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Comparative Fault and Products Liability: A Dangerous Combination

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COMPARATIVE FAULT AND PRODUCTS LIABILITY: A DANGEROUS COMBINATION

I. INTRODUCTION	445
II. TWO STEPS FORWARD - ONE STEP BACKWARD	447
III. POLICY CONSIDERATIONS.....	448
IV. VARIOUS APPROACHES.....	450
V. JUSTIFICATION OF <i>Lippard v. Houdailles Industries</i>	453
A. <i>Setting Up the Problem - Competing Policies</i>	453
B. <i>The Real Issue</i>	455
C. <i>Comparative Fault - Is It The Perfect Compromise?</i> ...	456
D. <i>The Dangers of the Daly approach</i>	458
1. Frustration of Product Liability Policy Interests....	458
2. Additional Dangers of <i>Daly</i>	462
VI. CONCLUSION	464

I. INTRODUCTION

Missouri has recently joined a minority of jurisdictions that refuse to apply the doctrine of comparative fault to strict products liability actions.¹ Because Missouri courts refused to apply contributory negligence to products liability cases² and comparative fault was adopted as a substitute for contributory negligence,³ comparative fault was similarly denied application to products liability cases.⁴

A majority of the Missouri Supreme Court believed the policy of spreading the losses caused by defective products⁵ outweighed competing policies supporting comparative fault. Comparative fault promotes fairness and justice by reducing a plaintiff's recovery to the extent that his own carelessness contributed to the injury, as well as instilling in product users a motive to be more careful.⁶

1. *Lippard v. Houdaille Indus.*, 715 S.W.2d 491, 493 (Mo. 1986) (en banc).

2. *Keener v. Dayton Elec. Mfg.*, 445 S.W.2d 362 (Mo. 1969) (en banc).

3. *Gustafson v. Benda*, 661 S.W.2d 11 (Mo. 1983) (en banc).

4. *Lippard*, 715 S.W.2d at 492-93.

5. *Id.* at 492.

6. *Id.* at 493.

Jurisdictions are split as to the applicability of comparative fault to products liability actions.⁷ The majority of jurisdictions addressing the issue have applied some form of comparative fault to products liability actions.⁸ This Comment will address the policy considerations involved in order to analyze the wisdom of the *Lippard* court's approach to this hotly debated area of the law.⁹

7. The following jurisdictions have applied comparative fault or comparative negligence to strict products liability: *Pan-Alaska Fisheries, Inc. v. Marine Constr. & Design Co.*, 565 F.2d 1129 (9th Cir. 1977) (federal admiralty case); *Butaud v. Suburban Marine & Sporting Goods, Inc.*, 555 P.2d 42 (Alaska 1976); *ARK. STAT. ANN. §§ 27-1763 to -1765* (1979); *Daly v. Gen. Motors Corp.*, 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978); *West v. Caterpillar Tractor Co.*, 336 So. 2d 80 (Fla. 1976); *Kaneko v. Hilo Coast Processing*, 65 Haw. 447, 654 P.2d 343 (1982); *Vannoy v. Uniroyal Tire Co.*, 111 Idaho 536, 726 P.2d 648 (1985); *Coney v. J.L.G. Indus.*, 97 Ill. 2d 104, 454 N.E.2d 197 (1983); *IOWA CODE ANN. § 668.1* (West Supp. 1986); *Kennedy v. City of Sawyer*, 228 Kan. 439, 618 P.2d 788 (1980); *Bell v. Jet Wheel Blast*, 462 So. 2d 166 (La. 1985); *ME. REV. STAT. ANN. tit. 14, § 156* (1964); *MICH. COMP. LAWS § 600.2949* (1986); *Busch v. Busch Constr., Inc.*, 262 N.W.2d 377 (Minn. 1977); *Zahrte v. Sturm, Ruger & Co.*, 203 Mont. 90, 661 P.2d 17 (1983); *Thibault v. Sears, Roebuck & Co.*, 118 N.H. 802, 395 A.2d 843 (1978); *Suter v. San Angelo Foundry & Mach. Co.*, 81 N.J. 150, 406 A.2d 140 (1979); *Marchese v. Warner Communications, Inc.*, 100 N.M. 313, 670 P.2d 113 (Ct. App. 1983), *cert. denied*, 100 N.M. 259, 669 P.2d 735 (1983); *N.Y. CIV. PRAC. LAW § 1411* (McKinney 1976); *Mauch v. Mfr. Sales & Serv.*, 345 N.W.2d 338 (N.D. 1984); *Wilson v. B.F. Goodrich Co.*, 292 Or. 626, 642 P.2d 644 (1982) (en banc); *Baccarelli v. Hyster Co.*, 287 Or. 3, 597 P.2d 351 (1979) (en banc); *McPhail v. Municipality of Culebra*, 598 F.2d 603 (1st Cir. 1979) (applying Puerto Rico law); *Fiske v. MacGregor*, 464 A.2d 719, (R.I. 1983); *Norman v. Fisher Marine, Inc.*, 672 S.W.2d 414 (Tenn. Ct. App. 1984); *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414 (Tex. 1984); *Mulherin v. Ingersoll-Rand Co.*, 628 P.2d 1301 (Utah 1981); *Murray v. Fairbanks Morse*, 610 F.2d 149 (3d Cir. 1979) (applying Virgin Islands law); *WASH. REV. CODE ANN. §§ 4.22.005-.015* (Supp. 1987); *Star Furniture Co. v. Pulaski Furniture Co.*, 297 S.E.2d 854 (W. Va. 1982); *Dippel v. Sciano*, 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

The following jurisdictions have refused to apply comparative fault or comparative negligence in strict products liability cases: *Kinard v. Coats Co.*, 37 Colo. App. 555, 553 P.2d 835 (1976). *But see Welch v. F.R. Stokes, Inc.*, 555 F. Supp. 1054 (D. Colo. 1983) (interpreting *COLO. REV. STAT. § 13-21-406* (Supp. 1986)); *Correia v. Firestone Tire & Rubber Co.*, 388 Mass. 342, 446 N.E.2d 1033 (1983); *Melia v. Ford Motor Co.*, 534 F.2d 795 (8th Cir. 1976) (applying Nebraska law); *Young's Mach. Co. v. Long*, 100 Nev. 692, 692 P.2d 24 (1984), *NEV. REV. STAT. § 41.141* (1985); *Knitz v. Minster Mech. Co.*, No. L-84-125, slip op. at ____ (Ohio Ct. App., Feb. 9, 1987); *Kirkland v. Gen. Motors Corp.*, 521 P.2d 1353 (Okla. 1974); *Bike v. Am. Motors Corp.*, 101 F.R.D. 77 (E.D. Pa. 1984) (predicting Pennsylvania law); *Klug v. Keller Indus.*, 328 N.W.2d 847 (S.D. 1982); *Smith v. Smith*, 278 N.W.2d 155 (S.D. 1979).

8. See *supra* note 7.

9. An example of the enthusiasm with which this topic is discussed can be seen in *Lippard v. Houdaille Indus.*, 715 S.W.2d 491 (Mo. 1986) (en banc), where a spirited dissent accuses the majority of disregarding the "long-standing principles of justice and fairness" by refusing to apply comparative fault in products liability cases.

II. TWO STEPS FORWARD - ONE STEP BACKWARD

The combination of comparative fault with strict products liability has reversed a significant trend in tort law.¹⁰ Comparative fault and strict products liability were both adopted to improve the position of plaintiffs. Comparative fault allows a negligent plaintiff to recover a percentage of his damages where contributory negligence would have denied any recovery.¹¹ Strict products liability eases the burden of proof and limits the availability of defenses such as contributory negligence.¹²

When these two pro-plaintiff doctrines are combined, however, the plaintiff's recovery is often reduced.¹³ A negligent plaintiff will be denied recovery of damages for which he is at fault whereas previously his negligence would not have been a defense. This reversal in our tort law system was created through providing manufacturers with a defense they were previously denied — the negligence of the plaintiff.¹⁴ Courts like the *Lippard* court feel the substitution of comparative fault for contributory negligence should not af-

The dissent further characterizes the opinion as "just legal gobbledy-gook." *Id.* at 503 (Welliver, J., dissenting).

10. Carestia, *The Interaction Of Comparative Negligence And Strict Products Liability - Where Are We?*, 47 INS. COUNS. J. 53, 70 (1980).

11. *Id.* at 70-71.

12. *Id.* at 71.

13. *Id.* There are instances where a court's adoption of comparative fault improves the plaintiff's chances for recovery. In many jurisdictions, misuse as well as an unreasonable and voluntary assumption of the risk were a complete bar to recovery in products liability cases prior to the adoption of comparative fault. By adopting comparative fault, these total bars were converted into partial defenses, thereby improving a plaintiff's chances for at least a partial recovery. See authorities cited *infra* at note 32, where many acts of ordinary contributory negligence are still no defense at all, but what was formerly a total bar, such as assumption of risk, is converted to a partial defense by the adoption of comparative fault in products liability cases.

These jurisdictions have varied from the approach of *Daly v. Gen. Motors Corp.*, 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978), the leading case adopting comparative fault in products liability cases. This article primarily addresses the policy ramifications of the *Daly* approach which permits all negligent conduct by the plaintiff (even that which previously would not have been a defense in a products liability case) as a partial defense, (see *infra* note 30 and accompanying text), as compared to the *Lippard* approach (prohibiting the use of a plaintiff's ordinary negligence as even a partial defense in products liability cases).

Unless otherwise stated, this article, when referring to the plaintiff's negligent or careless conduct, refers to ordinary negligence such as a negligent failure to discover a risk or negligent failure to guard against a risk or foreseeable misuse of a product. These activities did not constitute a defense according to RESTATEMENT (SECOND) OF TORTS § 402A comment h, n (1965), but have been converted into partial defenses by *Daly* and its progeny.

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

fect the status of products liability law.¹⁵ The majority of courts and commentators, however, argue that this combination furthers the basic goal of tort law—the fair and equitable compensation of injured parties.¹⁶

III. POLICY CONSIDERATIONS

Strict products liability is a doctrine designed to spread among all consumers the losses suffered by a few individuals.¹⁷ Manufacturers increase their prices to account for the potential losses they will incur when consumers are injured by their products. The manufacturer is a better risk-bearer not only because he can shift the loss, but also because, unlike consumers, he has the power to correct any defects.¹⁸ This doctrine is also designed to create an incentive beyond the demands of the market for manufacturers to produce safer products.¹⁹ Additionally, this doctrine relieves the injured consumer of the difficult burden of proving that the manufacturer of a defective product was negligent.²⁰

15. See, e.g., *Lippard v. Houdaille Indus.*, 715 S.W.2d 491, 492-93 (Mo. 1986) (en banc); *Young's Mach. Co. v. Long*, 100 Nev. 692, 692, 692 P.2d 24, 25 (1984); *Kirkland v. Gen. Motors Corp.*, 521 P.2d 1353, 1367 (Okla. 1974).

16. See *supra* note 7; see also *Carestia, supra* note 10, at 71; V. SCHWARTZ, *COMPARATIVE NEGLIGENCE* § 12.1, at 195 (1974); Epstein, *Products Liability: Defenses Based on Plaintiff's Conduct*, 12 UTAH L. REV. 267, 284 (1968); Levine, *Buyer's Conduct as Affecting The Extent of Manufacturer's Liability in Warranty*, 52 MINN. L. REV. 627, 652-63 (1968).

17. Fischer, *Products Liability - Applicability of Comparative Negligence*, 43 MO. L. REV. 431, 432 (1978); Holford, *The Limits of Strict Liability for Product Design and Manufacture*, 52 TEX. L. REV. 81, 82-84, 87-88 (1973); Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 826 (1973).

18. See, e.g., *Daly v. Gen. Motors Corp.*, 20 Cal. 3d 725, 736, 575 P.2d 1162, 1168, 144 Cal. Rptr. 380, 386 (1978); *Carestia, supra* note 10, at 68.

19. See Fischer, *supra* note 17, at 432; see generally Holford, *supra* note 17; Wade, *supra* note 17.

20. See *Daly*, 20 Cal. 3d at 736-37, 575 P.2d at 1168, 144 Cal. Rptr. at 386; *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 463, 150 P.2d 436, 441 (1944) (Traynor, J., concurring) ("An injured person, however, is not ordinarily in a position to refute such evidence or identify the cause of the defect, for he can hardly be familiar with the manufacturing process as the manufacturer himself is."); Gershonowitz, *Comparative Causation As an Alternative To, Not a Part of, Comparative Fault in Strict Products Liability*, 30 ST. LOUIS U.L.J. 483, 503 (1986); *Carestia, supra* note 10, at 68.

The doctrine of strict products liability does not require that the plaintiff prove that the manufacturing steps were unreasonable; this would be too difficult (see authorities cited above in this footnote). The plaintiff's burden is instead directed at the product itself. The reasonableness of the manufacturer's process in creating this product is not at issue. Strict products liability allows the plaintiff to attack the nature of the product without having to attack the reasonableness of the manufacturing process, a process familiar only to the manufacturer himself. *Escola*, 24 Cal. 2d at 463, 150 P.2d at 441.

Weighed against these policies is the countervailing interest in not impairing the operation of useful businesses.²¹ By requiring manufacturers to meet unreasonably exacting standards of safety in order to further the goals of consumer protection, strict products liability laws could force socially appealing businesses out of the market. When fashioning rules of liability designed to protect product users, this potential ramification must be considered.²²

Competing with these policies are those underlying comparative fault. While products liability laws encourage the spreading of losses among all consumers, comparative fault advocates the notion that losses caused by a plaintiff's own carelessness should not be shifted from him to the rest of society.²³ Fairness requires that a plaintiff's recovery be proportionately reduced by the amount of his fault in relation to that of the defendant.²⁴

In addition, by providing consumers with an incentive to act carefully, the comparative fault doctrine provides manufacturers with a safeguard against injured plaintiffs who refuse to protect themselves.²⁵ While products liability

21. See Fischer, *supra* note 17, at 432.

22. *Id.* Professor Fischer explains this problem by using the automobile industry as an example. Imposing liability on automobile manufacturers for all the injuries caused by cars is consistent with the consumer protection policies discussed above. See *supra* notes 17-20 and accompanying text. However, such a rule of law could spell the end of the auto industry because of the prohibitive increase in costs that would result. If the industry then attempted to pass these costs on to consumers, the vast majority of consumers would be priced out of the automobile market. Such a result is not in the best interest of society. Products liability law, Professor Fischer explains, has avoided making manufacturers insurers of all harm caused by their products (as the above example illustrated) by setting legal limits which must be satisfied before a manufacturer is required to compensate an injured consumer. This limitation requires, at a minimum, a showing that the product was defective and that this defect caused the plaintiff's injury. See *infra* note 49, discussing the uncertainty regarding exactly what is required in Missouri to allow recovery.

It is this risk of destroying otherwise useful business that in part determines how many hurdles an injured consumer must leap before the manufacturer will be found liable. Absolutely no hurdles would make the manufacturer an insurer, which could be disastrous for business. On the other hand, too many hurdles, such as requiring the plaintiff to prove the manufacturing process used was unreasonable (see *supra* note 20 and accompanying text), would seriously inhibit the consumer protection goals stated earlier. See *supra* notes 17-20 and accompanying text.

23. See, e.g., Gershonowitz, *supra* note 20, at 485; Carestia, *supra* note 10, at 61.

24. See Fischer, *supra* note 17, at 431. It is frequently asserted that this is what juries have commonly done anyway, contrary to the judge's instructions. *Id.* Codifying that which juries have been doing promotes respect for the law because now juries will be doing as the court tells them. *Id.*

25. Gershonowitz, *supra* note 20, at 486 (citing Epstein, *Products Liability, the Search For the Middle Ground*, 56 N.C.L. REV. 643, 658-59 (1978) (because the manufacturer is powerless to control what the plaintiff may do, the plaintiff's conduct

laws provide manufacturers with an incentive to make safe products, manufacturers are virtually powerless to prevent injuries if the plaintiff is unwilling to protect himself.²⁶

The debate on this issue stems from the incompatible nature of the policies behind each doctrine.²⁷ In products liability the general concept is one of spreading losses by forcing the manufacturer to bear the risks.²⁸ Contrarily, comparative fault is designed to prevent the shifting of certain losses away from the plaintiff because the plaintiff's conduct did not meet the standard required by society.²⁹

IV. VARIOUS APPROACHES

Different jurisdictions have adopted various approaches to this problem depending on which policy considerations they deemed the most persuasive. Some jurisdictions apply comparative fault in all strict liability cases with no limitations based on the level of the plaintiff's culpability.³⁰ At the other

must be considered)). *But see* W. PROSSER AND W. KEETON, ON THE LAW OF TORTS § 67, at 469 (5th ed. 1984) (contributory negligence does not promote caution by making the plaintiff responsible for his own safety and therefore does not reduce the number of accidents).

It could be argued that contributory negligence, and to a lesser degree comparative fault, actually increase the number of injuries if defendants think they can escape the consequences of their negligence. *Id.* See also Gershonowitz, *supra* note 20, at 486 n.17. With this in mind, manufacturers may produce unsafe products they otherwise may not have produced.

26. See Gershonowitz, *supra* note 20, at 486; cf. Twerski, *The Use and Abuse of Comparative Negligence in Products Liability*, 10 IND. L. REV. 797, 799 (1977) (Professor Twerski believes that if the policy behind products liability law is to encourage the manufacturing of safer products, it is inappropriate to bar plaintiff's recovery because of plaintiff's unreasonable conduct).

27. Carestia, *supra* note 10, at 61.

28. *Id.*; see *supra* notes 17-20 and accompanying text.

29. Carestia, *supra* note 10, at 61; Twerski, *supra* note 26, at 799; see *supra* notes 23-26 and accompanying text.

30. See, e.g., ARK. STAT. ANN. §§ 27-1763 to -1765 (1979) (fault includes any act, omission, conduct, or risk assumed); *Daly v. Gen. Motors Corp.*, 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978) (the leading case on the use of comparative fault in strict products liability); *Kaneko v. Hilo Coast Processing*, 65 Haw. 447, 654 P.2d 343 (1982) (adopting the *Daly* approach); IOWA CODE ANN. § 668.1 (West Supp. 1986) (fault includes any negligent act, unreasonable assumption of risk, misuse or unreasonable failure to avoid an injury); *Jaramillo v. Fischer Controls Co.*, 102 N.M. 614, 625, 698 P.2d 887, 900 (Ct. App. 1985) (plaintiff's failure to exercise ordinary care is a defense); N.Y. CIV. PRAC. LAW § 1411 (McKinney 1976) ("culpable conduct" includes all types of contributory negligence, including failure to discover a defect or guard against its existence, foreseeable misuse and assumption of risk. See H. WOODS, THE NEGLIGENCE CASE: COMPARATIVE FAULT 534 (1978)); *Fiske v. MacGregor*, 464 A.2d 719, 728-29 (R.I. 1983) (goes beyond *Daly* by maintaining

extreme are courts which have refused to apply comparative fault principles in strict liability cases at all.³¹ Between these extremes are two intermediate approaches. One category of cases specifically excludes as a defense the use of a plaintiff's negligence which consists solely of a failure to guard against or discover the defect which caused the injury.³² There are numerous other approaches jurisdictions have adopted when applying comparative fault principles to products liability cases which do not fall into any particular category.³³

assumption of risk as a total bar, but adds as a partial defense all other types of negligence, even those that were not defenses previously, such as a negligent encounter with a risk); WASH. REV. CODE §§ 4.22.005 -.015 (Supp. 1987) (fault includes any negligent act, including unreasonable failure to avoid an injury. Section 4.22.005 specifically states that the comparative fault rule applies "whether or not under prior law the claimant's contributory fault constituted a defense"); *Ransome v. Wisconsin Elec. Power Co.*, 87 Wis. 2d 605, 275 N.W.2d 641 (1979) (defenses include contributory negligence, misuse, abuse or alteration of products, and assumption of risk).

31. See, e.g., *Lippard v. Houdaille Indus.*, 715 S.W.2d 491, 493 (Mo. 1986) (en banc) (the Missouri law on products liability remains unchanged and a plaintiff's contributory negligence is not at issue); *Young's Mach. Co. v. Long*, 100 Nev. 692, 693, 692 P.2d 24, 25 (1984); *Knitz v. Minster Mach. Co.*, No. L-84-125, slip op. at ____ (Ohio Ct. App., Feb. 9, 1987); *Saupitty v. Yazoo Mfg. Co.*, 726 F.2d 657 (10th Cir. 1984) (applying Oklahoma law); *Smith v. Smith*, 278 N.W.2d 155 (S.D. 1979).

32. See *Dura Corp. v. Harned*, 703 P.2d 396 (Alaska 1985) (plaintiff's failure to exercise ordinary care was not sufficient to raise the defense of comparative fault in a products liability case; only the defenses of assumption of risk and misuse were allowed as partial defenses); *West v. Caterpillar Tractor Co.*, 336 So. 2d 80, 92 (Fla. 1976) (the ordinary negligence of the plaintiff is a defense except for the failure to discover a defect or guard against its existence); *Simpson v. Gen. Motors Corp.*, 108 Ill. 2d 146, 152, 483 N.E.2d 1, 3 (1985) (failure to discover a defect or guard against its danger is no defense; misuse and assumption of risk are converted from a total defense to a partial defense); *Austin v. Raybestos-Manhattan, Inc.*, 471 A.2d 280, 285-86 (Me. 1984) (failure to discover and failure to guard against a defect are no defenses; assumption of risk is a partial defense; misuse was purposely not addressed); *Holm v. Sponco Mfg.*, 324 N.W.2d 207, 213 (Minn. 1982) (allowed partial defenses of misuse, assumption of risk and contributory negligence, except for failure to discover or guard against a defect); *Suter v. San Angelo Foundry and Mach. Co.*, 81 N.J. 150, 158, 406 A.2d 140, 144-45 (1979) (plaintiff's negligence a defense except for the failure to discover or guard against a defect; assumption of risk only a partial defense; misuse not termed a defense but rather a factor to negate causation or the existence of a defect); *Mauch v. Mfr.'s Sales and Serv.*, 345 N.W.2d 338, 347 (N.D. 1984) (ordinary contributory negligence is not a defense); *Sandford v. Chevrolet Div. of Gen. Motors Corp.*, 292 Or. 590, 598, 642 P.2d 624, 628 (1982) (fault includes all kinds of negligent conduct except the "kind of unobservant, inattentive, ignorant or awkward failure to discover or to guard against the defect").

33. See, e.g., ARIZ. REV. STAT. ANN. § 12-2509 (Supp. 1986) (If product liability claim is based on strict liability in tort and negligence, all contributory negligence is a defense; if the claim is only in strict liability, contributory negligence is no defense); *McIlwain v. Moser Farms Dairy, Inc.*, 40 Conn. 230, 488 A.2d 102 (1985) (similar to the Arizona statute above); *Vannoy v. Uniroyal Tire Co.*, 111 Idaho

After a jurisdiction has adopted comparative fault in products liability cases, it must still decide what the jury is to compare. Jurisdictions vary on this issue as well.³⁴ Some compare the level of culpability, just as in any negligence case.³⁵ Some commentators feel that because the defendant's fault in strict products liability cases is based on a defective product rather than a wrongful act, courts should compare the degree of defectiveness of the product with the plaintiff's fault.³⁶ Other commentators have stated that a jury should only look at the plaintiff's conduct without comparing it at all, reducing the plaintiff's recovery in accordance with the culpability of his conduct.³⁷ This approach avoids the problems inherent in comparing the dissimilar concepts of strict liability and negligence, while still maintaining a degree of fairness by reducing a plaintiff's recovery to the extent his carelessness contributed to his injury.³⁸ Still others feel that causation should be compared.³⁹

536, ___, 726 P.2d 648, 653 (1985) (allows only the defenses of misuse and voluntarily and unreasonably proceeding in the face of a known danger); *Bell v. Jet Wheel Blast*, 462 So. 2d 166, 171-73 (La. 1985) (court refused to delineate what types of conduct would constitute a partial defense, but stated only that misuse and assumption of risk were included. As to other conduct, the lower courts were instructed to determine if the type of conduct in question is such that application of comparative fault would serve to provide any greater incentive to consumers to guard against injury, or whether reducing the claim would only serve to defeat the basic goals of strict products liability); *Mauch v. Mfr.'s Sales and Serv.*, 345 N.W.2d 338, 347 (N.D. 1984) (ordinary contributory negligence is not a defense in a products liability action but unforeseeable misuse and assumption of the risk will be partial defenses); *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414 (Tex. 1984) (the Texas approach is quite involved; for an excellent explanation of the intricacies of this jurisdiction's comparative fault law see H. Woods, *supra* note 30, at 566-71). *Mulherin v. Ingersoll-Rand Co.*, 628 P.2d 1301, 1303-04 (Utah 1981) (the court only addressed the application of misuse and stated that misuse will no longer be a total bar but rather only a partial defense; the court, however, refused to address the role of extreme unforeseeable misuse breaking the causal chain, or misuse so foreseeable that the manufacturer had a duty to anticipate it).

34. Gershonowitz, *supra* note 20, at 502; Twerski, *supra* note 26, at 805.

35. See, e.g., *Butaud v. Suburban Marine and Sporting Goods, Inc.*, 555 P.2d 42, 46 (Alaska 1976) ("The comparative negligence defense would be applied in the same manner as in any negligence case, with the major difference being that in products liability cases it would not be necessary to prove that a defect was caused by negligence."); *Dippel v. Sciano*, 37 Wis. 2d 443, 460-61, 155 N.W.2d 55, 64-65 (1967) (stating in dictum that comparative negligence applies because strict liability is negligence per se). But see Fischer, *supra* note 17, at 442-43 ("social fault in marketing defective products still has nothing in common with the type of specific culpability required for contributory negligence. The concepts can not be compared rationally.").

36. See, e.g., Wade, *supra* note 17, at 377 (the product is "bad" because it was not safe enough).

37. Twerski, *supra* note 26, at 806; Fischer, *supra* note 17, at 449-50.

38. Fischer, *supra* note 17, at 449-50.

39. See, e.g., *Vannoy v. Uniroyal Tire Co.*, 111 Idaho 536, ___, 726 P.2d

V. JUSTIFICATION OF *Lippard v. Houdailles Indus.*⁴⁰A. *Setting Up the Problem - Competing Policies*

The vast majority of jurisdictions that have adopted comparative fault have applied it to strict products liability.⁴¹ Why then did the Missouri Supreme Court in *Lippard* refuse to join this growing movement? In *Lippard* the plaintiff operated a planing machine as part of his employment. The blades of the machine were protected by a metal guard which was designed to close after the board being planed had cleared the cutterhead. A board slipped out of the plaintiff's hand, and he reached down to catch it as it fell. The guard plate had not covered the blades as it should have, and two of the plaintiff's fingers were severed.⁴² The trial court and court of appeals allowed a comparative fault defense and reduced the plaintiff's recovery by fifty percent, the percentage of fault the jury attributed to the plaintiff's negligence.⁴³ The Supreme Court of Missouri reversed, holding that the plaintiff's contributory negligence was not at issue in a products liability case.⁴⁴

Missouri's products liability law did not permit contributory negligence as a defense.⁴⁵ Therefore, when Missouri replaced contributory negligence with comparative fault,⁴⁶ it treated comparative fault the same way and refused to allow the plaintiff's negligence to serve as even a partial defense.⁴⁷

648, 653 (1985); *Thibault v. Sears, Roebuck and Co.*, 118 N.H. 802, 810, 395 A.2d 843, 848 (1978); *Mauch v. Mfr.'s Sales and Serv.*, 345 N.W.2d 338, 348 (N.D. 1984); *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 432 (Tex. 1984); Gershonowitz, *supra* note 20, at 507-15.

For an analysis of the reasoning of the jurisdiction cited in this note, see Carestia, *supra* note 10, at 64-68.

40. 715 S.W.2d 491 (Mo. 1986) (en banc).

41. See *supra* notes 7-8 and accompanying text.

42. *Lippard*, 715 S.W.2d at 492.

43. *Id.*

44. *Id.* at 493.

45. See *Keener v. Dayton Elec. Mfg. Co.*, 445 S.W.2d 362, 365 (Mo. 1969); see also *Uder v. Missouri Farmers Ass'n.*, 668 S.W.2d 82, 87 (Mo. Ct. App. 1983).

Missouri, like the vast majority of jurisdictions, adopted the RESTATEMENT (SECOND) OF TORTS § 402A, wherein comment n states that contributory negligence amounting to a failure to discover a defect or to guard against its existence is no defense.

46. See *Gustafson v. Benda*, 661 S.W.2d 11, 15 (Mo. 1983) (en banc).

47. *Lippard v. Houdaille Indus.*, 715 S.W.2d 491, 493 (Mo. 1986) (en banc).

There was not complete agreement among the Missouri Supreme Court Judges on this issue. Judge Welliver in his dissent stated that *Gustafson* was controlling in products liability cases even though *Gustafson* was a negligence case. *Lippard*, 715 S.W.2d at 500-01 (Welliver, J., dissenting).

This decision is justified by more than an adherence to precedent which prohibited the defense of ordinary contributory negligence.⁴⁸ Missouri's position regarding products liability is one of strongly encouraging the socialization of losses caused by defective products.⁴⁹ Because Missouri has

48. Many jurisdictions which now allow comparative negligence in products liability cases were faced with the same precedent. Precedent should not be sufficient grounds to retain bad law. *See, e.g.,* *Daly v. Gen. Motors Corp.*, 20 Cal. 3d 725, 742, 575 P.2d 1162, 1172, 144 Cal. Rptr. 380, 390 (1978) (judicially adopting comparative fault in strict products liability cases for all types of contributory negligence despite precedent prohibiting the use of contributory negligence in products liability cases); *Henderson v. Harnischfeger Corp.*, 12 Cal. 3d 663, 672, 527 P.2d 353, 358, 117 Cal. Rptr. 1, 6 (1978); *see also Gustafson*, 661 S.W.2d at 11-16, where the existence of precedent mandating all-or-nothing contributory negligence did not prevent this court from adopting comparative fault.

49. *See Lippard*, 715 S.W.2d at 493; *Keener*, 445 S.W.2d at 364. Recent developments in Missouri's products liability law indicate a strong policy in favor of compensating consumers injured by products so as to socialize their losses. According to Missouri Supreme Court Judge Donnelly, Missouri's movement toward compensating injured plaintiffs began when this court expanded the *Keener* holding to include design defects. *See Blevins v. Cushman Motors*, 551 S.W.2d 602 (Mo. 1977) (en banc). Next, in *Elmore v. Owens-Illinois Glass Co.*, 673 S.W.2d 434 (Mo. 1984) (en banc), the court "effectually excised the words 'unreasonably dangerous'" from the products liability cause of action. *Lippard*, 715 S.W.2d at 498 (Donnelly, J., dissenting). Most recently, the court in *Nesselrode v. Executive Beechcraft, Inc.*, 707 S.W.2d 371 (Mo. 1986) (en banc), according to Judge Donnelly, "effectually excised the words 'use reasonably anticipated'" from the products liability equation. *Lippard*, 715 S.W.2d at 498 (Donnelly, J., dissenting).

This movement toward encouraging the socialization of plaintiffs' losses may be capsulized by comparing the Missouri Approved Instructions (MAI) for products liability in 1969 when *Keener* was decided with what Judge Donnelly expects after *Nesselrode* in 1986. After *Keener*, MAI 25.04 read as follows:

Your verdict must be for plaintiff if you believe:

First, defendant sold the (describe product) in the course of defendant's business, and

Second, the (describe product) was then in a defective condition unreasonably dangerous when put to a reasonably anticipated use, and

Third, the (describe product) was used in a manner reasonably anticipated, and

Fourth, plaintiff was damaged as a direct result of such defective condition as existed when the (describe product) was sold.

In Judge Donnelly's opinion, based on the decision in *Nesselrode*, MAI 25.04 would read as follows:

Your verdict must be for plaintiff if you believe:

First, defendant sold the (describe product) in the course of defendant's business, and

Second, the (describe product) was then in a defective condition * * *, and

Third, the (describe product) was used * * *, and

Fourth, plaintiff was damaged as a direct result of such defective condition as existed when the (describe product) was sold. *Lippard*, 715 S.W.2d at 498 (Donnelly, J., dissenting).

consistently opted for a rule of law which expands the availability of products liability compensation,⁵⁰ it cannot be surprising⁵¹ that the *Lippard* court also rejected a defense that would serve to reduce an injured plaintiff's recovery, a defense that had previously been unavailable.⁵²

Mere consistency, however, does not make the *Lippard* decision correct. To justify the decision in *Lippard* requires one to conclude that Missouri's policy toward socializing losses arising from defective products, or its other policies supporting its strict products liability law, outweigh the competing policies which support the doctrine of comparative fault.⁵³

B. *The Real Issue*

The inescapable question opponents of the *Lippard* decision must answer is why the substitution of comparative fault for contributory negligence should mandate reducing a plaintiff's recovery in cases where prior to this switch, the plaintiff's ordinary contributory negligence had no impact on the plaintiff's recovery.⁵⁴

When comparative fault was first adopted in *Gustafson*, the Missouri Supreme Court stated that fairness and justice are best achieved by eliminating the all-or-nothing doctrine of contributory negligence and replacing it with comparative fault.⁵⁵ The *Gustafson* court reasoned that relieving a negligent defendant of all responsibility (as contributory negligence did) was no better than relieving a negligent plaintiff.⁵⁶ Opponents of the *Lippard*

50. See *supra* note 49.

51. See *Lippard*, 715 S.W.2d at 497 (Donnelly, J., dissenting) (stating that prohibiting the comparative fault defense in products liability "came as no surprise").

52. *Lippard*, 715 S.W.2d at 492-93.

53. Another competing policy that must be considered is the need to prevent putting socially useful manufacturers out of business by making them insurers of all who use their products. Although this topic is outside the scope of this article, see *supra* notes 21-22 and accompanying text for a brief discussion.

54. This is not to say that the plaintiff's conduct was irrelevant in Missouri. The defendant could make use of the plaintiff's carelessness to support arguments that the product was not unreasonably dangerous. *Lippard*, 715 S.W.2d at 493. Furthermore, the plaintiff's negligence can bar recovery in Missouri to the extent that it amounts to extreme unforeseeable misuse that breaks the causal connection between the defect and the injury, or an unreasonable and voluntary assumption of risk. *Id.*; RESTATEMENT (SECOND) OF TORTS § 402A comments h, n (1965). This article is primarily addressing negligence which was no defense in products liability cases prior to the adoption of comparative fault, namely the negligent failure to discover or guard against a defect and foreseeable misuse. See *supra* note 13.

55. *Gustafson v Benda*, 661 S.W.2d 11, 15 (Mo. 1983) (en banc).

56. *Id.* at 13 (quoting H. WOODS, *THE NEGLIGENCE CASE: COMPARATIVE FAULT* 14-15 (1978)). The *Gustafson* court also justified comparative fault because it would simplify multi-defendant litigation by encouraging the joining of all concerned parties in one trial to determine everybody's percentage of fault. This was not only simpler, but it relieved the congestion of overcrowded courts. *Gustafson*, 661 S.W.2d at 14.

decision argue that plaintiffs are now being relieved of responsibility despite their negligence, contrary to the expressed policy in *Gustafson*.⁵⁷ They argue that the policy behind *Gustafson* is just as strong in products liability cases as it is in pure negligence cases and therefore negligent plaintiffs in products liability cases should not be permitted total recovery.⁵⁸

As appealing as this argument may appear, it does not answer the original question. Products liability is significantly different from ordinary negligence.⁵⁹ Just because "fairness and justice" require the adoption of comparative fault in negligence cases does not explain why it should be adopted in strict products liability cases where the plaintiff's negligence has never been a defense.⁶⁰ The remainder of this Comment will address this question.

C. Comparative Fault - Is It the Perfect Compromise? *Daly v. General Motors Corp.*⁶¹

California was one of the first states to combine comparative fault with strict products liability. California, like Missouri, prohibited the use of the ordinary negligence of the plaintiff, short of voluntary and unreasonable assumption of risk, as a defense in products liability.⁶² California, like Mis-

57. See *Lippard v. Houdaille Indus.*, 715 S.W.2d 491 (Mo. 1986) (en banc). "The importance of fairness and justice that prompted this court to adopt comparative fault in *Gustafson*, is no less compelling in the strict products liability setting." *Id.* at 502 (Welliver, J., dissenting).

58. *Id.*

59. See Fischer, *supra* note 17, at 433-35.

60. See *supra* note 54 (explaining the limited role a plaintiff's negligence plays in strict products liability in Missouri).

The dissent in *Lippard* argued that *Gustafson* adopted the entire Uniform Comparative Fault Act (UCFA) as law in Missouri. The UCFA states that comparative fault shall be applied in strict liability cases. See UCFA § 1(b), 12 U.L.A. Supp. 35-40 (1983); *Lippard*, 715 S.W.2d at 500 (Welliver, J. dissenting). There are two responses to this. First, even if *Gustafson* did adopt comparative fault for strict products liability, it still does not answer the question whether Missouri should do this. Second, the majority in *Lippard* expressly stated that *Gustafson* did not enact the UCFA as a virtual statute in Missouri. *Lippard*, 715 S.W.2d at 492-93.

The *Gustafson* opinion, according to the *Lippard* majority, was only adopting the procedures of the UCFA "insofar as possible." *Id.* at 493. The *Lippard* majority held that the UCFA was not intended to be binding on substantive issues not then before the *Gustafson* court. *Id.* at 493 n.1. The court concluded that the language "insofar as possible" did not include applying the UCFA to strict products liability cases when *Gustafson* was only a negligence case. *Id.*

61. 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 80 (1978).

62. See, e.g., *Henerson v. Harnischteger Corp.*, 12 Cal. 3d 663, 672, 527 P.2d 353, 358, 117 Cal. Rptr. 1, 6 (1978). *Luque v. McLean*, 8 Cal. 3d 136, 145, 501 P.2d 1163, 1169-70, 104 Cal. Rptr. 443, 449-50 (1972).

souri, judicially adopted pure comparative fault for negligence claims.⁶³ Unlike Missouri, however, California felt the adoption of comparative fault justified the consideration of the plaintiff's negligence in products liability cases despite their refusal to do so under the prior doctrine of contributory negligence.⁶⁴

Daly combined these doctrines to promote the equitable allocation of losses among all parties in proportion to their fault without thwarting the expressed purposes underlying strict products liability.⁶⁵ The *Daly* court saw an opportunity to get the best of both worlds and seized it. *Daly* asserted that the goals of strict products liability can be achieved while still preventing defendants and society from shouldering responsibility for damages flowing from the fault of plaintiffs.⁶⁶ In other words, *Daly* and its progeny see the doctrines of comparative fault and strict liability as allies.⁶⁷ It should be noted that this is inconsistent with the earlier analysis which concluded that the two doctrines were in competition with each other.⁶⁸

In essence, *Daly* and its progeny are of the opinion that the policies of fairness and justice furthered by the adoption of comparative fault in place of the all-or-nothing approach of contributory negligence compel courts to consider the plaintiff's negligence as a partial defense in cases wherein it previously was prohibited as a defense.⁶⁹ Comparative fault, according to these jurisdictions, can be combined with strict liability without sacrificing the goals of strict liability, whereas this was not the case with the all-or-nothing approach of contributory negligence. The policy of encouraging safer products and socializing losses by putting the risk of loss on the manufacturer would be substantially impaired if a manufacturer were completely exonerated anytime the consumer was negligent.⁷⁰ By granting only partial relief, according to *Daly*, strict liability goals stay intact.⁷¹ Or do they?

63. See *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 810, 532 P.2d 1226, 1230, 119 Cal. Rptr. 858, 862 (1975).

64. *Daly v. Gen. Motors Corp.*, 20 Cal. 3d 725, 742, 575 P.2d 1162, 1172, 144 Cal. Rptr. 380, 390 (1978).

65. *Id.* at 737-38, 575 P.2d at 1168-69, 144 Cal. Rptr. at 387-88.

66. *Id.*

67. *Id.*

68. See *supra* notes 23-29 and accompanying text.

69. See, e.g., *Daly*, 20 Cal. 3d at 733, 575 P.2d at 1166, 144 Cal. Rptr. at 384; *Kaneko v. Hilo Coast Processing*, 65 Haw. 447, 654 P.2d 343 (1982); *Fiske v. MacGregor*, 464 A.2d 719, 728-29 (R.I. 1983); *Ransome v. Wisconsin Elec. Power Co.*, 87 Wis. 2d 605, 618, 275 N.W.2d, 641, 647 (1979); WASH. REV. CODE ANN. § 4.22.005 (Supp. 1987). In each of these cases, the courts recognized that contributory negligence as a total bar was no defense, but allowed its successor, comparative fault, to act as a partial defense.

70. See, e.g., *Twerski*, *supra* note 26, at 799 (It is inappropriate to bar the plaintiff's recovery because of plaintiff's unreasonable conduct if the policy behind

D. *The Dangers of the Daly Approach*

1. Frustration of Product Liability Policy Interests

Courts following the *Daly* rationale are subject to several attacks. Contrary to *Daly*, the application of comparative fault in products liability cases may very well reduce the manufacturer's incentive to produce safer products. It has been argued that "once a product with a design defect has been marketed, we know with substantial certainty that there will be a victim—we just do not know his name."⁷²

One can imagine a situation where a manufacturer is faced with a choice: should I spend X dollars to make this product safer or should I simply pay out the verdicts as they arise when consumers are injured?⁷³ This decision will turn on how much the manufacturer feels he will be forced to pay out for injuries. If the injured consumers consistently have their damages reduced because of comparative fault, the manufacturer's injury exposure is also reduced. This thereby lowers the threshold level where a manufacturer will choose to market a product without investing more money to improve its safety. His product will now be more dangerous than if he were threatened with higher damage awards. As a pure business decision, the lower his damage exposure, the less money the manufacturer will spend improving a product's safety in order to avoid potential injuries.⁷⁴

Professor Twerski argues that allowing the reduction of a plaintiff's award because of plaintiff's misconduct will also frustrate the safety policy by no longer encouraging the development of "anti-contributory negligence mechanisms."⁷⁵ Even *Daly*-type jurisdictions admit that it is the manufac-

strict products liability is to encourage the manufacture of safer products.).

By completely barring plaintiff's recovery despite the manufacturer's contribution to the injury, the socialization of plaintiff's loss is non-existent. With comparative negligence, at least that part of the loss attributable to the manufacturer is socialized. See *Daly*, 20 Cal. 3d at 736-37, 575 P.2d at 1168-69, 144 Cal. Rptr. at 386-87.

71. *Daly*, 20 Cal. 3d at 736-37, 575 P.2d at 1168-69, 144 Cal. Rptr. at 386-87.

72. Twerski, *supra* note 26 at 800. Professor Twerski used the safety guard cases as an example. He stated that, "if a drill press is designed without a safety guard, there is little question that somewhere in the manufacturing community there will be a plaintiff who is destined to have his hand severed." *Id.* See generally *Dorsey v. Yoder Co.*, 331 F. Supp. 753 (E.D. Pa. 1971); *Bexiga v. Havir Mfg. Corp.*, 60 N.J. 402, 290 A.2d 281 (1972); Owen, *The Highly Blameworthy Manufacturer: Implications on Rules of Liability And Defense In Product Liability Actions*, 10 IND. L. REV. 769 (1977).

73. Twerski, *supra* note 26, at 802.

74. *Id.*; see also *Daly v. Gen. Motors Corp.*, 20 Cal. 3d 725, 764, 575 P.2d 1162, 1186, 144 Cal. Rptr. 380, 404 (1978) (Mosk, J., dissenting).

75. Twerski, *supra* note 26, at 804.

turer's duty to make safe products and products liability laws are designed to encourage this policy. If the product is defective in some way, society places responsibility for injuries resulting from this unsafe product on the manufacturer.⁷⁶ A manufacturer should be required to design products which prevent injury to even negligent consumers if this negligence is foreseeable.⁷⁷ In this way the safety interests are significantly furthered. Though the manufacturer cannot control how the plaintiff will use the product, he can design the product to prevent the plaintiff from unwisely misusing it.⁷⁸ These "anti-contributory negligence mechanisms" have become commonplace today. Examples include simultaneous buttons on a stamping machine requiring both hands to be on the buttons before the stamp will lower,⁷⁹ safety shields which lower once wood has entered the system of a cutting press,⁸⁰ and warning beepers on heavy equipment which sound when the vehicle is in reverse.⁸¹

If comparative fault were applied in these cases it would be penalizing the plaintiff for acting unreasonably when that was the very problem the manufacturer was to guard against.⁸² Safety designs such as those enumerated above should be fully encouraged. The fact that they are in place today is a testamentary to the effectiveness of our products liability law—which traditionally disallowed contributory negligence as a defense. To now exonerate manufacturers (even partially) in these cases because the plaintiff acted unreasonably is, as Professor Twerski states, to "march up the hill in order to march down again."⁸³

76. See, e.g., *Daly*, 20 Cal. 3d at 736-37, 575 P.2d at 1168-69, 144 Cal. Rptr. at 386-87; *Butaud v. Suburban Marine and Sporting Goods, Inc.*, 555 P.2d 42, 44 (Alaska 1976).

77. See RESTATEMENT (SECOND) OF TORTS § 402A comments h, n (1965). Comment h states that generally misuse of a product will bar recovery, but where that misuse is reasonably anticipated the manufacturer may be required to take additional precautions. Comment n states that even a plaintiff who acts negligently by failing to discover a risk or failing to guard against its occurrence can still recover from the manufacturer. See also Twerski, *supra* note 26, at 804.

78. See *supra* note 77.

79. This design prevents a plaintiff from activating the stamping press with one hand while the other hand is still in danger. Without this mechanism, a worker who stamped his hand would have his recovery reduced because it is arguably unreasonable to stamp your own hand. Because this risk is foreseeable, we should require manufacturers to guard against its occurrence.

80. See *Lippard v. Houdaille Indus.*, 715 S.W.2d 491, 492 (Mo. 1983) (en banc).

81. See *West v. Caterpillar Tractor Co.*, 336 So. 2d 80, 82 (Fla. 1976); *Baccelleri v. Hyster Co.*, 287 Or. 3, 5, 597 P.2d 351, 352 (1979) (en banc).

82. Twerski, *supra* note 26, at 805.

83. *Id.* See James, *Assumption of the Risk: Unhappy Reincarnation*, 78 YALE L.J. 185 (1968). This restates the argument set out in *Parvi v. City of Kingston*, 41 N.Y.2d 553, 560, 362 N.E.2d 960, 965, 394 N.Y.S.2d 161, 166 (1977), warning that permitting affirmative defenses and causation arguments may destroy the duties the

Allowing reduction in damage awards because of plaintiffs' foreseeable misconduct does not create a full duty of safety but something less than

law has worked so hard to develop. *See also* *Daly v. Gen. Motors Corp.*, 20 Cal. 3d 725, 764, 575 P.2d 1162, 1186, 144 Cal. Rptr. 380, 414 (1978) (Mosk, J., dissenting) (the *Daly* decision "seriously erodes the pattern of law which up to now reflected a healthy concern for consumers victimized by defective products.").

Proponents of the use of comparative fault in strict liability would be quick to point out that the manufacturer is still liable and is therefore still encouraged to manufacture safe products. The fact is, however, that they are not liable to the same degree. Justice Mosk, in his *Daly* dissent, addressed this issue by stating: "The motivation to avoid polluting the stream of commerce with defective products increases in direct relation to the size of potential damage awards." *Daly*, 20 Cal. 3d at 764, 575 P.2d at 1186, 144 Cal. Rptr. at 414. Furthermore, as Professor Twerski has argued, allowing comparative fault as a defense gives juries the opportunity to tear down the duty requirements our law has placed on manufacturers by grossly reducing the plaintiff's award. These proponents must be willing to accept the fact that their approach delegates major law-making responsibility to juries. *See* Twerski, *supra* note 26, at 813; *see also Daly*, 20 Cal. 3d at 756-57, 575 P.2d at 1181, 144 Cal. Rptr. at 399 (Jefferson, J., concurring and dissenting).

As was noted earlier, it is often asserted that before comparative fault was adopted, instead of totally barring the plaintiff's recovery due to his contributory negligence, juries merely reduced the recovery, thereby ignoring the court's instructions. *See supra* note 24 and accompanying text. Opponents of the *Lippard* decision may argue that juries will similarly continue to ignore the instructions given and reduce the recovery in products liability cases as well. Therefore, the argument goes, by not allowing the comparative fault defense, the Missouri Supreme Court is fooling itself because juries will continue to reduce awards due to the plaintiff's negligence anyway.

However, a significant difference exists between what juries formerly did with contributory negligence instructions and what juries will do with the products liability instructions after *Lippard*. With contributory negligence, the jury was instructed to deny recovery if the plaintiff's negligence in any way contributed to his injury. In a products liability case after *Lippard*, however, the jury will not be instructed on the plaintiff's ordinary negligence. The plaintiff's conduct is only at issue if it amounts to an unreasonable assumption of risk, extreme misuse that breaks the causal connection, or a showing that the product is not defective. *See supra* note 54. The jury will not be instructed to consider ordinary negligence that falls short of these, such as failing to discover a defect. Evidence pertaining to the plaintiff's "ordinary" negligence will probably be excluded.

The only acts of negligence these instructions (and often times the evidence at trial) allow the jury to focus on go beyond mere unreasonableness. As a result, a juror will not be tempted with the choice of reducing the recovery because the plaintiff merely failed to use ordinary care. The juror will not be tempted because no instruction will be given directing the jury's attention to penalizing the plaintiff for any and all unreasonable acts. This is significantly different from the contributory negligence instructions which forced the jury to focus on any negligent act by the plaintiff.

The distinction is subtle but crucial. An example should help. Suppose defendant manufacturer designs a stamping press which only requires one button to be pushed before the stamping head lowers. Such a design makes it extremely likely that during a busy day a worker will inadvertently press the button before his other hand has cleared the stamping head and thereby seriously injure himself. Suppose a plaintiff

that.⁸⁴ There are those who argue that comparative fault provides plaintiffs with an incentive to act more carefully. This, however, misses the point. As Professor Twerski stated: "[T]he short answer to [this] argument is that the defendant's safety device would have eliminated plaintiff misjudgment, a goal which the law should foster totally, not partially."⁸⁵

Some have argued that the heart of product liability litigation arises out of products failing to perform to the level expected by consumers.⁸⁶ The way a consumer treats a product is a reflection of the marketing techniques used by manufacturers and sellers.⁸⁷ When a defendant encourages certain kinds of plaintiff behavior which increases sales, he should not be allowed to use this same behavior as a defense when the product malfunctions.⁸⁸

This reasoning applies whether the plaintiff's wrongful conduct is a total bar or only a partial defense. Either way, jurisdictions permitting the use of

does exactly this. After *Lippard*, the jury will not be instructed to consider the plaintiff's alleged negligent failure to guard against this risk because the plaintiff's conduct arguably did not amount to an unreasonable assumption of the risk, it did not amount to an extreme misuse of the product, and his conduct did not amount to a showing that no defect existed. With no instruction focusing the jury's attention to the plaintiff's conduct, the jury will not be tempted to ignore the court's instructions and penalize the plaintiff for his alleged ordinary negligence.

Only if the evidence presented makes a submissible case that the plaintiff's conduct amounted to one of the enumerated defenses will the jury be told to focus on the plaintiff's conduct. However, even in such a situation, the instructions would require the jury to look beyond mere reasonableness and instead consider the act only insofar as it affects causation, the existence of a defect or an unreasonable assumption of risk. The jury will not be told to punish the plaintiff merely because his unreasonableness contributed to his injury.

This significantly differs from the former contributory negligence instructions which required juries to consider not only any negligent acts by the plaintiff, but also to punish the plaintiff based solely on this unreasonable act. After *Lippard*, juries will not be asked to punish plaintiffs for unreasonableness. They will instead be told to punish plaintiffs only if one of the above mentioned defenses existed. As a result, the risk of juries ignoring the court's instructions and improperly reducing recoveries is significantly reduced.

84. Twerski, *supra* note 26, at 813.

85. *Id.*; see also *Daly*, 20 Cal. 3d at 756, 575 P.2d at 1181, 144 Cal. Rptr. at 399 (Jefferson, J., concurring and dissenting).

86. Twerski, *supra* note 26, at 803-04; Shapo, *A Representational Theory Of Consumer Protection: Doctrine, Function and Legal Liability For Product Dissatisfaction*, 60 VA. L. REV. 1109, 1370 (1974).

87. Twerski, *supra* note 26, at 803.

88. *Id.* Note that the conduct encouraged by the defendant need not be the exact behavior the consumer was involved in when the product malfunctioned for this theory to apply. For example, if a tire manufacturer advertises that its tires are excellent at handling high speed turns, and the tire malfunctions when the consumer is going 70 mph down a straightaway, the defendant has encouraged high speed driving and should not be permitted to use the consumer's speeding as even a partial defense.

plaintiff's misconduct as a defense are frustrating a fundamental policy of compensating consumers who are injured by products that fail to meet the standards the defendant has impliedly held them up to meet.

The detrimental effect the *Daly* approach will have on the socialization of losses, perhaps the primary reason the *Lippard* court declined to follow *Daly*, must not be overlooked. In addition to the earlier analysis given on this issue,⁸⁹ further arguments will be made at the conclusion of this Comment.⁹⁰

2. Additional Dangers of *Daly*

Other criticisms have been wielded against combining comparative fault and strict products liability that have nothing to do with furthering the policy considerations of strict products liability. By far the most often raised criticism is the "apples and oranges" argument. That is, it is logically impossible to compare a plaintiff's *negligence* with a manufacturer's *strict* liability.⁹¹

This criticism is especially compelling when one considers the second non-policy criticism of combining these two doctrines, namely, the inability of juries to apportion fault between a plaintiff's negligence and the defendant's defective product.⁹² The end result of a jury's search for some common denominator to compare will be a verdict prejudicial against the plaintiff.⁹³

The jury is instructed to compare the plaintiff's fault with the defendant's conduct in a cause of action that does not require that the jury consider the existence or nature of the defendant's culpability.⁹⁴ The jury is asked to find the defendant's product defective, irrespective of fault, then turn around

89. See *supra* notes 48-53 and accompanying text.

90. See *infra* notes 102-07 and accompanying text.

91. This article is devoted primarily to discussing the policy implications of combining comparative fault with strict products liability. As a result, issues such as the "apples and oranges" debate, though fuel for much scholarly discussion, will not be discussed in depth. For excellent discussions on this issue, see Gershonowitz, *supra* note 20, at 501-07; Fischer, *supra* note 17, at 433-36; Twerski, *supra* note 26, at 805-08.

92. See, e.g., *Melia v. Ford Motor Co.*, 534 F.2d 795 (8th Cir. 1976) (applying Nebraska law); *Daly v. Gen. Motors Corp.*, 20 Cal. 3d 725, 751, 575 P.2d 1162, 1178, 144 Cal. Rptr. 380, 396 (1978) (Jefferson, J., concurring and dissenting); *Smith v. Smith*, 278 N.W.2d 155, 161 n.7 (S.D. 1977).

This criticism obviously overlaps with the "apples and oranges" criticism. Because one cannot mix apples and oranges, a jury cannot compare them. But scholars treat the "apples and oranges" argument on a purely theoretical level and find it repugnant without ever considering the difficulty juries will find with it. See authorities cited *supra* note 91.

93. *Daly*, 20 Cal. 3d at 763, 575 P.2d at 1185, 144 Cal. Rptr. at 403 (Mosk, J., dissenting).

94. *Id.*

and compare the plaintiff's fault with the defendant's. Because the defendant's fault has not been emphasized in the litigation (because it is *strict liability*), the jury may not be aware of any "fault" by the defendant. So comparing this with the plaintiff's fault, which the defendant has emphasized, will likely result in an unjust apportionment of fault.⁹⁵

Professor Twerski argues that plaintiffs are prejudiced in that manufacturers producing defective products are really intentional tortfeasors, because "once a product with a design defect is marketed, we know with substantial certainty [somebody will be injured]."⁹⁶ Yet the "absoluteness" of the injury is hidden from jurors in the "one-on-one setting" of a trial.⁹⁷ The plaintiff may well be prohibited from demonstrating how the defendant's conduct has hurt others,⁹⁸ and even if some evidence of this kind is admissible, the courts will not permit the plaintiff to depict the danger inherent in the product outside the parameters of this one-on-one setting.⁹⁹ The true egregiousness and dangerousness of the product's design is hidden from jurors. Instead they are innundated with alleged negligent acts by the plaintiff which they are to consider in total ignorance of the other consumers this defendant's product has injured. Because the culpability of the plaintiff and the defendant cannot fairly be compared, they should not be compared at all.¹⁰⁰

95. See, e.g., *Buccery v. General Motors Corp.*, 60 Cal. App. 3d 533, 549, 132 Cal. Rptr. 605, 615 (1976) (there may be no negligence of the defendant to compare with that of the plaintiff). See also Fischer, *supra* note 17, at 433-34.

96. Twerski, *supra* note 26, at 800-01; *supra* note 72 and accompanying text.

97. *Id.*

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

99. Twerski, *supra* note 26, at 801.

100. The counter argument is usually made that juries can make these comparisons because jurisdictions that have applied it have experienced no difficulties. See, e.g., *Coney v. J.L.G. Indus.*, 97 Ill. 2d 104, 116, 454 N.E.2d 197, 202 (1983); *Kaneko v. Hilo Coast Processing*, 65 Haw. 447, 463, 654 P.2d 343, 353; *Butaud v. Suburban Marine and Sporting Goods, Inc.*, 555 P.2d 42, 45 (Alaska 1976).

Because juries have come back with verdicts apportioning fault between plaintiff and defendant does not answer the question of whether juries can *fairly* apportion fault in these cases. To say juries can do it because they are doing it fails to address the prejudicial effects discussed in the text above. All this argument states is that the courts are accepting these prejudicial verdicts.

The courts are simply refusing to address this question. A typical example is *Kaneko*, where the court cited three cases and a law review article which argued that juries cannot fairly compare strict liability and negligence, and then cited *Daly* and its progeny for the proposition that because those jurisdictions have found no difficulty for jurors, the two theories could be merged. *Kaneko*, 654 P.2d at 353. No analysis at all was given. The court ignored articulate arguments supporting a contrary position and instead held that because jurors have returned verdicts in other jurisdictions it must be working fairly. This reasoning is not persuasive.

VI. CONCLUSION

It is now apparent what may have gone through the minds of the Missouri Supreme Court Judges when a majority held in *Lippard* that comparative fault was not to be considered in products liability cases. Or perhaps none of these arguments were needed—they simply followed the precedent of *Keener* which prohibited the defense of contributory negligence in products liability.¹⁰¹

The strong policy in favor of socializing losses attributable to defective products which Missouri supports¹⁰² gives Missouri an additional incentive to restrict the defenses available to manufacturers. Often it is difficult to stand one's ground in the face of sweeping changes all around. Judge Welliver, in his dissent in *Lippard*, seems to be persuaded by the fact that twenty-eight of the "more influential jurisdictions" have applied comparative fault to strict products liability, whereas only six jurisdictions have held to the contrary.¹⁰³ The short answer to this is that what is good for these twenty-eight jurisdictions may not be right for Missouri.

Comparative fault is not the ideal solution *Daly* and its progeny propose it to be.¹⁰⁴ No longer will the costs of full compensation be spread throughout society. Instead, the total cost to manufacturers will be reduced at the expense of injured plaintiffs whose recovery turns on the "necessarily fortuitous, conjectural and haphazard determinations to be made by juries"¹⁰⁵ who are trying to compare conduct that cannot fairly be compared.¹⁰⁶ Such a result is contrary to Missouri's strong policy in favor of socializing the total loss suffered by plaintiffs from defective products.¹⁰⁷ This reason alone would seem sufficient grounds to justify the *Lippard* decision.

Additionally, the policy of encouraging safer products is also severely hindered if comparative fault is allowed as a defense.¹⁰⁸ Manufacturers will be slow to spend the money needed to improve the product's safety.¹⁰⁹ Con-

101. *Keener v. Dayton Elec. Mfg. Co.*, 445 S.W.2d 362, 365 (Mo. 1969).

102. *See supra* note 49 and accompanying text.

103. *Lippard v. Houdaille Indus.*, 715 S.W.2d 491, 502 (Mo. 1986) (en banc) (Welliver, J., dissenting).

104. *See supra* notes 65-68 and accompanying text.

105. *Daly v. Gen. Motors Corp.*, 20 Cal. 3d 725, 757, 575 P.2d 1162, 1181, 144 Cal. Rptr. 380, 399 (1978) (Jefferson, J., dissenting).

106. *See supra* notes 92-100 and accompanying text.

107. *See supra* note 49 and accompanying text; *see also Daly*, 20 Cal. 3d at 756-57, 575 P.2d at 1181, 144 Cal. Rptr. at 395 (Jefferson, J., dissenting); *Butaud v. Suburban Marine and Sporting Goods, Inc.*, 555 P.2d 42, 47 (Alaska 1976) (Burke, J., dissenting). Both Justice Jefferson in *Daly* and Justice Burke in *Butaud* felt the merging of comparative fault and strict products liability frustrated the policy of socializing losses caused by defective products.

108. *See generally supra* notes 72-85 and accompanying text.

109. *See supra* notes 72-74 and accompanying text.

sumers reacting to products as directed by defendants' marketing campaigns may have their recoveries reduced because this conduct was unreasonable.¹¹⁰ Manufacturers may lose their incentive to prevent foreseeable misjudgment.¹¹¹

When considering whether to ease the burden on manufacturers in products liability cases, it is crucial that one keep in mind exactly what products liability law addresses. Products liability deals with defective products. As Justice Mosk reminded us in his *Daly* dissent:

The defective product is comparable to a time bomb ready to explode; it maims its victims indiscriminately, the righteous and the evil, the careful and the careless. Thus when a faulty design or otherwise defective product is involved, the litigation should not be diverted to consideration of the negligence of the plaintiff. The liability issues are simple: Was the product or its design faulty, did the defendant inject the defective product into the stream of commerce, and did the defect cause the injury?¹¹²

With this in mind, the Missouri Supreme Court properly held that ordinary contributory negligence by a consumer should not be even a partial defense in products liability cases.

110. See *supra* notes 86-88 and accompanying text.

111. See *supra* notes 75-85 and accompanying text.

112. *Daly*, 20 Cal. 3d at 760, 575 P.2d at 1183, 144 Cal. Rptr. at 401 (Mosk, J., dissenting).

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