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## Products Liability—Washington Refuses to Allow Comparative Negligence to Reduce the Strict Liability Award—*Seay v. Chrysler Corp.*, 93 Wn. 2d 319, 609 P.2d 1382 (1980)

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**PRODUCTS LIABILITY—WASHINGTON REFUSES TO ALLOW COMPARATIVE NEGLIGENCE TO REDUCE A STRICT LIABILITY AWARD—*Seay v. Chrysler Corp.*, 93 Wn. 2d 319, 609 P.2d 1382 (1980).**

**I. INTRODUCTION**

Plaintiff Elwood Seay was injured while backing a truck chassis manufactured by defendant Chrysler Corporation onto a trailer for transportation. As the plaintiff depressed the accelerator pedal slightly, the throttle opened suddenly and he was thrown onto the trailer. The accelerator had been temporarily attached to facilitate transportation. In an action premised upon strict products liability, Seay sued for damages.

The jury found that the sudden acceleration was caused by defective attachment during manufacture by Chrysler. Although the jury found Chrysler liable, it also found that Seay's own negligence caused forty percent of his injuries.<sup>1</sup> Using Washington's comparative negligence statute<sup>2</sup> as authority, the trial court reduced Seay's damages by forty percent. Seay appealed. The Washington Supreme Court affirmed the judgment for plaintiff but reversed the reduction of the award.<sup>3</sup>

In reversing the reduction of plaintiff's damage award, the majority refused to join those states which have merged the concepts of strict products liability and comparative fault. Under this merger, strict liability is used to determine the fact of the defendant's liability. If the plaintiff's actions contributed to the injuries, comparative negligence is then applied to reduce the monetary award.

Chief Justice Utter dissented, urging that the merger be judicially adopted. Merger could also, however, be accomplished by legislative action and is included as part of Washington's proposed products liability bill.<sup>4</sup> This note will begin by examining the legal theories involved in merging the concepts of comparative negligence and strict products liability. The social policies that are behind the merger will then be discussed. The note concludes with a review of the proposal now before the Washington legislature which would effect the merger and change the result in *Seay*.

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1. Seay was found to be negligent for backing the chassis onto the lower level of the trailer without raising the upper level; consequently, he left too small a space for loading.

2. WASH. REV. CODE § 4.22.010 (1979). This section states:

Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages *caused by negligence* resulting in death or in injury to person or property, but any damages allowed shall be diminished in proportion to the percentage of negligence attributable to the party recovering.

*Id.* (emphasis added).

3. The decision was six to three with Justice Dolliver writing for the majority.

4. State of Washington, S.B. 3158, 47th Sess. (1981).

## II. BACKGROUND

Before comparative negligence emerged as a damage-reducing theory,<sup>5</sup> only two defenses were available to defendants in strict products liability actions: assumption of risk and unforeseeable product misuse.<sup>6</sup> Both were a complete bar to recovery by the plaintiff. Contributory negligence by the plaintiff that consisted of failure to discover a defect was generally not allowed as a defense. Courts thought that a failure-to-discover defense would defeat the basic purpose of strict liability, which was to shift to manufacturers the burden of risk of injuries caused by defective products.<sup>7</sup>

As comparative negligence principles evolved, a debate arose over whether a plaintiff's negligent actions should reduce the damages awarded in a strict products liability action. Two views emerged. A majority of the jurisdictions that considered the question<sup>8</sup> decided in favor of

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5. Contributory negligence operated as a liability-defeating theory before comparative negligence was accepted. Seven jurisdictions adopted general comparative negligence statutes before 1965. The real spate of activity, however, came in 1969 to 1973, when nineteen more states adopted it in some form, either judicially or by statute. Comparative negligence is now found in 34 states and the Virgin Islands. For an excellent history of comparative negligence, see V. SCHWARTZ, *COMPARATIVE NEGLIGENCE* 1-29 (1974).

6. The widely adopted RESTATEMENT (SECOND) OF TORTS § 402A, Comment n (1965) 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 . . . .  
*But cf.* *Lyons v. Redding Constr. Co.*, 83 Wn. 2d 86, 96, 515 P.2d 821, 826 (1973) (assumption of risk not separate defense from contributory negligence).

Comment h of the *Restatement* provides:  
"A product is not in a defective condition when it is safe for normal handling and consumption. If the injury results from abnormal handling . . . the seller is not liable." RESTATEMENT (SECOND) OF TORTS § 402A, Comment h (1965). See *Jackson v. Standard Oil Co.*, 8 Wn. App. 83, 100-01, 505 P.2d 139, 149 (1972), in which the court stated that misuse is an affirmative defense. Note, however, that unforeseeable misuse is not accurately a defense, but rather a part of plaintiff's burden of proof. Unforeseeable misuse breaks the causal chain so that plaintiff's injuries are not due to a defect. See *Suter v. San Angelo Foundry & Mach. Co.*, 81 N.J. 150, 406 A.2d 140, 144 (1979); Twerski, *The Many Faces of Misuse: An Inquiry into the Emerging Doctrine of Comparative Causation*, 29 *MERCER L. REV.* 403 (1978).

Courts generally, however, call misuse a defense. The result is the same for comparative purposes, provided the injury was not due totally to the plaintiff's misuse, in which case no defect existed. Note that the seller does have an obligation to prevent foreseeable misuse. See Noel, *Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk*, 25 *VAND. L. REV.* 93, 97 (1972).

7. RESTATEMENT (SECOND) OF TORTS § 402A, Comment n (1965); 2 L. FRUMER & M. FRIEDMAN, *PRODUCTS LIABILITY* § 16A[5][g] [v] (1980) (discussion in comparative negligence setting).

8. Nineteen jurisdictions have considered the problem. Sixteen have allowed the merger of comparative negligence with strict liability. They are: *Murray v. Fairbanks Morse*, 610 F.2d 149 (3d Cir. 1979) (applying Virgin Islands law); *Edwards v. Sears, Roebuck & Co.*, 512 F.2d 276 (5th Cir. 1975) (applying Mississippi law); *Stueve v. American Honda Motors Co.*, 457 F. Supp. 740 (D.

applying comparative negligence in strict products liability actions.<sup>9</sup> A minority<sup>10</sup> decided that strict products liability and comparative negligence are inherently incompatible.

The Washington Supreme Court previously discussed this incompatibility in *Albrecht v. Groat*,<sup>11</sup> a case involving the strict liability of common carriers. Stating that the carrier's liability was based on causation, not negligence, the court found the comparative negligence statute inapplicable. The reasoning in *Albrecht* is in direct conflict with decisions of other courts which have merged strict liability and comparative negligence on the basis that comparative negligence is synonymous with comparative causation.<sup>12</sup>

The court also refused to merge comparative negligence and strict liability in a contribution setting in *Wenatchee Wenoka Growers Association*

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Kan. 1978); *Sun Valley Airlines, Inc. v. AVCO-Lycoming Corp.*, 411 F. Supp. 598 (D. Idaho 1976); *Butaud v. Suburban Marine & Sporting Goods, Inc.*, 555 P.2d 42 (Alaska 1976); *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978); *West v. Caterpillar Tractor Co.*, 336 So. 2d 80 (Fla. 1976); *Busch v. Busch Contstr., Inc.*, 262 N.W.2d 377 (Minn. 1977) (aff'd by statute: MINN. STAT. ANN. § 604.01 (Supp. 1980)); *Thibault v. Sears, Roebuck & Co.*, 118 N.H. 802, 395 A.2d 843 (1978); *Suter v. San Angelo Foundry & Mach. Co.*, 81 N.J. 150, 406 A.2d 140 (1979); *Baccelleri v. Hyster Co.*, 287 Or. 3, 597 P.2d 351 (1979); *General Motors Corp. v. Hopkins*, 548 S.W.2d 344 (Tex. 1977), *rev'd on other grounds sub. nom.* *Turner v. General Motors Corp.*, 8 S.W.2d 844 (1979); and three jurisdictions which made the merger by statute: 1979 Conn. Pub. Acts No. 79-483; MICH. STAT. ANN. & 27A (Supp. 1980); NEB. REV. STAT. & 25-1151 (1979). Without purporting to apply Washington law, the Ninth Circuit Court of Appeals sitting in Washington also allowed the merger. *Pan-Alaska Fisheries, Inc. v. Marine Constr. & Design Co.*, 565 F.2d 1129 (9th Cir. 1979).

In addition, a majority of commentators have advocated the merger. Brewster, *Comparative Negligence in Strict Liability Cases*, 42 J. AIR. L. & COM. 107 (1976); Epstein, *Products Liability: Defenses Based on Plaintiff's Conduct*, 1968 UTAH L. REV. 267; Feinberg, *The Applicability of a Comparative Negligence Defense in a Strict Products Liability Suit Based on Section 402A of the Restatement of Torts 2D (Can Oil and Water Mix?)*, 42 INS. COUNSEL J. 39 (1975); Wade, *Products Liability and Plaintiff's Fault—The Uniform Comparative Fault Act*, 29 MERCER L. REV. 373 (1973).

9. The problem for most states was that the comparative negligence statute of the state was limited to negligence actions, making a judicial extension of the statute necessary. See, e.g., *Murray v. Fairbanks Morse*, 610 F.2d 149, 157 (3d Cir. 1979) (applying Virgin Islands law). In three states, the problem was solved by a new statute. In addition, seven states have statutes not limited to negligence actions. Of these, only one has considered the merger question, deciding it affirmatively. *Edwards v. Sears, Roebuck & Co.*, 512 F.2d 276 (5th Cir. 1975) (applying Mississippi law).

10. In addition to Washington, Colorado and Oklahoma follow the minority view. *Kinard v. Coats Co.*, 37 Colo. App. 555, 553 P.2d 835 (1976); *Kirkland v. General Motors Corp.*, 521 P.2d 1353 (Okla. 1974).

Commentators advocating this view are: Twerski, *From Defect to Cause to Comparative Fault—Rethinking Some Products Liability Concepts*, 60 MARQ. L. REV. 297 (1977); Levine, *Strict Products Liability and Comparative Negligence: The Collision of Fault and No-Fault*, 14 SAN DIEGO L. REV. 337, 355-56 (1977); Postilion, *Strict Liability and Contributory Negligence: The Two Just Don't Mix*, 57 ILL. B. J. 26, 26-29 (1968).

11. 91 Wn. 2d 257, 588 P.2d 229 (1978).

12. Many courts have stated that the terms are synonymous because what is actually at issue in both strict products liability and comparative negligence is each party's causal contribution to the

v. *Krack Corp.*<sup>13</sup> In *Teagle v. Fischer & Porter Co.*,<sup>14</sup> a products liability case, however, the court designated assumption of risk as a damage-reducing factor, apparently allowing a comparison of the plaintiff's and defendant's conduct. The theoretical breakthrough hinted at in *Teagle*, that of allowing all of a plaintiff's negligent actions to reduce the damage award, failed to materialize in *Seay*.

### III. SUMMARY OF DECISION

In *Seay*, the Washington Supreme Court rejected the view which supports reduction of damages for contributory negligence. The majority began by noting that Washington's comparative negligence statute applies only to actions based on negligence; in this case, defendant's liability was premised upon the theory of strict products liability. The court stated that strict liability actions in Washington are based on a no-fault concept,<sup>15</sup> whereas comparative negligence is based on fault. Consequently, the

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injuries. Concluding that negligence is not really compared, these courts have generally retermed the comparative process "comparative causation" or "comparative fault." They go on to note that the latter term is more commonly accepted but less accurate in that fault alone without causation does not subject one to liability. *Murray v. Fairbanks Morse*, 610 F.2d 149, 159 (3d Cir. 1979) (applying Virgin Islands law); *Pan-Alaska Fisheries, Inc. v. Marine Constr. & Design Co.*, 565 F.2d 1129, 1139 (9th Cir. 1977). See *Stueve v. American Honda Motors Co.*, 457 F. Supp. 740, 752 (D. Kan. 1978); *Sun Valley Airlines, Inc. v. AVCO-Lycoming Corp.*, 411 F. Supp. 598, 603 n.5 (D. Idaho 1976); *Suter v. San Angelo Foundry & Mach. Co.*, 82 N.J. 150, 406 A.2d 140, 145-46 (1979); *Seay v. Chrysler Corp.*, 93 Wn. 2d at 328, 609 P.2d at 1387 (1980) (Brachtenbach, J., dissenting). *But see Edwards v. Sears, Roebuck & Co.*, 512 F.2d 290 (5th Cir. 1975) (comparison of contribution to accident, not injuries).

This note will use comparative causation for the sake of analytical accuracy. The author agrees that causation is the best subject for comparison, even though this may lead to situations in which the defendant was grossly negligent but not a major cause of the injury, thus liable for only a small part. The use of causation as a basis for comparison has been criticized. *Carestia, The Interaction of Comparative Negligence and Strict Products Liability—Where Are We?*, 47 INS. COUNSEL J. 53, 67-70 (1980).

The use of causation, however, has the desirable effect of making a party liable only for the amount he harmed another and of not introducing the character of the parties' conduct into the comparative process when such a factor is irrelevant as to the strictly liable defendant. This view is in conflict with the Washington comparative negligence statute, which states that a plaintiff's damages shall be reduced by the percentage of *negligence* attributable to the plaintiff. WASH. REV. CODE § 4.22.010 (1979). Thus, juries now apparently are to compare only the conduct of the parties, not the causal contribution. See Washington Pattern Jury Instructions—Civil, 6 WASHINGTON PRACTICE § 11.01 (2d ed. 1980). The court in *Seay*, however, phrased the jury's finding in terms of causation. See note 29 *infra*. Statutes similar to Washington's, however, are found in states of the courts in the majority.

13. 89 Wn. 2d 847, 853, 576 P.2d 388, 391 (1978).

14. 89 Wn. 2d 149, 570 P.2d 438 (1977) (involving an exploded flowrater, a device for measuring chemical fertilizers).

15. The *Seay* court based this premise on *Wenatchee Wenoka Growers Ass'n v. Krack Corp.*, 89 Wn. 2d 847, 853, 576 P.2d 388, 391 (1978).

court held that comparative negligence could not reduce a strict liability award.

The court further based its refusal to reduce damages on the ground that comparative negligence was a legislatively created doctrine, and therefore the extension should be legislative. Because the legislature had not amended the comparative negligence statute after the court refused to merge strict liability with comparative negligence in *Albrecht*, the court concluded the legislature was satisfied with that decision.<sup>16</sup>

Chief Justice Utter in dissent noted that the majority of jurisdictions which have considered the question have allowed comparative fault principles to reduce a strict products liability award. He agreed that the merger was intellectually untidy, but argued that the result was far more equitable because each party would bear the cost of its contribution to the injuries. Furthermore, the merger would in some circumstances eliminate the use of assumption of risk or unforeseeable product misuse as a complete bar to plaintiffs' recovery. Liability could still be established without proving that the defendant was negligent. Thus, the proof problems that strict products liability was designed to eliminate would not be reinstated.

#### IV. ANALYSIS

##### A. *Theoretical Difficulties*

The major basis for the court's decision in *Seay* was the "theoretical difficulties of comparing concepts of fault (negligence) with no-fault (strict liability) . . . ."<sup>17</sup> The former focuses "on the conduct of the individual, [while] the latter focuses on the nature of the product and the consumer's reasonable expectation with regard to that product."<sup>18</sup> Only two other courts,<sup>19</sup> however, have had difficulty comparing these theoretical "apples and oranges."<sup>20</sup> The majority of courts found the difficulty to be more apparent than real.<sup>21</sup>

Courts adhering to the majority view reasoned that strict liability and negligence are both based on principles of causative fault.<sup>22</sup> Fault, how-

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16. *Seay v. Chrysler Corp.*, 93 Wn. 2d at 323, 609 P.2d at 1384.

17. *Id.* at 322, 609 P.2d at 1384.

18. *Id.*

19. *See* note 10 *supra*.

20. *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 734, 575 P.2d 1162, 1167, 144 Cal. Rptr. 380, 385 (1978).

21. *See, e.g., Butaud v. Suburban Marine & Sporting Goods, Inc.*, 555 P.2d 42, 45 (Alaska 1976).

22. *See* discussion in note 12 *supra*.

ever, need not have been the result of negligence.<sup>23</sup> As one author wrote:

In the case of products liability, the fault inheres primarily in the nature of the product. The product is "bad" because it is not duly safe . . . . [I]t is not necessary to prove negligence in letting the thing get in the dangerous condition . . . . Instead, simply maintaining the bad condition or placing the bad product on the market is enough for liability . . . . This is legal fault, and it can be mixed with, and compared with, fault of the morally reprehensible type. One does not have to stigmatize conduct as negligent in order to characterize it as fault.<sup>24</sup>

Once it is accepted that strict liability is not a no-fault concept<sup>25</sup> a basis for merger with comparative negligence exists. Many courts have retermed comparative negligence "comparative causation" or "comparative fault."<sup>26</sup> If the plaintiff "caused" some portion of the injury, application of comparative principles would reduce the award by the amount of the plaintiff's contribution. Under a merger approach, the contribution of both parties in causing the injuries would be compared; their negligence would not be.<sup>27</sup>

Policy reasons support a change to comparative causation in strict products liability actions. Comparative causation would not add proof problems to the plaintiff's burden. With a merger of strict liability and comparative negligence, the defendant would remain liable for placing a defective product on the market that was a cause of at least part of the plaintiff's injuries. This is important because a major reason for strict products liability was to relieve the plaintiff's burden of proving the manufacturer was negligent.<sup>28</sup>

Chief Justice Utter noted in his *Seay* dissent that the jury had no trouble with the conceptual difficulties bothering the majority when it determined

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23. An alternative to deciding that strict liability and comparative negligence are both based on causation is to hold that strict liability is just a form of negligence *per se*, and is thus readily comparable with a plaintiff's negligence. See *Dippel v. Sciano*, 37 Wis. 2d 443, 155 N.W.2d 55, 64 (1967) (first court to allow the merger). This alternative is usually rejected. See, e.g., *Wenatchee Wenoka Growers Ass'n v. Krack Corp.*, 89 Wn. 2d 847, 853-54, 576 P.2d 388, 391 (1978).

24. Wade, *Products Liability and Plaintiff's Fault—the Uniform Comparative Fault Act*, 29 MERCER L. REV. 373, 377 (1978) (footnotes omitted). The same idea is expressed in W. PROSSER, *THE LAW OF TORTS* § 75 at 493 (4th ed. 1971).

25. See, e.g., *Stueve v. American Honda Motors Co.*, 457 F. Supp. 740, 753 (D. Kan. 1978); *Thibault v. Sears, Roebuck & Co.*, 118 N.H. 802, 395 A.2d 843, 845-46 (1978).

26. See note 12 *supra*.

27. Triers of fact in Washington now apparently compare negligence, not causation. See note 12 *supra*.

28. *Murray v. Fairbanks Morse*, 610 F.2d 149, 161 (3d Cir. 1979) (applying Virgin Islands law); *Butaud v. Suburban Marine & Sporting Goods, Inc.*, 555 P.2d 42, 44 (Alaska 1976); *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 736, 575 P.2d 1162, 1168, 144 Cal. Rptr. 380, 386 (1978); *Seay v. Chrysler Corp.*, 93 Wn. 2d at 327, 609 P.2d at 1386 (Utter, C.J., dissenting).

the portion of damages caused by the plaintiff's negligent actions.<sup>29</sup> He also noted that federal courts have been making a similar comparison for years in admiralty suits.<sup>30</sup>

A merger of the doctrines of comparative causation and strict products liability would also yield more equitable results. Strict products liability was adopted to aid injured persons in recovery<sup>31</sup> by shifting the burden of the loss to the product sellers who were most able to allocate that loss among product purchasers.<sup>32</sup> It is inequitable, however, for the consuming public to pay for the passed-on costs that result from a plaintiff's own negligence.<sup>33</sup> While passing on these costs may have been justified when contributory negligence would have operated as a total bar to the plaintiff's recovery, it is not justified under a comparative system where an "all or nothing" choice is no longer necessary.<sup>34</sup> Furthermore, with comparative causation, certain other types of plaintiff's behavior, now complete bars to recovery, would in some circumstances be treated as damage-reducing factors.<sup>35</sup>

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29. 93 Wn. 2d at 326, 609 P.2d at 1386. The majority did phrase the jury's findings in terms of causation. It stated that the jury "found that 40 percent of [Seay's] damages could be attributed to his own negligence." *Id.* at 321, 609 P.2d at 1383.

Other courts have made Chief Justice Utter's observation about jury ability. *See* Butaud v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42, 45 (Alaska 1976); *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 738, 575 P.2d 1162, 1170, 144 Cal. Rptr. 380, 388 (1978).

30. 93 Wn.2d at 326, 609 P.2d at 1385-86 (citing *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 408-09 (1953)).

31. "[W]e sought to place the burden of loss on manufacturers rather than . . . injured persons who are powerless to protect themselves . . ." *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 736, 575 P.2d 1162, 1168, 144 Cal. Rptr. 380, 386 (quoting *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1962) (emphasis in original)).

32. *Spellmeyer v. Weyerhaeuser*, 14 Wn. App. 642, 646, 544 P.2d 107, 109 (1975); *Murray v. Fairbanks Morse*, 610 F.2d 149, 161 (3d Cir. 1979) (applying Virgin Islands law).

33. *Murray v. Fairbanks Morse*, 610 F.2d 149, 161 (3d Cir. 1979) (applying Virgin Islands law). *See* *Stueve v. American Honda Motors Co.*, 457 F. Supp. 740, 751 (D. Kan. 1978).

34. "Such 'all-or-nothing' defenses are inequitable in their operation because they fail to distribute responsibility in proportion to fault and place upon one party the entire burden of a loss for which the two are, by hypothesis, responsible." *Pan-Alaska Fisheries, Inc. v. Marine Constr. & Design Co.*, 565 F.2d 1129, 1139 (9th Cir. 1977). *See* *Murray v. Fairbanks Morse*, 610 F.2d 149, 161 (3d Cir. 1979) (applying Virgin Islands law); *Butaud v. Suburban Marine & Sporting Goods, Inc.*, 555 P.2d 42, 46 (Alaska 1976). *See also* *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 735, 575 P.2d 1162, 1167, 144 Cal. Rptr. 380, 385 (1978); *Suter v. San Angelo Foundry & Mach. Co.*, 81 N.J. 150, 406 A.2d 140, 147 (1979). In addition, see Chief Justice Utter's dissent in *Seay*, wherein he states: "[F]airness requires us to apportion liability so that the entire burden of loss is not placed upon only one party when two are responsible." 93 Wn. 2d at 326, 609 P.2d at 1386.

35. For example, the Washington Supreme Court has already held that voluntarily and unreasonably encountering a known risk is a damage-reducing factor. *Teagle v. Fischer & Porter Co.*, 89 Wn. 2d 149, 157-58, 570 P.2d 438, 443 (1977) (citing some of the same cases often used to support damage reduction where the plaintiff has been contributorily negligent). The Washington Court of Appeals relied on *Teagle* to hold assumption of risk was damage-reducing. *Berry v. Coleman Systems Co.*, 23 Wn. App. 622, 596 P.2d 1365 (1979).



Finally, reducing the damage award by the amount attributable to injuries caused by the plaintiff would eliminate the anomaly in recovery that now exists.<sup>36</sup> Negligence and strict liability theories are often pleaded in the alternative because of their overlapping elements.<sup>37</sup> If comparative causation is not merged with strict products liability, the result is “the seemingly illogical position that the fault of the plaintiff will relieve the defendant of liability when he is negligent, but not when he is innocent.”<sup>38</sup>

### B. *Deferring to the Legislature*

The second major basis for the court’s decision in *Seay* was that merging strict products liability with comparative causation was best left to the legislature. The court noted that several legislative proposals which would have extended comparative principles to strict liability were rejected.<sup>39</sup> Furthermore, the court observed that the legislature failed to extend the comparative negligence statute even after the court refused to make that extension in *Albrecht*.<sup>40</sup> From this, the court implied a legislative intent to reject merger.

Several other courts which merged comparative principles with strict products liability faced a similar legislative problem. They held, however, that because strict products liability is a judicially created doctrine, courts are free to alter it.<sup>41</sup> These courts noted that while a comparative negligence statute may expressly apply only to negligence actions (as Washington’s does) nothing in such a statute would *forbid* its application to strict liability actions.<sup>42</sup> Thus, the common law doctrine of strict prod-

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36. The anomaly is discussed in: *Stueve v. American Honda Motors Co.*, 457 F. Supp. 740, 751 (D. Kan. 1978); *Butaud v. Suburban Marine & Sporting Goods, Inc.*, 555 P.2d 42, 46 (Alaska 1976); *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 738, 575 P.2d 1162, 1169-70, 144 Cal. Rptr. 380, 387-88 (1978); *Suter v. San Angelo Foundry & Mach. Co.*, 81 N.J. 150, 406 A.2d 140, 147 (1979). See also Epstein, *Products Liability: Defenses Based on Plaintiff's Conduct*, 1968 UTAH L. REV. 267, 284.

37. *Stueve v. American Honda Motors Co.*, 457 F. Supp. 740, 752 (D. Kan. 1978). See also Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L. REV. 825, 841-50 (1973).

38. W. PROSSER, *THE LAW OF TORTS* § 79 at 522 (4th ed. 1971).

39. 93 Wn. 2d at 323, 609 P.2d at 1384.

40. *Id.*

41. *Murray v. Fairbanks Morse*, 610 F.2d 149, 157 (3d Cir. 1979) (applying Virgin Islands law); *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 733, 575 P.2d 1162, 1166-67, 144 Cal. Rptr. 380, 384 (1978); *Suter v. San Angelo Foundry & Mach. Co.*, 81 N.J. 150, 406 A.2d 140, 146 n.3 (1979).

42. *Murray v. Fairbanks Morse*, 610 F.2d 149, 157 (3d Cir. 1979) (applying Virgin Islands law); *Suter v. San Angelo Foundry & Mach. Co.*, 81 N.J. 150, 406 A.2d 140, 146 n.3 (1979). *But see* *Kirkland v. General Motors Corp.*, 521 P.2d 1353, 1367 (Okla. 1974).

ucts liability could be modified without changing or controverting the existing statute.<sup>43</sup>

The federal district court in Kansas refused to allot much significance to legislative failure to amend the comparative negligence statute. The district court noted that many provisions of the proposed bills contained sections which changed more than the applicability of the comparative system.<sup>44</sup> The failure of the legislature to adopt a comprehensive products liability bill need not prevent courts from acting in their traditional role as fine-tuners of a common law principle for such as strict products liability. This is especially true once a general legislative policy, such as comparative negligence, is pronounced.<sup>45</sup> The Washington legislature is currently considering a change in the comparative negligence system in Washington; however, it is contained in a comprehensive products liability and tort reform bill<sup>46</sup> to which objections have been made regarding sections other than the comparative fault provisions.<sup>47</sup> The failure of a comprehensive bill should not be interpreted by the courts as legislative disapproval of the merger of strict products liability and comparative causation.

## V. IMPLEMENTING COMPARATIVE CAUSATION

Now that the Washington Supreme Court has refused to apply comparative causation to strict products liability actions, the legislature must make the merger. The bill presently under consideration in the Washington legislature implements this merger in its "Effect of Contributory Fault" section.<sup>48</sup> This section, by requiring a reduction of damages in

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43. Some courts actually applied a "pure" comparative negligence system (straight percentage reduction of award) even though the statute provided a "modified" system (no recovery if plaintiff's negligence was greater than or as great as defendant's, or was gross and the defendant's slight). See *Murray v. Fairbanks Morse*, 610 F.2d 149, 162 (3d Cir. 1979) (applying Virgin Islands law) and V.I. CODE ANN. tit. 5, § 1451a (Supp. 1979); *Stueve v. American Honda Motors Co.*, 457 F. Supp. 740, 757-58 (D. Kan. 1978) and KAN. STAT. ANN. § 60-258(a) (1976); *General Motors Corp. v. Hopkins*, 548 S.W.2d 344, 352 (Tex. 1977) and TEX. CIV. STAT. ANN. art 2212a (Vernon Supp. 1980).

44. *Stueve v. American Honda Motors Co.*, 457 F. Supp. 740, 752 (D. Kan. 1978).

45. *Id.*; *Murray v. Fairbanks Morse*, 610 F.2d 149, 158 n.11 (3d Cir. 1979) (applying Virgin Islands law).

46. State of Washington, S.B. 3158, 47th Sess. (1981). For previously considered but unpassed Washington legislation, see S.B. 2744 and H.B. 1162, 45th Sess. (1977); S.B. 3073 and S.B. 2333, 46th Sess. (1979). *But see* S.B. 2296, 45th Sess. (1977) (proposing to change only the definition of fault in WASH. REV. CODE § 4.22.010 to include strict liability).

47. Comments submitted by Seattle Consumers Action Network, Independent Business Ass'n, Safeco Corp., and Washington State Trial Lawyers Association to the Select Senate Committee on Torts and Products Liability Reform for its hearing, Oct. 10, 1980. (Copies of these communications are on file at the *Washington Law Review*).

48. State of Washington, S.B. 3158 § 8, 47th Sess. (1981).

proportion to the extent the injury is attributable to the claimant's actions, is based on principles of causation.

A portion of the "Fault Defined" section,<sup>49</sup> however, states that the trier of fact shall consider both the causal contribution of the conduct and the *nature* of the conduct. This portion is flawed. In a strict liability action, the nature, *i.e.*, negligent character, of the defendant's conduct is irrelevant. Beyond the initial determination of the fact of the plaintiff's negligence, interjecting an evaluation of the degree of negligence of the plaintiff's conduct to further reduce damages is unfair. Causal contribution alone should be compared.

As well as making strict liability part of the comparative process, the bill includes unreasonable assumption of risk,<sup>50</sup> unforeseeable product misuse, and unreasonable failure to avoid injury or mitigate damages in the definition of faulty conduct subject to comparison. This approach follows that of the courts which have merged strict products liability and comparative causation.<sup>51</sup> Making all types of negligent conduct by the plaintiff damage-reducing, rather than recovery-defeating, is desirable.

## VI. CONCLUSION

With the decision in *Seay v. Chrysler Corp.*, Washington joined a minority of two states refusing to allow a plaintiff's negligence to reduce a

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49. *Id.* at § 9.

50. In Washington, the type of assumption of risk that consists of voluntarily and unreasonably encountering a known risk is already part of comparative negligence as damage-reducing behavior. *Lyons v. Redding Constr. Co.*, 83 Wn. 2d 86, 515 P.2d 821 (1973). A question remains, however, whether this sort of conduct by a plaintiff can truly be a part of the comparative process. If a plaintiff has unreasonably and voluntarily encountered a known risk, perhaps he has broken the causal chain completely, becoming the sole cause of his injuries. Despite theoretical problems, however, this author believes that, generally, the merger of comparative causation and strict products liability produces more equitable results than the current state of Washington law.

51. Merging assumption of risk: *Stueve v. American Honda Motors Co.*, 457 F. Supp. 740, 752 (D. Kan. 1978); *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 735, 575 P.2d 1162, 1167, 144 Cal. Rptr. 380, 385 (1978); *West v. Caterpillar Tractor Co.*, 336 So. 2d 80, 90 (Fla. 1976); *Busch v. Busch Constr., Inc.*, 262 N.W.2d 377, 394 (Minn. 1977); *Baccelleri v. Hyster Co.*, 287 Or. 3, 597 P.2d 351, 354 (1979); *Dippel v. Sciano*, 37 Wis. 2d 443, 155 N.W.2d 55, 64 (1967).

Merging unforeseeable product misuse: *Edwards v. Sears, Roebuck & Co.*, 512 F.2d 276, 289 (5th Cir. 1975) (applying Mississippi law); *Butaud v. Suburban Marine & Sporting Goods, Inc.*, 555 P.2d 42, 46 (Alaska 1976); *Busch v. Busch Constr., Inc.*, 262 N.W.2d 377, 394 (Minn. 1977); *Suter v. San Angelo Foundry & Mach. Co.*, 81 N.J. 150, 406 A.2d 140, 144 (1979); *General Motors Corp. v. Hopkins*, 548 S.W.2d 344, 352 (Tex. 1977).

Two courts, however, have taken the position that the failure to discover a defect or guard against the possibility of one should not be made part of the comparative process, although other sorts of negligent conduct should. *West v. Caterpillar Tractor Co.*, 336 So. 2d 80, 90 (Fla. 1976); *Busch v. Busch Constr., Inc.*, 262 N.W.2d 377, 394 (Minn. 1977). This approach lessens the equitable results of a merger.

## Products Liability/Comparative Negligence

strict products liability award. The majority concluded that changes in the comparative system were best left to the legislature.

Presently, a bill is before the Washington legislature which would allow a merger of strict products liability and comparative principles. This approach would produce more equitable results because each party would bear the cost of its contribution to the injuries. This is particularly true if the portion allowing a comparison of the nature of the conduct is omitted beyond the initial determination of the plaintiff's negligence. The consuming public would not have to absorb the costs passed on by manufacturers that result from an individual consumer's negligence. Plaintiffs also would no longer be totally barred from recovery if either assumption of risk or unforeseeable product misuse is found. Swift passage of such a comparative causation provision is urged. In the absence of legislative action, an adoption of the merger by the court would achieve more equitable results in strict products liability actions.

*Shannon J. Skinner*