

The Use and Abuse of Comparative Negligence in Products Liability

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The state of the law concerning the role of plaintiff's conduct in product liability litigation is unsettled and confused. The courts have barely become acclimated to strict liability when they were forced to encounter the comparative negligence revolution and assess its impact on the newly-emerging theory.¹ It is not an understatement to say that the results have been uneven.² But worse than the lack of uniformity has been the lack of incisive analysis in the judicial opinions. As could be expected, the bar has split sharply on the appropriateness of the comparative negligence defense in strict pro-

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¹Although prior to 1969 six states had adopted comparative negligence by statute, the dramatic shift in the adoption of comparative negligence has taken place since that time. Since 1969, 26 states have shifted to comparative negligence. Several courts have embraced comparative negligence by judicial opinion. *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973). For a comprehensive list of the statutes adopted as of 1976 see Fleming, *Forward: Comparative Negligence at Last—By Judicial Choice*, 64 CALIF. L. REV. 239 (1976). To that compilation should now be added Pennsylvania. 17 PA. CONS. STAT. §§ 2101, 2102 (Supp. 1977). For an incisive analysis of the comparative negligence doctrine see V. SCHWARTZ, *COMPARATIVE NEGLIGENCE* (1974).

²The following courts have applied comparative fault in product liability cases: *West v. Caterpillar Tractor Co.* 547 F.2d 885 (5th Cir. 1977) (The *West* court, apparently, would not apply comparative fault when the fault is in failing to discover a defect or to guard against the possibility of its existence); *Edwards v. Sears & Roebuck*, 512 F.2d 276, 290 (5th Cir. 1975); *Hagenbuch v. Snap-On Tools Corp.*, 339 F. Supp. 676 (D.N.H. 1972); *Butaud v. Suburban Marine & Sporting Goods, Inc.*, 555 P.2d 42 (Alas. 1976), modifying the court's earlier decision in the same case reported at 543 P.2d 209 (Alas. 1975); *West v. Caterpillar Tractor Co.* 336 So. 2d 80 (Fla. 1976); *Dippel v. Sciano*, 37 Wis. 2d 443, 155 N.W.2d 55 (1967). *Contra*, *Melia v. Ford Motor Co.*, 534 F.2d 795 (8th Cir. 1976) (holding that applying Nebraska slight-gross comparison statute, NEB.

ducts liability.³ It will be argued in the ensuing pages that the excesses of either extreme should be avoided. Comparative negligence should *not* be applied across the board in product liability cases. To do so would significantly reduce the responsibility which has been justifiably placed on the manufacturing community.⁴ On the other hand, it is just not true that the structure of product liability law precludes the application of comparative negligence in all circumstances. In those cases where the plaintiff has breached his responsibility for maintenance, care, and use of a product outside of certain well-defined parameters, serious consideration should be given to the reduction of plaintiff's recovery as a matter of fairness to the defendant. Indeed, it will be suggested that the issue of comparative negligence *vel non* should not depend on whether the theory of recovery is negligence or strict liability, but rather should depend on the type of product defect being litigated and the nature of the contributory fault under consideration. After examining the role of comparative negligence in relation to plaintiff behavior, either as contributory negligence or assumption of the risk, this Article will probe the use of comparative negligence as a means of avoiding exceedingly difficult cause in fact and/or proximate cause problems. There is substantial evidence that comparative negligence will be used by courts and juries as a method of compromising causation questions which heretofore have been considered all-or-nothing issues by the law.

I. POLICY CONSIDERATIONS—AND THEN ANOTHER THREE FACTORS

The discussion of the policy factors which either support or militate against the use of contributory negligence in products liability has focused to date on the theoretical justifications for

REV. STAT. § 25-1151 (1964), would be confusing in a strict liability case); *Buccery v. General Motors Corp.*, 60 Cal. App. 3d 533, 132 Cal. Rptr. 605 (1976); *Horn v. General Motors Corp.*, 17 Cal. 3d 359, 551 P.2d 398, 131 Cal. Rptr. 78 (1976); *Hoelter v. Mohawk*, 170 Conn. 495, 365 A.2d 1064 (1976) (dissent chastising majority for not applying comparative fault).

³Feinberg, *The Applicability of a Comparative Negligence Defense in a Strict Products Liability Suit Based on Section 402A of the Restatement of Torts 2d (Can Oil and Water Mix?)*, 42 INS. COUNS. J. 39 (1975); Fleming, *Forward: Comparative Negligence at Last—by Judicial Choice*, 64 CALIF. L. REV. 239, 268 (1976); Schwartz, *Strict Liability and Comparative Negligence*, 42 TENN. L. REV. 171 (1974); Note, *Products Liability, Comparative Negligence and the Allocation of Damages Among Multiple Defendants*, 50 S. CALIF. L. REV. 73 (1976).

⁴See text accompanying notes 45 to 49 *infra*.

strict product liability.⁵ It is argued that if the purpose of strict liability is to control risk exposure at the point of design or manufacture, it then becomes inappropriate to bar recovery because of plaintiff's unreasonable conduct.⁶ Furthermore, in those cases in which plaintiff's claim is based on some form of express warranty it is unfair to bar plaintiff's recovery because plaintiff was foolish enough to rely on the defendant's representations.⁷ On the other hand, advocates of the affirmative defenses argue that strict liability does not stem from an attempt to redefine basic relationships between manufacturers and consumers, but rather derives from the inordinately difficult proof problems which faced a plaintiff seeking recovery in a product liability case.⁸ To the extent that strict liability merely reflects a belief that in a product defect case the defendant is guilty of non-provable negligence, then there is no justification for limiting the affirmative defenses of contributory negligence and assumption of the risk.

Although the arguments which proceed from an examination of strict liability theory shed light on the appropriateness of utilizing affirmative defenses, they do not tell the whole story. There are perspectives which stem from the peculiar nature of product liability relationships which cut across doctrinal lines and which should affect our decision as to whether the plaintiff should be barred or have his recovery reduced. The following arguments should be considered without regard to whether the theory for recovery is negligence, strict liability, or express warranty.

A. *Multi-risk Product Exposure v. Uni-risk Plaintiff Exposure*

In evaluating the ultimate fairness of barring or reducing the plaintiff's recovery by the percentage of plaintiff's fault, the disparity between the kinds of risks created by plaintiff and defendant should be explored.⁹ Products liability claims, especially design

⁵See Epstein, *Products Liability: Defenses Based on Plaintiff's Conduct*, 1968 UTAH L. REV. 267; Levine, *Buyer's Conduct as Affecting the Extent of Manufacturer's Liability in Warranty*, 52 MINN. L. REV. 627 (1968); Noel, *Defective Products: Abnormal Use, Contributory Negligence and Assumption of Risk*, 25 VAND. L. REV. 93 (1972).

⁶Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 261 N.E.2d 305 (1970).

⁷Bahlman v. Hudson Motor Car Co., 290 Mich. 683, 288 N.W. 309 (1939).

⁸Levine, *supra* note 5, at 648; Noel, *supra* note 5, at 110; Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5 (1956).

⁹Twerski, *Old Wine in a New Flask—Restructuring Assumption of Risk in the Products Liability Era*, 60 IOWA L. REV. 1 (1974); Twerski, *From Defect to Cause to*

defect and failure-to-warn cases are not one-on-one situations. In the classic encounter between a negligent defendant and a contributorily negligent plaintiff, the defendant exposes the plaintiff to a risk and the plaintiff, by his negligent conduct, exposes himself to a risk. Equitable considerations preclude a plaintiff from total recovery when the plaintiff's conduct is similar in scope and in nature to that of the defendant. However, in a product liability case based on defective design, the defendant is not facing the plaintiff one-on-one. The defendant distributes to the world at large a product which is unreasonably dangerous and one can statistically calculate that it will bring harm to a percentage of users.¹⁰ Thus, for example, if a drill press is designed without a safety guard, there is little question that somewhere in the manufacturing community there will be a plaintiff who is destined to have his hand severed, due either to his negligence or to inadvertence.¹¹ One noted author has likened this to an intentional tort.¹² In essence, once a product with a design defect is marketed, we know with substantial certainty that there will be a victim—we just do not know his name. Thus, it seems to me that, whether the theory is strict liability or negligence, we should be reluctant to reduce plaintiff's recovery. The reasons are several. First, as a matter of simple fairness, the comparison between defendant's act and plaintiff's act leads to the conclusion that the defendant's act is certain to cause damage to any plaintiff who interacts with the product in the same manner as has this plaintiff.¹³ It might

Comparative Fault—Rethinking Some Product Liability Concepts, 60 MARQ. L. REV. 297 (1977).

¹⁰R. POSNER, *ECONOMIC ANALYSIS OF LAW* 66 (1972) states:

Most accidental injuries are intentional in the sense that the injurer knew that he could have reduced the probability of the accident by taking additional precautions. The element of intention is unmistakable when the tortfeasor is an enterprise which can predict from past experience that it will inflict a certain number of accidental injuries every year.

¹¹The safety guard cases make up a substantial portion of product liability literature. See, e.g., *Elder v. Crawley Book Mach. Co.*, 441 F.2d 771 (3d Cir. 1971); *Dorsey v. Yoder Co.*, 331 F. Supp. 753 (E.D. Pa. 1971), *aff'd sub nom. Yoder Co. v. General Copper & Brass Co.*, 474 F.2d 1339 (3d Cir. 1973); *Bexiga v. Havir Mfg. Corp.*, 60 N.J. 402, 290 A.2d 281 (1972); *Micallef v. Miehle Co.*, 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976); *Meyer v. Gehl Co.*, 36 N.Y.2d 759, 329 N.E.2d 666, 368 N.Y.S.2d 834 (1975); *Bartkewich v. Billinger*, 432 Pa. 351, 247 A.2d 603 (1968).

¹²See Posner, *supra* note 10; Owen, *The Highly Blameworthy Manufacturer: Implications on Rules of Liability and Defense in Product Liability Actions*, 10 IND. L. REV. 769 (1977). See also text accompanying notes 72-75 *infra*. But see Epstein, *Intentional Harms*, 4 J. LEGAL STUD. 391, 392 (1975).

¹³*Bexiga v. Havir Mfg. Co.*, 60 N.J. 402, 290 A.2d 281 (1972); *Schuh v. Fox River Tractor Co.*, 63 Wis. 2d 728, 218 N.W.2d 279 (1974), demonstrate the conflicting attitudes adopted by the courts to this problem. *Schuh* is discussed at length in Twerski,

be argued that this disparity in fault should enter into the consideration of what percentage of fault is to be attributed to the defendant and what percentage to plaintiff.¹⁴ Yet, this is easier said than done.

A lawsuit proceeds with plaintiff and defendant in a one-on-one adversarial setting. If the plaintiff seeks to broaden the scope of the inquiry to demonstrate that the defendant's activity affects others in a negative manner, the defendant may legitimately claim that the evidence is inadmissible.¹⁵ Even if the evidence is admissible for a limited purpose, the plaintiff is not free to paint defendant's product as faulty outside the context of the individual case.¹⁶ It thus remains for the court, in formulating its legal doctrine, to take into account the limitations which exclude such considerations from the litigation process. If a design defect bears the potential of great public harm and the certainty of individual harm, then it behooves the court in structuring its doctrine of comparative negligence to consider this factor. The court cannot expect that all this testimony will come out in the trial process since the trial is, by definition, limited to the direct adversarial setting.

There is a second consideration which is difficult to assess, but which must be taken into account nonetheless. Whether a defendant faces great financial exposure as a result of a design defect is not easy to determine. Many design defects, because of their obvious nature, bear a substantially reduced probability of producing harm. With the decline of the patent-danger rule, it may well be that products with such obvious defects will be defined as unreasonably

From Defect to Cause to Comparative Fault—Rethinking Some Product Liability Concepts, 60 MARQ. L. REV. 297, 346 (1977). In *Bexiga*, in now famous language, the court said:

We think this case presents a situation where the interests of justice dictate that contributory negligence be unavailable as a defense to either the negligence or strict liability claims.

The asserted negligence of plaintiff—placing his hand under the ram while at the same time depressing the foot pedal—was the very eventuality the safety devices were designed to guard against. It would be anomalous to hold that defendant has a duty to install safety devices but a breach of that duty results in no liability for the very injury the duty was meant to protect against.

60 N.J. at 412, 290 A.2d at 286.

¹⁴See Schwartz, *Strict Liability and Comparative Negligence*, 42 TENN. L. REV. 171, 178 (1974). To the extent that the intentional tort analogy is persuasive, then comparative fault should not be applied. V. SCHWARTZ, *COMPARATIVE NEGLIGENCE* § 5.2 (1974).

¹⁵L. FRUMER & M. FRIEDMAN, *PRODUCTS LIABILITY* § 12.01(2) (1976); Morris, *Proof of Safety History in Negligence Cases*, 61 HARV. L. REV. 205 (1948).

¹⁶*Id.*

dangerous and thus not socially desirable.¹⁷ We will, therefore, be faced with a situation in which a manufacturer produces an unreasonably dangerous product whose harm potential in terms of numbers is small. Might it not be profitable for defendant to pay out the verdicts and to continue manufacturing the selfsame product? If we are to consider comparative negligence as a factor in a product liability case, we may be reducing the defendant's financial exposure to the point where maintaining the design defect becomes economically prudent. A similar concern has led Professor Owen to the conclusion that we should not remove punitive damages from the plaintiff's arsenal in product liability litigation when dealing with a reckless or malicious tortfeasor.¹⁸ The argument would seem to be particularly strong when a defendant may otherwise be protected from facing the full force of compensatory damages.

B. *Product Liability Law As Representational*

A great debate rages as to whether product liability law is based on unreasonable risk principles which are rooted in negligence law,¹⁹ primarily tort, or whether it is fundamentally representational. In a landmark article,²⁰ Professor Shapo has developed the

¹⁷For all the relentless academic criticism leveled at the patent-danger rule, the rule demonstrates continued strength. See 2 F. HARPER & F. JAMES, *LAW OF TORTS* § 28.5 (1956); Marschall, *An Obvious Wrong Does Not Make a Right: Manufacturers' Liability for Patently Dangerous Products*, 48 N.Y.U.L. REV. 1065 (1973); Twerski, *From Codling, to Bolm to Velez: Tryptych of Confusion*, 2 HOFSTRA L. REV. 489 (1974). Nevertheless, cases continue to reflect the spirit if not the letter of the patent-danger rule. *Schell v. AMF Inc.*, 442 F. Supp. 1123 (M.D. Pa. 1976); *Nissen Trampoline Co. v. Terre Haute First Nat'l Bank*, 332 N.E.2d 820 (Ind. Ct. App. 1975), *rev'd on procedural grounds*, 358 N.E.2d 974 (Ind. 1976); *Tibbets v. Ford Motor Co.*, 358 N.E.2d 460 (Mass. 1976); *Micallef v. Miehle Co.*, 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976); *Vincer v. Esther Williams All-Aluminum Swimming Pool Co.*, 69 Wis. 2d 326, 230 N.W.2d 794 (1975). The better-reasoned cases have abandoned the patent-danger rule and have opted for a total risk utility analysis. *Byrns v. Riddell, Inc.*, 113 Ariz. 264, 550 P.2d 1065 (1976); *Pike v. Frank G. Hough Co.*, 2 Cal. 3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970); *Micallef v. Miehle Co.*, 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976).

¹⁸Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1258, 1282-87 (1976); Owen, *The Highly Blameworthy Manufacturer: Implications On Rules of Liability and Defense in Product Liability Actions*, 10 IND. L. REV. 769 (1977).

¹⁹Keeton, *Manufacturer's Liability: The Meaning of "Defect" in the Manufacture and Design of Products*, 20 SYRACUSE L. REV. 559 (1969); Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825 (1973); Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5 (1965).

²⁰Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 VA. L. REV. 1109 (1974).

thesis that the crux of product liability litigation lies in consumer disappointment in product performance.²¹ Whether or not one agrees in totality with Professor Shapo's thesis, he has clearly identified a major theme that runs through the entirety of product liability law. Its implications for affirmative defenses are most important. If the line of demarcation between express warranty and implied warranty/strict liability are blurred and one shades almost imperceptibly into the other, then we must face the implication that a consumer's reaction to a product has to a great extent been taught to him by the marketing process. It ill behoves a manufacturer who has encouraged certain product behavior, through either overt or subtle marketing techniques, to raise the defense that the consumer has failed to follow societal norms for product use and has instead followed the seller's norms. It smacks of the child who murders his parents so that he can attend the orphans' picnic. As a matter of elemental fairness, the defendant should not be permitted the advantages of product representations which encourage certain kinds of plaintiff behavior which, in turn, increase sales²² and at the same time use that behavior as a shield against full recovery when the product misfires at that level of performance. This argument is valid even if the defendant's representations fail to reach the explicit level necessary for an express warranty or misrepresentation.²³ The threshold level for express warranty and misrepresentation is fairly

²¹Professor Shapo's thesis is:

Judgments of liability for consumer product disappointment should center initially and principally on the portrayal of the product which is made, caused to be made or permitted by the seller. This portrayal should be viewed in the context of the impression reasonably received by the consumer from representations or other communications made to him about the product by various means: through advertising, by the appearance of the product, and by the other ways in which the product projects an image on the mind of the consumer, including impressions created by widespread social agreement about the product's function. This judgment should take into consideration the result objectively determinable to have been sought by the seller, and the seller's apparent motivation in making or permitting the representation or communication.

These determinations of liability should consider, generally, the integrated image of the product against the background of the public communications that relate to it; and should refer, specifically, to those communications concerning the characteristics or features of the product principally related to the element of disappointment, and to the question of whether these characteristics or features reasonably might have aroused conflict with respect to the decision to buy or otherwise to encounter the product.

Id. at 1370.

²²*Bahlman v. Hudson Motor Car Co.*, 290 Mich. 683, 288 N.W. 309 (1939).

²³W. PROSSER, *LAW OF TORTS* 694 (1971); J. WHITE & R. SUMMERS, *UNIFORM COMMERCIAL CODE* 274 (1972); Shapo, *supra* note 20, at 1153-92.

high and plaintiff may not be able to establish it; nonetheless, if the reality of our marketing system is such that its impact on consumer behavior is considerable, then contributory or comparative negligence ought not to be a defense. Again, it might be possible to argue that such considerations are for a jury, affecting the comparison of fault. But, it seems to me again that this is a basic duty question in which the courts must determine whether the overall scene of product litigation demands that the law recognize that subtle but powerful influences encourage plaintiff behavior even though they may not always be provable in an individual case to the degree that plaintiff would desire.²⁴ This is a law-making function for the court and cannot be delegated to the vagaries of the individual case and the individual jury.

C. *The Anti-Contributory Negligence Mechanism*

The discussion with regard to contributory negligence in tort law generally proceeds from the premise that the defendant and plaintiff act independently. Through the confluence of events, their negligent acts coincide to cause damage. To be sure, the act of each must be within the realm of contemplation of the other for the proximate cause element to be made out for each party.²⁵ If the plaintiff is not within the scope of foreseeability of the defendant, or if the defendant's negligence is not within the scope of the plaintiff's foreseeability, then the nexus between the act of each to the injury of the opposing party is not established.

In product liability actions, the scenario is radically different. If the plaintiff is negligent, the tool of his negligence is the product of the defendant. Now, if we proceed one step further and determine that the defendant's negligence was in not providing a device which would prevent the plaintiff from misusing the product or unwisely assuming risk, it becomes evident that plaintiff's action in reacting to the defendant's product as expected should not bar or reduce his recovery. If the defendant is required by the law to build safety into a product in order to prevent a plaintiff's negligent response, it makes little sense to reduce defendant's liability exposure when the plaintiff has responded as expected.²⁶ To be sure, there is some deterrence to be accomplished by penalizing plaintiff for his

²⁴Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014 (1928), 29 COLUM. L. REV. 255 (1929); Green, *Duties, Risks, Causation Doctrines*, 41 TEX. L. REV. 42 (1962).

²⁵W. PROSSER, LAW OF TORTS 244-89, 421-22 (1971).

²⁶*Bexiga v. Havir Mfg. Co.*, 60 N.J. 402, 290 A.2d 281 (1972).

negligent conduct,²⁷ but the better argument is that the plaintiff's reactions were, in a sense, built into the product. It is no answer that the law recognizes comparative negligence in other instances when the plaintiff's conduct is foreseeable. This is admittedly so. Without foreseeability, there would be no proximate cause. The difference lies in the harsh reality that the act of negligence of the plaintiff and that of the defendant in a non-products case have independent significance separate and apart from each other. In a products liability action, if the defendant has failed to install an anticontributory negligence button or safety shield, we have decided that responsibility for that failure is the defendant's. To censure the plaintiff for failing to act reasonably when that was the very problem to be guarded against is to march up the hill in order to march down again.²⁸

II. COMPARING NEGLIGENCE AND STRICT LIABILITY

Although for the reasons set forth above I oppose across-the-board application of comparative negligence in product liability actions, it should be noted that the grounds for my opposition are substantive, not doctrinal. Opposition to the comparative negligence doctrine in strict product liability cases has been voiced by those

²⁷Fleming, *Forward: Comparative Negligence At Last—By Judicial Choice*, 64 CALIF. L. REV. 239, 270 (1976); Schwartz, *Strict Liability and Comparative Negligence*, 42 TENN. L. REV. 171, 179 (1974).

²⁸This is a restatement of the classic argument against use of the assumption of the risk doctrine. See James, *Assumption of Risk: Unhappy Reincarnation*, 78 YALE L.J. 185 (1968). Care must be taken to guard against permitting affirmative defenses or proximate cause arguments from destroying duties which the law has labored to develop. A recent example of a court's sensitivity to this problem is *Parvi v. City of Kingston*, 41 N.Y.2d 553, 362 N.E.2d 960 (1977). The facts in this case concern two drunks who were picked up by the police and run out of town in order to dry out. The drunks were deposited outside of town several hundred feet from the New York Thruway. One was killed and the other seriously injured by an onrushing car. The court first recognized a clear duty on the part of police to act reasonably *vis-a-vis* the drunks after they had been picked up. The defendant argued that it was the act of the drunks and not that of the policemen which was the proximate cause of the accident. In response, Judge Fuchsberg, speaking for the majority, said:

To accept the defendant's argument, that the intoxication was itself the proximate cause of Parvi's injury as a matter of law, would be to negate the very duty imposed on the police officers when they took Parvi and Dugan into custody. It would be to march up the hill only to march down again. The clear duty imposed on the officers interdicts such a result if, as the jury may find, their conduct was unreasonable. For it is the very fact of plaintiff's drunkenness which precipitated the duty once the officers made the decision to act.

41 N.Y.2d at 555, 362 N.E.2d at 965 (citations omitted).

who fail to see how one can compare the strict liability of the defendant—a no-fault doctrine—with the negligence of the plaintiff—a fault doctrine.²⁹ In some instances, this doctrinal problem has been considered so serious that it has caused courts to proclaim that strict liability is the equivalent of negligence per se.³⁰ In another forum, I have examined this phenomenon at great length.³¹ The short answer to the dilemma of how one can compare strict liability and negligence is that one must simply close one's eyes and accomplish the task. To be sure, we must blind ourselves somewhat to pristine tort analysis, but the compromise in principle is not extreme and should not bar us from what we believe to be a legitimate reduction in plaintiff's verdict.

There are two methods for accomplishing the reduction.

A. *Focus on Plaintiff's Conduct*

If the purpose of comparative negligence is to reduce plaintiff's recovery by assessing the role that plaintiff's conduct played in causing his injury, then we are really not involved in a strict comparison of fault. Instead, what we are doing is viewing the injury event in totality and then asking ourselves if it is fair to allow the plaintiff full compensation for an injury event in which he played an important role. Although some comparison is inevitable, the reduction is essentially accomplished by looking at plaintiff's conduct. The draft Uniform Comparative Fault Act, reflecting this basic perspective, provides:

(a) In an action based on fault, to recover damages for injury or death to person or harm to property, any contributory fault chargeable to the claimant diminishes proportionately the award of compensatory damages, but does not bar recovery, whether or not the contributory fault previously constituted a defense, and including situations in which last clear chance was formally applied.

(b) "Fault" includes negligence, recklessness, breach of implied warranty, conduct subjecting the actor to strict tort liability, unreasonable assumption of risk, and failure to

²⁹See authorities cited in note 3 *supra*.

³⁰*Howes v. Deere & Co.*, 71 Wis. 2d 268, 273-74, 238 N.W.2d 76, 80 (1976); *Dippel v. Sciano*, 37 Wis. 2d 443, 461, 155 N.W.2d 55, 64 (1967). See also *Atkins v. American Motors Corp.*, 335 So. 2d 134 (Ala. 1976); *West v. Caterpillar Tractor Co.*, 336 So. 2d 80 (Fla. 1976).

³¹Twerski, *From Defect to Cause to Comparative Fault—Rethinking Some Product Liability Concepts*, 60 MARQ. L. REV. 297 (1977).

avoid or mitigate damage. The fault must have an adequate causal relationship to the damage suffered.³²

Note that the emphasis is not so much on the comparative aspects of the action; reduction is accomplished by diminishing the award according to the plaintiff's contributory fault.³³

B. Equating Defect with Fault

If the administration of justice had to be reconciled with philosophical purity, then comparison of fault in strict products liability would not be possible. However, we know that the reasons for adopting strict liability are multifarious. They stem from a desire to change risk distribution principles, to fulfill consumer expectations, and to free the plaintiff from proving fault when it is supposed that fault is present but cannot be easily demonstrated.³⁴ Given such a multiplicity of reasons for the adoption of strict liability, it is not untoward to suggest that the seriousness of defect should be equated in some rough sense with a percentage of fault. The draft Uniform Comparative Fault Act suggests the following:

In determining the percentage of fault allocable to each party, the trier of fact shall consider, on a comparative basis, both the nature and quality of the conduct of the party and the extent to which and directness with which the conduct contributed to cause the damages claimed.³⁵

In short, it is my thesis that it is simply incorrect to apply comparative negligence to a broad range of product liability cases. But the reason for not applying comparative negligence has little or nothing to do with the technical problem of making the comparison.

³²The quotation is taken from the May 1, 1977 draft of the Uniform Comparative Fault Act, section 1 [hereinafter cited as May 1, 1977 Draft]. An earlier version of the Act is discussed in Wade, *A Uniform Comparative Fault Act—What Should It Provide?*, 10 U. MICH. J. LAW REF. 220 (1977) [hereinafter referred to as Wade, *Uniform Act*]. The proposed act is scheduled for presentation to the National Conference of Commissioners on Uniform State Law in Vail, Colorado, July 29 through Aug. 5, 1977.

³³An earlier version of the Uniform Comparative Fault Act emphasized this theme by stating that contributory negligence by the claimant "diminishes the award of compensatory damages proportionately according to the measure of fault attributed to the claimant." See Wade, *Uniform Act*, *supra* note 32. See also WIS. STAT. § 895.045 (1973); N.Y. CIV. PRAC. LAW § 1411 (McKinney Supp. 1975).

³⁴Noel, *Defective Products: Abnormal Use, Contributory Negligence and Assumption of Risk*, 25 VAND. L. REV. 93 (1972).

³⁵Uniform Comparative Fault Act, May 1, 1977 Draft, *supra* note 32.

That issue is, in my opinion, a red herring and should be so identified. The policy reasons for not applying the defense depend on a careful identification of the type of case in which the comparative fault defense will produce an unjust result. Neither the broadside attack on comparative fault nor its uncritical acceptance demonstrates a fact-sensitive analysis worthy of acceptance.

III. ABUSE OF COMPARATIVE NEGLIGENCE

A. *The Second-Collision Case*

The prototype for this problem is *Ellithorpe v. Ford Motor Co.*,³⁶ in which plaintiff was injured when she was unable to stop her car on a wet road and caused a rear-end collision with another car stopped in front of her. The suit was brought against Ford Motor Co. for second-collision injuries. The hub of the plaintiff's steering wheel was padded, but in the middle of the padding Ford had inserted a plastic Ford emblem from which three sharp prongs protruded. The emblem with the prongs extended above the surface of the padding. Plaintiff suffered severe injuries upon impact when her face struck the insignia on the steering wheel.

In a well-considered opinion, the court decided to cast its lot with those courts which impose second-collision liability. Following the leading case of *Larsen v. General Motors*,³⁷ the court found that an automobile manufacturer has a duty to design a reasonably safe automobile. Since collisions are a foreseeable phenomenon, the manufacturer must utilize a reasonably safe design to minimize the effects of collisions. The court then faced the question of whether the plaintiff's possible contributory negligence in causing the collision should be a bar to recovery. Relying on *Restatement* § 402A, Comment (n), the court held that a plaintiff's contributory negligence in failing to discover a defect or guard against the possibility of its existence, is no defense to a strict liability action. Comment (n) provides:

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 (see § 524) 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

³⁶503 S.W.2d 516 (Tenn. 1973).

³⁷391 F.2d 495 (8th Cir. 1968).

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.

Although I am in agreement with the result reached by the court, my reasons for supporting the court's decision are not limited to the fact that plaintiff's cause of action was based on strict liability rather than negligence. The considerations I have outlined earlier have direct bearing on the *Ellithorpe* problem. First, the fault of the defendant was in designing a product which was not merely capable of causing harm, but which would almost inevitably do so. The Ford emblem on the hub of the steering wheel was destined to be implanted in some plaintiff's forehead; the large number of Fords which bore that design assured this result. Second, requiring design for second-collision safety serves the purpose of protecting the negligent as well as the non-negligent driver. It is simply inconceivable that the law would seek to discriminate against the negligent driver in a second-collision situation. A collision is a collision. It is the defendant's responsibility to build in sufficient safety to provide plaintiff, in the helpless state of reacting to a first collision, with as much protection as reasonably possible.³⁸

These arguments seem equally compelling to me whether the defense is contributory negligence or comparative negligence. The decision made in declaring the design defective includes an assumption that the plaintiff is deserving of protection. Responsibility for

³⁸Tort buffs will find that this argument bears a striking resemblance to the "last clear chance" doctrine. Under this doctrine a plaintiff's contributory negligence will not be a bar if defendant had the last clear chance to avoid the injury. See W. PROSSER, *LAW OF TORTS* 427 (4th ed. 1971); James, *Last Clear Chance: A Transitional Doctrine*, 47 *YALE L.J.* 704 (1938). Although some states have retained the last clear chance approach even after the adoption of comparative negligence, the better argument is that last clear chance should not survive the advent of comparative negligence. V. SCHWARTZ, *COMPARATIVE NEGLIGENCE* § 7.3 (1974).

The reason is that last clear chance was a crude method of comparing fault, thus negating the harsh effects of contributory negligence as a complete bar. With comparative negligence it is now possible to directly confront the nature of plaintiff's contributory fault and reduce his recovery accordingly. In some instances, however, it may be proper to utilize the last clear chance approach to assist the courts in deciding whether to engage the comparative fault doctrine. In a case when the defendant's initial design responsibility is to protect against a helpless plaintiff there are strong policy grounds for not recognizing contributory fault even in its comparative modality.

that protection should not be lessened merely because the plaintiff happened to be travelling too fast for road conditions at the time of the accident. If the law is concerned about deterring plaintiff negligence through the comparative negligence doctrine, that result can be accomplished in cases such as this by reducing plaintiff's recovery for first-collision injuries against another negligent driver. It should not reduce, by one farthing, her recovery against Ford Motor Company. Ford had no right to bargain for a better plaintiff, since the second collision could have occurred just as easily with a non-negligent plaintiff. It might even be argued that plaintiff's negligence in driving is not the proximate cause of her second-collision injuries. Plaintiffs have no reason to foresee that the automobiles they ride in are booby trapped to cause enhanced injury in case of collision. However, it should not be necessary to resort to tortured arguments to accomplish sensible and just results. Comparative negligence ought not to diminish clearly delineated duties merely because a compromise formula is extant.

Care must be taken to define the relationships between the parties so that the fundamental goals of comparative fault are accomplished. Slight variations in fact patterns may change the policy implications drastically. *Horn v. General Motors Corp.*³⁹ illustrates the principle. Plaintiff, while driving her car, was forced to swerve to avoid a car which had suddenly swung into her lane of traffic. As she steered to the right, plaintiff brought her left hand across the horn cap in the center of the steering wheel. The horn cap was defectively designed in that it was too easily removable. Below the horn cap were three sharp prongs which held it in place. Plaintiff's chin collided with the sharp prongs and she suffered serious injury.

Plaintiff sought to hold General Motors liable for the aggravation of her injuries due to the defective design of the horn cap and the sharp prongs. In affirming a jury verdict for the plaintiff, the court was faced with the contention that if plaintiff had been wearing her seat belt her injuries would have been much reduced. The court, citing its previous decision in *Luque v. McLean*,⁴⁰ held that the only defense to a strict liability action was voluntary and unreasonable assumption of a known risk. Since there was no evidence that plaintiff was aware that the car had an easily removable horn cap which masked sharp prongs, the defense was not allowed.

The dissent by Justice Clark raised the issue of comparative negligence. He argued that California's judicial adoption of com-

³⁹17 Cal. 3d 359, 551 P.2d 398, 131 Cal. Rptr. 78 (1976).

⁴⁰8 Cal. 3d 136, 501 P.2d 1163, 104 Cal. Rptr. 443 (1972).

parative negligence in *Li v. Yellow Cab Co.*⁴¹ should govern in this instance. He contended that the equitable principles of comparative negligence should operate in a strict liability situation as well.

If second-collision liability is to be imposed on General Motors, it is because there is a need to protect plaintiffs—even negligent or contributorily negligent plaintiffs—from needless injury when cars collide. The fault of General Motors is in not designing its car so that when a driver is involved in a collision his injuries will not be aggravated. The foreseeability and liability of General Motors could thus logically attach even to a non-belted plaintiff. An argument can, however, be made that in this particular case, plaintiff's verdict ought to be reduced by the percentage of her fault. A court might take the position that unlike the situation in *Ellithorpe v. Ford*,⁴² where the plaintiff's negligence was in the driving of the car, and the car manufacturer's liability protected the negligent and non-negligent driver alike, in the *Horn* case the negligence of the plaintiff was in a sense identical with that of the defendant. Although the defendant failed to take precautions to protect the plaintiff from second-collision injuries, it must be admitted that the plaintiff failed to take precautions to prevent second-collision injuries as well.⁴³ These issues are difficult and will require careful attention by the courts. The position of the majority, declining to consider comparative negligence in a strict liability situation, and that of the dissent, uncritically accepting the doctrine, both seem wrong.

It might be argued that the inherent intractability of the problem militates in favor of simply sending all cases in which plaintiff fault is a factor to a jury under a comparative negligence instruction. Yet, I cannot divest myself from the belief that law-making power, in its finest sense, belongs in the hands of the judge.⁴⁴ Clear doctrine will not emerge overnight; but when it does emerge it will reflect the best judicial assessment of where the duties and responsibilities ought to lie, rather than the foggy non-policy which is the product of comparative fault analysis.

B. *Design Defect—Protecting Plaintiff From Decision-Making*

In a recent case, plaintiff was injured while working on a Pan-O-Mat machine, an apparatus designed to receive roll-shaped pieces of

⁴¹13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

⁴²503 S.W.2d 516 (Tenn. 1973).

⁴³The injuries suffered by a plaintiff due to failure to wear a seat belt are second collision injuries. They are usually occasioned after initial impact with an external force, which is the primary or first collision.

⁴⁴The author's sympathies on this question lie with Leon Green. See authorities cited in note 24 *supra*.

bread dough from another machine. At the transfer point the dough occasionally misses the appropriate cup and falls to the floor beneath the Pan-O-Mat. In order to collect the fallen dough, the machine is equipped with an "excess" tray which fits beneath it. Usually, the excess tray can be removed and emptied without opening the guard doors which block access to the working mechanism of the machine, including gears, sprockets, etc. On this occasion the tray was so overfilled that the only way to get it out was to open the guard door. The machine continued to operate while the guard door was open and plaintiff noticed that while the tray was away there was a new accumulation of dough under the machine. He bent down to clean the area and lost his balance. His arm became entangled in the chain and sprocket mechanism, resulting in eventual loss of his arm through amputation.

The court, in *Schell v. AMF, Inc.*,⁴⁵ found that under the above-stated facts defendant was entitled to a directed verdict. It is interesting to reflect on two of the plaintiff's allegations of design defect in *Schell*:

- (1) The absence of an interlock mechanism which would shut down the machine when a guard door is open; and
- (2) The use of closing mechanisms on the guard doors which allow the door to be opened quickly and without reflection.

We have heretofore focused on parameters of product design which should protect a plaintiff when he either fails to inspect a product or fails to contemplate that the product may not always function properly. I should now like to suggest that in certain instances when plaintiff is voluntarily and unreasonably assuming a risk his recovery ought not to be barred, nor should it be reduced, under the comparative negligence doctrine. I realize that this flies in the face of the wisdom of the *Restatement* § 402A, comment (n), which provides that unreasonable assumption of the risk is a defense to a product liability action. Nevertheless, logic would appear to demand the result I am suggesting.

As noted above, the court in *Schell* held for defendant, because it reasoned that defendant had no duty to manufacture a machine which would prevent a plaintiff from putting himself at so obvious a risk.⁴⁶ The court squarely faced the duty issue and found against the plaintiff. But surely the courts that have recently overruled the patent danger doctrine might take a more charitable view of such a

⁴⁵422 F. Supp. 1123 (M.D. Pa. 1976).

⁴⁶*Id.* at 1126.

design defect.⁴⁷ A court might very well determine that an interlock mechanism which prevents plaintiffs from voluntarily placing their limbs in moving parts is a desirable safety feature. If a court were to require such a safety device, it would do so because it decided that plaintiff should be protected from foolish decision-making. In the *Schell* case, one could not even argue that such a safety device should be included to protect inadvertent plaintiffs;⁴⁸ such accidents will happen only if plaintiffs decide to take risks, either reasonably or unreasonably. Thus, the clear conclusion of such a decision would be that the defendant is in a far better position than plaintiffs to prevent such accidents, and such a conclusion should not be undone by the application of comparative negligence.

One might argue that by using comparative negligence we will be providing a pressure point on plaintiffs as a class to prevent injuries as well as defendants. Clearly, when we are considering voluntary activity on the part of plaintiffs, this is a worthwhile consideration, but I believe in balance it fails. First, if we create a duty to design safety into the product in a situation in which, if injuries occur, they will almost certainly result from some voluntary activity on the part of plaintiff, the net result is that in every case some reduction of award is bound to take place. Since that is the nature of the beast, we really have not created a full duty of safety, but something like a half-duty. Perhaps the short answer to a plaintiff deterrent argument is that the defendant's safety device would have eliminated plaintiff misjudgment, a goal which the law should foster totally, not partially. Second, and more important, we dare not fool ourselves as to the kinds of questions which will occupy the minds of jurors in assessing the fault apportionment. They will not only be assessing the reasonableness of the plaintiff's activity, they will be taking into account the pressure of the job, the state of unemployment, the ease of plaintiff entry into the job market, whether plaintiff is working by the hour or under an incentive plan, etc. One must consider whether such fundamental policy questions should be compromised by comparative negligence or should rather be squarely confronted by a court. My own strong preference is for a clean-cut duty decision.⁴⁹ Those who disagree will have to own up to the reality that major law-making responsibility is being delegated to juries. What will emerge are not crisp rules which will provide manufacturers and employers with guidance about their societal respon-

⁴⁷See cases cited in note 17 *supra*.

⁴⁸See Twerski, *Old Wine in a New Flask—Restructuring Assumption of Risk in the Products Liability Area*, 60 IOWA L. REV. 1, 21 (1974).

⁴⁹See note 44 *supra*.

sibilities, but rather an untutored compromise translated into the language of percentage fault.

C. Testing the Product Within the Normal Use Tolerance

The clearest case in which the plaintiff's negligence ought not to be a factor in recovery arises from express warranty cases. The classic case is, of course, *Bahlman v. Hudson Motor Car Co.*⁵⁰ In *Bahlman*, the defendant auto manufacturer expressly warranted that its car roof had no seams and no ragged edges. Plaintiff's car overturned as a result of his negligent driving and his head was cut by the jagged edges of the seam. Rejecting the contention that contributory negligence should be a bar, the court said:

Under such rule, although a manufacturer had falsely advertised that a windshield was made of shatterproof glass, as in the now famous case of *Baxter v. Ford Motor Co.*, . . . he would be allowed to escape the consequences of that deliberate misrepresentation because the plaintiff was exceeding the speed limit when a pebble flew up and shattered the glass. . . . It is undoubtedly true that [in the instant case] the negligence of the driver caused the car to overturn, but defendant's representations were not for the purpose of avoiding an accident, but in order to avoid or lessen the serious damages that might result therefrom. . . . The particular construction of the roof of defendant's cars was represented as protection against the consequences of just such careless driving as actually took place. Once the anticipated overturning of the car did occur, it would be illogical to excuse the defendant from responsibility for these very consequences.⁵¹

A more recent example, in which the warranty aspect is less explicit, is *Vernon v. Lake Motors*.⁵² About eight and one-half months after the Vernons purchased a Mercury Marquis, Mr. Vernon drove the car and noticed smoke coming from the windshield wipers. In addition, the wipers would not shut off. His local Ford agency refused to fix the car since he had not purchased the car through that agency.

Mrs. Vernon decided to drive the car forty miles to Salt Lake City the morning immediately following the "smoking event." Her

⁵⁰290 Mich. 683, 288 N.W. 309 (1939).

⁵¹*Id.*, 288 N.W. at 311-12.

⁵²26 Utah 2d 269, 488 P.2d 302 (1971).

reasons for doing so were several. First, she wanted to take the car to Lake Motors, the agency from which she purchased the car, for its 10,000-mile check-up. Second, she wanted to attend a dance recital in which her granddaughter was to perform. Concerned about the smoking incident, Mrs. Vernon went out to the car, turned the motor on, and let it run to see if smoke was accumulating in the car. The wipers would not turn off but, since it was storming, she needed them in any event. Her testimony was that she believed the worst that could happen was that some fuses would blow out. About three-fourths of the way to Salt Lake City, a fire started under the instrument panel and the car was devoured by fire.

In evaluating the contention that plaintiff's contributory negligence, as distinguished from assumption of the risk, ought to bar her recovery, the court said:

[F]irst, we agree with the principle that even if there be breach of warranty, there may be circumstances under which the plaintiff's own conduct would preclude his recovery. We are aware that it is sometimes said that contributory negligence is not a defense to such an action. *This may well be true if the effect of his conduct is simply to put the warranty to the test; this does not and should not eliminate the warranty, nor defeat a plaintiff's right to proper recovery for its breach.*⁵³

The court then considered whether the plaintiff had voluntarily and unreasonably assumed a known risk. Here, too, the court considered the fact that plaintiff had good reason to believe that nothing would be seriously wrong with a new car and remanded the issue for jury determination as to whether plaintiff's conduct was voluntary and unreasonable.

It should be noted that the warranty in this case was the standard new car warranty and not one specifically directed at some special aspect of product performance, as in *Bahlman*. Nevertheless, the court held that the general reliance of plaintiff on the representations of product liability should bar utilization of contributory negligence as a defense absent a clear case of assumption of the risk. Plaintiffs have a right to expect that a product will perform as represented. What is most interesting in the *Vernon* case is the court's willingness to consider the manufacturer's representations despite the fact that evidence of product failure had come to the plaintiff's attention. The court apparently agreed that even when a product is malfunctioning the plaintiff may justifiably believe that

⁵³*Id.*, 488 P.2d at 304 (emphasis added).

the product is not unreasonably dangerous—i.e., the most that could happen is that a fuse would blow. For reasons which I shall go into shortly, I believe that this well may be an appropriate case for comparative negligence; yet, it is significant that the Utah court recognized that testing the warranty is generally not grounds for denying a plaintiff recovery on the basis of contributory fault.

The *Vernon* case raises rather special problems, because the plaintiff had reason to believe that something serious was wrong with his product. The classic case of "testing the warranty" in modern product liability law falls between *Bahlman* and *Vernon*. Its paradigm is demonstrated by the following hypothetical:

Plaintiff is injured when a poorly beaded tire on his car blows out. At the time of the accident the plaintiff is speeding twenty miles per hour over the limit. There is evidence that had plaintiff been driving at the lawful speed limit he would have been able to bring his car under control and could have avoided impact with another car.

Note that in this instance we are not dealing with a highly specific warranty such as *Bahlman*; nor are we confronting a plaintiff who has some specific knowledge that something is wrong with the product. The problem here is what the authorities have called contributory negligence in failing "to guard against" the possible existence of a defect.⁵⁴ In reality, this description of the problem is a misnomer, because the true negligence of the plaintiff is not in failing to consider the possibility that the product might fail while in negligent use. Why should the plaintiff consider the possibility of product failure at a speed of fifty miles per hour? Clearly, he would not be negligent if he was travelling fifty miles per hour in a fifty mile per hour zone. Why should he guard against the defect merely because he is travelling fifty miles per hour in a thirty mile per hour zone? The true question is whether non-product contributory negligence—generally negligent conduct unrelated to the product—should bar the plaintiff in a case against a defendant manufacturer.

In this type of case, I believe that the analogy is very close to *Bahlman*: plaintiff's negligence should not enter at all into the product liability action even under the guise of comparative negligence. The plaintiff has been sold a product which has created in his mind a set of consumer expectations with regard to performance. At fifty miles per hour the plaintiff has a right to total reliance on the assumption that the product will function as marketing has

⁵⁴RESTATEMENT (SECOND) OF TORTS § 402A, Comment n (1965).

represented. It is of no great consequence that we may not be able to make out a technical case of express warranty or misrepresentation; the realities to the consumer are precisely the same. In short, when the consumer is using the product within the clear parameters of its normal functioning mode, the general or non-product contributory negligence should not enter into the picture, even as comparative negligence. The factor of reliance on product performance is so significant that it is simply unfair to penalize the plaintiff for relying on the set of consumer expectations which the defendant led him to rely upon.

IV. APPROPRIATE USE OF COMPARATIVE NEGLIGENCE IN PRODUCT LIABILITY

A. *Plaintiff's Duty—Maintenance and Repair*

The thrust of my objection to the use of comparative negligence in products liability has been that plaintiff's role in *product* failure is insignificant. If the defendant-manufacturer bears responsibility for product integrity, that responsibility ought not to be diminished because of certain kinds of plaintiff behavior *which are not directed to product integrity*. There are, however, cases in which it is quite correct for the law to require plaintiff to address himself to the question of product performance. In such cases, either because of the nature of the product or the nature of the product failure under consideration, it is just, as a matter of policy, to ask the plaintiff to become a product risk-avoider.⁵⁵

In our earlier discussion, we focused on *Vernon v. Lake Motors*,⁵⁶ in which the car signalled to its user that it was in need of repair. As a matter of policy, we must recognize that we live in a world where products break down for a variety of reasons. If the product has signalled to its user, "fix me," and if a reasonable person under the circumstances should have undertaken repair, it would seem appropriate to reduce the plaintiff's verdict by the percentage of his fault. Note that in this instance there are concrete, constructive steps that plaintiff should have undertaken to help in restoring product integrity. Certain products will demand that maintenance and repair be undertaken. They call for a joint responsibility between manufacturer and consumer. Admittedly, the problem arises from a defect in the product which should not have been there. Yet the nature of the product is such that society will place duties on the

⁵⁵Calabresi & Hirschhoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055 (1972).

⁵⁶26 Utah 2d 269, 488 P.2d 302 (1971).

consumer to help in maintaining its integrity. There are many reasons for this in the case of automobiles. The auto is a product designed for long-term use. Regular inspections are necessary, in any event, for general safety purposes, and it is well known that debugging problems with automobiles are such that periodic checks are necessary. For all these reasons, it becomes clear that plaintiff plays a role in repair and maintenance and it is thus fair to apportion the loss which arises from the failure of both parties to meet their joint burden with regard to product liability.

B. Product Misuse—Pushing the Product to Its Limits

In our earlier discussion, we focused on a plaintiff who was speeding on a poorly-beaded tire which failed at fifty miles per hour, a use of the product which was within the clear parameters of normal use. This fact situation represents the problems that exist at one polarity. For the reasons discussed earlier, I believe that comparative negligence should not be utilized to reduce plaintiff's recovery where the use is so clearly within the represented performance capabilities of the product. At the other extreme lie the cases in which the product misuse is so extraordinary that even if there is a defect we are unprepared to impose liability, since our judgment is that the product defect is not the proximate cause of the harm.⁵⁷ Thus, if tires designed and sold to be used only for normal driving are used for stock-car racing at extremely high speeds, recovery will be denied. It will be denied even if the product was, in fact, defective and a cause in fact of the harm. The use to which the product has been put is such that we are unwilling to saddle the manufacturer for losses which arise from activity which is so tangentially related to the product he has marketed. There does, however, exist a middle range in which comparative fault could play a role. Perhaps in a world of more honest and forthright marketing there would be no need to consider the interplay we are about to examine. However, in the real world it is clear that the scope of foreseeable use is a very delicate question. Consumers often use products to the very edge of the product's capabilities, and it is in this gray area where many accidents occur. One might argue that it is a manufacturer's duty to clearly identify the limits of product performance, but the millenium has yet not arrived. What we often encounter is a

⁵⁷McDevitt v. Standard Oil Co., 391 F.2d 364 (5th Cir. 1963); Helene Curtis Indus. v. Pruitt, 385 F.2d 841 (5th Cir.1968); RESTATEMENT (SECOND) OF TORTS § 402A, Comment h (1965); Noel, *Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk*, 25 VAND. L. REV. 93 (1972).

product whose use parameters are not well-defined and a plaintiff who knows that he is probably pushing the product to its limits and perhaps beyond. In this kind of situation, comparative negligence can play a role.

*Hoelter v. Mohawk Service, Inc.*⁵⁸ raises the problem. Plaintiff was speeding along in his 1964 MGB sports car at a rate of approximately eighty miles per hour. The posted speed limit was fifty-five miles per hour. He had attempted to overtake another car and when he tried to return to his lane the car began to fishtail. The car went out of control, seriously injuring the plaintiff. Plaintiff's MGB was outfitted with Pirelli studded snow tires. It was his contention that the accident was caused by the manner in which the metal studs had been inserted. Defendant, of course, claimed that the plaintiff's driving was the sole cause of the accident. The advertising brochure for the Pirelli tires read as follows:

"A remarkable snow tire . . . Step on the accelerator, change gears, take a curve or hit the brakes—Pirelli Invernors grip . . . and hold . . . When using studded tires sustained speeds should not exceed 70 miles per hour."

If the plaintiff were speeding at sixty-five miles per hour and the tires failed, thus contributing to his injuries, I would argue that plaintiff's speeding should neither bar nor reduce his recovery against the tire manufacturer. Plaintiff had been encouraged to use the tire at substantial speed with the assurance that the tire will not fail. But intermittent speeds of eighty miles per hour are clearly a problem area. The manufacturer has not clearly proscribed this kind of use, but plaintiff has grounds to believe that the product is being tested at its limits. To reduce plaintiff's recovery against the manufacturer in this instance by a percentage of his fault thus seems altogether proper.

V. TRADING CAUSE FOR FAULT

It is standard practice when teaching comparative negligence to freshman law students to emphasize the difference between apportionment of damages and comparative negligence, either between plaintiff and defendant or two defendant tortfeasors. Traditional teaching is that a defendant should never pay for a harm which he did not cause.⁵⁹ Thus, for example, when it is clear that one defendant injured the plaintiff's right arm and another his left arm, each

⁵⁸170 Conn. 495, 365 A.2d 1064 (1976).

⁵⁹W. PROSSER, LAW OF TORTS 236 (4th ed. 1971).

defendant will pay only for the harm he caused.⁶⁰ If, on the other hand, we have concurrent tortfeasors who have caused a plaintiff a single indivisible injury, then both are jointly and severally liable.⁶¹ In a contribution action, if damages are to be apportioned between them, apportionment will not be based on the dollar amount of damages they respectively caused, since that cannot be determined, but on the basis of comparative fault.⁶² Similarly, under the doctrine of avoidable consequences, when a plaintiff is responsible for adding to the harm which defendant brought upon him, his recovery is reduced by the amount which his own negligence caused.⁶³ On the other hand, when the harm is single and indivisible, the plaintiff's negligence, in a comparative negligence jurisdiction, reduces his recovery by the percentage of the plaintiff's fault.⁶⁴

In short, cause in fact is an all-or-nothing question. If harm can be clearly identified as attributable to one party, then we are faced with an apportionment of damages question based on cause in fact. If the harm cannot be logically identified as emanating from one source or another, then the damages must be apportioned on some basis of fault.

This analysis, although simple and straightforward, will no longer suffice. From a broad range of sources, we are coming to learn that the comparative fault doctrine may signal the beginning of the end of the all-or-nothing causation principle. If, indeed, my reading of the signals is correct, we may be witnessing a significant revolution in the law of torts. The seat-belt cases have brought the issues into sharp focus. Courts have differed sharply in their approach to this problem. Most have rejected the defense entirely.⁶⁵

⁶⁰*Louis v. Oakley*, 50 Haw. 260, 438 P.2d 393 (1968); *McAllister v. Pennsylvania R. Co.*, 324 Pa. 65, 187 A. 415 (1936).

⁶¹*Michie v. Great Lakes Steel Div., Nat'l Steel Corp.*, 495 F.2d 213 (6th Cir. 1974); *Maddux v. Donaldson*, 362 Mich. 425, 108 N.W.2d 33 (1961).

⁶²The majority rule, until the advent of comparative fault, held that contribution should be equal, depending on the number of joint tortfeasors. See W. PROSSER, J. WADE & V. SCHWARTZ, *CASE AND MATERIAL ON TORTS* (6th ed. 1976). The trend toward a comparative fault principle in contribution received strong impetus from the landmark decision of *Dole v. Dow Chemical Co.*, 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972). See Aushel, *The Impact of New York's Judicially Created Law Apportionment Amongst Tortfeasors*, 38 ALBANY L. REV. 155 (1974). The May 1, 1977 draft of the Uniform Comparative Fault Act, Section 4 adopts the comparative fault principle for contribution.

⁶³*Green v. Smith*, 261 Cal. App. 2d 392, 67 Cal. Rptr. 796 (1968); *Dohmann v. Richard*, 282 So. 2d 789 (La. Ct. App. 1973); *Zimmerman v. Ausland*, 266 Ore. 427, 513 P.2d 1167 (1973).

⁶⁴See generally V. SCHWARTZ, *COMPARATIVE NEGLIGENCE* (1974).

⁶⁵*Britton v. Doebling*, 286 Ala. 498, 242 So. 2d 666 (1970); *Clark v. State*, 28 Conn. Super. 398, 264 A.2d 366 (1970); *Romanekewiz v. Black*, 16 Mich. App. 119, 167 N.W.2d

However, two courts that have seen fit to recognize the defense have taken very different approaches to the problem of reducing the plaintiff's recovery.

A. Apportionment of Damages

In *Spier v. Barker*,⁶⁶ the New York Court of Appeals, prior to the adoption of its comparative fault statute, adopted the seat-belt defense.⁶⁷ It took the position that plaintiff should have his recovery reduced by the *amount* the injury would have been reduced had the plaintiff been wearing his seat belt. Thus, if defendant were travelling thirty miles per hour over the speed limit and lost control of his car, colliding with a non-belted plaintiff, the defendant would only be liable for the damages caused by the first, car against car, collision. The defendant would not be liable for the add-on injuries which resulted because the plaintiff failed to wear his seat belt. It should be noted that this is a straight cause-in-fact analysis. Defendant should only be liable for the damages which he caused. Since plaintiff had an opportunity to mitigate damages in advance of the accident by buckling up—a case of avoidable consequences—he is required to bear that loss.⁶⁸

B. Comparative Negligence

In *Bentzler v. Braun*,⁶⁹ the Wisconsin court faced the same question and decided that the plaintiff's award in a seat-belt case should be reduced by the percentage of plaintiff's fault. If there is evidence that a causal relationship exists between the failure to wear the seat belt and the aggravation of plaintiff's injuries, fault apportionment between the parties can be undertaken.⁷⁰ Thus, in seeking to

606 (1969); *Miller v. Miller*, 273 N.C. 228, 160 S.E.2d 65 (1968); *Robinson v. Lewis*, 254 Or. 52, 457 P.2d 483 (1969).

⁶⁶35 N.Y.2d 444, 323 N.E.2d 164, 363 N.Y.S.2d 916 (1974).

⁶⁷New York adopted the "pure" form of comparative negligence for causes of action accruing on or after Sept. 1, 1975. N.Y. CIV. PRAC. LAW § 1413 (McKinney Supp. 1975). It is possible that New York would have opted for the comparative negligence approach to the seat belt question rather than the avoidable consequences approach if New York had approved a comparative negligence doctrine at the time the court was faced with *Spier v. Barker*, 42 App. Div. 428, 431, 348 N.Y.S.2d 581, 583 (1973). There is an intimation to that effect in the Appellate Division decision. See text accompanying note 72 *infra*.

⁶⁸35 N.Y.2d 444, 451, 323 N.E.2d 164, 167, 363 N.Y.S.2d 916, 921 (1974).

⁶⁹34 Wis. 2d 362, 149 N.W.2d 626 (1967).

⁷⁰It should be noted that even under *Bentzler v. Braun* there must be evidence that there was a causal relationship between the failure to wear the seat belt and the aggravated injuries. This is, however, far different from the approach of the New York

discover a method of reducing plaintiff's recovery in a seat-belt case, the Wisconsin court shunned an apportionment of damages or cause-in-fact analysis and opted for a comparative fault approach.

The Wisconsin approach to the problem appears to be far superior to that dictated by *Spier v. Barker*.⁷¹ In the hypothetical discussed earlier, defendant was speeding at thirty miles per hour over the limit and crossed the median strip, colliding with the plaintiff's car, throwing the plaintiff and injuring him seriously. Let us assume that total damages were \$100,000. If expert testimony establishes that if plaintiff had been wearing a seat belt he would have suffered only \$10,000 damages, then his recovery will be limited to that amount. The \$90,000 add-on injuries would fall on the plaintiff, since they were due to his failure to buckle up. This would be the result of apportioning damages under *Spier*. Under the Wisconsin comparative fault approach, a jury would be entitled to reduce plaintiff's recovery by assessing plaintiff's fault in the overall injury situation. It would appear that the Wisconsin result would come closer to rendering justice in this situation.

C. *Apportioning Damages and Then Comparing Fault*

A third resolution of this problem might be to first apportion damages and then to accomplish the fault comparison on the second-collision or add-on injuries. The reasoning would be that the defendant is clearly responsible for all of the injuries which would have occurred even if the plaintiff had been wearing the seat belt, and the plaintiff is thus entitled to an undiminished recovery with regard to these injuries. It is only with regard to the add-on injuries that the fault comparison should be undertaken, since it is only with regard to the add-on injuries that joint fault took effect.

D. *Comparing the Various Methods of Reducing Plaintiff's Claim*

As I have already indicated, it would appear that the method which reduces plaintiff's award by apportioning damages can yield very harsh results. The fault apportionment is simple to administer but would seem unfair in that it deprives plaintiff of a percentage of award for which the defendant is clearly totally responsible. The third approach—apportioning damages and then apportioning fault—would seem to be the most sound analytical scheme for handling the problem.

court in *Spier v. Barker*, 42 App. Div. 428, 348 N.Y.S.2d 581 (1973), where an exact damage apportionment was required to reduce damages.

⁷¹35 N.Y.2d 444, 323 N.E.2d 164, 363 N.Y.S.2d 916 (1974).

The matter cannot, however, be disposed of so easily. Lest we forget, the courts have indicated reluctance to turn the courtroom into a theater for accident reconstruction games in which experts testify as to the hypothetical results which would have occurred had the plaintiff been wearing his seat belt.⁷² Even in the case of simple fault apportionment, the jury is certain to have some evidence as to how significantly the seat belt would have reduced damages. To be sure, the exactness of a damage apportionment will be missing from the case, but the record will not be barren as to the possible saving effects of the seat belt. Taking this into consideration, it may well be that the Wisconsin method of straight fault apportionment is still the soundest approach. The jury will not be subjected to detailed evidence about the precise amount of damages that could have been averted by wearing a seat belt; they will simply make a gross judgment, taking into consideration the evidence on fault and the evidence on causation in one fell swoop.

E. Trading Cause for Fault

It should be evident that what we have been discussing is a phenomenon which can have broad application to the entirety of tort law. If in a cause-in-fact case what the New York court calls apportionment of damages the Wisconsin court treats as apportionment of fault, then perhaps the problems are not as discrete as our law professors have taught us to believe. The possibility of compromising both cause-in-fact and proximate cause questions, so that the percentage fault question would reflect our inability to make all-or-nothing decisions with regard to these issues, is an option which must be seriously considered. I would suggest that in addition to the seat-belt cases, recent cases in fairly unrelated areas have broached the compromise. Although, in general, the courts did not confront the topic with the kind of clarity that academicians would prefer, the cases speak for themselves.

1. Huddell v. Levin—A Strange Confession

On the early morning of March 24, 1970, Dr. Huddell, a psychiatrist, was driving his 1970 Chevrolet Nova en route to the Delaware State Hospital, where he was engaged in psychiatric research.⁷³ Dr. Huddell had purchased the car new and had installed

⁷²*Britton v. Doehring*, 286 Ala. 498, 242 So. 2d 666 (1970); *Lipscomb v. Diamini*, 226 A.2d 914 (Del. Super. Ct. 1967).

⁷³*Huddell v. Levin*, 537 F.2d 726 (3d Cir. 1976). This decision vacated a superb opinion by Judge Cohen of the district court, 395 F. Supp. 64 (D.N.J. 1975).

head restraints as original equipment for both the driver and the front passenger seats. While travelling on the Delaware Memorial Bridge, Dr. Huddell's car ran out of gas. His car was brought to a full stop in the left-most southbound lane of traffic. He was seated belted in the driver's seat, and the blinker lights on his vehicle were in operation. The accident occurred when another car rear-ended the Huddell car at a considerable rate of speed. Upon impact, Dr. Huddell's head struck the head restraint on his car, resulting in extensive fracture to the occipital region of the skull. Because of a medical phenomenon known as "countercoup," by which the brain of a moving head striking a stationary object sustains injury opposite the point of impact, the frontal portions of Dr. Huddell's brain were extensively damaged. He died one day after the accident.

Plaintiffs brought suit against General Motors, Levin, the driver of the car which rear-ended Dr. Huddell, and Levin's employer, for whom he was driving at the time of the accident. The focus of the *Huddell* opinion, in the main, was with the liability of General Motors. It was the plaintiffs' contention that the head restraints were defective because they were designed with a relatively sharp edge of unyielding metal which allowed for excessive concentration of forces against the rear of the skull. As a result, the head came in contact with a thin metal plate rather than a flat surface which would have distributed the force over a larger area of the skull.

The Third Circuit, on appeal, affirmed the jury finding on defect. It then turned to a troublesome question. General Motors was clearly liable only for second-collision or add-on injuries caused by its defective head restraints. It was not liable for the harm caused to Dr. Huddell as a result of the primary collision. The two successive collisions—(1) Levin's car against Huddell's car, causing some injury to Huddell, and (2) Huddell against the defective head restraint—came in rapid-fire succession. It would be difficult, if not impossible, to divide the two events and separate the harms caused by each. The lower court took the position that these facts should be analogized to the chain-collision cases.⁷⁴ New Jersey had taken the position in those cases that the successive colliders should be treated as concurrent tortfeasors and thus jointly and severally liable for the *entire* injury, unless the defendant—the second collider—is able to prove that his damages are separable and that the amount of damages attributable to him are determinable.⁷⁵ For all

⁷⁴395 F. Supp. at 73.

⁷⁵*Dziedzic v. St. John's Cleaners & Shirt Launderers, Inc.*, 53 N.J. 157, 249 A.2d 382 (1968); *Hill v. Macomber*, 103 N.J. Super. 127, 246 A.2d 731 (1968); RESTATEMENT (SECOND) OF TORTS § 433A (1965).

the persuasiveness of the analogy, Chief Judge Aldisert was unwilling to adopt it in a second-collision product liability case:

The crashworthy or second-collision theory of liability is a relatively new theory, its contours are not wholly mapped, but one thing, at least is clear; the automobile manufacturer is liable only for the enhanced injuries attributable to the defective product. This being the essence of the liability, we cannot agree that the burden of proof on that issue can properly be placed on the manufacturer.⁷⁶

So be it. The court, faced with a novel cause of action, was not prepared to treat this as anything other than a problem of apportionment of damages with the traditional burden of proof resting on the plaintiff. But then in a dramatic turnabout at the close of the opinion, the court made the following suggestion for the trial judge on remand:

Upon retrial, the district court may request the parties to consider whether the New Jersey Supreme Court would be receptive to a rule kindred to the apportionment rule announced by the New York Court of Appeals in *Dole v. Dow Chemical Co.* that where a third party is found to have been responsible for a part, but not all, of the negligence for which a defendant is cast in damages, the responsibility for that part is recoverable by the prime defendant against the third party. To reach that end there must necessarily be an apportionment of responsibility in negligence between those parties. The adjudication is one of fact and may be sought in a separate action . . . or as a separate and distinguishable issue by bringing in the third party in the prime action.⁷⁷

The court recognized that this was a situation somewhat different from the normal comparison of fault between joint tortfeasors. *Dole*, they said:

[d]id not implicate a combination of negligence and products liability; and it did not implicate the troublesome—and in our view *sui generis*—concept of second collision liability . . . it did represent a salutary judicial reevaluation of a tired common law doctrine that had long outlived purposes. The common law must accommodate changing conditions, new rights and remedies.⁷⁸

⁷⁶537 F.2d at 738.

⁷⁷*Id.* at 741 (citations omitted), *citing* *Dole v. Dow Chem. Co.*, 30 N.Y. 2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

⁷⁸*Id.* at 742.

For all the language which indicates that the court is breaking new ground, the opinion fails to reveal just how novel the court's suggestion truly is. It will be recalled that the majority recoiled at the suggestion that the negligent driver and General Motors be treated as joint and several tortfeasors. The problem was one of apportionment of damages. General Motors, the second of the tortfeasors, was to be held liable only for the add-on injuries. Then, after reflection, the court suggested that General Motors and the driver Levin apportion *not damages, but fault* between them. Thus, for example, the driver might be found forty percent at fault and General Motors sixty percent at fault. It is irrelevant at this time to speculate whether this kind of apportionment would limit the liability of each party to the percentage of his own fault or whether, as in *Dole*, the parties would be jointly and severally liable to the plaintiff, with their rights *inter se* being affected by the fault apportionment.⁷⁹ The crucial point is that the court, faced with a difficult damage apportionment in which the plaintiff may be unable to segregate the harm caused by the second collision, has recognized that a tough damage question may perhaps best be resolved in fault apportionment.

2. *Barry v. Manglass—A Step Toward Comparative Causation*

The story of *Barry v. Manglass*⁸⁰ is a fascinating one. The supposedly major point for which the case will be cited is of anecdotal interest and will pass into twilight with other judicial opinions which deal with the auto recall question.⁸¹ But for the cogniscenti, there lies hidden in the depths of this decision a veritable gold mine, of which it may be said, "Observe, tis truly new."⁸²

The facts are humdrum. Gary Manglass was driving his 1969 Chevrolet Nova and took a turn on Old Route 202 going south at sixty miles per hour, clearly a foolhardy action. Apparently, upon reaching the southbound lane the car suddenly went out of control and began weaving from one lane to another. It ultimately hit a car in the northbound lane in which plaintiff Barry and others were occupants. Barry brought suit against Manglass for negligent driving and also joined General Motors as a defendant. The claim against

⁷⁹V. SCHWARTZ, *COMPARATIVE NEGLIGENCE*, §§ 16.3, 16.4, 16.7. See N.H. REV. STAT. ANN. § 507: 7-a (Supp. 1973); VT. STAT. ANN., tit. 12, § 1036 (1973); TEX. REV. CIV. STAT. ANN., art. 2212a, § 2(c) (West Supp. 1976-1977).

⁸⁰55 App. Div. 2d 1, 389 N.Y.S.2d 870 (1976).

⁸¹See, e.g., *H.P. Hood & Sons, Inc. v. Ford Motor Co.*, 345 N.E.2d 683 (Mass. 1976).

⁸²*Ecclesiastes* 1:10.

General Motors was that the 1969 Chevy Nova was manufactured with defective motor mounts which caused the car to go out of control.

The battle of the experts followed. Which came first—the chicken or the egg? Did the motor mounts fail, thus causing the collision, or did the collision occur first, thus causing the motor mounts to break? It was the contention of General Motors that the failure of the motor mounts followed Manglass' loss of control after he made the turn at too great a speed. On the other hand, the plaintiff's experts contended that the motor-mount failure preceded the accident and caused an unintended increase in the speed of the car as it was making the turn. The jury returned a verdict for plaintiff and, under the dictate of *Dole v. Dow*, which permits apportionment of fault between joint tortfeasors, found the liability of General Motors at thirty-five percent and that of Manglass at sixty-five percent.

A fault apportionment between tortfeasors on the basis of a percentage comparison is nothing novel. However, before one can assess fault against a tortfeasor causation must be established. The controversy in this case did not surround the issue of fault. There was evidence that General Motors had serious difficulties with the motor mounts on the 1969 Chevy Nova, and there was clear evidence that the driver was negligent. The battle of the experts was based on an assumption that a defect existed in the product when it left the hands of the manufacturer. The question to be decided was whether the harm was caused by the defect or the driving of Manglass. On this point the experts split sharply; the expert for General Motors claimed that the motor mounts failed post-collision and the plaintiff contended that it failed pre-collision.

The jury verdict on fault apportionment assessing thirty-five percent to General Motors and sixty-five percent to Manglass is difficult to reconcile with the testimony of the experts. If either of the experts is believed, then even if the fault of the parties can be assessed the cause aspect of the case cannot be compromised. Causation is, after all, an either/or issue. The motor mounts failed either before the collision or after the collision. If they failed after the collision, it would not seem to matter how much at fault General Motors was in bringing about the condition. It is possible, of course, that the jury found that both General Motors and the driver were concurrent tortfeasors, in that the defect of the car coincided with the negligent driving of the defendant Manglass to cause the accident, but the probabilities are strongly against such coincidence, since the expert testimony appears to have been unequivocal. If the jury did arrive at such a finding, it would be unsupported by the evidence which presented causation as an all-or-nothing issue.

There is an explanation for the jury finding that supports the thesis I have set forth. The normal standard of proof on causation is that plaintiff must establish the causal connection by the balance of probabilities.⁸³ If it is more probable than not that the defendant caused the harm, then causation is one hundred percent established. If it is less probable, then plaintiff has failed to make out his case. But, we all know that causation is never proven at a one hundred percent or a zero percent level. We treat the proof problem in a manner that is unrelated to reality. If, however, juries are presented with a mechanism to allow them to take into account the *likelihood, at a percentage basis*, that the defendant's fault caused the harm, then causation could be easily compromised and the issue removed from its all-or-nothing shibboleth.⁸⁴ Comparative fault presents to juries the mechanism for compromising difficult cause-in-fact questions. Again, it is possible that the Uniform Comparative Fault Act takes causation into account:

In determining the percentage of fault allocable to each party, the trier of fact shall consider, on a comparative basis, both the nature and quality of the conduct of the party and the extent to which and directness with which the conduct contributed to cause the damages claimed.⁸⁵

Certainly it might help to clarify matters if the Act specifically provided for cause in fact as well as proximate cause,⁸⁶ but that is a

⁸³W. PROSSER, LAW OF TORTS 241 (4th ed. 1971).

⁸⁴See generally Bauer, *The Degree of Moral Fault as Affecting Defendant's Liability*, 81 U. PENN. L. REV. 586 (1933); Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69 (1975). The basic thesis reflected in the text is touched on by Professor Owen in his symposium article, *The Highly Blameworthy Manufacturer*, *supra* note 12. See also text accompanying notes 57-58 *supra*. Professor Owen argues:

Thus, questions of causal linkage, rather than directly concerning metaphysical cause and effect, primarily involve questions of fairness to the parties concerning the *degree of proof* required to establish metaphysical causation. "The tendency to temper rules to fit moral conduct . . . in the field of certainty of proof" has been recognized on the damages side of tort law for some time. Courts have tended to administer the rules of causation "in such manner as to be most severe upon the intentional wrongdoer and more severe upon the reckless wrongdoer than upon the negligent wrongdoer." Thus, the manufacturer's blameworthiness may properly bear on the resolution of the cause in fact issue in certain products liability cases.

Id. at 780 (footnotes omitted).

⁸⁵May 1, 1977 Draft, *supra* note 32, at § 2(b).

⁸⁶The following modification is suggested: In determining the percentage of fault allocable to each party, the trier of fact shall consider, on a comparative basis, both the

minor matter. The tendency of courts to treat the cause-in-fact question in proximate cause terminology is well known.⁸⁷ The mechanism thus exists for plaintiffs to press comparative fault on the courts as a solution to difficult cause-in-fact questions. Comparative fault in the product liability area may yet turn out to be a substantial boon for claimants who may be able to use it to withstand directed verdicts and jury verdicts when evidence is less than overwhelming on causation.

VI. CONCLUSION

We have come full circle. Having begun this analysis on the premise that comparative fault is a damaging and unfair doctrine to apply indiscriminately against plaintiffs in product liability actions, we have concluded that it may yet turn out to be a boon to plaintiffs who face difficult causation problems. Yet, we need not abandon either position. Courts will have to examine each case on its facts to determine whether a fault comparison is proper. In some instances, it is clear that any reduction of plaintiff's recovery will negate basic duties that have been placed on manufacturers.⁸⁸ In other instances,

nature and quality of the conduct of the party and the causal relation, both in the *cause-in-fact and proximate cause sense*, with which the conduct contributed to cause the damages claimed.

It should be noted that the May 1, 1977 Draft, *supra* note 32, provides in section 1 (b):

(b) "Fault" includes negligence, recklessness, breach of implied warranty, conduct subjecting the actor to strict tort liability, unreasonable assumption of risk, and failure to avoid or mitigate damage. The *fault must have an adequate causal relationship to the damage suffered.*

(emphasis added).

The statement that fault must be causal must be related back to section 2 (b), which states that directness of fault is to be considered as an apportionment factor. The clear inference from section 1 (b) is that causation is an all-or-nothing decision. The inference from section 2 (b) is to the contrary. For reasons set forth in the text, the author favors eliminating cause-in-fact as an all-or-nothing issue, and it is suggested that the last sentence of section 1 (b) be eliminated and the author's modification be substituted.

⁸⁷W. PROSSER, LAW OF TORTS 236, 244 (4th ed. 1971); Owen, *The Highly Blame-worthy Manufacturer*, *supra* note 12. See also text accompanying notes 44-45 *supra*.

⁸⁸It is interesting to note that the original draft of the Uniform Comparative Fault Act provided in section 1 that:

In an action for injury to person or property, based on negligence [of any kind], recklessness, [wanton misconduct], strict liability or breach of warranty, or a tort action based on a statute *unless otherwise indicated by statute* any contributory fault on the part of, or attributed to, the claimant, or of any other person whose fault might otherwise have affected the claimant's recovery, does not bar the recovery but diminishes the award of compen-

a fault comparison will be proper because plaintiff has a role to fulfill in maintaining product safety. When causation is seriously at issue, there may be yet another role for comparative fault to play. If mishandled, comparative fault can become an excuse for avoiding important decision-making. In the hands of a creative judiciary, comparative fault can contribute to a system of product liability that is both just in theory and practical in result.

satory damages proportionately, according to the measure of fault attributed to the claimant. This Section applies whether the contributory fault previously constituted a defense or not, and replaces previous common law and statutory rules concerning the effect of contributory fault, including last clear chance and unreasonable assumption of risk.

(emphasis added). The comment to this proposed statute takes special note of the underlined language. It states:

Unless otherwise indicated by the statute is to keep from repealing by implication and to give a court the authority to construe a statute such as a child labor act to prevent any mitigation if it thinks the policy of the act requires protection of a class of persons even against their own weaknesses or inadequacies.

The May 1, 1977 Draft, *supra* note 32, eliminates the underlined language. This author has it on the good authority of Professor John Wade that the drafters did not intend by this omission to change the sense of the original draft. Thus, there is recognition that there may be circumstances prescribed by statute where certain classes of plaintiffs need the protection of the law and these persons should be entitled to full rather than partial recovery. It is the thesis of this article that in certain product liability situations comparative fault should not reduce recovery. Thus, the author would suggest restatement of the original language to read as follows:

Nothing contained in this statute shall prevent a court from refusing to apply the comparative fault principle in any case where a statute indicates otherwise or where in the judgment of the court the application of the comparative fault principle would significantly impair the purpose of the law in assessing liability on a defendant.