Montana Law Review

Volume 41
Issue 2 *Summer 1980*

Article 3

July 1980

Comparative Principles and Products Liability in Montana

Dominic P. Carestia
University of Montana School of Law

Follow this and additional works at: http://scholarship.law.umt.edu/mlr

Part of the Law Commons

Recommended Citation
Dominic P. Carestia, *Comparative Principles and Products Liability in Montana,* 41 Mont. L. Rev. (1980).
Available at: http://scholarship.law.umt.edu/mlr/vol41/iss2/3

This Comment is brought to you for free and open access by The Scholarly Forum @ Montana Law. It has been accepted for inclusion in Montana Law Review by an authorized administrator of The Scholarly Forum @ Montana Law.

COMMENT

COMPARATIVE PRINCIPLES AND PRODUCTS LIABILITY IN MONTANA[1]

Dominic P. Carestia

I. INTRODUCTION

During the past decade an overwhelming majority of jurisdictions, including Montana, adopted strict tort liability in products liability actions.[2] Concurrently, that majority mitigated the harshness of contributory negligence as an absolute defense by enacting comparative negligence statutes.[3] The resulting interaction between the doctrine of strict liability and comparative negligence is effecting a metamorphosis in products liability law. Inevitably Montana attorneys and the Montana Supreme Court must address the issue being resolved by other jurisdictions: Should loss be apportioned between the injured plaintiff and the manufacturer if the plaintiff's fault and the manufacturer's defective product have combined to produce plaintiff's injury?

II. THE RESULT OF THE INTERACTION—COMPARATIVE PRINCIPLES[4]

The Wisconsin Supreme Court adopted strict products liability in *Dipple v. Sciano.*[5] Seemingly, considerations of fault had no place in strict products liability actions under Section 402A.[6] The *Dipple* court analogized 402A actions to negligence per se,[7] how-

---

1. Much of the analysis in this comment is based on research done in preparing another article, Carestia, *The Interaction of Comparative Negligence and Strict Liability—Where Are We?*, 47 INS. COUNSEL J. 53 (1980), which was awarded first place in the 1979 legal writing contest sponsored by the International Association of Insurance Counsel. This comment is an attempt to apply the principles developed in this earlier article to Montana law.

2. Pinto, *Comparative Responsibility—An Idea Whose Time Has Come*, 45 INS. COUNSEL J. 115, 116 (1978). Forty-two jurisdictions have adopted strict products liability.

3. *Id.* at 120. Thirty-five states have replaced the defense of contributory negligence with comparative negligence.

4. Various terms are used to describe the recently developing concept of comparative principles when defenses to strict products liability are invoked. These include "comparative negligence," "comparative fault," "comparative cause," and "equitable apportionment or allocation of loss." *See* Daly v. General Motors Corp., 20 Cal.3d 725, 732-37, 575 P.2d 1162, 1165-68, 144 Cal. Rptr. 380, 383-86 (1978).

5. 37 Wis.2d 443, 460, 155 N.W.2d 55, 63 (1967).

6. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

7. Dipple v. Sciano, 37 Wis.2d 443, 461, 155 N.W.2d 55, 64 (1967).

ever, to apply Wisconsin's comparative negligence statute.[8] The effect of *Dipple* is to require consumers to exercise ordinary care in using manufacturers' products. Correspondingly, manufacturers have a duty not to place in the stream of commerce any product in a defective condition unreasonably dangerous to the user or consumer.

For several years following *Dipple*, Wisconsin was the only state to apportion damages between negligent plaintiffs and strictly liable manufacturers of defective products. As more jurisdictions enacted comparative negligence statutes they too began to consider the plaintiff's negligent conduct and to apportion damages accordingly. Twelve jurisdictions now apply comparative principles in strict products liability actions[9] and many other jurisdictions have recently suggested the possibility of future application of those principles.[10] A strong trend toward comparative principles

---

8. *Id.* at 464, 155 N.W.2d at 65 (Hollows, J., concurring).

9. Jurisdictions applying comparative principles are Alaska, California, Florida, Idaho, Minnesota, Mississippi, New Hampshire, New Jersey, Oregon, Texas, Washington, and Wisconsin. *See* Edwards v. Sears, Roebuck & Co., 512 F.2d 276 (5th Cir. 1975); Sun Valley Airlines, Inc. v. Avco-Lycoming Corp., 411 F. Supp. 598 (D. Idaho 1976); Hagenbuch v. Snap-On Tools Corp., 339 F. Supp. 676 (D.N.H. 1972); Butaud v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42 (Alas. 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 Constr., Inc., 262 N.W.2d 377 (Minn. 1977); Thibault v. Sears, Roebuck & Co., 395 A.2d 843 (N.H. 1978); Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 402 A.2d 140 (1979); Bacelleri v. Hyster Co., 597 P.2d 351 (Or. 1978); Hamilton v. Motor Coach Indus., Inc., 569 S.W.2d 571 (Tex. 1978); Berry v. Coleman Systems Co., 596 P.2d 1365 (Wash. App. 1979); Dipple v. Sciano, 37 Wis.2d 443, 155 N.W.2d 55 (1967).

10. Those jurisdictions include Alabama, Connecticut, Illinois, Michigan, New York, Utah, and Vermont. *See* Atkins v. American Motors Corp., 335 So.2d 134 (Ala. 1976) (adopted negligence per se theory of products liability and held contributory negligence applicable); Hoelter v. Mowhawk Service, Inc., 170 Conn. 495, 365 A.2d 1064 (1976) (Contributory fault which was a proximate cause of plaintiff's injuries barred recovery. Shortly thereafter the Connecticut legislature adopted a statute reversing the holding but was silent as to comparative principles.); Skinner v. Reed Prentice Div. Package Mach. Co., 70 Ill.2d 1, 374 N.E.2d 437 (1978) (The court adopted comparative contribution between defendants. Three dissenting justices suggested that by simple logic Illinois impliedly adopted a doctrine of comparative fault applicable to strict liability.); Kirby v. Larson, 400 Mich. 484, 256 N.W.2d 400 (1977) (In rebutting the argument that comparative negligence should not be adopted because no-fault legislation reduced the need for it, the court suggested that comparative negligence would be appropriate in those cases not involving no-fault such as products liability. Micallef v. Miehle Co., 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976) (accident at issue occurred prior to adoption of comparative negligence, but court indicated that comparative negligence would apply to strict liability); Ernest W. Hahn, Inc. v. Armco Steel Co., 601 P.2d 152, 158-59 (Utah 1979) ("We need not—and do not—reach the issue here . . . of whether comparative principles should apply in strict products liability cases . . . to diminish recovery by plaintiff. . . . "); Stannard v. Harris, 135 Vt. 544, 380 A.2d 101 (1977) (comparative negligence applicable in a negligence and breach of warranty action against the manufacturer). *See also* ARK. STAT. ANN. § 27-1763 (1962) which expressly includes "supplying of a defective product in an unreasonably dangerous condition."

and apportionment of damages in strict products liability actions is evident.

III. "Fault" in 402A Actions

In applying comparative principles a court must compare the plaintiff's fault (culpable conduct) to the manufacturer's strict liability (placing into the stream of commerce an unreasonably dangerous, defective product). The fault/strict liability comparison and the resulting apportionment of damages have been criticized as inconsistent with the pure concept of strict products liability.[11] That comparison, however, is proper because of the "quasi-fault"[12] aspects of strict products liability.

The drafters of Section 402A of the Restatement (Second) of Torts used the terms "defect" and "unreasonably dangerous" in framing the 402A action.[13] The definition of "defect" includes a "deficiency," "blemish" or "fault."[14] Further, the Restatement commentary on Section 402A suggests that a product is "defective" if "in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him."[15] Consumer expectations are a function of foreseeability, and indeed manufacturers in many instances should foresee unreasonable dangers and adjust their conduct to produce non-defective products. Any discussion of the 402A action, then, necessarily involves negligence terminology and fault concepts. Dean Prosser has explained the concept of fault as follows:

> There is a broader sense in which "fault" means nothing more than a departure from a standard of conduct required of a man by society for the protection of his neighbors; and if the departure is an innocent one, and the defendant cannot help it, it is none the less a departure, and a social wrong.[16]

---

11. "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." Daly v. General Motors Corp., 20 Cal.3d 725, 757, 575 P.2d 1162, 1181, 144 Cal. Rptr. 380, 399 (1978) (Mosk, J., dissenting).

12. For a thorough discussion of the fault aspects of strict products liability *see* Carestia, *The Interaction of Comparative Negligence and Strict Products Liability—Where are We?*, 47 Ins. Counsel J. 53, 61-64 (1980).

13. Restatement (Second) of Torts § 402A (1965) provides:

> 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 consumer, or to his property . . . .

14. Webster's New International Dictionary (2d ed. 1961).

15. Restatement (Second) of Torts § 402A, Comment g (1965).

16. W. Prosser, Handbook of the Law of Torts § 75, at 493 (4th ed. 1971).

Moreover, courts now boldly recognize the fault aspects of strict products liability:

> So viewed, the notion of fault is readily seen to be inherent in the concept of strict liability. The manufacturer or supplier of a chattel has been charged with the duty of distributing a product which is fit, suitable and duly safe. Failure to comply with this standard constitutes fault.[17]

Because strict products liability is simply another form of fault, the comparison to plaintiff's fault is proper. Further, the policies underlying strict products liability and comparative negligence render that comparison essential. The policies associated with strict products liability require a manufacturer to bear the cost of plaintiff's injuries because the manufacturer is the better risk bearer.[18] The policies justifying comparative negligence, however, dictate that the negligent plaintiff's loss not be shifted from him:

> [W]hen men live in society, a certain average of conduct, a sacrifice of individual peculiarities going beyond a certain point, is necessary to the general welfare. His neighbors accordingly require him, at his proper peril, to come up to their standard, and the courts which they establish decline to take his personal equation into account.[19]

Should the policies justifying strict products liability exclude from consideration those which justify comparative negligence, or should there be a delicate balancing of both doctrines? Courts in increasing numbers refuse to allow the strict products liability doctrine to excuse plaintiffs from their own negligence. Public policy dictates that consumers be responsible for their conduct. On the other hand, plaintiff's fault should not excuse a manufacturer from the duty imposed by Section 402A. Instead, both plaintiff's and manufacturer's duties should be considered in determining the damages fairly to be born by each party. Comparative principles properly apportion those damages based upon each party's culpability.

IV. VARIOUS COMPARATIVE SCHEMES

Courts applying comparative principles in products liability

17. Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 406 A.2d 140, 145-46 (1979).

18. *E.g.*, Greenman v. Yuba Power Products, Inc., 59 Cal.2d 57, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1962).

19. O. HOLMES, THE COMMON LAW 108 (1923).

actions have encountered difficulty in reconciling the two seemingly incongruous doctrines. Courts first applying comparative principles engaged in semantic juggling to demonstrate that the doctrines were compatible.[20] Their efforts produced terminology which includes "plaintiff's misconduct," "comparative fault," "comparative cause," and "blameworthy conduct."[21]

Butaud v. Suburban Marine & Sporting Goods, Inc.,[22] however, avoided semantic distinctions, holding that:

> It is unnecessary to conceptualize the theory of the action which strict liability creates in order for us to apply comparative negligence principles to strict products liability cases which result in personal injuries.[23]
> The defendant is strictly liable for harm caused from his defective product, except that the award of damages shall be reduced in proportion to the plaintiff's contribution to his injury.[24]

Since *Butaud* courts have been less concerned with semantic precision than with fairness to both plaintiffs and defendants:

> [O]ur reason for extending a full system of comparative fault to strict products liability is because it is fair to do so. The law consistently seeks to elevate justice and equity above the exact contours of a mathematical equation. We are convinced that in merging the two principles what may be lost in symmetry is more than gained in fundamental fairness.[25]

In overcoming semantic hurdles, however, courts adopted three comparative schemes: (1) application of the state's comparative negligence statute;[26] (2) adoption of the judicial doctrine of "comparative fault;"[27] and (3) adoption of the judicial doctrine of "com-

20. *See* Busch v. Busch Constr., Inc., 262 N.W.2d 377, 394 (Minn. 1977):
We find no difficulty in applying comparative concepts to products liability cases . . . . [C]omparative negligence is a misnomer: "[T]he comparative negligence statute becomes more than a comparative *negligence* or even a comparative *fault* statute; it becomes a comparative *cause* statute under which all independent and concurrent causes of an accident may be apportioned on a percentage basis." [citations omitted].

21. *E.g.*, Daly v. General Motors Corp., 20 Cal.3d 725, 732-37, 575 P.2d 1162, 1165-68, 144 Cal. Rptr. 380, 383-86 (1978).

22. 555 P.2d 42 (Alas. 1976).

23. *Id.* at 45.

24. *Id.* at 45-46.

25. Daly v. General Motors Corp., 20 Cal.3d 725, 742, 575 P.2d 1162, 1172, 144 Cal. Rptr. 380, 390 (1978).

26. West v. Caterpillar Tractor Co., 336 So.2d 82 (Fla. 1976).

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

Published by The Scholarly Forum @ Montana Law, 1980

parative causation."[28] Although the various schemes employ different terminology and are applied differently, they all seek the same result. An injured plaintiff will recover only those damages for which he is not at fault; that is, a plaintiff's damages will be reduced to the extent that his fault was a proximate cause of his injury. The manufacturer is liable only for the damage resulting from the defective product. If the plaintiff's fault and the manufacturer's defective product are both proximate causes of the injury, the loss will be apportioned.

These schemes preserve the positive aspects of both strict products liability and comparative negligence. Society requires consumers to meet a reasonable standard of conduct, or act at their peril. Conversely, manufacturers act at their peril in marketing unreasonably dangerous, defective products. A manufacturer's liability exposure is lessened "only to the extent that the trier finds that the victim's conduct contributed to his injury."[29] In cases where injured consumers were not negligent, manufacturers are solely liable. Under comparative principles, therefore, the "incentive to avoid and correct product defects, remains . . . ."[30]

Montana's adoption of comparative principles would require selection among the various comparative schemes. The court could simply apply Montana's comparative negligence statute.[31] Application of the statute, however, creates serious problems. Specifically, the statute creates an absolute defense if plaintiff's negligence is greater than fifty percent. Where plaintiff is more at fault than defendant, then, the statute creates the possibility of a windfall for the manufacturer. That potential for windfalls renders the comparative scheme unfair, thereby defeating the major advantage of comparative principles. Further, jurisdictions applying comparative principles disagree whether a comparative negligence statute is properly applied in strict products liability cases.[32] For example, "[T]he [New Hampshire] comparative negligence statute . . . does not apply to strict liability cases because it is confined by its terms to actions for negligence."[33]

A few jurisdictions have embraced "comparative causation" in apportioning the loss between negligent plaintiffs and manufactur-

28. Thibault v. Sears, Roebuck & Co., 395 A.2d 843 (N.H. 1978).

29. Daly v. General Motors Corp., 20 Cal.3d 725, 737, 575 P.2d 1162, 1169, 144 Cal. Rptr. 380, 387 (1978).

30. *Id.*

31. MONTANA CODE ANNOTATED [hereinafter cited as MCA] § 27-1-702 (1979).

32. *Compare* Dipple v. Sciano, 37 Wis.2d 443, 155 N.W.2d 55 (1967) *with* Thibault v. Sears, Roebuck & Co., 395 A.2d 843, (N.H. 1978).

33. Thibault v. Sears, Roebuck & Co., 395 A.2d 843, 846 (N.H. 1978).

ers of defective products.[34] Analysis of comparative causation nevertheless reveals serious shortcomings. Under this scheme, the loss to be born by each party is a function of the degree to which plaintiff's negligence and defendant's defect proximately caused the injury. Yet "proximate cause" is a concept with no readily identifiable meaning or method of application. Dean Prosser describes proximate cause as "all things to all men."[35]

> Having no integrated meaning of its own, its chameleon quality permits it to be substituted for any one of the elements of a negligence case when decision on that element becomes difficult . . . no other formula has found so much affection in the chambers of final authority; none other so nearly does the work of Alladin's lamp.[36]

Proximate cause "unnecessarily creates confusion and complexity"[37] and is simply not amenable to comparisons of degree. Moreover, for comparative causation to validly apportion the loss, the causes under consideration must bear a functional relationship to fault.[38] Comparative causation, therefore, is simply comparative fault in a confusing and complex disguise.[39]

Pure comparative fault is the preferable comparative scheme. The pure system minimizes the potential for windfalls. The manufacturer will not be absolved of liability unless the plaintiff is totally at fault for the injury; conversely, only if the plaintiff is without fault will the manufacturer be totally liable. Moreover, fault is more easily comprehended by jurors and less subject to judicial abuse than proximate cause. Comparative fault, then, is the proper comparative scheme because it focuses directly on each party's wrong, and asks a jury to apportion the loss in a familiar, manageable fashion.[40]

---

34. *See* Sun Valley Airlines, Inc. v. Avco-Lycoming Corp., 411 F. Supp. 598 (D. Idaho 1976); Thibault v. Sears, Roebuck & Co., 395 A.2d 843 (N.H. 1978); General Motors Corp. v. Hopkins, 548 S.W.2d 344 (Tex. 1977).

35. W. Prosser, Handbook of the Law of Torts § 42, at 246 (4th ed. 1971).

36. Green, *Proximate Cause in Texas Negligence Law*, 28 Tex. L. Rev. 471, 471-72 (1950).

37. *Id.* at 490.

38. Fischer, *Products Liability—Applicability of Comparative Negligence*, 43 Mo. L. Rev. 431, 445 (1978).

39. For an in-depth discussion of the failings of comparative causation *see* Carestia, *supra* note 11, at 64-68.

40. Justice Clark, concurring in Daly v. General Motors Corp., 20 Cal.3d at 748, 575 P.2d at 1176, 144 Cal. Rptr. at 394, convincingly disposed of the argument that comparative fault cannot be applied logically and consistently in strict liability cases.

V. Montana—Current Status

The Montana Supreme Court in *Brown v. North American Manufacturing Co.*[41] spoke peripherally to the issue of contributory negligence in strict products liability cases. The plaintiff in *Brown* lost his leg in a defectively designed Grain-O-Vator. During pre-trial proceedings the defendant asserted contributory negligence as a defense. The trial court, however, struck the contributory negligence issue from the case. That ruling was not appealed, and therefore the supreme court did not speak to whether plaintiff's fault in the form of contributory negligence could be a damage-reducing factor in a strict products liability action. The *Brown* court simply did not have the issue of comparative principles before it.

The court did speak directly to the issue of assumption of risk: "Henceforth, in product liability cases the defense of assumption of risk, will be based on a subjective standard rather than that of the reasonable man test."[42] In embracing comment *n* of Section 402A, as it relates to assumption of risk,[43] the court generally referred to contributory negligence:

> 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 . . . bars recover.[44]

At best the court's discussion of comment *n* permits the inference that plaintiffs are not to be penalized under Montana law for merely failing to discover a defect or guard against the possibility of a defect. Further, as a prelude to its discussion of comment *n*, the court stated that strict liability is "not . . . absolutely immune to considerations of plaintiff's conduct."[45]

The only other consideration regarding contributory negligence relates to the trial court Instruction No. 10, an instruction not on contributory negligence but assumption of risk:

> You are instructed that assumption of risk is voluntarily placing

41. ____ Mont. ____, 576 P.2d 711, 711 (1978).
42. *Id.* at ____, 576 P.2d at 719.
43. "We find the above standard of conduct of the plaintiff as related to the injury must be considered under the Montana case law *on the assumption of risk* when applied to strict liability cases." *Id.* (emphasis added).
44. Restatement (Second) of Torts § 402A, Comment n (1965).
45. ____ Mont. ____, 576 P.2d at 719.

Caresta: Comparative Principles

> oneself in a position to chance known hazards. If a person has assumed the risk, he cannot recover for any injury or damage sustained by him. In determining whether or not the plaintiff assumed a risk you are not to consider whether or not the plaintiff exercised due care for his own safety . . . .[46]

This instruction was drawn from the Montana Jury Instruction Guide but was modified by the language "you are not to consider whether or not the plaintiff exercised due care for his own safety." The court found the modified instruction, when considered as a whole, to be an accurate statement of Montana law, but disapproved the instruction's use in future cases because "it improperly inserts into the case elements of contributory negligence that could cause jury confusion."[47] Certainly the court wanted to prevent a future jury from confusing contributory negligence and assumption of risk. That confusion could result in improperly barring plaintiff from recovery based only upon contributory negligence.

Chief Justice Haswell in a specially concurring opinion also briefly addressed contributory negligence as it relates to assumption of risk and Instruction No. 10: "As pointed out in the majority opinion contributory negligence is not a defense . . . but assumption of risk is a complete bar to recovery . . . ."[48] With this statement the Chief Justice reaffirmed the court's decision to embrace comment *n*. Again, comment *n* precludes any consideration of plaintiff's mere failure to discover a defect or guard against the possibility of a defect. Chief Justice Haswell further emphasized that assumption of risk is not to be determined by contributory negligence standards; therefore, whether a plaintiff's assumption of the risk is "unreasonable" is not a proper consideration.[49] To discern more from *Brown* respecting contributory negligence and comparative principles is to elevate conjecture to the level of precedent.

VI. MONTANA—A UNIQUE OPPORTUNITY

The effect of plaintiff's conduct constituting fault, which goes beyond a mere failure to discover or guard against a defect, is yet to be delineated by the court. Comparative principles provide the best mechanism for considering plaintiff's fault including, for example, contributory negligence and misuse. Even the defense of as-

---

46. *Id.* at ____, 576 P.2d at 720.
47. *Id.* at ____, 576 P.2d at 721.
48. *Id.* at ____, 576 P.2d at 723.
49. *Id.*

sumption of risk is best applied via a comparative scheme. *Baccelleri v. Hyster Co.*[50] demonstrated the advantage of comparative principles regarding defenses in strict products liability actions:

> [C]ontributory negligence, assumption of the risk, and other defenses overlap and a plaintiff's conduct may often be characterized in a number of ways . . . .[51]
> We hold that conduct which was sometimes labeled assumption of the risk but which is a subspecies of contributory negligence can be compared in the apportionment of damages . . . and that comparative fault is applicable in strict liability in tort.[52]

No court, however well intentioned, can correctly categorize plaintiff's fault in every case as either contributory negligence, misuse, or assumption of the risk. Moreover, defendant's and plaintiff's fate should not turn on a semantic distinction which may result either in an absolute defense or an absolute bar to asserting a defense. Absolute defenses produce windfalls for manufacturers; elimination of defenses produces windfalls for plaintiffs. Receipt of a windfall is unfair, and the primary advantage of a comparative scheme is its focus on fairness to plaintiffs, manufacturers, and consumers.[53]

Montana is in an advantageous position respecting the development of comparative principles. Because the issue of comparative principles was not before the *Brown* court, and because the discussion of contributory negligence in *Brown* is peripheral to the assumption of risk holding,[54] the court can adopt comparative principles without upsetting prior law. The court can gain substantial insight into the comparative schemes simply by looking to the well-reasoned, recent opinions of other jurisdictions.[55] The adoption of comparative fault by the California Supreme Court, a court with a history of persuasive precedent in tort law, underscores the credence of comparative principles. Further, the Uniform Comparative Fault Act "[w]hile lacking any legislative sanction . . . points in the direction of a responsible national trend."[56] The act was adopted by the National Conference of the Commissioners on Uni-

50. 287 Or. 3, 597 P.2d 351 (1979).
51. *Id.* at ___, 597 P.2d at 354.
52. *Id.* at ___, 597 P.2d at 354-55.
53. *E.g.*, Daly v. General Motors Corp., 20 Cal.3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978); Butaud v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42 (Alas. 1976); West v. Caterpillar Tractor Co., 336 So.2d 80 (Fla. 1976).
54. *See* text accompanying notes 40-48 *supra*.
55. *See* note 8 *supra*.
56. Daly v. General Motors Corp., 20 Cal.3d 725, 741-42, 575 P.2d 1162, 1172, 144 Cal. Rptr. 380, 390 (1978).

form State Laws after several years of discussion and analysis by various committees of the conference.[57] Also, the apparent majority of scholarly commentators has urged the adoption of comparative principles in strict products liability cases.[58] Furthermore, the United States Department of Commerce, Interagency Task Force on Product Liability, has recommended the application of comparative principles in products liability actions to relieve "some of the inequities incurred by both plaintiffs and defendants as a result of an 'all or nothing' approach to recovery."[59]

A combined reading of these authorities suggests the following framework for evaluating plaintiff's conduct in a products liability setting:

1. That the court adopt a pure system of comparative fault.[60]
2. That the court reduce plaintiff's damage award commensurate with plaintiff's fault.
3. That plaintiff's fault constitute that conduct commonly referred to as contributory negligence,[61] misuse or abnormal use, or assumption of the risk.

---

57. For a thorough discussion of the Uniform Comparative Fault Act *see* Wade, *Products Liability and Plaintiff's Fault—The Uniform Comparative Fault Act*, 29 MERCER L. REV. 373 (1978).

58. *See, e.g.*, Brewster, *Comparative Negligence in Strict Liability Cases*, 42 J. AIR L. 107, 117-18 (1976); Epstein, *Products Liability: Defenses Based on Plaintiff's Conduct*, 68 UTAH L. REV. 267, 284 (1968); Feinberg, *The Applicability of a Comparative Negligence Defense in a Strict Liability Suit Based on Section 402A of the Restatement of Torts, 2d*, 42 INS. COUNSEL J. 39, 52 (1975); Fischer, *Products Liability—Applicability of Comparative Negligence*, 43 MO. L. REV. 431, 433 (1978); Fisher, Nugent & Lewis, *Comparative Negligence: An Exercise in Applied Justice*, 5 ST. MARY'S L.J. 655, 674 (1974); Fleming, *The Supreme Court of California 1974-1975—Forward: Comparative Negligence at Last—By Judicial Choice*, 64 CAL. L. REV. 239, 268-71 (1976); Freedman, *The Comparative Negligence Doctrine Under Strict Liability: Defendant's Conduct Becomes Another "Proximate Cause" of Injury, Damage or Loss*, 175 INS. L.J. 468, 479 (1975); Levine, *Buyer's Conduct as Affecting the Extent of Manufacturer's Liability in Warranty*, 52 MINN. L. REV. 627, 656-57 (1968); Noel, *Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk*, 25 VAND. L. REV. 93, 115-19 (1972); Pinto, *Comparative Responsibility—An Idea Whose Time Has Come*, 45 INS. COUNSEL J. 115, 127 (1978); Robinson, *Square Pegs (Products Liability) in Round Holes (Comparative Negligence)*, 52 CALIF. ST. B.J. 16 (1977); Schwartz, *Pure Comparative Negligence in Action*, 34 AM. TRIAL J. 117, 128-31 (1972); Twerski, *The Many Faces of Misuse: An Inquiry into the Emerging Doctrine of Comparative Causation*, 29 MERCER L. REV. 403, 436 (1978); Wade, *Products Liability and Plaintiff's Fault—The Uniform Comparative Fault Act*, 29 MERCER L. REV. 373, 391 (1978).

59. 2 U.S. DEPARTMENT OF COMMERCE, INTERAGENCY TASK FORCE ON PRODUCTS LIABILITY: FINAL REPORT ON THE LEGAL STUDY 116 (1977).

60. The Montana scheme should be similar to that suggested by the Uniform Comparative Fault Act and to that adopted by California.

61. Plaintiff's fault should exclude the mere failure to discover or guard against a defect. A flagrant lack of ordinary care in discovering a defect, however, should constitute plaintiff's fault and reduce plaintiff's award. A lack of ordinary care respecting plaintiff's use of the produce should also constitute plaintiff's fault, as should assumption of the risk.

4. That comparative fault in Montana operate in accordance with the following instructions:

> (1) Was defendant's product in a defective condition unreasonably dangerous to the user or consumer when placed in the stream of commerce? (If the answer is "no," you need go no further.)
>
> (2) Was the defect a proximate cause of the injury? (If the answer is "no," you need go no further.)
>
> (3) Was there any plaintiff's fault?
>
> (4) Was plaintiff's fault, if any, a proximate cause of the injury?
>
> (5) Taking the combined fault of the defendant and the plaintiff that proximately caused the injury as a total of 100%, what percentage of that fault was attributable to:
>
> Plaintiff ________%
> Defendant ________%
> Total 100 %

This framework implements not only the policies justifying strict products liability but also the positive social aspects of our negligence system. Moreover, it minimizes the potential for windfalls and thereby insures a greater degree of fairness in products liability adjudication.