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Comparative Negligence and Strict Tort Liability - A Marriage of Necessity

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Deeming the adoption of strict tort products liability by Wyoming a foregone conclusion, the authors inquire into whether comparative fault principles should be applicable to such actions. The authors find that the arguments in favor of applying comparative principles far outweigh the reasoning of those few courts which have rejected the concept. They conclude that the question is not so much whether comparative fault should be applied, but rather the extent to which the plaintiff's causative negligent conduct should affect his recovery.

COMPARATIVE NEGLIGENCE AND STRICT TORT LIABILITY— A MARRIAGE OF NECESSITY

by
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INTRODUCTION

In 1974,[1] 1975,[2] and again in 1982,[3] appeals of products liability actions came before the Wyoming Supreme Court which were pled and presented at the trial level on strict tort

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**Assistant Public Defender, Natrona County, Wyoming; J.D. 1981, University of Wyoming; Member, Wyoming State Bar. In addition to co-authoring this article, Ms. Rochelle participated in 1982 in research for and preparation of a memorandum brief on this topic for submission to the District Court of Converse County, Eighth Judicial District, Wyoming in a case which has since been tried in that court on negligence and strict liability theories.

The authors gratefully acknowledge the research assistance of Connie Knowles, J.D., 1982, Brigham Young University, during her internship with Murane & Bostwick.

1. Maxted v. Pacific Car & Foundry Co., 527 P.2d 832 (Wyo. 1974).
2. Wells v. Jeep Corp., 532 P.2d 595 (Wyo. 1975).
3. Caldwell v. Yamaha Motor Co., Ltd., 648 P.2d 519 (Wyo. 1982).

liability principles.[4] However, none of the appeals raised the question of whether strict tort liability was, in fact, the law of the State of Wyoming. In each case, the Wyoming Supreme Court discussed certain aspects of strict liability[5] but in two, *Maxted v. Pacific Car & Foundry Company*[6] and *Caldwell v. Yamaha Motor Co., Ltd.*,[7] declined to rule that strict liability was the law and in the third, *Wells v. Jeep Corporation*,[8] was silent on the question. As the Wyoming Supreme Court said in *Caldwell*:

> The case went to the jury on the theory of strict liability only and thus strict liability under § 402A of the Restatement became the law of the case even though the question of whether or not strict liability under

4. While there are variations, alterations, and modifications, "strict tort liability" for the purposes of this article is best exemplified by RESTATEMENT (SECOND) OF TORTS § 402A (1965) which states:

> § 402A Special Liability of Seller 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 is subject 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 a 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) applies 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 bought the product from or entered into any contractual relation with the seller.

Unless the context otherwise requires, the *Restatement (Second) of Torts*, is hereafter referred to as the "Restatement" and section 402A thereof is cited without further reference to the Restatement.

5. In *Maxted* and *Wells*, both the plaintiff's counsel and the court appeared to commingle (if not confuse) negligence and strict liability: "The amended complaint in Counts 1 and 2 asserts a claim of negligent design and bases this claim upon both warranty in the first count and strict liability in the second count. . . ." Maxted v. Pacific Car & Foundry Co., 527 P.2d at 833.

Also, in *Maxted*, quotations from section 402A, and comment (h) thereto concerning when a product is in an unreasonably dangerous defective condition are followed immediately by this quotation from a negligence section in FRUMER & FRIEDMAN, 1 PRODUCTS LIABILITY § 701, at 104.76 (1973): "In addition to liability for negligent construction, a manufacturer is required to exercise ordinary care in planning or designing his product so that it is reasonably safe for the purposes for which it is intended." 527 P.2d at 835. *Wells* contains the same kind of contradictory language:

> Plaintiff asserted his right to recover against Jeep Corporation and Jeep Sales Corporation for *negligence* in the design and manufacture of the vehicle involved in the accident, because of the positioning of the brake and accelerator pedals, claiming the vehicle was not safe for its ordinary and intended use. He asserts that Jeep Corporation and Jeep Sales Corporation are *strictly liable* to him for the damages he suffered under the circumstances in this case and for a breach of warranty. 532 P.2d at 596. (emphasis added).

6. 527 P.2d 832 (Wyo, 1974).
7. 648 P.2d 519 (Wyo. 1982).
8. 532 P.2d 595 (Wyo. 1975).

§ 402A is the law of this state is not before us for decision.[9]

Why then, if it is as yet undetermined that strict liability is the law of this state, should an article urging application of comparative negligence principles in strict liability actions appear in the Wyoming Section of the *Land & Water Law Review?* The answer is three-fold. First, a number of Wyoming district courts have accepted strict liability as the law in an appropriate case. Second, it appears from the Wyoming Supreme Court's recent embrace of many sections of the *Restatement (Second) of Torts*[10] that what is needed for adoption of section 402A is an appeal where the plaintiff has lost a case tried in negligence in which his well-pled section 402A cause of action was rejected by the trial court, or where the defendant has lost a case in which the theory was accepted. Third, even if the Wyoming Supreme Court never has the opportunity to face the issue, it has shown no reluctance to construe strict liability issues[11] which in the trial court became "the law of the case."

9. 648 P.2d at 520-21. Unlike its predecessors, *Caldwell* does not commingle negligence and strict liability principles. This is not to say, of course, that certain concepts and principles do not apply equally to each theory. For instance: "The necessity of proving defectiveness of the product applies no matter what theory governs the particular action: negligence, breach of warranty, strict tort liability, or any other theory." HURSH AND BAILEY, AMERICAN LAW OF PRODUCTS LIABILITY § 1:7, at 19 (2d ed. 1974).

10. The Wyoming Supreme Court has adopted, relied upon or cited with approval numerous sections of the Restatement, especially in the last two or three years. The more important decisions and the involved *Restatement (Second) of Torts* sections are:
Danculovich v. Brown, 593 P.2d 187, 193 (Wyo. 1979) (§ 500, definition of reckless disregard of safety); Kvenild v. Taylor, 594 P.2d 972, 977 (Wyo. 1979) and Basin Elec. Power Coop. v. Howton, 603 P.2d 402 (Wyo. 1979) (§ 766 and § 767, concerning interference with contract); Moore v. Kiljander, 604 P.2d 204, 206 (Wyo. 1979) (§ 390, negligent entrustment); Matter of Estate of Mora, 611 P.2d 842, 847 (Wyo. 1980) (§ 355, liability of lessors); Beard v. Brown, 616 P.2d 726, 731 (Wyo. 1980) and ABC Builder's, Inc. v. Phillips, 632 P.2d 925, 931-33 (Wyo. 1981) (§ 353, undisclosed dangerous conditions known to the vendor of land; § 3, definition of "actor"; § 4, definition of "duty"; § 11, definition of "reasonably believes"; § 12, definitions of "reason to know" and "should know"); Distad v. Cubin, 633 P.2d 167, 172 (Wyo. 1981) (§ 285, determining standard of conduct and §§ 286-288C, concerning the effect of legislation on the standard of conduct) (Dubus v. Dresser Indus., 649 P.2d 198 (Wyo. 1982) reaffirmed the holding in Distad v. Cubin relative to §§ 286-288C); Campen v. Stone 635 P.2d 1121, 1125-26 (Wyo. 1981) (§ 909, punitive damages against a principal); Cates v. Barb, 650 P.2d 1159 (Wyo. 1982) (§§ 624-632, injurious falsehood); Blake v. Rupe, 651 P.2d 1096 (Wyo. 1982) (§ 586, defamation defenses; § 653, wrongful prosecution of criminal proceedings; § 656, malicious prosecution; § 895D(3)(a), immunity).

11. *Maxted,* 527 P.2d at 835-36,and *Wells,* 532 P.2d at 597, concerned, inter alia, the duty of a manufacturer in designing its product (discussed, as noted above, in terms of both negligence and strict liability). *Caldwell* decided two important liability issues: first, that post-accident remedial measures of the manufacturer are admissible in a strict liability action since the exclusionary provisions of Rule 407 of the Wyoming Rules of Evidence are applicable to negligence, not strict liability; second, that evidence of an absence of prior similar accidents is admissible, just as the existence of prior similar accidents would be admissible, as bearing on the issue of whether the product was defective. 648 P.2d at 525-27.

One of the most important and difficult of those issues, and one which will arise in a great number, if not the majority, of strict liability cases, is how and to what extent a plaintiff's conduct will affect his recovery.

HISTORICAL OVERVIEW

While it is not within the scope of this article to chronicle the checkered, though relatively short, history of strict tort liability, a summary is necessary to an understanding of the proposals here presented.[12] Before strict liability became generally accepted,[13] a plaintiff injured by an allegedly defective product had the burden of proving that the often huge, well-financed, well-defended and usually distant defendant failed to act as a reasonable manufacturer[14] would have acted under the circumstances—that is, that the manufacturer was negligent. If the plaintiff sued in breach of implied warranty, then he had even more hurdles to clear, notice to the defendant of the defect and privity with the defendant chief among them.[15]

12. Should the reader desire to delve more deeply into the history and development of the doctrine, his attention is called to PROSSER, LAW OF TORTS §§ 96-98 (4th ed. 1971); Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966); Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363 (1965); and two cases from the jurisdiction perhaps most responsible for the genesis and evolution of the doctrine, Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978); Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).

13. By judicial decision or by statute, 45 states plus the District of Columbia have adopted section 402A or a variation thereof. The five remaining states are Massachusetts, North Carolina, South Carolina, Virginia and Wyoming. *See* West v. Caterpillar Tractor Co. Inc., 336 So. 2d 80, 87 (Fla. 1976); 2 FRUMER & FRIEDMAN, *supra* note 5, ch. 3[2], at 3-8; Carestia, *The Interaction of Comparative Negligence and Strict Products Liability—Where Are We?* 47 INS. COUNS. J. 53, 63 (1980); Note, *The Merger of Comparative Fault Principles with Strict Liability in Utah: Mulherin v. Ingersoll-Rand Co.*, 1981 B.Y.U. L. REV. 964.

14. Strict liability is generally applied to wholesalers, retailers and other middlemen, in addition to manufacturers. However, such "sellers" usually have rights of indemnity against the creator of the defective product. *See* 3A FRUMER & FRIEDMAN, *supra* note 5, § 44.02[3], at 15-20 to 15-39 (1982). This article variously refers to such parties as the "manufacturer," "seller," or "defendant," as best suits the context.

15. Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962). By adoption of WYO. STAT. § 34-21-232 (1977), Wyoming has eliminated privity restrictions in breach of implied warranty actions. Pursuant to the decision in Murphy v. Petrolane-Wyo. Gas Serv., 468 P.2d 969, 974 (Wyo. 1970), Wyoming may have also eliminated the notice requirement, at least in personal injury cases. *But see*, Western Equip. v. Sheridan Iron Works, 605 P.2d 806 (Wyo. 1980). A trial judge in Wyoming has suggested that with the absence of notice and privity requirements, a breach of implied warranty action is identical to strict liability and a plaintiff is not entitled to rely upon both theories. The judge referred to is the Honorable Kenneth Hamm, Fourth Judicial District, State of Wyoming who so held in Roberts v. Sweetwater County School Dist. #2, Civ. No. 1352, Sweetwater County, Fourth Judicial Dist., Wyo. (1977). Judge Hamm, in *Roberts*, anticipated the trend toward applying comparative principles in strict liability. *See infra* note 120 and accompanying text.

The Restatement. Section 402A effectively eliminates these roadblocks, requiring instead that the plaintiff prove only that a product was in an unreasonably dangerous[16] and defective condition when it was sold.[17] Restatement comments to section 402A recognize two limitations to liability which arise out of plaintiff's conduct. Comment (h) speaks of "injury resulting from abnormal handling," and has universally become to be known as the "misuse defense." Where it is applicable, "the seller is not liable."[18] Comment (n) provides the basis for the "assumption of risk" defense, under which the plaintiff is "barred from recovery."[19]

In 1965, when the *Restatement (Second) of Torts* was published and section 402A was added, the rule barring recovery in the presence of plaintiff's contributory negligence was the law of the land. Taking the Restatement language literally, conduct which does not amount to misuse or assumption of risk, even though negligent, is no defense and plaintiff

16. RESTATEMENT (SECOND) OF TORTS § 402A(1) (1965). A few jurisdictions have rejected the "unreasonably dangerous" requirement. *See* Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972); Glass v. Ford Motor Co., 123 N.J. Super. 599, 304 A.2d 562 (1973); Berkebile v. Brantly Helicopter Corp., 462 Pa. 83, 337 A.2d 893 (1975).

17. RESTATEMENT (SECOND) OF TORTS § 402A(1) (1965). There may be other matters which plaintiff must prove, *e.g.*, the seller may deny, and place the burden of proof on the plaintiff, that it was the defendant's product involved in the accident or that the defendant is in the "business" of selling such products. Plaintiff must also prove, of course, that the defect was a proximate cause of the injury, and the extent and nature of his damage. Some jurisdictions have shifted the burden to the defendant to prove the product was not defective. *See, e.g.*, Barker v. Lull Eng'g Co., Inc., 20 Cal. 3d 413, 573 P.2d 443, 455, 143 Cal. Rptr. 225 (1978).

18. RESTATEMENT (SECOND) OF TORTS § 402A, comment h (1965). Comment (h) provides in part:

> A product is not in a defective condition when it is safe for normal handling and consumption. If the injury results from abnormal handling, as where a bottled beverage is knocked against a radiator to remove the cap, or from abnormal preparation for use, as where too much salt is added to food, or from abnormal consumption, as where a child eats too much candy and is made ill, the seller is not liable.

Alleged product alteration is generally asserted as a "misuse" defense, but in addition, the manufacturer may assert that at the time of the accident the product had undergone a "substantial change" from the condition in which it was sold. RESTATEMENT (SECOND) OF TORTS § 402A(1)(b) (1965).

19. RESTATEMENT (SECOND) OF TORTS § 402A, comment n (1965). Comment (n) provides:

> n. *Contributory negligence.* Since the liability with which this Section deals is not based upon negligence of the seller, but is strict liability, the rule applied to strict liability cases (see § 524) applies. Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. On the other hand the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.

will recover all of his damages. Without question, this result was the Restatement response to the then "all or nothing" approach of contributory negligence doctrines and the perceived desirability of having the manufacturer's "deep pocket" stand the loss.[20]

It is obvious that the Restatement defenses of misuse and assumption of risk are also "all or nothing"; however, the positions of the parties are reversed. That is, the strictly liable defendant pays 100 percent of the plaintiff's damages, irrespective of the plaintiff's contributory negligence, whereas, in a negligence case before comparative negligence, the plaintiff would be precluded from any recovery. Most courts that were forerunners in the adoption of section 402A or an equivalent theory accepted, when the question was raised, the proposition that "mere" contributory negligence was not a bar to 100 percent recovery by the plaintiff.[21]

Emerging Problems. Soon the problem of what constituted "assumption of risk" or "misuse" began to appear. What was misuse to one jury might well have been mere negligence to another. Courts, juries and writers wrestled with the varying definitions of misuse and assumption of risk,[22] and often were unable to distinguish between those defenses and contributory negligence:

> It has been held that the doctrine of contributory negligence does not apply in products liability cases, whereas the doctrine of assumption of risk does. . . . However, the two concepts are related and, under some circumstances, appear to be virtually indistinguishable.[23]

20. *See* Butaud v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42, 44 (Alaska 1976); Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 1168, 144 Cal. Rptr. 380 (1978). *See also* RESTATEMENT (SECOND) OF TORTS § 402A, comments b and c (1965).
21. Annot., 46 A.L.R.3d 240, 248 (1972).
22. *See* Sales, *Assumption of the Risk and Misuse in Strict Tort Liability—Prelude to Comparative Fault,* 11 TEX. TECH L. REV. 729 (1980); Twerski, *The Many Faces of Misuse: An Inquiry into the Emerging Doctrine of Comparative Causation,* 29 MERCER L. REV. 403, 417-36 (1978); Note, *Assumption of Risk and Strict Products Liability,* 95 HARV. L. REV. 872 (1982).
23. Stodghill v. Fiat-Allis Constr. Mach., Inc., 2 PROD. LIAB. REP. (CCH) ¶ 9395, at 22,674 (Ga. App. 1982). (citations omitted). The Wyoming Supreme Court has long stated that assumption of risk is but a species of contributory negligence, and, since adoption of comparative negligence, a basis for apportionment of fault. Brittain v. Booth, 601 P.2d 532, 534 (Wyo. 1979).

It was not long before the Restatement's all or nothing approach began to erode, as courts cut through the semantic and doctrinal difficulties. The catalyst was the near explosion, at the end of the 1960's and early 1970's, of the concept of comparative negligence. Professor Twerski reports that prior to 1969 only six states had adopted comparative negligence.[24] The original volume of Professor Schwartz' *Comparative Negligence,* published in 1974, reported that by the end of 1973, "at least twenty-five states were applying comparative negligence in one form or another to all tort actions and Washington was ready to follow on April 1, 1974."[25] Wyoming is one of those states.[26] In the most recent supplement to *Comparative Negligence,* Professor Schwartz reports that an additional eleven states had followed suit, bringing the total, by early 1981, to thirty-seven.[27]

Wisconsin, one of the acknowledged leaders in the adoption and development of comparative negligence, was the first state to apply comparative negligence in strict liability actions.[28] As is discussed below, numerous jurisdictions have followed, to a greater or lesser degree, Wisconsin's lead.

THE UNDERLYING POLICY

Comparative negligence rightly rejects the "harsh result" of contributory negligence[29] and promotes the proposition that "each wrongdoer should pay for his own fault."[30] How can we embrace that philosophy, while in the next breath, in a strict liability personal injury action, endorse a rule which would either turn the injured, but only partially at fault, plaintiff away with nothing, or reward him with 100 percent of his damages regardless of his causative misconduct?

Dean Wade asks "Why is it desirable to transfer to the other users of the product—all innocent—the cost of that part

24. Twerski, *supra* note 22, at 404 n.1.
25. SCHWARTZ, COMPARATIVE NEGLIGENCE § 1.4, at 16 (1974) [hereinafter cited as SCHWARTZ]. To say that comparative negligence was being applied "to all tort actions" is too sweeping. Strict liability is a tort action, but in 1973 only a few jurisdictions were applying comparative principles to that theory of tort liability.
26. 1973 WYO SESS. LAWS Ch. 28, § 1 codified at WYO. STAT. § 1-1-109 (1977).
27. SCHWARTZ, *supra* note 25, § 1.4 at 5 (Supp. 1981).
28. Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55, 63 (1967).
29. Barnette v. Doyle, 622 P.2d 1349, 1361 (Wyo. 1981).
30. HEFT & HEFT, COMPARATIVE NEGLIGENCE MANUAL § 1.20 (1978). *See also* SCHWARTZ, *supra* note 25, § 1.3 at 9.

of plaintiff's injury that is attributable to his own fault?"[31] On the other side of the same coin, in the light of Wyoming's comparative negligence statute[32] and its supposedly salutary and humanitarian purposes, why is it desirable to thrust upon an injured plaintiff all of the economic cost of his injury where a product defect was a cause of the injury but the plaintiff "assumed the risk"? The answer to both questions is that neither result is desirable. The "all or nothing" strict liability defenses of misuse and assumption of risk are simply out of step with the philosophy and purposes behind comparative negligence, as well as with the developing law.

Maintaining Section 402A Objectives. While the result of the application of traditional 402A strict liability may be full recovery for a causally negligent plaintiff, that was not the paramount purpose or intent of the originators of the doctrine. It was, instead, to protect consumers, both economically and socially, in an increasingly mechanized society. Through section 402A (and its counterparts), this result was accomplished by relieving plaintiffs of proof of elements of negligence or implied warranty, which were often difficult or impossible to prove.[33]

The application of comparative principles to strict liability does not alter these basic goals and would not disturb the balance in favor of the consumer. Manufacturers would continue to be held strictly liable for harm done by defective products. Plaintiffs would still need only prove the existence of a defect and that the defect was a cause of the injury. Proof of plaintiff's causal misconduct would remain upon the defendant.[34] The social goal of promoting the manufacture of safer products will not be affected by the chance that a verdict may be reduced because of the plaintiff's conduct:

31. Wade, *Products Liability and Plaintiff's Fault—The Uniform Comparative Fault Act*, 29 MERCER L. REV. 373, 379 (1978).
32. WYO. STAT. § 1-1-109 (1977).
33. Greenman v. Yuba Power Prods., Inc., 377 P.2d at 901 (1962).
34. *See* Daly v. General Motors Corp., 575 P.2d at 1169 (1978). Except for that rare case where the court summarily decides the issue, evidence concerning the plaintiff's conduct will be identical whether the defendant must prove misuse or assumption of risk, or only "mere" negligence. Counsel, whether for plaintiff or defendant, will surely produce all the damning evidence which is otherwise admissible, whatever level of proof is required. The jury will, after hearing the evidence and applying the law given them by the instructions, decide whether the defendant has carried his burden, whatever it may be. Thus, there appears to be no judicial economy in restricting defenses to misuse or assumption of risk.

> [A]s a practical matter a manufacturer, in a particular case, cannot assume that the user of a defective product upon whom an injury is visited will be blameworthy. Doubtless, many users are free of fault, and a defect is at least as likely as not to be exposed by an entirely innocent plaintiff who will obtain full recovery. In such cases the manufacturer's incentive toward safety both in design and production is wholly unaffected.[35]

Strict liability is sometimes premised on the proposition that because the manufacturer placed a defective product on the market, the whole of the economic loss should be upon the manufacturer. The manufacturer, it is argued, can absorb the economic loss by spreading the risk of loss to the consuming public:

> The problem with this "deep pocket" rationale is that the manufacturer may be paying for a part of the loss which is attributable not to the product defect, but to plaintiff's conduct. If contributory negligence is ignored in determining the extent of plaintiff's loss, then the future cost of the manufacturer's product will be artificially inflated and will not accurately represent the actual risk posed by the defective product. Although individual plaintiffs may benefit from the immunity currently given for their contributory negligence, the consuming public at large may be adversely affected. If the future cost of a product does not accurately reflect the risk posed, then consumers may actually choose cheaper, less safe products because the cost of the manufacturer's product is artificially high.[36]

Perhaps the most often-voiced criticism of comparing the plaintiff's negligent conduct to the strict liability of defendant is simply that, being different legal concepts, "apples and oranges," so to speak, they are not comparable. For instance, before the adoption of its new products liability statute,[37] the Colorado Court of Appeals held that

> Products liability under § 402A does not rest upon negligence principles, but rather is premised on the con-

35. *Id.* at 1169.
36. Murray v. Fairbanks Morse, 610 F.2d 149, 161 (3d Cir. 1979).
37. *See infra* note 51 and accompanying text.

> cept of enterprise liability for casting a defective product into the stream of commerce. . . . Thus, the focus is upon the nature of the product, and the consumer's reasonable expectations with regard to that product, rather than on the conduct either of the manufacturer or of the person injured because of the product. . . . What defendant proposes here is that we inject negligence concepts into an area of liability which rests on totally different policy considerations. . . .[38]

These policy considerations, together with concerns for semantic harmony, fairness, practical problems of application, and apportionment of economic loss, have generated much comment from both the academic community and the practicing bar.[39]

Introduction of Comparative Principles. The majority of courts that have considered these issues have not tarried long in their resolution. The Alaska Supreme Court in its important decision in *Butaud v. Suburban Marine & Sporting Goods, Inc.*[40] reasoned

38. Kinard v. Coats Co., Inc., 553 P.2d 835, 837 (Colo. 1976) (citations omitted).

39. Brewster, *Comparative Negligence in Strict Liability Cases,* 42 J. AIR L. & COM. 107, 117-18 (1976); Carestia, *The Interaction of Comparative Negligence and Strict Product Liability—Where Are We?* 47 INS. COUNS. J. 53 (1980); Feinberg, *The Applicability of a Comparative Negligence Defense in a Strict Product Liability Suit Based on Section 402A of the Restatement of Torts 2d, (Can Oil and Water Mix?),* 42 INS. COUNS. J. 39 (1075); Fleming, *Comparative Negligence at Last—By Judicial Choice,* 64 CAL. L. REV. 239, 268-71 (1976); Levine, *Buyer's Conduct as Affecting the Extent of Manufacturer's Liability and Warranty,* 52 MINN. L. REV. 627, 652-62 (1968); Levine, *Strict Products Liability and Comparative Negligence: The Collision of Fault and No-Fault,* 14 SAN DIEGO L. REV. 337 (1977); Noel, *Defective Products: Abnormal Use, Contributory Negligence and Assumption of Risk,* 25 VAND. L. REV. 93, 117-19 (1972); Plant, *Comparative Negligence and Strict Tort Liability,* 40 LA. L. REV. 403 (1980); Sales, *Assumption of the Risk and Misuse in Strict Tort Liability—Prelude To Comparative Fault,* 11 TEX. TECH L. REV. 729 (1980); Schwartz, *Strict Liability and Comparative Negligence,* 42 TENN. L. REV. 171 (1974); Twerski, *The Use and Abuse of Comparative Negligence in Products Liability,* 10 IND. L. REV. 797 (1977); Wade, *On the Nature of Strict Liability for Products,* 44 MISS. L. REV. 825 (1973); Walkowiak, *Reconsidering Plaintiff's Fault in Product Liability Litigation: The Proposed Conscious Design Choice Exception,* 33 VAND. L. REV. 651 (1980); Westra, *Restructuring the Defenses to Strict Products Liability—An Alternative to Comparative Negligence,* 19 SANTA CLARA L. REV. 355, 376-81 (1979); Comment, *Strict Products Liability In Utah Following Ernest W. Hahn, Inc. v. Armco Steel Co.,* 1980 UTAH L. REV. 577; Note, *The Merger of Comparative Fault Principles with Strict Liability in Utah: Mulherin v. Ingersoll-Rand Co.,* 1981 B.Y.U. L. REV. 964; Note, *Comparative Negligence,* 81 COLUM. L. REV. 1668 (1981); Note, *Timmerman v. Universal Corrugated Box Machinery Corp.—An Exception to the Doctrine of Comparative Negligence in Products Liability Litigation: Michigan Courts Speak Out on Public Act 495,* 1981 Det. L. Rev. 223; Note, *Assumption of Risk and Strict Products Liability,* 95 HARV. L. REV. 872 (1982); Note, *Products Liability—Washington Refuses to Allow Comparative Negligence to Reduce a Strict Liability Award—Seay v. Chrysler Corp.,* 56 WASH. L. REV. 307 (1981); Note, *Assumption of Risk As the Only Affirmative Defense Available in Strict Products Liability Actions In Oregon, Baccelleri v. Hyster Co.,* 17 WILLAMETTE L. REV. 495 (1981).

40. 555 P.2d 42, 45 (Alaska 1976).

> We find it unnecessary to conceptualize the theory of the action which strict liability creates in order for us to apply comparative negligence principles to strict products liability cases which result in personal injuries. Whether the action is characterized as negligence, warranty, or in tort, the plaintiff must prove essentially the same elements to recover. Further, most of the cases of strict liability for defective products have recognized a defense based on the conduct of the plaintiff, for courts have been unwilling to disregard the plaintiff's conduct and to interpret strict liability to mean absolute liability even though they may have differed as to the defense itself. The seller has not been converted into an insurer of his product with respect to all harm generated by its use.

The Alaska Supreme Court goes on to quote Professor Schwartz, who stated in 1973 that

> It is true that the jury might have some difficulty in making the calculation required under comparative negligence when defendant's responsibility is based on strict liability. Nevertheless, this obstacle is more conceptual than practical. The jury should always be capable, when the plaintiff has been objectively at fault, of taking into account how much bearing that fault had on the amount of damage suffered and of adjusting and reducing the award accordingly. Triers of fact *are* apparently able to do this, and the benefits from the approach suggest that it be applied in all comparative negligence jurisdictions.[41]

California spoke of the overriding philosophy of comparative negligence in *Daly v. General Motors Corp.*:[42]

> 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 law in which new remedies are judicially created, and old defenses judicially merged, impelled by strong considerations of equity and fairness

41. *Id.* (quoting SCHWARTZ, *supra* note 25, § 12.7 at 208-09) (emphasis in SCHWARTZ).
42. 20 Cal. 3d 725, 575 P.2d 1162, 1169, 144 Cal. Rptr. 380 (1978).

> 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.[43]

In one of the most recent cases applying comparative fault in strict liability, the Utah Supreme Court stated in *Mulherin v. Ingersoll-Rand Co.:*

> Other courts have rejected the application of comparative fault principles to strict liability claims because culpable conduct is not at issue in strict liability, only causation. We find this unpersuasive. There may be semantic difficulties in comparing strict liability and negligence, but we believe that judges and juries will have no difficulty assigning the relative responsibility each is to bear for a particular injury when the ultimate issues in such comparisons are relative fault and relative causation. The trier of fact's comparing defendant's strict liability against plaintiff's misuse is no more anomalous than the use of plaintiff's contributory negligence as an absolute defense to defendant's breach of warranty, which this Court approved in *Vernon v. Lake Motors*. . . .[44]

The Trend. Those jurisdictions that have opted to compare the relative responsibilities of the product user and the product seller are running nearly three to one over those that have rejected the concept. At this writing, at least twenty states (or the federal courts of those states) apply comparative principles in strict liability actions by judicial decision or by statute, in one form or another, to one extent or another.

The courts of at least four states apply their comparative negligence statutes in strict liability actions—Kansas,[45] Mississippi,[46] New Jersey[47] and Wisconsin—even though the

43. The reference to "*Li*" is to Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 1232, 119 Cal. Rptr. 858 (1975), in which the California Supreme Court judicially adopted "pure" comparative negligence.
44. 628 P.2d 1301, 1304 (Utah 1981) (citations omitted).
45. *See* Albertson v. Volkswagenwerk Aktiengesellschaft, 230 Kan. 368, 634 P.2d 1127 (1981).
46. *See* Edwards v. Sears, Roebuck & Co., 512 F.2d 276 (5th Cir. 1975).
47. *See* Cartel Capital Corp. v. Fireco of N.J., 81 N.J. 548, 410 A.2d 674 (1980).

statutes are limited to negligence actions.[48] Professor Schwartz lists Vermont in the category of states that apply their comparative negligence statutes to strict liability cases,[49] relying upon *Carr v. Case*.[50] While the authors are not in agreement with this interpretation of *Carr* (at least as to products liability) Vermont trial counsel advise that the state and federal trial courts in Vermont are applying comparative liability in products actions. Additionally, the comparative or product liability statutes of seven states—Colorado,[51] Connecticut,[52] Idaho,[53] Michigan,[54] Minnesota,[55] Nebraska,[56] and Washington[57]— specifically provide that comparative principles shall apply to strict tort liability cases.[58] The courts of nine jurisdictions—Alaska,[59] California,[60] Florida,[61] Hawaii,[62] Montana,[63] Nevada,[64] New Hampshire,[65] Texas[66] and Utah[67]— have judicially applied (some commentators have used the term "merged") comparative principles in strict liability actions apart from, or without regard to, the specific requirements of a comparative negligence statute.[68]

48. *See* Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967).
49. SCHWARTZ, *supra* note 25, § 1.4 at 5 (Supp. 1981).
50. 135 Vt. 534, 380 A.2d 91 (1977).
51. COLO. REV. STAT. §§ 13-21-401 to -406 (Supp. 1981).
52. CONN. GEN. STAT. ANN. § 52-572h (1982).
53. IDAHO CODE §§ 6-1401 to -1409 (Supp. 1982).
54. MICH. COMP. LAWS § 600.2949 (1982-83).
55. MINN. STAT. ANN. § 604.01 (Supp. 1983).
56. NEB. REV. STAT. § 25-1151 (1979).
57. WASH. REV. CODE ANN. §§ 4.22.005 and 4.22.015 (1981).
58. In recent years a number of states have rushed to enact products liability legislation. *See* app. H, *Product Liability Legislation*, in FRUMER & FRIEDMAN, *supra* note 5. It is obvious from the language of many of these statutes that the legislatures were attempting to lessen the impact upon industry of products liability litigation. Some of these statutes, as noted in the text, specifically approve comparative liability. Some other statutes provide specific absolute defenses and make no reference to the applicability of comparative fault for blameworthy conduct which does not fall within the language of the statute. *See, e.g.*, N.D. CENT. CODE § 28-01.1-01 (Supp. 1981). Whether these new laws will in fact serve to reduce or lessen the impact of product liability litigation, and whether the applicability of comparative principles will be affected by those laws which are silent on the subject, remains to be seen.
59. *See* Butaud v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42 (Alaska 1976). *See also* Sturm, Ruger & Co., Inc., v. Day, 594 P.2d 38 (Alaska 1979).
60. *See* Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978).
61. *See* West v. Caterpillar Tractor Co., Inc., 336 So.2d 80 (Fla. 1976).
62. *See* Kaneko v. Hilo Coast Processing, 654 P.2d 343 (Hawaii 1982).
63. A recent Montana Supreme Court decision, Zahrte v. Sturm Ruger & Co., 661 P.2d 17 (Mont. 1983) does not alter the author's opinion as to probable adoption of comparative principles in strict liability by the Montana Supreme Court. *See* Trust Corp. of Mont. v. Piper Aircraft Corp., 506 F. Supp. 1093 (D. Mont. 1981).
64. *See* Aetna Casualty and Surety Co. v. Jeppesen & Co., 642 F.2d 339 (9th Cir. 1981).
65. *See* Thibault v. Sears, Roebuck & Co., 395 A.2d 843 (N.H. 1978).
66. *See* General Motors Corp. v. Hopkins, 548 S.W.2d 344 (Tex. 1977).
67. *See* Mulherin v. Ingersoll-Rand Co., 628 P.2d 1301 (Utah 1981).
68. It should be noted that Puerto Rico and the Virgin Islands have also judicially applied comparative negligence principles in strict liability actions. *See* McPhail v. Municipality of Culebra, 598 F.2d 603 (1st Cir. 1979); Murray v. Fairbanks Morse, 610 F.2d 149 (3rd Cir. 1979).

In addition, the comparative statutes of Arkansas,[69] Louisiana,[70] Maine,[71] New York[72] and Oregon[73] are not limited to actions based upon negligence. They speak instead of the comparative "fault" or "responsibility" or "culpable conduct" of the defendant.[74] Further, decisions in Illinois[75] and New Mexico[76] indicate the probable application of comparative principles in strict liability suits.

In all, counting those states which have in fact applied comparative negligence principles in strict liability actions, those which are likely to do so, and those whose comparative negligence statutes are not on their face limited to negligence actions, over one half of the states are included. In addition, two model laws, the Uniform Products Liability Act[77] and the Uniform Comparative Fault Act[78] provide that the relative responsibilities of the parties are to be compared and damages apportioned accordingly.

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69. *See* ARK. STAT. ANN. §§ 27-1763 to -1765 (1974). *See also* Bashlind Co. v. Smith, 277 Ark. 406, 643 S.W.2d 526 (1982).
70. *See* LA. CIV. CODE ANN. art. 2323 (West 1979).
71. *See* ME. REV. STAT. ANN. tit. 14, § 156 (1980).
72. *See* N.Y. CIV. PRAC. LAW § 1411 (McKinney 1976).
73. *See* ORE. REV. STAT. § 18.470 (1981). The Oregon comparative negligence statute is typical of others of its class and has recently been construed by the Oregon Supreme Court. In Sanford v. Chevrolet Div. of Gen. Motors, 292 Or. 590, 642 P.2d 624, 627 (1981), commenting on the 1975 change from a "negligence" statute to a "fault" statute, the Oregon Supreme Court stated:
> Removal of the prior reference to negligence actions and substitution of relative "fault" for "negligence" in the allocation of damages extended the principle of proportional fault on both sides to fault other than negligence. As we held in *Baccelleri*, this included products liability, where the defendants' "fault" lies in putting a dangerously defective product on the market.
74. A few jurisdictions consider strict tort liability to be liability "without fault." *See, e.g.*, Berkebile v. Brantly Helicopter Corp., 337 A.2d 893, 899 (Pa. 1975); Smith v. Smith, 278 N.W.2d 155, 160 (S.D. 1979). The majority of courts which have considered the question, however, have found that strict liability, while perhaps not a negligence theory (*but see infra* note 91), is still based upon fault concepts. *See, e.g.*, Trust Corp. of Mont. v. Piper Aircraft Corp., 506 F. Supp. at 1095 (D. Mont. 1981); Daly v. General Motors Corp., 575 P.2d at 1166 (1978); Albertson v. Volkswagenwerk Aktiengesellschaft, 634 P.2d at 1131 (1981); Mulherin v. Ingersoll-Rand Co., 628 P.2d at 1302-03 (Utah 1981).
75. Skinner v. Reed Prentice Div., 70 Ill. 2d 1, 374 N.E.2d 437 (1978).
76. Scott v. Rizzo, 96 N.M. 682, 634 P.2d 1234 (1981).
77. UNIF. PRODS. LIAB. ACT §§ 111-121 *reprinted in* 44 Fed. Reg. 62,714-62,739 (1979).
78. UNIF. COMP. FAULT ACT §§ 1 and 2, 12 U.L.A. 35(Supp. 1983). Section 1 provides in part:
> "Fault" includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk . . . misuse of a product for which the defendant otherwise would be liable, and unreasonable failure to avoid an injury or to mitigate damages.

Only a few jurisdictions—Georgia,[79] Ohio,[80] Oklahoma,[81] Pennsylvania,[82] South Dakota,[83] Rhode Island[84] and West Virginia[85]—appear to reject the concept entirely. But these jurisdictions are clearly in the minority. One noted writer states that he is astonished at such reluctance in the face of "the inexorable trend toward application of comparative negligence to strict tort liability actions. . . .[86] That same writer further asserts that the application of some form of comparative fault "is inevitable in resolving the current confusion and developing crisis in strict tort liability."[87]

THE ALTERNATIVES

Once one is "persuaded by logic, justice and fundamental fairness"[88] that comparative principles should be applied in strict liability actions, one must ask how the goal is to be accomplished in Wyoming. Should the courts simply extend our comparative negligence statute to strict liability actions or should we judicially adopt a comparative negligence scheme apart from that statute? If there is a judicial adoption, should it be of pure comparative negligence or, like the statute, should it preclude recovery if the plaintiff's fault is equal to or greater than that of the defendant? Should the scheme limit defenses to those found in the Restatement comments, misuse and assumption of risk, or should it include any conduct which contributes to the injury?

Statutory Extension. Wyoming's comparative negligence statute provides in part that the negligence of the plaintiff does not bar his recovery "if the contributory negligence was not as great as the *negligence* of the person against whom

79. *See* Center Chem. Co. v. Parzini, 234 Ga. 868, 218 S.E.2d 580 (1975), *on remand*, Parzini v. Center Chem. Co., 136 Ga. App. 396, 221 S.E.2d 475 (1975).
80. *See* Temple v. Wean United, Inc., 50 Ohio St. 2d 317, 364 N.E.2d 267 (1977); Jones v. White Motor Corp., 61 Ohio App. 2d 162, 401 N.E.2d 223 (1978).
81. *See* Kirkland v. General Motors Corp., 521 P.2d 1353 (Okla. 1974). *But see* McNichols, *The Complexities of Oklahoma's Proportionate Several Liability Doctrine of Comparative Negligence—Is Products Liability Next?* 35 OKLA. L. REV. 195 (1982) which suggests that the court in Oklahoma, when again faced with the issue of whether to apply comparative principles in strict liability actions, may modify its earlier holdings.
82. *See* Berkebile v. Brantly Helicopter Corp., 337 A.2d 893 (Pa. 1975).
83. *See* Smith v. Smith, 278 N.W.2d 155 (S.D. 1979).
84. *See* Roy v. Star Chopper Co., Inc., 584 F.2d 1124 (1st Cir. 1978).
85. Harris v. Karri-On Campers, Inc., 640 F.2d 65 (7th Cir. 1981).
86. Sales, *supra* note 22, at 768.
87. *Id.* at 776.
88. Daly v. General Motors Corp., 575 P.2d at 1172 (1978).

recovery is sought."[89] The state of origin of this statute is Wisconsin.[90] As previously noted, Wisconsin was the first state to permit the application of comparative negligence to strict liability actions. Of particular importance to Wyoming is the fact that the Supreme Court of Wisconsin did so by extending that state's comparative negligence statute to that cause of action. The difficulty in comparing apples (the plaintiff's negligence) with oranges (the defendant's strict liability) was overcome by classifying strict liability as negligence per se. Pointing out that strict liability "does not make the manufacturer or seller an insurer nor does it impose absolute liability,"[91] the Wisconsin Supreme Court said

> Strict liability in tort for the sale of a defective product unreasonably dangerous to an intended user or consumer now arises in this state by virtue of a decision of this court. If this same liability were imposed for violation of a statute it is difficult to perceive why we would not consider it negligence per se for the purpose of applying the comparative negligence statute just as we have done so many times in other cases involving the so-called "safety statutes." . . . Likewise, a defective product can constitute or create an unreasonable risk of harm to others. If this unreasonable danger is a cause, a substantial factor, in producing the injury complained of, it can be compared with the causal contributory negligence of the plaintiff.[92]

Wisconsin's application of its comparative negligence statute to strict liability is important, perhaps even critical, to Wyoming because in construing Wyoming's comparative negligence statute the Wyoming Supreme Court has held that Wisconsin's judicial construction is applicable since

> Where a statute that has been construed by the courts of last resort of another state has been enacted in the same terms by the Wyoming Legislature, the Legislature is presumed to have adopted it as a part of the law and intended the same construction apply in this state.[93]

89. WYO. STAT. § 1-1-109(a) (1977) (emphasis added).
90. Woodward v. Haney, 564 P.2d 844, 846 (Wyo. 1977).
91. Dippel v. Sciano, 155 N.W.2d at 63 (1967).
92. *Id.*, 155 N.W.2d at 64-65.
93. Woodward v. Haney, 564 P.2d at 845 (Wyo. 1977). *See also* Board of County Comm'rs v. Ridenour, 623 P.2d 1174, 1184 (Wyo. 1981).

It may be argued that the application of comparative negligence to strict liability is not a construction of the comparative negligence statute but of the law of strict liability. However, the State of Minnesota, which, like Wyoming, took its comparative negligence statute from Wisconsin, adopted the reasoning of the prior Wisconsin decisions:

> The Wisconsin Supreme Court in *Dippel v. Sciano* . . . adopted a cause of action for strict liability in tort under Restatement, Torts 2d, § 402A. The Wisconsin Supreme court further held that its comparative negligence statute applied to such actions. In *Marier v. Memorial Rescue Service, Inc.* . . . we held that our adoption of the Wisconsin comparative negligence statute presumed our adoption of the Wisconsin Supreme Court's interpretations of the statute up to that point. We therefore adopt the Wisconsin rule that the comparative negligence statute applies in actions brought on a § 402A theory, and we affirm the trial court on its application in this case.[94]

Kansas has extended its comparative negligence statute to strict liability without the necessity of redefining strict liability in the context of negligence,[95] as has New Jersey.[96] While it is difficult to determine whether Mississippi, a "pure" comparative state, has extended its statute or has judicially adopted the same scheme as the statute for strict liability actions, in either event the result is the same.[97]

Judicial Adoption. Of the nine states that have judicially applied comparative principles in strict liability cases,[98] three—Alaska, California, and Florida—had previously adopted comparative negligence by judicial fiat.[99] Thus, the judicial adoption of the same scheme for strict liability was less difficult in those states than for a court in a statutory com-

94. Busch v. Busch Constr., Inc., 262 N.W.2d 377, 393 (Minn. 1977) (citations omitted). Since the *Busch* decision, Minnesota has adopted a comparative negligence statute specifically applicable to "acts or omissions that . . . subject a person to strict tort liability." MINN. STAT. ANN. § 604.01(1a) (Supp. 1983).
95. Albertson v. Volkswagenwerk Aktiengesellschaft, 634 P.2d at 1131 (1981).
96. Cartel Capital Corp. v. Fireco of N.J., 410 A.2d at 682 (N.J. 1980).
97. *See* Edwards v. Sears, Roebuck & Co., 512 F.2d at 290 (5th Cir. 1975).
98. *See supra* notes 59-68 and accompanying text.
99. H. WOODS, THE NEGLIGENCE CASE—COMPARATIVE FAULT, Appendix at 421, 435 and 456 (1978).

parative negligence state where the statute is limited to negligence actions. Yet the courts of six comparative negligence statute states have forged ahead with little hesitation. Rejecting the concept of extending the comparative negligence statute "because it is confined by its terms to actions for negligence,"[100] or because the "statute only applies to the defense of contributory negligence,"[101] or without any reference to the comparative negligence statute at all, the courts of Hawaii,[102] Montana,[103] Nevada,[104] New Hampshire,[105] Texas[106] and Utah[107] have judicially merged comparative fault or causation into strict tort liability.

Applicable Conduct. Extension of the comparative negligence statute to strict liability should mean that all blameworthy conduct of the plaintiff will be considered. This is true in Wisconsin, where the plaintiff's conduct which would reduce his recovery is not limited to misuse or assumption of risk; that is, any causative conduct which would serve to reduce the plaintiff's award in a negligence case would have the same effect in a strict liability action.[108]

Nor would Kansas limit the defenses available in strict liability to specific categories. *Albertson v. Volkswagenwerk Aktiengesellschaft,*[109] states

> Albertson thus claims it is unjust to evaluate the plaintiff's negligence when the defendant is being judged on strict liability in tort. He argues negligence cannot be compared to strict liability in tort since negligence is based on fault and strict liability imposes

100. Thibault v. Sears, Roebuck & Co., 395 A.2d at 848 (N.H. 1978).
101. Mulherin v. Ingersoll-Rand Co., 628 P.2d at 1303 (Utah 1981).
102. Kaneko v. Hilo Coast Processing, 654 P.2d 343 (Hawaii 1982).
103. *See* Trust Corp. of Mont. v. Piper Aircraft Corp., 506 F. Supp. at 1096 (D. Mont. 1981).
104. *See* Aetna Casualty and Surety Co. v. Jeppesen & Co., 642 F.2d at 343 (9th Cir. 1981).
105. *See* Thibault v. Sears, Roebuck & Co., 395 A.2d at 850 (N.H. 1978). New Hampshire (and perhaps Texas, *see* General Motors Corp. v. Hopkins, 548 S.W.2d 344, 353 (Tex. 1977)) has adopted a comparative "causation" scheme. While a discussion of the concept is beyond the scope of this article, it must be noted that there are important differences between comparative causation and comparative fault. For an excellent discussion of the problems created when courts confuse comparative culpability or fault with comparative causation, or knowingly adopt comparative causation, see Carestia, *supra* note 39.
106. *See* General Motors Corp. v. Hopkins, 548 S.W.2d at 353 (Tex. 1977).
107. Mulherin v. Ingersoll-Rand Co., 628 P.2d at 1304 (Utah 1981).
108. Ladwig v. Ermanco, Inc., 504 F. Supp. 1229, 1237 (E.D. Wis. 1981); City of Franklin v. Badger Ford Truck Sales, Inc., 58 Wis. 2d 641, 207 N.W.2d 866 (1973).
109. 634 P.2d 1127 (1981).

> absolute liability thereby eliminating comparison. We reject that argument and hold strict liability in tort does have a fault basis, therefore subjecting it to comparison with other fault concepts. This position serves the ideal of judicial neutrality and will prevent a multiplicity of suits.[110]

The United States Court of Appeals for the Fifth Circuit, affirming the federal district court in Mississippi, stated

> While the issue has not been considered by the Mississippi Supreme Court, a noted commentator has suggested that the proper interaction between strict liability and contributory negligence "should be apparent on reflection. It is to apply a system of comparative fault of the 'pure type' and apply it to strict liability as well as to negligence."[111]

New Jersey's rule is perhaps the most restrictive in that it would apply its comparative negligence statute only to the Restatement defense of assumption of risk.[112]

Apart from those states that have applied their comparative negligence statutes to a greater or lesser degree to strict liability, the nine states[113] that have judicially adopted comparative concepts specifically for strict liability cases generally include all blameworthy conduct. California minces no words, extending a "full system of comparative fault to strict products liability . . . because it is fair to do so."[114] Likewise, Alaska, New Hampshire, and Montana do not limit the types of conduct that may be considered in the strict liability context.[115] The United States Court of Appeals for the Ninth Circuit, reviewing the trial court's holding that Nevada would follow California and the *Daly* decision, agreed that the trial court was correct in that aspect, but reversed on the basis that the trial court misconstrued California law.[116]

110. *Id.* at 1131.
111. Edwards v. Sears, Roebuck & Co., 512 F.2d at 290 (5th Cir. 1975) (quoting Wade, *Strict Tort Liability*, 44 MISS. L.J. 825, 850 (1973)).
112. Cartel Capital Corp. v. Fireco of N.J., 410 A.2d at 682 (1980).
113. *See supra* notes 59-68.
114. Daly v. General Motors Corp., 575 P.2d at 1172 (1978).
115. Butaud v. Suburban Marine & Sporting Goods, Inc., 555 P.2d at 43 (Alaska 1976); Thibault v. Sears, Roebuck & Co., 395 A.2d at 848-49 (N.H. 1978); Trust Corp. of Mont. v. Piper Aircraft Corp., 506 F. Supp. at 1094-95 (D. Mont. 1981).
116. Aetna Casualty and Surety Co. v. Jeppesen & Co., 642 F.2d at 344 (9th Cir. 1981).

Utah, on the other hand, has thus far applied comparative negligence in strict liability actions only to the Restatement defenses of misuse and assumption of risk. The Utah Supreme Court, however, in *Mulherin v. Ingersoll-Rand Co.*, left the door open for the assertion of other defenses.[117]

Texas would appear to limit comparative principles to misuse. Rejecting the Texas comparative negligence statute as the basis for its decision, the Texas Supreme Court held

> This comparison and division of causes is not to be confused with the statutory scheme of modified comparative negligence which bars all recovery to the plaintiff if his negligence is greater than the negligence of the parties against whom recovery is sought. . . . The defense in a product liability case, where both defect and misuse contribute to cause the damaging event, will limit the plaintiff's recovery to that function of his damages equal to the percentage of the cause contributed by the product defect.[118]

Florida would curtail the types of plaintiff's conduct which would be compared, but is not as restrictive as the Restatement:

> Contributory or comparative negligence is a defense in a strict liability action if based upon grounds other than the failure of the user to discover the defect in the product or the failure of the user to guard against the possibility of its existence. The consumer or user is entitled to believe that the product will do the job for which it was built. On the other hand, the consumer, user, or bystander is required to exercise ordinary due care.[119]

REALIZING THE OBJECTIVES

Several years ago, having held that strict liability was a theory upon which the plaintiff injured by an allegedly defec-

117. 628 P.2d at 1302-03.
118. General Motors Corp. v. Hopkins, 548 S.W.2d at 352 (Tex. 1977) (citing TEX. REV. CIV. STAT. ANN. art. 2212a(1) (Vernon 1982-1983)) (citation omitted). *See* Signal Oil & Gas Co. v. Universal Oil Prod., 572 S.W.2d 320 (Tex. 1978).
119. West v. Caterpillar Tractor Co., Inc., 336 So.2d at 92 (Fla. 1976).

tive product may rely, the Honorable Kenneth Hamm took what at that time was a bold and (these writers suggest, prophetic) step. He held that "plaintiff's negligence should be a permissible defense in a strict liability action."[120] Other Wyoming courts which are disposed to adopt strict tort liability as a theory upon which plaintiffs may proceed in products liability cases are urged to follow Judge Hamm's lead.

All Conduct Must Be Considered. Whatever means are utilized to apply comparative concepts to strict liability, all negligent conduct of the plaintiff that is a contributing cause of the injury should be included. This is so because

1. Comparison of all fault is consistent with the philosophy that each person should bear the responsibility for his own blameworthy conduct.
2. The point at which misuse or assumption of risk end and "mere" negligence begins (assuming they meet at all) is difficult to define in terms that are understandable to lawyers and judges, much less to jurors who, after all, must determine the "quality" of the plaintiff's conduct.
3. Equally as difficult of definition and application is conduct which consists of the plaintiff's "failure to discover the defect in the product, or to guard against the possibility of its existence."[121]
4. In the absence of a statute which limits products liability suits to one cause of action, most products cases are asserted on multiple theories, including negligence and various implied and express warranty claims, as well as strict liability. Presenting clear instructions to the jury in a simple negligence case for injuries caused by a defective product is difficult enough. To do so in a multiple theory case where the plaintiff's conduct must be evaluated using varying criteria (reasonable man, misuse, assumption of risk, failure to discover or guard against defect) and then be analyzed pursuant to divergent theories (negligence, warranty, strict liability) virtually assures a confused jury, an unjust result, and appealable issues.

120. Roberts v. Sweetwater County School Dist. #2, Civ. No. 1352, Sweetwater County, Fourth Judicial Dist., Wyo. (1977).
121. Quotation from RESTATEMENT (SECOND) OF TORTS § 402A, comment n (1965). *See supra* note 19.

To limit defenses to misuse and assumption of risk is an unwise concession to Restatement comments which were made obsolete by the spread of comparative responsibility. Such an approach satisfies neither the purposes of comparative fault nor the precepts of the Restatement, and thus does an injustice to both.

Despite the attempt of some courts to reconcile the limited strict liability defenses of the Restatement comments with the concept of comparative fault, the two are simply not comparable. To avoid confusion and injustice in products liability law, what must give way are the notions that a plaintiff may recover without regard to his causative negligence or that a defendant seller may be free of liability despite his injury-producing product. The concept which must prosper is that blameworthy actors must be responsible for damage caused by their conduct or their defective products.

Statutory Extension or Judicial Adoption? The negligence *per se* solution of Wisconsin offers, perhaps, the least troublesome means of applying comparative principles to strict liability in Wyoming. While strict liability as negligence *per se* has its supporters[122] and its detractors,[123] it unquestionably avoids the conceptual difficulties of comparing apples (negligence) and oranges (strict liability) by holding that strict liability is really an apple after all. Furthermore, should the Supreme Court of Wyoming adopt the reasoning of Minnesota,[124] that the borrowing state is bound by Wisconsin's interpretation of the comparative negligence statute, including its application to strict liability, there would be little choice in the matter.

However, there are conceptual difficulties in negligence *per se,* even though the semantic ones may be avoided. Although strict liability is a tort doctrine, and while it may be said to involve fault concepts, it is not, in the "reasonable man" sense, negligence. Section 402A liability applies whether

122. *See, e.g.,* Wade, *On the Nature of Strict Tort Liability for Products,* 44 MISS. L.J. 825 (1973).
123. *See, e.g.,* Twerski, *From Defect to Cause to Comparative Fault—Rethinking Some Product Liability Concepts,* 60 MARQ. L. REV. 297 (1977).
124. *See supra* note 94.

or not "the seller has exercised all possible care in the preparation and sale of his product. . . ."[125]

Should the thought of classifying strict liability as a species of negligence be unacceptable, the solution is to judicially adopt comparative fault (or comparative "responsibility," "risk" or even "causation") for application to strict liability actions.[126] Many states have done so.[127] If the courts can adopt so substantive a concept as strict tort liability, there seems little to hinder the judicial adoption of comparative negligence. The legislative adoption in Wyoming of comparative negligence would appear to lend weight to the argument that it is public policy that all persons should bear the responsibility for their own acts, a concept equally applicable to negligence and strict liability.[128]

Modified or Pure Comparative Fault? Comparative negligence statutes are generally classified as "pure" or "modified." Under a pure comparative negligence statute, the plaintiff will recover even though his negligence exceeds that of the defendant. Under a modified plan, the plaintiff will be precluded from any recovery if his fault exceeds a certain percentage of the whole fault.[129] In Wyoming, a plaintiff will

125. Quotation from RESTATEMENT (SECOND) OF TORTS § 402A2(a) (1965). *See supra* note 4.

126. Such an adoption should extend to any products liability cause of action other than in negligence (to which the comparative negligence statute would apply anyway). That is, judicial adoption of comparative fault should extend to breach of warranty cases as well as to strict tort liability. While that proposition is beyond the scope of this article, it should be noted that one comparative negligence text, citing Cline v. Sawyer, 600 P.2d 725 (Wyo. 1979) states, without qualification, that "[C]omparative negligence is applicable in Wyoming in a case involving breach of warranty and negligence." WOODS, *supra* note 100, § 14:16 at 109 (Supp. 1982). The authors of this article are of the opinion that Woods' unqualified statement must be viewed in the context of the facts and language of the *Cline* decision. That comparative negligence may arguably be applicable in a warranty action, however, is important in considering the question of whether comparative negligence applies to strict liability. This article has previously noted the fact that at least one Wyoming district court has suggested that breach of implied warranty and strict liability are, in reality, one and the same cause of action. *See supra* note 15. *See also* Kennedy v. City of Sawyer, 228 Kan. 439, 618 P.2d 788 (1980).

127. *See supra* notes 59-68 and accompanying text.

128. It may be argued, of course, that had the Wyoming Legislature desired to extend comparative negligence to strict liability it could have done so, and since it did not, it did not intend to do so and therefore comparative negligence does not extend to strict liability. That argument, however, is countered by the fact that strict liability had not (and at this writing still has not) received the blessing of the Wyoming Supreme Court. Therefore, the Legislature could not have intended to extend comparative negligence to that theory of tort liability. The argument also brings the retort that if the Legislature could have referenced strict liability but did not, this is because Wisconsin, the state of origin, had already extended its comparative negligence statute to strict liability. *See* SCHWARTZ, *supra* note 25, § 12.1 at 196.

129. *See* SCHWARTZ, *supra* note 25, § 2.1.

be precluded from recovery if his negligence is equal to or greater than that of the person against whom he seeks recovery.[130]

Courts in states like Wisconsin, which have chosen to extend their comparative negligence statutes to strict liability, obviously apply the same type of contributory negligence in strict liability cases as they do in negligence actions. Similarly, those states like California, which have judicially adopted comparative negligence, adopt the same form of comparative fault for strict liability. However, states that have comparative negligence statutes, but in which the courts have chosen to judicially apply comparative fault to strict liability rather than extend their comparative negligence statutes, are in conflict as to whether the court-made rule will be a pure or modified form of comparative fault.[131]

For two reasons, the authors take the position that the judicial "legislation" should be identical with the comparative negligence statute in such states. That is, if the statute provides for modified comparative negligence, as does Wyoming's, then the comparative fault that is to be judicially applied to strict liability should also be of the modified form. Similarly, if the comparative negligence statute is "pure," then so should be the court-imposed doctrine of comparative fault.

The first reason for the position set out above is that the legislature has already spoken with respect to how comparative negligence is to be applied, and the adoption of an identical concept for strict liability would thus comply with the stated public policy. Second, using a concept equivalent to that applied to negligence will avoid confusion and mistake in multiple theory and multiple party cases. The Wyoming Statutes provide that "The court may, and when requested by the party shall: . . . [i]nform the jury of the consequences of its determination of the percentage of negligence,"[132] and "[i]n all

130. WYO. STAT. § 1-1-109 (1977).
131. *Compare* Trust Corp. of Mont. v. Piper Aircraft Corp., 506 F. Supp. 1093 (D. Mont. 1981); Thibault v. Sears, Roebuck & Co., 395 A.2d 843 (N.H. 1978); General Motors Corp. v. Hopkins, 548 S.W.2d 344 (Tex. 1979) *and* Mulherin v. Ingersoll-Rand Co., 628 P.2d 1301 (Utah 1981).
132. WYO. STAT. § 1-1-109(b)(iii) (1977).

cases the court shall inform the jury of the consequences of its verdict."[133] If Wyoming should judicially adopt pure comparative fault for strict liability, the consequences of the jury's verdict in a multiple party case would vary between and among the parties, and the court would have to be especially cautious in how the jury was instructed as to those consequences. Under the circumstances, it seems that the preferable route would be to have identical comparative concepts apply to both negligence and strict liability.

CONCLUSION

Although the Supreme Court of the State of Wyoming has not yet embraced strict liability, a number of district courts in Wyoming have applied the doctrine and its ultimate adoption by the Wyoming Supreme Court appears likely. One of the most significant issues which will arise with respect to the application of strict liability is the effect of the plaintiff's conduct upon his right to recover.

As adopted in 1965, section 402A of the *Restatement (Second) of Torts* recognized in its comments only two basic defenses relative to the conduct of the plaintiff in strict liability actions. The plaintiff could recover all of his damages despite his causal negligence, unless that negligence was deemed by the jury to constitute misuse or assumption of risk. Conversely, if the plaintiff's conduct were misuse or an assumption of risk, he would be barred from any recovery, despite the fact that the product was defective and contributed to the accident.

At the time the *Restatement (Second) of Torts* was published, comparative negligence was in its infancy, at least with respect to its adoption by significant numbers of jurisdictions. As advocates for comparative negligence increased, questions concerning the fairness of the restricted defenses to strict liability were raised. Comparative principles began to be applied. At this writing, there are at least twenty states which apply comparative concepts in strict liability actions.

133. WYO. STAT. § 1-1-114 (1977).

The methods and means of application of comparative principles to strict liability are many and varied. Some states extend their comparative negligence statutes to strict liability, while others have judicially adopted a comparative fault or comparative causation scheme. Some states have judicially applied pure comparative fault in strict liability where the comparative negligence statutes are a modified form. Some jurisdictions limit defenses to those found in the Restatement comments (misuse and assumption of risk), some include all negligent conduct of the plaintiff except his failure to discover or guard against a defect, while still others permit the consideration of any blameworthy conduct which would serve, in a negligence case, to reduce plaintiff's recovery.

The authors of this article believe that the defenses which may be considered should not be restricted. To present varying and conflicting theories and ideas to the jury for application to different concepts or defendants promotes confusion and invites error.

The least troublesome method by which Wyoming could apply comparative concepts to strict liability would be to extend its comparative negligence statute to strict liability by considering strict liability to be negligence per se. Alternatively, there appears to be no statutory, common law, or other impediment to the judicial adoption of comparative principles for application in strict liability actions.

The Wyoming Supreme Court said in *Barnette v. Doyle*[134] that the bar of contributory negligence produced a harsh result, which was relieved by the adoption of comparative negligence. It must be recognized that the application of the Restatement "all or nothing" defenses to strict liability is equally harsh to both plaintiffs and defendants, and is likewise in need of relief.

> The foregoing goals, we think, will not be frustrated by the adoption of comparative principles. Plaintiffs will continue to be relieved of proving that the manufacturer or distributor was negligent in the production,

134. 622 P.2d at 1361.

> design, or dissemination of the article in question. Defendant's liability for injuries caused by a defective product remains strict. The principle of protecting the defenseless is likewise preserved, for plaintiff's recovery will be reduced *only* to the extent that his own lack of reasonable care contributed to his injury. The cost of compenstaing the victim of a defective product, albeit proportionately reduced, remains on defendant manufacturer, and will, through him, be "spread among society." However, we do not permit plaintiff's own conduct relative to the product to escape unexamined, and as to that share of plaintiff's damages which flows from his own fault we discern no reason of policy why it should . . . be borne by others.[135]

Surely the union of comparative fault and strict liability is a marriage of necessity.

135. Daly v. General Motors Corp., 575 P.2d at 1168-69 (1978) (emphasis in original).