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Comparative Negligence in Strict Liability Cases

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COMPARATIVE NEGLIGENCE IN STRICT LIABILITY CASES

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INTRODUCTION

WITH more states adopting the doctrine of comparative negligence in place of the traditional common law doctrine of contributory negligence, the applicability of comparative negligence to cases grounded on the doctrine of strict liability in tort must be determined. This article will outline the present status of this question among the fifty states, analyze the rationales embodied in the question, and conclude with a view of the future.

To date, thirty-one states have embraced some form of the doctrine of comparative negligence in preference to the all-or-nothing rule of contributory negligence.[1] Of those states, twenty-eight have accomplished this change by statute,[2] and three by judicial decision.[3]

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[1] Alaska, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Kansas, Maine, Massachusetts, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota, Oklahoma, Oregon, Rhode Island, South Dakota, Texas, Utah, Vermont, Washington, Wisconsin, and Wyoming.

[2] ARK. STAT. ANN. §§ 27-1763 to 27-1765 (1955); COLO. REV. STAT. ANN. § 13-21-111 (1975); CONN. GEN. STAT. § 38-224 (1973); GA. CODE ANN. §§ 94-703, 105-603 (_____); HAWAII REV. STAT. 1968 § 663-31 (_____); IDAHO CODE ANN. §§ 6-801 to 6-806 (1913); KAN. STAT. ANN. § 60-258a (1974); ME. REV. STAT. ANN. TIT. 14, § 156 (1965); MASS. GEN. LAWS, Ch. 231, § 85 (1969); MINN. STAT. ANN. § 604.01 (1969); MISS. CODE ANN., § 11-7-15 (1972); MONT. STAT. § 58-607.1 (1975); NEB. REV. STAT., § 25-1151 (1943); NEV. LAWS § 41.141 (1973); N.H. REV. STAT. ANN., § 507.7a (1969); N.J. STAT. ANN., §§ 2A:15-5.1 to 2A:15-5.3 (1973); N.Y. CPLR, Art. 14-A § 1411 (1975); N.D. CENT. CODE § 9-10-07 (1973); OKLA. STAT. ANN., TIT. 23, §§ 11-12 (1973); ORE. REV. STAT. § 18.470 (1971); R.I. GEN. LAWS ANN. § 9-20-4 (1972); S.D. COMP. LAWS, § 20-9-2 (1967); TEX. REV. CIV. STAT. ANN., Art. 2212a, §§ 1, 2 (1973); UTAH CODE ANN., §§ 78-27-37 to 78-27-43 (1973); VT. STAT. ANN., TIT. 12, § 1036 (1970); WASH. REV. CODE, Ch. 4.22.010 (1974); WIS. STAT. § 895.045 (1931); and WYO. STAT. ANN. § 1-72 (1973).

[3] The following states have judicially adopted comparative negligence: Alaska,

Of course, not all the applications are identical; the doctrines vary from "pure" to some type of modified comparative negligence.[4] Six states have enacted comparative negligence statutes which do not expressly limit their application to negligence cases, but rather appear to apply to tort liability in general,[5] while at least twenty-three states specifically provide that comparative negligence is a defense to a *negligence* action.[6] Of those states which have judicially

Kaatz v. State, 540 P.2d 1037 (Alas. 1975); California, Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858, *modified* 14 Cal. 3d 103a, ___ P.2d ___ (1975); and Florida, Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973).

[4] Pure: Alaska, adopted by court decision, Kaatz v. State, 540 P.2d 1037 (Alas. 1975); California, adopted by court decision, Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); Florida, adopted by court decision, Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973); MISS. CODE ANN. § 11-7-15 (1919); N.Y. CPLR ART. 14-A, § 1411 (1975); R.I. GEN. LAWS ANN. 1956, § 9-20-4 (1972); WASH. REV. CODE Ch. 4.22.010 (1974).

The "Not as great as" type (sometimes called the 49% system): ARK. STAT. ANN. §§ 27-1763 to 27-1765 (1955); COLO. REV. STAT. ANN. § 13-21-111 (1975); GA. CODE ANN. §§ 94-703 (1972); HAWAII REV. STAT. 1968 § 663-31 (Supp. 1975); IDAHO CODE ANN. §§ 6-801 to 6-806 (1913); KAN. STAT. ANN. § 60-285a (1974); ME. REV. STAT. ANN. 1964, TIT. 14, § 156 (1965); MASS. GEN. LAWS, Ch. 231, § 85 (1969); MINN. STAT. ANN. § 604.01 (1969); MISS. CODE ANN. 1972, § 11-7-15 (1919); N.D. CENT. CODE § 9-10-07 (1973); OKLA. STAT. ANN. TIT. 23, §§ 11-12 (1973); ORE. REV. STAT. § 18.470 (1971); UTAH CODE ANN., §§ 78-27-37 to 78-27-43 (1973); and WYO. STAT. ANN. § 1-72 (1973).

The "Not greater than" type (sometimes called the 50% system): CONN. GEN. STAT. § 38-224 (1973); MONT. STAT. § 58607.1 (1975); NEV. LAWS § 41.141 (1973); N.H. REV. STAT. ANN. § 507.7a (1969); N.J. STAT. ANN., §§ 2A:15-5.1 to 2A:15-5.3 (1973); TEX. REV. CIV. STAT. ANN., Art. 2212a, §§ 1, 2 (1973); VT. STAT. ANN., TIT. 12, § 1036 (1970); and WIS. STAT. § 895.045 (1931).

The "slight v. gross" system: NEB. REV. STAT., § 25-1151 (1943) and S.D. COMP. LAWS, § 20-9-2 (1967).

[5] ARK. STAT. ANN. §§ 27-1763 to 27-1765 (1955); ME. REV. STAT. ANN., TIT. 14, § 156 (1965) (*See* George v. Guerette, 306 A.2d 138 (Me. 1973)); MISS. CODE ANN., § 11-7-15 (1972) (*See* Edwards v. Sears, Roebuck and Co., 512 F.2d 276, 290 (5th Cir. 1975)); N.Y. CPLR, ART. 14-A § 1411 (1975); NEV. LAWS § 41.141 (1973); and R.I. GEN. LAWS ANN., § 9-20-4 (1972).

[6] COLO. REV. STAT. ANN. § 13-21-111 (1975), (*See* Powell v. City of Ouray, 32 Col. App. 44, 507 P.2d 1101 (1973)); CONN. GEN. STAT. § 38-224 (1973); GA. CODE ANN. §§ 94-703, 105-603 (1972); HAWAII REV. STAT. § 663-31 (Supp. 1975); IDAHO CODE ANN. §§ 6-801 to 6-806 (1913); KAN. STAT. ANN. § 60-258a (1974); MASS. GEN. LAWS, Ch. 231, § 85 (1969); MINN. STAT. ANN. § 604.01 (1969); MONT. STAT. § 58-607.1 (1975); NEB. REV. STAT., § 25-1151 (1943); NEV. LAWS § 41.141 (1973); N.H. REV. STAT. ANN., § 507.7a (1969), (*but see* Stephan v. Sears, Roebuck and Co., 110 N.H. 248, ___, 266 A.2d 855, 857 (1970)); N.J. STAT. ANN. §§ 2A:15-5.1 to 2A:15-5.3 (1973), (*but see* Feinberg, *The Applicability of a Comparative Negligence Defense in Strict Products Liability Suit Based on Section 402A of the Restatement of Torts 2D (Can Oil and Water Mix?)*, 42 INS. COUNSEL J. 39, 51 (1975) wherein the author predicts that New Jersey is a prime candidate to be the next state to apply its

adopted comparative negligence, none have addressed the question whether it applies to a case based on the doctrine of strict liability in tort or to breach of implied warranty.[7] Interestingly, the Wisconsin Supreme Court has applied the defense even though that state's statute speaks only in terms of negligence actions; the court reasoned that strict liability in tort is actually synonymous with the concept of negligence.[8] In the remaining states which have adopted comparative negligence, this writer was unable to find a reported case which considered the application of comparative negligence to a strict liability case.[9]

SHOULD THE CONCEPT OF COMPARATIVE NEGLIGENCE ALSO BE APPLIED TO STRICT LIABILITY ACTIONS?

The Florida Supreme Court has recognized that "[i]n the field of tort law, the most equitable result that can ever be reached by a court is the equation of liability with fault."[10] Certainly that must be the goal of every court seeking to administer a tort system grounded on standards of fault or culpability.[11]

If comparative negligence principles are applied in negligence cases, a plaintiff's misuse, contributory negligence, or assumption of risk falling short of intentional misconduct are all factors which

comparative negligence rule in a strict products liability suit.); N.D. CENT. CODE § 9-10-07 (1973); OKLA. STAT. ANN., TIT. 23, §§ 11-12 (1973), (*see* Kirkland v. General Motors Corp., 521 P.2d 1353 (Okla. 1974)); ORE. REV. STAT. § 18.470 (1971); S.D. COMP. LAWS., § 20-9-2 (1967); TEX. REV. CIV. STAT. ANN., Art. 2212a, §§ 1, 2 (1973); UTAH CODE ANN. 1953, §§ 78-27-37 to 78-27-43 (1973); VT. STAT. ANN., TIT. 12, § 1036 (1970); WASH. REV. CODE, Ch. 4.22.010 (1974); WIS. STAT. § 895.045 (1931); and WYO. STAT. ANN. § 1-7.2 (1973).

[7] *See* note 3 *supra.*

[8] Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

[9] The United States Court of Appeals for the Fifth Circuit has certified the following questions to the Supreme Court of Florida:

> (a) Under Florida law, may a manufacturer be held liable under the theory of strict liability in tort, as distinct from breach of implied merchantability, for injury to user of the product or a bystander?
>
> (b) If the answer to 1(a) is in the affirmative, what type of conduct by the injured party would create a defense of contributory or comparative negligence? West v. Caterpillar Tractor Co., 504 F.2d 967, 969 (5th Cir. 1974).

[10] Hoffman v. Jones, 280 So. 2d 431, 438 (Fla. 1973).

[11] Not included or discussed in this article is the body of law imposing liability *without* fault for ultrahazardous activity, since the field of aviation tort law has been held inapplicable to such rules.

are subsumed into the concept of plaintiff's negligence for purposes of *reducing*, but not *barring* plaintiff's recovery as previously was the rule.[12] The extent to which the culpable conduct of the plaintiff contributes as a proximate cause of injury or damage becomes the focus, rather than a strict cataloging of the precise nature of the plaintiff's culpable conduct. The contribution of the defendant's negligence is weighed to yield an equitable division of damages in direct proportion to the amount of negligence of each of the parties.[13]

In order to evaluate the extent to which negligence of the plaintiff can or should be compared to liability of the defendant based on the doctrine of strict liability in tort rather than negligence, we should examine the concept known as "strict liability in tort." Strict liability is a product of our common law.[14] As Dean Prosser has pointed out, its principal significance lies in its shedding of traditional contract notions wihch earlier had restricted the operation of the principle and often created traps for would-be claimants.[15] The doctrine of strict liability in tort retains the fault basis for liability. It is this fundamental fact which provides the point of commonality in the interaction of the doctrine of comparative negligence. For a manufacturer to be held liable in California, for example, the plaintiff must prove a product was "defective" when it left the hands of the manufacturer (or dealer as the case may be).[16] Liability is "strict" only in the sense that the defendant's negligence need not be proved in order to prove the product to be defective. And yet the very concept of a "defective" product, particularly one defective in design, requires some form of fault on the part of the manufacturer to allow such a defective design to be used or product to be sold to the public. Wisconsin has, in fact, deemed such defects to be the result of negligence by labeling the

[12] As the California Supreme Court stated in Li v. Yellow Cab Co., 13 Cal. 3d 804, 826, 532 P.2d 1226, ___, 119 Cal. Rptr. 858, 873 (1975), "[A] comprehensive system of comparative negligence should allow for the apportionment of damages in all cases involving misconduct which falls short of being intentional."

[13] *Id.* at 829, 532 P.2d at 1243, 119 Cal. Rptr. at 875.

[14] Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

[15] *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 98 (4th ed. 1971).

[16] Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1973).

fault as negligence *per se*, and therefore subject to its comparative negligence statute.[17]

Since it is clear that a defect may be found even though the defendant exercised the highest standards of skill and care, it seems apparent that the doctrine was enacted for the policy reasons of holding manufacturers liable for a fault which can be shown by proving only the existence of a defective end product rather than requiring proof of negligent conduct which produced the defect. In discussing the similar relationship of evidence in design defect cases, Professor Wade points out that:

> Whatever is enough to show a "defective design" under the *Cronin* approach would also be sufficient to show negligence on the part of the manufacturer. Even if the manufacturer is not aware of the danger created by the bad design, he is negligent in not learning of it. This is also true if the product is unsafe because it did not carry a suitable warning or adequate instruction. The proof necessary to establish strict liability will certainly be sufficient to establish negligence liability as well. Indeed the position of the California court in *Cronin*, in limiting the requirement of a 'defective' product, would be much more sustainable if the strict liability for products which is applied were confined to the product which has its 'defect' developed unintentionally in the manufacturing process thus leaving the design and warning cases to be handled under the negligence techniques. There are thus innate similarities between the action in negligence and in strict liability, and changing the terminology does not alter this.[18]

If comparative negligence is not to be applied in strict liability cases, potential inequities lurk for both plaintiffs and defendants. On the one hand, defendants would still have defenses resulting in a complete bar to recovery by establishing reasonably unforeseeable misuse, assumption of risk, and a failure to exercise reasonable care after acquiring actual knowledge of the defect, in addition to the surviving defense that the defect was not a proximate cause of the injuries or damages claimed.[19]

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[17] Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

[18] Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.R. 825, 836-37 (1973).

[19] *See, e.g.*, McGoldrich v. Porter Cable Tools, 34 Cal. App. 3d 885, ___ P.2d ___, 110 Cal. Rptr. 481 (1973); Barth v. B. F. Goodrich Tire Co., 265 Cal. App. 2d 228, ___ P.2d ___, 71 Cal. Rptr. 306 (1968); Martinez v. Nichols Conveyor & Engineering Co., Inc., 243 Cal. App. 2d 795, ___ P.2d ___, 52 Cal. Rptr. 842 (1966).

In *Kirkland v. General Motors Corp.*[20] an intoxicated plaintiff was denied recovery completely in a strict liability action alleging injuries resulting from a seat collapse. The Oklahoma Supreme Court refused to apply its comparative negligence statute which is expressly limited to negligence cases, holding that plaintiff's operation of the automobile while intoxicated was abnormal use or misuse of the automobile, constituting a complete defense to the plaintiff's action based on the theory of strict liability. *Query*, what would have been the result if the plaintiff had been allowed to apply the concept of comparative negligence in that strict liability case?

On the other hand, contributory negligence would otherwise continue to be no defense in a strict liability case, even if it constituted a substantial factor in causing the injuries, as was the recognized rule before the recent emergence of the doctrine of comparative negligence.[21] When one considers the arguments advanced by those who oppose the application of comparative negligence to strict liability cases, one cannot avoid the feeling that those arguments are as unenlightened as the justifications that have been advanced through the years in behalf of the doctrine of contributory negligence. For example, consider the following:

1) It has been urged that the product defect becomes an intervening cause, insulating the plaintiff's negligence from the resulting damages. Yet this theory is quickly discarded if an innocent bystander is injured by the concurrent conduct of the negligent plaintiff and the strictly liable defendant. The result is that both the plaintiff and the defendant are liable to the bystander. How then could it be said that the defendant's strict liability is an intervening cause which cuts off the causal relationship of plaintiff's negligence in the plaintiff's suit against the same defendant? It would seem that logic and justice would reject such a position in favor of the application of comparative negligence to such situations in the same manner as if the defendant's liability were grounded in negligence rather than in strict liability.

2) It has been urged that strict liability is a social policy in the

[20] 521 P.2d 1353 (Okla. 1974).

[21] *See* Barth v. B. F. Goodrich Tire Co., 265 Cal. App. 2d 228, ___ P.2d ___, 71 Cal. Rptr. 306 (1968); Luque v. McLea, 8 Cal. 3d 136, 501 P.2d 1163, 104 Cal. Rptr. 443 (1972).

nature of a penal device which seeks to punish a defendant who markets a defective product. Yet that basis seems unrealistic if it does not exact faultless conduct from all who come before the court. If a grossly negligent plaintiff can recover in strict liability from a defendant whose product proved latently defective, the social policy seems only partly developed, and arbitrary in its application.

3) The "unclean hands" argument has been advanced to deny the comparative negligence defense to a defendant whose defective product caused injury. Yet if that be just, how then could a court allow a negligent plaintiff to recover anything from such a defendant for the same reason? Such a result is reminiscent of the prior doctrine of the "all or nothing" rule of contributory negligence.

4) It has been claimed that defendants will be discouraged from marketing defective products if courts refuse to consider the negligence of the plaintiff in product liability suits. Yet in the present world of national and international commerce the proof of this claim is elusive, and its application has the same penal impact as outlined above with the same arbitrary focus on the defendant.

5) Perhaps one of the strongest arguments advanced in favor of abolishing the doctrine of contributory negligence in favor of comparative negligence finds an inverse application in a product liability suit. It has been recognized by most courts and commentators that the "all or nothing" rule of contributory negligence is inequitable and unjust. It is suggested by some that the earlier ban on the defense of contributory negligence was an attempt to ameliorate such injustice in the law, after the theory of strict liability in tort became available. In the context of a system of *comparative negligence*, however, this rationale becomes as inequitable as the doctrine of contributory negligence. The practical effect has been that juries have had to apply their own standards of fairness and equity through the size of their verdicts—a haphazard system at best.[22]

From the above review of the more commonly advanced arguments against applying comparative negligence in strict liability

[22] *See generally* Prosser, *Comparative Negligence*, 41 CAL. L. REV. 1, 3-4 (1953); 2 HARPER & JAMES, THE LAW OF TORTS, § 22.3 (1956).

cases, it seems that the arguments are as unconvincing as the arguments that were presented in defense of the "all or nothing" rule of contributory negligence.

Should two fault systems for recovery of damages co-exist for the same type of conduct by the plaintiff, one of which *reduces* plaintiff's recovery to the extent of his faulty conduct short of intentional acts, while the other retains the previously criticized system of "all or nothing"? Would it be an improvement in our judicial system to impose a greater liability on a defendant who created a defective product under the highest standards of skill and care than on a negligent or grossly negligent defendant? The strict liability case presumably would still require proof that the defendant's defective product be a proximate cause of plaintiff's injury, but no similar inquiry would be permitted as to plaintiff's negligent or grossly negligent conduct. In a case based on alleged negligence or gross negligence of the defendant, the proximate cause issue would require the assessment of liability in direct proportion to the fault of each participant, reducing plaintiff's recovery to the extent his wrongful conduct contributed proximately to his damages, even if the defendant were guilty of gross negligence. It seems difficult to justify, on the basis of either logic or policy, a system of jurisprudence which permits lesser compensations against more culpable defendants and which allows greater recovery against less culpable ones.

In the *Li* case,[23] the California Supreme Court had before it only a negligence action involving two motorists involved in an intersection collision. The court paid tribute to the Florida Supreme Court's decision in *Hoffman v. Jones*,[24] in which that court expressly refused to rule in advance on problems not before it.[25] Nevertheless, the California Supreme Court made clear its philosophy on apportionment of liability:

> We have undertaken a thorough reexamination of the matter, giving particular attention to the common law and statutory sources of the subject doctrine in this state. As we have indicated, this reexamination leads us to the conclusion that the "all-or-nothing"

[23] *See* Li v. Yellow Cab Co., 13 Cal. 3d 804, 811, 532 P.2d 1226, 1231, 119 Cal. Rptr. 858, 863 (1975) (*quoting* Dean Prosser).

[24] *Supra*, note 3.

[25] *See* note 10 *supra*.

> rule of contributory negligence can be and ought to be superseded by a rule which assesses liability in proportion to fault.[26]
> Our decision in this case is to be viewed as a first step in what we deem to be proper and just direction, not as a compendium containing the answers to all questions that may be expected to arise.[27]
> It remains to identify the precise form of comparative negligence which we now adopt for application in this state. . . . The first of these, the so-called "pure" form of comparative negligence, apportions liability in direct proportion to fault in all cases. . . . We have concluded that the "pure" form of comparative negligence is that which should be adopted in this state.[28]

A close reading of the *Li* case compels the conclusion that the California Supreme Court has ended the "all or nothing" rule in California, whether in negligence or any other tort theory of liability.

Learned writers in the field have also concluded that a dual fault system produces inequity and injustice and is without redeeming merit. Professor Victor E. Schwartz published a special California supplement following the decision in *Li v. Yellow Cab Co.*[29] In his supplement he proposes that comparative negligence should be applicable in strict liability cases:

> A major area of concern is the interaction of comparative negligence with strict liability. . . .
>
> It is the suggestion of the Treatise that the principle of comparative negligence should apply in strict liability cases. In effect, the theory becomes one of comparative fault. If plaintiff's fault was a cause of his own injury, the jury should be permitted to reduce his damages proportionately to that fault. This approach eliminates the fine distinctions between "unreasonable assumption of risk" and "contributory negligence." It also helps to resolve the problems that occur when a plaintiff makes a foreseeable misuse of a product.[30]

As Professor Wade puts it:

> That solution should be apparent on reflection. It is to apply a

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[26] 13 Cal. 3d at 810, 532 P.2d at 1230, 119 Cal. Rptr. at 862.

[27] *Id.* at 826, 532 P.2d at 1242, 119 Cal. Rptr. at 874.

[28] *Id.* at 827, 532 P.2d at 1242, 119 Cal. Rptr. at 874.

[29] 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

[30] SCHWARTZ, COMPARATIVE NEGLIGENCE, Supp. 9 (1975).

system of comparative fault of the "pure type" and to apply it to strict liability as well as to negligence.[31]

The first tentative draft of the Uniform Comparative Negligence Law adopts the "pure" form of comparative negligence and applies it to strict liability in tort as well.[32]

When one considers the multi-defendant case involving a strict liability claim against one defendant and a negligence claim against a co-defendant, it becomes even more apparent that application of comparative negligence concepts to strict liability cases is desirable, if not necessary, to prevent inequitable results to plaintiffs as well as to defendants. Consider a hypothetical case of an intoxicated pilot who fails to observe the gear indicator which shows his landing gear did not all lock down because of a defect in the landing gear mechanism, and consequently does not pump the gear

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[31] Wade, 44 MISS. L.R., *supra* note 18 at 850.

[32] UNIFORM COMPARATIVE FAULT ACT

SECTION 1. In a tort action for damages on the basis of negligence, recklessness or strict liability, including statutory actions unless otherwise expressed or construed, contributory fault of the plaintiff, or, in a derivative action the person injured or killed, whether previously constituting a defense or not, does not necessarily bar recovery, but the damages are diminished in proportion to the amount of fault attributable to the plaintiff, the injured person or the decedent.

SECTION 2. In a tort action involving contributory fault, the court shall instruct the jury to give answers to special interrogatories [render special verdicts], or make findings itself it [sic.] there is no jury, which indicate:

(1) The amount of damages which would have been recoverable if there had been no contributory fault,

(2) The percentage of the contributory fault for each plaintiff as compared with the total fault of all of the parties to the action, and

(3) The percentage of the fault of each defendant as compared with the total fault of all of the parties to the action.

SECTION 3. This act does not change common law principles of joint and several liability of joint tortfeasors. Contribution rights among multiple defendants are determined in accordance with the percentage of fault of each defendant, as found by the trier of fact. The court enters judgments on the basis of these principles and the findings made under Section 2.

SECTION 4. To the extent that liability insurance is available to pay a judgment entered under this act the principle of set-off is not applied.

SECTION 5. This act applies to all injuries incurred after the act takes effect.

Amend Section 2 of the Uniform Contribution Among Tortfeasors Act to read as follows:

'SECTION 2. [Pro Rata Shares.] In determining the pro rata shares of tortfeasors in the entire liability (a) *[their relative degrees of fault shall be the basis for allocations];* (b) if equity requires the collective liability of some as a group shall constitute a single share; and (c) principles of equity applicable to contribution generally shall apply.' "

UNIFORM COMPARATIVE FAULT ACT, First Tentative Draft (August, 1975).

down manually and also lands on an incorrect crosswind runway. In the resulting gear collapse, crash, and ground loop, he is injured. In his strict liability suit against the manufacturer, should he run the risk of an "all-or-nothing" result because of the possible defenses of abnormal use or misuse of the aircraft?[33] If he sues in negligence against the fixed base operator who just inspected the aircraft but failed to detect the reasonably observable gear mechanism defect, plaintiff's negligence and assumption of risk at most would cause a reduction, but not a *bar* to his claim for damages—provided he carries the same burden of proof that exists either in action on causation of the defect or on defendant's negligence as a cause of plaintiff's injuries. If he sues the fixed base operator-inspector for negligent inspection, why should he run the risk of obtaining a higher or lower judgment against him than against the manufacturer in the same case for the same injuries? In both causes of action the issues are joined on the question of the extent to which culpable conduct of the parties proximately contributed as the total cause of plaintiff's injuries. Application of comparative fault to strict liability actions would curtail the confusing and artificial distinctions between contributory negligence, assumption of risk, abnormal use or misuse, and failure to use reasonable care after knowledge of a defect is acquired. All these concepts would be weighed in assessing the proportionate liability percentages, but they would no longer constitute a complete defense. As Professor Schwartz suggests:

> . . . comparative negligence will *enhance* and facilitate the development of strict liability theory, rather than cause additional problems.[34]

CONCLUSION

The concern expressed in some quarters that the application of comparative negligence to strict liability actions requires comparison of "apples to oranges" does not seem to survive a careful scrutiny of what the court must do in administering justice under a fault system. The argument seems to equate strict liability with a

[33] *See* Kirkland v. General Motors Corp., 521 P.2d 1353 (Okla. 1974).

[34] Schwartz, *Strict Liability and Comparative Negligence*, 42 TENN. L.R. 171, 181 (1947).

theory of liability without fault, whereas the concept requires proof of a form of culpable conduct—production of a defective design or product. When this fallacy in reasoning is recognized, the comparison between negligent conduct and conduct which creates a defective product is no more strained than comparing different forms of negligent conduct, such as speeding versus failing to stop at a stop sign.

Proximate causation is the real emphasis in all comparative negligence cases, whether they be applications to a strict liability theory or a theory of negligent conduct of the defendant. It will be the task of the trier of fact to determine the percentage of contribution of culpable conduct of the parties to the total injuries sustained by the plaintiff. The precise nature of the fault or culpability of that conduct is not germane to the determination.

In the opinion of the writer the application of comparative negligence to strict liability is mandatory if we are to advance toward the goal of equating liability with fault. As long as our system is based on fault concepts, we can do no more, and we should permit no less.