Daly v. General Motors Corp.:[1] Principles of Comparative Fault Applied to Strict Products Liability

The supreme court held that comparative fault principles apply to actions founded on strict liability. Plaintiff's contributory negligence therefore will reduce his recovery in these cases.[2] The court contended that blending strict liability and negligence in such a manner will lead to fairer treatment of litigants and that the fairness achieved will overshadow any concern for "fixed semantic consistency."[3] California thus joins an increasing number of jurisdictions that have adopted some sort of comparative fault in strict liability cases.[4]

This Note examines how the court attempted to harmonize two apparently incompatible doctrines, strict liability and comparative negligence. It then will analyze some important issues that were inadequately addressed by the court, focusing on the doctrinal content, policy framework and practical consequences of the decision. The Note concludes that the change represented by *Daly*, although requiring further clarification, is a sensible alteration of strict liability defenses.

I

THE FACTS

Kirk Daly, a 36-year-old attorney, was driving his Buick Opel at fifty to seventy miles per hour on a Los Angeles freeway when the car

1. 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978) (Richardson, J.) (4-3 decision).

2. *Daly* overruled Horn v. General Motors Corp., 17 Cal. 3d 359, 369, 551 P.2d 398, 403, 131 Cal. Rptr. 78, 83 (1976), which held that a plaintiff's contributory negligence is not a defense in strict liability cases.

3. 20 Cal. 3d at 736, 575 P.2d at 1168, 144 Cal. Rptr. at 386.

4. The following cases have accepted some version of comparative fault in strict liability actions: Edwards v. Sears, Roebuck & Co., 512 F.2d 276 (5th Cir. 1975); Sun Valley Airlines Corp. v. Avco-Lycoming Corp., 411 F. Supp. 598 (D. Idaho 1976); 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); West v. Caterpillar Tractor Co., 336 So. 2d 80 (Fla. 1976); Haney v. International Harvester Co., 294 Minn. 375, 201 N.W.2d 140 (1972); General Motors Corp. v. Hopkins, 548 S.W.2d 344 (Tex. 1977). The following cases have rejected such an approach: Melia v. Ford Motor Co., 534 F.2d 795 (8th Cir. 1976); Kinard v. Coats Co., 553 P.2d 835 (Colo. App. 1976); Kirkland v. General Motors Corp., 521 P.2d 1353 (Okla. 1974).

collided with a metal divider fence. The impact threw the driver's door open, and Daly was killed upon being ejected from the automobile. Alleging that his death was caused by a defectively designed door latch, Daly's family sued General Motors, Boulevard Buick, and other links in the Opel's distribution chain under a strict products liability theory.[5] Plaintiffs argued that the car door opened because the divider fence pressed the exposed button on the door handle. Had the handle been properly designed, plaintiffs asserted, Daly would have remained in the vehicle and survived the crash.[6]

The defense asserted that Daly's own conduct caused his death. Over plaintiffs' objections, it introduced evidence that the automobile was equipped with safety belts and door locks which, had Daly used them, would have held him in the vehicle. Further evidence indicated that Daly was intoxicated at the time of the crash.

After brief deliberations, the jury found for all defendants. Plaintiffs appealed, and the supreme court reversed, holding that comparative fault principles will be applied to future strict liability actions and to this case if retried.[7]

II

LEGAL BACKGROUND

Strict liability and comparative fault are judicially created doctrines in California. The doctrines never were applied in the same case before *Daly*. This section will briefly examine the policy foundations and historical development of the two doctrines.

A. Strict Liability

Strict liability emerged from a belief that traditional negligence law ineffectively compensated victims of product-related injuries.[8] Critics of the negligence standard argued that it unnecessarily obstructed plaintiffs' recoveries. To recover under a negligence theory, a plaintiff had to prove that his injury was proximately caused by con-

5. The other defendants were Underwriter's Auto Leasing and Alco Leasing Company.

6. The case involved a "second collision," because the defect did not cause the initial accident but was a contributing cause of the fatal injury that ensued. Defendants did not dispute the contention that Daly's injuries would have been minor had the door not opened.

7. 20 Cal. 3d at 744, 575 P.2d at 1173, 144 Cal. Rptr. at 391. The court decided that its holding should not have retroactive effect, meaning that comparative fault would not be applied to strict liability cases which had commenced prior to the finality of the court's opinion. 20 Cal. 3d at 743, 575 P.2d at 1173, 144 Cal. Rptr. at 391. This is consistent with the court's approach to retroactivity in other cases. *See, e.g.*, Li v. Yellow Cab Co., 13 Cal. 3d 804, 829, 532 P.2d 1226, 1244, 119 Cal. Rptr. 858, 876 (1975).

8. Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 364 (1965).

duct which fell below the standard of reasonable care.[9] The complexity of the manufacturing process and the number of actors involved in it, however, made it difficult for plaintiffs to prove negligence.[10] The defense of contributory negligence was also an obstacle to recovery. Proof by the defendant that the plaintiff's own negligence contributed to his injuries barred all recovery.[11] These barriers to recovery under the negligence standard had two important effects. First, manufacturers faced inadequate safety incentives.[12] The number of injuries occurring in the 1940's and 1950's suggested that plaintiffs were not recovering often enough to induce optimal levels of accident prevention investment.[13] Second, these barriers to recovery caused plaintiffs severe hardship.[14] Many plaintiffs, it was argued, were inadequately insured against injuries of this nature.[15] Unable to recover under a negligence theory, plaintiffs thus were left to their own means to cope with the loss caused by product-related injuries.[16]

Responding to this situation, the California Supreme Court established a new legal standard for products liability cases. It held in

9. RESTATEMENT (SECOND) OF TORTS § 282 (1965). A manufacturer could be found negligent for three types of conduct: (1) letting the product get into a dangerous condition; (2) failing to discover this condition; (3) failing to take steps to remedy it. *See* Wade, *A Conspectus of Manufacturers' Liability for Products*, 10 IND. L. REV. 755, 758 (1977).

10. Noel, *Manufacturers of Products—The Drift Toward Strict Liability*, 24 TENN. L. REV. 963, 977-78 (1957). For a detailed analysis of some of these difficulties, see Keeton, *Products Liability—Problems Pertaining to Proof of Negligence*, 19 SW. L.J. 26 (1965). Mitigating this problem, to some extent, was the doctrine of res ipsa loquitur. That doctrine permitted a jury to infer that the defendant was negligent where the accident was: (1) one that does not ordinarily occur in the absence of negligence; (2) caused by an instrumentality exclusively within the control of defendant; and (3) not due to any voluntary action or contribution of the plaintiff. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 39, at 214 (4th ed. 1971). On the basis of circumstantial evidence alone, then, plaintiff might still recover in negligence. There is a considerable debate as to how effective this device was in overcoming the problems of proving negligence. Some have argued that negligence bolstered by res ipsa loquitur is equivalent to a strict liability regime. *See* Keeton, *Manufacturer's Liability: The Meaning of "Defect" in the Manufacture and Design of Products*, 20 SYRACUSE L. REV. 559, 563 (1969). Others have contended that res ipsa does not reach that far. *See* Plant, *Strict Liability of Manufacturers for Injuries Caused by Defects in Products—An Opposing View*, 24 TENN. L. REV. 938, 944 (1957). In any event, negligence *without* the aid of res ipsa left plaintiffs in a difficult situation.

11. This was California law before Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975). *See, e.g.*, Buckley v. Chadwick, 45 Cal. 2d 183, 192, 288 P.2d 12, 17 (1955).

12. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1119 (1960).

13. *See* Keeton, *Products Liability—Some Observations About Allocation of Risk*, 64 MICH. L. REV. 1329, 1329-30 (1965).

14. James, *General Products—Should Manufacturers Be Liable Without Negligence?*, 24 TENN. L. REV. 923 (1957).

15. This is implicit in Justice Traynor's discussion of the virtues of strict liability in Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 461-62, 150 P.2d 436, 440-41 (1944) (Traynor, J., concurring).

16. Keeton, *supra* note 13, at 1332.

Greenman v. Yuba Power Products, Inc.[17] that "a manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being."[18] The elements of the new tort significantly differ from those of negligence. The relevant factual inquiry concerns defendant's *product*, not his conduct. To recover in strict products liability, a plaintiff must show that the injury-causing product was defective, either in *design* (when the product turned out as the manufacturer intended), or in *manufacture* (when something went wrong in the production process).[19] Fault is not the theoretical basis of this tort. A manufacturer is liable even if he exercises the utmost diligence in producing and selling the product.[20] The source of liability instead is a judicially created obligation not to market defective products.

The defenses to strict liability, based on plaintiff's conduct, were narrower than defenses in negligence cases.[21] Whereas contributory negligence—the failure reasonably to discover a defect or take precautions against its existence[22]—formerly was a complete defense in a neg-

17. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

18. *Id.* at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700. *Greenman* did not take California directly from negligence into strict liability. There was, of course, the development of res ipsa loquitur, which, according to some, held defendants liable even though they were not actually negligent. *See* note 10 *supra*. Courts also had allowed relief in the absence of negligence on a warranty theory. *See* Prosser, *Strict Liability to the Consumer in California*, 18 HASTINGS L.J. 9, 11-12 (1966). Warranty is a hybrid of tort and contract which holds a manufacturer liable for injuries resulting from the use of its product, but only if there is a direct contractual relationship. Many warranty cases, however, have not required privity of contract. *See, e.g.*, Klein v. Duchess Sandwich Co., 14 Cal. 2d 272, 93 P.2d 799 (1939). *See* Prosser, *supra* note 12, at 1124. Warranty is related to strict products liability, but the latter doctrine is not encumbered with the contractual rigidities of the former. *See* Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5, 11 (1965).

19. 59 Cal. 2d at 64, 377 P.2d at 901, 27 Cal. Rptr. at 701. In Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 134, 501 P.2d 1153, 1163, 104 Cal. Rptr. 433, 443 (1972), the court seemed to obliterate any distinction between defects of "design" and "manufacture." In Barker v. Lull Eng'r Co., 20 Cal. 3d 413, 428, 573 P.2d 443, 453, 143 Cal. Rptr. 225, 235 (1978), however, the distinction has implicitly reemerged. Moreover, it has long been recognized in scholarly commentary, *see* Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825 (1973), and has important theoretical implications, *see* Dorfman, *The Economics of Products Liability: A Reaction to McKean*, 38 U. CHI. L. REV. 92, 95-96 (1970).

20. Wade, *supra* note 18, at 13.

21. Three categories of plaintiff's conduct might have some bearing on products liability cases: (1) negligent failure to discover the defective condition (ordinary contributory negligence); (2) use of the product after discovery of the defect (assumption of risk); and (3) use of the product in a manner which could not reasonably have been foreseen by the manufacturer (unforeseeable product use). *See* Epstein, *Products Liability: Defenses Based on Plaintiff's Conduct*, 1968 UTAH L. REV. 267, 268.

22. RESTATEMENT (SECOND) OF TORTS § 402A, Comment n (1965). More generally, it has been defined as conduct which falls below the standard to which a person is required to conform for his own protection. *Id.* § 463.

ligence action,[23] it did not preclude a plaintiff's recovery in strict liability.[24] The founders of the new tort obviously were reluctant to include such a powerful barrier in view of their purpose to compensate injured persons.[25] The only defense available to a manufacturer being sued in strict liability was assumption of risk.[26] Here, if the plaintiff was *aware* of the defect and nevertheless used the product, the defendant escaped liability.[27] Recovery in strict liability cases was therefore "all or nothing," depending on whether the plaintiff had assumed the risk of a defect. Because many plaintiffs were only careless about, but unaware of, the existence of a defect, plaintiffs' prospects of receiving full recovery under strict liability were considerable.

By facilitating plaintiffs' recoveries in products liability cases, it was argued, strict liability ameliorated the shortcomings of the negligence standard. First, the number of product-related injuries probably would decrease. Higher liability costs under the new standard give manufacturers a greater incentive to make their products safe.[28] The price of defect-prone products would increase because of this liability and society therefore would allocate more of its resources to safer activities.[29] Second, strict liability promotes the goal of loss spreading.

23. Buckley v. Chadwick, 45 Cal. 2d 183, 192, 288 P.2d 12, 17 (1955).

24. Horn v. General Motors Corp., 17 Cal. 3d 359, 369, 551 P.2d 398, 403, 131 Cal. Rptr. 78, 83, (1976); Luque v. McLean, 8 Cal. 3d 136, 145, 501 P.2d 1163, 1169, 104 Cal. Rptr. 443, 449 (1972); Kassouf v. Lce Bros., Inc., 209 Cal. App. 2d 569, 572, 26 Cal. Rptr. 276, 278 (1st Dist. 1962) (warranty action). *See also* Schwartz, *Strict Liability and Comparative Negligence*, 42 TENN. L. REV. 171, 177 (1974).

25. Schwartz, *supra* note 24, at 177.

26. It has been contended that "unforeseeable product use" also is a defense to strict liability. *See e.g.*, Comment, *A California Perspective on Strict Products Liability*, 9 PAC. L.J. 775, 783 (1978). It is, however, difficult to see how this can be an independeut defense. When a consumer misuses a product in an unforeseeable manner, the product is not defective. Thus, the Coke bottle that is used to hammer a nail ordinarily would not be considered defective. The plaintiff in sueh a case simply fails to state a canse of action, meaning that the consideration of defenses never arises. Schwartz, *supra* note 24, at 172.

27. Luque v. McLean, 8 Cal. 3d 136, 145, 501 P.2d 1163, 1169-70, 104 Cal. Rptr. 443, 449-50 (1972). There are basically two forms of assumption of risk: (1) when plaintiff knows about the risk but still proceeds to encounter it (implied assumption of risk) and (2) when plaintiff knows about and *consents* to enconnter the risk (express assumption of risk). *See* W. PROSSER, *supra* note 10, at § 68; RESTATEMENT (SECOND) OF TORTS § 402A, Comment n (1965). *See also* Keeton, *Assumption of Risk in Products Liability Cases,* 22 LA. L. REV. 122 (1961).

28. The incentive in this situation is to avoid liability. As such, a manufacturer presumably would be willing to spend amounts on safety that would reduce liability by an equal or greater amount. The evidence is, however, not very clear whether strict liability affects manufacturer's incentives. One commentator has indicated that while liability has increased under strict liability, the magnitude of this increase has not been dramatic. *See* McKean, *Products Liability: Trends and Implications*, 38 U. CHI. L. REV. 3, 21-22 (1970). This, however, may be because res ipsa loquitur was achieving results similar to strict liability under the negligence regime. *See* note 10 *supra*.

29. For an excellent analysis of this resource allocation argumeut, see G. CALABRESI, THE COSTS OF ACCIDENTS 69-73 (1970).

Manufacturers, it was argued, are better loss spreaders than plaintiffs.[30] By increasing the price of the product, a manufacturer can pass on the liability cost to consumers.[31] Placing *full* liability on manufacturers for accidents caused by defective products in effect forces each consumer of the product to purchase insurance from the manufacturer to cover many injuries resulting from the use of the product.[32] Injured persons thus are compensated, with consumers sharing the cost.

The court apparently has been satisfied with the justifications for and the results achieved by strict liability. It therefore has resisted efforts over time to alter the basic elements of this tort. It continually has emphasized that strict liability focuses on defendant's product, not his conduct.[33] The court has refused to introduce fault into the structure of the tort.[34] Strict liability thus has remained conceptually distinct from negligence.

B. Comparative Fault

Comparative fault emerged from judicial dissatisfaction with the doctrine of contributory negligence.[35] That doctrine barred plaintiff's recovery in a negligence suit if the plaintiff's own negligence was a legal cause of the injury,[36] regardless of how negligent the defendant may

30. *See* Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 462, 150 P.2d 436, 441 (1944) (Traynor, J., concurring). *See also* 2 F. HARPER & F. JAMES, THE LAW OF TORTS §§ 28.15, 28.16 (1956); Jeanblanc, *Manufacturers' Liability to Persons Other Than Their Immediate Vendees*, 24 VA. L. REV. 134, 136 (1937).

31. The ability of a manufacturer to pass these costs on to consumers is a function of market power. If he is in a competitive industry, it is unlikely that he can increase prices at will in response to tort judgments, suggesting that the advocates of strict liability greatly overplayed this point. *See* Plant, *supra* note 10, at 947. In such cases, strict liability does not "spread" the loss but instead transfers it from one party (plaintiff) to another (defendant).

32. It has been emphasized that the manufacturer would not become an "insurer" for all injuries connected with his product. *See* Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 133, 501 P.2d 1153, 1162, 104 Cal. Rptr. 433, 442 (1972). He nevertheless would perform this function for a great many of them.

33. In Barker v. Lull Eng'r Co., 20 Cal. 3d at 434, 573 P.2d at 457, 143 Cal. Rptr. at 239, the court stated: "As we have indicated, however, in a strict liability case as contrasted with a negligent design action, the jury's focus is properly directed to *the condition of the product itself*, and not to the reasonableness of the manufacturer's conduct." (emphasis added.) *See also* Ault v. International Harvester Co., 13 Cal. 3d 113, 528 P.2d 1148, 117 Cal. Rptr. 812 (1974).

34. In Cronin v. J.B.E. Olson Corp., 8 Cal. 3d at 132-33, 501 P.2d at 1161-62, 104 Cal. Rptr. at 441-42, the court rejected the Restatement (Second) of Torts version of the standard of strict liability as containing an element that "rings of negligence." Section 402A states that "one who sells any product in a defective condition *unreasonably dangerous* to the user or consumer . . . is subject to liability for physical harm thereby caused." (emphasis added.) The court stated that the "unreasonably dangerous" language is at odds with the nonfault character of strict liability and would therefore not be a part of the instruction given to juries.

35. V. SCHWARTZ, COMPARATIVE NEGLIGENCE 3 (1978).

36. Buckley v. Chadwick, 45 Cal. 2d 183, 192, 288 P.2d 12, 17 (1955). This was the general rule at common law. *See* W. PROSSER, *supra* note 10, at 416.

have been.[37] As in strict liability, recovery was "all or nothing." The major difference was that contributory negligence barred plaintiff's recovery in negligence cases, but only assumption of risk barred recovery in strict liability.

In *Li v. Yellow Cab Co.*,[38] the court replaced the doctrine of *contributory* negligence with *comparative* negligence. Plaintiff's recovery under the new system is not barred, but only reduced to the extent of fault.[39] "All or nothing" recoveries in negligence suits were thereby eliminated in favor of diminished recoveries. A jury now is asked to compare the conduct of plaintiff and defendant by examining the culpability of each.[40] The jury then assigns percentages of fault to the parties, totaling 100%. Recovery is reduced by the percentage of fault attributed to the plaintiff.[41]

The *Li* court asserted that fairness motivated the adoption of a comparative fault system. The "all or nothing" approach of contributory negligence was considered harsh in its application to careless plaintiffs. It placed on one party, in Dean Prosser's words, "the entire burden of a loss for which two are, by hypothesis, responsible."[42] Comparative negligence ameliorates this by requiring each party to share in the loss to the extent of fault. This doctrine and its rationale have received considerable scholarly support.[43]

The court has been willing, however, to restrict the application of comparative fault when policy considerations so dictated. In *American Motorcycle Association v. Superior Court*,[44] the court held that the adoption of comparative fault principles in *Li* did not warrant aboli-

37. 2 F. HARPER & F. JAMES, *supra* note 30, at § 22.3. It may be presumed, however, that juries did not adhere to the instructions of the court in those situations in which it would have been inequitable to do so. *See* Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 469 (1953).

38. 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

39. The court adopted a "pure" form of comparative negligence, whereby the "assessment of liability in proportion to fault proceeds in spite of the fact that the plaintiff is equally or more at fault than the defendant." 13 Cal. 3d at 808, 532 P.2d at 1229, 119 Cal. Rptr. at 861. This can be contrasted with the "Wisconsin rule," which allows recovery only when plaintiff's fault is less than defendant's, and the "50% rule," which permits apportionment as long as plaintiff's fault is less than or equal to defendant's. *See generally* Fleming, *The Supreme Court of California, 1974-75—Foreword: Comparative Negligence At Last—By Judicial Choice*, 64 CALIF. L. REV. 239, 244-50 (1976).

40. BAJI No. 1490 (6th ed. 1977).

41. For a description of how comparative negligence works in practice, see Prosser, *supra* note 37, at 481-82.

42. W. PROSSER, *supra* note 10, at § 67.

43. *See* V. SCHWARTZ, *supra* note 35; Prosser, *supra* note 37; Schwartz, *Contributory and Comparative Negligence: A Reappraisal*, 87 YALE L.J. 697, 722 (1978).

44. 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).

tion or contraction of the joint and several liability doctrine.[45] That doctrine applies in the context of multiple defendants. It states that each defendant is individually liable for all of the plaintiff's compensable damages.[46] For example, where the plaintiff is 20% at fault, one defendant is 10% at fault, and a second defendant is 70% at fault, both defendants individually are accountable for 80% of the plaintiff's damages. This means that if a defendant is insolvent or for some other reason does not pay, the other defendant will be liable for *more* than his apportioned share of the fault.[47] Comparative fault, on the other hand, mandates that liability be assessed only to the extent of a party's fault. Thus, comparative fault would not require one defendant to bear entirely the risk of another defendant's insolvency.[48] The *American Motorcycle* court, nevertheless, believed that the policy of compensating injured plaintiffs outweighed any concern of fairness to defendants,[49] and refused to extend comparative fault principles as far as they logically might reach.

Because contributory negligence after *Li* no longer was an "all or nothing" defense in negligence cases, it was natural for the court to reconsider the exclusion of this defense from strict liability cases.[50] But the decision to apply comparative fault to strict liability would not be easy to make. First, the decision required accommodating strict liability and negligence, doctrines that had previously been distinct. Second, there was a policy conflict. The central objectives of strict liability—deterrence and loss spreading—might be significantly undercut by the application of comparative fault. Finally, precedent suggested limiting the expansion of comparative fault. *American Motorcycle* demonstrated the court's willingness to restrict the application of comparative fault when overriding policy considerations were at stake. Facing these difficulties, the court had to set priorities.

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45. *Id.* at 583, 578 P.2d at 901, 146 Cal. Rptr. at 184.

46. *Id.* at 586, 578 P.2d at 904, 146 Cal. Rptr. at 187. *See generally* W. PROSSER, *supra* note 10, at § 52.

47. *See* Schwartz, Li v. Yellow Cab Company: *A Survey of California Practice Under Comparative Negligence*, 7 PAC. L.J. 747, 763-64 (1976).

48. For there is no reason, compatible with the *Li* rationale, why a defendant should bear a share disproportionately larger to his fault than a contributorily negligent plaintiff merely because a co-defendant is unable to pay his own full share. . . . The only sound solution compatible with *Li* is, therefore, to distribute the shortfall among the solvent parties, plaintiff as well as defendant(s), in the proportion of their respective shares of the fault.

Fleming, *Report to the Joint Legislative Committee on Tort Liability of the California Legislature on the Problems Associated with* American Motorcycle Association v. Superior Court 44-45 (1978) (citations omitted) (on file at the *California Law Review*).

49. 20 Cal. 3d at 586-90, 578 P.2d at 904-06, 146 Cal. Rptr. at 186-89.

50. *See* Fleming, *supra* note 39, at 267-71.

III

THE COURT'S ANALYSIS

Writing for the majority, Justice Richardson asserted that fairness requires that comparative fault be applied to strict liability:

> We reiterate that our reason for extending a full system of comparative fault to strict products liability is because it is fair to do so. The law consistently seeks to elevate justice and equity above the exact contours of a mathematical equation. We are convinced that in merging the two principles, what may be lost in symmetry is more than gained in fundamental fairness.[51]

He argued that *Li v. Yellow Cab Co.* emphasized that "all or nothing" recoveries are inherently unjust where *both* parties bear responsibility for the injury. That case, in his estimation, compels the assumption of risk defense to strict liability to give way to a new defense which reduces a defendant's liability in proportion to plaintiff's fault.[52] This achieves greater fairness for parties in strict liability cases, he argued. It has the advantage of subjecting all plaintiffs to the same set of defenses, regardless of the theory under which they sue.[53]

The court was confronted with the argument that strict liability and negligence cannot be logically accommodated. In his dissenting opinion, Justice Jefferson[54] wrote:

> Because the legal concept of negligence is so utterly different from the legal concept of a product defective by reason of manufacturer design, a plaintiff's negligence is no more capable of being rationally compared with a defendant's defective product to determine what percentage each contributes to plaintiff's total damages than is the quart of milk with the metal bar.[55]

He argued that the relevant factual inquiries of these two doctrines differ. Whereas negligence focuses on the nature of a party's *conduct*, strict liability looks to the condition of the party's *product*. The theoretical foundation of these doctrines also differ. Negligence is based on fault: the failure to exercise reasonable care. Strict liability, on the other hand, is a no-fault doctrine. Defendants are held liable regardless of their diligence. The effort to apportion fault between a contribu-

51. 20 Cal. 3d at 742, 575 P.2d at 1172, 144 Cal. Rptr. at 390.

52. As such, the doctrine of assumption of risk was abolished to the extent that it is a form of contributory negligence. *Id.* at 742, 575 P.2d at 1172, 144 Cal. Rptr. at 390. This means that express assumption of risk will continue to be a complete defense, with implied assumption of risk merging into the contributory negligence framework. *See* Schwartz, *supra* note 47, at 755.

53. 20 Cal. 3d at 738, 575 P.2d at 1169-70, 144 Cal. Rptr. at 387-88.

54. Sitting by assignment of the Chairperson of the Judicial Council. *Id.* at 750, 575 P.2d at 1177, 144 Cal. Rptr. at 395. Justice Jefferson is an Associate Justice for the California Court of Appeal, Second District.

55. *Id.* at 752, 575 P.2d at 1178, 144 Cal. Rptr. at 396.

torily negligent plaintiff and a strictly liable defendant is, in Justice Jefferson's view, without standards—like comparing apples and oranges.[56] This analysis suggests that the majority's approach will lead to absurd results because it attempts to allocate fault to a party who may not *be* at fault.

This reasoning did not persuade the majority. Justice Richardson acknowledged that there are "semantic" distinctions between strict liability and negligence, but asserted that these doctrines could be successfully "blended or accommodated."[57] Legal concepts in this area do not have fixed definitions, according to the majority. The merger of assumption of risk and contributory negligence in *Li*[58] shows that doctrines previously considered distinct actually overlap.[59] The court refused, however, to describe the exact manner in which strict liability and negligence overlap. It instead deferred to lower courts to develop a method to accommodate these doctrines.[60]

Justice Richardson asserted that the policies supporting strict liability would not be undercut by *Daly*. A manufacturer's incentive to make products safe remains unaffected because the manufacturer cannot anticipate when a plaintiff will be negligent. The manufacturer thus must take the same safety precautions as before.[61] Nor does the holding affect plaintiff's proof burden; the plaintiff still need not prove that the defendant was negligent.[62] With respect to the goal of loss-spreading, while plaintiffs will bear some of the loss when they are contributorily negligent, the majority concluded that policy dictated that this should be so.[63]

The court also argued that the practical consequences of this decision would be manageable. It noted that federal court juries have successfully applied comparative fault in maritime cases involving strict liability.[64] Other American jurisdictions which have adopted this rule

56. *Id.* at 754-55, 575 P.2d at 1179-80, 144 Cal. Rptr. at 397-98.

57. *Id.* at 734, 575 P.2d at 1167, 144 Cal. Rptr. at 385.

58. 13 Cal. 3d at 829, 532 P.2d at 1243, 119 Cal. Rptr. at 874.

59. 20 Cal. 3d at 734-35, 575 P.2d at 1167, 144 Cal. Rptr. at 385.

60. "The problems are more appropriately resolved at the trial level in a practical manner instead of a theoretical solution at appellate level." *Id.* at 742-43, 575 P.2d at 1172, 144 Cal. Rptr. at 390.

61. *Id.* at 737-38, 575 P.2d at 1169, 144 Cal. Rptr. at 387.

62. *Id.* at 736-37, 575 P.2d at 1168, 144 Cal. Rptr. at 386.

63. *Id.* at 737, 575 P.2d at 1168-69, 144 Cal. Rptr. at 386-87.

64. The court was referring, in particular, to the doctrine of "unseaworthiness." *See, e.g.*, Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 408-09 (1953); Price v. Mosler, 483 F.2d 275, 277 (5th Cir. 1973) ("[n]either contributory negligence nor assumption of risk is an absolute maritime defense; rather these defenses are applicable only in conjunction with the maritime rule of *comparative fault*." (emphasis added)).

also apparently found it workable.[65] The court said it was confident that juries could capably apportion liability where there are several defendants in a strict liability suit, all of whom are part of the product's distribution chain.[66]

The court concluded by setting forth an impressive list of scholarly commentary on this subject. Its research showed that most commentators[67] and most other courts that have considered the issue[68] support the position advanced in *Daly*.

IV

ANALYSIS

Justice Richardson's majority opinion in *Daly* was lengthy. It failed, however, to discuss several important questions and was unpersuasive when it did discuss others. The doctrinal content, policy implications, and practical consequences of the holding need further analysis.

The major doctrinal question posed by *Daly* is this: how will a jury apportion fault between plaintiff and defendant in strict liability cases in which, by hypothesis, the defendant need not be negligent at all? The court failed to offer any reliable guidelines. The opinion is ambiguous, for example, on whether a comparison between plaintiff and defendant is required to apportion fault. One might interpret the court as saying that no comparison is necessary. Justice Richardson stated: "We pause at this point to observe that where, as here, a consumer or user sues the manufacturer or designer alone, *neither fault or conduct is compared functionally*."[69] He added that the court would have preferred to call its doctrine "equitable apportionment or allocation of loss," which does not suggest a comparison, but decided on "comparative fault" simply because it is the accepted terminology.[70]

65. *See, e.g.*, Dippel v. Sciano, 37 Wis. 2d 443, 460-62, 155 N.W.2d 55, 64 (1967), where the Wisconsin Supreme Court held that strict liability was nothing more than negligence per se and therefore subject to comparative fault principles: "Comparison of the failure to exercise ordinary care and negligence per se is so common and widely approved in our jurisdiction as to need no citation."

66. 20 Cal. 3d at 739, 575 P.2d at 1170, 144 Cal. Rptr. at 388.

67. *Id.* at 740-41, 575 P.2d at 1171, 144 Cal. Rptr. at 389. *See, e.g.*, Brewster, *Comparative Negligence in Strict Liability Cases*, 42 AIR L. & COM. 107, 109-17 (1976); Noel, *Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk*, 25 VAND. L. REV. 93, 117-18 (1972); Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 850 (1973).

68. 20 Cal. 3d at 740, 575 P.2d at 1170-71, 144 Cal. Rptr. at 388-89. The court argued that two of the three decisions which declined to apply comparative fault to strict liability did so because of express statutory prohibition.

69. *Id.* at 736, 575 P.2d at 1168, 144 Cal. Rptr. at 386.

70. *Id.*

On the other hand, one might read the opinion as mandating a comparison. First, Justice Richardson argued that "we do not permit plaintiff's own conduct *relative to* the product to escape unexamined,"[71] suggesting that these elements should be considered together. Second, it seems anomalous that the court would choose to label its doctrine *comparative* fault if it actually intended to avoid comparison. Finally, the dissenting opinions speak exclusively of a comparison between plaintiff and defendant,[72] indicating that this prospect was contemplated by several justices. All of this reveals that the court has yet to settle on a particular method for putting its holding into effect.

If comparative fault is to be fairly and consistently applied to strict liability, the court eventually must resolve the ambiguities found in *Daly*. The majority apparently assumed that it is self-evident how juries will apportion fault between a contributorily negligent plaintiff and strictly liable defendant. This is a large assumption. First, it is still not entirely clear whether comparative fault can be logically applied in this context. And even if it can, it should not be expected that judges and juries will develop a consistent method of doing so in the absence of explicit guidelines from the supreme court.[73]

The fairness that this holding allegedly brings to strict liability

71. *Id.* at 737, 575 P.2d at 1169, 144 Cal. Rptr. at 387.

72. "The majority rejects what I consider to be a sound criticism of its holding—that it is illogical and illusory to compare elements or factors that are not reasonably subject to comparison." *Id.* at 751, 575 P.2d at 1178, 144 Cal. Rptr. at 396 (Jefferson, J.); "If comparative negligence is to be applied, how can the trier of fact rationally weigh the conduct of the plaintiff against the defective product?" *Id.* at 762, 575 P.2d at 1185, 144 Cal. Rptr. at 403 (Mosk, J.).

73. In this failure to articulate a method the California Supreme Court is not alone. Though all of the other state and federal court decisions which have applied comparative fault in this context have claimed that its application poses no problems, few have precisely defined how it works. In Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967), the court argued that strict liability is nothing but negligence per se and thus can easily be accommodated with comparative fault. Labeling strict liability in this fashion, however, does not solve the problem of how exactly the contributorily negligent plaintiff and strictly liable defendant will be compared. In Hagenbuch v. Snap-On Tools Corp., 339 F. Supp. 676 (D.N.H. 1972), the court relying on the "strict liability is negligence per se" argument of *Dippel* found the plaintiff in this case 20% at fault for his injury, but gave no explanation of how it achieved this result. In Butaud v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42, 46 (Alas. 1976), the court placed this issue squarely in the hands of the jury: "It is not anticipated that the trier of fact will have serious difficulties in setting the percentage that the damages would be reduced as a result of the comparative negligence of the plaintiff." The court itself offered no further guidance on how to accomplish this. *See also* Edwards v. Sears, Roebuck & Co., 512 F.2d 276, 280 (5th Cir. 1975) ("damages could be recovered but must be reduced in proportion to the extent to which decedent's negligence contributed to the accident") (without further instruction); Haney v. International Harvester Co., 294 Minn. 375, 386, 201 N.W.2d 140, 146 (1972) ("[t]he trial court should include a determination of the percentage of negligence as between employee Haney . . . and International Harvester") (without further instruction). *But see* General Motors Corp. v. Hopkins, 548 S.W.2d 344, 352 (Tex. 1977) ("the trier of fact must then determine the respective percentages (totaling 100%) by which these two concurring causes contributed to bring about the event").

cases and the policy objectives of strict liability which have been undercut as a result must be examined. The court adequately discussed some of the fairness arguments that support its holding.[74] It failed, however, to offer a thorough analysis of the toll this has taken on the loss-spreading and deterrence rationales of strict liability. Comparative fault principles, which apportion liability between the parties, conflict with the loss spreading rationale, whose goal is to place full liability on the better loss spreader.[75] And though the court argued that a manufacturer's safety incentives will not be affected by its holding, it is difficult to see how these incentives can possibly remain the same given the decrease in liability which results from *Daly*.[76]

The practical consequences of this decision also are uncertain. The court argued that lower courts are capable of competently managing the application of comparative fault to strict liability. It remains to be seen, however, whether defendants will take undue advantage of their ability to show contributory negligence under *Daly* and how liability will be allocated when more than one defendant is strictly liable.

The remainder of this Note analyzes the court's holding along these lines.

A. Doctrine

The method for reducing a plaintiff's recovery to the extent of fault in strict liability cases in California has yet to be chosen. Remarkably, few of the other state and federal courts that have adopted comparative fault have articulated precisely how that principle should be put into effect.[77] This is surely because of the inherent difficulty of sensibly blending strict liability and negligence concepts.

The dissent in *Daly* argued that the court's holding necessarily requires comparing a plaintiff's negligent conduct with a defendant's defective product.[78] In *Daly*, for example, a jury would apportion fault between the parties by comparing Daly's careless driving with the Opel's defective door latch. The dissenting justices said they could not rationally compare the two, because negligence and strict liability concepts cannot be accommodated.[79] Short of totally restructuring either

74. *See* text accompanying note 51 *supra*.

75. In implicitly rejecting the validity of loss spreading, the court failed to analyze what shortcomings this scheme may have. 20 Cal. 3d at 737, 575 P.2d at 1169, 144 Cal. Rptr. at 387. Indeed, *Daly* is but one example of a general judicial reluctance to challenge the justifications for loss spreading first articulated by Justice Traynor in *Escola*.

76. To the extent that liability costs affect a manufacturer's safety precautions, the court's conclusion is erroneous.

77. *See* note 73 *supra*.

78. *See* note 72 *supra*.

79. *See* text accompanying notes 54-56 *supra*.

doctrine, the dissenters argued, it was impossible to develop a principled method of reducing a plaintiff's recovery to the extent of his fault.

These arguments have some merit. Traditionally, negligence and strict liability have been perceived in California as distinct.[80] In moving from this traditional understanding, the court had an obligation to explain how these doctrines logically can be blended.

This flaw in the court's opinion, however, does not necessarily invalidate its holding. The dissenting justices may have condemned too quickly the application of comparative fault to strict liability. Unduly constrained by the traditional understanding of negligence and strict liability, the dissenters were unwilling to search for a "common denominator" between these doctrines.[81]

Several methods can be developed which might permit a sensible application of comparative fault in strict liability cases. The result in *Daly* should not be rejected without first considering the merits of these techniques.

1. No Comparison

One possibility is to reduce plaintiff's recovery by examining only plaintiff's conduct.[82] This approach avoids any comparison between plaintiff and defendant, requiring a jury instead to focus on the plaintiff's culpability. The strictly liable defendant, under this method, begins liable for 100% of the damages. A jury then would examine plaintiff's contributing conduct and reduce this liability by whatever percentage it believed plaintiff was at fault for the accident.[83] Thus if the jury concluded that plaintiff was 20% at fault, defendant would be liable for 80% of the damages. Though defendant is held responsible for 80% of plaintiff's damages, defendant is not considered 80% at fault—at no point in the allocation of liability is fault ever attributed to him.[84]

This approach is a simple way of apportioning liability. First, by apparently obviating the need to develop a comparison between the negligent plaintiff and strictly liable defendant, it seems to overcome

80. *See* notes 33-34 *supra*.

81. This was the term used by Justice Jefferson in rejecting this possibility. 20 Cal. 3d at 755, 575 P.2d at 1180, 144 Cal. Rptr. at 398.

82. *See* Levine, *Buyer's Conduct as Affecting the Extent of Manufacturer's Liability in Warranty*, 52 MINN. L. REV. 627, 653 (1968); Twerski, *The Use and Abuse of Comparative Negligence in Products Liability*, 10 IND. L. REV. 797, 806-07 (1977). *See also* Schwartz, *Strict Liability and Comparative Negligence*, 42 TENN. L. REV. 171 (1974).

83. Levine, *supra* note 82, at 653.

84. *See, e.g.*, Hagenbuch v. Snap-On Tools Corp., 339 F. Supp. 676 (D.N.H. 1972), where the court allocated 20% of the fault to plaintiff but did not contend that defendant was 80% at fault for the injury.

the dissent's "apples and oranges" dilemma. Negligence and strict liability concepts are not blended under this method. A related advantage of this approach is its retention of the no-fault character of strict liability. Strict liability holds defendants liable without considering the reasonableness of their conduct.[85] Because defendant can be held liable even though due care has been exercised,[86] a method which attributes a percentage of fault to him is inherently unsound. By apportioning liability between the parties solely on the basis of plaintiff's fault, this method seems to avoid such an uncomfortable result.

This approach, unfortunately, is flawed because it only *appears* to avoid the dilemma of assigning fault to a strictly liable party. When an injury takes place in which fault is involved, either one of the parties is completely at fault, or the two, together, share the entire fault.[87] Thus, when plaintiff is assigned less than one hundred *per cent* of the fault for an accident, defendant, by definition, is responsible for the remainder.[88]

In short, it is impossible to allocate a *percentage* of fault to the plaintiff without performing a comparison with defendant. A plaintiff's negligent conduct does not inherently indicate a particular percentage of fault. In order to assess the extent to which he is at fault for an injury, his conduct must be evaluated against a standard. This can be illustrated by the typical comparative negligence situation in which both parties are at fault. A jury apportions fault by examining and judging the conduct and culpability of each.[89] The defendant's fault provides the standard against which plaintiff's fault is assessed, and vice versa. Were the jury to look only at one of the parties, it could not make a sensible allocation.[90]

The same difficulties exist when one party is negligent and the other strictly liable. In the present case, the defense offered evidence that Daly failed to use the car's safety devices and was intoxicated at the time of the crash. From this, a jury could conclude that he was negligent. But it is impossible for a jury to assign Daly a specific per-

85. *See* text accompanying notes 17-20 *supra*.

86. RESTATEMENT (SECOND) OF TORTS § 402A(2)(a).

87. Where defendant, bnt not plaintiff, is negligent, defendant is 100% at fault. Where plaintiff is contributorily negligent but the defendant is not negligent, the plaintiff is 100% at fault. And where defendant is negligent and plaintiff is contributorily negligent, the two of them combined are 100% at fault.

88. For a discussion of this in the context of comparative negligence, see Prosser, *supra* note 37, at 482.

89. W. PROSSER, *supra* note 10, at § 67.

90. The court in American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 589 n.2, 578 P.2d 899, 906 n.2, 146 Cal. Rptr. 182, 189 n.2 (1978), adopted this viewpoint: "In determining to what degree the injury was due to the fault of the plaintiff, it is logically essential that the plaintiff's negligence be weighed against the combined total of all other causative negligence."

centage of fault for this accident without considering defendant's conduct or product. Absent a comparison, a jury finding that Daly was 90% at fault for the accident is no more compelling than an answer that he was 5% at fault.[91] Thus the *Daly* dissent correctly concluded that the majority's holding requires comparing plaintiff and defendant.

Numerous difficult questions are raised in developing a sensible comparison between the parties. First, it must be determined what *aspects* of the parties are to be compared. One might attempt to compare plaintiff's conduct with defendant's product, as the dissent thought would happen, or plaintiff's conduct with the defendant's conduct. Second, it must be determined on what *basis* the parties are to be compared. Fault, for example, might be the foundation of comparison. This creates the possibility, however, that strict liability could not remain a no-fault doctrine and would instead merge into the negligence framework.[92] The next three alternatives attempt to formulate a rational comparison by exploring whether there is a common denominator between the doctrines of strict liability and negligence.

2. *The Strictly Liable Defendant Is Negligent*

One approach is to argue that a defective product probably is the result of the manufacturer's negligence.[93] Somewhere in the design and production process, a careless act resulted in the marketing of a dangerous product.[94] An injured plaintiff would be unlikely to recover under a negligence theory only because of the insurmountable proof obstacles created by the negligence standard. Strict liability, in this view, permits plaintiffs to recover in cases in which they would have prevailed under negligence, but for these proof obstacles.[95] It does not purport to hold defendants liable without fault.[96] A defendant who is found strictly liable, then, is assumed to have been negligent.

If the manufacturer's negligence is the source of the product's defect, it is feasible to compare the plaintiff and defendant. A jury would compare defendant's negligent conduct with plaintiff's on a *fault* basis, and assign a percentage of fault to each, totaling 100%. Because strict liability is seen as a "fault" doctrine, there is no theoretical difficulty in

91. 20 Cal. 3d at 748, 575 P.2d at 1176, 144 Cal. Rptr. at 394 (Clark, J., concurring). Justice Clark argues that no standard exists in most cases. *See* text accompanying notes 143-45 *infra*.

92. *See* Comment, *supra* note 26, at 801.

93. *See* Twerski, *supra* note 82, at 799.

94. *See* Keeton, *supra* note 13, at 1339. Professor Keeton contends that common experience indicates that defects are likely to have been caused by a manufacturer's negligence, and that this justified the use of res ipsa loquitur in cases brought under a negligence theory.

95. *See* Twerski, *supra* note 82, at 799. *See also* Comment, *supra* note 26, at 786.

96. Horn v. General Motors Corp., 17 Cal. 3d at 374, 551 P.2d at 406, 131 Cal. Rptr. at 86 (Clark, J. concurring).

allocating fault to a strictly liable defendant. The comparison envisioned by this approach is, in fact, no different from that carried out in comparative negligence cases, where both parties have been found negligent by the jury.

The premise that a strictly liable defendant is negligent may be valid. One commentator has noted that in design defect cases, "[w]hatever is enough to show a "defective design" under the *Cronin* approach would also be sufficient to show negligence on the part of the manufacturer."[97] Though *Cronin v. J.B.E. Olson Corp.*[98] explicitly rejected the Restatement of Torts definition of a defective product—one which is "unreasonably dangerous"—because it "rings" of negligence,[99] the court failed to establish a clear distinction between the design defect and negligence standards.[100] A jury, it seemed, still would have to examine the reasonableness of a manufacturer's design choice to determine if the product was defective.

Recently in *Barker v. Lull Engineering Co.*,[101] however, the court clarified its definition, stating that a product is defective in design if:

> (1) the plaintiff proves that the product failed to perform as safely as an ordinary consumer would expect . . . or (2) . . . the defendant fails to prove, in light of the relevant factors, that on balance the benefits of the challenged design outweigh the danger of the risk inherent in such design.[102]

Part (2) of the new standard elicits "balancing" considerations analogous to the negligence inquiry.[103] The same cannot be said of part (1). A product may "fail to perform as an ordinary consumer would expect" even when it has been carefully designed.[104] Thus it is probably no longer accurate to contend that the design defect and negligence standards always produce the same results.

This method also fails to describe adequately manufacturing defect cases. Manufacturing defects are not always caused by someone's

97. Wade, *supra* note 19, at 836. Professor Wade did not offer any details on how the two standards would always arrive at the same results.

98. 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972).

99. *See* note 34 *supra*.

100. *See* Barker v. Lull Eng'r Co., 20 Cal. 3d 413, 417, 573 P.2d 443, 446, 143 Cal. Rptr. 225, 228 (1978).

101. 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).

102. *Id.* at 427, 573 P.2d at 452, 143 Cal. Rptr. at 234.

103. *See* Marschall, *An Obvious Wrong Does Not Make A Right: Manufacturers' Liability for Patently Dangerous Products*, 48 N.Y.U.L. REV. 1065, 1095 (1973).

104. "Expectations as to safety will not always be in line with what the reasonable manufacturer can achieve because the average consumer will not have the same information as experts in the field. Consumer expectations may be too high or too low." Fischer, *Products Liability—The Meaning of Defect*, 39 MO. L. REV. 339, 349-50 (1974).

negligence. Mishaps occur on assembly lines which cannot be prevented with reasonable diligence.[105] Even though a manufacturer would be accountable under a strict liability theory for injuries resulting from such defects, the manufacturer would not be liable under a negligence standard.

A practical difficulty with the "presumption of negligence" rationale is that it leaves juries guessing about what conduct of defendant led to the defect. This approach requires a jury to compare plaintiff's contributory negligence with defendant's negligent conduct, but it does not offer a way to identify that conduct. As noted earlier, it is difficult to demonstrate specific acts of negligence on assembly lines.[106] Thus the jury would be forced to speculate about the nature and culpability of the manufacturer's conduct based only on the existence of the defect. This is hardly a rational way to apportion fault.

The argument that a strictly liable defendant is negligent fails, then, both as a theoretical proposition and as a practical solution to the "apples and oranges" dilemma. The manufacturer is held under strict liability to a higher standard of care than under negligence. Moreover, in view of the minuscule practical benefits of thinking about strict liability in this manner, it seems preferable to search for more promising ways of finding a common denominator between these doctrines.

3. The Strictly Liable Defendant Is "Constructively" Negligent

Another approach treats the strictly liable defendant as "constructively" negligent. This is done by defining the strict liability concept of product "defect" in negligence terminology. According to Professors Wade and Keeton, a product is defective only if the manufacturer *would have been negligent* for marketing it *had he known* of its condition and appreciated the risks it created.[107] Thus to determine whether a product is defective, a jury must impute this knowledge to the manufacturer and ask whether he would have been negligent for marketing it in that condition.[108] The difference between strict liability and negli-

105. Most commentators, in acknowledging that strict liability holds defendants liable even when they have exercised due care, are implicitly in accord with this viewpoint.

106. *See* text accompanying note 7 *supra*.

107. Keeton, *Manufacturer's Liability: The Meaning of "Defect" in the Manufacture and Design of Products*, 20 SYRACUSE L. REV. 559, 568 (1969); Wade, *supra* note 19, at 834-35.

108. In the case of manufacturing defects, knowledge of the *defective condition* would be imputed. *See* Wade, *supra* note 18, at 15. Thus if an automobile comes off the assembly line with an improperly constructed axle, the manufacturer would be treated as if he knew about this at the time of sale. In the case of design defects, knowledge of the defective condition and all of the risks found to exist at the time of the trial would be imputed. *See* Keeton, *supra* note 107. For example, in *Daly*, knowledge of the objective possibility that a metal divider fence would hit the Opel's door latch would be imputed to General Motors.

gence, then, is only a matter of knowledge or "scienter."[109] Although the strictly liable defendant is not necessarily negligent, by imputing knowledge of the defect to him, his marketing the product is "constructive" negligence.

This understanding permits the parties to be compared rationally. The total fault for the injury would be apportioned based on a comparison of plaintiff's negligence and defendant's constructive negligence. Plaintiff's recovery of damages would be reduced by the percentage attributed to him.

This approach offers several advantages. Unlike the previous method, it does not consider the strict liability defendant to be negligent.[110] The defendant is assigned a percentage of "fault" for the accident, but only to reduce plaintiff's recovery. Whether defendant is liable at all continues to be determined under traditional strict liability standards unrelated to fault.

A second advantage is that this method does not force juries to speculate what conduct of the manufacturer was negligent. The previous approach required a jury to focus on specific acts of negligence which often cannot be ascertained.[111] This method asks a jury to evaluate what defendant's negligence in *marketing* the product would be if he knew of the defect. That inquiry poses no evidentiary difficulties.

The overriding problem with this approach is its artificiality. It technically overcomes the "apples and oranges" dilemma by comparing plaintiff's fault with defendant's constructive fault. But liability should not be apportioned between the parties according to how negligent the defendant *would have been* had he known about the defect or the risks it presented. A defendant's "constructive" negligence neither corresponds to defendant's actual fault in marketing the product, nor to the danger created by his actions. *Constructive* negligence is thus unrelated to any of the reasons why society might want to hold the defendant liable. Consequently, this method of apportioning liability fails to serve the underlying goals of tort liability.[112]

4. Norm Deviation

Another argument is that negligence and strict liability are similar in the sense that each creates a norm, deviation from which results in liability or diminished recovery. Plaintiff's norm, under comparative

109. Wade, *supra* note 18, at 15-16.

110. Holford, *The Limits of Strict Liability for Product Design and Manufacture*, 52 TEXAS L. REV. 81, 92-3 (1973) (discussing the Wade-Keeton analysis).

111. *See* text accompanying note 106 *supra*.

112. One scholar believes the goals are fairness and the reduction of accident costs. *See* G. CALABRESI, *supra* note 29, at 24.

fault principles, is to exercise reasonable care in self-protection.[113] When contributorily negligent, a plaintiff deviates from the norm and, accordingly, receives only partial recovery. Defendant's norm, as defined by the strict liability standard, is to market products which are free from design and manufacturing defects.[114] Deviation from this norm occurs when a product is defective.[115] Defendant is therefore liable for any resulting injuries.

The deviations from the norm by plaintiff and defendant permit comparison to apportion liability.[116] Plaintiff's deviation is measured by the extent to which his conduct differed from that of a reasonable person under the circumstances.[117] Defendant's deviation is measured by the extent to which the product differed from a product free from manufacturing or design defects.[118] The jury would compare plaintiff's deviation with defendant's deviation and assign a percentage of liability to each, totaling 100%, according to their *relative* degrees of deviation.[119] For example, a plaintiff who deviated significantly from the

113. RESTATEMENT (SECOND) OF TORTS § 282 (1965).

114. Ault v. International Harvester Co., 13 Cal. 3d at 124, 528 P.2d at 1155, 117 Cal. Rptr. at 819 (Clark, J., dissenting).

115. A defective product is "one which fails to match the quality of most like products, and the manufacturer is then liable for injuries resulting from *deviations from the norm.*" Jiminez v. Sears, Roebuck & Co., 4 Cal. 3d 379, 383, 482 P.2d 681, 684, 93 Cal. Rptr. 769, 772 (1971) (emphasis added).

116. The rudiments of this viewpoint can be found in Justice Clark's *Ault* and *Horn* opinions. He argues that strict liability is a fault doctrine in the sense that "plaintiff must show that something was wrong with the product even though he need not prove negligence. Defendant is held liable *only* when he has breached his duty not to market a defective product—thus only when he is at 'fault.'" In this view, fault acquires an expanded meaning large enough to incorporate both negligence and strict liability, making the application of comparative fault principles possible. For Justice Clark's view of how plaintiff's recovery should be reduced in these cases, see text accompanying note 143 *infra*. Norm deviation has been suggested by others. *See* W. PROSSER, *supra* note 10, at § 75 ("[t]here is a broader sense in which fault means nothing more than a departure from a standard of conduct . . . and if the departure is an innocent one, and the defendant cannot help it, it is none the less a departure, and a social wrong"); Fleming, *supra* note 39, at 270 (strict liability can be seen as "social fault"). For clarity, this section will use the terminology "norm deviation" instead of Justice Clark's "fault." It seems unnecessary to distort the traditional meaning of fault—failure to exercise reasonable care—to develop this approach.

117. For example, using the facts in *Daly*, the jury would examine Daly's driving at excessive speeds while intoxicated against how the hypothetical reasonable person would have driven that evening (surely in a state of sobriety at speeds under the legal maximum).

118. *See* Twerski, *supra* note 82, at 807-08. Note that defendant's conduct has no bearing upon his deviation. This is because the strict liability standard does not focus on defendant's conduct. Manufacturers and other products liability defendants are held liable regardless of the reasonableness of their conduct. Thus, it is necessary to gauge defendant's norm deviation by analyzing the product.

119. The comparison envisioned here is a perfect analog to comparative negligence cases in which both parties are negligent. Just as in comparative negligence, where the parties are jointly responsible for 100% of the fault, here they are jointly responsible for 100% of the norm deviation. Similarly, plaintiff and defendant are compared to allocate specific percentages of norm deviation which, in turn, determine their liability.

norm would be allocated the lion's share of liability if, in comparison, the product's defect was only slight.[120] Plaintiff's recovery would be reduced by his percentage share of liability.

Two critical questions are raised by this approach. First, can these deviations be measured with any precision?[121] Second, even if measurable, can they be compared on a *common scale* to allocate liability rationally? This Note argues that deviations from standard of care and product quality norms are subject to measurement and comparison.

a. Measurement of Deviation from Norms

A closer analysis of the meaning of negligence (fault) and defectiveness is necessary to determine whether deviations from norms are susceptible of measurement. A party is negligent in Learned Hand's terminology when the gravity of the accident his conduct might cause, discounted by the probability of the accident's occurrence, exceeds the burden to him of avoiding the accident.[122] In economic terms, a party is at fault when the cost of accidents his activity will produce exceeds his avoidance cost.[123] Society expects persons to behave so that the accident costs of their activities are less than or equal to the cost of preventing the accidents. The more persons deviate from this ideal—*i.e.*, the more the accident costs of activities exceed the cost of avoiding the accidents—the more they are at fault.[124] Thus the extent of fault

120. This is, in fact, how the jury might have come out in *Daly* had it received norm deviation instructions.

121. Fault and defectiveness are themselves rather vague concepts.

122. "[I]f the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P; *i. e.*, whether B<PL." United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947). This is the so called risk-benefit rule. Judge Hand himself recognized the limitations of this equation. *See* Moisan v. Loftus, 178 F.2d 148, 149 (2d Cir. 1949). There are inherent difficulties in applying a numerical test such as this to a subject matter that is incapable of quantitative evaluation. For example, how does one place precise dollar figures on the value of a human life? Nevertheless, in terms of assessing the reasonableness of conduct, this is what a jury has to consider. Despite its flaws, the Hand formula remains a valid definition of fault.

Hand, in using this formula, was referring specifically to the negligence of a defendant. The Hand formula applies equally well to the contributory negligence of a plaintiff.

123. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972). Posner views the Hand formula (B<PL) as an economic principle. The PL side of the equation represents the cost of the accident. B represents the cost to the party of avoiding it.

124. A simple illustration will demonstrate this. Consider a given party in three situations. In all three, assume that the accident cost his activity will create is $1000 (PL). In case 1, the cost to him of avoiding it (B) is $1000; in case 2, it is $500; and in case 3, it is $100. He is not at fault in case 1. The cost of avoiding the accident ($1000) is the same as the accident cost, thus society should be indifferent to his choice of whether to avoid or go ahead with his activity. In case 2, he is clearly at fault. By spending $500, he could have saved society $1000, a net saving of $500. In case 3, he is even *more* at fault than he is in case 2. By spending $100, he could have saved society $1000, a net saving of $900 (as opposed to $500 in case 2). His conduct in case 3 was more unreasonable than it was in case 2.

(and, consequently, the extent of deviation) is a function of the difference between the cost of the activity's accidents and the cost of avoiding them.[125]

A product is defective in the legal sense when it fails to comply with the defective product standard.[126] The way to measure the degree of defectiveness is by determining how much more dangerous the product is because of the defect.[127] Each product has associated with it a level of danger, which can be expressed in terms of the gravity of the accident that will occur, discounted by the probability of the accident's occurrence.[128] In economic terms, each product has a level of accident costs associated with it. For a defective product, either the seriousness of the accident or the probability of the accident's occurrence, or both, are greater than they would be for a normal product.[129] The danger posed by the product—its level of accident costs—is therefore correspondingly greater.[130] The difference between the accident costs associated with the defective product and the costs posed by a normal product measures the defendant's deviation from the norm.[131]

b. Comparing Deviations

Can the deviations be logically compared? A common scale of measurement is needed. Plaintiff's norm deviation is the difference between the accident costs of his activity and his avoidance cost.[132] Defendant's norm deviation is the difference between the level of accident costs associated with the defective product and the level of accident costs associated with a normal product.[133] Both are expressed in dol-

125. In other words, one would look to the equation PL − B.

126. For design defect cases, this is the *Barker* standard. *See* text accompanying note 102 *supra*. For manufacturing defect cases, it is the manufacturer's own quality standard (an "internal" standard). *See* Twerski, *From Defect to Cause to Comparative Fault—Rethinking Some Product Liability Concepts*, 60 MARQ. L. REV. 297, 302-03 (1977).

127. The Restatement (Second) of Torts § 402A defines a product as defective when it is "unreasonably dangerous," suggesting that the danger presented is one way of distinguishing a defective from a normal product. Though California has rejected the unreasonably dangerous language for purposes of determining liability, *see* note 34 *supra*, this ground for distinguishing between products remains valid.

128. In Hand's terminology, PL represents the level of danger.

129. Thus an automobile with a defective steering mechanism is more likely to cause an accident than its normal counterpart (the "P" in the Hand expression has increased). And a car with an improperly placed gas tank, though not more likely to cause an accident, will lead to a more serious accident if one results (the "L" in the Hand expression has increased).

130. $(PL)_{defective} > (PL)_{normal}$.

131. $(PL)_{defective} - (PL)_{normal}$.

132. PL −B. In most products liability cases, the cost to plaintiff of avoiding the accident (B) is negligible. For example, the burden that Kirk Daly would have incurred by foregoing his drunken driving at excessive speeds probably was zero. Thus the only relevant figure to focus on in these cases is the accident cost plaintiff's negligent activity creates (PL).

133. $(PL)_{defective} - (PL)_{normal}$.

lars,[134] so the deviations can be compared on a dollar scale.[135] A party's share of the liability is determined by dividing his deviation by the sum of the parties' deviations.[136] This yields a specific percentage of liability for each, totaling 100%. Plaintiff's recovery of damages is then reduced by the percentage of liability allocated to him.[137]

This is probably the most natural way of accommodating strict liability and negligence. The first method of comparison forced strict liability into a negligence framework;[138] the second created an artificial mechanism for comparison.[139] This one relies on the fact that strict liability and negligence have something in common—both mandate norms. There is some evidence that the judicial response to *Daly* may be in line with this approach.[140]

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134. This is not to argue that in the real world, actual dollar figures would be calculated by a jury for these deviations. *See* note 122 *supra*. Nevertheless, the ability to describe the deviations in these terms is important in determining whether they can be rationally compared.

135. Every dollar represents a unit of deviation from the norm. Thus, if PL − B for plaintiff is $1000, and $(PL)_{defective} - (PL)_{normal}$ for defendant is equal to $500, plaintiff's deviation is twice as great as defendant's.

136. Using the example in note 135 *supra*, plaintiff's share of the liability would be:

$$= \frac{PL - B}{[PL - B] + [(PL)_{defective} - (PL)_{normal}]}$$

$$= \frac{1000}{1000 + 500}$$

$$= 66.6\%.$$

Defendant's share would be

$$= \frac{(PL)_{defective} - (PL)_{normal}}{[PL - B] + [(PL)_{defective} - (PL)_{normal}]}$$

$$= \frac{500}{1000 + 500}$$

$$= 33.3\%.$$

137. In the example raised in note 135 *supra*, plaintiff would recover only 33.3% of his damages, because he was allocated 66.6% of the liability.

138. *See* text accompanying notes 93-106 *supra*.

139. *See* text accompanying notes 107-12 *supra*.

140. *See, e.g.*, Safeway Stores, Inc. v. Nest-Kart, 21 Cal. 3d 322, 326 n.1, 579 P.2d 441, 442 n.1, 146 Cal. Rptr. 550, 551 n.1 (1978), where the trial court's instructions to the jury on how to compare negligent and strictly liable parties resembled a norm deviation approach: "If you find that Plaintiff is entitled to recover from any of the Defendants, and with the Defendants whose fault proximately contributed to the Plaintiff's injuries being 100%, what proportion of such combined fault is attributable to each Defendant found liable. The word 'fault' as used herein means a defective product or negligence which was a proximate cause of the accident." The trial judge used the term "fault" in a distorted manner, *see* note 116 *supra*, but nevertheless conveyed to the jury that a defective product involves a deviation comparable to that of the negligent party. Interestingly, the *Daly* majority at one point used language which could be construed as moving toward this approach. The court cited the Uniform Comparative Fault Act, which states: " 'Fault' includes acts or omissions . . . that subject a person to strict tort liability." *Id.* § 1(b). The court

This approach is also principled. The norms which negligence and strict liability create for the parties are designed to prevent unnecessary accidents.[141] Deviation from the norm results in liability or a reduction in recovery, which will motivate individuals to take safety precautions. As between a negligent plaintiff and strictly liable defendant, the one who has deviated more from the relevant norm needs the stronger safety incentive and, thus, should bear a greater share of liability. The norm deviation approach achieves such a result. Thus this method promotes a primary objective of tort liability—accident prevention[142]—through the safety incentives it creates.

5. Fixed Reductions

A final alternative is to establish a fixed percentage reduction of contributorily negligent plaintiffs' recoveries in all cases. This was advocated by Justice Clark in his concurring opinion in *Daly*.[143] He contended that all comparisons, even ones in which both parties are negligent, are standardless and result in arbitrary verdicts.[144] The solution, in his view, is to take away apportionment of liability from the jury. The jury still would be asked to determine whether or not the plaintiff was contributorily negligent. Once that determination had been made, however, the trial court would reduce plaintiff's recovery by a fixed percentage. Justice Clark hoped that the legislature would intervene to establish this percentage reduction, but in the absence of such action, the supreme court could itself create a standard reduction.[145]

This method may have several advantages. First, it eliminates any need to compare the parties. The plaintiff's recovery is reduced by the fixed percentage whenever the plaintiff is at fault. It is arguably preferable to treat all plaintiffs the same where the only alternative is to place them at the mercy of a jury that lacks appropriate guidelines or is incapable of applying them. (If, however, the norm departure approach permits fair comparison, this concern is eliminated.) A second possible advantage of this method is that removing the apportionment question

found this definition notable because of "its substitution of the broad generic term 'fault' in subsection (a), as including *both negligence and strict liability*." 20 Cal. 3d at 742, 575 P.2d at 1172, 144 Cal. Rptr. at 390 (emphasis added), indicating that the court may accept the view that both doctrines mandate norms, deviation from which can be compared.

141. For negligence, see Posner, Book Review, 37 U. CHI. L. REV. 636, 645 (1970). For strict liability, see Fischer, *supra* note 104, at 340.

142. *See* note 112 *supra*.

143. 20 Cal. 3d at 747, 575 P.2d at 1175, 144 Cal. Rptr. at 393.

144. *Id.* at 748, 575 P.2d at 1175-76, 144 Cal. Rptr. at 393-94. *See also* Prosser, *supra* note 37, at 474-75.

145. 20 Cal. 3d at 750, 575 P.2d at 1177, 144 Cal. Rptr. at 395.

from the jury's hands eliminates the possibility of "sympathetic" verdicts in which the bulk of liability is allocated to the defendant-manufacturer even where the plaintiff is highly culpable. This might be true if juries favor injured plaintiffs over large corporations.[146] On the other hand, juries are likely to realize that plaintiffs may have insurance coverage,[147] and that imposing liability on manufacturers increases product prices.[148] The *Daly* jury, in fact, awarded no damages to plaintiffs.[149] It is not clear, therefore, that juries will ignore their legal instructions and give verdicts based on pro-plaintiff emotional considerations.

A fixed reduction rule is too blunt. It seems unreasonable to treat all contributorily negligent plaintiffs the same. Some are more at fault, relative to defendants, than others: this calls for differential treatment. A fixed percentage reduction in all cases allocates liability to parties in a manner which may not approximate their responsibility for the injury.[150]

It is also highly unlikely that the court would adopt this method on its own. The *Daly* opinion explicitly stated that recovery should be reduced to the extent of plaintiff's fault.[151] Thus the *degree* of plaintiff's fault, in the court's view, seems to be an important variable in apportioning liability between the parties. In addition, establishing a fixed percentage reduction by the court probably would be considered "unjudicial." It is normally the province of the legislature to set a fixed standard such as this.

The fixed reduction approach, then, should be considered a "last resort." Only if the court cannot develop an acceptable method for applying comparative fault to strict liability and the legislature does not provide a solution, should the court turn to this alternative.

6. Summary

This section has demonstrated some of the approaches that the court might take to apply comparative fault in strict liability cases. Most of them are fraught with insurmountable difficulties that support the dissent's assertions about the "apples and oranges" dilemma posed by the majority's holding. Only the norm deviation approach offers a

146. *Cf.* Comment, *Evidence: Revealing the Existence of Defendant's Liability Insurance to the Jury*, 6 CUM. L. REV. 123, 124 (1975) (revealing that the defendant is covered by a wealthy insurance company tends to prejudice the jury against him) (the same principle probably applies to a corporation).

147. *See* Keeton, *supra* note 13, at 1333-34.

148. *See* note 31 *supra*.

149. 20 Cal. 3d at 731, 575 P.2d at 1165, 144 Cal. Rptr. at 383.

150. *See* Prosser, *supra* note 37, at 469.

151. 20 Cal. 3d at 737, 575 P.2d at 1168-69, 144 Cal. Rptr. at 386-87.

workable, principled method of apportioning liability. Recognizing that both negligence and strict liability mandate norms permits the accommodation of the concepts and yields an intuitively satisfying comparison. It is also faithful to the majority's holding by keeping plaintiff's fault a variable in the apportionment process.[152] The norm deviation approach solves the doctrinal difficulties represented by the "apples and oranges" argument made by the dissenters in *Daly*.

B. Policy

The merger of strict liability with comparative fault principles involves a conflict between policies. Strict liability has traditionally stood for the proposition that plaintiffs injured by defective products should receive full compensation for their injuries.[153] Opposing this is the policy behind comparative fault: the notion that one party should not bear the entire burden of a loss for which two are responsible.[154] The *Daly* court believed that fairness compels that the comparative fault rationale should prevail.

This section examines this conclusion from a policy perspective. It considers why *Daly* promotes greater fairness in strict liability cases. Then it evaluates the impact this case has on the principal policy objectives behind strict liability. Finally, it compares the result reached in *Daly* with that in *American Motorcycle Association v. Superior Court*.[155]

1. Fairness

Several arguments support the court's assertion that *Daly* promotes fairness. The most compelling is that application of comparative fault principles to strict liability cases eliminates the harshness of "all or nothing" recoveries.[156] The facts of *Daly* illustrate this. The Opel's exposed door latch was a minor defect compared to Daly's disregard for his own safety. Yet under the old defenses to strict liability, plaintiffs would have recovered all of their damages.[157] This meant that General Motors or, more probably, the consumers of its products, would bear the loss attributable in large part to Daly's irresponsibility. In other words, purchasers of GM automobiles would pay higher prices

152. The extent of plaintiff's fault determines the extent of the deviation. *See* text accompanying note 117 *supra*.

153. *See* text accompanying notes 30-32 *supra*.

154. *See* text accompanying notes 38-43 *supra*.

155. 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).

156. *See* Fleming, *supra* note 39, at 242 (in the context of comparative negligence cases).

157. Although the jury found for defendants, the Supreme Court reversed because the trial court erroneously introduced evidence tending to show contributory negligence. 20 Cal. 3d at 744-46, 575 P.2d at 1173-74, 144 Cal. Rptr. at 391-92. Thus a properly guided jury would have found for plaintiffs.

so that Daly could receive *full* compensation. Innocent parties should not be compelled to bear a loss created by a wrongdoer.[158] The equities under these circumstances favor the purchasers' interest in lower prices over Daly's interest in full compensation.[159]

Justice Mosk disagrees. He contends that it is unfair to place any of the loss on a contributorily negligent plaintiff in strict liability cases. A plaintiff's negligence, in his view, bears no relationship to the injury that occurs.[160] This is because the typical consumer expects that products are safe and is powerless to protect himself against injuries. In their efforts to sell products, manufacturers have caused consumers to rely on representations of product safety.[161] Moreover, given the complexity of modern products, it cannot be expected that a reasonable consumer will discover and protect himself against defects.[162] Only the manufacturer has it within his control to prevent accidents. Thus, Justice Mosk concludes that the defendant should bear the entire loss, even when the plaintiff was contributorily negligent.

The reasoning behind his viewpoint, however, is suspect. First, even if it is true that consumers have been lulled into relying on product safety, this does not require rejection of the contributory negligence defense. A plaintiff who has *reasonably* relied upon a manufacturer's representations of safety will *not* be found contributorily negligent by a jury. The standard of reasonable conduct obviously must take into account the modern relationship between seller and buyer.[163] Plaintiffs like Daly, however—those who cannot claim that their behavior with respect to the product was motivated by a manufacturer's advertising—will face diminished recoveries under comparative fault. No argument advanced by Justice Mosk about "typical" consumers would require this to be otherwise. Second, the assertion that all plaintiffs are powerless to protect themselves against defective products is misleading. In the instant case, for example, Kirk Daly would not have collided with the divider fence had he been sober and driving at a reasonable speed. His negligent conduct was therefore instrumental in causing the injury and it was within his control not to behave as he did. It cannot be said that a plaintiff is "powerless" to protect himself as long as his negligence is a contributing cause of the injury.

158. Lucey, *Liability Without Fault and the Natural Law*, 24 TENN. L. REV. 952, 955 (1957).

159. *See* Huff, *Defense Strategies With Comparative Negligence*, 44 INS. COUNSEL J. 124, 129 (1977).

160. 20 Cal. 3d at 760, 575 P.2d at 1163, 144 Cal. Rptr. at 401.

161. *See generally* Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 VA. L. REV. 1109, 1120-31 (1974) (supporting this view).

162. *See* Comment, *supra* note 26, at 787 n.108 (describing this view).

163. *See generally* 2 F. HARPER & F. JAMES, *supra* note 30, at § 16.5.

A further difficulty with Justice Mosk's position is that in rejecting comparative fault, he advocates retention of the assumption of risk defense.[164] If plaintiff's unreasonable conduct is ever to be considered, it is not clear why the inquiry should be limited to whether plaintiff assumed the risk. The qualitative differences between conduct amounting to assumption of risk and that amounting to contributory negligence are not great enough to warrant drastically divergent treatment.[165] For example, it cannot be argued that Daly would have been less deserving of compensation had he been sober, but aware of the defective door latch, than he was by driving while intoxicated. Yet the old defenses to strict liability permitted no recovery in the former situation and full recovery in the latter. Thus, if the law will consider plaintiff's assumption of risk, fairness requires that it also consider contributory negligence.

One can disagree with the majority's argument that negligence and strict liability concepts can be "blended" and still embrace its contention that "all or nothing" recoveries are unnecessarily harsh. Among some critics of the court, the principal argument invoked for retaining the old defenses to strict liability is the infeasibility of comparing plaintiff and defendant under comparative fault.[166] Even if it is not feasible to use comparative fault in strict liability cases, an "all or nothing" system is not necessary. Justice Clark demonstrated that liability can be apportioned between the parties without comparing them.[167] That *comparative fault* may not be workable does not compel the conclusion that the loss should not be shared by the parties *in some manner*.[168]

A second argument in favor of the court's choice is that *Daly* eliminates the enormous consequences riding in strict liability cases on the distinction between assumption of risk and contributory negligence. Under the old defenses, a plaintiff who knew about the defect had assumed the risk and was barred from recovery. The unknowing but careless plaintiff, on the other hand, was only contributorily negligent and thus recovered all of his damages. It is difficult, if not impossible, for a jury to determine accurately whether the plaintiff actually knew about the defect or was only careless.[169] Thus it makes little sense to place high stakes on the assumption of risk-contributory negligence dis-

164. 20 Cal. 3d at 763-64, 575 P.2d at 1185-86, 144 Cal. Rptr. at 403-04.

165. This applies only to implied assumption of risk. *See generally* James, *Assumption of Risk: Unhappy Reincarnation*, 78 YALE L.J. 185, 190-91 (1968).

166. This was Justice Jefferson's primary attack. *See also* Levine, *Strict Products Liability and Comparative Negligence: The Collision of Fault and No-Fault*, 14 SAN DIEGO L. REV. 337, 351-56 (1977).

167. *See* text accompanying notes 143-45 *supra*.

168. *See* Fleming, *supra* note 48, at 12.

169. Levine, *supra* note 82, at 643.

tinction.[170] By providing diminished rather than "all or nothing" recoveries, comparative fault relieves juries from having to make error-prone distinctions upon which enormous consequences depend.

A third benefit of applying comparative fault in strict liability cases is the resulting uniformity of defenses between negligence and strict liability.[171] Plaintiffs who have suffered product injuries may sue either in negligence or strict liability.[172] When the defenses to these causes of actions were different, plaintiffs would choose between theories based, among other things, on which defenses would be applicable to their contributing conduct.[173] This left plaintiffs with enormous control over the case and meant that products liability defendants were subjected to different sets of defenses. If strict liability is designed to help plaintiffs overcome proof problems, there is no reason to give a strict liability defendant fewer defenses than a negligence defendant.[174] Nor is it evident why a plaintiff should have such unfettered control over the role his conduct plays in determining the extent of his recovery.[175] *Daly* ameliorates this situation by making uniform the defenses in products liability cases.

Fairness is not the only policy consideration, however. Although *Daly* clearly promotes fairness in strict liability cases by eliminating "all or nothing" recoveries, it may do so at the expense of undercutting the principal policy objectives of strict liability—loss spreading, deterrence, and relief from burdensome proof obstacles. The impact *Daly* will have on these policies must be examined.

2. *Loss Spreading*

Daly clearly has changed the loss-spreading scheme created by early strict liability cases. Under the old system of strict liability defenses, a defendant bore all of the loss except where the plaintiff had assumed the risk. Liability under the new law, however, is shared by the parties whenever the plaintiff has been contributorily negligent.

170. *Id.*

171. Butaud v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42, 46 (Alas. 1976).

172. Jiminez v. Sears, Roebuck & Co., 4 Cal. 3d 379, 482 P.2d 681, 93 Cal. Rptr. 769 (1971).

173. A plaintiff whose conduct was contributorily negligent would have preferred to sue in strict liability (no defense). One whose conduct verged on implied assumption of risk would, after *Li*, have preferred a negligence action (partial defense, like contributory negligence).

174. Indeed, justice seems to require that similarly situated parties be afforded the same treatment.

175. The court in *Jiminez* allowed plaintiff to sue under both strict liability and negligence because it believed that a plaintiff, in some circumstances, may be able to show evidence from which a jury could infer negligence even though he might not be able to demonstrate that the product was defective. 4 Cal. 3d at 386-87, 482 P.2d at 686, 93 Cal. Rptr. at 774. This reasoning, however, does not support giving plaintiff control over the applicable defenses.

Because plaintiffs now must bear more of the loss, the extent of loss spreading achieved by strict liability will decrease.

This may not be bad. The loss-spreading rationale of strict liability can be criticized, primarily because it is incomplete, inefficient, and probably unnecessary. Any person injured by a product suffers a great misfortune, regardless of the cause.[176] But under strict liability, only those persons injured by defective products receive compensation. All others must find their own means of spreading the loss. This suggests that strict liability only insures some injured persons, because coverage depends on how an accident takes place.[177] Given such a gap in the scheme, comparative fault's impact seems trivial in comparison. The loss-spreading scheme provided by strict liability also is inefficient. *Every* product carries its own "compulsory" insurance package[178]—consumers cannot choose between products which are insured and ones which are not. As a result, consumers must pay for this insurance even though they may already have adequate coverage or would prefer to forego such protection.[179] Plaintiffs should be able to decide whether or not they want to be insured and have it done by one insurance company rather than through an involuntary program involving thousands of business enterprises.[180] Comparative fault, by reducing recoveries in the aggregate, will reduce the amount consumers are forced to spend on product insurance through higher prices. Finally, the loss-spreading rationale ignores the fact that many plaintiffs already have insurance coverage to protect them against loss of income and medical expenses.[181] Worker's compensation, Blue Cross-Blue Shield, and other private and social schemes stand behind plaintiffs,[182] spreading injury loss at least as well as manufacturers can.

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176. *See* James, *supra* note 14, at 923-24.

177. *See* Plant, *supra* note 10, at 946:

> In this instance they ask the manufacturer to assume the burden and pass it on simply because they consider him to be in a position to do so. But if this approach is sound, why should we not carry the process still further? If the manufacturer can pass on to society the cost of all injuries arising from product defects, why should he not also be required to pass on to society the losses arising from all other injuries incurred in the course of manufacturing activity?

178. On the issue of compulsion in no-fault auto insurance plans, see Blum & Kalveu, *Ceilings, Costs, and Compulsion in Auto Compensation Legislation*, 1973 UTAH L. REV. 341. Their analysis applies equally well to strict products liability.

179. *Id.* at 352.

180. The costs of administering a strict liability loss-spreading scheme are enormous. Recovery can be obtained only through costly litigation. The winners, in the end, are often the lawyers, not the parties. Thus, unless there are very good reasons for shifting the loss, the tort machinery should not be invoked. *Id.* at 378.

181. Keeton, *supra* note 13, at 1333-34.

182. Blum & Kalven, *supra* note 178, at 365-66. *But see* G. CALABRESI, *supra* note 29, at 55-64.

The court itself has implicitly relegated the loss-spreading objective to secondary status. It stated that the loss arising from a product injury should be spread only to the extent that plaintiff's own negligent acts were not responsible for it.[183] Given the questionable justifications behind loss spreading under strict liability, this is supportable. Other policies behind strict liability, however, may have been adversely affected by *Daly*. Deterrence and the relief from onerous proof obstacles stand out among these.

3. Deterrence

Applying comparative fault principles to strict liability may diminish a manufacturer's incentives to make products safe. Before *Daly*, a producer was fully liable for accidents caused by defective products, except where a plaintiff assumed the risk of a defect. Faced with a given level of accident costs, a manufacturer had an incentive to spend up to that amount on safety measures which would prevent such accidents.[184] Comparative fault, however, apportions accident costs between the litigants, and thereby reduces a manufacturer's liability. Lower liability arguably will induce a manufacturer to spend correspondingly less on safety.[185]

The social interest in preventing accidents is clear. Accidents, after all, cost money. Some of these are *efficiently avoidable*, that is, the cost of preventing them is less than the damage costs that they caused.[186] When an accident is efficiently avoidable, it makes sense, from a social welfare perspective, to invest in safety measures which cheaply prevent the accident.[187] Tort law, then, should create incentives for those who can efficiently avoid accidents to take appropriate

183. 20 Cal. 3d at 737, 575 P.2d at 1168-69, 144 Cal. Rptr. at 386-87.

184. For example, if a manufacturer has $100 of liability costs each year, and there exists a method to prevent those costs, he should be willing to spend up to $100 to eliminate them.

185. Using the example in note 184 *supra*, the manufacturer under a comparative fault system might only face $70 of liability costs each year. Thus, if the particular safety measure costs $80 to eliminate the accidents which result in $70 worth of liability to him (although the total cost is $100, $30 is being borne by plaintiff), he will not take the safety measure because he would be worse off economically than had he let the accident happen. This viewpoint makes several critical assumptions, the most important of which is that defendant is motivated only by financial liability considerations. Professor Plaut has stated that the most powerful safety incentive may be the manufacturer's desire to avoid a reputation for producing unsafe products. *See* Plant, *supra* note 10, at 945. If so, a reduction in liability would be insignificant. Others, however, have argued that strict liability does have some impact on safety, *see* Noel, *supra* note 10, at 1011, and McKean, *supra* note 28, at 50, suggesting that comparative fault will undercut incentives when applied here.

186. Calabresi, *Optimal Deterrence and Accidents: To Fleming James, Jr.*, 84 YALE L.J. 656, 658 (1975); Posner, *supra* note 123.

187. The goal is to minimize the sum of accident and accident prevention costs. Calabresi & Bass, *Right Approach, Wrong Implications: A Critique of McKean on Products Liability*, 38 U. CHI. L. REV. 74, 79 (1970).

safety measures.[188] Liability, in a sense, is a signal to the party to implement such measures: the original failure to do so created an unnecessary waste of social resources. A system that places liability on the efficient accident avoider therefore helps achieve an optimal level of safety investment.

Too many signals may have been sent to manufacturers under the old defenses to strict liability. Manufacturers were being held fully liable even when plaintiffs were efficient accident avoiders.[189] *Daly* is an excellent example of this. Proper application of prior law in this case would have held General Motors completely liable. Yet the cost to Daly of preventing this accident was negligible compared to the probable cost to GM.[190] Full liability for the manufacturer in this situation creates too high a safety incentive. Society is asking the manufacturer to take, and the consumer to pay for, additional safety measures when the other party could and should have taken them at a lower cost.

By reducing defendant's liability when a plaintiff has been contributorily negligent, *Daly* seems to create a more proper incentive structure. Each party in most of these situations reasonably could have taken better safety precautions, but failed to do so. The goal of accident prevention requires that each one be induced to take these steps. Thus the strictly liable defendant should bear part of the loss as an incentive to invest in product safety. And the plaintiff, because he could have efficiently avoided the accident, also should be induced to act carefully.[191] Application of comparative fault to strict liability achieves this.

4. Proof Obstacles

The remaining major objective of strict liability—relieving plaintiffs of proof problems—is not impaired by *Daly*. Comparative fault permits the affirmative defense that a plaintiff failed to exercise reasonable care in using the product. It does not, however, affect the plain-

188. Chelius, *Liability For Industrial Accidents: A Comparison of Negligence and Strict Liability Systems*, 5 J. LEGAL STUD. 293, 294 (1976).

189. In the most extreme case, the strictly liable defendaut may not have been an efficient accident avoider (that is, not negligent). Thus, liability was placed on the party who could not reasonably have avoided the accident, even though the other one could have.

190. Daly could have avoided the accident by driving more slowly while sober. The burden to him of avoiding negligent behavior was small. Although the cost to GM of designing a safer door handle is not clear from the record, it would seem that it was higher than Daly's prevention costs.

191. The *Daly* plaintiffs were not involved in the accident. Daly—the driver of the automobile—did not survive. Diminished recovery in this case obviously has no deterrent effect on his future conduct. But a comparative fault liability rule is aimed at all product users, not just parties to the instant case. In other words, future product users will alter their conduct in response to comparative fault. *But see* Schwartz, *supra* note 43, at 714-15.

tiff's proof requirements,[192] because the plaintiff need only prove that the product was defective, not that the manufacturer was negligent.

5. Summary

Daly is therefore sound from a policy perspective. Comparative fault will treat litigants more fairly. Applying comparative fault does interfere with the loss-spreading objective of strict liability, but this presents little cause for concern because loss spreading by manufacturers may not always be desirable. *Daly* will also promote a more proper level of safety investment, without forcing plaintiffs to assume additional proof burdens.

The policy emphasis in this case seems at odds with *American Motorcycle Association v. Superior Court*.[193] That case held that the adoption of comparative fault in *Li* did not compel any contraction of the joint and several liability doctrine in situations in which the plaintiff is contributorily negligent. As such, a defendant can be held liable for more than his assessed share of fault where the second defendant is insolvent. An approach more consistent with comparative fault, however, would apportion the risk of the second defendant's insolvency between the plaintiff and the solvent defendant in proportion to their respective degrees of fault.[194] Under this method, the plaintiff would recover less than what he normally would, and the solvent defendant would pay more than his share, but these variations would be proportional to each party's fault.

The court based its decision to limit the application of comparative fault in this context principally on two grounds. First, it argued that "even when a plaintiff is partially at fault for his own injury, a plaintiff's culpability is not equivalent to that of a defendant's."[195] The defendant has breached a duty of care to *society* whereas the plaintiff has only acted unreasonably toward *himself*.[196] Second, abandonment of the doctrine of joint and several liability would work a "serious and unwarranted deleterious effect on the practical ability of negligently injured persons to receive adequate compensation for their injuries."[197]

Although the cases are factually distinguishable,[198] the policy arguments made in *American Motorcycle* are equally applicable to *Daly*.

192. Noel, *Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk*, 25 VAND. L. REV. 93, 110 (1972).

193. 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).

194. *See* Fleming, *supra* note 48, at 44-45.

195. 20 Cal. 3d at 589, 578 P.2d at 906, 146 Cal. Rptr. at 189.

196. *See* Schwartz, *supra* note 43, at 722-23.

197. 20 Cal. 3d at 590, 578 P.2d at 906, 146 Cal. Rptr. at 189.

198. *American Motorcycle* was a negligence suit, not a strict liability action like *Daly*.

In strict liability, as in negligence, a plaintiff's culpability is not the same as that of defendant: the law imposes strict liability on the product manufacturer because of the perceived social problem arising from product-related injuries. The law thus expects more of the manufacturer than of a plaintiff, who only need use reasonable care. Applying comparative fault to strict liability also makes it more difficult for plaintiffs to get full compensation. Thus a principled application of the *American Motorcycle* reasoning to *Daly* might have led the court to favor full compensation for plaintiffs over fairness to defendants and thereby refuse to apply comparative fault in strict liability cases.

This suggests that the court's priorities have shifted. In *American Motorcycle*, the desire to compensate plaintiffs prevailed over the unfairness of requiring defendants to bear the entire risk of another defendant's insolvency even when the plaintiff has been contributorily negligent. In *Daly*, fairness to defendants prevailed over the goal of compensating plaintiffs. This section has demonstrated that *Daly* is supported by strong policy arguments. If the court is to remain faithful to the fairness considerations it advanced in *Daly*, it should reassess *American Motorcycle*.

C. Practical Consequences

Daly significantly changes existing law and will inevitably affect the court system. The supreme court argued that whatever novel practical complexities its decision may have created can be competently managed by the lower courts, and cited the judicial experience after the landmark case of *Li v. Yellow Cab Co.* as evidence of this.[199] The dissent believed, however, that *Daly* may create more problems than the majority was willing to admit. Justice Jefferson argued that juries cannot handle the comparisons this holding seems to require.[200] Justice Mosk asserted that defendants now will routinely allege contributory negligence.[201] He also predicted difficulties when courts attempt to apportion liability among the intermediate entities in the product's distribution chain. Finally, he posited that there is no end in sight to the extension of comparative fault principles and wondered if negligence concepts will swallow up all of tort law.[202]

The dissent correctly concluded that the holding in *Daly*, as presently articulated, is beyond the comprehension of jurors having to implement it. In the absence of a sensible judicially sanctioned method of

199. 20 Cal. 3d at 742-43, 575 P.2d at 1172, 144 Cal. Rptr. at 390.
200. *Id.* at 752, 575 P.2d at 1178-79, 144 Cal. Rptr. at 396-97.
201. *Id.* at 759-60, 575 P.2d at 1183, 144 Cal. Rptr. at 401.
202. *Id.* at 760-61, 575 P.2d at 1184, 144 Cal. Rptr. at 402.

apportioning fault between a contributorily negligent plaintiff and a strictly liable defendant, juries will not know how to proceed in these cases. It might be expected, however, that the court will address this problem and develop a solution which either enables juries to render consistent results or keeps them out of the apportionment process entirely.

Because many defendants may now allege and attempt to prove that products liability plaintiffs are contributorily negligent, procedural delays and harassment of plaintiffs may occur. To avoid long trials, plaintiffs may be willing to settle out of court for less money. These fears appear to be behind Justice Mosk's complaint in dissent that the new affirmative defense will become a "boilerplate" allegation. Justice Mosk's prediction may be true, but this is no reason to reject comparative fault if fairer results will be achieved. Indeed, Justice Mosk himself—in the context of an *expansion* of tort liability—has remarked, "The rights of . . . tort plaintiffs should be forthrightly judged on their own merits, rather than by indulging in gloomy speculation on where it will all end."[203]

The problem of delay and harassment should be solved by confronting it, not by retaining the old strict liability defense system. Courts can establish other ways of preventing wealthy defendants from running roughshod over plaintiffs in discovery and trial proceedings.[204]

Daly also creates complexities where a suit involves multiple defendants. Traditionally, apportionment of liability between defendants was governed by the doctrine of indemnity[205] and the contribution statutes.[206] Under the former, one liable party might seek indemnity from another liable party or an outside party for damages paid to the plaintiff. The party who has paid the judgment receives full indemnity or none at all depending upon whether his own negligence was "active" or "passive" with respect to the party from which he seeks recovery.[207] Under the latter, a judgment defendant may seek contribution only against other judgment defendants.[208] The contribution statute allows

203. Borer v. American Airlines, Inc., 19 Cal. 3d 441, 460, 563 P.2d 858, 870, 138 Cal. Rptr. 302, 314 (1977) (dissenting opinion).

204. Thompson, *Discovery Proceedings—Avoiding Surprise and Invoking Protection Against Oppression*, 3 FORUM 317 (1967).

205. *See, e.g.*, Alisal Sanitary Dist. v. Kennedy, 180 Cal. App. 2d 69, 75-79, 4 Cal. Rptr. 379, 383-86 (1st Dist. 1960).

206. CAL. CIV. PROC. CODE §§ 875-877 (West Supp. 1979). The contribution statute does not override the right to indemnity. *See id.* § 875(f).

207. The distinction also has been described as "primary" versus "secondary" liability. *See* Alisal Sanitary Dist. v. Kennedy, 180 Cal. App. 2d at 75, 4 Cal. Rptr. at 383.

208. CAL. CIV. PROC. CODE § 875(a) (West Supp. 1979).

him to recover the excess paid over his pro rata share of the liability.[209] These laws thus allow a judgment defendant either to escape liability entirely or pay only a pro rata share. Apart from determining the right to indemnity, degree of fault has no bearing on the extent of one defendant's liability with respect to other defendants.

This system creates arbitrary rules for apportioning liability between defendants[210] and the supreme court recently has begun to change the law. In *American Motorcycle Association v. Superior Court*,[211] a case in which all defendants were negligent, the court abandoned the traditional structure in favor of a common law partial indemnity doctrine which apportions liability between multiple defendants according to fault, regardless of whether the individual against whom recovery is sought is a judgment defendant.[212] This case, in effect, overturned the legislature's contribution statutes and restructured the indemnity doctrine to eliminate its "all or nothing" character.[213]

What impact will *Daly* have in the multiple defendant context? Two fact situations exist: first, when one defendant is strictly liable and the other negligent, and second, when both are strictly liable. The first situation was addressed by the court in *Safeway Stores, Inc. v. Nest-Kart*.[214] The plaintiff in that case was injured when a shopping cart broke and fell on her foot. She sued Safeway, the owner of the cart, and Nest-Kart, its supplier, under negligence and strict liability theories. The jury found Safeway liable in negligence and Nest-Kart in strict liability, and apportioned the judgment between them on a comparative fault basis. The trial court held that such an apportionment was impermissible because of California's contribution statute and ordered each defendant to bear 50%, a pro rata share, of the judgment.[215] The supreme court reversed,[216] holding that the rationale of *Daly* and *American Motorcycle* mandate apportioning liability by comparative fault.

Safeway is a logical extension of *Daly*. *Safeway*, like *Daly*, applies comparative fault in a strict liability setting. *Safeway*, however, apportions liability between a negligent defendant and a strictly liable one. Though there are differences between the negligence of a defendant

209. *Id.* § 875(c).

210. On the inadequacy of the distinction between contribution and indemnity, see Phillips, *Contribution and Indemnity in Products Liability*, 42 TENN. L. REV. 85 (1974).

211. 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).

212. *Id.* at 599, 578 P.2d at 912, 146 Cal. Rptr. at 195.

213. Fleming, *supra* note 48, at 35.

214. 21 Cal. 3d 322, 579 P.2d 441, 146 Cal. Rptr. 550 (1978).

215. *Id.* at 327, 579 P.2d at 443-44, 146 Cal. Rptr. at 552-53.

216. *Id.* at 328, 579 P.2d at 444, 146 Cal. Rptr. at 553.

and the contributory negligence of a plaintiff,[217] these differences should not prevent application of comparative fault in this way.[218]

The court now must decide whether comparative fault will apply in cases in which both defendants are strictly liable. This might not be an easy step to take. If strict liability is seen as a type of "fault" or norm deviation, it will be possible to compare strictly liable defendants. Otherwise, however, the traditional indemnity and contribution rules probably will govern. That the policies behind strict liability often conflict with respect to which defendant in the product's distribution chain should bear liability further complicates analysis. The party better able to spread the loss may not always be the one society wants to deter. This area therefore is filled with uncertainty.

A final consideration involves Justice Mosk's concern about where all of this will end. He predicted that negligence concepts will swallow up all of tort law and implied that this would be bad.[219] It is not clear why this is so. The doctrine of comparative fault embodies the notion that a party whose injury was, in part, caused by his own substandard behavior should not receive full recovery. This seems fair. To the extent that the application of comparative fault to other situations produces fair results, its expansion into other areas should not be feared.

CONCLUSION

Application of comparative fault to strict liability is controversial. It raises questions about the analytical feasibility of blending negligence and strict liability concepts, the wisdom of doing so, and the practical consequences of doing so. The California Supreme Court argued in *Daly* that it makes sense to apply comparative fault in this context. The court's position can be supported. Though the majority failed to develop a method, this Note contends that a norm deviation approach offers a rational, principled method for applying comparative fault to strict liability. On a policy level, the court's holding—by replacing "all or nothing" with diminished recoveries—advances fairness without sacrificing the important objectives of strict liability. Any new doctrine creates complexities, but the practical problems posed by this holding do not appear insurmountable. The full potential of *Daly* will not be achieved, however, until the court clarifies the doctrinal issue

217. According to Prosser, plaintiff's conduct is not tortious without a breach of a duty of care owing to others through his contributory negligence. W. PROSSER, *supra* note 10, at § 65.

218. Both plaintiff and defendant have engaged in substandard conduct. Not only can their conduct be compared, but also fairness and the goal of accident prevention require that liability be allocated between them.

219. 20 Cal. 3d at 760-61, 575 P.2d at 1184, 144 Cal. Rptr. at 402.

left unresolved by the opinion. Developing an acceptable method for applying comparative fault should be the first priority after *Daly*.

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Walters v. Sloan.[1] The court reaffirmed the viability in California of the "fireman's rule," under which firemen and policemen injured in the course of their duties are precluded from bringing suit against the person whose negligence created the need for their services.

Defendants allowed their daughter to host a party in their home at which alcohol was served to minors. The party became disorderly, and plaintiff, a policeman acting in the course of his duties, was sent to defendants' home. When plaintiff attempted to arrest a minor guest for being drunk in public, he was attacked and sustained personal injury. Plaintiff alleged that the attack was a proximate result of the daughter's unlawful service of alcoholic beverages. The trial court sustained a demurrer to the complaint and entered an order of dismissal based on the fireman's rule.

In affirming the trial court's decision, the supreme court noted that the rule "is premised on sound public policy and is in accord with—if not compelled by—modern tort liability principles."[2] First, the court noted that policemen and firemen are precluded from suing in tort by the fundamental tort principle that one who voluntarily confronts a known peril with full realization of the risk cannot recover for injuries sustained as a result. The principle is most clearly applicable where, as in this case, a risk is confronted for compensation.[3] The court's second reason for upholding the fireman's rule was that, on public policy grounds, no duty is owed to avoid requiring the services of one who is trained and paid to perform such hazardous services. Firemen and policemen, the court reasoned, "cannot complain of negligence in the cre-

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1. 20 Cal. 3d 199, 571 P.2d 609, 142 Cal. Rptr. 152 (1977) (Clark, J.) (5-2 decision). For an additional discussion of this case, see Zimmerman, *Negligence Actions by Police Officers and Firefighters: A Need for a Professional Rescuers Rule*, 66 CALIF. L. REV. 585, 595-98 (1978).

2. 20 Cal. 3d at 203, 571 P.2d at 611, 142 Cal. Rptr. at 154.

3. The court explained that firemen and policemen are provided special benefits as compensation for assuming the risks that they take. Such benefits include special presumption of industrial causation as to certain disabilities, special death benefits, optional leaves of absence, and special permanent disability pensions that exceed ordinary worker's compensation benefits. *Id.* at 204-6, 571 P.2d at 611, 142 Cal. Rptr. at 154-55.

ation of the very occasion for [their] engagement."[4] The court found this public policy determination to be supported by the liberal compensation provided public safety officers for injuries,[5] as well as by the additional burden on courts that would be created by extending liability. Finally, the court noted that even if such tort actions were allowed, much of the recovery would in any case go to the public agencies, rather than to the injured public employee.[6]

In a vigorous dissent, Justice Tobriner attacked the logic underlying the fireman's rule. The rule, he explained, is largely based on the traditional common law characterization of firemen and policemen as licensees. Because status characterizations of this sort were abolished in *Rowland v. Christian*,[7] Tobriner reasoned, any doctrine based on such status schemes must fail. Instead, under California's statutorily based general duty of due care,[8] the defendants had the burden of demonstrating policy considerations that would justify a bar to recovery by police or firemen under circumstances in which other individuals, including persons facing inherent employment hazards, could recover for their injuries.[9]

If the decision in *Walters* is limited to its facts and confined to cases involving policemen and firemen, its impact will probably be minimal. Prior to *Walters*, although a policeman could arguably bring an action against third parties for injuries inflicted upon him in the course of his employment, he was still faced with the formidable obstacle of proving that he had not assumed the risk of such injury. The court in *Walters* increased this burden by mandating that in those tort cases in which a policeman has incurred injuries in the course of employment, he will be deemed to have assumed per se the risk of incurring such injuries.

If this decision is read more broadly to preclude tort actions in other situations where an employee suffers an injury that could be characterized as a normal, inherent risk of his employment, the impact of the case, at least in terms of number of persons affected, will be far greater. It is unlikely, however, that the decision will be so broadly

4. *Id.* at 205, 571 P.2d at 612, 142 Cal. Rptr. at 155 (citing Giorgi v. Pacific Gas & Elec. Co., 266 Cal. App. 2d 355, 72 Cal. Rptr. 119 (1st Dist. 1968)).

5. *See* note 3 *supra*.

6. The court explained that under the holding of Witt v. Jackson, 57 Cal. 2d 57, 69, 366 P.2d 641, 648, 17 Cal. Rptr. 369, 376 (1961), an employer who is free from fault is entitled to a lien on his employee's recovery against a third party to the extent that such recovery includes compensation benefits paid by the employer, and that therefore a policeman will be unlikely to receive any part of the tort award.

7. 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

8. CAL. CIV. CODE § 1714 (West 1973).

9. 20 Cal. 3d at 212, 571 P.2d at 616, 142 Cal. Rptr. at 159.

interpreted. The majority stressed that policemen and firemen were given added benefits to compensate them for the risks that they assumed.[10] It would therefore be difficult to apply the rule to employees who do not receive such added compensation.

The weakness of this decision is that it may diminish the deterrent effect that such tort actions have upon potential tortfeasors. The basic purposes of tort law are to compensate injured victims and deter future negligent conduct. The *Walters* holding has impaired this latter function as it pertains to negligent infliction of injury upon policemen and firemen.

Coulter v. Superior Court.[1] The supreme court held that a social host who serves alcoholic beverages to an obviously intoxicated person, with knowledge that that person intends to drive a motor vehicle, could be found to have breached his duty of reasonable care, and could be held liable for injuries proximately caused by that breach.[2]

Plaintiff alleged in his complaint that he was injured when the car in which he was a passenger collided with a roadway abutment. In his first cause of action, he alleged that prior to the accident, defendants, the manager and the owner and operator of an apartment complex, had served the driver of the car large quantities of alcoholic beverages at a time when they knew that the driver was "excessively intoxicated," that the driver "customarily drank to excess," and that the driver could not exercise the same degree of "volitional control" over her drinking as could the average reasonable person. A second cause of action was identical to the first, except that it omitted the allegation that defendants actually "furnished" alcohol to the driver, and instead alleged that defendants had "permitted" the driver to be served alcohol on the premises and that the defendant manager had "aided, abetted, partici-

10. The court's use of these benefits as a basis for denial of a cause of action raises an interesting question about the continued efficacy of the long-established "collateral source" rule. That rule provides that damages owed by a tortfeasor should not be reduced by benefits accruing to the plaintiff from other sources. By disallowing a cause of action in part because the victim received special disability benefits, the court seemed to undercut the traditional rationale for the collateral source rule, the belief that a tortfeasor should not escape liability merely because other sources of compensation are available. *See* Levy & Ursin, *Tort Law in California: At the Crossroads*, 67 CALIF. L. REV. 497 (1979). *See generally* Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 CALIF. L. REV. 1478 (1966).

1. 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978) (Richardson, J.) (6-1 decision).
2. *Id.* at 152-53, 577 P.2d at 674, 145 Cal. Rptr. at 539.

pated [in] and encouraged" the driver to drink to excess.[3]

The trial court granted defendants' demurrers to both causes of action. Plaintiff sought a writ of mandate to compel the trial court to overrule the granting of the demurrers. The supreme court issued the writ with regard to the demurrer to the first cause of action, but refused to compel the trial court to overrule the second demurrer.

Prior to 1971, to impose liability at common law upon the furnisher of alcoholic beverages for damages caused by an intoxicated person, plaintiffs had to prove that the providing of alcoholic drinks was the proximate cause of the damage and that the provider of alcohol owed a duty of reasonable care to the class of persons injured. The common law rule that the consumption and not the sale of liquor was the proximate cause of injuries sustained as a result of intoxication had long been a bar to imposing liability upon the furnisher of alcoholic beverages.[4] In *Vesely v. Sager*,[5] however, the court joined a substantial number of other states in rejecting this common law rule. The court in *Vesely* relied on the principle that an actor is not relieved of liability because of an intervening act of a third person if the act was reasonably foreseeable at the time of the negligent conduct.[6] Since the proximate cause issue in the case of a social host is no different than in the case of a commercial vender, *Coulter* is no more than a straightforward application of the proximate cause issue decided in *Vesely*.

The court struck new ground, however, by holding that a social host owed a duty of care to third persons with regard to damages caused by an intoxicated guest.[7] This duty of due care was based upon both statutory and common law principles. The statutory basis was Business and Professions Code section 25602,[8] which provides that "Every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to . . . any obviously intoxicated person is guilty of a misdemeanor."

The court also made explicitly clear that, wholly apart from section 25602, the social host's civil liability rested on general principles of negligence. The social host's duty of care to those who drive on the highways was based on the fact that serving alcohol to an intoxicated person who intends to drive a motor vehicle "creates a *reasonably foreseeable* risk of injury to those on the highway."[9]

3. *Id.* at 147-48, 577 P.2d at 671, 145 Cal. Rptr. at 536.
4. *See, e.g.*, Cole v. Rush, 45 Cal. 2d 345, 289 P.2d 450 (1955).
5. 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971).
6. *Id.* at 163-64, 486 P.2d at 158, 95 Cal. Rptr. at 630, and cases cited therein.
7. 21 Cal. 3d at 150-53, 577 P.2d at 672-74, 145 Cal. Rptr. at 537-39.
8. CAL. BUS. & PROF. CODE § 25602 (West Supp. 1979).
9. 21 Cal. 3d at 152-53, 577 P.2d at 674, 145 Cal. Rptr. at 539 (emphasis in original).

In addition to finding that the risk was foreseeable, the court found other indicia of the existence of a duty to third persons. While traditionally no moral blame was placed on the social host, the court held it was not unfair to ascribe blame to anyone who increases a guest's obvious intoxication under conditions involving a reasonably foreseeable risk of harm to others. The court also found that the burden placed on social hosts to decline serving alcohol to some of their intoxicated guests may dampen "the spirit of conviviality" but that this was outweighed by the catastrophic loss of life, limb, and property caused by intoxicated drivers on public highways.[10]

The *Coulter* decision evoked a swift and sharp response from the California legislature, which passed statutes[11] declaring that the serving of alcoholic beverages is not the proximate cause of injuries inflicted upon another by an intoxicated person. Even though *Coulter* has been nullified by the legislature, the decision shows a continuing commitment of the court to construe liberally the duty of due care under California common law. One may well wonder, however, whether the court's sense of fairness and moral culpability has outstripped that of the public. While popular opinion, as such, is not a proper concern of a common law court, judge-made law may lose its legitimacy when it conflicts with a society's moral and ethical precepts. A schism between the court's and the society's views of fairness and moral culpability, as is perhaps embodied in the *Coulter* decision, thus has worrisome implications for the integrity of California's common law.

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10. *Id.* at 153-54, 577 P.2d at 674-75, 145 Cal. Rptr. at 539-40.

11. Business and Professions Code § 25602 was amended to read, in part, as follows:

(b) No person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage pursuant to subdivision (a) of this section shall be civilly liable to any injured person or the estate of such person for injuries inflicted on that person as a result of intoxication by the consumer of such alcoholic beverage.

(c) The Legislature hereby declares that this section shall be interpreted so that the holdings in cases such as Vesely v. Sager, . . . Bernhard v. Harrah's Club, . . . and Coulter v. Superior Court . . . be abrogated in favor of prior judicial interpretation finding the consumption of alcoholic beverages rather than the serving of alcoholic beverages as the proximate cause of injuries inflicted upon another person by an intoxicated person.

CAL. BUS. & PROF. CODE § 25602 (West Supp. 1979).

The legislature also amended Civil Code § 1714 to read, in part, as follows:

(c) No social host who furnishes alcoholic beverages to any person shall be held legally accountable for damages suffered by such person, or for injury to the person or property of, or death of, any third person, resulting from the consumption of such beverages.

CAL. CIV. CODE § 1714 (West Supp. 1979).

Henrioulle v. Marin Ventures, Inc.[1] The supreme court, in reviewing a residential rental agreement, invalidated an exculpatory clause that purported to relieve a landlord of negligence liability. The court found the clause contrary to public policy under the doctrine set forth in *Tunkl v. Regents of the University of California*.[2]

Plaintiff entered into a lease agreement with the defendant in 1974 for a residential apartment. The lease contained a clause which provided that the owner would not be liable for any damage or injury occurring on the premises. Plaintiff was an unemployed widower with two children and received public assistance in the form of a rent subsidy. He brought this action to recover damages for injuries sustained when he tripped over a rock on a common stairway in the apartment building.

In passing on the validity of the exculpatory clause, the court applied the six criteria set forth in *Tunkl*[3] that identify the kind of exculpatory agreement which affects the public interest and thus is invalid as against public policy. First, the court found that residential leases are increasingly the subject of governmental regulation through state and local housing codes. Second, the court recognized that a residential lessor, in providing shelter, is supplying a basic necessity of life. Third, the court found that the landlord in this case offered to rent his units to all members of the public. Finally, the court pointed to the shortage of low-cost housing to establish that unequal bargaining power existed.[4]

The legislature anticipated the holding of *Henrioulle* by passing

1. 20 Cal. 3d 512, 573 P.2d 465, 143 Cal. Rptr. 247 (1978) (Bird, C.J.) (unanimous decision).

2. 60 Cal. 2d 92, 383 P.2d 441, 32 Cal. Rptr. 33 (1963). In *Tunkl*, the court invalidated a clause in a hospital admission form that released the hospital from liability for future negligence.

3. The six criteria were outlined in *Tunkl* as follows:

> (1) It concerns a business of a type generally thought suitable for public regulation. (2) The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public. (3) The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least any member coming within certain established standards. (4) As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services. (5) In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence. (6) Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents.

Id. at 98-101, 383 P.2d at 444-46, 32 Cal. Rptr. at 37-38 (citations omitted).

4. The court also found the fifth and sixth *Tunkl* criteria satisfied in that the defendant gave the plaintiff no opportunity to pay an additional amount to secure protection against negligence, and the plaintiff was exposed to the risk of injury through the defendant's carelessness. 20 Cal. 3d at 519, 573 P.2d at 469, 143 Cal. Rptr. at 251.

Civil Code section 1953,[5] which invalidates exculpatory clauses in residential rental agreements executed on or after January 1, 1976. Since *Henrioulle* involved an agreement made before that date, the court only addressed the question of whether such a clause was valid under common law principles.

It should be emphasized that *Henrioulle* only dealt with the validity of exculpatory clauses in *residential* rental agreements. The holding will probably not affect such clauses in *commercial* rental agreements, because commercial agreements are unlikely to exhibit the adhesive characteristics present in the residential situation. This is so both because commercial space will never constitute a "basic necessity of life,"[6] and because the commercial lessee is presumably more sophisticated and thus able to bargain on equal footing with the lessor.

Cooper v. Bray.[1] The supreme court held that California Vehicle Code section 17158[2] violates the equal protection clause of the state and federal constitutions by barring passengers from recovering for injuries negligently inflicted by a driver of the passenger's own vehicle, while allowing nonowner passengers to recover.

The plaintiff arranged with her regular automobile service station to have an employee pick up her car, have it repaired, and return it the next morning. After the repairs were completed, the defendant, an employee of the service station, delivered the car to plaintiff's home and instructed her " 'to get in there [the car], I'm going to drive myself back

5. Civil Code § 1953 provides in part as follows:

(a) Any provision of a lease or rental agreement of a dwelling by which the lessee agrees to modify or waive any of the following rights shall be void as contrary to public policy:

. . . .

(5) His right to have the landlord exercise a duty of care to prevent personal injury or personal property damage where that duty is imposed by law.

. . . .

(c) This section shall apply only to leases and rental agreements executed on or after January 1, 1976.

CAL. CIV. CODE § 1953 (West Supp. 1979).

6. 20 Cal. 3d at 518, 573 P.2d at 469, 143 Cal. Rptr. at 251.

1. 21 Cal. 3d 841, 582 P.2d 604, 148 Cal. Rptr. 148 (1978).

2. CAL. VEH. CODE § 17158 (West Supp. 1979) provides as follows:

No person riding in or occupying a vehicle owned by him and driven by another person with his permission has any right of action for civil damages against the driver of the vehicle or against any other person legally liable for the conduct of the driver on account of personal injury to or the death of the owner during the ride, unless the plaintiff in any such action establishes that the injury or death proximately resulted from the intoxication or willful misconduct of the driver.

to the station.' "[3] As the defendant turned into the service station driveway he collided with an oncoming car and as a result plaintiff was injured.

At trial, the defendants claimed the protection of section 17158, which provides that an owner-passenger cannot recover from the driver of her car unless the accident "proximately resulted from the intoxication or willful misconduct of the driver." The trial court held that the statute violated the equal protection clauses of the California and United States Constitutions, and the supreme court affirmed.

Guest statutes have long been a subject of controversy for California's courts and legislature. Prior to 1961, California's automobile guest statute[4] provided that a nonpaying guest in an automobile had no right of action against negligent drivers, or any person responsible for the conduct of negligent drivers. As the provision did not specifically refer to owner-passengers, several California courts had difficulty with cases involving such individuals. Some courts reasoned that the owner's action was not barred on the theory that he had compensated the driver by permitting him to use the car,[5] while other courts arrived at the opposite conclusion.[6] In 1961, the legislature ended the confusion by adding to section 17158 a specific bar to an owner's recovery from negligent drivers of his vehicle.[7]

In *Brown v. Merlo*,[8] the court held that the legislature could not constitutionally distinguish between paying and nonpaying guests, thus eliminating the bar to recovery by guests injured by negligent automobile drivers. In 1973, the legislature repealed the guest-passenger portion of section 17158,[9] but left in force the portion of the section which barred owner-passengers from recovering from negligent drivers.

In *Schwalbe v. Jones*,[10] the court examined the owner-passenger portion of section 17158. Initially, the court decided that the provision violated equal protection. On rehearing, however, the court found no violation of equal protection, and so reversed its earlier determination.

In *Cooper*, the court reconsidered the issue addressed in *Schwalbe*. In overruling its two year old decision, the court described its responsibility as the " 'conduct [of] a serious and genuine judicial inquiry' to determine whether [the] disparate treatment of owner-passengers bears

3. 21 Cal. 3d at 845, 582 P.2d at 606, 148 Cal. Rptr. at 150.
4. Ch. 3, § 17158, 1959 Cal. Stats. 1655.
5. *See, e.g.*, Ahlgren v. Ahlgren, 185 Cal. App. 2d 216, 8 Cal. Rptr. 218 (4th Dist. 1960).
6. *See, e.g.*, Ray v. Hanisch, 147 Cal. App. 2d 742, 306 P.2d 30 (2d Dist. 1957).
7. Ch. 1600, § 1, 1961 Cal. Stats. 3429.
8. 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973).
9. Ch. 803, § 4, 1973 Cal. Stats. 1426.
10. 534 P.2d 73, 120 Cal. Rptr. 585 (1975), *rev'd on rehearing*, 16 Cal. 3d 514, 546 P.2d 1033, 128 Cal. Rptr. 321 (1976).

a rational relationship to a realistically conceivable purpose or goal of the legislation."[11] The court focused on the state purposes allegedly justifying the statutory categorization, and considered the likelihood that the legislature had actually concentrated on that particular purpose when enacting the statute.

The court rejected the defendant's argument that one purpose of the legislature was to cause drivers to exercise care in permitting others to drive their cars. The court noted that if that were the statute's purpose, it would have distinguished between those who cautiously selected drivers and those who did not, rather than barring all owners from recovering. The court stated that the statute itself demonstrated that regulating the selection of drivers was not the contemplated goal of the legislature. The statutory exceptions affording an owner recovery against drivers guilty of willful misconduct run counter to a policy of encouraging owner-passengers to screen the drivers of their cars. Nor did the court find it conceivable that the owner's "legal right"[12] to control the driver's behavior could have influenced the legislature, as owner-passengers cannot affect the course of events in the car when they are not in the driver's seat.[13] Rather, the court found that the statute was designed to accord the same treatment to owner-passengers as that given social guests. With the court's holding in *Brown v. Merlo* eliminating the bar to recovery in automobile guest cases, this statutory purpose required the court in *Cooper* to eliminate the bar in owner-passenger cases.[14]

The court's analysis differs significantly from the traditional rational basis test. The court did not question whether encouraging owner-passengers to screen their drivers was a legitimate state purpose. Nor did the court ask whether the statute rationally related to, or furthered that purpose. Instead, the court sought to demonstrate that it was not realistic to assume that the legislature was, in fact, motivated by that specific purpose.

In the federal courts, this approach is characteristic of heightened equal protection scrutiny.[15] But automobile guest statutes involve neither suspect classifications nor fundamental rights and therefore normally would be given deferential scrutiny by federal courts.[16] Al-

11. 21 Cal. 3d at 847, 582 P.2d at 608, 148 Cal. Rptr. at 152.

12. *Id.* at 852, 582 P.2d at 610, 148 Cal. Rptr. at 154.

13. *Id.*

14. The court also concluded that it was not realistic to believe that in enacting § 17158 the legislature acted contrary to its basic policy of holding every person responsible for the consequences of his negligent acts. *Id.* at 854, 582 P.2d at 612, 148 Cal. Rptr. at 156.

15. *See, e.g.*, Dean Milk Co. v. Madison, 340 U.S. 349 (1951).

16. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

though the court rested the *Cooper* decision on both the federal and the state constitutions, its analysis is inconsistent with United States Supreme Court decisions and therefore should have been based on only the California Constitution.[17]

17. *See* Hawkins v. Superior Court, 22 Cal. 3d 584, 609 n.4, 586 P.2d 916, 932 n.4, 150 Cal. Rptr. 435, 451 n.4 (1978) (Bird, C.J., concurring).