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INTRODUCTION

Before the adoption of contribution in *Skinner v. Reed-Prentice Division Package Machine Co.*¹ and comparative negligence in *Alvis v. Ribar*,² Illinois courts allocated damages according to the common law. There was no contribution among joint tortfeasors and contributory negligence completely barred the plaintiff’s recovery in negligence actions.³ In strict products liability actions, however, the Illinois Supreme Court followed the Second Restatement of Torts in not allowing contributory negligence as a defense.⁴ Further, if two or more defendants were found liable for a plaintiff’s injuries, they were held jointly and severally liable.⁵ Each defendant could be held responsible for payment of the entire damages if judgment were entered for the plaintiff.⁶ Under the common law scheme, therefore, a strictly liable defendant fully compensated the plaintiff regardless of the plaintiff’s contributory negligence or the harm caused by another defendant.⁷

In *Skinner*, the Illinois Supreme Court allowed contribution between a strictly liable defendant and a defendant who had

². 85 Ill. 2d 1, 421 N.E.2d 886 (1981).
³. *Skinner*, 70 Ill. 2d at 9, 374 N.E.2d at 438-39; *Alvis*, 85 Ill. 2d at 5, 421 N.E.2d at 887-88.
⁵. Buehler v. Whalen, 70 Ill. 2d 51, 64, 374 N.E.2d 460, 466 (1977), modified, 70 Ill. 2d 16 (1978). The common law rule of joint and several liability allowed the plaintiff to proceed against any defendant and collect the entire judgment award, even if another defendant contributed to the injury. W. PROSSER, HANDBOOK OF THE LAW OF TORTS §§ 47-48, at 295, 300 (4th ed. 1971).
⁶. Paul Harris Furniture Co. v. Morse, 10 Ill. 2d 28, 43, 139 N.E.2d 275, 284 (1956) (defendant contractor held liable for plaintiff’s damages as the result of the propane gas tank explosion caused by the negligence of several defendants).
⁷. After entry of judgment for the plaintiff, the strictly liable defendant could proceed against a third-party defendant for indemnity in certain situations. Burke v. Sky
assumed the risk or misused the defective product. The court applied comparative negligence principles to the apportionment of damage between the concurrent tortfeasors. With Alvis v. Ribar, the court adopted comparative negligence between a plaintiff and defendant in negligence actions. Under the pure form of comparative negligence adopted in Alvis, a plaintiff’s damages are proportionately reduced by the fault attributable to him. The Alvis court did not address the issue of whether comparative negligence principles apply to strict products liability actions. Nor did the court decide what effect comparative negligence would have on the common law rule of joint and several liability. After Skinner and Alvis, an individual defendant’s responsibility for damages in a products liability suit was undetermined.

In Coney v. J.L.G. Industries, Inc., the Illinois Supreme Court resolved the issues of the application of comparative negligence to strict products liability and the effect of comparative negligence on joint and several liability. The court applied the defense of comparative fault to strict products liability and defined the defense to include the plaintiff’s behavior. Additionally, the court retained the doctrine of joint and several lia-
With the *Coney* decision, the court refined the changes in the common law allocation of damages initiated by *Skinner* and *Alvis*.  

This note will review the background to the *Coney* decision by examining Illinois case law on strict products liability goals and defenses, the development of the doctrine of joint and several liability before comparative negligence and after contribution, and the policy considerations which led the Illinois Supreme Court in *Skinner* and *Alvis* to adopt comparative fault principles in allocating damages. After discussing the court's reasoning in *Coney*, the opinion will be analyzed in terms of the underlying policy considerations which prompted the court to apply comparative fault principles to strict products liability and to retain joint and several liability. This analysis will explore the basis for comparison in apportioning damages, the operation of the comparative fault defense to strict products liability, and the allocation of the risk of an insolvent or immune tortfeasor. The analysis will also focus on the impact of *Coney* and suggest a procedure to implement the “equitable principles” articulated by the court.

**BACKGROUND**

*Strict Products Liability in Illinois*

The Illinois Supreme Court first recognized a cause of action for strict products liability against a manufacturer of a defective product in *Suvada v. White Motor Co.*  

17. *Id.* at 13. The court also decided that the retention of joint and several liability after comparative negligence does not deny defendants equal protection of the laws. *Id.* at 14-15.

18. In *Coney*, the cause of action arose before the supreme court permitted contribution among joint tortfeasors in *Skinner*. However, during the pleading stage comparative negligence became applicable (*Alvis v. Ribar*, 85 Ill. 2d 1, 421 N.E.2d 886 (1981)). Therefore, the defendant in *Coney* could not take advantage of contribution but could challenge the allocation of damages on the basis of relative fault. In deciding *Coney*, the court considered not only the issue of fault between a plaintiff and defendant, but also the issue of liability for damages among the defendants. See, e.g., 1 J. *DOOLEY*, MODERN TORT LAW §§ 4.03, 5.14.20, 5.14.30, at 93, 157, 161-62 (1982).

19. 32 Ill. 2d 612, 210 N.E.2d 182 (1965). In *Suvada*, the plaintiffs purchased a used tractor unit from defendant White Motor company. The brake system for the unit, which had failed, was manufactured by defendant Bendix-Westinghouse and installed by White. *Id.* at 613, 210 N.E.2d at 183. The Supreme Court of Illinois allowed the plaintiffs to seek indemnity from Bendix, the manufacturer, not on the contract theory of breach of an implied warranty, but on a theory of strict liability in tort. *Id.* at 619, 210 N.E.2d at 187. Therefore, lack of privity of contract was not a defense to the tort action against the
gence and contract warranty theories as the only basis of recovery for consumers injured by defective products.\(^{20}\) Analogizing to unwholesome food cases, the court noted that public policy demanded the imposition of strict liability on the manufacturers and sellers of unreasonably dangerous products.\(^{21}\) In announcing the strict products liability cause of action, the court assimilated section 402A of the Second Restatement of Torts.\(^{22}\)

The goal of this theory of tort recovery was to protect product users and consumers by allocating the loss to the manufacturer or seller.\(^{23}\) The Suvada court stated that, where the defective

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21. 32 Ill. 2d at 619, 210 N.E.2d at 186.

22. *Id.* at 621, 210 N.E.2d at 187. Section 402A provides:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

*Restatement (Second) of Torts* § 402A (1965) [hereinafter cited as *Restatement § 402A*].


"The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather
condition of a product makes it unreasonably dangerous to the user or consumer, justice required imposing the economic loss on the one who created the risk and reaped the profit.\textsuperscript{24} Courts in other jurisdictions have explained that shifting the risk of loss from the injured consumer to the manufacturer would allow the profit maker to distribute the loss to the public as a cost of doing business.\textsuperscript{25} Four years after \textit{Suvada}, the Supreme Court of Illinois articulated safety incentive as another goal of strict products liability. In \textit{Dunham v. Vaughan \& Bushnell Manufacturing Co.},\textsuperscript{26} the court reasoned that holding all the parts of the distribution chain strictly liable would provide an incentive for manufacturers and sellers to design and market safer products.\textsuperscript{27} Therefore, the goals of strict products liability as expressed by the Illinois Supreme Court were consumer protection, risk distri-

\textsuperscript{24} 32 Ill. 2d 612, 618-19, 210 N.E.2d 182, 186. \textit{See also} Liberty Mut. Ins. Co. v. Williams Mach. \& Tool Co., 62 Ill. 2d 77, 82, 338 N.E.2d 857, 860 (1975) (allowing the manufacturer of an adjustable work platform to seek indemnity from a component part manufacturer and emphasizing the risk allocation purpose of strict products liability).


\textsuperscript{27} 42 Ill. 2d at 344, 247 N.E.2d at 403. Some commentators have explained that if manufacturers were faced with potential liability and increased costs because of risk spreading, then they would want to produce a defect-free product to maintain a greater share of the competitive market. \textit{See Fischer, Products Liability—Applicability of Comparative Negligence}, 43 Mo. L. Rev. 431, 432 (1978); Holford, \textit{The Strict Limits of Liability for Product Design and Manufacture}, 52 Tex. L. Rev. 81, 82-84 (1973); Wade, \textit{supra} note 25, at 826.

As a corollary, manufacturers have the ability to anticipate hazards and guard against their occurrence, which a consumer or user cannot do. \textit{Skinner v. Reed-Prentice Div. Package Mach. Co.}, 70 Ill. 2d 1, 25, 372 N.E.2d 437, 448 (1977) (Dooley, J., dissenting).
bution and safety incentive.  

However, as the court initially pointed out in *Suvada*, strict products liability did not make the manufacturer or seller an absolute insurer of the product. The plaintiff must prove that the product contained a defective condition which existed at the time it left the manufacturer's control, that the condition was unreasonably dangerous and proximately caused the injury. Moreover, the defenses to a strict products liability action based on the plaintiff's conduct developed concurrently with the nature of the tort. Both the elements of proof of the plaintiff's prima facie case and the defenses based on plaintiff's conduct prevented strict products liability from becoming absolute liability.

The Illinois Supreme Court conclusively established the defenses to strict products liability in *Williams v. Brown Manufacturing Co.* Following the reasoning of comments "n" and "h"
to section 402A of the Second Restatement of Torts, the court held that assumption of the risk and misuse completely barred the plaintiff's recovery.\footnote{44} Contributory negligence, defined as "lack of due care for one's own safety as measured by the objec-}

\begin{quote}

34. 45 Ill. 2d at 424-29, 261 N.E.2d at 308-12. The court defined assumption of risk as "voluntarily and unreasonably proceeding to encounter a known danger." \textit{Id.} at 424, 261 N.E.2d at 308. The court also followed the Restatement's position that assumption of risk was to be measured by a subjective standard. \textit{Id.} at 430-31, 261 N.E.2d at 312. Comment n of section 402A of the Second Restatement of Torts states in pertinent part:

\begin{quote}
Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover a 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.
\end{quote}

\textbf{RESTATEMENT § 402A, supra note 22, at comment n.}


In order for misuse to bar recovery, it had to be unintended and unforeseeable by the manufacturer. 45 Ill. 2d at 425, 261 N.E.2d at 309. The court's treatment of misuse was derived from the Second Restatement of Torts, section 402A, comment h, which provided that a product was not defective when it was safe for normal use. The manufacturer may be required to give warnings, however, where "he has reason to anticipate that danger may result from a particular use . . . ." \textbf{RESTATEMENT § 402A, supra note 22, at comment h.}

tive reasonable man standard,” was not a defense to strict products liability. The court explained that the policy goals which led to the imposition of strict products liability demanded that any defenses based on a plaintiff's conduct involve more culpability than simple contributory negligence. Assumption of risk and misuse, however, were complete defenses which operated like the all-or-nothing rule of contributory negligence. In formulating the defenses to strict products liability, the Illinois

The Williams decision has been described as the leading case supporting the Restatement defenses to strict products liability. See Noel, supra, at 106-08; H. Woods, supra note 10, § 14:33, at 296-98; Note, A Reappraisal of Contributory Fault in Strict Products Liability Law, 2 WM. MITCHELL L. REV. 233, 239 (1976).

35. 45 Ill. 2d at 425, 261 N.E.2d at 309. See infra note 169 and accompanying text. The distinction between contributory negligence and assumption of risk, and their application to products liability, vary among jurisdictions. H. Woods, supra note 10, § 6:1, at 114. Prior to Williams, assumption of risk was available in Illinois as a defense only in negligence actions involving a contractual or employment relationship. Barret v. Fritz, 42 Ill. 2d 529, 536-37, 248 N.E.2d 111, 114-15 (1969). Therefore, unreasonable assumption of risk, which overlaps with contributory negligence, was not a defense in most negligence actions, but became a complete defense to strict products liability. See Kiselis, supra note 32, at 240-41. For a discussion of the differences between assumption of risk and contributory negligence, see W. Prosser, supra note 4, § 68, at 440-41, 445-51; Kionka, supra note 12, at 22-23. C.f. James, Assumption of Risk: Unhappy Reincarnation, 78 YALE L.J. 185 (1968) (assumption of risk should be abolished except by express agreement and replaced with concepts of duty and contributory negligence).

It should be noted that if the conduct of the plaintiff or of a third party were a superseding, intervening cause or the sole proximate cause of the injury, the plaintiff could not recover because he cannot establish that the defective product caused the injury. H. Woods, supra note 10, § 5:1, at 94. See, e.g., Rios, 59 Ill. 2d at 84-86, 391 N.E.2d at 235-36 (manufacturer relieved of liability because plaintiff's employer equipped punch press with a safety device).

36. 45 Ill. 2d at 426, 261 N.E.2d at 310. In Williams, the court explained: “We are persuaded that the policy considerations which led us to adopt strict liability in Suvada compel the elimination of 'contributory negligence' as a bar to recovery.” Id. Placing the economic risk of loss on the profit maker limited the defenses based on plaintiff's conduct and increased the likelihood of plaintiff's recovery. Nielson, Strict Liability Actions - Defenses Based on Plaintiffs Conduct, 32 FED. INS. COUNS. 189, 198 (1982). See Westra, supra note 28, at 76-81; Note, supra note 34, at 239.

Supreme Court affirmed the policy goals of this new tort theory and maintained the conceptual difference between strict products liability and negligence.\textsuperscript{38} Before \textit{Coney}, therefore, comparative negligence or fault was not a defense to strict products liability. Consequently, in deciding whether to apply comparative fault principles to strict products liability, the Illinois Supreme Court would have to consider the policy goals of both strict products liability and comparative negligence.\textsuperscript{39} If comparative fault principles were to apply, the court would have to clarify the basis for comparison and define the scope of the comparative fault defense.\textsuperscript{40} The application of comparative fault principles to strict products liability would significantly alter the common law assessment of damages in causes of action between a negligent plaintiff and a strictly liable defendant.

\textit{History and Policy Considerations of Joint and Several Liability}

Illinois case law refers to joint and several liability as “classic,” “established,” or “settled” law.\textsuperscript{41} Historically, joint and several liability arose from the separate theories of joint tortfeasors and entire liability.\textsuperscript{42} Joint tortfeasors were originally those wrongdoers who acted in concert, but later included those “joined” tortfeasors whose independent, concurrent acts produced a single, indivisible injury.\textsuperscript{43} Entire liability evolved from the princi-
ple that a tortfeasor is liable for all the consequences proximally caused by his tortious acts; therefore, any tortfeasor could be liable for the plaintiff's entire damages. The combination of these theories produced the rule of joint and several liability, that joint tortfeasors, together or separately, were held liable for the total amount of damages. The significance of the rule is that imposed in four distinguishable kinds of situations: (1) the actors knowingly join in the performance of the tortious act or acts (act in concert); (2) the actors fail to perform a common duty owed to the plaintiff; (3) the parties have a special relationship between them (e.g., master and servant or joint entrepreneurs); (4) although there is no concerted action, nevertheless, the independent acts of several actors concur to produce indivisible harmful consequences. F. HARPER & F. JAMES, supra note 42, § 10.1, at 697-98. See also Jackson, Joint Torts and Several Liability, 17 Tex. L. Rev. 399 (1939); Prosser, Joint Torts and Several Liability, 25 Calif. L. Rev. 413, 414, 429-33 (1937); Note, Contribution Act Construed—Should Joint and Several Liability Have Been Construed First? 30 U. Miami L. Rev. 747, 752 (1976). For the distinction between types of joint tortfeasors, see Morgan v. Kirk Bros., Inc., 111 Ill. App. 3d 914, 919 n.2, 444 N.E.2d 504, 507 n.2 (1982); Seattle First Nat'l Bank v. Shoreline Concrete Co., 91 Wash. 2d 230, 235-36, 588 P.2d 1308, 1312 (1978).

Although joint tortfeasors could be sued together, a tortfeasor could not compel joinder, and the plaintiff could choose which individual tortfeasor to sue. W. PROSSER, supra note 5, § 47, at 296-98. Not only could the plaintiff bring separate suits, but he could also pursue each to judgment and elect to enforce either or both. Id. § 48, at 300. See Comment, Multiple Party Litigation Under Comparative Negligence in Kansas—Damage Apportionment As a Replacement for Joint and Several Liability, 16 Wash. L.J. 672, 674 (1977).

44. W. PROSSER, supra note 5, § 47, at 297-98. The substantive concept of entire liability arose from the practical impossibility of dividing injuries. If an injury were incapable of being divided, then entire liability was imposed on each tortfeasor who substantially contributed to the result. Id. § 52, at 314-16. Dean Prosser states that joinder of parties and entire liability have been confused, and that an apportionment of damages should be allowed if possible to divide the harm caused. Id. §§ 48, 52, at 298, 314. See F. HARPER & F. JAMES, supra note 42, § 10.1, at 697; Comment, Recent Development in Joint and Several Liability, 24 Syracuse L. Rev. 1319 (1973).

The issue of the confusion between substantive and procedural concepts resulting in entire liability has been the subject of recent commentary. See generally Adler, Allocation of Responsibility After American Motorcycle Association v. Superior Court, 6 Pepperdine L. Rev. 1, 16-17 (1978); Zavos, Comparative Fault and the Insolvent Defendant: A Critique and Amplification of American Motorcycle Association v. Superior Court, 14 Loy. L.A.L. Rev. 775, 783-85 (1981); Comment, Comparative Negligence, Multiple Parties, and Settlements, 65 Calif. L. Rev. 1264, 1264-68 (1977) [hereinafter cited as Comment, Multiple Parties]; Comment, Comparative Negligence in California, Multiple Party Litigation, 7 Pac. L.J. 770, 776-77 (1976) [hereinafter cited as Comment, Comparative Negligence in California]. As used in this explanation, defendant refers to the tortfeasor actually sued by the plaintiff or otherwise made a party to the action. A tortfeasor is any party who contributed to the injury and may be subject to suit and held legally responsible.

45. F. HARPER & F. JAMES, supra note 42, § 10.1, at 695-99; W. PROSSER, supra note 5, § 52, at 315-20. The term joint tortfeasor was once limited to intentional tortfeasors but now includes negligent tortfeasors whose individual acts substantially contribute to plaintiff's indivisible injury. Id. § 47, at 291-93. See Sargent v. Interstate Bakeries, Inc.,
damages were not apportioned or divided because the tortfeasors were wrongdoers who contributed to the plaintiff’s single, invisible injury.\textsuperscript{46}

Joint and several liability is the basis for third-party practice.\textsuperscript{47} If one defendant were not held liable for all of the plaintiff’s damages, then there would be no need for that defendant to pursue a third-party claim against another defendant.\textsuperscript{48} Third-party practice evolved only because the common law did not divide damages among the defendants or joint tortfeasors.\textsuperscript{49} In Illinois, the doctrines of indemnity, equitable apportionment, and contribution developed to determine the defendants’ liability to each other for the plaintiff’s injury.\textsuperscript{50} These separate doctrines


46. W. Prosser, supra note 5, §§ 50, 52, at 306, 313-17. See Devaney v. Otis Elevator Co., 251 Ill. 28, 39, 95 N.E. 990, 994 (1911); Caruso v. City of Chicago, 305 Ill. App. 571, 576, 27 N.E.2d 545, 547 (1940) (no apportionment of damages between joint wrongdoers); Appel & Michael, supra note 45, at 170. Cf. F. Harper & F. James, supra note 42, § 10.1, at 708 (implicit in the concept of joint tortfeasors as wrongdoers is placing the burden on the defendants to apportion the damages).


49. Comment, Comparative Negligence in California, supra note 44, at 776-78.

50. Indemnity shifts the entire loss from one tortfeasor who has been compelled to pay the damages to the other tortfeasor who should bear the loss. Suvada v. White Motor Co., 32 Ill. 2d 612, 622, 210 N.E.2d 182, 188 (1965). Indemnity derives from contract principles, may be express or implied, and requires a pre-tort relationship between the parties giving rise to a duty to indemnify. Muhlbauer v. Kruzel, 39 Ill. 2d 226, 230, 234 N.E.2d 790, 792 (1968); Van Jacobs v. Parikh, 97 Ill. App. 3d 610, 613, 422 N.E.2d 979, 981 (1981). See W. Prosser, supra, note 5, § 51, at 310; Bua, Third Party Practice in Illinois: Express
did not divide the plaintiff's injury but instead shifted or reallocated the damages among the defendants. Joint and several liability ensured that the plaintiff was entitled to full recovery from any defendant who proximately caused the single, indivisible injury. After judgment was entered for the plaintiff, the burden was placed upon the defendants to either reallocate the damages or bear the loss caused by an immune, insolvent or absent tortfeasor.

The policy considerations behind the common law rule of joint and several liability were to hold the defendants liable as wrongdoers and to insure compensation for an injured, innocent plaintiff. The doctrines of third-party practice did not compromise


Equitable apportionment applies to those situations in which a second tortfeasor compounds an injury caused by the first tortfeasor. The original tortfeasor is liable for all damages flowing from his negligence, but receives that portion of the damages from the second tortfeasor caused by aggravating the plaintiff’s original injury. Gertz v. Campbell, 55 Ill. 2d 84, 302 N.E.2d 40 (1973). See W. Prosser, supra note 5, § 52, at 320-21 (determining liability for successive injuries).


51. See Note, Ohio's Comparative Negligence Statute: The Effect on Joint and Several Liability, Absent Defendants and Joinder, 30 Cine. L. Rev. 342, 345-46 (1981); Comment, Comparative Negligence in California, supra note 44, at 777-76.


52. Appel & Michael, supra note 45, at 178-80. For a complete discussion of joint and several liability, see American Motorcycle Ass’n v. Superior Court, 20 Cal. 3d 578, 587-90, 578 P.2d 899, 904-06, 146 Cal. Rptr. 182, 187-89 (1978).

53. See Appel & Michael, supra note 45, at 170-71; Zavos, supra note 44, at 780-83; Comment, Multiple Parties, supra note 44, at 1285-68.

54. See Adler, supra note 44, at 15; Note, supra note 43, at 752; Note, supra note 45, at
these goals.\textsuperscript{55} While the recent treatment of contribution in Illinois was evidence of the viability of joint and several liability before comparative negligence, the decision in \textit{Coney} would decide the issue of whether this traditional tort doctrine would survive after comparative negligence.

\textit{Contribution in Illinois}

The Illinois Supreme Court adopted contribution in \textit{Skinner v. Reed-Prentice Division Package Machine Co.} to change the inequitable rule of no contribution among joint tortfeasors.\textsuperscript{56} In \textit{Skinner}, the court allowed a cause of action for contribution between a strictly liable defendant and a more than negligent defendant.\textsuperscript{57} Specifically, the court recognized the manufacturer's claim for contribution against the employer which alleged that the latter's misuse or assumption of risk contributed to the plaintiff's injury.\textsuperscript{58} The court declared that equitable considera-

\begin{footnotesize}
1170. The common law justification rested on the indivisibility of plaintiff's injury. \textit{See supra} note 44. \textit{See also} Note, \textit{supra} note 51, at 347-49.
\textsuperscript{55} Appel & Michael, \textit{supra} note 45, at 178-80; Horan, \textit{supra} note 50, at 337. \textit{See Comment, supra} note 50, at 180-81.

The court responded to the 1976 Report of the Illinois Judicial Conference which unanimously recommended that liability among joint tortfeasors "be apportioned on the basis of their pure relative fault." \textit{Id.} at 7, 374 N.E.2d at 439.
\textsuperscript{57} \textit{Id.} at 16, 374 N.E.2d at 443. Although the manufacturer's third-party complaint averred negligence, the court in \textit{Skinner} construed the complaint to allege misuse and assumption of risk by the employer. \textit{Id.} By this interpretation of the pleadings, the court attempted to avoid the introduction of negligence concepts into strict products liability actions. \textit{See} Doyle v. Rhodes, 109 Ill. App. 3d 590, 595, 440 N.E.2d 895, 897-98 (1982); Appel & Michael, \textit{supra} note 45, at 182-85. The Illinois Supreme Court also liberally construed the pleadings in the companion cases to conform to the \textit{Skinner} rule. Stevens v. Silver Mfg. Co., 70 Ill. 2d 41, 44, 374 N.E.2d 455, 457 (1977), \textit{modified}, 70 Ill. 2d 16 (1978); Robinson v. International Harvester Co., 70 Ill. 2d 47, 49-50, 374 N.E.2d 437, 446 (1977), \textit{modified}, 70 Ill. 2d 16 (1978). \textit{See} Ferrini, \textit{supra} note 51, at 263-64.
\textsuperscript{58} 70 Ill. 2d at 16, 374 N.E.2d at 443. The forceful dissent by Justice Dooley stated that the \textit{Skinner} court had indeed adopted a system of comparative fault. \textit{Id.} at 24, 374
\end{footnotesize}
tions required that liability be apportioned based on the relative degree to which the employer's conduct and the manufacturer's defective product proximately caused the plaintiff's injuries. The goal of fairness to the defendants did not change the liability of the defendants to the plaintiff, however.

The *Skinner* court specifically noted that indemnity and contribution did not compromise the goals of strict products liability because the concepts of third-party practice were applied only after the plaintiff was assured of compensation. The language and goals of comparative contribution in *Skinner* did not affect the plaintiff's ability to recover, but only the apportionment of the damages among the defendants. Indeed, the Illinois Contribution Among Joint Tortfeasors Act, which codified *Skinner*,

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59. 70 Ill. 2d at 14, 374 N.E.2d at 442. It has been suggested that the court modified the opinion in *Skinner* to apply comparative causation rather than comparative fault principles in response to Justice Dooley's dissent. Appel & Michael, *supra* note 45, at 181-85, 188-92; Ferrini, *supra* note 51, at 270-72. The original opinion focused on the fault and relative culpability of the parties causing plaintiff's injuries. No. 48757, slip op. at 8-9 (Ill. Sup. Ct. Dec. 12, 1977). The modified opinion emphasized the causal elements of the events producing the injury. 70 Ill. 2d at 14-16, 374 N.E.2d at 442-43.


61. "When the economic loss of the user has been imposed on a Defendant in a strict liability action the policy considerations of *Suvada* are satisfied and the ordinary equitable principles governing the concepts of indemnity or contribution are to be applied." 70 Ill. 2d at 14, 374 N.E.2d at 443.

62. A further indication that *Skinner* did not eliminate joint and several liability is that the Illinois Supreme Court decided *Buehler v. Whalen*, 70 Ill. 2d 51, 374 N.E.2d 460 (1977), *modified,* 70 Ill. 2d 16 (1978), at the same time as *Skinner*, and retained the common law rule. *Id.* at 59, 374 N.E.2d at 466. For a complete discussion, see Appel & Michael, *supra* note 35, at 178-80.

63. Illinois Contribution Among Joint Tortfeasors Act, ILL. REV. STAT. ch. 70, ¶¶ 301-305 (1981) [hereinafter cited as Contribution Act]. With respect to the issue of comparing the strictly liable defendant to the negligent defendant the statute provides:

§ 2. Right of Contribution.

(a) Except as otherwise provided in this Act, where 2 or more persons are subject to liability in tort arising out of the same injury to person or property, or the same wrongful death, there is a right of contribution among them, even though judgment has not been entered against any or all of them.

*Id.* ¶ 302. The statutory language does not distinguish between negligence and strict
expressly states that the rights of plaintiffs are unaffected by contribution among joint tortfeasors. Therefore, the contribution doctrine maintained the policy goals of joint and several liability. Plaintiffs were fully compensated by wrongdoers who later apportioned damages.

The Skinner decision was significant with regard to both major issues before the court in Coney. First, using comparative causation as a basis for apportioning liability for damages between concurrent tortfeasors, the Illinois Supreme Court established the comparative fault analysis applicable to Illinois. Second, the court ensured the compensation of an injured plaintiff by adopting contribution on the traditional foundation of joint and several liability. The decision in Coney would rest in part on the policy considerations and comparative basis delineated by the court in Skinner as well as Alvis.

Before the adoption of comparative negligence, therefore, the strong policy goals of strict products liability severely restricted the defenses to a products liability action. Not only were the defenses carefully circumscribed, but the defendants were held jointly and severally liable for plaintiff's injuries. An injured plaintiff, even if contributorily negligent, received full compensation from a strictly liable defendant. Moreover, joint and several liability remained a viable rule even after Illinois adopted contribution. Contribution only affected the allocation of damages among the defendants; it did not affect the determination of liability and damages between plaintiff and defendants. In Coney, the Illinois Supreme Court would examine the defenses to strict products liability and the doctrine of joint and several liability in light of the policy considerations of comparative negligence espoused in Alvis v. Ribar.

products liability. Also, the basis of comparison is relative culpability. Section 3 provides “Amount of Contribution. The pro rata share of each tortfeasor shall be determined in accordance with his relative culpability.” Id. ¶ 303. See Horan, supra note 50, at 332.

66. See supra note 59. See also Coney, No. 56306, slip op. at 8. The court required more culpability than negligence on the part of the third-party defendant to qualify for damage apportionment with a strictly liable defendant.

67. Horan, supra note 50, at 335; Comment, supra note 50, at 181.

68. Appel & Michael, supra note 45, at 170-71.
Comparative Negligence in Illinois

The Illinois Supreme Court adopted the doctrine of pure comparative negligence in *Alvis v. Ribar* to alleviate the harshness of the common law rule of contributory negligence.\(^{69}\) The all-or-nothing rule of contributory negligence had completely barred a culpable plaintiff from recovery.\(^{70}\) In *Alvis* and its companion case, *Krohn v. Abbott Laboratories, Inc.*,\(^{71}\) the plaintiffs' negligence had contributed to their injuries. Instead of finding contributory negligence to be a complete defense, the holding of *Alvis* required that the plaintiff's damages be proportionately

\(^{69}\) 85 Ill. 2d 1, 15-25, 421 N.E.2d 886, 892-97 (1981). The court reviewed the history of contributory negligence from Butterfield v. Forrester, 11 East 60, 103 Eng. Rep. 926 (K.B. 1809) ("want of ordinary care . . . by the plaintiff" barring plaintiff's recovery) to its acceptance in Illinois in Aurora Branch R.R. Co. v. Grimes, 13 Ill. 585 (1858) (adding the requirement that plaintiff prove defendant's negligence and own lack of negligence). Next the court noted the brief Illinois history of comparative negligence adopted in Galena & Chicago Union R.R. v. Jacobs, 20 Ill. 478 (1858) (allowing plaintiff to recover where his negligence was slight and defendant's was gross). This approach was based on measurement of degrees of negligence and was abandoned in Calumet Iron & Steel Co. v. Martin, 115 Ill. 358, 368-69, 3 N.E.2d 456, 461-64 (1885) and City of Lanark v. Dougherty, 153 Ill. 163, 164, 38 N.E.2d 892, 892 (1894). See 85 Ill. 2d at 5-15, 421 N.E.2d at 887-92. See Note, *Pure Comparative Negligence in Illinois: Alvis v. Ribar*, 12 CHI. KENT L. REV. 599, 600-05 (1981).

The court noted with approval comparative negligence in federal statutes, e.g., Federal Employer's Liability Act of 1908, 45 U.S.C. § 33 (1976) and its adoption in thirty-six states, and concluded with a quote from Placek v. City of Sterling Heights, 405 Mich. 638, 653, 275 N.E.2d 511, 515 (1979): "This precedent is so compelling that the question before remaining courts and legislatures is not whether but when, how and in what form to follow this lead." 85 Ill. 2d at 15, 421 N.E.2d at 892.

\(^{70}\) 85 Ill. 2d at 7, 9, 421 N.E.2d at 888, 890. The court identified the exceptions that had developed to avoid the all-or-nothing rule: "willful," "wanton," or "reckless" conduct of the defendant, defendant's violation of a statute, and the last clear chance doctrine. *Id.* at 10-11, 421 N.E.2d at 890. See V. SCHWARTZ, *supra* note 10, § 1.2, at 5-8; H. WOODS, *supra* note 10, §§ 1.6-1.7, at 11-15; Prosser, *Comparative Negligence*, 41 CALIF. L. REV. 1, 5-7 (1953). Prosser also suggests that contributory "fault" would be a more descriptive term because negligence connotes a duty to someone else, while contributory negligence involves no duty except to prevent an undue risk of harm to the plaintiff himself. W. PROSSER, *supra* note 5, § 65, at 418.

\(^{71}\) 85 Ill. 2d 4, 421 N.E.2d 886 (1981). In *Alvis*, the plaintiff was injured as a result of the collision between a motor vehicle and a stop sign. Plaintiff filed a multicount personal injury suit seeking damages from Ribar and two other defendants. *Id.* at 4, 421 N.E.2d at 887. See Franzese v. Katz, 78 Ill. App. 3d 1117, 398 N.E.2d 124 (1979), rev'd sub nom. Alvis v. Ribar, 85 Ill. 2d 1, 421 N.E.2d 886 (1981).

In *Krohn*, plaintiff's decedent was fatally injured in a collision with a tractor-trailer owned by defendant, Abbott Laboratories, Inc. Plaintiff brought a wrongful death action against two defendants, the owner and the operator of the tractor-trailer. 85 Ill. 2d at 4-5, 421 N.E.2d at 887. In each case, the plaintiff's complaint included a count based on comparative negligence which was dismissed by the trial court upon motion by the defendants. *Id.* at 4, 421 N.E.2d at 887.
reduced by the fault attributable to him.\textsuperscript{72}

In \textit{Alvis}, the court reasoned that the policy of apportioning a loss between a negligent plaintiff and defendant was more equitable than the common law rule of contributory negligence.\textsuperscript{73} Furthermore, the adoption of comparative negligence would promote respect for the law by allowing juries to decide negligence cases on a rule of law rather than on a disregard of the court's instructions.\textsuperscript{74} In abolishing contributory negligence, the court did not specifically address what effect comparative negligence would have on the doctrines of strict products liability and joint and several liability.\textsuperscript{75} With respect to multiple parties, however, the court did state that the collateral issue of contribution among joint tortfeasors had been resolved by the comparative principles in \textit{Skinner}.\textsuperscript{76}

\textsuperscript{72} Ill. 2d at 27-28, 421 N.E.2d at 898. See V. SCHWARTZ, supra note 10, § 3.2, at 46. Professor Schwartz states that the jury first establishes that both plaintiff and defendant proximately caused the injury and then allocates the fault to each party. \textit{Id.} § 17.1, at 275. Therefore, the jury has to decide if both parties are negligent before determining relative fault. \textit{Id.} See also Fischer, supra note 27, at 438; Fleming, Forward, Comparative Negligence at Last—By Judicial Choice, 64 CALIF. L. REV. 239, 249 (1976); Prosser, Comparative Negligence, 51 MICH. L. REV. 465, 481 (1953).

In discussing the form of comparative negligence the court stated: "Under the 'pure' form, the plaintiff's damages are simply reduced by the percentage of fault attributable to him." 85 Ill. 2d at 25, 421 N.E.2d at 897.

\textsuperscript{73} 85 Ill. 2d at 15-25, 421 N.E.2d at 892-97. The court stated that "the 'pure' form of comparative negligence is the only system which truly apportions damages according to the relative fault of the parties and, thus, achieves total justice." \textit{Id.} at 27, 421 N.E.2d at 898. The court also rejected the modified form of contributory negligence which allowed a 49% negligent defendant to escape liability because it was as arbitrary as contributory negligence. \textit{Id.} See Li v. Yellow Cab Co., 13 Cal. 3d 804, 827, 532 P.2d 1226, 1242, 119 Cal. Rptr. 858, 874 (1975). The court noted that other authorities advocating a pure system as opposed to modified included: United States v. Reliable Transfer Co., 421 U.S. 397, 406 (1975); V. SCHWARTZ, supra note 10, § 21.3, at 347; Prosser, supra note 72, at 23-25. See supra note 10.

\textsuperscript{74} 85 Ill. 2d at 20-21, 421 N.E.2d at 894-95. It has been suggested that juries ignored the harshness of the contributory negligence rule and reached verdicts by a common sense relative culpability approach. \textit{Id.} In fact, the imposition of contributory negligence was seen as a way of controlling juries' sympathies. \textit{Id.} at 6, 421 N.E.2d at 888. H. WOODS, supra note 10, §§ 1:4-1:5, at 7-11. The Court concluded that there was something inherently wrong with a system of justice which required juries to disregard the law. 85 Ill. 2d at 13, 421 N.E.2d at 894. See Li v. Yellow Cab Co., 13 Cal. 3d 804, 811, 432 P.2d 1226, 1231, 119 Cal. Rptr. 858, 863 (1975); Hoffman v. Jones, 280 So. 2d 431, 437 (Fla. 1975). See also V. SCHWARTZ, supra note 10, § 21.1, at 338; Fischer, supra note 27, at 432; Fleming, supra note 72, at 242-43.

\textsuperscript{75} See supra notes 12-13.

\textsuperscript{76} 85 Ill. 2d at 28, 421 N.E.2d 898. The court also mentioned that the statutory codification of \textit{Skinner} was controlling on the issue of contribution among joint tortfeasors. \textit{Id.} See supra notes 63-64.
In Coney v. J.L.G. Industries, Inc., the Illinois Supreme Court accepted the opportunity to rule on the application of comparative fault principles to strict products liability and to determine its effect on joint and several liability. The court had to reconcile the policy considerations of each doctrine with the goal of comparative negligence as announced in Alvis: to apportion loss on the basis of relative fault. If comparative fault principles applied to strict products liability and joint and several liability, the court would necessarily change the common law allocation of damages in Illinois. In resolving both major issues in Coney, the court ultimately determined the extent of the defendants’ liability to the plaintiff in a strict products liability action.

**CONEY V. J.L.G. INDUSTRIES, INC.**

Jack A. Coney, plaintiff and administrator of the estate of Clifford M. Jaspar, deceased, filed a suit against J.L.G. Industries, Inc., seeking recovery under a theory of strict products liability. Plaintiff alleged that Jaspar died as a result of injuries proximately caused by the unreasonably dangerous condition existing in the aerial work platform manufactured by the defendant. The defendant denied these allegations and raised two

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77. No. 56306, slip op. at 1 (Ill. Sup. Ct. May 18, 1983). The complaint sought damages under the Wrongful Death and Survival Acts. *Id.* Complaint at 1. The Wrongful Death Act provides that the representative of the decedent may pursue an action for damages against “the person who or company or corporation which would have been liable if death had not ensued . . . .” Wrongful Death Act, ILL. REV. STAT. ch. 70, ¶ 1 (1981). The Survival Act allows “actions to recover damages for an injury to the person” to pass to the estate of the decedent upon the death of the injured person, ILL. REV. STAT. ch. 110 1/2, ¶ 27-6 (1981). For a discussion of the distinction between the Wrongful Death and Survival Acts, see Murphy v. Martin Oil Co., 56 Ill. 2d 423, 426-27, 308 N.E.2d 583, 586; W. PROSSER, supra note 5, §§ 126-127, at 901, 906.

The original and amended complaints named Weise Planning and Engineering Inc., the distributor of the work platform, as a party defendant. No. 56306, Complaint at 1. However, these counts were voluntarily dismissed upon motion by the plaintiff in the Circuit Court of the Tenth Judicial Circuit of Illinois. The plaintiff could not pursue a common law claim against the decedent’s employer because the employer was subject to statutory liability under the Worker’s Compensation Act, ILL. REV. STAT. ch. 48, §§ 138.1-138.30 (1981). See infra note 81.

78. Brief for Appellant at 7, Coney v. J.L.G. Indus., Inc., No. 56306 (Ill. Sup. Ct. May 18, 1983). Specifically, the complaint alleged that the bucket of the hydraulic manlift in which decedent was working abruptly shifted position injuring the decedent. *Id.* Plaintiff’s decedent died five days after the occurrence. Plaintiff averred that the equipment operated by the decedent at his workplace was defective because it lacked sufficient warning devices. Brief for Appellee at 10.
affirmative defenses. The defendant claimed that the negligence or fault of both the decedent and the decedent's employer, V. Jobst & Sons, Inc., was a proximate and substantial cause of the decedent's injury and death. Under existing Illinois law, the defendant could not pursue a third-party claim against the employer for contribution or indemnity, and instead sought to limit its liability to its relative fault.

79. Brief for Appellant at 7.
80. No. 56306, slip op. at 1. The first affirmative defense claimed that the decedent was guilty of comparative negligence or fault in operating the hydraulic manlift. The second affirmative defense asserted that the decedent's employer was guilty of comparative negligence or fault in failing to train the decedent in the proper operation of the work platform. In effect, defendant claimed that comparative negligence should proportionately reduce plaintiff's recovery by the fault attributable to the plaintiff and to others contributing to the injury.


Also, the defendant manufacturer could not seek indemnity in a third-party action from a "downstream" employer or supplier under an implied indemnity theory. Burke v. Sky Climber, Inc., 57 Ill. 2d 542, 546, 316 N.E.2d 516, 519 (1975); Liberty Mut. Ins. Co. v. Williams Mach. & Tool Co., 62 Ill. 2d 77, 81-82, 338 N.E.2d 857, 859-60 (1975). See Note, supra note 58, at 176-77. By filing the affirmative defenses, therefore, defendant sought to reduce its liability to its percentage of fault. No. 56306, slip op. at 1. Defendant filed the affirmative defenses within one month after the Alvis v. Ribar decision. The rule in Alvis specifically applied to "all cases in which trial commences on or after June 8, 1981." 85 Ill. 2d at 28, 421 N.E.2d at 898.

Thus, Coney squarely raises the issue of which party should bear the loss of an immune tortfeasor. The employer is immune from suit because of the statutory liability of workers' compensation. The Illinois Workers' Compensation Act provides in pertinent part:

(a) No common law or statutory right to recover damages from the employer [or] his insurer ... for injury or death sustained by any employee while engaged in the line of his duty as such employee, other than the compensation herein provided, is available to any employee who is covered by the provisions of the Act.


The operation of the workers' compensation system raises questions concerning the fairness to all litigants in the apportionment of damages in workplace settings. See Skinner, 70 Ill. 2d at 20-21, 374 N.E.2d at 445-46 (Underwood, J., dissenting); id. at 33-36, 374 N.E.2d at 452-53 (Dooley, J., dissenting); 2A A. LARSON, supra, §§ 76.10-76.42, at 227-
The plaintiff moved to strike both affirmative defenses on the grounds that comparative negligence was inapplicable to strict products liability and did not abrogate the common law doctrine of joint and several liability. The trial court granted the motion to strike but certified three questions for appeal.

In an unpublished order, the Illinois Appellate Court for the Third Judicial District denied the defendant's application for leave to appeal, stating that the policy issues before the court required it to examine the evidence relating to the claims. Thereafter, the Illinois Supreme Court granted the defendant leave to appeal. The primary issues on appeal were: whether comparative negligence or fault applies to strict products liability actions and whether joint and several liability survives comparative negligence. In a thoughtful opinion, the supreme court held that


82. Brief for Appellant at 10. Plaintiff asserted that the only defenses based on defendant's conduct available to the defendant manufacturer in a strict products liability action were assumption of risk or misuse. See supra text accompanying notes 34-35. Moreover, plaintiff claimed that comparative negligence affected the determination of fault between plaintiff and defendant but did not change the fundamental tort doctrine of joint and several liability of defendants. See supra text accompanying notes 51-53.


84. Coney, 102 Ill. App. 3d 1205, 434 N.E.2d 1206 (unpublished opinion at 2). The court agreed with the plaintiff that the policy issues should be decided "in light of the record, rather than in a vacuum." Id.

85. The actual issues certified for appeal were as follows:
   Whether the doctrine of comparative negligence or fault is applicable to actions of claims seeking recovery under products liability or strict liability in tort theories?
   Whether the doctrine of comparative negligence or fault eliminates joint and several liability?
   Whether the retention of joint and several liability in a system of comparative negligence or fault denies defendants equal protection of the laws in violation of U.S. Const. Amend. XIV, § 1 and Ill. Const. 1970, § 2 as to causes of action
comparative fault does apply to strict products liability and does not eliminate joint and several liability. The reasoning of the court reflects the policy considerations the court weighed in arriving at these answers.

Reasoning of the Court

In deciding the first issue presented, the supreme court went beyond the issue of the applicability of comparative fault to strict products liability and determined which aspects of the decedent’s misconduct would be treated as damage-reducing factors. The Illinois court initially reviewed the imposition of strict products liability in *Suvada v. White Motor Co.* After quoting the public policy rationale articulated in *Suvada*, the court pointed out that manufacturers were not absolute insurers of defective products, that a plaintiff had specific proof requirements, and that defenses based on the user’s conduct existed. The court then noted that public policy demanded the adoption of comparative negligence in *Alvis v. Ribar* to more equitably allocate the loss in negligence actions. The court summarized the impact of comparative negligence upon strict products liability in other jurisdictions, commenting that the majority of jurisdictions have applied comparative negligence principles to strict products liability.

Further, the court declared that the application of comparative fault principles would not frustrate the fundamental policy goals announced in *Suvada*. Strict products liability would still

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86. *Id.* at 8, 13. In resolving the third issue, the *Coney* court decided that retaining joint and several liability in a system of comparative fault does not deny the defendants equal protection of the laws. *Id.* at 14-15. The court stated that defendant could not attempt to circumvent the prospective ruling of *Skinner* by the equal protection argument. *Id.* at 14. Moreover, the court questioned the defendant’s standing to raise the constitutional issue because the defendant had not filed a third-party claim and, therefore, was the only defendant in the suit. *Id.*

87. *Id.* at 9.
88. *Id.* at 2. See 32 Ill. 2d at 618-19, 210 N.E.2d at 186.
89. *Id.* at 2-3.
90. *Id.* at 3.
91. *Id.* at 3-5. While the court in *Coney* distinguished the cases which did not apply comparative negligence to strict products liability, the court did not include Connecticut as a comparative jurisdiction. See *Conn. Gen. Stat. Ann.* § 52-572a(a) (West Supp. 1982).
92. No. 56306, slip op. at 6.
relieve the problems encountered by the plaintiff in proving negligence or breach of warranty for injuries received from defective products.\textsuperscript{93} The court also explained that, with comparative negligence, the plaintiff bears only the risk of loss caused by his fault; the manufacturer spreads the remaining loss among all consumers and users of defective products.\textsuperscript{94}

Recognizing the theoretical difficulty of comparing the plaintiff's conduct (a fault concept) with the defendant's product (a no-fault concept), the court reasoned that the basis for comparison was the causative contribution of each to the injury.\textsuperscript{95} The court noted the reliance on comparative causation in other jurisdictions and quoted with approval the language of \textit{Skinner} which focused on causation factors to apportion damages for contribution purposes.\textsuperscript{96} The court paraphrased the language of \textit{Skinner}, stating that the damages for plaintiff's injuries would be apportioned "on the basis of the relative degree to which the defective product and plaintiff's conduct proximately caused them."\textsuperscript{97}

To implement the comparative fault defense, the court reevaluated the applicability of the prior defenses to strict products liability. Instead of completely barring a plaintiff's recovery, the court announced that a plaintiff's assumption of the risk or misuse would proportionately reduce his recovery.\textsuperscript{98} However, contributory negligence such as a plaintiff's failure to inspect, discover or guard against a product defect, would not be a damage-reducing factor.\textsuperscript{99} The court held that after the defendant's

\textsuperscript{93} Id. The court's analysis followed the reasoning of Daly v. General Motors Corp., 20 Cal. 3d 725, 736-37, 575 P.2d 1162, 1168, 144 Cal. Rptr. 380, 386 (1978).

\textsuperscript{94} No. 56306, slip op. at 6. See Stueve v. American Honda Motors Co., 457 F. Supp. 740, 753-54 (D. Kan. 1978); Daly, 20 Cal. 3d at 737, 575 P.2d at 1168, 144 Cal. Rptr. at 386.

\textsuperscript{95} No. 56306, slip op. at 7-8.


\textsuperscript{97} No. 56306, slip op. at 8.

\textsuperscript{98} Id. at 9.

liability is established, and where the plaintiff's misconduct causes the injury, the plaintiff's damages will be proportionately reduced by his fault.\textsuperscript{100}

In deciding the second issue, whether the adoption of comparative negligence eliminates joint and several liability, the court discussed the treatment of the issue in other jurisdictions. Observing that the majority of jurisdictions retain joint and several liability after comparative negligence, the court summarized the four primary rationales for retaining joint and several liability: (1) an indivisible injury is not made divisible because fault is capable of apportionment—a concurrent tortfeasor is still responsible for the entire indivisible injury proximately caused by his negligence; (2) the plaintiff should not have to bear the burden of loss caused by an insolvent or immune tortfeasor; (3) the plaintiff is not a tortfeasor—the plaintiff has the duty to protect his own safety, whereas the defendant has the duty to act with care for the safety of others; and (4) injured plaintiffs need to obtain adequate compensation for their injuries.\textsuperscript{101}

Relying on the policy goals and language of \textit{Alvis}, the court asserted that comparative negligence requires that the plaintiff's damages be reduced by the percentage of fault attributable to him.\textsuperscript{102} The plaintiff's damages should not be further reduced by the percentage of fault caused by an insolvent or an immune tortfeasor.\textsuperscript{103} The court also found support in the legislative enactment of the \textit{Skinner} contribution doctrine to retain joint and several liability.\textsuperscript{104} Under the statute, the defendant continues to bear the burden of the insolvent or immune tortfeasor. The court maintained that \textit{Alvis} did not require that the defendant be liable for only the portion of damages produced by his fault.\textsuperscript{105}

\textsuperscript{100} No. 56306, slip op. at 9.
\textsuperscript{101} Id. at 10-11. The court followed the reasoning of American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 588-90, 578 P.2d 899, 905-06, 146 Cal. Rptr. 182, 188-89 (1978).
\textsuperscript{102} No. 56306, slip op. at 12.
\textsuperscript{103} Id.
\textsuperscript{104} Id. at 12-13.
\textsuperscript{105} Id. at 13.
ANALYSIS

The Application of Comparative Negligence to
Strict Products Liability

1. Policy Considerations

In applying comparative negligence principles to strict products liability, the Illinois Supreme Court attempted to balance the competing policy considerations of each doctrine. The policy goals of strict products liability previously articulated by the court were consumer protection, risk distribution and safety incentive. The overriding policy reason for adopting comparative negligence was fairness to the litigants. The Coney court did not address the products liability goals of consumer protection and safety incentive. Neither goal would be advanced by the application of comparative negligence principles. Instead, the court focused on relieving the plaintiff’s proof problems and risk distribution as the major reasons for imposing strict products liability. It explained that reducing the plaintiff’s recovery through comparative negligence would not affect the plaintiff’s

107. See supra text accompanying notes 69, 73.

For the view that the application of comparative negligence principles does not promote the public policy of consumer protection, see Note, supra note 69, at 622-27; Note, Comparative Fault and Strict Products Liability: Are They Compatible? 5 PEPPERDINE L. REV. 501, 513-14 (1978). For a discussion of the lessening of the safety incentive after comparative negligence, see Seidelson, The 402A Defendant and the Negligent Actor, 15 DUQ. L. REV. 371, 375 (1977); Westra, supra note 28, at 363. Contra Sales, supra note 34, at 771-72 (safety incentive remains because user may be blameless); Note, supra note 81, at 607 (safety incentive is part of the user's responsibility). See generally Twerski, The Use and Abuse of Comparative Negligence in Products Liability, 10 IND. L. REV. 797, 798-802 (1977) (suggesting that applying comparative negligence in all product liability actions, regardless of the type of defect litigated, would significantly reduce the manufacturer's responsibility to the public).

109. No. 56306, slip op. at 6. See Butaud v. Suburban Marine & Sporting Goods, Inc. 55 P.2d 42, 45-46 (Alaska 1976); Daly, 20 Cal. 3d at 737-39, 575 P.2d at 1168-69, 144 Cal. Rptr. at 386-87. Many commentators have asserted that applying comparative negligence to strict products liability would advance the goal of risk distribution. See Fischer, supra note 27, at 433; Plant, Comparative Negligence and Strict Tort Liability, 40 LA. L. REV. 403, 415 (1980); Wade, Products Liability and Plaintiff's Fault—The Uniform Comparative Fault Act, 29 MERCER L. REV. 373, 378-79 (1978); Comment, Product Liability Reform
proof requirements and would further the goal of risk distribution.\textsuperscript{110}

Although the \textit{Coney} court downplayed the goals of consumer protection and safety incentive, it correctly decided that the language and policy goals of \textit{Alvis} demanded the priority of risk distribution. In \textit{Alvis}, the court had held the defendant liable for all of the plaintiff’s damages not caused by the fault of the plaintiff.\textsuperscript{111} By holding the product user or consumer responsible for his own culpable conduct, the \textit{Coney} court allocated the risk to the party who created that portion of the risk. After \textit{Coney}, the injured consumer or user will be protected and compensated, but only to the extent of damage not attributable to his misconduct.\textsuperscript{112} The \textit{Alvis} goal of fairness to the litigants required that the plaintiff assume the economic loss caused by his fault rather than place the total loss on the manufacturer and eventually other consumers.\textsuperscript{113} In \textit{Coney}, the court concluded that apportioning damages in a strict products liability suit more equitably allocated the loss if both plaintiff’s conduct and defendant’s product caused the injury.\textsuperscript{114}
2. Basis For Comparison

The decision in *Coney* reaffirmed the conceptual distinction between negligence and strict products liability causes of action in Illinois. While recognizing that this "apples and oranges" comparison between the plaintiff's conduct and the defendant's product may be more theoretical than practical, the court maintained the conceptual distinction by using comparative causation as the basis for comparison. With comparative causation, courts apportion damages by comparing the parties' causal contribution to plaintiff's injury, irrespective of fault. This comparative analysis shifts the focus from weighing the fault of the parties to measuring and comparing causative factors and avoids the semantic difficulties of the comparative fault analysis. However, this approach creates other problems in administering a system of comparative fault.

There has been extended legal debate concerning the problems in applying comparative negligence principles to strict products liability and the appropriate basis for comparison. Although courts and juries have been able to make the comparison between plaintiff's conduct and defendant's product, legal authorities have been unable to resolve the controversy. Whether the

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119. For the commentators favoring application of comparative negligence, see Fischer, * supra* note 27, at 432-33 n.11. Those commentators opposed to applying comparative negligence to strict products liability include: Levine, *Strict Products Liability and Comparative Negligence: The Collision of Fault and No-Fault*, 14 San Diego L. Rev. 337, 346 (1977) (no basis of comparison between plaintiff conduct and defective product); Westra, * supra* note 28, at 150-55 (restructure defenses rather than apply comparative princi-
problem is merely semantic or conceptually significant, courts and commentators have struggled to bridge the gap between fault and no-fault theories of recovery to determine shares of liability. Besides comparative causation, courts in other jurisdictions have developed four principle methods to apportion damages between a negligent plaintiff and a strictly liable defendant: negligence per se, quasi-fault comparison, comparative fault and damage reduction. While the court in Coney did not adopt any of the alternative methods, comparative causation does not completely solve the problems encountered in equitably allocating damages in products liability actions.

Although comparative causation conquers the conceptual problem, there are practical disadvantages to this method of
applying comparative principles to strict products liability. Critics of comparative causation argue that it is difficult to measure causation because there may be many interrelated causes of the injury. It has also been suggested that there is no functional relationship between causation and fault. One party may be the major cause of the injury, but demonstrate little fault in terms of culpable conduct. Further, several authorities observe that causation should play a different role in apportioning damages in comparative fault. Initially proximate causation is established, then the fault of the parties is determined for purposes of comparison. Therefore, causal fault is compared, not causation.

There are obvious theoretical and practical problems inherent in any process of apportionment. The major difficulty lies in the question of what is compared in comparative negligence: fault, causation, or fault and causation combined. Although

122. Sandford, 292 Or. at 597-98, 642 P.2d at 630-31. Professor Twerski has criticized comparative causation as a judicial "slight of hand" which developed to resolve the inability to compare fault and no-fault theories of recovery. Twerski, Selective Use of Comparative Fault, 16 TRIAL 30, 32 (1980).

123. Aiken, Proportioning Comparative Negligence—Problems of Theory and Special Verdict Formulation, 53 MARQ. L. REV. 293, 296 (1970); Carestia, supra note 121, at 67; Fischer, supra note 27, at 445. See W. Prosser, supra note 5, § 52, at 313-14.


125. A frequent example given to demonstrate the distinction between fault and causation for comparative purposes is the hypothetical of the intoxicated motorist. A collision occurs between two motorists, one intoxicated and the other momentarily distracted. The distracted motorist causes 75% of the damages, but was only slightly at fault. If only causation is measured, the issue becomes whether the intoxicated motorist, who was more at fault but caused 25% of the damages, should recover more than the distracted motorist. See V. Schwartz, supra note 10, § 17.1, at 276; Fischer, supra note 27, at 445-46; Kionka, supra note 27, at 18. Additionally, questions of causation lead to the area of proximate causation, which is imprecisely defined in terms of foreseeability and legal responsibility. Carestia, supra note 121, at 66-67. Cf. Murray v. Fairbanks Morse, 610 F.2d 149, 159 (3d Cir. 1979) (explanation of cause-in-fact and proximate causation).

126. E.g., Fleming, supra note 72, at 249; Prosser, Comparative Negligence, 51 Mich. L. Rev. 465, 481 (1953).

127. V. Schwartz, supra note 10, § 17.1, at 275-76; Fischer, supra note 27, at 438. For a discussion of the relationship between fault and causation in comparative fault analysis, see H. Woods, supra note 10, § 5.5, at 108-09. Some scholarly authorities claim that fault is a qualitative evaluation whereas causation is a quantitative measurement. Aiken, supra note 123, at 294; Appel & Michael, supra note 45, at 189.

128. See, e.g., Sandford, 292 Or. at 595-607, 642 P.2d at 628-35.

129. Id. at 617-23, 642 P.2d at 638-43 (Peterson, J., concurring). For the view that fault is compared, see State v. Katz, 572 P.2d 775, 777 (Alaska 1977); Pearson, supra note 121, at 346; Prosser, supra note 126, at 481. For an explanation of the comparative causation approach, see Murray, 610 F.2d at 159-61; Arnold & Rizzo, supra note 117, at 1402-05;
the authorities have not been able to agree on the precise role of fault and causation in comparative negligence, both factors are considered in apportioning damages. In fact, both comparative fault and comparative causation evaluate fault and causation, but in a different order and with different emphasis. The important consideration is that the comparative process should allow the court or jury to determine a party's share in the responsibility for damages.

The basis of comparison that makes the most sense, practically and theoretically, is that courts and jurors should weigh fault and causation in whatever manner appears to be most fair. A jury considering only the extent to which fault contributed to the injury and not the seriousness of the blameworthy conduct is difficult to imagine. By comparing fault and causation, courts would have to sacrifice some doctrinal fault distinctions between negligence and strict products liability actions.

Jensvold, supra note 28, at 741. For the view that both fault and causation are compared, see Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 162-63, 406 A.2d 140, 146 (1979); J. Fleming, THE LAW OF TORTS, 256-57 (1977) (interpreting English and Australian law); James, CONNECTICUT'S COMPARATIVE NEGLIGENCE STATUTE: AN ANALYSIS OF SOME PROBLEMS, 6 CONN. L. REV. 207, 216-17 (1973-74). Both the Uniform Comparative Fault Act and the Model Uniform Products Liability Act compare fault and causation to apportion damages. UCFA, supra note 114, § 2(b); UPLA, supra note 114; § 111(b)(3).

With comparative fault, each party's fault which proximately caused the injury is compared, and percentages of liability are assigned accordingly. Pan-Alaskan Fisheries, 565 F.2d at 1139. In comparative causation, the culpable conduct and product are compared in terms of the causal factors contributing to the injury. Thibault, 118 N.H. at 812, 395 A.2d at 850. However, it is first necessary to determine what conduct is included in the definition of fault. Sun-Valley, 411 F. Supp. at 603 n.5.

Several courts have expressed the view that the labels comparative fault and comparative causation are inconsequential; the semantic distinctions only add more confusion to the application of comparative principles to strict products liability. See Pan-Alaskan Fisheries, 565 F.2d at 1139; Stueve, 457 F. Supp. at 757, 759-60. However, other courts have contended that the distinction between assigning a percentage figure to a party's degree of fault in contrast to the degree of causation will make a difference in calculating the proportionate share of liability. See Thibault, 118 N.H. at 809-12, 395 A.2d at 848-50; Sandford, 624 Or. at 589, 642 P.2d at 632. It has been suggested that the focus on either fault or causation will affect the language of the jury instructions and counsels' presentation of evidence and arguments to the court or jury. Id.; Kionka, supra note 12, at 18.

Measuring fault and causation will most nearly approximate the common sense approach used by juries to apportion damages. Kionka, supra note 12 at 18.

V. Schwartz, supra note 10, § 17.1, at 276.

Daly, 20 Cal. 3d at 737, 575 P.2d at 1168, 144 Cal. Rptr. at 386. Contra Thibault,
However, even though the Illinois Supreme Court applied comparative causation to strict products liability in *Skinner* and *Coney*, the court took fault into account because it measured the culpability of the blameworthy parties.

In *Skinner*, the court required more culpability than negligence on the part of the defendant employer before permitting the strictly liable manufacturer to seek contribution. Before the causal contribution to the injury could be considered, fault had to reach a certain level. Moreover, the statutory codification of *Skinner* allows contribution from parties “subject to liability in tort” and determines liability on the basis of “relative culpability.” Both the *Skinner* decision and the contribution act, therefore, partially apportioned damages on the basis of relative fault.

In *Coney*, the court applied the *Skinner* comparative causation analysis to strict products liability, but the court again evaluated fault by defining the plaintiff’s misconduct which was included in the comparative fault defense. The court took fault into account by rejecting plaintiff's unobservant, awkward, ignorant or inattentive behavior as a defense. Only more culpable user conduct was permitted as a damage-reducing factor. The court followed the *Alvis* “fault” reasoning as well as the *Skinner* “causation” reasoning. The court held that after defendant's liability is established, and where both defendant's product and plaintiff's misconduct cause the damages, plaintiff's recovery would be reduced by the “amount which the trier of fact finds him at fault.” Therefore, the court in *Coney* interjected fault into the

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118 N.H. at 811, 395 A.2d at 849 (semantic and conceptual clarity is crucial in the comparative process).
136. See supra notes 57-58.
137. Applying the reasoning of *Williams*, the *Skinner* court required the employer to assume the risk or misuse the product before permitting the manufacturer's claim for contribution. 70 Ill. 2d at 16, 374 N.E.2d at 443. See supra text accompanying notes 33-36, 57-59.
139. No. 56306, slip op. at 8-9.
140. Id. at 9. See infra text accompanying notes 155-57.
141. The Illinois Supreme Court declared that both misuse and assumption of risk could be compared in the apportionment of damages. Id. This approach evolved from the Restatement defenses adopted in *Williams*, 45 Ill. 2d at 423, 261 N.E.2d at 308. See supra note 35.
142. No. 56306, slip op. at 9. If the court in *Coney* had intended to apply a pure comparative causation analysis, it should have reduced the damage award “in proportion to the plaintiff's causal contribution to his own injury.” *Murray*, 610 F.2d at 162. Cf. *Thi*
comparative causation analysis. Although the emphasis was placed on causal factors in both *Skinner* and *Coney*, in effect fault and causation were compared.

The comparative causation approach in *Coney* somewhat modified the comparative fault doctrine espoused in *Alvis*. In *Alvis*, the court emphasized the comparative fault basis for apportioning damages in negligence actions.\(^{143}\) However, the comparative basis in *Coney* is compatible with the *Alvis* doctrine because both fault and causation enter into the comparison.\(^{144}\) If *Coney* shifted the *Alvis* comparative fault approach to comparative causation, Illinois courts must decide whether they want to distinguish between the comparative basis for negligence and strict products liability actions. Perhaps the analytical shift in *Coney* was in emphasis only and thus the trier of fact should compare fault and causation to apportion damages in all comparable tort actions.

Comparative causation is an appropriate method of allocating damages in Illinois if the courts realize that fault should also be taken into account in calculating the proportionate shares of liability. Both fault and causation are legal conclusions; both should be used by juries and courts to determine responsibility for damages.\(^{145}\) Illinois courts should not rigidly follow the doctrine of comparative causation without considering fault in applying comparative principles to strict products liability. The jury instructions should reflect the fact that both fault and causation be compared in apportioning liability for damages.

3. Defenses to Strict Products Liability

In *Coney* the Illinois Supreme Court applied the defense of comparative fault to strict products liability.\(^{146}\) The court did not include the plaintiff's failure to inspect, discover or guard against a product defect within the definition of comparative fault; however, it did declare that the plaintiff's assumption of the risk or

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\(^{143}\) *See supra* notes 72-73.

\(^{144}\) *See supra* text accompanying notes 139-42.

\(^{145}\) *See* Aiken, *supra* note 123, at 294-95. *See also supra* text accompanying notes 133-35.

\(^{146}\) *No.* 56306, slip op. at 8.
misuse would be damage-reducing factors.\textsuperscript{147} By restricting the type of user conduct which could be characterized as fault for comparative purposes, the court partially maintained the defenses established by the Second Restatement of Torts, section 402A, comment “n”.\textsuperscript{148} The court also harmonized the goals of strict products liability and comparative negligence in defining the comparative fault defense.\textsuperscript{149}

The Restatement defenses to strict products liability evolved from the all-or-nothing rule of contributory negligence.\textsuperscript{150} The problem with the old vocabulary of defenses was that plaintiff’s conduct did not always fit into the convenient categories of contributory negligence, assumption of risk and misuse.\textsuperscript{151} In dis-

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\textsuperscript{147} See supra text accompanying note 140. In Coney, the first affirmative defense stated:

1. That plaintiff’s decedent, Clifford M. Jasper, was guilty of negligence or fault in that he:
   a) applied hydraulic pressure to such an extent that rear wheels of the lift were caused to raise from the floor;
   b) failed to keep a proper lookout for structural components of the building while operating the lift;
   c) failed to properly monitor the build-up of hydraulic pressure;
   d) failed to gradually reduce hydraulic pressure upon appreciation of the position of the wheels of the lift;
   e) removed the support for the “bucket” at a time when the wheels of the lift were raised; and
   f) failed to follow instructions and directions for elimination of risk.

Brief for Appellant at 7.8.

Although it is unclear from the pleadings, plaintiff’s decedent was not alleged to have assumed the risk or misused the product. The issue of whether the defense of comparative fault includes assumption of risk and misuse was not an issue before the court. See supra note 85. See, e.g., Murray, 610 F.2d at 162. However, the defendant raised the possibility of the anomalous situation where plaintiff’s assumption of the risk would bar his recovery in strict products liability actions but reduce his award in negligence actions. No. 56306, slip op. at 3. See supra note 35. See also Kionka, supra note 12, at 22. This anomaly has been noted in other jurisdictions because products liability actions are often alternatively pleaded in negligence and breach of warranty counts. Stueve, 457 F. Supp. at 751; Butaud, 555 P.2d at 45; Daly, 20 Cal. 3d at 738, 575 P.2d at 1169-70, 144 Cal. Rptr. at 387-88. See Sales, supra note 34, at 756-57.

\textsuperscript{148} The court in Coney left intact the Restatement’s position that consumer reliance behavior was not a defense to strict products liability. Restatement 402A, supra note 22, at comment n. See Busch v. Busch Constr. Inc., 262 N.W.2d 377, 394 (Minn. 1977); Note, supra note 34, at 240.

\textsuperscript{149} By excluding reliance behavior from the comparative fault defense, the court advanced the risk distribution policy goal. See infra text accompanying notes 156-59.

\textsuperscript{150} Nielson, supra note 36, at 193; Noel, supra note 34, at 118; Westra, supra note 28, at 379. See supra notes 37, 39.

\textsuperscript{151} Daly, 20 Cal. 3d at 741-42, 575 P.2d at 1172, 144 Cal. Rptr. at 390; Note, supra note 34, at 240-46.
distinguishing the types of plaintiff's conduct, the parties had to label the user's conduct as either objective negligence, subjective assumption of risk or unforeseeable misuse.\textsuperscript{152} If the plaintiff were negligent, he would recover totally; if he had assumed the risk or misused the product, he would recover nothing.\textsuperscript{153}

While the old system of defenses produced inequitable results, the classification of all user's conduct in causing the injury as fault is also unjust.\textsuperscript{154} In a design defect or failure to warn cause of action where lack of safety devices is alleged as the defect,
plaintiff's behavior in using the product may be built into the product and, therefore, not constitute fault.\textsuperscript{155} This situation, which includes the plaintiff's failure to discover the defect or guard against the possibility of its existence, poses the issue of "reliance" behavior which was an initial reason for imposing strict products liability.\textsuperscript{156} In this reliance situation, the risk created is due to the defective product, rather than the plaintiff's conduct. The consumer or user has been lulled by the packaging of the product and by the manufacturer's assurances that the product is safe.\textsuperscript{157} Under these circumstances, the plaintiff should not have to assume the responsibility for the risk of injury to which the manufacturer exposed him.\textsuperscript{158} Similarly, with foreseeable misuse, the manufacturer should have reasonably anticipated that the product would be used in a particular manner and protected against that use with safety or warning devices.\textsuperscript{159}

Consistent with the strict products liability and comparative fault goals of allocating the risk to those who created the risk, the decision in \textit{Coney} correctly distinguishes reliance behavior from fault. The plaintiff will not be held responsible for the risk created by the manufacturer. If plaintiff's misconduct contributed to his injury and it was not the reliance behavior, then it would be defined as fault by the trier of fact and will proportionately reduce plaintiff's recovery.\textsuperscript{160}

By characterizing all plaintiff's conduct as fault except the reliance behavior, however, the court did not simplify the court or jury's task. The court merely shifted the battleground from labeling plaintiff's behavior as contributory negligence, assumption of risk or misuse to defining it as comparative fault.\textsuperscript{161} After

\begin{enumerate}
\item Twerski, \textit{supra} note 119, at 343-48. \textit{Cf.} Wade, \textit{supra} note 110, at 382 (the failure to discover the defective condition must be found to be negligent).
\item Note, \textit{supra} note 34, at 240. \textit{See, e.g.}, West v. Caterpillar Tractor Co., 336 So. 2d 80, 92 (Fla. 1976).
\item Epstein, \textit{supra} note 34, at 284. The consumer reliance theory and resulting obligation of the manufacturer was first expressed in Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 467, 150 P.2d 436, 443 (1944) (Traynor, J., concurring).
\item West, 336 So. 2d at 92.
\item Epstein, \textit{supra} note 34, at 284. The consumer reliance theory and resulting obligation of the manufacturer was first expressed in Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 467, 150 P.2d 436, 443 (1944) (Traynor, J., concurring).
\item West, 336 So. 2d at 92.
\item No. 56306, slip op. at 9. The Supreme Court of New Hampshire coined the phrase "plaintiff's misconduct" to replace contributory negligence in the jury charge and to describe accurately the behavior of the plaintiff which caused the injury. \textit{Thibault}, 118 N.H. at 811, 395 A.2d at 849.
\item \textit{Cf.} Schwartz, \textit{supra} note 34, at 177 (including all the old defenses in the definition of fault makes it unnecessary to draw difficult distinctions between types of plain-
\end{enumerate}
Loss Allocation in Products Liability

Coney, the plaintiff will try to categorize his behavior as inadvertent, awkward, inattentive or totally dependent on the defective product.\textsuperscript{162} Defendant will attempt to classify the plaintiff's behavior as objectively negligent (falling below the reasonable standard of care), reckless, adventuresome or use of the product after the discovery of the defect.\textsuperscript{163} Although fault and reliance behavior may be difficult to distinguish, this approach has the beneficial effect of forcing the factfinder to consider both fault and causation in apportioning damages.\textsuperscript{164} Moreover the fine-line distinctions between fault and reliance behavior are necessary to preserve the risk distribution policies of strict products liability and comparative fault.\textsuperscript{165} Therefore, the advantages of this fault-weighing process outweigh the difficulty in distinguishing the reliance behavior. The jury instructions should reflect the fact that the plaintiff has the right to rely on product safety and that inadvertent failure to inspect does not constitute fault.\textsuperscript{166}

In Coney, the Illinois Supreme Court also changed the definition of contributory negligence as applied to strict products liability. Previously, the court had defined contributory negligence as the lack of due care for one's own safety, objectively measured by the reasonable person standard.\textsuperscript{167} Failure to discover or guard against a product defect was included within that definition.\textsuperscript{168} Now that the court has implemented the comparative fault defense, contributory negligence in the objective "lack of due care" sense is treated as fault and will be a damage-reducing factor.\textsuperscript{169} It is only the reliance type of contributory negligence which is not considered as fault and will not be causally com-

\textsuperscript{162}. No. 56306, slip op. at 9.
\textsuperscript{163}. See, e.g., UPLA, supra note 114, §§ 112(A)(2), (B)(1), (C)(1)-(2) (describing the conduct which will proportionately reduce claimant's damages).
\textsuperscript{164}. See supra text accompanying notes 139-42.
\textsuperscript{165}. See supra text accompanying notes 156-59. It can be argued that the exclusion of reliance behavior from fault furthers the strict products liability goal of consumer protection. See, e.g., Busch, 262 N.W.2d at 394 (the comparative fault defense "must be tailored to protect the consumer's reliance on the product safety").
\textsuperscript{166}. Note, supra note 24, at 251.
\textsuperscript{167}. Williams, 45 Ill. 2d at 425, 261 N.E.2d at 309.
\textsuperscript{168}. Id. at 423-24, 261 N.E.2d at 308-09. The court in Coney quoted the language from Williams which distinguished the narrow interpretation of contributory negligence by the appellate court.
\textsuperscript{169}. See, e.g., West, 336 So. 2d at 90, 92. In Williams, the court had recognized that contributory negligence included behavior other than failure to inspect or guard against a product defect. 45 Ill. 2d at 423-25, 261 N.E.2d at 308-10. A plaintiff can be unaware of
pared to the manufacturer’s product.\textsuperscript{170} Therefore, contributory negligence is more narrowly defined in strict products liability actions after \textit{Coney}.

Finally, the application of the comparative fault defenses in \textit{Coney} should resolve the comparative problem that existed in apportioning damages for contribution after \textit{Skinner}. In \textit{Skinner}, the court required the strictly liable defendant to allege assumption of the risk or misuse on the part of the third-party defendant to state a claim for contribution.\textsuperscript{171} The statutory codification of \textit{Skinner} allowed contribution between parties subject to liability in tort for the same injury.\textsuperscript{172} It has not been determined whether contribution is permitted between a strictly liable defendant and a negligent defendant.\textsuperscript{173} Illinois courts should apply the reasoning in \textit{Coney} and allow contribution between strictly liable and negligent defendants. Damages should be apportioned unless the defendant’s negligence constituted the reliance type of the defective condition of the product, yet still fail to act with the care of an ordinary reasonably prudent person or with reckless disregard of his own safety. See UPLA, supra note 114, § 112(A)(2); Note, supra note 34, at 241 (suggesting that this type of contributory fault be designated as “active user” negligence). This objective contributory negligence is distinguished from assumption of risk which is the voluntary and unreasonable use of a product with a known defect. Kionka, supra note 12, at 22-23; Kiselis, supra note 32, at 237-41. Nor is this type of conduct included within the definition of misuse because it does not negate plaintiff’s proof of a defective condition or causation. See Sales, supra note 34, at 767-68.

\textit{Contra} Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 160, 406 A.2d 140, 147 (1979) (holding that comparative negligence was applicable to strict products liability but redefined contributory negligence to include only § 402A, comment n unreasonable assumption of risk. Neither unforeseeable misuse, objective contributory negligence nor reliance behavior will operate as damage-reducing factors). See Sales, supra note 34, at 767-68.

\textsuperscript{170} No. 56306, slip op. at 9. Note, supra note 34, at 251.

\textsuperscript{171} \textit{Skinner}, 70 Ill. 2d at 16, 374 N.E.2d at 443. See supra note 57.

\textsuperscript{172} Contribution Act, supra note 63, § 2(a).

\textsuperscript{173} The Illinois Appellate Court has interpreted the Contribution Act to allow a claim for contribution in the following instances: Wirth v. City of Highland, 102 Ill. App. 3d 1074, 1082, 430 N.E.2d 236, 242 (1981) (interspousal immunity does not bar a third-party action for contribution); Larson v. Buschkamp, 105 Ill. App. 3d 965, 969-71, 435 N.E.2d 221, 224-26 (1982) (intrafamily immunity does not preclude a claim for contribution against a parent whose child is the plaintiff); Stephens v. McBride, 105 Ill. App. 3d 880, 885, 435 N.E.2d 162, 165 (1982) (failure to give notice under the Local Governmental and Governmental Employers Tort Immunity Act does not bar a claim for contribution); Doyle v. Rhodes, 109 Ill. App. 3d 590, 440 N.E.2d 895, 899 (1982) (contribution permitted between parties whose liability was based on negligence and violation of the Road Construction Industries Act); LeMaster v. Amsted Indus., Inc., 110, Ill. App. 3d 729, 442 N.E.2d 1367, 1371 (1982) (contribution was available to a party found liable under the Structural Work Act); Morgan v. Kirk Bros., 111 Ill. App. 3d 914, 444 N.E.2d 504, 509
behavior that was not defined as fault in *Coney.* If a defendant employer reasonably relies on a defendant manufacturer's product, then the employer is not at fault and should not be liable for a portion of plaintiff's damages. Because the defense of comparative fault operates within the comparison of fault and causation established by the court in *Coney,* the following procedure is suggested to implement the apportionment of damages. First, the defendant's strict liability is established and a damage figure is calculated. If the plaintiff's conduct is also found to have contributed to his injury, then the plaintiff's damages will be proportionately reduced by his relative fault. The court or jury will determine the degree of plaintiff's fault and the extent to which that fault caused the injury compared to the defendant's product and its causal contribution to the injury. Even if plaintiff's reliance behavior contributed significantly to cause the injury, it will not be compared because that conduct does not constitute fault. After a percentage figure is obtained, plaintiff's proportionate share of the entire damages will be deducted from the original damage figure. The policy goals underlying the Illinois Supreme Court's integration of strict products liability and comparative negligence will be achieved. The strictly liable defendant will be held responsible for the loss caused by the defective product, and the plaintiff will bear the responsibility for the loss resulting from his fault.

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175. *See, e.g., Daly*, 20 Cal. 3d at 743, 575 P.2d at 1173, 144 Cal. Rptr. at 391.
176. No. 56306, slip op. at 9. *See Murray*, 610 F.2d at 163; *Pan-Alaskan Fisheries*, 565 F.2d at 1139.
177. *See supra* text accompanying notes 133-35.
178. *See supra* text accompanying note 160. To facilitate the policy of worker protection, the New Jersey Supreme Court did not permit the defense of contributory negligence to reduce plaintiff employee's recovery while injured at an "assigned task on a plant machine" because the employee had no choice in using the unsafe equipment. *Suter*, 81 N.J. at 167, 406 A.2d at 148. *Accord Tulkku*, 406 Mich. at 620, 281 N.W.2d at 294.
179. No. 56306, slip op. at 9. In *Coney,* the court reversed the dismissal of the first affirmative defense alleging contributory fault on the part of plaintiff's decedent. *Id.* at 15. Although the defense was pleaded as contributory fault, it may have included charges that plaintiff's decedent failed to discover or guard against the alleged product defect. *See supra* note 147. The court remanded the cause of action to the Circuit Court of Peoria.
Application of Comparative Negligence to Joint and Several Liability

In deciding to retain joint and several liability after the adoption of comparative negligence, the Illinois Supreme Court rejected the argument that damages are apportioned according to each party's fault under comparative negligence. Although the court did not address the competing policies of joint and several liability and comparative negligence, it implied that the overriding policy concern in tort actions is compensating injured plaintiffs. The court stated that comparative negligence only reduced plaintiff's amount of damages by his fault, not the fault of any other party causing his injury. By announcing that the risk of an insolvent or immune tortfeasor remains on the defendant, the court ensured that plaintiff's damages would not be further reduced after comparative negligence.

The argument that comparative negligence changes the doctrine of joint and several liability is based on the theory that wrongdoers could not profit from their harmful conduct. Joint and several liability ensured that injured, innocent plaintiffs would be compensated and wrongdoers would be held liable for their tortious acts. Under the system of contributory negligence, the plaintiff who recovered was not a wrongdoer. With the adoption of comparative negligence, the plaintiff must no

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180. Id. at 12-13.
181. Paraphrasing the language of Alvis, the court stated that plaintiff's damages should not be "reduced beyond the percentage of fault attributable to him." Id. at 12 (emphasis in original).
182. Id. at 12-13. Specifically, in Coney, the court affirmed the circuit court's order striking defendant J.L.G. Industries' second affirmative defense. Id. at 15. The court did not allow the alleged fault of plaintiff's decedent's employer V. Jobst & Sons, Inc. to be considered in the computation of damages. For a discussion of the interrelationships between comparative negligence, joint and several liability, and contribution from an immune employer, see McNichols, Judicial Elimination of Joint and Several Liability Because of Comparative Negligence—A Puzzling Choice, 32 OKLA. L. REV. 1, 6-9 (1979); Pulliam, Comparative Loss Allocation and the Rights and Liabilities of Third Parties Against an Immune Employer: A Modest Proposal, 1980 FED'N INS. COUN. 80, 84-86.
183. Zavos, supra note 44, at 803-04; Comment, Comparative Negligence in California, supra note 44, at 776-77.
184. See supra note 54.
185. Adler, supra note 44, at 18; Fleming, supra note 72, at 251; McNichols, supra note 182, at 26; Note, supra note 51, at 349.
longer be innocent to recover. After comparative negligence, the issue becomes whether a wrongdoer should receive full compensation from any defendant, less only the adjustment for plaintiff's fault.

Before comparative negligence there was no incentive to divide plaintiff's injury among all the wrongdoers. In multiple defendant suits, third-party practice allocated the damages among the defendants but did not divide liability among all the parties. However, if fault can be apportioned between a negligent plaintiff and defendant, then it is argued that the injury is in fact divisible. Those opposed to retaining joint and several liability after comparative negligence contend that the plaintiff should not have an inherent protected party status. Because the plaintiff may be a wrongdoer, his status is merely the result of being the first party to sue and, therefore, there is no justification for imposing entire liability on the defendants.
In *Coney*, the Illinois Supreme Court refuted the "wrongdoing plaintiff" argument by following the rationale that the plaintiff is not a tortfeasor.\(^{193}\) The plaintiff has the duty to protect his own safety, whereas the defendant has the duty to act with care for the safety of others.\(^{194}\) To the extent that the plaintiff does not act with due care, his recovery should be reduced proportionately.\(^{195}\) The scope of defendant's duty and resulting liability is broader because he subjected others to the risk of harm.\(^{196}\)

The court also rejected the argument that apportioning liability for fault makes an indivisible injury "divisible." The court explained that the feasibility of apportioning fault does not change the concept of entire liability.\(^{197}\) A concurrent tortfeasor is responsible for all the harm proximately caused by his tortious acts whether or not damages are later apportioned.\(^{198}\) The court observed that each defendant whose negligence proximately caused plaintiff's single, indivisible injury was still liable for the entire damage award.\(^{199}\)

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\(^{193}\) No. 56306, slip op. at 11. See *American Motorcycle*, 20 Cal. 3d at 589-90, 578 P.2d at 906, 146 Cal. Rptr. at 189; *Seattle First Nat'l*, 91 Wash. 2d at 237, 588 P.2d at 1314. See also Comment, supra note 186, at 848.

\(^{194}\) No. 56306, slip op. at 11. See supra note 193. See also W. Prosser, *supra* note 5, § 65, at 416-21.

\(^{195}\) No. 56306, slip op. at 8-9, 12.

\(^{196}\) 20 Cal. 3d at 589-90, 578 P.2d at 906, 146 Cal. Rptr. at 189. The scope of defendant's duty is particularly significant in a products liability action such as in *Coney*. Strict products liability evolved to place the risk of loss on the manufacturer who subjected consumers and users to injury. See supra notes 22-24. Following the policy of risk distribution, the strictly liable manufacturer is more able to spread the loss than the injured, negligent plaintiff. Therefore, the defendant manufacturer should bear the loss in the event of an immune, insolvent or absent tortfeasor. Note, supra note 81, at 615 n. 202.

\(^{197}\) No. 56306, slip op. at 11.

\(^{198}\) Id. The court adopted the reasoning of the California Supreme Court expressed in *American Motorcycle*, 20 Cal. 3d at 588-90, 578 P.2d at 905-06, 146 Cal. Rptr. at 188-89. In *American Motorcycle*, the court did not equate apportionment of damages based on fault with division of the injury. *Id.* For a discussion of the substantive concept of entire liability, see supra note 44. See also *Restatement (Second) of Torts* § 433A (1965).

\(^{199}\) No. 56306, slip op. at 11. See Cornell v. Langland, 109 Ill. App. 3d 472, 440 N.E.2d
The goals of comparative negligence as articulated in *Alvis* were to alleviate the harsh effects of the contributory negligence rule, to treat litigants fairly and to promote respect for the law. In *Coney*, the court asserted that eliminating joint and several liability would not further the *Alvis* goal of alleviating harshness on the plaintiff. The plaintiff, not the defendant, would bear the loss in the event of an immune, insolvent or absent tortfeasor. In addition, the goals of ensuring fairness to the litigants and promoting respect for the law do not require the plaintiff to absorb such a loss. The Illinois Supreme Court decided that it is fair to make the defendant pay for the harm caused by another tortfeasor who contributed to the injury, because plaintiffs must be able to obtain adequate compensation. The court concluded that the plaintiff did not have to bear the burden of an insolvent or immune tortfeasor as the price for being relieved of the contributory negligence bar to recovery.

In *Coney*, the Illinois Supreme Court correctly decided that the doctrine of joint and several liability survives the adoption of comparative negligence. The argument for abolishing joint and several liability may be persuasive in some jurisdictions but is not in Illinois. Illinois is one of the few states that allows...


200. See supra text accompanying notes 73-74.

201. No. 56306, slip op. at 12.


204. No. 56306, slip op. at 12. Other courts and legal authorities have recognized that the goal of tort law is to fairly compensate individuals for losses. *American Motorcycle*, 20 Cal. 3d at 590, 578 P.2d at 906, 146 Cal. Rptr. at 189, *Seattle First Nat'l*, 91 Wash. 2d at 236, 588 P.2d at 1313-14; *W. Prosser*, supra note 5, § 1, at 6.


206. Critics of joint and several liability have advocated that the common law be replaced with "several" liability, which would allow damages according to the relative fault of each of the parties. Adler, *supra* note 44, at 16-17; *Pulliam, supra* note 182, at 80-81; *Guy, supra* note 47, at 489-90. See *Laubach v. Morgan*, 588 P.2d 1071, 1075 (Okla. 1978) (interpreting the comparative negligence statute as mandating several liability). Other authorities have suggested a second method: several liability should apply only in those situations where the plaintiff is at fault. *McNichols, supra* note 182, at 28-31; *Pearson, supra* note 121, at 363. For a discussion of the states which apply several liability when the plaintiff is negligent, see *Note, supra* note 51, at 352-53. Moreover, the Supreme Court of Oklahoma limited the application of its comparative negligence statute as inter-
comparative contribution between a third-party defendant and an employer with workers' compensation liability. In most situations, third-party defendants can seek contribution and

interpreted by \textit{Laubach} to those situations where the plaintiff was negligent in \textit{Boyles v. Oklahoma Natural Gas Co.,} 619 P.2d 613, 616 (Okla. 1980). Under this modified several liability theory, the innocent plaintiff would be entitled to complete recovery, but the negligent plaintiff would bear the loss caused by an immune tortfeasor.

The Uniform Comparative Fault Act recommends a compromise approach. Under this system, joint and several liability is retained and damages are assessed against all those responsible for plaintiff's injury. UCFA, \textit{ supra} note 114, §§ 111(B)(1)(b), 111(B)(5)-(6). However, if the defendant is unable to collect the damages that are apportioned to an immune or insolvent tortfeasor within a year, the plaintiff and other defendants share the portion of damages remaining uncollected. UCFA, \textit{ supra} note 114, § 2(d). In this manner, the plaintiff and defendants reallocate the loss and split the risk of insolvency. \textit{McNichols, supra} note 182, at 16. The Model Product Act adopts the reallocation approach of the Fault Act but has a special provision for the claimant's employer. UPLA, \textit{ supra} note 114, §§ 111(A)(2), 111(B)(6). Minnesota has adopted a variation of the Uniform Comparative Fault Act proposal. MINN. \textit{REV. STAT. ANN.} § 604.02 subd. 1-2 (West Supp. 1979). See \textit{H. Woods, supra} note 10, §§ 22.5-22.8, at 417-19.

Other authorities have suggested that the negligent plaintiff and defendants immediately share the uncollected damages according to their proportionate share. Fleming, \textit{ supra} note 72, at 251-52; \textit{Zavos, supra} note 44, at 779-83; \textit{Note, supra} note 45, at 1171. However, several scholarly authorities have advocated retaining joint and several liability. \textit{J. Dooley, supra} note 18, § 22.8, at 418-19; \textit{Humphrey, Haas & Gritzner, supra} note 203, at 823-25; \textit{Kionka, supra} note 12, at 20-21.

In fact, the majority of jurisdictions do not change the doctrine of joint and several liability after the adoption of comparative negligence. \textit{Coney, No. 56306,} slip op. at 10-11. For a partial compilation, see \textit{id.; Humphrey, Haas & Gritzner, supra} note 203, at 822-23. \textit{See also V. Schwartz, supra} note 10, § 16.4, at 253; \textit{H. Woods, supra} note 10, § 13.3, at 225-27. In addition to the jurisdictions listed by the previous sources, Massachusetts and Montana retain joint and several liability after comparative negligence. MASS GEN. LAWS ANN. ch. 231B, §§ 1(b), 3(e) (West Supp. 1981); MONT. \textit{REV. CODE ANN.} § 27-1-703 (Supp. 1982).

Six jurisdictions modify joint and several liability by statute: KAN STAT. ANN. § 6-258a(d) (1976) (eliminated); REV. REV. STAT. § 41.141(3)(a) (Supp. 1980) (retained unless plaintiff's negligence is greater than that of defendants); N.H. REV. STAT. ANN. § 507:7-a (Supp. 1979) (each defendant liable in proportion to causal negligence); OR REV. STAT. § 18.485 (1979) (retained unless plaintiff's negligence is greater than that of defendants); TEX. REV. STAT. ANN. art. 2212(a), § 2(c) (Vernon Supp. 1982) (retained unless plaintiff's negligence is greater than that of defendant); VT. STAT. ANN. tit. 12, § 1035 (Supp. 1981) (eliminated). For a discussion of the interpretation of the comparative negligence statutes which modify joint and several liability, see \textit{Adler, supra} note 44, at 17-19 n. 52; \textit{Note, supra} note 51, at 347-49. Only New Mexico has eliminated joint and several liability in the absence of statute. \textit{Bartlett v. New Mexico Welding Supply, Inc.,} 98 N.M. 152, 646 P.2d 579, 583-86 (1982).

207. \textit{Skinner,} 70 Ill. 2d at 16, 374 N.E.2d at 443; \textit{Doyle v. Rhodes,} 109 Ill. App. 3d 590, 440 N.E.2d 895, 898 (1982). Only five other states permit the defendant manufacturer to seek contribution from an employer with statutory liability: California, Minnesota, New
ultimately pay their proportionate share. This allocation of damages does not reduce the plaintiff’s award and does not unfairly burden the defendant. The Illinois plan for loss allocation is fair to the litigants and, therefore, furthers the policy goals of Alvis.

The timing of the accident in Coney precluded the defendant from taking advantage of the equitable allocation of damages mandated by Skinner and the contribution statute. Without the possibility of contribution, J.L.G. Industries, Inc., is not served by the Illinois system of loss allocation contemplated by Alvis and Skinner. Because the employer cannot be made a third-party defendant and is immune from suit by the decedent...
employee, the apportionment of damages would be inequitable if the employer were at fault. However, joint and several liability should not be abandoned because there might be an unfair result in one instance.

After Coney, Illinois courts will continue to equitably apportion damages by the operation of comparative negligence and comparative contribution with joint and several liability of defendants. Comparative negligence determines the fault reduction of the plaintiff vis-a-vis the defendants. Contribution determines the apportionment of plaintiff's damages among the defendants. Neither comparative negligence nor contribution apportion liability according to the proportionate fault of all the parties involved, plaintiff and defendants.

Each tortfeasor who proximately caused the plaintiff's injury remains liable for the total

212. In suits in which injuries occurred before March 1, 1978, the effective date of the contribution act, and in which trial had not commenced before June 8, 1981, the date of application of comparative negligence, the defendant will be denied contribution but be subject to comparative negligence. See supra note 81. The Illinois Supreme Court rejected the argument that the different dates of application of both doctrines resulted in a denial of equal protection to the defendants in these suits. Coney, No. 56306, slip op. at 13-14. See supra note 89. See also Johnson v. Hoover Water Well Serv., Inc., 108 Ill. App. 3d 994, 1010, 439 N.E.2d 1284, 1296 (1982) (there is no legal reason for comparative negligence and contribution to have the same effective date).

The Supreme Court of Alaska considered a similar claim in Arctic Structures, Inc. v. Wedmore, 605 P.2d 426 (Alaska 1979). The court found that the differential treatment of tortfeasors who were held jointly and severally liable but could not seek contribution was reasonably related to legitimate governmental objectives. Id. at 436-37.

213. It would have been more inequitable to place the loss on the plaintiff in Coney. The loss due to physical injury has generally been recognized as more compensable than economic loss in tort actions. Moorman Mfg. Co. v. National Tank Co., 91 Ill. 2d 69, 80-85, 435 N.E.2d 443, 448-51 (1982). See J. Dooley, supra note 18, § 32.89, at 133; Bertschy, The Economic Loss Doctrine in Illinois After Moorman, 71 ILL B.J. 346 (1983). The strictly liable defendant is subject to economic loss, where plaintiff's decedent was physically injured. In choosing between a negligent plaintiff and a strictly liable defendant to bear the economic loss of plaintiff's (decedent's) injury and death caused by an immune tortfeasor in Coney, the court's selection of the strictly liable defendant was the logical and fair choice. See Note, supra note 81, at 615 n. 202.

214. Seattle First Nat'l, 91 Wash. 2d at 238-39, 588 P.2d at 1314; Appel & Michael, supra note 45, at 170; Comment, supra note 109, at 165-67.

215. J. Dooley, supra note 18, § 26.33, at 576; Note, supra note 51, at 352. See Johnson, 108 Ill. App. 3d at 109-11, 439 N.E.2d at 1295-96 (both comparative negligence and comparative contribution equitably apportion responsibility for damages, but each rule was designed for a different purpose).

216. Seattle First Nat'l, 91 Wash. 2d at 236-39, 588 P.2d at 1312-14. In the case of multiple tortfeasors, one commentator suggests that comparative negligence "was designed only to compute the amount of damages for contribution purposes, rather than to abolish joint and several liability and to provide a new system for ascertaining liability." Note, supra note 51, at 349.
amount of damages reduced only by the percentage of the plaintiff's fault.\textsuperscript{217}

CONCLUSION

The Illinois Supreme Court adopted comparative contribution and comparative negligence to apportion damages more equitably. This new system of loss allocation assessed responsibility for damages on the basis of comparative fault and comparative causation. In \textit{Coney v. J.L.G. Industries, Inc.}, the court resolved two important issues for loss allocation. The court decided that comparative fault applies to strict products liability and that joint and several liability survives comparative negligence. In its opinion, the court successfully balanced the policy considerations of strict products liability and joint and several liability with those of comparative negligence.

The \textit{Coney} decision incorporated the comparative causation analysis of \textit{Skinner} and the comparative fault principle of \textit{Alvis} to apportion damages between a negligent plaintiff and a strictly liable defendant. Plaintiff's damages are now proportionately reduced by his causal fault in a strict products liability action. However, plaintiff's fault does not include the reliance type of contributory negligence. The court also affirmed the policy that injured plaintiffs must be compensated. In retaining joint and several liability, the court refused to shift the risk of an immune or insolvent tortfeasor to the plaintiff. By applying comparative negligence to strict products liability and retaining joint and several liability, the Supreme Court of Illinois insured that the Illinois loss allocation plan equitably apportions damages.

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\textsuperscript{217} \textit{Coney}, slip op. 9, 13.