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EXAMINING THE PLAINTIFF’S CONDUCT UNDER THE MODEL UNIFORM PRODUCT LIABILITY ACT

MARK A. MITCHELL

ON OCTOBER 31, 1979, the Department of Commerce Task Force on Product Liability and Accident Compensation promulgated its Model Uniform Product Liability Act (UPLA or Model Act).¹ Sections 111 and 112 announce virtually across-the-board application of comparative fault principles, reducing the manufacturer’s liability when the plaintiff’s conduct or that of a third party contributes to the harm. This comment will explain and evaluate the application of comparative responsibility principles and the Model Act’s impact on the existing state law in this area.

I. LACK OF UNIFORMITY

The concepts of products liability and comparative negligence both originated in relatively recent times and their existence, as well as their application, has varied throughout the states. Originally, a consumer who sought to assert liability against the manufacturer for injuries resulting from a defective product had to be in privity of contract in addition to having to prove negligence." This “citadel of privity” begun to crumble in 1916 with Justice Cardozo’s opinion in McPherson v. Buick Motor Co.⁴ Cardozo reasoned that the manufacturer “of a thing . . . that is reasonably certain to place life and limb in peril when negligently made . . . is under a duty to make it carefully.”⁵ Although the creation of a negligence action removed the requirement of contractual privity, the consumer was still required to prove that the defendant ex-

¹ MODEL UNIFORM PRODUCT LIABILITY ACT, 44 Fed. Reg. 62,714 (1979) [hereinafter cited as UPLA, MODEL ACT]. The Act is published as a model law for use by the states at their election. Id. at 62,714.

² See generally W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 96 at 641 (4th ed. 1971) [hereinafter cited as W. PROSSER].


⁴ 217 N.Y. 382, 111 N.E. 1050 (1916).

⁵ Id. at 389, 111 N.E. at 1053.
posed the consumer to an unreasonable risk of harm and that the defendant's actions produced the actual damage or loss.  

Initial attempts to avoid the burden of proving negligence were made under a warranty theory. If the express warranty of safety was breached, the consumer had a cause of action. Although the efficiency of the warranty theory was originally hindered through the use of contractual disclaimers, the New Jersey Supreme Court in *Henningsen v. Bloomfield Motors Inc.* recognized the existence of implied warranties and refused to enforce the contractual disclaimers, thereby accelerating the trend toward strict products liability.

Since the substance of the products liability cause of action following *Henningsen* was in fact based upon strict liability, the drafters of the Second Restatement of Torts decided to discard the warranty label and recognized an independent strict products liability cause of action in tort under section 402A. Section 402A was first applied in 1963 by the California Supreme Court in

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6 W. Prosser, *supra* note 2, § 30 at 143.


8 See Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409 (1932) (statement in literature distributed by manufacturer of automobile that windshield was shatterproof made manufacturer liable for injuries received when windshield shattered, without any showing of negligence).

9 W. Prosser, *supra* note 2, § 97 at 651.

10 Id. at 656.


13 See *Restatement (Second) of Torts § 402A, Comment m* (1965).

14 *Restatement (Second) of Torts § 402A (1965)* [hereinafter cited as Restatement] reads:

   (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 bought the product from or entered into any contractual relation with the seller.
Greenman v. Yuba Power Products, Inc. The doctrine of strict products liability in tort now is accepted and applied by a substantial majority of the courts. A few states, however, have not recognized a strict tort liability cause of action in products liability, adhering instead to earlier negligence or warranty theories.

One reason for the recent trend toward adoption of a strict products liability action in tort may be related to the expanding scope of the area of products liability. As our "highly industrialized" society continues to advance, both the quantity and complexity of products increases, and the courts' role in adhering to the policies behind products liability theory becomes increasingly important. The courts' role is especially important where the manufacturer's decision to continue production is made with knowledge of the possible defect and is based largely upon economics.

Similar to the development of the theories supporting strict prod-

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19 See Friedman & Frumer, supra note 12, at 3B-13.

17 For a thorough survey on the abandonment of the privity requirement and the adoption of strict tort liability throughout jurisdictions in the United States, see generally Friedman & Frumer, supra note 12, at 3-7.

18 Id. at 1-1.

19 Id. The aviation industry is a perfect example. Today's aircraft is a highly complex product made up of highly complex components and the consequences of a defective product in this industry are often grave. See generally S. J. Levy, The Rights of Passengers—A View From the United States, in Die Produkthaftung in der Luft- und Raumfahrt (Product Liability in Air and Space Transp.) 83-89 (1978) (Proceedings of an International Colloquium in Cologne, Germany, 1977).

20 There are basically three different theories for imposing strict liability on the seller of a defective product. The first is known as enterprise liability, the notion that industry should pay for the injuries it causes. Since the enterprise can pass the loss on to consumers through an increase in price, the risks are spread throughout society. See generally Morris, Hazardous Enterprises and Risk Bearing Capacity, 61 Yale L.J. 1172, 1173 (1952). Another theory, known as the "spreading of losses" justification, is based upon the premise that losses are least harmful if they are broadly spread, taking a series of small sums from many people. See generally Freezer, Capacity to Bear Loss as a Factor in the Decision of Certain Types of Tort Cases, 78 U. Pa. L. Rev. 805, 809-10 (1930). Finally, there is the deep pocket theory, "that a dollar removed from a rich man caused the rich man less pain than a dollar removed from a poor man, and that, therefore, shifting losses from the poor to the rich was in itself a good thing." Calabresi, Some Thoughts on Risk Distribution and the Law of Torts, 70 Yale L.J. 499, 527 (1961).

21 See note 188 infra.
products liability, the use of comparative negligence principles and their application to strict products liability actions has varied substantially among the states. The concept of comparative negligence originated under the common law as a part of the law of admiralty. It was first extended to other negligence actions by Congress in a 1908 statute which was designed to prevent the often harsh application of the common law defenses to claims arising from injuries sustained by railroad employees. The concept's popularity quickly increased, until today a majority of the states have adopted comparative negligence in one form or another. The "pure" form of comparative negligence, which allows the plaintiff to recover the proportion of his damages equivalent to the defendant's negligence even if the plaintiff's negligence exceeds that of the defendant, has been adopted by eight states, four by statute, four judicially. Twenty-three states have adopted one of two versions of a "modified" comparative negligence system which limits the plaintiff's right of recovery to cases in which the plaintiff's negligence either is not as great as the defendant's

In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, . . . the fact that the employee may have been guilty of contributory negligence shall not bar any recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee; . . .
24 See H. WOODS, supra note 22, at 24.
25 See V. SCHWARTZ, COMPARATIVE NEGLIGENCE 3 (1974) [hereinafter cited as SCHWARTZ].
negligence," or is not greater than that of the defendant. A limited number of jurisdictions apply comparative negligence principles only when the plaintiff's negligence is slight, compared to the defendant's gross negligence, or when the plaintiff's negligence is remote compared to the defendant's more direct negligence.

There is also substantial disagreement among the states as to the application of comparative negligence principles to a strict products liability action. The decision has often turned upon the state law's analysis of the products liability cause of action or the language of its comparative negligence statute. The traditional criticism directed against a comparison of the two concepts was simply that the fact-finder cannot compare "the 'apples' of negligence with the 'oranges' of strict liability." A majority of the commentators, however, submit that the two concepts can be com-

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31 See Bejach v. Colby, 141 Tenn. 686, 214 S.W. 869 (1919) (Tennessee Supreme Court held that plaintiff's contributory negligence, if only remotely connected with cause of injury, will not bar plaintiff's recovery but will be considered only in mitigation of damages).

32 One of the first cases to apply comparative negligence to strict products liability was Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967). The court reasoned that strict liability was analogous to negligence per se, which can be compared with the plaintiff's negligent conduct. Id. at 461, 155 N.W.2d at 64.

33 See Kirkland v. General Motors Corp., 521 P.2d 1353 (Okla. 1974) (court held that Oklahoma's comparative negligence statute, which is expressly limited to negligence actions, does not extend to strict product liability actions).

pared, and it appears that most of the states which have adopted comparative negligence provisions are willing to apply them to products liability actions.

The courts have differed as to the grounds upon which a basis for comparison may be found. The Wisconsin Supreme Court, one of the pioneers in comparing the two concepts, reasoned in Dipple v. Sciano, that strict products liability was analogous to negligence per se; when viewed in this light, the defendant's liability could be compared with the plaintiff's negligent conduct. This "negligence per se" theory subsequently was used to justify the inclusion of the concept of strict liability in the Uniform Comparative Fault Act, an act heavily relied upon in creating section 111 of the UPLA. The theory, however, is not without its critics. At least one commentator has found fault with the use of the "negligence per se" theory as a means of comparison because the

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37 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

38 Id. at 461, 155 N.W.2d at 64.

39 The Act is set out in an appendix to Professor Wade's analysis of its provisions. Wade, supra note 35, at 392.

standard for determining "negligence per se" is inconsistent with the "reasonable person" negligence standard.41

The Texas Supreme Court has found a common ground for the comparison of negligence and strict liability through the issue of causation. In General Motors Corp v. Hopkins,42 the court indicated that the plaintiff's recovery would be limited "to that portion of his damages equal to the percentage of the cause contributed by the product defect."43 Similarly, a concurrence to the Alaska Supreme Court opinion in Butaud v. Suburban Marine & Sporting Goods, Inc.,44 has approved of the use of causation, explaining that the "[a]doption of a comparative causation approach would avoid the theoretical problems inherent in any attempt to compare relative degrees of fault where the defendant's negligence, or fault is determined by the principles of strict liability." Professor Twerski advocates the inclusion of the concept of cause in fact into the comparative fault doctrine as a step away from the unrealistic "all-or-nothing" rule of causation.45 He concludes that "[j]uries should be allowed to consider the likelihood at a percentage basis that a party's activities caused harm."46

The use of comparative causation as a replacement for com-

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41 Fischer, Products Liability—Applicability of Comparative Negligence, 43 Mo. L. Rev. 431, 439-41 (1978) [hereinafter cited as Fischer]. According to Professor Fischer, the two standards differ when viewed with regard to the role of the trier of fact. "In negligence per se cases the court determines that a legislatively established specific standard of conduct shall constitute the standard of conduct of a reasonable person . . . ." The role of the jury is merely to determine the facts, i.e., whether the statute was violated. Id. He reasons that, in contrast, section 402A contains no specific standard of conduct; therefore, "the jury could conclude that no reasonable precaution on behalf of the manufacturer would have prevented the creation of the defect." This, he argues, would yield the conclusion that the defendant was not at fault, barring the plaintiff from any recovery. Id. at 441. Professor Fischer concludes that the most satisfactory way to consider the plaintiff's conduct is to compare it to that of a hypothetical reasonable person under similar circumstances. Id. at 449.

42 548 S.W.2d 344 (Tex. 1977) (plaintiff was seriously injured when his automobile went out of control, allegedly due to defective carburetor which plaintiff had attempted to fix prior to accident).

43 Id. at 352.

44 555 P.2d 42 (Alaska 1976).

45 Id. at 47 (Rabinowitz, J., concurring).


47 Id. at 413.
paring fault, however, would often produce harsh results and would defeat the rationale behind both products liability and comparative negligence. The lack of a "functional relationship between physical causation and personal culpability" is clearly illustrated by Professor Schwartz's example of an intoxicated motorcyclist who, speeding at eighty miles per hour, loses control of his cycle, crosses into another lane of traffic and collides with a large truck. "In terms of pure physical causation, perhaps an expert could testify that the truck supplied 95% of the force that killed the motorcyclist . . . . Nevertheless, the jury's line of inquiry under comparative negligence does not focus on physical causation; rather, it considers and weighs culpability."

A third theory used to justify the comparison of strict products liability and comparative negligence is based upon a comparison of the respective fault of the parties. In *Sun Valley Airlines, Inc. v. Avco-Lycoming Corp.*, a federal district court, applying Idaho law, reasoned that "[t]he manufacturer is under a duty to produce a product which is free from unreasonably dangerous conditions. A violation of that duty constitutes blameworthiness or culpability or sense of legal fault." The manufacturer's inherent fault, in marketing a defective product, can therefore be balanced against the plaintiff's fault pertaining to the particular misconduct. The most persuasive argument supporting a comparison of fault between the parties is the concept's inherent fairness. In *Daly v. General Motors Corp.*, the California Supreme Court explained:

"Our reason for extending a full system of comparative fault to strict products liability is because it is fair to do so. The law consistently seeks to elevate justice and equity above the exact contours of a mathematical equation. We are convinced

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49 *Fischer, supra* note 41, at 446.
50 *Schwartz, supra* note 25, at 276.
51 Id. at 276.
52 Id.
54 Id. at 602.
55 See *Brewster, supra* note 35, at 118; *Fleming, supra* note 35, at 270.
56 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978).
that in merging the two principles what may be lost in symmetry is more than gained in fundamental fairness.\textsuperscript{57}

\textit{Daly}, which was a 4-3 decision, reflects the conflict among authorities throughout the states over the application of both comparative negligence and strict products liability in tort, and over their application to each other. As one commentator concluded, "the split on the \textit{Daly} court clearly indicates that the debate on the relationship of comparative negligence to strict products liability is far from over."\textsuperscript{58}

\section*{II. The Proposed Solution}

\textbf{A. Section 111—Administration of Comparative Responsibility}

In an effort to facilitate the unification of products liability principles and to determine what effect a plaintiff's negligent conduct will have upon his cause of action, the Model Act announces the application of comparative responsibility principles to all claims brought under it.\textsuperscript{59} Under section 111(A), the claimant's damages are reduced proportionately according to the measure of responsibility attributed to him.\textsuperscript{60}

The Act requires the fact finder, unless all the parties agree otherwise, to answer special interrogatories which indicate the amount of damages to which each claimant would be entitled if comparative responsibility principles were not considered.\textsuperscript{61} The special interrogatories also require the fact finder to indicate each party's percentage of the total responsibility for each claim, which is then allocated to each claimant, defendant or to any other person or entity who could be responsible for the injury.\textsuperscript{62} If the fault of an employer or co-employee is considered, the claimant's damages are reduced by the amount of the worker compensation bene-

\footnotesize{\textsuperscript{57} Id. at 742, 575 F.2d at 1172, 144 Cal. Rptr. at 390.  
\textsuperscript{58} \textit{FRISHMAN}, 1978 ANN. SURVEY AM. L. 577, 591.  
\textsuperscript{59} 44 Fed. Reg. at 62,734. (UPLA § 111(A)).  
\textsuperscript{60} Id.  
\textsuperscript{61} Id. (UPLA § 111(B)(1)(a)).  
\textsuperscript{62} Id. at 62,734-35. (UPLA § 111(B)(1)(b)). For example, the trier of fact may determine that the plaintiff himself is responsible for ten percent of his damages, that the manufacturer is responsible for sixty percent of the plaintiff's damages and that some other party whose conduct falls within one of the provisions of Section 112 is responsible for thirty percent of the plaintiff's damages.}
fits received by the claimant or by the percentage of responsibility apportioned to that employer or co-employee, whichever is greater.\textsuperscript{63} The claimant's damages are also reduced by the percentages of responsibility apportioned to a party who has been released from liability.\textsuperscript{64} In determining the percentage of responsibility of each party, the fact finder is to consider both the nature of each party's conduct and the extent of the proximate causal relation between the conduct and the damages claimed.\textsuperscript{65}

The court, in addition to entering judgment against each party who is liable, is to determine each party's equitable share of the obligation for purposes of contribution.\textsuperscript{66} The rules of joint and several liability apply unless a party is responsible for a distinct harm or unless there is some other reasonable basis for apportioning that party's responsibility, in which case that party will be severally liable.\textsuperscript{67}

If a motion is made within one year from the date of judgment, the court will determine whether all or part of a joint tortfeasor's share of the obligation is uncollectible.\textsuperscript{68} If it is, the uncollectible amount is reallocated among the other joint tortfeasors according to their respective percentages of responsibility.\textsuperscript{69}

B. Section 112—Conduct Affecting Comparative Responsibility

The Model Act, in section 112,\textsuperscript{70} sets out four types of conduct which may affect the claimant's comparative responsibility, reducing his damages.\textsuperscript{71} First, the claimant is not required to inspect the product for a defective condition.\textsuperscript{72} If the seller of the product, however, can prove that the injury resulted from a defective condition which was apparent to an ordinary, reasonably prudent person without inspection, the claimant's damages are

\textsuperscript{63} Id. at 62,735. (UPLA § 111(B)(2)).
\textsuperscript{64} Id.
\textsuperscript{65} Id. (UPLA § 111(B)(3)).
\textsuperscript{66} Id. (UPLA § 111(B)(4)).
\textsuperscript{67} Id. (UPLA § 111(B)(5)).
\textsuperscript{68} Id. (UPLA § 111(B)(6)).
\textsuperscript{69} Id.
\textsuperscript{70} Id. at 62,736.
\textsuperscript{71} Id.
\textsuperscript{72} Id. (UPLA § 112(A)(1)).
subject to reduction to the extent that the claimant thus was responsible for his injury.\textsuperscript{73} A non-claimant's failure to observe a defective condition which would be apparent to an ordinary prudent person will not reduce the plaintiff's recovery.\textsuperscript{74}

Another type of conduct, commonly known as an assumption of the risk, also may affect the claimant's recovery. The Act states that if a product seller can prove that the claimant knew about the defective condition and voluntarily used the product or voluntarily assumed the risk of the harm, and if in doing so the claimant did not act as an ordinary prudent person, his damages will be subject to reduction.\textsuperscript{75} This provision expressly allows the fact finder to place sole responsibility on the claimant.\textsuperscript{76} An optional provision subjects the claimant's damages to apportionment if a product user other than the claimant knew about the defective condition and voluntarily and unreasonably used or stored the product, causing the claimant's harm.\textsuperscript{77}

Misuse, the third category of conduct, is defined as action by the product user in a manner that would not be expected of an ordinary prudent person who would be likely to use the product under similar circumstances.\textsuperscript{78} If the product seller can prove that misuse of the product by the claimant or some third party has caused the harm, the claimant's damages are subject to reduction or apportionment to the extent that the misuse was a cause of the harm.\textsuperscript{79} This provision also allows the trier of fact to find that the harm arose solely from misuse of the product, in which case the plaintiff would be denied recovery.\textsuperscript{80} The trier of fact also may find that a third party who had misused a product and who is not immune under state or federal law may be subject to liability to the claimant.\textsuperscript{81}

The fourth type of conduct which may affect the claimant's re-

\textsuperscript{73} Id. (UPLA § 112(A)(2)).
\textsuperscript{74} Id. (UPLA § 112(A)(3)).
\textsuperscript{75} Id. (UPLA § 112(B)(1)).
\textsuperscript{76} Id. at 62,736-37.
\textsuperscript{77} Id. at 62,737. (UPLA § 112(B)(2)).
\textsuperscript{78} Id. (UPLA § 112(C)(1)).
\textsuperscript{79} Id. (UPLA § 112(C)(2)).
\textsuperscript{80} Id.
\textsuperscript{81} Id. (UPLA § 112(C)(3)).
covery deals with a product's alteration or modification. The Act defines "alteration or modification" as a change of the design, construction or formulation of the product, or a change or removal of warnings or instructions which accompanied or were displayed on the product. The definition also includes the failure to observe the requirements of routine care and maintenance, excepting ordinary wear and tear. If the product seller can prove that the alteration or modification by the claimant or some third party caused the claimant's harm, the claimant's damages are subject to reduction or apportionment to the extent that the alteration or modification was a cause of the harm. This provision also allows the trier of fact to find that the harm arose solely because of the product's alteration or modification. This provision is not applicable if the alteration or modification was in accordance with the product seller's instructions or specifications; if it was made with the express or implied consent of the product seller; or if it was conduct that was reasonably anticipated, and the product lacked instructions or adequate warnings pertaining to the alteration or modification. The trier of fact also is allowed to determine that a third party who has altered or modified the product and who is not immune under state or federal law may be subject to liability to the claimant.

III. IMPACT OF THE UPLA UPON THE EXISTING RULES PERTAINING TO THE CONDUCT OF THE PLAINTIFF

A. Failure to Discover a Defective Condition

Section 112(A) provides:

(1) Claimant's Failure to Inspect. A claimant is not required to have inspected the product for a defective condition. Failure

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82 Id.
83 Id. (UPLA § 112(D)(1)).
84 Id.
85 Id. (UPLA § 112(D)(2)).
86 Id.
87 Id. (UPLA § 112(D)(2)(a)).
88 Id. (UPLA § 112(D)(2)(b)).
89 Id. (UPLA § 112(D)(2)(c)).
90 Id. (UPLA § 112(D)(3)).
to have done so does not render the claimant responsible for the
harm caused or reduce the claimant's damages.

(2) Claimant's Failure to Observe an Apparent Defective Con-
dition. When the product seller proves by a preponderance of the
evidence that the claimant, while using the product, was injured
by a defective condition that would have been apparent, without
inspection, to an ordinary, reasonably prudent person, the claim-
ant's damages shall be subject to reduction...

(3) A Non-Claimant's Failure to Inspect for Defects or to Ob-
serve an Apparent Defective Condition. A non-claimant's failure
to inspect for a defective condition or to observe an apparent
defective condition that would have been obvious, without inspec-
tion, to an ordinary reasonably prudent person, shall not reduce
claimant's damages. 91

Although the Model Act purports to require no inspection of
the defective product, 92 the claimant is required "to observe an
apparent defective condition." 93 The courts are in general agree-
ment that the buyer's failure to inspect the goods and to discover
any defect will not relieve the seller of liability. 94 Support for this
position has been reinforced by Comment n 95 to section 402A
of the Restatement. 96 A few states have reached a different con-
clusion when the hazard was obvious 97 or was foreseeable by a
reasonable person. 98

92 See text accompanying note 72 supra.
93 See text accompanying note 73 supra.
94 See 1 Friedman & Frumer, supra note 12, at 395.
95 Restatement (Second) of Torts § 402A, Comment n (1965):
Since the liability with which this section deals is not based upon
negligence of the seller, but is strict liability, ... [c]ontributory
negligence of the plaintiff is not a defense when such negligence
consists merely in a failure to discover the defect in the product,
or to guard against the possibility of its existence...
96 See note 13 supra. See De Pree v. Nutone, Inc., 422 F.2d 534 (6th Cir.
1970).
97 Auburn Mach. Works Co., Inc. v. Jones, 366 So. 2d 1167 (Fla. 1979)
(Florida Supreme Court rejected patent danger doctrine, but held that obvious-
ness of hazard is defense to manufacturer's liability, and also is applicable to
comparative negligence principles). The patent danger rule prevents recovery
based upon a negligent design theory where the danger is patent or obvious.
The defense was often asserted when the injury was caused by moving parts of
machinery not protected by safety devices. See generally 1 Friedman & Frumer,
supra note 12, at § 118.8(8).
(New Hampshire Supreme Court held that plaintiff's misconduct could be com-
The drafters of the Model Act justified the distinction between ordinary defects and those "defects . . . apparent, without inspection, to an ordinary reasonably prudent person" as a means to reduce the "considerable litigation and expense" pertaining to the issue of the plaintiff's knowledge of the defect. Although the justification may seem convincing at first glance, it is submitted that the drafters' distinction will not appreciably reduce litigation and expense but will only shift the key issue from the question of knowledge of the defect to the question of whether the defect was apparent. The latter question was vividly illustrated by the drafters' example of a plaintiff with good eyesight who eats a candy bar which has bright green worms crawling on it. The drafters' position is that the above example illustrates a defective condition that can be discovered without inspection of the product. Professors Twerski and Weinstein, in an article evaluating a draft of the Model Act, turned the argument around to support their contention that requiring the claimant to notice the apparent defective condition is, in substance, requiring the claimant to inspect the product.

pared causally in products liability action). New Hampshire traditionally had recognized that the plaintiff's failure to discover or to foresee dangers which an ordinary person would have discovered or foreseen was a defense to claims based upon strict products liability. Stephen v. Sears, Roebuck & Co., 110 N.H. 248, 266 A.2d 855 (1970); Cadling v. Paslia, 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973) (contributory fault includes failure to exercise such reasonable care as would have disclosed defect).

44 Fed. Reg. at 62,737. Since the existence of the product seller's defense in most jurisdictions has turned upon whether the plaintiff had knowledge of the defect, the issue has been an important one. See Fincher v. Surrrette, 365 So. 2d 860 (La. Ct. App. 1978) (no defense for manufacturer where plaintiff testified she was not aware that machinery was moving).


Id.


Twerski & Weinstein, supra note 102, at 249. Professors Twerski and Weinstein reasoned that obviously the plaintiff would not have eaten the candy bar if he had noticed the worms. He did not notice the worms because he reasonably did not expect the candy bar to have worms. Therefore, his recovery is diminished because he did not look before he ate—clearly imposing a duty to inspect for defects. Id.
B. Claimant's Assumption of the Risk

Section 112(B) provides:

(B) Use of a Product With a Known Defective Condition.

(1) By a Claimant. When the product seller proves by a preponderance of the evidence, that the claimant knew about the product's defective condition, and voluntarily used the product or voluntarily assumed the risk of harm from the product, the claimant's damages shall be subject to reduction to the extent that the claimant did not act as an ordinary reasonably prudent person under the circumstances. Under this Subsection, the trier of fact may determine that the claimant should bear sole responsibility for harm caused by a defective product. . . . 105

Originally, the drafters drew a distinction between a claimant's assumption of the risk which was clearly unreasonable and that assumption of the risk where the reasonableness was uncertain. 106

In the former situation the claimant was to be barred from recovery, but in the latter instance the claimant's damages were only to be subject to reduction. 107

Professors Twerski and Weinstein, in discovering this "jurisprudential anomaly," pointed out that a determination of unreasonableness by a judge would bar recovery; however, if a jury made the same determination, the claimant would not be barred. 108 The drafters responded by eliminating the distinction, and section 112(B) is now in substantial agreement with the commentators' 109 as well as with most of the states which recognize the application of comparative negligence to strict products liability. 110

Even in the early days of the acceptance of strict products lia-

106 DRAFT UNIFORM PRODUCT LIABILITY ACT, supra note 103, at 3000.
107 "Id.
108 Twerski & Weinstein, supra note 102, at 250.
109 See Fischer, Products Liability—Applicability of Comparative Negligence To Misuse And Assumption of the Risk, 43 Mo. L. Rev. 643, 662 (1978); Schwartz, supra note 35, at 181; Vetri, Products Liability: The Developing Framework for Analysis, 54 Or. L. Rev. 293, 313 (1975). But see Twerski & Weinstein, supra note 102, at 253 (claimant's assumption of risk, even though voluntary and unreasonable, should not diminish recovery if harm that took place was foreseeable); Walkowiak, Reconsidering Plaintiff's Fault in Product Liability Litigation: The Proposed Conscious Design Choice Exception, 33 VAND. L. REV. 651, 679 (1980) [hereinafter cited as Walkowiak] (when product's defect is result of conscious design, plaintiff's conduct should not be considered).
110 See note 36 supra and accompanying text.
bility, a substantial portion of the states recognized the plaintiff's "assumption of risk" as a complete defense. One reason for this broad recognition of the defense was Comment n to section 402A of the Second Restatement of Torts, which explained that "the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section . . . ." One area of confusion in this context is the requirement of unreasonableness in an assumption of risk defense. Although the drafters of the Restatement and most of the courts that have recognized the defense have included unreasonableness as an ingredient of an assumption of risk defense, other courts have applied the defense where the plaintiff had full knowledge of the product's defects and continued to use it, regardless of whether his conduct was reasonable in doing so. At least one court has discounted this difference in application as "more theoretical than real, since in many instances a plaintiff who has full knowledge of the defective condition, and yet proceeds to use the product, will be acting unreasonably." The Model Act's clarification of this problem, reducing the claimant's damages only when he fails to act as an "ordinary reasonably prudent person," should help to unify the application of the condition of unreasonableness in an assumption of risk defense. The Model Act's position is also favorable in its amelioration of the often harsh result which accompanies a defense based solely on the plaintiff's knowl-

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112 See note 95 supra.
113 Id. See note 111 supra.
117 See text accompanying note 105 supra.
edge of the product’s dangerous condition. For example, an employee, severely injured while operating a defective machine, may be held to have assumed the risk, thus barring or substantially reducing his recovery, solely because of his knowledge of the dangerous condition. The New Jersey Supreme Court has realized the potential unfairness of such a result, reasoning, in *Suter v. San Angelo Foundry & Machinery Co.*, that “an employee engaged at his assigned task on a plant machine . . . has no meaningful choice. Irrespective of the rationale that the employee may have unreasonably and voluntarily encountered a known risk, we hold as a matter of policy that such an employee is not guilty of contributory negligence.” The result in *Suter* finds support in the article written by Professors Twerski and Weinstein which questions the voluntariness of such an act and also suggests its foreseeability by the manufacturer.

In sharp contrast to the persuasive arguments supporting greater protection for an employee who is responsible for operating a dangerous machine, the Model Act offers an optional section which could reduce the manufacturer’s liability even though the claimant was in no way responsible for the injuries he has suffered. Section 112(B)(2) provides:

> If the product seller proves by a preponderance of the evidence

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121 Twerski & Weinstein, *supra* note 102, at 251. The authors question the voluntariness of a plaintiff’s “conscious choice to utilize a piece of dangerous machinery in an employment setting.” *Id.* Citing Barkewich v. Billinger, 432 Pa. 351, 247 A.2d 603 (1968), the authors argue that an employee who was seriously injured while attempting to remove an object which was jamming a machine should not have his damages reduced. Although the plaintiff’s actions were neither involuntary nor reasonable, his decision was made in a split second. In contrast, the manufacturer’s decision is made with great deliberation and with cost and marketing factors in mind. Finding the plaintiff’s actions to be foreseeable, the authors conclude that the product should be manufactured to protect a “Barkewich-type plaintiff from his own foolish decision making.” *Twerski and Weinstein, supra* note 102, at 253.

The above argument is especially appealing in an “employee-dangerous machine” setting; however, it is submitted that the same result can be accomplished without specifically carving out an exception to the rule. The plaintiff’s conduct could arguably be considered reasonable given the split second requirement for making the decision and the duties related to his employment.
that a product user, other than the claimant, knew about a product's defective condition, but voluntarily and unreasonably used or stored the product and thereby caused claimant's harm, the claimant's damages shall be subject to apportionment. . . .\textsuperscript{128}

The drafter's rationale for this section is that if some third party voluntarily and unreasonably exposes the claimant to the product's risks, that person should be liable for the damages which result.\textsuperscript{128} The drafters cite two cases, \textit{Aetna Insurance Co. v. Loveland Gas & Electric Co.},\textsuperscript{124} and \textit{Drazen v. Otis Elevator Co.},\textsuperscript{125} as analogous support for shifting liability when a third party's actions are an intervening cause.\textsuperscript{126} Those cases, however, were negligence actions under which liability was not based upon a policy of primary loss reduction.\textsuperscript{127} Moreover, the harsh result which is possible when an otherwise responsible employer is immune under a workmens compensation law is acknowledged.\textsuperscript{128} Professor Phillips has also found fault in replacing the manufacturer's liability with that of the third party when the latter had actual knowledge of the danger.\textsuperscript{129} He advocates a different result, however, if the third party's conduct involves a failure to pass on a warning from the manufacturer or a misuse which negates the defectiveness of the product.\textsuperscript{130}

On the other hand, notions of fairness reinforce the idea that the third party should be liable for the damages for which he is responsible. A suggested compromise is to hold the manufacturer

\textsuperscript{128} 44 Fed. Reg. at 62,737.
\textsuperscript{129} Id. at 62,738.
\textsuperscript{124} 369 F.2d 648 (6th Cir. 1966) (gas company not negligent in supplying tank from which gas seeped into building since plaintiff's knowledge of dangers and opening of valve were intervening causes).
\textsuperscript{125} 96 R.I. 114, 189 A.2d 693 (1963) (manufacturer of escalator handrail not negligent or liable for injuries sustained by guests where store owner knew of similar accidents but did not notify manufacturer).
\textsuperscript{126} 44 Fed. Reg. at 62,738.
\textsuperscript{127} See generally Walkowiak, \textit{supra} note 109.
\textsuperscript{128} 44 Fed. Reg. at 62,738.
\textsuperscript{129} Phillips, \textit{A Synopsis of the Developing Law Of Products Liability}, 28 \textit{Drake L. Rev.} 317, 372 (1978-1979). Professor Phillips argues that a distinction should not be drawn between a third party's failure to observe an apparent defective condition and that third party's knowledge of the dangerous condition since "[t]he third party rarely intends to cause the plaintiff injury. Where there is no such intent, the third party's failure to prevent the injury is attributable to his inadvertence, regardless of whether he actually knew or merely should have known of the danger." Id.
\textsuperscript{130} Id. at 372-73.
jointly liable to the claimant for the third party's misconduct, allowing the manufacturer to recover the third party's portion of the damages from that party in a later suit. The burden of collecting this sum, as well as the risk of encountering an immune defendant, is therefore on the manufacturer, not the claimant.\footnote{131 This is entirely appropriate since it is the manufacturer, not the claimant, who placed the defective product on the market.}

C. Misuse of a Product

Section 112(C) provides:

(1) "Misuse" occurs when the product user does not act in a manner that would be expected of an ordinary reasonably prudent person who is likely to use the product in the same or similar circumstances.

(2) When the product seller proves, by a preponderance of the evidence, that product misuse by a claimant, or by a party other than the claimant or the product seller, has caused the claimant's harm, the claimant's damages shall be subject to reduction or apportionment to the extent that the misuse was a cause of the harm. Under this subsection, the trier of fact may determine that the harm arose solely because of product misuse.

(3) Under this Subsection, subject to state and federal law regarding immunity in tort, the trier may determine that a party or parties who misused the product and thereby caused claimant's harm should bear partial or sole responsibility for harm caused by the product and are subject to liability to the claimant.\footnote{132}

In the vast majority of jurisdictions, the existence of the manufacturer's defense of misuse has turned upon the foreseeability of

\footnote{131 The Model Act, in the absence of this suggestion, is not clear as to when joint and several liability will be imposed. Section 111(B)(5) states that joint and several liability should not apply "when there is some other reasonable basis for apportioning that party's responsibility for the harm." 44 Fed. Reg. at 62,735. This language should not be construed as authorization for limiting the product seller's liability to the percentage of damages for which he is found responsible. In their analysis, the drafters indicated that the common law rules of joint and several liability continue to apply. Id. at 62,736. They cited as support for this view the comment to section four of the Uniform Comparative Fault Act which explained that "[j]oint-and-several liability under the common law means that each defendant contributing to the same harm is liable to him for the whole amount of the recoverable damages." Wade, supra note 35, at 398.

Even if the drafters intended that the product seller should not be jointly and severally liable for the third party's portion of liability, it is submitted that such a provision places a potentially heavy burden on the wrong party.

\footnote{132 UPLA, 44 Fed. Reg. at 62,737.}
the misuse. If the plaintiff's misuse of the product was foreseeable, his conduct would not affect his recovery. As might be expected, the cases do not follow any rational pattern. For example, striking the face of a hammer against the face of another hammer in order to wedge its claws under a nail head was held to be unforeseeable misuse. The use of a fourteen ounce geologist's hammer "guaranteed unbreakable in all normal use" to break open a large rock was held to be foreseeable conduct. Also held to be foreseeable conduct were factual situations involving a child's drinking furniture polish and the possibility of ground coffee being eaten.

The commentators, although generally agreeing that foreseeability alone should not be the controlling factor, are in substantial disagreement as to the application of the defense of product misuse. Professor Schwartz, who played an active role in the UPLA's creation and who has been in agreement with most of its provisions, has advocated that the plaintiff's claim be dismissed when his conduct was unforeseeable, if he thus was responsible for a portion of the damages. In contrast, Professor Twerski has argued that the assertion of product misuse as a defense should only be upheld on a case by case basis and that foreseeability is not such an important factor. According to Twerski, more important factors include "whether the basic purposes of product liability law will be furthered by permitting the affirmative defense"

132 See 1 FRIEDMAN & FRUMER, supra note 12, at 404.
134 Id.
138 Id. at 94, 99, 331 N.Y.S.2d at 827, 832.
141 See Fischer, Products Liability—Applicability of Risk, 43 Mo. L. REV. 643 (1978); Twerski, supra note 46, at 428; Wade, supra note 35, at 384.
142 Professor Schwartz was chairman of the Task Force which drafted the Model Act. 44 Fed. Reg. 2996 (1979).
143 Schwartz, supra note 35, at 172-73.
144 Twerski, supra note 46, at 430.
and whether the type of misuse concerns product maintenance or product integrity. Professor Wade also fails to see any meaningful difference between foreseeable and unforeseeable conduct, but in a different context. According to Professor Wade, if the manufacturer produces a defective product "and the buyer misuses the product in a way that makes it dangerous to him," comparative fault principles should apply regardless of whether the misuse was foreseeable.

One of the reasons for these conflicting theories may be the substantially different effects that different forms of misuse may have on a products liability lawsuit. For example, a plaintiff's misuse of the product may negate the existence of a defect, preventing the plaintiff from having a valid cause of action. Misuse may also negate an essential portion of the plaintiff's cause of action through its effect on principles of causation. Despite the existence of a defect, misuse of the product by the plaintiff or by some other party may be found to be the sole proximate cause of the accident. Even where the misuse has been found to be a proximate cause of the injury, a few courts have discarded the all-or-nothing principles of causation if the product has been determined to be defective and have only reduced the plaintiff's damages by the percentage of the cause contributed by the misuse. Professor Twerski has found merit in apportioning proximate cause. He reasons that it is possible to apportion cause since the concept is a legal fiction, very similar to fault, designed to "help us decide whether

145 Id.
146 Wade, supra note 35, at 384.
147 Id.
148 Comment h provides that "[a] product is not in a defective condition when it is safe for normal handling and consumption. If the injury results from abnormal handling, as where a bottled beverage is knocked against a radiator to remove the cap, . . . the seller is not liable." Restatement (Second) of Torts § 402A, comment h (1965).
149 See Hays v. Western Auto Supply Co., 405 S.W.2d 877 (Mo. 1966) (plaintiff injured when his eight-year-old brother backed over him with a riding lawn mower).
150 See Sun Valley Airlines Corp. v. Avco-Lycoming Corp., 411 F. Supp. 598 (D. Idaho 1976) (plaintiff not barred from recovery following jury's determination that 90% of cause of crash could be attributed to plaintiff's misuse); General Motors Corp. v. Hopkins, 548 S.W.2d 344 (Tex. 1977).
151 Twerski, supra note 46, at 432.
the harm is to be placed at the defendant's doorstep."

The Model Act has incorporated most of these principles into section 112(C). Since subsection (1) limits misuse to conduct not "expected of an ordinary reasonably prudent person who is likely to use the product," what has traditionally been known as foreseeable misuse apparently has no application whatsoever. In regard to the types of misuse which negate the causation portion of the plaintiff's case, subsection (2) expressly provides that "the trier of fact may determine that the harm arose solely because of product misuse." Section 112 is also consistent with the notion of apportioning proximate cause because the trier of fact is to consider "both the nature of the conduct of each person or entity responsible and the extent of the proximate causal relation between the conduct and the damages claimed."

Section 112(C), however, is not void of problems. The potential reduction of the manufacturer's liability when a third party's misuse has caused a portion or all of the harm is equitable only when the misuse has rendered the product non-defective or when the misuse is the sole cause of the accident. When the product is in fact defective and the third party's misuse is also a cause of the injury, it is suggested that the manufacturer of the defective product should be jointly liable to the claimant for the third party's portion of responsibility. Since the manufacturer has released a defective product, the burden of collecting the third party's portion of liability should be upon it, not upon the injured party.

D. Alteration or Modification of a Product

Section 112(D) provides:

(1) "Alteration or modification" occurs when a person or entity other than the product seller changes the design, construction,
or formula of the product, or changes or removes warnings or instructions that accompanied or were displayed on the product. "Alteration or modification" of a product includes the failure to observe routine care and maintenance, but does not include ordinary wear and tear.

(2) When the product seller proves, by a preponderance of the evidence, that an alteration or modification of the product by the claimant, or by a party other than the claimant, or the product seller, has caused the claimant's harm, the claimant's damages shall be subject to reduction or apportionment to the extent that the alteration or modification was a cause of the harm. Under this Subsection, the trier of fact may determine that the harm arose solely because of the product alteration or modification.\textsuperscript{159}

The above section is not applicable if the alteration or modification was made pursuant to the seller's instructions\textsuperscript{160} or after receipt of his express or implied consent\textsuperscript{161} or if it was reasonably anticipated conduct and the product was defective because of a failure to provide adequate warning.\textsuperscript{162} The trier of fact may determine that a third party who is not immune under state or federal law and who has altered or modified the product may be subject to liability to the claimant.\textsuperscript{163}

Under the Draft version of the UPLA, the provisions pertaining to product alteration or modification were placed in a different section which was applicable to third parties only.\textsuperscript{164} Any modification or alteration by the claimant was considered equivalent to misuse and therefore was covered by the section pertaining to misuse.\textsuperscript{165} It is submitted that the two forms of conduct are not equivalent and that their differences are important since the Model Act now distinguishes between a claimant's misconduct and a claimant's modification or alteration of the product, with different rules pertaining to each action.\textsuperscript{166} Their differences can be illustrated by an examination of the facts in General Motors Corp. v. Hop-

\begin{itemize}
  \item \textsuperscript{159} 44 Fed. Reg. at 62,737. (UPLA § 112(D)).
  \item \textsuperscript{160} 44 Fed. Reg. at 62,739. (UPLA § 112(D)(2)(a)).
  \item \textsuperscript{161} \textit{Id.} (UPLA § 112(D)(2)(b)).
  \item \textsuperscript{162} \textit{Id.} (UPLA § 112(D)(2)(c)).
  \item \textsuperscript{163} \textit{Id.} (UPLA § 112(D)(3)).
  \item \textsuperscript{164} Draft UPLA, \textit{supra} note 103, at 3000.
  \item \textsuperscript{165} \textit{Id.} at 3012.
  \item \textsuperscript{166} \textit{Compare} UPLA § 112(C), \textit{supra} note 132, with UPLA § 112(D) and text accompanying notes 159-63 \textit{supra}.
\end{itemize}
kins. In Hopkins, the plaintiff driver was severely injured in an automobile accident due to his truck's continued acceleration despite his release of the accelerator pedal. The jury found that the truck's carburetor was defectively designed and was a producing cause of the accident. The jury also found that the plaintiff had made changes in the carburetor during the course of its removal and reinstallation and that this "misuse" was also a producing cause of the accident. The conduct in Hopkins was not a misuse but an alteration of the product. The carburetor was used on the correct model of the truck for which it had been designed; the problem was that it had been altered.

One of the traditional problems with regard to product alteration or modification pertained to language in the Restatement which placed liability on the manufacturer if the product was "expected to and does reach the user or consumer without substantial change in the condition it is sold." Whether the product had been changed substantially, thereby exonerating the manufacturer, became an important issue and a number of theories were developed to facilitate its determination. For example, a manufacturer's liability has been held to be discharged when the product experiences change in identity or a change which is unforeseeable. The main theory, however, involves principles of causation. Since the plaintiff in strict products liability cases is required to prove that the defect caused his injury, the courts

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167 548 S.W.2d 344 (Tex. 1977).
168 General Motors Corp. v. Hopkins, 548 S.W.2d 344, 346 (Tex. 1977).
169 Id.
170 Id. The court held that if a defective product is a producing cause of the injury, and if the plaintiff's misuse is a proximate cause, the trier of fact must determine the percentages contributed to the event by the two causes (totaling 100%) and must award damages accordingly. Id. at 352.
172 See generally Comment, Substantial Change: Alteration of a Product as a Bar to a Manufacturer's Strict Liability, 80 DICK. L. REV. 245 (1976).
173 See Young v. Aeroil Prods. Co., 248 F.2d 185 (9th Cir. 1957) (employer's alteration of portable conveyor by increasing its height, modifying its center of gravity, and making extensive repairs rendered a far different product than that purchased).
175 See W. PROSSER, supra note 2, § 30 at 143.
have often held the manufacturer not liable if the defect was created by an alteration which amounts to an intervening or superseding cause. Even if the product contained a pre-existing defect, a showing that an alteration was the sole cause of the injury has exonerated the manufacturer. Conversely, if the injury was caused by the manufacturer's defect an alteration of the product does not prevent the imposition of strict liability.

A potential area of conflict exists concerning the Model Act's application to situations where neither the manufacturer's defect nor the alteration was the sole cause of the injury. In such a situation, the manufacturer has released a defective product which is partially responsible for the plaintiff's injury and the courts may justifiably be reluctant to reduce the manufacturer's liability. For example, in *Wells v. Web Machinery Co.* the plaintiff was injured by a defectively designed punch press. His employer had also installed a defective unit switch and the injury would not have occurred without the presence of the defective switch. The court refused to release the manufacturer from liability, pointing out that the "press was unsafe and harmful at delivery because of its design irrespective of any defective component part.

Although comparative principles were not available in *Wells*, it is arguable that the same reasoning would apply to prevent the application of those principles. The argument is especially persuasive in a situation like that in *Wells* where the claimant is innocent and the alteration or modification was made by some third party. In this situation, the Model Act provides that the claimant's damages shall be reduced or apportioned "to the extent that the alteration or modification was a cause of the harm." Therefore, in a setting similar to that of *Wells* where the employer is re-

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177 *See generally* Texas Metal Fab. Co. v. Northern Gas Prods. Corp., 404 F.2d 921 (10th Cir. 1968) (owner's actions in bracing loose tubes of heat exchanger caused explosion).
178 *See* Dennis v. Ford Motor Co., 471 F.2d 733 (3d Cir. 1973) (installation by plaintiff of fifth wheel did not affect tractor manufacturer's liability for defective steering mechanism).
180 *Id.* at 553, 315 N.E.2d at 309.
181 *Id.*
sponsible for the alteration or modification, the manufacturer’s liability to the employee would be reduced, possibly by a very large percentage, and the employee’s recovery against the employer would be barred by workmen’s compensation laws.¹⁸³ Such a result would substantially erode traditional sanctions concerning a manufacturer’s strict liability for distributing a defective product.¹⁸⁴ A better result would be to continue to impose strict liability on the manufacturer, rendering him liable for a third party’s alteration or modification, and to allow the manufacturer to obtain reimbursement from the third party in accordance with the percentages of fault which are determined by the trier of fact.¹⁸⁵

IV. CONCLUSION

Although it appears that a substantial number of commentators and jurisdictions are willing to compare the plaintiff’s and defendant’s respective misconduct in a products liability setting, it is quite possible that they may have made the decision to do so without proper consideration of the rationale behind products liability. The principle of comparative negligence is a giant leap toward fairness and reality in a negligence setting, the question is whether it should apply in a products liability setting. To make that application is tempting, for the adoption of comparative principles has become increasingly popular in recent years¹⁸⁶ as a method of equitable apportionment, requiring the negligent party to compensate the plaintiff for only those damages for which he is, in fact, responsible. Moreover, the application of comparative principles could greatly simplify many difficult product liability issues. Assume, for example, that the manufacturer has produced a defective product which has been tampered with by the plaintiff, and that the jury has concluded that both parties caused the injury; it is tempting and more practical to hand the problem to the jury, requesting that they determine each party’s percentage of

¹⁸³ *Id.* at 62,738.

¹⁸⁴ Professor Walkowiak has stressed the importance of “concentration upon elimination of primary losses through the imposition of liability upon those parties who can best bear the burden of compensating for losses . . . .” *Walkowiak, supra* note 109, at 697. See note 20 *supra*.

¹⁸⁵ See note 131 *supra* and accompanying text.

¹⁸⁶ See *Schwartz, supra* note 25, at 1.
fault, and simply split the damages accordingly.\footnote{187 See General Motors Corp. v. Hopkins, 548 S.W.2d 344 (Tex. 1977). One response to this contention may be that the function of the jury is not one of an inadequate problem-solver, but that it is an appropriate method for spreading the costs of the injury over society as a whole. If so, the argument follows, the jury should also determine how much of the burden a claimant should bear because of his own conduct.}

The true problem is not whether the two concepts \textit{can} be compared, but whether the two \textit{should} be compared. All other things being equal, if the aggregate result of applying comparative negligence principles to products liability litigation is a reduction of the amount of damages the manufacturer will have to pay, a by-product of that result may very well be an increase in the number of defective products. If the manufacturer's decision to change the position of an automobile's gas tank is based upon economics, \textit{i.e.}, a comparison of the costs involved in making the change with the costs involved in potential lawsuits should the change be rejected, marketing the product without any change may be worth the risk incurred and the smaller amount of predicted costs.\footnote{188 During the reckless homicide trial of the Ford Motor Company which pertained to its design of the 1973 Pinto, Harley Copp, a former Ford executive, testified that a plan to modify the design which would have required an expense of $6.65 per car was rejected because of "cost and the effect it would have on profitability." Wall St. J., Feb. 8, 1980, at 2, col. 4. The Model Act's punitive damage section would offer little deterrence to a manufacturer in this situation. A large manufacturer could arguably conceal evidence of any damaging conduct, preventing the plaintiff from meeting his already sizable burden of proving "by clear and convincing evidence" that the manufacturer acted in "reckless disregard for the safety of product users." 44 Fed. Reg. at 62,748. Although the Ford Motor Company has been held liable, at least at the trial level, for millions of dollars of damages in regard to the design of the Pinto, see Ford Motor Co. v. Havlick, [1975-1977 Transfer Binder] PROD. LIAB. REP. (CCH) § 7927 (Fla. Dist. Ct. App. 1977) (plaintiff awarded $1,740,000 in damages resulting from manufacturer's failure to warn of potential danger in gas tank design); Wall St. J., April 7, 1978, at 10, col. 4 (California state court awarded plaintiff $3.5 million in punitive damages due to auto maker's knowledge of hazardous design), important evidence in the Pinto litigation was obtained from a former Ford executive. In the average product liability setting, an individual who has knowledge of the manufacturer's wrongful conduct and is willing to testify against that manufacturer will probably not be available.}

A more difficult solution to this question is advocated by at least
two commentators. Professor Twerski has warned that the application of the principles of comparative fault must not “negate basic duties that have been placed on manufacturers.” Accordingly, he advocates the use of comparative fault only in cases “in which the role of the plaintiff’s conduct with regard to maintaining product integrity is significant or those in which the plaintiff has pushed the product beyond the limits of its capacities.”

Similarly, Professor Walkowiak has suggested that the plaintiff’s conduct should not be taken into consideration when the defect is one of design, consciously made by the manufacturer.

Even if the risk of shrinking the manufacturer's basic duties is not considered persuasive evidence against the application of across-the-board comparative fault principles, certain provisions of the UPLA can be improved. First, the determination that a claimant should not be required to inspect the product should not turn upon the obviousness of the defective condition. Requiring that the claimant observe an apparent defective condition is in substance requiring that he inspect the product, a requirement which this act has professed to have decided against. Such a provision will not alleviate the considerable litigation and expense which is associated with determining the issue of knowledge of the defect, but will merely redirect them to the issue of whether the defective condition was apparent.

Second, the manufacturer's liability to the claimant should not be reduced because of some third party's misconduct if the product is found to be defective and has contributed to the claimant's injuries. A better result is to hold the manufacturer jointly and severally liable for an amount which includes the liability attributable

189 Twerski, The Use and Abuse of Comparative Negligence in Products Liability, 10 Ind. L. Rev. 797, 829 (1977).

190 Twerski, supra note 46, at 434.

191 Professor Walkowiak concludes:
If the acts which constitute a defense in conscious design choice litigation are acts of a claimant that the manufacturer was expected to consider and protect against in the selection of design choice, it is not in the interests of the goal of primary loss limitation to permit foreseeable user conduct to constitute a defense to the action. Walkowiak, supra note 109, at 679. See note 184 supra.

192 Id.

193 See text accompanying note 72 supra.
to the third party's misconduct and to allow the manufacturer to seek contribution from the third party in accordance with that party's percentage of responsibility as determined by the trier of fact. To do so would simply place the burden of collecting the third party's portion of the liability as well as the risk of non-collection, on the manufacturer, an equitable result since the manufacturer did in fact produce and sell a defective product.