

# STATUS AND TRENDS IN STATE PRODUCT LIABILITY LAW: COMPARATIVE NEGLIGENCE

## INTRODUCTION

Since the 1800s, when Georgia created the first comparative negligence system,<sup>1</sup> more than forty states have statutorily or judicially adopted some form of comparative negligence to ameliorate the harsh results of contributory negligence.<sup>2</sup> Under the doctrine of contributory negligence, a plaintiff cannot recover from the defendant if the plaintiff is partially

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1. The Georgia system "evolved out of a joint enterprise between the legislature and the judiciary" when the judiciary merged two statutes to create a general comparative negligence doctrine. See V. SWARTZ, *COMPARATIVE NEGLIGENCE* § 1.5 (2d ed. 1986).

2. The states use four basic formulas of comparative negligence: pure, modified, "slight versus gross" and remote. A breakdown of jurisdictions follows:

1) Pure contributory negligence does not bar recovery, but damages are reduced by the percentage of negligence attributable to the plaintiff. See Alaska: *Kaatz v. State*, 540 P.2d 1037 (1975); California: *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); Florida: *Hoffman v. Jones*, 280 So. 2d 431 (1973), FLA. STAT. ANN. § 768.81 (West Supp. 1987); Illinois: *Alvis v. Ribar*, 85 Ill. 2d 1, 421 N.E.2d 886 (1981); Kentucky: *Hilen v. Hays*, 673 S.W.2d 713 (1984); Louisiana: LA. CIV. CODE ANN. art. 2323 (West Supp. 1987); Michigan: *Placek v. City of Sterling Heights*, 405 Mich. 638, 275 N.W.2d 511 (1979), MICH. COMP. LAWS ANN. § 600.2949 (1986); Mississippi: MISS. CODE ANN. § 11-7-15 (1972); Missouri: *Gustafson v. Benda*, 661 S.W.2d 11 (1983) (en banc); New Mexico: *Scott v. Rizzo*, 96 N.M. 682, 634 P.2d 1234 (1981); New York: N.Y. CIV. PRAC. LAW §§ 1411-1413 (McKinney 1976); Rhode Island: R.I. GEN. LAWS § 9-20-4 (1985); Washington: WASH. REV. CODE ANN. § 4.22.005 (Supp. 1987).

2) Modified—there are two types of modified comparative negligence systems:

A. "Not as great as," "less than" or 50% rules bar recovery if the plaintiff's negligence is equal to or greater than the defendant's negligence. See Arkansas: ARK. STAT. ANN. §§ 27-1763 to -1765 (1979); Colorado: COLO. REV. STAT. § 13-21-111 (1973); Georgia: GA. CODE ANN. § 105-603 (1984) (diligence of plaintiff); Idaho: IDAHO CODE § 6-801 (1979); Kansas: KAN. STAT. ANN. § 60-258a (1983); Maine: ME. REV. STAT. ANN. tit. 14, § 156 (1980); North Dakota: N.D. CENT. CODE § 9-10-07 (1975); Utah: UTAH CODE ANN. § 78-27-37 (1977); West Virginia: *Bradley v. Appalachian Power Co.*, 163 W. Va. 332, 256 S.E.2d 879 (1979); Wyoming: WYO. STAT. § 1-1-109(a) (Supp. 1987).

B. "Not greater than" or 51% rules bar recovery if the plaintiff's negligence is greater than the defendant's negligence. See Connecticut: CONN. GEN. STAT. ANN. § 52-572h (West Supp. 1987); Hawaii: HAWAII REV. STAT. § 663-31 (1985); Indiana: IND. CODE ANN. § 34-4-33-4 (West Supp. 1986); Iowa: IOWA CODE ANN. § 668.3 (West Supp. 1987); Massachusetts: MASS. GEN. LAWS ANN. ch. 231, § 85 (1986); Minnesota: MINN. STAT. ANN. § 604.01 (West Supp. 1987); Montana: MONT. CODE ANN. § 27-1-702 (1985); Nevada: NEV. REV. STAT. § 41.141 (1985); New Hampshire: N.H. REV. STAT. ANN. § 507:7-d (Supp. 1986); New Jersey: N.J. STAT. ANN. § 2A:15-5.1 (West. Supp. 1986); Ohio: OHIO REV. CODE ANN. § 2315.19 (Page 1981); Oklahoma: OKLA. STAT. ANN. tit. 23, §§ 13-14 (West 1987); Oregon: OR. REV. STAT. § 18.470 (1983); Pennsylvania: PA. STAT. ANN. § 7102(a) (Purdon 1982); Texas: TEX. CIV. PRAC. & REM. CODE ANN. § 33.001 (Vernon 1986); Vermont: VT. STAT. ANN. tit. 12, § 1036 (Supp. 1986); Wisconsin: WIS. STAT. ANN. § 895.045 (West 1983).

3) "Slight versus gross" system—allows recovery only when the plaintiff's negligence was "slight" in comparison with the "gross" negligence of the defendant. See Nebraska: NEB. REV. STAT. § 25-21,185 (1985); South Dakota: S.D. CODIFIED LAWS ANN. § 20-9-2 (1979).

4) Remote rule—plaintiff's negligence does not bar recovery if it is only "remotely" connected with the tort. Damages are reduced by plaintiff's negligence. See Tennessee: *Bejach v. Colby*, 141 Tenn. 686, 214 S.W. 869 (1919).

responsible for his or her injuries.<sup>3</sup> The doctrine bars recovery even if the plaintiff's negligence is minimal compared with the defendant's negligence.<sup>4</sup> Comparative negligence, on the other hand, does not bar a negligent plaintiff's recovery but apportions damages based on the respective negligence of each party.<sup>5</sup>

Given the wide acceptance of comparative negligence, state legislatures and courts now are considering whether comparative principles also should be applied in strict product liability actions.<sup>6</sup> This section will examine whether the policies behind comparative negligence and strict product liability theory are compatible. It will outline the conceptual difficulty of applying comparative principles to strict product liability actions and how courts have addressed the problem. Finally, this section will focus on state statutes that merge the two theories.

### THE POLICY OF FAIRNESS

The policy underlying comparative negligence is that all parties should be held responsible in proportion to their injury-causing conduct.<sup>7</sup> This same policy of fair apportionment underlies the merger of comparative negligence with strict product liability theory. Merging the two theories means that, in a product action brought under strict liability theory, a plaintiff partially responsible for causing his or her own injuries will not be allowed to recover all damages from a partially responsible defendant.

The policy of fair apportionment is compatible with the policy considerations giving rise to strict product liability theory.<sup>8</sup> First, an

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3. One of the earliest cases enunciating the doctrine of contributory negligence was *Butterfield v. Forrester*, 11 East 60, 103 Eng. Rep. 926 (1809). While riding his horse as fast as he could, Butterfield did not see a pole that was partially obstructing the road. The court held that Butterfield failed to exercise ordinary care; therefore, he was barred from recovery. For a historical development of contributory negligence, see Turk, *Comparative Negligence on the March*, 28 CHI.-KENT L. REV. 189 (1950).
  4. Application of the contributory negligence doctrine places the plaintiff in an all-or-nothing predicament. The plaintiff's negligence determines whether the plaintiff is compensated for all of his or her injuries or none of them. For a discussion of the policies behind contributory negligence, see Schwartz, *Contributory and Comparative Negligence: A Reappraisal*, 87 YALE L.J. 697 (1978) (concluding that policy rationales do not support the doctrine and that comparative negligence is the better rule of law).
  5. For a discussion of the various formulas of comparative negligence, see *supra* note 2 and accompanying text.
  6. For purposes of this section, references to strict product liability also will refer to actions based on breach of warranty. Although the theories differ, the arguments and underlying policies are applicable to both theories.
  7. See C. HEFT, *COMPARATIVE NEGLIGENCE MANUAL* § 1.10 (1978).
  8. The policies underlying strict product liability theory include protecting the powerless consumer and discouraging manufacturers from producing unsafe products. The manufacturer is also better able to absorb the losses of a few by spreading the cost to all consumers. Although the main theme of strict product liability theory is that manufacturers should bear the cost of injuries caused by defective products, manufacturers are not insurers against all harm associated with products. See Fischer, *Products Liability—Applicability of Comparative Negligence*, 43 MO. L. REV. 431 (1978); Feinberg, *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. COUNSEL J. 39 (1975).

application of comparative negligence to actions brought under strict product liability theory does not burden the plaintiff with proving the manufacturer's negligence.<sup>9</sup> The manufacturer still would be strictly liable, thereby easing the evidentiary burden on the powerless consumer. The plaintiff's conduct, however, may proportionately reduce the amount of damages.

Second, although contributory negligence is not a defense in strict product liability actions,<sup>10</sup> an all-or-nothing problem remains.<sup>11</sup> The plaintiff's assumption of risk or misuse of the product can completely bar recovery.<sup>12</sup> When comparative negligence is merged with strict product liability theory, assumption of the risk and misuse are not complete defenses but are merely factors that reduce the plaintiff's total award. Third, merging the two theories would not endanger the deterrent value of strict product liability theory. In *Daly v. General Motors Corp.*,<sup>13</sup> the court discussed why manufacturers remain motivated to produce safe products. The court explained that a manufacturer remains strictly liable, even if the plaintiff is contributorily negligent. When comparative principles are applied, only the plaintiff's award is reduced, not the manufacturer's liability.<sup>14</sup> Also, if assumption of the risk remains a complete defense, manufacturers may choose to create obviously defective products.<sup>15</sup>

In addition to deterring manufacturers from producing unsafe products, the adoption of a comparative approach to strict product liability may encourage consumers to exercise more care in the use of products and decrease avoidable injury.<sup>16</sup> Finally, merging the two theories would not thwart the public policy of loss spreading that underlies strict product liability theory.<sup>17</sup>

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9. *Coney v. J.L.G. Industries*, 97 Ill. 2d 104, 116, 454 N.E.2d 197, 202 (1983).

10. RESTATEMENT (SECOND) OF TORTS § 402A comment n (1965).

11. See *supra* note 4 and accompanying text.

12. RESTATEMENT (SECOND) OF TORTS § 402A comment n (1965). Determining the point at which a plaintiff stops being contributorily negligent and assumes the risk is difficult. Where the jury draws the line determines whether the plaintiff receives the total of all damages or nothing. See Woods, *Product Liability: Is Comparative Fault Winning the Day?*, 36 ARK. L. REV. 360, 382 (1984).

13. 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978) (complaint alleged that but for an improperly designed automobile door handle, the driver would not have been ejected from the car and killed).

14. The California Supreme Court stated that the manufacturer could not assume that every plaintiff injured by the product would be contributorily negligent. 20 Cal. 3d at 736, 575 P.2d at 1169, 144 Cal. Rptr. at 387 ("[d]oubtless, many users are free of fault, and a defect is at least as likely as not to be exposed by an entirely innocent plaintiff who will obtain full recovery"). Accord *Kaneko v. Hilo Coast Processing*, 65 Haw. 447, 654 P.2d 343 (1982) (merging comparative negligence doctrine with strict product liability theory). But see Sobelsohn, *Comparing Fault*, 60 IND. L. REV. 413, 438 (1985) (argues that strict liability does not deter on a case-by-case basis but deters based on the aggregate of product liability cases that might result from production of a defective product).

15. 20 Cal. 3d at 738, 575 P.2d at 1169, 144 Cal. Rptr. at 387.

16. See Gershonowitz, *Comparative Causation as an Alternative To, Not a Part of, Comparative Fault in Strict Products Liability*, 30 ST. LOUIS U.L.J. 483, 486 (1986).

17. In *Coney v. J.L.G. Industries*, 97 Ill. 2d 104, 454 N.E.2d 197 (1983), the Illinois Supreme Court

## JUDICIAL APPLICATION OF COMPARATIVE PRINCIPLES TO STRICT PRODUCT LIABILITY ACTIONS

Although the policy reasons underlying the application of comparative principles to strict product liability actions are sound, the merger is semantically and conceptually difficult. The major problem is comparing a negligent plaintiff with a strictly liable defendant. In *Dippel v. Sciano*,<sup>18</sup> the Wisconsin Supreme Court avoided the semantic problem by characterizing strict product liability as "negligence per se."<sup>19</sup> The court then applied Wisconsin's comparative negligence statute to strict product liability actions.<sup>20</sup> Critics argue, however, that the negligence per se analogy is inappropriate.<sup>21</sup>

State courts also have merged comparative negligence with strict tort liability, based on the respective fault of the parties. Although the fault of the plaintiff is easily identifiable, the fault of the defendant is not so apparent.<sup>22</sup> Under traditional strict product liability theory, the conduct of the manufacturer is irrelevant—it may be held liable even if not actually blameworthy. The New Jersey Supreme Court extended its comparative negligence statute based on its observation that distributing an unsafe product departed from a required standard of conduct; therefore, fault

explained that the plaintiff would not be burdened with the entire risk of the defective product but "only that portion due to plaintiff's own conduct or fault." 454 N.E.2d at 202. The remaining cost of compensating the victim of a defective product will be borne by the manufacturer and consequently spread to all consumers.

18. 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

19. 155 N.W.2d at 64.

20. *Id.* at 64-65. The conceptual problem is often expressed in terms of the metaphor that apples and oranges cannot be compared. The Wisconsin court avoided comparing "apples" (negligence of the plaintiff) with "oranges" (strict liability of the defendant) by deciding that the orange was really an apple after all. See Feinberg, *supra* note 8, at 42.

Other courts using the negligence per se characterization include Minnesota: *Busch v. Busch Constr.*, 262 N.W.2d 377 (1977) (extended comparative negligence statute) (case codified at MINN. STAT. ANN. 604.01 (West Supp. 1987)); Florida: *West v. Caterpillar Tractor Co.*, 336 So. 2d 80 (1976) (extended judicially created comparative negligence system). (In 1986, Florida enacted a comparative fault statute; see *infra* notes 33-48 and accompanying text.)

Some courts did not use the negligence per se characterization but extended the state's comparative negligence statute to apply to strict product liability actions. See Mississippi: *Edwards v. Sears, Roebuck & Co.*, 512 F.2d 276 (5th Cir. 1975) (applying Mississippi law); Rhode Island: *Fiske v. MacGregor, Div. of Brunswick*, 464 A.2d 719 (1982). The Alaska Supreme Court has extended the state's judicially created pure comparative negligence system to strict product liability actions. *Butaud v. Suburban Marine & Sporting Goods, Inc.*, 555 P.2d 42 (Alaska 1976).

21. See Twerski, *From Defect to Cause to Comparative Fault—Rethinking Some Products Liability Concepts*, 60 MARQ. L. REV. 297, 319 (1977). Professor Twerski argues that negligence per se sets up a minimum standard of conduct for the defendant. Yet, if it is impossible for the defendant to meet the set standard, then "strict liability is being imposed and any attempt to label it negligence per se is sophistry." *Id.* at 321. See also Fischer, *supra* note 8, at 439.

22. Defining fault in strict liability theory is difficult. The defendant could be at fault for failing to produce a safe product or for putting a defective product in the stream of commerce. The defendant's fault could be the defective product itself. The latter definition is the most compatible with traditional strict liability theory, because the others focus on the manufacturer's conduct. See Comment, *Duncan v. Cessna Aircraft Company: "Sooner or Later" Is Now*, 36 BAYLOR L. REV. 429, 455-56 (1984).

was involved.<sup>23</sup> Other states have used similar reasoning to extend comparative negligence systems to strict product liability actions.<sup>24</sup>

Because of conceptual difficulties associated with the term "comparative fault," some state courts have chosen the term "comparative causation" to describe comparative loss allocation in strict product liability actions. In *Duncan v. Cessna*,<sup>25</sup> the Texas Supreme Court adopted comparative causation. The court stated that "the trier of fact is to compare the harm caused by the defective product with the harm caused by the negligence of the other defendants, any settling tortfeasors and the plaintiff."<sup>26</sup> Seven jurisdictions have adopted comparative causation to effectuate the merger between comparative negligence and strict product liability.<sup>27</sup>

Although a majority of state courts seem willing to inject comparative principles into strict product liability theory, seven jurisdictions have refused to merge the two concepts.<sup>28</sup> These courts offer a number of rationales for not following the trend, including fears that a merger will undercut strict product liability policies<sup>29</sup> and create jury confusion.<sup>30</sup> A common rationale for refusing to judicially adopt comparative principles in strict liability is the belief that the legislature should set policy in this area.<sup>31</sup> One court that judicially adopted comparative principles, for

23. "The manufacturer or supplier has been charged with the duty of distributing a product which is fit, suitable and duly safe." *Suter v. San Angelo Foundry & Machine Co.*, 81 N.J. 150, 162, 406 A.2d 140, 146 (1979).
24. California: *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978); Kansas: *Kennedy v. City of Sawyer*, 228 Kan. 439, 618 P.2d 788 (1980); North Dakota: *Day v. General Motors Corp.*, 345 N.W.2d 349 (1984) (comparative fault or comparative causation); Oregon: *Baccelleri v. Hyster Co.*, 287 Or. 3, 597 P.2d 351 (1979).
25. 665 S.W.2d 414 (Tex. 1984).
26. *Id.* at 427.
27. Idaho: *Sun Valley Airlines v. Avco-Lycoming Corp.*, 411 F.Supp. 598 (D. Idaho 1976) (in 1980 Idaho enacted a comparative responsibility statute; see *infra* notes 54, 57 and accompanying text); Illinois: *Coney v. J.L.G. Industries*, 97 Ill. 2d 104, 454 N.E.2d 197 (1983); New Hampshire: *Thibault v. Sears, Roebuck & Co.*, 118 N.H. 802, 395 A.2d 843 (1978) (in 1986 New Hampshire enacted a comparative fault statute; see *infra* notes 46-47 and accompanying text); New Mexico: *Marchese v. Warner Communications*, 100 N.M. 313, 670 P.2d 113 (Ct. App. 1983) (accepting dicta in *Scott v. Rizzo*, 96 N.M. 682, 634 P.2d 1234 (1981)); Utah: *Mulherin v. Ingersoll-Rand Co.*, 628 P.2d 1301 (1981); Virgin Islands: *Murray v. Fairbanks-Morse*, 610 F.2d 149 (3rd Cir. 1979); West Virginia: *Star Furniture Co. v. Pulaski Furniture Co.*, 297 S.E.2d 854 (1982).
28. Colorado: *Kinard v. Coats, Inc.*, 37 Colo. App. 555, 553 P.2d 835 (1976) (superseded by COLO. REV. STAT. § 13-21-406 (Supp. 1987)); Massachusetts: *Correia v. Firestone Tire & Rubber Co.*, 388 Mass. 342, 446 N.E.2d 1033 (1983) (warranty law is comparable to strict liability in Massachusetts); Nebraska: *Melia v. Ford Co.*, 534 F.2d 795 (8th Cir. 1976) (interpreting Nebraska law) (superseded by NEB. REV. STAT. § 25-21,185 (1985)); Oklahoma: *Kirkland v. General Motors Corp.*, 521 P.2d 1353 (1974); Pennsylvania: *Berkebile v. Brantly Helicopter*, 462 Pa. 83, 337 A.2d 893 (1975); South Dakota: *Smith v. Smith*, 278 N.W.2d 155 (1979); Washington: *Seay v. Chrysler Corp.*, 93 Wash. 2d 319, 609 P.2d 1382 (1980) (superseded by WASH. REV. CODE ANN. §§ 4.22.005, 4.22.015 (Supp. 1987)).
29. See, e.g., *Berkebile v. Brantly Helicopter Corp.*, 462 Pa. at 97, 337 A.2d at 900. See also *supra* notes 8-17 and accompanying text.
30. See, e.g., *Smith v. Smith*, 278 N.W.2d, 151, at 161 n.7 (S.D. 1979).
31. See, e.g., *Correia v. Firestone Tire & Rubber Co.*, 388 Mass. 342, 446 N.E.2d 1033 (1983) (warranty law is comparable to strict liability in Massachusetts). The Massachusetts Supreme

example, admitted it would have preferred to wait for legislative guidance.<sup>32</sup>

### STATUTORY APPLICATION OF COMPARATIVE PRINCIPLES TO STRICT PRODUCT LIABILITY ACTIONS

Legislatures in twelve states have statutorily merged comparative principles with strict product liability theory.<sup>33</sup> The first such statute was enacted by the Arkansas Legislature in 1973.<sup>34</sup> The Arkansas statute became the model for the Uniform Comparative Fault Act.<sup>35</sup> The U.C.F.A. defines fault very broadly to include the entire spectrum of the plaintiff's and defendant's acts or omissions.<sup>36</sup> In an action based on fault, the basic rule under the U.C.F.A. is that "any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery."<sup>37</sup> This rule creates a pure comparative fault system of loss apportionment.<sup>38</sup>

Iowa,<sup>39</sup> Minnesota<sup>40</sup> and Washington<sup>41</sup> have enacted statutes modeled after the U.C.F.A.<sup>42</sup> Florida,<sup>43</sup> Maine,<sup>44</sup> Nebraska<sup>45</sup> and New Hampshire<sup>46</sup> have statutes that are not modeled after the U.C.F.A. but embody the

Court stated that "[t]he policies of negligence and warranty liability will best be served by keeping the spheres in which they operate separate until such time as the Legislature indicates how and to what extent they should be melded." 446 N.E.2d at 1040.

32. In *Gustafson v. Benda*, 661 S.W.2d 11 (Mo. 1983) (en banc) the Missouri Supreme Court judicially adopted the Uniform Comparative Fault Act, stating "[w]e have remained quiescent more than five years while waiting for the legislature to act." *Id.* at 14-15.
33. Arkansas, Colorado, Connecticut, Florida, Idaho, Maine, Michigan, Minnesota, Nebraska, New Hampshire, New York and Washington.
34. ARK. STAT. ANN. §§ 27-1763 to -1765 (1979).
35. UNIFORM COMPARATIVE FAULT ACT, 12 U.L.A. 38 (Supp. 1987).
36. The Uniform Comparative Fault Act states:  
 "Fault" includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of the risk not constituting an enforceable express consent, misuse of a product for which the defendant otherwise would be liable, and unreasonable failure to avoid an injury or to mitigate damages. Legal requirements of causal relation apply to fault as the basis of liability and to contributory fault.
- Id.* § 1(b).
37. *Id.* § 1(a).
38. If the total amount of damages equals \$100,000, for example, and the jury finds that 90 percent of plaintiff's damages are attributable to the plaintiff's contributory fault, then the plaintiff is entitled to recover \$10,000 from the defendant.
39. IOWA CODE §§ 668.1-668.3 (West Supp. 1987).
40. MINN. STAT. ANN. § 604.01 (West Supp. 1987).
41. WASH. REV. CODE ANN. §§ 4.22.005, 4.22.015 (Supp. 1987).
42. Indiana has also enacted a statute modeled after the U.C.F.A. IND. CODE ANN. §§ 34-4-33-1 to -14 (West Supp. 1986). The Indiana statute, however, specifically does not apply to strict product liability actions. *Id.* § 34-4-33-13.
43. FLA. STAT. ANN. § 768.81 (West Supp. 1987).
44. ME. REV. STAT. ANN. tit. 14, § 156 (1980).
45. NEB. REV. STAT. § 25-21, 185 (1985).
46. N.H. REV. STAT. ANN. § 507:7-d (Supp. 1986).

same fault-based comparisons. The Arkansas, Iowa, Minnesota, Nebraska and New Hampshire legislatures rejected a pure comparative fault statute in favor of a modified system.<sup>47</sup> Under a modified system of comparative fault, the plaintiff's damages are still proportionately reduced in accordance with his or her own fault, but recovery may be barred, depending upon the extent of the plaintiff's contributory fault.<sup>48</sup>

Applying modified comparative principles to strict product liability presents several problems. Modified comparative fault systems absolve the manufacturer of liability, even though his product may have caused up to fifty percent of the plaintiff's injuries.<sup>49</sup> This shifts the focus of the strict product liability suit away from the product.<sup>50</sup> A modified comparative fault system can also unfairly penalize a plaintiff by barring recovery, even though the plaintiff's contributory fault did not rise to the level of assumption of risk or misuse. In adopting the modified system, the legislature lowers the threshold level of fault<sup>51</sup> above which the plaintiff may not recover.<sup>52</sup> A more appropriate statutory merger of the two doctrines is a pure comparative fault system.<sup>53</sup>

Idaho<sup>54</sup> and Connecticut<sup>55</sup> merged strict liability theory with comparative negligence by enacting comparative responsibility statutes. Both statutes are specifically geared to product liability. Under comparative responsibility, the plaintiff's award is reduced proportionately "according to the measure of responsibility attributed to the claimant."<sup>56</sup> Connecticut follows a pure system, and Idaho enacted a modified system of comparative responsibility.<sup>57</sup>

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47. Arkansas bars recovery if plaintiff's fault is "equal to or greater than" defendant's fault. ARK. STAT. ANN. § 27-1795 (1979). Iowa allows recovery unless the plaintiff "bears a greater percentage of fault" than the defendant. IOWA CODE § 668.3(1) (West Supp. 1987). Minnesota and New Hampshire allow recovery if plaintiff's fault is "not greater than" the defendant's fault. MINN. STAT. ANN. § 604.01(1) (West Supp. 1987); N.H. REV. STAT. ANN. § 507:7-d (Supp. 1986). Nebraska allows recovery if the plaintiff's negligence is slight in comparison with the defendant's gross action or omission, giving rise to strict liability in tort. NEB. REV. STAT. § 25-23, 185 (1985).
  48. In 1979, the drafters of the U.C.F.A. adapted the Act to provide for a modified form of comparative fault. U.C.F.A., § 1, addition to comment, 12 U.L.A. 41 (Supp. 1987).
  49. Under the Arkansas statute, for example, if the plaintiff and defendant are equally at fault, the plaintiff is barred from recovery. See ARK. STAT. ANN. § 27-1765 (1979).
  50. See *supra* note 22 and accompanying text.
  51. Under most modified systems, the plaintiff's threshold level of fault is 50% or 51%. See, e.g., ARK. STAT. ANN. § 27-1765 (1979) (50%); MINN. STAT. ANN. § 604.01(1) (West Supp. 1986) (51%). The plaintiff's contributory fault should be greater than 50% of the total fault in order to be characterized as assumption of the risk or misuse.
  52. A modified system of comparative fault, however, may help discourage nuisance suits and frivolous claims.
  53. See Razook, *Merging Comparative Fault and Strict Products Liability: The Case For Judicial Innovation*, 20 AM. BUS. L.J. 511 (1983) (argues that a pure comparative fault system should be judicially applied to strict product liability actions).
  54. IDAHO CODE §§ 6-1404-1405 (Supp. 1986).
  55. CONN. GEN. STAT. ANN. § 52-572m, § 52-572o (West Supp. 1987).
  56. CONN. GEN. STAT. ANN. § 52-572o (West Supp. 1987).
  57. Idaho allows recovery if the plaintiff's comparative responsibility is "not as great as" the defendant's responsibility. IDAHO CODE § 6-1404 (Supp. 1986).

New York merged the two theories by enacting an expanded comparative negligence statute.<sup>58</sup> New York enacted a pure comparative system based on the "culpable conduct" attributable to each party.<sup>59</sup> On its face, the statute is not limited to negligence actions and can be applied to an action based on strict product liability theory. The Michigan and Colorado statutes require that the product liability plaintiff's recovery be reduced in proportion to the negligence<sup>60</sup> or fault<sup>61</sup> attributed to the plaintiff. Michigan and Colorado achieved the merger between comparative negligence and strict product liability theory by broadly defining "product liability action."<sup>62</sup>

### CONCLUSION

An analysis of the policies underlying comparative negligence and strict product liability indicates that the two theories are compatible. Courts and legislatures have found the conceptual and semantic difficulties associated with the merger surmountable. A survey of the states reveals a clear trend in favor of applying comparative principles in strict product liability actions.

To date, twelve states have legislatively merged comparative principles with strict product liability theory. The statutes have effectuated the merger under a variety of labels, including comparative fault, comparative responsibility and comparative "culpable conduct."<sup>63</sup> Whatever label is chosen, legislatures considering a statutory merger of the theories should enact a pure comparative system, because it is most closely compatible with the policies underlying strict product liability theory.

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58. N.Y. CIV. PRAC. LAW § 1411 (McKinney 1976).

59. *Id.*

60. MICH. COMP. LAWS ANN. § 600.2949 (West 1986).

61. COLO. REV. STAT. § 13-21-406(1) (West Supp. 1987).

62. Michigan defines product liability action as "an action based on any legal or equitable theory of liability. . . ." MICH. COMP. LAWS ANN. § 600.2945 (West 1986). Colorado defines the term as "any action brought against a manufacturer or seller of a product, regardless of the substantive legal theory. . . ." COLO. REV. STAT. § 13-21-401(2) (West Supp. 1987).

63. See *supra* notes 33-62 and accompanying text.

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