PennState Dickinson Law

DICKINSON LAW REVIEW
PUBLISHED SINCE 1897

Volume 89
Issue 4 *Dickinson Law Review - Volume 89, 1984-1985*

6-1-1985

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Recommended Citation

Todd P. Leff & Joseph V. Pinto, *Comparative Negligence in Strict Products Liability: The Courts Render the Final Judgment*, 89 DICK. L. REV. 915 (1985).
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Comparative Negligence in Strict Products Liability: The Courts Render the Final Judgment

Todd P. Leff*
Joseph V. Pinto**

I. Introduction

In the last fifteen years there has been extraordinary growth in both the conceptual development of strict products liability and the number of cases filed.[1] Mirroring that development has been the equally noteworthy acceptance of comparative negligence in a majority of jurisdictions.[2] Until the mid 1970's strict products liability and comparative negligence developed on separate planes with minimal interaction. After a few early decisions considered the applicability of comparative negligence in strict liability, however, there followed a multitude of comment discussing the propriety of intermingling these concepts.[3]

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1. In fiscal year 1974 there were 1,579 products liability cases filed in the federal courts. 1974 Ann. Rep. of the Dir. of the Administrative Office of the U.S. Courts 240. This figure increased tremendously by fiscal year 1979 with 6,132 products liability cases being filed. 1979 Ann. Rep. of the Administrative Office of the U.S. Courts 227. The 1979 figure represented a 288% increase over the 1974 figure. *Id.* The figures for fiscal year 1983 illustrate another dramatic increase with 9,221 products liability cases being filed that year. 1983 Ann. Rep. of the Administrative Office of the U.S. Courts 129. Not only has the number of cases increased, but also, the cost. Product cases now account for more million-dollar judgments than any other litigation. The average judgment in a products case has risen from $220,000 in 1972 to over $800,000 in 1981. West, *Mass Products Litigation Strains Court, Parties*, LITIGATION NEWS, Spring 1984, at 1.

2. *See infra* notes 21 and 22 for states adopting comparative negligence.

3. *See, e.g.*, Brewster, *Comparative Negligence in Strict Liability Cases*, 42 J. AIR L. 107 (1976); Feinberg, *The Applicability of a Comparative Negligence Defense in a Strict Liability Suit Based on § 402A of the Restatement of Torts 2D*, 42 INS. COUNS. J. 39 (1975); Kroll, *Comparative Fault: A New Generation in Products Liability*, 1977 INS. L.J. 492 (No. 655, Aug. 1977); Levine, *Strict Products Liability and Comparative Negligence: The Collision of Fault and No-Fault*, 14 SAN DIEGO L. REV. 337 (1977); Robinson, *Square Pegs*

Now that the theoretical smoke has cleared and a majority of jurisdictions have considered the arguments presented by the commentaries and litigants, it is necessary to examine those decisions as the final word on whether, and how, comparative principles will be applied in strict liability.[4] This review is particularly important for practitioners in jurisdictions such as Pennsylvania, where no appellate court has squarely considered the issue. Rather than constructing tenuous arguments from the dearth of caselaw and statutory comment in these undecided jurisdictions, it would be more persuasive to demonstrate that the objections to applying comparative principles in strict liability have been reconciled by a majority of courts.

The principal purpose of this article will be to examine the decisions meeting such objections and discuss the analysis employed. The decisions go beyond the semantical and theoretical boundaries espoused by some commentators and instead provide a fully evolved theory of strict products liability. By merging comparative negligence and strict liability the courts have preserved the purposes of products liability while assuring that the reparation system is not bankrupted by imposing the entire economic loss of an accident on the manufacturer.[5]

This article will also examine the practical considerations that are presented to courts once they make the theoretical hurdle and decide to apply comparative negligence in strict liability. One such issue is whether a court should apply pure comparative negligence in strict liability even where a statute mandates application of a modified comparative negligence system. Another important practical consideration is whether comparative negligence should only apply to specific types of user misconduct. These practical problems are no less important than the theoretical debate which preceded them. By limiting the applicability of comparative negligence in strict liability to certain types of misconduct, the courts may defeat the equitable

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(Products Liability) In Round Holes (Comparative Negligence), 52 STATE BAR J. 16 (1977); Schwartz, *Strict Liability and Comparative Negligence*, 42 TENN. L. REV. 171 (1974); Twerski, *The Many Faces of Misuse: An Inquiry into the Emerging Doctrine of Comparative Causation*, 29 MERCER L. REV. 403 (1978); Wade, *Products Liability and Plaintiff's Fault—The Uniform Comparative Fault Act*, 29 MERCER L. REV. 373 (1978).

4. Although these authors prefer the term "comparative responsibility," *see* Pinto, *Comparative Responsibility—An Idea Whose Time has Come*, 45 INS. COUNS. J. 115 (1978), it is not necessary to belabor semantics. Whether the concept is termed "comparative negligence," "comparative fault," "comparative causation" or "comparative responsibility," the underlying rationale is the same. All of these terms connote some examination of the plaintiff's conduct in causing the injury and a reduction of the award for that conduct. For convenience sake the concept will be referred to as comparative negligence throughout this article.

5. Members of the business community have pointed out that products liability as it has developed threatens the viability of many companies and even whole industries. Understandably, the business community has been in favor of comparative negligence in products liability. *See* Malott, *Let's Restore Balance to Product Liability Law*, May-June 1983 HARV. BUS. REV. 67, 71. *See also* West, *supra* note 1, at 15.

loss allocation that comparative negligence seeks to achieve.

II. Historical Development

Until the 1970's strict products liability developed autonomously from comparative negligence. The basis for the growth in products liability litigation is the California Supreme Court decision in *Greenman v. Yuba Power Products, Inc.*[6] and the subsequent adoption of that holding by the American Law Institute in Section 402A of the Restatement (Second) of Torts.[7] The doctrine of strict liability set forth in *Greenman* was originally espoused by Justice Traynor in his concurring opinion in *Escola v. Coca-Cola Bottling Co.*[8] Although the emphasis of Justice Traynor's opinion was that manufacturers should be strictly liable, he also noted that liability should be determined by examining the "safety of the product in normal and proper use."[9]

As strict products liability has developed, however, any serious consideration of the plaintiff's use of the product has been foreclosed. A majority of jurisdictions interpreting the Comments to the Restatement language[10] have found that contributory negligence is not a defense in product litigation.[11] Most courts have held that the only defenses based on the user's conduct are abnormal misuse and assumption of risk.[12] Thus, the manufacturer is liable unless some exigent circumstance, more weighty than user conduct, justifies shifting

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6. 59 Cal. 2d 21, 27 Cal. Rptr. 697, 377 P.2d 897 (1962).

7. RESTATEMENT (SECOND) OF TORTS § 402A [hereinafter § 402A] provides:

Special liability of harm of product for physical harm to user or consumer.

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

8. 24 Cal. 2d 453, 150 P.2d 436 (1944) (Traynor, J., concurring).

9. *Id.* at 468, 150 P.2d at 444.

10. Comment (n) to § 402A provides that, "contributory negligence of the plaintiff is not a defense when such negligence consists merely in the failure to discover the defect in the product, or to guard against the possibility of its existence."

11. Although Comment (n) only appears to apply when the plaintiff fails to discover the defect or guard against the possibility of its existence, a great majority of jurisdictions have extended the bar to include contributory negligence that amounts to a failure to exercise ordinary care for one's own safety. *See, e.g.*, Annot., 46 A.L.R.3d 240 (1972). The extension of Comment (n) to a failure to exercise due care for personal safety appears unjustified and is not supported by the language of the Restatement. *Compare* Dazenko v. James Hunter Machine Co., 393 F.2d 287 (7th Cir. 1968) *with* Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 261 NE.2d 305 (1970).

12. *See* Keeton, *Products Liability and Defenses — Intervening Misconduct*, 15 FORUM 109, 115 (1979); Noel, *Defective Products: Abnormal Use, Contributory Negligence and Assumption of Risk*, 25 VAND. L. REV. 93, 95 (1972).

the risk from manufacturer to consumer.

The defense of abnormal misuse exemplifies that rationale. A consumer may misuse a product and a defense will arise only if the use was not "reasonably foreseeable by the seller."[13] When a consumer does abnormally misuse a product, no defect is proven, and the manufacturer has not breached a duty to the user.[14] In practice, however, the defense has been difficult to assert since the distinction between foreseeable misuse and unforeseeable misuse is often elusive[15] and because almost any misuse can be deemed "foreseeable."[16]

The only other available defense based on user conduct is assumption of risk. To establish an assumption of risk defense, the manufacturer must prove that the user "voluntarily and unreasonably proceeded to encounter a known danger."[17] This inquiry turns on the plaintiff's subjective knowledge.[18] The assumption of risk defense has also proven difficult to apply in practice since a plaintiff will rarely admit to knowledge of the particular danger prior to the injury.[19]

The constriction of defenses based on the user's conduct represented a judicially determined public policy, when faced with the issue of allowing no recovery or holding the manufacturer solely liable, of placing the entire loss from injury caused by a defective product on the manufacturer. The harshness of contributory negligence as an "all or nothing" rule[20] was the primary reason why user conduct was

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13. *See, e.g.*, Trust Corp. of Montana v. Piper Aircraft Corp., 506 F. Supp. 1093 (D. Mont. 1981); Roberts v. May, 41 Colo. App. 82, 583 P.2d 305 (1978); Magic Chef, Inc. v. Sibley, 546 S.W.2d 851 (Tex. Cir. App. 1977). Courts which refuse to apply comparative negligence in strict liability claiming that the rationales are conceptually incompatible are thus placed in a hypocritical situation. The manufacturer's foreseeability is a negligence concept based on reasonableness. *See* Lancaster v. Jeffrey Galion, Inc., 77 Ill. App. 3d 819, 33 Ill. Dec. 259, 396 N.E.2d 648 (1979); Greiner v. Volkswagenwerk, A.G., 540 F.2d 85 (3d Cir. 1976). The user's conduct in an abnormal misuse case has also been labeled in negligence terms, a form of gross negligence, which if committed by a third party would be a superseding cause. *See* Keeton, *supra* note 10, at 115. Therefore, no matter how doctrinaire some courts may claim to be, negligence and strict liability concepts have been intermeshed as products liability has developed.

14. Schwartz, *supra* note 3, at 172.

15. *See, e.g.*, Schwartz, *supra* note 3, at 173; Noel, *supra*, note 3, at 96.

16. For example, because in a past accident a person drove a car off a bridge into a river, such an accident may be deemed foreseeable, but it would be unconscionable to require a manufacturer to produce a car that floats. *See* Dreisonstok v. Volkswagenwerk, A.G., 489 F.2d 1066, 1070-71 (4th Cir. 1974).

17. RESTATEMENT (SECOND) OF TORTS § 402A, Comment (n). *See also* Thomas v. Kaiser Agricultural Chemicals, 81 Ill. 2d 206, 40 Ill. Dec. 801, 407 N.E.2d 32 (1980); Hamilton v. Motor Coach Indus. Inc., 569 S.W.2d 571 (Tex. Civ. App. 1978).

18. *See* Clark v. Crane Carrier Co., 69 Ill. App. 3d 514, 26 Ill. Dec. 41, 387 N.E.2d 871 (1979); Berkebile v. Brantly Helicopter Corp., 462 Pa. 83, 397 A.2d 893 (1975).

19. The courts have also gone to great lengths to hinder the assertion of this defense. *See* Dorsey v. Yoder Co., 331 F. Supp. 753 (E.D. Pa. 1971), *aff'd*, 474 F.2d 1339 (3d Cir. 1973) (even though plaintiff knew about the existence of a danger and although he voluntarily put his hands on the dangerous article, he may not have appreciated the risk of his action). *See also* Thomas v. American Cystoscope Makers, Inc., 414 F. Supp. 255 (E.D. Pa. 1976).

20. *See* Schwartz, *supra* note 3, at 177; Noel, *supra* note 10, at 111.

not available as a defense as strict product liability developed. Admittedly, such a complete bar would impinge upon the underlying purposes of products liability, loss spreading, loss minimization and compensation.

The doctrine of comparative negligence also arose from a public policy determination, but one made by state legislatures rather than the judiciary. Some thirty-five jurisdictions have enacted comparative negligence statutes.[21] Another eight jurisdictions apply comparative negligence as a result of judicial adoption.[22] Both the statutory and judicial systems follow a general definition of comparative negligence as a fault concept "that apportions liability for damages in proportion to the contribution of each tortfeasor causing the injury or damages."[23] Under such a system every party is held responsible to another to the extent that his or her conduct caused the injury.[24]

Various systems of apportionment have been created. There are three major types: pure comparative negligence, modified comparative negligence, and "slight" vs. "gross" negligence.[25] Under the

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21. Arkansas: ARK. STAT. ANN. § 27.1755 (1979) (lesser than); Colorado: COLO. REV. STAT. § 13-21-111 (Supp. 1983) (not as great as); Connecticut: CONN. GEN. STAT. ANN. § 52-572H (West Supp. 1984) (not greater than); Georgia: GA. CODE ANN. § 51-11-7 (1982); Hawaii: HAW. REV. STAT. § 663-31 (1976) (note greater than); Idaho: IDAHO CODE § 6-801 (1979) (not as great as); Kansas: KAN. STAT. ANN. § 60-258A (Supp. 1983) (less than); Louisiana: LA. CIV. CODE ANN. art. 2323 (West Supp. 1984) (pure); Maine: ME. REV. STAT. ANN. tit. 14, § 156 (Supp. 1984); Massachusetts: MASS. ANN. LAWS ch. 231, § 85 (Supp. 1984) (note greater than); Michigan: MICH. COMP. LAWS § 600.2949 (1983), MICH. STAT. ANN. § 27A-2949 (Callaghan 1983); Minnesota: MINN. STAT. ANN. § 604.01 (Supp. 1983) (not as great as); Mississippi: MISS. CODE ANN. § 11-7-15 (1972) (pure); Montana: MONT. CODE ANN. § 27-1-702 (1979) (not greater than); Nebraska: NEB. REV. STAT. § 25-1151 (1979) (slight vs. great); Nevada: NEV. REV. STAT. § 41.141 (1979) (not greater than); New Hampshire: N.H. REV. STAT. ANN. § 507:7-A (1983) (not greater than); New Jersey: N.J. STAT. ANN. § 2A:15-5.1 (West Supp. 1983) (not greater than); New York: N.Y. CIV. PRAC. LAW § 1411-13 (1978) (pure); North Dakota: N.D. CENT. CODE § 9-10-07 (1975) (not as great as); Ohio: OHIO REV. CODE § 2315.19 (Page's 1981) (not greater than); Oklahoma: OKLA. STAT. ANN. tit. 23 § 11 (West. Supp. 1983) (not greater than); Pennsylvania: 42 PA. CONS. STAT. ANN. § 7102 (Purdon 1984 pamphlet) (not greater than); Puerto Rico: P.R. LAWS ANN. tit. 31, § 5141 (1968); Rhode Island: R.I. GEN. LAWS ANN. § 9-20-4, -4.1 (Supp. 1983) (pure); South Carolina: S.D. COMP. LAWS ANN. § 15-1-300 (1977) (limited to automobile accidents), declared violative of due process clause, Marley v. Kirby, 271 S.C. 122, 245 S.E.2d 604 (1978); South Dakota: S.D. CODIFIED LAWS ANN. § 20-9-2 (1979) (slight v. negligent); Texas: TEX. REV. CIV. STAT. ANN. art. 2212A (Vernon Supp. 1984) (not greater than); Utah: UTAH CODE ANN. § 78-27-37 (1977) (not as great as); Vermont: VT. STAT. ANN. tit. 12, § 1036 (Supp. 1983) (not greater than); Virgin Islands: 5 V.I.C. § 1451 (1983) (not greater than); Washington: WASH. REV. CODE ANN. § 4.22.005 (Supp. 1984) (pure); Wisconsin: WIS. STAT. ANN. § 895-045 (1983) (not greater than); Wyoming: WYO. STAT. § 1-1-109 (1982) (not as great as).

22. Alaska: Kaatz v. State, 540 P.2d 1037 (Alaska 1975) (pure); California: Li v. Yellow Cab Co., 13 Cal. 3d 804, 119 Cal. Rptr. 858, 532 P.2d 1226 (1975) (pure); Florida: Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973) (pure); Illinois: Alvis v. Ribar, 85 Ill. 2d 1, 52 Ill. Dec. 23, 421 N.E.2d 886 (1981); Missouri: Gustafson v. Benda, 661 S.W.2d 11 (Mo. 1983) (en banc) (adopting Uniform Comparative Fault Act); New Mexico: Scott v. Rizzo, 96 N.M. 682, 634 P.2d 1234 (1981); West Virginia: Bradley v. Appalachian Power Co., 256 S.E.2d 879 (W. Va. 1979) (modified system).

23. C. HEFT, COMPARATIVE NEGLIGENCE MANUAL § 1.10 (1978).

24. *Id.*

25. *See supra* note 21 for the types of comparative negligence adopted by individual

pure system the plaintiff's recovery is reduced by the percentage of contributory negligence.[26] The plaintiff, however, is permitted to recover no matter what percentage of contributory negligence is affixed. There are two types of modified comparative negligence which allow recovery as long as the plaintiff's negligence is "less than" or "not greater than" the defendant's fault.[27] Under both modified systems any recovery by the plaintiff is reduced by the percentage of his or her contributory negligence. The "slight" vs. "gross" system only allows recovery if the plaintiff's negligence was "slight" as compared to the defendant's which was "gross".[28] The modified and "slight" vs. "gross" systems retain characteristics of the contributory negligence defense since all recovery is barred after the plaintiff's conduct reaches a certain percentage in causing the accident.

The major public policy reason for abandoning contributory negligence and adopting comparative negligence was that contributory negligence failed to distribute responsibility in proportion to fault.[29] Inequities were found on both sides under the old system. For example, a plaintiff who was minimally negligent would be required to bear the entire loss notwithstanding the defendant's negligence.[30] On the other side, under the doctrine of last clear chance, defendants were required to bear the entire burden even when the plaintiff was more negligent than defendant in causing the injury.[31] Comparative negligence was adopted as an equitable apportionment system in which each wrongdoer bears the burden of his or her own fault.[32]

In considering the applicability of comparative negligence to strict liability the courts have examined the public policies underlying each doctrine. Although the justifications for adopting comparative negligence in strict liability may differ among courts, there is a consensus that the socio-economic reasons for the development of

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jurisdictions.

26. HEFT, *supra* note 24, at § 1.50.

27. *See supra* note 21 for jurisdictions adopting modified comparative negligence statutes.

28. Only Nebraska and South Dakota have adopted this approach. For a more complete discussion of this system, see HEFT, *supra* note 23, at § 1.30; Comment, *Comparative Negligence: A look at the South Dakota Approach*, 14 S. DAK. L. REV. 92, 94-95 (1969).

29. *See* Li v. Yellow Cab Co., 13 Cal. 2d 804, 810, 119 Cal. Rptr. 858, 862, 532 P.2d 1226, 1230 (1975); HEFT, *supra* note 23, at § 1.10.

30. *See, e.g.*, Sun Valley Airlines, Inc., v. Avco-Lycoming Corp., 411 F. Supp. 598, 603 (D. Idaho 1976); McDowell v. Davis, 104 Ariz. 69, 448 P.2d 869 (1968) (contributory negligence is negligence which contributes in any degree to plaintiff's injuries).

31. *See* RESTATEMENT (SECOND) OF TORTS § 479 (1966). *See also* Motley v. Robinette, 64 Mich. App. 470, 236 N.W.2d 102 (1975).

32. In jurisdictions that have adopted comparative negligence, either statutorily or judicially, the last clear chance doctrine has been abolished. *See, e.g.*, French v. Grigsby, 571 S.W.2d 857 (Tex. 1978); Li v. Yellow Cab Co., 13 Cal. 3d 804, 119 Cal. Rptr. 858, 532 P.2d 1226 (1975).

both systems can be served by applying comparative principles in strict liability.

III. Application of Comparative Negligence in Strict Liability

The concept of comparative negligence in strict liability has gained widespread approval since 1980[33] and a substantial majority of jurisdictions now apply such a system.[34] Recent decisions illus-

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33. The following 17 jurisdictions have adopted comparative negligence in strict liability since 1980: Colorado, Hawaii, Illinois, Kansas, Louisiana, Maine, Michigan, Missouri, Montana, New Mexico, North Dakota, Oregon, Rhode Island, Tennessee, Utah, Washington, West Virginia. *See infra* note 34 for specific cases.

34. *See, e.g.*, Admiralty: Pan-Alaska Fisheries, Inc. v. Marine Construction & Design Co., 565 F.2d 1129 (9th Cir. 1977); Alaska: Sebring v. Colver, 649 P.2d 932 (Alaska 1982); Butaud v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42 (Alaska 1976); Caterpillar Tractor Co. v. Beck, 593 P.2d 871 (Alaska 1979); Arkansas: Strange v. Stovall, 216 Ark. 53, 546 S.W.2d 421 (1977) (predicting comparative fault could apply in strict liability); California: Mature v. Belco Industries, Inc., 191 Cal. Rptr. 85 (App. 1983); Daly v. General Motors Corp., 20 Cal. 3d 725, 144 Cal. Rptr. 380, 575 P.2d 1162 (1978); Colorado: Welch v. F.R. Stokes, Inc., 555 F. Supp. 1054 (D. Colo. 1983) (applying Colorado law) (as to damages not liability); Florida: West v. Caterpillar Tractor Co., Inc., 336 So.2d 80 (Fla. 1976); Hawaii: Kaneko v. Hilo Coast Processing, 654 P.2d 343 (Haw. 1982); Idaho: Sun Valley Airlines, Inc. v. Avco-Lycoming Corp., 411 F. Supp. 598 (D. Idaho 1976) (applying Idaho law); Illinois: Coney v. J.L.G. Indus., Inc., 97 Ill. 2d 104, 454 N.E.2d 197 (1983); LaBree v. Schrieber Co., 116 Ill. App. 3d 15, 452 N.E.2d 1, (1983); Kansas: Forsythe v. Coates Co., Inc., 230 Kan. 553, 639 P.2d 43 (1982); Hardin v. Manitowoc-Forsythe Corp., 691 F.2d 449 (10th Cir. 1982) (applying Kansas law); Kennedy v. City of Sawyer, 228 Kan. 439, 618 P.2d 788 (1980); Louisiana: Bell v. Jet Wheel Blast, Division of Ervin Industries, CCH Products Liability #10,351, Louisiana Sup. Ct. (Jan. 14, 1985); Kent v. Gulf States Utilities Co., 418 So.2d 493 (La. 1982); Maine: Austin v. Raybestos-Manhattan, Inc., 471 A.2d 280 (Me. 1984); Michigan: In re Certified Questions from the U.S. Court of Appeals, 416 Mich. 558, 331 N.W.2d 456 (1982) (applying MCL 600:2949; MSA 27A-2949); Karl v. Bryant Air Conditioning Co., 705 F.2d 164 (6th Cir. 1983) (applying Michigan law); Minnesota: Lesmeister v. Dilly, 330 N.W.2d 95 (Minn. 1983) (comparative fault statute could apply in breach of warranty action) (dicta); Busch v. Busch Construction, Inc., 262 N.W.2d 377 (Minn. 1977); Mississippi: Edwards v. Sears, Roebuck and Co., 512 F.2d 276 (5th Cir. 1975) (applying Mississippi law); Missouri: Gustafson v. Benda, 661 S.W.2d 11 (Mo. 1983) (en banc) (adopting Uniform Comparative Fault Act); Montana: Trust Corp. of Montana v. Piper Aircraft Corp., 506 F. Supp. 1093 (D. Mont. 1981) (applying Montana law); Zahrte v. Sturm, Ruger & Co., 498 F. Supp. 389 (D. Mont. 1980) (applying Montana law); New Hampshire: Thibault v. Sears, Roebuck & Co., 118 N.H. 802, 395 A.2d 843 (1978) (comparative causal fault); Rodrigues v. Ripley Industries, Inc., 507 F.2d 782 (1st Cir. 1974) (applying N.H. law); New Jersey: Cartel Capital Corp. v. Fireco of New Jersey, 81 N.J. 548, 410 A.2d 674 (1980) (limited circumstances); Suter v. San Angelo Foundry & Machine Co., 81 N.J. 150, 406 A.2d 140 (1979); New Mexico: Marchese v. Warner Communications, Inc., 100 N.M. 313, 670 P.2d 113 (N.M. Ct. App. 1983); Scott v. Rizzo, 96 N.M. 682, 634 P.2d 1234 (1981) (dicta); New York: Murph & Fritz's Place, Inc. v. Loretta, 112 Misc. 2d 554, 557, 447 N.Y.S.2d 205 (1982); Lippes v. Atlantic Bank, 69 A.D. 127, 135, 419 N.Y.S.2d 505 (N.Y. App. Div. 1979); North Dakota: Day v. General Motors Corp., 345 N.W.2d 349 (N.D. 1984); Oregon: Baccelleri v. Hyster Co., 287 Or. 3, 597 P.2d 351 (1979); Puerto Rico: McPhail v. Municipality of Culebra, 598 F.2d 603 (1st Cir. 1979) (applying Puerto Rico law); Rhode Island: Fiske v. MacGregor, Div. of Brunswick, 464 A.2d 719 (R.I. 1982); Tennessee: Norman v. Fisher Marine, Inc., 672 S.W.2d 414 (Tenn. App. 1984) (applying Miss. law); Texas: Duncan v. Cessna Aircraft, 665 S.W.2d 414 (Tex. 1984); Utah: Moore v. Burton Lumber & Hardware Co., 631 P.2d 865 (Utah 1981); Mulherin v. Ingersoll-Rand Co., 628 P.2d 1301 (Utah 1981); Washington: Klein v. R.D. Weiner, Co., Inc., 654 P.2d 94, 98 Wash. 2d 316 (1982) (en banc); South v. A.B. Chance Co., 635 P.2d 728 (Wash. 1981) (en banc) (dicta); West Virginia: Star Furniture Co. v. Pulaski Furniture Co., 297 S.E.2d 854 (W.V. 1982); Wisconsin: Powers v. Hunt-Wesson Foods, Inc., 64 Wis. 2d 532, 219 N.W.2d 393 (1974); City of Franklin v. Badger Ford Truck Sales, Inc., 58 Wis. 2d 641, 207 N.W.2d 866 (1973); Dippel v. Sciano, 37 Wis. 2d 443, 155

trate a fully evolved theory of products liability and a higher level of theoretical sophistication as compared to early decisions which resorted to characterizing strict liability as negligence *per se* in order to justify comparative negligence principles in strict products liability.[35]

The objections advanced by theoreticians to comparative negligence in strict product liability, however, have remained unchanged. One primary objection is that strict liability, which is not based on fault or negligence, is conceptually incompatible with comparative negligence principles.[36] A corollary argument is that it would be too difficult for juries to apportion loss because of theoretical problems involved in comparing the two types of conduct.[37] Another argument against adopting comparative negligence in strict liability is that such a system would be a disincentive for manufacturers to produce safe products, thereby undercutting the doctrine of strict products liability.[38] A semantical argument has also been made recently based on comparative negligence statutes which by their specific language appear restricted to "negligence actions."[39]

A. Theoretical Objections

Early decisions applying comparative negligence in strict liability did little to answer the arguments raised above. These decisions relied on a presumption that strict liability was a form of negligence *per se*, allowing the courts to sidestep the theoretical conflict.[40] For example, in *West v. Caterpillar Tractor Co.*[41] the Supreme Court of Florida considered whether comparative negligence was a defense in a strict products liability and breach of implied warranty action. The court noted that strict liability is "negligence as a matter of law or negligence *per se*" which removes the consumer's burden of "proving

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N.W.2d 55 (1967); Virgin Islands: Murray v. Fairbanks Morse, 610 F.2d 149 (3d Cir. 1979) (applying Virgin Islands law). Alabama, Kentucky, and Virginia allow contributory negligence as a defense in strict liability actions rather than comparative negligence. *See, e.g.*, Anderson v. Black & Decker, Inc., CCH Products Liability #10,406, (D. Ky. November 28, 1984) (applying Kentucky law); Banner Welders, Inc. v. Knighton, 425 So.2d 441 (Ala. 1982); Ford Motor Co. v. Bartholomew, 297 S.E.2d 675 (Vir. 1982) (dicta).

35. *Compare* Murray v. Fairbanks-Morse, 610 F.2d 149 (3d Cir. 1979) (applying Virgin Islands law) *with* Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

36. *See* Melia v. Ford, 534 F.2d 795, 802 (8th Cir. 1976) (applying Nebraska law); Levine, *Strict Products Liability and Comparative Negligence: The Collision of Fault and No-Fault*, 14 SAN DIEGO L. REV. 337, 351-55 (1977).

37. *See* Smith v. Smith, 278 N.W.2d 155, 160-61 n.7 (S.D. 1979); Levine, *supra* note 36, at 356.

38. *See* Carreia v. Firestone Tire & Rubber Co., 388 Mass. 342, 446 N.E.2d 1033, 1039 (1983); Smith v. Smith, 278 N.W.2d 155, 160-61 n.7 (S.D. 1979).

39. *See* Carreia v. Firestone Tire & Rubber Co., 388 Mass. 342, 446 N.E.2d 1033, 1039 (1983); Kirkland v. General Motors Corp., 521 P.2d 1353, 1367 (Okl. 1974).

40. *See, e.g.*, Hagenbuch v. Snap-on Tools Corp., 339 F. Supp. 676 (D.N.H. 1972) (applying New Hampshire law); Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

41. 336 So. 2d 80 (Fla. 1976).

specific acts of negligence."[42] The majority concluded that comparative negligence was a defense in a strict liability action if the plaintiff's conduct was other than a failure to discover the defect in the product.[43] Theoretical objections to applying comparative negligence in strict products liability were not discussed.

One of the first cases to directly confront these objections was *Butaud v. Suburban Marine and Sporting Goods, Inc., (II)*.[44] In that case the plaintiff was racing a snowmobile when a drive belt broke causing a guard to shatter and injure his eye. The defendant contended that the plaintiff was contributorily negligent because the snowmobile was not designed for racing and was not properly maintained. At trial, the jury was instructed on contributory negligence and returned a verdict for the defendant. On appeal, the Supreme Court of Alaska reversed, holding that contributory negligence was only available as a defense in strict liability when the plaintiff assumed the risk of the particular defect.[45] Before the case was retried the supreme court adopted "pure" comparative negligence in another decision.[46] The court then agreed to consider the effect of comparative negligence in strict liability actions.

The court began its analysis by discussing and rejecting Wisconsin and New Hampshire decisions which had adopted comparative negligence in strict liability.[47] Those decisions conceptualized the theory of the action created by strict products liability before applying comparative negligence principles.[48] The court found that no matter what characterization was applied to the action the plaintiff was essentially required to prove the same elements.[49] Moreover, the court explained, most jurisdictions had retained a defense based on the conduct of the plaintiff because they were unwilling to regard the seller as an insurer of the product.[50]

The *Butaud (II)* court recognized the theoretical difficulty in comparing the seller's strict liability to the user's negligence, but found the problem more illusory than real based on the experience of other jurisdictions. Specifically, the court noted that comparative negligence had been applied without any serious problems to cases arising under the doctrine of unseaworthiness, a form of strict

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42. *Id.* at 90.
43. *Id.* at 92.
44. 555 P.2d 42 (Alaska 1976), *modifying* Butaud v. Suburban Marine and Sporting Goods, Inc. (I), 543 P.2d 209 (Alaska 1975).
45. *Butaud (I)*, 543 P.2d 209 (Alaska 1975).
46. Kaatz v. State, 540 P.2d 1037 (Alaska 1975).
47. *Butaud II*, 555 P.2d at 44 (citing Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967); Hagenbuch v. Snap-on Tools Corp., 339 F. Supp. 676 (D. N.H. 1972)).
48. 555 P.2d at 45.
49. *Id.*
50. *Id.*

liability.[51]

More important, the court explained that pure comparative negligence would provide a system of fairness to products liability cases in which plaintiff and defendant contributed to the injury.[52] Apportionment would also avoid the incongruous result of mitigating a plaintiff's damages if the products liability suit was in negligence, but allowing full recovery if the suit was brought in strict liability.[53] Finally, the majority noted that comparative negligence did not undermine the policy reasons for strict products liability since the manufacturer was still accountable for the harm caused by the defective product, except that part caused by the user's own conduct.[54]

Although the *Butaud (II)* court made a cursory examination of the effect of comparative negligence on the public policy reasons underlying strict products liability, a complete analysis of this issue was not undertaken until the seminal California Supreme Court decision in *Daly v. General Motors*.[55] The decedent in *Daly* was killed after his Opel, traveling at a speed of 50 to 70 miles per hour, collided with a metal divider fence. After striking the fence, the Opel spun counterclockwise and the driver's door was thrown open. The decedent was ejected from the car and sustained fatal head injuries. The plaintiffs claimed that the door latch on the vehicle was improperly designed and should not have activated upon impact.[56] It was undisputed that had the decedent remained in the vehicle his injuries would have been minor.[57]

Over plaintiff's objections, defendants were permitted to introduce evidence at trial showing that: the Opel was equipped with a seat belt-harness system and a door lock, either of which would have prevented the decedent's ejection; the decedent used neither the harness system nor the lock; the owner's manual for the vehicle contained warnings that the seat belt should be worn and the doors locked for "accident security"; and that the decedent was intoxicated at the time of the collision.[58] The jury returned a verdict for defen-

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51. *Id.* (citing Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 409 (1953)).

52. *Id.* The court noted that the defendant remained strictly liable, but, the award of damages is reduced in proportion to the plaintiff's contribution to the injury. *Id.* at 46.

53. *Id.* at 46. Such a result is particularly questionable considering that a negligent defendant is clearly more culpable than a defendant that is found strictly liable. *See* Fiske v. MacGregor, Div. of Brunswick, 464 A.2d 719, 728 (R.I. 1983).

54. 555 P.2d at 46. The court held that comparative negligence would be applied to cases where the plaintiff misused the product and would not be limited to cases in which the plaintiff used the product with knowledge of the defective condition. *Id.*

55. 20 Cal. 3d 725, 144 Cal. Rptr. 380, 575 P.2d 1162 (1978).

56. *Id.* at 730, 144 Cal. Rptr. at 382, 575 P.2d at 1164. The plaintiffs were the decedent's widow and his three surviving minor children. The plaintiffs based their cause of action on strict liability contending that if the latch was properly designed, the decedent would have been restrained in the vehicle and would have been injured, but not killed. *Id.*

57. *Id.*

58. *Id.* at 731, 144 Cal. Rptr. at 383, 575 P.2d at 1165. The intoxication evidence was

dants and plaintiffs appealed.

On appeal the *Daly* court considered and rejected three major arguments against adopting comparative negligence in strict products liability.[59] First, the court considered the conceptual and semantical barriers to merging the two concepts and found that the inherent flaw in this "apples and oranges" argument was its insistence on fixed and precise definitional treatment of legal concepts.[60] In the past, there had been conceptual intermingling between tort defenses and strict products liability so as to obtain a system that would provide substantial justice.[61] Consequently, the court rejected the argument, concluding that "[f]ixed semantic consistency at this point is less important than the attainment of a just and equitable result. The interweaving of concepts and terminology in this area suggests a judicial posture that is flexible rather than doctrinaire."[62]

The second major objection considered by the *Daly* court was that application of comparative principles in strict products liability would reduce or remove the manufacturer's incentive to produce safe products.[63] The court found that since manufacturers could only reduce their liability by the extent of the victim's conduct, and not completely escape liability, the manufacturer's incentive to produce safe products would continue.[64] Moreover, manufacturers could not assume before producing a defective product that ultimately the user would also be deemed at fault.[65]

The final objection rejected by the court was that the merger of the two principles would abolish the liability of intermediaries, such as retailers, in the chain of distribution.[66] The court did not foresee any difficulty with retaining liability for retailers since a jury could

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only admitted for the limited purpose of determining if the decedent had used the safety equipment. *Id.*

59. The California Supreme Court adopted "pure" comparative negligence in Li v. Yellow Cab Co., 13 Cal. 3d 804, 119 Cal. Rptr. 858, 532 P.2d 1226 (1975).

60. 20 Cal. 3d at 734, 144 Cal. Rptr. at 385, 575 P.2d at 1167. The court noted that strict liability itself was developed because of dissatisfaction with the formalisms of traditional tort and contract law which did not provide sufficient protection for consumers. The court explained that comparative negligence similarly arose from dissatisfaction with the traditional "all or nothing" rule of contributory negligence. *Id.* at 735, 144 Cal. Rptr. at 385, 575 P.2d at 1167.

61. *Id.*

62. *Id.* at 736, 144 Cal. Rptr. at 386, 575 P.2d at 1168. The court added that the "apples and oranges" argument may itself be conceptually suspect. The court found that the term "contributory negligence," the basis for the conceptual incompatibility argument, may be a misnomer since it lacks the basic element of negligence, a duty of care to another. The court added that the terms "comparative negligence," "contributory negligence," and assumption of risk" are not capable of exact measurement and the attempt to achieve consistent definitions of these terms should not divert the court from the more important countervailing public policy considerations. *Id.* at 735, 144 Cal. Rptr. at 386, 575 P.2d at 1168.

63. *Id.* at 737, 144 Cal. Rptr. at 387, 575 P.2d at 1169.

64. *Id.*

65. *Id.*

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

assess the legal responsibility of distributors and vendors of the product just as they would for manufacturers.[67]

Supported by a majority of the jurisdictions that had considered the issue, the weight of scholarly comment, and the Uniform Comparative Fault Act, the court held that pure comparative negligence should apply in strict products liability actions.[68] The court noted that apportionment of tort liability was a sound, logical rationale capable of wider application beyond negligence cases. A contrary decision, the court explained, would perpetuate the much criticized result of placing upon one party the entire burden of the loss for which two were responsible.[69] In concluding, the court set forth fairness as the underlying basis for applying comparative negligence in strict liability stating, "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."[70]

More recent cases have also stressed fundamental fairness as the basis for adopting comparative negligence in strict products liability.[71] For example, in *Coney v. J.L.G. Industries, Inc.*,[72] the Illinois Supreme Court decided to apply a judicially adopted "pure" form of comparative negligence in strict products liability after concluding that such a system would not frustrate the fundamental reasons for adopting strict products liability. The court noted that the gains afforded plaintiffs in strict products liability were not affected since plaintiffs were still relieved of the proof problems associated with negligence actions, and because privity and the manufacturer's negligence were still irrelevant.[73] Moreover, comparative negligence did not lessen the manufacturer's duty to produce a reasonably safe product since the manufacturer's liability remained strict; only its responsibility for damages was reduced by the amount of the user's conduct in contributing to the injuries.[74]

In considering the public policy of loss spreading which underlies strict products liability, the *Coney* court found no reason to spread the cost of an injury resulting from the plaintiff's own fault onto the consuming public.[75] The court also rejected the theoretical

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67. *Id.*

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

69. *Id.* at 742, 144 Cal. Rptr. at 390, 575 P.2d at 1172.

70. *Id.*

71. *See, e.g.*, Fiske v. MacGregor, Div. of Brunswick, 464 A.2d 719, 729 (R.I. 1983); Kaneko v. Hilo Coast Processing, 654 P.2d 343, 352 (Haw. 1982); Zahrte v. Sturm, Ruger & Co., 498 F. Supp. 389, 391 (D. Mont. 1980).

72. 97 Ill. 2d 104, 454 N.E.2d 197 (1983).

73. 454 N.E.2d at 202.

74. *Id.*

75. *Id.* (citing Daly v. General Motors Corp., 20 Cal. 3d 725, 737-38, 575 P.2d 1162, 1169, 144 Cal. Rptr. 380, 387 (1978); Fischer, *Products Liability—Applicability of Compar-*

inconsistency argument that had previously been considered in *Daly*.[76] In reiterating the fundamental fairness consideration underlying the *Daly* decision, the court stated that equitable principles required apportionment of a plaintiff's total damages on the basis of the degree to which the product and the user's conduct proximately caused them.[77]

Rather than simply rely on the fundamental fairness of such a system, several courts have labored to find a theoretically consistent common denominator by which to compare user and manufacturer conduct. The most widely accepted view is the use of causation as the relevant factor.[78] For example, in *Murray v. Fairbanks Morse*, the United States Court of Appeals for the Third Circuit, applying Virgin Islands law, considered the appropriate "conceptual bridge" between the plaintiff's conduct and manufacturer's product.[79] The court rejected the use of "fault" as the comparative factor, noting that in products liability there is no proven fault on the part of the manufacturer that can be compared with the faulty user conduct.[80] Moreover, even if the manufacturer's conduct could be termed faulty, the parties' injury producing conduct is qualitatively different.[81] The court concluded that causation was the only conceptual basis by which to apportion the loss and that the significant inquiry is how much of the injury was caused by the defect versus the amount caused by plaintiff's own actions.[82] Thus, a defendant is strictly liable once a jury determines a defect caused the injury, but, the jury may then reduce the award in proportion to plaintiff's contribution to the cause of injury.[83]

B. The Semantic Objection

One argument recently presented in opposition to the adoption of comparative negligence in strict liability is based on several state comparative negligence statutes which by their very language appear only to apply to "negligence actions."[84] Courts considering this ob-

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ative Negligence, 43 MO. L. REV. 431, 433 (1978)).

76. 454 N.E.2d at 202.

77. *Id.* at 203.

78. *See, e.g.*, Murray v. Fairbanks Morse, 610 F.2d 149 (3d Cir. 1979) (applying Virgin Islands law); Pan-Alaska Fisheries, Inc. v. Marine Construction & Design Co., 565 F.2d 1129 (9th Cir. 1977) (applying admiralty law); Sun Valley Airlines, Inc. v. Avco-Lycoming Corp., 411 F.Supp. 598 (D. Idaho 1976) (applying Idaho law); Duncan v. Cessna Aircraft Co., 665 S.W.2d 414 (Tex. 1984).

79. 610 F.2d at 160.

80. *Id.* at 159.

81. *Id.*

82. *Id.*

83. *Id.* at 160.

84. The following state statutes contain this terminology:
Colorado, Connecticut, Georgia, Hawaii, Idaho, Kansas, Massachusetts, Montana, New Hampshire, New Jersey, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, Texas,

jection have applied two approaches to overcome the semantic barrier. Several courts have gone beyond the statutory language to examine the legislative intent and policy behind the comparative negligence statute, concluding that the statute should apply in strict products liability.[85] The other approach rejects application of the comparative negligence statute based on the statutory language and instead judicially adopts some form of comparative negligence in strict products liability.[86]

The first approach is illustrated by the Supreme Court of New Jersey decision in *Suter v. San Angelo Foundry and Machine Co.*[87] The New Jersey statute in that case provided that comparative negligence would be applied "in an action . . . for negligence."[88] The court admitted that the statutory phrase could be read literally so as to only include traditional negligence actions, but held that such a reading would not be consistent with the underlying purpose of the statute.[89] In examining the legislative history behind the statute, the court found that when the statute was enacted contributory negligence was a defense in strict liability and there was no indication that the legislature intended to abrogate examination of the user's conduct by enacting the comparative negligence statute.[90] The statute was only aimed at softening the harshness that the complete bar contributory negligence presented.

The *Suter* court also found support for its conclusion in legislative history which indicated a conscious attempt on the part of the legislature to adopt a statute similar to the Wisconsin comparative negligence statute.[91] Since Wisconsin courts had previously applied their comparative negligence statute to strict liability actions, the court reasoned that the New Jersey legislature may have believed its

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Utah, Vermont, Virgin Islands, Wisconsin and Wyoming. Of those states with such statutes, Colorado, Hawaii, Idaho, Kansas, Montana, New Hampshire, New Jersey, North Dakota, Texas, Utah, and Wisconsin all apply comparative negligence in strict products liability. *See supra* note 34 for cases from the above jurisdictions adopting comparative negligence in strict liability. State statutes in Arkansas, Maine, Mississippi, Nevada, and Rhode Island do not contain any limitations on the actions to which the statute can apply. Schwartz, Comparative Negligence § 12.1 at 196 (1974). Other states, such as Connecticut, Michigan and Nebraska have enacted comparative negligence statutes which specifically apply to strict products liability. CONN. GEN. STAT. ANN. § 52-572-0 (West Supp. 1984); MICH. STAT. ANN. § 27A-2949 (Callaghan Supp. 1984-1985); MICH. COMP. LAWS § 600.2949 (1983); NEB. REV. STAT. § 25-1151 (1979).

85. *See, e.g.*, Hardin v. Manitowoc-Forsythe Corp., 691 F.2d 449 (10th Cir. 1982) (applying Kansas law); Murray v. Fairbanks-Morse, 610 F.2d 149 (3d Cir. 1979) (applying Virgin Islands law); Sun Valley Airlines, Inc. v. Avco-Lycoming Corp., 411 F. Supp. 598 (D. Idaho 1976) (applying Idaho law).

86. *See, e.g.*, Day v. General Motors, 345 N.W.2d 349 (N.D. 1984); Zahrte v. Sturm, Ruger and Co., 498 F. Supp. 389 (D. Mont. 1980) (applying Montana law).

87. 81 N.J. 150, 406 A.2d 140 (1979).

88. N.J. Stat. Ann. § 2A:15-5.1-5.3 (West Supp. 1984).

89. 81 N.J. at 160, 406 A.2d at 145.

90. *Id.* at 161, 406 A.2d at 145.

91. *Id.*

statute would receive a similar interpretation.[92] The court concluded that the term "negligence" in the statute should be construed as being "subsumed within the scope of tortious fault."[93] Based on that conclusion, the court held that the Comparative Negligence Act was applicable in strict liability actions where the plaintiff's conduct could be found to constitute contributory negligence.[94]

The second approach for overcoming the semantic barrier presented by a comparative negligence statute was utilized in *Zharte v. Sturm, Ruger & Co.*[95] The federal district court, applying Montana law, found, based on fundamental fairness and a review of case law from other jurisdictions, that comparative negligence should be applied in strict products liability. The court was then faced with the issue of whether Montana's comparative negligence statute, which referred to recovery of "damages for negligence resulting in death or injury to person or property," should be applied.[96] By its terms, the statute only applied to recovery of damages for negligence.[97] The court reasoned that since strict liability actions were not based on negligence, statutory comparative negligence could not be applied in a strict liability action[98] unless expressly provided by the legislature.[99] Instead of applying the statute, the court judicially adopted a pure form of comparative negligence in strict liability actions.[100] The court opined that the judicial adoption of a pure comparative negligence system would also avoid a "windfall" for defendants under the modified comparative negligence system in the Montana statute.[101]

The semantic problem presented in the *Suter* and *Zharte* cases will probably be ameliorated in the future as state legislatures amend their comparative negligence statutes. In states that have enacted or amended statutes which refer to actions for damages from the "fault"[102] of another, or refer to "all actions" for damages,[103] or

92. *Id.* The court noted that in Hagenbuch v. Snap-On Tools Corp., 339 F. Supp. 676, 682-683 (D. N.H. 1972), the New Hampshire comparative negligence statute was similarly interpreted to apply to strict liability actions on the basis of the Wisconsin statute and caselaw. *Id.*

93. 81 N.J. at 162, 406 A.2d at 145.

94. *Id.* at 164, 406 A.2d at 147. On the basis of the facts before it, however, the court found that the Comparative Negligence Act should not be applied. *Id.*, 406 A.2d at 147-48.

95. 498 F. Supp. 389 (D. Mont. 1980).

96. MONT. CODE ANN. § 27-1-702 (1979).

97. 498 F. Supp. at 392.

98. *Id. See also* Thibault v. Sears, Roebuck & Co., 118 N.H. 802, 395 A.2d 843 (1978).

99. 498 F. Supp. at 392.

100. *Id.*

101. *Id. See also* Day v. General Motors, 345 N.W.2d 349 (N.D. 1984) (rejecting modified comparative negligence statute and applying pure comparative negligence.

102. *See* Austin v. Raybestos-Manhattan, Inc., 471 A.2d 280 (Me. 1984) ("comparative fault" statute could apply in strict products liability).

103. *See* Fiske v. MacGregor, Div. of Brunswick, 464 A.2d 719 (R.I. 1983).

which specifically apply to strict products liability actions,[104] the courts have had an easier time avoiding this argument.

IV. Future Practical Considerations

After courts overcome the theoretical and semantical barriers to applying comparative negligence in strict products liability, there are practical problems to confront. One such problem is pointed out by the *Zharte* decision in which the court refused to apply the Montana modified comparative negligence statute, but judicially adopted a pure form of comparative negligence in strict liability.[105] Unlike construing a reference to "negligence" in a Comparative Negligence Act as applying to strict liability actions, refusing to apply a legislatively mandated system of apportionment undercuts the statute and thwarts public policy as determined by the legislature. Courts should be loath to disregard a modified comparative negligence statute because of their decision that pure comparative negligence is the better rule of law.

A careful analysis of this issue was undertaken by the Kansas Supreme Court in *Forsythe v. Coates Co.*[106] The Kansas legislature had enacted a modified system of comparative negligence.[107] The court recognized that it could judicially adopt a pure comparative negligence system for strict liability actions while maintaining the modified system in other tort actions,[108] but found that the choice between a pure or modified system was a policy decision made by the legislature. The decision whether to adopt pure or modified comparative negligence for strict liability actions involved a balancing of the purposes of strict liability and comparative negligence.[109] In striking that balance, the court found that it could not ignore the public policy decision of the legislature to create a modified negligence system.[110] Adopting a pure comparative fault system would represent judicial intrusion into the legislative sphere and would also create a dual system of comparative negligence, one for strict liability cases and another for traditional tort actions. Although the court recognized deficiencies in the modified system, it did not find such a system inherently inconsistent with the policies of strict liability.[111] The court concluded that it would apply the modified comparative

104. *See* In re Certified Questions from the U.S. Court of Appeals, 416 Mich. 558, 331 N.W.2d 456 (1982).
105. 498 F. Supp. at 392.
106. 230 Kan. 553, 639 P.2d 43 (1982).
107. KAN. STAT. ANN. § 60-258A (1974).
108. 230 Kan. at 556-57, 639 P.2d at 45.
109. *Id.* at 557, 639 P.2d at 46 (citing Kennedy v. City of Sawyer, 228 Kan. 439, 618 P.2d 788 (1980)).
110. *Id.*
111. *Id.*

negligence statute rather than frustrate the public policy declared by the legislature.[112]

The *Forsythe* decision exemplifies the appropriate deference to legislative public policy decisions in this area. Legislative creation of an apportionment system represents a careful balancing of the goals of tort law. This balancing should not be callously upset by the judiciary. The alternative of a judicially adopted pure comparative negligence system, however, cannot be harshly criticized. Adoption of a pure comparative negligence system over the legislatively mandated modified system may be necessary to make the application of comparative negligence in strict products liability more palatable to those courts who have in the past refused to recognize such a system. The ultimate goal is to achieve the equitable loss allocation that comparative negligence principles bring to strict products liability.

A second practical consideration faced by courts is delineating the types of plaintiff misconduct that should reduce damages in a strict products liability action. Several courts that apply comparative negligence principles when a plaintiff makes an unforeseeable misuse of a product or assumes the risk of use have refused to apply comparative negligence when the plaintiff failed to discover the defect or when the plaintiff's misuse was foreseeable.[113]

Limiting application of comparative negligence to certain types of plaintiff conduct erodes the basic fairness and equitable loss allocation that is an objective of a comparative negligence system. As Professor Schwartz argues, a defendant should bear some responsibility if the defendant should have foreseen the misuse; however, it is also appropriate to reduce the user's award by the amount of fault affixed to him or her by the jury.[114] Professor Schwartz also notes that applying comparative negligence principles to all forms of user misconduct will relieve the courts from the difficult line drawing between unforeseeable misuse and foreseeable misuse.[115]

The other limitation on considering user conduct has occurred when the plaintiff fails to discover or guard against a product defect. In *Pan-Alaska Fisheries, Inc. v. Marine Construction and Design Co.*,[116] the court considered and rejected such a limitation on comparative negligence in strict products liability. The court recognized that comment (n) to section 402A would prohibit "contributory negligence" as a defense when the plaintiff's conduct consisted of failure

112. *Id.*

113. *See, e.g.*, West v. Caterpillar Tractor Co., Inc., 336 So. 2d 80, 92 (Fla. 1976); Austin v. Raybestos-Manhattan, Inc., 471 A.2d 280, 286 (Me. 1984); Suter v. San Angelo Foundry and Machine Co., 81 N.J. 150, 406 A.2d 140, 153 (1979).

114. Schwartz, *supra* note 3, at 173-74.

115. *Id.* at 173.

116. 565 F.2d 1129 (9th Cir. 1977).

to discover the product defect, but reasoned that such labels were "merely refugees from the old, harsh 'all or nothing' rule of contributory negligence."[117] The court found that any label which allows a plaintiff to recover full damages even though partially at fault was not consistent with comparative fault principles.[118] Such a limitation on the application of comparative fault would be inequitable since responsibility would not be distributed in proportion to fault and would place upon one party the entire burden of a loss for which both parties were responsible.[119]

For example, the court noted that if the user's failure to discover or guard against a product defect was highly irresponsible and the product defect was slight, it would offend the court's "sense of justice and fair play" to impose the entire loss on the manufacturer.[120] The court found no reason why society as a whole should bear the portion of blameworthy conduct attributable to the plaintiff. Therefore, the court concluded that all of the plaintiff's conduct contributing to the cause of injury could be compared to the defendant's liability.[121] The *Pan-Alaska Fisheries* approach assures that the equitable loss allocation sought to be achieved by applying comparative negligence in strict products liability will not be undercut by hinging application of comparative fault on the type of plaintiff misconduct.

V. Conclusion

Although the principles of comparative negligence and strict products liability developed separately, an overwhelming majority of courts considering the issue have concluded that comparative negligence should apply in strict liability actions.[122] Both strict liability and comparative negligence are based on socio-economic policies. By examining the underlying policies, courts have been able to overcome the semantical and theoretical barriers to applying comparative negligence in strict liability.

The primary reason that comparative negligence has not been found inconsistent with the purpose of strict liability is because is does not in any manner relieve the manufacturer from a duty to cre-

117. *Id.* at 1139 (citing Sun Valley Airlines v. Avco-Lycoming Corp., 411 F. Supp. 598, 603 (D. Idaho 1976); Butaud v. Suburban Marine and Sporting Goods, Inc. (II), 555 P.2d 42, 44 (Alaska 1976)).

118. *Id.*

119. *Id.*

120. *Id.* at 1140.

121. *Id. See also* Hardin v. Manitowoc-Forsythe Corp., 691 F.2d 449, 454 (10th Cir. 1982) (applying Kansas Law) (all types of fault, regardless of degree, are to be compared in order to apportion the causal responsibility for the accident).

122. *See supra* note 34 for jurisdictions adopting comparative negligence in strict liability.

ate a safe product.[123] By applying comparative negligence, however, the court can examine the conduct of all parties involved in causing the injury. Such an analysis allows an equitable allocation of loss and assures that society does not bear the burden of the plaintiff's blameworthy conduct.[124] Allocating a proportion of cost to the culpable user by reducing the award is a sound public policy decision fully consistent with equity and fairness.

Now that a majority of the courts have considered and rejected the theoretical and conceptual objections to applying comparative negligence in strict liability, these arguments can be put to rest. There are, however, important practical considerations that must be considered in the future. In determining how the comparative negligence system will be applied, courts should be reluctant to disregard a legislatively mandated system in favor of one advanced by the court. More important, courts should not limit application of comparative negligence to particular types of user misconduct. All injury-producing conduct, whether on the part of defendant or plaintiff, should be considered if comparative negligence in strict products liability is to achieve its designed purpose of equitable loss allocation.

123. *See, e.g.*, Daly v. General Motors Corp., 20 Cal. 3d 725, 144 Cal. Rptr. 380, 575 P.2d 1162, 1169 (1978); Coney v. J.L.G. Industries, Inc., 97 Ill. 2d 104, 454 N.E.2d 197, 202 (1983).

124. *See, e.g.*, Murray v. Fairbanks-Morse, 610 F.2d at 161; Coney v. J.L.G. Industries, Inc., 454 N.E.2d at 202; Schwartz, *supra* note 3, at 177. As the *Murray* court notes, if the negligence of the plaintiff is ignored in determining the plaintiff's loss, the future cost of the manufacturer's product will be artificially inflated and not representative of the actual risk posed by the product. The detriment to the community at large, other than absorbing the cost of the plaintiff's conduct, is that consumers may be forced to choose cheaper, less safe products because the cost of the manufacturer's product is artificially high. 610 F.2d at 161.