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Contributory Fault and Strict Products Liability: A Reappraisal

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A REAPPRAISAL OF CONTRIBUTORY FAULT IN STRICT PRODUCTS LIABILITY LAW

I. INTRODUCTION

Products liability law has been fundamentally changed by the recent emergence of strict liability in tort, which has modernized the law and eliminated problems inherent in the warranty theory of strict products liability. Most courts have relied heavily upon the rules promulgated by the American Law Institute in the Restatement (Second) of Torts § 402A when adopting the strict products liability theory. While Section 402A is essentially sound, some of its provisions are ambiguous and inequitable. One such provision is comment n to Section 402A. Comment n allows full recovery if


2. For a general discussion of the development and nature of products liability law, see Prosser, The Fall of the Citadel (Strict Liability to the Consumer), 50 MINN. L. REV. 791 (1966); Prosser, The Assault Upon the Citadel (Strict Liability to the Consumer). 69 YALE L. J. 1099 (1960); Wade, On the Nature of Strict Tort Liability for Products, 44 MISS. L. REV. 825 (1973).

3. RESTATEMENT (SECOND) OF TORTS § 402A (1965) provides:

   Special Liability of Seller of Product for Physical Harm to User or Consumer

   (1) One who sells any product in a defective condition unreasonably dangerous to
   the user or consumer or to his property is subject to liability for physical harm thereby
   caused to the ultimate user or consumer, or to his property, if
   (a) the seller is engaged in the business of selling such a product, and
   (b) it is expected to and does reach the user or consumer without substantial change
   in the condition in which it is sold.

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

4. See, e.g., Johnson v. American Motors Corp., 225 N.W.2d 57 (N.D. 1974) (court specifically adopted § 402A to ensure no ambiguity would result from its decision to adopt the strict products liability theory).


6. RESTATEMENT (SECOND) OF TORTS § 402A, comment n at 356 (1965), provides:

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

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the plaintiff only fails to discover the defect, but bars recovery if the plaintiff
assumes the risk of being injured by voluntarily and unreasonably using the
product while aware of the defect. This rule, combined with the defense of
misuse, represents the prevailing view in strict products liability law on
contributory fault. This Note will analyze the theoretical and pragmatic short-
comings of the Restatement rules on contributory fault and propose, as an
alternative, the adoption of an approach based on comparative fault.

II. DEVELOPMENT OF THE COMMENT N RULE

The text of comment n offers little insight into the background or justifi-
cation for its provisions. Apparently, comment n was derived from two in-
contributory negligence which consists in voluntarily and unreasonably proceeding
to encounter a known danger, and commonly passes under the name of assumption
of risk, is a defense under this Section as in other cases of strict liability. If the user or
consumer discovers the defect and is aware of the danger, and nevertheless proceeds
unreasonably to make use of the product and is injured by it, he is barred from
recovery.

7. Id.
8. See, e.g., Restatement (Second) of Torts § 402A, comment h at 351 (1965).
9. The majority rule as expressed in comment n to the Restatement (Second) of Torts
§ 402A (1965) has been adopted by courts in at least 23 states: Alaska (Bachner v. Pearson, 479
California (Carmichael v. Reitz, 17 Cal. App. 3d 958, 95 Cal. Rptr. 381 (1971));
Colorado (Higley v. General Motors Corp., Colo., 544 P.2d 983 (1973)); Connecticut
(Parzini v. Center Chem. Co., Ga. App. 221 S.E.2d 475 (1975)); Idaho (Rindlis-
45 Ill. 2d 418, 261 N.E. 2d 305 (1970)); Indiana (Perfection Paint & Color Co. v. Konduris,
Motor Co., 199 N.W.2d 373 (Iowa 1972)); Kansas (Brooks v. Deitz, 545 P.2d 1104 (1976));
(Keener v. Dayton Elec. Mfg. Co., 445 S.W.2d 362 (Mo. 1969)); Montana (Jackson v. Coast
Paint & Lacquer Co., 499 F.2d 809 (9th Cir. 1974)); Nebraska (Hawkins Constr. Co. v.
Matthews Co., 190 Neb. 546, 209 N.W.2d 643 (1973)); New Mexico (Mooney v. Massey
Ferguson, Inc., 429 F.2d 184 (10th Cir. 1970)); Oklahoma (Kirkland v. General Motors Corp.,
521 P.2d 1355 (Okla. 1974)); Oregon (Findlay v. Copeland Lumber Co., 265 Ore. 300, 509
Texas (Shamrock Fuel & Oil Sales Co. v. Tunks, 416 S.W.2d 779 (Tex. 1967)); Utah (Smith
Mix Co., 75 Wash. 2d 833, 454 P.2d 205 (1969)).

Some courts have taken other positions: New Hampshire (Stephan v. Sears, Roebuck & Co.,
290 A.2d 281 (1972) (contributory negligence is a defense unless justice demands otherwise));
New York (Codling v. Paglia, 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973) (lack of reasonable care is a defense)); Wisconsin (Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55
(1967) (contributory negligence is a defense but is subject to the state's comparative negligence
law)); cf. Kentucky (Penker Constr. Co. v. Finley, 485 S.W.2d 244 (Ky. 1972) (contributory
32, 171 N.W.2d 201 (1969) (majority opinion indicates contributory negligence is a defense)).

10. See text accompanying notes 40-106 infra.
11. See text accompanying notes 107-57 infra.
dependent sources: the Restatement provisions on ultrahazardous activities\textsuperscript{12} and the pre-Section 402A warranty theory case law.\textsuperscript{13}

With regard to the first source, comment \textit{n} states only that the same standards should be applied in cases involving Section 402A as are applied in other instances of strict liability\textsuperscript{14} and, in conclusory fashion, refers the reader to the contributory fault rules in the Restatement for ultrahazardous activities.\textsuperscript{15} By equating strict products liability with the ultrahazardous activities theory, the drafters of comment \textit{n} apparently attempted to achieve some consistency; however, while there may be some parallels between the two theories,\textsuperscript{16} they differ fundamentally both in origin and purpose. The strict liability of ultrahazardous activities is the result of a century-old theory\textsuperscript{17} designed to protect persons from activities which are inherently dangerous in relation to the places where they are performed.\textsuperscript{18} In essence, this strain of strict liability represents the law’s reluctant accommodation of such activities.\textsuperscript{19} Traditionally, this theory of strict liability has been construed narrowly\textsuperscript{20} and

\begin{itemize}
\item 12. See notes 14-26 infra and accompanying text. The rules for the ultrahazardous activities theory are contained in the Restatement of Torts §§ 519-24 (1938).
\item 13. See notes 27-33 infra and accompanying text.
\item 14. See Restatement (Second) of Torts § 402A, comment \textit{n} at 356 (1965) (“Since the liability with which this Section deals is not based upon negligence of the seller, but is strict liability, the rule applied to strict liability cases (see § 524) applies.”)
\item 15. Restatement of Torts § 524 (1938) provides:
\end{itemize}

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(1) A plaintiff is not barred from recovery for harm done by the miscarriage of an ultrahazardous activity caused by his failure to exercise reasonable care to observe the fact that the activity is being carried on or by intentionally coming into the area which would be endangered by its miscarriage.

(2) A plaintiff is barred from recovery for harm caused by the miscarriage of an ultrahazardous activity if, but only if,

- (a) he intentionally or negligently causes the activity to miscarry, or
- (b) after knowledge that it has miscarried or is about to miscarry, he fails to exercise reasonable care to avoid harm threatened thereby.

Although comment \textit{n} to § 402A refers to and relies upon the rules promulgated in § 524, the two sections interestingly enough are not identical. Section 524 (2)(a) discusses intentional or active misconduct by the plaintiff, which is conspicuously absent from comment \textit{n}. See Bachner v. Pearson, 479 P.2d 319 (Alas. 1970) (recognized that comment \textit{n} does not provide a rule for active contributory negligence).

6. Both theories impose a higher duty of care than the ordinary negligence standard and both are designed to have a deterrent effect upon those who come within the scope of the respective theories.

17. Strict liability for ultrahazardous activities was first imposed in Rylands v. Fletcher, [1868] L.R. 3 H.L. 330. The theory was promptly adopted in Minnesota in Cahill v. Eastman, 18 Minn. 324 (Gil. 292)(1871).

18. Strict liability for ultrahazardous activities is imposed on defendants carrying out inherently dangerous activities where injuries can result even if all possible precautions are taken. The policy is that society will only tolerate these activities if they pay their own way for the injuries they cause. See W. Prosser, Handbook of the Law of Torts § 75 (4th ed. 1971).

19. See id.

consequently has not been invoked with great frequency. In contrast, the primary purpose of the newer strict products liability theory is to utilize the superior risk- and cost-bearing abilities of sellers of products. Moreover, courts have invoked the theory frequently due to the numerous product-related injuries in our modern society. The two theories therefore are fundamentally different. Underlying the ultrahazardous activities theory is the policy that such activities will be tolerated only if they pay their own way; while the products liability theory recognizes the inevitability of product-related injuries but attempts to minimize their impact by spreading the costs to product consumers. Consequently, the contributory fault rules for the ultrahazardous activities theory should not be applied summarily in Section 402A cases without a thorough evaluation of how those rules compliment the underlying policies of strict products liability law.

The second source which influenced the adoption of the comment rule was the case law under the pre-Section 402A warranty theory. No recognized majority rule concerning contributory fault was contained in these cases, but Dean Prosser analyzed their results and concluded that they embodied the same standards as those eventually adopted in comment n. When Section 402A was drafted, Prosser's interpretation of the warranty theory cases was incorporated, a position consistent with the preservation of many other aspects of the warranty theory in Section 402A. Comment n, however, is more than a mere continuation of the pre-Section 402A warranty law because Prosser's analysis and its limited non-Section 402A progeny was not ex-

21. See W. Prosser, supra note 18, § 78.
25. See note 18 supra and accompanying text.
26. See note 42 infra and accompanying text.
27. See, e.g., I R. Hursh, AMERICAN LAW OF PRODUCTS LIABILITY § 3:9 (1961, Supp. 1973) (the main volume recognized the conflict in the warranty cases' treatment of contributory fault and did not distinguish between contributory negligence and assumption of risk; the supplement, published in 1973 after Dean Prosser's analysis of the warranty cases, recognized a growing trend in the warranty cases toward the comment n approach).
29. Dean Prosser was the reporter for the RESTATEMENT (SECOND) OF TORTS when § 402A was drafted.
30. See Prosser, The Fall of the Citadel (Strict Liability to the Consumer), 50 MINN. L. REV. 791, 804-05 (1966) (only the rules pertaining to contract aspects of the warranty theory were changed).
31. Following Prosser's interpretation, several warranty cases did adopt a contributory fault rule similar to that advocated in comment n. See Chapman v. Brown, 198 F. Supp. 78 (D. Hawaii 1961), aff'd, 304 F.2d 149 (9th Cir. 1962); Kassouf v. Lee Bros., Inc., 209 Cal. App. 2d
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pressly recognized by the courts as a rule of law. Consequently, comment n represents a new rule and has been treated as such by most courts. The rationale of the comment n rule has seldom been judicially discussed. Instead, courts generally have been content with merely mechanically citing and applying the provisions of comment n. The leading case adopting the comment, Williams v. Brown Manufacturing Co., contains perhaps the most thorough analysis of the policies underlying the rule. The Williams court cited the difference in culpability between assumption of risk and ordinary contributory negligence as the reason for the rule, stressing that Section 402A requires greater culpability to bar recovery than is necessary under negligence law. This attempt to balance the plaintiff's contributory fault with the imposition of strict liability upon a defendant appears to be the most valid rationale for the rule. Yet, as further analysis indicates, the comment n rule has proved to be an ineffective tool for achieving equitable results, and the balancing of fault would be more efficaciously accomplished through the utilization of a comparative fault approach.

III. SHORTCOMINGS OF THE COMMENT N RULE

Because the strict products liability theory is strongly policy-oriented, the validity of any contributory fault rule must be analyzed in light of its consistency with the policies of the theory. The reasons propounded for imposing strict liability on sellers of defective products include consumer reliance resulting from modern merchandising methods, the superior risk-and cost-bearing abilities of manufacturers, avoidance of the interpretive

36. Id. at 425, 261 N.E.2d at 309.
37. Id.
38. See text accompanying notes 40-106 infra.
39. See text accompanying notes 107-57 infra.
40. See Prosser, The Fall of the Citadel (Strict Liability to the Consumer), 50 MINN. L. REV. 791 (1966).
42. See, e.g., Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 65, 207 A.2d 305, 312 (1965) ("The purpose of such liability is to insure that the cost of injuries or damages, either to the

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difficulties inherent in the warranty theory, the need to simplify recovery in products cases, and its deterrent effect on manufacturers. While the comments to Section 402A discuss these policy considerations in varying degrees, these policies have often been frustrated by the comment n rule. The harsh all-or-nothing consequences of the rule invariably have resulted in hardship to one of the parties to the action, and it imposes upon the courts an analytical rigidity which threatens the orderly development of the strict products liability theory. The inadequacy of the comment n rule is best demonstrated by an analysis of the judicial treatment of contributory negligence, assumption of risk, and misuse in Section 402A cases.

A. Contributory Negligence

Pursuant to comment n, contributory negligence is not a defense if it involves only a failure to inspect for or to guard against the possible existence of a defect. This aspect of the comment n rule is fundamentally sound; it respects the basic right of consumer reliance and allows the costs of product-related injuries to be spread among the users and consumers of the products.

Plaintiffs' conduct, however, is not normally limited to a mere failure to inspect for defects. Often, the plaintiff acts recklessly, yet he does not assume the risk or misuse the product as those concepts are properly defined. In goods sold or to other property, resulting from defective products, is borne by the makers of the products who put them in the channels of trade, rather than by the injured or damaged persons who ordinarily are powerless to protect themselves....

44. See, e.g., Berkebile v. Brantly Helicopter Corp., Pa., 337 A.2d 893, 898 (1975); Wade, supra note 2, at 826. This rationale is most meaningful when the defendant is a seller other than the manufacturer, because to prove negligence against retailers who were not involved in manufacturing the product is difficult.
46. See Restatement (Second) of Torts § 402A, comments c ("the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the Seller, that reputable sellers will stand behind their products"); c ("public policy demands that the burden of accidental injuries be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained"); a ("The rule is one of strict liability, making the seller subject to liability to the user or consumer even though he has exercised all possible care"); m ("The warranty theory in some instances has been an unfortunate one since it is so identified with contract law. The courts have resorted to fictions in order to overcome limitations of contract law.") (1965).
47. See notes 72-79 infra and accompanying text.
48. See notes 52-67, 80-88 infra and accompanying text.
49. Restatement (Second) of Torts § 402A, comment n at 356 (1965).
50. See note 41 supra and accompanying text.
51. See note 42 supra and accompanying text.
52. The assumption of risk defense is only applicable when the plaintiff is aware of the defect yet voluntarily and unreasonably encounters the known risk. See note 7 supra and accompanying text.
53. The misuse defense is not applicable when the defective product is a proximate cause of
these instances, some of the glaring shortcomings of the comment n rule appear. While the comments to Section 402A and most courts recognize only three types of plaintiffs' conduct—negligent failure to inspect, assumption of risk, and misuse—other distinct types have been completely ignored.

The most significant type of plaintiffs' fault ignored by comment n is "active user" contributory negligence, which occurs when the plaintiff is unaware of the defect yet acts with a reckless disregard for his own safety. Under this active user type of contributory negligence, the plaintiff's culpability consists of more than mere failure to inspect; but he has not assumed the risk because he is unaware of the defect and he has not misused the product because the defect was a proximate cause of the injury. Therefore, active user negligence does not properly fit into any of the three traditional categories of plaintiffs' conduct. As a result, the courts have classified active user negligence as ordinary contributory negligence (thereby allowing full recovery) or misuse (thereby barring recovery).

the injury even if the plaintiff's reckless conduct also contributes to the injury. See note 99 infra and accompanying text.

54. For a good discussion of the limitations of the comment n rule, see Bachner v. Pearson, 479 P.2d 319 (Alas. 1970).


56. See Rhoads v. Ford Motor Co., 374 F. Supp. 1317 (W.D. Pa. 1974), aff'd, 514 F.2d 931 (3d Cir. 1975). This type of conduct seems to be what the court had in mind in Codling v. Paglia, 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973), when it remanded the case for a new trial to determine if Paglia used reasonable care aside from failure to discover the defective condition of the product. See also Bachner v. Pearson, 479 P.2d 319 (Alas. 1970) (court recognizes comment n does not apply where the plaintiff acts negligently in ways other than failing to discover a defect).

57. Cf. Dragotis v. Kennedy, 190 Minn. 128, 250 N.W. 804 (1933) (active plaintiffs' fault discussed in a negligence case).

58. See note 52 supra and accompanying text.

59. See note 53 supra and accompanying text.

60. These are assumption of risk, contributory negligence for failure to inspect, and misuse. See note 55 supra and accompanying text.


62. See Preston v. Up-Right, Inc., 243 Cal. App. 2d 636, 52 Cal. Rptr. 679 (Dist. Ct. App. 1966) (defective scaffold wheel lock was a cause of the injury but plaintiff was held to have misused the product); Kirkland v. General Motors Corp., 521 P.2d 1353 (Okla. 1974) (drinking while driving can constitute misuse, even when the car is defective and defect is a cause of the accident); Procter & Gamble Mfg. Co. v. Langley, 422 S.W.2d 773 (Tex. Civ. App. 1967) (plaintiff's hair was severely damaged by defendant's home permanent lotion, but because she did not follow directions exactly she misused the product and was barred from recovery).

63. See, e.g., Moran v. Raymond Corp., 484 F.2d 1008 (7th Cir. 1973) (plaintiff assumed risk that crossbar of a fork lift would strike him because he was operating the machine improperly); Henrich v. Cutler Hammer Co., 460 F.2d 1325 (3d Cir. 1972) (plaintiff assumed the risk slitter machine he was repairing would activate because he neglected to turn the power switch off).
These attempts at categorization have caused semantical and interpretive difficulties, because active user negligence is different from the three accepted types of plaintiffs’ fault, yet it is not so recognized.

In active user cases, the courts face a very real dilemma. If full recovery is allowed, the plaintiff receives a windfall because the injury is partially caused by his own recklessness. If recovery is barred, however, the defendant avoids liability for marketing a defective product and the plaintiff is unnecessarily punished. If the injury is caused in part by the defective product, the plaintiff should be afforded at least a partial recovery, thereby allowing the proportionate costs of the injury caused by the defective product to be borne by the users and consumers of the product. Unfortunately, comment n does not provide the requisite flexibility to accomplish this result.

B. Assumption of Risk

In theory, the assumption of risk defense is simple: if the user of a product is aware of the defect yet voluntarily and unreasonably encounters the known risk, he has assumed the risk of any ensuing injuries and is barred from recovery. The rationale of the rule is that the plaintiff’s conduct is so culpable as to require a denial of recovery even if the product is dangerously defective. However, because the harsh all-or-nothing consequences of the comment n rule, combined with the practical difficulty of distinguishing assumption of risk from ordinary contributory negligence, the defense often has proved to be both unjust and complex.

When the assumption of risk defense is allowed, the plaintiff is required to bear the entire cost of his injury, while the defendant is exonerated despite marketing a dangerously defective product. The cost of the injuries, therefore, is not spread to the users and consumers of the product and the seller’s superior risk-bearing capabilities are not utilized. In addition to being con-

64. The courts’ attempts to classify plaintiffs’ conduct have become reminiscent of the older last clear chance cases in which the courts’ major concern was to determine the proper application of the doctrine rather than its equitable basis and purpose. See W. PROSSER, supra note 18 § 66.

65. Only two courts seem to have considered this type of conduct when formulating their rules on contributory fault: New York in Codling v. Paglia, 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973), discussed in note 56 supra, and New Jersey in Bexiga v. Havir Mfg. Corp., 60 N.J. 402, 290 A.2d 281 (1972), which allows a defense of contributory negligence unless justice requires a different result. See also Bachner v. Pearson, 479 P.2d 319 (Alas. 1970), which recognizes that comment n does not take all types of plaintiffs’ misconduct into account.

66. But see J. O’CONNELL, ENDING INSULT TO INJURY (1975). O’Connell argues product-related injuries are inevitable and their costs should be borne by society as a whole, despite the plaintiff’s contributory fault.

67. See note 43 supra and accompanying text.

68. See RESTATEMENT (SECOND) OF TORTS § 402A, comment n at 356 (1965).


70. See notes 72-79 infra and accompanying text.

71. See notes 80-88 infra and accompanying text.

72. See note 42 supra and accompanying text.
trary to the policies of strict liability,\textsuperscript{73} this result is also unfair to the plaintiff who suffers the injury, especially if his culpability is relatively inconsequential when compared with the injury caused by the defective product.\textsuperscript{74} The result of invoking the assumption of risk defense in employment accident cases is even harsher.\textsuperscript{75} The plaintiff-employee has little choice but to work with the defective machinery, yet if he becomes aware of the defect he often is barred from recovery.\textsuperscript{76} The assumption of risk defense is thus contrary to the spirit

\textsuperscript{73} See notes 41-45 \textit{supra} and accompanying text.

\textsuperscript{74} See Moran v. Raymond Corp., 484 F.2d 1008 (7th Cir. 1973), cert. denied, 415 U.S. 932 (1974) (inexperienced fork lift operator assumed the risk the crossbar would strike him because he was operating the machine improperly); Henrich v. Cutler Hammer Co., 460 F.2d 1325 (3d Cir. 1972) (plaintiff assumed the risk that slitter machine he was adjusting would unexpectedly activate due to faulty wiring because he did not turn power off); Benson v. Beloit Corp., 443 F.2d 839 (9th Cir. 1971) (plaintiff assumed the risk of serious injury when he came into contact with large paper making machine); Downey v. Moore's Time-Saving Equip., Inc., 432 F.2d 1088 (7th Cir. 1970) (plaintiff assumed the risk that mechanical rug washer would swing and strike him in eye); Tomicich v. Western-Knapp Eng'r Co., 423 F.2d 410 (9th Cir. 1970) (plaintiff assumed the risk of losing arm while improperly cleaning the sheaves running a conveyor belt); Hayes v. Pennsylvania Lawn Prods., Inc., 359 F. Supp. 644 (E.D. Pa. 1973) (alternative holding) (plaintiff assumed the risk that lawn mower would eject sharp object into his leg); Mather v. Caterpillar Tractor Corp., 23 Ariz. App. 409, 533 P.2d 717 (1975) (deceased assumed the risk that tractor would roll over and crush him); Ralston v. Illinois Power Co., 13 Ill. App. 3d 95, 299 N.E.2d 497 (1973) (plaintiff assumed the risk that auger rod would buckle, injuring his leg and causing its amputation); Kirby v. General Motors Corp., 10 Ill. App. 3d 92, 293 N.E.2d 345 (1973) (plaintiff assumed the risk that truck's steering mechanism would fail because he had repaired the defective mechanism himself in the past); Fore v. Vermeer Mfg. Co., 7 Ill. App. 3d 346, 287 N.E.2d 526 (1972) (plaintiff assumed the risk that brakes of trenching machine would fail); Cornette v. Searjeant Metal Prods., Inc., 147 Ind. App. 46, 258 N.E.2d 652 (1970) (plaintiff assumed the risk of a malfunction of the press with which she worked); Bereman v. Burdolski, 204 Kan. 162, 460 P.2d 567 (1969) (plaintiff assumed the risk of car accident because he knew brakes were defective); Walk v. J.I. Case Co., 36 App. Div. 2d 60, 318 N.Y.S.2d 598 (1971) (plaintiff assumed the risk of injury because he did not follow directions for cleaning corn picker); Bartkewich v. Billinger, 432 Pa. 351, 247 A.2d 603 (1968) (plaintiff assumed the risk of injury because he reached into glass breaking machine which had no safety devices); Perkins v. Fit-Well Artificial Limb Co., 30 Utah 2d 151, 514 P.2d 811 (1973) (plaintiff assumed the risk of crutches breaking because she knew of defect); Stark v. Allis-Chalmers, 2 Wash. App. 399, 467 P.2d 854 (1970); cf. Bronson v. Club Comanche, Inc., 286 F. Supp. 21 (D.V.1. 1968) (plaintiff assumed the risk that fish defendant restaurant served was deleterious) (an implied warranty case applying comment \textit{n}).


\textsuperscript{76} Some courts have explicitly stated that even if the plaintiff was directed by his employer to use the product in a certain way he can still assume the risk. \textit{E.g.}, Ralston v. Illinois Power Co., 13 Ill. App. 3d 95, 98, 299 N.E.2d 497, 499 (1973) ("An employee cannot exculpate himself from the legal consequences of his acts on the grounds that he is fearful of losing his job if he does not comply with his superior's orders. The fact remains that the plaintiff knew and appreciated the risk and still voluntarily assumed it.").
of the strict liability theory. Even under general negligence law, the severity of the defense has been mitigated in most states through comparative negligence laws. Yet under the theoretically more liberal strict products liability theory, recovery is barred.

The assumption of risk defense causes problems in addition to its inherent injustice. The comment n rule makes the distinction between assumption of risk and unreasonable failure to discover a defect of crucial significance, barring recovery for the former but not for the latter. The rule fails to recognize, however, that these two types of plaintiffs' conduct are almost impossible to distinguish in practice. Unless the plaintiff admits he was aware of the defect, the jury must consider circumstantial evidence such as the plaintiff's background, experience, and knowledge to make this determination. Thus, although assumption of risk is supposed to be a subjective standard, the jury must consider objective factors when considering the defense. What the plaintiff probably knew or should have known, rather than what he actually knew becomes the issue. Consequently, if the jury decides that the plaintiff because of his background should have been aware of the defect, it is justified in either barring recovery on grounds of assumption of risk, or allowing full recovery on grounds that the plaintiff only negligently failed to discover the defect. Comment n therefore establishes incompatible rules for contributory fault. On the same set of facts, the finder of fact is justified in either barring recovery or allowing full recovery. Since

77. Most states that have considered the issue make the assumption of risk defense subject to their comparative fault laws in negligence cases. E.g., Springrose v. Willmore, 292 Minn. 23, 192 N.W.2d 826 (1971).
78. See note 44 supra and accompanying text.
79. See Restatement (Second) of Torts § 402A, comment n at 356 (1965).
80. Id.
82. See Baker v. Rosemurgy, 4 Mich. App. 195, 144 N.W.2d 660 (1966) (plaintiff admitted he was aware of risk and therefore was barred from recovery).
83. See Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 431, 261 N.E.2d 305, 312 (1970). W. PROSSER, supra note 18, at 448 states that the plaintiff need not be taken at his word if the jury believes he in fact knew of the risk. Prosser admits that "the standard applied in fact does not differ greatly from that of the reasonable man." Yet, ironically, Prosser was the Reporter responsible for drafting § 402A, and he made the distinction between assumption of risk and contributory negligence the cornerstone for the rule on defenses in strict liability cases.
84. See, e.g., Berkebile v. Brantly Helicopter Corp., ___ Pa. ___, ___, 337 A.2d 893, 901 (1975) ("a finding of assumption of risk must be based on the individual's own subjective knowledge, not the objective knowledge of a 'reasonable man.' ").
85. See note 83 supra and accompanying text.
86. Compare Cornette v. Searjeant Metal Prods., Inc., 147 Ind. App. 46, 258 N.E.2d 652 (1970) (plaintiff assumed the risk that his fingers would be severed in machine) with Elder v. Crawley Book Mach. Co., 441 F.2d 771 (3d Cir. 1971) (plaintiff's fingers were severed in machine but she did not assume the risk).
the finding is critical to the outcome of the case, products liability trials can become battles of semantics between opposing counsel, in which the jury must distinguish between two types of plaintiffs' conduct which are in fact almost indistinguishable.97

In general negligence law, many courts have recognized the practical difficulty of distinguishing assumption of risk from ordinary contributory negligence and have merged the two concepts.88 Comment n however, unfortunately has made this distinction the cornerstone of the contributory fault rule for the strict products liability theory. Comment n therefore has injected uncertainty into products liability law, making unpredictable and inequitable results inevitable until the rule is changed.

C. Misuse

The defense of misuse, with its synonym abnormal use89 and its first cousins unintended use90 and mishandling,91 is perhaps one of the most misunderstood concepts in products liability law.92 The utilization of the term "misuse" is unfortunate. It implies an affirmative defense and has been so treated by some courts.93 Such treatment, however, is erroneous because misuse actually signifies an attack on the plaintiff's theory of recovery and thus is not an affirmative defense.94

To understand misuse, the elements which the plaintiff must prove to prevail under Section 402A should be considered. Among other things,95 the plaintiff must establish that the product is dangerously defective96 and that the defect was a proximate cause of his injuries.97 The defense of misuse merely refutes these prerequisites to recovery.98 For example, if the plaintiff

87. See Kissel, Defenses to Strict Liability, 60 ILL. B.J. 450 (1972) (discussion of how the inherent ambiguity of the majority rule can be used to the advantage of defense attorneys). Some courts have also recognized the problem of resolution of disputes on seemingly semantic questions. See, e.g., Elder v. Crawley Book Mach. Co., 441 F.2d 771 (3d Cir. 1971).
90. "Unintended use" implies a narrower interpretation of the misuse concept than the terms "misuse" and "abnormal use." Unintended use, when allowed as a defense, bars recovery even if the unintended use is foreseeable, while misuse and abnormal use are only defenses if the use is both unintended and unforeseeable. See Magnuson v. Rupp Mfg. Co., 285 Minn. 32, 171 N.W.2d 201 (1969) (unintended use allowed as a defense), discussed in Comment, Products Liability: The Victim's Conduct as a Bar to Recovery—The Minnesota Supreme Court Reaffirms the Magnuson "Limiting Factors", 1 WM. MITCHELL L. REV. 207 (1974).
91. See RESTATEMENT (SECOND) OF TORTS § 402A, comment g at 351 (1965).
92. See generally Noel, supra note 89.
93. See cases cited in note 62 supra.
94. For a good discussion of the proper application of the misuse concept see Schuh v. Fox River Tractor Co., 63 Wis. 2d 728, 218 N.W.2d 279 (1974).
96. Id.
cuts himself with a knife, it is not defective; rather the plaintiff's misuse of
the knife is the cause of his injury. Similarly, even if a product is defective,
if there is no causal link between the defect and the injury, and if the plain-
tiff's conduct is the sole cause of the injury, the defense of misuse is appropri-
ate. However, if the plaintiff establishes the existence of a dangerous defect
and the necessary causation, the defense of misuse is no longer applicable.99
If the defense is nonetheless allowed, it becomes a disguised affirmative de-
fense and actually invades the realm of contributory negligence.100 When
misuse is used in this manner, confusion is inevitable.

The courts' sometimes confused treatment of misuse is understandable,
because comment n does not recognize different types of plaintiffs' fault.101
For example, if a plaintiff uses a product in an unintended yet foreseeable
manner, the defense of misuse is inapplicable, because a product is defective
if it is not safe for its foreseeable uses.102 However, by using the product in an
unintended manner the plaintiff is probably acting negligently, yet comment
n does not recognize this type of misconduct.103 Consequently, some courts
have applied the defense of misuse to such conduct,104 thereby making it an
affirmative defense and again suggesting the deficiencies of the comment n
rule.

In summary, the comment n rule on plaintiffs' contributory fault is both
harsh and unworkable. The rule requires a court to make an absolute deter-
mination in favor of one party or the other which is often unjust and frustrates
the important policies of products liability law.105 In addition, the
limited types of misconduct recognized in comment n impose a rigidity which
makes it impossible for courts to reach just and legally sound results.106 The
standards presented in comment n are therefore simply too crude to be effec-
tive as a tool for properly balancing the fault of the parties in products lia-
bility cases. The alternative approach of comparative fault analysis will there-
fore be considered as a possible method for rectifying the problems created
by the comment n rule.

IV. COMPARATIVE FAULT ANALYSIS — AN ALTERNATIVE APPROACH

A. Present Status of Comparative Fault Analysis

Comparative fault analysis has been a viable legal concept for many

99. Id.
100. See Noel, supra note 89.
101. See text accompanying note 56 supra.
(plaintiff barred from recovery because she did not follow exactly the instructions for using
defendant's home permanent lotion).
105. For a discussion of the policies underlying the strict products liability theory see notes
41-45 supra and accompanying text.
106. See notes 52-65 & 101-04 supra and accompanying text.
years, but has gained widespread acceptance in this country only since 1969. At the present time, at least 29 jurisdictions have adopted some sort of general comparative negligence law. In recent years, a number of courts have judicially adopted comparative negligence laws after their state legislatures failed to do so.

The comparative negligence laws have not been extensively utilized in strict products liability cases. Only three state legislatures have passed general comparative fault laws which apparently will apply in strict liability cases, but to date there are no reported cases in these states interpreting these laws. The Wisconsin Supreme Court is the only state court that applies the state’s comparative negligence statute in Section 402A cases, while federal courts construing New Hampshire and Minnesota law have since followed the Wisconsin lead. In addition, a small number of courts have urged their legislatures to adopt a comparative fault law for strict liability cases.

Probable the primary, although unarticulated, reason for the reluctance of

107. Wisconsin has had a general comparative negligence law for over 40 years. See also Wilson, A Study of Comparative Negligence (pts. I & 2), 17 CORNELL L.Q. 333, 604 (1932).

108. Prior to 1969, only seven states had comprehensive comparative negligence laws: Arkansas, Georgia, Maine, Mississippi, Nebraska, South Dakota, and Wisconsin. See generally V. SCHWARTZ, COMPARATIVE NEGLIGENCE (1974).


110. See id.


114. See note 198 infra and accompanying text.

the courts to adopt the comparative fault approach is the dominate influence Section 402A has had upon the development of strict products liability law. When ruling on the issue of contributory fault, most courts have simply cited comment n to Section 402A with little discussion of the equities of the rule. These courts apparently have reasoned that because they have adopted Section 402A in general, they should also accept the comment n rule regarding plaintiffs' fault. This reasoning is suspect; comment n and Section 402A were drafted and approved by the American Law Institute in 1963, well before comparative fault analysis was extensively utilized in this country. Therefore, comment n should not be viewed as the superior approach; rather it was the most reasonable approach available when it was drafted.

B. Compatibility of Section 402A and Comparative Fault

The policies underlying comparative fault analysis are compatible with those of products liability law. Rather than barring recovery as at common law, comparative fault allows apportionment of damages. As a result, the severity of the common law defenses of contributory negligence and assumption of risk is mitigated by only reducing plaintiffs' recovery in proportion to their contribution to the injury. Although this rationale has been acceptable in negligence cases, there has been a hesitancy to apply comparative fault in Section 402A cases, which is inherently contradictory because a major policy reason for imposing strict liability is to make recovery easier than under the negligence theory. But the current status of the law is that for a product-related injury the plaintiff might receive a partial recovery under the negligence theory yet be barred under the strict liability theory.

If the comparative fault approach were used in Section 402A cases, the inequities of the comment n rule would be greatly mitigated and the rule's interpretive difficulties minimized. By allowing the apportionment of costs,
the comparative fault approach provides courts with the tools needed to balance properly the fault of the parties; while not unduly rewarding plaintiffs who act negligently or recklessly, the courts would require sellers of defective products to bear their share of the costs of product-related injuries.

Comparative fault analysis also permits the abandonment of the current problematical distinctions between different types of plaintiffs' fault. Instead, the only issue is whether the plaintiff's fault contributed to the injury. If so, plaintiff's recovery would be diminished accordingly. As a result, the current distortions of the concepts of misuse and assumption of risk would no longer be necessary and products liability law could develop in a more equitable and technically sound manner.

C. Technical Problems

If the courts decide to apply comparative fault analysis to Section 402A cases, at least three technical problems must be resolved. First, the apparent conflict between comparing the negligence of the plaintiff with the strict liability of the defendant must be overcome. Second, if the comparative fault law of the jurisdiction is limited to only negligence cases, the court must determine if the law may be utilized in Section 402A cases. Finally, a decision must be made as to which types of plaintiffs' conduct should be subjected to comparative fault analysis.

Concerning the first problem, the comparison of one party's negligence with strict liability in theory may seem troublesome and contradictory. This theoretical problem, however, represents an unduly restrictive view of both comparative fault and the strict products liability theory. The purpose of comparative fault analysis is to allocate fairly the costs of injuries among the responsible parties, a rationale which is applicable whenever more than one party contributes to the injury. The view of strict products liability as a theory not based upon fault is also improper. Strict liability is not absolute liability; it is implicitly predicated on fault because a dangerous defect

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125. See notes 61-63 & 80-87 supra and accompanying text.
126. For a discussion of how liability could be allocated between the plaintiff and defendant in § 402A cases see notes 136-37 infra and accompanying text. See also Jensvold, supra note 5 (discussion of allocating liability among joint-tortfeasors in § 402A cases through the use of comparative fault analysis).
127. See notes 61-63, 80-87 & 101-04 supra and accompanying text.
128. See notes 131-37 infra and accompanying text.
129. See notes 138-48 infra and accompanying text.
130. See notes 149-57 infra and accompanying text.
131. See Kirkland v. General Motors Corp., 521 P.2d 1353, 1367 (Okla. 1974); Farley v. M M Cattle Co., 529 S.W.2d 751, 758 (Tex. 1975) (court specifically stated that their comparative negligence laws were not to be applied in strict products liability cases).
133. See, e.g., Farr v. Armstrong Rubber Co., 288 Minn. 83, 179 N.W.2d 64 (1970). An example of absolute liability is a safety statute designed to protect a special class of people from their own recklessness. E.g., Zerby v. Warren, 297 Minn. 134, 210 N.W.2d 58 (1973) (absolute
must be proven to recover.\textsuperscript{134} In essence, the strict liability theory merely relieves the plaintiff from the burden of showing specific acts of negligence and assumes fault if the product is defective.\textsuperscript{135} Therefore, Section 402A is a fault theory of recovery, and the relative fault of the parties may be compared without contradiction. The jury simply could be instructed to allocate damages based on the percentage of the injury caused by the plaintiff's misconduct and the percentage caused by the defendant's defective product.\textsuperscript{136} Alternatively, the jury could first determine whether the product was defective, then reduce the plaintiff's recovery to the extent it deems equitable.\textsuperscript{137} Under either approach, the application of comparative fault analysis should be no more complicated than its current application in negligence cases.

The second technical problem concerns the applicability of comparative negligence statutes to strict products liability cases. Most comparative negligence laws by their terms are limited to only negligence cases,\textsuperscript{138} and some courts have therefore assumed that these laws cannot be utilized in strict liability cases.\textsuperscript{139} An equally compelling view, however, was presented by a New Hampshire federal district court in \textit{Hagenbuch v. Snap-On Tools Corp.},\textsuperscript{140} wherein the court reasoned that the intention of the legislature was to eliminate the harshness of the common law defenses of contributory negligence and assumption of risk.\textsuperscript{141} This intention, the court concluded, applies to strict liability cases as equally as to negligence cases.\textsuperscript{142} The Wisconsin Supreme Court, on the other hand, has resolved this problem by treating Section 402A as a type of negligence per se for purposes of Wisconsin's comparative negligence statute.\textsuperscript{143} This approach is not without some logical foundation, for strict liability and negligence per se in essence have the same effect; both theories merely establish the defendant's standard of care as a matter of law.\textsuperscript{144}

\textsuperscript{134} See Restatement (Second) of Torts § 402A (1965).

\textsuperscript{135} See Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967); Wade, \textit{Strict Tort Liability of Manufacturers}, 19 Sw. L.J. 5 (1965).

\textsuperscript{136} See C. Heft & C. Heft, \textit{supra} note 119 (in comparative fault analysis the percent of injury caused by each party should determine the amount of liability).

\textsuperscript{137} Although no support can be found for the adoption of this method of allocating damages under a comparative fault law, the method probably conforms more realistically with the actual decision making process used by juries. Furthermore, this approach may be more simple than those presently being utilized, such as comparing the fault of the parties or comparing the causation.

\textsuperscript{138} See, e.g., Minn. Stat. § 604.01, subd. 1 (1974).

\textsuperscript{139} See Kirkland v. General Motors Corp., 521 P.2d 1353, 1367 (Okla. 1974) (court stated that because strict liability is not based on negligence, comparative negligence statutes do not apply); Farley v. M M Cattle Co., 529 S.W.2d 751, 758 (Tex. 1975) (same).


\textsuperscript{141} Id. at 682.

\textsuperscript{142} \textit{See id.}

\textsuperscript{143} See Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

\textsuperscript{144} See Wade, \textit{supra} note 135.
The recent trend in negligence law toward the judicial adoption of the comparative negligence approach\textsuperscript{145} may have a significant effect on the willingness of courts to extend their comparative negligence statutes to Section 402A cases. The courts that have judicially adopted comparative negligence have recognized their inherent power to alter court-created common law defenses, without legislative approval.\textsuperscript{146} This reasoning is also applicable to strict liability cases, since Section 402A is a judicially-created theory of recovery.\textsuperscript{147} If a state already has a comparative negligence statute, the legislative approval of the general concept renders the expansion of the statute to strict liability cases a much less drastic step than that taken by courts that have adopted a general comparative negligence law without legislative sanction.\textsuperscript{148} Therefore, ample precedent exists to overcome the problem of whether comparative negligence laws may be utilized in strict products liability cases.

The third problem concerns the types of plaintiffs' conduct which should be subjected to comparative fault analysis. The Wisconsin Supreme Court and a New Hampshire federal district court apparently have decided that all types of plaintiffs' fault should be considered by the jury when allocating damages.\textsuperscript{149} This approach is equitable if the plaintiff's right to rely on the product's safety is respected.\textsuperscript{150} The jury therefore should be instructed that a mere failure to inspect does not constitute contributory fault. All other types of plaintiffs' fault, such as active user negligence,\textsuperscript{151} assumption of risk,\textsuperscript{152} or use of a product in an unintended yet foreseeable manner,\textsuperscript{153} could then be considered by the jury under the single heading of contributory fault.\textsuperscript{154} As a result, the subtle distinctions that create problems of equity and interpretation\textsuperscript{155} under the comment \textit{n} rule would be eliminated. A just theory thereby could be reached which neither gives the plaintiff a windfall\textsuperscript{156} nor

\textsuperscript{145} See note 110 supra and accompanying text.
\textsuperscript{146} See, e.g., Nga Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).
\textsuperscript{147} Maine apparently has adopted strict products liability by statute. See ME. REV. STAT. ANN. tit. 14, § 221 (Supp. 1975). All other jurisdictions that impose strict liability have done so judicially. See, e.g., McCormack v. Hanksraft Co., 278 Minn. 322, 154 N.W.2d 488 (1967).
\textsuperscript{148} See note 110 supra and accompanying text.
\textsuperscript{150} See note 41 supra and accompanying text.
\textsuperscript{151} See notes 56-65 supra and accompanying text.
\textsuperscript{152} See note 68 supra and accompanying text.
\textsuperscript{153} See note 102 supra and accompanying text.
\textsuperscript{154} The defense of misuse would not be subject to comparative fault analysis because it is not an affirmative defense. See Schuh v. Fox River Tractor Co., 63 Wis. 2d 728, 218 N.W.2d 279 (1974).
\textsuperscript{155} See text accompanying notes 40-106 supra.
\textsuperscript{156} Some commentators believe that the plaintiff should be allowed full recovery regardless
allows the defendant to avoid liability for marketing a dangerously defective product.\textsuperscript{157}

In summary, the general reluctance of the courts to use comparative fault analysis is based largely on misconceptions and an unnecessary reliance upon comment \textit{n}. Once aware of deficiencies of the rule, perhaps the courts will shed the shackles of the comment \textit{n} rule and follow the more equitable course of comparative fault analysis.

\section*{V. MINNESOTA LAW}
\subsection*{A. Present Status of Minnesota Law}

The Minnesota Supreme Court has yet to resolve firmly how plaintiffs' fault should be treated in strict products liability cases. The court has not adopted comment \textit{n} to Section 402A\textsuperscript{158} nor has it opted to apply the state's comparative negligence statute.\textsuperscript{159} In the few cases in which the court has dealt with contributory fault in Section 402A cases, however, it has encountered many of the same problems faced by other courts which have been discussed previously in this Note.\textsuperscript{160} An analysis of the three traditional types of plaintiffs' conduct—contributory negligence, assumption of risk, and misuse—suggests that the court's treatment of contributory fault has not been entirely satisfactory and that a new approach is needed to clarify the law.

\subsection*{1. Contributory Negligence}

The leading Minnesota contributory fault case, \textit{Magnuson v. Rupp Manufacturing Co.},\textsuperscript{161} contains language which suggests that ordinary contributory

\footnotesize{\textsuperscript{157} An additional issue the courts must face is the type of comparative fault analysis which should be applied. Most jurisdictions currently have a modified form of comparative fault law whereby recovery is barred if the plaintiff's fault exceeds the defendant's. The modified approach can still cause inequities, because the defendant can contribute to the injury without incurring liability. See Schuh v. Fox Fiver Tractor Co., 63 Wis. 2d 728, 218 N.W.2d 279 (1974). Therefore, the best approach perhaps would be the pure form of comparative fault analysis, because then the defendant would compensate the plaintiff whenever the defective product is a cause of the injury.

\textsuperscript{158} But see Magnuson v. Rupp Mfg. Co., 285 Minn. 32, 171 N.W.2d 201, 210 (1969) (concurring opinion). See also the Minnesota court's treatment of contributory fault when an injured third person sues a seller of alcohol under the Minnesota Dram Shop Act. See \textsc{Minn. Stat.} \S 340.95 (1974). The court has termed the liability under the Act as strict liability and has imposed a contributory fault rule similar to comment \textit{n}. See, e.g., Turk v. Long Branch Saloon, Inc., 280 Minn. 438, 159 N.W.2d 903 (1968).

\textsuperscript{159} The court, however, has recognized that comparative negligence analysis is a developing area of strict products liability law but has withheld final judgment on its application until a more appropriate case arises. See Haney v. International Harvester Co., 294 Minn. 375, 386, 201 N.W.2d 140, 146-47 (1972).

\textsuperscript{160} See notes 40-106 supra and accompanying text.

\textsuperscript{161} 285 Minn. 32, 171 N.W.2d 201 (1969).}
negligence is a defense in Section 402A cases.\textsuperscript{162} The actual holding of \textit{Magnuson}, however, is unclear because the court based its ruling on the alternative grounds of contributory negligence,\textsuperscript{163} assumption of risk,\textsuperscript{164} abnormal use,\textsuperscript{165} mishandling,\textsuperscript{166} lack of proximate causation,\textsuperscript{167} and lack of a defect.\textsuperscript{168} A more coherent concurring opinion was offered by Mr. Justice Rogosheske, who advocated an approach similar to the comment \textit{n} rule.\textsuperscript{169} A subsequent Minnesota case suggested that the concurring opinion should be controlling,\textsuperscript{170} but the recent decision of \textit{Halvorson v. American Hoist & Derrick Co.}\textsuperscript{171} apparently considered the \textit{Magnuson} majority opinion as being good law in Minnesota.\textsuperscript{172}

Although not recognized by the court, \textit{Magnuson} is interesting as it seemed to deal with active user contributory negligence.\textsuperscript{173} The plaintiff in \textit{Magnuson} was driving a snowmobile when the accident that caused his injuries occurred. The court was obviously influenced by the plaintiff's reckless operation of the vehicle, stressing that he drove it at a high speed into a deep ditch filled with snow.\textsuperscript{174} The court, therefore, was confronted with a type of conduct quite different from the mere failure to discover a defect. Consequently, although \textit{Magnuson} suggests that contributory negligence is a defense, the decision is not clear as to whether the mere failure to inspect or a more active type of negligence is required to bar recovery. Therefore, \textit{Magnuson} should not be

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  \item \textsuperscript{162} \textit{Id.} at 43, 171 N.W.2d at 208. The court noted that "it is still necessary to prove that the plaintiff was in the exercise of due care for his own safety," quoting from the Illinois Supreme Court in \textit{People ex rel. General Motors Corp. v. Bua}, 37 Ill. 2d 180, 226 N.E.2d 6 (1967), a case which was later overruled by \textit{Williams v. Brown Mfg. Co.}, 45 Ill. 2d 418, 261 N.E.2d 305 (1970).
  \item \textsuperscript{163} \textit{Magnuson v. Rupp Mfg. Co.}, 285 Minn. 32, 37, 171 N.W.2d 201, 205 (1969).
  \item \textsuperscript{164} \textit{Id.} at 42, 171 N.W.2d at 207 (court stressed plaintiff's awareness of the defect).
  \item \textsuperscript{165} \textit{Id.} at 44, 171 N.W.2d at 208-09.
  \item \textsuperscript{166} \textit{Id.} at 42-43, 171 N.W.2d at 208 (court stressed that because the plaintiff had removed the spark plug cover he had mishandled the product, thereby barring recovery under the \textit{Restatement (Second) of Torts} § 402A, comment \textit{g} (1965)).
  \item \textsuperscript{167} 285 Minn. at 43, 171 N.W.2d at 208.
  \item \textsuperscript{168} \textit{Id.} at 42, 171 N.W.2d at 207 (court stated that because the plaintiff was aware of the danger the product was not defective).
  \item \textsuperscript{169} \textit{Id.} at 46, 171 N.W.2d at 210 (concurring opinion). Justice Rogosheske stated that "while contributory negligence in the sense of an unreasonable failure to notice or to take precautions against the possible existence of a defect is not a defense to strict liability, it has been held that when a person is aware of the defect, and the hazard involved in using the product in a particular way would be obvious to a reasonable man, the plaintiff should not be able to recover on the theory of strict liability." \textit{Id.} at 49, 171 N.W.2d at 211 (citations omitted) (citing comment \textit{n}).
  \item \textsuperscript{170} \textit{See Haney v. International Harvester Co.}, 294 Minn. 375, 386, 201 N.W.2d 140, 146 (1972) ("[v]arious defenses may be available to defend against a prima facie case of strict liability. See concurring opinion of Mr. Justice Rogosheske in \textit{[Magnuson].}.").
  \item \textsuperscript{171} \textit{Id.} at 46, 171 N.W.2d at 210 (concurring opinion).
  \item \textsuperscript{172} \textit{Id.} at 240 N.W.2d 308 (referring to the treatment of plaintiffs' awareness of defects in \textit{Magnuson}).
  \item \textsuperscript{173} For a discussion of active user contributory negligence see text accompanying notes 56-65 \textit{supra}.
  \item \textsuperscript{174} \textit{See Magnuson v. Rupp Mfg. Co.}, 285 Minn. 32, 37, 171 N.W.2d 201, 205 (1969); \textit{Id.} at 50, 171 N.W.2d at 212 (Rogosheske, J., concurring).
interpreted as holding that all types of contributory negligence are defenses in Section 402A cases.\textsuperscript{175}

Because the court has not firmly resolved how it will treat ordinary contributory negligence, the Minnesota pre-Section 402A warranty cases may be consulted for guidance. These cases consistently stated that contributory negligence was a defense.\textsuperscript{178} Consequently, if the court decides to adopt comment \textit{n}, it should probably reconsider these earlier warranty cases. If it does not, its treatment of contributory negligence would be contradictory, because Section 402A and the warranty theory are essentially identical\textsuperscript{177} and both are normally pleaded in products cases,\textsuperscript{178} yet, the rules on contributory negligence for the two theories would differ. In addition, if the court opts for the comparative fault approach it should still reconsider the warranty cases, for those cases have ignored the plaintiff's right to rely on the safety of products\textsuperscript{179} by making contributory negligence a defense. Thus, although the warranty cases did establish a firm contributory negligence rule, the policy underlying the rule is suspect and should not be given great weight.

2. Assumption of Risk

In negligence cases, the Minnesota court has adopted the general rule that the plaintiff cannot assume the risk unless he is aware of the specific danger and acts voluntarily and unreasonably in light of that knowledge.\textsuperscript{180} The court has also held that in negligence cases, assumption of risk should be considered as only a type of contributory negligence and be subject to Minnesota's comparative negligence statute.\textsuperscript{181}

The court, however, has treated the assumption of risk defense differently in Section 402A cases. In \textit{Magnuson}, the court stressed the plaintiff's awareness of the defect without considering whether he acted voluntarily or unreasonably.\textsuperscript{182} In its recent \textit{Halvorson} decision,\textsuperscript{183} the court again addressed the issue of plaintiff's awareness, but took the unique position that if the plaintiff is aware of a danger, the product is not defective.\textsuperscript{184} The court therefore was
not dealing with assumption of risk as an affirmative defense, but rather incorporated awareness into the definition of a defect. In essence, the court decided that if a dangerous condition is obvious, the product is not defective and the plaintiff cannot recover.

The impact of the Halvorson holding is unclear. The court may have reverted to a latent-patent test for all products cases, thereby making the determination of the existence of a defect turn on whether the danger is open and obvious. Or the case may be one which will be limited to its particular facts, and not followed in other products cases. The consequences are troublesome if the latent-patent test is construed as applicable to all Section 402A cases, because sellers then could market dangerous products as long as the danger is obvious. The deterrent effect of the strict liability theory would thus be eliminated, and the policy of protecting users from dangerous products frustrated.

The Halvorson decision may also have rendered meaningless the defense of assumption of risk. The major element of that defense is the plaintiff's awareness of the dangerous defect. Halvorson, however, apparently makes lack of awareness an element of the plaintiff's theory of recovery. Consequently, if the danger is open and obvious the product is not defective, and the assumption of risk question is no longer relevant. The defense would then be relevant only when the danger is not obvious and the plaintiff nonetheless is aware of the defect. If the court decides to apply the comparative fault approach, this treatment of assumption of risk will create problems, because the defense may never reach the jury for apportionment of fault. The usefulness of the comparative fault approach would thus be significantly reduced and a major type of plaintiffs' fault would remain an absolute bar to recovery. The Minnesota court's treatment of assumption of risk therefore has been unusual and may cause difficult interpretive problems in the future.

3. Misuse

The Minnesota Supreme Court has not dealt extensively with the defense of misuse. As mentioned, the Magnuson court held alternatively that the plaintiff was barred from recovery because he used the snowmobile in an abnormal manner. The decision, however, was not clear as to whether recovery was barred on grounds of misuse or contributory negligence; nor
did the court discuss in detail the proper application of the misuse concept. Consequently, Magnuson cannot be viewed as establishing a firm rule regarding the treatment of misuse in Section 402A cases.

Probably the most important Minnesota case concerning the issue of misuse is Farr v. Armstrong Rubber Co. In Farr, the court discussed in detail the definition of a defect, stating that a product is not defective if safe for normal handling and consumption. Although the court in Farr did not specifically discuss misuse, it set the perimeters of the defense by defining what constitutes a defect. Under the Farr treatment of defectiveness, if the consumer uses the product in an abnormal manner and is injured, he is barred since the product is not defective if it is not safe for abnormal uses. Therefore, in Minnesota the defense of misuse applies only if the plaintiff uses the product in an abnormal or unforeseeable manner. This treatment of misuse is consistent with decisions in other jurisdictions and should cause no major interpretive problems in the future.

B. Comparative Fault Approach

In 1970, the Minnesota Legislature passed a general comparative negligence law modeled after the then existing Wisconsin statute. The Minnesota Supreme Court has yet to apply the statute in Section 402A cases, although it has suggested that it might do so. The Minnesota federal district courts, however, apparently allow the use of comparative fault analysis in strict products liability cases.

One factor that may influence the Minnesota court's decision to utilize comparative fault in Section 402A cases is the case law in Wisconsin prior

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191. 288 Minn. 83, 179 N.W.2d 64 (1970). In Kerr v. Corning Glass Works, 284 Minn. 115, 169 N.W.2d 587 (1970), the court also apparently was dealing with misuse and barred recovery because the plaintiff did not use the product as the manufacturer intended.


193. See notes 95-104 supra and accompanying text.


197. See note 159 supra.

198. See, e.g., Elsing v. International Harvester Co., Civil No. 3-75-195 (D. Minn., June 9, 1975) (Devitt, J.); Gilbertson v. Tryco Mfg. Co., Civil No. 4-71-538 (D. Minn., Oct. 15, 1971), affd. 492 F.2d 958 (8th Cir. 1974) (Bogue, J. visiting judge, presiding at trial). The remaining Minnesota federal district court judges apparently have not yet ruled on the issue, but the above-named cases suggest that the federal judges in Minnesota are proceeding on the assumption that the Minnesota Supreme Court will decide to apply Minnesota's comparative negligence statute in strict products liability cases.
A REAPPRAISAL OF CONTRIBUTORY FAULT


200. See Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967). The Dippel decision has been followed consistently in Wisconsin. See, e.g., Jagmin v. Simonds Abrasive Co., 61 Wis. 2d 60, 211 N.W.2d 810 (1973).


203. See Tape of Meeting of the Minnesota Senate on S.F. No. 2227 (Mar. 18, 1976). The floor debate was concerned exclusively with the implications of establishing a pure comparative negligence approach. No mention was made of the apparent proposed expansion to encompass non-negligence actions.

204. See notes 145-47 supra and accompanying text.

205. See Haeg v. Sprague, Warner & Co., 202 Minn. 425, 429-30, 281 N.W. 261, 263 (1938), where the court stated:

No one can appreciate more than we the hardship of depriving plaintiff of his verdict and of all right to collect damages from defendant; but the rule of contributory negligence, though 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.
utilization of comparative fault in strict products liability cases. A failure to adopt this approach would frustrate the basic Section 402A goals of spreading the costs of product-related injuries and facilitating recovery in products cases.

VI. SUMMARY

The comment n majority rule regarding plaintiffs' fault has proved to be an unsatisfactory means for achieving the goals of products liability law. The rigidity of the rule has caused harsh and legally questionable results. Despite the deficiencies of comment n, it unfortunately has received almost universal judicial acceptance. The alternative comparative fault approach is a more sophisticated and equitable tool with which to balance the relative fault of the parties in products cases. The interpretive difficulties inherent in the comment n rule would be lessened, thereby allowing products liability law to develop in a more rational and technically sound manner. More significantly, the conflicting policies of not unduly rewarding reckless plaintiffs and spreading the costs of injuries from defective products would be reconciled without unnecessary hardship to either party.

206. See note 42 supra and accompanying text.
207. See note 44 supra and accompanying text.