policy arguments that had been made by those courts that prefer to maintain an impregnable wall between negligence and strict product liability concepts.[95]

After examining the history of strict product liability actions, the court considered the contention that the concepts of negligence and strict liability were so diametrically opposed that a merging of the two concepts would be a conceptual error.[96] In dismissing this argument, the court reasoned that product liability actions should not be restricted by a distinction based on a fixed definition of legal concepts, but instead should be allowed to evolve in order to achieve a result that provides for fairness to both the defendant and the plaintiff.[97] Furthermore, the court asserted that comparative negligence entailed a merger of the contributory negligence defense[98] and the defense of assumption of the risk.[99]

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ing the availability of and the victim's failure to use a "seat belt-shoulder harness system" and a door lock, contending that had one or both been employed by the victim, he would have remained in the vehicle. *Id.* at 1165. In addition, the defendants admitted evidence that, at the time the incident occurred, the victim was intoxicated. *Id.* The defendants prevailed at trial and the plaintiffs' appealed the decision asserting that the evidence of the victim's non-use of the safety equipment and his alleged intoxication were improperly presented to the jury. *Id.*

94. *Id.* at 1165.

95. *Id.* at 1166. The California Supreme Court first examined the history of strict product liability actions and noted that its decision in *Greenman v. Yuba Power Products, Inc.*, was one of the first to sanction the strict product liability action and that the principles elicited in *Greenman* were embodied in Section 402A. *Id.* (citing Greenman v. Yuba Power Products, Inc., 377 P.2d 897 (Cal. 1963)). The court stated that the principles behind the decision in *Greenman* were primarily the need to protect consumers and the inadequacies inherent in negligence and warranty actions. *Daly*, 575 P.2d at 1166. Furthermore, the court reiterated its avowed purpose in deciding *Greenman* which was "to insure that the costs of injuries resulting from defective products are borne by the manufacturer that put such products on the market rather than by the injured persons who are powerless to protect themselves." *Id.*

96. *Id.* at 1167.

97. *Daly*, 575 P.2d at 1167.

98. *Id.* Contributory negligence was formerly thought to be unjust to the plaintiff because of its "all or nothing" results. *Id.*

99. *Id.* The court elaborated on this idea in providing the following explanation:

> As for assumption of the risk, we have recognized in this state that this defense overlaps that of contributory negligence to some extent. That in one kind of situation . . . where a plaintiff unreasonably undertakes to encounter a specific known risk imposed by the defendant's negligence, plaintiff's conduct, although he may encounter that risk in a prudent manner, is in reality a

The court also noted that in an action asserting both the negligence and strict liability of a manufacturer, a plaintiff who assumed the risk of his conduct would be unable to recover in the strict liability action.[100] The plaintiff's same conduct, however, would only limit his award in a negligence action.[101] A plaintiff, therefore, by suing in strict liability would be deprived of a remedy to which he would be entitled in a negligence action.[102] One of the purposes of the establishment of strict liability, freeing the plaintiff from difficulties involved in pursuing negligence and warranty actions, would be defeated.[103] The court opined that this unjust result could only be obviated by applying comparative negligence principles to strict liability actions and abandoning the defense of assumption of the risk.[104] The defenses, therefore, to both strict liability and negligence actions would be given similar treatment.[105]

The court then examined whether the effect of recognizing comparative negligence principles in strict liability actions would discourage manufacturers from developing safer products.[106] In concluding that it would not result in this form of impropriety, the court pointed to the fact that the manufacturer's liability was not extinguished by the merging of these concepts, it was only mitigated to the extent of the plaintiff's negligence.[107] The court reasoned that a manufacturer could never assume that a particular plaintiff would in fact be negligent.[108] Consequently,

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form of contributory negligence. We think it clear that adoption of a system of comparative negligence should entail the merger of the defense of assumption of the risk into the general scheme of assessment of liability in proportion to fault in those particular cases in which the form of assumption of risk involved is no more than a variant of contributory negligence.

Id.

100. *Id.* at 1169. This is as a result of assumption of the risk being an affirmative defense in a strict liability action.

101. *Id.*

102. *Daly*, 575 P.2d at 1169.

103. *Id.*

104. *Id.* at 1169-70.

105. *Id.* The court next examined the policy of holding the manufacturers strictly liable in order to allocate the costs of injuries to the manufacturers, who are best able to sustain the costs and pass them on to their customers. *Id.* at 1168-69. The court reasoned that this policy would not be defeated by the introduction of comparative negligence concepts into strict liability actions. *Id.* at 1169. The costs for injuries sustained due to a defective product, while reduced by the negligence attributed to the victim, would remain the responsibility of the manufacturer. *Id.* Requiring the costs attributable to the victim's conduct to be placed totally upon the manufacturer would put an unjust burden upon the rest of society. *Id.*

106. *Id.* at 1169.

107. *Daly*, 575 P.2d at 1169.

108. *Id.*

a manufacturer would continue to be exposed to complete liability and thus, the production of safer products would remain a paramount consideration in product development.[109] Therefore, the California Supreme Court held that there were no policy considerations sufficient to overcome the "substantial justice" that would result by the introduction of comparative negligence principles into strict product liability actions.[110]

In *Murray v. Fairbanks Morse*,[111] the Third Circuit Court of Appeals, applying Virgin Islands law, also addressed the issue of whether comparative negligence principles should be applied to a strict product liability action.[112] In *Murray*, the plaintiff was injured when a portion of a control panel collapsed and caused him to fall ten feet onto a concrete floor.[113] The plaintiff brought an action against the manufacturer of the panel under both Section 402A strict product liability and negligence.[114]

In affirming the district court's decision to reduce the plaintiff's award in accordance with the jury's determination of fault, the Third Circuit opined that the difficulty in applying comparative negligence principles to Section 402A actions was that the defendant's conduct was not at issue.[115] It reasoned that a jury, in reaching its verdict, could not compare the defendant's conduct and the faulty conduct of the plaintiff.[116] To solve this anomaly, the court asserted that a comparison should instead be based upon each party's "causative contribution" to the harmful incident.[117] The court contended that the damages should be based upon a determination of the amount of the injury attributable to the defect and the amount attributable to the plaintiff's conduct.[118] The court held that applying com-

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109. *Id.*

110. *Id.* at 1172. The court did, however, reverse the lower court and find that the evidence of the victim's intoxication and failure to utilize safety devices was improperly admitted. *Id.* at 1174.

111. 610 F.2d 149 (3d Cir. 1979).

112. *Murray*, 610 F.2d at 150.

113. *Id.* at 151.

114. *Id.* The jury found the manufacturer liable for the plaintiff's injuries. *Id.* However, in answering special interrogatories, the jury determined that the plaintiff's negligence proximately caused his injuries and that he was five percent at fault. *Id.* at 150. The trial court entered judgment for the plaintiff but reduced his award in accord with the jury's determination of fault. *Id.* The plaintiff appealed the decision asserting that it was error to allow the plaintiff's negligence to reduce an award grounded on Section 402A. *Id.* The Third Circuit, therefore, affirmed the district court's decision. *Id.*

115. *Id.* at 159.

116. *Id.*

117. *Murray*, 610 F.2d at 159.

118. *Id.* The court discussed the procedure that should be used in applying this

parative negligence principles in strict liability actions would result in a fairer distribution of the costs of injuries caused by defective products.[119]

Similarly, in *Coney v. J.L.G. Industries, Inc.*,[120] the Illinois Supreme Court examined whether comparative negligence principles could be applied to strict product liability actions.[121] In *Coney*, the administrator of the decedent's estate brought wrongful death and survival actions (grounded upon strict product liability) against the manufacturer of a hydraulic aerial work platform.[122] The trial court refused to allow the defendant to assert the comparative negligence of the decedent and his employer as a defense.[123] On appeal, the supreme court considered the issue of whether comparative negligence principles could be introduced in strict product liability actions.[124]

The Illinois Supreme Court held that in an action where damages are caused by both a defective product and a plaintiff's malfeasance, comparative fault should be used to discount the plaintiff's award by the amount that his actions contributed to the injuries.[125] The court also eliminated the defenses of misuse and assumption of the risk in strict product liability actions.[126]

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system of "comparative causation." *Id.* at 160. First, the court explained that the jury should separately determine whether the product defect and the plaintiff's conduct were each a "cause in fact" of the resulting injury. *Id.* A "cause in fact" is "[t]hat particular cause which produces an event and without which the event would not have occurred." BLACK'S LAW DICTIONARY 221 (6th ed. 1990). If the conduct of both parties was determined to be a "cause in fact" of the injury, then the jury should consider whether their actions were a "proximate cause" of the injury. *Murray*, 610 F.2d at 160. "Proximate cause" is defined as "that which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury and without which the accident could not have happened, if the injury be one which might be reasonably anticipated or foreseen as a natural consequence of the wrongful act." BLACK'S LAW DICTIONARY 1225 (6th ed. 1990). Upon concluding that the product defect was both a "cause in fact" and a "proximate cause" of the injury, the defendant is strictly liable. *Murray*, 610 F.2d at 160. However, if the jury also determined that the plaintiff's actions were both a "cause in fact" and a "proximate cause" of the injury, the award would be reduced accordingly. *Id.*

119. *Murray*, 610 F.2d at 162.

120. 454 N.E.2d 197 (Ill. 1983).

121. *Coney*, 454 N.E.2d at 199.

122. *Id.*

123. *Id.* The trial court certified three questions for appeal as designated by Illinois rules of procedure. *Id.* The Illinois Supreme Court granted defendant leave to appeal and thereby addressed the three certified questions, the following of which is pertinent to the foregoing discussion: "[w]hether the doctrine of comparative negligence or fault is applicable to actions or claims seeking recovery under products liability or strict liability in tort theories." *Id.*

124. *Id.*

125. *Id.* at 204.

126. *Coney*, 454 N.E.2d at 204. In reaching this decision, the court, echoing *Daly*, stated that the use of comparative negligence principles in strict product liabil-

The Pennsylvania Supreme Court has remained steadfast in its refusal to follow the majority of other jurisdictions in allowing the application of comparative negligence principles to strict product liability actions. The thrust of the court's refusal appears to be centered on the conceptual difficulties encountered by "extend[ing] negligence concepts to the area of [Section] 402A strict product liability."[127] This difficulty, however, may be alleviated by replacing the word "negligence" with the term "causation," as in the cases that have applied comparative negligence concepts to strict liability actions. This concept of determining causation is not foreign to a strict liability action in Pennsylvania. As discussed in *Berkebile*, a plaintiff must prove the defect was a proximate cause of the resulting injuries.[128] Furthermore, as the superior court pointed out in *Kimco*, in failure to warn cases the manufacturer's liability is determined through the use of negligence concepts.[129] Implicitly, there is already some application of negligence concepts in strict product liability actions. Thus, "extending negligence concepts" into strict product liability actions is not as great a leap as the supreme court appears to believe.

The better view, therefore, would be to apply comparative negligence concepts in the form of comparative causation or fault, to strict product liability actions as asserted by the Court of Appeals for the Third Circuit in *Murray*.[130] The jury would examine the causative contribution of each party. Upon determining that the manufacturer's defect was both a cause in fact and a proximate cause of the injury, the jury should then exam-

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ity actions would not affect the policy basis behind the concept of strict product liability. *Id.* at 202. The plaintiff remained free from the requirements of proving the manufacturer's negligence or establishing privity. *Id.* The court also maintained that the manufacturer remained strictly liable thereby sustaining the incentive to produce safe products. *Id.* The court, however, charged that the plaintiff would be responsible for that portion of damages resulting from his own misconduct. *Id.*

127. *Kimco*, 637 A.2d at 606.

128. *Berkebile*, 337 A.2d at 901. See notes 58-70 and accompanying text.

129. Remy v. Michael D's Carpet Outlet, 571 A.2d 446, 451 (Pa. Super. 1990), *aff'd sub. nom.* Kimco Development Corp. v. Michael D's Carpet Outlet, 637 A.2d 603 (1993). The court stated that:

> Notwithstanding what some courts have said, in establishing this ground of recovery, the plaintiff in most states must prove negligence in the failure to warn properly. There will be no liability in these cases without a showing that the defendant knew or should have known of the risk or hazard about which he failed to warn. Moreover, there will be no liability unless the seller or manufacturer failed to take the precautions that a reasonable person would take in presenting the product to the public.

Remy, 571 A.2d at 451.

130. See notes 111-19 and accompanying text for a discussion of *Murray*.

ine the plaintiff's conduct. If the plaintiff's conduct is also both a cause in fact and a proximate cause of the injury, the award should be reduced accordingly. In addition, the defense of assumption of the risk should be eliminated and a plaintiff's contributory negligence should only be used to diminish a plaintiff's recovery.

Failure to take this course of action and apply comparative negligence concepts to strict liability actions would lead to unjust decisions, as was argued by the defendant in *Coney*.[131] The argument made in *Coney*, similar to that discussed by the court in *Daly*, was that maintaining a comparative negligence system exclusive from actions founded upon strict liability can lead to rather absurd results.[132] In a negligence and strict liability action against a manufacturer, for example, a plaintiff who assumed the risk of his conduct would be able to recover in the negligence action; however, the same plaintiff would be barred from any recovery in a strict liability action.[133] In addition, were the plaintiff merely contributorily negligent, his award under the strict liability action would be intact, while his negligence award would be reduced accordingly.[134]

Pennsylvania, which allows the defense of assumption of the risk in strict liability actions[135] and does not allow comparative negligence concepts in strict liability actions, remains susceptible to this type of a result. This outcome defeats one of the purposes for the development of Section 402A.[136] A plaintiff, who assumes the risk and is injured by a manufacturer's product, would be forced to pursue a negligence action and not an action based on strict product liability. The plaintiff would then be confronted with the difficulties inherent in bringing negligence actions; difficulties which precipitated the development of strict product liability in the first place.[137]

The policy considerations underlying the Pennsylvania Supreme Court's decision in *Kimco*, will not be adversely affected by applying comparative negligence principles to strict product liability actions. The policy of placing the costs of injuries upon the manufacturers who can absorb and redistribute the costs will remain in effect. The plaintiff's recovery will only be dimin-

131. Coney v. J.L.G. Industries, 454 N.E.2d 197, 200 (Ill. 1983).

132. *Coney*, 454 N.E.2d at 200. See notes 100-04 and accompanying text for the *Daly* court's discussion of the possible unjust results.

133. *Coney*, 454 N.E.2d at 200.

134. *Id.*

135. *Berkebile*, 337 A.2d at 901.

136. *See Daly*, 575 P.2d at 1169.

137. *Id.*

ished by that portion for which he is deemed responsible. The court in *Murray* examined a flaw in the policy of requiring the manufacturer to bear all of the costs of the resultant injury.[138] In failing to consider the plaintiff's conduct, the manufacturer is forced to pay for losses due to both the defective product and the plaintiff's conduct.[139] As a result, the public is forced to pay an "artificially inflated" cost for the product, which is an inaccurate depiction of the risk involved in using the product.[140] As a result of the inflated cost, consumers may opt to purchase inferior, less reliable products.[141] This would undermine the consumer's presumption of safety, which was an additional policy consideration advanced by the Pennsylvania Supreme Court in *McCown*.[142]

The policy consideration of lessening the manufacturer's incentive to produce safer products will also not be undermined, as pointed out in *Daly*.[143] The manufacturer is not absolved of liability when comparative negligence concepts are applied to strict liability actions; instead, its liability is merely lessened to the extent of the plaintiff's negligent conduct.[144] Because it could never assume a plaintiff's negligence, the manufacturer would remain exposed to full liability and the incentive to produce safe products would remain.[145]

The policy considerations which the Pennsylvania Supreme Court has so dutifully held onto as a basis for its refusal to allow comparative negligence concepts to apply to strict product liability actions will not be threatened. Therefore, there remains little basis for not allowing comparative negligence concepts to apply to strict liability actions. However, because the Pennsylvania Supreme Court remains adamant in its stance against applying comparative negligence principles to strict product liability actions, any change in this area will likely require legislative action. This would not be unprecedented as this has been done in other states whose courts have been opposed to this concept.[146]

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138. *Murray*, 610 F.2d at 161.
139. *Id.*
140. *Id.*
141. *Id.*
142. *See McCown*, 342 A.2d at 382.
143. *Daly*, 575 P.2d at 1169.
144. *Id.*
145. *Id.* See notes 106-10 and accompanying text for the *Daly* court's discussion of negligence principles discouraging manufacturers from developing safer products.
146. The Illinois Supreme Court in *Coney* discussed an example of this which occurred in Colorado. *Coney*, 454 N.E.2d at 202. In *Kinard*, the Colorado Court of Appeals had declined to allow comparative negligence concepts to apply to strict lia-

In conclusion, the application of comparative negligence principles to strict product liability actions is arguably the most equitable way to apportion costs between manufacturers, injured parties and society. Until the Pennsylvania legislature enacts a measure applying comparative negligence principles to strict product liability actions, this author believes that the consumer will ultimately bear the burden of the current system in the form of increased prices.

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bility actions. Kinard v. Coats Co., 553 P.2d 835, 838 (Colo. App. 1976). Subsequently, the Colorado legislature enacted a comparative fault provision in Colorado's product liability statute, which, in the opinion of the court in *Coney*, rendered the *Kinard* case of "little precedential value." *Coney*, 454 N.E.2d at 202.