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PRODUCT LIABILITY IN THE SIXTH CIRCUIT: 1984–1985

*Stephen J. Werber**

The Sixth Circuit, as other federal courts, is deciding a growing number of product liability cases. The court has been required to carefully explore state substantive law in such complex areas as comparative fault and foreseeability. Several of the recent cases have required application of difficult facts to recognized legal principles. In the following article Professor Werber analyzes key decisions against applicable state law and suggests areas in which the court has applied that law in manners both consistent with, and contrary to, state law. Professor Werber is critical of the court's Erie *determination that the Ohio Supreme Court would not adopt comparative principles in strict liability actions. Nevertheless, he concludes that the court is performing fairly and that its judgments are generally consistent with those that would be reached by state courts.*

I. INTRODUCTION

WHERE potential diversity exists, counsel for plaintiffs in a product liability action must carefully consider the advisability of filing in federal district court instead of state court. Defense counsel, in certain situations, must consider the possible benefit of removal to the federal court.[1] The usual litany of elements or factors to consider includes the quality of the bench and the potential jury pool, the general predilections of judges in a given court, pre-trial procedures including conferences with the court and discovery rules, calendar congestion and the likelihood of delays before trial, and geographic convenience. The decision is sometimes deferred by counsel who file identical actions in both courts and attempt to proceed before the judge with the action in the court most likely to favor plaintiff. This procedure raises questions of ethics and of law.[2]

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1. *See* 28 U.S.C.A. §§ 1441, 1446 (West 1976 & Supp. 1985).

2. In Howard v. Plastipak Packaging, Inc. No. C83–4994–A (N.D. Ohio order, June 19, 1985), Judge Bell dismissed the federal action on the grounds that the identical action was pending in the Ohio Court of Common Pleas. *See also* Moses H.

Certain factors which should be weighed in making the determination are sometimes ignored. These factors include (1) the manner in which the federal court will interpret and apply the required state substantive law, and (2) analysis of the record on appeal in terms of any indicia of outcome which tends to favor a particular side. Interpretation of state law is often difficult. In the still developing area of product liability law, the federal court is often required to exercise considerable wisdom in interpretation of applicable law. At other times the court may face the onerous, yet challenging, duty of predicting state law where no specific precedent can be found.[3]

A review of the decisions of the Sixth Circuit in product liability cases decided from January 1, 1984, through August 30, 1985, is revealing. In this time span the Sixth Circuit issued twelve reported decisions[4] and at least two slip opinions, *Stearns v. Johns-Manville Sales Corp.*[5] and *Bailey v. V & O Press Co., Inc.*,[6] which concern the product field. These decisions are not quantitatively adequate as a basis for statistical predictions. However, a statistical analysis of a limited nature suggests that all parties have been treated quite fairly by the Sixth Circuit. The decisions exhibit considerable effort to properly apply existing law while exercising caution and restraint in those cases demanding an *Erie* prediction of future state law.

In most of the decisions the court correctly determined applicable law, the roles of procedure and review, and made a proper application of the facts to reach its decision. Regrettably, some of the

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Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983); Crawley v. Hamilton County Comm'rs, 744 F.2d 28 (6th Cir. 1984). Ethical considerations are beyond the scope of this article.

3. Consistent with the mandates of the *Erie* doctrine. Erie R.R. v. Tompkins, 304 U.S. 64 (1934).

4. Rhea v. Massey-Ferguson, Inc., 767 F.2d 266 (6th Cir. 1985); Leonard v. Uniroyal, Inc., 765 F.2d 560 (6th Cir. 1985); Phillips v. Hardware Wholesalers, Inc., 762 F.2d 46 (6th Cir. 1985); Minichello v. U.S. Indus., Inc., 756 F.2d 26 (6th Cir. 1985); Bright v. Firestone Tire & Rubber Co., 756 F.2d 19 (6th Cir. 1984); Toth v. Yoder Co., 749 F.2d 1190 (6th Cir. 1984); Calhoun v. Honda Motor Co., 738 F.2d 126 (6th Cir. 1984); Adams v. Union Carbide Corp., 737 F.2d 1453 (6th Cir.), *cert. denied*, 105 S. Ct. 545 (1984); Miller v. Utica Mill Specialty Mach. Co., 731 F.2d 305 (6th Cir. 1984); Grover Hill Grain Co. v. Baughman-Oster, Inc., 728 F.2d 784 (6th Cir. 1984); Wade v. Descent Control, 727 F.2d 111 (6th Cir. 1984); Birchfield v. International Harvester Co., 726 F.2d 1131 (6th Cir. 1984).

5. 770 F.2d 599 (6th Cir. 1985).

6. 770 F.2d 601 (6th Cir. 1985).

decisions seem to illustrate that either the court did not fully comprehend the basis of the decision below or failed to properly apply the law to the facts.[7]

The substantive law applied covers each of the four states within the Sixth Circuit. Six decisions invoked the law of Ohio, four the law of Michigan, two the law of Kentucky, and two the law of Tennessee.[8] In each, the law of the state in which the district court sat was applied and no serious question of choice of law under *Klaxon Co. v. Stentor Electric Manufacturing Co.*[9] was raised.

Eleven district court decisions favored defendant manufacturers.[10] Eight of the district court decisions were affirmed including

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7. *Toth*, 749 F.2d 1190 (6th Cir. 1984); *Birchfield*, 726 F.2d 1131 (6th Cir. 1984). *See infra* notes 46–56 and accompanying text.

8. Ohio Law: *Bailey*, 770 F.2d 601 (6th Cir. 1985); *Stearns*, 770 F.2d 599 (6th Cir. 1985); *Minichello*, 756 F.2d 26 (6th Cir. 1985); *Adams*, 737 F.2d 1453 (6th Cir.), *cert. denied*, 105 S. Ct. 545 (1984); *Grover Hill Grain Co.*, 728 F.2d 784 (6th Cir. 1984); *Birchfield*, 726 F.2d 1131 (6th Cir. 1984).

Michigan Law: *Rhea*, 767 F.2d 266 (6th Cir. 1985); *Phillips*, 762 F.2d 46 (6th Cir. 1985); *Toth*, 749 F.2d 1190 (6th Cir. 1984); *Wade*, 727 F.2d 111 (6th Cir. 1984).

Kentucky Law: *Leonard*, 765 F.2d 560 (6th Cir. 1985); *Calhoun*, 738 F.2d 126 (6th Cir. 1984).

Tennessee Law: *Bright*, 756 F.2d 19 (6th Cir. 1984); *Miller*, 731 F.2d 305 (6th Cir. 1984).

9. 313 U.S. 487 (1941).

10.

Case	District Court *Judgment for*	Sixth Circuit *Judgment*	Prevailing *Party*
Bailey	Defendant	Reversed	Plaintiff
Stearns	Defendant	Reversed	Plaintiff
Rhea	Plaintiff	Affirmed	Plaintiff
Leonard	Plaintiff	Affirmed	Plaintiff
Phillips	Plaintiff	Affirmed	Plaintiff
Minichello	Defendant	Reversed	Plaintiff
Bright	Defendant	Affirmed	Defendant
Toth	Defendant	Reversed	Plaintiff
Calhoun	Defendant	Affirmed	Defendant
Adams	Defendant	Affirmed	Defendant
Miller	Defendant	Affirmed	Defendant
Grover Hill Grain	Defendant	Reversed	Plaintiff
Wade	Defendant	Affirmed	Defendant
Birchfield	Defendant	Reversed	Plaintiff

Note: The term "reversed" is used in the broad sense to include remands and does not denote a judgment on the merits. The district court judgments included summary judgment, directed verdict, judgment *n.o.v.*, and judgments entered on jury verdicts.

five which favored the defendant manufacturer.[11] After the Sixth Circuit decisions, a total of nine cases favored plaintiffs and five favored defendants.[12] The three district court opinions favoring plaintiffs were affirmed.[13] Of the eleven decisions initially favoring defendants, six were reversed.[14] Plaintiffs' verdicts were upheld in one hundred per cent of the cases, whereas defense verdicts were upheld in forty-five per cent of the cases. In light of the general trend toward liberalizing the law in favor of injured parties in product litigation (e.g., easing a plaintiff's burden of proof) and the social policies now entrenched in favor of loss allocation, it is surprising and rewarding to find that defendants have prevailed with this degree of regularity. At the same time, meritorious claims put forth by plaintiffs have prevailed.

Of course, these percentages are based on limited data and do not reflect the large number of cases in which there are no reported decisions or in which no appeal had been perfected. The vast majority of product cases continue to be resolved prior to or during trial. Despite the limited sample size, it is evident that a manufacturer has a significant likelihood of a successful defense where his product is not defective or did not cause the harm. The Sixth Circuit has not made manufacturers the insurers of injured consumers and shows no consistent inclination to do so. Despite the orientation of the law, it appears that a fair trial can be had and that there is a significant potential for affirmance of the district court judgment regardless of the prevailing party below. (Eight of the fourteen decisions, fifty-seven per cent, were affirmed.)

Counsel for both plaintiff and defendant would be well advised to ascertain the pattern in the applicable state courts at both the trial and appellate levels before deciding whether a federal action would be in their client's best interest.

On a more substantive level, a wide variety of legal issues were presented to the Sixth Circuit in 1984 and 1985.[15] Of these,

11. *See supra* note 10.

12. *See supra* note 10.

13. *See supra* note 10.

14. *See supra* note 10.

15. The primary substantive legal areas, excluding procedural and evidentiary issues, included:

Admissibility of Evidence: *Minichello*, 756 F.2d 26 (6th Cir. 1985) (non-occurrence of prior accidents); *Bright*, 756 F.2d 19 (6th Cir. 1984) (intoxication-causation, negligence and strict liability); *Calhoun*, 738 F.2d 126 (6th Cir. 1984) (recall letter).

the most interesting and revealing appear to be the decisions involving Michigan's law relating to foreseeability and Ohio's law relating to comparative fault. These four decisions are discussed below. Many of the other decisions also merit comment. For illustrative purposes relatively brief comment will be directed to *Birchfield v. International Harvester, Co.*,[16] *Bright v.*

Affirmative Defenses: *Bailey*, 770 F.2d 601 (6th Cir. 1985) (comparative negligence-strict liability; assumption of risk); *Stearns*, 770 F.2d 599 (6th Cir. 1985) (comparative negligence-strict liability); *Minichello*, 756 F.2d 26 (6th Cir. 1985) (assumption of risk); *Wade*, 727 F.2d 111 (6th Cir. 1984) (comparative negligence, misuse).

Alternative Design: *Phillips*, 762 F.2d 46 (6th Cir. 1985).

Dangerous Work Place—Duty of Care: *Miller*, 731 F.2d 305 (6th Cir. 1984).

Design Defect Elements—Burden of Proof—Manufacturer's Conduct: *Rhea*, 767 F.2d 266 (6th Cir. 1985) (negligence and breach of warranty); *Phillips*, 762 F.2d 46 (6th Cir. 1985) (breach of warranty); *Calhoun*, 738 F.2d 126 (6th Cir. 1984) (strict liability); *Birchfield*, 726 F.2d 1131 (6th Cir. 1984) (strict liability, conduct).

Expert Witnesses—Need and Weight of Testimony: *Calhoun*, 738 F.2d 126 (6th Cir. 1984) (weight); *Grover Hill Grain Co.*, 728 F.2d 784 (6th Cir. 1984) (need); *Birchfield*, 726 F.2d 1131 (6th Cir. 1984) (Weick, J., dissenting) (weight). Failure to Warn—Adequacy of Warning: *Leonard*, 765 F.2d 560 (6th Cir. 1985) (tire inflation); *Adams*, 737 F.2d 1453 (6th Cir.), (to reach employees), *cert. denied*, 105 S. Ct. 545 (1984); *Grover Hill Grain Co.*, 728 F.2d 784 (6th Cir. 1984) (assembly requirements).

Foreseeable Risk or Use—Reasonable Care—Modification: *Rhea*, 767 F.2d 266 (6th Cir. 1985); *Adams*, 737 F.2d 1453 (6th Cir.), *cert. denied*, 105 S. Ct. 545 (1984); *Toth*, 749 F.2d 1190 (6th Cir. 1984).

Industry or Government Standards: *Bailey*, 770 F.2d 601 (6th Cir. 1985); *Minichello*, 756 F.2d 26 (6th Cir. 1985); *Birchfield*, 726 F.2d 1131 (6th Cir. 1984) (Weick, J., dissenting).

Intervening Cause: *Adams*, 737 F.2d 1453 (6th Cir.) (notice of danger), *cert. denied*, 105 S. Ct. 545 (1984); *Grover Hill Grain Co.*, 728 F.2d 784 (6th Cir. 1984) (improper assembly).

Obvious Danger: *Leonard*, 765 F.2d 560 (6th Cir. 1985); *Miller*, 731 F.2d 305 (6th Cir. 1984).

RESTATEMENT (SECOND) OF TORTS, § 388 (1965) (dangerous chattel): *Adams*, 737 F.2d 1453 (6th Cir.), *cert. denied*, 105 S. Ct. 545 (1984).

The court also addressed the continuing saga of liquidation of some 160 product liability personal injury actions brought against White Motor Corp. The decision in Citibank N.A. v. White Motor Corp., 761 F.2d 270 (6th Cir. 1985) resolved the conflict between 28 U.S.C.A. § 157(b)(5) and § 1334(c)(1) (West 1976 & Supp. 1985) by exploring the history of the Bankruptcy Amendments & Federal Judgeship Act of 1984, Pub. L. No. 98–353, 98 Stat. 333 (1984). The court concluded that the actions could proceed in the separate courts. The statute was interpreted to permit abstention despite an existing reorganization plan, which would usually trigger a statutory injunction. The district court was reversed only as to questions concerning personal injury actions with respect to which no claim was filed in the bankruptcy proceedings.

16. 726 F.2d 1131 (6th Cir. 1984).

Firestone Tire & Rubber Co.,[17] and *Calhoun v. Honda Motor Co.*[18]

II. The Ohio Law—Comparative Negligence Decisions

In both *Stearns v. Johns-Manville Sales Corp.* and *Bailey v. V & O Press Co.* the court was faced with the task of deciding a significant issue without benefit of appellate level or Supreme Court precedent. The court did have the benefit of an extensive opinion by Judge Thomas in the *Stearns* case.[19] In a real sense the court was forced to decide between the persuasive logic, reasoning, and policy arguments set forth by Judge Thomas in support of his conclusion that comparative fault principles would be applied to strict liability actions under Ohio law, and the caution required before a federal circuit court should decide a major substantive issue in a manner extending existing case law. In these cases, the court was also faced with a Comparative Negligence Act[20] which specifically approved the concept of comparative negligence but was silent as to application of such a principle in strict liability. The court took the position that the specific limitations in the Comparative Fault Act precluded extension of the principle.

In *Stearns*, the plaintiff, executrix of the Estate of Arthur J. Stearns, ultimately proceeded solely on a theory of strict liability. The gravaman of the complaint was that the plaintiff's decedent contracted cancer by exposure to asbestos produced and marketed by several defendants. The defendants asserted contributory negligence and assumption of the risk as affirmative defenses. After the filing of briefs, hearings were held which focused primarily on the application of the Ohio Comparative Negligence Act as it bore on comparative principles in a strict liability action and as it effected joint and several liability. The district court ruled that a form of common law comparative fault, consistent with the Act, was appli-

17. 756 F.2d 19 (6th Cir. 1984).

18. 738 F.2d 126 (6th Cir. 1984).

19. Stearns v. Johns-Manville Sales Corp., No. C79–2088 (N.D. Ohio, Feb. 17, 1984) (Memorandum and Order).

20. Ohio Rev. Code Ann. § 2315.19 (Page 1981). Comparative Negligence applies in negligence actions where the defense of contributory negligence is asserted.

cable and that only several liability was allowed. The Sixth Circuit reversed and remanded on the comparative fault question:

> Stearns challenges the district court's ruling that § 2315.19 applies to her strict liability action. We agree and hold, consistent with our decision and reasoning in *Bailey v. V & O Press Co.*, that the statute, which on its face is limited to negligence actions, does not apply in actions based on strict liability in tort.[21]

The court refrained from comment on the other primary issue raised below, the abolition of joint and several liability, on the basis of the non-applicability of the statute. In reaching its decision, the court virtually ignored the major arguments and significant authority relied on by the district court. The court failed to recognize that the district court, as the Ohio Supreme Court in *Wilfong v. Batdorf*,[22] did not apply the statute. The district court applied common law to reach its conclusion:

> When the question of applying the statute to a strict liability in tort claim comes before the Ohio Supreme Court, it is believed that the Court will analyze the strict liability in tort defense of assumption of risk as a 'form of contributory negligence' in keeping with section 402A's comment n, ... When these analyses are coupled by the Court with the policy considerations which this court has suggested are relevant, it is believed that the Supreme Court of Ohio, taking the next logical step beyond *Ceccardi* but consistent with its holding, will merge the strict liability in tort assumption of risk defense with 'contributory negligence' under the comparative negligence statute. Hence, it is concluded that *under the common law of Ohio, the principle of comparative negligence, consistent with R.C. § 2315.19, applies to this strict liability* in tort case . . . .[23]

To a considerable extent, the substantive issue and *Erie* mandate were addressed in *Bailey*. The court relied upon this decision as the basis for reversing *Stearns*. The court correctly limited its substantive and *Erie* analysis to one of the two cases. This is a common, reasonable, and accepted judicial approach which provides effi-

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21. *Stearns*, 770 F.2d 599, 601 (6th Cir. 1985) (citations omitted).

22. 6 Ohio St. 3d 100, 451 N.E.2d 1185 (1983).

23. *Stearns*, No. C79–2088 (N.D. Ohio, Feb. 17, 1984) (Memorandum and Order, at 18–20) (emphasis added) (footnote omitted).

ciency. However, by selecting *Bailey* as the fulcrum decision, the court was able to avoid a thorough analysis of the arguments put forward by the district court in *Stearns*.

In *Bailey*, unlike *Stearns*, it was the plaintiff who sought application of comparative negligence in a strict liability action. The district court refused to give a jury instruction on comparative negligence. A jury verdict was returned in favor of defendant (though plaintiff may well have prevailed had comparative principles been applied). The Sixth Circuit concurred in the district court refusal to apply comparative principles to this cause of action although the district court was reversed on other grounds.[24]

Plaintiff was injured while working on a seventy-one ton punch press. He inadvertently activated the press by stepping on a foot pedal when he turned in response to a call from someone across the room. Defendant was the press manufacturer. The press, when originally sold, did not have a point of operation safety guard and did not have any warnings affixed to the press.[25] Plaintiff's employer had installed a point of operation guard, but it was not in place at the time of the accident due to the kind of work being performed.[26] The defendant urged contributory negligence, assumption of the risk, and intervening acts as affirmative defenses.

In reaching its decision on the comparative negligence issue, the Sixth Circuit panel recognized its *Erie*-based obligation stating that:

> If the highest court has not yet spoken, the federal court must ascertain from all available data what the state law is and apply it . . . .
>
> Since the Ohio Supreme Court has not addressed the issue *sub judice*,

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24. The reversal was based upon the district court's failure to issue a limiting instruction in regard to the admission of OSHA and ANSI standards. "While the initial admission and use of this evidence may have been proper, the court's failure to include a limiting instruction . . . on the strict liability claim permitted unrestricted consideration of the testimony." *Bailey*, 770 F.2d 601, 608–09 (6th Cir. 1985) (footnotes omitted).

25. Failure to warn is not a basis for imposition of strict liability under Ohio law. Overbee v. Van Waters & Rogers, 706 F.2d 768 (6th Cir. 1983) and cases cited therein; Hardiman v. Zep Manufacturing Co., 14 Ohio App. 3d 222, 470 N.E.2d 941 (1984).

26. The court observed that the employer could not be sued because of the Ohio Workman's Compensation Act. *Bailey*, 770 F.2d 601, 603 (6th Cir. 1985). Such an action is now possible. *See* Jones v. VIP Development Co., 15 Ohio St. 3d 90, 472 N.E.2d 1046 (1984) and Blankenship v. Cincinnati Milacron Chem., Inc., 69 Ohio St. 2d 608, 433 N.E.2d 572 (1982).

> we must consider all relevant data to determine whether that court would apply the principles of comparative negligence to strict liability actions.[27]

The decision of the court was inconsistent with this stated duty as all available data was not considered despite a considerable effort to do so. The court's caution and conservative approach, often appropriate in *Erie* analysis cases, went too far. The court failed to recognize the importance of several cases relied upon by Judge Thomas and failed to consider the logical progression exhibited by the Ohio Supreme Court in its treatment of comparative negligence principles and related defenses. The *Erie* approach taken was correct, but the application of that approach, i.e., the analysis of Ohio law and policy, was either incorrect or highly questionable. Despite its flawed reasoning, the court's refusal to extend comparative negligence to strict liability actions may ultimately be validated by the Ohio Supreme Court. Such a decision by the Ohio Supreme Court would justify the Sixth Circuit conclusion. It would not justify the reasoning which led to that conclusion.

Admittedly, the Ohio Comparative Negligence Act is limited to negligence actions and comparative negligence applies only where contributory negligence is asserted as a defense. This is the extent of the Act. Nothing in the Act directly prohibits analogous common law development. The court recognized the possibility of an extension of comparative negligence principles predicated on the merger of contributory negligence and assumption of the risk as announced in *Anderson v. Ceccardi*.[28] The court also recognized that commentators, as an example of sound policy, support the application of comparative fault regardless of plaintiff's underlying legal theory.[29] Moreover, the court was aware that a majority of jurisdic-

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27. *Bailey*, 770 F.2d 601, 604 (6th Cir. 1985) (footnotes and citations omitted). The court also observed that the Ohio Supreme Court had refrained from adopting comparative negligence until adoption of the Comparative Negligence Act in Baab v. Shockling, 61 Ohio St. 2d 55, 399 N.E.2d 87 (1980). *Id.* at n.1. However, the court did not recognize the Ohio Supreme Court's willingness to provide retroactive effect to the Act in Wilfong v. Batdorf, 6 Ohio St. 3d 100, 451 N.E.2d 1185 (1983), which limits the persuasiveness of *Baab*.

28. 6 Ohio St. 3d 110, 451 N.E.2d 780 (1983).

29. For support, the court cited Kasten, *Comparative Liability Principles: Should They Now Apply to Strict Products Liability Actions in Ohio?*, 14 U. TOL. L. REV. 1151, 1185–98 (1983).

tions had extended comparative principles to strict liability actions.[30]

Few any longer argue that there is any inherent difficulty, in logic or policy, for rejecting comparison of a plaintiff's conduct with a purported non-conduct based design defect. That strict liability does not refer to "conduct" or "fault" is a legal fiction. Behind every design defect there is a conscious or unconscious design decision predicated on human participation. The "risk-benefit" definition of defect is grounded in conduct and human decision-making processes. Design defect and conduct (of the injured party) often act in a complementary fashion to yield a very uncomplimentary result. Design defect and conduct are often symbiotic, not mutually inconsistent factors.

Based on its interpretation of the *Erie* mandate, the court determined that it was "not commissioned to take a position regarding the advisability or fairness of the state court rule to be applied . . . ."[31] This approach is juxtaposed against, and inconsistent with, recognition that when anticipating a state's highest court ruling a "delicate balancing of policy considerations"[32] is involved.

Through its reliance upon the misguided duty not to be concerned with the fairness or advisability of the anticipated rule (the duty should be limited to application of existing law), the court took a constrictive view of *Anderson* and other Ohio decisions. This approach forced the court to take a highly restrictive view of the Act and to ignore the policy considerations which supported its enactment. The policies which formed the foundation for the Act also undergird an extension into the area of strict liability. In lieu of a policy-oriented approach to the Act, the court relied on the nonpassage of a comprehensive product liability bill,[33] which included

30. A partial list of such decisions is set forth in *Bailey*, 770 F.2d 601, 606 n.3 (6th Cir. 1985). The list includes Murray v. Fairbanks Morse, 610 F.2d 149 (3d Cir. 1979) in which the court extended the virtually identical statute of the Virgin Islands to strict liability. The reasoning of this decision was not refuted or considered.

At least 28 jurisdictions have ruled on the issue of whether comparative principles apply in strict liability actions. Twenty-two have answered in the affirmative. Ohio is included in the minority group of rejecting states based on a court of common pleas decision. See Note, *Loosing the Shackles of "No-Fault" in Strict Liability: A Better Approach to Comparative Fault*, 33 CLEV. ST. L. REV. 339, 343 n.15 (1984–85).

31. *Bailey*, 770 F.2d 601, 605 (6th Cir. 1985).

32. *Id.* at 604 n.1.

33. *Id.* at 605 referring to H.B. No. 779, 114th Ohio Gen. Ass., Reg. Sess. (1981–82). For a variety of reasons, the Ohio General Assembly has failed to enact a

as one of its many provisions a section expanding contributory negligence to strict liability actions, as evidence that judicial extension was improper.

Recognizing the weight to be given the district court ("[w]here state law is unclear court of appeals should not reverse if district judge reached permissible conclusion"),[34] the court was largely able to support the district court decision in *Bailey*. This principle was not applied to the district court opinion in *Stearns* because that decision was critically viewed as "in contravention of the express statutory language, giving no weight to the Supreme Court's distinction of the two theories, or the Common Pleas decision contrary."[35] The degree of persuasiveness of a single common pleas decision is minimal and should play no significant role in an *Erie* determination. Such a decision lacks precedential effect. That the court utilized such a basis for its cavalier treatment of the *Stearns* opinion is not characteristic.

In reaching its conclusion, the court committed several errors. First: As the court observed, a delicate balancing of policy was needed. The opinion is essentially devoid of any such balancing effort. This duty was largely abdicated by the very court which carefully recognized it. Rather, the court inartfully avoided such a delicate task by determining that fairness and appropriateness were not relevant.

Second: The court ignored the *Wilfong v. Batdorf*[36] decision. The opinion does not even cite this important Ohio Supreme Court decision which established a form of common law comparative negligence consistent with the Comparative Negligence Act. The Ohio Supreme Court has recognized the important policy considerations which support the principles of comparative negligence. The Sixth Circuit did not consider these policy considerations, did not consider *Wilfong*, did not consider the effect of *Wilfong* on prior decisions, and totally failed to recognize the interrelationship between the *Anderson* and *Wilfong* cases. For these reasons the court lost an opportunity to develop a common law of comparative negligence consistent with the Act.

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comprehensive product liability act. That the comparative fault component of such a comprehensive bill has failed is as readily attributable to the overall effects of the bill as to this particular provision.

34. *Id.* at 607.

35. *Id.* at 607 n.4.

36. 6 Ohio St. 3d 100, 451 N.E.2d 1145 (1983).

Third: The court failed to recognize that contributory negligence and assumption of the risk are creatures of the common law subject to judicial modification. A number of the jurisdictions cited by the court adopted comparative negligence as a common law concept in the absence of statute or chose to extend statutory comparative negligence through development of parallel common law. Nothing in the Ohio Comparative Negligence Act specifically proscribes such a common law parallel development. The Ohio General Assembly has not acted to overrule this approach in the time since *Wilfong* was reported. In essence, the court surrendered its common law rights to the Ohio General Assembly.[37]

Fourth: The court failed to rectify the potential conflict wherein a jury can find for plaintiff on both a theory of negligence and a theory of strict liability. Should such findings be made, a jury would be hard pressed to ascertain the proper amount of damages. Moreover, the jury determination and intent to find that the plaintiff was partially responsible for his injury would be totally preempted if the full award was upheld under the strict liability jury instruction.

A manufacturing defect in a vacuum causes no harm. When that defect causes harm, in and of itself, an injured consumer should recover fully. This the court has allowed. When that same defect causes harm only because of the intervention of the injured plaintiff, whose conduct was inappropriate, that plaintiff is entitled to recover only to the extent of harm caused by the defect. This the court failed to recognize. The decision reached by Judge Thomas in *Stearns* has the support of the overwhelming weight of decisional law and most commentators. His analysis of the logical next step for the Ohio Supreme Court is as valid as any contrary conclusion. Judge Thomas' decision was both "permissible" and "tenable" and should have been affirmed.[38] This author has not had the privilege of reviewing the written opinion, if any, of the district court in *Bailey*. If it was as well reasoned and articulate as that of the district court in *Stearns* then, perhaps, the Sixth Circuit ruled correctly. In such a situation only one of the district court judges could be upheld. On the evidence available, it appears that caution prevailed over logic, reason, and

37. A similar result occurred when the Sixth Circuit refused to limit the imposition of multiple punitive damages by indicating that any such limitation should be legislatively established. This result was reached even though the principle of punitive damages is, and always has been, a creature of the common law. *See* Moran v. Johns-Manville Sales Corp., 691 F.2d 811, 817 (1982).

38. *Bailey*, 770 F.2d 601, 607 (6th Cir. 1985).

policy. This is an untenable result for a court as qualified, competent, and erudite as the Sixth Circuit.

III. The Michigan Law—Foreseeability Decisions

In both *Rhea v. Massey-Ferguson, Inc.*[39] and *Toth v. Yoder Co.*,[40] the court had ample state law upon which to base its decisions. The common question concerned the interpretation and application of the foreseeability element to specific facts. In *Rhea*, the result is fully supported on both the facts and law. However, in *Toth*, the court may have gone beyond a proper application as noted in the strenuous dissent.[41] If *Toth* is correctly reasoned and resolved, the substantive law of Michigan varies significantly from that of other jurisdictions including a sister state in the Sixth Circuit.[42]

In *Rhea*, the plaintiff obtained a jury verdict for injuries sustained when he inadvertently shifted a Massey-Ferguson tractor into gear while standing next to it. The tractor moved forward and rolled over the plaintiff causing severe injury. This movement occurred despite the fact that the clutch was not engaged. Liability was predicated upon claims of negligence and breach of warranty. The jury found plaintiff partially liable under the applicable comparative negligence statute and reduced the judgment accordingly. Defendant's motion for judgment n.o.v. was denied by the district court and this decision was affirmed.

The Sixth Circuit in *Rhea* had no difficulty with determining that jury issues were raised as to both negligence and breach of warranty. Whether viewed from the perspective of negligence and "foreseeable risk,"[43] or the perspective of breach of warranty and "foreseeable uses,"[44] a jury could determine that activation of the

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39. 767 F.2d 266 (6th Cir. 1985).

40. 749 F.2d 1190 (6th Cir. 1984).

41. 749 F.2d 1190, 1198–99 (6th Cir. 1984) (Krupansky, J., dissenting).

42. Contrary to the result arguably called for by Michigan law, the Ohio Supreme Court has made clear that employer modification which is the direct cause of injury insulates the manufacturer-designer from liability and provides a basis for summary judgment. King K.R. Wilson Co., 8 Ohio St. 3d 9, 455 N.E.2d 1282 (1983); Temple v. Wean United, Inc., 50 Ohio St. 2d 317, 364 N.E.2d 267 (1977).

43. *Rhea*, 767 F.2d 266, 269 (6th Cir. 1985), relying on Byrnes v. Economic Mach. Co., 41 Mich. App. 192, 201, 200 N.W.2d 104, 108 (1972).

44. *Rhea*, 767 F.2d 266, 269 (6th Cir. 1985), relying on Fredericks v. General Motors Corp., 411 Mich. 712, 720, 311 N.W.2d 725, 728 (1981).

tractor was possible, without intent, due to the design of the clutch and transmission. Similar allegations against other manufacturers, involving substantial numbers of vehicles, have been made (e.g., claims that a shift lever moves out of "park" into gear). Although the quality of evidence presented by plaintiff was not detailed, it appears that defendant's "failure to incorporate a mechanism to prevent inadvertent movement of the 'hi-lo' shift lever rendered the tractor unsafe for its foreseeable uses."[45] As mechanisms to avoid inadvertent slippage of shift levers are available, it was reasonable for a jury to conclude that such a device should have been incorporated into the design. Allowing this issue to reach the jury was consistent with Michigan law and numerous decisions elsewhere.

A far more serious question concerning the scope of foreseeability and its relationship to liability is found in *Toth*. Here the district court entered judgment n.o.v. in favor of defendant, Yoder Company. The standard of review played an important role in the decision of the Sixth Circuit which reversed and reinstated the jury verdict. Defendant manufactured the subject cold roll-forming machine and sold it to plaintiff's employer in 1958. When sold it had an on/off switch only at the entry end and the machine could be "jogged" by use of a clutch bar that ran the length of the machine. Prior to the date of injury (1977), the employer made a number of modifications to the machine including the addition of toggle type on/off switches at either end and the addition of "jog" buttons along the front. When plaintiff learned that the product being rolled was creased, he shut down the machine and began to realign the spacers. The evidence did not clearly establish what caused the machine to jog and cause the injury, but the court candidly admitted that: "it appears that he brushed against one of the jog buttons along the front of the machine . . . ."[46] The machine was not equipped with point of operation guards which could have prevented the injury. It is fairly clear that the machine was not inadvertently put into the "on" position thereby requiring a determination that the jog button added by the employer was the sole device responsible for the activation which caused the injury. The district court therefore granted judgment n.o.v. on the grounds that, as sold, the machine could not have caused the harm. (Plaintiff, at the front of the machine, could not have activated the side clutch jogging mecha-

45. 767 F.2d at 269.

46. 749 F.2d 1190, 1192 (6th Cir. 1984).

nism.) Under Michigan law, the defective design issue had to be decided, as in *Rhea*, on theories of negligence and breach of warranty.

Defendant admitted that a barrier guard was available in 1957 and would have prevented the injury. This raised the question of whether plaintiff had to establish that the design was the sole factor causing injury or merely a proximate cause of injury. This specific question was not satisfactorily resolved by the court. However, it is common to impose liability where more than one factor contributed to the injury causing event provided that the injury could have occurred in the absence of the other factors. The court ignored this recognized limitation.

Again, as in *Rhea*, the court applied proper Michigan law. Here, however, it did so by asserting that:

> There was evidence from which the jury could have found that the addition of jog buttons was probable and foreseeable. As originally supplied, the machine was jogged by use of the clutch bar, and in starting it slowly and gradually it was necessary to slip the clutch. Slipping the clutch would cause wear and eventually necessitate its replacement. Defendant had itself sold machines equipped with jog buttons, and its current model is equipped with a cord and a button for that purpose. A jury could have reasonably concluded that the addition of electrical jog buttons, which would not have the wear characteristics of the mechanical clutch, was a foreseeable alteration of the machine.[47]

The basis for this argument appears to be an improper application of the facts to the law resting largely on the court's analogy to *Byrnes v. Economic Machinery Co.*[48] In *Byrnes*, the operator of the subject machine had turned it off so that he could safely adjust the brakes. Another employee inadvertently activated the machine resulting in the injuries. The Michigan appellate court correctly found that this was a foreseeable circumstance.

The Sixth Circuit, in *Toth*, failed to distinguish between the foreseeable negligence of a fellow employee and the intentional intervention of an employer who modified the machine in a manner which increased the danger to the user. A simple negligent act of a fellow employee cannot be equated with the intentional act of an employer. Even if some modification was foreseeable, the act of the

47. *Id.* at 1196.

48. 41 Mich. App. 192, 200 N.W.2d 104 (1972). 749 F.2d at 1195–96 n.3.

employer, coupled with the plaintiff's own action, caused the harm to Toth. The degree of foreseeability reached unreasonable proportions. The duty to protect against foreseeable risk, as observed by the court, extends as a qualified duty, i.e., the risk must be reasonably foreseeable. The *Toth* majority did not give effect to this limitation. As there was no Michigan law directly on point, the court could have looked to the analogous cases in Ohio.[49] Although such cases would not have been binding, their application of the foreseeability concept, as it related to manufacturer design decisions and employer modification, would have compelled a different result. The "liberal" or "consumer oriented" approach of the Ohio Supreme Court is well known. Nevertheless, this court denies recovery where the modification was the cause of the injury.

The dissenting opinion in *Toth* argues that the majority decision imposes absolute liability or vicarious liability (due to the negligence of the third party employer). Whether absolute liability was imposed is a question of degree. It is evident that something very close to absolute liability was imposed even if Justice Krupansky's description is debatable. The dissent observed that the majority itself recognized that without the addition of the jog buttons the injury could not have occurred. The injury was the result of the modification and the plaintiff's own negligence. Relying largely on the same cases as the majority, and certainly on the same legal principles, the dissent reaches an inapposite conclusion, in part because:

> [s]tated differently, the danger presented by the machine was clearly *not* a result of defective design, but rather a result of the negligence of plaintiff's employer in making major modifications to the machine without regard for the hazardous consequences to employees. Thus, the majority vicariously imposed the employer's negligence on the defendant in this case, an approach which has been expressly rejected in this circuit.[50]

The expansive application of the foreseeability standard utilized by the majority virtually equates foreseeability with liability. The courts have assiduously refrained from establishing such a basis for imposition of liability. To do otherwise would be to impose absolute

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49. *King*, 8 Ohio St. 3d 9, 455 N.E.2d 1282 (1983); *Temple*, 50 Ohio St. 2d 317, 364 N.E.2d 267 (1977).

50. 749 F.2d at 1198 (Krupansky, J., dissenting) (citations omitted).

liability. With benefit of hindsight, any injury causing event or design is foreseeable. In the *Toth* case, the defendant manufacturer could not have prevented the modification regardless of any instructions or warnings it could have theoretically provided. Had a barrier guard been incorporated into the design, nothing would have prevented the employer from removing it if this suited his economic convenience.[51] Assuming that the manufacturer could reasonably foresee the actual modification, he could not equally foresee that it would be made without regard to the additional danger it created or that the employer would not, at the same time, retrofit the machine with an available point of operation guard. The defendant could have readily foreseen removal of any safety device it did provide. In essence, the employer defeated the existing safety design feature which permitted jogging only while depressing a clutch bar at the side of the machine.

Not only did the court engage in speculation and permit the jury to engage in speculation as to what was foreseeable, it did so only with regard to the foreseeability of the jog button addition. The equally foreseeable potential for addition of a proper safety device subsequent to, or simultaneously with, the addition of the jog buttons was ignored as was the equally foreseeable potential for defeating any safety device. On the reasoning of the court, liability would have been imposed if the employer had (a) added a jog button and (b) removed a barrier guard. This combination of actions is as readily foreseeable as either alone. Such a possibility for the imposition of liability must not be tolerated as it mandates that every manufacturer be the insurer of the safety of its design. This potential exists regardless of the age of the product at the time of injury (nineteen years in *Toth*), the date of modification, or the date when a retrofit could have been made.

On the reasoning of the court, a jury issue would be created if a terrorist action succeeded even though it was novel and could not have been prevented by the use of reasonable care. The very foreseeability of a terrorist bombing would be sufficient to raise a jury issue and support imposition of damages. The broad language of the foreseeability rule under Michigan law requires a reviewing court to interpret that law and its application to specific facts. It is highly unlikely that a Michigan court would uphold liability for a terrorist act or travel this road to protect an injured user from harm

51. *See* Cepeda v. Cumberland Eng'g Co., 76 N.J. 152, 386 A.2d 816 (1978).

caused by the intentional act of his employer, with a direct effect upon the product design, and the user's negligence. Foreseeability under Michigan law does not compel the abolition of intervening cause as a defense nor eliminate the basic causation requirement. The *Toth* majority seems to believe that it does.

IV. A Sampler of Other Decisions

Brief discussion of an additional decision involving application of Ohio law and decisions applying Kentucky and Tennessee law, respectively, will complete this overview of the Sixth Circuit's approach to product liability law. In *Birchfield v. International Harvester Co.*,[52] a further example of the difficulty presented in application of the law to specific facts, together with some question of whether the correct law was applied, will be presented. More perceptive and accurate determinations of the law and its application to the facts are seen in *Calhoun v. Honda Motor Co.*[53] and *Bright v. Firestone Tire & Rubber Co.*[54]

In *Birchfield*, a plaintiff's decedent sustained crushing injuries when he attempted to remove compacted fertilizer from a bin without first loosening the fertilizer by blasting. When the effort was made, the battle of Jericho was reenacted. The wall came tumbling down. Plaintiff was struck by a considerable amount of compacted fertilizer. The front-end loader which he was operating was not equipped with an overhead guard or shield. The absence of the shield was viewed as a design defect to justify a new trial after the district court had directed a verdict in favor of the manufacturer. The Sixth Circuit correctly observed that the district court erred by failing to recognize that the doctrine of strict liability was applicable to design defect claims under Ohio law. The court failed to recognize that even under strict liability the directed verdict was correct due to the particular factual circumstances. A strenuous dissent focused on a number of flaws in the majority reasoning.[55]

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52. 726 F.2d 1131 (6th Cir. 1984) (Ohio law).

53. 738 F.2d 126 (6th Cir. 1984) (Kentucky law).

54. 756 F.2d 19 (6th Cir. 1984) (Tennessee law).

55. 726 F.2d at 1137–38 (Weick, J., dissenting). The flaws observed included: (1) the manufacturer provided such guards as optional equipment which the purchaser (plaintiff's employer) did not order; (2) the guards could not be used on all front-end loaders as these machines are often used in cramped areas or in areas where

In essence, the court failed to recognize that even if the case was viewed from the perspective of strict liability, the defendant manufacturer had no duty to provide an overhead guard. As far as defendant was aware, such a guard could have rendered its product unfit for the purposes intended. It was the purchaser-employer who had the duty to obtain equipment which could safely perform the functions of the business. As in *Toth*, the court appears to have imposed a form of vicarious liability based upon the misconduct of the employer. Not only did the employer fail to purchase and provide the available guard, the employer was aware of the condition of the fertilizer and encouraged plaintiff to get one load before blasting. The true cause of plaintiff's injury was a result of the employer's actions and inactions.

The law applied was correct insofar as it was stated. The case, however, mandated that additional legal concepts be considered. The plaintiff asserted that the cause of death was the failure to provide a guard. The claim presented an issue of enhanced injury identical to the issue raised in crashworthiness cases, i.e., that the front-end loader did not prevent or reduce what may have been an avoidable injury. Just as in a crashworthiness case, no defect in the front-end loader caused the accident. The injury claim was directed solely to the unit's failure to prevent injury after an accident sequence was initiated. This is identical to a claim for enhanced injury arising from crashworthiness. In such a case, it is incumbent upon the plaintiff to prove the degree of enhanced injury.[56] No such evidence was provided. Without this evidence plaintiff failed to establish a prima facie case regardless of whether the action was predicated on negligence, warranty or strict liability. For this reason alone, without regard to any other factor noted in the dissent, the directed verdict should have been affirmed.

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obstructions are present; (3) defendant was not advised of the use to which its front-end loader would be put; (4) the only relevant standard, an ANSI specification, provided that guards should be installed unless, as in this case, otherwise ordered by the purchaser; (5) there was no evidence to establish that an overhead guard would have prevented this injury or reduced its extent; and (6) as in Orfield v. International Harvester, Inc., 535 F.2d 959 (6th Cir. 1976) the expert testimony was not determinative. *Id.*

56. This burden of proof was established in the seminal negligence based decision, Larsen v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968). It was applied and met by the use of expert testimony in the strict liability based case of Leichtamer v. American Motors Corp., 67 Ohio St. 2d 456, 424 N.E.2d 568 (1981). The majority relied on *Leichtamer* but ignored this ramification.

The setting aside of a jury verdict, upon motion for judgment n.o.v., was upheld in *Calhoun*. The plaintiff, operating a Honda motorcycle, rear-ended a tractor-trailer truck. As a result of the injuries sustained, plaintiff had no recall of the facts leading to this unwitnessed accident. The complaint alleged that a design defect in the brakes caused poor braking performance when wet conditions prevailed. Plaintiff relied upon a recall letter stating that rear brake pad efficiency was reduced by heavy rain conditions. It had not rained on the day of the accident, but the motorcycle had been through a carwash approximately thirty minutes prior to the accident.[57] There was conflicting expert testimony as to the existence of a defect.

The court recognized that under the circumstances and evidence adduced the recall letter was inadmissible.[58] The affirmance was based on the absence of any proof of causation rather than an inadequate proof of defect. (The evidence relating to the existence of defect merited jury considerations had this been the sole element needed to establish a prima facie case.) The court was able to affirm the district court on the causation issue alone, i.e., that the evidence did not adequately relate the brake defect to the plaintiff's loss of motorcycle control.[59] That the court was able to perceive the need for proving causation as well as defect is to be commended. Here the court carefully reviewed the facts, and the omissions of factual evidence, to uphold a defense judgment after a jury determination in favor of a seriously injured young plaintiff. It is interesting to note that the panel included Judges Weick and Krupansky. The case may illustrate the vagaries of panel selection. Had the same panel decided either *Birchfield* or *Toth*, the result in either or both may well have been different.

The ability to focus on the totality of legal issues and facts is also illustrated in *Bright*. Here a jury verdict in favor of the defendant was upheld in an action brought by the fathers or representatives of three young men who had died as a result of an automobile accident. Plaintiffs alleged that the accident was caused by tread separation

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57. The court established that the broad fact of exposure to water in the carwash did not provide adequate specifics to show that the brake pad was wet at the time of the accident. 738 F.2d at 132.

58. *Id.* at 133. *See* Werber, *Automobile Recall Campaigns: Proposals for Administrative and Judicial Responses*, 56 U. DET. J. URB. L. 1083 (1979).

59. 738 F.2d at 133. Correctly relying, in part, on Midwestern V.W. v. Ringley, 503 S.W.2d 745 (Ky. 1973).

of a tire manufactured by the defendant. There was sufficient evidence to justify a jury question on the issue of defect in the tire.[60]

A significant issue arose, in part from pre-trial maneuvering by counsel for plaintiff, with regard to whether the claim sounding in negligence would be reinstated for trial. Plaintiff finally decided to do so and proceeded on grounds of strict liability and negligence. The hesitancy was caused by evidence that the plaintiff's decedent driver was intoxicated and the question of the admissibility of such evidence if the case was limited to strict liability. The court rejected plaintiff's contention that the negligence claim was presented to the jury only because the district court had made clear that the intoxication evidence would be admitted regardless of whether this claim was presented at trial. (The contention that plaintiffs were thereby forced to include the negligence basis was refuted and described as "disingenuous," as plaintiff's only route to recovery of the punitive damages sought was through a negligence claim.)[61] The key to the admission of the intoxication evidence was not its role as contributory negligence. Rather, the intoxication was properly viewed by both the district court and the Sixth Circuit, as a causation factor:

> The District Court did not even refer to contributory negligence. The Court merely indicated that the evidence would be admitted if found relevant to any of the issues in the case. Evidence that the car's driver was intoxicated could be relevant to the issue of causation, which is an element of a strict liability cause of action.[62]

For this reason the intoxication evidence was admissible regardless of the underlying legal theory asserted.

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60. A considerable portion of the decision was directed to the admissibility of documentary evidence and testimony arising from a National Highway Traffic Safety Administration hearing. 756 F.2d 19, 21–23 (6th Cir. 1984). This issue was resolved through application of the Federal Rules of Evidence and is beyond the scope of this article.

61. 756 F.2d 19, 21 (6th Cir. 1984).

62. *Id.* (citations omitted).

V. CONCLUSION

It appears that the Sixth Circuit is often as willing to take a realistic view of evidence relating to the need to establish causation as it is to the effect of foreseeability. With proper focus on causation, the extension of foreseeability into liability can be avoided. Sound application of the causation concept would also lead to a proper application of comparative negligence or comparative fault principles.[63] Perhaps it is only the personal views of the author that led to criticism (herein) of *Bailey*, *Birchfield*, and *Toth*, and to praise for *Bright*, *Calhoun*, and *Rhea*. Nevertheless, there is some tendency to focus on either foreseeability or causation aspects in a given case rather than upon the interaction of these two key elements.

On balance, the Sixth Circuit cannot, as it should not, be categorized as pro or con either party. No discernible trend suggests the sobriquet of a plaintiff or defendant oriented court. That plaintiffs have prevailed more often than defendants is largely a result of the state law applied and the facts of the given case. The opinions illustrate the court's willingness to ascertain and apply the most recent relevant law to a given case. That this author disagrees with some factual applications of the law or with some determination of the law, in no way diminishes the careful analysis performed by the court. Those who practice in the Sixth Circuit, and argue before this court, are fortunate. Win or lose, each counsel can be confident that his position will receive a fair hearing and that the court will act solely on its analysis of the law and its understanding of the facts. Lucid appellate briefs and persuasive oral argument will enable the court to reach sound decisions. The burden of advocacy remains on counsel.

63. A key to comparative principles is, of course, causation. This was not truly considered in *Bailey*. Strict liability is often referred to as a form of breach of warranty action minus a variety of technical obstacles. The Uniform Commercial Code recognizes that a breach of warranty may be defeated by the conduct of the purchaser. See U.C.C. § 2–314, comment 13 (1972). As illustrated by *Rhea* and *Toth*, no real problem seems to exist with application of comparative principles to a warranty action when there is also a negligence action.