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PLAINTIFFS' FAULT IN PRODUCTS LIABILITY CASES: WHY ARE THEY GETTING AWAY WITH IT IN MARYLAND?

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I. INTRODUCTION

Assume a driver gets drunk and then wrecks his car. Assume also that the wreck is injurious to the driver but "fatal" to the car. Because the car is defective in its ability to withstand foreseeable accidents, it bursts into flames. The driver is killed by the fire rather than surviving the wreck with injuries. Family members sue the auto manufacturer. But for the fire caused by the defect, the driver would be alive. But for the driver's drinking, however, there would have been no fire. This scenario poses key questions. Can the driver's family recover? Does the driver's fault diminish the recovery?

Affirmative defenses in Maryland products liability cases represent a paradox. It has been too easily assumed that the plaintiffs' fault is generally irrelevant.[1] Yet that assumption makes it challenging to fashion a place for plaintiffs' fault in strict products liability cases. This Article considers the possibilities of plaintiffs' fault in Maryland products liability law and discusses alternative approaches.[2]

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1. *See* Valk Mfg. Co. v. Rangaswamy, 74 Md. App. 304, 324, 537 A.2d 622, 634 (1988) (finding it irrelevant that plaintiff assumed the risk or was contributorily negligent); Ellsworth v. Sherne Lingerie, 303 Md. 581, 597, 495 A.2d 348, 356 (1985) (finding it irrelevant that the plaintiff wore the defective clothing inside-out); Sheehan v. Anthony Pools, 50 Md. App. 614, 620-26, 440 A.2d 1085, 1089-92 (1982), *aff'd* 295 Md. 285, 455 A.2d 434 (1983) (stating plaintiff's negligence was irrelevant in pool accident). *But see* Simpson v. Standard Container Co., 72 Md. App. 199, 206-07, 527 A.2d 1337, 1341 (1987) (stating that a failure to follow directions precludes recovery under strict liability); Kirby v. Hylton, 51 Md. App. 365, 372-73, 443 A.2d 640, 644-45 (1982) (finding that a child assumed the risk when playing with a pipe on contractor's land).
2. *See infra* Parts II-IV.

II. MARYLAND LAW

A. *Maryland's Adoption of* Restatement (Second) of Torts *Section 402A*

Maryland long ago established contributory fault as the rule governing the effect of plaintiffs' fault in negligence.[3] Then, in 1976, the Court of Appeals of Maryland adopted section 402A from the *Restatement (Second) of Torts* ("*Restatement (Second)*"), which provides various defenses available to a seller in products liability actions.[4] Specifically, the court found that comment n of section 402A allows a seller to use the defense of unreasonable assumption of risk when the plaintiff uses a product that he or she knows to possess a danger.[5]

Unfortunately, the court of appeals failed to clarify the ambiguities that existed regarding the defenses provided in comment n.[6] For instance, comment n is vague and incomplete in its assertion that the ordinary, contributory negligence of a consumer's mere "failure to discover the defect in the product, or to guard against the possibility of its existence," is not a manufacturer's defense to a section 402A claim.[7] A consumer's knowing and unreasonable assumption of the risk of the product defect, however, is a complete bar to a products liability claim.[8] Thus, comment n is problematic in that it fails to provide a rule or any guidance for situations in which a plaintiffs' fault

3. *See* Warner v. Markoe, 171 Md. 351, 359-60, 189 A. 260, 264 (1936) (discussing the distinction between contributory negligence and voluntary assumption of risk). "Assumption of the risk and contributory negligence are closely related and often overlapping defenses." Schroyer v. McNeal, 323 Md. 275, 280, 592 A.2d 1119, 1121 (1991). Assumption of the risk, as a defense to a negligence claim, occurs where the plaintiff voluntarily encounters obvious danger, with knowledge and appreciation of the risk. *Id.* at 282, 592 A.2d at 1123. Contributory negligence occurs when a person neglects "the duty imposed upon all to observe ordinary care for their own safety." Balt. Gas and Elec. Co. v. Flippo, 348 Md. 680, 703, 705 A.2d 1144, 1155 (1998) (quoting Campfield v. Crowther, 252 Md. 88, 93, 249 A.2d 168, 172 (1969)). Contributory negligence is judged by the actions which "a person of ordinary prudence" would do, or not do, in the circumstances. *Id.* Assumption of a risk might be unreasonable, which makes the assumption negligent. In situations where assumption of the risk is reasonable, it is still a defense because the plaintiff cannot recover for a harm that was voluntarily accepted. *Id.* at 705, 705 A.2d at 1156 (citing Rogers v. Frush, 257 Md. 233, 243, 262 A.2d 549, 554 (1970)).

4. *See* Phipps v. Gen. Motors Corp., 278 Md. 337, 346, 363 A.2d 955, 959-60 (1976) (stating that "[u]nder § 402A, various defenses are available to the seller in an action based on strict liability in tort").

5. *Id.* at 346, 363 A.2d at 960.

6. *Id.*

7. RESTATEMENT (SECOND) OF TORTS § 402A cmt. n (1965) [hereinafter RESTATEMENT (SECOND)]. Comment n does not purport to contain an exhaustive list of a product user's potential fault. *Id.*

8. *Id.* The only other form of plaintiffs' fault addressed in section 402A is product misuse. *Id.* at cmts. g, h; Ellsworth v. Sherne Lingerie, Inc., 303 Md. 581, 592-97, 495 A.2d 348, 353-56 (1985). Misuse is not considered in this Article.

falls in the gray area between the two extremes of failure to notice a product defect and unreasonable assumption of risk.[9]

Returning to the introductory hypothetical, there is nothing "unreasonable" about a driver's conduct in not noticing that his car's fuel system is sub-standard for withstanding the force of a crash. On the other hand, that driver is arguably unreasonable when committing the crime of driving drunk. Even though the driver was drunk, he did not assume the risk of a defective fuel system. Because the driver had no knowledge that the fuel system would enhance the risk of injury after collision, he could not have assumed the risk.

In 1998, the *Restatement (Third) of Torts: Products Liability* ("*Restatement (Third)*") clarified comment n.[10] The *Restatement (Third)* asserts that the true purpose of section 402A was threefold: (1) manufacturing defects; (2) eliminating privity of contract; and (3) eliminating any unreasonable requirement of proving why a product was sold with a manufacturing defect.[11] The *Restatement (Third)* claims that "[s]ection 402A had little to say about liability for design defects or for products sold with inadequate warnings."[12] Thus, disallowing as a defense the user's failure to notice a manufacturing defect is logical, because the user has no obligation to look for a fault that he can reasonably expect not to exist.[13] If the user knows of the defect yet unreasonably continues to use the product, however, the seller should be absolved from liability for the risk the plaintiff knowingly assumes.[14]

Furthermore, comment n to section 402A illustrates the American Law Institute's (ALI) resistance to adopting a contributory negligence standard, which was the rule of the majority of American states in the mid-1960s when the *Restatement (Second)* was published.[15] Essentially, comment n "altered the general tort defenses by narrowing the applicability of contributory negligence and emphasizing assumption of risk as the primary defense."[16] This alteration consequently elimi-

9. *See* RESTATEMENT (SECOND) § 402A cmt. n.
10. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. (1998) [hereinafter RESTATEMENT (THIRD)].
11. *See id.* at *Introduction*, p. 3.
12. *Id.*; *see also id.* § 1 cmt. a ("[I]t soon became evident that § 402A, created to deal with liability for manufacturing defects, could not appropriately be applied to cases of design defects or defects based on inadequate instructions or warnings."); Daly v. Gen. Motors Corp., 575 P.2d 1162, 1165-66 (Cal. 1978).
13. *See* RESTATEMENT (THIRD) § 17 cmt. d.
14. RESTATEMENT (SECOND) § 402A cmt. n.
15. *See* RESTATEMENT (THIRD) § 17 cmt. a (noting that because section 402A was largely an effort to create law rather than restate the law, the drafters did not bind themselves to the historical rule of contributory negligence for products liability).
16. *Id.* (noting that the application of the rule of contributory negligence was narrowed, not expressly eliminated). Comment n of the *Restatement (Second) of Torts* ("*Restatement (Second)*") provides, "[c]ontributory negligence

nated all defenses requiring the user to search for manufacturing defects, as such a requirement would go beyond exactly the type of liability that section 402A was trying to avoid.[17]

When Maryland adopted section 402A and repeatedly thereafter, the court of appeals emphasized that products liability actions are fault-based, as opposed to true strict liability cases.[18] The *Restatement (Second)* requires only proof of the sale of a defective and unreasonably dangerous product, not proof of the reason why the product was defective.[19]

B. Maryland Cases

The drafters of section 402A were focused on manufacturing defects, privity, and unrealistic burdens of proof.[20] Because of these concerns and the drafters' dislike of the contributory negligence rule, comment n to section 402A deals with affirmative defenses in a single paragraph that limits the application of the contributory negligence defense.[21]

The limited products liability experience of the drafters in framing section 402A has infected the Maryland decisions. A review of the Maryland cases considering plaintiffs' fault in a products liability setting shows the way into this muddle. Without addressing the subject, the Maryland cases have eliminated a product user's reasonable care as an aspect of a section 402A claim.

1. *Babylon v. Scruton*

A Maryland case which predates the *Restatement (Second)* holds a manufacturer liable in negligence while applying key principles of section 402A liability. In *Babylon v. Scruton*,[22] the superintendent of a product purchaser was permitted to pursue a claim against the manufacturer, though the plaintiff had no privity of contract with the defendant.[23] The manufacturer was held to "the skill of an expert in that business and to an expert's knowledge of the arts, materials, and

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. . . is not a defense *when such negligence consists merely in a failure to discover the defect in the product*, or to guard against the possibility of its existence." RESTATEMENT (SECOND) § 402A cmt. n. (emphasis added). The comment simply does not address the situations, like those seen in the Maryland cases discussed herein, where a plaintiff's fault is one of several causes of a harm and another cause of the harm is a defective product. *See id.*

17. *See id.* § 402A cmts. a, d.
18. Phipps v. Gen. Motors Corp., 278 Md. 337, 350-52, 363 A.2d 955, 962-63 (1976); *see also* Owens-Illinois, Inc. v. Zenobia, 325 Md. 420, 436-38, 601 A.2d 633, 641 (1992).
19. *Phipps*, 278 Md. at 351-52, 363 A.2d at 962-63.
20. *See supra* notes 10-14 and accompanying text.
21. *See supra* notes 15-17 and accompanying text.
22. 215 Md. 299, 138 A.2d 375 (1958).
23. *Id.* at 301-02, 138 A.2d at 376-77.

processes."[24] The manufacturer's negligence was determined by what "he knew or should have known."[25] This precise rationale and language, citing *Babylon*, has been used by the court of appeals subsequently to explain section 402A "strict liability."[26]

2. *Binakonsky v. Ford Motor Co.*

In *Binakonsky v. Ford Motor Co.*,[27] the Fourth Circuit ruled that drunk driving is irrelevant to the recovery in a claim of uncrashworthiness.[28] When the district court originally heard this case, however, it ruled that the negligence of drunk driving defeated the plaintiff's negligence and strict liability counts as a matter of law.[29] The Fourth Circuit then reversed the summary judgment for Ford on the section 402A claim, even though that count sought the same damages for the same alleged product defect caused by the same alleged fault of the manufacturer as in the negligence count.[30] The functional difference between the two counts is limited entirely to the labels "negligence" and "strict liability."[31] If a plaintiff has a "negligence" count and a "strict liability" count which seek the same damages for the same defect caused by the same fault (and everything else is the same except the title of the count), the defenses to the two counts should be the same. In *Owens-Illinois, Inc. v. Zenobia*,[32] the court of appeals stated that the difference for a product claim between negligence and strict

24. *Id.* at 304, 138 A.2d at 378 (quoting 2 FOWLER V. HARPER & FLEMING JAMES, JR., THE LAW OF TORTS, § 28.3 (1956)).
25. *Id.*
26. Owens-Illinois, Inc. v. Zenobia, 325 Md. 420, 432-39, 601 A.2d 633, 638-41 (1992).
27. 133 F.3d 281 (4th Cir. 1998).
28. *Id.* at 288 (applying Maryland law). "Crashworthiness" is a term of art used in products liability law when "the manufacturer of a defective product can be held liable for injury or death resulting from a vehicle crash even though the defective crash did not cause the initial harm to the victim." Binakonsky v. Ford Motor Co., 929 F. Supp. 915, 920 (D. Md. 1996).
29. *Binakonsky*, 929 F. Supp. at 920, 922. If the victim's injuries are exacerbated by the defective product, the manufacturer may be liable for the enhanced injuries beyond those caused by the initial accident. *Id.*
30. *Binakonsky*, 133 F.3d at 288-90.
31. *See* Owens-Illinois v. Zenobia, 325 Md. 420, 435 n.7, 601 A.2d 633, 640 n.7 (1992). There the court demonstrated the difference between a strict products liability and a negligence claim by distinguishing the defenses addressed in this Article. *Id.* The *Restatement (Third) of Torts: Products Liability* ("*Restatement (Third)*") would do away with the false distinction between strict liability and negligence products liability claims. "Two or more factually identical defective-design claims or two or more factually identical failure-to-warn claims should not be submitted to the trier of fact in the same case under different doctrinal labels." RESTATEMENT (THIRD) § 2 cmt. n; *see also* J. Henderson & A. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. REV. 265 (1990).
32. 325 Md. 420, 601 A.2d 633 (1992)

liability is the availability of the contributory negligence defense.[33] The distinction is backwards. The claims should not be different because the courts say the defenses are different. The defenses should be different *if* the claims are distinct. Thus, the *Restatement (Third)* would eliminate both the meaningless distinctions between "negligence," "strict liability," and "implied warranty,"[34] and it would provide the same defenses to all products liability claims.[35]

3. *Sheehan v. Anthony Pools*

In *Sheehan v. Anthony Pools*,[36] one of the only cases factually considering the plaintiff's fault in a section 402A claim, the court of special appeals and the court of appeals appropriately referred to the text of comment n.[37] The plaintiffs in *Sheehan* alleged failure to warn because there was no notice to product users that the non-skid surface on the diving board did not extend to its side edges.[38] The defense argued that the plaintiff's inattention caused him to slip off the side of the board.[39] Because the plaintiffs claimed that a proper board would have prevented the fall,[40] the significance of this plaintiff's conduct was whether the fall would have occurred even if the board were properly designed.[41]

This instance appears to fall into the species of failure to detect the defect to which comment n directly speaks. When faced with this situation, the courts noted without elaboration that the "ordinary" contributory negligence of failing to notice the defect is not a defense to the section 402A claim.[42]

C. *Maryland Dicta*

While no subsequent state court decision has directly considered the significance of a plaintiff's fault in a section 402A claim, several opinions touch on the subject with dicta.

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33. *Id.* at 435 n.7, 601 A.2d at 640 n.7; *see also supra* note 31 and accompanying text.
34. RESTATEMENT (THIRD) § 2 cmt. n.
35. *Id.* § 17.
36. 295 Md. 285, 455 A.2d 434 (1983).
37. Sheehan v. Anthony Pools, 50 Md. App. 614, 623-26, 440 A.2d 1085, 1090-92 (1982), *aff'd* 295 Md. 285, 299, 455 A.2d 434, 441 (1983).
38. *Sheehan*, 50 Md. App. at 621, 440 A.2d at 1089.
39. *See id.* at 617, 440 A.2d at 1087. This inference is drawn from the court's rejection of the appellee's requested jury instruction that contributory negligence was a defense before the case went to the jury on the strict liability count. *Id.*
40. *Id.* at 616-17, 440 A.2d at 1087.
41. *See id.* at 622-23, 440 A.2d at 1090 (describing plaintiff's alleged improper use of the board).
42. *Id.* at 626, 440 A.2d at 1092 (citing Luque v. McLean, 501 P.2d 1163, 1169 (Cal. 1972)).

1. *Ellsworth v. Sherne Lingerie*

In *Ellsworth v. Sherne Lingerie*,[43] the plaintiff was burned while wearing a bathrobe.[44] The robe was worn inside out, which exposed a pocket to the burner of a stove.[45] When the pocket touched the heat, the robe caught fire and burned the plaintiff.[46] The question for the court of appeals was whether the jury should have been instructed that there was no contributory negligence defense available.[47] The court held that any fault by the plaintiff was not a defense to the section 402A claim.[48] Despite the absence of a factual context necessary to induce a change in the law, the Court of Appeals of Maryland in dicta omitted the word "ordinary" in stating that contributory negligence is not a defense to a section 402A claim.[49]

With no party claiming that the plaintiff was at fault,[50] *Ellsworth* is another weak vehicle for delineating the effect of true causal fault on a products liability case. Nothing in the facts or posture of the case indicates a conscious intent to amend the rule stated in *Sheehan* and the *Restatement (Second)*. *Ellsworth*, however, does provide the authority that contributory negligence is never a defense to a section 402A claim.[51]

2. *Valk Manufacturing Co. v. Rangaswamy*

In the subsequent case of *Valk Manufacturing Co. v. Rangaswamy*,[52] Rangaswamy suffered fatal injuries in an automobile accident with a Montgomery County truck carrying a snowplow hitch made by Valk.[53] The defendant argued that contributory negligence amounted to the knowing and unreasonable assumption of the risk of a product defect that is a defense to a strict products liability claim.[54] The trial court found the decedent contributorily negligent as a matter of law, pre-

43. 303 Md. 581, 495 A.2d 348 (1985).
44. *Id.* at 587, 495 A.2d at 351.
45. *Id.*
46. *Id.* at 588, 495 A.2d at 351.
47. *Id.* at 598-600, 495 A.2d at 356-57.
48. *Id.* at 598, 495 A.2d at 357 (holding that "contributory negligence is not a defense in an action of strict liability in tort"); *see also supra* notes 6-9, 31 and accompanying text.
49. *Ellsworth*, 303 Md. at 598, 495 A.2d at 356 (noting that the plaintiff's fault was not even the subject of the appeal).
50. *Id.* at 588, 495 A.2d at 351.
51. *See id.* at 598, 495 A.2d at 356. For cases citing this aspect of *Ellsworth*, see *Owens-Illinois, Inc. v. Zenobia*, 325 Md. 420, 435 n.7, 601 A.2d 633, 640 n.7 (1992); *Montgomery County v. Valk Mfg. Co.*, 317 Md. 185, 188, 562 A.2d 1246, 1247 (1989); *Mazda Motor of Am., Inc. v. Rogowski*, 105 Md. App. 318, 326, 659 A.2d 391, 395 (1995).
52. 74 Md. App. 304, 537 A.2d 622 (1987).
53. *Id.* at 307, 537 A.2d at 622, 624.
54. *Id.* at 324, 537 A.2d at 632.

cluding recovery on the negligence count.[55] In analyzing the products liability count, however, the court determined that the plaintiff "was not remotely aware" that a defectively designed product "was about to aggravate the imminent collision" between plaintiff and the county vehicle.[56] Therefore, since the plaintiff was not aware of the defect in the hitch, the plaintiff did not, as a matter of law, assume the risk of the product defect.[57]

The *Valk Manufacturing* court was asked to hold that plaintiff's negligent driving could at least be considered by the jury to be assumption of the risk that a high-mounted snowplow hitch might come through his car window.[58] The court noted the absence of knowing and unreasonable assumption of the defect in an unseen snowplow hitch.[59] Perhaps because of the way in which the issue was presented, the decision does not address the policy issue of whether the driver's fault, but for which the harm would not have occurred, should be legally irrelevant in determining the plaintiff's recovery.

While the *Valk Manufacturing* court was not asked to consider declaring the plaintiff's fault irrelevant for the section 402A count, the case presents facts that raise the policy issue.[60] If the decedent had not put his car in a position to be "battered" by the high-mount snowplow hitch, the hitch would not have hurt him. He drove without due care as a matter of law.[61] The "ordinary" contributory negligence referred to in comment n is inapplicable because the decedent's poor driving was not a matter of failing to guard against a product defect he had no reason to expect.[62] Instead, the negligent driving was unreasonable conduct that had foreseeable results, including severe injury or death, even though the precise means of the harm were not anticipated. While his contributory negligence resulted in a judgment for the defense on the negligence count,[63] the plaintiff still recovered full damages under section 402A by also pleading strict liability, as contributory negligence is not a defense to strict liability under Maryland law.[64]

III. TREATMENT OF PLAINTIFFS' AND DEFENDANTS' FORESEEABILITY OF HARM

The treatment of defendants' and plaintiffs' fault in Maryland products liability cases is inconsistent. Courts broadly apply the concept of

55. *Id.* at 308, 537 A.2d at 624.
56. *Id.* at 325, 537 A.2d at 632.
57. *Id.*
58. *Id.* at 324-25, 537 A.2d at 632-33.
59. *Id.* at 325, 537 A.2d at 632.
60. *See id.* at 307-08, 537 A.2d at 623-24.
61. *Id.* at 308, 537 A.2d at 624.
62. *See id.* at 324-25, 537 A.2d at 632.
63. *Id.*
64. *Id.* at 325, 537 A.2d at 633; *see also supra* note 1.

foreseeability when analyzing the defendants' fault—fault-based liability extends to all foreseeable harms caused by the fault.[65] According to the court of appeals, "[u]nder this analysis the unusual and bizarre details of accidents, which human experience shows are far from unlikely, are only significant as background facts to the individual case; it is not necessary that the manufacturer foresee the exact manner in which accidents occur."[66]

In contrast, plaintiffs' relevant fault in a Maryland products liability case is purportedly limited to unreasonably assuming a risk of the product known personally to the plaintiff. The "subjective" elements of the assumption of the risk defense as the Maryland courts construe comment n to section 402A are, "1) the plaintiff actually knew and appreciated the particular risk or danger created by the defect; 2) the plaintiff voluntarily encountered the risk while realizing the danger; and 3) the plaintiff's decision to encounter the known risk was unreasonable."[67] As we have seen, the asymmetry in the treatment of the plaintiffs' and defendants' fault was not intended by the *Restatement (Second)* and has not survived in the *Restatement (Third)*.[68]

The result of the asymmetry is that product sellers are required to compensate plaintiffs who were injured only because their own fault placed them in harm's way. For instance, a plaintiff can reasonably foresee the perils, including death, of driving into the path of a dump truck. The Maryland courts hold, however, that when a product such as a defective plow hitch is appended to the truck, the plaintiff's contributory fault becomes irrelevant, even though the risk of harm posed by the plow hitch only exists for people in the path of the dump truck.[69]

A product seller must anticipate, and mitigate to the extent possible, the risk that the product will be involved in accidents.[70] For instance, cars must be reasonably crashworthy even though they are not intended to be crashed;[71] nightgowns must resist catching fire even

65. *See, e.g.*, Ellsworth v. Sherne Lingerie, 303 Md. 581, 598, 495 A.2d 348, 357-58 (1985) (wearing of a bathrobe inside-out, which resulted in the robe catching fire over a kitchen stove, was foreseeable to the product sellers and as a matter of law was not product misuse); Moran v. Faberge, Inc., 273 Md. 538, 553, 332 A.2d 11, 20 (1975) (pouring perfume on a lighted candle to "scent" the candle was foreseeable to the seller).

66. *Moran*, 273 Md. at 553, 332 A.2d at 20.

67. *Ellsworth*, 303 Md. at 597, 495 A.2d at 356 (quoting Sheehan v. Anthony Pools, 50 Md. App. 614, 626 n.11, 440 A.2d 1085, 1092 n.11 (1982)).

68. *See supra* Part II.A.

69. See *supra* Part II.C.2 for a discussion of *Valk Mfg. Co. v. Rangaswamy*.

70. Volkswagen of Am., Inc. v. Young, 272 Md. 201, 215-16, 321 A.2d 737, 745 (1974) (answering the certified question of law and stating that an automobile must be crashworthy).

71. *See, e.g.*, Binakonsky v. Ford Motor Corp., 929 F. Supp. 915, 920 (D. Md. 1996); *Volkswagen*, 272 Md. at 217, 321 A.2d at 745-46.

when worn inside out;[72] and a warning must be given that perfume is flammable even though it is not intended to be used near open flames.[73] In both *Binakonsky* and *Valk Manufacturing*, the alleged defects might have caused the death of persons other than the plaintiff through no fault of the person harmed.[74] That does not mean, however, that the plaintiff at fault should be compensated as if there were no fault.

If the product seller can foresee some accidents occurring beyond the seller's control, some of those accidents will be foreseeable to the product user as well. For instance, a drunk driver ought to foresee the risk of a crash, and the seller should foresee the consequences of a crash not caused by its product.[75]

The reason an accident was caused should not always be irrelevant when determining the defendants' liability in a products liability claim. The Fifth Circuit has held that a drunk driver driving at high speeds and causing tire failure was relevant to a claim that the tires were faulty.[76] North Dakota has also addressed a driver's fault in a crashworthiness claim when a sleeping driver wrecked.[77]

The Illinois Supreme Court holds plaintiffs accountable for their own contributory fault in a products liability action, yet does not undermine the principle of holding sellers liable for the harm caused by their fault; there is "no reason to spread the cost of the loss resulting from the plaintiff's own fault to the consuming public."[78]

Maryland's differential treatment of both plaintiffs' and defendants' fault in products liability cases results from neither articulated reasoning nor from application of persuasive analogies. This shortcoming springs entirely from a three-sentence comment to section 402A intended to absolve product users from inspecting for unexpected defects.[79] Treating plaintiffs' fault more gently than defendants' is not good policy because plaintiffs' fault is not inherently "better" than defendants.[80] The *Restatement (Third)*, which replaces comment n to section 402A with a complete, coherent section based on the contributory negligence rule,[81] provides a better treatment of plaintiffs' fault in products liability cases.

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72. *Ellsworth*, 303 Md. at 598, 495 A.2d at 357.
73. Moran v. Faberge, Inc., 273 Md. 538, 553, 332 A.2d 11, 20 (1975).
74. See *supra* Part II.B.2 for a discussion of *Binakonsky v. Ford Motor Co.* See *supra* Part II.C.2 for a discussion of *Valk Mfg. Co. v. Rangaswamy.*
75. *See generally supra* Part I.
76. Edwards v. Sears, Roebuck & Co., 512 F.2d 276, 290 (5th Cir. 1975) (applying Mississippi law).
77. Day v. Gen. Motors Corp., 345 N.W.2d 349, 357 (N.D. 1984).
78. Coney v. J.L.G. Indus., 454 N.E.2d 197, 202 (Ill. 1983).
79. *See* RESTATEMENT (SECOND) § 402A cmt. n.
80. *See* RESTATEMENT (THIRD) § 17; *see also supra* notes 76-78.
81. *See* RESTATEMENT (THIRD) § 17.

IV. THREE ALTERNATIVE APPROACHES TO PLAINTIFFS' FAULT

A. *Knowing and Unreasonable Use*

Presently, Maryland law limits a successful defendant's argument to a knowing and unreasonable use of a dangerous and defective product by the plaintiff.[82] Essentially, this approach elevates the pleading of products liability theories as either "negligence" or "strict liability" above either the facts of the case or the policies behind fault-based liability. The difference caused by pleading in one way or another is the defenses permitted,[83] rather than having different defenses because there is a substantive difference in the theories. Maryland's approach to plaintiffs' fault in a products liability case is inconsistent with Maryland's general contributory negligence bar to recovery,[84] and is inconsistent with the approach of the majority of states, which treat plaintiffs' fault as relevant in a products liability case.[85]

B. *Contributory Negligence*

One alternative to the current state of Maryland law is to expand the types of plaintiffs' fault that form a complete defense to a products liability claim. Maryland already recognizes that its assumption of the risk defense is closely related to contributory negligence.[86] The contributory negligence defense could be included without overruling any Maryland decision. The new rule could state that a product user has no obligation to inspect a product for unanticipated safety defects, and a failure to inspect for such defects would not constitute a lack of due care.[87] The revised statement of the rule would be that a person has the same obligation of due care with regard to products, whether that person is a product user or a product seller.[88] In a products lia-

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82. *See supra* Part II.
83. *See supra* notes 30-33 and accompanying text.
84. *See* Montgomery County v. Valk Mfg. Co., 317 Md. 185, 188, 562 A.2d 1246, 1247 (1989) (stating that in Maryland, contributory negligence bars direct negligence claims but not claims of strict liability).
85. *See, e.g.*, Lewis v. Timco, Inc., 716 F.2d 1425 (5th Cir. 1983).
86. Ellsworth v. Sherne Lingerie, 303 Md. 581, 598, 495 A.2d 348, 356 (1985). The court stated:

> [C]ontributory negligence is not a defense in an action of strict liability in tort. *Conduct which operates to defeat recovery may in fact be negligent,* but confusion will be avoided if it is remembered that a plaintiff is barred only because such conduct constitutes misuse or assumption of risk, and not because it constitutes contributory negligence.

Id. (emphasis added) (citation omitted).
87. *See* Sheehan v. Anthony Pools, 50 Md. App. 614, 626 n.11, 440 A.2d 1085, 1092 n.11 (1982), *aff'd* 295 Md. 285, 455 A.2d 434 (1983). This is precisely the approach adopted by Illinois. Coney v. J.L.G. Indus., 454 N.E.2d 197, 203-04 (Ill. 1983).
88. *See supra* note 3.

bility action, if the plaintiffs' failure to use due care was a proximate cause of the harm complained of, then the result would be the same as in any negligence claim asserting a defendant's liability for lack of due care. The contributory negligence defense, however, contradicts the dicta in Maryland case law that user fault is irrelevant in a strict products liability claim.[89]

C. *Comparative Fault*

The third alternative approach to plaintiffs' fault in a products liability action is adoption of comparative fault for products liability claims.[90] Comparative fault reduces plaintiffs' recovery based on the amount of fault a plaintiff contributes to the harm suffered.[91] This approach has the virtue of not conflicting with the language of *Ellsworth*[92] and *Valk Manufacturing*[93] that plaintiffs' fault will not completely bar recovery in a products liability action. This approach would also be consistent with the majority of states that apply the rule from the current *Restatement.*[94]

Conversely, a rule of comparative fault for products liability cases in Maryland would be inconsistent with the rule of contributory negligence for other kinds of negligence cases.[95] Reducing plaintiffs' recovery because of plaintiffs' fault, however, makes more sense than "compensating" plaintiff for that fault.[96] Therefore, such a partial solution is better than none at all. Currently, Maryland's contributory negligence rule is completely at odds with the treatment of plaintiffs' fault in products liability cases.[97]

A court should not require a manufacturer to pay unreduced damages to a plaintiff who is at fault. Consequently, a majority of states reduce plaintiffs' recovery for a products liability claim caused in part

89. *See supra* note 48 and accompanying text.
90. *See* Kampen v. Am. Isuzu Motors, Inc., 157 F.3d 306, 324 (5th Cir. 1998) (discussing Louisiana's adoption of comparative fault by statute when applied to products liability and by common law for ordinary tort situations).
91. Section 17 states a rule of comparative fault. RESTATEMENT (THIRD) § 17. Distinguishing between and arguing about various iterations of comparative fault is beyond the scope of this Article. For a discussion of different types of comparative fault regimes see *Harrison v. Montgomery County Bd. of Educ.*, 295 Md. 442, 447-48, 453-55, 456 A.2d 894, 896-97, 899-901 (1983); *see also* RESTATEMENT (THIRD) § 17 cmt. b.
92. *See supra* Part II.C.1.
93. *See supra* Part II.C.2.
94. Section 17 of the *Restatement (Third)* states that the majority rule for the American states is comparative fault in products liability suits. RESTATEMENT (THIRD) § 17.
95. *See Harrison*, 295 Md. at 442, 456 A.2d at 894. Whether comparative fault or contributory negligence represents better policy generally for treating plaintiffs' fault is beyond the scope of this Article.
96. *See* Coney v. J.L.G. Indus., 454 N.E.2d 197, 202 (Ill. 1983).
97. *See supra* Part II.B-C.

by plaintiffs' fault.[98] While Maryland has not adopted this rule, section 17 of the *Restatement (Third)* provides: "[a] plaintiff's recovery of damages for harm caused by a product defect may be reduced if the conduct of the plaintiff combines with the product defect to cause the harm and the plaintiff's conduct fails to conform to generally applicable rules establishing appropriate standards of care."[99]

One justification for section 17 is the fact that comparative fault for negligence has replaced contributory negligence as the majority rule since the adoption of the *Restatement (Second)*.[100] In fact, the ALI finds that a "strong majority of jurisdictions apply the comparative responsibility doctrine to products liability actions."[101] Application of this doctrine broadens the relevance of plaintiffs' fault beyond an unreasonable assumption of the risk of the product's defect.[102]

The *Restatement (Third)*'s approach considers "all forms of plaintiff's failure to conform to applicable standards of care" for apportioning responsibility between the plaintiff and defendant.[103] This approach declines to separate plaintiffs' fault into discrete categories like assumption of the risk, "ordinary" inattention to product design failures, or use of a product while impaired.[104] Section 17 states that "[r]ecognition of such special categories tends to result in either a plaintiff being absolved from responsibility or being completely barred from recovery."[105] Such recognition results in litigation attempting to pigeonhole conduct rather than acknowledging the true significance of all of the facts. As a result, "[t]hat effort has proven costly and largely futile."[106] In determining the "appropriate percentages of responsibility between the plaintiff and the [defendant]," the

98. *See* Butaud v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42, 43 (Alaska 1976) (holding for the first time that comparative negligence applies to products liability); Jimenez v. Sears, Roebuck & Co., 904 P.2d 861, 866 (Ariz. 1995) (applying statutory comparative fault principles to strict products liability); Daly v. Gen. Motors Corp., 575 P.2d 1162, 1169 (Cal. 1978) (stating that the adoption of comparative negligence will not result in large impairment of safety incentives); Bell v. Jet Wheel Blast, 462 So. 2d 166, 171 (La. 1985) (rejecting contributory negligence and adopting comparative fault in a products liability case); Field v. Boyer Co., 952 P.2d 1078, 1085 (Utah 1998) (applying statutory comparative fault).

99. RESTATEMENT (THIRD) § 17(a).

100. *See id.* § 17 cmt. a.

101. *Id.* The comparative fault doctrine reduces plaintiffs' recovery in proportion to plaintiffs' fault, with variations among the states that apply comparative fault. *Id.* § 17 cmt. b. Maryland has not applied comparative fault to negligence claims. *See* Harrison v. Montgomery County Bd. of Educ., 295 Md. 442, 447-48, 453-55, 456 A.2d 894, 896-97, 899-901 (1983).

102. RESTATEMENT (THIRD) § 17(a).

103. *Id.* § 17 cmt. d.

104. *Id.*

105. *Id.* § 17 cmt. d. (Tentative Draft No. 1, 1994).

106. *Id.*

severity of the plaintiffs' fault as well as the nature of the product defect are relevant.[107]

Courts employing comparative fault in strict products liability cases emphasize that it is both unfair and economically inefficient for the plaintiffs' fault to be compensated and spread to other consumers. For instance, in *Coney v. J.L.G. Industries, Inc.*,[108] the Supreme Court of Illinois decided that comparative fault does not reduce the incentive to sell safe products.[109] The cost of product defects continues to be borne by the sellers and is accordingly spread among consumers.[110] The court in *Coney* also stated that "[o]nly that portion [of the cost of injuries] due to plaintiff's own conduct or fault is borne by the plaintiff."[111] The court saw no reason to spread the loss resulting from plaintiffs' fault to other consumers.[112] The Third Circuit has joined in the criticism of "compensating" plaintiffs for harm they have caused themselves, which results in the defendant "paying for a part of the loss which is attributable not to the product defect, but to plaintiff's conduct."[113]

In the *Restatement (Third)*, the ALI has abandoned any non-fault distinctions between negligence and strict liability and settled upon a single body of law for products liability.[114] While Maryland has not

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107. *Id.*
108. 454 N.E.2d 197 (Ill. 1983).
109. *Id.* at 202.
110. *Id.*
111. *Id.*; *see also* Whitehead v. Toyota Motor Corp., 897 S.W.2d 684, 693 (Tenn. 1995); *Coney*, 454 N.E.2d at 203. *Coney* stated that the apportionment between plaintiffs' and defendants' fault is a matter of "'asking how much was caused by the plaintiff's own actions.'" *Id.* at 203 (quoting Murray v. Fairbanks Morse, 610 F.2d 149, 159 (3d Cir. 1979)); *see also* Busch v. Busch Constr., Inc., 262 N.W.2d 377, 394 (Minn. 1977). The North Dakota Supreme Court has stated that, "the ultimate objective of comparing negligence in a products liability case is to apportion, on a percentage basis, all causes of the mishap resulting in damages." Day v. Gen. Motors Corp., 345 N.W.2d 349, 354 (N.D. 1984).
112. *Coney*, 454 N.E.2d at 197.
113. Murray v. Fairbanks Morse, 610 F.2d 141, 161 (3d Cir. 1979).
114. *See* RESTATEMENT (THIRD) § 2 cmt. n. Maryland should adopt section 2 of the *Restatement (Third)*. The only meaningful distinction between negligence and strict liability products claims in Maryland is the effect of plaintiff's fault. *See, e.g.*, Owens-Illinois, Inc. v. Zenobia, 325 Md. 420, 435 n.7, 601 A.2d 633, 640 n.7 (1992) ("[S]trict liability differs from a negligence cause of action in that contributory negligence is not a defense to a strict liability claim.") (citation omitted). This distinction stems from the incipient nature of section 402A, when the *Restatement (Second)* was written, as opposed to thirty-five years of national legal development since then. Because the distinguishing effect of plaintiffs' fault is unsound and incoherent, there is no reason Maryland should try to distinguish indistinct legal doctrines. There are at least two untoward effects of maintaining two names for defendants' fault in a products liability case. One is the temptation for juries and judges to find that distinctions must inhere in the two names for fault, rather than addressing the facts and obligations in any given case. *See, e.g.*, Eagle-Picher Indus., Inc. v. Balbos, 84 Md. App. 10, 35,

addressed this development by the ALI, the development is consistent with Maryland's decisions following section 402A of the *Restatement (Second).*[115]

1. Adoption of Comparative Fault by Other Jurisdictions

The Reporters' Note to *Restatement (Third)* section 17, comment a, provides a compendium of judicial decisions and statutes adopting comparative fault for products liability cases.[116] This authority indicates that approximately seventeen states, including Tennessee, have judicially adopted comparative fault as a reduction of strict products liability damages.[117] Puerto Rico also applies comparative fault in strict products liability cases.[118] Furthermore, twelve states, including several not included in the Reporters' Note, have enacted comparative fault statutes that reduce strict products liability damages.[119] Nonetheless, a small minority of states continue to define strictly the defenses that completely bar or reduce a section 402A claim and reject any other fault as a basis for affecting the damages recoverable for

578 A.2d 228, 240 (1990), *rev'd on other grounds*, 326 Md. 179, 604 A.2d 445 (1992) ("Appellants . . . argue that they could not consistently have been found to have acted negligently with respect to the use of products which the jury also concluded were not unreasonably dangerous in the absence of any warning.").

115. *See, e.g.*, ACandS, Inc. v. Asner, 344 Md. 155, 168, 686 A.2d 250, 256 (1996) ("'[I]n a failure to warn case governed by the Restatement § 402A and Comment j, negligence concepts to some extent have been grafted onto strict liability.'") (quoting Owens-Illinois, Inc. v. Zenobia, 325 Md. 420, 435, 601 A.2d 633, 640 (1992)); Klein v. Sears, Roebuck & Co., 92 Md. App. 477, 492, 608 A.2d 1276, 1284 (1992) ("Maryland's view of strict liability in tort for injuries caused by a dangerous and defective product is that such tort is akin to negligence."); Ziegler v. Kawasaki Heavy Indus., 74 Md. App. 613, 619, 539 A.2d 701, 704 (1988) ("To recover under the authority of § 402A, a plaintiff need not prove any specific act of negligence on the part of the seller, but the plaintiff must prove that the product was in a defective condition *and* unreasonably dangerous at the time the product was sold.") (footnote omitted) (emphasis in original).

116. RESTATEMENT (THIRD) § 17 rptr. n., cmt. a.

117. *See* Whitehead v. Toyota Motor Corp., 897 S.W.2d 684, 693 (Tenn. 1995) ("In keeping with the principle of linking liability with fault, a plaintiff's ability to recover in a strict products liability case should not be unaffected by the extent to which his injuries result from his own fault.").

118. *See* McPhail v. Municipality of Culebra, 598 F.2d 603, 606 (1st Cir. 1979) ("Puerto Rico has adopted the rule announced in *Daly v. Gen. Motors Corp.* that an injured victim's assumption of risk or contributory negligence will not bar but will only reduce recovery in a strict liability case.") (citations omitted) (footnotes omitted); P.R. LAWS ANN. tit. 31, § 5141 (1991) ("Concurrent imprudence of the party aggrieved does not exempt from liability, but entails a reduction of the indemnity.").

119. *See* ARIZ. REV. STAT. ANN. § 12-2505 (West 1984); IOWA CODE ANN. §§ 668.1, 668.3 (West 1998); KY. REV. STAT. ANN. § 411.182 (Michie 1988); ME. REV. STAT. ANN. tit. 14, § 156 (West 2000); MO. ANN. STAT. § 537.765 (West 2000); MONT. CODE ANN. § 27-1-719 (1997).

that claim.[120] A reading of cases from those statutes, however, shows an approach to strict products liability that diverges from Maryland's fault-based application of section 402A.[121]

2. Maryland's Authority to Adopt Comparative Fault

Maryland courts have the authority to adopt comparative fault for section 402A claims. The court of appeals, in *Phipps v. General Motors Corp.*,[122] the seminal section 402A case, rejected the claim that only the General Assembly could determine the law in this field.[123] The sole fact that decisions prior to *Phipps* had not adopted strict liability did not constitute a rejection of the concept.[124] Likewise, prior decisions not considering comparative fault in relation to a section 402A claim should not constitute a rejection of that concept. Several courts have excluded failure to inspect from plaintiffs' fault relevant to section 402A liability, while comparing all other fault in determining the defendant's liability.[125] Thus, comparative fault could be adopted without overruling prior Maryland case law.[126]

V. CONCLUSION

Fault-based products liability is inconsistent with a constriction of defenses so tight that truly faulty behavior, which is a substantial contributing cause of harm, does not affect plaintiffs' recovery at all. The policy of not requiring consumer inspections for defects is a far cry from holding that plaintiffs' causal fault has no bearing at all on the liability of the defendant unless it is a knowing and unreasonable assumption of risk of the product defect.[127] Meaningful fault on the

120. *See supra* note 119.
121. *See supra* note 119; *see also* Phipps v. Gen. Motors Corp., 278 Md. 337, 346, 363 A.2d 955, 960 (1976).
122. 278 Md. 337, 363 A.2d 955 (1976).
123. *Id.* at 350, 363 A.2d at 962.
124. *See id.* at 346-48, 363 A.2d at 960-61.
125. *See, e.g.*, Star Furniture Co. v. Pulaski Furniture Co., 297 S.E.2d 854, 862-63 (W. Va. 1982) ("We note, however, that the *Restatement, (Second), Torts* specifically states that a plaintiff's failure to discover a defect or to guard against it should not be considered contributory negligence . . . . We adopt this rule . . . ."); Busch v. Busch Constr. Inc., 262 N.W.2d 377, 394 n.16 (Minn. 1977) ("Thus we adopt Restatement, Torts 2d, § 402A, comment *n*, only insofar as it removes the failure to inspect a product as a defense. In all other cases, plaintiff is not absolutely barred from recovery, but comparative fault concepts will apply."); *see also* Murray v. Fairbanks Morse, 610 F.2d 149, 161 (3d Cir. 1979) ("The recognition of contributory fault as an absolute bar to recovery would improperly shift the total loss to the plaintiff. Under a system of comparative fault, however, there are good reasons for allowing some form of contributory fault to be considered in reducing damages.").
126. *See supra* Part II.B.
127. *See supra* Part II.A.

part of a plaintiff should affect any recovery in litigation, without regard to doctrines sprouting from the infancy of modern products liability law and its focus on manufacturing defects.[128]

128. *See supra* Part II.A.