Restructuring the Defenses to Strict Products Liability - An Alternative to Comparative Negligence

Nikki Ann Westra

Follow this and additional works at: http://digitalcommons.law.scu.edu/lawreview

Part of the Law Commons

Recommended Citation
Available at: http://digitalcommons.law.scu.edu/lawreview/vol19/iss2/3
RESTRUCTURING THE DEFENSES TO STRICT PRODUCTS LIABILITY—AN ALTERNATIVE TO COMPARATIVE NEGLIGENCE

Nikki Ann Westra*

INTRODUCTION

Traditionally, courts have permitted only a very limited examination of the plaintiff's action or inaction in an action brought in strict products liability. The plaintiff's conduct has been deemed relevant only when such conduct has met the stringent tests of assumption of the risk or misuse of the product.1 However, this limitation on the examination of plaintiff's conduct no longer exists in California. On March 13, 1978, the California Supreme Court, in Daly v. General Motors Corp.,2 announced that the principles of comparative negligence,3 as enunciated in Li v. Yellow Cab Co.,4 would be applicable to future actions brought in strict products liability.5 Daly, a four to three decision, marks a significant upheaval in well-settled strict liability principles. As the court itself noted, the ramifications of the decision will not be known until subsequent litigation establishes the new dimensions of the doctrine.6 Califor-
nia juries, however, will now be presented with the dilemma of comparing defendant's defective product with plaintiff's negligent conduct in an attempt to equitably allocate percentages of liability.7

This article will assess the impact of the Daly case in light of the public policies underlying the strict products liability cause of action and will discuss whether the adoption of comparative fault principles best serves those policies. An initial overview of the development of the prima facie strict products liability case will be presented with particular emphasis on the formulation of defect articulated in Barker v. Lull Engineering Co.8 The public policies underlying the original cause of action as well as the traditional defenses to an action brought under a strict products liability theory will be examined.

The article will then focus on the impact of comparative fault principles in strict products liability actions. The court in Daly stated that it was adopting comparative fault principles in order to promote "more just result[s]."9 This article suggests that, although the goal of the court was laudable, the desired end could have been more expediently realized by a limited expansion of the traditional defenses to strict products liability actions.

**Strict Products Liability: The Prima Facie Case**

Section 402A of the Restatement (Second) of Torts,10 was

at 743, 575 P.2d at 1172, 144 Cal. Rptr. at 390. [(Rather than attempt to anticipate every variant and nuance of circumstance and party that may invoke comparative principles in a strict products liability context, we deem it wiser to await a case-by-case evolution in the application of the broad principles herein expressed.) Id. at 747, 575 P.2d at 1175, 144 Cal. Rptr. at 393.

7. As Justice Mosk in his dissent in Daly remarked: "If comparative negligence is to be applied, how can the trier of fact rationally weigh the conduct of the plaintiff against the defective product? I know of no other instance in American jurisprudence in which the antagonists are the conduct of a human being versus an inanimate object." Id. at 762, 575 P.2d at 1185, 144 Cal. Rptr. at 403 (Mosk, J., dissenting). See generally Levine, Strict Products Liability and Comparative Negligence: The Collision of Fault and No-Fault, 14 San Diego L. Rev. 337 (1977).

8. 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).

9. 20 Cal. 3d at 737, 575 P.2d at 1169, 144 Cal. Rptr. at 387.

10. A draft of section 402A was first introduced in 1961. Revisions extending the types of products covered were adopted in 1962 and 1964. This final form was published in 1965.

(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,
adopted by the American Law Institute in the early 1960's. Its basic premise is that the seller of a defective product which is unreasonably dangerous is liable for harm caused to the ultimate user or consumer. This express rejection of the negligence and contract warranty theories as the only bases of recovery was first applied by a California court in the seminal case of Greenman v. Yuba Power Products, Inc. The plaintiff, injured by a defective power tool, was allowed to recover for his injuries from the manufacturer. Recovery was permitted even though the plaintiff did not give notice of the breach of warranty within a reasonable time as was required by California law. The court, after a review of prior cases, held that:

the abandonment of the requirement of a contract . . . ,
the recognition that the liability is not assumed by agreement but imposed by law . . . , and the refusal to permit the manufacturer to define the scope of its own responsibility for defective products . . . make clear that the liability is not one governed by the law of contract warranties but by the law of strict liability in tort.

According to Justice Traynor, speaking for a unanimous California Supreme Court, a manufacturer is strictly liable in tort "when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being." The purpose of impos-
ing liability, as enunciated in Greenman, is to ensure that the costs of such injuries are borne by the manufacturers rather than by injured persons who are unable to protect themselves. Thus, under the holding in Greenman, a plaintiff was allowed to recover in strict liability if his injuries were caused by a defect in the product which made it unsafe for its intended use and that defect existed at the time the product left the control of the manufacturer.

In Cronin v. J.B.E. Olson Corp., the California Supreme Court elaborated on the intricacies of the expanding strict products liability cause of action. The Cronin court, in dis-

The Greenman case was followed by Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 361 P.2d 168, 37 Cal. Rptr. 896 (1964). Vandermark held that the manufacturer of the completed product cannot delegate its duty to have its product delivered to the ultimate consumer free from dangerous defects. Id. at 261, 361 P.2d at 171, 37 Cal. Rptr. at 899. Therefore, it cannot escape liability on the ground that the defect may have been caused by something one of its authorized dealers did or failed to do.


16. 59 Cal. 2d at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701.
17. Id. at 64, 377 P.2d at 901, 27 Cal. Rptr. at 701. Because Greenman discussed the plaintiff's lack of awareness of the defect, many subsequent decisions held that the plaintiff also had to be unaware of the defect for him to recover. The court in Luque v. McLean, 8 Cal. 3d 136, 501 P.2d 1163, 104 Cal. Rptr. 443 (1972), clarified its position on this point. Stating that its discussion in Greenman concerning the plaintiff's lack of awareness of the defect was only intended to show that the plaintiff need not prove the additional elements of a cause of action in contractual breach of warranty in order to state a cause of action in strict liability, the court in Luque held that lack of awareness was not a requirement under Greenman. The instruction stating this to be a requirement was, therefore, erroneous. Id. at 143-46, 501 P.2d at 1168-70, 104 Cal. Rptr. at 448-50.

18. 59 Cal. 2d at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701.
19. The product in Cronin was an aluminum hasp that was designed to secure bread trays in a delivery truck. The hasp, which had a metallurgical defect, broke during a collision, causing serious physical injuries to the driver of the truck. Plaintiff's expert testified that the broken hasp was porous and full of holes, voids, and cracks.
cussing the concept of "defect," went beyond the Section 402A formulation of strict products liability and rejected the requirement that the defect render the product "unreasonably dangerous" to the consumer. The court stated that the requirement that plaintiff prove not only that a defect existed, but also that such defective condition is unreasonably dangerous, "places upon him a significantly increased burden and represents a step backward in the area pioneered by this court." According to the court in Cronin, the manufacturer is adequately protected from being an insurer of its products by the necessity of proving that the product contains a defect in design or manufacture and that such defect was the proximate cause of the injuries.

The inability to formulate a precise definition of defect has continued to plague the courts because of the "inherent elasticity and resilience" of the concept. According to Dean Prosser, a defective product is one that "does not meet the reasonable expectations of the ordinary consumer as to its safety."

The flaws were in the metal itself and resulted in a lowered tolerance to force. *Id.* at 128, 501 P.2d at 1157, 104 Cal. Rptr. at 437.

20. 8 Cal. 3d at 133, 501 P.2d at 1162, 104 Cal. Rptr. at 442.

Comment (i) to section 402A of the *RESTATEMENT (SECOND) OF TORTS* (1965), defines the term unreasonably dangerous as "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."

The California Supreme Court has explicitly stated in its recent decision in *Barker v. Lull Engineering Co.* that the rejection of the "unreasonably dangerous" element in Cronin applies with equal force to design defects as well as to defects in manufacturing. 20 Cal. 3d at 417, 573 P.2d at 446, 143 Cal. Rptr. at 228.

21. 8 Cal. 3d at 133, 501 P.2d at 1162, 104 Cal. Rptr. at 442.

22. The court refused to make a distinction between defects in design and in manufacture for purposes of imposing liability.

We recognize that the words "unreasonably dangerous" may also serve the beneficial purpose of preventing the seller from being treated as the insurer of its products. However, we think that such protective end is attained by the necessity of proving that there was a defect in the manufacture or design of the product and such defect was a proximate cause of the injuries. Although the seller should not be responsible for all injuries involving the use of its products, it should be liable for all injuries proximately caused by any of its products which are judged "defective."

We can see no difficulty in applying the Greenman formulation to the full range of products liability situations, including those involving "design defects." A defect may emerge from the mind of the designer as well as from the hand of the workman. *Id.* at 133-34, 501 P.2d at 1162, 104 Cal. Rptr. at 442 (footnotes omitted).

23. *Id.*

24. See *id.* at 134 n.16, 501 P.2d at 1162 n.16, 104 Cal. Rptr. at 442 n.16.


The California Supreme Court recently noted that the concept of defectiveness defies a simple, uniform definition applicable to all sectors of the diverse product liability domain. Although in many instances—as when one machine in a million contains a cracked or broken part—the meaning of the term "defect" will require little or no elaboration, in other instances, as when a product is claimed to be defective because of an unsafe design or an inadequate warning, the contours of the defect concept may not be self-evident.27

Recognizing that the amorphous concept of design defect is particularly troublesome to apply in a given fact situation, the court set out to provide its own definition. In Barker v. Lull Engineering Co.,28 the court held that

a trial judge may properly instruct the jury that a product is defective in design (1) if the plaintiff demonstrates that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or (2) if the plaintiff proves that the product's design proximately caused his injury and the defendant fails to prove, in light of the relevant factors

proof that some part of an article broke during normal use does not in itself establish existence of a defect when the article left the defendant's control. The plaintiff must introduce evidence from which the jury could find that the article was more probably than not defective when leaving the defendant's control. This does not cause difficulty when the defect alleged is one in design but can be a problem when the allegation is a manufacturing defect. See McCurter v. Norton Co., 263 Cal. App. 2d 402, 69 Cal. Rptr. 493 (1968). Note too that a deviation from the industry norm is not necessarily the test of whether a defect exists. Jimenez v. Sears, Roebuck & Co., 4 Cal. 3d 379, 383, 482 P.2d 681, 684, 93 Cal. Rptr. 769, 772 (1971).

The deviation-from-the-norm test has been criticized as overinclusive and underinclusive, and because liability may be imposed as to products whose norm is dangerous. See Traynor, The Ways and Meanings of Defective Products and Strict Liability, 32 TENN. L. REV. 363, 372 (1965); Note, Products Liability-Strict Liability-Elimination of the "State of the Art" Defense, 41 TENN. L. REV. 357 (1974). In a recent attempt to define defect, a California appellate court in Korli v. Ford Motor Co., 69 Cal. App. 3d 115, 137 Cal. Rptr. 828 (1977), stated: The starting point for analyzing the concept of "defect" is whether the product is "... one which fails to match the quality of most like products, ..." and if so "... the manufacturer is then liable for injuries resulting from deviations from the norm: the lathe did not like other lathes have a proper fastening device, the brakes of the automobile went on unexpectedly, the drive shaft of a new car became disconnected."

Id. at 121, 137 Cal. Rptr. at 831 (citations omitted).


that on balance the benefits of the challenged design outweigh the risk of danger inherent in such design.\textsuperscript{29}

It is significant to note that the tests in \textit{Barker} are stated in the disjunctive. Accordingly, a plaintiff need fulfill only one of the alternatives in order to establish the defect element of his prima facie case.

The first test, which requires the plaintiff to show that the product failed to perform safely, is based on the expectations of the ordinary consumer as to the product's performance.\textsuperscript{30} This test incorporates the requirement that the plaintiff used the product "in an intended or reasonably foreseeable manner."\textsuperscript{31} The implication is that the defendant could refute the finding that his product is defective in design by establishing that the plaintiff \textit{misused} the product.\textsuperscript{32}

In order to meet the requirements of the second test in \textit{Barker}, the plaintiff need only demonstrate that his injuries were proximately caused by the product's design.\textsuperscript{33} The burden of proof then shifts to the defendant\textsuperscript{34} to prove that the benefits of the challenged design outweigh its inherent danger. Some of the factors that the jury may consider are

- the gravity of the danger posed by the challenged design,
- the likelihood that such danger would occur,
- the mechanical feasibility of a safer alternative design,
- the financial cost of an improved design,
- the adverse consequences to the product and to the consumer that would result from an alternative design.\textsuperscript{35}

In light of these factors, it will be difficult for the defendant to sustain his burden of proof in any given case. In effect, once the

\textsuperscript{29} Id. at 435, 573 P.2d at 457-58, 143 Cal. Rptr. at 239-40.
\textsuperscript{30} Id. at 418, 573 P.2d at 446, 143 Cal. Rptr. at 228.
\textsuperscript{31} Id.
\textsuperscript{32} See text accompanying notes 37-39 infra.
\textsuperscript{33} 20 Cal. 3d at 432, 573 P.2d at 456, 143 Cal. Rptr. at 238.
\textsuperscript{34} We conclude that once the plaintiff makes a prima facie showing that the injury was proximately caused by the product’s design, the burden should appropriately shift to the defendant to prove, in light of the relevant factors, that the product is not defective. Moreover, inasmuch as this conclusion flows from our determination that the fundamental public policies embraced in \textit{Greenman} dictate that a manufacturer who seeks to escape liability for an injury proximately caused by its product’s design on a risk-benefit theory should bear the burden of persuading the trier of fact that its product should not be judged defective, the defendant’s burden is one affecting the burden of proof, rather than simply the burden of producing evidence.
\textsuperscript{35} Id. at 431-32, 573 P.2d at 455, 143 Cal. Rptr. at 237.
plaintiff has shown the requisite causation, the defendant must prove that the product could not reasonably have been designed so as to prevent the plaintiff's injury in the particular fact situation.36

Once the plaintiff establishes that the product is defective, he must further prove that the defect was the proximate cause of his injuries. A defendant in a strict products liability action "is entitled to expect a normal use of his product, and is not liable when it is put to an abnormal one."37 In Greenman, the court held that it was "sufficient that the plaintiff proved that he was injured while using the [product] in a way it was intended to be used."38 Subsequent cases have extended the

36. The defendant's difficulty in establishing that the benefits of his product's design outweigh its inherent dangers are illustrated by the facts of Barker. The plaintiff was injured at a construction site while operating a piece of heavy construction equipment manufactured by the defendant. The defendant denied that the loader was defective in any respect and claimed that the accident resulted either from plaintiff's lack of skill or from his misuse of its product. The defendant contended that the plaintiff had misused the loader by operating it on steep terrain for which the product was unsuited. 20 Cal. 3d at 420, 573 P.2d at 447-48, 143 Cal. Rptr. at 229-30.

The jury returned a verdict for the defendant. On appeal, the decision was reversed on the basis that the trial judge gave an erroneous instruction to the jury to the effect that "strict liability for a defect in design is based on a finding that the product was unreasonably dangerous for its intended use." Id. at 417, 573 P.2d at 446, 143 Cal. Rptr. at 228. Such an instruction constituted reversible error, according to the California Supreme Court, because the "unreasonably dangerous" element of the definition of defect had been rejected in Cronin. See text accompanying notes 19-21 supra.

The court then proceeded to enunciate its new two-prong test for defect. Barker, though expressly rejecting the "unreasonably dangerous" concept as a part of the plaintiff's burden, incorporated that concept into the defendant's burden of proof. By requiring the defendant to establish that the benefits of the product's design outweigh its inherent risks, the defendant must, in effect, prove a negative (that is, that the design is not unreasonably dangerous).

Assuming that the plaintiff merely demonstrates that the design of the loader was the proximate cause of his injuries at retrial, the defendant will have to establish that the benefits of each alleged deficiency outweigh its risks of danger. According to the court, "a product may be found defective in design, even if it satisfies ordinary consumer expectations, if through hindsight the jury determines that the product's design 'embodies excessive preventable danger.'" 20 Cal. 3d at 430, 573 P.2d at 454, 143 Cal. Rptr. at 236.

After Barker, the plaintiff need only prove that the design of the product proximately cause his injury. The shifting of the burden of proof to the defendant to establish that his product was not defective eliminates the protection that was carefully retained in Cronin.

Thus, California's new formulation of defect may prove to have rendered the concept meaningless. Former Chief Justice Traynor's warning that the term "defect" will become a fiction "if it means nothing more than a condition causing physical injury" has gone unheeded. Traynor, The Ways and Meanings of Defective Products and Strict Liability, 32 Tenn. L. Rev. 363, 367 (1965).


concept of "use" to include the term *reasonably foreseeable* use as well as *normal* or *intended* use. Obviously, the extension of this element has greatly increased the scope of the manufacturer's liability. It is questionable, however, whether this extension of liability furthers the public policies underlying the strict products liability cause of action.

**THE POLICY CONSIDERATIONS**

The major policies underlying the imposition of strict products liability on manufacturers and sellers are safety incentive and risk distribution. Comment c of section 402A of the Restatement (Second) of Torts indicates that the cause of action is designed to implement a comprehensive marketing policy of protecting unwary consumers from defective products. The incentive theory, according to one commentator, imposes a highly stringent measure of strict tort liability upon the manufacturer, who is in the best position to discover defects. It assumes that judgments paid to injured plaintiffs will provide the incentive to manufacture safer products. Left unarticulated is the implied premise that all manufacturers can and should make safer products and that their failure to do so is a social or moral failing—in short, a return to a muted fault system of jurisprudence.


41. On whatever theory, the justification for strict products liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; that 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 goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products.


The risk allocation theory, however,
rests not on fault allocation but solely on the distribution of economic risk; regardless of their volitional control, manufacturers, distributors and retailers should, on policy grounds, pay the inevitable and statistically predictable costs of marketing products. This cost is socialized by being passed on to consumers via the price mechanism. 43

Thus, whether strict liability is characterized as a fault 44 or no-fault 45 cause of action, the essence of the underlying policies is consumer protection. 46 The traditional defenses to strict products liability, however, constitute a recognition that in some instances the underlying policy has been thwarted by the plaintiff’s own action or inaction. Therefore, recovery is not warranted.

THE TRADITIONAL DEFENSES BEFORE Daly

Although the term strict liability implies that a heavy burden is imposed on the defendant manufacturer, this liability is not absolute. Traditionally, courts have recognized two com-


46. It is interesting to note, however, that in some situations the policy of consumer protection precludes the imposition of strict liability. In McDonald v. Sacramento Medical Foundation Blood Bank, 62 Cal. App. 3d 873, 133 Cal. Rptr. 449 (1976), the court held that the vital need for the availability of blood to conduct modern surgical practices and the relatively minor risk of consequent hepatitis infection justified a statutory exception to the application of strict products liability. See id. at 873, 133 Cal. Rptr. at 448; Shepard v. Alexian Bros. Hosp., 33 Cal. App. 3d 606, 109 Cal. Rptr. 132 (1973). "[T]he imposition of strict liability for transfusion of contaminated blood would not achieve the policy goal of added incentive to safety." 33 Cal. App. 3d at 611-12, 109 Cal. Rptr. at 135 (emphasis in original). "The encouragement of an adequate blood supply, therefore, appears to outweigh a plaintiff's right to be compensated for damages incurred as a result of being administered contaminated blood." Id.

plete defenses to the strict products liability action: assumption of the risk and misuse of the product.47

Assumption of the Risk

As defined by the Restatement (Second) of Torts, assumption of the risk is the "form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger."48 Contributory negligence itself is not a defense to strict products liability, but commentators have noted that the two defenses have considerable overlap.49 The California courts have used the Restatement language in recent cases to distinguish between assumption of the risk and contributory negligence.

Ordinary contributory negligence does not bar recovery in a strict liability action. "The only form of plaintiff's negligence that is a defense to strict liability is that which con-

47. While the misuse concept is utilized as a defense and, in a practical sense, is a defense to strict products liability, it is also used to negate the plaintiff's prima facie case. The misuse concept has been used to show the lack of a defect in the product and has also been used to show the lack of proximate cause. See General Motors Corp. v. Hopkins, 548 S.W.2d 344, 349-50 (Tex. 1977). See generally Noel, Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk, 25 Vand. L. Rev. 93 (1972).

48. Restatement (Second) of Torts § 402A, Comment n (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 . . . 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 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.


49. "[T]he defense of assumption of risk and contributory negligence overlap, and are as intersecting circles, with a considerable area in common, where neither excludes the possibility of the other." W. Prosser, Handbook of the Law of Torts § 68, at 441 (4th ed. 1971).

Where they have been distinguished, the traditional basis has been that assumption of risk is a matter of knowledge of the danger and intelligent acquiescence in it, while contributory negligence is a matter of some fault or departure from the standard of conduct of the reasonable man, however unaware, unwilling, or even protesting the plaintiff may be.

Id.
sists in voluntarily and unreasonably proceeding to encounter a known danger. For such a defense to arise, the user or consumer must become aware of the defect and danger and still proceed unreasonably to make use of the product.  

There are two basic types of assumption of risk: express and implied. Express assumption of risk is based on a prior agreement between plaintiff and defendant whereby the defendant is relieved from liability for harm resulting from defendant's conduct or product. The plaintiff expressly consents to exculpate the defendant and assume responsibility for his own safety.

Implied assumption of risk is the form of the defense that most often arises in products liability actions. This defense, as explained by one commentator, is based on a plaintiff's state of mind of uncoerced willingness to encounter a fully appreciated risk—that is, a willingness, with full understanding of the risk to himself or his property, to remain or have his property remain within the area of risk. This is consent to risk, not consent to exculpation, and it is subjective in the sense that it is based on a plaintiff's state of mind rather than his objective manifestations.

In contrast to this subjective implied assumption of the risk, there is also an objective form. This form is based on the plaintiff's

objective manifestations of uncoerced willingness to encounter a fully appreciated risk, even though his uncommunicated state of mind may be one of lack of full appreciation of the risk or lack of willingness to encounter it.

---


53. Id. (footnotes omitted) (emphasis in original). Professor Keeton identifies five variant forms of implied assumption of risk: (1) subjectively consensual assumption of risk; (2) objectively consensual assumption of risk; (3) assumption of risk by consent to conduct or condition; (4) associational assumption of risk; and (5) imposed assumption of risk. Id. at 124-28.
Thus, one of these two forms of implied assumption or consent to risk exists if the plaintiff has, in fact, the state of mind to encounter willingly the risk or if his manifestations indicate that the requisite state of mind exists.

The value of these distinctions appears to be purely academic. Few courts ever ponder such amorphous theoretical distinctions in considering a proffered assumption of the risk defense. The plaintiff's subjective state of mind as to his knowledge of the risk must, of necessity, be determined by his objective manifestations. In fact, the practical application of the distinction takes its form in the degree of proof a court requires to prove the plaintiff's state of mind. This, in turn, depends upon the equities of the fact situation and the court's inclination as to which party should bear the cost of the plaintiff's injuries. This application of differing standards is illustrated by Brooks v. Dietz, a Kansas Supreme Court decision. The majority opinion and the dissent expressed conflicting views concerning the applicability of the assumption of risk defense. It is apparent that the majority was applying a subjective standard while the dissent was applying an objective standard.

In Brooks, plaintiff, an experienced plumber and furnace repairman, ordered a customer's family from their home when he discovered a gas leak in their basement. Plaintiff then returned to the basement without turning off the outside gas valve. Plaintiff was injured in the subsequent explosion and sued the manufacturer of the furnace in strict liability in tort. The majority allowed plaintiff to recover, dismissing the assumption of the risk defense by stating that

[Knowledge of the danger of doing a certain act without a full appreciation of the risk involved is not sufficient to preclude a plaintiff from recovery even though there may be added to the knowledge of the danger a comprehension of some risk.]

54. Id. at 127 (emphasis added).
55. Id. at 138 n.42. See also W. Prosser, Handbook of the Law of Torts § 68, at 448 (4th ed. 1971).
57. Id. at 699, 545 P.2d at 1106.
Thus, the majority in *Brooks* applied the subjective form of the defense by requiring the defendant to prove that the plaintiff fully appreciated the danger that caused his injuries. This requirement of actual subjective realization of the risk is the view adopted by most courts.

The dissent in *Brooks*, however, proposed an objective standard. The dissent's view would allow the defendant to avoid liability under the assumption of risk defense if there existed sufficient evidence from which it could be inferred that the plaintiff knew of the risk. Crucial to the dissent's argument was plaintiff's twenty-five years as a plumber and his twelve years of experience with gas furnaces. This superior knowledge and skill, it was argued, should raise the standard of care required of plaintiff and impute the knowledge of the risk of an explosion to him.

The prevailing subjective view of the implied assumption of the risk defense to strict liability requires the concurrence of two essential elements in any given fact situation. The plaintiff must be aware of and understand the extent of the risk he is assuming and must voluntarily choose to incur that risk. Voluntary subjective assumption of the risk is a "willingness or consent by the plaintiff to use a product he actually knows is defective and dangerous."

**The Policy Considerations**

Although the subjective form of the assumption of the risk defense to strict products liability is the majority view of the courts, several commentators have noted dissatisfaction with

---


61. 218 Kan. at 710-12, 545 P.2d at 1114-15 (Miller, J., dissenting).


The role of assumption of risk in products liability cases is properly a limited one. It applies only to actions of the consumer that shift the blame from the manufacturer to him. Thus, courts require the plaintiff to show he made "normal use" of the product. Moreover, if the plaintiff understands the risk in a product . . . the harm thereafter incurred would seem to be self-inflicted, and the plaintiff would then be barred from recovery.


63. Noel, *Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk*, 25 Vand. L. Rev. 93, 106 (1972). "When the acceptance of the possibility of danger is unreasonable, voluntary assumption of risk also constitutes one kind of contributory negligence." *Id.*
the consequences of this view. The cause of action itself is based not on the theory of fault, but on the public policies of risk distribution and safety incentive. Thus, the subjective knowledge element of the assumption of risk defense is implemented to allow the plaintiff to recover in those cases in which the courts are "primarily concerned with the need to protect the plaintiff against his own choice." The stringent requirements for the knowledge and voluntariness elements severely limit the success of the defense in strict liability actions.

Since in the ordinary case there is no conclusive evidence against the plaintiff on these issues, they normally go to the jury; and since juries are notoriously unfavorable to the defense, the percentage of cases in which the plaintiff has actually been barred from recovery by his assumption of the risk is quite small... It is evident that a purely subjective standard opens a very wide door for the plaintiff who is willing to testify that he did not know or understand the risk.

Besides protecting plaintiffs from their unwise choices of conduct, courts are also zealous to protect plaintiffs from denial of recovery in cases where no reasonable alternative choice of action was available. This element of the assumption of risk defense, a voluntary encountering of the risk, is illustrated by Buccery v. General Motors Corp. In Buccery, the plaintiff's vehicle was found to be defective because it was not equipped with head restraints. The assumption of the risk defense was not established as a matter of law even though plaintiff was subjectively aware that head restraints were absent, and he understood the risk of injury in the event of a collision. The


68. See generally Green, Strict Liability Under Sections 402A and 402B: A Decade of Litigation, 54 Tex. L. REV. 1185, 1215-16 (1976).


70. Id. at 547, 132 Cal. Rptr. at 614.

71. Id. at 550, 132 Cal. Rptr. at 616.
court held that the defense did not apply as a matter of law because a jury could reasonably have found that the plaintiff did not fully understand the magnitude of the risk. The plaintiff was forced to choose between using the vehicle or finding alternate transportation. His continued use of the vehicle was not deemed an unreasonable choice and he was therefore allowed to recover for his injuries.

In Buccery, even though the plaintiff was subjectively aware of the risk, the court allowed recovery because his choice to encounter the risk was not voluntary. Thus, Buccery demonstrates that the two elements of the assumption of risk defense, knowledge and voluntariness, do not remain static in definition or even distinct from each other. Rather, their individual meaning and their relation to each other vary with the facts and the policies involved. To achieve the desired result the court need only "describe the risk in a particularized form. It could then be rationalized that plaintiff was encountering a risk different from that which actually caused the harm." 

**Misuse of the Product**

Misuse, the second pre-Daly defense to strict products liability, is based on the theory that a "seller is entitled to expect a normal use of his product, and is not liable when it is put to an abnormal one." Comment h of section 402A of the Re-
statement (Second) of Torts states that

a product is not in a defective condition when it is safe for
normal handling and consumption . . . Where, however,
he has reason to anticipate that danger may result from a
particular use . . . he may be required to give adequate
warning.\textsuperscript{76}

Underlying this defense is the realization that the risk dis-
tribution rationale of strict liability does not reach the
"adventurous consumer [who] has voluntarily placed himself
in a category distinct from the normal consumer who foregoes
the pleasure and convenience of using products in novel but
dangerous ways."\textsuperscript{77} Thus, strict liability does not mean that the
defendant is to be a general insurer for the plaintiff regardless
of the manner in which he was injured. Although courts recog-
nize that the doctrine must have limits, "their efforts at an-
swering the questions posed in strict liability cases seem in
many cases to degenerate into either meaningless semantic dis-
putes or attempts at balancing the costs of the accident against
the costs of avoiding it."\textsuperscript{78}

Much of the confusion seems to stem from commentators’
and courts’ use of the term misuse as synonymous with
abnormal use. For example, one author of an article on misuse
stated: "A manufacturer is generally not liable for an injury
caused by plaintiff’s abnormal use of its product. A primary
point of inquiry concerns the elements of abnormal use that
will bar a misuser’s recovery."\textsuperscript{79} Courts commonly require the
plaintiff’s use to be unforeseeable to the defendant in order to
relieve him of liability.\textsuperscript{80} This foreseeability element severely
restricts the availability of the defense. A California court, in
Self v. General Motors Corp.,\textsuperscript{81} even required a manufacturer
reasonably foreseeable). Thus, the concept of misuse is inherent in proximate causa-
tion and is not abolished by the second test of Barker.

\textsuperscript{76} Restatement (Second) of Torts § 402A, Comment h (1965). "If a consumer
employs a product in some extraordinary manner, and encounters a known danger in
the course of his conduct, the doctrine of product misuse will bar recovery from the
manufacturer." Holford, The Limits of Strict Liability for Product Design and
Manufacture, 52 Tex. L. Rev. 81, 89 (1973).

\textsuperscript{77} Holford, supra note 76, at 89.

\textsuperscript{78} Calabresi & Hirschoff, Toward a Test for Strict Liability in Torts, 81 Yale

\textsuperscript{79} Comment, Misuse as a Bar to Bystander Recovery Under Strict Products

\textsuperscript{80} Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 126, 501 P.2d 1153, 1157, 104
Cal. Rptr. 433, 437 (1972).

\textsuperscript{81} 42 Cal. App. 3d 1, 116 Cal. Rptr. 575 (1974).
to "foresee some degree of misuse and abuse of his product, either by the user or by third parties, and to take reasonable precautions to minimize the harm that may result from misuse and abuse."

There are at least four ways in which a consumer can misuse a product: (1) use in a manner that disregards clear warnings of danger; (2) use in contravention of a manufacturer's written instruction; (3) use in a manner neither intended nor actually foreseen; (4) use in a manner neither intended nor reasonably foreseen. The first two types, uses that disregard warnings and instructions, have considerable overlap with the assumption of risk defense. In these situations the plaintiff voluntarily and knowingly acts or omits to act contrary to the manufacturer's instructions as to the proper use of the product.

The third formulation of the defense, a use neither intended nor actually foreseen, does not represent the usual court interpretation of the defense. This definition would apply a subjective test to the defendant's foreseeability of such use. A subjective test, that is, a defendant must actually foresee the use to which the plaintiff put the product, would impose an extremely onerous burden of proof on the plaintiff. However, it is interesting to note that utilization of this test would place the same burden on the plaintiff as that imposed on the defendant in proving the assumption of the risk defense. That is, defendant must prove plaintiff's actual subjective knowledge of the risk.

The fourth formulation of the misuse defense, a use neither intended nor reasonably foreseen, is the type which courts generally recognize will bar plaintiff's recovery in a strict products liability cause of action. The requirement that the defendant not objectively foresee the improper use of his product is a carry-over from the negligence theory of liability. A manufa-

82. Id. at 7, 116 Cal. Rptr. at 579.
84. The subjective standard of actual foreseeability was formerly applied in products liability cases predicated upon negligence. Under this test, a child who drank poisonous shoe cleaner was denied recovery because shoe cleaner is for shoes and not for internal consumption. Boyd v. Frenchee Chem. Corp., 37 F. Supp. 306, 311 (E.D.N.Y. 1941).
turer will be held strictly liable for plaintiff's injuries if such improper use of the product was reasonably foreseeable even if he did not, in fact, actually foresee such use.  

_Daly v. General Motors Corporation—The Application of Comparative Fault to Strict Products Liability_

The limitations that the traditional defenses imposed upon the courts in their examination of plaintiff's conduct in strict products liability cases have been severely criticized. Taking heed of this criticism, the California Supreme Court reshaped this entire area of the law by incorporating comparative fault concepts in strict products liability.

_The Effect of Daly on the Traditional Defenses_

Writing for the majority in _Daly_, Justice Richardson stated that by adopting comparative negligence principles "a more just result [will] follow." The basis for the dissatisfaction of the California Supreme Court with the traditional formulation of the strict products liability cause of action is well illustrated by the facts of _Daly_.

Plaintiffs, a widow and three minor children of the decedent, brought an action in strict products liability against General Motors Corporation for damages caused by defendant's allegedly defective product. The decedent, Kirk Daly, was killed in a one-car accident on October 31, 1970. The decedent was driving southbound on the Harbor Freeway in Los Angeles at a speed of fifty to seventy miles per hour when his vehicle collided with the metal divider fence. After the initial impact

---

88. 20 Cal. 3d 725, 575 P.2d 1162, 1169, 144 Cal. Rptr. at 387.
89. Id. at 737, 575 P.2d at 1169, 144 Cal. Rptr. at 387.
90. Also sued in this action were Boulevard Buick, Underwriter's Auto Leasing, and Alco Leasing Company, the successive links in the vehicle's manufacturing and distribution chain.
91. It should be noted that, as in the _Horn_ case, there was no allegation that the defendants were responsible for the initial collision with the divider fence. These cases involved only liability for the "so-called second collision in which the 'defect' did not contribute to the original impact, but only to the enhancement of injury." Id. at 730-31, 575 P.2d at 1164, 144 Cal. Rptr. at 382.
the car spun counterclockwise, the door flew open, and the
decedent sustained fatal head injuries. The alleged defect was
an "improperly designed door latch claimed to have been acti-
vated by the impact." 92

It was undisputed that if the decedent had remained in the
vehicle he would not have been killed. 93 Plaintiffs' witness testi-
fied that the decedent's door opened when the "latch button
of the exterior handle of the driver's door was forcibly de-
pressed by some protruding portion of the divider fence." 94 It
was argued that the exposed push button constituted a defect
in design. 95 Defendants' experts testified that the force of the
impact with the divider fence was sufficient to cause the door
to open even if it had been equipped with door latches of an
alternative design. 96

The trial court permitted the defendants to introduce evi-
dence demonstrating that the decedent did not have his door
locked at the time of the accident. The seatbelt-shoulder har-
ness system was also not in use. 97 Furthermore, evidence was
admitted which indicated that the decedent was intoxicated at
the time of the collision. 98 The jury returned a verdict for the
defendants, and the plaintiffs appealed on the ground that the
"intoxication-nonuse" evidence was improperly admitted. The
California Supreme Court, applying traditional concepts, held
that the admission of that evidence in a strict products liability
action constituted reversible error because the conduct of the
decedent did not constitute either assumption of risk or misuse
of the product. 99

92. 20 Cal. 3d at 730, 575 P.2d at 1164, 144 Cal. Rptr. at 382.
93. Id.
94. Id. at 731, 575 P.2d at 1165, 144 Cal. Rptr. at 383.
95. Id.
96. The plaintiffs introduced evidence that "other vehicular door latch designs
used in production models of the same and prior years afforded substantially greater
protection." Id. at 731, 575 P.2d at 1165, 144 Cal. Rptr. at 383.
97. The 1970 Opel owner's manual contained warnings that seat belts should be
worn and doors locked when the car was in motion for "accident security." Id.
98. The evidence of Daly's intoxication was admitted for the limited purpose of
determining whether decedent had used the vehicle's safety equipment. Id.
99. Id. at 744-46, 575 P.2d at 1173-74, 144 Cal. Rptr. at 391-92. The trial court
admitted the intoxication evidence because it related to decedent's failure to use the
safety devices. Such nonuse, the trial court reasoned, would bar recovery on the theory
of product misuse. Id. at 745, 575 P.2d at 1174, 144 Cal. Rptr. at 392.
The court in Daly, however, did not limit itself to the specific question of whether evidence of the decedent's conduct was admissible as being relevant to the defenses of assumption of risk or misuse of the product. The court further examined the entire area of decedent's conduct in relationship to traditional strict products liability and found the traditional concepts to be inequitable.\(^\text{100}\)

The court's observation that traditional concepts of strict products liability produce inequitable results is well-founded. The cases that structured the evolution of the strict products liability cause of action demonstrate that in shaping the dimensions of the doctrine the California courts lost sight of the original purpose for its adoption. As enunciated in Greenman, and cited with approval in Daly, that underlying purpose was to "insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves."\(^\text{101}\)

The California Supreme Court in Daly recognized that injured persons who recover under strict products liability are not always defenseless consumers. Accordingly, it enlarged the area in which an examination of plaintiff's conduct is allowed to include any negligence under the comparative negligence principles\(^\text{102}\) enunciated in Li v. Yellow Cab Co.\(^\text{103}\) Plaintiff's conduct may now be examined for the purpose of reducing the amount recoverable as damages based upon the comparative fault of the parties.\(^\text{104}\) Furthermore, the court in Daly reshaped strict products liability by limiting the extent to which plaintiff's conduct will totally bar recovery. Assumption of risk, to the extent that it is a form of contributory negligence, was abolished by Daly.\(^\text{105}\) Additionally, Daly contains an implication that the misuse defense is likewise abolished.\(^\text{106}\)

The practical effects of these abolitions, however, differ. The vast majority of the strict products liability cases that have barred plaintiff's recovery based on assumption of risk

\(^{100}\) Id. at 731-42, 575 P.2d at 1165-72, 144 Cal. Rptr. at 383-90.


\(^{102}\) 20 Cal. 3d at 742, 747, 575 P.2d at 1172, 1175, 144 Cal. Rptr. at 390, 393.

\(^{103}\) 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

\(^{104}\) Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978).

\(^{105}\) See id. at 742, 575 P.2d at 1172, 144 Cal. Rptr. at 390.

\(^{106}\) Id. at 745, 575 P.2d at 1174, 144 Cal. Rptr. at 392.
have involved the type of assumption of risk that is merely a form of contributory negligence. Therefore, assumption of risk as a defense will be directly and significantly affected by Daly. Other forms of assumption of risk rarely occur. Misuse of the product, on the other hand, should not be as drastically affected. While assumption of risk arises from, and directly concerns, facts separate and apart from the plaintiff's prima facie case and is, in this sense, a true affirmative defense, the concept of misuse is interwoven into the very fabric of the plaintiff's case. The misuse concept has been used to negate the existence of a defect and causation.\footnote{General Motors Corp. v. Hopkins, 548 S.W.2d 344, 350 (Tex. 1977).} Because defect and causation are still required to be proven by the plaintiff, misuse, to this extent, should remain a viable concept.\footnote{The Daly court cited General Motors Corp. v. Hopkins, 548 S.W.2d 344 (Tex. 1977), as extending comparative fault to the misuse concept. 20 Cal. 3d at 740, 575 P.2d at 1171, 144 Cal. Rptr. at 389. The court in Hopkins, however, did not broadly apply comparative fault to misuse. Recognizing the origins and nature of the misuse defense, the court in Hopkins limited the application of comparative fault to situations in which the misuse of the product is a concurring cause of the injury and then only if plaintiff personally misused the product. 548 S.W.2d at 351.} Analysis would focus on causation and recovery would be reduced based upon the parties' relative responsibility for the cause of the injury. The application of comparative fault to misuse should not go beyond these bounds.

Thus, Daly, in applying comparative fault to strict products liability, will drastically affect the defense of assumption of risk but should less significantly affect the misuse concept. Whether the court's solution—the application of comparative fault—is the most appropriate means to remedy the problems perceived by the court remains to be seen.

\textit{Public Policy Considerations and Daly}

The key elements of the strict products liability cause of action are the existence of a defective product and an injured consumer who is unable to protect himself from the defective product.\footnote{See discussion of the Greenman case in text accompanying notes 11-18 supra.} The problem sensed by the court in Daly is that the concept of defect has evolved to mean almost anything that causes a plaintiff's injury.\footnote{The court in Daly also held that in determining whether a product is defective, the jury can take into consideration provided safety features. The product thus must be evaluated as a whole, not just the allegedly defective component. "The jury could properly determine whether the [vehicle's] overall design, including safety}
ted to recover for their injuries regardless of their ability to protect themselves.

The court, however, misconstrued the issue presented by the facts of *Daly* when it stated:

Because plaintiffs' case rests upon strict products liability based on improper design of the door latch and because defendants assert a failure in decedent's conduct, namely, his alleged intoxication and nonuse of safety equipment, without which the accident and ensuing death would not have occurred, *there is thereby posed the overriding issue in the case, should comparative principles apply in strict products liability actions?*

The question presented was not the expediency of the application of comparative negligence principles. Rather, the issue was whether strict products liability could be restructured so as to protect consumers from defective products without subjecting manufacturers to unwarranted liability. By injecting negligence principles into a theory that was designed to disregard negligence, the court unnecessarily eliminated essential protection for plaintiffs injured by defective products. The dissent noted this result, commenting that

> every defendant charged with marketing a defective product will hereafter assert that the injured plaintiff did something, anything, that conceivably could be deemed contributorily negligent . . . . I need no crystal ball to foresee that the pleading of affirmative defenses alleging contributory negligence . . . will now become boilerplate.

The public policies of promoting safe product design and equitably distributing risks will not be furthered by the application of comparative negligence principles. Mere contributory negligence on the part of the injured party should not defeat or even diminish a plaintiff's recovery in an action brought in strict products liability. By the same token, conduct of the plaintiff that causes the injury must not, in all instances, be labeled mere contributory negligence. The interests of society
and the public policies underlying the traditional strict products liability cause of action are not furthered by making manufacturers absolute insurers of their products.

The California Supreme Court in *Daly* was grappling with the unsatisfactory results obtained by the present formulation of the strict products liability cause of action. The court recognized that users of products must, consistent with the basic public policy of equitably allocating loss, accept some responsibility for their own actions which cause their injuries.\(^{114}\) That recognition is evidenced by the court's adoption of comparative negligence principles to limit the plaintiff's recovery. But the attempt to homogenize strict products liability principles and the principles of comparative negligence will necessarily result in an unworkable system.\(^{115}\) Justice Mosk's dissent described the *Daly* decision as

the dark day when this court, which heroically took the lead in originating the doctrine of products liability . . . and steadfastly resisted efforts to inject concepts of negligence into the newly designed tort, . . . inexplicably turned 180 degrees and beat a hasty retreat almost back to square one. The pure concept of products liability so pridefully fashioned and nurtured by this court for the past decade and a half is reduced to a shambles.\(^{116}\)

The basis of Justice Mosk's strong criticism of the majority decision is that strict products liability is based on the philosophy that it is irrelevant if the manufacturer is at fault\(^{117}\) in marketing a defective product. According to the traditional theory, if the plaintiff's injury was caused by a defective product the plaintiff may recover from the defendant manufacturer even in the absence of negligence on the part of the defendant. Under the court's holding in *Daly*, a jury must now apportion plaintiff's recovery based on plaintiff's fault and defendant's defective product.\(^{118}\) As Justice Mosk commented, "I know of

---

\(^{114}\) *Id.* at 737, 575 P.2d at 1169, 144 Cal. Rptr. at 387.


\(^{116}\) *Id.* at 757, 575 P.2d at 1181, 144 Cal. Rptr. at 399 (Mosk, J., dissenting).


no other instance in American jurisprudence in which the antagonists are the conduct of a human being versus an inanimate object.” It is difficult to conceive of how a jury, faced with the task of comparing negligent conduct to conduct in which negligence is irrelevant, will ever achieve equitable results. Comparative negligence will not achieve the Daly court’s goal of more equitable results. Jury verdicts will be haphazard, unpredictable, and will of necessity bear little relationship to an equitable apportionment of damages.

The court’s goal is, nevertheless, a legitimate one. The appropriate means to achieve that end, however, is to reform the cause of action rather than to discard it in favor of an unworkable hybrid of fault and no-fault theories. The court’s goal could be realized by redefining the traditional defenses to strict products liability. Rather than adopting comparative fault the court could have found that the decedent’s conduct in Daly constituted either assumption of risk or misuse of the product.

It is recognized that courts decry the harshness of the total bar to recovery occasioned by the application of the assumption of risk and misuse defenses. A review of the development

\[\text{119. 20 Cal. 3d at 762, 575 P.2d at 1185, 144 Cal. Rptr. at 403 (Mosk, J., dissenting).}\\]
\[\text{120. Levine, supra note 118, at 356.}\\]
\[\text{In Safeway Stores, Inc. v. Nest-Kart, 21 Cal. 3d 322, 334-35, 579 P.2d 441, 448, 146 Cal. Rptr. 550, 557 (1978), decided after Daly, Justice Clark in his concurring opinion noted that this case demonstrates the arbitrariness and wastefulness of the comparative fault system. . . . Plaintiff was injured when a shopping cart broke and fell on her foot. Nest-Kart manufactured the defective cart, Safeway maintained and inspected it. While the jury determined Safeway was 80 percent at fault, it could just as well have concluded the manufacturer was 80 percent at fault. Such division is clearly arbitrary because it is standardless. Blind inquiry into relative fault is no better than the flip of a coin, and disputes over degree of fault must greatly increase the time and cost of litigation. . . . It is now clear we have bred a horse which can be neither saddled nor raced. Rather, he runs wild awarding at whim.}\\]
\[\text{121. The court in Daly expressed dissatisfaction with assumption of risk as a complete defense to strict products liability. The court stated:}\\]
\[\text{[W]e must observe that, under the present law, which recognizes assumption of risk as a complete defense to products liability, the curious and cynical message is that it profits the manufacturer to make his product so defective that in the event of injury he can argue that the user had to be aware of its patent defects. To that extent the incentives are inverted.}\\]
\[\text{20 Cal. 3d at 738, 575 P.2d at 1169, 144 Cal. Rptr. at 387.}\\]
	his comment misstates the current state of the law. In the 1972 case of Luque v. McLean, 8 Cal. 3d 136, 501 P.2d. 1163, 104 Cal. Rptr. 443 (1972), the California Supreme Court expressly rejected the latent-patent distinction. In Luque, the plaintiff’s hand was mangled in the unguarded hole of a power lawnmower. Even though he was aware that the lawnmower blade did not have a guard, such knowledge did not
of products liability demonstrates the increasing reluctance of courts to deny recovery to injured plaintiffs on those bases. Courts must be cognizant, however, that imposition of excessive liability on manufacturers will not promote product safety and may, in fact, conflict with the public interest.122 As one commentator notes:

Manufacturers will pass the costs of liability or of designing safer [products] on to consumers in the form of higher . . . prices. These higher prices are justified only to the extent that they reflect design modifications reasonably necessary to promote safety. . . . [E]xcessive manufacturer liability increases prices for consumers without improving [product] design and substitutes an indirect insurance system of higher prices for improved liability insurance coverage.123

Thus, in some cases, imposing liability on the manufacturer is not in the public interest.124 Certain types of injuries are better
PRODUCTS LIABILITY DEFENSES

prevented by modifying the behavior of the consumer. In these instances, imposing liability on the manufacturer is unwarranted because the public policies of strict products liability are not furthered.

EXPANSION OF THE TRADITIONAL DEFENSES TO STRICT PRODUCTS LIABILITY

Expansion of the traditional defenses to strict products liability can better serve the public policies underlying the cause of action. Limited expansion would allow the courts to solve the specific deficiencies of strict products liability while avoiding the repercussions of the broader, more general approach of comparative fault. The case of Horn v. General Motors Corp. can be used to further illustrate the basis for, and the scope of, the proposed expansion.

Horn v. General Motors Corp.

Lillian Horn swerved her 1965 Chevrolet station wagon to avoid a head-on collision and struck a concrete-reinforced abutment. As she steered to the right, her left hand displaced the horn cap in the middle of the steering wheel. Upon impact, her face struck three prongs that had held the horn cap in place. As a result, Ms. Horn sustained a chin laceration, a fracture of her jaw and left ear canal, and the loss of two teeth. Ms. Horn subsequently brought suit against General Motors in strict liability in tort, claiming that her injuries were aggravated because of the defective horn cap. The evidence demonstrated that the cap was insecurely fastened by three sharp prongs. Consequently, the driver was exposed to the possibility of contact with the prongs during a collision. The jury found that this fastening mechanism constituted a

126. 17 Cal. 3d 359, 551 P.2d 398, 131 Cal. Rptr. 78 (1976).
127. The plaintiff was driving down Laurel Canyon Boulevard, a curving Los Angeles street. A car swung into her lane, its headlights temporarily blinding her. She swerved the vehicle to the right, bounced off the right curb across the street to the left, and into a concrete reinforced abutment.
128. Fletcher Chevrolet, Inc., the dealer from whom the plaintiff had purchased her automobile, was also named as a defendant. The jury in the trial court returned a verdict against both defendants for damages in the amount of $45,000.
129. It was conceded by the plaintiff that neither defendant caused the accident itself. 17 Cal. 3d at 365, 551 P.2d at 400, 131 Cal. Rptr. at 80 (1976).
defect in design or manufacture.\textsuperscript{130} As in \textit{Daly}, the defendants in \textit{Horn} urged that the plaintiff's failure to use the seat belts provided by the manufacturer constituted assumption of the risk and, therefore, barred her from recovery.\textsuperscript{131} General Motors argued that "plaintiff consciously chose not to use her seat belt with the knowledge that such conduct would increase the risk of injury in the event of a collision, since she would probably be thrown about the interior of the car."\textsuperscript{132} The California Supreme Court rejected this contention on the ground that in order for plaintiff's negligence to constitute assumption of risk and thereby a defense to strict products liability, she must have voluntarily and unreasonably proceeded to encounter a known danger.\textsuperscript{133} Because there was no evidence that plaintiff was aware of the specific danger in question—that the horn cap was removable and would expose sharp prongs—she did not assume the risk.\textsuperscript{134} Ms. Horn's failure to use her seat belt, according to the court, "at best indicated some negligence of a general nature...."\textsuperscript{135}

General Motors further argued that the nonuse of the seat belts constituted misuse of the automobile.\textsuperscript{136} Under the traditional formulation of the misuse defense, if a product is put to a use that is not reasonably foreseeable, strict liability will not be imposed.\textsuperscript{137} The Supreme Court of California summarily dismissed this argument in \textit{Horn} on the ground that the "driving

\textsuperscript{130.} Defendants' expert admitted on cross-examination that the horn cap could have been affixed by screws, thereby eliminating both the prongs and preventing the displacement of the cap. \textit{Id.} at 367, 551 P.2d at 401-02, 131 Cal. Rptr. at 81-82.
\textsuperscript{131.} \textit{Id.} at 369, 551 P.2d at 403, 131 Cal. Rptr. at 83.
\textsuperscript{132.} \textit{Id.}
\textsuperscript{133.} The defendants' argument was that the known danger was impact with the interior of the car during a collision and that it is irrelevant that the plaintiff was not aware of the exact point of impact. \textit{Id.} at 369-70, 551 P.2d at 403, 131 Cal. Rptr. at 83. \textit{See also} Barth v. B.F. Goodrich Tire Co., 265 Cal. App. 2d 228, 243, 71 Cal. Rptr. 306, 314 (1968).
\textsuperscript{134.} 17 Cal. 3d at 370, 551 P.2d at 403, 131 Cal. Rptr. at 83.
\textsuperscript{135.} \textit{Id.} The court formulated the definition of "danger" very narrowly. In order to prevail on the assumption of risk defense, the defendant had to prove that the plaintiff was actually aware that the horn cap was easily removable, that three sharp prongs would be exposed, and that failure to use seat belts would place her in danger of impact on the prongs. \textit{Id.}
\textsuperscript{136.} \textit{Id.}
\textsuperscript{137.} \textit{Cronin v. J.B.E. Olson Corp.}, 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972). This case held that even though a collision is not the normal or intended use of an automobile, manufacturers must take accidents into consideration as reasonably foreseeable occurrences. \textit{See also} Passwaters v. General Motors Corp., 454 F.2d 1270, 1276 (8th Cir. 1972); Johnson v. Standard Brands Paint Co., 274 Cal. App. 2d 331, 79 Cal. Rptr. 194 (1969).
of an automobile without using a seat belt is an entirely foreseeable use of the vehicle."

Assumption of Risk in Horn

Under the traditional formulation of the assumption of risk defense, as evolved by the courts, the plaintiff must voluntarily encounter a specific known risk. The knowledge element is met only by a showing that the plaintiff knew of the specific danger, the degree of risk, and the manner in which the injury would be caused. The traditional formula places a substantial burden of proof on the defendant manufacturer, and the underlying public policies of strict products liability—safety incentive and risk distribution—are not always promoted by such a strict standard. This result is illustrated by the *Horn* case.

The plaintiff in *Horn* made no claim that General Motors was responsible for the collision itself. In fact, the vehicle performed properly in allowing the driver to swerve and successfully avoid a head-on collision with another automobile. The causation of the injuries themselves merits comment. As the plaintiff steered to the right to avoid the oncoming car, she dislodged the horn cap with her left hand while she used her right hand to hold her son on the front seat. Arguably, if the seat belts had been in use they would not only have prevented the plaintiff's face from hitting the horn cap, they would also have prevented the collision with the concrete abutment, because both of her hands would have been free to control the vehicle. Such nonuse of the safety devices was alleged by the defendants to constitute assumption of risk.

---

138. 17 Cal. 3d at 371, 551 P.2d at 404, 131 Cal. Rptr. at 84. The appellate court had held that the trial court's ruling disallowing evidence of plaintiff's failure to use seat belts to go to the jury was prejudicial error.

Conceding that the horn cap was defectively attached, as respondent asserts, it appears to us that whether respondent's omission to use the seat belt was the sole proximate cause of the injuries suffered in the accident, or her failure to use a seat belt equated with an assumption of risk . . . were questions of fact, either of which, if proved, would be a complete defense against respondent's claim. *Horn v. General Motors Corp.*, 110 Cal. Rptr. 410, 415-16 (1973), rev'd, 17 Cal. 3d 359, 551 P.2d 398, 131 Cal. Rptr. 78 (1976).

Defendants also urged that the seat belt evidence was admissible to demonstrate that the failure of the plaintiff to use her seat belt was itself the proximate cause of her injuries. This argument was also rejected by the court as another formulation of the inadmissible defense of contributory negligence. 17 Cal. 3d at 370, 551 P.2d at 403, 131 Cal. Rptr., at 84.

139. *Id.* at 370, 551 P.2d at 403, 131 Cal. Rptr. at 83.
The voluntariness element of the assumption of risk defense appears to have been satisfied in Horn. According to one commentator, "plaintiff should not be absolved from his choice unless the duress situation he faces is extreme." In Horn, no duress existed. The plaintiff was not forced to relinquish use of her automobile in order to avoid the danger. Use of the seatbelts would have been, at most, a slight inconvenience. The use of the seatbelts did not constitute an unreasonable demand on the plaintiff to take responsibility for her own safety.

Automobile manufacturers are required by law to install seatbelts because of their proven ability to reduce or eliminate injury to occupants of vehicles involved in collisions. These safety devices restrain passengers from striking surfaces on the vehicle's interior and from being ejected from the vehicle. It is clear that Ms. Horn was contributorily negligent in failing to use her seatbelt. The court held that this contributory negligence, however, did not contain the knowledge element necessary to constitute assumption of risk. Even though she was aware that the vehicle was equipped with seatbelts and that such safety devices would restrain her and her passengers from being thrown about the interior of the car in the event of a collision, this knowledge was not deemed specific enough. Due to the fact that the plaintiff was unaware that the horn cap was defectively designed, she was permitted to recover for her injury.

The court in Horn, although willing to consider accidents reasonably foreseeable for automobile manufacturers, was unwilling to so hold for the plaintiff whose conduct may have been the cause-in-fact of the accident. The court's reasoning indicates that users of vehicles are being protected in a "vacuum," and are not required to be cognizant of the

---

144. Horn v. General Motors Corp., 17 Cal. 3d 359, 369, 551 P.2d 398, 403, 131 Cal. Rptr. 78, 83 (1976). The trial court ruled such evidence inadmissible on the ground that plaintiff's contributory negligence was not an issue because contributory negligence is not a defense to strict liability. Id. See also Luque v. McLean, 8 Cal. 3d 136, 501 P.2d 1163, 104 Cal. Rptr. 443 (1972).
145. 17 Cal. 3d at 370-71, 551 P.2d at 403, 131 Cal. Rptr. at 83.
146. Id.
"reality" of automobile collisions and preventive safety devices.\textsuperscript{147}

Revision of the Knowledge Element of the Assumption of Risk Defense—A Limited Exception

The \textit{Horn} and \textit{Daly} cases illustrate a fundamental deficiency in the knowledge element of the traditional assumption of risk defense to strict products liability. The court's insistence on subjective knowledge of a specific danger in the fact of an objective awareness of the general danger encountered by the plaintiffs resulted in an unjustified recovery. A limited exception to this strict formulation of the knowledge element in cases in which safety devices were not utilized by injured plaintiffs would better promote public safety. When a plaintiff's injuries would have been prevented by use of available safety devices, recovery should be denied on the basis of assumption of risk. A vehicle user's general awareness that such safety devices will prevent forcible ejection or contact with the interior should be held sufficient to satisfy the knowledge element of the assumption of risk defense.

The proven ability of seatbelts to save the lives of thousands of persons involved in collisions has resulted in the additional requirements of head restraints\textsuperscript{148} and shoulder harnesses.\textsuperscript{149} This public policy of saving lives and reducing injuries was directly involved in \textit{Horn}. The plaintiff admitted that her vehicle was equipped with seatbelts and that they were in good working order at the time of the accident.\textsuperscript{150} The defect


\textsuperscript{149} \textit{Id.} § 571.209S4.1(c).

\textsuperscript{150} \textit{Horn v. General Motors Corp.}, 17 Cal. 3d 359, 369, 551 P.2d 398, 402, 131 Cal. Rptr. 78, 83 (1976).

[A] seat belt is designed to protect against injury from the "second collision" resulting when the body of the occupant, suddenly accelerated or decelerated by the impact of the first collision, comes into contact with the interior of the vehicle in which he is riding.

involved, the horn cap fastening mechanism, was at most a minor error in design. In contrast, the non-utilization of provided safety equipment by vehicle users represents a far more serious denigration of the policy of public safety. By denying defendants' assumption of risk defense on the basis that plaintiff's knowledge of the risk was not specific, the court in effect placed total responsibility for safety on the manufacturer. In holding the defendant manufacturer responsible, the court utilized the strict, subjective form of the knowledge element of the assumption of risk defense. The court described the risk in a particularized form; that is, as a failure to realize that there were sharp prongs under the horn cap. If, however, the court had wanted to promote utilization of safety devices by automobile users, it could have adopted the defendants' characterization of the risk assumed by the plaintiff. Defendants argued that

plaintiff consciously chose not to use her seat belt with the knowledge that such conduct would increase the risk of injury in the event of collision, since she would probably be thrown about the interior of the car.

This characterization of the risk involved would constitute an objective, more realistic estimation of the plaintiff's knowledge of the risk. It would impose upon the plaintiff the same common sense requirements imposed upon automobile manufacturers in Cronin—that collisions are reasonably foreseeable. A judicial recognition that consumers take accidents into consideration when using their vehicles would remove consumers from their "vacuum" and attribute to them the knowledge of the "realities of everyday use." Upon review of the competing policies in the Horn case, it is clear that public policy would have been better served by denying recovery to the plaintiff. This result could be attained in cases such as Horn by "a more modest assessment of knowledge of the risk . . . ."

If the court had analyzed the facts of Horn and Daly in light of the policies of safety incentive and equitable risk distribution, the plaintiffs would have been denied recovery. The

151. 17 Cal. 3d at 370, 551 P.2d at 403, 131 Cal. Rptr. at 83.
152. Id.
153. Id. at 369, 551 P.2d at 403, 131 Cal. Rptr. at 83.
155. Id.
most productive method of promoting those policies would have been to hold that the nonuse of vehicle safety equipment constituted assumption of risk. This defense would bar recovery in those instances where the injury, although nominally caused by a defect in the vehicle, could have been prevented by the use of safety devices. Thus, a general awareness that available safety devices will prevent ejection or forcible contact with interior surfaces should be deemed to satisfy the knowledge element of the assumption of risk defense.

Nonuse of Safety Equipment—A Proposed Exception to the Foreseeability Requirement of the Misuse Defense.

Traditionally, the misuse defense has required that a plaintiff's improper use of a product must not have been reasonably foreseeable to the defendant. The Horn and Daly cases illustrate that this foreseeability requirement does not always further the underlying public policy. When courts require defendants to foresee that consumers will not utilize provided safety equipment, and thereby deny the availability of the misuse defense, plaintiffs are relieved of responsibility for their own safety. The manufacturer, in effect, becomes a general insurer of its product. Such an approach

convert[s] the tort system into something other than a mechanism for determining the just distribution of accident losses. [It becomes] . . . a mechanism for maximizing social utility by shifting the cost of accidents (or accident prevention) to the party to whom it represents the least disutility.\(^{157}\)

In order to preserve strict products liability as a mechanism for determining the just allocation of accident losses, a limited exception to the foreseeability requirement of the misuse defense should be recognized. When a plaintiff's injury would have been prevented by the use of provided safety equipment, the failure to utilize such devices should be held to constitute the defense of misuse and bar recovery. The foreseeability of such nonuse should not be the controlling factor.

In analyzing Horn and Daly, it is important to recall the underlying policies thought to be promoted by granting recovery to a plaintiff in a strict products liability action. Those policies should not be “ignored for the sake of inquiries about insurance and the efficient allocation of resources.”\(^{158}\)

---

158. Id. at 538.
safety is not promoted by granting recovery to plaintiffs who fail to utilize safety equipment. Risk distribution does not imply that the party to be held liable should always be the one who can best afford to pay for the injuries. Injuries caused by the failure to utilize safety equipment are more effectively prevented by modifying the behavior of the users of the product rather than by imposing excessive liability on the manufacturer. A court should not concern itself with determining which party could best afford to pay for the plaintiff's injury. The court in Horn and Daly should have examined the merits of the proffered misuse defense in light of the goal of furthering the underlying policies of the strict products liability cause of action.

Under the facts of the Horn and Daly cases, driving a car without using seatbelts was objectively foreseeable to the manufacturer. But the question of whether nonuse of safety equipment constitutes misuse of the vehicle should also involve an inquiry as to whether the plaintiffs failed to act responsibly for their own safety. In order to promote the underlying policies of strict products liability, the court should recognize that those who fail to use automobile safety devices needlessly expose themselves to the risk of serious injury. Courts can assume that

---

160. Id.
161. This was the approach taken in a 1977 federal case applying California law, Kay v. Cessna Aircraft Co., 548 F.2d 1370 (9th Cir. 1977), which held that plaintiff's misuse of the product negated the conclusion that a defect existed. In Kay, the pilot of a Cessna Skymaster model 337 was killed when the aircraft crashed during takeoff because of rear engine failure. The plaintiff urged that the plane was defective because of the lack of a warning in the takeoff instructions. The trial court granted the defendant manufacturer's motion for judgment notwithstanding the verdict, and held that the pilot's failure to comply with the pre-takeoff instructions constituted misuse of the product. Compliance with those procedures would have alerted the pilot to the rear engine failure and the accompanying danger. The Ninth Circuit Court of Appeals affirmed the trial judge's ruling on the motion. The court held that the pilot's failure to follow safe operating procedures was not reasonably foreseeable to the manufacturer.

In denying recovery the court, in effect, recognized that the policy of promoting safety would not be furthered by allowing recovery where the decedent had disregarded the manufacturer's safety instructions. Although the court espoused the usual foreseeability test for the misuse defense, it appears that the court actually applied a different standard. The failure to comply with the product's safety instructions is, after all, an objectively foreseeable event. The court, however, recognized that the foreseeability requirement should not bar the application of the misuse defense on those facts. Because the pilot disregarded safety instructions, the plaintiff should not be allowed to recover for the fatal injuries which would not have occurred but for the pilot's own action. The policy of promoting public safety is furthered in such cases by denying recovery to the plaintiff.
automobile users are aware of the existence and purpose of safety equipment.\footnote{162} The court should recognize a limited exception to the foreseeability requirement of the misuse defense. Allowing plaintiffs who do not use safety equipment to recover for preventable injuries detracts from the underlying public policies of the strict products liability cause of action. Those policies are more effectively promoted by deterring such conduct through the denial of recovery. The application of the misuse defense in this limited situation would accomplish that deterrence.\footnote{163}

**CONCLUSION**

This article has traced the development of strict products liability from its inception in *Greenman* to its apparent demise in *Daly*. Special emphasis has been placed on the defect element and the traditional defenses of assumption of risk and product misuse. The *Horn* and *Daly* cases illustrate that the goals of risk distribution and safety incentive are not always furthered by granting recovery to the plaintiff. The analysis demonstrates that the policies underlying the strict products liability cause of action have been thwarted by the courts' narrow interpretation of the defenses. For the defendant to prevail on the assumption of risk defense, the plaintiff must have subjectively foreseen the particular risk which caused his injury. By defining the risk very specifically with the benefit of hindsight, the defendant is put to an insurmountable burden of proof. By holding the defendant to an objective foreseeability standard in the misuse defense, the plaintiff is relieved of responsibility to act reasonably for his own safety.

A simple revision of the traditional defenses to strict products liability readily achieves the goal left unfulfilled by the imposition of comparative negligence principles. By reasonably defining the risk of injury in the assumption of risk defense, the court may hold cavalier plaintiffs responsible for disregarding
their own safety. Persons who are, or should reasonably be, aware that they are in a dangerous situation will thereby be encouraged to assume some degree of responsibility for their own safety. By enlarging the misuse concept to include nonuse of provided safety equipment, plaintiffs will be encouraged to refrain from using products in an unsafe manner.

The advent of comparative negligence in strict products liability evidences a recognition that the underlying policies of the cause of action are not being realized. The court, however, chose an inappropriate remedy. The Daly decision will arguably result in three undesirable results: (1) recoveries by plaintiffs injured by defective products will be reduced by any incidental contributory negligence committed by the plaintiff; (2) manufacturers will be liable to some extent for a plaintiff's injuries regardless of whether plaintiff's actions constituted either assumption of risk or product misuse; (3) the apportionment of fault by the jury will be necessarily speculative and will result in inconsistent and unjust results.

The Daly case demonstrates that courts, in their zeal to achieve equitable results, sometimes lose sight of underlying policies in fashioning an appropriate remedy. The responsibility for safety should not rest solely on the manufacturer. The efficacy of safety devices is severely diminished if consumers are not encouraged to utilize them. In 1944, Justice Traynor, urging the California Supreme Court to adopt strict liability as a basis for recovery in products liability actions, stated: "[P]ublic policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market."¹⁶⁴ This policy would be furthered by redefining the traditional defenses to strict products liability so as to deny all recovery to those injured parties who fail to use provided safety equipment when such use would have prevented the injury.