COMPARATIVE FAULT AND STRICT PRODUCTS LIABILITY IN KANSAS: REFLECTIONS ON THE DISTINCTION BETWEEN INITIAL LIABILITY AND ULTIMATE LOSS ALLOCATION

William Edward Westerbeke* and Hal D. Meltzer**

Table of Contents

I. Introduction .................................................................................................................. 26
II. The Statutory Problem ............................................................................................... 31
   A. The Negligence Per Se Approach ........................................................................... 32
   B. The Legislative Intent Approach .......................................................................... 36
   C. Judicial Adoption of Comparative Fault .............................................................. 40
      1. Legislative History ............................................................................................ 41
      2. Development of Tort Law is a Judicial Function ............................................... 42
      3. Promotion of Equitable Loss Distribution ......................................................... 44
III. The Substantive Policy Consideration .................................................................. 46
   A. The Illusory Conflict in Loss Allocation Theories ............................................. 46
      1. The Historical Development of Strict Liability ................................................. 51
      2. The Manufacturer's Excess Liability as a Function of the All or Nothing System ........................................................................................................... 55
         a. Contributory Negligence ................................................................................ 56
         b. Abnormal Use .................................................................................................. 59
         c. Contribution ...................................................................................................... 62
   B. Excess Liability as a Policy of Strict Liability ................................................... 63
      1. The Nature and Scope of Strict Liability ........................................................ 64
      2. The Compensation Policy .................................................................................. 67
      3. The Deterrence Policy ...................................................................................... 68
      4. A Proposed Tort Policy of Nondiscriminatory Loss Allocation ....................... 71
         a. Tort Principles and Policies Should Determine Ultimate Allocation of Tort Losses ........................................................................................................... 71
         b. Long-term Development of Tort Law ............................................................. 74
IV. The Problem of Effective Comparison ................................................................ 77
   A. The Meaning of Effective Comparison ................................................................ 78
   B. Methods of Comparison ...................................................................................... 80
V. Specific Applications of the Kansas Comparative Negligence Statute to Strict Products Liability ......................................................................................... 84
   A. Plaintiff's Fault .................................................................................................... 84
      1. Contributory Negligence .................................................................................... 84
      2. Abnormal Use .................................................................................................... 86
      3. Assumption of Risk ............................................................................................ 87
      4. The Forty-Nine Percent Rule ........................................................................... 89
   B. Multiple Tortfeasors and the Individual Judgment Provision ................................ 91
      1. Unrelated Other Tortfeasors ............................................................................ 91
      2. Parties in the Chain of Supply and Distribution ............................................... 92
   C. The Implied Warranty of Merchantability ............................................................ 95
VI. Conclusion .................................................................................................................. 98

* Associate Professor of Law, University of Kansas. B.A. 1964, Bowdoin College; M.A. 1968, Middlebury College; J.D. 1970, Stanford University.
** Member of Kansas Bar. B.A. 1975, University of Texas; J.D. 1979, University of Kansas.
I. Introduction

In 1974 the Kansas legislature enacted the comparative negligence statute, section 60-258a of the Kansas Statutes Annotated, which abolished the traditional common law rules of contributory negligence and joint and several liability and instituted a modified comparative negligence system under which most accident losses would be apportioned on the basis of proportionate fault. In 1976 the Kansas Supreme Court in Brooks v. Dietz judically adopted the theory of strict tort liability for defective

---

1 Kan. Stat. Ann. § 60-258a (1976). Section 60-258a provides as follows:
(a) The contributory negligence of any party in a civil action shall not bar such party or said party's legal representative from recovering damages for negligence resulting in death, personal injury or property damage, if such party's negligence was less than the causal negligence of the party or parties against whom claim for recovery is made, but the award of damages to any party in such action shall be diminished in proportion to the amount of negligence attributed to such party. If any such party is claiming damages for a decedent's wrongful death, the negligence of the decedent, if any, shall be imputed to such party.
(b) Where the comparative negligence of the parties in any such action is an issue, the jury shall return special verdicts, or in the absence of a jury, the court shall make special findings, determining the percentage of negligence attributable to each of the parties, and determining the total amount of damages sustained by each of the claimants, and the entry of judgment shall be made by the court. No general verdict shall be returned by the jury.
(c) On motion of any party against whom a claim is asserted for negligence resulting in death, personal injury or property damage, any other person whose causal negligence is claimed to have contributed to such death, personal injury or property damage shall be joined as an additional party to the action.
(d) Where the comparative negligence of the parties in any action is an issue and recovery is allowed against more than one party, each such party shall be liable for that portion of the total dollar amount awarded as damages to any claimant in the proportion that the amount of his or her causal negligence bears to the amount of the causal negligence attributed to all parties against whom such recovery is allowed.
(e) The provisions of this section shall be applicable to actions commenced pursuant to this chapter and to actions commenced pursuant to the code of civil procedure for limited actions.

2 As used in this Article, the contributory negligence rule refers to the common law rule that plaintiff's contributory negligence, no matter how minimal, constituted a complete defense to defendant's negligence and thereby shifted to plaintiff the entire burden of a loss caused by the negligence of both plaintiff and defendant. The Kansas comparative negligence statute partially abolished this defense by providing that plaintiff shall recover a proportionate share of his or her damages whenever plaintiff was less than fifty percent at fault in causing his or her own injuries. Plaintiff's contributory negligence remains a complete bar to recovery whenever plaintiff is fifty percent or more at fault in causing his or her own injuries. Id.

3 The Kansas courts have always adhered to the old common law rule of no contribution among joint tortfeasors. See Alsike v. Miller, 196 Kan. 547, 412 P.2d 1007 (1966). The Kansas legislature, however, created a limited right of contribution among joint judgment debtors. Kan. Stat. Ann. § 60-2413(b) (1976). See also McKinney v. Miller, 204 Kan. 436, 464 P.2d 276 (1970). Thus, if plaintiff were injured through the negligence of two tortfeasors and sued both of them, the tortfeasor who paid the judgment in favor of plaintiff would be allowed to recover half the amount of the judgment from the other tortfeasor. If plaintiff sued only one of the tortfeasors, however, that tortfeasor would have no right to join the other tortfeasor or otherwise obtain any contribution from him. This approach to the multiple tortfeasor problem allowed the ultimate allocation of tort losses to be decided by plaintiff rather than on neutral considerations of public policy. The Kansas comparative negligence statute addressed this problem by permitting the joinder of additional parties under Kan. Stat. Ann. § 60-258a(c) (1976) and by providing for individual judgments against each tortfeasor for an amount based upon proportionate fault under id. § 60-258a(d).

4 Under a modified comparative negligence system, plaintiff is permitted to recover a proportionate share of his or her damages only so long as his or her fault does not exceed a certain percentage of the total causal fault of all parties. Twelve states follow the 50% rule under which plaintiff's fault must not be greater than defendant's fault. Eleven states follow the 49% rule under which plaintiff's fault must be less than defendant's fault. Two states follow the slight-gross rule under which plaintiff's fault must be characterized as "slight" in comparison with defendant's "gross" fault. Eight states have adopted a pure comparative negligence system under which plaintiff is permitted to recover a proportionate share of his damages irrespective of his percentage of the total causal fault. See note 10 infra. See generally V. Schwartz, Comparative Negligence §§ 3.1-5, at 43-82 (1974) [hereinafter cited as Schwartz]; H. Woods, The Negligence Case: Comparative Fault 77-90 (1976).

products as defined in section 402A of the Restatement (Second) of Torts, which provided an alternative to the long recognized negligence and implied warranty theories of product liability in Kansas. Since Brooks concerned an injury occurring prior to the effective date of the comparative negligence statute, the court had no opportunity to discuss the applicability of this statute to strict tort or implied warranty actions. Instead, the court simply followed the Restatement position that contributory negligence consisting of mere failure to discover the defect or to guard against its possible existence is not a defense, but that contributory negligence consisting of "voluntarily and unreasonably proceeding to encounter a known danger" is a defense to strict tort liability actions. Kansas has joined the burgeoning number of jurisdictions that in recent years have adopted both some form of comparative negligence and some form of strict tort liability for defective products and must now

6 Restatement (Second) of Torts § 402A (1965) provides,

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

(a) he is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

7 See, e.g., Jones v. Hittle Serv., Inc., 219 Kan. 627, 549 P.2d 1383 (1976); Garst v. General Motors Corp., 207 Kan. 2, 484 P.2d 47 (1971). Kansas apparently flirted briefly with the rule that privity of contract might be required in some negligence actions based upon defective products, see Mastin v. Leagood, 47 Kan. 36, 27 P. 122 (1891), but the rule never became a major element in Kansas negligence law. See, e.g., Malone v. Jones, 92 Kan. 708, 709-10, 142 P. 274, 274-75 (1914). The courts liberally interpreted the doctrine of res ipsa loquitur to so that plaintiff was not automatically barred from recovery by an inability to identify which party in the chain of product distribution was the negligent party. See, e.g., Nichols v. Nold, 174 Kan. 613, 258 P.2d 317 (1953). As in other categories of negligence cases, however, plaintiff could be barred from any recovery by mere contributory negligence. See, e.g., Jones v. Hittle Serv., Inc., 219 Kan. 627, 549 P.2d 1383 (1976).


8 Restatement (Second) of Torts § 402A, Comment n at 356 (1965).

confront the question of whether comparative negligence principles should be applied to strict liability actions.12

Since the Kansas comparative negligence statute refers only to negligence and not to any other conceptual form of legal fault, the threshold question is whether the Kansas courts have the authority to apply the provisions and the principles of the statute, directly or indirectly, to strict liability actions. Two recent Kansas decisions applying the statute to highway defect cases, *Thomas v. Board of Trustees*13 and *Wilson v. Probst*,14 suggest respectively a negligence per se rationale and a legislative intent rationale; these theories would permit direct application of the Kansas statute to strict liability actions. Alternatively, the Kansas courts could judicially adopt, independently or by analogy to the comparative negligence statute, a separate comparative fault system applicable to strict liability actions.


12 As used in this Article strict liability refers primarily to the strict tort theory of products liability. Most references to strict liability, however, will apply equally to implied warranty theories of products liability based solely on the product's condition or design or on the inadequacy of warnings about the ingredients, characteristics, or propensities of the product. This use of the term strict liability does not include any express or implied warranty theories based on statements or representations concerning special conditions, qualities, or performance characteristics of the product, nor does it include the tort liability theory of public misrepresentation under Restatement (Second) of Torts § 402B (1965). The application of comparative fault principles to these theories of products liability is beyond the scope of this Article.


Part II of this Article will demonstrate that, if the statute is to be applied directly, negligence per se is preferable to the legislative intent rationale from both an analytical and a pragmatic perspective, but that the judicial adoption rationale drawing from the Kansas statute only by analogy is clearly preferable to either of the direct application approaches. Judicial adoption would permit the courts to draw upon the public policy considerations reflected in the Kansas statute, but also to retain sufficient flexibility to deviate from the rigid provisions of the Kansas statute whenever sound public policy considerations require deviation. Most importantly, these issues relate only to the limited question of judicial authority to apply the statute to strict liability actions and not to the more fundamental question of whether the Kansas courts should apply this statute.

Part III of this Article will discuss the underlying policy considerations relevant to the potential application of comparative fault principles to strict liability actions. The proper perspective for the analysis of this question is whether any sound policy considerations support the continued imposition of an amount of liability on manufacturers in excess of the liability that they would bear under a comparative fault system. First, it will be demonstrated that an apparent conflict in loss allocation theories is illusory. The rationale of comparative fault systems is that allocating losses on the basis of the proportionate fault of the parties is an equitable system of loss allocation. A common rationale for strict liability is that manufacturers are better able to bear accident losses than are injured users and consumers because manufacturers can treat accident losses as a cost of production and thereby spread the cost of accident losses to all consumers of the product. An examination of the historical developments leading to the adoption of strict liability reveals that the loss spreading rationale was intended simply to provide a legal basis for holding manufacturers of defective products liable. The imposition of the entire burden of loss on manufacturers despite some fault by plaintiffs or third parties resulted from the limitations of the then-prevailing all or nothing loss allocation system rather than from any affirmative policy related to the loss spreading rationale.

Second, the authors suggest that once a jurisdiction adopts a comparative fault system, tort policy considerations do not support the continued imposition of excess liability on manufacturers. The two policy considerations that oppose the application of comparative fault principles to strict liability actions are the need to compensate injured users and consumers and the need to deter the manufacture and sale of defective products. Yet these arguments appear to depend on analytical isolation of

---

15 The widespread adoption of comparative fault systems was apparently more a reaction against past experience than a proposal of independent merit for governing future transactions. Courts, legislatures, and commentators simply viewed comparative fault as a more equitable system of loss allocation than the harsh approach of imposing the entire burden of loss on one of two or more blameworthy parties. See, e.g., Li v. Yellow Cab Co., 13 Cal. 3d 804, ..., 532 P.2d 1226, 1230-32, 119 Cal. Rptr. 858, 862-64 (1975); notes 64, 80-81, & 93 and accompanying text infra. Commentators undertook serious examination of the independent merits of comparative fault as an equitable system of loss distribution only after the widespread adoption of comparative fault systems. See, e.g., Schwartz, Contributory and Comparative Negligence: A Reappraisal, 87 Yale L.J. 697 (1978); George & Walkowiak, Blame and Reparation in Pure Comparative Negligence: The Multi-Party Action, 8 Sw. U.L. Rev. 1 (1976).


strict liability and its underlying policies from other tort concepts and policies. Although strict liability is said to be liability without fault, the overwhelming majority of defective product cases involve an analysis fundamentally similar to negligence analysis. The essential difference between the two theories of recovery is simply a lessening of plaintiff's burden of proof necessary for the initial imposition of liability under the strict liability theory. Accordingly, the question is not whether compensation and deterrence are important policy considerations underlying strict liability, but whether they justify a deviation from the proportionate fault loss allocation that would be applied to a defective product case brought under a negligence theory. The authors conclude that these policies cannot justify this deviation and suggest that courts should adopt a policy of nondiscrimination in matters of loss allocation unless a rational application of sound tort policy justifies a different loss allocation system.

Part IV of this Article will consider whether effective comparison of fault and strict liability is feasible even if sound policy considerations otherwise support the application of comparative fault principles to strict liability actions. Some courts and commentators have proposed a comparative causation approach to the problem, but this approach does not appear to be rationally related to the relative culpability of the parties and thus is incompatible with the equitable characteristic of comparative fault systems. Accordingly, the appropriate approach should focus directly on comparative fault, and plaintiff should have the choice of two options. Even though plaintiff is not required in a strict liability action to prove the fact or degree of the manufacturer's negligence, as a practical matter the evidence in most cases will be sufficient for a proportionate fault determination, and plaintiff should have the option of instructions concerning a comparison of the parties' fault. When the evidence is not sufficient to show the fact or degree of the manufacturer's fault, plaintiff should have the option of instructions explaining the nature of strict liability and the nature of a presumption that the manufacturer of a defective product is responsible for the entire loss and requiring the jury to reduce the amount of the manufacturer's liability on the basis of the degree of plaintiff's deviation from his or her applicable standard of care. Yet an overly theoretical approach to the problem of effective comparison fails to consider that all comparative fault determinations reflect more of an equitable than a factual decision by juries. Since this problem is reached only after one concludes that sound policy considerations support the application of comparative fault principles to strict liability actions, courts should at least experiment


20 Plaintiff must only prove that the product was in "a defective condition unreasonably dangerous to the user or consumer or to his property." RESTATEMENT (SECOND) OF TORTS § 402A(1) (1965). Section 402A liability "does not rest upon negligence." Id. Comment m at 355. Despite this formal distinction between strict liability and negligence, strict liability actions involving design and warning defects will necessarily involve a form of analysis essentially similar to traditional negligence analysis. See notes 233-44 and accompanying text infra.
with methods of comparison and jury instructions until experience clearly shows that effective comparison is not possible.

Part V of this Article will consider the specific issues raised by an application of comparative fault principles to strict liability actions and will recommend a few limited adjustments. Although the authors advocate the judicial adoption approach to the overall problem, the provisions and policies of the Kansas statute should govern, if only by analogy. Deviations from the statute should be limited to clear cases of incompatibility between the policies. Otherwise, courts would make adjustments in the manner in which they apply comparative fault principles to strict liability actions in order to preserve the policy interests of strict liability when actually these adjustments would be the result of dissatisfaction with the broader policies underlying the Kansas comparative negligence statute. The authors adopt this restrictive approach because the interests of injured parties will be better served in the long-term if the Kansas courts identify the true source of any dissatisfaction with existing policies and deal with these problems directly.\footnote{The Kansas courts could also provide for a more expansive adjustment of existing comparative fault provisions and policies in the limited context of strict liability actions by redefining the underlying policies of strict liability more broadly than the authors suggest they currently are defined in the majority of jurisdictions. That approach, however, is beyond the scope of this Article.}

\footnote{The Oklahoma Supreme Court has held that the comparative negligence statute of that state has “no application to manufacturers’ products liability, for its application is specifically limited to negligence actions.” Kirkland v. General Motors Corp., 521 P.2d 1353, 1367 (Okla. 1974) (emphasis in original). The court provided no underlying analysis to support this conclusive statement, and the holding would seem to have little precedential value. See generally McNichols, The Kirkland v. General Motors Manufacturer’s Product Liability Doctrine—What’s in a Name?, 27 Okla. L. Rev. 347 (1974). A Federal court attempting to predict Rhode Island law has apparently used a similar rationale. See Roy v. Star Chopper Co., 584 F.2d 1124, 1133-34 (1st Cir. 1978). Other courts have declined to apply comparative negligence statutes to strict liability actions on other grounds. In Melia v. Ford Motor Co., 534 F.2d 795, 802 (8th Cir. 1976), the court decided simply that the issue would be “better directed to the state court and Nebraska legislature in the first instance.” In Kinard v. Coats Co., 553 P.2d 835 (Colo. App. 1976), the court declined to apply comparative fault principles to a strict liability action because of the public policy against injecting negligence principles into strict liability actions.}

II. THE STATUTORY PROBLEM

The Kansas comparative negligence statute specifically refers only to negligence and is silent concerning all other conceptual forms of legal fault. Consequently, the threshold problem is whether the Kansas courts have the authority to apply the statute to strict liability actions. Although at least one state apparently limited the application of comparative principles to negligence actions because of the limited scope of its statute,\footnote{The Oklahoma Supreme Court has held that the comparative negligence statute of that state has “no application to manufacturers’ products liability, for its application is specifically limited to negligence actions.” Kirkland v. General Motors Corp., 521 P.2d 1353, 1367 (Okla. 1974) (emphasis in original). The court provided no underlying analysis to support this conclusive statement, and the holding would seem to have little precedential value. See generally McNichols, The Kirkland v. General Motors Manufacturer’s Product Liability Doctrine—What’s in a Name?, 27 Okla. L. Rev. 347 (1974). A Federal court attempting to predict Rhode Island law has apparently used a similar rationale. See Roy v. Star Chopper Co., 584 F.2d 1124, 1133-34 (1st Cir. 1978). Other courts have declined to apply comparative negligence statutes to strict liability actions on other grounds. In Melia v. Ford Motor Co., 534 F.2d 795, 802 (8th Cir. 1976), the court decided simply that the issue would be “better directed to the state court and Nebraska legislature in the first instance.” In Kinard v. Coats Co., 553 P.2d 835 (Colo. App. 1976), the court declined to apply comparative fault principles to a strict liability action because of the public policy against injecting negligence principles into strict liability actions.} the sounder view would recognize the propriety of judicial authority to extend the scope of comparative principles to other forms of actions, either by statutory construction or by independent judicial action. The comparative negligence cases in Kansas to date have suggested two rationales that might justify application of the statute to strict liability actions. First, strict liability actions could be considered forms of negligence per se, which would avoid any formal expansion of the scope of the statute beyond negligence actions. Second, extension of the statute to encompass strict liability actions might be justified as necessary to give full force and effect to the legislative purpose and intent of the statute. As an alternative to applying the comparative negligence statute, the courts could create an independent comparative fault system applicable to strict liability actions and thus avoid any problems of statutory construction.}
The statutory problem is not unlike the question of whether proper etiquette requires players to wear white clothing on tennis courts; although the color of clothing is unrelated to the quality of a person's tennis skills, some people nevertheless consider the matter to be important. Similarly, although the statutory problem may raise an interesting question concerning the respective roles of the legislature and the judiciary in the development and the determination of sound tort policy, the resolution of this problem should not have any significant relevance to the ultimate question of whether courts should apply comparative principles to strict liability actions. The answer to that question depends primarily on an examination and an analysis of the respective tort policies underlying comparative fault and strict liability. Nevertheless, the statutory problem merits careful examination because the selection of an approach to this problem could have significant ramifications both on the specific manner in which comparative principles might be applied to strict liability actions and on the ultimate scope of comparative principles in other areas of Kansas tort law.

A. The Negligence Per Se Approach

Negligence per se means that certain conduct will be deemed to constitute negligence as a matter of law, and therefore, full case-by-case examination of the circumstances surrounding such conduct is not required.\textsuperscript{23} Traditionally, negligence per se has had two primary uses in Kansas. First, in civil tort cases courts have used it to adopt as legal standards of reasonable care criminal and administrative standards that actually contain no reference to civil tort liability.\textsuperscript{24} Second, courts have used it to formulate rules of law that establish fixed standards of reasonable care applicable to specific patterns of conduct as a matter of law.\textsuperscript{25} A new use of this doctrine has emerged with the adoption of the comparative negligence statute. In \textit{Thomas v. Board of Trustees},\textsuperscript{26} the Kansas Supreme Court characterized the civil tort liability created by a highway defect statute as "in legal contemplation ... negligence ... as a matter of law"\textsuperscript{27} so that the provisions of the Kansas comparative negligence statute would encompass what had previously been considered strict statutory liability. Accordingly, the Kansas courts could bring strict liability actions within the purview of the comparative negligence statute by legally characterizing those actions as a form of negligence per se.

In its most common usage negligence per se is essentially a mechanism to facilitate the identification of actual negligence adopted by the courts despite some limited distortion of traditional negligence analysis in order to promote other tort policy considerations. The violation of a standard derived from a statute, ordinance, or

\begin{itemize}
  \item For example, for many years Kansas had a rule that an automobile passenger had the same duty as the driver to watch for trains approaching a railroad crossing. Accordingly, if the driver were negligent in the manner in which he or she approached the crossing, the passenger was deemed contributorily negligent as a matter of law. See, e.g., Buchhein v. Atchison, Topeka & Santa Fe R.R., 147 Kan. 192, 75 P.2d 280 (1938). The Kansas Supreme Court finally discarded this rule in 1977. See Smith v. Union Pac. R.R., 222 Kan. 303, 564 P.2d 514 (1977).
  \item 224 Kan. 539, 582 P.2d 271 (1978).
  \item \textit{Id.} at 546, 582 P.2d at 277.
\end{itemize}
regulation allows a court to find negligence as a matter of law.\textsuperscript{26} For example, assume that a driver traveling at forty miles per hour strikes and injures a young child who suddenly darted into the street and that the driver could have stopped in time to avoid the accident if he had been driving at only thirty miles per hour. In the absence of any speed limit, the reasonableness of a forty mile per hour speed on that street for normal driving purposes would be an open issue to be determined by an evaluation of all relevant circumstances, and a trier of fact might conclude that forty miles per hour was a reasonable speed. If the speed limit had been thirty miles per hour, however, the court could use the doctrine of negligence per se to eliminate as a matter of law any issue of the reasonableness of any speed above thirty miles per hour for normal driving purposes under normal driving conditions.\textsuperscript{29} Thus, the driver would be found negligent unless he could establish a specific excuse for driving at forty miles per hour.\textsuperscript{30} This use of negligence per se abbreviates the traditional negligence analysis in order to promote both the judicial interest in expediting cases\textsuperscript{31} and the tort interest in compensating injured parties.\textsuperscript{32}

At the same time, negligence per se has long been recognized as capable of creating limited forms of strict liability.\textsuperscript{33} Many statutes, ordinances, and regulations define a criminal or an administrative standard in terms of the condition of specific property, rather than in terms of an actor's conduct.\textsuperscript{34} When this standard is coupled with a judicial refusal to recognize any legal excuse for violation of the standard, the use of negligence per se creates a form of strict liability. For example, many states have a statutory requirement that the brakes on any motor vehicle must be in good working condition.\textsuperscript{35} If an accident occurs as the result of sudden and unforewarned brake failure, judicial refusal to recognize as a legal excuse the driver's exercise of reasonable care in attempting to comply with the statutory requirement constitutes

\textsuperscript{26}The violation of a standard derived from a statute, ordinance, or regulation will usually involve some element of scienter—an appreciation of the risks that the standard seeks to avoid coupled with the ability to comply fully with the standard.

\textsuperscript{29}Nevertheless, the driver's conduct may be properly characterized as actual negligence because scienter is present—the driver should appreciate that in most situations any increase in speed increases the risk of injuries, and the driver has the ability to comply with the standard derived from the speed limit.

\textsuperscript{30}For example, if the driver were exercising reasonable care in other respects and were driving at 40 miles per hour to get a severely injured passenger to a hospital for emergency medical care, most courts probably would allow a legal excuse for the violation of the speed limit. For an enumeration of the categories of legally recognized excuses in negligence per se actions, see RESTATEMENT (SECOND) OF TORTS § 288A (1965).

\textsuperscript{31}The interest in judicial economy is enhanced by eliminating evidence relating to the otherwise legitimate issue whether 40 miles per hour is a reasonable speed for normal driving purposes under normal driving conditions.

\textsuperscript{32}The interest in compensation is enhanced by eliminating the otherwise legitimate issue whether 40 miles per hour is a reasonable speed. Thus, defendant may avoid liability only by showing a specific excuse.

\textsuperscript{33}See, e.g., RESTATEMENT (SECOND) OF TORTS § 288A, Comment c at 34 (1965); PROBER, supra note 23, § 36, at 197-98; Fischer, Products Liability—Applicability of Comparative Negligence, 43 Mo. L. Rev. 431, 440-41 (1978); Note, Nonfault Liability for Vehicle Equipment Failures, 23 Stan. L. Rev. 1112, 1127-31 (1971).

\textsuperscript{34}Motor vehicle codes are replete with provisions describing the specific condition and performance capacity of required equipment for motor vehicles. For example, in Kansas motor vehicles must be equipped with high-beam headlights capable of providing illumination for a distance of not less than 450 feet. KAN. STAT. ANN. § 8-1724(a)(1) (1975). Every motor vehicle shall be equipped with a service braking system capable of stopping the vehicle within 40 feet from an initial speed of 20 miles per hour on a level, dry, smooth, hard surface. Id. § 8-1734(a). Every motor vehicle shall be equipped with a horn capable of being heard under normal conditions from a distance of not less than 200 feet. Id. § 8-1738(a). Operation of a vehicle not in compliance with these provisions is a misdemeanor. Id. § 8-1701(a).

\textsuperscript{35}See generally Annot., 40 A.L.R.3d 9 (1971).
strict liability in the sense that the driver is held liable for an accident that theoretically he could not have avoided.\textsuperscript{36} Liability is imposed simply on the basis of the defective condition of the brakes and not on the basis of any avoidable conduct by the driver.

No Kansas case to date demonstrates an unequivocal acceptance of this strict liability application of negligence per se. Although initially the court's characterization of the highway defect statutes\textsuperscript{37} as negligence per se in \textit{Thomas v. Board of Trustees}\textsuperscript{38} might appear to be such a strict liability application, close examination of these statutes reveals that they are limited by a form of scintence requirement. Each statute provides that an injured party may recover only when the governmental entity has had notice of the defect at least five days prior to the date of the accident.\textsuperscript{39} The obvious intent and effect of this notice provision is that a governmental entity will be held liable not for the mere existence of a defective condition in a highway, but rather only for the entity's failure to correct the defective condition after becoming aware of its existence. Accordingly, the highway defect statutes create a liability analogous to traditional negligence liability based on blameworthy conduct, rather than to strict liability based on defective condition.

At the same time, no Kansas case rejects the general proposition that negligence per se may encompass limited forms of strict liability, and the Kansas courts have indicated that they would not be reluctant to employ this strict liability application of negligence per se in an appropriate case. The court in \textit{Thomas} cited with approval a Wisconsin decision that characterized as negligence per se a statute holding the owner of a dog strictly liable for certain harms caused by the dog.\textsuperscript{40} Furthermore, if the issue had ever arisen, the Kansas courts probably would have used negligence per se to impose strict liability for violation of the Kansas criminal statute prohibiting the manufacture or sale of food containing any poisonous or deleterious substance injurious to health.\textsuperscript{41} Undoubtedly the issue never arose simply because the courts had already recognized the implied warranty rationale as a convenient mechanism

\textsuperscript{36}See, e.g., Spalding v. Waxler, 2 Ohio St. 2d 1, 205 N.E.2d 890 (1965). The Ohio Supreme Court disposed of defendant's claim of sudden brake failure by characterizing the brake statute as imposing a mandatory duty that cannot be satisfied by the exercise of ordinary care in maintaining the brakes. Although recognizing the harshness of the holding from defendant's perspective, the court held that the plaintiff, having the burden of the loss on an innocent plaintiff would be even harsher. Thus, the \textit{Spalding} court used negligence per se to impose strict liability in order to promote the compensation rationale of tort law.

\textsuperscript{37}\textit{Kan. Stat. Ann.} § 68-301 (1972) provides for the liability of counties and townships for defects in bridges, culverts, and highways that these political subdivisions are obligated to maintain. \textit{Id.} § 68-419 (Cum. Supp. 1979) provides for the liability of the State of Kansas for defects in bridges, culverts, and highways that the State is obligated to maintain. Although \textit{Thomas} only concerned the liability of a township under § 68-301, both statutes are extremely similar in their language and in their essential requirements, and the negligence per se analysis in \textit{Thomas} should be equally applicable to § 68-419.

\textsuperscript{38}224 Kan. at 543-47, 582 P.2d at 276-78.


\textsuperscript{40}Nelson v. Hansen, 10 Wis. 2d 107, 162 N.W.2d 251 (1960). The statute involved in \textit{Nelson} provided for the liability of the owner or the keeper of a dog for certain harms caused by the dog "without provings notice to the owner or keeper of such dog or knowledge by him that his dog was mischievous or disposed to kill, wound or worry horses, cattle, sheep or lambs." \textit{Wis. Stat. Ann.} § 174.02 (West 1974). The Wisconsin Supreme Court had previously interpreted this statute as providing for liability without the necessity of proving scintence. See Legault v. Malacker, 156 Wis. 507, 145 N.W. 1081 (1914).

\textsuperscript{41}See \textit{Kan. Stat. Ann.} §§ 65-657(a), -664(a)(1) (1972). Section 65-657(a) prohibits, \textit{inter alia}, the "manufacture, sale, or delivery, holding or offering for sale of any food . . . that is adulterated." Section 65-664(a)(1) provides that a food is adulterated "if it bears or contains any poisonous or deleterious substance which may render it injurious to health."
for accomplishing the same purpose. Under this rationale the courts created an implied contractual obligation for sellers to sell only wholesome food, which rendered irrelevant any question whether the unwholesomeness of the food resulted from negligent conduct. The courts now concede that, for cases involving personal injury and property damage, the implied warranty rationale was always in reality a reflection of tort policy considerations. It seems logical that, in an appropriate case, the courts would have been guided by the same tort policy considerations under a negligence per se approach not only to derive a civil standard of care from the criminal statute, but also to refuse to recognize as a legal excuse the exercise of reasonable care in the manufacture and the sale of the food.

In Dippel v. Sciano the Wisconsin Supreme Court followed this basic line of analysis to characterize as negligence per se the rule of strict liability in section 402A of the Restatement (Second) of Torts. The court justified this approach to strict liability by analogizing the results of safety rule violations and defective product sales. A defective product is as capable of creating a condition of unreasonable risk of harm to others as is a violation of a safety rule. Consequently, if liability in tort for the sale of a defective product were imposed as the result of a violation of a statute, "it is difficult to perceive why we would not consider it negligence per se for the purpose of applying the comparative negligence statute just as we have done so many times in other cases involving the so-called 'safety statutes.'"

The use of negligence per se to bridge the conceptual gap between comparative negligence and strict liability has been criticized as an "artificial step" in the analytical resolution of the problem, and in one sense this criticism is valid. Strict liability has been adopted in response to problems for which negligence had proved to be an inadequate remedy and is imposed despite the absence of the scienter element that is fundamental to negligence analysis. The mere characterization of strict liability as a form of negligence is no more an analytical justification for applying comparative principles to strict liability actions than a recognition of the differences in the two conceptual forms of liability is an analytical justification for not applying comparative principles to these actions. Determining whether comparative principles should be applied to strict liability actions requires careful analysis of tort policy considerations, rather than mere reliance on nomenclature.

In another sense the criticism is not valid. Negligence per se is a useful and desirable mechanism for the selective introduction of limited forms of strict liability

---

42 The Kansas courts first recognized the implied warranty rationale for unwholesome food cases by way of dictum in 1882 and first applied this rationale in 1914. See note 8 supra. The Kansas Legislature did not enact the statutory prohibition against adulterated food until 1953. Act of April 2, 1953, ch. 286, 1953 Kan. Sess. Laws 513 (codified at KAN. STAT. ANN. § 65-655 to -669 (1972)).


45 37 Wis. 2d 444, 155 N.W.2d 55 (1967).

46 Id. at ___, 155 N.W.2d at 65-66.

47 See Schwartz, supra note 4, § 12.1, at 196. See also Fischer, supra note 33, at 439-42; Pinto, Comparative Responsibility—An Idea Whose Time Has Come, 45 INS. COUNSEL J. 115, 121-22 (1978). For an excellent analysis of the Wisconsin cases and the dangers inherent in substantively treating strict product liability as a form of negligence per se, see Twerski, Comparative Fault—Rethinking Some Product Liability Concepts, 60 MARQ. L. REV. 297, 319-25 (1977) [hereinafter cited as Twerski, Comparative Fault].

48 See notes 123-30 and accompanying text infra.
into tort law, and the open and formal recognition of strict liability in the defective products area is no reason for restricting the potential scope of negligence. More importantly, the use of negligence per se proposed in this Article is limited to the narrow question whether the courts have authority to apply the provisions of the comparative negligence statute to strict liability actions and is wholly separate from the broader question whether the courts should adopt this approach. As long as this distinction is carefully maintained, the negligence per se approach should be viewed as a viable option available to the Kansas courts.

B. The Legislative Intent Approach

An alternative to the negligence per se approach would involve an expansive interpretation of the statutory phrase "causal negligence" to encompass strict liability in order to give full force and effect to the legislative intent underlying the comparative negligence statute. The paramount rule of statutory construction is that the purpose and intent of the legislature in enacting a statute govern the interpretation of the statute. Therefore, courts must resolve all ambiguities in a manner consistent with the legislative intent, even if "words, phrases and clauses at some place in the statute must be omitted or inserted." In Brown v. Keil, the Kansas Supreme Court determined that the purpose and intent of the legislature in enacting the comparative negligence statute was "to impose individual liability for damages based on the proportionate fault of all parties to the occurrence which gave rise to the injuries and damages even though one or more parties cannot be joined formally as a litigant or be held legally responsible for his or her proportionate fault." This purpose is liability restrictive because it envisions that a negligent tortfeasor should pay no more than his or her proportionate share of the total damages even though he or she has a greater capacity to bear the loss occasioned by the accident and even though

---

See notes 133-39 and accompanying text supra.

When a broad category of cases such as abnormally dangerous activity cases or defective products cases are susceptible to definition by certain general characteristics, formal recognition of strict liability is feasible and probably desirable. In other areas, however, definition of a general category of strict liability cases may not be feasible. For example, every jurisdiction has a large number of safety statutes, ordinances, and regulations, but not every one of them is necessarily appropriate for strict liability treatment. Negligence per se provides a convenient mechanism for judicial experimentation with strict liability on a limited scale with such statutes, ordinances, and regulations in a situation in which a broader, more formal recognition of strict liability might not be feasible. This experimentation should be viewed as a positive attribute of the common law case-by-case system of developing tort law.


Id. at 207, 580 P.2d at 876. Although the court frequently uses the word "fault" rather than "negligence," e.g., in Brown, nothing in this opinion or in subsequent cases indicates that the court intended the word "fault" to encompass any conceptual form of legal fault other than negligence. The court's careful analysis of the highway defect statutes as a form of negligence per se in Thomas would seem to support this conclusion. Accordingly, none of the arguments in this Article depend on the court's use of "fault" rather than negligence. See also notes 64 & 73 infra.

The court in Brown expressly rejected the possibility of adjusting this individual judgment system on the basis of a party's capacity to pay. Plaintiffs now take the parties as they find them. If one of the parties at fault happens to be a
this restriction on the payment of damages may shift a disproportionate share of the burden to the injured plaintiff.\(^{57}\)

The courts can readily give full force and effect to this legislative intent in any case in which the negligent conduct of two or more tortfeasors causes plaintiff’s injury. If plaintiff’s damages were $10,000 and if each of two tortfeasors were fifty percent causally negligent, plaintiff would receive a judgment for $5,000 against each individual tortfeasor. If one of the tortfeasors were insolvent, immune, unavailable, or unknown, the other tortfeasor’s liability would still be limited to $5,000. A problem in giving full force and effect to this legislative intent arises, however, when the concurrence of one tortfeasor’s negligent conduct and another tortfeasor’s defective product causes plaintiff’s injury. If strict liability is the only basis for the second tortfeasor’s liability and plaintiff sues only the negligent tortfeasor, denying the negligent tortfeasor a right to join the nonnegligent tortfeasor may seem inconsistent with the legislative intent to limit a negligent tortfeasor’s liability to an amount based on proportionate fault. The negligent tortfeasor would now be liable for the entire $10,000 damages suffered by plaintiff.\(^{58}\) A court could treat this situation as an ambiguity between the specific statutory language and the legislative intent underlying the statute and, therefore, could construe “causal negligence” to include strict product liability in order to accomplish the legislative intent of the statute.

The 1978 decision of the Kansas Supreme Court in *Wilson v. Probst*\(^{59}\) provides some support for this approach. Plaintiff alleged that the negligent conduct of two drivers caused the collision in which he was injured. One of the drivers joined the Kansas Secretary of Transportation on the theory that a highway defect was a contributing cause of the collision. The supreme court reversed the trial court’s dismissal of the Secretary of Transportation and held that highway defects claimed to have contributed to the collision must be compared with the fault of the allegedly negligent drivers in order to determine the parties’ proportionate fault. The court recognized that the Kansas cases had consistently treated liability for highway defects simply as strict statutory liability and not as negligence\(^{60}\) and that under the former rule of joint and several liability a more precise articulation of the conceptual nature

\(^{57}\) As interpreted by the Kansas Supreme Court, the individual judgment system created by the comparative negligence statute shifts to plaintiff without exception the burden of all losses attributable to the proportionate fault of insolvent, immune, unavailable, and unknown tortfeasors. The same result apparently applies even when plaintiff has not been contributorily negligent. See Westerbeke, *Survey of Kansas Law*: *Torts*, 27 Kan. L. Rev. 321, 345-46 (1979).

\(^{58}\) The provisions governing allocation of loss among tortfeasors prior to the adoption of the comparative negligence statute would presumably still apply to actions not encompassed by the comparative negligence statute. If courts do not apply comparative fault principles to strict liability actions, the negligent tortfeasor sued by plaintiff would not be allowed to join the strictly liable manufacturer not sued by plaintiff for purposes of a comparative fault apportionment of the loss.

of this liability was not important. 61 Nevertheless, the court made no attempt to analyze the proper characterization of liability for highway defects, but instead relied entirely on the legislative intent of the comparative negligence statute for its holding that any highway defects had to be included in the proportionate fault determination.

The appellants contend that the claimed defects contributed to plaintiff's loss. In the context of comparative negligence, highway defects claimed to have contributed to the occurrence from which the injuries and damages arose must be compared to the alleged negligence of other parties if the intent of K.S.A. 60-258a is to be accomplished. 62

The court in Wilson apparently treated as irrelevant the question whether highway defects constitute negligence or some other conceptual form of fault, and nothing in the opinion suggests that the result would have been different if the defects contributing to the occurrence had been in a manufactured product rather than in a highway.

The legislative intent approach of Wilson is distinguishable from and less desirable than the negligence per se approach in two significant respects. First, the legislative intent approach provides a logical basis for applying comparative principles to strict products liability actions in only one of the three basic situations in which the issue would commonly arise. This approach may be sound in a case like Wilson in which a negligent tortfeasor seeks to join a strictly liable tortfeasor in order to determine proportionate fault. Its logic becomes quite strained and artificial, however, in the reverse situation in which a nonnegligent defendant seeks to reduce his or her liability by joining a negligent tortfeasor as an additional party. For example, if plaintiff in Wilson had sued the Secretary of Transportation on a highway defect theory instead of suing the two allegedly negligent drivers, it would not logically follow that the two drivers should be joined to accomplish the purpose of the comparative negligence statute unless the court first determined that liability for highway defects was in essence a form of negligence. 63

The legislative intent approach also would be strained and artificial in situations in which plaintiff's contributory negligence did not previously constitute a defense to defendant's nonnegligent conduct. For example, in a strict liability action under Kansas law against a manufacturer of a defective product, it would not be logical to argue that plaintiff's contributory negligence in failing to discover the defect, previously not a defense, requires a reduction in plaintiff's recovery in order to accomplish the purpose of the comparative negligence statute. Proportionate reduction of plaintiff's recovery was included in the statute for the obvious purpose of

61 In Kansas a right of contribution exists between joint judgment debtors liable on a common obligation to plaintiff. Kan. Stat. Ann. § 60-2413(b) (1976). As long as debtors were jointly liable on a common obligation, the conceptual characterization of their liability was irrelevant. See Lenhart v. Owens, 211 Kan. 534, 507 P.2d 318 (1973); McKinney v. Miller, 204 Kan. 436, 464 P.2d 276 (1970). Accordingly, the characterization of liability as negligence per se was unimportant until the enactment of the comparative negligence statute.
62 224 Kan. at 463, 581 P.2d at 384 (emphasis added).
63 If liability for highway defects were simply statutory liability and not negligence, the governmental entity would not be in a position to assert that its statutory liability must be limited on a proportionate fault basis in order to accomplish the intent of the comparative negligence statute.
abolishing the contributory negligence defense as a complete bar to recovery and not to reduce plaintiff’s recovery in those situations in which complete recovery was previously allowed. Thus, the negligence per se approach of Thomas is preferable to the legislative intent approach of Wilson because it provides a mechanism for the complete incorporation of comparative principles into strict liability actions.

Second, since the analytical focus of the legislative intent approach is simply on the need to limit a negligent tortfeasor’s liability on the basis of proportionate fault, this approach fails to provide any suitable basis for careful discrimination among the different conceptual forms of fault that might be subjected to comparative principles. Logically, the legislature in enacting a statute consistently referring only to negligence did not intend an unlimited application of comparative principles that would establish the broadest possible system of comparative fault. Moreover, from a tort policy perspective the strength of the argument for application of comparative principles is not necessarily the same for each conceptual form of fault. For example, the substantially greater culpability traditionally attributed to intentional torts might suggest that the order of priorities between compensation and liability limitation in intentional tort situations should be different from the order of these priorities established by the comparative negligence statute. The court’s analytical approach in Wilson would have logically supported the same result even if the liability of the Secretary of Transportation had been founded on intentional tort because the need to permit joinder in order to limit the negligent tortfeasors’ liability to an amount based on their proportionate fault still would have existed.

---

86 The only formal report reflecting the legislative intent underlying the Kansas comparative negligence statute provided as follows:

Present Kansas law is based on the theory of contributory negligence, that is: If the plaintiff in an action for damages is in any way negligent and such negligence contributed to the injury, then the plaintiff is barred from recovery from the defendant. The Committee is of the opinion that this theory is arbitrary and unjust and that negligence on the part of the plaintiff should diminish rather than defeat his recovery. There is no moral or legal justification for a system which, for example, makes the person who is only 11% at fault bear 100% of the loss. The Committee believes that the concept of comparative negligence is a desirable substitute for the harshness of the all-or-nothing approach of the traditional contributory negligence doctrine.

SPECIAL COMMITTEE ON CIVIL LAW AND PROCEDURE AND RELATED MATTERS, REPORT ON KANSAS LEGISLATIVE INTERIM STUDIES TO THE 1974 LEGISLATURE, PART II, 84-1 to -2 (1973) (filed with the Legislative Coordinating Council) [hereinafter cited as SPECIAL COMMITTEE REPORT]. See also Brown v. Keil, 224 Kan. 195, 197, 580 P.2d 867, 870 (1978).

87 This does not necessarily mean that the comparative negligence statute will not effect a diminution of plaintiff’s recovery in situations in which a contributorily negligent plaintiff was previously permitted to recover his or her entire loss from a negligent defendant. That result may follow in appropriate cases from the broader purpose of the statute to apportion losses on the basis of the proportionate fault of all the parties. See note 102 supra. Nevertheless, the specific purpose of the statute was not to prevent a contributorily negligent plaintiff from recovering his or her entire loss irrespective of the nature of the defendant’s fault.

88 See notes 72-76 and accompanying text infra.

89 While liability in negligence may be predicated on momentary inadvertence or poor judgment, intentional torts involve harms that the actor intended to cause in the sense that he or she knew or should have known with substantial certainty that the harm would occur. See RESTATEMENT (SECOND) OF TORTS § 8A (1965). Thus, the greater culpability derives from the distinction between conduct involving a mere appreciation of an unreasonable risk of harm that may or may not actually occur and conduct involving knowledge with substantial certainty that the harm will occur.

90 If plaintiff suffers a broken leg, his interest in being compensated is arguably the same irrespective of whether the injury was the result of defendants’ negligence or their intentional acts. Nevertheless, because of the substantially greater culpability generally associated with intentional acts, the interest in deterring these acts assumes greater importance, and the interest in promoting fairness to defendants by limiting liability to an amount based on proportionate fault assumes lesser importance. By default, plaintiff’s interest in compensation would necessarily assume a higher priority among the relevant tort policy considerations and, therefore, the court might determine that the rationale of the comparative negligence statute would be inappropriate for such cases.
The negligence per se approach of *Thomas* is preferable to the legislative intent approach of *Wilson* because it provides a mechanism for thorough analytical examination of the conceptual forms of fault to which comparative principles might be applied. The legislative intent approach is analytically inadequate as a basis for determining complex issues concerning the ultimate scope and application of comparative fault principles in Kansas. It is also undesirable as a matter of sound tort policy because it changes the rigid protection of defendants at the expense of plaintiffs’ legitimate interests from merely the practical effect of the statute to the purpose of the comparative negligence statute.\(^6\) The legislative intent approach should be abandoned.

C. Judicial Adoption of Comparative Fault

The negligence per se and the legislative intent approaches provide rationales for applying the Kansas comparative negligence statute to strict liability actions, but a more viable alternative to these statutory approaches would involve judicial adoption of a limited comparative fault system applicable to strict liability actions.\(^7\) Since the statute contains no reference to any conceptual form of legal fault other than negligence, the issue is whether the statute should be considered the exclusive source of comparative principles in Kansas or merely a limitation on judicial choice of loss distribution mechanisms in negligence actions without any intent to affect this choice in other areas of tort law.\(^8\) The latter view constitutes the more realistic interpreta-

---

\(^6\) Commentators seem to agree that the development in the 19th century of the fault principle generally and the contributory negligence rule specifically resulted largely from a perceived societal need to promote and to protect growing industries, especially railroads. See notes 80-81 and accompanying text infra. The widespread denial of compensation to injured parties was the result of these attitudes. The development of a more balanced perspective of tort law has been a slow and painstaking process that is not yet complete. By permitting the joinder of additional parties in order to accomplish the intent of the statute without regard to the conceptual form of fault of other parties or to any other relevant tort policy, *Wilson* simply goes too far toward defining the statute as a mechanism to protect negligent defendants. Although this result may be inadvertent, it seems to express a preference for parties rather than principles and thus may constitute a step backwards towards 19th century tort law priorities.

\(^7\) At least three jurisdictions have recognized and adopted this approach by judicially creating for use in strict liability actions a "pure" comparative system that was wholly separate and distinct from the modified system provided for by the jurisdiction's comparative negligence statute. See Murray v. Fairbanks Morse, 610 F.2d 149, 159-61 (3d Cir. 1979); Thibault v. Sears, Roebuck & Co., 118 N.H. 802, 395 A.2d 843, 848 (1978); General Motors Corp. v. Hopkins, 548 S.W.2d 344, 352 (Tex. 1977). In addition, one federal district court suggested that courts in a state not having any comparative negligence system might nevertheless judicially adopt a comparative fault system applicable to strict liability actions. See Chapman v. Brown, 198 F. Supp. 78, 85-86 (D. Hawaii 1961).

\(^8\) Ideally, the initial adoption of comparative fault in a jurisdiction would involve a comprehensive resolution of a wide range of issues concerning the structure and the scope of a comparative fault system, including choices between pure and various modified comparative fault systems, between individual and aggregate comparison, and among various mechanisms relating to multiple tortfeasors. See note 10 supra. The courts would have to make specific decisions concerning the inclusion or exclusion of forms of legal fault such as recklessness, intent, strict liability, and implied warranty, and concerning the impact of comparative fault on specific doctrines such as assumption of risk and last clear chance. Because of this wide range of choices inherent in or raised by the abolition of the contributory negligence rule, Professor Kalven suggested that the legislature might be the more appropriate body to undertake the initial creation of a comprehensive comparative fault system. See Kalven, *Comments on Maki v. Frelk—Comparative v. Contributory Negligence: Should the Court or Legislature Decide?* 21 Vand. L. Rev. 897 (1968). But see Wade, *Comments on Maki v. Frelk—Comparative v. Contributory Negligence: Should the Court or Legislature Decide?* 21 Vand. L. Rev. 938 (1968). See also Fleming, *The Supreme Court of California, 1974-75—Forward: Comparative Negligence at Last—By Judicial Choice*, 64 Cal. L. Rev. 239, 273-82 (1976).

Although Professor Kalven’s argument has theoretical merit, the resulting legislation has lacked comprehensiveness. Most comparative fault statutes have defined only the broad outlines of a comparative fault system and have ignored numerous important issues. Accordingly, the issues of judicial activism becomes quite different after the initial enactment of such a statute. Because the legislature has had a full opportunity to address as many issues as it chose to address, judicial action concerning issues omitted
tion of the statute for three reasons. First, the statute apparently was primarily intended simply to redress certain specific problems frequently encountered in negligence actions under the former all or nothing system and not to provide a comprehensive determination of the proper scope and application of comparative principles in all areas of Kansas tort law. Second, the development of rules of tort law in a manner designed to promote sound tort policies, including the policy of equitable loss distribution, has always been primarily a judicial prerogative, and this prerogative should not be deemed restricted by legislation in the absence of a clear legislative intent to this effect. Third, the distribution of tort losses on the basis of proportionate fault is now recognized as a viable means of achieving equitable loss distribution and thus may be judicially adopted and applied in appropriate categories of cases not encompassed within the scope of the comparative negligence statute.

1. Legislative History

An examination of the legislative history and of the specific provisions of the Kansas comparative negligence statute discloses no basis for concluding that the Kansas legislature actually intended to exclude any application of comparative principles outside the scope of the statute. All prior drafts of the statute that were considered by the various legislative committees referred only to negligence actions. Moreover, the legislative committees appear to have been preoccupied with seeking a statutory solution to two specific problems that had consistently prevented the achievement of equitable loss distribution in common law negligence actions—the contributory negligence problem and the joint judgment debtor problem. Nothing in the legislative history indicates that either the entire legislature or any of its committees

from the legislation cannot be realistically viewed as interference with the legislature's prerogative to enact a comprehensive comparative fault system. In the absence of a clear legislative intent to the contrary, matters omitted from legislation should be deemed to be deferred to the judiciary. Certainly the specific mechanisms and the broad policies of the legislation should guide the courts in making these additional decisions, but this approach is quite different from treating incomplete legislation as comprehensive legislation.


* See Special Comm. Rep., note 64 supra. Although at one point the Committee used the word "fault" in its report, the context clearly indicates that the Committee was using "fault" as synonymous with "negligence." Id. at 84-2.

* Comparison of the various drafts of S. 146, Kan. Legis. (1973), and of H.R. 1784, Kan. Legis. (1974), indicate that one substantive issue that preoccupied the legislative committees was the type of modified comparative negligence system that should be adopted. The Senate version provided that plaintiff should recover as long as his or her negligence was not greater than a defendant's negligence, i.e., the 50% rule applied separately to each defendant. The House version provided that plaintiff should recover as long as his or her negligence was less than the negligence of all defendants, i.e., the 49% rule coupled with aggregate comparison. The legislature ultimately adopted the House version.

* The other substantive issue considered by the legislature was the allocation of liability among multiple parties. The individual judgment system based on proportionate fault was included in all versions of the S. 146, Kan. Legis. (1973), but was not included in the first two versions of the H.R. 1784, Kan. Legis. (1974). The final version of the House bill included the individual judgment system and added a provision for the joinder of additional parties.
ever considered the possible application of comparative principles by statute or otherwise to any conceptual form of legal fault other than negligence. The subject matter simply never arose. It would be quite illogical to assume that the legislature had any intent whatsoever concerning strict liability. At the time that the comparative negligence statute was enacted in 1974, the Kansas courts had not yet adopted the section 402A theory of strict tort liability and had not yet indicated that the implied warranty theory of products liability was in reality tort liability. These developments did not occur until two years later in Brooks v. Dietz.\textsuperscript{78}

Should this total absence of legislative consideration of other possible applications of comparative principles be interpreted as a denial of judicial authority to apply comparative principles in areas of tort law outside the scope of the statute? In an area in which the creation and definition of rights and benefits is primarily a legislative prerogative, legislative silence concerning an omitted matter that might reasonably have been included within a statutory system could properly be interpreted as an “intent” to exclude the matter.\textsuperscript{77} The opposite conclusion would seem more appropriate, however, when a statute constitutes a limited legislative intrusion into an area that has been primarily and traditionally the prerogative of the judiciary.\textsuperscript{78}

2. Development of Tort Law is a Judicial Function

The development of rules of tort law in a manner consistent with the sound public policy of equitable loss distribution has always been primarily a judicial function to be freely exercised in the absence of any controlling legislative enactment. The development of the contributory negligence rule under the all or nothing common law system provides a good example. The contributory negligence rule was harsh because it imposed on plaintiff the entire burden of an injury that was caused by the negligent conduct of both plaintiff and defendant. In order to justify the rule, courts attempted to distinguish plaintiff’s situation on conceptual grounds such as proximate cause and on policy grounds such as deterrence,\textsuperscript{79} but the rule probably existed because the parties were presumptively indistinguishable. Concerning the general category of harms caused by the negligence of both plaintiff and defendant, each party would initially be presumed to be equally blameworthy, equally capable of bearing the loss, and equally appropriate as the party whose wrongful conduct should be deterred. Thus, the contributory negligence rule is essentially an arbitrary decision\textsuperscript{80} necessitated by the fundamental underlying premise of the common law.

\textsuperscript{78} 218 Kan. 698, 545 P.2d 1104 (1976).
\textsuperscript{79} As Dean Prosser aptly noted, these arguments applied equally to defendant and could not justify the contributory negligence rule. See Prosser, supra note 23, \S 65, at 416-18; James, Contributory Negligence, 62 Yale L.J. 691, 696-703 (1953).
\textsuperscript{80} The contributory negligence rule may be viewed as arbitrary in the sense that conceptual legal analysis combined with both the traditional tort policy bases of compensation and deterrence, and the equitable considerations of loss allocation provide no justification for the rule. The rule is not entirely unexplainable, however. The most common explanation is that both its origin and its widespread judicial acceptance during the 19th century were the result of perceived economic interests in promoting industrial growth generally and in railroad expansion specifically by protecting them from the flood of personal injury lawsuits that these activities could be expected to generate. See, e.g., James, supra note 79, at 695-96; Malone, The Formative Era of Contributory Negligence, 41 Ill. L. Rev. 151, 151-55 (1946); Prosser, Comparative Negligence, 51 Mich. L. Rev. 465, 468-69 (1953). This explanation would seem
in the precomparative negligence period that a loss caused by the wrongful conduct of two parties must be distributed entirely to one party rather than apportioned between them.\footnote{Generally, courts never attempted to provide any rationale for this underlying premise. One commentator has suggested that courts were concerned that the process of apportionment of losses on a comparative fault basis would be too difficult and speculative. See Prosser, supra note 80, at 474-75. Even if this point were valid, it does little to explain the absence of any judicial interest in pro rata allocation of loss between plaintiff and defendant. The rationale most frequently accepted by commentators is that the ill all or nothing premise was a necessary adjunct to the judicial desire to retain control over the perceived profligacy of the courts in the direction of personal injury actions. See James, supra note 79, at 695-96; Malone, supra note 80, at 164-77; Prosser, supra note 80, at 468-69. For an excellent analysis of this rationale in the early development of the contributory negligence rule in Illinois, see Green, Illinois Negligence Law, 39 Ill. L. Rev. 36 (1944).} The courts recognized exceptions to the contributory negligence rule in cases in which this presumption of indistinguishability was clearly invalid and in which considerations of equitable loss allocation favored a shifting of the loss to defendant. The rules that mere contributory negligence is not a defense to defendant's intentional,\footnote{See Restatement (Second) of Torts § 481 (1965). See, e.g., Eckerd v. Weve, 85 Kan. 752, 118 P. 870 (1911).} reckless,\footnote{See Restatement (Second) of Torts § 482 (1965). In Kansas reckless conduct is treated as synonymous with wanton conduct. See Elliott v. Peters, 163 Kan. 631, 635, 185 P.2d 139, 143 (1947).} willful, or wanton\footnote{See, e.g., Friesen v. Chicago, Rock Island & Pac. R.R., 215 Kan. 316, 524 P.2d 1141 (1974); Byers v. Heaton Appliance, Inc., 212 Kan. 125, 509 P.2d 1151 (1973); Kniffen v. Hercules Powder Co., 164 Kan. 196, 188 P.2d 980 (1948).} conduct shifted the loss to the clearly more blameworthy party. The rule that mere contributory negligence is not a defense to a strict tort\footnote{See, e.g., Brooks v. Dietz, 218 Kan. 698, 545 P.2d 1104 (1976).} or implied warranty action based on defendant's manufacture and sale of a defective product shifted the loss to the party that presumably had the greater capacity to bear the loss.\footnote{See, e.g., Beerman v. Burdzinski, 204 Kan. 162, 460 P.2d 567 (1969).} The rule that mere contributory negligence is not a defense to defendant's violation of a safety statute designed to protect a class of persons deemed relatively incapable of protecting themselves\footnote{A capacity to pay rationale for strict product liability is supported by the limitation of both § 402A and the implied warranty of merchantability to commercial sellers. Section 402A is limited to a seller who is "engaged in the business of selling such a product." Restatement (Second) of Torts § 402A(1)(a) (1965). The implied warranty of merchantability is limited to a seller who is "a merchant with respect to goods of that kind." Kan. Stat. Ann. § 84-2-314(1) (1965). The "occasional" or "casual" seller is clearly excluded from these provisions. See Kan. Stat. Ann. § 84-2-314(1), Kansas Comment (1965) (referring to "casual" seller). Restatement (Second) of Torts § 402A, Comment f at 350-51 (1965) (referring to "occasional" seller). While commercial sellers may be presumed to carry insurance or otherwise have the ability to pay for losses and to spread the cost over a substantial number of transactions, users and consumers from the general population may not have the same presumptive capacity to bear and to spread losses. Users and consumers could become loss bearers and spreaders through private insurance, but manufacturers may be better loss spreaders, at least with respect to situations involving numerous small sales to large numbers of users and consumers. See generally G. Calabresi, The Costs of Accidents: A Legal and Economic Analysis 161-73 (1970). Moreover, large numbers of users and consumers probably would not become self-insurers, and society has an interest in not permitting substantial numbers of injured persons to remain uncompensated. See generally Franklin, Replacing the Negligence Lottery: Compensation and Selective Reimbursement, 53 Va. L. Rev. 774 (1967).} shifted the loss to the more appropriate party in terms of the deterrence rationale of tort law. Each of these rules is founded on some distinguishing characteristic of a general category of cases that affirmatively identifies defendant as the more appropriate party to bear
the loss.\textsuperscript{90} In this sense the exceptions to the contributory negligence rule reflect a long- and well-established judicial policy of mitigating the harshness of the all or nothing system and of promoting equitable loss distribution.\textsuperscript{90}

3. Promotion of Equitable Loss Distribution

If one accepts the proposition that the promotion of equitable loss distribution has always been an inherent component of judicial control over the development of tort law, there should be no compelling reason to assume that courts could not have judicially adopted comparative principles to replace the traditional all or nothing system of loss distribution.\textsuperscript{91} Courts have always been free to discard or to modify judicially created doctrines that produced unsound or unsatisfactory results.\textsuperscript{92} Despite the well-recognized harshness of the all or nothing system,\textsuperscript{93} however, the Kansas courts have never exercised their prerogative to adopt comparative principles. Against this background, the enactment of the Kansas comparative negligence statute may be viewed as a manifestation of legislative intent to mandate the elimination of the harsh results of the all or nothing system in negligence cases.\textsuperscript{94} If the harshness of this system were deemed to be so onerous as to justify legislative intrusion into an area traditionally reserved to the judiciary, it would seem illogical and anomalous to interpret the same legislation as "intended" to prohibit judicial adoption of comparative principles in other areas of tort law in which the all or nothing system has produced similar harsh results. Therefore, the more logical approach would be to interpret the statute as intended to affect only negligence

\textsuperscript{90} Ironically, the 49% rule system of modified comparative negligence adopted in Kansas and in many other jurisdictions returns to the all or nothing principle and shifts the entire burden of loss to plaintiff exactly at the point at which the presumptive indistinguishability of the parties is found by the jury to be a reality.

\textsuperscript{91} This system might be better described as "less inequitable loss distribution" rather than "equitable loss distribution." The basic inequity of imposing the entire burden on one of two blameworthy parties remained. Moreover, the system lacked the capacity to shift the burden of loss to defendant on an ad hoc basis when the various relevant policy considerations favored such a shift under the circumstances of a given case; rather, the burden was shifted only when plaintiff's situation came within a previously defined category of cases in which these policy considerations had general applicability.

\textsuperscript{92} See note 71 supra.

\textsuperscript{93} For example, the doctrine of governmental immunity originated in the common law and was well established and entrenched in Kansas until 1969. Yet commencing with Carroll v. Kittle, 203 Kan. 841, 457 P.2d 21 (1969), and continuing through Gorrell v. City of Parsons, 223 Kan. 645, 576 P.2d 616 (1978), and Plax v. Kansas Turnpike Authority, 226 Kan. 1, 596 P.2d 446 (1979), the Kansas Supreme Court demonstrated a strong commitment to reform the doctrine by attempting to extend liability to the State of Kansas and by abandoning the governmental-proprietary distinction. Arguably, the court should have left changes of this magnitude to the legislature, but without this judicial leadership, the Kansas Legislature may not have acted as quickly to enact the Kansas Tort Claims Act.

\textsuperscript{94} Dean Leon Green characterized contributory negligence as "the harshest doctrine known to the common law of the 19th century." Green, supra note 81, at 36. Dean Prosser referred to "the obvious injustice of a rule which visits the entire loss caused by the fault of two parties on one of them alone, and that one the injured plaintiff, least able to bear it, and quite possibly much less at fault than the defendant who goes scot free." Prosser, supra note 80, at 469. See also James, supra note 79, at 704-05; Turk, Comparative Negligence on the March, 28 Chi.-Kent L. Rev. 189, 199-203 (1950).

\textsuperscript{95} An accepted rule of statutory construction in Kansas is that courts may examine the historical background of a statute in order to use the circumstances that gave rise to the legislation as a guide to determining the underlying intent of the legislation. See, e.g., State v. City of Overland Park, 213 Kan. 700, 713, 527 P.2d 1340, 1351-52 (1974); Duggan v. Navart, 198 Kan. 637, 639, 426 P.2d 153, 155 (1967). The circumstances that primarily influenced the Kansas comparative negligence statute were the harshness of the contributory negligence rule and, to a lesser extent, the harshness of only limited availability of contribution among joint and several tortfeasors. See notes 74-75 and accompanying text supra. The legislature resolved both of these problems by abolishing the harsh all or nothing principles applied in these areas and by substituting comparative fault principles.
actions and to leave courts wholly free to develop a sound policy of loss allocation in other areas of tort law.\textsuperscript{65}

A judicially created comparative fault system applicable to strict liability actions is the preferable approach to the statutory problem. First, it would avoid both the semantic difficulties of the negligence per se approach and the serious analytical deficiencies of the legislative intent approach. Second, it would probably permit a more selective determination of the specific areas of tort law more appropriate for the application of comparative principles. The legislative intent approach provides no analytical basis for distinguishing among different areas of tort law or among different conceptual forms of legal fault, and the negligence per se approach may involve the same problem to a lesser extent. For example, assume that sound public policy supported the application of comparative fault principles to strict liability actions based on defective products, but not to strict liability actions based on abnormally dangerous activities.\textsuperscript{66} The legislative intent approach provides no analytical basis for distinguishing between the two forms of strict liability; once the courts characterized one form as negligence per se, it would be difficult to conclude differently as to the other. Under the judicial adoption approach, however, the court would focus solely on sound public policy, and distinguishing between them would raise no problem.

Finally, and perhaps most importantly, the judicial adoption approach would enable the courts to develop a comparative fault system for strict liability actions that differs somewhat from the provisions of the comparative negligence statute. The loss allocation theories of the comparative fault provisions and principles of the Kansas statute and strict liability may be somewhat incompatible.\textsuperscript{67} For example, the individual judgment system as opposed to joint and several liability may be an inappropriate loss allocation mechanism as applied to the manufacturer's chain of supply and distribution. If the court uses the negligence per se or the legislative intent approach to apply comparative fault principles to strict liability actions, the court would have difficulty deviating from the individual judgment provision of the statute even if sound tort policy supported this deviation. As a result, all conflicts in policy matters would be artificially resolved in favor of the Kansas statute and contrary to the policies underlying strict liability. The judicial adoption approach would avoid this one-sidedness and would permit judicial flexibility in seeking to achieve greater compatibility between conflicting loss allocation policies. Since the Kansas legislature had no intent concerning the application of comparative fault principles to strict

\textsuperscript{65} Under this judicial adoption approach the legislation is not necessarily rendered meaningless. Rather, the broad purpose and public policy considerations underlying the legislation may be used for guidance in other appropriate situations not actually encompassed by the legislation. For example, in Petersen v. Hubschman Constr. Co., 76 Ill. 2d 31, 389 N.E.2d 1154 (1979), the Illinois Supreme Court judicially created an implied warranty of habitability applicable to the sale of new housing and drew an analogy to the public policy considerations underlying the implied warranty provisions applicable to the sale of goods under the Uniform Commercial Code (UCC). The public policy of the Kansas comparative negligence statute is that comparative fault principles provide a more equitable method of allocating tort losses than all or nothing principles. Thus, by drawing an analogy to this broad purpose of the legislation, the Kansas courts should have the liberty to substitute comparative fault principles in other areas not encompassed by the statute if a more equitable method of loss distribution would result.

\textsuperscript{66} The distinction between these two forms of strict liability is raised hypothetically for the sole purpose of demonstrating the desire for judicial control unencumbered by statutory considerations. The authors take no position in this Article concerning the application of comparative fault principles to strict liability for abnormally dangerous activities.

\textsuperscript{67} See notes 374-98 and accompanying text infra.
liability, the negligence per se and legislative intent approaches would give the Kansas statute an unwarranted influence over strict liability actions. 88

III. THE SUBSTANTIVE POLICY CONSIDERATIONS

The question whether comparative fault principles should be applied to strict liability actions must be answered on the basis of the fundamental policy considerations underlying strict liability for defective products. This determination may be best viewed as involving the question whether any justification exists for continuing to impose on manufacturers an amount of liability in excess of the liability that they would bear under a comparative fault system. Under a comparative fault system each party, including a strictly liable manufacturer, would bear an amount of liability or loss in proportion to his or her relative causal fault, whereas presently strictly liable manufacturers frequently bear excess liability attributable to the fault of plaintiffs or third parties. Under this analysis, the issue may be divided into two parts. First, is the loss spreading rationale commonly used to justify strict liability incompatible with the loss allocation theory underlying comparative fault systems? Second, do the fundamental tort policies of compensation and deterrence justify the imposition of excess liability on parties who are liable without fault? Both questions must be answered in the negative. In addition, the policy of nondiscriminatory loss allocation supports the application of comparative fault principles to strict liability actions.

A. The Illusory Conflict in Loss Allocation Theories

Although a majority of courts 89 and commentators 90 have concluded that

---

88 One caveat is necessary in recommending the judicial adoption approach over either of the statutory construction approaches. No sound reason would prevent the Kansas courts from judicially creating a comparative fault system for strict liability actions that eliminates any provision of the Kansas comparative negligence statute deemed to be contrary to sound tort policy. The Kansas courts need only draw an analogy to the broad purpose of the statute, and otherwise they are at liberty to deviate from the specific statutory provisions in order to accomplish the most equitable system of loss distribution. Nevertheless, the authors will continue to follow the more restrictive approach of accepting the policies and the provisions of the Kansas statute as reflecting sound tort policy and recommending only those deviations that are deemed necessary to provide greater compatibility between the underlying policies of the Kansas statute and strict liability. By limiting our recommendations, the authors would consider these recommendations appropriate even if the courts should decide to adopt one of the statutory construction approaches rather than the judicial adoption approach.

89 As used in this Article, the phrase “excess liability” means any portion of the total dollar liability charged to a strictly liable party in excess of the liability that a negligent party in similar circumstances would bear under the comparative fault system in effect in a given jurisdiction. What constitutes excess liability will vary depending on the precise provisions of a jurisdiction’s comparative fault system. For example, the proportionate share of total liability attributable to a judgment proof tortfeasor, if borne by a strictly liable manufacturer, would constitute excess liability in a jurisdiction substituting an individual judgment system for joint and several liability, but not in a jurisdiction retaining joint and several liability.


91 See, e.g., Brewster, supra note 19, at 113-14; Feinberg, The Applicability of a Comparative Negli-
comparative fault and strict liability are not incompatible, these authorities provide only partial support for the similar conclusion of the authors. The application of comparative fault to strict liability cannot be realistically viewed as a single unitary issue common to all jurisdictions having both a comparative fault system and strict liability for defective products. Comparative fault systems differ greatly concerning purpose,\textsuperscript{102} scope of plaintiff recovery,\textsuperscript{103} and loss allocation among multiple tortfeasors,\textsuperscript{104} and strict liability jurisdictions vary significantly concerning the scope of recognized defenses.\textsuperscript{105} Therefore, the meshing together of a comparative fault system and strict liability may produce greatly varied results concerning the impact on plaintiff's compensation and on the manufacturer's ultimate burden of loss.\textsuperscript{106}

The Kansas comparative negligence statute is unique in the extent to which it limits tortfeasors' scope of liability strictly on the basis of proportionate fault; this uniqueness creates an apparent conflict between the loss allocation theories that underlie comparative fault and strict liability in Kansas.

The modern rationale of all strict liability systems is that the characteristics of


Professor Twerski, one of the most prolific and thoughtful writers in the field of products liability, has taken a more cautious approach. He recognizes some advantages of comparative fault principles in products liability litigation, but expresses strong reservations about the unlimited application of comparative fault principles in a manner that would undermine the development and clear articulation of special duties owed by manufacturers. See Twerski, Comparative Causation, supra note 19; Twerski, The Use and Abuse of Comparative Negligence in Products Liability, 10 Ind. L. Rev. 797 (1977) [hereinafter cited as Twerski, Comparative Negligence], supra note 47.

Some comparative fault systems apparently have the broad purpose of achieving equitable loss distribution by allowing all fault of all parties, whereas other systems apparently have a more narrow purpose and apply only to those situations in which plaintiff's contributory negligence was previously a total bar to recovery. Thus, in some jurisdictions plaintiff's mere contributory negligence is compared in strict liability actions, while in other jurisdictions it is no defense. Compare Butaud v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42 (Ala. 1976) and Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978) with Busch v. Busch Constr., Inc., 262 N.W.2d 377 (Minn. 1977) and Murray v. Beloit Power Sys., Inc., 450 F. Supp. 1145 (D.V.I. 1978). The same problem arises when a defendant violates a safety statute designed to protect a class of persons from their own negligence. See SCHWARTZ, supra note 4, § 6.2, at 119-25.

Only eight of the thirty-three comparative fault states have adopted pure comparative fault; twenty-five states follow some form of modified comparative fault that reintroduces the complete defense of contributory negligence after a certain quantum of plaintiff fault. See note 10 supra.

See id.

Considerable conflict and confusion exists in various strict liability jurisdictions concerning whether and to what extent plaintiff's mere contributory negligence short of assumption of risk and plaintiff's misuse or abnormal use of the product constitute defenses to strict liability actions. See Noel, supra note 101, at 118.

The issue whether comparative fault principles should be applied to strict liability actions should vary from state to state, depending on an evaluation of the policies underlying strict liability and on the impact of the state's specific form of comparative fault on those policies. For example, the compensation interest underlying strict liability will be impaired to some extent in a modified comparative fault state that subjects all forms of plaintiff fault to comparison, whereas this interest will be enhanced in a pure comparative fault jurisdiction that applies comparative fault principles only to those forms of plaintiff fault that formerly constituted complete defenses. Similarly, the compensation interest will be impaired to some extent in a comparative fault system, whereas the compensation interest will not be affected in a state that retains joint and several liability.
certain activities in a complex society provide sufficient legal justification for shifting the burden of some accident losses from the injured party to the actor, even though the actor may have exercised all reasonable care in the manner in which he or she engaged in the activity. The primary characteristics that have given rise to strict liability for defective products are the relative inability of users and consumers to avoid injuries resulting from defective products, the financial hardship imposed on users and consumers if they are required to bear the burden of unavoidable losses caused by defective products, and the greater ability of commercial sellers of products to bear these losses by treating them as a manufacturing and marketing cost to be spread over all units of production. Thus, strict liability reflects the loss allocation theory that under certain circumstances fair allocation of losses involves the shifting of these losses to the party having the greater ability to bear them.

The rationale of all comparative negligence systems is that to some extent the ultimate allocation of tort losses based on each party’s proportionate fault will generally constitute a fair allocation of loss. Theoretically, comparative fault provides for a perfect balance between the compensation and deterrence policies of tort law because each party is both deterred and obligated to pay compensation or to bear loss in proportion to relative degrees of fault. The insolvency, immunity, or other unavailability of a party will frequently distort this ideal situation, and most comparative negligence jurisdictions have retained some balance between the interest in proportionate allocation of loss and the separate tort interest in compensating injured parties. For example, the majority of comparative negligence jurisdictions have retained joint and several liability and provide for contribution among tortfeasors on either a pro rata or a comparative fault basis. This approach expresses an initial preference for compensation and treats fair allocation of the loss among the tortfeasors as a secondary objective and thus shifts to the tortfeasors the risks of insolvency, immunity, unavailability, and other factors that distort the ideal allocation of these losses.

---

107 The concept of strict liability may be viewed as a legal preference for plaintiff’s interest in security, whereas the concept of fault may be viewed as a legal preference for defendant’s interest in freedom of action. Seavey, Principles of Torts, 56 Harv. L. Rev. 72, 73 (1942). Since the emergence of fault as the primary basis of liability in modern tort law, formal recognition of strict liability has been the exception, not the rule, and thus has been restricted to carefully defined categories of cases in which special reason exists for preferring plaintiff’s interest in security over defendant’s interest in freedom of action. For example, strict liability may be imposed on one who keeps a wild animal not indigenous to the locality and on one who engages in an abnormally dangerous activity that is not a matter of common usage. Restatement (Second) of Torts §§ 507-508, 519-520 (1977). In each situation the actor has introduced into the community something that involves not only a heightened risk of harm despite the exercise of reasonable care, but also a new and unusual risk to which the community would not otherwise normally be exposed. Thus, as between two innocent parties, i.e., two nonnegligent or morally blameless parties, specific justification exists for imposing the burden of loss on defendant rather than on plaintiff.


109 See note 15 supra.

110 See note 10 supra.

111 The retention of joint and several liability enhances the likelihood of full compensation for plaintiff by allowing plaintiff access to the assets of all tortfeasors until the full amount of the judgment is paid. Once plaintiff is compensated, contribution effects a more equitable allocation of loss among the tortfeasors. This sequence of loss distribution promotes the compensation rationale of tort law by deferring the impact of any distortion until after satisfaction of plaintiff’s judgment.
Comparative Fault and Strict Products Liability in Kansas

The Kansas comparative statute is unique, however, in the extent to which it promotes the rationale of proportionate liability and subordinates the tort interest in compensation. Under Kansas law, not only has a system of individual judgments based on each tortfeasor's proportionate fault replaced joint and several liability, but the statute considers the fault of immune, unavailable, and unknown tortfeasors in order to reduce the degree of fault, and thereby the amount of damages, attributable to suable tortfeasors. By shifting to plaintiff the burden of all legal and practical barriers to the accomplishment of a true proportionate allocation of loss based on relative fault, the Kansas comparative negligence statute reflects a loss allocation theory under which fair allocation of loss simply means the strict limitation of a defendant's obligation to pay damages to an amount based on proportionate fault without regard to any impact on plaintiff's interest in compensation.

An uncompromising application of the Kansas comparative negligence statute to strict liability actions would undoubtedly result in a significant reduction of overall plaintiff compensation and a commensurate reduction in the deterrence of unsafe products. All forms of actual fault by plaintiff would constitute the basis not only for a reduction of compensation in proportion to plaintiff's fault, but also for a complete bar to compensation under the forty-nine percent rule of modified comparative fault adopted in Kansas. In addition, manufacturers would avoid paying any compensation attributable to the insolvency, immunity, or other unavailability of other tortfeasors under the individual judgment provision of the Kansas statute.


[114] In Brown the court initially indicated that "the legislature intended to equate recovery and duty to pay to degree of fault." 224 Kan. at 203, 580 P.2d at 873 (emphasis added). The inclusion of "recovery" in this definition logically followed from the provision that plaintiff's recovery should be reduced only in proportion to his or her degree of fault. Kan. Stat. Ann. § 60-258a(a) (1976). Immediately thereafter, the court redefined this legislative intent to merely "relate duty to pay to the degree of fault." 224 Kan. at 203, 580 P.2d at 874. Despite the statutory limitation of the individual judgment system to "parties against whom . . . recovery is allowed," Kan. Stat. Ann. § 60-258a(d) (1976), the court then interpreted that provision as permitting the consideration of the fault of immune, unavailable, and unknown tortfeasors in proportionate fault determinations under the individual judgment system so that no defendant would ever be exposed to liability in excess of the amount based upon his or her proportionate fault. 224 Kan. at 206, 580 P.2d at 875-76. In Miles v. West, 224 Kan. 284, 580 P.2d 876 (1978), the court explained that this interpretation was necessary because the comparative negligence statute was intended to prevent the harsh results formerly produced by the concept of joint and several liability. Any alleged unfairness to plaintiffs, including plaintiffs wholly free from fault, was simply "the price plaintiffs must pay for being relieved of the burden formerly placed upon them by the complete bar to recovery based on contributory negligence." 224 Kan. at 287, 580 P.2d at 880. Thus, the court interpreted the comparative negligence statute in a manner most protective of defendants' interest in avoiding liability and in a manner least promotive of plaintiffs' interest in obtaining compensation for injuries.


[116] Both the 49% rule modifying a contributorily negligent plaintiff's right to recover a portion of the total damages and the individual judgment system applied to multiple tortfeasors may be criticized as incompatible with the tort policy of promoting compensation for injuries suffered. In general, however, these criticisms relate to fundamental provisions in the statute that the Kansas courts are largely powerless to change. Moreover, while judicial extension of the individual judgment system to immune, unavailable, and unknown tortfeasors seems to contradict the clear language of the statute and to augment the harshness to plaintiffs, both authors have previously recognized that this extension was not without a rational basis. Considering the initial starting point created by the legislature, See Westerbeke, supra note 57, at 343-45; Comment, Brown and Miles: At Last, An End to Ambiguity in the Kansas Law of Comparative

Conversely, if comparative fault principles are not applied to strict liability actions, overall plaintiff compensation and manufacturer deterrence would be significantly greater. The manufacturer would bear excess liability otherwise attributable to any plaintiff fault not rising to the level of voluntary and unreasonable exposure to a known risk. In addition, manufacturers would remain jointly and severally liable for the total liability owed to plaintiff and would bear excess liability attributable to the fault of any insolvent, immune, or otherwise unavailable tortfeasor, including any solvent and suable tortfeasor not made a joint judgment debtor of plaintiff.

Nevertheless, this substantial impact of the Kansas comparative negligence statute on compensation and deterrence in strict liability actions does not answer the ultimate question of resolving the apparent conflict between loss allocation theories, but rather merely provides the appropriate starting point for analysis. The issue becomes whether and to what extent the excess liability presently borne by manufacturers reflects an affirmative policy of strict liability to shift excess liability to manufacturers or the merely fortuitous results of a strict liability doctrine that developed under the all or nothing system.

In any tort action proper analysis should involve two levels of inquiry. First, did one or more of the parties breach a legal obligation that would justify the imposition of liability? Second, how should the loss be allocated between or among the parties? Unfortunately, legal analysis of tort issues is occasionally confused by the inadvertent intermingling of these two essentially separate questions, and this overlap may be a primary source of the confusion concerning the application of comparative fault principles to strict liability actions. The common rationale that manufacturers are better able than users and consumers to bear and spread losses caused by defective products may be interpreted in two ways. It might suggest that losses should be

*Negligence, 27 Kan. L. Rev. 111, 131-32 (1978). Since courts are largely powerless to rewrite the statute, it is even more important that courts seriously consider the propriety of the judicial adoption approach of applying comparative fault principles to strict liability actions.*

*See notes 5-9 and accompanying text supra.*

*The same conflict would logically exist in those jurisdictions that have adopted the individual judgment system or limited special applications of the individual judgment concept, although the conflict would be of lesser magnitude since no other jurisdiction has included the fault of immune, unavailable, and unknown tortfeasors in the individual judgment system. See id. The conflict will exist even in jurisdictions that have retained joint and several liability, although to a much lesser extent, if the jurisdiction under its all or nothing system refuses to recognize contributory negligence consisting merely of plaintiff’s failure to discover the defect or to take precautions against its possible existence as a defense to a strict product liability action. See notes 171-91 and accompanying text infra.*

*This level of inquiry involves only the initial determination that a party is legally at fault and thus could justifiably incur the obligation to bear all or part of the loss. A finding of legal fault, however, does not necessarily mean that the party will be obligated to bear the loss; it only provides the justification for that obligation in the event that it should ultimately be imposed on the party. For example, if defendant’s negligent conduct proximately causes plaintiff’s injury, legal justification exists for imposing the burden of loss on defendant. If plaintiff’s contributory negligence is also a proximate cause of his or her injury, then under the all or nothing system defendant would not incur the obligation to bear the loss even though there would be legal justification for a contrary result. Indeed, under a pure comparative fault system defendant’s obligation to bear a portion of the loss would be both justified and imposed.*

*Once the legal fault of the parties has been determined, the determination of the allocation of the loss between or among the parties is made on the basis of a wide range of judicial and societal policy considerations. For example, the fundamental premise of the all or nothing system that the entire burden of loss must be imposed on either the negligent defendant or the contributorily negligent plaintiff was apparently based in part on considerations of judicial administration, i.e., the desire to retain judicial control over juries. See note 81 supra. The decision to shift the entire burden from the contributorily negligent plaintiff to the negligent defendant in certain categories of cases was based on broad tort policies of relative fault, deterrence, and perhaps capacity to bear loss. See notes 82-90 and accompanying text supra.*
shifted away from other blameworthy parties to manufacturers because manufacturers have a special ability to spread these losses by adding a small insurance cost to each unit of production. Under this interpretation strict liability would possess limited characteristics of an insurance system because all purchasers of products would pay to insure users and consumers against certain harms. The rationale may be viewed more narrowly, however, as merely providing legal justification for subjecting manufacturers of defective products to liability without regard to fault. Under this interpretation strict liability would focus on the question of the initial imposition of liability\textsuperscript{122} and would remain largely neutral concerning the ultimate allocation of loss among multiple tortfeasors. The apparent conflict between loss allocation theories declines in relative importance to the extent that the latter interpretation is the more accurate assessment of strict liability.

A historical analysis indicates that strict liability was adopted simply as a justification for the initial imposition of liability on manufacturers of defective products in order to surmount the artificial barriers to recovery under negligence and warranty theories. The excess liability imposed on manufacturers that is attributable to the fault of plaintiffs and third parties apparently is primarily a function of the limitations of the all or nothing system rather than the result of any carefully considered affirmative policy of strict liability. Thus, the apparent conflict between the loss allocation theories of comparative fault and strict liability is largely illusory.

1. The Historical Development of Strict Liability

At the beginning of the twentieth century users and consumers who had been injured by defective products were confronted with an array of pragmatic and doctrinal barriers that frequently prevented the imposition of any liability against the manufacturers or the sellers of those products. In a negligence action, plaintiff had to prove both that the defect was the result of negligence\textsuperscript{125} and that the defendant was the negligent party in the chain of distribution.\textsuperscript{124} Yet courts permitted only limited pretrial discovery,\textsuperscript{126} products and manufacturing processes were becoming increasingly complex,\textsuperscript{128} and because of modern distribution methods, an increased number of parties had some possession and control over the product before it reached the ultimate purchaser.\textsuperscript{127} In certain categories of cases the doctrine of re ipsa

\textsuperscript{122} As used in this Article, the phrase "initial imposition of liability" refers only to the initial determination that a party has breached a legal obligation and not to any considerations relating to the ultimate allocation of the loss among the parties.


\textsuperscript{125} See generally, F. James, Civil Procedure § 6.1, at 179-82 (1965); R. Millar, Civil Procedure of the Trial Court in Historical Perspective 201-28 (1952); Developments in the Law—Discovery, 74 Harv. L. Rev. 940, 946-51 (1961). For the historical background of pretrial discovery in Kansas, see Degnan, Enlarging Kansas Discovery, 11 Kan. L. Rev. 221 (1962).

\textsuperscript{126} See Gillam, Products Liability in a Nutshell, 37 Okla. L. Rev. 119, 144-45 (1958).

loquitur could overcome these problems, but the uses of the doctrine were somewhat limited, and courts applied it unevenly. The development of implied warranty was more helpful in overcoming these evidentiary problems because of its strict liability characteristics, but warranty was perceived as a contract doctrine used primarily to govern commercial transactions and thus presented users and consumers with new barriers of notice, disclaimer, and limitation of liability. Although notice was useful in true commercial transactions, it became a “booby trap for the unwary” in personal injury cases. In addition, the ultimate purchaser lacked the necessary bargaining power to counteract the disclaimers and the limitations of liability contained in standardized contracts prepared by manufacturers.

Users and consumers in both negligence and implied warranty actions also faced the requirement of privity of contract, which posed a formidable barrier to recovery because of the increased use of independent retailers and middlemen in the mass distribution of products and because defective products frequently caused injuries not to the actual purchaser, but rather to persons other than the purchaser such as family members, employees, acquaintances of the purchaser, and foreseeable bystanders. Although the privity barrier fell early in negligence actions,
it fell slowly and piecemeal in implied warranty actions, falling first for unwholesome foods, then gradually for cosmetics and other products intended for intimate bodily contact, and only at a relatively late date for defective products generally.

Of course, the existence of numerous barriers to recovery does not necessarily mean that the ultimate recognition of the strict tort theory of liability was not intended to effect changes broader than a mere streamlined basis for the initial imposition of liability. If courts and commentators were deeply concerned about broader questions of ultimate loss allocation theories relevant to product liability actions, most have kept these concerns quiet. The overwhelming majority of the commentary prior to the adoption of section 402A focused almost entirely on matters relating to the initial imposition of liability—problems of proof in negligence cases, problems of privity of contract in negligence and warranty cases, problems of notice, disclaimer, and limitation of liability in warranty cases, and the problem of the appropriate conceptual theory of liability. Commentators discussed the policies of compensation and deterrence in their traditional context as bases for the imposition of liability and not from the perspective of new theories of loss distribution. In all of this literature the arguments were framed primarily in terms of the simplest model—a nonculpable plaintiff versus the manufacturer of a defective product or those in his chain of distribution; problems relating to defenses based on plaintiff’s fault were largely ignored or were given only cursory treatment.

A parallel body of literature considered the general problems of contribution and

---

146 See Mazetti v. Armour & Co., 75 Wash. 622, 135 P. 633 (1913); Haley v. Swift & Co., 152 Wis. 570, 140 N.W. 292 (1913); Perkins, Unwholesome Food as a Source of Liability (pt. 1), 5 Iowa L. Bull. 6, 12-16 (1919).


149 See James, supra note 123, at 68-76.

150 See generally Jeanblanc, Manufacturer's Liability to Persons Other Than Their Immediate Vendors, 24 Va. L. Rev. 134 (1937); Milling, Henningsen and the Pre-Delivery Inspection and Condition-Schedule, 16 Rutgers L. Rev. 559 (1962).


157 See Noel, supra note 147, at 1009-11.

158 A search of the legal literature relating to liability for defective products prior to the promulgation of the Restatement (Second) of Torts § 402A (1965) discloses no attempt by commentators to suggest that the loss spreading capacities of manufacturers supports full compensation of plaintiffs who contributed to their own injury. The overwhelming majority of the literature during this period wholly ignores issues relating to plaintiffs' fault. The literature that does mention these issues tends to limit the discussion to description of existing or developing rules. See, e.g., Green, Should the Manufacturer of General Products Be Liable Without Negligence?, 24 Tenn. L. Rev. 928, 950 (1957); Keeton, Products Liability—Liability Without Fault and the Requirement of a Defect, 41 Tex. L. Rev. 855, 872-73 (1963); Prosser, supra note 131, at 1147-48; Rheingold, Products Liability—The Ethical Drug Manufacturer's Liability, 18 Rutgers L. Rev. 947, 990-92 (1964); Wilson, supra note 124, at 827-30.

indemnity\textsuperscript{160} both as equitable remedies\textsuperscript{161} and as loss distribution mechanisms,\textsuperscript{162} but apparently none of this literature singled out manufacturers of defective products as deserving different treatment from other joint and several tortfeasors.\textsuperscript{163}

In this legal environment the California Supreme Court in \textit{Greenman v. Yuba Power Products, Inc.}\textsuperscript{164} formally adopted the strict tort theory of products liability based essentially on the loss spreading rationale proposed nearly two decades earlier in Justice Traynor’s concurring opinion in \textit{Escola v. Coca Cola Bottling Co.}\textsuperscript{165}

Even if there is no negligence, however, public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot. Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of the time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business. It is to the public interest to discourage the marketing of products having defects that are a menace to the public. If such products nevertheless find their way into the market it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the market. However intermittently such injuries may occur and however haphazardly they may strike, the risk of their occurrence is a constant risk and a general one. Against such a risk there should be general and constant protection and the manufacturer is best situated to afford such protection.\textsuperscript{166}

Viewed in isolation, this forward-looking statement is perhaps broad enough to support an interpretation that manufacturers not only should be held liable for harms caused by defective products despite an absence of negligence, but also should bear additional burdens of liability that otherwise might be borne by other legally culpable parties. Because the manufacturer occupies a unique position concerning both the compensation and the deterrence rationales of tort law, full compensation by the manufacturer might be viewed as appropriate even though the fault of plaintiff or third party in part caused the injury.

When Justice Traynor’s rationale is viewed in context, however, it appears that he did not intend such a far-reaching change in tort law. Both \textit{Escola} and \textit{Greenman} involved only the simple model of an innocent plaintiff injured by a defective

\textsuperscript{160} See Davis, \textit{Indemnity Between Negligent Tortfeasors: A Proposed Rationale}, 37 Iowa L. Rev. 517 (1952); LeFlar, supra note 159; Note, Actions Between Tortfeasors—The Implied Right of Indemnity, 32 S. Cal. L. Rev. 293 (1959).

\textsuperscript{161} See supra note 159, at 136; Note, supra note 160, at 295-96.

\textsuperscript{162} See James, supra note 159, at 1156-59; Note, supra note 160, at 295.

\textsuperscript{163} A search of the legal literature concerning contribution and indemnity prior to the promulgation of the \textit{Restatement (Second) of Torts} § 402A (1965) discloses no attempt by commentators to treat manufacturers of defective products differently from other tortfeasors regarding contribution and indemnity.


\textsuperscript{165} 24 Cal. 2d 453, 150 P.2d 436, 440 (1944) (Traynor, J., concurring).

\textsuperscript{166} Id. at 440-41.
product; neither case involved any issue of contributory negligence.\textsuperscript{167} Justice Traynor appeared to carefully circumvent the contributory negligence issue by limiting strict liability to situations in which the manufacturer placed a product on the market "knowing that it is to be used without inspection."\textsuperscript{168} Rather than proposing a novel system of loss allocation among multiple wrongdoers, he appeared to be concerned merely with the burden of loss between two theoretically innocent parties. He recognized not only that considerations of compensation and deterrence supported the imposition of that burden on manufacturers, but also that courts were already imposing strict liability on manufacturers under negligence\textsuperscript{169} and implied warranty\textsuperscript{170} theories. Thus, the loss spreading rationale espoused in \textit{Escola} and adopted in \textit{Greenman} should be viewed as merely providing the theoretical and policy justification for the straightforward recognition of strict tort as the basis for the initial imposition of liability on manufacturers of defective products. While courts are free to expand the rationale to include the imposition of excess liability on manufacturers, they must justify this expansion with a thorough examination of current conditions and policies, and not with an erroneous and overly broad interpretation of the original precedents.

2. The Manufacturer's Excess Liability as a Function of the All or Nothing System

Whatever the original genesis of the loss spreading rationale, it is quite clear that under strict liability manufacturers are frequently burdened with excess liability that is theoretically attributable to the fault of other parties. The most common sources of this excess liability are the rules that plaintiff's mere contributory negligence and foreseeable abnormal use of the product do not constitute defenses to a manufacturer's strict liability and the inability of manufacturers to obtain contribution or indemnity from third party tortfeasors. Yet the mere frequency of these results provides no logical basis for assuming their correctness. The question is whether this excess liability is the result of an affirmative policy of loss distribution especially applicable to manufacturers of defective products or is merely a function of the inadequacies of the all or nothing system of tort loss distribution under which strict liability was developed.

\textsuperscript{167} In \textit{Escola} plaintiff was injured when she was transferring bottles of Coca Cola from a carrying case to a refrigerator and one of the bottles suddenly exploded in her hand. The uncontradicted evidence showed that she did not knock the bottle against anything or otherwise contribute to the explosion. In \textit{Greenman} plaintiff was injured when the set screws on a new multi-purpose power tool loosened during normal use, causing a piece of wood to fly out and strike plaintiff. Neither case involved any issue of contributory negligence, and both courts' analyses focused solely on the basis of the manufacturers' liability.


\textsuperscript{169} In \textit{Escola} the majority affirmed a jury verdict in favor of plaintiff on a negligence theory and liberally applied \textit{res ipsa loquitur} not only to support an inference of negligence, but also to find the bottling company rather than the bottle manufacturer to be the negligent party. In his concurring opinion, Justice Traynor observed that this use of \textit{res ipsa loquitur} with its broad deference to jury findings of negligence was actually a subtle form of strict liability.

\textsuperscript{170} In \textit{Greenman} Justice Traynor observed that warranty liability for injuries caused by defective products actually arises by operation of law rather than by contract, that courts have refused to permit manufacturers to define the scope of their responsibility by contract, and that the liability is, therefore, better characterized as strict tort liability.
a. Contributory Negligence

One of the minor mysteries of strict liability for defective products is the rationale underlying the rule that plaintiff’s mere contributory negligence in failing to inspect for defects or to guard against their possible existence is not a defense. For the most part this rule appears to have developed in haphazard fashion and was explained only in conceptual terms without any serious attempt to identify underlying policy reasons. The experience in Kansas was fairly typical. Although contributory negligence was always a defense to a products case based on negligence, Challis v. Hartloft held that contributory negligence was not a defense to an action based on breach of implied warranty. The stated rationale for this rule, however, was based solely on the conceptual distinction between tort and contract; contributory negligence was a defense only to negligence actions whereas implied warranty was a contract remedy.

The Challis rule made no attempt to distinguish between mere contributory negligence and assumption of risk; rather, it appeared to apply broadly to all forms of contributory negligence. Nevertheless, the court apparently ignored this rule when plaintiff’s fault involved something more akin to voluntary and unreasonable exposure to a known defect. The Kansas Supreme Court directly addressed this apparent conflict in its cases in Bereman v. Burdolski in 1969, four years after the promulgation of section 402A by the American Law Institute. The court noted the apparent anomaly of treating contributory negligence as a defense to a products case based on negligence, but not when the same case was brought on an implied warranty theory. Yet in its actual holding the court defined the defense of contributory negligence in implied warranty cases as limited to “unreasonable use of a product after discovery of a defect and becoming aware of the danger.” The court gave no specific policy rationale for the exclusion of mere contributory negligence short of assumption of risk. When the Kansas Supreme Court adopted section 402A, it merely followed without independent analysis the Restatement’s distinction between mere contributory negligence and assumption of risk. The mere contributory negligence rule in Kansas originated in an outdated conceptual distinction and evolved without any real focus on underlying policy reasons.

The rule seems quite understandable when examined from the perspective of the all or nothing system under which it developed. As previously discussed, the all or nothing system involved not only the allocation of the entire burden of loss on

---


174 Id. at 828-29, 18 P.2d at 202.

175 Id. at 828-29, 18 P.2d at 202.

176 See, e.g., Frier v. Procter & Gamble Distrib. Co., 173 Kan. 733, 252 P.2d 850 (1953). In Frier the supreme court affirmed a directed verdict granted in favor of defendants at the close of plaintiff’s evidence. The evidence disclosed that plaintiff suffered skin irritation within a week after using a new brand of dish washing detergent, but that she continued to use the detergent for several weeks thereafter despite a worsening of her skin condition. Although the supreme court gave no clear rationale for its holding, it explained in a subsequent opinion that by her continued use of the product plaintiff had been contributarily negligent as a matter of law. Graham v. Bottenfield’s, Inc., 176 Kan. 68, 70-71, 269 P.2d 413, 415 (1954). Yet the court’s emphasis on the “continued use” of the product suggests that it viewed plaintiff’s conduct as involving use of the product with knowledge of the defect.

one of two blameworthy parties, but also the need to define broad categories of cases for purposes of shifting the loss from one party to the other.\textsuperscript{178} Thus, when mere contributory negligence and assumption of risk are viewed as broad categories of plaintiff misconduct and are compared with the manufacturer's situation in defective products cases, the rule may be explained as a crude loss shifting mechanism based on generalizations about the relative or comparative legal responsibility of the parties.\textsuperscript{179}

To the extent that failure to inspect for defects or to guard against their possible existence constitutes actual fault,\textsuperscript{180} these failures may be viewed as comprising a broad category of conduct generally reflecting only a minimal level of culpability that from an equitable perspective should be deemed insufficient to wholly negate the manufacturer's legal responsibility to produce nondefective products. Failure to inspect a product for defects as a form of contributory negligence presupposes the ability of the consumer to identify defects by inspection of the product. Yet as a class consumers are relatively unsophisticated about most products and have at best only a limited ability to discover defects.\textsuperscript{181} Conversely, the manufacturer is considered to be an expert concerning his product\textsuperscript{182} and has a responsibility to avoid defects at every stage of the process from the selection of raw materials and component parts\textsuperscript{183} through the design, manufacturing, testing, and inspection of the product\textsuperscript{184} to the marketing of the product.\textsuperscript{185} If a defect is discoverable by inspection, it would seem

\textsuperscript{178} See notes 79-90 and accompanying text supra.

\textsuperscript{179} Although the manufacturer is strictly liable in all cases, his actual culpability may vary from true strict liability reflecting only technical legal fault to a substantial breach of reasonable care capable of being characterized as aggravated negligence. Yet the dichotomy between mere contributory negligence and assumption of risk without formal recognition of the variable nature of the manufacturer's breach of legal obligation, and thus for purposes of analyzing the defenses based on blameworthy plaintiff's conduct the manufacturer's breach of legal obligation necessarily must be treated as a constant.

\textsuperscript{180} It is most unlikely that all conduct encompassed by the broad definition "failure to discover the defect in the product, or to guard against the possibility of its existence" constitutes blameworthy conduct capable of being characterized as contributory negligence. See notes 331-40 and accompanying text infra.

\textsuperscript{181} Many of the early cases concerned situations in which an extremely cautious consumer might well have discovered the defect by simple inspection of the product. See, e.g., Eisenbeiss v. Payne, 42 Ariz. 262, 25 P.2d 162 (1933) (decomposed mouse in beverage); Coca Cola Bottling Co. v. Rowland, 16 Tenn. App. 184, 66 S.W.2d 272 (1933) (decomposed mouse in beverage). Other cases involved situations in which an extremely cautious consumer might discover the defect or at least minimize injury by considering the possibility of a defect and proceeding to use the product in a tentative manner. See, e.g., Silva v. F.W. Woolworth Co., 28 Cal. App. 2d 649, 83 P.2d 76 (1938) (piece of bone in chicken salad); Tonsman v. Greenglass, 248 Mass. 275, 142 N.E. 756 (1924) (piece of metal in loaf of bread). These types of cases, however, no longer constitute the typical subject matter of products liability and should not serve as the model for any conclusions about the feasibility of requiring consumers to inspect for defects or to take other precautionary measures. Today our society is composed of automobiles, pharmaceutical drugs, and a myriad of other complex mechanical, electrical, and chemical products that people are conditioned to accept as commonplace by advertising and mere familiarity. These products would seem to provide a more meaningful context within which to examine and define the consumer's legal obligations of self-protection.


\textsuperscript{184} See, e.g., Vestric Battery Co. v. Standard Elec. Co., 482 F.2d 1307, 1313 (10th Cir. 1973).

\textsuperscript{185} See, e.g., Vandermark v. Ford Motor Co., 61 Cal. 2d 256, ..., 391 P.2d 168, 170-71, 37 Cal. Rptr. 896, 1949 (1964) (automobile manufacturer liable for defects caused by faulty brake design delivered to retailer); West v. Broderick & Bascom Rope Co., 197 N.W.2d 202, 210-11 (Iowa 1972) (automobile manufacturer liable where warning contained in retailer's literature, but not attached to product itself).
that the consumer's breach of legal obligation should properly be viewed as less blameworthy than the manufacturer's breach.

Conversely, assumption of risk may be viewed as a significantly more culpable form of consumer conduct. Any presumption concerning the consumer's relative inability to perform a sophisticated inspection for defects becomes invalid once the consumer actually knows of the defect and appreciates the danger. At this point the consumer may be reasonably expected to exercise reasonable care for his or her own safety in the same manner in which the consumer must exercise care in any other situation entailing appreciable risks of harm. It does not seem inherently inequitable to treat a substantial failure to exercise reasonable care as a defense to a products case any more than it is inequitable to treat other unreasonable consumer conduct as a defense in other situations of personal danger. Accordingly, if one of the parties must bear the entire loss and the loss may be shifted from one party to the other only on the basis of broadly defined categories of conduct, the distinction between mere contributory negligence and assumption of risk as such loss shifting categories is not without a rational basis.

These arguments do not necessarily preclude a broader interpretation of the mere contributory negligence rule based on an affirmative policy of shifting to manufacturers the excess liability attributable to plaintiff's mere contributory negligence. The period prior to the Restatement's promulgation of the rule provides no real support for this interpretation, however. Some commentators during this period reported that the courts were actually making the distinction between mere contributory negligence and assumption of risk, but these commentators provided no analysis of why the courts were making this distinction. The Restatement only indicates that the rule was taken from a parallel provision governing strict liability for abnormally dangerous activities. Because that form of strict liability applies to

---

186 Since the manufacturer is strictly liable, he may have taken every reasonable precaution to avoid the defect and thus may be considered legally but not necessarily morally culpable in placing a defective product on the market. It would be inappropriate, however, to place much weight on this absence of moral blame. The overwhelming majority of defective products cases involve moral as well as legal blame, but plaintiff is relieved of the burden of proving the moral blame. See notes 226-42 and accompanying text infra. Moreover, the absence of moral blame has not caused the courts to treat plaintiff's fault short of assumption of risk as a defense. Accordingly, the primary basis for treating assumption of risk as a defense would seem to be the more substantial fault generally assumed to exist in that conduct rather than the absence of moral fault of the strictly liable manufacturer.

187 Of course, characterizing mere contributory negligence and assumption of risk as broad categories based on relative culpability is not without exceptions. Some consumers may have sufficient expertise concerning certain products to undertake a meaningful inspection for defects. Other consumers may become aware of circumstances short of actual knowledge of a defect that nevertheless would make the existence of a defect considerably more than a mere possibility. A manufacturer may purposefully not eliminate certain obvious design defects and thus would be viewed as more culpable than the user or the consumer who is constantly exposed to the known defect. Exceptions seem to be inherent in broadly defined tort categories. As long as the categories allocate the entire loss on a rational and equitable basis in the substantial majority of cases, occasional exceptions should not necessarily prevent the general use of the categories as a loss shifting mechanism.

188 See note 158 supra.

189 RESTATEMENT (SECOND) OF TORTS § 402A, Comment b at 356 (1965) provides that the distinction between mere contributory negligence and assumption of risk was taken from the RESTATEMENT (SECOND) of TORTS § 524 (1965). Section 524 articulates the same distinction concerning defenses to strict liability for abnormally dangerous activities. The only explanation for the distinction is that policy "places the full responsibility for preventing the harm resulting from abnormally dangerous activities upon the person who has subjected others to the abnormal risk." Id. Comment a at 50. The specific policy referred to in Comment a is not identified. The same rationale is given for not recognizing contributory negligence as a defense to the strict liability of the owner of a wild animal or abnormally dangerous domestic animal. Id. § 515, Comment b at 25.
individual as well as to commercial actors. It could not be based on the loss spreading rationale, which emphasizes the seller's capacity to treat accident losses as a cost of doing business that may be spread over numerous commercial transactions. Thus, it is extremely doubtful that the original purpose of the mere contributory negligence rule can truly be explained without reference to the all or nothing principles under which the rule developed.

b. Abnormal Use

In most strict liability jurisdictions the manufacturer's obligation to produce a nondefective product encompasses foreseeable abnormal uses of the product. Some courts occasionally have stated that plaintiff's foreseeable abnormal use of the product is not a defense, but that his unforeseeable abnormal use of the product is a defense. Thus, to the extent that foreseeable abnormal use of a product constitutes culpable conduct, this rule imposes excess liability on manufacturers of defective products. This focus on product use, however, is an artificial and analytically inadequate substitute for the traditional fault concept of foreseeable risk. The better view is that any defenses in abnormal use cases should be characterized simply as contributory negligence and assumption of risk.

The doctrine of abnormal use primarily involves the initial imposition of liability. Strict liability does not make the manufacturer an absolute insurer of all harms caused by products. Rather, the fundamental premise is that manufacturers should be liable only for harms caused by defective products, and one method by which courts have sought to define and to control the meaning of defectiveness is by

---

190 See id. § 520, Comment d at 37. A similar distinction between contributory negligence and assumption of risk applies in cases of strict liability based upon keeping a wild animal or an abnormally dangerous domestic animal. See id. § 515. This form of strict liability is also not restricted to commercial activities.

191 Rather than being founded on the loss spreading rationale, strict liability for abnormally dangerous activities appears to be based on the actor's introduction of a unique and enhanced risk of harm into the community. See note 107 supra.

192 This obligation is not unique to strict liability, but rather was previously recognized in products cases brought under negligence and implied warranty theories. See generally 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 16A [4][a] (1979) [hereinafter cited as FRUMER & FRIEDMAN]; Noel, supra note 101, at 95-105; Twerski, Comparative Fault, supra note 47. As used in this Article the phrase "abnormal use" refers to abnormal use, unintended use, and misuse of products.

193 See, e.g., General Motors Corp. v. Hopkins, 548 S.W.2d 344, 351 (Tex. 1977).


195 The authors do not intend to support the view that assumption of risk should be considered a conceptually separate and distinct defense in general tort law. They merely recognize that assumption of risk, as defined in § 402A, provides a useful distinction for defining a defense based on plaintiff's blameworthy conduct under all or nothing principles, and they prefer the view that assumption of risk is really a form of contributory negligence governed by reasonable care principles. See James, Assumption of Risk, 61 YALE L.J. 141 (1952). If the Kansas courts apply comparative fault principles to strict liability actions, assumption of risk should be eliminated as a complete defense and merged with contributory negligence. See notes 343-60 and accompanying text infra.

196 Statements to the effect that manufacturers are not absolute insurers of their products are found in the cases of every strict liability jurisdiction. See, e.g., West v. Caterpillar Tractor Co., 336 So. 2d 80, 90 (Fla. 1976); Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182, 188 (1965); Kirkland v. General Motors Corp., 521 P.2d 1353, 1366 (Okla. 1974); Engberg v. Ford Motor Co., 87 S.D. 196, 205 N.W.2d 104, 109 (1973); Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55, 63 (1967). These statements reflect the concept that courts should place reasonable limitations on the manufacturer's liability for harms caused by products so that strict liability does not become a pure enterprise liability system in which the manufacturer insures against all product-related harms.

197 "Defectiveness" means that the product lacks some condition or quality that it should possess. Cf. Wade, On the Nature of Strict Tort Liability for Products, 44 Miss. L. REV. 825, 829-30 (1973) ("defectiveness" means there is "something wrong" with the product). See also notes 226-42 and accompanying text infra.
characterizing the product uses for which the manufacturer should be responsible. In *Greenman* Justice Traynor defined strict liability as encompassing use of the product “in a way in which it was intended to be used.” The Restatement provides that a product is not defective “when it is safe for normal handling and consumption.” It appears that limiting defectiveness to the intended or normal uses of products is necessary to prevent absolute liability for all harms caused by products.

Nevertheless, literal application of the concept of intended or normal product use has proven too restrictive as a matter of sound tort policy. Most products have foreseeable abnormal uses that may expose consumers to increased risk of harm, and certainly there is no sound reason to permit these risks to exist when they are deemed unreasonable under the traditional risk-utility analysis of tort law. For example, the intended or normal use of a car is for transportation, not for colliding with other objects. Yet manufacturers fully appreciate that cars are all too frequently involved in collisions and that the condition and design of a car may have a substantial effect on the severity of collision-related injuries. When a manufacturer may change the condition or design of the car to eliminate a serious risk without significant expense or impairment of the car’s utility, a definition of defectiveness that includes these considerations is a sound application of the tort policy of injury avoidance. It is sound, however, not because the abnormal use of the product is foreseeable, but because the risk of harm to consumers is unreasonable.

This focus on use rather than on risk has also produced confusion concerning the potential defenses based on plaintiff’s conduct in abnormal use cases. If the definition of defectiveness encompasses only foreseeable abnormal uses of the product, then by definition the manufacturer’s obligation to produce nondefective products does not extend to unforeseeable abnormal uses. Therefore, characterizing plaintiff’s

---

188 59 Cal. 2d at 62, 377 P.2d at 901, 27 Cal. Rptr. at 701 (emphasis added).
189 Restatement (Second) of Torts § 402A, Comment h at 351 (1965) (emphasis added).
192 Phillips v. Ogle Aluminum Furniture, Inc., 106 Cal. App. 2d 650, 235 P.2d 857 (1951), illustrates this distinction. Plaintiff was injured when she stood on an aluminum tubular chair in order to reach a kitchen cupboard, lost her balance, and fell onto a sharp upright to which the back of the chair was fastened. Because defendant had not used the proper size screws to fasten the back to the uprights, the force of plaintiff’s fall was able to knock the back of the chair loose and to expose the upright. In response to defendant’s argument that the chair was intended to be used only for sitting, the court observed that people often stand on chairs in their homes. In essence, standing on a chair is a foreseeable abnormal use of a chair. A chair is not required, however, to meet the safety standards of a stepladder or to have a design that enables its use as something to stand on. The court imposed liability because the failure to fasten the back of the chair securely to the upright created an unreasonable risk of harm in the event that a user fell, and the risk was unreasonable because defendant could have easily avoided it by using the proper size screws. Indeed, if plaintiff’s injury had merely been a broken wrist from falling off the chair onto the floor, imposition of liability on defendant would undoubtedly be improper even though the tubular design of the chair with no back legs may have contributed to plaintiff’s loss of balance. Otherwise, this type of chair and every other type of chair, such as a swivel chair or a rocking chair, which is perfectly safe for sitting, but which lacks the stability of a stepladder or a four-legged chair, could be manufactured and sold only at the manufacturer’s peril.
193 If the product is not defective in terms of both its normal and its foreseeable abnormal uses, the manufacturer’s obligation to produce a reasonably safe product is satisfied. See, e.g., Findlay v. Copeland Lumber Co., 265 Or. 300, ..., 509 P.2d 28, 31 (1973) (“Misuse, to bar recovery, must be a use or handling so unusual that the average consumer could not reasonably expect the product to be designed and manufactured to withstand it—a use which the seller, therefore, need not anticipate and provide for.”) (emphasis added).
unforeseeable abnormal use of the product as a defense obfuscates proper analysis since the question of defense becomes relevant only after the manufacturer's breach of his legal obligation has been established.204 Similarly, the refusal to treat foreseeable abnormal use as a defense also produces analytical confusion. For example, consider the single car collision in which plaintiff suffers injuries that are greatly aggravated by a defective condition in the car. Characterizing the collision as an abnormal use of the car does not, by itself, justify a conclusion that plaintiff has engaged in any culpable conduct. If the collision were simply the result of a sudden, unforewarned fainting spell, plaintiff's conduct would not be culpable because there was nothing that he should have done differently.205 If, however, the collision were caused by plaintiff's excessive speed under all the circumstances, plaintiff's culpability would be based on his appreciation of an unreasonable risk of harm to himself and could be characterized as contributory negligence.206 If the collision were caused by plaintiff's continued use of the car after discovering that the brakes were defective, plaintiff's culpability would be based on his voluntary and unreasonable exposure to a known risk and could be characterized as assumption of risk.207 In all of these examples plaintiff's culpability is in reality a function of his appreciation of risk, and his abnormal use of the product is analytically relevant only as one of the circumstances bearing on the degree to which plaintiff appreciated an unreasonable risk of harm to himself.208 Proper analysis of plaintiff's relative fault in strict liability actions will be improved if abnormal use is limited to a factor relevant only to the question of whether plaintiff was contributory negligent or assumed the risk.

Even though abnormal use should not define a separate and distinct category of plaintiff fault, certain abnormal use cases tend to demonstrate the inadequacy of the all or nothing dichotomy between contributory negligence and assumption of risk in strict liability actions. As discussed in the prior section,209 plaintiff's failure to dis-

---

204 Conversely, an unforeseeable abnormal use should not necessarily bar recovery. If the product is defective in terms of its normal use or its foreseeable abnormal use and the defect causes injury during an unforeseeable abnormal use of the product, recovery might well be appropriate. For example, in Ritter v. Narragansett Elec. Co., 109 R.I. 176, 283 A.2d 255 (1971), a 4-year old, 40-pound girl stepped on the drop-down oven door of a stove to see what was cooking on top of the stove. The stove tipped over, and she was scalded with boiling water. The stove was designed so that it would tip over when more than 30 pounds was placed on the oven door. The girl's use of the oven door could reasonably be characterized as an unforeseeable abnormal use, but this should not preemptarily bar recovery. "Slip and fall" accidents in the home are quite common, and it is certainly foreseeable that somebody might accidentally fall against the open oven door and cause a similar injury. A stove that tips over so easily could be described as defective if counterbalances or other feasible changes in design would provide greater stability. Thus, the injury in Ritter could be characterized as a foreseeable harm that simply came about in a somewhat unusual manner. In negligence law harms characterized in this manner may be viewed as proximately caused by defendant's negligent conduct. See Petition of Kinsman Transit Co., 338 F.2d 708, 726 (2d Cir. 1964). The same result would seem appropriate under strict liability despite the characterization of plaintiff's conduct as an unforeseeable abnormal use of defendant's defective product.

205 See, e.g., Cohen v. Petty, 65 F.2d 820 (D.C. Cir. 1933).


208 For example, standing on a chair may be viewed as a foreseeable abnormal use of a chair, which was intended simply to be used for sitting. Yet standing on a solid, four-legged chair placed on a flat surface usually creates no more risk than the risk inherent in the use of a step ladder. Standing on a tubular chair with no back legs, however, such as the chair in Phillips v. Ogle Aluminum Furniture, Inc., 106 Cal. App. 2d 650, 235 P.2d 857 (1951), involves an appreciable risk of harm and could be characterized as contributory negligence. Standing on a swivel chair or rocking chair would involve an even greater risk of harm because of the increased instability of the chair while standing on it. Thus, all three cases involve the same abnormal use, but the extent to which the abnormal use constitutes blameworthy conduct varies according to the degree of appreciable risk.

209 See notes 178-77 and accompanying text supra.
cover the defect or to guard against its possible existence, as a category of fault, may be characterized as an extremely minimal form of contributory negligence and thus is insufficient to relieve the manufacturer of all liability.\textsuperscript{210} In the abnormal use cases plaintiff's contributory negligence frequently consists of careless use of the product and may readily encompass the entire range from minimal to substantial fault.

Consider, for example, a single car collision caused by plaintiff's culpable conduct in which a defect in the design of the car aggravates his injuries. If plaintiff were unaware of the defect, his fault would not be characterized as assumption of risk, and he would be deemed only contributorily negligent whether the initial collision was caused by momentary inattention or by driving while intoxicated. Negligent driving encompasses a wide range of highly culpable conduct closer in degree of blameworthiness to assumption of risk than to the minimal form of contributory negligence contemplated by section 402A.\textsuperscript{211} The appropriateness of imposing excess liability on manufacturers in these cases is questionable, but this result frequently occurs because of the inadequacy of broad conceptual categories to distinguish all the cases on the basis of their more relevant characteristics.\textsuperscript{212} The all or nothing system necessitated these broad categories, but nothing indicates that these categories were ever intended to have any special significance independent of the all or nothing system.\textsuperscript{213}

\textit{c. Contribution}

Manufacturers also frequently bear excess liability when the negligent conduct of other actors has combined with the manufacturer's defective product to harm plaintiff. For example, plaintiff's injury is often caused by the concurrence of the manufacturer's defective product and the negligent conduct of a party in the manufacturer's chain of product distribution,\textsuperscript{214} plaintiff's employer,\textsuperscript{215} or a party unrelated to either plaintiff or the manufacturer, such as a negligent driver.\textsuperscript{216} In jurisdictions recognizing either no right of contribution or only a limited right of contribution, the manufacturer will frequently bear excess liability attributable to the fault of these negligent actors.

Nevertheless, the unavailability of contribution in these cases appears to be entirely the result of conceptual restrictions on the right of contribution applicable to all tortfeasors without regard to the particular basis of liability to plaintiff. First,

\textsuperscript{210} Phillips v. Ogle Aluminum Furniture, Inc., 106 Cal. App. 2d 650, 235 P.2d 857 (1951), provides an excellent example. Plaintiff's foreseeable abnormal use of the chair probably should be characterized as relatively slight fault, while an exposed sharp upright on the back of the chair created a risk of substantial injury that could have been easily avoided and could thus be characterized as substantial fault. Relieving defendant of all legal responsibility in this situation would be a harsh and unjustifiable result.

\textsuperscript{211} See, e.g., Edwards v. Sears, Roebuck & Co., 512 F.2d 276 (5th Cir. 1975); Schenel v. General Motors Corp., 384 F.2d 802 (7th Cir. 1967), cert. denied, 390 U.S. 945 (1968); Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 114 Cal. Rptr. 380 (1978).

\textsuperscript{212} See, e.g., Messick v. General Motors Corp., 460 F.2d 485 (5th Cir. 1972) (plaintiff continued driving car with steering mechanism known to be dangerously defective); Brooks v. Dietz, 218 Kan. 698, 545 P.2d 183 (1976) (plaintiff entered gas filled basement despite his knowledge that a pilot light was burning and could cause an explosion at any moment); Haugen v. Minnesota Mining & Mfg. Co., 15 Wash. App. 379, 550 P.2d 71 (1976) (plaintiff used grinding wheel without wearing goggles made available to him despite his knowledge of risk of injury to his eyes). In all three cases the courts upheld jury verdicts in favor of plaintiffs on the ground that assumption of risk involves questions of fact for the jury.

\textsuperscript{213} See notes 171-91 and accompanying text supra.


\textsuperscript{216} See, e.g., General Motors Corp. v. Simmons, 558 S.W.2d 855 (Tex. 1977).
in those jurisdictions still following the common law rule of no contribution between joint tortfeasors, the denial of contribution applies to all tortfeasors and not simply to strictly liable manufacturers. Second, in those jurisdictions, including Kansas, allowing contribution only between joint judgment debtors, the distinguishing characteristic of the right of contribution is that both tortfeasors are made joint judgment debtors of plaintiff on a common obligation rather than on the basis of liability of either tortfeasor. Indeed, when both a strictly liable manufacturer and a negligent actor are made joint judgment debtors of plaintiff and the manufacturer satisfies the judgment, the manufacturer should be entitled to contribution from the negligent actor. Third, in those jurisdictions allowing a broad right of contribution against any tortfeasor who, if sued by plaintiff, would have been jointly liable to plaintiff, a strictly liable manufacturer usually cannot obtain contribution from a negligent employer protected by the provisions of a workers' compensation act. This denial of contribution, however, is invariably based on plaintiff's legal incapacity to maintain a tort action against the employer, and the same result would apply to any tortfeasor seeking contribution from the employer without regard to the tortfeasor's basis of liability. Accordingly, the excess liability borne by manufacturers as a result of the unavailability of contribution is apparently unrelated to any affirmative policy of shifting excess liability to strictly liable manufacturers.

B. Excess Liability as a Policy of Strict Liability

Ever since the seminal case of Greenman courts have repeatedly characterized strict liability as liability without fault. This form of liability is said to be justified

---

218 See supra note 61.
221 Since the majority of workers' compensation acts provide that workers' compensation is the exclusive remedy against the employer, the employer cannot be a joint tortfeasor with the third party. See Larson, Workmen's Compensation: Third Party's Action Over Against Employer, 65 Nw. U.L. Rev. 351, 353-55 (1970).
222 See Weigall, supra note 220, at 1040-43.
223 In Chamberlain v. Carborundum Co., 485 F.2d 31, 34 (3d Cir. 1973), the court expressly rejected the argument against allowing § 402A tortfeasor to recover contribution proceeds upon the assumption that manufacturers' strict liability to injured users of defective products is more in the nature of a contractual warranty than of classic tort liability, and that manufacturers should therefore be treated as indemnitors even in favor of others whose tortious conduct contributed to the accident. To reach this conclusion we would have to read the Pennsylvania cases adopting § 402A liability not only as eliminating the necessity for proof of manufacturer's negligence or contractual privity, but also of adopting a major shift in the burden of reparations in product personal injury cases by relieving negligent third parties of the burden of making contribution. We have discovered no indication that this result was intended. See also Bristol-Myers Co. v. Gonzalez, 548 S.W.2d 416, 428 (Tex. Civ. App. 1977).
224 Statements to the effect that strict liability is liability "without fault" are found in the cases of every strict liability jurisdiction. See, e.g., Bachner v. Pearson, 479 P.2d 319, 329 (Alas. 1970); Martin v. Ryder Truck Rental Co., 353 A.2d 581, 588-89 (Del. 1976); Weber v. Fidelity & Cas. Ins. Co., 259 La. 599, 26 So. 2d 784, 786 (1956); Sleepy Stove Mfg. Co. v. Hodges, 189 So. 2d 113, 120-21 (Miss. 1966), cert. denied, 386 U.S. 912 (1967); Santor v. A & M Karageghian, Inc., 44 N.J. 52, ..., 207 A.2d 305, 313 (1965). See also Levin, supra note 17. Section 402A is described as a form of liability that "does not rest..."
by the especial relevance of the compensation and deterrence policies of tort law. Nevertheless, these statements imply conceptual and policy differences that in reality cannot justify the imposition of excess liability on manufacturers. When strict liability is viewed from the perspective of the extent to which courts impose liability without resort to traditional fault principles, one may reasonably conclude that strict liability represents remarkably little change in tort law other than to lessen, but not wholly to eliminate, plaintiff’s burden of proving a form of traditional fault. Notwithstanding the conceptual nature of strict liability, the tort policies of compensation and deterrence do not justify imposing liability on manufacturers in excess of the liability that they would otherwise bear under a comparative fault system.

1. The Nature and Scope of Strict Liability

Determining whether strict liability is truly liability without fault depends on whether the need to resort to the scienter element of traditional negligence analysis—the limitation of liability to foreseeable avoidable risks—is actually eliminated from strict liability analysis. Strict liability is said to differ from negligence in that the analytical focus is on the product’s condition rather than on the seller’s conduct. Thus, liability would require only a finding of a defective condition and not a finding that the seller should have been able to appreciate the risk and to avoid the defective condition of the product.

Nevertheless, considerable doubt exists concerning the viability of this distinction. A product is not defective merely because it causes injury to a user or a consumer. Rather, it is defective when it lacks the condition that it should have possessed and this substandard condition creates an unreasonable risk of harm to users or consumers of the product. Accordingly, defectiveness cannot be determined in a vacuum; the product condition that actually exists must be compared with a standard of product condition that may be characterized as nondefective. This necessity of comparison prevents the total elimination of negligence analysis from the field of strict product liability. Product defects may be divided into three categories: production defects, design defects, and warning defects. Only production defect cases will be decided on the basis of an analysis significantly different from negligence analysis.

A production defect is the unreasonably dangerous condition of an occasional unit of production that represents a deviation below the standards of product condition of the manufacturer’s normal production. A production defect makes the product different from that which the manufacturer intended to produce. For example, a small pebble may be found in a can of peas even though the manufacturer

upon negligence,” Restatement (Second) of Torts § 402A, Comment m at 355 (1965), and is applicable even though “the seller has exercised all possible care in the preparation and sale of his product.” Id. § 402A(2)(a).

This distinction is derived from the description of liability in § 402A: “One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability . . . .” Restatement (Second) of Torts § 402A(1) (1965) (emphasis added). See generally Twersky, Comparative Fault, supra note 47, at 299, 316; Wade, supra note 101, at 15.


See generally 2 Frumer & Friedman, supra note 192, § 16A[4][f][iii].
did not intend that this occur and even though the manufacturer had established various safeguards in the manufacturing, testing, and inspection process to prevent this defect. Under negligence analysis plaintiff would have to prove that the presence of the pebble both rendered the can of peas defective and was the result of some failure by the manufacturer to exercise reasonable care. The latter requirement frequently imposed a nearly insurmountable burden on plaintiffs because the ever-increasing complexity of modern products and modern manufacturing processes often made proof of negligence a virtual impossibility or at least possible only at great financial expense.

The adoption of strict products liability relieves plaintiff of the burden of proving negligence as the cause of the defect, and plaintiff only has to prove that the product condition was defective. In addition, production defect cases rarely present any difficult issue concerning the standard of nondefective product condition for comparison purposes because the deviant unit of production may be compared with the manufacturer's normal units of production. Accordingly, although a production defect may give rise to legal or social fault in the sense that the manufacturer has breached the legal duty to place only nondefective products into commerce, it is liability without fault in the sense that negligence concepts of personal culpability are unnecessary to show why the defect occurred or to show that the product condition is defective.

The situation concerning design and warning defects differs considerably, however, because no simple objective method exists to determine the nondefective product condition standard with which to compare defendant's product. A design defect is a condition defined by the physical characteristics of the manufacturer's normal units of production. A warning defect involves a product that is physically in a nondefective condition, but is rendered defective by inadequate warnings made to users or consumers. Thus, the product is in the condition intended by the manufacturer. The problem lies in the analytical means of determining the appropriate standard of nondefective product condition, and under the current status of strict liability this standard is determined by the application of traditional fault concepts inherent in negligence analysis. Strict liability jurisdictions generally use the negligence concept of foreseeable avoidable risk to define the outer boundary of potential liability. A manufacturer is not liable for failure to design a product that would protect users

---


231 See notes 123-30 and accompanying text supra & note 327 and accompanying text infra.

232 In other words, what the manufacturer intends to and normally does produce may reasonably be deemed to establish the minimum standard of nondefective product condition that the manufacturer is legally obligated to satisfy. See Holford, The Limits of Strict Liability for Product Design and Manufacture, 52 Tex. L. Rev. 81, 84 (1973); Twerski, Comparative Fault, supra note 47, at 302-03; Wade, supra note 228, at 831.


234 See generally 2 Frumer & Friedman, supra note 192, § 16A[4][F][vi]. Unfortunately, courts have not consistently followed this restrictive definition. Rather, many courts treat design and warning defects as overlapping issues and characterize as adequate a warning that will not realistically reduce product risks to acceptable levels. See Twerski, Weinstein, Donaher & Pielert, The Use and Abuse of Warnings in Products Liability—Design Defect Litigation Comes of Age, 61 Cornell L. Rev. 495, 500-24 (1976). The better view is that mere warnings should be deemed inadequate when an unreasonable danger inherent in the physical condition of the product may feasibly be eliminated by an improvement in the design of the product. See, e.g., Sturm, Ruger & Co. v. Day, 594 P.2d 38, 44 (Ala. 1979); Uloth v. City Tank Corp., 384 N.E.2d 1188, 1192-93 (Mass. 1978); Thibault v. Sears, Roebuck & Co., 118 N.H. 802, ..., 395 A.2d 843, 847 (1978).
and consumers from harms not capable of being known or avoided under the existing knowledge, technology, and state of the art at the time of the product's manufacture. Thus, in contrast to production defects that may be based on wholly unavoidable circumstances, this initial requirement of a foreseeable avoidable risk for design defects constitutes a reliance on fault concepts to determine which product risks may be characterized as defects for purposes of strict liability.

Moreover, the mere existence of a foreseeable avoidable risk does not necessarily render the product defective. Courts substantially agree that defectiveness should be further limited to those risks that manufacturers can feasibly avoid. For example, a manufacturer should not normally be liable for a risk inherent in the design of the product if the necessary change in design would create a different and greater risk of harm or, in comparison with the seriousness of the risk, an unreasonably burdensome expense or an unreasonable impairment of the utility of the product. These limitations on the scope of defectiveness reflect factors inherent in the traditional risk-benefit analysis of negligence law. Indeed, although a number of courts have experimented with a “consumer expectations” test to determine defectiveness, the trend seems to strongly favor open recognition of a risk-benefit

---

235 See U.S. DEP'T OF COMMERCE, INTERAGENCY TASK FORCE ON PRODUCT LIABILITY: FINAL REPORT OF THE LEGAL STUDY 109-10 (1977) [hereinafter cited as FINAL REPORT]; see, e.g., Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1092-93 (5th Cir. 1973); Cudmore v. Richardson-Merrill, Inc., 398 S.W.2d 640 (Tex. Civ. App. 1966). See generally 1 PRIMROSE & FRIEDMAN, supra note 192, § 6.05[15]; Reeton, Product Liability and the Meaning of Defect, 5 ST. MARY'S L.J. 30, 37-39 (1973); Phillips, supra note 233, at 104-05. When the risk is known but the scientific knowledge and technology to avoid the danger do not exist, the product may be characterized as an unavoidably unsafe product and marketed without liability as long as it is properly prepared and proper warnings are given. See RESTATEMENT (SECOND) OF TORTS § 402A, Comment k at 353-54 (1965).

236 The authors do not suggest that courts necessarily agree with the phrase “foreseeable avoidable risk.” This phrase is used because it describes a limitation generally applied in strict liability cases and because it demonstrates the parallel with traditional negligence concepts. Moreover, it is not suggested that this limitation is necessarily sound or permanent, at least as to all categories of cases. See notes 243-44 and accompanying text infra.


'The court should balance the utility of the risk against its magnitude in deciding whether to submit a design defect case to the jury. One of the factors to be weighed in making this determination is the manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility. In other words, the court is to determine, and to weigh in the balance, whether the proposed alternative design has been shown to be practicable. The trial court should not permit an allegation of design defect to go to the jury unless there is sufficient evidence upon which to make this determination. If liability for alleged design defects is to "stop somewhere short of the freakish and the fantastic," plaintiffs' prima facie case of a defect must show more than a technical possibility of a safer design.

238 See, e.g., Kori v. Ford Motor Co., 69 Cal. App. 3d 115, 137 Cal. Rptr. 828 (1977) (design of car door and locking mechanism not defective where plaintiff's proposed alternative design would expose users to additional and greater dangers).

239 See, e.g., Phillips v. Kimwood Mach. Co., 269 Or. 485, ..., 525 P.2d 1033, 1038 (1974). The court noted that "the cost of the change necessary to alleviate the danger in design may be so great that the article would be priced out of the market and no one would buy it even though it was of high utility."


241 The "consumer expectations" test is derived from RESTATEMENT (SECOND) OF TORTS § 402A, Comment g at 351 (1965) (emphasis added): "The rule stated in this Section [402A] applies only where the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him." Focusing on the consumer's perception of safe product condition may be a desirable means of avoiding an unwarranted infusion of traditional negligence concepts into strict liability through the "unreasonably dangerous" concept set forth in Comment g and in § 402A itself, and the test also appears to reinforce the concept that consumers have a right to rely on sellers to provide reasonably safe products. See notes 179-81 and accompanying text supra. See also SHAPIRO, A REPRESENTATIVE Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment, 60 Va. L. Rev. 1109, 1363-68 (1974). The test poses little difficulty in produc-
analysis to determine defectiveness.242 All the cases tend to use a form of analysis substantially analogous to traditional fault analysis.

The authors do not suggest that the Kansas courts should adopt the risk-benefit approach to defectiveness. Any definition of defectiveness will entail some internal contradictions between underlying policies of strict liability. In some categories of cases the use of risk-benefit analysis to reasonably limit the scope of a manufacturer's liability seems sound,243 while in other categories defectiveness might appropriately apply to wholly unavoidable risks inherent in a properly manufactured product.244 Therefore, debate and experimentation concerning the definition and scope of defectiveness undoubtedly are desirable. The important point, however, is that defectiveness is a necessary predicate to the initial imposition of liability in a strict liability action and presently overlaps traditional fault analysis to a substantial degree. Nothing in either the conceptual or the pragmatic definitions of defectiveness would justify by itself the imposition of excess liability on manufacturers of defective products. If that justification exists, it must be found in tort policy considerations particularly applicable to strict liability.

2. The Compensation Policy

Although courts often emphasize compensation of injured consumers as a policy

242 The risk-benefit analysis is derived from the phrase "defective condition unreasonably dangerous to the user or consumer or to his property" in Restatement (Second) of Torts § 402A(1) (1965). Some form of risk-benefit analysis is necessary in design defect cases in which the reasonable user is not within the manufacturer's entire line of production is brought into issue. See, e.g., Cepeda v. Cumberland Eng'r Co., 76 N.J. 152, 386 A.2d 816 (1978); Roach v. Kononen, 269 Or. 457, 525 P.2d 125 (1974). For a discussion of factors relevant to risk-benefit analysis in products liability actions, see Montgomery & Owen, Reflections on the Theory and Administration of Strict Tort Liability for Defective Products, 27 S.C.L. Rev. 803, 814-18 & nn.43-47 (1976).

243 Some form of risk-benefit analysis seems necessary in design defect cases, but this approach seems inappropriate for and does not appear to be used in production defect cases. For example, the cost of eliminating or discovering the occasional production defect in a certain product line might be prohibitive and, therefore, not required under a true risk-benefit analysis, but this approach to production defects would return products liability law to its status under negligence law prior to the adoption of strict liability. Undoubtedly, manufacturers will remain strictly liable for production defects without regard to risk-benefit considerations. See, e.g., Brown v. General Foods Corp., 117 Ariz. 530, ..., 573 P.2d 930, 932 (1978).

244 For example, polio vaccine is highly beneficial to society because it has nearly eradicated a crippling disease. Yet one unavoidable side effect is that out of the millions of doses of the vaccine administered annually it causes a dozen or so cases of polio. Under the current state of products liability law sellers of the vaccine would bear no liability if adequate warnings are given. See Restatement (Second) of Torts § 402A, Comment k at 353-54 (1965). See also Reyes v. Wyeth Laboratories, 498 F.2d 1264 (5th Cir. 1974). A limitation on the scope of liability for "unavoidable harms" seems necessary in some categories of cases in order to avoid the ruinous liability that might occur if an otherwise beneficial drug had an unknowable side effect which produced numerous injuries. The polio cases, however, involve a situation in which the loss spreading rationale of strict liability might justify absolute liability because a statistically proven small number of harms could be financed by a substantially large number of transactions. Indeed, the number of harms is so small that the situation could be analogized to production defects, which should be small in number if manufacturers are actually exercising all reasonable care. Given these extremes, continued debate over and experimentation with tests for defectiveness and with the ultimate scope of strict liability seems inevitable, and quick and easy solutions would seem both unavailable and undesirable. Nevertheless, these conflicting considerations relate primarily to the fundamental question of the appropriate circumstances governing the initial imposition of liability and should not be confused with questions of ultimate loss allocation when the blameworthy conduct of additional parties contribute to product related harms.
interest especially relevant to strict liability, this interest cannot logically provide a basis for singling out manufacturers from other tortfeasors as a class of parties to whom courts should shift excess liability. Admittedly, an independent interest in compensation was an important aspect of Justice Traynor’s analysis of the defective products problem. The manufacturer has the unique ability to incorporate losses caused by defective products into the cost of the product and to pass them on as a quasi-insurance cost to consumers, while the individual consumer would probably suffer a severe hardship if he or she were required to bear the entire loss caused by a defective product. This use of the compensation policy merely to justify an initial imposition of liability on the manufacturer without proof of fault is logical.

Reliance on this policy is illogical, however, when it is extended to the issue of excess liability. Consider a plaintiff who is injured in a car accident. His interest in compensation is based on the fact of injury and on the tort policy of avoiding unwarranted hardship on injured parties by awarding damages against tortfeasors who cause injuries to others. Thus, from plaintiff’s perspective it is “a matter of indifference” whether his injury was caused by the negligence of another driver, a highway defect, or a defect in his own car. Each of these causes would be sufficient to impose an obligation to compensate on another. If plaintiff were also contributorily negligent, he would clearly suffer a reduction of recovery in the first two instances despite his interest in compensation, and this interest should not be any greater simply because a defective product caused his injury. Other tort policies might vary the amount of compensation, but plaintiff’s personal interest in being compensated remains constant and logically cannot vary based on the cause of his injury.

3. The Deterrence Policy

The deterrence policy of tort law is based on the premise that the likelihood of liability will discourage actors from engaging in legally blameworthy conduct. The importance of this policy should be primarily a function of four factors: the severity and frequency of harms caused by the conduct, the vulnerability of the class of persons exposed to harm by the conduct, the ability of the actor to avoid or reduce the harms by altering his or her course of conduct, and the blameworthiness of the conduct.

When viewed in isolation, this deterrence policy may provide a more plausible basis for shifting excess liability to manufacturers of defective products. Defective products have long been one of the major causes of injuries, and users and consumers frequently have only limited, if any, ability to protect themselves from the risks presented by defective products. Moreover, manufacturers as a class appear to

---


247 For example, the recovery of a contributorily negligent plaintiff will be reduced when he or she is injured by a negligent tortfeasor, but not when he or she is injured by an intentional tortfeasor. Plaintiff’s interest in compensation is the same in each case, but the interest in deterring the tortfeasor’s conduct is substantially greater when an intentional tortfeasor is involved.

248 See Prosser, supra note 23, § 5, at 23.

249 See Final Report, supra note 235, at 36-37.
have a unique ability to avoid or reduce these harms. Because the manufacturer produces the same basic product over and over again, he or she has the capacity to continuously improve the product's design, the selection of raw materials and component parts, the method of manufacture, and the inspection and testing processes. Every reported harm caused by the product or by similar products of other manufacturers provides additional information relevant to the continued improvement of the product. In light of the risks of harm and the relative vulnerability of users and consumers, the failure of the manufacturer to take full advantage of this special ability to avoid or to reduce risks of harm constitutes substantial blameworthiness. Therefore, the deterrence policy would appear to have special relevance for defective products, and excess liability theoretically would provide additional incentive for manufacturers to eliminate defects from their products.  

Nevertheless, the validity of this argument apparently depends either on the isolation of defective products cases as a distinct category that should be treated differently from negligence cases or, alternatively, on the determination that excess liability should also be shifted to actors in analogous categories of negligence cases. Characterization of defective products cases as strict liability does not justify different treatment based on a deterrence rationale. In true strict liability situations the manufacturer is not able to identify and to eliminate the defect and thus the imposition of liability cannot deter defects. An effective deterrence policy presupposes the ability to identify and to eliminate unreasonable risks of harm, and ironically, the deterrence argument in the area of defective products implicitly recognizes that the substantial majority of cases involve a form of negligence rather than true strict liability. Thus, the uniqueness of defective products cases must be determined by comparing them with other categories of negligence cases in which deterrence is also an important policy consideration.

Professional malpractice and violation of safety statutes provide appropriate analogies. The manufacturer's liability is a form of professional malpractice. A physician, by holding himself or herself out as a specialist, undertakes a special responsibility to the patient and is held to the standard of an expert in the field. Similarly, by marketing a product and thereby impliedly representing that it is safe, the manufacturer undertakes a special responsibility to the consumer and is held to the standard of an expert concerning that product. Deterrence is a particularly relevant policy in both situations because both actors engage in frequent transactions that may cause a substantial number of serious harms, the patient and the consumer.

---

250 Increased exposure to liability should theoretically encourage accident avoidance, but widespread reliance on liability insurance may negate the deterrent effect of liability in at least some categories of cases. See Blum & Kalven, Ceiling, Costs, and Compulsion in Auto Compensation Legislation, 1973 Utah L. Rev. 341, 380 n.44. This problem may be further complicated in the field of products liability by the apparent lack of any direct correlation between the frequency of accidents and the cost of products liability insurance. See U.S. Dep't of Commerce, Interagency Task Force on Product Liability: Selected Papers 341 (1978). Thus, an appreciable gap may exist between the theory and the reality of the deterrence policy in tort law, particularly in products liability law. Since it is not clear that the appropriate response to this problem is to reject theoretical considerations of deterrence as opposed to adjusting prevailing insurance practices, the authors will assume for purposes of this discussion that deterrence remains an important policy consideration in tort law.

251 See notes 228-32 and accompanying text supra.


253 See note 182 supra.
are both largely unable to protect themselves, and theoretically the likelihood of
liability should motivate both the doctor and the manufacturer to exercise the utmost
care to avoid harm to the patient and to the consumer. Thus, concerning the excess
liability issue the two categories cannot be significantly distinguished on the basis of
the deterrence policy.

The manufacturer's breach of the obligation to produce nondefective products
is also analogous to the violation of a safety statute designed to protect a particular
class of persons who are deemed unable to protect themselves.254 The deterrence
rationale in these safety statute cases seems more limited, however. Consider the
retailer who is prohibited by statute from selling gunpowder to a minor. Unlike the
doctor or the manufacturer, the retailer does not necessarily possess special expertise
concerning the product, make any implied representation adversely affecting the
minor's ability to protect himself or herself, or engage in frequent similar transactions.
In these cases the minor's contributory negligence is by definition not subject to
effective deterrence,255 and thus it is important to deter the retailer from violating the
statute simply because he is the only party with any meaningful ability to prevent
potential harm.

The defective products cases are not significantly distinguishable from the mal-
practice and the safety statute cases regarding the factors relevant to deterrence.
Accordingly, if deterrence is not deemed a sufficient justification for the imposition
of excess liability on defendants in the malpractice and the safety statute cases under
a comparative fault system, logically the same conclusion should apply to the defective
products cases. The malpractice cases present no problem under this analysis. Under
the all or nothing system contributory negligence was always a potential defense in
these cases,256 and nothing suggests that it would not be treated as a partial defense
in an appropriate case under a comparative fault system. The safety statute cases
cause some confusion, however. Under the all or nothing system contributory
negligence was not a defense in these cases,257 and thus arguably courts imposed
excess liability on defendants in order to promote deterrence. If this approach con-
tinued under a comparative fault system, logically deterrence would also justify the
same result in defective products cases.

Nevertheless, it seems doubtful that the Kansas courts would continue to impose
excess liability on defendants in safety statute cases under its comparative fault system.
As previously discussed, the rejection of the contributory negligence defense in these
cases was largely the result of the inflexibility of the all or nothing system.258 Since
courts had to impose the entire loss on one of two blameworthy parties and the

254 See text at note 88 supra.

255 Courts have not discarded contributory negligence as a defense in all actions involving violations of
safety statutes, but only in those actions in which plaintiffs as a class are deemed incapable of protecting
themselves.

256 Contributory negligence is rare in medical malpractice because plaintiff tends to be inactive during
treatment and generally relies on the professional's advice and treatment. See 1. D. LOUSSELL & H.
WILLIAMS, MEDICAL MALPRACTICE § 9.03 (1960). No Kansas court has actually found plaintiff to be
contributorily negligent in a medical malpractice action, but in those cases in which contributory negli-
gence was in issue the Kansas courts have consistently proceeded on the apparent assumption that con-
tributory negligence would constitute a defense in an appropriate case. See, e.g., Simpson v. Davis, 219

370, 244 P. 232 (1926).

258 See notes 79-90 and accompanying text supra.
contributory negligence defense was deemed harsh, the greater ability of defendant to prevent the harm to a presumptively helpless plaintiff justified shifting the loss from plaintiff to defendant. In addition, the Kansas comparative negligence statute has been interpreted as requiring allocation of loss strictly on a proportionate fault basis without formal regard to other tort policies.\textsuperscript{259} No reason exists for anticipating that the courts will recognize any exception to this interpretation in order to promote the deterrence policy of tort law. Kansas undoubtedly will subject the safety statute cases to comparative fault principles,\textsuperscript{260} and therefore the imposition of excess liability on manufacturers of defective products can no longer be justified on the basis of the deterrence policy of tort law.

4. A Proposed Tort Policy of Nondiscriminatory Loss Allocation

The preceding analysis of the compensation and deterrence policies is based on the premise that strict liability and negligence actions should be subject to the same system of loss allocation among legally blameworthy parties unless considerations of sound tort policy can rationally justify differentiating between them. This premise may be called the tort policy of nondiscrimination.\textsuperscript{261} This policy reflects the value judgment that nondiscriminatory treatment of matters of loss allocation is desirable for sound development of tort principles.

a. Tort Principles and Policies Should Determine Ultimate Allocation of Tort Losses

A policy of nondiscrimination is supported by the concept that tort principles and policies rather than the manipulations of parties should determine the ultimate allocation of tort losses. Consider a plaintiff who suffers $100,000 damages in a two-car collision caused by plaintiff's driving his car with knowledge of some deterioration in the effective working of his brakes, the other driver's entering an intersection without stopping at a stop sign, and the admittedly defective brakes in plaintiff's car that prevented his avoiding the collision. Assume that plaintiff was twenty percent at fault, the other driver was thirty percent at fault, and the manufacturer of plaintiff's car was fifty percent at fault. Assume also that the evidence presents extremely close jury issues concerning whether plaintiff assumed the risk of defective brakes or was merely contributorily negligent and concerning whether any negligence of the manufacturer caused the brakes to be defective. In Kansas plaintiff will be able to proceed against the manufacturer under alternative theories of negli-

\textsuperscript{259} See notes 113-15 and accompanying text supra.

\textsuperscript{260} The Kansas Supreme Court will hear an interlocutory appeal raising this issue. See Vincent Anthony Arredondo v. Duckwall Stores, Inc., Kan. App. No. 50965 (filed ......................... 1979). Arredondo concerns a claim that defendant proximately caused a minor plaintiff's injuries by selling gunpowder to the minor in violation of the prohibitions in Kan. Stat. Ann. § 21-4209 (1969). This appeal is from the district court's order denying plaintiff's motion to strike from defendant's answer the asserted defense of contributory negligence pursuant to the provisions of the Kansas comparative negligence statute.

\textsuperscript{261} In proposing a tort policy of nondiscrimination in the absence of rational justification for differentiating between two similarly situated classes of parties, the authors do not suggest that the equal protection clause of the fourteenth amendment to the United States Constitution necessarily applies—that constitutional issue is beyond the scope of this Article. Nevertheless, as a matter of sound tort policy discriminatory treatment of classes of parties should be based on rational grounds related to policy considerations inherent in tort analysis.
gence and strict liability and may submit both theories to the jury subject only to the traditional limitation of one satisfaction of judgment. If comparative fault principles are applied to both theories, under either theory plaintiff would bear $20,000 of his own loss and would recover $30,000 and $50,000 from the other driver and the manufacturer respectively, regardless of the outcome of either close issue. If, however, comparative fault principles are not applied to the strict liability theory, the following allocations of loss could occur under Kansas law:

<table>
<thead>
<tr>
<th></th>
<th>Plaintiff</th>
<th>Driver</th>
<th>Manufacturer</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>0</td>
<td>0</td>
<td>100,000</td>
</tr>
<tr>
<td>B</td>
<td>0</td>
<td>50,000</td>
<td>50,000</td>
</tr>
<tr>
<td>C</td>
<td>20,000</td>
<td>30,000</td>
<td>50,000</td>
</tr>
<tr>
<td>D</td>
<td>40,000</td>
<td>60,000</td>
<td>0</td>
</tr>
<tr>
<td>E</td>
<td>100,000</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>

If viewed in isolation, each of these potential allocations of loss might be justified to some extent by one or more policies of tort law. None of these allocations, however,

---

202 Usually plaintiff will also be able to proceed against the manufacturer on the theory of breach of implied warranty of merchantability. See Kan. Stat. Ann. § 84-2-314 (1965). Although this theory was long characterized as a contract remedy, the Kansas Supreme Court now recognizes that the implied warranty remedy is essentially a tort remedy and is the forerunner of strict liability for defective products. Brooks v. Dietz, 218 Kan. 698, 545 P.2d 1184 (1976). For discussion of the specific applications of comparative fault principles to implied warranty actions, see text at notes 393-412 infra.


204 This allocation will occur when plaintiff brings the action against the manufacturer under the strict liability theory, plaintiff brings no action against the other driver, and the jury finds that plaintiff did not assume the risk. Plaintiff’s mere contributory negligence is no defense. Moreover, the manufacturer cannot join the other driver since only the comparative negligence statute allows joinder, and thus the manufacturer cannot obtain contribution from the other driver because that driver is not a joint judgment debtor of plaintiff. This result will occur even if the manufacturer admits that his negligence caused the defect.

205 This allocation will occur when plaintiff brings the action against the manufacturer under the strict liability theory, plaintiff brings the action against the other driver under the negligence theory, and the jury finds that plaintiff did not assume the risk. Plaintiff will receive a proportionate fault judgment against the other driver for either $30,000 or $50,000. See notes 266-67 and accompanying text infra. Plaintiff will also receive a judgment against the manufacturer for $100,000. When plaintiff obtains satisfaction of the $100,000 judgment from the manufacturer, the manufacturer will be entitled to a pro rata contribution of $50,000 from the other driver under the joint judgment debtor rule.

206 This allocation will occur when plaintiff brings the action against the manufacturer under the strict liability theory, plaintiff also brings a negligence action against either or both of the parties, and the jury finds that the manufacturer was negligent and that plaintiff assumed the risk. Plaintiff’s assumption of risk will prevent any recovery under strict liability. Since Kansas does not recognize assumption of risk as a defense in negligence actions, the court will apportion the loss on the basis of the proportionate fault of the three parties.

207 This allocation will occur when plaintiff brings the action against the manufacturer under the strict liability theory, plaintiff brings a negligence action against the other driver, and the jury finds that the manufacturer was not negligent and that plaintiff assumed the risk. Plaintiff cannot recover a judgment against the manufacturer under strict liability, and the other driver cannot successfully shift a portion of the liability to the manufacturer under the joinder and individual judgment provisions of the comparative negligence statute. Since the manufacturer is not liable to plaintiff, the other driver will also be unable to obtain contribution from the manufacturer under the joint judgment debtor rule. Therefore, the court will consider only the fault of plaintiff and of the other driver in determining the proportionate fault allocation of the loss.

208 This allocation will occur when plaintiff brings the action against the manufacturer only under the strict liability theory, plaintiff brings no action against the other driver, and the jury finds that plaintiff assumed the risk. Plaintiff’s assumption of risk will prevent any recovery under the strict liability action even though his proportionate fault is substantially less than the fault of the manufacturer. Since plaintiff could always bring a negligence action against the other driver without prejudice to his strict liability action, this result will normally occur only when some extraneous reason such as immunity or insolvency makes a negligence action against the other driver meaningless.
may properly be viewed in isolation. Whenever the manufacturer is shown to have been negligent, one potential allocation of loss is a proportionate fault allocation under the Kansas comparative negligence statute.\textsuperscript{260} When the theory of recovery is strict liability, substantial variations in the portion of loss allocated to each of the three parties become possible, but these variations are not rationally related to any affirmative policy underlying strict liability for defective products.

Some of these variations result solely from plaintiff's choice of the party or parties to be sued and the subsequent operation of the joint judgment debtor rule.\textsuperscript{270} Yet the joint judgment debtor rule is value neutral concerning theories of recovery\textsuperscript{271} and is not rationally related to either the compensation or deterrence policies of strict liability. While two applications of the rule will permit full compensation of plaintiff,\textsuperscript{272} a third application will double the burden of loss that would be imposed on plaintiff under a proportionate fault allocation of loss.\textsuperscript{273} While one application of the rule will promote deterrence by imposing the entire burden of loss on the manufacturer,\textsuperscript{274} a second application will reduce that burden by half,\textsuperscript{275} and a third application will permit the manufacturer to avoid any responsibility for the accident.\textsuperscript{276}

Other variations result from plaintiff's choice of theory of recovery and the jury's characterization of the manufacturer's basis of liability. If the theory of recovery is negligence and the jury finds that the manufacturer was negligent, the loss will be allocated among the three parties on a proportionate fault basis. In this situation shifting the entire burden of loss to the manufacturer cannot be justified by plaintiff's denomination of the action as one in strict liability rather than as one in negligence. The common facts support both theories of recovery, and the elements supporting the compensation and deterrence policies are identical. Nor can a jury finding that the basis of liability is strict liability and not negligence justify these variations. Strict liability is important as a means of facilitating the initial imposition of liability without requiring proof of the manufacturer's negligence. It is anomalous to suggest that the imposition of excess liability is justified when the manufacturer exercised all reasonable care, but not when the manufacturer failed to exercise reasonable care.\textsuperscript{277}

\textsuperscript{260} To date no appellate court in Kansas has decided a defective product case brought on a negligence theory under the comparative negligence statute. Nevertheless, the Kansas Supreme Court has consistently interpreted the comparative negligence statute as requiring proportionate fault allocations of loss without regard to other policy considerations in negligence actions. See notes 113-15 and accompanying text supra. Nothing suggests that the court would deviate from this interpretation in a negligence action involving a defective product.


\textsuperscript{271} Even if sound policy considerations underlying strict liability supported the imposition of excess liability on manufacturers of defective products, the joint judgment debtor rule could not be viewed as rationally related to those policy considerations because this rule simply imposes excess liability on the tortfeasor sued by plaintiff irrespective of the theory of liability. Thus, a nonnegligent plaintiff injured by the combined negligence of a driver and the defective product of a nonnegligent manufacturer might impose the entire burden of loss on the negligent driver by not including the manufacturer as a defendant in the lawsuit. When no serious issue exists concerning liability and the driver is adequately insured, plaintiff would avoid the expense, burden, and delay of a complex strict liability claim against the manufacturer.

\textsuperscript{272} See notes 264-65 and accompanying text supra.

\textsuperscript{273} See note 267 and accompanying text supra.

\textsuperscript{274} See note 264 and accompanying text supra.

\textsuperscript{275} See note 265 and accompanying text supra.

\textsuperscript{276} See note 267 and accompanying text supra.

Still other variations result from plaintiff's choice of theory and the jury's characterization of plaintiff's conduct as either contributory negligence or assumption of risk. Kansas negligence law does not recognize the doctrine of assumption of risk except in employment cases; thus if plaintiff's theory is negligence, any blameworthy conduct by plaintiff will be characterized simply as contributory negligence, and the court will apportion the loss among the three parties on a proportionate fault basis. In this situation the characterization of the identical blameworthy conduct either as assumption of risk, which shifts the entire burden of loss to plaintiff, or as mere contributory negligence, which shifts the entire burden of loss to the manufacturer, cannot be justified simply by denoting the action as one in strict liability. If plaintiff's contributory negligence requires a proportionate reduction of his or her recovery when the manufacturer is held negligent, it is anomalous to alter the result either because the negligent manufacturer is held strictly liable or because the defect occurs despite all reasonable care by the manufacturer. Similarly, if plaintiff's blameworthy conduct requires only a proportionate reduction of his recovery when the theory of the action is negligence, it is anomalous to shift the entire burden of loss to plaintiff simply because the identical conduct may be legally characterized as assumption of risk under the strict liability theory.

b. Long-term Development of Tort Law

A policy of nondiscrimination in loss allocation is arguably supported by a broad view of the long-term development of tort law. In the relatively brief period since the widespread adoption of strict liability, courts have shown considerable willingness to experiment in matters affecting the application and scope of strict liability. For example, courts have adjusted traditional rules governing the burden of proof, have liberalized the scope of admissible evidence, and have attempted to restrict the concept of foreseeability as a device that limits liability. In addition, courts have considered the expansion of strict liability beyond the commercial sale of defective chattels to mass-produced homes and other housing, to land, and to

---

279 See note 268 and accompanying text supra.
280 See notes 264-70 and accompanying text supra.
281 See cases at note 277 supra.
283 See, e.g., Barker v. Lull Eng'r Co., 20 Cal. 3d 413, 431-32, 573 P.2d 443, 455, 143 Cal. Rptr. 225, 237 (1978) (once plaintiff shows that the manufacturer's design of the product caused his injury, the burden shifts to the manufacturer to prove the nondefectiveness of the design under the "risk-benefit" test).
services\textsuperscript{289} and have considered the expansion of the concept of seller to lessors of products\textsuperscript{290} and of housing\textsuperscript{294} and to other non-sale transactions.\textsuperscript{292}

Strict liability has become a judicial laboratory for experimentation with tort doctrine and policy. Yet it is somewhat contrary to the nature of courts to experiment freely, and undoubtedly courts perceive some need to justify this experimentation. This perceived need may partially explain the tendency of courts to overstate the differences between negligence and strict liability. By separating the two theories of recovery, courts may provide themselves with freedom from the traditional restraints that tend to restrict and to discourage liberal experimentation with established doctrine and policy.

This experimentation is probably a desirable process. Historically courts have been considerably reluctant to develop negligence law to its full potential as a compensation system. Traditional negligence doctrines such as duty and proximate cause were often given unduly restrictive interpretations,\textsuperscript{285} and policy considerations such as fear of unlimited liability,\textsuperscript{284} burdensome claims,\textsuperscript{295} fraudulent claims,\textsuperscript{296} the need to protect public funds,\textsuperscript{297} domestic tranquility,\textsuperscript{298} and the uninhibited


\textsuperscript{294}For example, the majority rule in the United States has long been that drivers have no duty to remove the ignition key from a parked car in order to prevent theft of the car and injury to other motorists or pedestrians as a result of the thief's subsequent negligent driving. \textit{See}, e.g., George v. Breising, 206 Kan. 221, 477 P.2d 983 (1970). Courts continue to describe the occurrence as unforeseeable even though no burden is involved in removing the ignition key, no social utility exists in leaving the key in the car, a statistically demonstrated higher rate of theft occurs when the ignition key is available for a potential thief, and a statistically demonstrated higher accident rate exists for stolen cars. \textit{See} Vines v. Plantation Motor Lodge, 336 So. 2d 1338 (Ala. 1976); Peck, \textit{An Exercise Based Upon Empirical Data: Liability for Harm Caused by Stolen Automobiles}, 1969 Wis. L. Rev. 909. Approximately 175 reported decisions involving accidents of this nature have had little discernible impact on the characterization of the occurrence as "unforeseeable."

\textsuperscript{295}Fear of unlimited liability was the major policy reason given to support the requirement of privity of contract in negligence actions involving defective products. \textit{See} Huset v. J.I. Case Threshing Mach. Co., 120 F. 865 (8th Cir. 1903); Winterbottom v. Wright, 152 Eng. Rep. 402 (Ex. 1842). In a more modern context, this policy consideration is the primary reason given for judicial refusal to recognize a cause of action for negligently inflicted emotional distress by a family member who witnesses a harm negligently inflicted upon another member of the immediate family. \textit{See}, e.g., Tobin v. Grossman, 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969); Whetnam v. Bismark Hosp., 197 N.W.2d 678 (N.D. 1972).

\textsuperscript{296}See, e.g., Thompson v. Thompson, 218 U.S. 611, 617-18 (1910) (relying in part on a concern about burdensome levels of litigation to uphold interspousal immunity).

\textsuperscript{297}\textit{See}, e.g., Justice v. Gatchell, 325 A.2d 97, 102-03 (Del. 1974) (relying in part on a concern about fraudulent claims to uphold automatic guest statute against equal protection challenge).

\textsuperscript{298}\textit{See}, e.g., Brown v. Wichita State Univ., 219 Kan. 2, 16, 547 P.2d 1015, 1027 (1976) (relying in part on need to protect state treasury from tort claims to uphold governmental immunity statute against equal protection challenge).

\textsuperscript{299}\textit{See}, e.g., Sink v. Sink, 172 Kan. 217, 219, 239 P.2d 933, 934 (1952) (relying on policy of avoiding disruption of marital relationship to uphold interspousal immunity).
performance of public duties were often accepted on faith as sufficient justification for the denial of otherwise meritorious claims for compensation.

The vestiges of these doctrines still haunt many areas of modern negligence law. Nevertheless, a precipitous overthrow of all countervailing restraints on the imposition of liability would not necessarily be desirable if means are available to measure the impact of change in a more controlled forum. For example, most states prohibit the admission of evidence of subsequent remedial measures to prove negligence in the manner in which property was maintained at the time of an accident. In *Ault v. International Harvester Co.*, the California Supreme Court held that a statutory prohibition of this evidence to prove "negligence or culpable conduct" did not apply to strict liability actions. An overall reading of the opinion suggests that perhaps the court was motivated more by doubt about the merits of the traditional rationale that admission of such evidence would deter defendants from remedying unsafe conditions than by a belief that strict liability does not involve culpable conduct. Thus, *Ault* illustrates an example of judicial separation of strict liability from negligence in order to provide a controlled forum for testing the propriety of a traditional policy rationale that tends to limit the imposition of liability.

While some separation of strict liability from negligence is desirable, this separation should logically be limited to doctrines and policies relating to the initial imposition of liability and should not extend to ultimate loss allocation. A common loss allocation system provides a bridge between the two theories of recovery by recognizing their substantial conceptual and policy similarities. Thus, as the process of limited separation and experimentation demonstrates a lack of significant merit in certain traditional tort doctrines and policies, this bridge between the two theories should theoretically enable these results to filter back into negligence law and thereby facilitate the elimination or modification of unwarranted restrictions on the initial imposition of negligence liability. In this manner limited separation serves the long-term interests of tort law in general.

Total separation, however, would arguably impede this filter back effect by rejecting the nexus between the two theories of recovery. Although total separation might permit an even greater level of experimentation in the area of strict liability, the results of this experimentation would tend to benefit only users and consumers injured by defective products and not persons injured by other forms of legally culpable conduct. Because doctrines or policies underlying strict liability cannot rationally justify this discrimination between classes of injured persons and the resultant imposition of excess liability on manufacturers of defective products, the

---


270 2 J. WIGMORE, EVIDENCE § 283 (Chadbourn rev. 1979).


272 The traditional rationale for the inadmissibility of evidence of subsequent remedial measures is that defendants would be reluctant to remedy dangerous conditions if those measures could then be used to prove negligence at the time of the accident. The court in *Ault* suggested that this rationale was not particularly applicable to strict liability actions because delay in correcting the defective condition of products would expose manufacturers to too many additional claims. Throughout its opinion the court appeared to be unconvinced of the merit of the traditional rationale as applied to routine negligence cases. The court noted that the rule of inadmissibility had been riddled with exceptions in recent cases and conceded only that the rule "may fulfill this anti-deterrent function in the typical negligence actions." *Id.* at 119, 529 P.2d at 1151, 117 Cal. Rptr. at 812 (emphasis added). The court might completely discard this rule if it had not been imposed by statute.
policy of nondiscrimination should be recognized as an additional reason for the application of comparative fault principles to strict liability actions.

IV. THE PROBLEM OF EFFECTIVE COMPARISON

Notwithstanding substantive and policy arguments, some concern may exist about the ability of juries to effectively compare the strict liability of a manufacturer with the traditional fault of other parties. If plaintiff introduces at trial no proof of fault or, at least, incomplete proof of the degree of fault against the manufacturer, the jury may be unable as a practical matter to apportion the liability on the basis of the comparative fault of the parties. For example, a plaintiff whose contributory negligence constituted only the most minor deviation from the standard of reasonable care nevertheless would be more at fault than a strictly liable manufacturer who was not shown to be at fault at all.

Judicial experience, however, apparently has not produced any support for the argument that juries lack the ability to make effective comparisons. Juries have compared fault and strict liability in Wisconsin since 1966 and in seaworldiness cases in the federal court system since 1953 without any indication of dissatisfaction by courts or commentators. Moreover, the question is not simply whether juries will encounter difficulties in making these comparisons, but rather whether these difficulties will be so severe as to warrant, by themselves, a refusal to apply comparative fault principles to strict product liability actions. Two inquiries are relevant. First, what constitutes "effective" comparison, and second, are acceptable mechanisms available by which courts may achieve effective comparison?

---


804 Wisconsin was the first state to apply comparative fault principles to strict liability actions. An examination of the jury cases reviewed by the Wisconsin Supreme Court reveals no statement critical of the jury's ability to compare fault and strict liability; rather, the court has consistently expressed confidence in the jury's ability to decide these matters. See Arbit v. Gussarson, 66 Wis. 2d 551, 225 N.W.2d 431, 437-38 (1975):

[[Jurors are always called upon to make decisions based upon complex facts in many different kinds of trial cases. It is advisable if not necessary to reduce complicated concepts to ideas readily understandable to lay jurors. The problems presented in products liability jury trials would require no more insurmountable than similar problems in other areas of the law. See also Fonder v. A.A.A. Mobile Homes, Inc., 80 Wis. 2d 3, 257 N.W.2d 841 (1977). On a number of occasions the Wisconsin Supreme Court has reversed trial court attempts to usurp the jury's function in apportioning fault. See, e.g., Kozlowski v. John E. Smith's Sons Co., 67 Wis. 2d 882, 257 N.W.2d 915 (1979); City of Franklin v. Badger Ford Truck Sales, Inc., 58 Wis. 2d 641, 207 N.W.2d 866 (1973); Jagmin v. Simonds Abrasive Co., 61 Wis. 2d 60, 211 N.W.2d 810 (1973). Although the trial courts may still remove the apportionment issue from the jury when a directed verdict for the manufacturer is warranted as a matter of law, see Schuh v. Fox River Tractor Co., 63 Wis. 2d 728, 218 N.W.2d 279 (1974), these cases are rare, and normally an erroneous jury apportionment should result in a new trial by the jury. Jagmin v. Simonds Abrasive Co., 61 Wis. 2d at , 211 N.W.2d at 825.

805 The maritime doctrine of seaworthiness is analogous to the doctrine of strict liability for defective products. The seaworthiness doctrine focuses on the "reasonably fit" condition of the vessel rather than on the conduct of the owner or operator, and this warranty cannot be avoided or modified by disclaimer. See Chamlee, The Absolute Warranty of Seaworthiness: A History and Comparative Study, 24 Mercer L. Rev. 519 (1973). Since 1955 the contributory negligence of plaintiff has been compared with the unseaworthiness of the vessel in order to achieve a proportionate fault reduction of plaintiff's damages. See Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953). Despite this substantial history of comparing fault and "strict liability," the admiralty law literature discloses no thorough study of the effectiveness of these comparisons. Nevertheless, federal court opinions seem to reflect general satisfaction with the comparison process. See, e.g., Crador v. Boh Bros., Inc., 473 F.2d 1040 (5th Cir. 1973); Williamson v. Roen Steamship Co., 149 F. Supp. 787, 788 (E.D. Wis. 1957). See also United States v. Reliable Transfer Co., 421 U.S. 397 (1975) (adopting comparative fault apportionment for collision and stranding cases in admiralty law). The absence of any expression of dissatisfaction with the effectiveness of these comparisons after more than a quarter century strongly suggests that these comparisons have been perceived as reasonably effective.
A. The Meaning of Effective Comparison

In order to assess the effectiveness of any comparison of fault and strict liability, it is necessary to begin the task with realistic expectations. Not even the most enthusiastic advocates of comparative negligence ever considered that this concept would result in a precise measurement of the relative fault of the parties. Even in routine negligence cases measurement of fault is not a process akin to the preparation of a scientific formula in which each of a finite number of ingredients is measured exactly. Negligence law is replete with subtle doctrines designed to influence or to distort the reasonable care standard in order to promote in specific categories of cases some particularly relevant policy consideration such as compensation or the deterrence or encouragement of certain conduct. These subtle doctrines make an already difficult measurement process even more subject to imprecise results.

Consider the hypothetical case in which a twelve-year-old boy runs into the street without looking and is struck and injured by a car driven by an eighty-year-old man whose reactions and reflexes have been somewhat slowed by age. The youth of plaintiff will result in a formal jury instruction on the special standard of care for children that should affect the measurement of his degree of fault. The age of defendant, however, will probably not result in a parallel instruction focusing on his old age because courts generally have not recognized a special standard of care for the elderly, even if a special standard did exist, the adult activity doctrine would probably prevent its application in this case. Yet the jury will have observed both parties during trial and will have gained some reasonable appreciation of defendant’s actual capabilities. A precise measurement of the parties’ relative fault is most unlikely, if not impossible, because of this mixture of abstract legal standards coupled with a wide variety of subjective human factors. The percentage of the child’s fault is inherently a matter on which reasonable minds may and will disagree.

Comparisons of fault and strict liability will involve some additional difficulties that will require some adjustments in the comparison methods used in routine negligence cases, but these difficulties should not be viewed as unique to strict liability. Consider two classic textbook negligence problems. In Ybarra v. Spanagar plaintiff suffered a shoulder injury while unconscious during an appendectomy, but could not prove which doctor or nurse was the negligent party. Although it was fully possible that some of the doctors and nurses participating in the operation were not negligent, the court allowed the jury to hold all of them jointly and severally

---

306 See, e.g., SCHWARTZ, supra note 4, § 17.1, at 275-77; Aiken, Proportioning Comparative Negligence—Problems of Theory and Special Verdict Formulation, 53 MARQ. L. REV. 293, 294-97 (1970); Prosser, supra note 80, at 474-75.

307 In most situations children are subjected not to the standard of a reasonable person, but rather to the standard of children of like age, intelligence, and experience under similar circumstances. This special and somewhat more subjective standard of care undoubtedly represents an appreciation of both the substantial number of accidents causing harm to children and the inability of most children to perform at the level demanded by the reasonable person standard. See generally PROSSER, supra note 23, § 32, at 154-57; RESTATEMENT (SECOND) OF TORTS § 283A (1965); Shulman, The Standard of Care Required of Children, 37 YALE L.J. 618 (1927).

308 Because of the insufficient number of cases on point, it is not yet clear whether courts will generally recognize a parallel special standard of care for the elderly. See Prosser, supra note 23, at 157.

309 Children are subject to the reasonable care standard applicable to adults when they are engaged in an activity, such as driving an automobile, “which is normally undertaken only by adults, and for which adult qualifications are required.” RESTATEMENT (SECOND) OF TORTS § 283A, Comment c at 16 (1965). Accordingly, even if the elderly received a special standard of care based upon age, the adult activity exception should logically apply to the operation of an automobile.

liable. Similarly, in *Summers v. Tice*\textsuperscript{311} plaintiff lost an eye when two hunters simultaneously and negligently fired their weapons in his direction, but plaintiff could not prove which negligent hunter actually caused the injury. The court held both hunters jointly and severally liable.

Both holdings promote the compensation policy of tort law. Under comparative negligence each case would pose the same difficulties that would exist when fault and strict products liability are compared, \textit{i.e.}, no factual basis exists for determining the degree of fault of each party. If these difficulties are sufficient to prevent comparison of fault and strict liability, they should logically also require the abandonment of the rules derived from \textit{Ybarra} and \textit{Summers}.\textsuperscript{312} Yet one must seriously doubt that the \textit{Ybarra} and \textit{Summers} rules will be discarded merely because of these pragmatic problems, for that approach would shift the entire burden of loss to an innocent plaintiff in contravention of the previously determined sound public policy of compensation. Rather, one would fully expect the courts to experiment with adjustments to the comparison methods used in routine cases in order to promote sound public policy. Similarly, if sound public policy supports a comparison of fault and strict liability, then difficulties of comparison should not mandate a contrary result without at least some experimentation with adjustments to the normal comparison methods. No sound and logical basis seems to exist for concluding that comparisons of fault and strict liability will necessarily be any more imprecise or difficult than comparisons made wholly within the confines of traditional negligence litigation.

Moreover, undue emphasis on the imprecision and difficulty inherent in fault comparisons may distort a proper view of comparative processes. As Dean Prosser so aptly stated,

> Obviously any estimate that 40 per cent of the total fault rests with the pedestrian who walks out into the street in the path of an automobile, and 60 per cent with the driver who is not looking and runs him down, represents nothing resembling accuracy based on demonstrable fact. The estimate might quite as well be anywhere between 25-75 and 75-25. Yet it is equally clear that a division of the plaintiff's damages on any such basis is at least more accurate than one based on the arbitrary conclusion that 100 per cent of the responsibility rests with the plaintiff and none whatever with the defendant, or, if the last clear chance is applicable, 100 per cent with the defendant and none with the plaintiff—both of which are demonstrably wrong.\textsuperscript{313}

In essence, despite the imprecision of the comparison process, any apportionment of loss between two negligent parties on a comparative fault basis is an improvement over the harsh and inequitable results of the former all or nothing system. Although this imprecision may produce the same harsh results under a modified comparative negligence system, the harshness is more the function of the choice of modified

\textsuperscript{311} 33 Cal. 2d 80, 199 P.2d 1 (1948).

\textsuperscript{312} The underlying premise of the ineffective comparison argument is that the inability to achieve a reasonably accurate comparison of relative fault should prevent any application of comparative fault principles. Given this premise, the \textit{Ybarra} rule must be abandoned because the identity of the defendant(s) who were in fact negligent and of those who were not negligent is not known, nor is the specific nature of and degree of fault involved in any negligent act(s) known. Similarly, the \textit{Summers} rule must be abandoned because it is not known which of the two defendants actually caused plaintiff's injury. Indeed, both rules were developed because of the inadequacy of information necessary for the achievement of an equitable resolution of the action under traditional concepts and procedure.

\textsuperscript{313} Prosser, \textit{supra} note 80, at 474-75.
rather than pure comparative negligence, and not the result of any inherent inadequacy of comparative fault principles per se.\textsuperscript{314} Similarly, to the extent that all or nothing principles are deemed harsh and inequitable in strict liability actions, the adoption of an admittedly imprecise comparison process would constitute an improvement for the same reasons.

Finally, concerns about imprecision and other difficulties in the comparison process may be somewhat minimized by an appreciation of the jury’s function in these cases. Since precise measurement of proportionate fault is not a realistic objective, the comparison process in large measure depends on the assumption that after all the evidence is presented, the jury will exercise sound judgment and a fundamental sense of fairness to arrive at a reasonable approximation of the proportionate fault of the parties. To expect more would be quixotic. In a sense the jury is making determinations that inherently involve a mixture of factual and equitable considerations.\textsuperscript{315}

The Kansas Supreme Court has apparently recognized and condoned this special jury function. In \textit{Thomas v. Board of Trustees}\textsuperscript{316} the trial court instructed the jury concerning the legal effects of their proportionate fault findings. The jury then found plaintiff forty-nine percent at fault, a finding that of course would be inconceivable without the trial court’s instructions. The supreme court affirmed on the ground that these instructions might prevent distortion of the determination of damage amounts due to jury speculation about the legal effects of their findings, but in reality the court must have appreciated how the jury arrived at that figure and simply was condoning such equitable adjustments to the fact finding process. Thus, the court has indicated a willingness to experiment with the workings of the new comparative negligence statute, and no sound reason would seem to prevent similar experimentation with comparisons of fault and strict liability.

\section*{B. Methods of Comparison}

Kansas courts will need to experiment on a trial and error basis with adjustments to the normal comparison approach used in more routine cases. Not only is there rather limited judicial experience with comparisons of fault and strict liability to serve as a guide,\textsuperscript{317} but also specific problems of comparison undoubtedly may vary

\textsuperscript{314} Since it is unrealistic to assume that comparisons of fault could ever be mathematically precise even in routine negligence cases, one may reasonably expect that in a given set of facts one jury might find plaintiff 40\% at fault, a second jury might find plaintiff 50\% at fault, and a third jury might find plaintiff 60\% at fault. These are reasonable variations in a close case, and a court would have great difficulty holding that any one of the three findings is clearly erroneous. Yet under the 50\% rule of modified comparative negligence recovery would be allowed in only two of the three cases, and under the 49\% rule recovery would be allowed in only one of the three cases. Yet this system is clearly preferable to a total denial of recovery in all cases under the old contributory negligence rule, and the harshness is clearly identified as a function of the concept of modified comparative negligence. In Kansas this harshness will be largely offset by instructing the jury on the legal effects of its comparative fault findings and thereby encouraging findings of 49\% plaintiff fault in lieu of slightly larger findings of plaintiff fault. \textit{See Thomas v. Board of Trustees}, 224 Kan. 539, 582 P.2d 271 (1978).


\textsuperscript{316} 224 Kan. 539, 582 P.2d 271 (1978).

\textsuperscript{317} Most jurisdictions that have applied comparative fault principles to strict liability actions have done so since 1975. \textit{See note 100 supra}. Wisconsin is the only jurisdiction with any significant experience in making these comparisons. \textit{See note 304 supra}.
somewhat depending on the particular type of defect involved in a given case.\textsuperscript{318} The process of gradual adjustments and refinements on a case-by-case basis is the traditional function of the adversary system, and thus experimentation with methods of comparison should not be viewed as a problem.

Some courts and commentators\textsuperscript{319} have suggested that the problem of comparing fault and strict liability may be avoided by comparing causation rather than fault. This approach should be rejected because comparative causation is incompatible with the fundamental policy bases and objectives of comparative fault systems. Comparative fault provides a rational basis for loss distribution in the sense that a party’s share of the burden of loss theoretically increases in proportion to his or her degree of deviation from the standard of conduct that the party is legally obligated to satisfy.

The concept of comparative causation has no similar rational basis. In tort law causation refers generally to the connection between an act and a harm.\textsuperscript{320} Generally a wrongful act or omission must be shown to constitute a necessary antecedent to a harm in order to establish legal causation.\textsuperscript{321} For example, if a child darts into a street and is struck by a car driven in a reasonable manner by all outward manifestations and under circumstances from which one would conclude that the accident would have occurred despite all possible care by the driver, the driver’s intoxication would not be a legal cause of the accident. Of course, a cause in fact of the accident was the presence of a moving car at the point of impact, but for legal purposes the cause that conducted the accident would be the mere nonwrongful act of driving rather than the wrongful act of driving while intoxicated.\textsuperscript{322} The former and not the latter was the necessary antecedent to the harm. Causation does not provide a proper basis for comparison simply because it bears no rational relationship to the proportionate fault of the parties.

For example, vary this hypothetical so that the two legal causes affecting liability are the child’s negligent running into the street and the driver’s negligent driving at ten miles per hour in excess of the speed limit. These circumstances establish causation for comparison purposes, and the result would be unaffected by additional matters such as the slight negligence or recklessness that might constitute the proper legal characterization of the conduct of either party.\textsuperscript{323} In other words, comparative

\textsuperscript{318} For example, most design and warning defect cases will require proof that to a considerable extent parallels the proof in a traditional negligence case. See notes 325-26 and accompanying text infra. In production defect cases, however, plaintiff may be wholly unable to prove negligence or at least the degree of negligence of the manufacturer. See notes 326-27 and accompanying text infra.

\textsuperscript{319} See notes 18-19 supra.

\textsuperscript{320} See generally Prosser, supra note 23, § 41, at 237-41.

\textsuperscript{321} Although this description is accurate in the vast majority of cases, it is not true in one small category of cases. If two causes concur to produce a harm under circumstances in which either cause would have been sufficient to produce the harm by itself, then logically neither cause was the necessary antecedent to the harm. In these cases the test is whether a cause was a substantial factor in producing the harm. See Restatement (Second) of Torts §§ 431-432 (1965).

\textsuperscript{322} Since the accident would have occurred even if the driver had been sober, it cannot be said that intoxication was a circumstance that, if avoided, could have prevented the accident. See, e.g., Jones v. Spencer, 220 Kan. 445, 553 P.2d 300 (1976) (failure to keep a lookout to the rear not a cause of rear-end collision); Rouleau v. Blotner, 84 N.H. 559, 152 A. 916 (1931) (failure to signal not a cause of collision); Tennessee Trailways, Inc. v. Ervin, 222 Tenn. 523, 438 S.W.2d 733 (1969) (excessive speed not a cause of accident).

\textsuperscript{323} Depending upon the attendant circumstances the excessive speed might constitute only the slightest deviation from the standard of reasonable care or, conversely, a substantial deviation from this standard. Yet these matters relate only to the state of mind of the driver, i.e., the scienter element, and bear only on the legal characterization of the quality of the conduct as wrongful and, if so, the degree of wrongfulness.
causation would produce random results unrelated to the proportionate fault of the parties and thus could readily allocate the greatest portion of the loss to the least blameworthy party.\textsuperscript{324} To the extent that comparative causation is suggested as a means of avoiding the perceived difficulties of comparing fault and strict liability, one might as well compare the height, weight, or hair color of the parties; the results would bear no less of a relationship to the proportionate fault of the parties, and the system would be much easier to apply.

Any comparison for loss allocation purposes must be made on the basis of fault, but in light of the potential difficulties in the comparison process plaintiff should be afforded a choice between two alternative methods of comparison. The first alternative involves a straightforward comparison of the fault of the parties. Although plaintiff does not have the formal burden of proving the manufacturer's traditional fault or degree of fault in a strict liability action, plaintiff will usually introduce evidence tending to prove these matters. For example, in design and warning defect cases plaintiff must show that the actual product condition deviated from the hypothetical standard of nondefective product condition in order to prove definitiveness.\textsuperscript{325} In most cases a competent trial attorney should have little difficulty using the evidence necessary to prove definitiveness to also demonstrate the variety, likelihood, and gravity of risks created by the defect in design or warning as well as the feasible improvements in physical product condition or warnings that could have averted the harm to plaintiff.\textsuperscript{326}

Admittedly, in some defective product cases plaintiff will be able to prove definitiveness, but not the traditional fault or degree of fault of the manufacturer, at least not without greatly increasing the burden that would otherwise be imposed on plaintiff.\textsuperscript{327} Accordingly, the second alternative available to plaintiff should be a

\begin{flushleft}
Neither relates to causation, which is established merely by finding a connection between the actual speed and the harm. Characterization of speed as wrongful goes only to the question of breach of duty, not causation. Characterization of the speed as slightly wrongful or greatly wrongful goes to the question of relative fault, not causation.

\textsuperscript{324} Since the child's injury would undoubtedly have been of much lesser magnitude if he had been struck by another running person rather than by a moving car, one could logically conclude that the physical force provided by the moving car was a far more substantial cause of the harm than was the force provided by the running of the child. Yet one could easily hypothesize circumstances in which the child's conduct would be far more blameworthy than the driver's conduct. See, e.g., Schwartz, supra note 4, § 17.1, at 276-77; Fischer, supra note 33, at 445-46. If the driver is found to be the more culpable party, then the desirable result is achieved, but for the wrong reason and only by the purely fortuitous concurrence of the greater cause and the greater fault.

\textsuperscript{325} See notes 233-42 and accompanying text supra.

\textsuperscript{326} Indeed, comparative fault considerations aside, one commentator has suggested that most plaintiffs would prefer to try a defective product case on a negligence theory and demonstrate moral culpability whenever possible rather than limit the claim against the manufacturer to mere technical liability. See Reningold, \textit{The Expanding Liability of the Product Supplier: A Primer}, 2 Hofstra L. Rev. 521, 531-32 (1974).

\textsuperscript{327} In the typical production defect case the definitiveness of the product does not present any significant problems of proof. See notes 229-33 and accompanying text supra. Proof of fault or degree of fault, however, is quite another matter. For example, in the typical exploding bottle case the mere fact of the explosion suggests that the product was defective, but the explosion may have been caused "by an excessive internal pressure in a sound bottle, by a defect in the glass of a bottle containing a safe pressure, or by a combination of these two possible causes." Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, ..., 150 P.2d 436, 439 (1944). Moreover, there was rarely any direct evidence identifying the specific cause of the explosion. Accordingly, in many exploding bottle cases, including \textit{Escola}, courts simply had to permit a liberalized use of \textit{res ipsa loquitur} to infer which party negligently caused the defect. Even if circumstantial evidence points to a particular party as the most likely cause of the defect, it is for all practical purposes impossible to prove that party's \textit{degree} of fault. The defect could have been caused by the momentary carelessness of an employee, by the inadequacy of inspection and testing procedures, or despite the exercise of all reasonable care. Since it is not even known with reasonable certainty that the party caused the defect, further inferences about \textit{how} he caused the defect would seem to border on sheer
“reduction system” of loss allocation. Under this approach the manufacturer of a defective product causing injury to another would initially be presumptively liable for 100 percent of the damages, and then portions of this liability would be shifted to other culpable parties on the basis of each party’s individual degree of fault. Since this approach theoretically avoids any direct and formal comparison with the manufacturer, the problem becomes the method of measuring a party’s degree of fault. A party’s actual fault could be compared against the hypothetical standard of reasonable care from which the party has deviated.\textsuperscript{228} Thus, the plaintiff who deviated only slightly from the reasonable care standard would have his or her damages only slightly reduced, whereas the plaintiff who deviated substantially would have his or her damages greatly reduced. This approach will not be a panacea for all the special difficulties that exist in the comparison process, but neither will it be without effect.

The theoretical problem with this approach is that measurement of fault against a hypothetical standard might produce results significantly different from those produced by comparing the fault of one party with the fault of another party. For example, a substantial deviation from the hypothetical standard of care, viewed in isolation, may be ascribed a high fault factor sufficient to bar all recovery under a modified comparative negligence system. If that same deviation is compared with an even more substantial deviation by another party, by comparison it will be ascribed a lesser fault factor insufficient to bar recovery under a modified comparative negligence system. Moreover, since the manufacturer’s legal fault is treated as a constant under this approach, the jury may not perceive the same significant variations in degree of fault that are so apparent with regard to parties tested by traditional fault concepts.\textsuperscript{229} Accordingly, this reduction approach might theoretically shift disproportionate portions of the total liability from the manufacturer to either plaintiff or a third party tortfeasor.

This concern is probably a good example of a theoretical problem that will largely be tempered and resolved by the pragmatic and equitable features of the tort litigation process. In most cases the jury will retain a reasonably accurate impression of where the seller’s legal culpability falls along the spectrum from mere technical fault to serious breach of the legal obligation to produce nondefective products.\textsuperscript{230}

---

\textsuperscript{228} See Fischer, supra note 33, at 449-50.

\textsuperscript{229} Consider, for example, the case of the pebble in a can of peas. While the presence of the pebble renders the product defective, it is not necessarily known whether its presence occurred despite all reasonable care by the manufacturer, or because the manufacturer failed to purchase expensive testing equipment that might have detected the pebble’s presence, or because an employee of the manufacturer saw the pebble, but was too lazy to remove the pebble itself or the whole can of peas from the production line. Yet these various possibilities, if known, would undoubtedly affect the degree of fault ascribed by the jury to the manufacturer.

\textsuperscript{230} Since the adoption of strict liability, production defect cases apparently have almost disappeared from the reported decisions. While it is possible that a significant number of production defect cases are being tried but not reported in published opinions, this possibility seems rather unlikely. Production defect
More importantly, the theoretical problem tends to overlook the equitable nature of the jury's function in these cases. Fault cannot be precisely measured in any event, and the jury will be guided largely by its collective perception of fairness. Jury instructions explaining the nature and purpose of strict liability and the legal effects of proportionate fault findings will probably provide sufficient protection against a shifting of disproportionate shares of liability from manufacturers to other parties. Since substantive policy considerations favor the application of comparative fault principles to strict liability actions, the Kansas courts certainly should experiment with the reduction approach to the comparison problem in cases in which a more conventional comparison of fault is not feasible.

V. SPECIFIC APPLICATIONS OF THE KANSAS COMPARATIVE NEGLIGENCE STATUTE TO STRICT PRODUCTS LIABILITY

Of all the comparative fault systems adopted to date in the United States, the Kansas comparative negligence statute is the least supportive of the tort policy of plaintiff compensation. The individual judgment system, the joinder of immune, unknown, and unavailable tortfeasors, and the forty-nine percent rule combine to shift to plaintiffs disproportionate shares of the burden of accident losses. Nevertheless, these provisions reflect the established tort policy of Kansas, and courts should apply them to strict liability actions to the extent that they are not incompatible with specific policy considerations underlying strict liability. Moreover, this analysis should not be affected by the manner in which the Kansas courts resolve the statutory problem. Whether the courts apply the provisions of the comparative negligence statute directly under the negligence per se approach or indirectly and by analogy under the judicial adoption approach, the policy of nondiscrimination should govern and should prevent deviation from the specific provisions of the comparative negligence statute simply on the ground that the specific statutory provision is perceived as reflecting undesirable tort policy.

A. Plaintiff's Fault

1. Contributory Negligence

The Kansas courts should apply comparative fault principles to plaintiff's contributory negligence. Although contributory negligence formerly was not a defense to strict liability actions, this result derived from the inadequacies of the all or nothing system of loss allocation rather than from any affirmative policy of shifting excess liability to manufacturers of defective products. In addition, the purpose of the Kansas comparative negligence statute is to apportion losses on the basis of the proportionate fault of all parties. It would be anomalous to reduce the contributorily negligent plaintiff's recovery when the manufacturer was negligent,
but not when the manufacturer was without fault or, although negligent, was sued only on the strict liability theory.

A more difficult question, however, concerns the circumstances under which plaintiff’s failure to discover the defect or to guard against its possible existence should be a defense. The Restatement does not characterize these failures as necessarily involving contributory negligence, but simply provides that when either failure does constitute contributory negligence, the failure is not a defense.331 Neither failure should normally be sufficient to constitute legal fault. Many defects are truly latent, which means they are not discoverable by reasonable inspection;332 furthermore, most consumers lack the ability to make any meaningful inspection for defects. In these cases the failure to inspect could not be a legal cause-in-fact of any resulting injury.333 In addition, modern marketing practices, which heavily emphasize advertising, tend to instill in consumers an unquestioning faith in the quality, safety, and desirability of products.334 Thus, it would be unreasonable to presuppose a high level of consumer skepticism concerning products and to insist as a matter of law that consumers constantly must guard against the mere possibility of defects in products. In the substantial majority of cases the consumer is essentially “forced to rely upon the seller”335 to market nondefective products, and the consumer should have a concomitant legal right to rely on an initial assumption that the product is nondefective.

This right to rely, however, should not be absolute. When additional or special circumstances indicate that the initial assumption of nondefectiveness is no longer valid, the consumer’s failure to act in a reasonable manner concerning his or her own safety in dealing with the product should be characterized as legal fault.336 At this point, the consumer’s conduct consists of more than “merely . . . a failure to discover the defect . . . or to guard against the possibility of its existence.”337 This limited right to rely on an assumption of product nondefectiveness is analogous to the well-established rule that a driver is entitled to assume that other drivers will obey the rules of the road until circumstances indicate otherwise.338 In a society in which

331 Restatement (Second) of Torts § 402A, Comment n at 356 (1956) provides: “Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence.”

332 See, e.g., Ford Motor Co. v. Mathis, 322 F.2d 267 (5th Cir. 1963) (defect in component part not discoverable except by destruction of the component part).

333 Failure to inspect for defects could be a cause-in-fact of plaintiff’s injury only if plaintiff could have avoided the injury by inspecting for defects. In order to be a legal cause-in-fact of a harm, a wrongful act or omission must constitute a necessary antecedent to the harm. See Prosser, supra note 23, § 41, at 237-41. See also notes 319-24 and accompanying text supra.


335 Restatement (Second) of Torts § 402A, Comment c at 349-50 (1965).

336 Indeed, limited support for this view is found in the cases applying comparative fault principles to strict liability actions. In Murray v. Beloit Power Sys., Inc., 450 F. Supp. 1145, 1147 (D.V.I. 1978), aff’d sub nom Murray v. Fairbanks Morse, 610 F.2d 149 (3d Cir. 1979) (emphasis added), the court held that the “mere failure of plaintiff to discover or guard against the existence of a defect where plaintiff had no reason to suspect the same would not constitute a defense in a § 402A type action.” See also Busch v. Busch Constr., Inc., 262 N.W.2d 377, 394 (Minn. 1977).

337 Restatement (Second) of Torts § 402A, Comment n at 356 (1965) (emphasis added).

338 See, e.g., Halliri v. Stone, 216 Kan. 568, 534 P.2d 232 (1975); Lehar v. Rogers, 208 Kan. 831, 494 P.2d 1124 (1972); Kelty v. Best Cabs, Inc., 206 Kan. 654, 481 P.2d 980 (1971). Indeed, in negligence law courts frequently require special circumstances as a predicate to the existence of a duty. For example, a landowner may owe no duty of care to trespassers until either the landowner discovers the trespasser or the special circumstances giving rise to the attractive nuisance doctrine exist. See, e.g., Talley v. J & L Oil Co., 224 Kan. 214, 579 P.2d 706 (1978) (attractive nuisance); Atchison, Topeka & Santa Fe R.R. v. Todd, 54 Kan. 551, 38 P. 804 (1895) (discovery). A driver normally owes no duty to other motorists or pedestrians to remove the ignition key from his or her car to prevent the theft and negligent operation of
crowded highways are common, drivers are frequently forced to rely on the proper
driving conduct of others, and thus the legal rule reflects the reality of this type of
activity. The drafters of the Restatement apparently recognized a similar reliance by
consumers concerning manufactured products in a complex society:

The basis for the rule [of strict liability] is the ancient one of the special respon-
sibility for the safety of the public undertaken by one who enters into the business of
supplying human beings with products which may endanger the safety of their
persons and property, and the forced reliance upon that undertaking on the part of
those who purchase such goods.\textsuperscript{339}

The Kansas courts should ensure, however, that the special circumstances ex-
ception does not become overly broad and thereby shift unwarranted portions of
accident losses to plaintiffs. Accordingly, the identification of the circumstances
sufficient to constitute plaintiff’s fault should not simply be a function of the jury
pursuant to a broad instruction. Rather, the initial determination of special circum-
stances should be reserved to the court in order to better promote the strong policy
of consumer protection underlying strict liability.\textsuperscript{340}

2. Abnormal Use

As previously discussed, extension of the manufacturer’s obligation to produce
nondefective products to encompass foreseeable abnormal uses of the product may
be viewed as a sound application of the tort concept of foreseeable risk, but charac-
terization of plaintiff’s conduct as a separate defense known as abnormal use or
misuse simply creates unnecessary analytical confusion in the cases.\textsuperscript{341} The Kansas
courts have never characterized plaintiff’s abnormal use of a product as a separate
defense,\textsuperscript{342} and they should not do so now. Rather, the courts should characterize

\textsuperscript{339} Restatement (Second) of Torts § 402A, Comment f at 351 (1965) (emphasis added).

\textsuperscript{340} See notes 205-13 and accompanying text supra.

\textsuperscript{341} The sole reference to abnormal use or misuse as a defense in a defective product case in Kansas is
found as dictum in a lengthy quotation from 2 Frumer & Friedman, supra note 192, § 16.01[3], in which those
authors discussed contributory negligence and misuse. See Bereman v. Burdolski, 204 Kan. 162, 167-69, 460 P.2d 567, 571-72
(1969). Kansas does recognize a defense to express and implied warranty
actions for the unreasonable use of the product after plaintiff has discovered the defect and is aware of the
danger. See Pattern Instructions Kansas 2d (Civil) § 13.19 (1977). This defense, however, appears to
be analytically analogous to assumption of risk rather than a defense based on an unusual, abnormal, or
(1970). Indeed, the same language is used to define the defense of unreasonable use in a strict liability
action, and in those actions the defense clearly reflects the concept of assumption of risk as set forth in
Restatement (Second) of Torts § 402A, Comment n at 356 (1965). Compare Pattern Instructions
Kansas 2d (Civil) § 13.23 (1977) with Brooks v. Dietz, 218 Kan. 698, 545 P.2d 1104 (1976). Other-
wise, Kansas appears to treat ordinary use of the product as relevant simply to the question of defectiveness.
See Pattern Instructions Kansas 2d (Civil) § 13.21 (1977).
abnormal use simply as a form of contributory negligence, when appropriate, and they should subject this conduct to comparative fault principles.

3. Assumption of Risk

The Kansas courts should use comparative fault principles to eliminate as a complete defense "contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk." The majority of courts that have applied comparative fault principles to strict liability actions have specifically subjected the defense to comparative fault principles. In essence, the courts have indicated a preference for the view that this defense is a crude relative fault concept derived from all or nothing principles rather than a conceptually different form of plaintiff fault.

This interpretation seems particularly sound under Kansas law. The Kansas courts have never recognized assumption of risk as a defense of general application in tort law, but rather they have adamantly limited the defense to employment cases under the rationale that an employee assumes all ordinary risks inherent in the employment as an implied term in the employment contract. This contract rationale also provided a conceptual basis for applying the defense without regard to the unreasonableness of a voluntary exposure to danger, whereas in strict liability actions both voluntariness and unreasonableness must be established.

The retention of two similar, but essentially different, forms of assumption of risk under Kansas law would create potential for undue confusion in the future development of Kansas law.

Furthermore, eliminating assumption of risk as a complete defense should alleviate the troublesome consequences that result from all or nothing principles in cases such as Brooks v. Dietz. In that case plaintiff, an experienced furnace retailer and repairman, suffered serious personal injury in a propane gas explosion caused by a defective seal in the relay switch box of a furnace manufactured by defendant. After inspecting the basement of a home, plaintiff knew that it was filled with gas, that the

---

343 RESTATEMENT (SECOND) OF TORTS § 402A, Comment n at 356 (1965).
345 See, e.g., Pan-Alaska Fisheries, Inc. v. Marine Const. & Design Co., 565 F.2d 1129, 1139-40 (9th Cir. 1977); Stueve v. American Honda Motors Co., 457 F. Supp. 740, 754 (D. Kan. 1978); Daly v. General Motors Corp., 20 Cal. 3d 725, 735, 742, 575 P.2d 1162, 1167, 1172, 144 Cal. Rptr. 380, 385, 390 (1978). In these cases the courts viewed the dichotomy between contributory negligence and assumption of risk as essentially related to the all or nothing system of tort loss allocation.
349 In addition to potential confusion, it would seem senseless not to apply comparative principles to assumption of risk in strict liability actions since in most cases plaintiff could elect to proceed in negligence when the defense is not recognized. As discussed previously, loss allocation in a tort action based on given facts should be decided on the basis of public policy and not on the basis of counsel's maneuvering. See notes 261-83 and accompanying text supra.
windows had not been opened for ventilation, and that a pilot light was burning in the water heater. The explosion occurred when plaintiff reentered the basement to turn off the supply of gas. Although he was apparently motivated by a desire to prevent substantial damage to the homeowners' property, he fully appreciated the danger to himself and could have turned off the gas at an outside source. Therefore, although plaintiff's conduct could have been characterized as voluntary and unreasonable, a sharply divided supreme court upheld a jury verdict in his favor.

In cases in which plaintiff's conduct is perilously close to the definition of assumption of risk, frequently the choice is between recovery of all compensable damages and no recovery at all.\textsuperscript{351} If ten different juries heard this identical case probably half of them would find for plaintiff while the other half would find for defendant. While there is no guarantee that similar results would not occur under a modified comparative fault system, this lottery effect should be less likely to prevail under modified comparative fault because juries would be instructed concerning the legal effects of their findings.\textsuperscript{352}

Similarly, eliminating assumption of risk as a complete defense should ensure that the harsh and illogical patent danger rule is not unduly perpetuated in Kansas product liability law.\textsuperscript{353} This rule was originally applied in negligence cases involving alleged design defects\textsuperscript{354} and provides that a manufacturer has a duty only to avoid latent or concealed dangers in products and could assume that users and consumers would take appropriate precautions against patent or obvious dangers.\textsuperscript{355} Although the rule focuses on the duty concept, it actually encompasses a mixture of duty and assumption of risk concepts. If further design changes for safety purposes would not be feasible, then analytically the product may be reasonably safe when coupled with a warning about the remaining danger. The patent or obvious nature of a danger, however, would make a warning unnecessary, and the manufacturer has arguably satisfied his legal obligation to produce a reasonably safe product.\textsuperscript{356} Courts also have applied the rule in situations in which a simple and inexpensive design change would have eliminated a danger, and this application of the rule shifts an unreasonable

\textsuperscript{351} Drawing lines to distinguish between recovery and no recovery is, of course, inherent in legal rules. A close issue of defectiveness may exist in a given case, and the outcome will determine whether plaintiff is entitled to a substantial recovery or to no recovery at all. In this type of case the issue goes to the existence of legal fault, and the dramatic results of a decision one way or the other are unavoidable. The situation concerning assumption of risk is distinguishable, however, because the line is not between legal fault and no fault, but rather between quantities of fault. Thus, a blameworthy plaintiff may recover a portion of his or her damages up to a point, but once that point is passed no recovery at all is allowed. If this process is to continue, it should be done directly under the 49% rule rather than indirectly and alternatively under a conceptual definition of assumption of risk that may or may not equate with substantial plaintiff fault in any given case.

\textsuperscript{352} When the jury is instructed concerning the legal effects of comparative fault findings and perceives both parties to be approximately equally at fault, they will probably find plaintiff 49%, at fault rather than totally bar plaintiff from recovery by a finding of 50% fault. If this option had been available in \textit{Brooks}, the jury probably would have apportioned the loss rather than allowed plaintiff a complete recovery, and undoubtedly three Justices would not have dissented from the affirmance.

\textsuperscript{353} See, e.g., Hartman v. Miller Hydro Co., 499 F.2d 191 (10th Cir. 1974) (Kansas law).

\textsuperscript{354} See generally 2 FRUMER & FRIEDMAN, supra note 192, § 16A[4][b].

\textsuperscript{355} See, e.g., Atkins v. Arlan's Dept. Store of Norman, Inc., 522 P.2d 1020 (Okla. 1974). In Atkins a minor threw a dart and accidentally struck and injured plaintiff, another minor. Nothing about the physical condition of the dart made it defective, and the obvious nature of a dart renders a warning not to throw it at other people rather meaningless. In this situation it is difficult to conclude that the product was defective because of manufacture, design, or inadequate warnings. One could argue that providing young children with darts constitutes negligence, but this argument relates to negligent conduct of a seller rather than to a defective condition of the product.
burden of accident avoidance to users and consumers. In these cases the rationale is more akin to assumption of risk since the manufacturer has not met his or her obligation to produce a reasonably safe product. The harsh results occurred because users and consumers often found themselves in situations in which they could not realistically be expected to pay constant and undivided attention to their own safety. For example, the rule was frequently applied to employees whose jobs required continuous use of unsafe production machinery and who were particularly vulnerable because of the need both to perform efficiently and to keep their jobs in order to earn a livelihood. Courts and commentators have justly criticized the patent danger rule, and many courts have discarded it. Eliminating assumption of risk as a complete defense in strict liability actions will enable Kansas to eliminate the patent danger rule without shifting excess liability to manufacturers.

4. The Forty-Nine Percent Rule

The final issue concerning plaintiff’s fault is whether the courts should apply the modified comparative negligence provision of the Kansas statute or a judicially adopted pure comparative fault provision to strict liability actions. In Stueve v. American Honda Motors Co., a federal court attempting to predict the development of Kansas law suggested that the Kansas courts might judicially adopt a pure comparative system in order to avoid the harsh effects of contributory negligence and to better promote the public policy of strict liability. Although this argument represents an enlightened view of the public policy issues involved in the loss allocation problem, the courts should decide the question on the basis of whether the public policy reflected by the forty-nine percent rule in the Kansas statute is incompatible with the public policy of strict liability.

From an abstract public policy perspective, pure comparative negligence provides the best opportunity for equitable loss distribution, and the forty-nine percent rule is

---


*See cases cited in note 357 supra.


*Elimination of the patent danger rule will not impose excess liability on manufacturers because the court will reduce plaintiff’s recovery to the extent that his or her encountering an obvious and thus known defect was unreasonable conduct.


* Id. at 756-58.

*KAN. STAT. ANN. § 60-258(a) (1976). See note 4 supra.
harsh, illogical, and inequitable. First, the forty-nine percent rule discriminates between plaintiffs and defendants in a manner incompatible with the compensation rationale of modern tort law. It essentially provides that a defendant who is fifty-one percent or more at fault shall bear only a proportionate share of the burden of loss with the remainder of the burden being shifted to plaintiff, whereas a plaintiff who is fifty percent or more at fault shall bear the entire burden of the loss with none of the burden being shifted to the culpable defendant. Thus, as the court correctly observed in *Stueve*, the forty-nine percent rule does not abolish the contributory negligence rule, but rather merely shifts the point at which the harsh and inequitable effects of the contributory negligence rule are imposed.365

Second, the forty-nine percent rule is harsh and inequitable even in comparison with the fifty percent rule of modified comparative negligence because the forty-nine percent rule has no capacity to produce equitable results in double injury accidents. For example, in a two-car accident in which both drivers are injured and are equally at fault, under the fifty percent rule both drivers could recover half of his or her damages from the other driver, or in reality from the other driver's insurance company, whereas under the forty-nine percent rule neither driver could recover. Thus, insurance companies frequently will be the primary beneficiaries of the rule.366  The adoption of pure comparative negligence would readily avoid these inequities, and thus by comparison the forty-nine percent rule is not well supported by considerations of sound tort policy.

Despite its deficiencies, the forty-nine percent rule represents the established public policy underlying current Kansas negligence law. Thus, the more appropriate question is whether this rule is incompatible with specific policy considerations underlying strict liability. Since the rule shifts excess liability from manufacturers to injured users and consumers, initially the rule might appear to be incompatible with the loss spreading rationale of strict liability. Yet courts have always imposed excess liability on users and consumers whose conduct was characterized as assumption of risk.367  Indeed, when assumption of risk is viewed as a crude relative fault loss shifting mechanism, it seems quite analogous to the basic premise of modified comparative negligence that a highly blameworthy plaintiff should not recover at all even though the defendant was also legally blameworthy.368  Accordingly, the forty-nine percent

365 457 F. Supp. at 756. See also Schwartz, supra note 101, at 179.

366 Representatives of the insurance industry testified in general opposition to the enactment of the Kansas comparative negligence statute on the ground that comparative negligence would result in increased payment of claims and thus increased insurance premiums. Although the 50% rule contained in earlier versions of the bill was changed to the 49% rule in subsequent versions, no meaningful legislative history reflects the reasons for this change and it is unclear if a concern about increased insurance premiums was influential in effecting this change. See Special Comm. Rep., supra note 64, at 84-2. See also notes 87-88 supra.

367 In the typical assumption of risk case the manufacturer is legally blameworthy for placing a defective product in commerce, and the user or consumer is legally blameworthy for voluntarily and unreasonably encountering the known defect. Yet the court imposes the entire burden of loss on the user and consumer, who thus bear excess liability attributable to the fault of the manufacturer. Of course, imposition of excess liability on one or the other party has always been a natural consequence of the all or nothing system in cases involving two or more blameworthy parties.

368 If assumption of risk is viewed as a category of conduct in which plaintiff was at fault to a substantial degree, then it is quite analogous to the implicit rationale of modified comparative fault systems that highly blameworthy plaintiffs should not recover at all. Assuming that this rationale is sound, modified comparative fault is the preferable means by which to promote the policy because assumption of risk does not necessarily coincide with a high percentage of proportionate fault. See, e.g., McConville v. State Farm Mut. Auto. Ins. Co., 15 Wis. 2d 374, 113 N.W.2d 14 (1962). To the extent that the patent danger rule is premised in part on assumption of risk considerations as well as duty considerations, it is quite foresee-
rule is not inherently inconsistent with the policies of strict liability. Although the rule is harsh, it is equally harsh to plaintiffs in both negligence and strict liability actions. The policy of nondiscrimination should govern, and the forty-nine percent rule should be applied to strict liability actions in the same manner that it is applied to negligence actions.

B. Multiple Tortfeasors and the Individual Judgment Provision

1. Unrelated Other Tortfeasors

The courts should apply the individual judgment provision of the Kansas comparative negligence statute to cases involving injuries caused by the concurrence of a manufacturer's defective product and the culpable conduct of another tortfeasor not in the manufacturer's chain of supply or distribution. Admittedly, this approach will reduce overall plaintiff compensation in the long-term because these other tortfeasors will often be employers protected by the Kansas Workers' Compensation Act,\textsuperscript{380} inadequately insured drivers,\textsuperscript{379} and other parties who are not viable sources of full compensation.\textsuperscript{371} Nevertheless, this adverse impact on compensation does not constitute an actual deviation from the affirmative policy considerations underlying strict liability. In Kansas, as in most other jurisdictions, courts have subjected the strictly liable manufacturer to the same ultimate loss allocation rules and concepts as they have applied to other tortfeasors. Under prior Kansas law the strictly liable manufacturer had the same limited right of contribution as other tortfeasors\textsuperscript{372} and, like other tortfeasors, frequently bore the burden of disproportionate loss allocation whenever one of the tortfeasors contributing to an injury was not sued by plaintiff or was judgment proof. Surely, if the Kansas comparative negligence statute had adopted a system of joint and several liability coupled with comparative contribution, there would be little argument against affording the same right of comparative contribution to strictly liable manufacturers.

The problem lies in the statutory change of the ultimate loss allocation policy from joint and several liability to an individual judgment system, which shifts from other tortfeasors to plaintiff the burden of any insolvency, immunity, or unavailability of one of the tortfeasors.\textsuperscript{373} If all tortfeasors were solvent and suable, the ultimate

\textsuperscript{380} Undoubtedly cases occasionally will arise in which the proportionate fault of the employer will substantially exceed the fault of the manufacturer, and the workers' compensation benefits paid by the employer will be substantially less than the employer's proportionate share of the total damages suffered by plaintiff. See, e.g., Balido v. Improved Mach., Inc., 29 Cal. App. 3d 633, 105 Cal. Rptr. 890 (1973).

\textsuperscript{379} Automobile liability insurance is frequently the only practical source of compensation in automobile accidents, yet Kansas drivers are required to purchase liability insurance only in the amounts of $15,000 per person and $30,000 per accident. KAN. STAT. ANN. § 40-3107(e) (Cum. Supp. 1979). As a result, the problem of the inadequately insured motorist is not uncommon in Kansas.

\textsuperscript{372} When plaintiff's injury is caused by the concurrence of a defective product and the fault of an immune party such as a governmental entity, an unavailable party such as a tortfeasor who cannot be served with process, or an unknown party such as a "hit and run" driver, plaintiff's compensation will be reduced.

\textsuperscript{373} As actually written, the individual judgment provision appeared to apply only to "parties against whom . . . recovery is allowed." KAN. STAT. ANN. § 60-258a (d) (1976). This approach would have shifted to plaintiffs only the burden of the insolvency of an otherwise suable, formally joined tortfeasor. The Kansas Supreme Court then interpreted the comparative negligence statute to permit joinder of immune tortfeasors, which shifted additional burdens to plaintiff, and to permit informal assertion of another's liability in lieu of formal joinder, which shifted to plaintiffs the additional burdens of the pro-
allocation of loss would be identical under either system, and the burden borne by the manufacturer would be characterized as his equitable share of the ultimate loss. If the inability of another tortfeasor to pay his proportionate share distorts this ideal allocation of loss, the ensuing hardship on plaintiff is clearly a function of the individual judgment system itself rather than the application of that system to strict liability actions. The manufacturer still bears his previously determined equitable share of the ultimate loss, and the perceived inequity results simply from the decision to burden plaintiff rather than the manufacturer with the share of loss attributable to the insolvent, immune, or otherwise unavailable tortfeasor.

2. Parties in the Chain of Supply and Distribution

A difficult question of first impression involves the potential application of the individual judgment provision to parties in the manufacturer's chain of distribution and supply. Section 402A provides for the strict liability of any "seller" of a defective product; the term "seller" includes parties in the manufacturer's chain of distribution such as retailers and wholesalers. Some courts also apply strict liability to parties who supply the manufacturer with defective materials or component parts that are incorporated without substantial change into the completed product. If the individual judgment provision is applied to parties in the chain of distribution and supply, the burden of loss attributable to the insolvent or other unavailability of any party involved in the overall manufacturing and marketing process would be shifted to the injured user or consumer. This result would appear to be incompatible with the fundamental policy considerations underlying strict liability; therefore joint and several liability coupled with the rights of joinder and comparative contribution among all "sellers" of the defective product should be the preferable approach in these cases.

From a strict liability perspective analysis of this issue must focus on the appropriate characterization of these parties in the context of the loss spreading rationale. The basic premise of the loss spreading rationale is that the commercial enterprise, with its capacity to bear losses by passing them on to the consuming public, should bear the losses caused by its defective products rather than impose those losses on injured users and consumers. If the parties in the chain of distribution and supply are characterized as essentially separate and independent entities, each responsible only for its own wrongful conduct, the individual judgment provision would arguably apply in the same manner that it applies to unrelated other tortfeasors. Yet these parties are not truly separate and independent to the extent that their proportionate liability of unknown and unavailable parties. See Brown v. Keill, 224 Kan. 195, 580 P.2d 867 (1978); Miles v. West, 224 Kan. 284, 580 P.2d 876 (1978). See also notes 113-15 and accompanying text supra. Restatement (Second) of Torts § 402A, Comment f at 350 (1965). See generally 2 FRUMER & FRIEDMAN, supra note 192, §§ 19A, 20.4(2).


The more that these parties are characterized as separate and independent, the more that they cannot be rationally distinguished from the "unrelated other tortfeasors" discussed in the prior section and the more that the policy of nondiscrimination would support application of the individual judgment provision.
common enterprise affects users and consumers. Rather, they are integral parts of a single manufacturing and marketing enterprise and should be deemed to share a common obligation to users and consumers injured by the defective products of the enterprise.

The courts have recognized this concept of a common obligation in a number of situations in which they have held a party within the overall enterprise to be strictly liable even though another party within the enterprise caused an undiscoverable defect. For example, retailers and wholesalers may be strictly liable for undiscoverable defects caused by the manufacturer. The manufacturer may be strictly liable for an undiscoverable defect in a component part supplied by another party or for a defect caused by a retailer performing the final aspects of the manufacturing process after the product has left the manufacturer’s control. A successor corporation that has merely purchased the assets of the predecessor corporation may be held liable for defects caused by the predecessor manufacturer. The common rationale in all these situations is that the overall enterprise should bear these losses in order to provide both maximum deterrence against defective products and maximum consumer protection through a broad application of the loss spreading rationale. As the California Supreme Court stated,

Retailers like manufacturers are engaged in the business of distributing goods to the public. They are an integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products. In some cases the retailer may be the only member of that enterprise reasonably available to the injured plaintiff. In other cases the retailer himself may play a substantial part in insuring that the product is safe or may be in a position to exert pressure on the manufacturer to that end; the retailer’s strict liability thus serves as an added incentive to safety. Strict liability on the manufacturer and retailer alike affords maximum protection to the injured plaintiff and works no injustice to the defendants, for they can adjust the costs of such protection between them in the course of their continuing business relationship.

In addition, joint and several liability in this limited context is not necessarily incompatible with the purpose and intent of the individual judgment provision. Despite an absence of legislative history concerning this provision, it apparently reflects the attitude that requiring one tortfeasor to pay the damages attributable to another tortfeasor is harsh and unfair. This rationale was influential in the extension by the Kansas Supreme Court of the joinder and the individual judgment provisions

---


379 The majority rule has long been that a corporation purchasing the assets of another corporation does not succeed to the liabilities of the selling corporation. 8 S. THOMPSON & J. THOMPSON, COMMENTARIES ON THE LAW OF CORPORATIONS § 6068 (3d ed. 1972). Nevertheless, a number of courts have created an exception to this rule by holding the successor corporation liable for injuries caused by the defective products of the selling corporation. See, e.g., Leannais v. Cincinnati, Inc., 565 F.2d 437 (7th Cir. 1977); Knapp v. North Am. Rockwell Corp., 506 F.2d 361 (3d Cir. 1974); Ray v. Alad Corp., 19 Cal. 3d 22, 560 P.2d 3, 136 Cal. Rptr. 574 (1977).


381 See notes 72-73 and accompanying text supra.
to immune, unknown, and unavailable tortfeasors. As the court stated in *Miles v. West*,

The comparative negligence statute was intended to prevent harsh results which
could occur in lawsuits similar to the case at bar. An example of what could happen
if joint and several liability existed under comparative negligence in a case involving
spouses is *Kampman v. Dunham*, .... Colo. ...., 560 P.2d 91 (1977). There a hus-
band was operating a motorcycle on which his wife was a passenger. He collided
with defendant's automobile. In the wife's lawsuit against the automobile owner a
jury found the wife 0% negligent, her husband 99% negligent, and the automobile
owner 1% negligent. The trial court limited the wife's recovery against the auto-
mobile owner to 1% of her damages. The Colorado Court of Appeals reversed and
allowed her to recover 100% of her damages from a party only 1% negligent. The
Colorado Supreme Court affirmed, holding that joint and several liability had not
been abolished by the adoption of the Colorado comparative negligence statute. We

decline to adopt such a construction of our comparative negligence act.282

This policy of avoiding harsh and unfair results is understandable and arguably
logical in cases in which the tortfeasors are unrelated, particularly in cases in
which the immunity or unavailability of one tortfeasor is based on a relationship
with plaintiff such as a family relationship,383 an employment relationship384 or
settlement.385

The rationale is illogical, however, in cases in which the tortfeasors are closely
related and share a common legal obligation to plaintiff. Many traditional tort
doctrines such as imputed negligence,386 respondeat superior,387 joint "in concert"
liability,388 and joint venture389 are based on a relationship concept and recognize
the legal responsibility of one party for the actual fault of another. These doctrines do
not lend themselves to apportionment under the individual judgment provision.390

---

282 224 Kan. at 286, 580 P.2d at 880.
283 If the immediate family is viewed as a single economic unit, allocation to the family of the portion of
loss caused by one family member to another may seem appropriate. This result seems analogous to the
reduction of plaintiff's recovery in proportion to plaintiff's own fault.
284 If plaintiff collects workers' compensation benefits from his or her employer, treating those benefits
as satisfaction of the employer's proportionate share of plaintiff's total damages is not necessarily unfair.
Before this result can be considered equitable, however, the employer's right of subrogation against
plaintiff's recovery from third parties must be abrogated except to the extent that the workers' compensation
285 If plaintiff settles with one tortfeasor, treating the settlement payment as satisfaction of that tort-
feasor's proportionate share of plaintiff's total damages is not necessarily unfair. In all of these situations,
plaintiff has a relationship with an immune or otherwise unavailable tortfeasor, and this relationship pro-
vides the basis for deeming equitable the limitation of another tortfeasor's obligation to his or her propor-
tionate share of the total loss.
287 Id. § 70, at 460-67.
288 Id. § 46, at 291-93.
289 Id. § 72, at 475-81.
290 The individual judgment provision is not necessarily inappropriate in cases involving two unrelated
tortfeasors whose separate acts of negligence combine to cause a single, indivisible injury to plaintiff. In
these cases the tortfeasors were formerly held jointly and severally liable not because of any relationship
between them, but rather because they each caused an injury that could not be apportioned on any
judicially acceptable basis prior to the adoption of comparative fault principles. See Prosser, *supra* note 23,
§ 47, at 297-99 & § 52, at 313-17. Accordingly, with the adoption of comparative fault apportionment of
the loss on a relative fault basis became possible, and the individual judgment system of loss allocation is
not inherently unfair because arguably "common-sense is opposed to making one man pay for another
man's wrong, unless he actually has brought the wrong to pass according to the ordinary canons of legal
responsibility,..." Holmes, *Agency* (pt. II), 5 Harv. L. Rev. 1, 14 (1891). The situation is entirely
different, however, in cases of imputed fault. The common rationale of imputed fault doctrines is that by
Since the Kansas comparative negligence statute expressly recognizes the continued vitality of imputed negligence,\textsuperscript{391} no reason exists to believe that the individual judgment provision was intended to be absolute and unlimited in application. The authors predict that the Kansas courts will ultimately refuse to apply the individual judgment provision in cases involving common obligations.

Moreover, joint and several liability in this limited context is not incompatible with the policy of nondiscrimination. In some possible situations different loss allocations under negligence and strict liability theories might initially seem to be unjustified. Consider a defective products case in which the manufacturer and retailer are each fifty percent negligent and one of them is bankrupt. Under the negligence theory the court might apply the individual judgment provision and thus would shift the half of the loss attributable to the bankrupt tortfeasor to the innocent plaintiff, while under the strict liability theory with joint and several liability the solvent party would bear the entire loss. This result, however, cannot be characterized as merely a different loss allocation based on choice of theory with no distinguishing rational policy basis. Consider the case in which the manufacturer creates a defect that is wholly undiscoverable by the retailer. Under the negligence theory the retailer has not been negligent and thus is not liable, while under the strict liability theory the retailer as a "seller" of a defective product is liable despite the absence of traditional fault, although the retailer would be entitled to indemnity from the manufacturer.\textsuperscript{392} If the court were to apply the individual judgment provision in the strict liability action, however, the retailer who breached a legal obligation to another would nevertheless be relieved of any obligation to pay. This result is inappropriate because it would render the concept of strict liability as a basis for the initial imposition of liability wholly meaningless. The apparent "excess liability" imposed on the retailer in this situation is not discriminatory because it is derived from a rational difference in legal doctrines relating to the initial imposition of liability, and this difference necessitates a different approach to ultimate loss allocation.

C. The Implied Warranty of Merchantability

Users and consumers may bring an action for injuries caused by defective products on the theory of breach of the implied warranty of merchantability, in addition to the negligence and strict liability theories of recovery.\textsuperscript{393} This warranty is a hybrid


\textsuperscript{392} See W. Kimble & R. Leisher, Products Liability § 275, at 308-09 (1979).

\textsuperscript{393} See Kan. Stat. Ann. § 84-2-314 (1965), which provides in pertinent part:

(1) Unless excluded or modified . . . a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as . . . .

(c) are fit for the ordinary purposes for which such goods are used . . . .
form of tort and contract; it encompasses items of damages usually not recoverable under strict liability and has a different statute of limitations. Nevertheless, in order to give the policy of nondiscriminatory loss allocation meaningful effect, the provisions and principles of the Kansas comparative negligence statute should be applied to implied warranty actions in the same manner that they are applied to strict liability actions.

Early Kansas courts developed the concept of warranties implied in the sale of goods both as a means of protecting the legitimate contractual expectations inherent in commercial transactions and as a means of providing a remedy for personal injuries caused by defective products. In 1966 the Kansas legislature merged and codified these two purposes of warranty by adopting the Uniform Commercial Code (UCC). Although the primary purpose of the UCC was to modernize and make uniform commercial contractual transactions, a secondary purpose was the protection of the general public against the unreasonable dangers of defective products. The implied warranty of merchantability essentially imposes on sellers a strict liability obligation to sell only nondefective products, and the consequential damages re-

384 See Prosser, supra note 131, at 1126-27.
385 Strict liability is generally limited to actions involving "physical harm . . . to the ultimate user or consumer, or to his property," while the implied warranty of merchantability protects buyers against mere economic loss as well as against personal injury and property damage. Restatement (Second) of Torts § 402A(1) (1965). See also Kan. Stat. Ann. § 84-2-715 (1965). To date the majority of courts have refused to permit strict liability actions for mere economic loss. See generally Edmades, The Glazel Stands: The Recovery of Economic Loss in American Products Liability, 27 Case W. Res. L. Rev. 647 (1977); Ribstein, Guidelines for Deciding Product Economic Loss Cases, 29 Mercer L. Rev. 493 (1978); Speidel, Products Liability, Economic Loss and the UCC, 40 Tenn. L. Rev. 309 (1973). In addition, considerable debate exists concerning the appropriate scope of property damage for purposes of strict liability. See Mid Continent Aircraft Corp. v. Curry County Spraying Serv., Inc., 572 S.W.2d 308 (Tex. 1978). The Kansas courts have not yet had an opportunity to decide the precise extent to which strict liability should be an available remedy for certain forms of property damage and economic loss, and the authors take no position concerning this issue or concerning the application of comparative fault principles to implied warranty actions that permit recovery of losses not recoverable under strict liability. Rather, the authors suggest only that comparative fault principles should apply to those implied warranty actions involving damages also recoverable under strict liability.
386 The limitations period for implied warranty actions is four years from the date of sale of the product, while the limitations period for strict liability actions is two years from the date of the occurrence. Compare Kan. Stat. Ann. § 84-2-725 (1965) with id. § 60-513(a)(4) (1976). If courts apply comparative fault principles to implied warranty actions involving personal injury or property damage, sellers will be permitted to join additional tortfeasors for purposes of apportionment under the individual judgment system. Since immune parties may be joined, plaintiffs should not allow the two year tort limitations period to lapse and wait to bring the action within the four year warranty limitations period if the concurrence of a defective product and the negligence of another actor caused the injury.
387 If comparative fault principles are not applied to implied warranty actions, factors such as plaintiff's choice of theory, plaintiff's choice of the party or parties to be sued, and the operation of the joint judgment debtor rule could produce the same variations in ultimate loss allocation that would be produced if comparative fault principles are not applied to strict liability actions. See notes 261-82 and accompanying text supra.
388 Kansas courts recognized implied warranty as a mechanism to govern purely commercial transactions in 1868. See Field v. Kinney, 4 Kan. 476 (1868).
400 The stated purposes of the UCC are: (a) to simplify, clarify and modernize the law governing commercial transactions; (b) to permit continued expansion of commercial practices through custom, usage and agreement of the parties; (c) to make uniform the law among the various jurisdictions." Id. § 84-1-102(2).
coverable by plaintiffs for breach of warranty expressly include personal injuries and physical damage to property.\textsuperscript{403} Provisions expressing a clear policy of affording increased protection to persons incurring personal injury rather than economic losses demonstrate the underlying tort basis of these remedies. For example, the UCC generally recognizes the right to disclaim implied warranties\textsuperscript{404} or to limit remedies by excluding the recovery of consequential damages.\textsuperscript{405} At the same time, however, exclusion of consequential damages in personal injury cases involving consumer goods is prima facie unconscionable,\textsuperscript{406} and disclaimer of the implied warranty of merchantability in personal injury cases would arguably be invalid under the general prohibition of unconscionable agreements.\textsuperscript{407} In addition, warranty protection is generally available only to buyers, but in personal injury cases the UCC extends this protection to all individuals “who may reasonably be expected to use, consume or be affected by the goods."\textsuperscript{408} Finally, the UCC requires buyer to give seller notice of breach within a reasonable time as a prerequisite to a warranty action,\textsuperscript{409} but recognizes that the reasonable time standard should be more liberally and flexibly interpreted in personal injury cases.\textsuperscript{410}

Despite its primarily commercial nature, the UCC clearly provides an elaborate series of mechanisms to protect consumer interests that might be better characterized as founded on tort rather than on contract. In \textit{Brooks v. Dietz}\textsuperscript{411} the Kansas Supreme Court recognized that implied warranty as a means of protecting consumers from unreasonably dangerous defective products was in reality a tort remedy, not a contract remedy, and adopted the doctrine of strict liability in tort. Accordingly, the conceptual nature of implied warranty does not provide any sound reason for failing to


\textsuperscript{404} \textit{Id.} § 84-2-316.

\textsuperscript{405} \textit{Id.} § 84-2-719(3).

\textsuperscript{406} \textit{Id.} provides that "[c]onsequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not." The UCC defines "consumer goods" as those goods "used or bought for use primarily for personal, family or household purposes." \textit{Id.} § 84-9-109(1).

\textsuperscript{407} \textit{Id.} § 84-2-302, which authorizes the courts to refuse to enforce any contract or any clause in a contract that the court finds as a matter of law to be unconscionable. Since § 2-719 expressly declares limitation of damages in personal injury cases prima facie unconscionable, but § 2-316 does not contain a parallel provision concerning the disclaimer of implied warranties in personal injury cases, a split of authority exists concerning the applicability of the § 2-302 unconscionability provision to disclaimers of implied warranties in personal injury cases. \textit{Compare J. White & R. Summers, Handbook of the Law Under The Uniform Commercial Code} 394-95 (1972) and \textit{Left, Unconscionability and the Code: The Emperor's New Clause}, 115 U. Pa. L. Rev. 485 (1967) with \textit{Weintraub, Disclaimer of Warranties and Limitation of Damages for Breach of Warranty Under the UCC}, 53 Tex. L. Rev. 60, 80-83 (1974). Although the Kansas courts have not yet decided this issue, the Kansas Consumer Protection Act, \textit{Kan. Stat. Ann.} §§ 50-623 to -643 (1976), prohibits the exclusion, modification, or other limitation of the implied warranties of merchantability or fitness for a particular purpose in any consumer transaction. \textit{Id.} § 50-639.


\textsuperscript{409} \textit{Id.} § 84-2-607(3)(a) (1965).

\textsuperscript{410} \textit{Id.} § 84-2-607, Official UCC Comment 4, which provides in pertinent part:

"The time of notification is to be determined by applying commercial standards to a merchant buyer."

"A 'reasonable time' for notification from a retail consumer is to be judged by different standards so that in his case it will be extended, for the rule of requiring notification is designed to defeat commercial bad faith, not to deprive a good faith consumer of his remedy."

\textit{See also, id.}, Official UCC Comment 5, providing for an even more liberal interpretation of the notice requirement in favor of beneficiaries of the buyer who are injured by defective products.

\textsuperscript{411} 218 Kan. 698, 545 P.2d 1104 (1976).
VI. Conclusion

The principles and provisions of the Kansas comparative negligence statute should be applied to strict liability actions. First, the Kansas courts have authority to do so either directly by characterizing strict liability as a form of negligence per se or indirectly by recognizing that equitable loss allocation has always been an integral aspect of the traditional judicial role in the development of sound tort principles and policies. Second, the concept of strict liability is essentially related to the initial imposition of liability rather than to the ultimate allocation of loss between blameworthy parties; neither the conceptual nature of strict liability, nor the tort policies of compensation and deterrence, nor any theoretical difficulties involved in jury comparison of fault and strict liability adequately justify the imposition of excess liability on strictly liable manufacturers of defective products. Indeed, since strict liability and negligence are essentially indistinguishable in matters concerning ultimate loss allocation, a policy of nondiscriminatory loss allocation supports the application of comparative fault principles to strict liability actions. Finally, the provisions of the Kansas comparative negligence statute involving proportionate reduction of plaintiff's recovery, the forty-nine percent rule, the individual judgment system, and joinder of immune and other unavailable tortfeasors should be applied to strict liability actions, including strict liability actions brought under the overlapping implied warranty theory. Joint and several liability, however, should be retained for parties in the manufacturer's chain of supply and distribution.

This nondiscriminatory approach to loss allocation will not cure the inadequacies of the fault system as a comprehensive and efficient mechanism for compensation of injured persons in modern society. Yet the artificial and illogical separation of strict liability from negligence is no cure for these inadequacies. The simple payment of larger judgments cannot solve problems such as the inefficiency of the litigation process that results from the delays and expenses associated with complex triable issues or the lottery effect of jury decisions in close cases of liability. Nondiscriminatory loss allocation through the widespread application of comparative fault, however, may enable courts to focus more clearly and logically on issues and problems arising under the fault system. If this much might be accomplished, nondiscriminatory loss allocation is desirable.

413 The only contrary suggestion is the UCC's limitation of recovery to those personal injuries and property damages "proximately resulting" from a breach of warranty. Kan. Stat. Ann. § 84-2-715(2)(b) (1965). The Comments to that provision indicate that damages resulting from a reasonable failure to discover the defect are "proximately" caused by the defect, but that damages resulting from an unreasonable failure to inspect for defects or from use of the product after discovery of the defect are not "proximately" caused by the defect. Id. Official UCC Comment 5. Despite the apparent use of "proximately" in an all or nothing context, this Comment should not be viewed as prohibiting the application of comparative fault principles to breach of warranty actions. Both § 2-715 and Comment 5 were drafted prior to the adoption of the comparative negligence statute, and under the rules of statutory construction "old statutes must be read in light of later legislative enactments. The older statute must be harmonized with the newer; if a conflict exists, the older must be subordinated to the newer." Thomas v. Board of Trustees, 224 Kan. 539, 544, 582 P.2d 271, 276 (1978) (subordinating a highway defect statute treating contributory negligence as a complete defense to the subsequently enacted comparative negligence statute). Subordination of Comment 5 to the comparative negligence statute would be entirely consistent with the subordination of both the highway defect statute in Thomas and Comment n to § 402A of the Restatement to the comparative negligence statute.