COMPARATIVE CONTRIBUTION AND STRICT TORT LIABILITY: A PROPOSED RECONCILIATION

INTRODUCTION

The legal system will sometimes shift all or part of the loss suffered by one party to another. Since at least 1799, courts, litigants, and legislatures have had to deal with the problem of dividing the damages between defendants held jointly responsible for a plaintiff's injury. Recently this struggle has intensified with the increasing emphasis on strict liability as a ground for recovery in products liability cases. "[C]ommon law rules governing loss allocation based on fault [have been extended] to situations where, at least in its legal definition, fault does not necessarily exist." Increasingly, courts are utilizing comparative fault principles to apportion damages among defendants whose respective liability is predicated on widely disparate theories. The result has frequently been an inequitable distribution of losses.

This comment will first survey the conceptual bases and development of both contribution and strict tort liability. Then, applicability of the contribution remedy to the products liability cause of action will be examined in two situations: where all defendants are strictly liable; and where multiple defendants are held liable under different theories—i.e., one tort-feasor was negligent while another tort-feasor was strictly liable. Finally, potential consequences of dividing damages between strictly liable and negligently liable defendants will be considered in an attempt to fashion a loss allocation system for use in products liability cases which will promote consistency of result while providing an essentially equitable distribution of losses.

BACKGROUND

CONTRIBUTION

"[C]ontribution is an equitable concept which provides for the

3. See notes 72-77 and accompanying text infra.
equalization of burdens and the fair division of losses between tort-feasors.\(^5\) In joint liability cases where one tort-feasor pays more than his share of the plaintiff’s loss, that tort-feasor may be able to recover a portion of his payment from other responsible parties through an action for contribution.\(^6\)

Two prerequisites exist to an action for contribution.\(^7\) First, both parties to the contribution action must be under a common, although not necessarily identical, liability to the injured individual.\(^8\) The usual situation involves “persons whose separate and independent acts concur to produce the plaintiff’s injury.”\(^9\) The second prerequisite is that one tort-feasor must have paid more than his proportionate share of the common burden.\(^10\) Discharge by way of settlement is not precluded; if a tort-feasor satisfies the victim’s claim and secures a release, he may seek contribution as readily as one who pays under compulsion of a judgment.\(^11\)

In those jurisdictions recognizing the right of contribution among negligent tort-feasors, an important problem that must be resolved is determining the measure of contribution.\(^12\) Most states

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6. Comment, Contribution and the Distribution of Loss Among Tortfeasors, 25 AM. U.L. REV. 203, 203 (1975) [hereinafter cited as Distribution of Loss]. For purposes of this comment, the term joint tort-feasors will be used to refer to two or more persons jointly and severally liable in tort for a single indivisible injury to a third person. See Comment, Another Look at Strict Liability: The Effect of Contribution Among Tortfeasors, 79 DICK. L. REV. 125, 126-27 (1974) [hereinafter cited as Another Look].
7. Distribution of Loss, supra note 6, at 220.
9. See Another Look, supra note 6, at 127. Joint and several liability in tort includes two other categories of persons: those who knowingly join in the performance of a tortious act, and those who fail to perform a common duty to the plaintiff. Contribution seldom arises in these two situations. See 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 10.1, at 692-93 (1956).
10. Distribution of Loss, supra note 6, at 220.
11. Id. at 222. Three procedural routes exist from which a joint tort-feasor can enforce his right of contribution. First, if the injured person brings an action against only one of the tort-feasors, that defendant can implead the other joint tort-feasor as a third party defendant in the same action. Another Look, supra note 6, at 128. Second, a joint tort-feasor who does not implead the other tort-feasor but instead pays more than his pro rata share of the judgment recovered against him may bring a separate action for contribution. Id. Third, if one tort-feasor settles with the injured person and pays more than his pro rata share of the common liability, he may bring an independent action for contribution against the other joint tort-feasor. Id.
12. Distribution of Loss, supra note 6, at 232. At least thirty-eight American jurisdictions currently allow, either statutorily or by judicial determination, some degree of contribution among tort-feasors. For examples of jurisdictions permitting contribution by statute, see CAL. CIV. PROC. CODE §§ 875-78 (West Supp. 1979); KAN. STAT. ANN. § 60-2413(b) (1976); N.J. STAT. ANN. §§ 2A:53A-1 to -4 (1952); TENN. CODE
allowing contribution seem to adhere to the position that "equality is equity" and divide the loss equally among the tort-feasors.\textsuperscript{13} On the other hand, several jurisdictions have deemed it appropriate to adopt the theory that, for purposes of contribution, the responsibility for damages suffered by an injured party should be apportioned, as between joint tort-feasors, on the basis of their relative fault.\textsuperscript{14}

Contribution is a corollary "of the fault principle in tort law and . . . developed as [a] subordinate [aspect] of fault-based liability."\textsuperscript{15} The doctrine of contribution allocates the loss between those who caused the injury, provided they were, in the language of common-law negligence, at fault.\textsuperscript{16} Where culpable conduct is found, it can be compared and fairly apportioned in a reasonably consistent manner by the trier of fact.\textsuperscript{17}

The ultimate objective of contribution is to promote fairness by requiring an equitable apportionment of liability among all parties whose conduct was in some significant manner responsible for the plaintiff's loss.\textsuperscript{18} Without interfering with the compensatory goal of tort law, "[c]ontribution permits the loss to be equitably distributed among all persons responsible for the injury, so it does not rest on one alone."\textsuperscript{19}

Contribution has often been confused with indemnity.\textsuperscript{20} Al-
though it has been said that "indemnity is only an extreme form of contribution," though it has been said that "indemnity is only an extreme form of contribution," indemnity remains a largely separate remedy also used to allocate damages among those jointly liable. The traditional definitions of the terms are as follows: contribution refers to a distribution of the loss among responsible tort-feasors by requiring each to pay his proportionate share, whereas indemnity transfers the entire burden from one tort-feasor who has been compelled to pay it to another who, in justice and equity, ought to bear it instead.

Certain courts and commentators have advocated combining the traditional doctrines of indemnity and contribution to effectively create "an entirely new rule stripped of historical anachronisms and semantic absurdities, which would allocate responsibility among all persons whose conduct was in some significant manner responsible for the plaintiff's loss." Apportioning liability among joint tort-feasors on the basis of comparative fault and causation appears to be the current trend. Although this system has received diverse, and often semantically confusing, labels in jurisdictions in which it has been adopted, it seems to have developed from a judicial dissatisfaction with one or both of the following: "the all-or-nothing characteristics of common law indemnity," and serious and inequitable restrictions placed on

22. See Another Look, supra note 6, at 127.
23. 3A L. FRUMER & M. FRIEDMAN, supra note 20, § 44.02(2); W. PROSSER, supra note 13, § 51; Another Look, supra note 6, at 127. A detailed discussion of indemnity is beyond the scope of this comment. For comprehensive treatments of contribution and indemnity, see Bohlen, Contribution and Indemnity Between Tortfeasors, 21 CORNELL L.Q. 552 (1936); Hodges, Contribution and Indemnity Among Tortfeasors, 26 TEX. L. REV. 150 (1947); Leflar, Contribution and Indemnity Between Tortfeasors, 81 U. PA. L. REV. 130 (1932). For articles focusing specifically on indemnity in various contexts, see Davis, Indemnity Between Negligent Tortfeasors: A Proposed Rationale, 37 IOWA L. REV. 517 (1952); Note, The Right to Indemnity in Products Liability Cases, 1964 U. ILL. L.F. 614 (1964); Note, 32 S. CAL. L. REV. 293 (1955).
27. Comparative Causation, supra note 4, at 592.
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the contribution remedy in the statutory contribution schemes of some states.\footnote{28} A wave of recent decisions has espoused this concept wherein liability is determined by the factfinder in accordance with the relative percentages of fault for the several tort-feasors or their causal contribution to the victim’s injury.\footnote{29} The Restatement (Second) of Torts has suggested that the eventual outcome is likely to be a single remedy based on comparative fault,\footnote{30} which could perhaps be styled “comparative responsibility.”\footnote{31}

**Strict Tort Liability**

When the contribution remedy is sought in strict liability cases, the allocation of damages between joint tort-feasors becomes more complicated.\footnote{32} There seems to be an inherent conflict in the policies underlying contribution, which is essentially a tool for promoting fairness to defendants, and those behind strict liability, which was developed primarily to protect injured consumers and focuses on plaintiffs’ rights.\footnote{33} A brief examination of the foundations of strict liability will aid in resolving the issue of whether contribution principles should be employed to apportion damages between products liability defendants.

“[S]trict liability in the products liability field is a form of liability imposed upon manufacturers and other suppliers of products for injuries resulting to consumers or users due to defects in those products.”\footnote{34} Proof of actual fault is not required: a defendant may be grossly negligent or may exercise every possible precaution in the preparation and sale of the product and still be held

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33. *Id.*
liable. "An action based on strict liability is to be distinguished from liability predicated on a breach of warranty or simple negligence. It is not based on fault." Once a product is held to be defective, the defendant's liability is established unless it has been precluded by some type of plaintiff conduct.

Unlike negligence, in which the injured plaintiff as a prerequisite to recovery must sue the party who caused the defect, the common-law view of strict liability is that the injured person may bring an action against anyone within the chain of distribution of the product. Today nearly all jurisdictions have adopted strict liability in some form.

A primary goal of products liability has been consumer protection and compensation. Consumers rely on the manufacturer to create a product without an injury-producing defect and are powerless to protect themselves. Courts hold manufacturers strictly liable for the harm caused by their products because a mass production and marketing system creates substantial risks of personal injury, and consumers are not sufficiently protected from such risks by liability grounded in negligence or warranty concepts.

In addition to this consumer protection goal, a major justification for strict liability is risk distribution, which perceives strict liability as a loss spreading vehicle "whereby those in the stream of commerce of the defective product 'internalize' the potential risks involved by insuring against liability and adding the cost to the price of the product." All users of the product thereby absorb a fraction of the cost of accidents resulting from defective prod-

38. Oldham & Maynard, supra note 1, at 250. This has been changed by statute in some jurisdictions. See, e.g., NEB. REV. STAT. § 25-21, 181 (Supp. 1978) (barring any action based on strict liability in tort brought against the seller or lessor of either a defective or unreasonably dangerous product unless the seller or lessor is also the manufacturer of the product).
39. See Banks, supra note 34, at 295-304; Pinto, Comparative Responsibility — An Idea Whose Time Has Come, 45 INS. COUNSEL J. 115, 116 n.2 (1978). Section 402A of the Restatement (Second) of Torts is the basic standard used by most courts to define strict liability. Banks, supra note 34, at 295.
40. Comparative Fault and Strict Liability, supra note 37, at 504.
42. Jensvold, supra note 2, at 724; Prosser, The Fall of the Citadel (Strict Liability to the Consumer), 50 MINN. L. REV. 791, 799-800 (1966).
43. Comment, Strict Tort Liability in Nebraska: Recent Developments in Perspective, 12 CREIGHTON L. REV. 370, 376 (1978); Note, Products Liability, Compara-
Defendants in products liability actions are better risk distributors than are injured plaintiffs. The foregoing policies underlying strict tort liability differ from those behind contribution. Contribution does not necessarily further the purposes of strict liability; in many cases contribution will have no effect on those purposes. But considering the overriding importance of fairness as an objective of tort law, and realizing that contribution promotes fairness, equitable considerations mandate that contribution be allowed in strict liability actions.

Additionally, it should be recalled that strict liability attaches to both the manufacturer and the distributor of a product. Both such entities should arguably bear the losses resulting from defective products since both are essential parts of the producing and marketing complex. This recognition of the importance of distribution in product-induced injuries suggests that the fairness goal of contribution cannot be attained merely by shifting the economic loss from the injured consumer to the creator of the defective product.

44. Comparative Negligence, supra note 43, at 76 n.18.
45. Id.; Calabresi & Hirschoff, Toward a Test for Strict Liability in Torts, 81 Yale L.J. 1055, 1082-83 n.93 (1972).
46. See Distribution of Loss, supra note 6, at 252.
47. Three policies supporting strict liability are consumer protection, risk distribution, and deterrence. Since contribution does not reduce liability, but merely distributes the loss, the consumer protection goal of strict liability should remain unaffected by contribution. See notes 35-40 and accompanying text supra. Risk distribution, on the other hand, mandates that the manufacturer of a product should bear, as a cost of production, the burden of injuries caused by his products. See notes 33 & 43-45 and accompanying text supra. This conflicts directly with the goal of contribution when a party other than the product’s manufacturer was principally responsible for causing the plaintiff’s injury. Finally, contribution may enhance deterrence by imposing liability among all responsible entities within the distributive chain. See note 45 supra; see note 60 and accompanying text infra.
48. See Distribution of Loss, supra note 6, at 257.
49. Jensvold, supra note 2, at 735.
51. Jensvold, supra note 2, at 735.
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ALL DEFENDANTS STRICTLY LIABLE

Traditionally, in products cases "where the liability of all the defendants is premised solely on strict liability, the loss caused by a defective product [has] ultimately rest[ed] with the party at the beginning of the distributive chain."52 This section considers the allocation of damages between manufacturers or retailers—in other words, allocation among suppliers at the same level of the production and marketing process.53

Claims between suppliers are usually for full indemnity rather than for contribution, and they run up rather than down the distribution chain.54 The seller sued is thus allowed indemnity up the chain until the manufacturer is reached.55 The producer of a defective product is invariably held responsible among strictly liable defendants.56 Instead of the usual situation wherein the manufacturer passes on the loss to all suppliers by increasing the price of the product, it would be more equitable to allocate a greater part of this loss to suppliers who proximately caused the injury.57

Legally, all members of the distributive chain are "equally

52. Id. at 729-30; see Farr v. Armstrong Rubber Co., 288 Minn. 83, —, 179 N.W.2d 64, 72 (1970).
53. How the policy goals of strict liability and contribution will be best served when damages are sought to be apportioned between defendants on successive levels of the chain is, to say the least, problematic. The situation where the defendants are, for example, a neighborhood hardware store and a manufacturing conglomerate might well require a solution different from that where the defendants are an inexperienced manufacturer with little capital and a large, nationwide retail concern. See Jensvold, supra note 2, at 738-39.
54. A perhaps neglected method available to control loss from product liability is an express contract of contribution or indemnity. When executed between members of the distribution chain, such express agreements are not generally contrary to public policy because the parties to the agreement are merchants who are capable of striking a free bargain on the issue of apportionment of risk and who will hopefully allocate the heavier burden to that party best able to absorb and spread the loss through inspection, quality control, and insurance. See Phillips, supra note 24, at 89.
55. Distribution of Loss, supra note 6, at 254. See generally 3A L. FRIEMER & M. FRIEDMAN, supra note 20, § 44.02.
56. Burke v. Sky Climber, Inc., 13 Ill. App. 3d 498, —, 301 N.E.2d 41, 46 (1973), aff'd, 56 Ill. 2d 542, 316 N.E.2d 516 (1974); see Comparative Negligence, supra note 43, at 84. In cases where two manufacturers are held strictly liable, neither manufacturer is entitled to indemnity from the other. See 3A L. FRIEMER & M. FRIEDMAN, supra note 20, § 44.02(3) at 15-34. At common law, the loss would apparently remain where the victim chose to impose it. Comment, The Allocation of Loss Among Joint Tortfeasors, 41 S. Cal. L. Rev. 728, 728 (1968).
faultless" in the sense that their liability derives entirely from strict liability principles. The traditional indemnity rules discount the importance of nonnegligent behavior in causing product-related injuries. This situation mitigates the potential deterrent effect of strict tort liability by making it difficult to apportion damages among all suppliers who profit from selling defective products.

Furthermore, the goal of equitable loss allocation among tortfeasors warrants a critical reappraisal of the alternatives available to strict products liability defendants. One commentator stated that "[t]here is no compelling reason why recovery of claims between suppliers should be for the full amount of liability when there is joint fault or joint strict liability; nor is there any reason why the right to claim should be limited to those claims made up the chain of distribution, instead of including claims made in either direction." Where the liability of all defendants in a products case is premised on strict liability, the element of common liability is present and contribution should be allowed.

The presence of a common conceptual standard of comparison enables the trier of fact to determine, with some consistency, the relative roles of all defendants in proximately causing the victim's injuries. Equitable loss sharing on the basis of responsibility then requires that principles of comparative contribution be applied.

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58. See Jensvold, supra note 2, at 729.
59. Id. at 738.
61. Phillips, supra note 24, at 104.
63. See Jensvold, supra note 2, at 740.
65. Doundoulakis v. Town of Hempstead, 42 N.Y.2d 440, —, 368 N.E.2d 24, 29, 398 N.Y.S.2d 401, 406 (1977); Jensvold, supra note 2, at 740-41; cf. Busch v. Busch Const., Inc., — Minn. —, —, 262 N.W.2d 377, 393-94 (1977) (applying comparative contribution principles to the situation where one defendant is liable under ordinary negligence principles while the other defendant is strictly liable). Comparative contribution may be defined as an apportionment of liability among tortfeasors in which the jury first determines the relative responsibility of each defendant in causing the victim's injury, and then assigns the corresponding percentage (0 to 100 percent) of plaintiff's award to each defendant.
Although comparative contribution is feasible where a common denominator exists, the issue becomes more complex where theories of liability differ. For purposes of this section, the defendants will remain the same: one joint tort-feasor is strictly liable and the other is negligent. Whether contribution should be allowed, and if so, what its measure should be, are the questions which will now be addressed.

Claims for contribution between negligent and strictly liable parties have been asserted in relatively few products cases. This may be explained, in part, by the predominance of actions for full indemnification and, in part, by the absence, in some states, of statutory or judicial schemes permitting contribution among joint tort-feasors. Courts considering the problem have advanced

66. See notes 63-65 and accompanying text supra.
70. See Oldham & Maynard, supra note 1, at 250.
three theoretical characterizations of strict liability: negligence per se, culpable violation of a duty to produce a reasonably safe product, and liability irrespective of fault. The theory adopted usually forms the basis for the courts' application of contribution.

In adopting the comparative system of distributing losses among joint tort-feasors to products cases, at least one court has treated strict liability as a variant of negligence per se.\(^2\) This injection of fault concepts into the strict liability cause of action has provided the jury with a common standard of comparison to apportion damages among all defendants in a products liability action, and may have avoided the conceptual difficulties of comparing the mere existence of a defect with the negligence of another party.\(^3\)

Rather than labeling strict liability as negligence per se, most jurisdictions applying comparative fault to strict liability actions reason that violation of the duty to produce a nondefective product involves culpable conduct and is capable of apportionment by the jury.\(^4\) "Some courts taking this view merely state that negligent and strictly liable parties may be in pari delicto, or point out that, with the exception of intentional tort-feasors, the contribution statute makes no distinction."\(^5\) Courts allowing contribution in favor of a strictly liable defendant against a negligent defendant frequently state that strict liability is not absolute liability,\(^6\) and seem to emphasize the role of strict liability as a substitute for proof of negligence rather than as a device to spread losses.\(^7\)

Thus, some authorities have suggested that strict liability "rests on theoretical foundations of fault,"\(^8\) referring to fault in

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\(^3\) See Pinto, supra note 39, at 122.


\(^6\) Daly v. General Motors Corp., 20 Cal. 3d 725, —, 575 P.2d 1162, 1170, 144 Cal. Rptr. 380, 384 (1978); Dippel v. Sciano, 37 Wis. 2d 443, —, 155 N.W.2d 55, 63 (1967).

\(^7\) Distribution of Loss, supra note 6, at 256.

\(^8\) Levine, Strict Products Liability and Comparative Negligence: The Collision of Fault and No-Fault, 14 SAN DIEGO L. REV. 337, 346 (1977). In the very recent case of Caterpillar Tractor Co. v. Beck, 593 P.2d 871 (Alaska 1979), the Supreme Court of Alaska stated simply: "The production and marketing of a defective product is tantamount to 'fault' in the sense that we will impose legal responsibility for it." Id. at 889; accord, Sun Valley Airlines, Inc. v. Avco-Lycoming Corp., 411 F. Supp. 598, 602 (D. Idaho 1976).
the sense of negligent acts. Yet the fact remains that this approach is foreign to the characterization offered by most jurisdictions. Although it is said that strict liability is not absolute liability and that a defect cannot exist without someone’s fault, such criticism misses the mark. “The [strict products liability] 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 proposition that a defect presupposes the existence of fault simply ignores the irrelevancy of the defendant’s conduct in a strict liability action.

The majority view characterizes strict liability as essentially an unrelated tort providing “liability irrespective of fault.” A strictly liable defendant has not been permitted to seek contribution from a negligent defendant by several courts. These decisions emphasize the loss spreading, risk distribution rationale behind strict liability, and often focus “on the lack of an exact mechanism for an equitable allocation of damages between negligent and strictly liable defendants.” The fact that the strictly liable tort-feasor may have exercised all possible care suggests to some authorities that no right to contribution exists between those whose liability is imposed under different theories.

Although no consensus is provided by the cases as to the applicability of contribution between joint tort-feasors whose liability is imposed under different theories, a recent California decision may signal a trend in favor of contribution. In *Safeway Stores, Inc. v. Nest-Kart*, the California Supreme Court utilized a common-law equitable indemnity doctrine to apportion liability on a comparative fault basis between a strictly liable defendant and a negli-

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80. Horn v. General Motors Corp., 17 Cal. 3d 359, —, 551 P.2d 398, 406, 131 Cal. Rptr. 78, 86 (1976) (Clark, J., dissenting); see notes 76-78 and accompanying text *supra*.
81. *Comparative Fault and Strict Liability, supra* note 37, at 508.
82. *Id.*
86. *Comparative Causation, supra* note 4, at 591 n.27.
88. 21 Cal. 3d 322, 579 P.2d 441, 146 Cal. Rptr. 550 (1978).
89. In spite of this label the court was, in fact, awarding contribution as defined above. See note 23 and accompanying text *supra*.
The plaintiff in this case was injured in a supermarket when the shopping cart she was using broke and collapsed on her foot. Subsequently, she obtained a jury verdict against Safeway Stores (the owner of the cart who had made it available for customers' use) and Nest-Kart Corporation (the manufacturer of the cart). In response to the trial court's direction to make special findings, the jury indicated that Safeway's liability rested on both negligence and strict liability principles, that Nest-Kart's liability was grounded solely on strict liability principles and that Safeway's comparative fault for the accident was 80% and Nest-Kart's was 20%. After the judgment had initially been satisfied on the 80%-20% basis, Safeway moved for a judgment of contribution to require Nest-Kart to pay an additional 30% of the judgment to Safeway, so as to achieve an equal apportionment between the two tort-feasors. The trial court granted Safeway's motion, concluding that apportionment on a comparative fault basis was not permissible in light of California's existing contribution statutes. Nest-Kart appealed from this order, and the supreme court reversed.

The Safeway Court supported its holding by reasoning that fairness and tort goals such as deterrence of dangerous conduct often demand an apportionment of losses among joint tort-feasors, even where the liability of one rests on strict liability principles. Noting that the jury had evidently concluded that while the defectiveness of the shopping cart partially caused the injury, primary fault for the accident lay with Safeway, the court relied on common sense and equitable considerations to suggest that Safeway should bear a greater share of the liability than Nest-Kart. The court apparently viewed the difficulties of comparing the relative fault of a negligent defendant with that of a strictly liable defendant whose liability rests on no-fault concepts as more theoretical than practical.

In extending a full system of comparative fault to strict tort liability, the California Supreme Court was convinced that in
merging the two principles what may be lost in symmetry is more than gained in fundamental fairness. But not all are in agreement as to the wisdom of employing comparative contribution to apportion damages between a strictly liable and a negligent tort-feasor. It is submitted that the problem is not "that the allocation of fault cannot be precisely measured—rather, in most cases there is no measuring standard." Indeed, several jurists have suggested that a comparative fault-type allocation between defendants who are not liable under the same theory will have serious untoward effects.

These pragmatic consequences deserve thoughtful consideration and indicate the need for caution on the part of courts facing this dilemma in the future. Will the jurors in such a case be able to compare the noncomparables—strict liability and negligence—and still reach a fair apportionment of damages?

It has been suggested that factors not reasonably subject to comparison cannot logically be compared. Applying contribution on the basis of relative fault will require the jury, on the one hand, to focus on the product, disregarding questions of whether the manufacturer acted negligently, to determine defendant manufacturer's liability. On the other hand, the jury must focus on the remaining defendant's conduct in order to find that he was at fault. The jury would then compare its examination of the manufacturer's product with its examination of the other defendant's conduct to assign percentages of fault and allocate the plaintiff's loss between the two parties.

There may be no logical formula that can be given to the jury to guide it in considering one tort-feasor's product and another tort-feasor's negligence as constituting 100% responsibility for the plaintiff's injuries and then deciding what percentage of this 100% responsibility

100. Id. at --, 579 P.2d at 441-42, 146 Cal. Rptr. at 550-51 (citing Daly v. General Motors Corp., 20 Cal. 3d 725, --, 575 P.2d 1162, 1172, 144 Cal. Rptr. 380, 390 (1978)).
104. Cf. 20 Cal. 3d at --, 575 P.2d at 1180, 144 Cal. Rptr. at 398 (Jefferson, J., concurring in part and dissenting in part) (criticizing the application of comparative fault principles in apportioning liability between a negligent plaintiff and a strictly liable defendant).
105. Id.
106. Id.
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is caused by each of the two noncomparables. 107 "[T]he percentage assessed will represent nothing more substantial or reasonable than that which results from the application of the jurors' instincts, speculations, conjectures and guesses." 108

If apportionment of fault by way of comparative contribution is to be extended to situations where not all defendants are either strictly liable or negligent, allocation of loss would necessitate a wholly different comparison of the liability-producing relationship between the parties. 109 Factors such as size and technical expertise would be important concerns in determining the relative responsibilities of, for example, a diversified manufacturer and a one-man installer. 110

Attempting to apportion damages between tort-feasors where the theories of liability differ "constitutes a glaring failure to appreciate the limitations on, and the realities of, our jury trial system." 111 By starting with the premise that things as different as negligent conduct and a defective product can be added together and assigned percentages to total 100%, juries would be expected to reach a just result without possessing the means to reduce the two noncomparables to a common denominator. 112 This may indeed "be a feat which is beyond the prowess of an American jury." 113

Doubt exists that an intelligible jury instruction, which would permit a jury to apply the principles necessarily required to justly allocate losses, could be formulated. 114 The complex task of considering social and economic principles is thrust upon the jury when it is required to assign a percentage to the relative responsibility of a strictly liable defendant and a negligent defendant. 115 Ironically, courts are embracing comparative fault "at a time when increasing numbers of legal thinkers are proposing limitations on

107. Id.
108. Id., at —, 575 P.2d at 1178, 144 Cal. Rptr. at 396.
110. Id.
111. 20 Cal. 3d at —, 575 P.2d at 1180, 144 Cal. Rptr. at 398 (Jefferson, J., concurring in part and dissenting in part); id. at —, —, 575 P.2d at 1183, 1185, 144 Cal. Rptr. at 401, 403 (Mosk, J., dissenting). See generally Henderson, Expanding the Negligence Concept: Retreat from the Rule of Law, 51 IND. L.J. 467, 468 (1976).
112. 20 Cal. 3d at —, 575 P.2d at 1180, 144 Cal. Rptr. at 398 (Jefferson, J., concurring in part and dissenting in part).
113. Levine, supra note 78, at 356.
115. See id. at —, 255 N.W.2d at 368 (Kelly, J., dissenting).
the function of the civil jury or even its abolition."\textsuperscript{116}

Comparative fault, when applied to the allocation of damages between strictly liable and negligent parties, may be equitable in theory, but it is difficult to apply equitably and precludes consistency of result.\textsuperscript{117} Employing a process of decision that is predicated on conjecture and speculation, the factfinder will not arrive at consistent verdicts.\textsuperscript{118}

This lack of consistency not only means that most contribution claims will not be disposed of equitably but also that defense attorneys may only rarely be able to reasonably evaluate the cases for purposes of settlement.\textsuperscript{119} And due to the fact that settlement plays a major role in the determination of accident claims the efficient administration of justice will be impaired.\textsuperscript{120}

\textit{Safeway Stores, Inc. v. Nest-Kart}\textsuperscript{121} is a case which demonstrates the arbitrariness of the comparative fault system.\textsuperscript{122} Nest-Kart manufactured the defective cart and was held strictly liable; Safeway maintained the cart and was held liable in negligence. Although the jury ascertained that Safeway was 80\% at fault, it could just as well have concluded that the manufacturer was 80\% responsible.\textsuperscript{123} In his concurring opinion, Justice Clark addressed this precise problem:

Blind inquiry into relative fault is no better than the flip of a coin, and disputes over degree of fault must greatly increase the time and cost of litigation. While the comparative fault doctrine continues irresistible in the abstract, implementing the new doctrine requires both great administrative expense and analytical and mathematical determination for which the judicial system is not equipped.\textsuperscript{124}

\begin{itemize}
\item \textsuperscript{116} Id. For an interesting article which questions the ability of a jury to understand the laws it is expected to apply, see Strawn \& Buchanan, \textit{Jury Confusion: A Threat to Justice}, 59 Jud. 478 (1976).
\item \textsuperscript{117} Daly v. General Motors Corp., 20 Cal. 3d 725, —, 575 P.2d 1162, 1177, 144 Cal. Rptr. 380, 395 (1978) (Clark, J., concurring); Levine, \textit{supra} note 78, at 356. In the states that have adopted comparative negligence statutes, the statute operates to apportion the loss between a strictly liable defendant and a contributorily negligent plaintiff on the basis of causation. \textit{E.g.}, Caterpillar Tractor Co. v. Beck, 593 P.2d 871, 888-89 (Alaska 1979).
\item \textsuperscript{118} See 20 Cal. 3d at —, 575 P.2d at 1176, 144 Cal. Rptr. at 394 (Clark, J., concurring).
\item \textsuperscript{119} Id.
\item \textsuperscript{120} Id.
\item \textsuperscript{121} 21 Cal. 3d 322, 579 P.2d 441, 146 Cal. Rptr. 550 (1978).
\item \textsuperscript{122} See notes 88-99 and accompanying text \textit{supra}.
\item \textsuperscript{123} 21 Cal. 3d at —, 579 P.2d at 448, 146 Cal. Rptr. at 557 (Clark, J., concurring).
\item \textsuperscript{124} Id. In a more recent case, \textit{Associated Constr. \& Eng'r Co. v. Workers' Comp. App. Bd.}, 22 Cal. 3d 829, 587 P.2d 684, 150 Cal. Rptr. 888 (1978), Justice Clark reiterated his contention that the comparative fault system involves great expense and requires determinations which triers of fact are ill-equipped to make. \textit{Id.} at —,
Justice Clark suggested that the comparative system of loss allocation employed by the majority in Safeway is unfair both to the liability insurance premium payer and to the accident victim because it increases distribution costs, while allowing arbitrary results. Some people who would ordinarily purchase insurance will not because of the inflated premium cost; this will result in little or no compensation to some victims for their injuries.

Those advocating the application of comparative principles to loss allocation between negligent and strictly liable tort-feasors point to the provisions of the proposed Uniform Comparative Fault Act. In adopting the principles of comparative fault, this Act defines fault to include acts or omissions that constitute negligence or subject a person to strict tort liability. But the Uniform Comparative Fault Act possesses the same weaknesses as the majority's assumptions in the Safeway case. The Act does not provide a workable formula by which the jury can avoid the task of employing conjecture and occult divination in seeking to compare noncomparable factors that comprise the Act's concept of total fault.

The difficulty in comparing relative responsibility does not, however, warrant the complete denial of contribution in such cases. "There is obvious lack of sense and justice in a rule which permits the entire burden of an unintentional loss, for which two defendants were equally responsible, to be shouldered onto one alone... while the latter goes scot free." But this equitable principle does not require a comparative fault system. The usual method of distributing the loss has been to divide the total damages pro rata, or equally, among the tort-
feasors without regard to comparative fault. The pro rata approach eliminates the necessity of the difficult task of comparing responsibility in cases where liability is predicated on different theories. A pro rata system would foster consistency and predictability, and would facilitate evaluation and settlement of claims.

The adoption or retention of a pro rata method of apportionment will not eliminate all inequities. Arbitrary results are inherent in attempting to adjust a loss between the parties responsible, when their liability is based on different acts. The absence of a measuring standard renders the application of comparative fault principles to the strictly liable defendant versus negligent defendant situation not only inequitable and arbitrary but also inconsistent and unpredictable. Substantial elimination of two of the four defects by establishing a pro rata system of contribution is worthy of a court’s consideration.

CONCLUSION

The equitable apportionment of damages among those responsible for a single harm is an important goal of tort law. Loss allocation systems derived from common-law indemnity theories and originally developed for use in negligence actions are poorly suited for use in strict liability cases. The ability of a tort-feasor, even one held strictly liable, to obtain contribution from a jointly responsible tort-feasor seems essential to achieve an equitable distribution of the loss.

Contribution is, however, a corollary of fault-based liability, whereas, in most jurisdictions products liability is strict liability as a matter of public policy and is not based on fault. Even so, courts can and should balance the policy concerns underlying contribution with those of strict liability. The difficulty of formulating a logical system of contribution does not warrant the denial of loss.

132. Distribution of Loss, supra note 6, at 232.
133. Cf. 20 Cal. 3d at —, 575 P.2d at 1176, 144 Cal. Rptr. at 394 (Clark, J., concurring) (advocating a uniform discount system of loss allocation). Even under a pro rata system, a complete shifting of the loss will remain appropriate where one party (such as a small neighborhood retailer) is held liable on a purely technical basis and the other party (a large manufacturer, for example) is 100% responsible. The jury in such a case might conclude that the retailer’s negligence was not an independent and concurrent cause of the plaintiff’s injuries. See Jensvold, supra note 2, at 742; The Application of Contribution, supra note 32, at 185.
135. See 20 Cal. 3d at —, 575 P.2d at 1177, 144 Cal. Rptr. at 395 (Clark, J., concurring); Levine, supra note 78, at 355-56.
apportionment in products liability actions. Rather, it requires the establishment of a better and simpler system of apportionment.

It is submitted that the following two-tiered method of loss allocation among multiple defendants in products cases will promote consistency in the law while it serves to fairly distribute the victim's loss.

In cases where the liability of defendants on the same level of the distributive chain is predicated on the same theory of liability, principles of comparative contribution should be utilized to apportion damages on the basis of each tort-feasor's relative degree of responsibility in causing the plaintiff's injury. The presence of a common standard of comparison enables the factfinder to assign percentages of responsibility and apportion damages with an acceptable measure of accuracy and consistency.

In cases where contribution is sought between defendants liable under different theories, damages should be allocated equally among the responsible parties. It would appear that any arbitrariness present in such a system is more than offset by the benefits flowing from elimination of speculative and unpredictable jury verdicts. Recognition of the essential differences between theories of liability would be preserved and a reasonably equitable distribution of losses would be achieved.

In an apparent attempt to do justice in every case, some courts are adopting comparative fault systems to apportion damages between joint tort-feasors, whether a common denominator exists with which to compare their respective responsibility for the plaintiff's injury or not. As a perceptive commentator stated, however, "[b]ald assertions which conclusively abandon essential differences in theories of liability should never serve as a method of resolving important legal issues." Sound judicial decision making requires a critical analysis of the potential consequences, both conceptual and pragmatic, which might result from the adoption of any given system of loss allocation to the products liability action.

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137. Levine, supra note 78, at 355.