Loosing the Shackles of No-Fault in Strict Liability: A Better Approach to Comparative Fault

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**NOTE**

LOOSING THE SHACKLES OF "NO-FAULT" IN STRICT LIABILITY: A BETTER APPROACH TO COMPARATIVE FAULT*

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I. INTRODUCTION

Products liability law in America has crossed a new threshold. The current trend toward comparative fault in strict products actions moves with such force that it is only a question of time before it assumes majority status. Of twenty-eight jurisdictions which have considered the issue, twenty-two have allowed the defense,¹ most in the wake of the 1978 California Supreme Court decision, *Daly v. General Motors Corp.*² Much favorable commentary has focused on the emergence of this phenomenon,³ but as more courts decide the question, it becomes timely to analyze

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* The author gratefully acknowledges the timely advice and unselfish assistance in the preparation of this Note by Assistant Professor Robin West, Cleveland-Marshall College of Law, Cleveland State University. This Note was awarded first prize in the Sindell Tort Competition of Cleveland-Marshall College of Law.

¹ See infra note 15.

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


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the discernible themes in this trend. The fundamental question of what comparative fault means to products liability law has yet to be answered.

Of the courts that have ruled on comparative fault and strict liability, none have offered elaborate rationales for their position; those in favor maintain that "equity" demands comparative fault, while those against stress that fault and strict liability are incapable of comparison. As this Note shall suggest, both rationales serve only to confuse the law of products liability. Both proceed on the questionable assumption that strict liability is a "no-fault" theory. Indeed, the cases favoring comparative fault only compound the confusion by conceding the no-fault basis of strict liability, yet compare plaintiff's fault nonetheless. As more states move to implement comparative principles in strict liability actions, there is a growing need for a consistent theory that rationally justifies the confluence of the two doctrines. This theory will arrive only after a frank reevaluation of strict liability policy and practice, and after the popular nomenclature of products liability is "unmasked" to reveal the meaning beneath the language.

This Note contends that such a theory is available, and that comparative fault can rationally comport with the essential meaning of strict liability, thus providing a coherent basis on which the two doctrines may function. This Note traces the current trend toward comparative fault in strict products actions. It begins by discussing briefly the background of defenses traditionally available to strict liability, and then turns to the actual treatment of comparative fault and strict liability by the courts, attempting to demonstrate how courts have so far failed to resolve adequately the problem of rationally merging the two doctrines. This Note then examines the widely divergent perceptions of strict liability and suggests an analysis of the doctrine, centered on the concept of defectiveness, which will obviate the conceptual pitfalls to which courts have so far been prone, and provide the needed symmetry for comparative fault and strict liability.

II. DEFENSES TO STRICT LIABILITY

It is against an uncertain background of available defenses in strict liability that the recent trend toward comparative fault—with its emphasis

* See infra note 64 and accompanying text.
* The metaphor is borrowed from Professor Sheila Birnbaum. See infra note 133.
* The term "comparative fault" often differs little conceptually from "comparative negligence," and for the purposes of this Note, the two shall be used interchangeably. The only notable difference in the terms is that "fault" is broad enough to embrace product misuse and assumption of risk in addition to plaintiff's comparative "negligence." UNIF. COMPARA-
on the conduct of plaintiff—must begin to be measured. Defenses available in strict products actions are typically derived from section 402A of the Restatement (Second) of Torts. Alluding to comment n of that section, courts have consistently maintained that contributory negligence does not bar a plaintiff's action in strict liability, while assumption of the risk is a complete defense. As comment n states:

Since the liability with which this Section deals is not based upon negligence of the seller, but is strict liability, the rule applied to strict liability cases . . . applies. 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. On the other hand the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.

Thus, assumption of the risk, a "form of contributory negligence," has

Special Liability of Seller of Product for Physical Harm to User or Consumer

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

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

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

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

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

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

RESTATEMENT (SECOND) OF TORTS § 402A (1965). The burden of proof thus resulting from § 402A is that plaintiff must prove: 1) a defective product; 2) substantially unchanged from the condition in which it was initially sold; and 3) actual and "proximate" (foreseeable) causation.


* RESTATEMENT (SECOND) OF TORTS § 402A comment n (1965).
been held to bar the plaintiff’s claim in strict liability. It is of some interest to note that, while courts have routinely based their refusal to countenance the defense of contributory negligence on comment n, the actual language of that section precludes only minimal contributory negligence which “consists merely [of] a failure to discover the defect in the product, or to guard against the possibility of its existence.” Somewhere between the failure to guard or discover and the voluntary and unreasonable assumption of the risk, the language of comment n makes it at least conceivable that some other degree of contributory negligence would bar plaintiff’s claim. Nonetheless, the prevailing rule has been that nothing short of assumption of the risk shall suffice.

Other defenses typically raised in strict products actions include: “unintended use;” “abnormal use;” or “unforeseeable misuse.” These defenses, while founded on the conduct of plaintiff, are not affirmative defenses, for they do not function to defeat plaintiff’s prima facie case. Instead, the general import of these “defenses” is that the plaintiff has not met his burden of proof, either by failing to establish defectiveness, proximate cause, or both.

Against this limited range of available defenses, courts are now contem-
COMPARATIVE FAULT

plating the prospect of evaluating plaintiff's fault in strict liability actions. Yet the proposition that infuses the entire notion of defenses to strict liability is that contributory negligence is not a defense because strict liability is not based on negligence. Since comparative negligence derives from contributory negligence, "[t]he syllogism runs ... [that] comparative negligence cannot be a defense to strict liability." It is this very objection that must be adequately answered if comparative fault is to make sense in strict products actions.

III. THE TREND TOWARD COMPARATIVE FAULT IN STRICT PRODUCTS ACTIONS: AN OVERVIEW

A. The Silent Majority

The great majority of the jurisdictions which have considered the question of whether plaintiff's fault or negligence should reduce his recovery in a strict products action have allowed the defense. Nevertheless, it is premature to state that those jurisdictions allowing the defense constitute

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the majority view. The jurisdictions that have remained silent on the sub-
ject are, at least presumptively, in accord with traditional strict liability
doctrine which does not recognize the contributory negligence of plaintiff
as a defense. Thus, while the current momentum of comparative fault
suggests that it will soon become the prevailing view, it has not yet at-
tained such status.

Those who have objected to the adoption of comparative fault have
done so without apology. In Daly v. General Motors Corp., where the
California Supreme Court first allowed the defense in a strict liability ac-
tion, Justice Mosk strongly dissented:

This will be remembered as the dark day when this court,
which heroically took the lead in originating the doctrine of prod-
ucts liability . . . and steadfastly resisted efforts to inject concepts
of negligence into the newly designed tort . . . inexplicably turned
180 degrees and beat a hasty retreat almost back to square one.
The pure concept of products liability so pridefully fashioned and
nurtured by this court for the past decade and a half is reduced
to a shambles.

The majority inject a foreign object—the tort of negli-
gence—into the tort of products liability by the simple expedient
of calling negligence something else: on some pages their opinion
speaks of "comparative fault," on others reference is to "compar-
ative principles," and elsewhere the term "equitable apportion-
ment" is employed, although this is clearly not a proceeding in
equity. But a rose is a rose and negligence is negligence . . . .

The argument advanced by Justice Mosk is not complicated; simply, it
holds that strict liability is not a fault concept, but is rather a concept of
enterprise liability, where the costs of injuries resulting from defective
products are shifted to the manufacturer which is "the party responsible
for putting the article in the stream of commerce." The manufacturer is
then free to spread the loss evenly throughout society by pricing its prod-
ucts accordingly. Since the purpose of strict liability is to compensate in-
jured persons "who are powerless to protect themselves," despite the
blameless conduct of the manufacturer, Justice Mosk argued that "[t]he
best reasoned authorities decline to inject negligence, contributory or
comparative, into strict products liability litigation." The majority's ac-

18 See supra notes 7-11 and accompanying text.
17 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978).
16 Id. at 757, 575 P.2d at 1181, 144 Cal. Rptr. at 399.
15 Id. at 759, 575 P.2d at 1183, 144 Cal. Rptr. at 401.
20 Id. (quoting Greenman v. Yuba Power Prods., 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27
Cal. Rptr. 697, 701 (1963)).
21 20 Cal.3d at 762, 575 P.2d at 1184, 144 Cal. Rptr. at 402. The authorities which Jus-
tice Mosk referred to were Kinard v. Coats Co., 37 Colo. App. 555, 553 P.2d 835 (1976), and
tion, he concluded, was "grievously unsettling to the law of torts." 22

In a separate opinion partially concurring and dissenting, Justice Jefferson agreed that the existing policy of cost spreading should be preferred over comparative principles. Dismissing the majority opinion as "a case of wishful thinking and an application of an impractical, ivory-tower approach," Justice Jefferson stressed that strict liability and negligence were not subject to comparison. 23 Evidently discontent with the majority's "apples and oranges" metaphor, 24 Justice Jefferson indicated that a quart of milk and a three-foot metal bar better illustrated the difference between the two concepts:

The majority's assumption that a jury is capable of making a fair apportionment between a plaintiff's negligent conduct and a defendant's defective product is no more logical or convincing than if a jury were to be instructed that it should add a quart of milk (representing plaintiff's negligence) and a metal bar three feet in length (representing defendant's strict liability for a defective product), and that the two added together equal 100 percent—the total fault for plaintiff's injuries . . . .

. . . .

What the majority envisions as a fair apportionment of liability to be undertaken by the jury will constitute nothing more than an unfair reduction in the plaintiff's total damages suffered, resulting from a jury process that necessarily is predicated on speculation, conjecture and guesswork. Because the legal concept of negligence is so utterly different from the legal concept of a product defective by reason of manufacture or design, a plaintiff's negligence is no more capable of being rationally compared with a defendant's defective product to determine what percentage each contributes to plaintiff's total damages than is the quart of milk with the metal bar . . . . 25

Adding that the majority unrealistically expected jurors to "accomplish a feat which trained judges cannot accomplish," Justice Jefferson concluded that advocating comparative fault in strict liability actions "constitutes a glaring failure to appreciate the limitations on, and the realities

Kirkland v. General Motors Corp., 521 P.2d. 1353 (Okla. 1974). At the time that Justice Mosk wrote his Daly dissent, there were far fewer jurisdictions allowing comparative negligence in strict liability. It is interesting to note, too, that Justice Mosk would refer to Kinard as one of the "best reasoned" authorities on the subject; in little more than a paraphrase of comment n of § 402A, the Kinard court dealt with the issue in a paragraph of less than one hundred words. 37 Colo. App. at 557, 521 P.2d at 837.

22 Daly, 20 Cal. 3d at 764, 575 P.2d at 1186, 144 Cal. Rptr. at 404.

23 Id. at 751, 575 P.2d at 1178, 144 Cal. Rptr. at 396.

24 The phrase signifies the different natures of negligence and strict liability, and therefore suggests the absence of a basis upon which to compare the two.

25 Daly, 20 Cal. 3d at 751-52, 575 P.2d at 1178, 144 Cal. Rptr. at 396.
of, our jury trial system."\textsuperscript{28}

In *Kinard v. Coats Co.*,\textsuperscript{27} the court unanimously held that the comparative negligence of the plaintiff had no application to a products liability action based on section 402A. In *Kinard*, the plaintiff was injured when repairing an automobile that was propelled from an hydraulic floor hoist onto him. The sudden propulsion was attributed to a defectively designed bumper jack which the plaintiff had used in conjunction with the floor hoist.\textsuperscript{28} The jack manufacturer contended that the plaintiff, who held a degree in engineering, had been negligent in his use of the jack, and that his contributory fault should be compared to the defective product in the jury's apportionment of damages.\textsuperscript{29} Stating that negligence concepts should not be injected "into an area of liability which rests on totally different policy considerations," and that plaintiff's conduct was relevant only on the issue of causation, the court held that comparative fault would subvert the doctrinal integrity of strict liability.\textsuperscript{30}

Products liability under [section] 402A does not rest upon negligence principles, but rather is premised on the concept of enterprise liability for casting a defective product into the stream of commerce . . . . Thus, the focus is upon the nature of the product, and the consumer's reasonable expectations with regard to that product, rather than on the conduct either of the manufacturer or of the person injured because of the product . . . . What defendant proposes here is that we inject negligence concepts into an area of liability which rests on totally different considerations.\textsuperscript{31}

In *Seay v. Chrysler Corp.*,\textsuperscript{22} the plaintiff was injured while attempting to drive a truck chassis onto a convoy trailer. When the accelerator pedal stuck, the chassis suddenly accelerated backwards, and the plaintiff was thrown from the makeshift chassis seat onto the trailer. The defendants presented evidence that the plaintiff had not sufficiently raised the top racks of the convoy trailer and had been attempting to load the chassis into too small a space. The jury returned a verdict for the plaintiff but,
over his objection, considered the issue of comparative fault and found that forty percent of the plaintiff's damages could be attributed to his own negligence.\(^{33}\)

In reversing the lower court's decision that the plaintiff's comparative fault was applicable in a strict products liability case, the Washington Supreme Court held not only that the language of the Washington comparative negligence statute was restricted to negligence actions, but, like the dissenters in Daly and the majority opinion in Kinard stressed "the theoretical difficulties of comparing concepts of fault (negligence) with no-fault (strict liability)."\(^{34}\) Emphasizing that strict liability did not sound in negligence, but was "based on a no-fault concept," the court reiterated the familiar maxim that strict liability did not focus on the conduct of any individual, but "on the nature of the product and the consumer's reasonable expectations with regard to that product."\(^{35}\)

**B. The Move Toward Comparative Fault**

The leading authority for the application of comparative fault in strict liability actions is the majority opinion in Daly v. General Motors Corp.\(^{36}\) The reason for this probably lies more in California's unique position in products liability litigation than in the novelty or ingenuity of the opinion. Four state supreme courts had allowed comparative negligence in strict liability actions prior to California's 1978 decision,\(^{37}\) and the Daly court's insistence that equitable principles were more important than "fixed semantic consistency" was hardly a new argument.\(^{38}\) Nevertheless, it was the Daly decision that provided the major impetus to the present trend toward comparative fault; this is probably due in part to the prestige of the California Supreme Court "which heroically took the lead in originating the doctrine of products liability."\(^{39}\)

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\(^{33}\) 93 Wash.2d at 320-21, 609 P.2d at 1383.

\(^{34}\) Id. at 323, 609 P.2d at 83-84.

\(^{35}\) 93 Wash. 2d at 324, 609 P.2d at 1387.

\(^{36}\) 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978).

\(^{37}\) The courts were the Alaska, Florida, Minnesota, and Wisconsin Supreme Courts. See cases cited supra note 15.


\(^{39}\) 20 Cal. 3d at 757, 575 P.2d at 1181, 144 Cal. Rptr. at 399.

The impact of the California Supreme Court in the field of products liability cannot be denied. In Greeman v. Yuba Power Prods., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963), the court was the first to adopt strict liability in tort as a theory upon which product related injuries could be compensated. Bolstered by the subsequent publication of § 402A, the doctrine has been adopted in one form or another in every state. See 1 PROD. LIAB. REP. (CCH) ¶ 4015, at 4018 (June 1984).

While the Greenman decision constituted the court's most widely followed precedent in the products liability area, it persisted in an avant-garde approach to the subject in general. In 1972, at a time when many courts were beginning to feel comfortable with equating de-
Daly was a second collision case, where the vehicle defect did not cause the initial impact, but enhanced the injuries sustained. Second collision and crashworthiness cases are particularly well-suited to a stark showing of the victim's negligence as a substantial factor in the causative chain of injury, since the plaintiff must begin by admitting that a negligent act apart from the product condition began the injury-producing sequence. In Daly, the plaintiff's decedent was thrown from his automobile when it

effectiveness with "unreasonable danger." Based on the qualification in § 402A(1), the California Supreme Court held that the "unreasonably dangerous" proviso of defectiveness imposed upon the plaintiff a burden of proof "which rings of negligence." Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 125, 501 P.2d 1153, 1162, 104 Cal. Rptr. 433, 442 (1979). By leaving the concept of defectiveness to be defined in a vacuum, apart from considerations of reasonableness, the court in effect failed to promulgate a standard of defectiveness. See generally Keeton, Products Liability and the Meaning of Defect, 5 St. Mary's L.J. 30, 30-32 (1973)(By eliminating the unreasonably dangerous qualification of defect, the court not only siphoned all content from defectiveness as a concept, but opened the door to tests for defectiveness which amount to no more than circuitous findings of "unreasonable danger.")

In 1978, the court at last recognized the conceptual deficiencies inherent in the Cronin approach. In Barker v. Lull Eng'g Co., 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978), in an attempt "to alleviate some confusion that [the] Cronin decision has apparently engendered," id. at 417, 573 P.2d at 446, 143 Cal. Rptr. at 228, the court promulgated two tiers of options to establish "defect" in design cases. Under the first alternative, the plaintiff must prove that "the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner." Id. at 428, 573 P.2d at 452, 143 Cal. Rptr. at 234. This simply resurfaces the consumer expectancy test of comment i to § 402A, which was used to establish "unreasonable danger" in the first place. See infra notes 119-21 and accompanying text. It is, however, the second alternative of the Barker test that signified a clear departure from the existing law of products liability. If the plaintiff could prove that the product's design was the "proximate cause" of the injury, "and the defendant fails to prove ... that the benefits of the challenged design outweigh the risk of danger inherent in such design," the case could go to the jury. 20 Cal.3d at 428, 573 P.2d at 452, 143 Cal. Rptr. at 234 (emphasis added). By requiring the defendant to prove nondefectiveness, the court established a truly radical premise by which a showing of foreseeability of injury could literally lead to a finding of defectiveness and establishment of liability. See, e.g., Schwartz, Foreward: Understanding Products Liability, 67 Calif. L. Rev. 435, 436 (1979); Werber, The Products Liability Revolution—Proposals for Continued Legislative Response in the Automotive Industry, 18 New Eng. L. Rev. 1, 15 (1982). The second prong of the Barker test for design defectiveness is conceivably the closest that American products liability litigation has come to absolute manufacturer liability.

It is therefore somewhat remarkable that barely two months after the extreme plaintiff-oriented holding in Barker, the court made an about-face in Daly and added the powerful tool of comparative fault to the defense counsel's arsenal. The fact that that decision has emerged as the "leading" case allowing comparative fault in strict liability actions only reinforces the vanguard position of the California Supreme Court in products liability actions.

Both second collision and crashworthiness theories allege defective designs, but a subtle difference exists between the two. In a second collision case, there is an actual secondary impact with a specific part of the vehicle, which, due to its defective design, enhances or increases the injuries sustained. Crashworthiness is not directed to a specific part of a vehicle, but is concerned with the overall protection that passengers receive in a collision. See Foland, Enhanced Injury: Problems of Proof in "Second Collision" and "Crashworthy" Cases, 16 Washburn L.J. 600, 606-07 (1977).
collided at high speed with a metal fence. The plaintiff alleged that a
defective door latch had caused the door to open upon impact, thus caus-
ing ejection from the car which then resulted in fatal head injuries. De-
spite plaintiff's objections, the defendants were permitted to introduce
evidence that the decedent was intoxicated at the time of the crash, and
that he had failed to use the available seatbelt and shoulder harness
which, the defendants contended, would have prevented his ejection from
the automobile. 41 On appeal from a jury verdict in favor of the defen-
dants, the California Supreme Court posed "the overriding issue in the
case, should comparative principles apply in strict products liability
actions?" 42

The court began its analysis by tracing the historical development of
strict products liability, emphasizing the reasons behind enterprise liabil-
ity of manufacturers, 43 but qualified by the assertion that "strict liability
has never been, and is not now, absolute liability." 44 Discussing the doc-
trine of comparative negligence and its obvious advantage over the doc-
trine of contributory negligence, 45 the court announced "we now stand at
the point of confluence of these two conceptual streams." 46

Addressing first the argument that "apples and oranges" (i.e., fault and
no-fault) are incapable of comparison, the court observed:

Those counseling against the recognitions of comparative fault
principles in strict products liability cases vigorously stress, per-
haps equally, not only the conceptual, but also the semantic diffi-
culties incident to such a course. The task of merging the two
concepts is said to be impossible, that "apples and oranges" can-
not be compared, that "oil and water" do not mix, and that strict
liability, which is not founded on negligence or fault, is inhospita-
ble to comparative principles. ... While fully recognizing the the-
oretical and semantic distinctions between the twin principles of
strict products liability and traditional negligence, we think they
can be blended or accommodated.

The inherent difficulty in the "apples and oranges" argument is
its insistence on fixed and precise definitional treatment of legal
concepts. In the evolving areas of both products liability and tort

41 20 Cal. 3d at 730-31, 575 P.2d at 1164-65, 144 Cal. Rptr. at 382-83.
42 Id. at 732, 575 P.2d at 1165, 144 Cal. Rptr. at 383.
43 See infra notes 104-08 and accompanying text (noting the social, economic, and politi-
cal bases of enterprise liability).
44 20 Cal. 3d at 733, 575 P.2d at 1166, 144 Cal. Rptr. at 384 (emphasis added). See infra
note 110.
45 Comparative negligence does not have the harsh effect of contributory negligence,
which acts as a complete bar to recovery, no matter how slight plaintiff's negligence might
be. See Bazydlo v. Placid Marcy Co., 422 F.2d 842 (2d Cir. 1970); Bahm v. Pittsburgh &
46 20 Cal. 3d at 734, 575 P.2d at 1167, 144 Cal. Rptr. at 385.
defenses, however, there has developed much conceptual overlapping and interweaving in order to attain substantial justice.\textsuperscript{7}

While the court stressed equity over semantic consistency, it nevertheless appeared perturbed by the conceptual compromises it was making. Pausing to note that, even if comparative negligence were allowed in a strict products liability case, "neither fault nor conduct is really compared functionally," and that "in the situation before us, we think the term 'equitable apportionment or allocation of loss' may be more descriptive than 'comparative fault'," the court refused to tamper with the no-fault underpinnings of strict liability.\textsuperscript{8} Consequently, all that Daly really offers is the limited rationale that it is better to be fair than to adhere to hardened rules which might result in unfairness. As the court maintained:

Fixed semantic consistency at this point is less important than the attainment of a just and equitable result. The interweaving of concept and terminology in this area suggests a judicial posture that is flexible rather than doctrinaire.\textsuperscript{9}

We reiterate that our reason for extending a full system of comparative fault to strict products liability is because it is fair to do so. The law consistently seeks to elevate justice and equity above the exact contours of a mathematical equation. We are convinced that in merging the two principles what may be lost in symmetry is more than gained in fundamental fairness.\textsuperscript{50}

Thus, in elevating "justice and equity above the exact contours of a mathematical equation,"\textsuperscript{51} the court reluctantly conceded that it was doing damage to the doctrine of strict liability. By characterizing this damage as a negligible deviation from "symmetry," the court simply softened the blow to the no-fault doctrine. The court was acutely aware of the concessions it was making, but deemed them a necessary trade-off for "fundamental fairness." One of the decisions relied on by the Daly majority\textsuperscript{52} was the Alaska Supreme Court decision in Butaud v. Suburban Marine & Sporting Goods.\textsuperscript{53} In Butaud, the plaintiff was injured while operating a snowmobile when a pulley guard shattered. The defendant-manufacturer asserted that plaintiff's racing of the machine or lack of maintenance constituted comparative negligence which was a causative factor in his injuries.\textsuperscript{54} Noting that the effect of comparative negligence in a strict products action was a question of first impression, as well as "the

\textsuperscript{7} Id. at 735, 575 P.2d at 1167, 144 Cal. Rptr. at 385.
\textsuperscript{8} Id. at 736, 575 P.2d at 1168, 144 Cal. Rptr. at 386.
\textsuperscript{9} Id.
\textsuperscript{50} Id. at 742, 575 P.2d at 1172, 144 Cal. Rptr. at 390.
\textsuperscript{51} Id.
\textsuperscript{52} Id. at 739, 575 P.2d at 1170, 144 Cal. Rptr. at 388.
\textsuperscript{53} 555 P.2d 42 (Alaska 1976).
\textsuperscript{54} Id.
theoretical argument that the strict liability of the defendant is difficult to compare with the contributory negligence of the plaintiff," the court said:

We feel that pure comparative negligence can provide a predicate of fairness to products liability cases in which the plaintiff and defendant contribute to the injury. The defendant is strictly liable due to the existence of a defective condition in the product. On the other hand, the plaintiff's liability attaches as a result of his conduct in using the product. It is appropriate, therefore, that the parties' contribution to the injury be apportioned. 5

The Butaud court was less troubled by problems of inconsistency than the Daly court. Stating that "the public policy reasons for strict products liability do not seem to be incompatible with comparative negligence," the court apparently did not consider that no-fault liability posed any serious problem for its decision. The "predicate of fairness" which comparative fault would bring to products liability cases appeared to the court to be a sufficient basis on which to proceed. 5

A recent decision allowing comparative fault in strict liability actions indicates that little analytical progress has been made since Butaud and Daly. In Coney v. J.L.G. Industries, the defendants asserted that plaintiff's decedent had been comparatively negligent in the operation of a hydraulic aerial work platform and that defendants' liability should reflect only that percentage of the overall damages which the decedent's negligence had not caused. One of the questions certified for appeal to the Illinois Supreme Court was "whether the doctrine of comparative negligence or fault is applicable to actions or claims seeking recovery under products liability or strict liability in tort theories?" 5

Relying on and utilizing an analysis patterned on Daly, the court acknowledged the difficulty of comparing "noncomparables." While never objecting to the no-fault basis of strict liability, the court noted that the obstacle of comparing plaintiff's negligence to the strict liability of the defendant was "more conceptual than practical." Thus, having characterized the difficulties as academic and not substantive, the court rested its decision on the following rationale: "[W]e believe that equitable principles require that the total damages for plaintiff's injuries be apportioned."

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56 Id. at 43.
57 Id. at 45-46 (footnotes omitted).
58 Id. at 46.
59 Id. at 45.
60 97 Ill. 2d 104, 106, 454 N.E.2d 197, 199 (1983).
61 Id.
62 Id. at 110, 454 N.E.2d at 203.
63 Id. at 109, 454 N.E.2d at 202 (quoting V. Schwartz, Comparative Negligence § 12.7, at 208-09 (1974)).
tioned on the basis of the relative degree to which the defective product and plaintiff's conduct proximately caused them. Accordingly, we hold that the defense of comparative fault is applicable to strict liability cases. 63

It would be an exercise in needless repetition to catalogue all the decisions that have dealt with the issue of comparative fault in strict liability actions. While in recent years the question has been frequently litigated, two dominant themes have emerged. If the opinion is against comparative fault, such as the dissents in *Daly* or the majority opinions of *Kinard* or *Seay*, it invariably indicates that negligence or fault concepts cannot be compared with a no-fault form of liability. If the opinion advocates the adoption of comparative fault, as in *Daly, Butaud*, or *Coney*, it stresses that "equitable principles" or "fundamental fairness" sufficiently compensate the victim for the minor losses, if any, in consistency of theory. 64

But the issue hardly ends with a simple difference of opinion. Both the courts and state legislatures that have considered the issue thus far favor the adoption of comparative fault in strict liability actions. 65 Indications are strong that this will be the majority rule. While this may answer the question of what is preferable, it nevertheless begs the question of what is actually the better result.

One way to measure the utility of comparative fault in strict liability is by the coherence and predictability it contributes to products liability. Because the key concept of products liability—an essential principle of defectiveness—has yet to be adequately established, and because of the widely diverging conceptions of fundamental strict liability theory, it is important to sort out the confusion in the general area of products liability.

In developing a coherent standard, it must be said that the trend toward comparative fault thus far has failed. By appealing only to "equity" and "fairness" in justifying their actions, courts have sidestepped the legitimate question of comparing fault with no-fault. This not only creates practical difficulties, but also drives to the heart of no-fault strict liability theory. A no-fault theory of strict liability is based on an "equity" all its own—that it is "fair" to reduce the costs and occurrences of accidents as efficiently as possible. 66 For courts to maintain that injecting fault con-

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63 97 Ill. 2d at 109, 454 N.E.2d at 203.

64 As the Hawaii Supreme Court noted, after surveying the relevant decisions and subsequently concluding that comparative fault should apply in strict liability actions: "In short, those who oppose the merger believe that negligence and strict liability are different theories and therefore are not compatible. Those jurisdictions that are in favor of the merger argue that fairness and equity are more important than semantic consistency." Kaneko v. Hilo Coast Processing, 65 Hawaii 447, 457, 654 P.2d 343, 352 (1982).

65 See supra note 15 (indicating which states consider comparative fault in strict liability actions).

66 See infra notes 102-08 and accompanying text.
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cepts into strict liability is justified by "equity" not only fails to comport with no-fault theory, but also discredits the essential risk-spreading policy of no-fault liability. As long as comparative fault in strict liability actions retains this inherent contradiction and is justified by no more than an arguably irrelevant sense of fair play, it confuses the law of products liability and, to that extent, remains undesirable.

This does not mandate the abandonment of comparative fault in strict liability actions. A better approach is available. Rather than the tenuous assertion that the no-fault premise is compatible with diametrically opposed concepts of fault, a more fruitful task for courts espousing the adoption of comparative fault lies in establishing that the doctrine which passes under the rubric of strict products liability is, in fact, a fault concept. On conceptual and practical levels, this amounts to an assertion that strict products liability is not founded on the wholesale rejection of fault concepts, but rather on a modification of those concepts. The justification for this position lies in a close scrutiny of the history and policy affecting strict products liability.

IV. STRICT LIABILITY THEORY: A SUGGESTED ANALYSIS AS A FAULT CONCEPT

No-fault theory is centered on the ambit of risk created by placing a particular product on the market. It does not derive from the fault of either the manufacturer or the injured party since, as a matter of social economic policy, the costs of injuries incurred from products are shifted to the manufacturer who then spreads such costs to consumers through its pricing structures.\(^6\)\(^7\) To inject fault concepts into this system essentially amounts to asking an irrelevant question: Does the injured plaintiff "deserve" the compensation he is entitled to as a matter of law? Except for the fringe areas beyond the limits of proximate cause, the manufacturer is strictly liable, despite its own blameless conduct or plaintiff's fault. To proceed on this theory precludes by definition all mention of "comparative fault." The approach typified by Daly, Butaud, and Coney, which asserts that the goals of no-fault liability "would not be frustrated by the adoption of comparative principles,"\(^6\)\(^8\) is therefore seriously flawed. As long as tribute is paid to the no-fault premise of strict liability, it is erroneous even to mention the fault of either party.

Yet there is real doubt that this is the true meaning of strict liability. Despite the language of no-fault common in strict liability litigation, there has never been a real departure from a fault concept of liability. Given the requirement of defectiveness which is invariably established by manufacturer conduct, the doctrine of strict liability is nothing other

\(^{6}\) Id.
\(^{7}\) Daly, 20 Cal. 3d at 736, 575 P.2d at 1168, 144 Cal. Rptr. at 386.
than fault by another name.

It is this fault premise of strict liability that courts following Daly need to show. Avoiding the mistaken approach of invoking equity to override no-fault, courts can point to history, theory, and practice to justify the fault base of strict liability. Having taken this step, it will then be perfectly consistent to compare the fault of the manufacturer and plaintiff, and the "fairness" of Daly, Butaud, and Coney will begin to make the sense it should.

A. The Historical Basis of Strict Products Liability:
The Leap From Escola to Greenman and Section 402A

The development of products liability law in America is marked by judicial dissatisfaction with traditional theories of recovery—warranty and negligence—as adequate responses to the needs of an enormously industrialized society. Courts rightfully sought to establish manufacturer liability for products that caused injuries, yet proceeding on theories of negligence and warranty often left courts confronted with insurmountable obstacles.

One such obstacle was the privity doctrine, established in Winterbottom v. Wright. Holding that a seller or manufacturer was not liable for damages caused by defective goods except to the immediate purchaser, or those in privity with the immediate purchaser, the privity doctrine insulated the manufacturer from enormous potential for liability. The Winterbottom rule simply stated a point beyond which the law would not recognize a claim.

If we were to hold that [one not in privity] could sue in such a case there is no point at which such actions would stop. The only safe rule is to confine the right to recover to those who enter into the contract: if we go one step beyond that, there is no reason why we should not go fifty.

The privity doctrine endured in negligence actions until 1916, when

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49 Recent figures place the number of product related injuries at 36 million per year in this country alone. See W. Keeton, D. Owen & J. Montgomery, Products Liability and Safety 2 (1980). The annual cost to the nation has been estimated at 20 billion dollars. Owen, Punitive Damages in Products Liability Litigation, 74 Mich. L. Rev. 1258, 1259 n.2 (1976). Because the risk of injury was a corollary to industrialization, the problem of compensating those injuries grew in proportionate severity and swiftness. Sudden social problems precipitated sudden legal solutions, and departure from traditional theories which could not adapt to the new accident problem became inevitable. See generally J. Beasley, Products Liability and the Unreasonably Dangerous Requirement 9-42 (1981) (describing the rise of strict products liability theory).
51 Id. at 115, 152 Eng. Rep. at 405.
Justice Cardozo in *MacPherson v. Buick Motor Co.* extended the duty of the manufacturer beyond the immediate purchaser to, essentially, all foreseeable users. Characterizing a negligently made auto wheel as a "thing of danger," Cardozo added:

> Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully.

In warranty actions, it was not until 1960, in *Henningsen v. Bloomfield Motors,* that the requirement of privity was abolished and the "reasonably expected ultimate consumer" became a protected party under an implied warranty of merchantability.

Despite the erosion of privity in negligence and warranty, courts were still confined by the limited reach of those theories. In negligence, proving that the negligent conduct of a manufacturer or seller of a product caused an ultimate consumer's injury often proved impossible. However, in 1944, Justice Traynor issued his concurring opinion in *Escola v. Coca-Cola Bottling Co.*, which has long been considered a seminal articulation of the doctrine of strict products liability. One of the principle reasons cited in support of a form of liability "irrespective of negligence," was that the plaintiff was in no position to meet the burden of proving negligence in a manufacturing process with which he was unfamiliar. For example, in *Escola*, although a soda bottle had exploded in the plaintiff's hands, she was unable to prove any specific act of negligence. Despite the majority's application of the doctrine of res ipsa loquitur, to hold the manufacturer liable, Justice Traynor urged a different approach. He

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72 217 N.Y. 382, 111 N.E. 1050 (1916).
73 Id. at 389, 111 N.E. at 1053 (emphasis added).
75 Id. at 370, 161 A.2d at 80. But privity has not altogether vanished as a prerequisite for manufacturer-seller liability. Under U.C.C. § 2-318 (1978), three alternatives are presented regarding third parties who may sue under an express or implied warranty. Alternative A extends to "any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty." Id. Alternative B extends the same warranty to any natural person, so long as such person "may reasonably be expected to use, consume or be affected by the goods." Id. Alternative C extends the provisions of B to "any person" (as distinct from "a natural person"). Id. Warranty actions can thus be limited by the § 2-318 alternative adopted by a particular state. See W. Prosser, *Handbook of the Law of Torts* § 98, at 658 (4th ed. 1971).
76 24 Cal. 2d 453, 150 P.2d 436 (1944). See W. Prosser, *supra* note 75, § 97, at 650 & n.95 (Justice Traynor's concurring opinion provided a "well-stated" argument for strict liability).
77 24 Cal.2d at 458, 150 P.2d at 441.
78 Id. at 456, 150 P.2d at 438.
stressed that as long as a product "proves to have a defect that causes injury to human beings," public policy demanded that the court affix responsibility on the manufacturer, who was "best situated" to protect against such occurrences. Justice Traynor objected to the class of product-related injuries which "cannot be classified as negligence of the manufacturer," and therefore left various injuries uncompensated. It is important to note that, even as early as Escola, the notion of strict liability was predicated on a finding of defectiveness and reflected a dissatisfaction with negligence theory.

In warranty actions, two problems in particular were raised. First, under both the Uniform Sales Act and the Uniform Commercial Code, buyers were unable to recover on a seller's warranty unless the seller was notified within a reasonable time of the breach. Although generally considered a sound rule in commercial transactions, in relation to personal injury actions, it has been characterized as a "booby-trap for the unwary." Courts necessarily dealt in fictitious renditions of "reasonable time," or held simply that the provision did not apply to personal injuries, or was not applicable to parties not dealing with one another. The second problem in warranty actions was the possibility of the seller effectively disclaiming the warranty or limiting the remedy. While many such disclaimers could easily be dismissed as unconscionable, they nevertheless presented obstacles to recovery.

What was needed, then, was a theory of manufacturer liability equal to the ever-multiplying accident problem. The next step in the historical development of products liability was the arrival of strict liability to meet this need. But it is only against the historical backdrop of dissatisfaction with warranty and negligence theories that the underlying concerns of strict liability can be identified.

Justice Traynor's call for a new form of manufacturer liability in Escola, while not immediately sufficient to mandate a new direction for American courts, stirred considerable commentary. Finally, nearly

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79 Id. at 458-59, 150 P.2d at 440-41.
80 Id. at 459, 150 P.2d at 441.
81 UNIF. SALES ACT § 49 (act withdrawn 1951).
83 W. PROSSER, supra note 75, § 97, at 655.
84 See, e.g., Brown v. Chapman, 304 F.2d 149, 152 (9th Cir. 1962); Pritchard v. Liggett & Myers Tobacco Co., 295 F.2d 292, 296-99 (3d Cir. 1961).
85 See, e.g., Wright Bachman, Inc. v. Hadnett, 235 Ind. 307, 311-12, 133 N.E.2d 713, 715 (1956).
88 See id. § 2-302 (unconscionable contract or clause).
89 See, e.g., F. HARPER & F. JAMES, LAW OF TORTS 729-43 (1956); R. POUND, NEW PATHS OF THE LAW 39-47 (1950); James, Product Liability, 34 Tex. L. Rev. 44 (1955); Prosser, The
Compared to twenty years after Escola, the California Supreme Court adopted a new theory of manufacturer liability in Greenman v. Yuba Power Products. In Greenman, the plaintiff received severe head injuries when struck in the head by a large piece of wood that was inexplicably thrown back at him by the power saw he was using. The plaintiff sought recovery for his injuries under warranty theory, but the defendant-manufacturer asserted that the plaintiff had not fulfilled the notice requirement of the state’s Uniform Sales Act. The court rejected the notice requirement in personal injury actions and added further that plaintiff need not prove the existence of a warranty, since the appropriate theory of recovery was strict liability in tort. Citing scholarly commentaries and his own concurring opinion in Escola, Justice Traynor wrote confidently that the reasons for imposing strict liability on the manufacturer had been “fully articulated” and needed no restatement.

The standard for liability proffered in Greenman was simply phrased: “A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being.” It is significant that there was little discussion of the standards by which “defect” was to be defined. Assuming that a defect was something which could be recognized with little trouble, the clear thrust of Justice Traynor’s opinion was to make available a new theory—easier to prove and broader in scope—on which injured plaintiffs could proceed. In so doing, Justice Traynor emphasized several facts. He took issue with the evidence that absolved the retailer of negligence liability, as well as the fact that plaintiff had given no notice of the warranty breach to the manufacturer. He mentioned that there was no longer “the requirement of a contract” (privity) between the parties, and therefore, the action sounded, not in warranty, but in “strict liability in tort.”

Greenman thus marked the crystallization into law of the ideas that Justice Traynor set forth years earlier in his concurring opinion in Escola. It is appropriate to recall that the Escola concurrence was offered in the context of a burden of proof problem. The plaintiff’s inability to produce the negligent act which caused the soda bottle to explode in Escola should not, Traynor asserted, inhibit the plaintiff’s claim where it was evident that somewhere along the production or retail line, something had gone wrong. The holding in Greenman was based on this same prin-

Assault upon the Citadel (Strict Liability to the Consumer), 69 YALE L.J. 1099 (1960).
91 Id. at 59-60, 377 P.2d at 898-99, 27 Cal. Rptr. at 698-99.
92 Id. at 60-62, 377 P.2d at 900, 27 Cal. Rptr. at 700.
93 Id. at 61, 377 P.2d at 901, 27 Cal. Rptr. at 701.
94 Id. at 61, 377 P.2d at 900, 27 Cal. Rptr. at 700.
95 Id. at 59-61, 377 P.2d at 899-901, 27 Cal. Rptr. at 699-701.
96 Id. at 61, 377 P.2d at 901, 27 Cal. Rptr. at 701.
principle, and it is important to note that, while the product defects in Escola or Greenman were not linked evidentially to particular acts, they were assumed to be the result of some act, proof of which was simply not important—in the manner of res ipsa loquitur, the manufacturing defect spoke for itself.

A year after Greenman, the American Law Institute published a new section to the Restatement (Second) of Torts. Ultimately entitled “Special Liability of Seller of Product for Physical Harm to User or Consumer,” section 402A sought to address the same problems as Greenman. Maintaining that the rule of the section “is one of strict liability,” and that the rule applied in spite of “all possible care” by the seller, the Restatement endeavored, as did Greenman, to supply a new theory of recovery which obviated the confinements of negligence and warranty.

Echoing Greenman, subsections 2(a) and (b) of section 402A explicitly denoted that proof of negligence, as well as contractual privity, were unnecessary to sustain an action in tort. Comment a added that liability could be based on negligence “where such negligence can be proved.”

The point here is that in its historical inception, viewed from the standpoint of either Greenman or section 402A, the actual thrust behind the new doctrine was not to herald a social policy of injury compensation devoid of fault. Rather, the doctrine was formed as a rejection of the obstacles imposed by negligence and warranty theories. Indeed, even in Daly, where the no-fault premise of strict liability was never questioned, the court frankly admitted that the principle of “strict liability” announced fifteen years previously was based on the inadequacy of traditional tort and contract principles of recovery.

General dissatisfaction continued with the conceptual limitations which traditional tort and contract doctrines placed upon the consumers and users of manufactured products, this at a time when mass production of an almost infinite variety of goods and products was responding to a myriad of ever-changing societal demands stimulated by wide-spread commercial advertising. From an historic combination of economic and sociological forces was born the doctrine of strict liability in tort.

Further, the fact that Greenman and section 402A predicated liability on a defective product cannot help but place the doctrine of strict products liability squarely on the grounds of fault.

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97 Restatement (Second) of Torts § 402A comment a (1965).
98 Id. § 402A.
99 Id. § 402A comment a (emphasis added).
B. Strict Liability Policy: Fault or No-Fault?

The historical reasons for the presence of strict products liability are concededly not conclusive as to the nature of the doctrine. Only a close study of its policies and rationales, as well as its practical functioning, can determine whether it is based upon fault or no-fault.

A no-fault conception of strict liability or a "genuine strict liability" is, by definition, distinct from the fault of either party. Designed to reduce the occurrence and cost of accidents, as well as to spread the loss resulting from accidents, a rule of genuine strict liability would make manufacturers "automatically liable for all accidents caused or occasioned by the use of their products." The economic basis of this scheme truly renders the question of fault irrelevant. By shifting the costs of accidents entirely to the manufacturer, who can then spread the losses evenly throughout

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1 Policy arguments advanced by courts and commentators favoring imposition of strict liability on the manufacturer reveal the negligence-warranty heritage of strict liability. The fundamental concerns of negligence and warranty—the unreasonable infliction of harm and the reasonable expectations of the consumer—are the central themes for a rule of strict liability. A near-exhaustive list of "policies" for strict liability is compiled in Montgomery & Owen, Reflections on the Theory and Administration of Strict Tort Liability for Defective Products, 27 S.C.L. Rev. 803 (1976). The policies are:

1. Manufacturers convey to the public a general sense of product quality through the use of mass advertising and merchandising practices, causing consumers to rely for their protection upon the skill and expertise of the manufacturing community.
2. Consumers no longer have the ability to protect themselves adequately from defective products due to the vast number and complexity of products which must be "consumed" in order to function in modern society.
3. Sellers are often in a better position than consumers to identify the potential product risks, to determine the acceptable level of such risks, and to confine the risks within those levels.
4. A majority of product accidents not caused by product abuse are probably attributable to the negligent acts or omissions of manufacturers at some stage of the manufacturing or marketing process, yet the difficulties of discovering and proving this negligence are often practicably insurmountable.
5. Negligence liability is generally insufficient to induce manufacturers to market adequately safe products.
6. Sellers almost invariably are in a better position than consumers to absorb or spread the costs of product accidents.
7. The costs of injuries flowing from typical risks inherent in products can fairly be put upon the enterprises marketing the products as a cost of their doing business, thus assuring that these enterprises will fully "pay their way" in the society from which they derive their profits.

Id. at 809-10.

Of these arguments, only the last three imply some sort of separation from a general notion of "fault," and, as discussed in this section of the text, the no-fault basis of strict liability, ostensibly supported by these policies, maintains coherence only when the requirement of "defect" is abandoned altogether. This has not yet happened in an American court, and the likelihood is that it never will.

1 Schwartz, supra note 39, at 441.
the market, the retail price of dangerous products will consequently rise, and thus diminish the sales of such products. With less dangerous products sold, the level of accident occurrence will fall, and the human and economic toll resulting from such accidents will have been abated. 103 Genuine strict liability or "enterprise liability" is in response to the inevitability of accident losses, a compensation system for society, and is political in its orientation. 104

As a form of "social engineering," 105 the enterprise theory of liability considers the potential effects of costly accidents on society and seeks not only to prevent those accidents, but to affect the societal distribution of wealth. As Professor Klemme has stated:

The enterprise liability theory . . . is concerned with conservation of the community's limited resources.

. . . It seeks to achieve greater or more effective preventive action than did the force and fault theories. It also seeks, when possible, more effective . . . use of the market place as a tool for "best" allocating the community's limited resources.

. . . How the tort law allocates a tort-like loss between the immediate parties will affect not only the distribution of wealth between them, it will also affect the distribution of wealth between the various segments of the public to which each of the immediate parties will be able to pass the cost by way of the market

103 This is the essential thesis of Professor Guido Calabresi, who is at the forefront of no-fault theorists. By raising prices to reduce sales of dangerous goods, Professor Calabresi's approach aims not only at compensating injured parties as a matter of social policy (which is a great deal different than injured parties litigating to determine whether they are entitled to compensation), but also at reducing the number of accidents and their attendant costs. Because it ultimately would be "cheaper" for the manufacturer to set into motion the cost-avoiding process (by raising retail prices), the loss is shifted, as a matter of social economics, to the manufacturer. See G. CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970); Calabresi, Optimal Deterrence and Accidents, 84 YALE L.J. 656 (1975); Calabresi & Hirschoff, Toward a Test for Strict Liability in Torts, 81 YALE L.J. 1055 (1972).

104 It is political because it is a form of socialism; rather than allowing the fault system of tort law to allocate losses based on fault, no-fault liability redistributes wealth to injured claimants based on social policy. As Professor Fletcher points out:

This is an argument of distributive rather than corrective justice, for it turns on the defendant's wealth and status, rather than his conduct. Using the tort system to redistribute negative wealth (accident losses) violates the premise of corrective justice, namely that liability should turn on what the defendant has done, rather than on who he is . . . . What is at stake is keeping the institution of taxation distinct from the institution of tort litigation.


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Thus, the theory seeks to distribute "as fairly as possible among various segments of the consuming public the costs of [accident] prevention, or, alternatively, the costs of insuring against the tort-like losses which will nonetheless occur." The means chosen to effect this purpose, under a rule of no-fault liability, is to shift the costs of accidents onto the manufacturer, who can then raise retail prices, thus spreading the loss. As a result, the dynamics of the marketplace will remove dangerous products, and their results, from society. As Professor Calabresi has said, this "primary reduction [in the] number and severity of accidents," is accomplished simply by making certain activities "more expensive and thereby less attractive to the extent of the accident costs they cause." The method chosen by Calabresi shifts the costs of accidents to the "cheapest cost avoider." Invariably, this means shifting the cost to the manufacturer.

The loss spreading/risk-distribution rationale is, however, suspect. In order to deal effectively with the accident problem, the rationale would have to contemplate all product related accidents. Because the existing law of strict liability is predicated on a finding of defectiveness, "loss spreading" is limited to accidents resulting from defective products, and therefore has but a limited effect on the marketplace and the pricing of goods. As Professor Gary Schwartz has pointed out: "[S]o long as the existing strict liability rule continues to refuse to compensate the victims of nondefective products, its alleged devotion to the loss spreading ideal invites real skepticism." Put simply, if loss spreading were of such paramount importance, then why limit it to defective products? It should be applicable to all accident victims, not merely those accidents attributable to the adventitious presence of a defect. If loss spreading or risk distributing is to have any effect on the reduction of accident costs and occurrences, it must also affect the prices of non-defective goods. Strict liability has always been held short of absolute insurer liability. Yet absolute insurer liability is the only form of liability in which loss spreading makes any sense. As stated in the Model Uniform Products Liability Act:

Some courts have attempted to apply strict liability in [the areas of design and warning defects]. They have sought to justify

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107 Id.
109 Schwartz, supra note 39, at 443.
110 The statement that the manufacturer is not an absolute insurer of its product is so prevalent in products liability litigation that the West Publishing Company has given its own topic (313a) and key (4) number.
the result under a theory of "risk distribution," wherein the product seller distributes the costs of all product-related risks through liability insurance. The courts state that they are not imposing "absolute" insurer liability; nevertheless, they have not been able to articulate "why" they draw the line short of that particular point. The reason for this is that the "risk distribution" rationale provides no stopping point short of absolute liability. Thus, a number of courts have plunged into a foggy area that is neither true strict liability nor negligence. The result has been the creation of a wide variety of legal "formulae," unpredictability for consumers, and instability in the insurance market.111

Equally suspect is the premise that shifting the loss to the manufacturer is invariably the "efficient" thing to do. Professor Calabresi's economic analysis assumes that applying a rule of strict liability to the manufacturer optimally deters accident costs and occurrences. Judge Posner, on the other hand, argues that the most efficient use of resources derives from a system of negligence rather than strict liability.112 Posner points out that each case needs individual evaluation to determine whether it would be more efficient to encourage victims (as a class) to carry their own personal injury insurance.113 Because the prospect of a negligence suit encourages manufacturers to create safe products, he further contends that a negligence standard functions to "bring about . . . the efficient . . . level of accidents and safety."114 The purpose here is not to insist that Posner is right and Calabresi wrong; it is simply to point out that even if a rule of no-fault or genuine strict liability existed—which is presently being argued against—it would be prone to severe theoretical deficiencies. Loss spreading could not be justified if only defective products established liability, and negligence might prove more "efficient."

Apart from the real doubts surrounding no-fault theory, there remains an additional feature of strict liability doctrine which suggests that it is fundamentally a fault concept. The most important connotation of fault is the requirement that a product be defective. A seemingly ubiquitous statement in strict liability adjudication and commentary is that the

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113 R. Posner, Economic Analysis of Law § 6.11, at 141 (2d ed. 1977). Arguing against the idea that it is always more efficient to shift the loss to the manufacturer, Posner says:

If injurers are cheaper insurers than victims, there is an (economic) argument for strict liability. But whether they are or not is difficult to say a priori . . . . The injurer, if a corporation, may be able to self-insure against the injury at low cost; but the cost of market insurance to the victim may be even lower if he can purchase comprehensive life and accident insurance covering risks from many activities, not merely those of the particular injurer. Id.

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manufacturer is not "a general insurer for the victim no matter how or where the victim comes to grief." Rather, in order to recover in a strict products action, the plaintiff must suffer injury from a defective product. Not only does this requirement cause existing strict liability doctrine to fall far short of genuine strict liability, it arguably mandates that the doctrine be approached as a fault concept. This is best illustrated by an examination of just what is meant by the term "defect".

C. The Requirement of Defectiveness

There are three generally recognized categories of defectiveness: 1) manufacturing defects, where the product fails to meet the manufacturer's own safety specifications; 2) design defects, where the basic product structure is inherently unsafe; and 3) warning defects, where the inadequacy of warnings or instructions account for an unsafe product. To establish any of these three types of defects, two dominant theories have been advanced in the courts: the consumer expectancy theory and the risk/utility theory. The two theories are not mutually exclusive for they share a significant degree of overlap that has produced a great deal of confusion. The result is that even though different "categories" of defect exist, there has been no resolution as to the essential meaning of defectiveness.

The consumer expectancy test was suggested in comment i to section 402A as a means of establishing the "unreasonably dangerous" requirement of the Restatement. Although the language of that section ostensibly calls for a two-part finding of defect and unreasonable danger, the finding of the latter has generally established the former as well. According to an accompanying comment to section 402A, in order for a product to be unreasonably dangerous, it must be dangerous "beyond that which would be contemplated by the ordinary consumer ... with the ordinary knowledge common to the community as to its characteristics." Simply put, the quality of a product's danger should not surprise

119 Calabresi & Hirschoff, supra note 103, at 1056. See supra note 110.
118 See Keeton, supra note 39, at 35-34. See also W. Keeton, D. Owen & J. Montgomery, supra note 69, at 269-431 (categorizing the general "concept of defectiveness" into defective manufacture, defective design, and defective warnings).
117 See supra notes 30-35 and accompanying text.
116 See Keeton, supra note 39, at 34.
115 Restatement (Second) of Torts § 402A comment i (1965).
113 Restatement (Second) of Torts § 402A comment i (1965).
the consumer; if it does, it is "unreasonably dangerous."

The consumer expectancy test is borrowed from contract law.\textsuperscript{122} It describes, essentially, a breach of warranty with the important distinction that the action sounds in tort, thus obviating any contract-based defenses. As a rule of contract law, where there are agreements by which the "reasonable" or "ordinary" expectations of the parties can be meaningfully gauged, and thus establish a threshold for "breach," it is a manageable test. As a tool employed to establish the defective condition of a product, its utility is far less clear.

Only in cases of unusual simplicity does the consumer expectancy test serve any clear purpose. Consider the hypothetical of the new automobile being driven at normal speeds. If the engine suddenly falls out, causing an accident and consequential injury to the driver, it is clear that some generalized notion of product safety has been violated and that there is little difficulty in finding a defective condition. However, in the harder, more typical case, "consumer expectations are as subtle as perceived meanings; both depend on the particular environments in which they operate . . . . The most troublesome situations are those in which the consumer attitudes have not sufficiently crystallized to define an expected standard of performance."\textsuperscript{123} Thus, in \textit{Heaton v. Ford Motor Co.},\textsuperscript{124} where the plaintiff, driving his relatively new Ford truck, ran over a rock of about five or six inches in diameter, causing the wheel to malfunction and tip the truck over, the court held that there was no basis for a jury to determine what a reasonable consumer's expectations should be. Courts are routinely confronted with the task of determining what the ordinary consumer "expects" in scenarios that range from silicone breast implants that break inside plaintiff\textsuperscript{2} to pajama tops that ignite while children played with matches.\textsuperscript{126} In an Ohio crashworthiness case, the court sought to establish what level of safety the ordinary consumer riding in a jeep expected, \textit{beginning at the point the jeep overturned}, due to the negligence of its driver.\textsuperscript{127}

Added to the problem of what expectations are reasonable is that of whose expectations are to be considered. In \textit{Vincer v. Esther Williams All-Aluminum Swimming Pool Co.},\textsuperscript{128} where a two year old child wandered into a swimming pool, allegedly because its gate was not self latching, the court held that this condition was "obvious" to an adult and,

\textsuperscript{122} See \textit{Corbin, Corbin on Contracts} § 1, at 2 (1952) (main purpose of contract law is the realization of reasonable expectations induced by promises).
\textsuperscript{123} Dickerson, \textit{Product Liability: How Good Does a Product Have to Be?}, 42 Ind. L.J. 301, 307 (1967).
\textsuperscript{124} 248 Or. 467, 435 P.2d 806 (1967).
\textsuperscript{128} 69 Wis. 2d 326, 230 N.W.2d 794 (1975).
therefore, not dangerous beyond the ordinary consumer's expectations. The problems of whose expectations are controlling is also apparent in relation to product experts who know more about the product at issue and have lower expectations of safety. Unlike the injured child in Vincer, the injured expert would stand to benefit from having the ordinary consumer's expectations imputed to him. The wide divergence of possibilities in product-related injuries make a uniform principle of consumer expectations virtually impossible to formulate or so general as to be meaningless. It is, therefore, not surprising that the Model Uniform Product Liability Act would abandon the consumer expectancy test altogether:

The reasons for not including it are rooted in both economics and practicality.

The consumer expectation test takes subjectivity to its most extreme end. Each trier of fact is likely to have a different understanding of abstract consumer expectations. Moreover, most consumers are not familiar with the details of the manufacturing process and cannot abstractly evaluate conscious design alternatives.

Establishing defectiveness from the consumer expectancy test is a two-fold task. First, legitimate consumer disappointment in a product must be shown; secondly, the source of the disappointment must be relabeled as a product defect. Because there are no express agreements or tests designed to illustrate what the ordinary or reasonable consumer expects, courts invariably ask whether an alternative, safer design or warning was available. If the level of safety that an alternate product would have provided was what the consumer expected and the product's feasibility made it reasonable for the consumer to expect this level of safety, then defectiveness is established under the consumer expectancy test. Yet, all this amounts to is an oblique risk/utility analysis of the manufacturer's conduct. A good example may be found in Seattle First National Bank v. Tabert where the court instructed the jury that the relevant factors for determining the reasonable expectations of the consumer were "[t]he relative cost of the product, the gravity of the potential harm from the claimed defect and the cost and feasibility of eliminating or minimizing the risk." In commenting on this "consumer expectation" test, Profes-
Birnbaum observed:

[T]o buttress the comment i approach, some courts have fashioned a consumer expectations test with a risk-utility base. That is, in seeking to establish that a product is dangerous to an extent beyond that which the ordinary consumer would expect, the trier of fact must first determine what reasonable consumer expectations would be. Under a literal application of comment i, the trier of fact would be invited to rely on some vague commonsense notion of what the ordinary consumer expects in the way of safety. The court would offer no guidelines to help the trier of fact in making this crucial determination. Nonetheless, by grounding the comment i test on a risk-utility base, some courts have recognized the need to define for the jury exactly which factors should be considered in discerning what the objective ordinary consumer expects. Factors considered relevant in determining the reasonable expectations of the ordinary consumer include [the factors mentioned by the Seattle First National court]. These factors, of course, involve the traditional balancing test usually invoked to prove unreasonableness in a design case.133

Thus, where the manufacturer has failed to meet an objective standard of product safety because its product falls below the standard of the reasonably feasible alternative, its product has "unreasonably disappointed" the consumer. This is nothing more than a circuitous finding of fault. It establishes the unreasonable conduct of the manufacturer; to call it anything else ignores the negligence basis by which the consumer's expectations are measured. As the court in Phillips v. Kimwood Machine Co.,134 recognized: "[A] manufacturer who would be negligent in marketing a given product, considering its risks, would necessarily be marketing a product which fell below the reasonable expectations of the consumers who purchase it."135 Only in the simple case where an obvious violation of the consumer's expectations of safety has occurred and, thus, defectiveness exists, does the consumer expectancy test function at all coherently. Yet even then it does not escape a subtle risk/utility analysis, for the consumer probably expected that the product manufacturer made a risk/utility analysis. Further, the risk/utility analysis establishes the fault of the manufacturer more than it does anything else.

The alternative to the consumer expectancy test—or its secret identity—is the risk/utility analysis. Used almost exclusively in cases of design defects, the test asks whether "the risk of danger inherent in the

135 Id. at 490, 525 P.2d at 1037.
challenged design outweighs the benefits of such design.”

Couched either in the assessment of “risks” or “utilities” of a particular design, lies the usually determinative question of whether an alternative cost-effective and safer design was available.

This approach is typified by Caterpillar Tractor Co. v. Beck, where the plaintiff’s decedent was killed when the front-end loader he was operating rolled over. The plaintiff contended that Caterpillar’s failure to equip the vehicle with a roll-over protective shield constituted a design defect. Discussing the alternative theories of establishing a defect in design, the court noted that the risk/utility analysis “requires a weighing of various factors.” By balancing the “risk and the social utility of the product,” the jury must determine whether “the benefits of the challenged design outweigh the risk of danger inherent in such design.” While the court shifted the burden of proving nondefectiveness to the defendant, it nevertheless approved of the risk/utility test as the appropriate measure of product defect. In Dorsey v. Yoder Co., the plaintiff’s arm was injured while operating a metal slitter machine. The plaintiff asserted that the failure to install a guard on the machine constituted a design defect. The court reasoned that, even though the absence of the guard was obvious to the plaintiff, the cost of installing a guard was not great, and the presence of a guard would not impair the machine’s utility. From these facts, the jury concluded that the “risk” of leaving the machine without a guard exceeded its “utility,” and found a “defect.”

The ostensible technique utilized in cases such as Beck or Dorsey is to balance the factors of risk and utility which are inherent in a product. It is important to note that goods do not spring into sudden existence; they are designed and manufactured by human beings and, as such, reflect the human conduct that went into their creation. The front-end loader in Beck was not simply “missing” a protective shield. It was missing because the manufacturer failed to put it there. The same is true for the machine guard in Dorsey, and it is less than honest for a court to employ a risk/utility analysis and at the same time maintain that it is the condition of the product, not the conduct of the manufacturer, which is being scrutinized.

As Professor Calabresi has pointed out, the risk/utility analysis “sounds devilishly like the very calculus of negligence, or Learned Hand’s test for

136 Barker, 20 Cal. 3d at 428, 573 P.2d at 454, 143 Cal. Rptr. at 234.
138 Id. at 875.
139 Id. at 885.
140 Id. (quoting Barker, 20 Cal. 3d at 436, 573 P.2d at 458, 143 Cal. Rptr. at 240).
141 Id. (following the Barker allocation of proof). See supra note 39.
143 331 F. Supp. at 755.
144 Id. at 760.
fault, which strict liability was meant to replace."\(^{145}\) Whether, historically, strict liability was "meant to replace" fault liability is disputed. Nonetheless, as Calabresi and others have correctly pointed out, the risk/utility analysis amounts to little more than the Learned Hand test for negligence.\(^{146}\) Since the risk/utility test is employed almost exclusively to establish defective design, it becomes apparent that the "focus on the product" axiom of a no-fault system is simply not true of design litigation. As with *Beck* and *Dorsey*, courts are balancing considerations of safety, economy, and engineering, and concluding "defect" from a process which essentially involves impugning the manufacturer's conduct in the design process. As Professor Birnbaum points out:

> A design defect is neither random, nor unpredictable, nor inevitable. It is the result of deliberate and documentable decisions on the part of the manufacturer. Here the plaintiff does not struggle to find some fleeting indicia of negligent conduct; instead, he seeks to impugn an entire product line by condemning a manufacturer's judgment, as manifested by his conscious choice of available options . . . . Furthermore, as almost every vigorously litigated design defect case shows, plaintiffs do in fact come forward with detailed technical evidence tending to prove that the manufacturer was either aware of the nature and gravity of the risk posed by the challenged product or that he could have designed the product more safely.\(^{147}\)

The conscious decisions of engineers and technicians are, thus, found to be negligent. To label this legal conclusion as a "defect" is simply a preference for style over substance. Negligence is what the test determines, yet defect is what it is called.

Strict liability in warning cases is similarly predicated upon fault. Courts which have characterized the warnings or instructions on products

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\(^{145}\) Calabresi & Hirschoff, supra note 103, at 1056.


The Learned Hand test of negligence is set forth in *Conway v. O'Brien*, 111 F.2d 611 (2d Cir. 1940), rev'd on other grounds, 312 U.S. 492 (1941). "The degree of care demanded of a person ... is the resultant of three factors: the likelihood that his conduct will injure others, taken with the seriousness of the injury if it happens, and balanced against the interest which he must sacrifice to avoid the risk." 111 F.2d at 612. Accord W. Prosser, supra note 75, § 31, at 148 ("Against this probability, and gravity, of the risk, must be balanced in every case the utility of the type of conduct in question."). Given the pervasiveness of this negligence "formula" in American jurisprudence with its focus on the conduct of the injuring party, it becomes difficult to conceive of courts conscientiously accepting the risk/utility analysis as an acceptable means of analyzing product condition apart from manufacturer conduct.

\(^{147}\) Birnbaum, supra note 133, at 648.
as "defective" or "unreasonably dangerous" have employed a straight negligence analysis in finding the defendant "strictly liable." In Borel v. Fibreboard Paper Products Corp., the court based its judgment for plaintiff on the fact that knowledge of the dangers of inhaling asbestos was available to the defendant long before the plaintiff had contracted lung cancer. The defendant was held to the status of an expert and was found "strictly liable" for failing to warn. By holding the defendant to expert status, the court established a level of responsibility ("duty") which defendant failed to achieve. Moreover, defendant's "strict liability" was established by an analysis nothing short of negligence. In Smith v. E.R. Squibb & Sons, Inc., the plaintiff's decedent died as a result of an injection of the defendant's drug. The court said:

The test for determining whether a legal duty has been breached is whether defendant exercised reasonable care under the circumstances. Determination of whether a product defect exists because of an inadequate warning requires the use of an identical standard. Consequently, when liability turns on the adequacy of the warning, the issue is one of reasonable care, regardless of whether the theory pled is negligence, implied warranty, or strict liability in tort.

The considerations in "defective warning" cases—such as whether the warning is sufficiently explicit, intense, prominent, or correct—are the considerations of negligence. The threshold question is whether the manufacturer's warning breached the court-determined standard of care. Again, the warning did not simply "appear" on the product. It was put there by the same people who created it. To take the inadequate warning of a manufacturer and call it a product "defect," unrelated to the manufacturer's fault, is simply misleading. All that is proved is a preference for the term "defect."

It is only in the case of the manufacturing defect that something close to a true "focus on the product" is achieved. Nevertheless, even this defect is hardly unrelated to the fault of the manufacturer. For example, in Ford Motor Co. v. Zahn, the plaintiff applied his brakes suddenly and was thrown forward into the dashboard of his automobile. His eye was punctured by the jagged edge of the ashtray. While the case was tried under a negligence theory, it nevertheless represents the typical manufac-

149 493 F.2d at 1092-94.
150 Id. at 1093.
152 Id. at 90, 273 N.W.2d at 480.
153 265 F.2d 729 (8th Cir. 1959).
154 Id. at 730.
turing defect case;¹⁶⁶ where the product fails to conform to the manufacturer's own specifications, there is no problem in showing defectiveness.¹⁶⁶ Yet, the application of strict liability in manufacturing defect cases hardly maintains that liability is not based on fault. Rather, as long as the plaintiff can prove that the product was substantially in the same condition as when it left the seller's hands, strict liability merely relieves the plaintiff of the burden of proving the negligent act which resulted in the manufacturing defect.¹⁵⁷

It has been pointed out by several commentators, among them Professors Wade and Keeton, that the manufacturing defect is the only category really within the scope of section 402A.¹¹¹ Since the violation of the manufacturer's own specifications establishes the defective condition of the product, the reasonable care of the manufacturer is irrelevant. But it is only irrelevant in terms of the plaintiff's burden of proof. Even in the strict liability manufacturing defect case the fault of the manufacturer is important since its conduct caused the specification violations. As Professor Werber has noted: "No amount of terminological exercise can remove the fact that conduct-fault resulted in the defective product."¹⁵⁹

Thus, the requirement of defectiveness strikes a serious blow to the notion that strict liability is a no-fault concept. Because the consumer expectancy test and the risk/utility analysis probe the reasonableness of the manufacturer's conduct, the manufacturer's fault ultimately translates into a finding of defect. Because strict liability is based on defectiveness, the doctrine remains entrenched in fault concepts which render it more correctly a component of traditional tort law, as opposed to a no-fault system of injury compensation.

D. Back to Fault: A Basis for Comparison

Because the concept of defectiveness cannot be reconciled with a theory of no-fault liability, a considerable body of commentators have urged

¹⁶⁶ The case antedated Greenman and § 402A, and strict liability was simply not an available theory. It is, nevertheless, interesting that the Zahn court persistently referred to the "defect" in the ashtray, mentioning that "[b]y force of law there is imposed upon the manufacturer . . . the duty . . . to prevent defective conditions [in its products]." 265 F.2d at 731. While the plaintiff was actually able to establish negligence in Ford's failure to inspect, the case is a telling example of the judicial tendency to find liability where a product had evidently gone wrong somewhere along the production line, the assumption which impelled the appearance of strict liability in tort. Moreover, the case exemplifies how courts did not intend to establish liability without a finding of fault, but wanted to create alternative bases of fault to ease plaintiff's difficult burden of proving negligence.

¹⁵⁷ See, e.g., Zahn, 265 F.2d at 732.

¹⁵⁸ See, e.g., RESTATEMENT (SECOND) OF TORTS § 402A(1)(b) (1965).

¹⁶⁸ Hoenig, supra note 120, at 121; Keeton, supra note 39, at 36; Wade, supra note 146, at 837.

¹⁵⁹ Werber, supra note 39, at 27.
a return to a fault conception of strict liability. While this commentary has focused on the legal subterfuge involved in calling liability for design defects, "strict liability," it has strong implications for the current controversy of whether to compare plaintiff's fault to defendant's conduct in strict products actions.

The courts, however, are not calling for a fault-based strict liability. For while they experience no trouble in comparing plaintiff's fault with the manufacturer's strict liability, they proceed on the basis that equitable principles overcome the conceptual difficulties of comparing fault and no-fault. Not only does this reveal a fundamental misunderstanding of the nature and purpose of no-fault liability, it raises serious questions as to whether courts have ever truly meant no-fault, though often using its language. Because the policies of the law must be tied to its actual practice, decisions like Daly add only confusion by maintaining that the policies of no-fault liability are "compatible" with comparative fault. Comparative fault can and should be utilized in strict liability actions, but not on the simple basis of fairness. The application of comparative fault principles must also cohere to strict liability theory; this coherence can be achieved only by analyzing strict liability as a fault concept. Once this step is taken, the conceptual basis will exist for comparing plaintiff's fault in strict products cases.

The result will be that courts will no longer need to deal with the "symmetrical" problem of comparing "apples and oranges." Unsatisfactory references to equity will be replaced by a frank, consistent, fault-based theory of strict liability. Because fault will be compared with fault, the task for juries will be no more difficult than assessing percentages of responsibility in comparative negligence cases.

By keeping the rubric of strict liability, plaintiff will retain certain advantages. Any vestiges of privity will be short-circuited, and proving manufacturing defects will require only a showing that the product failed to comport with the manufacturer's own specifications. In accordance with section 402A, the plaintiff's failure to discover or guard against a defect will not result in recovery-reducing "fault" since the reasonable "consumer . . . is entitled to believe that the product will do the job for which it is built." Finally, comparative fault will favor the plaintiff by mitigating the harsh effects of assumption of risk and unforeseeable product misuse. Rather than completely barring plaintiff's claim, in jurisdictions having a "pure" system of comparative fault, those defenses will

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160 Birnbaum, supra note 133, at 645; Hoenig, supra note 120, at 123; Keeton, supra note 39, at 39; Wade, supra note 146, at 834. Accord Werber, supra note 39, at 46.

161 See supra note 75.

162 However, the plaintiff attempting to establish such a defect does not have to prove actual negligent manufacturer conduct. See supra notes 153-59 and accompanying text.

diminish the plaintiff's claim only to the extent that the plaintiff's conduct caused his injury. 164

Implementing comparative fault in strict products cases will differ little, if at all, from general schemes of comparative negligence. The approach utilized thus far involves two basic determinations by the jury. 165 First, the jury is instructed to compute the amount of the plaintiff's damages, without regard to the plaintiff's own negligence. 166 Second, the jury must determine the percentage of the plaintiff's own responsibility for his injuries. 167 It is thus left for the court to diminish the determination of total damages by the percentage of plaintiff's own responsibility. 168 If the comparative negligence system is "pure," the plaintiff can conceivably cause up to ninety-nine percent of his own injuries and still recover the remaining one percent. 169 If it is a "modified" system, the plaintiff can recover damages provided his negligence does not exceed a certain percentage of the defendant's responsibility, usually forty-nine or fifty percent.

The methods of allocating responsibility will doubtlessly evolve, as the great majority of states, by adopting comparative principles in negligence and strict liability, begin to concentrate on comparative questions. 171

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164 See infra note 169.
165 E.g., Butaud, 555 P.2d at 46; Daly, 20 Cal. 3d at 743, 575 P.2d at 1172-73, 144 Cal. Rptr. at 391; Coney, 97 Ill. 2d at 110, 454 N.E.2d at 204.
166 See, e.g., Daly, 20 Cal. 3d at 743, 575 P.2d at 1172-73, 144 Cal. Rptr. at 390-91.
167 See, e.g., id. at 743, 575 P.2d at 1173, 144 Cal. Rptr. at 391.
168 See, e.g., id.

In the case of multiple parties, however, the lingering problem of joint and several liability remains; its application can, in many cases, defeat the entire purpose of comparative fault. Where one defendant has been deemed only slightly responsible for plaintiff's injuries, he may yet be liable for the plaintiff's entire judgment if other defendants primarily responsible for plaintiff's injuries are judgment-proof. For a convincing criticism of this "arbitrary application of law," see Werber, supra note 39, at 25-38. But see Coney, 97 Ill. 2d at 110-13, 454 N.E.2d at 204-06; MODEL UNIFORM PROD. LIAB. ACT § 111(B)(5) (1979), reprinted in 44 Fed. Reg. 62,735 (1979).

169 "Pure" comparative negligence is premised on the notion that any amount of fault by either party affects the defendant's liability. While it is unlikely that single "percentage points" of fault, such as one percent, will affect damage awards or reductions, the pure form precludes the possibility that the plaintiff will fail to recover because the defendant was not sufficiently responsible for an accident; unless, the defendant had no responsibility. See, e.g., Kaatz v. Alaska, 540 P.2d 1037, 1049 (Alaska 1975); Li v. Yellow Cab Co., 13 Cal. 3d 804, 827-29, 532 P.2d 1226, 1242-43, 119 Cal. Rptr. 858, 874-75 (1975).

170 Three forms of modified comparative negligence have been noted. See Carestia, supra note 3, at 59-60. In the modified "less than" approach, as long as the plaintiff's contribution to the injury is less than the defendant's, the plaintiff can recover. E.g., MINN. STAT. ANN. § 604.01 (West Supp. 1984). For modified "not greater than" jurisdictions, as long as the plaintiff's contribution does not exceed the defendant's (or 50 percent), the plaintiff can recover. E.g., MONT. CODE ANN. § 27-1-702 (1979). Under the "slight versus gross" method, as long as the plaintiff's negligence is only "slight" as compared to the "gross" fault of the defendant, the plaintiff may recover. E.g., NEB. REV. STAT. § 25-1151 (1975).

171 A recent case indicates that forty jurisdictions have now adopted some form of com-
What is important here is that the refinements developed in allocating responsibility will not be restricted to negligence actions. Strict liability, as a fault concept, will be capable of comparison with other forms of fault.

V. Conclusion

Comparative fault in strict products liability actions is approaching majority status; the momentum of this trend indicates that this result is imminent. Nevertheless, the courts that lead this movement routinely proceed on the assumption that equity and fairness are sufficient to compensate for the conceptual compromise of comparing fault and no-fault. The effect is to confuse further the law of products liability, not only because it indulges the questionable premise of no-fault, but because it goes on to radically contradict that premise. The attempt to justify that contradiction by appealing to fairness lacks foundation, since no-fault theory is based on its own equity, which is to compensate injured parties and reduce the costs and occurrences of accidents as efficiently as possible. Unless the movement toward comparative fault in strict products actions is based upon a theory which avoids these contradictions, it will contribute little to a consistent theory of strict products liability.

These deficiencies can be overcome. By sweeping away the vestiges of no-fault language and acknowledging frankly that strict liability is a fault concept, courts can consistently compare plaintiff's fault with the strict liability of the manufacturer. This premise of fault can be justified by the fact that the requirement of defectiveness in strict products cases has only proven that the fault of the product cannot logically be separated from the fault of the maker or seller. Strict liability should be retained as a theory upon which the limitations of warranty and the difficulties of proving negligence will not defeat plaintiff's claim, but it must no longer be cloaked in the language of no-fault, particularly when every test for defectiveness is integrally related to the fault of the maker or seller.

Currently, the trend toward comparative fault in strict products cases contributes more toward euphemism than coherence. When the courts begin to compare the plaintiff's fault to the fault of the defendant's strict liability, then the equity called for in Daly—that the law should not impose upon one party the burden of compensating for the negligence of another—will begin to make perfect sense.

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parative negligence. See Gustafson v. Benda, 661 S.W.2d 11, 13-14 (Mo. 1983).