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The Scope of Comparative Fault in Minnesota

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THE SCOPE OF COMPARATIVE FAULT IN MINNESOTA

As Minnesota sheds the shackles of traditional torts, it experiments with dissolving all distinctions between causes of actions such as torts, both intentional and unintentional, strict liability, absolute liability, and contract. The Minnesota Comparative Fault Act marks a major move toward the single, multi-purpose cause of action. This Note identifies what has already been subsumed under the Act, what has been excluded, and what factors might guide future inclusions.

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I. INTRODUCTION

Traditionally, the scope of contributory negligence was limited.1 Courts applied the common law contributory negligence doctrine to

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traditional negligence torts but rarely beyond. Even then, scholars criticized while courts and juries avoided the doctrine whenever possible.

In 1969, Minnesota abandoned contributory negligence with the adoption of the Comparative Negligence Act. The Minnesota Supreme Court defined negligence as "a departure from a standard of conduct required by the law for the protection of others against unreasonable risk of harm." In 1978, the Minnesota Legislature amended the 1969 Act, changing the comparative negligence statute to a comparative fault statute.

Since fault is a broader concept than negligence, the comparative fault statute's scope is potentially broader than the comparative negligence statute's scope. The history of comparative fault and its development in Minnesota demonstrate a tendency toward increasingly broader use of the doctrine. Recent Minnesota cases show with more detail how expansively Minnesota courts will apply comparative fault.

II. HISTORY AND DEVELOPMENT

A. Contributory Negligence

Prior to the development of comparative negligence, the common law defense of contributory negligence governed a negligent plaintiff's recovery. Contributory negligence originated in the English case of Butterfield v. Forrester. In Butterfield, the plaintiff, when returning from an

2. Id. at 426.
5. See Act of May 23, 1969, ch. 624, §§ 1-2, 1969 Minn. Laws 1069, 1069-70 (current version at MINN. STAT. § 604.01 (1982)).
9. See Seim v. Garavalia, 306 N.W.2d 806 (Minn. 1981). The court noted that "[t]he 1978 legislation significantly broadened the scope of the comparative negligence statute in an expansive definition of the word 'fault,' which replaced the word 'negligence' in the statute." Id. at 809; see also Steenson, The Anatomy of Products Liability in Minnesota, 6 WM. MITCHELL L. REV. 243, 335 (1980).
10. See infra notes 88-99 and accompanying text.
11. See infra notes 100-40 and accompanying text.
12. See infra notes 141-86 and accompanying text.
13. See W. PROSSER, supra note 1, § 65, at 416.
evening at the "public house," spurred his horse to a fast gait. No sooner had the horse gotten up to speed than it stumbled over a pole which the defendant left in the road. The plaintiff flew from his horse and landed with a bone crunching thud. The court held that the plaintiff could not recover for he had "cast himself upon a barrier." Later courts give the Butterfield decision the broadest of readings: contributory negligence came to mean that when plaintiff's negligence in any way contributed to an accident, the plaintiff may not recover.

B. Comparative Negligence

Early in this century, dissatisfaction began to grow with the all-or-nothing recovery rule of contributory negligence. Some legal scholars called for its abolition in favor of comparative negligence. Judges criticized the defense and were most unwilling to find a plaintiff negligent as a matter of law. A few statutes provided for comparative fault in limited circumstances. Those statutes incorporating comparative fault typically protected injured workers. The Federal Employers' Liability Act of 1908, protected railroad workers; the Jones Act of 1920, protected seamen; state statutes protected other workers. These statutes apportioned fault according to the principles of comparative fault.

Abolition of contributory negligence in all negligence actions was longer in coming. Mississippi took the first lasting step by enacting a pure comparative negligence statute in 1910. Under Mississippi's pure

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16. Id.
17. Id.
18. Id. at 61, 103 Eng. Rep. at 927.
20. See generally W. PROSSER, supra note 1, § 67; V. SCHWARTZ, supra note 19, § 1.4.
21. See e.g., Gregory, supra note 3; Mole and Wilson, supra note 3.
24. See V. SCHWARTZ, supra note 19, § 1.4, at 11.

The Death on the High Seas Act of 1920 (DOHSA) also incorporates pure comparative fault principles. See Act of Mar. 30, 1920, ch. 111, § 6, 41 Stat. 537 (codified at 46 U.S.C. § 766 (1976)). While the Jones Act applied only to sailors, DOHSA applies to anyone killed on the high seas. Likely, sailors have been the major group of DOHSA benefit recipients but the Act does protect others.

27. See V. SCHWARTZ, supra note 19, § 1.4, at 12.
28. See W. PROSSER, supra note 1, § 67, at 435-36.
29. See generally id.
30. See Act of Apr. 16, 1910, ch. 135, 1910 Miss. Laws 125 (current version at Miss.
system the plaintiff’s recovery was diminished by the percentage of the plaintiff’s negligence even if the plaintiff was 99% negligent he could still recover 1% of his damages.31 Three years later, Georgia followed Mississippi’s example, but by judicial decision rather than legislative action.32 The Georgia Supreme Court expanded a statute governing railroad accidents to cover all negligence actions33 and laid the groundwork for what would become modified comparative fault.34 The court added a requirement that damages be apportioned unless the plaintiff’s “negligence was equal to or greater than the negligence of the defendant.”35 In 1913, Nebraska passed a slight/gross comparative negligence statute.36 The plaintiff could still recover if his negligence was slight in comparison to the gross negligence of the defendant.37

The field of comparative negligence remained fairly dormant until the middle of this century.38 Wisconsin passed a modified form of comparative negligence in 1931.39 Under the Wisconsin statute the plaintiff could recover if his negligence was “not as great as that of the defendant.”40 A 49% negligent plaintiff would recover 51% of his damages, but a 50% negligent plaintiff would recover nothing.41 Ten years later, in 1941, South Dakota passed a slight/gross comparative negligence statute nearly identical to Nebraska’s statute.42 Comparative negligence did not catch hold immediately but did gain a beachhead.

Several proposed comparative negligence bills were voted down by

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34. See Christian v. Macon Ry. & Light Co., 120 Ga. 314, 47 S.E. 923 (1904); see also infra notes 79-85 and accompanying text (discussion of modified comparative negligence).
35. 120 Ga. at 317, 47 S.E. at 923 (“The first headnote [stating the ‘equal to or than’ language] is sufficient without elaboration.”).
37. See generally V. Schwartz, supra note 19, §§ 2.1, 3.4.
38. See generally W. Prosser, supra note 1, § 67, at 436; V. Schwartz, supra note 19, § 1.4, at 11-16.
41. See id. In 1971, the Wisconsin statute was amended to allow the plaintiff to recover if his negligence was “not greater than” that of the defendant. See Act of June 22, 1971, ch. 47, 197 Wis. Laws 50 (codified at Wis. Stat. Ann. § 895.045 (West 1983)).

In 1960, comparative negligence was a vastly outnumbered minority rule; by the end of that decade, however, comparative negligence became the majority rule. Most states adopted comparative negligence by statute, while some adopted it by judicial decision. Most of the states legislatively adopting comparative fault opted for a modified form; whereas most of the states judicially adopting it opted for the pure form, with the result that comparative negligence is now firmly entrenched in American law.

C. Types of Comparative Negligence and Fault

1. Comparative Negligence Generally

American jurisdictions have spawned three forms of comparative negligence: slight/gross, modified, and pure. Only two states have enacted the slight/gross form: Nebraska and South Dakota. Modified comparative negligence is the majority rule in the United States with twenty-four jurisdictions in the fold. Ten American jurisdictions have

43. See V. SCHWARTZ, supra note 19, § 1.4, at 14.
45. See V. SCHWARTZ, supra note 19, § 1.4, at 14.
47. See V. SCHWARTZ, supra note 19, § 1.4, at 14; Note, Comparative Negligence in Pennsylvania, 17 TEMP. L.Q. 276, 286 (1943) (discussing proposed bill).
49. See generally V. SCHWARTZ, supra note 19, § 1.4, at 15.
50. See id., § 1.4, at 15-16.
51. See id., § 1.5, at 17.
52. Id., § 1.5.
53. See id., § 3.2.
54. Id., § 1.1.
55. See infra notes 69-78 and accompanying text.
56. See infra notes 79-85 and accompanying text.
57. See infra notes 86-87 and accompanying text.
adopted pure comparative fault. Modified comparative fault has been enacted in two states: Arkansas and Minnesota. Pure comparative fault is contemplated by the Uniform Comparative Fault Act. Twenty-one legislatures have decided what form of comparative negligence their jurisdictions will have: twenty-five opted for either slight/gross or a modified form; only six opted for the pure form. On the other hand, six courts have decided the question for their jurisdictions: only one opted for a modified system; the other five chose pure comparative negligence.

2. Slight/Gross Comparative Negligence

South Dakota’s and Nebraska’s slight/gross systems are only a small step away from contributory negligence. A South Dakota Law Review comment noted:

Contrary to what might logically be assumed . . . the comparative negligence statute has not changed the law defining contributory negligence . . . . The legislative purpose in enacting a comparative negligence law was to benefit only that particular and very limited class of plaintiffs in negligence cases whose contributory negligence is small in quantum. The idea was to substitute, under these circumstances alone, a comparative negligence theory for the unduly harsh doctrine of con-


63. See MINN. STAT. § 604.01 (1982).

64. See UNIF. COMPARATIVE FAULT ACT § 1, 12 U.L.A. 36-37 (Supp. 1984).

65. See supra notes 58-60 and accompanying text.

66. See supra note 61 and accompanying text.

67. See supra note 60 and accompanying text.

68. See supra note 61 and accompanying text.

69. See W. PROSSER, supra note 1, § 67, at 437.
Only when the plaintiff's negligence is slight and the defendant's negligence is gross can a negligent plaintiff recover.\(^7\)

The slight/gross system was an early attempt to ameliorate the harshness of contributory negligence.\(^7\) Illinois\(^7\) and Kansas\(^7\) first experimented with slight/gross systems in the late nineteenth century. Both jurisdictions dropped the experiments because of endless appeals resulting from the hopeless confusion involved in defining "slight" and "gross."\(^7\) In the early twentieth century both Nebraska and South Dakota adopted slight/gross systems.\(^7\)

The tenor of the slight/gross system is that contributory negligence is a good system, the rough edges simply need to be rounded off.\(^77\) These rough edges are smoothed by allowing a comparative negligence allocation between the parties only under very limited circumstances. The slight/gross system is more an affirmation on contributory negligence than an embracing of comparative negligence.\(^78\) Therefore, one should not expect the slight/gross system to be used beyond traditional negligence cases covered by contributory negligence.

3. Modified Comparative Negligence

Most American jurisdictions have adopted modified comparative negligence systems.\(^79\) Modified systems are a fifty-fifty mixture comparative negligence and contributory negligence.\(^80\) If the plaintiff's negligence contributes less than a specific percentage, the plaintiff's recovery is diminished by that percentage. If the plaintiff's negligence contributes more than the specific percentage, the plaintiff cannot recover at all.\(^81\) The specific percentage of contributory negligence is an unreasonable figure prior to trial. In most modified comparative negligence jurisdictions the plaintiff can recover only if his negligence is equal to or less


\(^{71}\) See S.D. Codified Laws Ann. § 20-9-2 (1979); see also Roberts v. Brown, 72 S.D. 479, 36 N.W.2d 665 (1949); Friese v. Gulbrandson, 69 S.D. 179, 8 N.W.2d 438 (1943).

\(^{72}\) See W. Prosser, supra note 1, § 67.


\(^{74}\) See Wichita & W. R.R. v. Davis, 37 Kan. 743, 16 P. 78 (1887); Sawyer v. Sauer, 10 Kan. 466 (1872).

\(^{75}\) See Lake Shore & M.S. Ry. v. Hessions, 150 Ill. 546, 37 N.E. 905 (1894).

\(^{76}\) See Johnson, Comparative Negligence—The Nebraska View, 36 Neb. L. Rev. 240 (1957); Comment, supra note 70.

\(^{77}\) See generally Comment, supra note 70.

\(^{78}\) Id.

\(^{79}\) See supra notes 55-68 and accompanying text.

\(^{80}\) See V. Schwartz, supra note 19, § 2.1, at 32.

\(^{81}\) Id.
than the defendant's negligence. A few jurisdictions still hold that the plaintiff's negligence must be less than the defendant's—a fifty-fifty split of negligence would yield no recovery.

Modified comparative negligence does not totally abandon contributory negligence. If the plaintiff's negligence is more than a given percentage, contributory negligence bars recovery; if the plaintiff's negligence is less than that given percentage, comparative negligence principles allocate the damages. Modified comparative negligence was enacted to eliminate the harsh results of contributory negligence. Modified comparative negligence does, however, go a significant way toward abolition of contributory negligence. Depending upon the jurisdiction's legislative history and judicial attitudes toward interpretation, courts should be freer to apply modified comparative fault to situations beyond the scope of traditional negligence actions.

4. Pure Comparative Negligence

Eleven jurisdictions have taken the great step and totally abolished contributory negligence. In those jurisdictions, the plaintiff's negligence never bars a claim, it merely diminishes the plaintiff's recovery. A 10% negligent plaintiff will recover 90% of his damages; a 90% negligent plaintiff, 10% of his damages.

Contributory negligence's abolishment alone does not mean that pure comparative negligence will be broadly applied beyond the scope of traditional negligence considered. Legislative and judicial intent must be weighed. If the new law was intended only to replace contributory negligence with comparative negligence, the new law will probably not be extended beyond the traditional negligence field. If, however, the law was meant as a more comprehensive loss allocation scheme, broader application would follow.

5. Comparative Fault
   a. Generally

Comparative fault is a relatively recent development, with its beginnings in the Uniform Comparative Fault Act (UCFA). At present only

82. See id.
83. Id; see also Marier v. Memorial Rescue Serv., Inc., 296 Minn. 242, 207 N.W.2d 706 (1973) (plaintiff and two defendants were each 1/3 negligent, therefore plaintiff recovered nothing).
84. See supra notes 79-83 and accompanying text.
85. See generally Cady, Alas and A/ack, Modified Comparative Negligence Comes to West Virginia, 82 W. VA. L. REV. 473, 490-91 (1980).
86. See supra notes 29-37 and accompanying text.
87. See V. SCHWARTZ, supra note 19, § 2.1, at 32.
two states have adopted comparative fault: Minnesota\textsuperscript{89} and Arkansas.\textsuperscript{90} “Fault” is potentially a broader category than “negligence.”\textsuperscript{91} UCFA defines fault as:

acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty unreasonable assumption of risk not constituting an enforceable express consent, misuse of a product for which the defendant otherwise would be liable, and unreasonable failure to avoid an injury or to mitigate damages. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.\textsuperscript{92}

The definition itself speaks of application beyond traditional negligence.

\textbf{b. Modified Comparative Fault}

Both Arkansas' and Minnesota's comparative fault statutes are based upon a modified system.\textsuperscript{93} If the plaintiff’s fault contributed equally or less than the defendant’s fault, the plaintiff’s recovery is diminished by his percentage of fault. If the plaintiff's fault is greater than the defendant's fault, the plaintiff cannot recover.\textsuperscript{94} The only difference between the Minnesota and Arkansas statutes and, the majority of other comparative negligence statutes, is that fault is compared not negligence.\textsuperscript{95} Since “fault” may be potentially broader than negligence, the Minnesota and Arkansas statutes could easily be applied far beyond traditional negligence actions.

\textbf{c. Pure Comparative Fault}

Pure comparative fault has never been enacted by any state.\textsuperscript{96} UCFA contemplates a pure system, and defines fault much broader than traditional negligence.\textsuperscript{97} The Act, however, does not profess to be a compre-
hensive loss allocation scheme, although it invites extention of its principles as broadly as a court sees fit. Potentially, a court could apply the principles of comparative fault as a broadly based loss allocation scheme.

III. DEVELOPMENT OF COMPARATIVE FAULT IN MINNESOTA

A. Contributory Negligence

Early in its statehood, Minnesota adopted contributory negligence. According to the Minnesota Supreme Court, in City of St. Paul v. Kuby, "it was for the Defendant to show, by way of defence, that negligence on the part of the Plaintiff concurred in producing the result." The Kuby court, thus adopted the contributory negligence doctrine. In the next few years, the court repeatedly upheld contributory negligence as a defense. By the turn of the century, the defense was a doctrine.

Contributory negligence had two elements: a plaintiff's want of ordinary care and causation. The court spoke of want of ordinary care in normal negligence terms. The plaintiff need not have knowledge and willingness to encounter the danger. Causation means not a slight cause, but the probable cause of the injury. The doctrine was applied, however, only to tort claims. The tort plaintiff whose lack of ordinary liability. Further the Act includes breach of warranty, unreasonable assumption of risk not constituting an enforceable express consent, misuse of a product for which the defendant otherwise would be liable, and unreasonable failure to avoid an injury or to mitigate damages. Id.

98. See Unif. Comparative Fault Act § 1 comment, 12 U.L.A. 37 (Supp. 1984). The scope of this Act is confined to physical harm to person or property. It does not include economic loss resulting from torts such as negligent misrepresentation, defamation, or interference with contractual relations. Id.

99. Id. Failure to include harms outside the scope of this Act does not preclude their application should a court determine them applicable under the state's common law. Id.

100. 8 Minn. 154, 8 Gil. 125 (1862).

101. Id. at 164, 8 Gil. at 135.

102. See id.

103. E.g., Tvedt v. Wheeler, 70 Minn. 161, 72 N.W. 1062 (1897); Carroll v. Minnesota Valley R.R., 14 Minn. 57, 14 Gil. 42 (1869); Schell v. Second Nat'l Bank, 14 Minn. 43, 14 Gil. 34 (1869); Johnson v. Winona & St. P. R.R., 11 Minn. 296, 11 Gil. 204 (1865).


108. See, e.g., Shafer v. Gaylord, 287 Minn. 1, 176 N.W.2d 745 (1970) (traffic accident); Martz v. Revier, 284 Minn. 166, 170 N.W.2d 83 (1969) (traffic accident); Cormican v. Parsons, 282 Minn. 94, 163 N.W.2d 41 (1968) (traffic accident); Mourning v. Interlachen
care proximately caused his injury was barred from any recovery.\textsuperscript{109}

Contributory negligence had its critics in Minnesota.\textsuperscript{110} In fact, judicial antagonism produced a host of exceptions for circumventing the doctrine:\textsuperscript{111} the emergency rule,\textsuperscript{112} the rescue doctrine,\textsuperscript{113} the discovered


110. Justice Holt of the Minnesota Supreme Court noted that:

\begin{quote}
No one can appreciate more than we the hard-ship of depriving plaintiff of his verdict and of all right to collect damages from defendant; but the rule of contributory negligence, through no fault of ours, remains in our law and gives us no alternative other than to hold that defendant is entitled to judgment notwithstanding the verdict. It would be hard to imagine a case more illustrative of the truth that in operation the rule of comparative negligence would serve justice more faithfully than that of contributory negligence. We but blind our eyes to obvious reality to the extent that we ignore the fact that in many cases juries apply it in spite of us. But as long as the legislature refuses to substitute the rule of comparative for that of contributory negligence we have no option but to enforce the law in a proper case. We cannot escape the conclusion that this case compels its application.
\end{quote}


111. \textit{See} Lowndes, \textit{Contributory Negligence}, 22 GEO. L.J. 674 (1934). Prof. Lowndes notes that:

\begin{quote}
Liability in Torts is frequently more sentimental than rational. If anyone be shocked at this thesis let him cast a critical eye at what has happened to the doctrine of contributory negligence. This tall timber in the legal jungle has been whittled down to toothpick size by the sympathetic sabotage of juries, whose inability to perceive contributory negligence in suits against certain defendants is notorious; by the emotional antagonism of judges who have placed constrictions upon the doctrine which suggest the more evident purpose to destroy it entirely, rather than to attempt any logical limitation; by the popular prejudices of legislators who have pulled the teeth of the common-law dogma or damned it outright.
\end{quote}

\textit{Id.} at 674; \textit{see also} Note, \textit{supra} note 23, at 481-82.

\begin{quote}
Juries as well have been antagonistic to contributory negligence. As Justice Holt noted, "We but blind our eyes to obvious reality to the extent that we ignore the fact that in many cases juries apply it [apportionment] in spite of us." Haeg v. Sprague, Warner & Co., 202 Minn. 425, 430, 281 N.W. 261, 263 (1938).
\end{quote}
peril doctrine, and the last clear chance rule. Only two doctrines seemed to affirm contributory negligence and then only tangentially: the step in the dark rule and rescue of property as an exception under the rescue doctrine.

Though not well loved, contributory negligence was firmly established in Minnesota. Courts believed themselves unable to change the doctrine so they applied it narrowly, with many exceptions, to tort actions.

B. Comparative Negligence

After nearly a century of contributory negligence, the 1969 Minnesota Legislature heeded the calls of scholars and jurists by passing the Comparative Negligence Act. The legislature modeled its statute after Wisconsin's statute. Thus, Minnesota adopted a modified comparative negligence scheme. Originally contributory negligence did not bar recovery if the plaintiff's negligence was less than the defendant's.

112. See Martelle v. Thompson, 283 Minn. 279, 167 N.W.2d 376 (1969) (no real emergency situation but recognized rule); Hacker v. Berkner, 263 Minn. 278, 117 N.W.2d 13 (1962) (not applied because plaintiff's negligence caused peril but recognizes rule); Anderson v. Davis, 151 Minn. 454, 187 N.W. 224 (1922).
114. See Koval v. Thompson, 272 Minn. 53, 136 N.W.2d 789 (1965).
115. See Gardner v. Germain, 264 Minn. 61, 117 N.W.2d 759 (1962) (elements: 1. defendant aware of plaintiff's negligence, 2. reasonable opportunity to avoid, 3. does not avoid).
117. See, e.g., Berg v. Great Northern Ry., 70 Minn. 272, 73 N.W. 648 (1897).
118. Haeg v. Sprague, Warner & Co., 202 Minn. 425, 281 N.W. 261 (1938). Justice Holt notes that "[a]s long as the legislature refuses to substitute the rule of comparative for that of contributory negligence we have no option but to enforce the law in a proper case." Id. at 430, 281 N.W. at 263.

Many courts have agreed with Justice Holt that substituting comparative for contributory negligence is a legislative rather than judicial perogative. Many scholars disagree. See generally V. Schwartz, supra note 19, § 1.5. Since contributory negligence was judicially adopted, judicial abrogation seems in order. Nonetheless, the Minnesota Supreme Court clearly waited for the legislature to abolish contributory negligence.

119. See Act of May 23, 1969, ch. 624, § 1, 1969 Minn. Laws 1069 (codified as amended at Minn. Stat. § 604.01 (1982)).
120. Compare Wis. Stat. § 895.045 (1983) with Minn. Stat. § 604.01 (1969); see also, Busch v. Busch Constr., Inc., 262 N.W.2d 377, 393 (Minn. 1977) (court recognizes Wisconsin origins); Marier v. Memorial Rescue Serv., Inc., 296 Minn. 242, 244, 207 N.W.2d 706, 708 (1973) (court recognizes Wisconsin origins).
121. See supra notes 79-85 and accompanying text.
122. Under this wording when the plaintiff's negligence is equal to the defendant's negligence the plaintiff is barred from recovery. See Marier v. Memorial Rescue Serv., Inc., 296 Minn. 242, 207 N.W.2d 706 (1973) (plaintiff's negligence: ½; defendant no. 1: ½; defendant no. 2: ½—plaintiff recovers nothing).
This was later amended to provide recovery if the plaintiff's negligence was not greater than the defendant's negligence. The statute became effective on July 1, 1969.

Comparative negligence has been more broadly applied than contributory negligence. On its face, the Minnesota statute applied only to negligence actions. The Minnesota Supreme Court applied the statute, however, to a number of causes of action not traditionally within the scope of negligence: strict liability, assumption of the risk, nonabsolute statutory liability, and wrongful death actions.

The broadening of comparative negligence's scope is not surprising. Antagonism to contributory negligence caused judges to apply it nar-
as they have done with another much-hated doctrine, the statute of frauds. Comparative negligence seemed a fairer way to apportion damages. Thus, judges were not reluctant to use comparative negligence.

C. Comparative Fault

The 1978 legislature decided to tinker with Minnesota's comparative negligence statute. The legislature changed the statute to a comparative fault statute and adopted UCFA's definition of fault. In Minnesota, comparative fault now includes:

acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an express consent, misuse of a product and unreasonable failure to avoid an injury or to mitigate damages.

Potentially, the scope of comparative fault is even broader than that of comparative negligence. The terms themselves point to fault including negligence as well as other blameworthy acts. The UCFA comments note that, "[t]he Act applies to . . . the traditional action for negligence but covers all negligent conduct, whether it comes within the traditional

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131. See supra notes 110-15 and accompanying text.
133. See Act of Apr. 5, 1978, ch. 738, § 6, 1978 Minn. Laws 836, 839-40 (codified at MINN. STAT. § 604.01, subd. 1 (1982)). The session law shows the changes:

604.01 COMPARATIVE FAULT; EFFECT. Subdivision 1. SCOPE OF APPLICATION. Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if the contributory fault was not greater than the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person recovering. The court may, and when requested by any party shall, direct the jury to find separate special verdicts determining the amount of damages and the percentage of negligence attributable to each party; and the court shall then reduce the amount of damages in proportion to the amount of negligence attributable to the person recovering. When there are two or more persons who are jointly liable, contributions to awards shall be in proportion to the percentage of negligence attributable to each, provided, however, that each shall remain jointly and severally liable for the whole award.

Id.

135. MINN. STAT. § 604.01, subd. 1(a) (1982).
136. "Fault" is defined as:
Negligence; an error or defect of judgment or of conduct; any deviation from prudence, duty, or rectitude; any shortcoming, or neglect of care or performance
negligence action or not.137 Professor Steenson agrees, noting that the Minnesota Act, although consistent with previous cases expanding comparative negligence, expands the definition of apportionable plaintiff misconduct.138 The Minnesota Supreme Court recognized in Seim v. Garavalia139 that "[t]he 1978 legislation significantly broadened the scope of the comparative negligence statute in an expansive definition of the word 'fault,' which replaced the word 'negligence,' in the statute."140

The fairness of apportioning fault in negligence cases has been widely recognized. These considerations of fairness have prompted courts and legislatures to expand the scope of comparison beyond traditional negligence. The next logical step then would seem to be comparing fault instead of just negligence. Minnesota has taken that logical step.

IV. MINNESOTA COMPARATIVE FAULT CASES

After the Minnesota legislature adopted comparative fault, the courts faced the task of interpreting the meaning of "comparable fault." The Minnesota Supreme Court has had three opportunities to deal with the issue.

A. Seim v. Garavalia

In Seim v. Garavalia,141 little Shanon Marie Seim visited a neighbor, Scott Garavalia. The Garavalias owned a dog named Hollow. Hollow had never bitten anyone before but when Shanon petted him, he knocked her over and bit her face. Permanent scarring resulted.142

resulting from inattention, incapacity, or perversion; a wrong tendency, course or act; bad faith or mismanagement; neglect of duty.
The word "fault" connotes an act to which blame, censure, impropriety, shortcoming or culpability attaches.
Wrongful act, omission or breach.
BLACK'S LAW DICTIONARY 548 (rev. 5th ed. 1979) (citations omitted).
"Negligence" is defined in part as:
The omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do, or the doing of something which a reasonable and prudent man would not do.
Negligence is the failure to use such care as a reasonably prudent and careful person would use under similar circumstances; it is the doing of some act which a person of ordinary prudence would not have done under similar circumstances or failure to do what a person of ordinary prudence would have done under similar circumstances. . . . Conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm; it is a departure from the conduct expectable of a reasonably prudent person under like circumstances.
Id. at 930-31 (citations omitted).
138. See Steenson, supra note 9, at 335.
139. 306 N.W.2d 806 (Minn. 1981).
140. Id. at 809.
141. 306 N.W.2d 806 (Minn. 1981).
142. See id. at 808.
The Minnesota Supreme Court faced the question of whether comparative fault applied to statutorily imposed liability. Noting that the scope of comparative fault is broader than that of comparative negligence, the court examined the types of liability imposed by statutes: Negligence per se, strict liability, and absolute liability. Negligence per se is ordinary negligence established by violation of a statutory standard of care. Negligence per se was subject to contributory negligence, and therefore, also subject to comparative fault. Statutes may also create strict liability and strict liability was formerly comparable negligence. Absolute liability statutes are, however, an exceptional class of statutes which were not subject to contributory negligence. According to the UCFA, absolute liability statutes are not subject to comparative fault either. Whether a statute imposes liability is a matter of specific legislative intent, therefore, the comparative fault act does not abolish absolute liability.

Minnesota's dog bite statute provides that "[i]f a dog, without provocation, attacks or injures any person who is . . . in any place where he may lawfully be, the owner of the dog is liable in damages . . . to the full amount of the injury sustained." This statute creates absolute liability except for the statutory exceptions of provocation and trespass. Shannon, guilty of neither provocation nor trespass, was entitled to full recovery because comparative fault did not apply to statutorily created absolute liability.


143. Id. at 809.
144. Id. at 810.
145. Id.; see also Prosser, supra note 6, at 110.
146. See Seim, 306 N.W.2d at 810; see also Scott v. Independent School Dist. No. 709, 256 N.W.2d 485, 488-89 (Minn. 1977).
147. See Seim, 306 N.W.2d at 810.
148. Id. at 810; see also Busch v. Busch Constr., Inc., 262 N.W.2d 377 (Minn. 1977).
149. Seim, 306 N.W.2d at 811; see also Dart v. Pure Oil Co., 223 Minn. 526, 27 N.W.2d 555 (1947).
152. Seim, 306 N.W.2d at 812. The court noted that, "[o]ur application of the absolute liability doctrine during this era of comparative fault recognizes the principle that the legislative body that enacted the comparative fault statute has the authority to carve out or preserve exceptions to the statute in the interest of public policy." Id. at 812-13.
154. Seim, 306 N.W.2d at 812. An interesting question is whether the statutory exceptions are total bars to recovery or simply comparable fault.
155. Id. at 813.
156. 318 N.W.2d 50 (Minn. 1982).
a new mobile home.157 She moved into the mobile home but was eventually driven out by a strong odor which caused a facial rash, burning eyes, irritated throat, and persistent cough.158 Peterson sued on a number of theories including breach of warranty.159 The jury found Peterson 75% at fault and Bendix only 25% at fault.160 Peterson would be barred from recovering on any claim to which comparative fault applied.

The court faced the question of how comparative fault applies to breaches of warranty. Noting that warranties involve an amalgam of tort and contract law, the court divided Peterson's warranty claim into its tort and contract parts:161 her claim for personal injuries as consequential damages was tort-like; her claim for defects in the mobile home as general damages and miscellaneous incidental damages was contract-like.162

In examining Peterson's tort like claim for consequential damages, the court noted that contributory negligence was a bar to consequential damages.163 Likewise, a plaintiff's comparative negligence could reduce his consequential damages.164 The inclusion of "breach of warranty" in the comparative fault statute's definition of "fault" makes it clear that the statute applies at least to consequential damages in a breach of warranty.165 Thus, the court concluded that Peterson could not recover for her personal injuries.166

Examining the contract-like claims, on the other hand, the court did not find any reason to apply comparative fault. Prior cases had not applied contributory negligence to non-consequential damages in a warranty claim.167 The UCFA comments note that there is "no intent to include in the coverage of the Act actions that are fully contractual in their gravamen and in which the plaintiff is suing solely because he did not receive what he contracted to receive."168 The court noted legal scholars were in agreement.169

157. See id. at 51.
158. Id. at 52.
159. Id. Other theories included strict liability, and negligent design, construction, and distribution.
160. Id.
161. Id.
162. Id. at 53.
163. Id.; see also Gardner v. Coca-Cola Bottling Co., 267 Minn. 505, 511, 127 N.W.2d 557, 562 (1964).
164. See Peterson, 318 N.W.2d at 53; see also Chatfield v. Sherwin-Williams Co., 266 N.W.2d 171, 176 (Minn. 1978).
165. See Peterson, 318 N.W.2d at 53; see also MINN. STAT. § 604.01, subd. 1(a) (1982).
166. See Peterson, 318 N.W.2d at 52.
168. UNIF. COMPARATIVE FAULT ACT § 1 comment, 12 U.L.A. 37 (Supp. 1984); see Peterson, 318 N.W.2d at 54.
169. See Peterson, 318 N.W.2d at 54; see also Levine, Buyer's Conduct as Affecting the Extent
Peterson's claim for general damages for receiving a defective mobile home included "the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted." The fact that she stayed in the mobile home longer than she should have has no relation to the mobile home's value. Comparative fault was irrelevant to her claim for general damages. Therefore, she recovered her entire general damages award. Peterson's incidental damages were, likewise, contract claims. Comparative fault being irrelevant, she recovered her entire incidental damages award.

C. Lesmeister v. Dilly

In *Lesmeister v. Dilly,* Jack Lesmeister contracted for construction of a corn storage shed on his farm. Through a comedy of errors and with "help" from Keystone Cops construction crews, partially directed by Lesmeister himself, the shed was finished late and incorrectly. Lesmeister sued several defendants for breach of contract and negligence in performance. As part of a long special verdict form, the trial judge allowed the jury to apportion fault among the parties.

*of Manufacturer's Liability in Warranty,* 52 MINN. L. REV. 627, 651 (1968); Steenson, supra note 9, at 338.

170. *See Peterson,* 318 N.W.2d at 54 n.2 (quoting MINN. STAT. § 336.2-714(2) (1982)).
171. *Id.* at 55.
172. *Id.* at 55-56.
173. *Id.* at 54.
174. *Id.* at 55-56.
175. 330 N.W.2d 95 (Minn. 1983). Although the precedential value of *Lesmeister* is somewhat in question, see *Lesmeister,* 330 N.W.2d at 100, the court's statements regarding the breadth of the definition of "fault" under the Minnesota comparative fault statute, the assertion of a negligent contract cause of action, and the mitigation of damages as "fault" are instructive.
176. *Id.* at 97-100. Lesmeister helped to construct the foundation, dumped 38,000 bushels of corn on the foundation impeding construction of the building, and requested a change in procedure that made waterproofing the building impossible. *Id.*
177. *Id.* The special verdict form was worded as follows:

If you have found that two or more of the parties — Monarch, Dilly, Atlantic, Brown or Lesmeister, to have breached a contract, or were negligent, or breached a warranty, and that such breach or negligence was a direct cause of damage to Lesmeister, then answer the following question:

Taking the combined fault that contributed as a direct cause of damage to Lesmeister as 100 percent, we apportion such fault as follows:

- **Monarch**: 40 percent
- **Dilly**: 5 percent
- **Atlantic**: 5 percent
- **Brown**: 10 percent
- **Lesmeister**: 40 percent

100 percent total

*Id.* at 101.
On appeal, the court had to decide if comparative fault applied to contract actions and in particular, negligent breaches of contract. As a general proposition, the court determined that comparative fault does not apply to contract actions. Contract law has never spoken in terms of fault and the UCFA comments indicate that there was no intent to include contract claims under the Act. 178

Nor does the Minnesota Act apply to negligent breaches of contract. 179 The idea that a separate action for a negligent breach of contract existed in Minnesota derives from Northern Petrochemical Co. v. Thorsen & Thorshov, Inc. 180 In an attempt to clarify, the court ruled that Northern Petrochemical announced only a rule of damages, not a separate cause of action. Since the gravamen of the case is contractual, comparative fault cannot be applied wholesale. 181

In awarding damages, however, the Lesmeister court found a place for comparative fault. The court awarded consequential damages to Lesmeister. 182 He was, however, under a duty to mitigate those damages. 183 Unreasonable failure to mitigate damages is apportionable under comparative fault. 184 Since Lesmeister was partially to blame for his losses, the court looked upon the jury verdict as failure to mitigate rather than negligence. 185 Lesmeister’s consequential damages were reduced by his percentage of fault. 186

V. Analysis

The Minnesota Supreme Court has clearly recognized that the scope of comparative fault is broader than that of comparative negligence. The Seim court said as much. 187 The court in Lesmeister applied the statute beyond comparative negligence’s previous scope: to unreasonable failure to mitigate damages. 188 The extent of comparative fault’s scope

178. Id. at 101-02. The court cited the same language in the UCFA comments that it cited in Peterson. “There is no intent to include in the coverage of the Act actions that are fully contractual in their gravamen and in which the plaintiff is suing solely because he did not recover what he contracted to receive.” Id. (quoting UNIF. COMPARATIVE FAULT ACT § 1 comment, 12 U.L.A. 37 (Supp. 1984)); see also supra note 168 and accompanying text.

179. See Lesmeister, 330 N.W.2d at 102.
180. 297 Minn. 118, 211 N.W.2d 159 (1973).
181. See Lesmeister, 330 N.W.2d at 102.
182. Id. The measure of damages was, “either the cost of reconstruction in accordance with the contract, if this is possible without unreasonable economic waste, or the difference in the value of the building as contracted for and the value as actually built, if reconstruction would constitute unreasonable waste.” Id.
183. Id. at 103.
184. Id.; see also MINN. STAT. § 604.01, subd. 1(a) (1982).
185. Lesmeister, 330 N.W.2d at 103.
186. Id. at 104.
187. See Seim, 306 N.W.2d at 809. See generally Steenson, supra note 9, at 335.
188. See Lesmeister, 330 N.W.2d at 103-04.
remains, however, an open question. Looking at the factors analyzed by the court in *Sein, Peterson, and Lesmeister* does provide clues to future application. The court consistently looked to four ideas: a general concept of fairness, scholarly articles, pre-comparative fault cases, and the UCFA comments.

**A. Fairness**

Fairness is a general motivation and policy for comparative fault. In applying the statute to failure to mitigate damages the court relied heavily on fairness. Since Lesmeister contributed to his losses, it was only fair his recovery be diminished. In *Peterson*, diminishing Florence Peterson's recovery for the defective mobile home would have been unfair since her negligence was irrelevant to the defects. Though fairness is a wonderful policy, it alone is a thin reed of authority on which to rely.

**B. Legal Scholars**

For the most part, the court has used the ideas of legal scholars for general propositions of law. This is partly because so little has been written on the scope of comparative negligence and fault. Twice, however, the court has found fairly specific pieces of scholarly authority to support its position: in *Sein*, William Prosser's article on statutory liability and in *Peterson*, Joel Levine's article on warranties. Scholarly authority seems very persuasive to the court but some caution is in order. A situation considered inappropriate for apportionment under contributory or comparative negligence may be appropriate for apportionment under comparative fault's broader scope.

**C. Pre-Comparative Fault Cases**

Pre-comparative fault cases are not necessarily applicable to comparative fault situations but the court has relied on them. In *Sein* the court made clear that because the 1978 amendment significantly broadened the scope of the comparative negligence statute, pre-comparative fault cases were not necessarily dispositive. The court has, however, repeatedly looked to pre-comparative fault cases for guidance. In *Seim*, the court recognized that the 1978 amendment is consistent with comparable negligence cases and even expands the definition of plaintiff miscon-
In *Peterson*, the case of *Nelson v. Anderson* suggested to the court that non-consequential damages are not apportionable under comparative fault.

Since the 1978 amendment expands the scope of comparative fault, any case applying contributory or comparative negligence should still be good law. Comparative fault applies, then, to all traditional negligence cases, strict liability, assumption of the risk, nonabsolute statutory liability, and wrongful death actions.

Old cases not applying contributory or comparative negligence are more difficult to deal with. Whether a particularly disfavored cause of action is within comparative fault's scope depends on legislative intent. The court's application of *Nelson* in *Peterson* was in connection with clear legislative intent that non-consequential damages should not be apportioned under comparative fault. Use of a case not applying contributory or comparative fault should be accompanied by evidence of legislative intent to also exclude the particular cause of action from comparative fault's scope.

Cases applying contributory or comparative negligence in a situation can readily be used to show comparative fault's applicability to a similar situation today. Cases not applying contributory or comparative negligence, however, are not necessarily dispositive in comparative fault cases. Combined with legislative intent not to include the previously disfavored cause of action within comparative fault's scope, cases not applying contributory or comparative negligence are strong authority. Absent such legislative intent, old cases not applying contributory or comparative negligence should be examined closely in connection with the other factors from *Seim, Peterson,* and *Lesmeister*.

**D. UCFA Comments**

Repeatedly the court has given great weight to the UCFA's comments. Since the UCFA is the model for the comparative fault amendments, the court's reliance on the comments is not surprising. The comments speak generally about the Act covering "physical harm to person or property... including consequential damages [but]... not in-

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196. *Id.* at 810; see also *Steenson,* *supra* note 9, at 335.
197. 245 Minn. 445, 72 N.W.2d 861 (1955).
198. *Id.* at 451, 72 N.W.2d at 865; see *Peterson,* 318 N.W.2d at 53.
199. See *Seim,* 306 N.W.2d at 809; *Steenson,* *supra* note 9, at 335.
200. See *Seim,* 306 N.W.2d at 809. See generally *supra* note 127 (comparative negligence cases).
201. See generally *supra* notes 125-30 and accompanying text.
202. See *supra* notes 197-98 and accompanying text.
203. See *Peterson,* 318 N.W.2d at 53-54 (comment to § 1 of the UNIF. COMPARATIVE FAULT ACT indicated no intent to include contract actions).
204. See *Lesmeister,* 330 N.W.2d at 101; *Peterson,* 318 N.W.2d at 53; *Seim,* 306 N.W.2d at 812; see also *Steenson,* *supra* note 9, at 334.
This is not to say, however, that "the Act is... intended to preclude application of the general principle... if a court determines that the common law of the state would make the application." The comments then go on to discuss comparative fault's affect on a variety of specific causes of action.

The comments leave for each state to decide whether comparative fault includes reckless conduct. In comparative negligence jurisdictions, two schools of thought have developed. According to one school, reckless conduct is conduct of a different kind from the plaintiff's negligence, therefore, apportionment is impossible. The other school sees reckless conduct as simply a greater degree of negligence making apportionment possible. In *Ferguson v. Northern States Power Co.*, the Minnesota Supreme Court hinted that in a proper case, reckless conduct might bar contributory negligence. *Ferguson* involved a plaintiff who, while trimming trees, was electrocuted by an NSP high voltage line. The court did not preclude the application of comparative negligence in the case. It noted that:

> [b]ecause of the comparatively greater knowledge possessed by a utility of the extraordinary magnitude of the risk involved in the transmission of high-voltage electricity through residential neighborhoods, the risk to which it subjects the ordinary city dweller is not the equivalent of the risk the residential user subjects himself to by coming in close proximity to the overhead wires. The risks are different in degree. While we cannot hold that they are so different as to be an absolute bar to the defense of contributory negligence, we do rule that in a case such as this, involving a dangerous instrumentality and a great disparity in risks, the jury, in order to fairly and accurately apportion causal negligence, should be instructed to give special consideration to this disparity.

Strict liability is apportionable according to the UCFA comments. A host of authorities agree. Some courts have likened the application...
to negligence *per se*. A more intellectually pleasing argument posits that strict liability at root is not really absolute but fault based. In a product liability situation, for example, the defendant manufacturer’s fault is producing a defective product; the plaintiff consumer’s fault is misuse, assumption of the risk, or the like. The two faults cause the injury and can, therefore, be compared.

Breaches of warranty are apportionable under the UCFA but there is “no intent to include . . . actions that are fully contractual in their gravamen and in which the plaintiff is suing solely because he did not recover what he contracted to receive.” The Minnesota Supreme Court interpreted this section of the comments in *Peterson*. Actions to recover consequential, tort-like damages, are apportionable; actions to recover general or incidental or other contract-like damages, are not apportionable.

According to the comments intentional torts are not covered by the Act. Comparative negligence is generally rejected as a defense to intentional torts. Under common law, contributory negligence was not

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17. See Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967).


219. Id.


221. See supra notes 156-74 and accompanying text.

222. Id.


a defense to an intentional tort.\(^\text{225}\) Intentional torts are punished not because the actor failed to use reasonable care, but because the actor intended the act.\(^\text{226}\) The difference between the plaintiff's actions and the defendant's actions is not one of degree but of kind. Therefore, no basis exists for comparing the plaintiff's negligence with the defendant's intentional act.

Nuisance actions can be based on a number of theories: intentional tort, negligence, or strict liability.\(^\text{227}\) According to the comments, the UCFA applies to nuisance actions based on negligence or strict liability but not to actions based on an intentional tort.\(^\text{228}\) This application is consistent with the UCFA comments.\(^\text{229}\) Cases have applied comparative negligence to negligence based nuisance claims.\(^\text{230}\)

Tort actions for violation of a statute are apportionable under the UCFA if the conduct can be deemed "fault."\(^\text{231}\) The only exception is if the statute was intended to impose absolute liability.\(^\text{232}\) Minnesota followed this logic in \emph{Seim}.\(^\text{233}\)

Secondary assumption of the risk is simply a degree of fault to be compared.\(^\text{234}\) Minnesota has held that comparative negligence subsumed secondary assumption of the risk.\(^\text{235}\)

Product misuse is apportionable, under the UCFA comments, only if the misuse gave rise to a reasonably anticipated danger.\(^\text{236}\) This seems

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\(^{225}\) See Birmingham Ry., Light & Power Co. v. Jones, 146 Ala. 277, 41 So. 146 (1906); Jenkins v. North Carolina Dept. of Motor Vehicles, 244 N.C. 560, 94 S.E.2d 577 (1956); W. Prosser, supra note 1, § 65, at 426.

\(^{226}\) See W. Prosser, supra note 1, § 8, at 31.


\(^{228}\) See supra note 137 and accompanying text (negligence); supra note 215 and accompanying text (strict liability); supra note 223 and accompanying text (intentional torts).


\(^{232}\) See supra notes 141-55 and accompanying text.

\(^{234}\) See Unif. Comparative Fault Act § 1 comment, 12 U.L.A. 38 (Supp. 1984). Primary assumption of the risk is a different animal. In a primary assumption of the risk situation, the defendant would not even owe a duty to the plaintiff. See W. Prosser, supra note 1, § 68, at 454-57; see also Armstrong v. Mailand, 284 N.W.2d 343 (Minn. 1979) (firemen primarily assume all expected risks but not unexpected risks).

\(^{235}\) See Springrose v. Willmore, 292 Minn. 23, 192 N.W.2d 826 (1971); see also Wegscheider v. Plastics, Inc., 289 N.W.2d 167 (Minn. 1980); Bakhos v. Driver, 275 N.W.2d 594 (Minn. 1979). \textit{But see} Armstrong v. Mailand, 284 N.W.2d 343 (Minn. 1979) (primary assumption of the risk not apportionable).

\(^{236}\) See Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978); Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

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consistent with comparative negligence cases where the court stated, "a consumer's negligent failure to inspect a product or to guard against defects is not a defense [but] . . . all other types of consumer negligence, misuse, or assumption of the risk must be compared . . . under the statute."\textsuperscript{237}

The doctrine of avoidable consequences, sometimes called last clear chance, is expressly included in UCFA.\textsuperscript{238} Most courts have apportioned fault in such circumstances.\textsuperscript{239} Minnesota has not yet faced the issue but will likely follow the comment and decisions of other courts.

VI. CONCLUSION

Adoption of comparative fault was the next logical step in the expansion of comparative negligence's scope. The Minnesota Supreme Court tested the scope of comparative fault three times, in \textit{Seim}, \textit{Peterson}, and \textit{Lesmeister}. Although no all-encompassing definition of comparative fault's scope has emerged, the court's emphasis on fairness, scholarly comment, pre-comparative fault cases, and the UCFA comments gives an indication of the court's disposition. Clearly, comparative fault's scope is broader than that of comparative negligence. The court will not, however, pull all conceivable actions into a comparative fault apportionment. A substantial relationship to the comparative fault statute will have to be shown by use of fairness concepts, scholarly comment, pre-comparative fault cases, and the UCFA comments.

\textsuperscript{237} Id.

\textsuperscript{238} \textit{See} UNIF. COMPARATIVE FAULT ACT § 1 comment, 12 U.L.A. 38 (Supp. 1984).