Pepperdine Law Review

Volume 6 | Issue 2 Article 7

3-15-1979

Another Citadel Has Fallen - This Time the Plaintiff's. California Applies Comparative Negligence to Strict Products Liability

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INTRODUCTION

When the California Supreme Court handed down its decision in *Greenman v. Yuba Power Products, Inc.*,[1] heralding the dawning of strict products liability in tort, a great number of corporate attorneys and private defense attorneys no doubt considered the advantages of becoming plaintiffs' attorneys. The plaintiff's burden of proof became much simpler and many of the defenses the defendant could have previously raised were forever inhumed. But after fifteen years of strict products liability law that for the most part favored the plaintiff, a decision has been handed down which leans towards balancing the scales of the adversary process in strict products liability cases. Indeed, some writers will indubitably contend that the scales have been tipped dramatically in favor of the defendant, at least where the plaintiff was contributorily negligent.

That decision was made in *Daly v. General Motors Corp.*,[2] where the court held that pure comparative negligence applies to cases brought under strict products liability theories. Before *Daly*, when a defendant wanted to bring into evidence the negligent conduct of the plaintiff, the plaintiff could usually characterize this conduct as contributory negligence thereby blocking off the defendant's recriminations because any evidence of plaintiff's contributory negligence was inadmissible in strict products liability cases. The plaintiff's ability to shield himself from the defendant's counter-assaults by characterizing his conduct as contributory negligence armed him with a power that was similar to that which the defendant had possessed for decades previous to the decision in *Henningsen v. Bloomfield Motors, Inc.*[3] That ability constituted a citadel from which a party could effectively cut off any assaulting opponent. The citadel defendant had used

1. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).
2. 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978).
3. 32 N.J. 358, 161 A.2d 69 (1960).

when a products liability action was brought against him was the citadel of privity. Similarly, when a defendant attempted to accuse a plaintiff of contributory negligence he was cut off, for the reason that contributory negligence was inadmissible in a strict products liability case. Plaintiff too, had a citadel, a stronghold; it was the mere words, "contributory negligence," and the ability to characterize his conduct as such that threw up a barricade which precluded the defendant from attacking that type of conduct.

The court in *Daly v. General Motors Corp.*, did away with the plaintiff's ability to characterize his conduct in such a way as to preclude it from evidence. An even greater impact, however, was felt when the *Daly* Court applied comparative negligence to strict products liability. This comment begins with a brief history of strict products liability law leading up to the *Daly* decision, then it indulges in a pro and con discussion which helps illuminate the importance and probable effects of that decision.

A COMPENDIOUS HISTORY

In William L. Prosser's comprehensive treatment of the development of products liability law,[4] he analyzes the assaults made on the defenses and strongholds of the various defendants who attempted to escape liability for the defective products they manufactured. The main stronghold of the defendant was the "citadel of privity"[5] which insulated manufacturers from liability for the injuries of a consumer who was injured by his defective product. The consumer could not sue the manufacturer unless he was in privity of contract. However, as Professor Prosser noted,[6] this citadel of privity fell in 1960 with the New Jersey Supreme Court's decision in *Henningsen v. Bloomfield Motors, Inc.*[7]

Before *Henningsen*, the inroads made against the privity defense are well known to most law students. First, the privity requirement was rejected in cases involving foods, drugs and cosmetics—"articles of such kind as to be imminently dangerous

4. Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099 (1960), and Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791 (1966). *See also*, PROSSER, LAW OF TORTS § 96, at 641-644 (5th ed., 1971).

5. Justice Cardozo first referred to the "citadel of Privity" in Ultramares Corp. v. Touche, 255 N.Y. 170, 180, 174 N.E. 441, 445 (1931), where he said, [T]he assault upon the citadel of privity is proceeding in these days apace." And, of course, the requirement of privity itself was first enunciated in Winterbottom v. Wright, 10 M. & W. 109, 152 ENG. REP. 402 (1842). Some authorities say that the rule of privity was mistakenly derived from *Winterbottom v. Wright*. *See* Bohlen, *The Basis of Affirmative Obligations in Tort*, 44 AM. L. REG. N.S. 209, 280-285, 289-310 (1905), or 53 U. PA. L. REV. 209 (1905). *But see*, Lord Atkin, in Donoghue v. Stevensen, A. C. 562, 588-589 (1932).

6. Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791 (1966).

7. 32 N. J. 358, 161 A.2d 69 (1960).

to human life or health unless care is exercised in their preparation"[8]—and later with regard to inherently dangerous products. In these cases the wholesaler or manufacturer was held liable on the basis of prudent public policy.[9] Then, in *MacPherson v. Buick Motor Co.*,[10] the New York Court of Appeals held that despite privity, the manufacturer "of a thing . . . that is reasonably certain to place life and limb in peril when negligently made . . . is under a duty to make it carefully."[11] The rule in *MacPherson* was later extended to mere bystanders,[12] property damage[13] and other areas.[14]

The importance of the *Henningsen* decision lies in the fact that the court held defendants liable without any proof of negligence, as the *MacPherson* decision required, or privity of contract. The court stated that if an injury results as a consequence of a defective product, "strict liability is imposed . . . [and] [r]ecovery of damages does not depend upon proof of negligence or knowledge of the defect."[15] Of equal if not greater importance, the court also stated:

> Accordingly, we hold that under modern marketing conditions, when a

8. Boyd v. Coca Cola Bottling Works, 132 Tenn. 23, 28, 177 S. W. 80, 81 (1915). *See also*, Thomas v. Winchester, 6 N.Y. 397, 57 Am. Dec. 455 (1852).

9. *See*, Boyd v. Coca Cola Bottling Works, 132 Tenn. 23, 177 S.W. 80 (1915) (cigar butt in a coke bottle); Klein v. Duchess Sandwich Co., Ltd., 14 Cal. 2d 272, 93 P.2d 799 (1939) (a wrapped sandwich poisoned the wife of a man who purchased it); Gottsdanker v. Cutter Laboratories, 182 Cal. App. 2d 602, 6 Cal. Rptr. 320 (1960) (salk polio vaccine caused the disease of poliomyelitis in patients who received it). For a general discussion *see*, 2 WITKIN, SUMMARY OF CALIFORNIA LAW, SALES §§ 91-99, at 1156-63 (8th ed. 1973).

10. 217 N.Y. 382, 111 N.E. 1050 (1916).

11. 217 N.Y. at 389, 111 N.E. at 1053. Thus, New York, and the states that fell in line with its *MacPherson* decision based manufacturer's liability on negligence, not contract, thereby avoiding the privity problem. Still, this fell short of strict liability, so plaintiffs next attempted to get around the burdens of proof required by a negligence action by arguing an expressed or implied warranty. But here again, the privity requirement became a barrier to holding defendent liable, until *Henningsen v. Bloomfield Motors, Inc.*, put an end to that requirement.

12. *See*, Reed & Bargon Corp. v. Maas, 73 F.2d 359 (1st Cir. 1934); Flies v. Fox Bros. Buick Co., 196 Wis. 196, 218 N.W. 855 (1928); McLeod v. Linde Air Products Co., 318 Mo. 397, 1 S.W. 2d 122 (1927); Hopper v. Charles Cooper & Co., 104 N.J. 93, 139 A. 19 (1927).

13. Sutton v. Diimmel, 55 Wash. 2d 592, 349 P.2d 226 (1960); Washborn Storage Co. v. General Motors Corp., 90 Ga. App. 380, 83 S.E.2d 26 (1954); Ellis v. Lindmark, 177 Minn. 390, 225 N.W. 395 (1929).

14. *See generally*, William L. Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099 (1960).

15. Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 366, 161 A.2d 69, 77 (1960).

> manufacturer puts a new automobile in the stream of trade and promotes its purchase by the public, an implied warranty that it is reasonably suitable for use as such accompanies it into the hands of the ultimate purchaser. Absence of agency between the manufacturer and the dealer who makes the ultimate sale is immaterial.[16]

In California, Justice Traynor, in his concurring opinion in *Escola v. Coca Cola Bottling Co.*,[17] was the first to advance the idea that a manufacturer should be held strictly liable in tort without regard to privity of contract or negligence when he places an article on the market, knowing that it will be used without inspection, and such article proves defective and causes injury to human beings.[18] Ultimately, in *Greenman v. Yuba Power Products, Inc.*,[19] with Justice Traynor writing the majority opinion, the court cited with approval the decision in *Henningsen*, but went beyond that holding by concluding that strict liability did not require a basis in contract warranty theories but could be based on strict liability in tort.[20] Accordingly, the court held that "[a] manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being."[21] The court noted that this liability is "imposed by law," "not assumed by agreement."[22] To establish the manufacturer's liability it is sufficient that plaintiff prove he was injured while using the product in a way it was intended to be used, and that the injury was a result of a defect in design and manufacture, of which plaintiff was not aware, that made the product unsafe for its intended use.[23]

The decisions discussed, from *Boyd v. Coca Cola Bottling Works* to *Greenman v. Yuba Power Products, Inc.*, highlight what can be seen as a major assault on a manufacturer's or wholesaler's ability to defend himself in a products liability suit. One by one the defenses or theories defendants hid behind were shattered and they were left exposed to plaintiffs who could attack with less arms, while being sheltered by barricades that effectively prevented defendants counter-assaults. Now, with strict products liability, the plaintiff need not be armed with proof of negligence or privity of contract; he simply needs to prove that a

16. *Id.* at 384, 161 A.2d at 84.
17. 24 Cal. 2d 453, 150 P.2d 436 (1944).
18. *Id.* at 461, 150 P.2d at 440.
19. 59 Cal.2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).
20. *Id.* at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701.
21. *Id.* at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700.
22. *Id.* at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701.
23. 59 Cal. 2d at 64, 377 P.2d at 901, 27 Cal. Rptr. at 701. Note also that the *Greenman* doctrine of strict liability in tort was extended to the retailer in Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964).

defect existed in the product which is attributable to the manufacturer or retailer and that the defect caused the injury.[24] In *Ault v. International Harvestor Co.*, the court stated that, "[i]n an action based upon strict liability against a manufacturer, negligence or culpability is not a necessary ingredient. The plaintiff may recover if he establishes that the product was defective, and he need not show that the defendants breached a duty of due care."[25]

The barricades that prevented a defendant's counter-assaults were the rules of law that precluded a defendant from admitting evidence of plaintiff's contributory negligence, and to a certain extent, his nonuse of a product's safety devices in a strict products liability case. In *Bill Loeper Ford v. Hites*,[26] the defendant's contributory negligence—driving 20 miles per hour in a 55 mile per hour zone—did not allow the plaintiff to be indemnified by the defendant when the plaintiff was found liable for injuries caused to the defendant's passenger. The court held:[27]

> We see that in the development of strict liability it has now been determined that a plaintiff can still recover even though he may have been contributorily negligent in using the product. (*Luque v. McLean*,[28] *supra.*) Plaintiff here is seeking to interject the concept of fault in an indemnification case between a retailer and the driver of a defective automobile. The Supreme Court has repeatedly indicated that a retailer is strictly liable, regardless of fault. To allow indemnification because Hites was actively negligent in driving the automobile is the antithesis of strict liability. Plaintiff attempts to shift the liability for selling a defective automobile to the driver simply because he used the automobile in such a way as to expose the design defect. The present status of strict liability prohibits this avoidance of accountability. The court in *Cronin*,[29] *supra*, held that a manufacturer must take the occurrence of an accident (i.e., the negligence of a driver) into consideration in designing the vehicle.

In *Horn v. General Motors Corp.*,[30] an action was brought against a car manufacturer for injuries sustained in a so-called "second collision."[31] The plaintiff reached her hand across the

24. Cronin v. J.B.E. Olson Corp., 8 Cal.3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972). For a discussion of the meaning of "defect" *see* Levine, *Strict Products Liability and Comparative Negligence: The Collision of Fault and No-Fault*, 14 SAN DIEGO L. REV. 337, 338 (1977).

25. 13 Cal.3d 113, 118, 528 P.2d 1148, 1150 (1974), 117 Cal. Rptr. 812, 814.

26. 47 Cal. App. 3d 828, 121 Cal. Rptr. 131 (1975).

27. 47 Cal. App. 3d at 835-36, 121 Cal. Rptr. at 136. (Footnotes added).

28. 8 Cal. 3d 136, 501 P.2d 1163, 104 Cal. Rptr. 443 (1972).

29. Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972).

30. 17 Cal. 3d 359, 551 P.2d 398, 131 Cal. Rptr. 78 (1976).

31. As noted in Daly v. General Motors Corp., 20 Cal. 3d 725, 730-31, 575 P.2d

steering wheel in an attempt to swerve and thereby avoid an oncoming car and in doing so she knocked off the horn cap, leaving exposed three sharp prongs with which her face came into contact when she ran into a concrete abutment. These injuries could have most likely been avoided if the plaintiff had used her seatbelts. Outside the presence of a jury, the defendant contended that "failure to use seatbelts was a misuse of the automobile and that if plaintiff had been using the seat belts at the time of the accident, her injuries would have been substantially reduced."[32] The court in *Horn* affirmed the trial court's ruling that such evidence of nonuse of seatbelts was *inadmissible* on the grounds that the plaintiff's contributory negligence was not an issue.[33] The plaintiff was, in effect, able to attack the design of defendant's car while sheltering herself from counter-assaults that would have allowed the jury to consider her own possible contributory negligence.

PLAINTIFF'S CITADEL FALLS—*Daly v. General Motors Corp.*

With the above historical stage set, the California Supreme Court was faced with a situation where an intoxicated driver not wearing his seatbelt, collided with a metal divider fence while travelling at a speed of fifty to seventy miles per hour along a major freeway.[34] During the collision with the fence his door was allegedly forced open because a defectively made door handle was pushed in. The plaintiffs, whose action in *Daly v. General Motors Corp.*[35] was based on strict products liability for the defective door handle on the car, argued that the evidence of intoxication and nonuse of safety devises was inadmissable "since contributory negligence was not a defense to an action founded in strict liability for a defective product."[36] The plaintiffs were asking the court to allow them to attack defendants while remaining in the safety of a citadel that protected them from the defendants' counter-offensive which would have exposed to the jury that possibly the real cause of the accident was the plaintiff's intoxication and his nonuse of seatbelts. While decades of court decisions had broken down the barricades and citadels that sheltered defendants from assailing plaintiffs, some citadels had been constructed

1162, 1164, 144 Cal. Rptr. 380, 382 (1978), a "second collision" is one in which the defect in the product did not contribute to the original impact, but only to the enhancement of injury.

32. 17 Cal. 3d 359, 369, 551 P.2d at 403-404, 131 Cal. Rptr. at 83-84.

33. *Id.* at 370, 551 P.2d at 403, 131 Cal. Rptr. at 83.

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

35. *Id.*

36. *Id.* at 745, 575 P.2d at 1174, 144 Cal. Rptr. at 392.

for the plaintiffs' benefit which have effectively protected them from the defendants' counterattacks. Defendants could still use the defenses of assumption of risk and misuse[37] but the courts' willingness to allow these had lessened in recent years.

At the trial court level of the *Daly v. General Motors Corp.* decision, the trial judge allowed the nonuse of seatbelt and intoxication evidence, the former in that such evidence would bar recovery on the theory of product misuse, and the latter on the theory that such evidence was relevant to the decedent's failure to use the car's safety devices.[38] The Supreme Court noted that the trial preceded rendition of the opinion in *Horn v. General Motors Corp.*[39] The court of appeal, basing its decision on *Horn*, reversed the jury's judgment in the defendants' favor. At this point, the plaintiffs were exultant; they could conceivably go back to the trial court, attack the defective design of the defendants' product and hide in a citadel (called contributory negligence) that would preclude the defendants from exposing what are arguably the weaknesses of the plaintiffs' case. On appeal, however, defendants came up with a theory that had been on the drawing boards of California law for at least the last six years[40] and which had already been applied in several other states. They argued that the principles of pure comparative negligence as adopted by California in the Supreme Court case of *Li v. Yellow Cab Co.*,[41] should be applicable to strict products liability. Why? Mainly because it would "[f]urther the public policies underlying California tort law," and because it is more equitable.[42]

The California Supreme Court in *Daly v. General Motors Corp.* accepted the above argument;[43] pure comparative negligence now applies to strict products liability. Now, on retrial, the evidence of intoxication and nonuse of safety devices can be introduced against the plaintiffs. The plaintiffs can introduce their evidence of the defendants' defectively designed car but cannot hide from the fact that they might have been contributorily negligent—their

37. *Id.* at 738, 575 P.2d at 1169, 144 Cal. Rptr. at 387.
38. *Id.* at 745, 575 P.2d at 1174, 144 Cal. Rptr. at 392.
39. *See* text accompanying note 30.
40. *See* authorities noted in 20 Cal. 3d 725, 740-741, 575 P.2d at 1171, 144 Cal. Rptr. at 389.
41. 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).
42. *See*, L.A. Number 30687, Respondent's Supplemental Brief at 2, Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978).
43. 20 Cal. 3d 725, 730, 575 P.2d at 1164, 144 Cal. Rptr. at 382 (1978).

citadel fell. As the court declared, the manufacturer's "exposure will be lessened only to the extent that the trier finds that the victim's conduct contributed to his injury."[44] Among the myriad results that are possible on retrial, it is conceivable that the jury who must now apply "comparative fault"[45] principles, could find the plaintiffs' decedent ninety-five percent at fault and the defendants five percent at fault. Assuming that the jury concluded that the plaintiffs' damages equaled one hundred thousand dollars, they would award the plaintiffs five thousand dollars accordingly.

The court found that by applying the principles of *Li* to strict products liability, one "felicitous result" would occur. Those last vestiges, those last strongholds of the defendant, that could aid him in totally defending a strict products liability case, assumption of risk and product misuse, could be done away with.[46] The court held that "[i]n each instance the defense, if established, will reduce but not bar plaintiff's claim."[47]

It is as if all the castles, walls, barricades, and flanges of Sparta and Athens were brought to the ground and the troops of both adversaries forced to fight man for man on open ground, and on the mountains, seated in ornate chairs and surrounded by attendants, sat the kings who had come from afar from impartial countries. Finally, at the end of the day they determined the percentage of victory that would be awarded to each side and thereafter divided the spoils accordingly.

Are the sides in the battle equal? Was the decision "fair"[48] as the court says it was? What follows is a pro and con analysis.

THE PROS

A concentrated analysis of the *Daly v. General Motors Corp.* decision cannot help but expose a struggle between philosophical arguments on one hand and legal arguments on the other. The court took a quantum leap in *Daly* when it applied comparative fault[49] to strict products liability and it did so because it was "fair to do so."[50] A strict application of precedent would have pre-

44. *Id.* at 737, 575 P.2d at 1169, 144 Cal. Rptr. at 387.
45. *Id.* at 742, 575 P.2d at 1172, 144 Cal. Rptr. at 390.
46. *Id.* at 738, 575 P.2d at 1169-1170, 144 Cal. Rptr. at 387-388. The court in *Daly* noted that assumption of risk and product misuse or any other variant of contributory negligence was to be merged into comparative principles, just as assumption of risk was expressly merged into comparative principles in Li v. Yellow Cab Co., 13 Cal. 3d 804, 825, 533 P.2d 1226, 1241, 119 Cal. Rptr. 858, 873 (1975).
47. 20 Cal. 3d 725, 738, 575 P.2d at 1170, 144 Cal. Rptr. at 388.
48. 20 Cal. 3d at 742, 575 P.2d at 1172, 144 Cal. Rptr at 390.
49. *Id.*
50. *Id.*

cluded the decision in *Daly*, but, as was proven in *Li v. Yellow Cab Co.*,[51] the court is willing to adopt a rule contrary to one hundred years of precedent if it is "irresistible to reason and all intelligent notions of fairness."[52]

A. The Proper Step After Li v. Yellow Cab Co.

The court in *Li* held that the "all-or-nothing" rule of contributory negligence, which bars all recovery when the plaintiff's negligent conduct contributes in any degree to the harm suffered by him, would henceforth be replaced by a system of pure comparative negligence "under which liability for damage will be borne by those whose negligence caused it in direct proportion to their respective fault."[53] The court noted that "logic, practical experience, and fundamental justice counsel against the retention of the doctrine rendering contributory negligence a complete bar to recovery" in a negligence action.[54]

The pros,[55] those who advocated the application of the comparative fault principles expounded by *Li* to strict products liability, literally jumped on the *Li* decision and the words it used to justify its holding. They could not have been happier when the court stated, "Our decision in this case is to be viewed as a first step in what we deem to be a proper and just direction, not as a compendium containing the answers to all questions that may be expected to arise."[56]

The first step taken in *Li*, a step which basically said, let fault

51. 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).
52. *Id.* at 811, 532 P.2d at 1231, 119 Cal. Rptr. at 863.
53. *Id.* at 813, 532 P.2d at 1232, 119 Cal. Rptr. at 864.
54. *Id.* at 812-13, 532 P.2d at 1232, 119 Cal. Rptr. at 864.
55. The pros referred to here are the defendants-respondents in *Daly v. General Motors Corp. See*, L.A. Number 30687, Respondent's Supplemental Brief, Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978). Note also other advocatres of the *Daly* decision; SCHWARTZ, COMPARATIVE NEGLIGENCE § 12.1 *et seq.*, at 195 *et seq.* (1974) (*see also* SPECIAL CAL. SUPPLEMENT RE: *Nga Li v. Yellow Cab Co. of California* § 4(b), at 8 (1975); Epstein, *Products Liability: Defenses Based on Plaintiff's Conduct*, 1968 UTAH L. REV. 267, 284 (1968); Fleming, *The Supreme Court of California 1974-1975 — Forward: Comparative Negligence at Last — By Judicial Choice*, 64 CAL. L. REV. 239, 269-271 (1976); Noel, *Defective Products, Abnormal Use, Contributory Negligence and Assumption of Risk*, 25 VAND. L. REV. 93, 117-118 (1972); Wade, *A Uniform Comparative Fault Act—What Should it Provide?* 10 U. OF MICH. J. L. REF. 220 (1977); Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 850 (1973).
56. Cited in L.A. Number 30687, Respondent's Supplemental Brief at 2, Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978). Li v. Yellow Cab Co., 13 Cal. 3d 804, 826, 532 P.2d 1226, 1242, 119 Cal. Rptr. 858, 874 (1975).

be placed where fault lies, was a positive step already adopted by a growing number of other jurisdictions.[57]

B. The Trend Towards Comparative Fault

In the 1976 decision of *Butaud v. Suburban Marine & Sporting Goods, Inc.*,[58] the Supreme Court of Alaska held:

> We feel that pure comparative negligence can provide a predicate of fairness to products liability cases in which the plaintiff and defendant contribute to the injury. The defendant is strictly liable due to the existence of a defective condition in the product. On the other hand, the plaintiff's liability attaches as a result of his conduct in using the product. It is appropriate, therefore, that the parties' contribution to the injury be apportioned. The defendant is strictly liable for the harm caused from his defective product, except that the award of damages shall be reduced in proportion to the plaintiff's contribution to his injury.[59]

In 1975, the United States Fifth Circuit Court of Appeals in *Edwards v. Sears, Roebuck and Co.*,[60] applied Mississippi law to hold that when the trial court instructed "the jury that if it found that the decedent was contributorily negligent, but that the defendants also proximately caused or contributed to George Edwards' death, damages could be recovered but must be reduced in proportion to the extent to which decedent's negligence contributed to the accident . . ., [that] the correct path through the thicket of strict [products] liability and contributory negligence"[61] was taken.

These decisions and others[62] often cited important legal scholars[63] to bolster their decisions to allow the plaintiff's fault to be

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57. Edwards v. Sears, Roebuck and Co., 512 F.2d 276 (5th Cir. 1975), applying Mississippi Law; Rodrigues v. Ripley Industries, Inc., 507 F.2d 782, 786 (1st Cir. 1974), applying New Hampshire law; Coons v. Washington Mirror Works, Inc., 344 F. Supp. 653 (S.D.N.Y. 1972), applying New York law; Butaud v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42 (Alaska Sup. Ct. 1976); West v. Caterpillar Tractor Co., Inc., 336 So. 2d 80 (Fla. Sup. Ct. 1976); Haney v. International Harvester Co., 201 N.W. 2d 140 (Minn. Sup. Ct. 1972); City of Franklin v. Badger Ford Truck Sales, Inc., 207 N.W. 2d 866 (Wis. Sup. Ct. 1973); Dipple v. Sciano, 155 N.W. 2d 55 (Wis. Sup. Ct. 1967).

58. 555 P.2d 42 (Alaska Sup. Ct. 1976).

59. *Id.* at 45-46. (Footnotes omitted). The *Butaud* decision is worth special notation in that the Alaskan Supreme Court in the 1965 decision of Butaud v. Suburban Marine & Sporting Goods, Inc., 543 P.2d 209 (1975), had adopted the exact California formulation of strict tort liability which developed from the Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963), Cronin v. J. B. E. Olson Corp., 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972), and, Luque v. McLean, 8 Cal. 3d 136, 501 P.2d 1163, 104 Cal. Rptr. 443 (1972), decisions. However, note one authority who said that the decision in *Butaud* was a "[f]lagrant disregard for the controlling nature of the theoretical basis of [strict products] liability." Leving, *Strict Products Liability and Comparative Negligence: The Collision of Fault and No-Fault*, 14 SAN DIEGO L. REV. 337, 355 (1977).

60. 512 F.2d 276 (5th Cir. 1975).

61. *Id.* at 290.

62. *Supra* note 57.

63. *Supra* note 55.

compared with the defendant's. Professor John W. Wade is an oft-cited authority who has said that when trying to reconcile strict liability with contributory negligence, "[the] solution should be apparent on reflection. It is to apply a system of comparative fault of the 'pure type' and to apply it to strict liability as well as to negligence."[64] Indeed, in California it is arguably inconsistent and invites theory shopping to have strict liability without comparative principles when negligence without comparative principles was held to be an "all or nothing" vice which the California Supreme Court found unfair in *Li*. With but few exceptions, most jurisdictions which have comparative negligence principles apply them to strict products liability actions.[65] As the *Daly v. General Motors Corp.* decision noted,[66] citing Dean Prosser, to perpetuate a system disallowing comparative principles in strict products liability, would place "upon one party the entire burden of a loss for which two are, by hypothesis, responsible."[67]

C. The Positive Results in the Federal Admiralty Courts

In advocating the advantages of comparative negligence principles in strict liability cases, one problem the proponents had to grapple with was the possible difficulties that could be encountered when those principles were applied to non-negligence cases. If a jury found that a plaintiff was contributorily negligent and that the defendant's product was defective, how could that jury fairly and consistently proportion the damages?

Initially, it should be noted that when the *Li* court was faced with similar objections it held:

> The existence of the foregoing areas of difficulty and uncertainty (as well as others which we have not here mentioned—see generally Schwartz, *supra* [Comparative Negligence] § 21.1, pp. 335-339 (1974)) has not diminished our conviction that the time for a revision of the means for dealing with contributory fault in this state is long past due and that it lies within the province of this court to initiate the needed change by our decision in this case.[68]

64. Wade, *Strict Tort Liability*, 44 MISS. L. J. 825, 850 (1973).

65. *Supra* note 57. Exceptions: Melia v. Ford Motor Co., 534 F.2d 795 (8th Cir. 1976) (the court would not apply Nebraska's comparative negligence statute); Kinard v. Coats Company, Inc., 553 P.2d 835 (Colo. App. 1976) (the court disallowed comparative fault); Kirkland v. General Motors Corp., 521 P.2d 1353 (Okla. 1974) (the comparative negligence statute was restricted to negligence actions).

66. 20 Cal. 3d 725, 742, 575 P.2d 1162, 1172, 144 Cal. Rptr. 380, 390 (1978).

67. PROSSER, TORTS § 67, at 433 (4th ed. 1971).

68. 13 Cal. 3d 804, 826, 532 P.2d 1226, 1241, 119 Cal. Rptr. 858, 873 (1975).

More importantly, however, the proponents found much help from, and the court in *Daly*, much solace in, the fact that Federal Admiralty Courts have been applying comparative principles to non-negligence situations for more than eighty years. A seaman, whose injuries are proximately caused by the unseaworthiness of a vessel, may recover without regard to negligence.[69] However, the rule developed early in federal courts that negligence on the part of the seaman would cause a reduction in his awarded damages but not bar his claim under "unseaworthiness," which is a form of strict liability. In *Pope & Talbot, Inc. v. Hawn*,[70] the United States Supreme Court stated that:

> The harsh rule of the common law under which contributory negligence wholly barred an injured person from recovery is completely incompatible with modern admiralty policy and practice. Exercising its traditional discretion, admiralty has developed and now follows its own fairer and more flexible rule which allows such consideration of contributory negligence in mitigation of damages as justice requires.[71]

As the *Daly* court found, when the fault of the plaintiff and defendant has been compared in Admiralty cases, "[n]o serious practical difficulties appear to have arisen even where jury trials are involved."[72]

D. Balancing the Scales

At the heart of the proponents' arguments has been a recognition that California has come a long way in eliminating burdensome factors which have hampered plaintiffs' attempts to recover for injuries resulting from defendants' defective products. And now, more than ever, the public is "insure[d] that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves."[73] The public has questioned, however, the reasonableness of allowing a plaintiff to fire away without restrictions at a defendant, while being able to retreat behind a citadel that blockades any introduction of contributory negligence evidence. It is, indeed, arguable that a plaintiff who was contributorily negligent, *e.g.*, intoxicated

69. *See*, Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 550 (1960); Mahnich v. Southern Steamship Co., 321 U.S. 96, 100 (1944); The Osceola, 189 U.S. 158, 175 (1903).

70. 346 U.S. 406 (1953).

71. *Id.* at 408-409.

72. 20 Cal. 3d at 739, 575 P.2d at 1170, 144 Cal. Rptr. at 388, citing Price v. Mosler, 483 F.2d 275, 277-278 (5th Cir. 1973). *See*, Houston-New Orleans, Inc. v. Page Engineering Co., 353 F. Supp. 890, 900 (1972), for an example of how a judge apportioned fault.

73. Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963).

and not using safety devices, was not "powerless to protect himself." Further, it is arguably unreasonable to hold a defendant responsible for a plaintiff's negligence and thereby have him spread the costs through society and to individual consumers, by higher prices for his goods, when those consumers had nothing to do with the accident.[74] Innocent consumers in essence, have been suffering the consequences of contributorily negligent plaintiffs in addition to the consequences of negligent defendants.

THE CONS

A. The Jury Cannot "Compare Fault" with a No-Fault Theory of Law

Central to the cons[75] argument is the contention that the court or the jury cannot compare "apples and oranges."[76] A comparison between a plaintiff's contributory negligence and a defendant's defective product is impossible absent a showing of negligence on the part of the defendant. As noted by Professor Harvey R. Levine, when considering whether it is reasonable to apply the *Li* principles of comparative negligence to strict products liability, "the crucial question . . . is whether the strict products liability action rests on a theoretical foundation of fault. If the strict liability action does not proceed on a fault basis, it would be illogical to consider the nature of the plaintiff's conduct to determine liability in proportion to fault."[77]

The weight of authority in California supports the proposition that strict products liability is imposed regardless of fault. As noted earlier,[78] in *Bill Loeper Ford v. Hites*, when confronted with a retailer who sold a defective car to a defendant, the court stated that, "[p]laintiff here is seeking to interject the concept of fault in

74. *See*, Schwartz, *Strict Liability and Comparative Negligence*, 42 TENN. L. REV. 171, 179 (1974).

75. The cons are the Plaintiffs-Appellants in Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978). *See also*, Hickey, *Comparative Fault and Strict Products Liability: Are They Compatible:* 5 PEPPERDINE L. REV. 501 (1978); Levine, *Strict Products Liability and Comparative Negligence: The Collision of Fault and No-Fault*, 14 SAN DIEGL L. REV. 337 (1977); Robinson, *Square Pegs (Products Liability) in Round Holes (Comparative Negligence)*. 52 STATE BAR J. 16 (1977).

76. Daly v. General Motors Corp., 20 Cal. 3d 725, 734, 575 P.2d 1162, 1167, 144 Cal. Rptr. 380, 383 (1978).

77. Levine, *Strict Products Liability and Comparative Negligence: The Collision of Fault and No-Fault*, 14 SAN DIEGO L. REV. 337, 352 (1977).

78. *Supra* note 24 and accompanying text.

an indemnification case between a retailer and the driver of a defective automobile. The Supreme Court has repeatedly indicated that a retailer is strictly liable, regardless of fault."[79] And, again, as noted earlier, the court in *Ault v. International Harvestor Co.* declared that, "In an action based upon strict liability against a manufacturer, negligence or culpability is not a necessary ingredient."[80]

In essence, the cons are demonstrating that too many theoretical and semantic differences exist between comparative negligence and strict liability. Comparative negligence, therefore, is best left to actions (negligence actions) where the defendant's negligence is at issue. In *Luque v. McLean*,[81] the court stated:

> Ordinary contributory negligence does not bar recovery in a strict liability action. "The only form of plaintiff's negligence that is a defense to strict liability is that which consists in *voluntarily and unreasonably proceeding to encounter a known danger*, more commonly referred to as assumption of risk. For such a defense to arise, the user or consumer must become aware of the defect and danger and still proceed unreasonably to make use of the product."[82]

Thus, in *Buccery v. General Motors Corp.*,[83] a strict products liability case, where assumption of risk was asserted as a defense, the court was required to decide whether the principles expounded by *Luque* should apply or the principles of comparative negligence set down by *Li*. The court concluded:

> Comparative negligence, therefore, as adopted in *Li*, entails a comparison of the respective negligence of the plaintiff on the one hand and of the defendant on the other. *Strict liability for defective products is not based upon defendant's negligence. There may be, therefore, no negligence of the defendant to compare with that of plaintiff.* It thus seems doubtful that *Li* has superseded *Luque* in strict liability cases.[84]

The problem, therefore, arises: How can comparative negligence or comparative fault be applied to what the California cases have called the non-fault doctrine of strict liability?[85] As the court in *Daly* noted, "Defendant's liability for injuries caused by a defective product remains strict."[86]

Ideally, an omniscient jury will hear both the evidence regard-

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79. 47 Cal. App. 3d 828, 835-36, 121 Cal. Rptr. 131, 136 (1975).

80. 13 Cal. 3d 113, 118, 528 P.2d 1148, 1150, 117 Cal. Rptr 812, 814 (1974).

81. 8 Cal. 3d 136, 501 P.2d 1163, 104 Cal. Rptr. 443 (1972).

82. *Id.* at 145, 501 P.2d 1163, 1169-70, 104 Cal. Rptr. 443, 449-50. (Citations omitted).

83. 60 Cal. App. 3d 533, 132 Cal. Rptr. 605 (1976).

84. *Id.* at 549, 132 Cal. Rptr. at 615. (Emphasis added).

85. Against what appears to be the weight of authority in California, Justice Clark in his dissenting opinion in Horn v. General Motors Corp., 17 Cal. 3d 359, 372, 551 P.2d 398, 405, 131 Cal. Rptr. 78, 85 (1976), suggested that strict products liability is based on fault. In accordance with this, *see*, Brewster, *Comparative Negligence in Strict Liability Cases*, 42 J. AIR L. & COM. 107, 110 (1976).

86. 20 Cal. 3d 725, 737, 575 P.2d 1162, 1168, 144 Cal. Rptr. 380, 386 (1978).

ing the defective product and the evidence regarding plaintiff's contributory negligence, and from this decide what percentage of fault lies with the defendant and what percentage lies with the plaintiff. The cons argue, however, that this ideal is unachievable.

B. Plaintiffs Will be Compelled to Prove the "Negligence" of Defendants

Those who will benefit most from the *Daly*[87] decision, of course, are defendants. As the cons see it, defendants will now be able to place undue emphasis on the plaintiff's negligence. For a doctrine that according to *Greenman v. Yuba Power Products, Inc.*, was designed primarily "to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves,"[88] a heavy burden of proof has now been added to the plaintiff's side. The cons feel that not only will the plaintiffs who were questionably negligent have to prepare their own defenses but they will also have to prove negligence on the part of the defendants. If the plaintiffs don't prove negligence on the part of the defendants, then the jurors will most likely be faced with a seemingly harmless defective product on the one hand (*e.g.*, a mere door handle with a button that extended from the handle grip) and plaintiff's negligence on the other at which the flamboyant defense attorney has now been able to fire away at and possibly blow all out of proportion.

In strict products liability actions the goal has always been to relieve the plaintiff's burden of proof. As noted in *Cronin v. J. B. E. Olson Corp.*:[89]

> Yet the very purpose of our pioneering efforts in this field [of strict products liability] was to relieve the plaintiff from problems of proof inherent in pursuing negligence (*Escola v. Coca Cola Bottling Co.*, *supra*, 24 Cal. 2d 453, 461-462, [150 P.2d 436]) (Traynor, J., concurring) and warranty (*Greenman v. Yuba Power Products, Inc. supra*, 59 Cal. 2d 57, 63, 27 Cal. Rptr. 697, 701, [377 P.2d 897, 901]) remedies, and thereby "to insure that the costs of injuries resulting from defective products are borne by the manufacturers . . . ."[90]

87. *See*, L.A. Number 30687, Petitioner's Petition for Rehearing, and Appendix to Petition for Rehearing; Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978).

88. 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1962).

89. 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 4333 (1972).

90. *Id.* at 133, 501 P.2d at 1162, 104 Cal. Rptr. at 442 (1972). The court in Cronin, also noted: "We think that a requirement that a plaintiff also prove that the defect

It is now arguable, however, that with the *Daly* decision, the contributorily negligent plaintiff in a strict products liability action is back to base one. He's back to proving a defendant's negligence and defending his own negligence.[91] If a plaintiff fails to do either of these during trial, the jury will be unduly influenced in using the comparative fault doctrine to award the plaintiff a much smaller sum because defendant, who if not proven negligent, is only responsible for a defective product which had probably never hurt anyone before and probably wouldn't have this time were it not for plaintiff's negligence. There is, therefore, less chance for the policy reasons underlying strict products liability law to be effectuated. That is, there is less assurance "that the costs of injuries resulting from defective products are borne by the manufacturers . . . ."[92]

C. The Inevitable Evidentiary Problems

It is important, at this point, to raise the question as to whether it would be advantageous for the contributorily negligent plaintiff to simply by-pass his action for strict products liability and proceed with a cause of action for negligence. In that, "[d]efendant's liability for injuries caused by a defective product remains strict,"[93] it is questionable whether a plaintiff may introduce additional evidence of a defendant's negligence, besides the defective product itself, for the jury to balance against plaintiff's negligence. If the defendant's negligence is inadmissible under a case brought on a strict products liability theory it may be advantageous for the plaintiff to pursue his cause of action on a negligence theory, especially if his contributory negligence is susceptible to latent jury prejudices.

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made the product 'unreasonably dangerous' places upon him a significantly increased burden and represents a step backward in the area pioneered by this court." *Id.* The court was concerned about burdens of proof that would place a "considerably greater burden" upon plaintiff "than that articulated in Greenman." *Id.* at 134-35, 501 P.2d at 1163, 104 Cal. Rptr. at 443. It seems that this rationale could have precluded the decision in *Daly v. General Motors Corp.*

91. *See*, Justice Mosk's dissenting opinion in *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 757, 575 P.2d 1162, 1181, 144 Cal. Rptr. 380, 399 (1978), where he says:

> This will be remembered as the dark day when this court, which heroically took the lead in originating the doctrine of products liability (*Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal. 2d 57, [27 Cal. Rptr. 697, 377 P.2d 897] and steadfastly resisted efforts to inject concepts of negligence into the newly designed tort (*Cronin v. J.B.E. Olson Corp.*, (1972) 8 Cal. 121, [104 Cal. Rptr. 433, 501 P.2d 1153], inexplicably turned 180 degrees and beat a hasty retreat almost back to square one.

92. Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 63, 377 P.2d 897, 901 27 Cal. Rptr. 697, 701 (1962).

93. Daly v. General Motors Corp., 20 Cal. 3d 705, 737, 575 P.2d 1162, 1168, 144 Cal. Rptr. 380, 386 (1978).

On the other hand, there is the problem that if defendant's negligence is admissible, the defendant is now in the favorable position of being able to introduce evidence showing his lack of negligence which before the *Daly* decision would have been most likely barred. In other words, the defendant, perhaps a car manufacturer, will now be able to introduce mountains of evidence demonstrating the care and precautions taken in the design and manufacture of his car. Films, charts, blueprints, diagrams, sample tests, reports and data, not to mention myriad expert opinions, will now be standard courtroom props for defense attorneys. These props and devices could have the subtle effect of convincing the jury that defendant wasn't negligent, thereby lessening plaintiff's award even though the defendant should be held strictly liable.

Many of these problems are erased if, by chance, the plaintiff was simply not contributorily negligent. In such a case plaintiff must still prove that there was a defect in the defendant's product and that it was that defect that caused his injuries. However, as Appellants and Petitioners so assiduously argued in their brief before the California Supreme Court in *Daly v. General Motors Corp.*,[94] the vast majority of strict products liability cases involve at least some conduct on the part of the plaintiff that the defendant can exploit and argue is contributory negligence. The implications for the plaintiff are obvious: tread lightly and carry a big shield.

THE PROS HAVE IT

Justice Richardson, speaking for the majority, succinctly summed up the holding in *Daly v. General Motors Corp.* when he said:

> We conclude, accordingly, that the expressed purposes which persuaded us in the first instance to adopt strict liability in California would not be thwarted were we to apply comparative principles. What would be forfeit is a degree of semantic symmetry. However, in this evolving area of tort

94. *See*, L.A. Number 30687, Petitioner's Petition for Rehearing, and Appendix to Petition for Rehearing, Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978). The Appendix to Petition for Rehearing contains a vast compendium of cases, most of which show at least some conduct by plaintiff that is arguably contributory negligence. Also, in the Petition for Rehearing, is a section entitled, *The Primer for Defense Attorneys in Defending Future Serious Injury Strict Products Liability Cases After Daly v. General Motors.* This "Primer" could be of interest to the unscrupulous defense attorney in a strict products liability case. On file at Pepperdine University School of Law, Law Review Office.

> law in which new remedies are judicially created, and old defenses judicially merged, impelled by strong considerations of equity and fairness we seek a larger synthesis. If a more just result follows from the expansion of comparative principles, we have no hesitancy in seeking it, mindful always that the fundamental and underlying purpose of *Li* was to promote the equitable allocation of loss among all parties legally responsible in proportion to their fault.[95]

As if to complete the balancing of the scales, the court also held that "assumption of risk" or "product misuse" would no longer bar a claim in strict products liability, but would simply reduce a plaintiff's recovery.[96] The court felt that their decision constituted "the next appropriate and logical step in the same direction" as that which was taken in *Li*;[97] that is, towards allocating fault among all parties legally responsible. The step was taken, however, on shaky legs. In what was already a close four-three decision it would have been more advantageous if Justice Clark in his concurring opinion, had demonstrated more resolve for the majority's opinion. Instead, he said, "The present comparative system is not only inequitable and arbitrary but also inconsistent and unpredictable."[98] In essence, Justice Clark expressed agreement with the majority's holding, but qualified his agreement by stating that there is little chance that juries will arrive at consistent results.[99] He advocated a uniform index factor which would consistently discount a negligent plaintiff's recovery and thereby "eliminate the necessity of the often impossible task of comparing fault."[100] In any event, by concurring and remaining with the majority, Justice Clark has joined those who have voted to leave the allocation process to the jury who must now learn to face the rigorous process of comparing a plaintiff's contributory negligence with a defendant's defective product.

CONCLUSIONS

The stage is now set. California has joined the march. Comparative fault now applies to strict products liability. In a strict products liability action, the judge or jury may now consider the plaintiff's contributory negligence and offset any recovery by the amount of fault placed on that negligence. No longer does the defendant have to bear the full burden of the plaintiff's contributory negligence.

From the revered authorities of the law, the cloaked men of let-

95. 20 Cal. 3d at 737, 575 P.2d at 1169, 144 Cal. Rptr. at 387.
96. *Id.* at 738, 575 P.2d at 1169-70, 144 Cal. Rptr. at 387-88.
97. *Id.* at 747, 575 P.2d at 1175, 144 Cal. Rptr. at 393.
98. *Id.* at 750, 575 P.2d at 1177, 144 Cal. Rptr. at 395.
99. *See*, Clark, J., concurring opinion, *Id.* at 747, 575 P.2d at 1175, 144 Cal. Rptr. at 393.
100. *Id.* at 749, 575 P.2d at 1176, 144 Cal. Rptr. at 394.

ters, came a decree, founded on fairness and hope, which said equalize the swords of the legal foemen and let us see which way the scales doth tip.

The adversaries are in open field now, their troops and arms exposed to discernment, the plaintiff's citadel has fallen, neither side can retreat; the kings, hunched forward in their chairs, look down in anticipation. But wait! One king has raised his arm; he poses a question, "My fellow monarchs, what if at the end of the day there are one hundred Knights left on Athen's side occupying forty percent of the land, and on Sparta's side there are left, sixty Knights and twenty chariots occupying sixty percent of the land? How do we decide who is most victorious and divide the spoils accordingly?" As the kings rest back in their chairs, subdued into pensive silence, one squire feeling sympathy for the emperors, looks heavenward and whispers, "May they be wise dear Zeus, may they be wise."

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