Strict Products Liability and Comparative Negligence: The Collision of Fault and No-Fault

Harvey R. Levine
INTRODUCTION

The recent adoption, expansion, and application of comparative negligence concepts to causes of action based on negligence have raised a basic question of whether principles of comparative fault should be applied to strict products liability actions. Traditionally, contributory negligence has not been a defense to the strict liability cause of action. However, because plaintiff's negligence no longer acts as a total bar to recovery and because the harshness of contributory negligence has been diluted by comparative fault, the role of plaintiff's conduct in the strict products liability action is being exposed to judicial reconsideration.

* Associate Professor of Law, University of San Diego School of Law; B.S. Long Island University, 1966; J.D., St. Mary's University, 1970; LL.M., 1971; S.J.D., New York University School of Law, 1974. The author expresses appreciation for the assistance of Ms. Merribeth Boisseau (class of 1978) in the preparation of this article.

A flurry of judicial\(^2\) and academic authority\(^3\) has presented argument for the application of comparative fault to the strict products liability action. This article will consider the nature of the term *defect* and the judicial characterization of the strict liability cause of action. An analysis of the "defect" concept and of the nature of the strict products liability cause of action indicates that the cause of action is not based on principles of fault. If doctrines of comparative negligence are applied to the products liability action, an inevitable collision of fault and no-fault concepts will occur.

**Efforts to Establish the Meaning of Defect in Products Liability Actions**

The varied and overlapping theoretical bases for tort recovery offer dynamic and challenging considerations. The three basic theories of recovery are intentional tort, negligence, and strict liability. Although each of the bases of liability requires multiple elements for a prima facie cause of action, one element of each theory of recovery generally predominates because of the inherent complexities of defining, limiting, and characterizing the scope of the tort. These elements tend to draw a disproportionate share of analytical concern. For example, recovery on a theory of intentional tort often depends on the concept of intent. In negligence, the dynamics of liability frequently pivot upon questions of duty. In the strict liability action for abnormally dangerous activities, emphasis tends to be upon the difficult, and frequently humorous, task of defining the element of abnormality. Thus, the resolutions of intent, duty, and abnormality often determine liability itself.

The dynamics of defining and characterizing the concepts of intent, duty, and abnormality are paralleled in strict products liability cases by efforts to establish a functional definition of *defect*. In fact, the inherent elasticity and resilience of the word *defect* has frequently caused the defect requirement to become the major

---


determinant of liability. In order to characterize the theoretical basis governing liability in a products case, the myriad efforts of judges, lawyers, and scholars to establish a functional definition of defect must be considered. An analytical approach to defining defect can help to answer the greater question of whether the products liability action is a fault or no-fault concept.

Courts have repeatedly recognized the difficulty of reducing the requirement of defect to verbal certainty.\(^4\) In *Baker v. Chrysler Corp.*, the court stated: "The word 'defect' is not capable of precise definition in all cases; 'no definition [of defect] has been formulated that would resolve all cases or that is universally agreed upon.'\(^5\) Most courts adopting the theory of strict liability in products cases accept the basic premise of section 402A of the *Restatement (Second) of Torts*.\(^6\) This section establishes liability whenever a product is in a defective, unreasonably dangerous condition. In clarifying these terms, comment g states: "The rule stated in this Section applies only where the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him."\(^7\) Comment i of section 402A further suggests: "The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."\(^8\) The definitional contours offered by section 402A of the *Restatement* have given rise to a wealth of interpretation and critical analysis.\(^9\)

---

8. Id. comment i at 352.
The judicial approach to defining defect has been far from uniform. Some jurisdictions have followed the mandates of section 402A and have required proof of a defective condition which is unreasonably dangerous. In these jurisdictions added concern has been directed toward defining unreasonably dangerous. Some courts have addressed the issue of defect by considering whether the product deviates from the standards or norm of similar products, while others have tested for defect by determining whether the product is reasonably fit for its intended purpose. Still others have adopted the multiple-factor test suggested by Professor Wade.

It is apparent the courts have not agreed on whether the term unreasonably dangerous tends to clarify the meaning of defective or whether the term is redundant and therefore imposes an undue burden upon the plaintiff. In Phillips v. Kimwood Machine Co., the court adopted a dangerously defective standard which is supposed to be the equivalent of a finding that the product is unreasonably dangerous. In that case the court held:


A dangerously defective article would be one which a reasonable person would not put into the stream of commerce if he had knowledge of its harmful character. The test, therefore, is whether the seller would be negligent if he sold the article knowing of the risk involved. Strict liability imposes what amounts to constructive knowledge of the condition of the product.17

The Washington Supreme Court has adopted a standard which borrows from the best of all definitional worlds. In Seattle-First National Bank v. Tabert,18 the court suggested that if a product is unreasonably dangerous, it is necessarily defective. The court indicated that liability would be imposed under section 402A if a product is not reasonably safe. The court reasoned the product must be unsafe to an extent beyond that which would be reasonably contemplated by the ordinary consumer. The evaluation of the product in terms of the reasonable expectations of the ordinary consumer would allow the trier of fact to consider the intrinsic nature of the product. More importantly, the court concluded that in determining the reasonable expectations of the ordinary consumer a number of factors would be considered—for example, the relative cost of the product, the gravity of the potential harm from the claimed defect, and the cost and feasibility of eliminating or minimizing the risk.19

The multiple-factor analysis has also been applied in other jurisdictions. Texas has approached the issue in a manner similar to

19. Id. at 779. This approach is reflective of Professor Wade's earlier suggestions that the question of defect should be governed by the following determinants: (1) the usefulness and desirability of the product—that is, its utility to the user and to the public as a whole; (2) the safety aspects of the product—that is, the likelihood it will cause injury and the probable seriousness of the injury; (3) the availability of a substitute product which would meet the same need and will be safer; (4) the manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility; (5) the user's ability to avoid danger by the exercise of care in the use of the product; (6) the user's anticipated awareness of the dangers inherent in the product and their avoidability because of general public knowledge of the product's obvious condition or because of the existence of suitable warnings or instructions; (7) the feasibility of the manufacturer's spreading the loss by increasing the price of the product or by carrying insurance. Wade, On the Nature of Strict Tort Liability for Products, 44 Miss. L.J. 825, 837 (1973).
the evaluation of duty in negligence cases—that is, by balancing the risk and seriousness of harm against the precautionary burden of avoiding harm.\textsuperscript{20} In recent Oregon decisions, the courts entertained a factor analysis approach similar to that suggested by Professor Wade.\textsuperscript{21} In \textit{Roach v. Kononen}, the court stated that the design of the product must be dangerously defective.\textsuperscript{22} The court held that in strict liability the concern is the condition (dangerousness) of an article which is designed in a particular way, while in negligence the issue is the reasonableness of the manufacturer's actions in designing and selling the article. The factors which the court suggested would be necessarily considered in deciding the question of defect are the utility to the user, the consumer's use of the product, the seriousness of injury, and the cost of avoiding the defect. The court suggested that it considered the term \textit{dangerously defective} equivalent to \textit{unreasonably dangerous}.\textsuperscript{23}

In sharp contrast to the approaches discussed above is the holding of \textit{Berkebile v. Brantley Helicopter Corp.}.\textsuperscript{24} In \textit{Berkebile} the Pennsylvania Supreme Court suggested it would completely reject standards based upon what the reasonable consumer is expected to know or what the reasonable manufacturer is expected to foresee concerning consumers who use his product. Instead, the court noted:

\begin{quote}
[T]he sole question here is whether the seller accompanied his product with sufficient instructions and warnings so as to make his product safe. This is for the jury to determine. The necessity and adequacy of warnings in determining the existence of a defect can and should be considered with a view to all the evidence. The jury should review the relative degrees of danger associated with use of the product since a greater degree of danger requires a greater degree of protection.\textsuperscript{25}
\end{quote}

The foregoing judicial analysis suggests that defect is considered within the realm of traditional negligence concepts by defining the degree of warning in proportion to the danger which necessitates the warning itself.

The California Supreme Court has recognized that the defect requirement was being decided on the basis of a reasonable manufacturer standard, much like a traditional negligence test. How-

\begin{itemize}
\item \textsuperscript{22} 269 Or. 457, 463, 523 P.2d 125, 129 (1974).
\item \textsuperscript{23} Id.
\item \textsuperscript{24} 337 A.2d 893 (Pa. 1975).
\item \textsuperscript{25} Id. at 902.
\end{itemize}
ever, in *Cronin v. J.B.E. Olson Corp.*,\(^26\) the court considered the
defect requirement and specifically rejected the unreasonably dan-
ggerous component.\(^27\) In *Cronin*, a bread delivery truck collided
with another vehicle. The impact of the collision broke an alumi-
num safety hasp holding bread trays in place in the rear of the
truck. The trays struck the driver's back and hurled him through
the windshield; he sustained serious personal injuries. Among
other claims, the defendant argued that the jury instruction erro-
eously failed to include that the defect must be found unreasonably
dangerous. The defendant contended that failure to include such
a requirement would make the manufacturer an insurer of his
product.

In considering whether a plaintiff must prove a product both
defective and unreasonably dangerous, the court acknowledged the
purpose of the unreasonably dangerous requirement as a limit on
liability, but found that the limit placed too great a burden on the
plaintiff. The court stated:

> The result of the limitation, however, has not been merely to
> prevent the seller from becoming an insurer of his products with
> respect to all harm generated by their use. Rather, it has burdened
> the injured plaintiff with proof of an element which rings of negli-
> gence . . . . In fact, it has been observed that the Restatement
> formulation of strict liability in practice rarely leads to a different
> conclusion than would have been reached under the laws of negli-
> gence . . . . Yet the very purpose of our pioneering efforts in this
> field was to relieve the plaintiff from problems of proof inherent
> in pursuing negligence . . . and thereby "to insure that costs of
> injuries resulting from defective products are borne by the manu-
> facturers . . . ."\(^28\)

Although the California Supreme Court held that the plaintiff
need prove only that the product was defective,\(^29\) it failed to provide
a guide to what makes a product defective.\(^29\) However, the court

\(^{26}\) 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972).
\(^{27}\) Id. at 134-35, 501 P.2d at 1162, 104 Cal. Rptr. at 442.
\(^{28}\) Id. at 132-33, 501 P.2d at 1161-62, 104 Cal. Rptr. at 441-42 (citation
omitted).
\(^{29}\) See id. at 134 n.16, 501 P.2d at 1162 n.16, 104 Cal. Rptr. at 442 n.16.

The court believed that useful precedents existed to give content to the
defect requirement. However, as the foregoing discussion indicates, de-
fect is interpreted in many different ways. For a good summary of the
case law on the various theories of defect, see Seattle-First Nat'l Bank
v. Tabert, 86 Wash. 2d 145, 542 P.2d 774 (1975). Significantly the *Cronin*
case considered the utility of providing qualifying language which would
characterize and define the term *defect*. The decision reflects the greater
expressed a desire to purge the defect requirement of its "negligence complexion" and reaffirm the risk distribution policy underlying the doctrine, by stating that products liability is not a fault-based concept and that elements which ring of negligence must be eradicated.

Although the courts have not been able to provide a precise definition of the term defect, the lack of verbal precision has resulted in a flexibility of the strict liability cause of action similar to the characteristic resilience of negligence law. However, the basic distinction between a cause of action based on strict liability and a cause of action based on negligence has been preserved for purposes of perpetuating the public policy considerations which serve as the foundation for the strict liability theory of recovery. As the court stated in Santor v. A & M Karagheusian, Inc.: "It is not necessary . . . to define the outer limits of the term 'defect.' . . . Suffice it to say that the concept is a broad one. The range of its operation must be developed as the problems arise and by courts mindful that the public interest demands consumer protection." Although no consensus exists concerning the definition of the term defect, there is definite agreement that the concept does not pivot upon principles of legal fault.

Judicial reluctance to inject precise meaning into the term might flow from the fact that important issues relating to the products liability cause of action can be decided apart from the defect determination. For example, in most instances the determination relating to defect is not inextricably intertwined with considerations governing either defenses or the extent to which plaintiff's conduct might mitigate damages. In general, the courts have tended to decide each issue by referring to public policy rather than by rely-

problem presented to the courts in situations in which efforts to reduce elements of the cause of action to verbal clarity become impractical because the qualifying language invariably clashes with the basic theory of liability.


31. 8 Cal. 3d at 132-33, 501 P.2d at 1162, 104 Cal. Rptr. at 442.


ing upon a common theory of liability which would serve as a basis for resolving all issues common to the cause of action. However, the pending issue of whether the doctrine of comparative negligence should be invoked in a strict products liability action to reduce the plaintiff's damages in proportion to the plaintiff's culpability will require that the judiciary provide and be guided by a clear basis of liability.

In an effort to decide the issue of whether comparative fault should apply to the strict liability cause of action, a consideration of the characterizations of products liability by courts and academic authorities is essential. Some authorities view strict liability as the conceptual equivalent of the law of warranty.\textsuperscript{34} Other decisions have stated that recovery based on strict liability is nothing more than a modified form of negligence per se.\textsuperscript{35} A third category of substantial authority suggests that the strict liability cause of action is a new creature in the law of tort providing liability irrespective of fault.\textsuperscript{36} The initial characterization of the theoretical basis of liability is essential in resolving the question of whether comparative fault should apply to the strict liability cause of action.

Courts have frequently characterized the theory of liability as based on the law of warranty. Strict products liability was originally imposed from an express and implied warranty perspective. However, because of the contractual principles of privity, notice, waiver, and disclaimer, courts were required to engage in conceptual gymnastics in order to impose strict liability on the manufacturers of defective products.\textsuperscript{37} Section 402A of the Restatement was adopted to minimize the types of legal theories which would be necessary to circumvent the barriers of warranty.\textsuperscript{38} That section did away with the obstacles of privity, disclaimer, and notice. The courts were therefore able to pierce the barriers created by contract principles which had frequently insulated manufacturers from strict liability actions.\textsuperscript{39}

\textsuperscript{34} Prosser, The Fall of the Citadel, 50 MINN. L. REV. 791 (1966).
\textsuperscript{35} Powers v. Hunt-Wesson Foods, Inc., 64 Wis. 2d 532, 219 N.W.2d 393 (1974); Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967).
\textsuperscript{38} RESTATEMENT (SECOND) OF TORTS § 402A (1965).
\textsuperscript{39} See Prosser, The Fall of the Citadel, 50 MINN. L. REV. 791 (1966).
An interesting contrast to the contention that section 402A of the Restatement is a derivative of warranty law is provided by authorities who have suggested the liability which flows from a cause of action based on 402A is not absolute. These authorities suggest the cause of action rests on theoretical foundations of fault. This conclusion is based on the contention that section 402A is similar to a statute which dictates a standard of care and that noncompliance results in liability analogous to negligence per se. However, a basic distinction from negligence law is that the cause of action based on section 402A of the Restatement does not require the plaintiff to prove the manufacturer had or should have possessed knowledge of the defect. Neither does this theory require proof of specific negligent acts by the manufacturer.

The third theory of liability, which represents the majority view, is that section 402A liability is not analogous to recovery based on warranty or negligence, but rather is liability irrespective of fault. The legal characterization of the strict liability cause of action will invariably control the question of whether comparative fault should be considered for purposes of mitigating damages based on the nature and degree of plaintiff's culpability. However, the courts' characterization of the central element of the cause of action and of the action itself is not fault oriented. In fact current authority is that the courts are proceeding on the assumption that the action is not based on fault.

PLAINTIFF'S CONDUCT AS A BASIS FOR DEFENSES IN A STRICT LIABILITY CAUSE OF ACTION

In a strict liability cause of action the plaintiff's conduct is considered in various contexts. The plaintiff's conduct may be examined to determine if the plaintiff used the product in an abnormal

or unintended manner or if plaintiff engaged in assumption of the risk. However, early characterizations of the strict liability cause of action and subsequent cases focusing upon the relation of the plaintiff’s conduct to the cause of action have unequivocally stated that plaintiff’s negligence is not a defense to the action.43

Misuse of the Product

Plaintiff’s actions constituting misuse of the product (as distinguished from acts or omissions which are responsible for a lack of knowledge concerning a product’s defect) are a recognized defense to a strict liability action.44 Some courts have found the product not defective when the plaintiff’s misuse is unforeseeable to the defendant.45 Furthermore, in Greenman v. Yuba Power Products, Inc.,46 the California Supreme Court held that plaintiff must prove he was using the product in a foreseeably intended manner. Thus, although product misuse is a recognized defense, it is adequate only when the defendant cannot foresee the particular type of misuse. Numerous cases have allowed recovery on the ground that if the use is foreseeable, it is intended and normal. For example, in Cronin v. J.B.E. Olson Corp.,47 the California Supreme Court held that collision of vehicles was a reasonably foreseeable occurrence and should be considered in the design and manufacture of a product. The court stated: “The design and manufacture of products should not be carried out in an industrial vacuum but with recognition of the realities of their everyday use.”48 Other courts have held that collisions are emergency situations which must be considered by manufacturers of products and that such occurrences do not constitute abnormal or unintended uses of the products.49

44. Although this proposition is a variant of contributory negligence, it is a recognized defense. Prosser has stated the defendant is not liable because the plaintiff has not established causation if the latter has misused the product. Prosser, Strict Liability to the Consumer in California, 18 Hastings L.J. 9, 48 (1966). See, e.g., Dooms v. Stewart Bolling & Co., 68 Mich. App. 5, 241 N.W.2d 738 (1976).
47. 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972).
48. Id. at 126, 501 P.2d at 1157, 104 Cal. Rptr. at 437.
Assumption of Risk

The distinction between assumption of risk and contributory negligence which is significant in the products liability cause of action is clearly expressed in comment n of section 402A of the Restatement which provides:

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 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.50

Thus assumption of risk is recognized as an affirmative defense to the strict liability cause of action.51

Because the strict liability cause of action evolved from the law of warranty, it logically follows that plaintiff's negligence should not be a defense. Any semblance of unfairness to the defendant is diluted by the doctrine of assumption of risk and by consideration of abnormal or unintended use of the product. In other words, even though plaintiff's conduct is referred to as contributory negligence and is not an appropriate defense, plaintiff's conduct is a defense if it reaches the level of assumption of risk or if it consists of abnormal or unintended use of the product.52 Frequently plaintiff's actions cannot be categorized, and misuse of the product serves as a basis for an assumption of risk defense.53 Prosser suggests that an unforeseeable abnormal or unintended use of the product should preclude liability because proximate cause will not be sufficiently established.54

50. Restatement (Second) of Torts § 402A, comment n at 356 (1965).
52. Although Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 306 (1975), abolished implied assumption of risk in negligence actions, there was no suggestion a similar application would be extended to the strict liability cause of action. See Buccery v. General Motors Corp., 60 Cal. App. 3d 533, 132 Cal. Rptr. 605 (1976).
It is significant to note assumption of the risk and misuse of the product, if established by the defendant, act as a total bar to plaintiff's recovery. Defenses based on plaintiff's conduct are not available to mitigate damages. Cases have consistently held contributory negligence does not bar recovery in a strict liability action.55

Adopting Comparative Negligence in California

Until recently, in California the doctrine of contributory negligence was harsh, for it acted as a total bar to plaintiff's recovery in a negligence cause of action. However, the California Supreme Court sought to mitigate this harshness by adopting the pure form of comparative negligence. In the landmark case of Li v. Yellow Cab Co.,56 the court held that a plaintiff's contributory negligence would be considered only for purposes of reducing plaintiff's recovery instead of acting as a total bar to recovery. More specifically the case held liability is in proportion to fault.

The Li case has given rise to the significant question of whether the comparative fault concept should be extended to strict liability causes of action for purposes of mitigating plaintiff's damages in proportion to his fault. If the Li decision is found applicable to the strict liability cause of action, plaintiff's conduct would no longer act as a total bar to recovery, but rather would be applied only for purposes of diminishing the plaintiff's damages in proportion to his or her own culpability. The basic thrust of the Li decision is that contributory negligence is no longer a bar to plaintiff's recovery; thus much of the prior harshness of applying the doctrine of contributory negligence is removed by utilizing comparative negligence. The argument has followed that comparative fault should apply to the strict liability cause of action because it would only diminish plaintiff's recovery and no longer act as a total bar.57

The case of Horn v. General Motors Corp.58 reflects growing

57. See the dissenting opinion of Justice Clark in Horn v. General Motors Corp., 17 Cal. 3d 359, 551 P.2d 398, 131 Cal. Rptr. 78 (1976) (Clark, J., dissenting).
58. 17 Cal. 3d 359, 551 P.2d 398, 131 Cal. Rptr. 78 (1976).
judicial sensitivity to the issue of whether comparative fault should apply to the strict liability cause of action. In *Horn* the plaintiff was injured during a collision when her face hit exposed prongs of the steering column of her automobile. The defendant contended that plaintiff's failure to use the seatbelt constituted misuse of the product. The trial court ruled such evidence inadmissible on the ground that plaintiff's contributory negligence was not an issue. On appeal the California Supreme Court stated that this evidence was properly excluded because at the time of the trial, contributory negligence was not a defense to the strict liability cause of action and because the plaintiff's actions fell far short of the technical requirements of assumption of risk.59 In a footnote to the holding, the court noted that the ramifications of *Li* would not be considered at that time because *Li* had been decided after the trial of the case. The court stated: "Under these circumstances we find no compelling reason to apply the rule of comparative negligence to this case which was tried long before our decision in *Li* and in which on this appeal the issue of comparative negligence was neither briefed nor argued."60 In dissent Justice Clark argued that the doctrine of comparative negligence as promulgated by *Li* should apply to a strict products liability cause of action. Justice Clark's dissent is based primarily upon policy considerations in *Li*. A basic premise of his argument is that products liability is a fault doctrine. The dissent draws language from *Li*, stating:

The doctrine [contributory negligence] is inequitable in its operation because it fails to distribute responsibility in proportion to fault . . . . The basic objection to the doctrine [of contributory negligence] grounded in the primal concept that in a system in which liability is based on fault the extent of fault should govern the extent of liability—remains irresistible to reason and all intelligent notions of fairness.61

In addition Justice Clark suggested that the doctrine of comparative negligence, as enunciated in the *Li* decision, should be applicable to strict products liability actions because "[s]trict or product liability is a fault doctrine—not an absolute or no-fault doctrine . . . . While the injured plaintiff is not required to prove the manufacturer is negligent, he must prove the manufacturer is at fault."62 Although the majority of the California Supreme Court would not address the issue of whether to apply comparative fault to the strict

59. *Id.* at 370 n.2, 551 P.2d at 398 n.2, 131 Cal. Rptr. at 83 n.2.
60. *Id.*
61. *Id.* at 372, 551 P.2d at 405, 131 Cal. Rptr. at 85 (Clark, J., dissenting) (emphasis added).
62. *Id.* at 373, 551 P.2d at 406, 131 Cal. Rptr. at 86 (Clark, J., dissenting) (emphasis added).
liability cause of action, it is apparent the issue will be presented in the future. Ostensibly, those arguing that the doctrine should apply to strict liability actions will present the viewpoint expressed by Justice Clark in the Horn case that strict liability or product liability rests on a theoretical foundation of fault and that the dictates of the Li case should apply.63

Numerous commentators have suggested that plaintiff's conduct should be considered in a strict products liability action for purposes of mitigating damages. However, it is important to examine the rationale offered by those contending that comparative negligence should be applied to the strict liability cause of action. Some have suggested that products liability "is not absolute but is based on the social fault of marketing defective products," and therefore it is logical and consistent to consider plaintiff's fault in relation to the defendant's conduct.64 Other authorities also support application of comparative fault to the strict liability cause of action.65 These authors suggest that no difficulty exists in considering the nature and extent of the plaintiff's conduct in relation to the defendant's culpability. However, most of the writers fail to take cognizance of the body of case law which unequivocally states that the defendant's fault or culpability is not a factor in the strict liability cause of action. In essence, those proposing the adoption of comparative fault in the strict liability action are actually suggesting a comparison of a fault doctrine (comparative negligence) to a no-fault doctrine (strict products liability).

FAULT OR NO-FAULT—CHARACTERIZING THE TORT WILL RESOLVE THE ISSUE

In Li v. Yellow Cab Co., the California Supreme Court held that:

Logic, practical experience, and fundamental justice counsel against the retention of the doctrine rendering contributory negligence a

63. Id. at 372-79, 551 P.2d at 405-10, 131 Cal. Rptr. at 85-90 (Clark, J., dissenting).
64. Fleming, Foreword: Comparative Negligence at Last—By Judicial Choice, 64 Calif. L. Rev. 239, 270 (1976).
complete bar to recovery—and that it should be replaced in this state by a system under which liability for damage will be borne by those whose negligence caused it in direct proportion to their respective fault.66

The essence of the Li holding is the weighing of fault for purposes of proportioning damages. In resolving the question of applying the conceptual equivalent of Li to the strict liability cause of action, the crucial question which now will be presented to the courts is whether the strict products liability action rests on a theoretical foundation of fault. If the strict liability action does not proceed on a fault basis, it would be illogical to consider the nature of the plaintiff's conduct to determine liability in proportion to fault. Although the dissenting opinion in Horn v. General Motors Corp. suggested that strict liability is liability based on fault,67 this suggestion is a significant contradiction of the law in the majority of jurisdictions which has characterized the cause of action as proceeding irrespective of fault. Connecticut, in a case devoted to characterizing the theory of liability stated: “An action based on strict liability is to be distinguished from liability predicated on a breach of warranty or simple negligence. It is not based on fault. It is a doctrine imposed to meet the exigencies of modern life.”68

Nevada has adopted a similar view as reflected in a case holding that:

A product being defective gives rise to strict tort liability even though faultlessly made if it was unreasonably dangerous for the manufacturer or supplier to place the product in the hands of a user without giving suitable and adequate warnings . . . . The doctrine of strict liability for an injury caused by a defective product applies even though the supplier has exercised all possible care in the preparation and sale of his product.69

The Alaska Supreme Court has held that:

[T]he focus of attention in strict liability cases is not on the conduct of the defendant, but rather on the existence of the defective product which causes injuries. Liability is attached, as a matter of policy, on the basis of the existence of a defect rather than on the basis of the defendant's negligent conduct.70

66. 13 Cal. 3d at 812-13, 532 P.2d at 1232, 119 Cal. Rptr. at 864.
69. General Elec. Co. v. Bush, 88 Nev. 360, 367, 498 P.2d 366, 369 (1972). See also Worrell v. Barnes, 87 Nev. 204, 206, 484 P.2d 573, 575 (1971), stating: “It makes no difference whether the manufacturer was or was not negligent, acted in good faith, or even took every possible precaution to prevent defects.”
An Arizona court has stated:

[W]e fail to agree that strict liability has not circumvented the "fault concept." The Restatement clearly makes the vendor liable although he has "exercised all possible care in the preparation and sale of his product." It does not matter that the seller has done "the best he can" if the product is defective and unreasonably dangerous.\textsuperscript{71}

Clearly substantial authority exists supporting the view that the strict liability cause of action is no-fault in nature. Significantly, California courts have been even more forceful than other courts in unequivocally characterizing the strict liability cause of action as resting on a no-fault foundation. This characterization is strikingly apparent in the landmark California case, \textit{Ault v. International Harvester Co.}\textsuperscript{72}

The \textit{Ault} factual setting raised dynamic legal issues which demanded succinctly articulating the basis and theory of recovery in a strict liability cause of action. In \textit{Ault} the plaintiff suffered injuries when his vehicle abruptly left the road after an aluminum steering gearbox failed. The plaintiff sought to introduce evidence of subsequent remedial measures taken on behalf of the defendant manufacturer which consisted of substituting malleable iron for aluminum in the manufacture of the gearbox.\textsuperscript{73} The defendant objected to the admissibility of evidence of remedial measures on the basis of section 1151 of the California Evidence Code which provides:

\begin{quote}
When after the occurrence of an event, remedial or precautionary measures are taken, which, if taken previously, would have tended to make the event less likely to occur, evidence of such subsequent measures is inadmissible to prove negligence or culpable conduct in connection with the event.\textsuperscript{74}
\end{quote}

This language and plaintiff's offer of evidence of remedial measures taken by the defendant manufacturer crystalized the legal issue of whether strict products liability actions cling to conceptual equivalents of culpability. If products liability was based on defendant's fault or culpable conduct, the evidence would not be allowed.\textsuperscript{75}

\begin{footnotes}
\begin{footnote}
\end{footnote}
\begin{footnote}
\end{footnote}
\begin{footnote}
73. \textit{Id.} at 117, 528 P.2d at 1150, 117 Cal. Rptr. at 814.
\end{footnote}
\begin{footnote}
74. CAL. EVM. CODE § 1151 (West 1966) (emphasis added).
\end{footnote}
\begin{footnote}
75. The anomalous, paradoxical, and humorous texture of contemporary
\end{footnote}
\end{footnotes}
However, the *Ault* court held that evidence of subsequent repairs or remedial measures would be admissible and that section 1151 is inapplicable to the strict liability action. More importantly, the court held that no culpable conduct is implied in a products liability cause of action. The court stated:

[T]he language and the legislative history of section 1151 demonstrate that the section is designed for cases involving negligence or culpable conduct on the part of the defendant, rather than to those circumstances in which a manufacturer is alleged to be strictly liable for placing a defective product on the market.\textsuperscript{76}

In *Ault* the court clearly indicated that culpability is not a determinant of the strict liability cause of action and that a manufacturer may, without fault, place a defective product on the market.\textsuperscript{77}

It is difficult to reconcile the *Ault* characterization of liability with Justice Clark's statement in *Horn* that "strict product liability is a fault doctrine . . ."\textsuperscript{78} Furthermore, the conclusions reached by one writer that "[t]he doctrine of strict liability in tort retains the fault basis for liability"\textsuperscript{79} and that "[t]he concept requires proof of a form of culpable conduct"\textsuperscript{80} cannot be recon-

tort law is reflected in the nature of the litigant's arguments. The plaintiffs, *for purposes of seeking recovery*, contended that the defendants were not culpable in placing a defective product on the market. In contrast, the defendant requested the court to consider the act of selling a defective product with a view toward fault and culpability.

\textsuperscript{76} 13 Cal. 3d at 117, 528 P.2d at 1150, 117 Cal. Rptr. at 814.

\textsuperscript{77} See also Bill Loep Ford v. Hites, 47 Cal. App. 3d 828, 121 Cal. Rptr. 131 (1975); Recent Development, 1975 U. ILL. L.F. 288.

\textsuperscript{78} 17 Cal. 3d at 373, 551 P.2d at 406, 131 Cal. Rptr. at 85 (Clark, J., dissenting (emphasis added).


\textsuperscript{80} Id. at 118. Significantly, all those supporting the application of comparative negligence to the strict liability action (*see notes 2 & 3 supra*) refer to the Wisconsin case of *Dippel* v. *Sciano*, 37 Wis. 2d 443, 155 N.W.2d 55 (1967), in support of their contention. In *Dippel* the court characterized the strict liability action as a variant of negligence per se. In the recent case of *Powers* v. *Hunt-Wesson Foods*, Inc., 64 Wis. 2d 532, 210 N.W.2d 393 (1974), the Supreme Court of Wisconsin affirmed the earlier characterization of the strict product liability action as a remedy sounding in negligence by stating:

Strict liability in this state at least means negligence as a matter of law or negligence *per se*, and the effect of the adoption of the rule of strict liability based on this negligence in effect shifts the burden of proof from the plaintiff of proving acts of negligence to the defendant to prove he was not negligent in any respect.

The authorities which have cited either *Dippel* or *Powers* must realize that the characterization of the strict liability action by the Wisconsin courts as an action charged with the law of negligence and basic fault concepts in-
ciled with the theoretical basis of liability recognized by most courts. These contentions appear to be unsupported characterizations of the theory of liability employed to satisfy a pre-existing conclusion that comparative negligence should apply to the strict liability cause of action. Such conclusions are clearly in direct conflict with cases such as Ault, which have held that neither fault nor culpability is necessary to a section 402A cause of action. It would be illogical and inconsistent to apply comparative fault to a cause of action which the California Supreme Court has strongly suggested is not based on fault.

A theory of liability should provide a resolution of the legal issues; the legal issues should not result in ad hoc characterizations of the theory of liability. Flagrant disregard for the controlling nature of the theoretical basis of liability is reflected by a recent decision of the Supreme Court of Alaska. In Butaud v. Suburban Marine & Sporting Goods, Inc., the court applied comparative negligence to the strict liability action. The court suggested that theories of liability are unimportant in resolving the question of whether to apply comparative negligence to strict liability actions. The court stated that "whether the action is characterized as negligence, warranty or in tort, the plaintiff must prove essentially the same elements to recover." This statement does not demonstrate a fundamental awareness of the significant disparities among varied theories of recovery. Bald assertions which conclusively abandon essential differences in theories of liability should never serve as a method of resolving important legal issues.

herent therein is alien to the characterization of the basis of liability offered by most other jurisdictions. (See notes 32-36 supra). In addition California courts have taken the added effort in Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972), to purge the conceptual equivalents of negligence from the strict products liability action. The significant disparity between the theoretical basis of liability in Wisconsin compared to that in California and other jurisdictions should preclude any authoritative reference to the Wisconsin cases for purposes of applying comparative negligence to the strict product liability action.

82. Id. at 45.
83. In addition to the simplistic and inaccurate reasoning by the majority of the court that there is no difference in theories of liability and therefore no problem in applying comparative negligence to strict liability, a concurring opinion was offered by Justice Rabinowitz. In his concurring opinion Justice Rabinowitz presents the novel idea of adopting a doctrine of comparative causation as a means of circumventing theoretical obstacles.
CONCLUSION

In California, comparative fault cannot logically and consistently be applied to the strict liability cause of action. Prejudice to a plaintiff would result if the jury was required to determine the plaintiff's fault and to compare it to the defendant's conduct in a cause of action not requiring that a jury consider the existence, nature, or extent of defendant's culpability. How can comparative fault exist in a cause of action which proceeds irrespective of fault? What can a jury compare the plaintiff's fault with if the defendant's fault is not at issue? If the jury has not determined the nature, extent, or degree of the defendant's fault but has merely concluded the product is defective, how can it reduce the plaintiff's damages in proportion to respective fault?

The application of “comparative” fault to the strict products liability cause of action would prejudice a plaintiff because of the unusual and impossible demand placed upon a jury. In essence we would ask a jury that if they find the defendant's product was defective, irrespective of fault, they should reduce the plaintiff's damage by considering the plaintiff's culpability in proportion to the defendant's non-culpability. This requirement may be a feat which is beyond the prowess of an American jury.

encountered when applying comparative negligence to strict liability. In support of this suggestion the concurring opinion would require “the trier of fact to compare the harm caused by the product's defect with the harm caused by the claimant's own negligence.” Id. at 47 (Rabinowitz, J., concurring). However, the suggestion fails to recognize the fact that plaintiff's degree of culpability would be meaningful only if contrasted to the nature and degree of defendant's fault. For example, suppose the particular defect in a product consisted of a negligent failure to warn of dangers related to the use of a product. How would a jury consider the plaintiff's conduct in relation to discovering the dangers without engaging in a consideration of the degree of liability which should attach to the failure to warn of the risks?