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Comparative Fault and Strict Products Liability: Are They Compatible?

C. R. Hickey

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INTRODUCTION

A major question raised, and left unanswered, by the California Supreme Court in its adoption of a comparative negligence system[1] is whether or not it should be applied to strict products liability.[2] It is a question that has justifiably aroused a great deal of discussion and controversy and is now ripe for decision.

The California Supreme Court most recently avoided the question in *Horn v. General Motors*[3] by finding that the case was tried long before the decision in *Li v. Yellow Cab*[4] and that the issue of the applicability of comparative negligence to strict products liability was neither briefed nor argued on appeal.

All of the various arguments for applying comparative negligence to strict products liability are well represented by a comprehensive dissent written by Justice Clark in *Horn*.[5] Briefly they are: (1) strict products liability is in fact a fault system; (2) the policies of risk allocation, cost distribution and upgrading of product safety standards, which are important rationales of strict products liability, would not be offended by comparing fault, since the manufacturer would still be liable for that part of the harm actually caused by the defect in its product; (3) society as a whole should not be burdened with, through increased cost of a product, that part of the loss attributable to an injured plaintiff's own conduct; (4) the application of comparative negligence to strict products liability provides uniformity in the law; (5) there is a basis for apportioning liability between

1. Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

2. The use of the term "strict products liability," in this comment, describes the cause of action established by the California Supreme Court in Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). It is to be distinguished from strict liability, based on concepts of warranty, and from the traditional concept of strict liability in tort for abnormally dangerous activities.

3. 17 Cal. 3d 359, 370, 551 P.2d 398, 404, 131 Cal. Rptr. 78, 84 (1976).

4. *See* note 1, *supra*.

5. *See* note 3, *supra* (Clark, J. dissenting).

a manufacturer who places a defective product on the market and a negligent plaintiff; (6) the policies supporting strict products liability and those supporting comparative negligence are compatible.

We can reasonably foresee, in the near future, a California Supreme Court decision which will answer the question.[6] With recent changes in the court, it would be difficult to predict which direction the decision will take. However, the arguments for the application of comparative negligence to strict products liability are, at least on the surface, as persuasive as the authorities advocating such a change are impressive.[7]

The purpose of this comment is to explore: (1) the nature of strict products liability as applied in California; (2) the underlying policy reasons which the California approach is based upon; (3) the compatibility of such policies with those policies supporting comparative negligence; and (4) the practical effect that the application of comparative negligence will have on the doctrine of strict products liability as it exists in California today.

Without such an analysis and conscientious survey of the reasons for, and the nature of, this distinctive remedy, we may abandon it in favor of the "equitable principles of comparative fault" and in the interest of "uniformity in the law"[8] without good cause. This author feels that it is the least that can be done for a doctrine that has been uniquely given life by a progressive court, exhumed from the morass of negligence and warranty concepts, and is now potentially subject to re-internment in the same sod.

WHY STRICT PRODUCTS LIABILITY?

The policy considerations which prompted the California Supreme Court to adopt a system of strict products liability were first given consideration in California in a concurring opinion by Justice Traynor in *Escola v. Coca Cola Bottling Co.* in 1944.[9]

6. Currently before the court are at least two cases which raise the issue of the applicability of comparative negligence to strict products liability; Daly v. General Motors Corp., L.A. 30687 (2 Civ. 46925). Unpublished opinion. Petition for hearing after the court of appeal reversed a judgment entered on a jury verdict in favor of defendants on an action for wrongful death arising out of a single car automobile accident; Campbell v. Southern Pacific, L.A. 30540 (2 Civ. 43810). Unpublished opinion.

7. *See* authorities cited by Justice Clark, note 4, *supra*. Many jurisdictions have already applied their comparative negligence scheme to strict products liability, this aspect will be dealt with more specifically later in this comment.

8. Horn v. General Motors Corp, 17 Cal. 3d 359, 551 P.2d 398, 131 Cal. Rptr 78 (1976) (Clark, J., dissenting).

9. 24 Cal. 2d 453, 150 P.2d 436 (1944) (Traynor, J., concurring).

These policy considerations are significant in their emphasis on the doctrine of "enterprise liability" or "risk distribution" theory and the lack of emphasis given to fault concepts.

Justice Traynor reasoned that those who suffer from defective products are unprepared to meet its consequences, and that:

> The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer, and distributed among the people as a cost of doing business. It is to the public interest to discourage the marketing of products having defects that are a menace to the public. If such products nevertheless find their way into the market it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who *even if he is not negligent* in the manufacture of the product, is responsible for its reaching the market. However intermittently such injuries may occur and hazardly they may strike, the risk of their occurrence is a constant risk and a general one. Against such a risk there should be a general and constant protection and the manufacturer is best suited to afford such protection.[10] (emphasis added)

This famous concurring opinion recognized the historical, economic, and social developments that created a mandate for strict products liability. Describing the change in the structure of the market, the complexity of current manufacturing processes and the remote relationship between the consumer and the manufacturer, he noted that "The consumer no longer has means or skills enough to investigate for himself the soundness of a product, and his erstwhile vigilance has been lulled by the steady efforts of manufacturers to build up confidence by advertising and marketing devices such as trade marks."[11]

Such policy considerations were not the only impetus in the development of strict products liability. The cumbersome remedies available under negligence and warranty concepts were fraught with proof problems for the plaintiff. In an action based upon negligence the plaintiff was confronted with proving negligence against a remote manufacturer and the intervening handlers of the product.[12] Additionally, although it was already possible to enforce strict liability by resort to a series of warranty actions, it was an expensive, time-consuming and wasteful

10. *Id.* at 462, 150 P.2d at 441.
11. *Id.* at 467-68, 150 P.2d at 443-44.
12. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1114-1119 (1960).

process which caused Dean Prosser to comment, "What is needed is a blanket rule which makes any supplier in the chain liable directly to the ultimate user, and so short circuits the whole unwieldy process."[13]

The American Law Institute, aware of the problems in the area and of the growing desire for a remedy which would protect consumers in a modern technological society, adopted Section 402 A of the Second Restatement of Torts.[14] It established a rule which emphasized consumer protection and eliminated the problems inherent in the remedies available under negligence and warranty concepts.

In a comment to Section 402 A, the nature of the remedy established is precisely defined:

> Since the liability with which this Section deals is *not based upon the negligence of the seller*, but is strict liability, the rule applied to strict liability cases (see §524) applies. Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence . . .[15]
> (emphasis added)

The California Supreme Court adopted this Restatement remedy in a landmark case in 1963, *Greenman v. Yuba Power Prods., Inc.*,[16] wherein Justice Traynor reiterated the policy discussion from his concurring opinion in *Escola* by stating: "The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves."[17]

The development of the doctrine of strict products liability in California has been primarily concerned with consumer protection and compensation. It is recognized that the manufacturer is better able to bear the loss since such loss can be reflected in the cost of goods and liability insurance. By imposing a greater risk

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13. *Id.* at 1124.

14. RESTATEMENT (SECOND) OF TORTS § 402 A (1965), reads as follows:

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

a. the seller is engaged in the business of selling such a product, and
b. it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule used in subsection (1) applies although (a) the seller has exercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

15. *Id.* comment n.

16. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

17. *Id.* at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701.

of liability on the manufacturer the quality and safety of goods will improve. Very simply, therefore, this policy is designed to protect the mass of consumers who have relied on the manufacturer to produce a product without an injury producing defect, who have generally not insured themselves against such unexpected losses and who are powerless to protect themselves.

The progression of cases in California supports the proposition that the fundamental approach is one of consumer protection and compensation. In *Vandermark v. Ford Motor Co.*,[18] the court held that manufacturer liability could not be avoided by reliance on the retailer to prevent or correct defects and that the requirement of notice of breach of warranty is not applicable to strict products liability. In *Elmore v. American Motors Corp.*,[19] the court held that strict products liability extended to bystanders. In *Price v. Shell Oil Co.*,[20] the court held that a lessor, being an integral part of the overall marketing enterprise, should be held accountable for injuries from defective products, despite the nonexistence of a sales transaction. In *Cronin v. J.B.E. Olson Corp.*,[21] the court rejected the "unreasonably dangerous" standard, as adopted by Section 402 A of the Restatement,[22] stating that such requirement burdens the plaintiff with proof of an element "which rings of negligence."[23] In *Luque v. McLean*,[24] the court stated that the consumer need not prove that he was unaware of the defect. In *Ault v. International Harvester Co.*,[25] the court held that evidence of subsequent remedial measures, which are ordinarily inadmissible in negligence cases, are admissible in strict products liability cases. Finally, most recently in *Horn v. General Motors*,[26] the court approved the exclusion of evidence on seat belt use, since conduct which constitutes negligence is not a defense to strict products liability.

The foregoing does not constitute an exhaustive review of

18. 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964).
19. 70 Cal. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969).
20. 2 Cal. 3d 245, 466 P.2d 722, 85 Cal. Rptr. 178 (1970).
21. 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972).
22. *See* text cited at note 13, *supra*.
23. 8 Cal. 3d at 133, 501 P.2d at 1162, 104 Cal. Rptr. at 442.
24. *Id.* at 136, 501 P.2d 1163, 104 Cal. Rptr. 443 (1972).
25. 13 Cal. 3d 113, 528 P.2d 1148, 117 Cal. Rptr. 812 (1973).
26. 17 Cal. 3d 359, 551 P.2d 398, 131 Cal. Rptr. 78 (1976).

cases decided by the California Supreme Court in the area of strict products liability, but includes the important decisions reflecting the momentum of the underlying policy in favor of consumer protection and compensation.

Implicit in the reasoning thus far noted is the concept that liability is imposed for harm produced by a product without proof that the defendant failed to exercise reasonable care. The distinction between strict products liability and liability based on failure to use reasonable care was made explicit in *Jiminez v. Sears, Roebuck & Company*,[27] where the court held it was error not to give requested instructions on negligence issues as well as strict liability when both had been plead and litigated. Also, as noted earlier, the holding in *Cronin*, that it was not error to refuse to instruct in the Restatement of Torts 2d §402 A terms of "a defective condition unreasonably dangerous" rejects a general standard of reasonableness of conduct for one of "strict liability" for injury from defects.

This lack of concern for finding culpable conduct, to any degree, on the part of the manufacturer, supplier or retailer, again emphasizes the basic rationale of strict products liability: consumer protection from, and compensation for, injuries received as a result of a defective product. It also raises the next point of discussion, the nature of strict products liability.

The Nature of Strict Products Liability

The liability of the manufacturer under strict products liability is not that of an insurer. The defendant in such a case is liable only for injuries caused by its products which are adjudged defective. The original proposition by Justice Traynor in *Escola*[28] was stated in terms of "absolute liability." In the *Greenman* opinion, however, and in every California decision since, except one,[29] it is referred to as a rule of "strict liability" and is expressly characterized as *not* a rule of "absolute" or "insurer's" liability.[30]

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27. 4 Cal. 3d 379, 482 P.2d 681, 93 Cal. Rptr. 769 (1971).
28. 24 Cal. 2d 453, 461, 150 P.2d 436, 440 (1944).
29. Christofferson v. Kaiser Foundation Hospitals, 75 Cal. App. 3d 75, 78, 92 Cal. Rptr. 825, 826 (1971).
30. Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 133-34, 501 P.2d 1153, 1162, 104 Cal. Rptr. 433, 442 (1972). "We recognize that the words 'unreasonably dangerous' may also serve the beneficial purpose of preventing the seller from being treated as the insurer of its products. However, we think that such protective end is attained by the necessity of proving that there was a defect in the manufacture or design of the product and that such defect was the proximate cause of the injuries. Although the seller should not be responsible for all

To what degree then is strict products liability a fault doctrine, i.e., when are the defendant's acts or omissions considered or evaluated? The answer is: never.

In a cause of action for strict products liability the defendant's particular acts or omissions are irrelevant. The only relevant factor is the defective condition of the product. The issue of reasonable and ordinary care in making the product is not imposed on the plaintiff as an element of proof. The focus is on the character of the products and not the manufacturer's conduct.[31]

Such a scheme of fault is consistent with the underlying policy of strict products liability, i.e., to provide protection and compensation for those consumers who are powerless to protect themselves. Once a product is adjudged defective, the search for fault is at an end and the defendant manufacturer is liable, regardless of due care considerations, unless of course, some plaintiff conduct precludes that liability.

As noted in the previous section, attempts to interject concepts of negligence into actions based on strict products liability have been consistently rejected by the California Supreme Court.[32] In *Cronin* the court stated that the interjection of such concepts would confront a plaintiff with problems of proof similar to those that had once defeated injured consumers prior to the adoption of the theory of strict products liability.[33]

While it is probably correct to say that the term "defect" connotes fault, or at least a feeling that the defendant has done something wrong,[34] it does not logically follow that strict prod-

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injuries involving the use of its products, it should be liable for all injuries proximately caused by any of its products which are adjudged 'defective.' "

31. Ault v. International Harvester Co., 13 Cal. 3d 113, 121, 528 P.2d 1148, 1152, 117 Cal. Rptr. 812, 816 (1974). As this article went to press the California Supreme Court decided Barker v. Lull Engineering Co., Inc., 20 Cal. 3d 413, 418, —P.2d—, 143 Cal. Rptr. 225, 229 (1978). In discussing the dual standard for design defect the court stated: "Finally, this test reflects our continued adherence to the principle that, in a product liability action, the trier of fact must focus on the *product,* not on the *manufacturers conduct*, and that the plaintiff need not prove that the manufacturer acted unreasonably or negligently in order to prevail in such an action."

32. *See* notes, 20, 23, 24 and 25 *supra*.

33. 8 Cal. 3d at 133, 501 P.2d at 1162, 104 Cal. Rptr. at 442.

34. Horn v. General Motors, 17 Cal. 3d 359, 374, 551 P.2d 398, 406, 131 Cal. Rptr. 78, 86 (1976). *See* Justice Clark's dissent in regard to his contention that strict products liability is a fault concept.

ucts liability is a "fault concept" within the general meaning of the latter term.

Fault, as it is normally applied, raises questions as to whether the defendant was guilty of an error or defect of judgment or conduct. It is generally equated to a failure of duty, or negligence. In a legal sense, "fault" means a departure from the conduct required of a man by society for the protection of others.[35] The search for this type of conduct is the antithesis of the whole policy underlying strict products liability. The plaintiff is not burdened with proof of fault on the part of the defendant, but only with proof of a defect. The acts, or omissions of the defendant are never relevant to the questions of his liability.

An analogy to the area of strict liability based on warranty will be illustrative. The buyer is ordinarily required to allege and prove that he relied on the seller's skill or judgment when he purchased the injury-causing product. The California Supreme Court specifically rejected the necessity of evaluating such seller conduct in *Greenman* and stated: "The remedies of injured consumers ought not to be made to depend upon the intricacies of the law of sales."[36] The buyer may recover for an injury resulting from a defective product regardless of the existence or nonexistence of a seller warranty. The seller's conduct is just not relevant in strict products liability.

Thus, the statements made by some,[37] that strict products liability is not "absolute" or "insurer's" liability, and that fault is usually an inherent element of a defect, may be accepted without conceding that the doctrine is a "fault" concept in the sense that the defendant's conduct is considered in establishing liability. The defendant is an insurer to the extent that an injury proximately results from a product which he has placed on the market in a defective condition, regardless of his exercise of due care. The term "defect" may connote fault, but such does not alter the irrelevancy of defendant's acts or omissions in a cause of action for strict products liability.

Since it is not the defendant's conduct which is under scrutiny in strict products liability, but the existence of a defect, some theoretical and practical difficulties seem to exist in attempting to compare plaintiff conduct with the mythical and illusive conduct of the defendant. Those authorities who would hold to

35. W. PROSSER, LAW OF TORTS 18 (4th ed. 1971).

36. 59 Cal. 2d at 64, 377 P.2d at 901, 27 Cal. Rptr. at 701.

37. Dissent by Justice Clark in *Horn*, note 33, *supra*. *See also* Note, *Applying Comparative Negligence to Strict Products Liability*, 4 WEST. ST. U.L. REV. 283, 286 (1966).

the contrary[38] commence with the tenuous proposition that the manufacturer's conduct has always been under scrutiny in that a defect cannot exist without someone's fault. This proposition begs the question of the relevancy of defendant conduct in litigation regarding strict products liability.

We will return to discuss the theoretical and practical difficulties of considering certain types of plaintiff conduct as an offset to defendant's liability after we survey that type of plaintiff conduct which is currently considered in strict products liability cases. We will also conduct a comparison of the *Greenman* doctrine with the approach utilized by other jurisdictions.

DEFENSES TO STRICT PRODUCTS LIABILITY

While the *Greenman* doctrine removed major impediments to recovery in cases where a defect in the defendant's product had caused harm, it did not make the manufacturer liable for injuries that: were not proximately caused by such defect; resulted from an unintended, unforeseeable misuse by the plaintiff; or occurred after the plaintiff had assumed the risk of such injury.

The maintenance of these particular traditional defenses, and the rejection of ordinary contributory negligence as a defense,[39] are entirely consistent with the policy reasons which support the unique remedy of strict products liability.

The elimination of contributory negligence as a defense to strict products liability follows from the recognition that some carelessness is to be expected from the ordinary consumer. In a commercial and industrial environment where the consumer does not have the means or skill to investigate the soundness of a product, it would be very unfair and unrealistic to impose a duty upon such consumers to act as a reasonable person in discovering defects or guarding against their possible existence.

If a manufacturer's defect has placed the consumer in a position where his only reasonable course is to confront the danger,

38. *Id. See also* Comment, *Tort Defenses to Strict Products Liability*, 20 SYRACUSE L. REV. 924, 925-28 (1969); SCHWARTZ, COMPARATIVE NEGLIGENCE 204-05 (1974).

39. Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 127, 501 P.2d 1153, 1157, 104 Cal. Rptr. 433, 437 (1972). Luque v. McLean, 8 Cal. 3d 136, 145, 501 P.2d 1163, 1167, 104 Cal. Rptr. 443, 449 (1972).

then the manufacturer should bear the loss. This is the very situation that the remedy of strict products liability was designed for. Such a consumer is a person powerless to protect himself.[40]

Conduct, however, which goes beyond this and is tantamount to a conscious election to risk injury may be a defense if it falls within the definition of assumption of the risk as set out most clearly in *Luque v. McLean*:

> Ordinary contributory negligence does not bar recovery in a strict liability action. The only form of plaintiff's negligence that is a defense to strict liability is that which consists in *voluntarily and unreasonably proceeding to encounter a known danger*, more commonly referred to as assumption of risk. For such a defense to arise, the user or consumer must become aware of the defect and danger and still proceed unreasonably to make use of the product.[41]

The underlying policies of strict products liability are not offended when a plaintiff is barred recovery because of his subjective consensual assumption of the risk of injury from a known defect. In such a case, the consumer knows of the danger and, in the face of a reasonable escape or avoidance, has elected to confront the danger. Such a person is fully able to protect himself and is one who does not need the protection of the unique remedy of strict products liability.

In *Li v. Yellow Cab*,[42] the California Supreme Court abolished the defense of assumption of risk to the extent that it is merely a variant of the former doctrine of contributory negligence.[43] This presents the anomaly of making the defense of assumption of risk more easily available to a defendant in a strict products liability case than to a defendant in a negligence case.[44]

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40. Greenman v. Yuba Power Products Inc., 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963).

41. 8 Cal. 3d 136, 145, 501 P.2d 1163, 1169, 104 Cal. Rptr. 443, 449-50 (1972).

42. 13 Cal. 3d 804, 829, 532 P.2d 1226, 1243, 119 Cal. Rptr. 858, 875 (1975).

43. *Id.* at 824-25, 532 P.2d at 1240, 119 Cal. Rptr. at 872. The court defines the overlap:

> As for assumption of risk, we have recognized in this state that this defense overlaps that of contributory negligence to some extent and in fact is made up of at least two distinct defenses. 'To simplify greatly, it has been observed . . . that in one kind of situation, to wit, where a plaintiff unreasonably undertakes to encounter a specific known risk imposed by a defendant's negligence, plaintiff's conduct, although he may encounger that risk in a prudent manner, is in reality a form of contributory negligence . . . . Other kinds of situations within the doctrine of assumption of risk are those, for example, where plaintiff is held to agree to relieve defendant of an obligation of reasonable conduct toward him. Such a situation would not involve contributory negligence, but rather a reduction of defendant's duty of care.'

44. *See* Use Note accompanying BAJI 9.02 CALIFORNIA JURY INSTRUCTIONS, CIVIL [Baji] 9.02 (5th ed. Supp. 1975).

It is urged that this dichotomy of results may be avoided by applying comparative negligence to strict products liability.[45] While this approach might possibly benefit those plaintiffs who have assumed the risk of danger, it resurrects obstacles, which were purposefully eliminated by the *Greenman* doctrine, for all other plaintiffs for whom the doctrine was designed to protect and compensate.[46]

The plaintiff's conduct may negate an essential element of a strict products liability case although it amounts neither to negligence nor assumption of the risk. If the plaintiff's conduct is the sole proximate[47] cause of the harm, no defect traceable to the defendant can be a proximate cause and recovery is barred. There is nothing in the *Greenman* doctrine which dispenses with proof of proximate cause.[48]

This is consistent both with general principles of tort law and the policy of strict products liability of compensation for injuries *caused* by defects. However, there is a controversy regarding the so-called "second accident" situation. California, consistent with its consumer oriented policy, allows recovery where a defect has caused an injury due to an occurrence which the defect did not bring about.[49]

The California approach to the second accident situation is

45. *See* Horn v. General Motors, 17 Cal. 3d 359, 551 P.2d 398, 131 Cal. Rptr. 78 (1976) (Clark, J., dissenting); Note, *Applying Comparative Negligence to Strict Products Liability*, 4 WEST. ST. U.L. REV. 283, 290 (1977); SCHWARTZ, COMPARATIVE NEGLIGENCE 201 (1974).

46. *See* quote from *Greenman* note 16, *supra*.

47. Magee v. Wyeth Laboratories, Inc., 214 Cal. App. 2d 340, 348-350, 29 Cal. Rptr. 322, 326-338 (1963). Plaintiff was denied recovery against a drug manufacturer for side effects he suffered when plaintiff's doctor prescribed a drug manufactured by defendant. The doctor had been warned by the defendant that the drug should not be given to people with certain allergies. The plaintiff was one of those persons and the court held that the doctor's negligence, not any defect in the drug, was the proximate cause of the injury.

48. Greenberg v. General Air-Cond. Corp., 233 Cal. App. 2d 545, 549, 43 Cal. Rptr. 662, 665 (1965).

49. Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 126, 501 P.2d 1153, 1157, 104 Cal. Rptr. 433, 437 (1972). Contrary to this view the court in Evans v. General Motors Corp., 359 F.2d 822 (7th Cir. 1966), held that the manufacturer was not responsible where the condition of an object, for which the defendant was responsible, caused an injury because of an occurrence, an accident which the condition did not cause; In Larsen v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968) the court discussed aspects of the manufacturer's duty to inspect and to test for designs that would cause an unreasonable risk of foreseeable injury and refused to follow Evans, 391 F.2d at 506.

most recently illustrated in *Horn*, where the plaintiff was allowed to recover for injuries incurred as a result of a defective horn cap when her face struck exposed sharp prongs after an accident which occurred for reasons other than as a result of the alleged defective condition.[50]

This approach enhances the underlying policies of consumer protection by creating an incentive for production of safer products and consumer compensation for injuries proximately caused by defects. Yet it is not unfair to the defendant since he is only liable for that part of the injury attributable to the defect.

The plaintiff's conduct may also negate an essential element of a strict products liability case if he "misuses" a product. The misuse can negate a claim that the product was being put to its intended use or refute a defective condition or causation.[51] The misuse must be one that is not reasonably foreseeable by the defendant[52] and the burden of proof is on the plaintiff to prove that he utilized the product in a reasonably foreseeable manner.

If the plaintiff fails in this burden, the cause of action will fail either on the ground that there was no defect or on the ground that the product, defective or not, was not a proximate cause of the injury. The overlap between unforeseeable misuse and proximate cause is apparent, but the underlying consideration is the same: is there *plaintiff conduct* which precludes liability of the defendant.

It is doubtful, however, that the application of comparative negligence to strict products liability would entail the abolition of unforeseeable misuse as a complete bar to liability. Professor Schwartz, in his often quoted treatise on comparative negligence, recommends that comparative negligence should not apply to unintended unforeseeable misuse of a product by the plaintiff. His approach is based on the premise that in such a case the defendant has not violated a duty to the plaintiff and therefore there is no basis for recovery.[53]

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50. *See* note 3, *supra*.

51. Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964). Reversed for a new trial because plaintiffs made a strict liability case that was sufficient to carry them to the jury. On a re-trial the jury found that the automobile accident was not due to the asserted defects but apparently was influenced by the fact that the driver was operating the vehicle in the dirt shoulder of the road instead of on paved area just prior to accident. "It is incumbent upon a plaintiff to prove that he was using the article in a way that it was intended to be used as a result design and manufacture of which plaintiff was not aware that made the unsafe for its intended use." Tresham v. Ford Motor Co., 275 Cal. App. 2d 403, 410, 79 Cal. Rptr. 833, 837 (1969).

52. CALIFORNIA JURY INSTRUCTION, CIVIL [BAJI] § 9.00 (5th ed. Supp. 1975).

53. SCHWARTZ, COMPARATIVE NEGLIGENCE 199 (1974).

Regardless of the premise that you base this limitation to liability on, i.e., nonexistence of a defect, not the proximate cause of the injury or no failure of a duty, the result is justified and is consistent with the policies underlying strict products liability. The defendant is an insurer of only those products which are defective when they leave his control and are the proximate cause of an injury.

The defenses to strict products liability, as discussed above, involve a limited evaluation of the plaintiff's conduct to establish one or more of the following: (1) that there was no defect, i.e., an unintentional, unforeseeable misuse occured; (2) that the defective product was not a proximate cause of the injury, i.e., plaintiff's conduct or some other factor was the proximate cause (this overlaps easily with unintended, unforeseeable misuse); (3) the plaintiff assumed the risk of the danger presented by the defect. These defenses focus on whether a defective product, defective when it left the defendant's hands, was the proximate cause of an injury incurred by a person powerless to protect himself.

Beyond those considerations, the plaintiff's conduct is not relevant. The plaintiff's failure to discover or foresee danger is not relevant because of the basic policy reasons discussed above:[54] the mass of consumers are powerless to protect themselves; their ability to investigate and determine the soundness of products in today's commercial environment is severely limited; the manufacturer is the father of the transaction, he makes the article and puts it in the stream of commerce and profits from the commerce; and, the fact that the manufacturers and suppliers exercise massive and persistent efforts in gaining the confidence of consumers by advertising and marketing devices such as trade marks. In effect, such defendants are estopped from asserting the reliance upon, and confidence of consumers in, the array of products on today's markets.

In California there is an additional policy reason of major importance: the doctrine of "enterprise liability" or "risk distribution theory."[55] This theory has received little mention in the

54. *See* quotes cited at Notes 10 & 11, *supra*.

55. Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944) (Traynor, J., concurring); Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963); Cronin v. J.B.E. Olson, 8 Cal. 3d 121, 501

decisions outside California,[56] and is thereby illustrative of the uniqueness of the California remedy and its emphasis on consumer protection and compensation.

The limitations to liability that currently apply to strict products liability in California were designed to screen only those who are undeserving of the unique remedy of strict products liability. When a plaintiff has successfully maneuvered the hurdles of assumption of the risk, unintended unforeseeable misuse and proximate cause, he has demonstrated that he is a person for whom the *Greenman* doctrine was designed to protect and compensate: a consumer who is powerless to protect himself from injuries proximately caused by a defective product which was defective when it left the defendant's hands.[57]

THE *Greenman* DOCTRINE—A UNIQUE APPROACH

A popular argument in support of the application of comparative negligence to strict products liability is to point to those jurisdictions that have adopted such an approach. This argument may have merit if the approaches utilized by these other jurisdictions are based on the same policy reasoning as the *Greenman* doctrine.

In *Dippel v. Sciano*[58] the Supreme Court of Wisconsin applied comparative negligence to strict products liability by reasoning that the liability of the defendant is not grounded upon a failure to exercise ordinary care with its necessary element of foreseea-

P.2d 1153, 104 Cal. Rptr. 433 (1972); Luque v. McLean, 8 Cal. 3d 136, 501 P.2d 1163, 104 Cal. Rptr. 433 (1972). *See also* quote cited at note 16, *supra*.

56. Prosser, *Strict Liability to the Consumer in California*, 18 HASTINGS L.J. 9, 20 (1966). Dean Prosser reasons that this is true because the "risk distribution" theory "embarks upon a broad theory of 'enterprise liability' from which the courts thus far have tended to shy away."

57. In this regard it should be remembered that the defendant is only liable for the injury or aggravation of an injury proximately caused by a defective product which he has placed on the market. Thus in effect the damages are already apportioned to a certain extent on the basis of proximate cause. *See* Horn v. General Motors, 17 Cal. 3d 359, 366, 551 P.2d 398, 401, 131 Cal. Rptr. 78, 81 (1976), where the court states this measure of damages: ". . . if the station wagon was defectively designed or manufactured in such a manner that the horn assembly caused plaintiff to sustain greater injuries in the collision than she would have otherwise sustained absent the defect, then the manufacturer and distributor of the vehicle would be liable to the extent of such aggravation of her injuries."

See Horn v. General Motors, 17 Cal. 3d 359, 373, 551 P.2d 398, 405, 131 Cal. Rptr. 78, 86 (1976) (Clark, J., dissenting), where he cites decisions of other jurisdictions to support his argument. *See also*: Note, *Applying Comparative Negligence to Strict Products Liability*, 4 WEST. ST. U.L. REV. 283 (1977), which is based on Butaud v. Suburban Marine and Sporting Goods, Inc., 555 P.2d 42 (Alaska 1976), wherein comparative negligence was applied to strict products liability; Treatise cited at note 52, *supra* at 195-209.

58. 37 Wis. 2d 443, 115 N.W. 2d 555 (1967).

bility, but rather upon a theory similar to negligence per se.[59] It appears that the Wisconsin court hoped to avoid the theoretical and conceptual difficulties of comparing the *mere existence of a defect* with the contributory negligence of a plaintiff by simply characterizing strict products liability as negligence per se.

Negligence per se involves conduct by the defendant which amounts to a violation of a standard of care fixed by statute or previous decision. "The employment of a minor child in violation of the statute is an instance of the first kind, and the failure to stop, look and listen is the most common illustration of the second type."[60] Such a standard eliminates foreseeability as an element of negligence, but it does not eliminate the failure of duty as an element. The conduct of the defendant is relevant in negligence per se.

In a concurring opinion to *Dippel* by Justice Hallows, the courts result is explained very well:

> I think the majority opinion is unnecessarily misleading in attempting to state the position of the court. The issue is stated in terms of strict liability and is also stated that we adopt the rule of strict liability in tort as set forth in Sec. 402A of the Restatement, Torts 2d. I think not. The Restatement is in terms of liability, but if we are to keep the doctrine of comparative negligence, which is one of the bulwarks against strict liability in Wisconsin jurisprudence, our statement of the first step in the solution of product liability cases must clearly be in terms of negligence and not [strict] liability. *It is a plainly misleading statement to say we adopt the strict liability rule but we do not mean it.* (emphasis added)
>
> What we mean is that a seller who meets the conditions of Sec. 402 A, Restatement, Torts 2d, in Wisconsin is guilty of negligence as a matter of law and such negligence is subject to the ordinary rules of causation and the defense applicable to negligence. *While the Restatement, Torts 2d, Sec. 402 A, imposes a strict or absolute liability regardless of the negligence of the seller, we do not.* (emphasis added) . . . I concur on the express ground that the liability rests on negligence.[61]

The mixing of "apples and oranges" is not the only material variance from the *Greenman* doctrine by the Wisconsin court. It is noted that the court adopted[62] the "unreasonably dangerous" standard of Restatement 2d, Section 402 A, which was rejected by the California Supreme Court in *Cronin*.[63] Additionally,

59. *Id.* at 462, 155 N.W. 2d at 64.
60. *Id.*
61. *Id.* at 464, 155 N.W. 2d at 65, 66.
62. *Id.* at 461, 155 N.W. 2d at 63.
63. *See* note 29, *supra*.

there is no reference by the Wisconsin Court to the "risk distribution" theory which stands as a major rationale of the *Greenman* doctrine.[64]

Dippel is an often cited case by the proponents of the application of comparative negligence to strict products liability.[65] However, these proponents do not include in their discussion of the case the major differences between the Wisconsin approach and the *Greenman* doctrine.

In *Edwards v. Sears, Roebuck and Company*,[66] the U.S. Court of Appeals applied comparative negligence to strict products liability, although there was no precedent under Mississippi law for such an extension. With little discussion and total reliance on a "noted commmentator",[67] the court approved a jury instruction which, in effect, allowed the jury to consider the contributory negligence of the plaintiff in a cause of action for strict products liability.

Perhaps the court's unreasoned haste in the application of comparative negligence was predicated on the fact that Mississippi, like Wisconsin, had adopted the "unreasonably dangerous" standard of Restatement, Torts 2d Section 402 A. In such a jurisdiction, the plaintiff is confronted with problems of proof similar to those involved in negligence action and thus there is not theoretical difficulty in comparing fault.

Another often cited case is *Hegenbuck v. Snap-On Tools Corp.*[68] In this case the U.S. District Court applied the New Hampshire comparative negligence statute to strict products liability although no New Hampshire decision had previously done so. The court based its decision on the reasoning that the New Hampshire contributory negligence statute, which was previously construed as a defense to strict liability, had been completely replaced by the comparative negligence statute. In effect, although this was a movement toward greater emphasis on consumer protection and compensation, it did not extend quite far enough to be a comparable remedy to the *Greenman* doctrine.

It should also be noted that New Hampshire had adopted Restatement, Torts 2d, Section 402 A intact, including the "unreasonably dangerous" standard rejected in *Cronin*.

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64. *See* note 44, *supra*.
65. *See* note 57, *supra*.
66. 512 F.2d 276, 290 (5th Cir. 1975).
67. Wade, *Strict Tort Liability*, 44 MISS. L.J. 825, 850 (1973).
68. 339 F. Supp. 676, 680-682 (D. N.H. 1972).

The Supreme Court of Alaska, in *Butaud v. Suburban Marine and Sporting Goods, Inc.*,[69] applied comparative negligence to strict products liability, apparently confusing plaintiff's contributory negligence with the concept of proximate cause. In a footnote the court stated:

> Even before its carryover to products cases, strict liability was not akin to absolute liability when the *plaintiff's conduct was a factor in causing the injury*.[70]

There is no dispute that, even under the *Greenman* doctrine, the defendant is liable only for those injuries which were proximately caused by the defect. It should also be noted here that Alaska also adopted intact Restatement, Torts 2d, Section 402A.[71]

In a dissent to *Butaud*,[72] Justice Burke stated that the court's decision represented a significant step backward, in that it ignored the basic, fundamental policy considerations that gave rise to the doctrine of strict products liability cases. He cited the policy language from *Greenman*,[73] and concluded that:

> Clearly, this underlying policy will be given little effect if a plaintiff is to be held responsible for his own injuries, to the extent that those injuries are caused by his own ordinary negligence, when he is not aware of the defect and the dangers associated with that defect. Accordingly, I would hold that a plaintiff's own negligence is relevant only in those cases where he is aware of a specific defect and voluntarily procedes to encounter a known danger.[74]

The distinctive nature of the *Greenman* doctrine has been amply demonstrated by the foregoing discussion. The emphasis on consumer protection and compensation through the "enterprise liability" theory makes it a unique concept and not easily compared with the approach of less progressive jurisdictions.

With a doctrine which had its judicial origin in California,[75] where the courts have developed for themselves a very considerable body of decisions which have fairly well settled the

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69. 555 P.2d 42 (Alaska 1976).
70. *Id.* at 45, (*see* footnote 14 in case).
71. 4 WEST. ST. U.L. REV. 283, 287 (1977).
72. 555 P.2d 42 (Burke, J., dissenting).
73. *See* note 16, *supra*.
74. 555 P.2d at 47.
75. Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 896, 27 Cal. Rptr. 697 (1963).

main features of the doctrine, and where there are controlling California decisions, there is no occasion to look elsewhere.[76]

DOES IT REALLY MATTER?

This question involves a two part inquiry: (1) whether the policies supporting comparative negligence are compatible with those supporting strict products liability, and (2) what practical effect the application of comparative negligence to strict products liability will have.

The first question must be viewed as a balancing of the respective policies. Its resolution will also depend upon the answer to the second question since the practical effect of the application of comparative negligence to strict products liability may enhance those policies supporting comparative negligence while detracting from the policies supporting strict products liability to an unacceptable degree, and vice versa.

Comparative negligence is predicated on the desire of the courts to relieve the plaintiff of the harsh "all or nothing" rule of contributory negligence and to apportion liability and damages in proportion to *fault* in cases based on negligence.[77] The rationale is simply and succinctly stated by Harper and James, and cited by the *Li* court:

> There is no justification—in either policy or doctrine—for the rule of contributory negligence, except for the feeling that if one man is to be held liable *because of his fault*, then the fault of him who seeks to enforce that liability should also be considered. But this nation does not require that all or nothing rule, which would exonerate a very negligent defendant for even the slight fault of his victim. The logical corallary of the fault principle would be a rule of comparative or proportional negligence not the present rule. (emphasis added)[78]

The court made explicit what it meant by the term "fault" in a modification order issued after the decision in *Li*. In effect it substituted the term "negligence" for that of "fault". In a footnote it explained:

> In emplying the generic term "fault" throughout this opinion we follow a usage common to the literature on the subject of comparative negligence. In all cases, however, we intend the term to import *nothing more than "negligence"* in the accepted legal sense. (emphasis added)[79]

The emphasis in a negligence action is on fault. In deciding a negligence action the court analyzes the conduct of both parties and a decision as to liability is rendered on the basis of fault.

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76. S.F. Bridge Co. v. Dumarton Co., 119 Cal. 272, 275, 51 P. 335, 336 (1897).

77. Li v. Yellow Cab Co., 13 Cal. 3d 804, 810-812, 532 P.2d 1226, 1230-32, 119 Cal. Rptr. 858, 862-64 (1975). *See* notes 3, 4 and 5.

78. *Id.* at 810 n.3, 352 P.2d at 1230-31 n.3, 119 Cal. Rptr. at 862 n.3.

79. *Id.* at 813 n.6a, 532 P.2d at 1232 n.6a, 119 Cal. Rptr. at 864 n.6a.

Strict products liability reverses this emphasis and gives primary concern to consumer protection and compensation.[80] Under the *Greenman* doctrine, an analysis of fault is at least of secondary importance and only in certain limited areas can it be considered at all.[81] Such an approach constitutes a recognition that consumers are at a disadvantage in the marketplace and need to be protected.

In view of these observations, it is difficult to perceive the compatibility of the two doctrines. Strict products liability was developed, in part, to avoid all of the difficulties inherent in a search for proof of conduct which rings of negligence.[82]

The practical effect of the application of comparative negligence to strict products liability supports the view that the policies supporting the respective doctrines are not compatible.

An apparent problem is the theoretical and practical difficulty inherent in attempting to compare the contributory negligence of the plaintiff with a defect in a product. In *Buccery v. General Motors Corp.*, the Court of Appeals noted the difficulty and stated:

> Comparative negligence, therefore, as adopted in *Li*, entails a comparison of the respective negligence of the plaintiff on the one hand and of the defendant on the other. *Strict liability for defective products is not based upon defendant's negligence*. There may be, therefore, no negligence of the defendant to compare with that of plaintiff. (emphasis added)[83]

The problem is demonstrated well in those situations where a retailer does nothing more than move the product in the stream of commerce, as in *Vandermark v. Ford Motor Co.*[84] In *Hauter v. Zogarts*[85] a seller and a manufacturer were held strictly liable when the court found that the product was *defectively designed as a matter of law*. In *Kasel v. Remington Arms*[86] a trademark licensor was held strictly liable for injuries resulting from a defective shotgun shell which had never even passed through his hands and the court said:

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80. *See* cases and quotes cited at notes 9, 10 and 16.
81. *See* Section on DEFENSES TO STRICT PRODUCTS LIABILITY, in text at p. 509.
82. *See* note 11, *supra*.
83. 60 Cal. App. 3d 553, 549, 132 Cal. Rptr. 605, 615 (1976).
84. 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964).
85. 14 Cal. 3d 104, 534 P.2d 377, 120 Cal. Rptr. 684 (1965).
86. 24 Cal. App. 3d 711, 101 Cal. Rptr. 314 (1972).

> Also California has utilized the enterprise stream of commerce liability concept in the strict liability field without regard for the individual defendant's control . . .[87]

Any attempt to compare the contributory negligence of the defendant with the elusive and mythical fault of the defendant will justifiably renew the objection by the court in *Cronin* that the interjection of negligence concepts in strict products liability "places upon . . . [the plaintiff] . . . a significantly increased burden and represents a step backward in the area pioneered by this court."[88]

In addition to the problem of comparing contributory negligence of the plaintiff with a mere defect, the application of comparative negligence to strict products liability will create other proof problems for the plaintiff.

The plaintiff will not only have to prove that the product had a defect which caused injury, but will also be forced to present proof of negligent acts and omissions of the defendant, if any exist, to reduce his own percentage of negligence. In effect, the burden of proof placed on the plaintiff would be exactly similar to that required in a negligence action.

The barrage of expert witnesses that could be unleashed by an economically superior defendant, once the question of comparative fault is an issue, would be overwhelming. In such an atmosphere, the issue could rarely be restrained to a comparison between a contributorily negligent plaintiff and the defective product. The plaintiff would be in constant jeopardy of refuting evidence that the defendant exercised reasonable and ordinary care in the design and production of the product. The inherent difficulties of the traditional cause of action in negligence would, once again, confront the plaintiff, and the *Greenman* doctrine would stand as a eunuch at the threshold of a chamber wherein a harem of consumers, powerless to protect themselves, await, guarded but guarded not.

CONCLUSION

The doctrine of strict products liability, as developed in California, is a unique remedy designed primarily to protect those consumers who are powerless to protect themselves. It is based upon the reasoning that the ". . . risk of the occurrence of injuries caused by a defective product is a constant risk and a general one;" that ". . . against such a risk there should be a

87. *Id.* at 725, 101 Cal. Rptr. at 323-24.
88. 8 Cal. 3d 121, 133, 501 P.2d 1153, 1162, 104 Cal. Rptr. 433, 442 (1972).

general and constant protection;" and that ". . . the manufacturer is best suited to afford such protection."[89] It was additionally designed to remove the burdensome "luggage" and "complications",[90] inherent in actions based on negligence and warranty concepts from the plaintiff's shoulders.

The emphasis of the *Greenman* doctrine is on consumer protection and compensation. In this respect it is a distinct remedy as compared to what other jurisdictions call strict products liability. Thus, it is inappropriate and misleading to look to other jurisdictions for guidance in the further development of this remedy, which has been given significant viability by a progressive California court.

The current limitations on manufacturer liability under the *Greenman* doctrine are sufficient to screen the undeserving plaintiffs who do not need the protection provided by this unique remedy. A plaintiff may not recover unless: (1) the injury was proximately caused by a defective product, defective when it left the hands of the defendant; (2) the product was being used in a reasonably foreseeable manner; and (3) the plaintiff did not assume the risk of injury from the defect.

If plaintiff conduct which consists of ordinary negligence, failure to discover the defect or failure to take precautions against the possibility of its existence, is allowed to decrease recovery, then the underlying policies of the *Greenman* doctrine will be given little effect. Such a plaintiff, whose confidence in the quality and safety of products has been generated by manufacturer advertising and marketing devices, is, in reality, powerless to protect himself since he was not aware of the defect.

Along with the theoretical and practical problems of comparing plaintiff's conduct with the mere existence of a defect, will come other proof burdens for the plaintiff. In order to reduce his own percentage of fault, a plaintiff would not only be required to prove that the product had a defect which caused injury, but such plaintiff would also have to show that the *manufacturer's* particular acts and omissions were far more culpable than his own. The plaintiff would additionally have the burden of refuting evidence, submitted by the manufacturer,

89. 24 Cal. 2d 453, 462, 150 P.2d 436, 441 (1944) (Traynor, J., concurring).
90. W. PROSSER, TORTS, 656 (4th ed. 1971).

that it exercised reasonable and ordinary care in the design and production of the product.

In conclusion therefore, returning to concepts of negligence implicit in any system of comparative fault will, in effect, not only abrogate the *Greenman* doctrine and dilute the remedy of strict products liability to an ineffective level, but most importantly, it will constitute an abandonment of the policy reasons of consumer protection and compensation so heavily emphasized by the California courts.

C.R. HICKEY