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Comparative Negligence and Strict Tort Liability—The Marriage Revisited

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In a 1983 article in this Review, the authors predicted Wyoming's adoption of strict products liability. The prediction came to pass in a March, 1986 decision of the Wyoming Supreme Court. That decision, however, reserved the issue of strict liability defenses for later determination. In their original article the authors urged that comparative principles, rather than the absolute defenses of the comments to section 402A of the Restatement (Second) of Torts be applied in strict liability cases. In this update, the authors predict Wyoming's adoption of comparative principles for strict liability and find that the question is no longer whether comparative principles should apply, but instead, the extent and nature of that application.

I. INTRODUCTION

Within days and a few hundred feet of each other, Wyoming's legislative, executive and judicial branches significantly altered Wyoming law regarding strict liability and comparative fault. At the Wyoming State Capitol on March 14, 1986, over his objection and without his signature, Wyoming Governor Ed Herschler allowed a new comparative "negligence" act to become law.¹ A block away at the Wyoming Supreme Court Building, strict liability in the form of section 402A of the *Restatement*

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1. 1986 Wyo. Sess. Laws ch. 24; WYO. STAT. ANN. § 1-1-109 (Supp. 1986). While the statute is entitled "Comparative Negligence," it is arguably a comparative fault act. See *infra* text accompanying notes 83-95 (Section III.A.).

(*Second*) of Torts became the law of Wyoming when, on March 19, 1986, the Wyoming Supreme Court handed down its opinion in *Ogle v. Caterpillar Tractor Co.*²

Wyoming has now joined what one author calls the "product liability revolution."³ Wyoming goes well-armed into that revolution and enters "well-charted territory on most strict liability issues that arise."⁴ One "well-charted," although controversial, strict liability issue concerns the effect of the plaintiff's conduct upon the strictly liable defendant's responsibility. Some thirty-four states now apply, to a greater or lesser degree, comparative fault principles in strict products liability cases.⁵ They allow recovery which previously may have been barred by "all or nothing" contributory defenses but may reduce that recovery where the plaintiff's conduct caused the injuries.

This article supplements the authors' original article published in this Review four years ago⁶ and updates developments from other jurisdictions regarding the application of comparative principles to strict liability. It assesses the *Ogle* decision's impact upon the course of Wyoming's strict liability law and evaluates Wyoming's revised comparative "negligence" act.⁷ It looks at recent Wyoming Supreme Court decisions that are likely to affect Wyoming's development of strict liability law and considers and recommends various courses of action which Wyoming should consider.

II. THE TREND CONTINUES

In our original article, we found that at least twenty states applied, by judicial decision or by statute, in one form or another, to a greater or lesser extent, comparative principles in strict liability actions.⁸ Additionally, we reported that the comparative statutes of five other states were not limited to actions based on negligence and that court decisions in two

2. 716 P.2d 334, 341 (Wyo. 1986).

3. V. SCHWARTZ, *COMPARATIVE NEGLIGENCE* § 12.1, at 195 (2d. ed. 1986). Wyoming comes late to the fray. In *Ogle v. Caterpillar Tractor Co.*, the Wyoming Supreme Court noted that Wyoming was one of only five states which had not adopted strict liability. 716 P.2d at 341 n.8. However, the *Ogle* court incorrectly named Utah as one of those states. *Id.* (citing 2 L. FRUMMER & M. FRIEDMAN, *PRODUCTS LIABILITY* 3-8 to -24 (1985)). To the contrary, Utah adopted *RESTATEMENT (SECOND) OF TORTS* § 402A in *Ernest W. Hahn, Inc. v. Armco Steel Co.*, 601 P.2d 152, 158 (Utah 1979).

4. *Ogle*, 716 P.2d at 341.

5. See *infra* text accompanying notes 11-62 (Section II). The reader is cautioned regarding two aspects of this analysis. First, the statutes or judicial decisions discussed are the latest pronouncements which our research has revealed. Thus they may not apply to a particular case which, instead, may be governed by prior decisions or statutes. Second, the nationwide wave of "tort reform" has resulted in numerous recent changes in product liability and comparative negligence law. This trend is expected to continue, and the classification in this article of the various states will be affected accordingly.

6. Greenlee & Rochelle, *Comparative Negligence and Strict Tort Liability—A Marriage of Necessity*, XVIII *LAND & WATER L. REV.* 643 (1983) [hereinafter Greenlee & Rochelle and referred to in the text as the "original article"].

7. See *supra* note 1.

8. Greenlee & Rochelle, *supra* note 6, at 654.

others indicated probable application of comparative principles.⁹ Finally, we reported that only seven jurisdictions appeared to reject the concept of applying comparative principles to strict liability.¹⁰ The trend in 1983 was definitely toward application of comparative principles in strict liability. In the four years since publication of the original article, the trend has become a rout.

A. States Applying Comparative Negligence Statutes to Strict Liability

Montana¹¹ has joined¹² Kansas,¹³ New Jersey¹⁴ and Wisconsin¹⁵ in applying its comparative *negligence* statute to strict liability actions. Mississippi was originally reported as a state applying its comparative negligence statute to strict liability.¹⁶ Mississippi has been reclassified under states whose comparative statutes are not limited to negligence.¹⁷

B. States With Comparative Strict Liability or Product Liability Statutes

The original article reported¹⁸ that the comparative or product liability statutes of seven states—Colorado,¹⁹ Connecticut,²⁰ Idaho,²¹

9. *Id.* at 656.

10. *Id.* at 657.

11. *Zharte v. Strum, Ruger & Co., Inc.*, 203 Mont. 90, 661 P.2d 17 (1983). In *Zharte*, the Montana Supreme Court on a certified question from the United States Court of Appeals for the Ninth Circuit, directed the application of MONT. CODE ANN. § 27-1-702 (1985) (identical to 1983 version) to strict liability. Montana, however, severely limits the conduct of the plaintiff which may be compared to the harm caused by the faulty product of the defendant, permitting comparison only if the plaintiff's conduct amounts to assumption of risk. "If the defense is found to exist then plaintiff's conduct must be compared with that of defendant. The same Montana law which governs comparison of contributory negligence controls comparison of assumption of risk." *Id.*, 661 P.2d at 19; see also *Fredenberg v. Superior Bus Co.*, 631 F. Supp. 66 (D. Mont. 1986); *Matkovic v. Shell Oil Co.*, 707 P.2d 2 (Mont. 1985). Limiting conduct which may be considered by the trier of fact is criticized below. See *infra* text accompanying notes 175-190 (Section V.D.).

12. *Greenlee & Rochelle*, *supra* note 6, at 654. See *infra* notes 13-15, for an update of the three originally reported states which remain in this category.

13. *Prince v. Leeson Corp., Inc.*, 720 F.2d 1166 (10th Cir. 1983) (applying KAN. STAT. ANN. § 60-258a (1974)).

14. *Hull v. Getty Ref. & Mktg. Co.*, 202 N.J. Super. 461, 495 A.2d 445 (1985) (applying N.J. STAT. ANN. § 2A:15-5.1 (West 1973)). Note that New Jersey, like Montana, limits the plaintiff's conduct to be compared to assumption of risk. *Id.*

15. *Collins v. Eli Lilly Co.*, 116 Wis. 2d 166, 342 N.W.2d 37 (applying WIS. STAT. ANN. § 895.045 (West 1971)), *cert. denied sub nom. E.R. Squibb & Sons, Inc. v. Collins*, 469 U.S. 826 (1984).

16. *Greenlee & Rochelle*, *supra* note 6, at 654.

17. See *infra* note 37 and accompanying text.

18. *Greenlee & Rochelle*, *supra* note 6, at 655. See *infra* notes 19-25, for an update of the seven originally reported states whose statutes specifically provide that comparative principles will apply to strict liability.

19. COLO. REV. STAT. § 13-21-406 (1985) provides for pure comparative fault "in any product liability action." Unforeseeable misuse may be a complete defense. See *Peterson v. Parke Davis & Co.*, 705 P.2d 1001 (Colo. Ct. App. 1985). Colorado's modified comparative negligence statute is found at COLO. REV. STAT. § 13-21-111 (1971).

20. CONN. GEN. STAT. ANN. § 52-572o (West Supp. 1987) provides pure "comparative responsibility" for product liability actions. Connecticut's modified comparative *negligence* statute is found at *id.* § 52-572h.

21. IDAHO CODE § 6-1404 (Supp. 1986) provides for modified "comparative responsibility" for product liability actions. Idaho's modified comparative *negligence* statute is found at *id.* § 6-801 (1979).

Michigan,²² Minnesota,²³ Nebraska²⁴ and Washington²⁵—specifically provided that comparative principles would apply to strict liability. There are now eleven states with such statutes including, in addition to the original seven—Arizona,²⁶ Illinois,²⁷ Iowa²⁸ and

22. MICH. COMP. LAWS ANN. § 600.2949(1) (West 1986) provides, “in all products liability actions,” for a reduction of damages “in proportion to the amount of negligence attributed to the plaintiff”—in other words, pure comparative fault. Michigan’s comparative history is interesting in that its product liability statute was adopted in 1978, one year prior to the judicial adoption of pure comparative negligence. *Placek v. City of Sterling Heights*, 405 Mich. 638, 275 N.W.2d 511 (Mich. 1979). For an excellent discussion of the Michigan product liability statute, see *Karl v. Bryant Air Conditioning Co.*, 705 F.2d 164 (6th Cir. 1983).

23. MINN. STAT. ANN. § 604.01 (West Supp. 1987) is an all-inclusive modified contributory fault scheme which includes negligence, strict liability, breach of warranty, product misuse and other causes of action.

24. NEB. REV. STAT. § 25-21,185 (1985) applies to “all actions brought to recover damages for injuries to a person or to his property caused by the negligence or act or omission giving rise to strict liability in tort” and provides that the plaintiff’s recovery shall not be barred when the contributory negligence of the plaintiff was slight and the negligence or act or omission . . . of the defendant was gross in comparison, but the contributory negligence of the plaintiff shall be considered by the jury in the mitigation of damages in proportion to the amount of contributory negligence attributable to the plaintiff

The terms “slight” and “gross” do not appear well defined, but the scheme is clearly a modified comparative plan, for surely a plaintiff whose “amount” of negligence is, say, “three-fourths” (or “over half” or “more than the defendant’s”) could hardly be said to have been only “slightly” negligent.

25. WASH. REV. CODE ANN. §§ 4.22.005 to .925 (Supp. 1987) provides a pure comparative fault system applicable to all causes of action including strict liability.

26. ARIZ. REV. STAT. ANN. § 12-2509.B (West Supp. 1986). This section is part of Arizona’s “Uniform Contribution Among Tortfeasors Act,” *id.* §§ 12-2501 to -2509, which is anything but uniform so far as it applies to comparative negligence. Sections 12-2505.A to .C provide:

A. The defense of contributory negligence or of assumption of risk is in all cases a question of fact and shall at all times be left to the jury. If the jury applies either defense, the claimant’s action is not barred, but the full damages shall be reduced in proportion to the relative degree of the claimant’s fault which is a proximate cause of the injury or death, if any. There is no right to comparative negligence in favor of any claimant who has intentionally, willfully or wantonly caused or contributed to the injury or wrongful death.

B. If an action involves claims for relief alleging both negligence and strict liability in tort, and if Section 12-2505 is applied with respect to the negligence claims for relief, the reduction in damages under Section 12-2505 shall be applied to the damages awarded against all defendants, except that contributory negligence, as distinguished from assumption of risk, is not a defense to a claim alleging strict liability in tort, including any product liability action, as defined in Section 12-681, except claims alleging negligence.

C. For purposes of Section 12-2502, Section 12-2503, subsection F and Section 12-2505 with respect to cases involving assumption of risk, the relative degree of fault of a person strict liable in tort is the defect causing injury to the claimant. Among two or more persons strictly liable in tort who are entitled to claim contribution against each other, the relative degree of fault of each is the degree to which each contributed to the defect causing injury to the claimant.

Id. §§ 2501.A to .C. Thus Arizona compares the plaintiff’s conduct to the fault of the strictly liable defendant only if that conduct amounts to more than mere negligence. Whether assumption of risk is the only available defense is an open question.

27. ILL. REV. STAT. ch. 110, §§ 2-1107.1, -1116 (1971). These statutes apply comparative fault to all causes of action and permit comparison of all conduct or causative factors.

28. IOWA CODE ANN. § 668.1 to .10 (West Supp. 1986). The Iowa statute broadly defines fault to include negligence as well as acts or omissions “that subject a person to strict liability.”

Utah.²⁹ Some of these states—Colorado, Connecticut, Idaho and Michigan—have comparative product liability statutes separate from their comparative negligence statutes. Others—Arizona, Illinois, Iowa, Minnesota, Nebraska, Washington and Utah—have comparative statutes which specifically apply to both negligence and strict liability.³⁰

C. States with Statutes Not Limited to Negligence

The “undefined” comparative statute presents intriguing complexities. In the original article,³¹ the comparative statutes of five states—Arkansas,³² Louisiana, Maine,³³ New York³⁴ and Oregon³⁵—were found to speak of “fault,” “responsibility” or “culpable conduct” without defining those terms or indicating the causes of action to which they apply.

ity.” *Id.* § 668.1. The statute further provides that the claimant may recover “unless the claimant bears a greater percentage of fault than the combined percentage of fault attributed to the defendants, third-party defendants and persons who have been released” *Id.* § 668.3.

29. UTAH CODE ANN. §§ 78-27-37, -38 (Supp. 1986). The Utah statute, although called “comparative negligence,” refers to fault and defines fault as including strict liability and, even more specifically, product liability actions.

30. See statutes cited in Greenlee & Rochelle, *supra* note 6, at 655, and those cited *supra* notes 26-29.

31. Greenlee & Rochelle, *supra* note 6, at 656. See *infra* notes 32-35, for an update of the four originally reported states remaining in this category which have undefined comparative statutes.

32. ARK. STAT. ANN. §§ 27-1763 to -1765 (1979) provides for a modified comparison of fault and defines “fault” as including “any act, omission, conduct, risk assumed, breach of warranty or breach of any legal duty” but does not specifically include strict liability. *Id.* § 27-1763. Because the statute does include breach of warranty and breach of any legal duty, it is assumed that it will apply to strict liability although at this writing there are no decisions on point. Author, and now United States District Judge, Henry Woods certainly thinks so: “Whether the action is brought in negligence, warranty, or strict liability, the conduct is compared.” H. WOODS, COMPARATIVE FAULT 435 (1978); see also *Keltner v. Ford Motor Co.*, 748 F.2d 1265 (8th Cir. 1984).

33. ME. REV. STAT. ANN. tit. 14, § 156 (1964) provides that where the plaintiff is partly at fault his claim is not defeated unless his fault is equal to or greater than that of the defendant. *Austin v. Raybestos-Manhattan, Inc.*, 471 A.2d 280 (Me. 1984), construes the Maine statute as applicable to strict liability actions but severely limits the conduct to be compared.

34. N.Y. CIV. PRAC. L. & R. 1411 (McKinney 1976) applies to “any action to recover damages” and compares the “culpable conduct” of the plaintiff with the “culpable conduct” which caused the damages, reducing plaintiff’s damages on a pure comparative basis. The statute applies to strict liability claims. See McLaughlin, *Practice Commentaries*, 7B N.Y. CIV. PRAC. L. & R. 385, 386 (McKinney 1976 & Supp. 1987), which states: “By its terms, Section 1411 is not limited to negligence actions. Thus, in an action for breach of warranty [or] strict liability . . . CPLR 1411 now directs that the recovery be diminished by the proportion of the plaintiff’s ‘culpable conduct.’” See also *Schumacher v. Richards Shear Co., Inc.*, 59 N.Y.2d 239, 451 N.E.2d 195, 464 N.Y.S.2d 437 (1983); *Curry v. Moser*, 89 A.D.2d 1, 454 N.Y.S.2d 311 (1982).

35. OR. REV. STAT. § 18.470 (1981) is a modified comparative fault statute, which provides that:

Contributory negligence shall not bar recovery in an action . . . to recover damages . . . if the fault attributable to the person seeking recovery was not greater than the combined fault of the person or persons against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the percentage of fault attributable to the person recovering

The statute is applied to strict liability actions. See *Sandford v. Chevrolet Div. of Gen. Motors*, 292 Or. 590, 642 P.2d 624 (1982); *Hackett v. Alco Standard Corp.*, 71 Or. App. 24, 691 P.2d 142 (1984), *review denied*, 298 Or. 822, 698 P.2d 963 (1985). However, the conduct to be compared is limited.

Louisiana now judicially applies comparative principles in strict liability and has rejected the direct application of its undefined comparative statute to strict liability actions.³⁶ Mississippi, originally catalogued as applying its comparative negligence statute to strict liability, is now included in this category since its comparative statute is not limited to negligence actions.³⁷ In 1986, New Hampshire adopted an undefined comparative fault statute.³⁸ Because of a federal court decision,³⁹ Rhode Island was originally catalogued as rejecting the concept of applying comparative principles to strict liability.⁴⁰ The Rhode Island Supreme Court has now spoken. That state now joins those whose undefined statutes are said to apply to strict liability.⁴¹

The group of states with undefined comparative statutes may now include Wyoming. Wyoming's revised comparative negligence statute, though entitled "Comparative Negligence" provides that "contributory negligence shall not bar a recovery . . . by any person . . . to recover damages for negligence . . . if the contributory negligence is not more than fifty percent (50%) of the total fault."⁴²

D. Judicial Adoption of Comparative Principles

In the original article, we noted that nine states (plus the Virgin Islands) had judicially adopted comparative principles for strict liability.⁴³ These states were⁴⁴ Alaska,⁴⁵ California,⁴⁶ Florida,⁴⁷ Hawaii,⁴⁸ Montana,

36. See *infra* note 56 and accompanying text.

37. MISS. CODE ANN. § 11-7-15 (1972); see *Edwards v. Sears, Roebuck & Co.*, 512 F.2d 276 (5th Cir. 1975); *Nichols v. Western Auto Supply Co., Inc.*, 477 So. 2d 261 (Miss. 1985).

38. N.H. REV. STAT. ANN. § 507:7-d (West 1986).

39. *Roy v. Star Chopper Co., Inc.*, 584 F.2d 1124 (1st Cir. 1978), cert. denied, 440 U.S. 916 (1979).

40. *Greenlee & Rochelle*, *supra* note 6, at 657.

41. R.I. GEN. LAWS § 9-20-4 (1985) provides:

Comparative negligence—In all actions hereafter brought for personal injuries, or where such injuries have resulted in death, or for injury to property, the fact that the person injured, or the owner of the property, or person having control over the property may not have been in the exercise of due care shall not bar a recovery, but damages shall be diminished by the finder of fact in proportion to the amount of negligence attributable to the person injured, or the owner of the property or the person having control over the property.

Rejecting the First Circuit's decision in *Star Chopper*, 584 F.2d 1124, the Rhode Island Supreme Court stated, "After prolonged consideration and reading of this statute, we can only come to the conclusion that the language 'all actions hereafter brought for personal injuries' includes actions brought on the theories of strict liability and breach of implied warranty, as well as actions brought on negligence theory." *Fiske v. MacGregor*, 464 A.2d 719, 727 (R.I. 1983).

42. WYO. STAT. ANN. § 1-1-109 (Supp. 1986) (emphasis added); see *infra* text accompanying notes 83-95 (Section III).

43. *Greenlee & Rochelle*, *supra* note 6, at 655.

44. *Id.*

45. While Alaska still applies comparative principles to strict liability, it has substantially retreated from the sweeping language of *Butaud v. Suburban Marine & Sporting Goods, Inc.*, 555 P.2d 42 (Alaska 1976), in which the Alaska Supreme Court held, "The comparative negligence defense would be applied in the same manner as in any negligence case, with the major difference being that in products liability cases it would not be necessary to prove that a defect was caused by negligence." *Id.* at 46. After vacillating for nearly a decade,

Nevada, New Hampshire, Texas⁴⁹ and Utah. Montana has now been reclassified as a state which, to a limited degree, has extended its comparative negligence statute to strict liability.⁵⁰ Relying on a federal court decision,⁵¹ Nevada was originally classified as a state whose courts applied comparative principles to strict liability. Because of a recent decision of the Nevada Supreme Court,⁵² Nevada has been reclassified as one of only nine states rejecting the concept.⁵³ Because of legislative action in 1986, New Hampshire has a new undefined comparative fault statute⁵⁴ and Utah has a new comparative statute applying to both negligence and strict products liability.⁵⁵

compare Caterpillar Tractor Co. v. Beck, 593 P.2d 871 (Alaska 1979) with Sturm, Ruger & Co., Inc. v. Day, 594 P.2d 38 (Alaska 1979), the Alaska Supreme Court reversed its broad holding in *Butaud* and adopted, instead, the rule that the plaintiff's conduct, in order to be compared in a strict liability action, must be more than a failure to exercise ordinary care. *Dura Corp. v. Harned*, 703 P.2d 396 (Alaska 1985).

The Supreme Court of Alaska has confirmed its holding in *Dura*. In a footnote in *Lamer v. McKee Indus., Inc.*, 721 P.2d 611, 616 n.8 (Alaska 1986), the court stated that:

It should be emphasized that in a products liability case based on strict liability in tort, comparative negligence is limited to the plaintiff's voluntary assumption of a known risk and that the plaintiff's mere failure to exercise ordinary care is not enough to justify submitting the issues of comparative negligence to the jury.

46. California adheres to its 1978 decision in *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978). *Daly* is acknowledged as the "landmark" decision in the area of comparative negligence in strict liability. See Greenlee & Rochelle, *supra* note 6, at 651, 653, 654, 661, 668 (discussing *Daly*). California originally adopted pure comparative negligence in *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

47. *West v. Caterpillar Tractor Co.*, 336 So. 2d 80 (Fla. 1976), holds that, in strict liability cases, the user's contributory negligence, in the sense of failure to discover a defect, is not a defense. However, unreasonable use of a product after discovery of a defect or failure of the plaintiff to act as a reasonably prudent person are defenses which will be compared. *Id.* at 90. Florida had previously adopted pure comparative negligence in *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973).

48. Hawaii embraces California's decision in *Daly* and applies pure comparative principles to strict liability. *Kaneko v. Hilo Coast Processing*, 654 P.2d 343 (Haw. 1982). Hawaii's comparative negligence statute, however, is of the modified variety. HAW. REV. STAT. § 663-31 (1976).

49. In a far-reaching and exhaustive decision, the Texas Supreme Court has held that all products liability actions will be subject to the principle of "comparative causation." *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414 (Tex. 1984). Despite Texas' modified comparative negligence statute, TEX. REV. CIV. STAT. ANN. § 2212a (Vernon 1971) (recodified at TEX. CIV. PRAC. & REM. CODE ANN. §§ 33.001 to .017 (Vernon 1986)), the court chose a pure comparative system where "[t]he trier of fact is to compare the harm caused by the defective product with the harm caused by the negligence of the other defendants, any settling tortfeasor and the plaintiff." 665 S.W.2d at 427.

50. See *supra* note 11 and accompanying text.

51. *Aetna Casualty & Sur. Co. v. Jeppesen & Co.*, 642 F.2d 339 (9th Cir. 1981).

52. *Young's Mach. Co. v. Long*, 100 Nev. 692, 692 P.2d 24 (1984).

53. *Id.*, 692 P.2d at 25; see *infra* notes 63-75 and accompanying text (Section II.E.).

54. See *supra* note 38 and accompanying text. Prior to adoption of the new statute, the New Hampshire Supreme Court in *Thibault v. Sears, Roebuck & Co.*, 118 N.H. 802, 395 A.2d 843 (1978), refused to apply New Hampshire's modified comparative negligence statute, N.H. REV. STAT. ANN. § 507:7-a (West 1983), to strict liability but did apply modified comparative principles anyway. 118 N.H. 802, 395 A.2d at 850. See *infra* note 157 and accompanying text.

55. See *supra* note 29 and accompanying text.

Seven additional states—Louisiana,⁵⁶ New Mexico,⁵⁷ North Dakota,⁵⁸ Ohio,⁵⁹ Vermont,⁶⁰ West Virginia⁶¹ and, arguably, Wyoming⁶²—may now be added to the seven remaining states whose state or federal courts have judicially adopted comparative principles for strict liability actions.

56. *Bell v. Jet Wheel Blast*, 462 So. 2d 166 (La. 1985). Rejecting the direct application of Louisiana's pure comparative negligence statute, LA. CIV. CODE ANN. § 2323 (West Supp. 1987), the court held:

In those types of cases in which comparative fault principles may be applied, the principles of article 2323 and its predecessors should be applied by analogy so that the claim for damages recoverable shall be reduced in proportion to the degree or percentage of negligence attributable to the person suffering the injury, death or loss. Thus, the "pure" form of comparative negligence shall apply in those strict products liability cases in which the plaintiff's award may be reduced. Furthermore, the adoption of a system of comparative fault should, where it applies, entail the merger of the defenses of misuse and assumption of risk into the general scheme of assessment of liability in proportion to fault.

462 So. 2d at 172. Ordinary negligence, however, is not a defense. *Id.*

57. *Jaramillo v. Fisher Controls Co., Inc.*, 102 N.M. 614, 698 P.2d 887 (Ct. App. 1985); *Marchese v. Warner Communications, Inc.*, 100 N.M. 313, 670 P.2d 113 (Ct. App. 1983). The *Marchese* court relied on *Scott v. Rizzo*, 96 N.M. 682, 634 P.2d 1234 (1981) (a non-products liability case which adopted pure comparative negligence for New Mexico), to hold that pure comparative fault, without restriction, would be applied in strict liability cases.

58. *Mauch v. Manufacturers Sales & Serv., Inc.*, 345 N.W.2d 338 (N.D. 1984). The *Mauch* court held that:

When the defenses of assumption of risk and unforeseeable misuse are raised in the context of a strict products-liability action, the trier of fact must determine, on a pure comparative causation basis, the percent of the injuries proximately caused by the assumption of risk or the unforeseeable misuse and the percent proximately caused by the unreasonably dangerous defect in the product, and the plaintiff's recovery must be reduced by an amount proportionate to the damage caused by the misuse or assumption of risk.

Id. at 348-49; see also *Keller v. Vermeer Mfg. Co.*, 360 N.W.2d 502 (N.D. 1984); *Kaufman v. Meditec, Inc.*, 353 N.W.2d 297 (N.D. 1984); *Day v. General Motors Corp.*, 345 N.W.2d 349 (N.D. 1984). North Dakota has a modified comparative negligence statute. N.D. CENT. CODE § 9-10-07 (1975).

59. Ohio law on this topic is in a state of flux. The authors believe, however, that the Ohio Supreme Court will adopt comparative principles in strict liability actions. Two recent but at this writing unpublished opinions from two intermediate Ohio Courts of Appeal both adopt the concept. Additionally, Ohio has a modified comparative negligence statute, OHIO REV. CODE ANN. § 2315.19 (Baldwin 1984). In *Bowling v. Jake Sweeney Chevrolet*, No. CA84-05-054 (Ohio Ct. App. Mar. 31, 1986) (LEXIS, States library, Ohio file), the Court of Appeals for Butler County, Ohio, found "that comparative negligence is a factor for jury consideration in strict liability cases concerning specifically the plaintiff's percentage of responsibility for causing the harmful event by his misconduct just as it would be under the comparative negligence statute." The Court of Appeals of Trumbull County, Ohio, in *Onderko v. Richmond Mfg. Co.*, No. 3474 (Ohio Ct. App. July 25, 1986) (LEXIS, States library, Ohio file), concluded "that the doctrine of comparative fault applies to strict liability cases in Ohio, and . . . that the negligence of all parties and assumption of risk shall be apportioned by the court or jury in the same manner as the method provided in R.C. 2315.19." The Ohio federal courts, however, disagree. See *Bailey v. V & O Press Co., Inc.*, 770 F.2d 601 (6th Cir. 1985).

60. The Vermont Supreme Court has not yet passed upon the issue. Vermont has enacted, however, a modified comparative negligence statute, VT. STAT. ANN. tit. 12, § 1036 (1973 & Supp. 1986). In a comprehensive and well-reasoned opinion, the United States District Court for the District of Vermont considered the issue and held "that juries may consider evidence of plaintiffs' negligence in assessing damages as to strict liability claims as well as to negligence claims." *Smith v. Goodyear Tire & Rubber Co.*, 600 F. Supp. 1561 (D. Vt. 1985). The authors believe that when the issue is directly presented, the Vermont Supreme Court will follow the federal court's lead.

61. West Virginia was the first and only state to judicially adopt *modified* comparative negligence. *Bradley v. Appalachian Power Co.*, 163 W. Va. 332, 256 S.E.2d 879 (1979). In

E. States Rejecting Application of Comparative Principles to Strict Liability

The original article reported that, in spite of their judicial or statutory adoption of comparative negligence, only seven states—Georgia, Ohio, Oklahoma, Pennsylvania, South Dakota, Rhode Island and West Virginia—had rejected the concept of applying comparative principles in strict liability actions.⁶³

Some of those states that rejected the concept have changed since 1983. While Georgia,⁶⁴ Oklahoma,⁶⁵ Pennsylvania⁶⁶ and South Dakota⁶⁷ have maintained their position, Ohio⁶⁸ and Rhode Island⁶⁹ now apply comparative principles to strict liability actions. Originally listed as a state accepting the concept, Nevada⁷⁰ has determined that comparative fault or causation has no place in strict liability.⁷¹ Massachusetts⁷² and Missouri⁷³ were not classified in the original article, but should be included with those states that judicially reject the application of comparative

1982, the West Virginia Supreme Court extended this modified plan to strict liability claims. *Star Furniture Co. v. Pulaski Furniture Co.*, 297 S.E.2d 854 (W. Va. 1982). In doing so, the court held that the plaintiff's negligence must be something more than failing to discover a defect or to guard against it. *Id.* at 861-62.

62. *Sheldon v. Unit Rig & Equip. Co.*, 797 F.2d 883 (10th Cir. 1986), *cert. denied*, 107 S. Ct. 1300 (1987); *see infra* text accompanying notes 118-126 (Section IV.B.) and 163-174.

63. Greenlee & Rochelle, *supra* note 6, at 657.

64. *See Center Chem. Co. v. Parzini*, 235 Ga. 868, 218 S.E.2d 580 (1973), *on remand* 136 Ga. App. 396, 221 S.E.2d 475 (1975).

65. *See Saupitty v. Yazoo Mfg. Co., Inc.*, 726 F.2d 657 (10th Cir. 1984); *Kirkland v. General Motors Corp.*, 521 P.2d 1353 (Okla. 1974). Oklahoma's modified comparative negligence statute is found at OKLA. STAT. ANN. tit. 23, §§ 13, 14 (West 1987).

66. *See Bike v. American Motors Corp.*, 101 F.R.D. 77 (E.D. Pa. 1984); *Berkebile v. Brantly Helicopter Corp.*, 462 Pa. 83, 337 A.2d 893 (1975); *Dambacher v. Mallis*, 336 Pa. Super. 22, 485 A.2d 408 (1984). Pennsylvania's modified comparative negligence statute is found at 42 PA. CONS. STAT. ANN. §§ 7102 (Purdon 1982 & Supp. 1986), 8324 (Purdon 1982). Pennsylvania may be moving toward adoption of comparative principles for strict liability. *See Dambacher*, 336 Pa. Super. 22, 485 A.2d at 430 (Wieand, J., dissenting).

67. Confirming its holding in *Smith v. Smith*, 278 N.W.2d 155 (S.D. 1979), the South Dakota Supreme Court held that strict liability and comparative principles are incompatible. *Klug v. Keller Indus., Inc.*, 328 N.W.2d 847 (S.D. 1982). South Dakota's comparative negligence statute, S.D. CODIFIED LAWS ANN. § 20-9-2 (1979), provides for a comparison of the plaintiff's negligence to that of the defendant but only if the plaintiff's negligence is "slight in comparison." *See supra* note 24 (concerning the Nebraska comparative negligence statute, on which the South Dakota law was based).

68. *See supra* note 59.

69. *See supra* notes 39-41 and accompanying text.

70. Greenlee & Rochelle, *supra* note 6, at 665.

71. *See supra* note 53.

72. *Correia v. Firestone Tire & Rubber Co.*, 388 Mass. 342, 446 N.E.2d 1033 (1983); *Hallmark Color Labs, Inc. v. Damon Corp.*, 20 Mass. App. 909, 477 N.E.2d 1052 (1985). Massachusetts does not have strict products liability as such. *Swartz v. General Motors Corp.*, 375 Mass. 628, 378 N.E.2d 61 (1978), but applies breach of warranty without the requirement of privity to achieve the same result. *Back v. Wickes Corp.*, 375 Mass. 633, 378 N.E.2d 964 (1978).

73. *Lippard v. Houdaille Indus., Inc.*, 715 S.W.2d 491 (Mo. 1986). Although the Missouri Supreme Court embraced the UNIF. COMPARATIVE FAULT ACT, 12 U.L.A. 37 (Supp. 1983), when adopting pure comparative fault for negligence cases, *Gustfason v. Benda*, 661 S.W.2d 11 (Mo. 1983), the *Lippard* decision rejects the application of comparative principles of any sort in a strict liability context.

principles in strict liability actions. Two states, Indiana⁷⁴ and Kentucky,⁷⁵ have adopted product liability statutes which reject comparative defenses in strict products liability actions.

F. States Without Comparative Negligence

Finally, there are six states which have not yet adopted, or have specifically rejected, comparative principles in any context. These states are Alabama,⁷⁶ Maryland,⁷⁷ North Carolina,⁷⁸ South Carolina,⁷⁹ Tennessee⁸⁰ and Virginia.⁸¹

G. Summary of the States

With the exception of Delaware,⁸² this update classifies each state with respect to statutory and judicial action concerning comparative negligence and the application of comparative principles to strict liability actions. Of the remaining forty-nine states, six have not adopted comparative principles even for negligence actions. Only nine states reject application of comparative principles in strict liability. This leaves thirty-four states which have applied comparative principles or whose statutes permit such application. While the argument that comparative principles and strict liability are incompatible concepts still enjoys some life, it is slowing dy-

74. IND. CODE ANN. §§ 34-4-20A-1 to -5 (Burns 1986) define four absolute defenses to a strict liability action: assumption of risk, product misuse, modification or alteration, and conformity with the state of the art. Conduct of the plaintiff not described in the statute is not a defense, comparative or absolute. Indiana's comparative fault act, which was amended to specifically exclude strict liability and warranty, is found at *id.* §§ 34-4-33-2 to -13.

75. Kentucky has a unique "Products Liability Act" providing that a manufacturer is liable "only if the product was used in its original, unaltered and unmodified condition" or for "alterations or modifications made . . . in accordance with specifications or instructions furnished by the manufacturer." KY. REV. STAT. ANN. § 411.320 (Michie/Bobbs-Merrill Supp. 1986). The act also provides:

(2) In any product liability action, if the plaintiff performed an unauthorized alteration or an unauthorized modification, . . . *the defendant shall not be liable* whether or not said defendant was at fault or the product was defective.

(3) In any product liability action, if the plaintiff failed to exercise ordinary care in the circumstances in his use of the product, . . . *the defendant shall not be liable* whether or not said defendant was at fault or the product was defective.

Id. §§ 411.320(2), -(3) (emphasis added).

Kentucky judicially adopted pure comparative negligence for negligence cases in *Hilen v. Hayes*, 673 S.W.2d 713 (Ky. 1984). Although dicta in *Hilen* suggested that, despite the clear language of the statute, the defenses might be applied on a comparative basis, a 1986 decision of the Kentucky Supreme Court now holds that the defenses are absolute. *Redo Pump Co. v. Finck*, 713 S.W.2d 818 (Ky. 1986).

76. See *Golden v. McMurry*, 392 So. 2d 815, 817 (Ala. 1980); *Atkins v. American Motors Corp.*, 335 So. 2d 134, 143 (Ala. 1976).

77. See *Harrison v. Montgomery County Bd. of Educ.*, 295 Md. 442, 456 A.2d 894 (1983).

78. See *Miller v. Miller*, 273 N.C. 228, 160 S.E.2d 65, 73 (1980).

79. See *Langley v. Boyter*, 286 S.C. 85, 332 S.E.2d 100, 101 (1985).

80. See *Kennedy v. Perry*, 688 S.W.2d 74, 77 (Tenn. Ct. App. 1984).

81. See *Gardner v. Old Dominion Stevedoring Corp.*, 225 Va. 599, 303 S.E.2d 914, 916-17 (1983).

82. DEL. CODE ANN. tit. 10, § 8132 (Supp. 1986) established modified comparative negligence in Delaware. There has been no decision, however, as to the applicability of comparative principles in strict liability actions.

ing away. The question of far greater vitality today is how, and the extent to which, a strictly liable defendant will be affected by the negligent conduct of the plaintiff.

Appended to this article is a table of all states setting forth the statutory and judicial action in each state concerning these matters.

III. WYOMING'S REVISED COMPARATIVE "NEGLIGENCE" ACT

In 1986, the Wyoming State Legislature modified Wyoming's comparative negligence statute.⁸³ The 1986 comparative negligence act changed Wyoming law in four major ways. First, the language of the new statute now arguably compares all *fault*, not just the negligence of the parties; second, it eliminated joint and several liability; third, it changed Wyoming's scheme of comparative fault under which each tortfeasor's fault was *individually* compared to that of the plaintiff, to a system under which plaintiff's responsibility is compared to that of *all* tortfeasors; and fourth, it eliminated statutory contribution. A discussion of each of these points will be made in turn.

A. Comparative Fault Principles Under The New Act

While the title of the statute is "Comparative Negligence," the text of the new statute is not limited to the comparison of the parties' "negligence." It compares "fault."⁸⁴ New section 1-1-109 of the Wyoming Statutes states:

(a) Contributory negligence shall not bar a recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if the contributory negligence of the said person is not more than fifty percent (50%) of the total fault. Any damages allowed shall be diminished in proportion to the amount of negligence attributed to the person recovering.

83. WYO. STAT. ANN. § 1-1-109 (Supp. 1986) The act applies to all causes of actions accruing after its effective date. The act is effective June 11, 1986. 1986 Wyo. Sess. Laws ch. 24, §§ 2, 3. Causes of action accruing prior to June 11, 1986, are governed by WYO. STAT. ANN. § 1-1-109 (1977). Wyoming's prior comparative negligence statute can arguably be applied to strict liability actions. Greenlee & Rochelle, *supra* note 6, at 657-59, discussed the means by which Wyoming's 1973 comparative negligence statute could be applied to strict liability. See also *infra* text accompanying notes 143-156 (Section V.B.).

84. The statute is arguably a comparative "fault" act. Maine's Supreme Court had no problem construing its incorrectly captioned statute to be a comparative fault scheme. In *Austin v. Raybestos-Manhattan, Inc.*, 471 A.2d 280, 282 n.3 (Me. 1984), it stated, "Although section 156 is loosely referred to as Maine's 'comparative negligence statute,' it in specific terms requires a comparison of fault"

Ogle appeared to equate "fault" with negligence or a failure to exercise due care. *Ogle v. Caterpillar Tractor Co.*, 716 P.2d 334, 342 (Wyo. 1986). While some jurisdictions speak of strict liability as liability without fault, the majority, and better, rule is that strict liability, although not a negligence theory, is premised upon fault concepts. See Greenlee & Rochelle, *supra* note 6, at 656 n.74. The authors believe that the use of the term "fault" in *Ogle* to distinguish strict liability from negligence actions was merely a means of making a point, and not a determination that strict liability is absolute liability or liability without fault.

- (b) The court may, and when requested by any party shall:
- (i) If a jury trial:
 - (A) Direct the jury to find separate special verdicts determining the total amount of damages and the percentage of fault attributable to each actor whether or not a party; and
 - (B) Inform the jury of the consequences of its determination of the percentage of fault.
 - (ii) If a trial before the court without jury, make special findings of fact, determining the total amount of damages and the percentage of fault attributable to each actor whether or not a party.
- (c) The court shall reduce the amount of damages determined under subsection (b) of this section in proportion to the amount of fault attributed to the person recovering and enter judgment against each defendant in the amount determined under subsection (d) of this section.
- (d) Each defendant is liable only for that proportion of the total dollar amount determined as damages under paragraph (b)(i) or (ii) of this section in the percentage of the amount of fault attributed to him under paragraph (b)(i) or (ii) of this section.⁸⁵

Comparing the 1973 statute to the 1986 law, many references to "negligence" in the 1973 law have been replaced by the term "fault" in the new law.⁸⁶ The new comparative act originated as Senate File No. 17.⁸⁷

85. WYO. STAT. ANN. 1-1-109 (Supp. 1986).

86. Compare *id.* § 1-1-109 (1977) with *id.* § 1-1-109 (Supp. 1986). The 1973 law made no references to "fault" and made eight references to "negligence." By comparison, the 1986 law mentions "fault" six times and only mentions "negligence" four times, all but one of which refers to the conduct of the claimant. Old section 1-1-109 stated:

(a) Contributory negligence shall not bar a recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if the contributory negligence was not as great as the negligence of the person against whom recovery is sought. Any damages allowed shall be diminished in proportion to the amount of negligence attributed to the person recovering.

(b) The court may, and when requested by any party shall:

(i) If a jury trial, direct the jury to find separate special verdicts.

(ii) If a trial before the court without jury, make special findings of fact, determining the amount of damages and the percentage of negligence attributable to each party. The court shall then reduce the amount of such damages in proportion to the amount of negligence attributed to the person recovering;

(iii) Inform the jury of the consequences of its determination of the percentage of negligence.

Id. § 1-1-109 (1977).

87. Senate File No. 17, 48th Legis., Budget Sess. (Wyo. 1986) (Legislative Serv. Office No. 86L50-0122.01), as originally introduced, read in pertinent part as follows:

Be It enacted by the Legislature of the State of Wyoming:

Section 1. W.S. 1-1-109 is amended to read:

1-1-109. *Comparative negligence.*

(a) Contributory negligence shall not bar a recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property. ~~if the contributory negligence was~~

By the time the 1986 law was passed, most references in Senate File No. 17 to the comparison of the defendant's "negligence" had been changed to the defendant's "fault."⁸⁸

The preamble to the final version of section 1-1-109 also referenced comparison of "fault" by noting "that a plaintiff in a negligence action is entitled to a proportionate recovery of his damages if the plaintiff's contributory negligence is not more than fifty percent (50%) of the total *fault* . . ." The preamble further provides "that each defendant is liable only to the extent of his percentage of *fault* as compared to all other actors whether or not parties to the action. . . ."⁸⁹

Based upon this legislative history, "fault" obviously means something more than "negligence." The authors suggest that "fault" in the statute has or should have the same meaning as "fault" in the Uniform Comparative Fault Act, which includes strict liability and breach of warranty, as well as negligence, within that term.⁹⁰

It could, however, be argued that the new statute is limited to a comparison of the "negligence" of the parties. The title is "Comparative *Negligence*,"⁹¹ the preamble says that the act applies to "a plaintiff in

~~not as great as the negligence of the person against whom recovery is sought.~~
Any damages allowed shall be diminished in proportion to the amount of negligence attributed to the person recovering.

(b) The court may, and when requested by any party shall:

(i) If a jury trial: ;

(A) Direct the jury to find separate special verdicts DETERMINING THE TOTAL AMOUNT OF DAMAGES AND THE PERCENTAGE OF NEGLIGENCE ATTRIBUTABLE TO EACH ACTOR WHETHER OR NOT A PARTY; AND

(B) INFORM THE JURY OF THE CONSEQUENCES OF ITS DETERMINATION OF THE PERCENTAGE OF NEGLIGENCE.

(ii) If a trial before the court without jury, make special findings of fact, determining the TOTAL amount of damages and the percentage of negligence attributable to each ACTOR WHETHER OR NOT A party.

(c) The court shall then reduce the amount of ~~such~~ damages DETERMINED UNDER (b) OF THIS SUBSECTION in proportion to the amount of negligence attributed to the person recovering; AND ENTER JUDGMENT AGAINST EACH DEFENDANT IN THE AMOUNT DETERMINED UNDER SUBSECTION (d) OF THIS SECTION.

~~(iii) Inform the jury of the consequences of its determination of the percentage of negligence.~~

(d) EACH DEFENDANT IS LIABLE ONLY FOR THAT PROPORTION OF THE TOTAL DOLLAR AMOUNT DETERMINED AS DAMAGES UNDER PARAGRAPH (b)(i) OR (ii) OF THIS SECTION IN THE RATIO OF THE AMOUNT OF FAULT ATTRIBUTED TO HIM UNDER PARAGRAPH (b)(i) OR (ii) OF THIS SECTION.

88. Compare Senate File No. 17, *supra* note 87 with WYO. STAT. ANN. § 1-1-109 (Supp. 1986). Not including the preamble or the title, original Senate File No. 17 contained only one reference to "fault," while the 1986 law as enacted contains six such references. The original Senate File No. 17 contained seven "negligence" references, while the 1986 law has only four references to "negligence," all but one of which refers to the conduct of the claimant.

89. 1986 Wyo. Sess. Laws ch. 24 (emphasis added). Although the preamble to a statute is not binding, the Wyoming Supreme Court does consider it in construing statutes. *Sanchez v. State*, 567 P.2d 270, 275 n.3 (Wyo. 1977).

90. UNIF. COMPARATIVE FAULT ACT § 1, 12 U.L.A. 37 (Supp. 1983).

91. WYO. STAT. ANN. § 1-1-109 (Supp. 1986). See *Austin v. Raybestos-Manhattan, Inc.*, 471 A.2d 280, 282 (Me. 1984). In *Fiske v. MacGregor*, 464 A.2d 719 (R.I. 1983), the Supreme

a *negligence* action;" and the first sentence of the statute provides that "Contributory *negligence* shall not bar a recovery in an action . . . for *negligence*. . . ."92 However, rules of statutory construction require that "all portions of an act must be read in *pari materia*, and every word, clause and sentence of it must be considered so that no part will be inoperative or superfluous."⁹³ Further, courts "must assume that the legislature did not intend futile things."⁹⁴ Unless "fault" is limited to negligence, to say this statute is a comparative *negligence* statute, allowing only the comparison of negligence would be to ignore the many references to *fault* in the statute as well as the statute's clear directive requiring the jury to determine the percentage of the *fault* of each actor.⁹⁵

B. Elimination of Joint and Several Liability

A major impetus for the 1986 change was a challenge by the Judiciary to the Legislature to redress the inequities of joint and several liability.⁹⁶ *Kirby Building Systems v. Mineral Explorations*⁹⁷ summarized the joint and several liability doctrine in the 1973 law by saying:

If there are defendants whose fault exceeds that of the plaintiff, the plaintiff may proceed against any or all of such tortfeasors jointly or severally for the full amount of the judgment, and, contrary to the position of the appellant Kirby, no other reduction

Court of Rhode Island refused to use the title to the statute to assist in its construction of the statute. The title to the statute seemed to limit its application to negligence cases. The clear language of the statute showed its application to be broader than just negligence cases and the court held it applied to "all actions hereafter brought for personal injuries." *Id.* at 727.

92. WYO. STAT. ANN. § 1-1-109(a) (Supp. 1986) (emphasis added). The United States Court of Appeals for the Tenth Circuit, in the case of *Sheldon v. Unit Rig & Equipment Co.*, 797 F.2d 883 (10th Cir. 1986), refused to extend the 1973 comparative negligence statute to a products liability case based upon breach of warranty, saying, "The Wyoming Comparative Negligence Statute on its face does not resolve the warranty claim issue. The statute refers to an action 'to recover damages for negligence.' The statute does not refer explicitly to actions sounding in warranty or in strict liability." *Id.* at 886; see *infra* notes 117-125 and accompanying text (Section IV.B.).

93. *Hamlin v. Transcon Lines*, 701 P.2d 1139, 1142 (Wyo. 1985).

94. *Id.*; see also *State Bd. of Equalization v. Tencoco Oil*, 694 P.2d 97, 99 (Wyo. 1985).

95. WYO. STAT. ANN. § 1-1-109(b)(ii) (Supp. 1986).

96. In *Kirby Bldg. Systems v. Mineral Explorations Co.*, Justice Brown's specially concurring opinion states:

Rather than overrule our earlier cases and reverse, I would opt to affirm this case and urge the legislature to reexamine our statutes and by appropriate legislation cure the inequities pointed out by Justice Rooney.

Under our statutory scheme, Section 1-1-109, W.S. 1977 (comparative negligence), and Sections 1-1-110 through 1-1-113, W.S. 1977 (right to contribution among joint tortfeasors), a defendant with only slight fault could be required to pay the entire judgment (in the event the defendant who was principally at fault was insolvent). Also under our statutory scheme, a defendant who is principally at fault could settle for a token amount before trial and thus shift the remaining burden of a large judgment on a defendant whose fault is slight. (See examples set out by Justice Rooney in his dissent.)

I am not convinced the legislature intended the apparent inequity that I have pointed out. Our statutory scheme helps redistribute the wealth but I am not persuaded it is free from constitutional infirmities.

704 P.2d 1266, 1277-78 (Wyo. 1985) (Brown, J., specially concurring) (parentheses in original).

97. *Id.*

may be made from the verdict figure which reduction is based upon the fault of a tortfeasor.⁹⁸

The final bill became law with sharp criticism by Governor Herschler. The Governor refused to sign the bill, saying that it was not likely to cure the evils of joint and several liability.⁹⁹

Under the new law, judgment is entered against each defendant in the amount proportional to his fault, not for the entire amount of the damages as under prior law.¹⁰⁰ Gone is the concept of joint liability for the indivisible whole of the damages.¹⁰¹

C. Changes in Wyoming's "Modified" Scheme

With the 1973 law, Wyoming had a "modified" comparative scheme under which a plaintiff could recover only if his negligence was less than the negligence of each of the defendants compared *individually*.¹⁰² As an example, this meant that a plaintiff who was ten percent responsible could not recover from a five percent responsible defendant. That plaintiff could, however, recover from either a fifteen percent liable defendant or a seventy percent liable defendant. Plaintiff's recovery, of course, was diminished by plaintiff's percentage of negligence.

Under the 1986 act, the fault of the plaintiff is compared to the *total* fault of all tortfeasors. While a plaintiff may recover if his fault exceeds a particular defendant's fault, he will not recover if his fault is more than fifty percent of the total. His recovery will diminish by his percentage of fault as long as his fault is fifty percent or less.¹⁰³ Under the prior example, the ten percent liable plaintiff can recover from the five percent liable defendant. However, under the new law, no defendant is liable for damages beyond his percentage share.

98. *Id.* at 1273.

99. 1986 Wyo. Sess. Laws ch. 24; see also Herschler *lets what he calls 'horrible' bill become law*, Casper (Wyo.) Star-Tribune, Mar. 15, 1986, at A1, col. 5, which states: Gov. Ed Herschler allowed a bill repealing the doctrine of joint and severability [sic] to become law without his signature Friday, despite his belief that it is a "horrible piece of legislation."

The new law, which substitutes a modified form of comparative negligence for the joint and several liability doctrine, is a critical part of the Joint Judiciary Committee's package to help solve the liability-insurance crisis.

The bill also was recommended by a majority of the members of a special insurance committee appointed by Herschler.

"I'm glad the governor has followed the advice of his own select committee on insurance," said one committee member, House Speaker Jack Sidi, R-Natrona.

100. WYO. STAT. ANN. § 1-1-109(d) (Supp. 1986) ("Each defendant is liable only for that proportion of the dollar amount determined as damages . . . in the percentage of fault attributed to him.")

101. Under the old law, plaintiff could look to any defendant whose fault exceeded that of plaintiff. *Id.* § 1-1-109 (1977).

102. *Id.* § 1-1-109(a) (1977); Board of County Comm'rs v. Ridenour, 623 P.2d 1174, 1186 (Wyo.), *reh'g denied*, 627 P.2d 163 (Wyo. 1981).

103. WYO. STAT. ANN. § 1-1-109(a) (Supp. 1986).

Wyoming's scheme under the 1986 law is still a "modified" approach. Plaintiff cannot recover if he is more than fifty percent at fault.¹⁰⁴

D. Elimination of the Contribution Statutes

When the Wyoming Legislature eliminated the doctrine of joint and several liability, it eliminated the statutes regarding contribution.¹⁰⁵ Because a less than 100% at fault defendant is no longer liable to the plaintiff for the entire amount of the judgment, as he was under the joint and several liability doctrine, there should be no need for the doctrine of contribution.¹⁰⁶

IV. RECENT WYOMING CASE LAW DEVELOPMENTS

A. *Ogle v. Caterpillar Tractor Co.*

The Wyoming Supreme Court decision in *Ogle v. Caterpillar Tractor Co.*¹⁰⁷ is noteworthy in several respects. It adopts for Wyoming the tort of strict liability. It clearly explains the philosophy and reasons for the adoption. It defines, and to the extent the court was able under the facts before it, explains how strict liability is to be construed and applied. It virtually eliminates the need to rely upon the warranty provisions of the Uniform Commercial Code in any but a commercial action. It provides guidelines for pleading the tort. It makes clear which statute of limitations will apply. It does not, however, provide any definitive guidelines as to how to handle negligent conduct of the plaintiff.

Ogle eagerly embraced the doctrine of strict liability:

Today we join the overwhelming majority of American jurisdictions and hold that strict liability in tort is a valid cause of action in Wyoming. It is truly an independent cause of action that can

104. The differences between the 1973 and 1986 laws are evident upon comparing the recoveries under each law using a hypothetical \$100,000 jury verdict. Assume a ten percent responsible plaintiff, a five percent responsible defendant, a fifteen percent responsible defendant, and a seventy percent responsible defendant. These results obtain:

	1973 Law	1986 Law
P (10%)	Reduce recovery by \$10,000.	Reduce recovery by \$10,000.
D1 (5%)	No liability.	Responsible for \$5,000.
D2 (15%)	Responsible (potentially) for \$90,000.	Responsible for \$15,000.
D3 (70%)	Responsible (potentially) for \$90,000.	Responsible for \$70,000.

Totals under 1973 Law. Plaintiff can recover \$90,000 from either D2 or D3. If D2 pays the entire \$90,000, he can look to D3 for contribution according to D3's percentage of liability. If D3 is unable to pay, then D2 is "stuck" shouldering the responsibility for the entire judgment.

Totals under 1986 Law. Plaintiff can recover \$90,000. To do so however, plaintiff must look to each of the defendants for payment of each defendant's proportionate share of fault. If one defendant is unable to pay, plaintiff may not look to the other defendants for the defaulting defendant's share.

105. WYO. STAT. ANN. §§ 1-1-110 to -113 (1977) were repealed. See 1986 Wyo. Sess. Laws ch. 30, § 2.

106. While the Supreme Court of Wyoming has not yet considered the issue, the argument has been made that, since the act repealed the contribution statutes as of June 11, 1986, there is no contribution available, even for those cases in which joint and several liability applies. A discussion of this topic is beyond the scope of this article.

107. *Ogle v. Caterpillar Tractor Co.*, 716 P.2d 334 (Wyo. 1986).

be successfully pled and proven without regard to a manufacturer's or seller's negligence and without regard to the UCC's restrictions on breach of warranty actions.¹⁰⁸

Recognizing that different states define strict liability in various ways, the court specifically adopted section 402A of the *Restatement (Second) of Torts*,¹⁰⁹ noting that:

[W]e believe that the restatement definition forms the best starting place from which the cause of action can evolve in Wyoming. The definition is reasonably complete and will allow the district courts and Wyoming lawyers to litigate these cases with some measure of confidence. In addition, many of the finer points that are not explicitly covered in Section 402A or its official comments have been considered and resolved elsewhere.¹¹⁰

Ogle was faced with the specific question of whether material alteration is a defense to strict liability in Wyoming. *Ogle* answered affirmatively.¹¹¹ In so recognizing this defense, *Ogle* demonstrated that "strict" liability does not mean "absolute" liability. At minimum, material alteration is a defense.¹¹²

Other defenses available to a defendant in a strict liability action in Wyoming are not clear. If Wyoming adheres to the literal language of the *Restatement* and its comments in defining what defenses apply, then the

108. *Id.* at 341.

109. *Id.* at 341-42. Section 402A provides:

- (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
 - (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.

RESTATEMENT (SECOND) OF TORTS § 402A (1965) [hereinafter RESTATEMENT].

110. *Ogle*, 716 P.2d at 341. Under *Ogle*, a plaintiff seeking recovery under strict liability must prove five elements:

- (1) That the sellers were engaged in the business of selling the product that caused the harm;
- (2) that the product was defective when sold;
- (3) that the product was unreasonably dangerous to the user or consumer;
- (4) that the product was intended to and did reach the consumer without substantial change in the condition in which it was sold; and
- (5) that the product caused physical harm to the plaintiff/consumer.

Id. at 344.

111. *Id.* at 345.

112. Actually, proof of material alteration, or lack thereof is the burden of both the plaintiff and the defendant. The plaintiff must show that the product reached him in substantially the same condition as it was when sold. RESTATEMENT § 402A(1)(b); *supra* note 109 (quoting § 402A) & 110 (element number four). Once having done so, however, the burden shifts to the defendant to prove that the product had been materially altered. *Ogle*, 716 P.2d at 346.

only defenses will be assumption of risk,¹¹³ misuse¹¹⁴ and material alteration.¹¹⁵ Further, these defenses would operate as complete bars to plaintiff's recovery. There is language in *Ogle* which supports the contention that the defense of material alteration is a complete bar. The *Ogle* court said that "the seller *may not be liable* for a plaintiff's injuries which are caused by unforeseeable alterations in the product rather than the original defects."¹¹⁶ The *Ogle* court notes that negligence and warranty actions raise the defense of alteration "under the rubric of intervening or superseding cause" which would make the alteration a complete bar.¹¹⁷

B. *Sheldon v. Unit Rig & Equipment Co.*

In *Sheldon*,¹¹⁸ the Tenth Circuit refused to apply Wyoming's 1973 comparative negligence statute¹¹⁹ to a warranty action saying that the statute was limited by its terms to negligence actions.¹²⁰ *Sheldon*, however, went on to say that apart from the 1973 statute, "a plaintiff's contributory negligence is entitled to some consideration in a breach of warranty action, even though such negligence may not preclude recovery, . . ."¹²¹ The *Sheldon* court concluded by saying that plaintiff's recovery in a warranty action is reduced by plaintiff's percentage of fault:

Based on the existing precedent in Wyoming and the silence of statutory law on the issue, we conclude that appellant's contrib-

113. RESTATEMENT § 402A, comment n, at 356 (emphasis added), states, "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." In *Brittain v. Booth*, 601 P.2d 532 (Wyo. 1979), the Wyoming Supreme Court indicated that assumption of risk is but a species of contributory negligence or contributory fault and therefore is not a complete bar.

114. RESTATEMENT § 402A, comment h, at 351 (emphasis added), states, "If the injury results from abnormal handling, . . . the seller is *not liable*."

115. *Id.* § 402A(1)(b); *Ogle*, 716 P.2d at 345.

116. *Ogle*, 716 P.2d at 345 (emphasis added). Schwartz recognized two varieties of misuse and stated that they should carry two different consequences. One should be a complete defense and one should result in a reduction to a plaintiff's claim:

Unintended Unforeseeable Misuse

It is suggested that plaintiff's unintended unforeseeable misuse of a product should constitute a complete defense and comparative negligence should have no bearing. Defendant has violated no duty to plaintiff and, therefore, should pay no penalty.

Unintended Foreseeable Misuse

On the other hand, when plaintiff makes an unintended but reasonably anticipated or truly foreseeable misuse of a product that is defective as to that use, his claim should be reduced by the amount he is at fault.

V. SCHWARTZ, *supra* note 3, § 12.8, at 214. Courts have failed to maintain the distinction between the two concepts of misuse. Greenlee & Rochelle, *supra* note 6, at 646-48.

117. *Ogle*, 716 P.2d at 345.

118. 797 F.2d 883 (10th Cir. 1986), *cert. denied*, 107 S. Ct. 1300 (1987).

119. WYO. STAT. ANN. § 1-1-109 (1977).

120. *Sheldon*, 797 F.2d at 886. In Greenlee & Rochelle, *supra* note 6, at 664-65, we stated that the language of the 1973 act did not preclude application of the statute to strict products liability. For the various reasons advanced in our prior article, the authors disagree with the *Sheldon* court's conclusion regarding the non-applicability of the statute to strict liability or warranty.

121. *Sheldon*, 797 F.2d at 887.

utory negligence did not bar recovery completely under a warranty theory. The jury assessed appellant's damages at \$540,000. Applying the relevant case law of Wyoming, we hold that it is appropriate to reduce appellant's damages by the percentage of his contributing fault¹²²

Sheldon specifically refused to say if new section 1-1-109 would alter the court's conclusion. As the new law did not become effective until June 11, 1986 and the *Sheldon* cause of action arose prior to that date, the new statute did not affect the instant case.¹²³

Sheldon takes a very literal interpretation of Wyoming's 1973 comparative negligence statute. Since the decision cites strict liability cases from other jurisdictions as authority, it apparently overlooked Wisconsin's application of its comparative negligence statute to strict liability claims.¹²⁴ Wisconsin is important because it is the state of origin of Wyoming's 1973 comparative negligence act.¹²⁵ *Sheldon* also failed to deal with the sound policy reasons which have been advanced for applying the same comparative scheme in a warranty or strict liability action as in a negligence action.¹²⁶ Wyoming has a "modified" scheme under its 1973 comparative negligence statute and, because of *Sheldon*, now has a "pure" scheme under warranty and, arguably, strict liability actions, at least in the federal courts.

The *Sheldon* court must, however, be given credit for its willingness to recognize comparative negligence as a defense to a warranty claim and because it did not limit the types of plaintiff's conduct which could be compared. Its reasoning and methodology, however, create inconsistency and practical problems for courts and juries in cases involving multiple theories or parties.

C. Other Decisions

Three additional products liability cases, decided since publication of the original article, will be of interest to Wyoming lawyers involved in products cases. These cases are *Caterpillar Tractor Co. v. Donahue*,¹²⁷ *Herman v. Speed King Manufacturing Co.*,¹²⁸ and *O'Donnell v. City of Casper*.¹²⁹ While none of these decisions directly involved strict products

122. *Id.* at 887-88. The plaintiff in *Sheldon* was found to be more negligent than either of the other two actors. See *infra* note 164 and accompanying text.

123. *Id.* at 886 n.2.

124. *Id.* at 887 n.3; see *Dippel v. Sciano*, 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

125. *Woodward v. Haney*, 564 P.2d 844, 845 (Wyo. 1977).

126. In *Sheldon*, the court applied "pure" comparative principles of fault, as opposed to the "modified" scheme of comparative negligence in the statute. These authors disagree with this holding. If the scheme for negligence is "pure" then the scheme for strict liability should be "pure." If the negligence scheme is "modified," then the strict liability scheme should be "modified." See *Greenlee & Rochelle, supra* note 6, at 666; *infra* text accompanying notes 157-174 (Section V.C.).

127. 674 P.2d 1276 (Wyo. 1984).

128. 675 P.2d 1271 (Wyo. 1984).

129. 696 P.2d 1278 (Wyo. 1985).

liability, the decisions are valuable for their discussions of various products liability issues, including expert testimony, the seller's duties and industry custom.

V. ANALYSIS OF THE ALTERNATIVES

A. *The Decision to Adopt Comparative Fault for Strict Liability*

One alternative as to what to do with the plaintiff's conduct, of course, is to reject the concept that comparative fault principles should apply in strict liability actions. In doing just that, one justice of the South Dakota Supreme Court noted:

There is definitely a trend in the United States to compare negligence on [sic] strict products liability actions. [Citing cases.] However, this creates two great difficulties:

- (1) how do you compare the negligence of one party with the strict liability of the other; and
- (2) the plaintiff's misconduct: how may it be used as a basis for reducing the plaintiff's recovery under the principles of comparative negligence?¹³⁰

The authors suggest that courts which have refused to apply comparative principles in strict liability, on the basis that the theories are abhorrent, are unnecessarily embroiled in semantics. The comparison is not of the plaintiff's "negligence" with the product seller's "strict liability." It is, instead, a ranking by the fact finder of those factors which combined to cause the accident, be they substandard conduct or a product defect. If jurors can assign percentages of fault in a case of a speeding driver who collides with a jaywalking pedestrian, there is no reason why they should not complete the analysis by determining the percentage of fault to be assigned to the manufacturer of the vehicle's defective brakes. As Professor Schwartz notes, any perceived obstacle in making the comparison in a strict liability action is "more conceptual than practical. Juries have shown that they are 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."¹³¹

As is stated elsewhere in this article,¹³² the Wyoming Supreme Court in *Ogle* made specific reference to the official comments to section 402A of the *Restatement (Second) of Torts*¹³³ but did not quote or rely on them in the course of the opinion. The court further noted that "many of the finer points [of strict liability] have been considered and resolved

130. *Smith v. Smith*, 278 N.W.2d 155, 162 (S.D. 1979) (Henderson, J., concurring). The South Dakota Supreme Court has refused to overrule *Smith*. See *Klug v. Keller Indus., Inc.*, 328 N.W.2d 847 (S.D. 1982); see also *supra* note 67 (discussing *Klug*).

131. V. SCHWARTZ, *supra* note 3, § 12.8, at 215.

132. See *supra* text accompanying note 110.

133. *Ogle v. Caterpillar Tractor Co.*, 716 P.2d 334, 341 (Wyo. 1986).

elsewhere."¹³⁴ This language presents several problems. First, two of the *Restatement* comments, (h) and (n), reject simple contributory negligence as a defense and establish misuse and assumption of risk as absolute defenses.¹³⁵ Second, the Wyoming Supreme Court has for many years refused to recognize assumption of risk as a separate defense.¹³⁶ Third, as is clear from Section II of this article, the vast majority of courts which have considered the issue have resolved the "finer points" of what to do with the plaintiff's conduct by adopting some form of comparative fault for strict liability. So should Wyoming.

The *Restatement* comments concerning defenses based upon the plaintiff's conduct were developed and adopted in the mid-1960s. In that era, comparative negligence theory was in its embryonic state.¹³⁷ As was pointed out in the original article, the *Restatement's* restriction of defenses to misuse and assumption of risk was the *Restatement's* response to the then absolute defense of contributory negligence.¹³⁸ With the advent of comparative negligence, which now prevails in all but six states,¹³⁹ absolute defenses (except in the context of superseding cause) should cease to exist. Absolute defenses unfairly punish the plaintiff who is only partially at fault, while allowing a more culpable defendant to escape liability. The determination of relative responsibility for causing injury should be left to the fact finder.

Now that strict liability has been adopted by Wyoming,¹⁴⁰ the question of whether and to what extent the plaintiff's conduct will affect his recovery must soon be resolved.¹⁴¹ Wyoming should follow the vast majority of comparative negligence states which apply comparative principles, since:

[T]he expressed purposes which persuaded us in the first instance to adopt strict liability . . . 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

134. *Id.*

135. See Greenlee & Rochelle, *supra* note 6, at 647-48; *infra* text accompanying notes 178-180.

136. *Brittain v. Booth*, 601 P.2d 532, 534 (Wyo. 1979) ("[A]ssumption of risk, as a form of contributory negligence, is not an absolute defense to a negligence action, but is a basis for apportionment of fault.").

137. In 1965, the year that the *RESTATEMENT* § 402A was published, only seven states had adopted comparative negligence. V. SCHWARTZ, *supra* note 3, § 1.1, at 1. Today those proportions have been reversed, with only six states remaining which have not adopted some form of comparative negligence. See *supra* notes 76-81 and accompanying text.

138. Greenlee & Rochelle, *supra* note 6, at 648.

139. See *infra* Appendix (Table of States).

140. *Ogle v. Caterpillar Tractor Co.*, 716 P.2d 334 (Wyo. 1986).

141. The question has already arisen. See *Sheldon v. Unit Rig & Equipment Co.*, 797 F.2d 883 (10th Cir. 1986), *cert. denied*, 107 S. Ct. 1300 (1987); see also *supra* notes 118-126 and accompanying text (Section IV.B.). Additionally, the authors and other Wyoming practitioners report that strict liability cases which have been settled or which are still pending have considered the question.

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 [comparative negligence] was to promote the equitable allocation of loss among all parties legally responsible in proportion to their fault.¹⁴²

B. Statutory or Judicial Application?

Once there is a determination to adopt comparative fault for strict liability, a decision must be made as to how Wyoming is to achieve that result. There are two alternatives: to extend the comparative negligence statute to strict liability or, alternatively, to judicially adopt comparative principles for strict liability. If the decision is judicial adoption, then there is a sub-issue—should the judicially adopted scheme, like the statute, be a modified comparative plan or should it institute pure comparative fault?

The alternative of extending Wyoming's prior comparative negligence statute¹⁴³ to strict liability actions was discussed in some detail in the original article.¹⁴⁴ Even though the comparative negligence statute has since been radically amended,¹⁴⁵ the prior statute will still apply for several years. The new comparative negligence statute is applicable only to causes of action which accrue after June 11, 1986.¹⁴⁶ Because Wyoming's tort statute of limitation is four years,¹⁴⁷ the prior comparative negligence statute will govern pre-June 11, 1986 causes of action at least until June, 1990.

The simplest means of applying comparative principles to strict liability would be to follow Wisconsin's lead, deem strict liability to be negligence *per se*, and merely apply the comparative negligence statute in such cases.¹⁴⁸ Since the 1973 statute was taken from Wisconsin,¹⁴⁹ that result may be pre-ordained for causes of action to which that statute applies by the rule which requires the adopting state (Wyoming) to also adopt the judicial construction of the parent state (Wisconsin) at the time of adoption.¹⁵⁰

Wyoming's new comparative statute¹⁵¹ is unique to Wyoming. While a compelling argument can be made that the statute was intended to apply to all causes of action for personal injury or death,¹⁵² the fact remains that

142. *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 737, 575 P.2d 1162, 1169, 144 Cal. Rptr. 380, 387 (1978).

143. WYO. STAT. ANN. § 1-1-109 (1977).

144. *Greenlee & Rochelle*, *supra* note 6, at 657-59.

145. *See supra* text accompanying notes 83-106.

146. 1986 Wyo. Sess. Laws ch. 24, §§ 3, 4.

147. WYO. STAT. ANN. § 1-3-105(a)(iv)(C) (1977). The statute applies to strict liability claims. *Ogle v. Caterpillar Tractor Co.*, 716 P.2d 334, 345 (Wyo. 1986).

148. *Dippel v. Sciano*, 37 Wis. 2d 443, 155 N.W.2d 55, 64-65 (1967).

149. *Woodward v. Haney*, 564 P.2d 844, 846 (Wyo. 1977).

150. *Id.* at 845; *see Greenlee & Rochelle*, *supra* note 6, at 658-59.

151. WYO. STAT. ANN. § 1-1-109 (Supp. 1986).

152. *See supra* text accompanying notes 83-101.

by its terms it applies to "an action . . . to recover damages for negligence . . ." ¹⁵³ Such a restriction has not prevented some courts from applying their state's comparative negligence statute to strict liability actions. ¹⁵⁴

Many courts, however, while refusing to apply their comparative negligence statutes to strict liability, have judicially legislated comparative principles for application in such actions. ¹⁵⁵ As Professor Schwartz points out:

[I]t is within the power of the judiciary to decide what defenses are appropriate in strict liability cases, and there is no reason why comparative negligence should not be selected in the appropriate situation. . . . [S]ince the legislature has endorsed comparative negligence, it is reasonable to apply it as a principle of common law where it would be helpful. ¹⁵⁶

C. Modified or Pure Comparative Fault

Where a court determines to apply comparative fault in strict liability, but decides that the comparative negligence statute itself does not apply, the question arises as to whether to adopt the same comparative scheme as that of the statute. That is, if the comparative negligence statute is of the modified form, such as that of Wyoming, should the judicial "legislation" for strict liability also be modified? The authors consider it unfortunate that most courts which have considered this question have adopted a pure comparative scheme for strict liability even though their comparative negligence statutes are modified. Only the New Hampshire Supreme Court seems to have followed that state's modified comparative negligence statute, saying: "We judicially recognize the comparative concept in strict liability cases parallel to the legislature's recognition of it in the area of negligence." ¹⁵⁷

Texas and Utah are typical of those states whose comparative negligence statutes are modified but whose courts have opted to adopt pure comparative principles for strict liability. Rejecting comparative "fault" as a misnomer, Texas has chosen to call its plan for strict liability "comparative causation." ¹⁵⁸ Despite Texas' modified comparative neg-

153. WYO. STAT. ANN. § 1-1-109(a) (Supp. 1986).

154. See *supra* notes 11-15 and accompanying text.

155. See *supra* notes 43-62 and accompanying text.

156. V. SCHWARTZ, *supra* note 3, § 12.2, at 197.

157. *Thibault v. Sears, Roebuck & Co.*, 118 N.H. 802, 395 A.2d 843, 850 (1978). Since *Thibault*, New Hampshire has adopted a comparative fault statute. See *supra* note 38. In actuality there are not many states which need to consider the question. While there are twenty states having modified comparative negligence statutes, only seven—Delaware, Hawaii, North Dakota, Ohio, Texas, Vermont and Wyoming—need to consider whether to adopt pure or modified comparative principles for strict liability in the face of a modified comparative negligence statute. This is because the question of what scheme to apply to strict liability in other states is answered by a separate statute on strict liability (four states); by applying their comparative negligence statute to strict liability (four states); or by rejecting the concept of applying comparative principles to strict liability at all (five states). See *infra* Appendix (Table of States).

158. *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 427 (Tex. 1984).

ligence statute,¹⁵⁹ the Texas Supreme Court held "that in products liability cases in which at least one defendant is found liable on a theory other than negligence, the plaintiff's damages shall be reduced only by the percentage of causation attributed to the plaintiff, regardless of how large or small that percentage may be."¹⁶⁰

Similarly, the Utah Supreme Court has held, "In contrast to the statutory limitation governing the application of comparative principles in the case of negligence and contributory negligence, the rule we adopt for strict liability will not altogether bar recovery where plaintiff's relative fault and causation exceeds that of defendant."¹⁶¹

Other states which have considered the question and have opted for pure comparison despite a modified statute are Hawaii, North Dakota and, arguably, Wyoming.¹⁶²

In *Sheldon*,¹⁶³ with virtually no analysis of whether to apply Wyoming's modified comparative negligence statute, ala Wisconsin, or whether to apply it in principle, ala New Hampshire, the Tenth Circuit adopted pure comparative fault. In so doing it granted the plaintiff judgment for \$324,000 despite the fact that the jury found him ten percent more negligent than either of the other actors.¹⁶⁴ It is the authors' opinion that so long as Wyoming has a modified comparative negligence statute¹⁶⁵ any judicial adoption of comparative principles for strict liability should match the terms of the statute. Compare two cases, building upon the hypothetical facts set forth in *Ogle*, used there in support of the court's adoption of strict liability.¹⁶⁶

Case No. 1 An automobile manufacturer makes spindle nuts. (A spindle nut holds the entire wheel and bearing assembly onto the axle). Despite the exercise of due care, one of the millions of spindle nuts is defective. The plaintiff, in whose vehicle the defective nut was installed, notices that he has a wobbly wheel, which he calls to the attention of his garage mechanic. The mechanic tells

159. TEX. CIV. PRAC. & REM. CODE ANN. §§ 32.001 to .003, 33.001 to .017 (Vernon 1986) (formerly TEX. CIV. STAT. ANN. art 7, §§ 2212, 2212a (Vernon 1971 & Supp. 1987)).

160. *Duncan*, 665 S.W.2d at 429.

161. *Mulherin v. Ingersoll-Rand Co.*, 628 P.2d 1301, 1304 (Utah 1981). Since *Mulherin*, Utah has adopted a new modified comparative statute which applies to strict liability. See *supra* note 29 and accompanying text.

162. See *infra* Appendix (Table of States).

163. 797 F.2d 883 (10th Cir. 1986), *cert. denied*, 107 S. Ct. 1300 (1987). *Sheldon* was a breach of warranty, not a strict liability, case. See *supra* text accompanying notes 118-126 (Section IV.B.).

164. *Sheldon*, 797 F.2d at 885, 887-88. The other "actors" were the defendant Unit Rig and the plaintiff's employer, Federal American Partners. Federal American Partners was immune from liability to the plaintiff because of Wyoming's workers' compensation law, WYO. STAT. ANN. § 27-12-103 (1977). It is interesting to note that had Wyoming's new comparative negligence act been in effect and had the decision been based on negligence, see *supra* text accompanying notes 82-104, the plaintiff in *Sheldon* could recover from Unit Rig, thirty percent of the jury's verdict of \$540,000, or \$162,000.

165. Which it does under either the pre-1986 version or the new act. See *supra* text accompanying notes 83-106.

166. *Ogle v. Caterpillar Tractor Co.*, 716 P.2d 334, 342 (Wyo. 1986).

him it will take a few days to get the parts and, in the meantime, it would be best not to drive the car because the wheel might fall off. But, since the plaintiff has been driving the car for several weeks with the wobbly wheel and nothing has happened, he drives the car anyway. The wheel does come off and the plaintiff is injured. He sues the automobile manufacturer in strict liability. Pursuant to Section 402A, the plaintiff need only prove that the product was defective and that the defect caused his injuries. Due care of the manufacturer is immaterial.¹⁶⁷ The jury finds the product defective, returns a verdict of \$100,000, but assigns 45% of the fault or "cause" or "responsibility" to the manufacturer's defective product and 55% to the plaintiff. Under the pure comparative rule in *Sheldon*,¹⁶⁸ the plaintiff could recover \$45,000 despite being 55% at fault.

Case No. 2. In this hypothetical there is no defective product. Instead, an improperly trained garage mechanic, drunk at the time, negligently installs a spindle nut on the plaintiff's car. The plaintiff notices a wheel wobble, takes it back to the garage and is told that it will take a few days to get new parts and, in the meantime, it would be best not to drive the car because the wheel might fall off. But, since the plaintiff has been driving the car for several days with the wobbly wheel and nothing has happened, he drives the car anyway. The wheel does come off and the plaintiff is injured. The plaintiff sues the garage in negligence. The jury returns a verdict of \$100,000 but assigns 45% of the fault to the garage and 55% to the plaintiff. Under Wyoming's modified comparative negligence statute, the plaintiff would be precluded from any recovery.¹⁶⁹

Why the difference in the result? Why, indeed, especially in view of the fact that the garage and its mechanic were guilty of blameworthy conduct—of negligence—while the manufacturer is liable despite its exercise of due care.¹⁷⁰

The above examples are simplistic factual situations. In real life, litigation is seldom as clear cut. A more likely scenario would involve the allegedly negligent plaintiff against the allegedly negligent garage and the allegedly negligent and strictly liable manufacturer, cross-claims among

167. RESTATEMENT § 402A(2)(a).

168. *Sheldon*, 797 F.2d at 887.

169. Under old section 1-1-109, there was no recovery if the plaintiff's negligence was equal to or greater than that of any party against whom recovery was sought. WYO. STAT. ANN. § 1-1-109 (1977); see Board of County Comm'rs v. Ridenour, 623 P.2d 1174 (Wyo.), *reh'g denied*, 627 P.2d 163 (Wyo. 1981). Under new section 1-1-109(a), there is no recovery if the plaintiff's negligence was greater than fifty percent of the total fault. WYO. STAT. ANN. § 1-1-109(a) (Supp. 1986).

170. This argument is certainly not intended as a criticism of strict products liability, as such. The authors applaud its long awaited adoption by the Wyoming Supreme Court. The hypothetical cases are, however, intended to be a criticism of the inconsistencies and contradictions inherent in having a modified plan for negligence and a pure scheme for strict liability.

the defendants and a third-party indemnity claim by the manufacturer against the supplier of the spindle nuts based on negligence, breach of warranty and strict liability. In this far more true-to-life hypothetical there is not only the inconsistency and contradiction noted above, there is the nightmare of instructing the jury as to the law and as to "the consequences of its determination of the percentage of negligence"¹⁷¹ or "fault"¹⁷² and "of the consequences of its verdict."¹⁷³ Thus, the authors urge the adoption of consistent rules which would apply to both negligence and strict liability. Should any court considering this issue find it inappropriate to apply Wyoming's comparative negligence statute to strict liability, but find it appropriate to adopt comparative principles anyway, the New Hampshire approach is recommended. A modified comparative plan for negligence is, after all, the established public policy of this state. There is no cogent reason why a modified plan should not also be applied to strict liability.¹⁷⁴

D. Conduct to be Compared

In a comparative negligence case, all causative, substandard conduct of all actors will be considered by the jury in assessing each actor's relative percentage of fault.¹⁷⁵ In a number of jurisdictions, however, in strict liability litigation, some causative negligent conduct of the plaintiff is ignored. As is shown by the Table of States appended to this article, 21 of the 34 states applying comparative principles in strict liability permit comparison of all conduct of the plaintiff, 11 permit comparison of only certain types of conduct, one (Ohio) has conflicting intermediate court decisions and one (Vermont) has yet to decide the issue.

Despite its shortcomings, the *Sheldon* decision¹⁷⁶ was correct in two key respects. First, it properly determined that comparative principles should be applied in a products case (albeit breach of warranty). Second, it properly accepted the jury's findings as to the percentage of negligence of the plaintiff, reducing his recovery accordingly. The "quality" of that negligence was not questioned, it was simply applied.¹⁷⁷

171. WYO. STAT. ANN. § 1-1-109 (1977).

172. *Id.* § 1-1-109(b)(j)(B) (Supp. 1986).

173. *Id.* § 1-1-114 (1977).

174. Some of the courts which have adopted pure comparative fault for strict liability in the face of a modified comparative negligence statute have done so on the basis that pure comparative negligence advances the purposes of strict liability. *See, e.g., Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 429 (Tex. 1984); *see also supra* text accompanying note 158 (quoting from *Duncan*).

The issue of pure versus modified comparison, however, was never an issue in and is not a part of § 402A or its comments. The motivating factor behind adoption of strict liability was to avoid the sometimes impossible burden of proving the product seller's lack of due care. *See Ogle v. Caterpillar Tractor Co.*, 716 P.2d 334, 342 (Wyo. 1986). This basic tenet is unaffected by the application of comparative principles, be they pure or modified. *See Greenlee & Rochelle, supra* note 6, at 665-67.

175. *See, e.g., Comparative Negligence—Theory and Effect*, WYO. CIV. PATTERN JURY INSTRUCTIONS 10.01, 10.03 (1981).

176. 797 F.2d 883 (10th Cir. 1986), *cert. denied*, 107 S. Ct. 1300 (1987); *see supra* notes 118-126 and accompanying text (section IV.B.).

177. *Sheldon*, 797 F.2d 883. Nor was the issue discussed.

Those states which would ignore certain causally negligent conduct of the plaintiff primarily rely on comments (h) and (n) to section 402A of the *Restatement*.¹⁷⁸ Comment (h) addresses "abnormal handling" and states that where the product is safe for normal handling and the injury results from abnormal handling, "the seller is not liable."¹⁷⁹ Comment (n), entitled "Contributory negligence," states that negligence of the plaintiff which is merely "a failure to discover the defect in the product, or to guard against the possibility of its existence" is not a defense. However, the comment continues, if the plaintiff's conduct amounts to an assumption of risk, "he is barred from recovery."¹⁸⁰ It is apparent that if either defense exists, it is, by the terms of the comments, absolute. There is no comparison, no proportionate reduction—the plaintiff loses.

After the advent of comparative negligence¹⁸¹ and the early efforts to apply that concept to strict liability, it became apparent that the *Restatement* comments and comparative principles were incompatible. There were two responses by the courts: first, to disregard the comments as the product of an earlier, now irrelevant, (contributory negligence) era or, second, to continue recognition of the comments but to apply them on a comparative basis. Those courts choosing the second alternative fall generally into two categories: (1) those which will permit comparison of any conduct of the plaintiff except a failure to discover a defect or guard against its existence¹⁸² and (2) those which permit no comparison except conduct which amounts to assumption of risk.¹⁸³ The majority of courts which have considered the issue, however, have elected to submit to the fact finder all conduct of all parties, without restriction. The following language from the seminal case of *Daly v. General Motors Corp.*¹⁸⁴ exemplifies this determination:

Those same underlying considerations of policy which moved us judicially in [negligence cases] to rescue blameworthy plaintiffs from a 100-year-old sanction against *all* recovery persuade us now to extend similar principles to the strict products liability area. Legal responsibility is thereby shared. We think that apportioning tort liability is sound, logical and capable of wider application than to negligence cases alone. . . . We reiterate that our reason for extending a full system of comparative fault to strict products liability is because it is fair to do so.¹⁸⁵

Author, now Judge, Woods states:

The attractiveness of comparative fault is its simplicity. It profits from the obvious drawback to comment (n) [of section 402A

178. RESTATEMENT § 402A.

179. *Id.* § 402A, comment h. This is the "misuse" defense.

180. *Id.* § 402A, comment n.

181. See *supra* note 137 and accompanying text.

182. See, e.g., *West v. Caterpillar Tractor Co.*, 336 So. 2d 80, 90 (Fla. 1976).

183. See, e.g., *Dura Corp. v. Harned*, 703 P.2d 396, 405 (Alaska 1985).

184. 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978).

185. *Id.* at 742, 575 P.2d at 1172, 144 Cal. Rptr. at 390 (emphasis in original).

of the *Restatement (Second) of Torts*] that it is difficult to distinguish between "failure to discover the defect or guard against the possibility of its existence" and "lack of ordinary care"; between "assumption of risk" and "contributory negligence"; and between "contributory negligence" and "foreseeable or unforeseeable misuse."¹⁸⁶

It should also be noted that the Uniform Comparative Fault Act provides:

In an action based on fault to recover damages for injury or death to person or harm to property, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault. . . .¹⁸⁷

"Fault" is then defined to include negligence, strict liability, breach of warranty, assumption of risk and product misuse.¹⁸⁸

Professor Schwartz says:

It is, at best, extremely difficult to justify the distinction made in contributory negligence states between, on the one hand, assumption of risk as an absolute defense to strict liability, and, on the other hand, ordinary contributory negligence as no defense. This troublesome dichotomy need not and should not be retained under comparative negligence.¹⁸⁹

In our original article, we concluded:

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.¹⁹⁰

186. Woods, *The Trend Toward Comparative Fault*, 20 TRIAL 16 (1984).

187. UNIF. COMPARATIVE FAULT ACT § 1(a), 12 U.L.A. 37 (Supp. 1983) (emphasis added).

188. *Id.* § 1(b).

189. V. SCHWARTZ, *supra* note 3, § 12.8, at 214-15.

190. Greenlee & Rochelle, *supra* note 6, at 664 (italics added).

The developments in the law since the original article was published, while still to some extent conflicting, reinforce the validity of these arguments.

VI. CONCLUSION

At long last, Wyoming has adopted the doctrine of strict products liability. But the question of how and to what extent a plaintiff's negligent conduct will affect his recovery remains basically unanswered. The alternatives are many, ranging from applying misuse and assumption of risk as absolute defenses, to adopting an unqualified comparative fault plan; from denying recovery if the plaintiff's share of the fault is more than half of the total, to compensating him to some degree regardless of his share of the fault; from applying, directly or by analogy, Wyoming's comparative negligence statute, to forging a different plan specifically for this new tort.

Adoption of some form of comparative fault for strict products liability is considered a certainty. To avoid confusion and complexity, and to provide fairness and equity, a plan which parallels Wyoming's statutory scheme for negligence is considered a necessity.

APPENDIX: TABLE OF STATES

State	Statutory Scheme	Judicial Action	Conduct Compared
Alabama n.76	none	none	—
Alaska n.45	none	5p, 6p	10
Arizona n.26	3p	—	10
Arkansas n.32	2m	none	9
California n.46	none	5p, 6p	9
Colorado n.19	1m, 4p	—	9
Connecticut n.20	1m, 4p	—	9
Delaware n.82	1m	none	—
Florida n.47	none	5p, 6p	10
Georgia n.64	1p	5p, 8	—
Hawaii n.48	1m	6p	9
Idaho n.21	1m, 4m	—	9
Illinois n.27	3m	—	9
Indiana n.74	1m, 4	—	—
Iowa n.28	3m	—	9
Kansas n.13	1m	7m	9
Kentucky n.75	4	5p, 8	—
Louisiana n.56	1p	6p	10
Maine n.33	2m	7m	10
Maryland n.77	none	none	—
Massachusetts n.72	1m	8	—
Michigan n.22	4p	5p	9

State	Statutory Scheme	Judicial Action	Conduct Compared
Minnesota n.23	3m	—	9
Mississippi n.37	2p	7p	9
Missouri n.73	none	5p, 8	—
Montana n.11	1m	7m	10
Nebraska n.24	3m	—	9
Nevada n.53	1m	8	—
New Hampshire n.38	3m	—	9
New Jersey n.14	1m	7m	10
New Mexico n.57	none	5p, 6p	9
New York n.34	2p	none	9
No. Carolina n.78	none	none	—
No. Dakota n.58	1m	6p	10
Ohio n.59	1m	6p?	?
Oklahoma n.65	1m	8	—
Oregon n.35	2m	7m	10
Pennsylvania n.66	1m	8	—
Rhode Island n.41	2p	7m	9
South Carolina n.79	none	none	—
South Dakota n.67	1m	8	—
Tennessee n.80	none	none	—
Texas n.49	1m	6p	10
Utah n.29	3m	—	9
Vermont n.60	1m	6p?	?

State	Statutory Scheme	Judicial Action	Conduct Compared
Virginia n.81	none	none	—
Washington n.25	3p	—	9
West Virginia n.61	none	5m, 6m	10
Wisconsin n.15	1m	7m	9
Wyoming nn.1, 83-95, 107-126	1m, 2m?	6p	9

Key:

The n. following each state name is to the footnote(s) in this article referring to that state.

The letter “m” following a numeral indicates a modified comparative plan.

The letter “p” following a numeral indicates a pure comparative plan.

A “?” indicates the issue is unresolved.

1 = Comparative Negligence Statute

2 = Undefined Comparative Statute

3 = Comparative Statute Includes Both Negligence and Strict Liability

4 = Separate Product Liability Statute (If not followed by either a letter “m” or “p”, the statute rejects comparative application of defenses)

5 = Judicial Adoption of Comparative Negligence

6 = Judicial Adoption of Comparative Principles for Strict Liability

7 = Judicial Extension of Comparative Negligence or Undefined Statute to Strict Liability

8 = Judicial Rejection of Comparative Principles for Strict Liability

9 = All Conduct is Compared

10 = Less Than All Conduct is Compared

