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Modified Contributory Fault and Strict Products Liability: Illinois' Silent Disposal of Misuse and Assumption of Risk Turns Back the Evolution, 23 J. Marshall L. Rev. 247 (1990)

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COMMENT

MODIFIED CONTRIBUTORY FAULT AND STRICT PRODUCTS LIABILITY: ILLINOIS' SILENT DISPOSAL OF MISUSE AND ASSUMPTION OF RISK TURNS BACK THE EVOLUTION

I. INTRODUCTION

> "Here," the judges felt, "is a stable body of rules which create legal certainty. We ourselves, seldom change any of them, and then only after the most careful consideration. But the legislature makes new rules, frequently without adequate consideration, which upset legal certainty. The legislatures do their work capriciously, superficially, on the basis of the limited subjective impressions of a few members of a legislative committee. Why should we greatly respect such shoddy products?"[1]

With the Illinois General Assembly's enactment of Illinois Code of Civil Procedure paragraph 2-1116,[2] Illinois has become a modified contributory fault state.[3] Effective November 25, 1986,[4] paragraph 2-1116 was a part of omnibus legislation[5] enacted in response to the "insurance crisis".[6] The purpose behind enacting modified contributory fault was to limit recoveries in tort actions by barring recovery if a plaintiff's fault is more than 50% of the proximate cause of the injury.[7] The act abolished the short lived pure comparative negli-

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1. Mikva, *Reading And Writing Statutes*, 48 U. PITT. L. REV. 627 (1987) (quoting J. FRANK, COURTS ON TRIAL 292 (1950)).

2. ILL. REV. STAT. ch. 110, ¶ 2-1116 (1987).

3. For the text of paragraph 2-1116, see *infra* note 89.

4. Paragraph 2-1116 only applies to cases filed after November 25, 1986, the date P.A. 84-1431, Art. 4, § 1 (1986), went into effect.

5. This legislation, Public Act 84-1431 (1986), is commonly known as the Tort Reform Act. *See* Mulgrew, *Strict Tort Products Liability In Illinois - An Updated Exposition*, 76 ILL. B.J. 854, 856 n.81 (1987) (tort reform act recently enacted). *See also* Erickson v. Muskin Corp., 180 Ill. App. 3d 117, 123, 535 N.E.2d 475, 478 (1989) (tort reform legislation further complicates strict liability cases).

6. For a discussion of the so-called insurance crisis, see *infra* notes 77-80 and accompanying text.

7. The legislature's purpose of limiting recoveries is evident from the titles within the act. The Legislature enacted paragraph 2-1116 under Public Act 84-1431.

gence principles the Illinois judiciary had previously adopted.[8]

In contrast to paragraph 2-1116, pure comparative negligence was intended to increase plaintiffs' recoveries.[9] The Illinois Supreme Court considered the pure system the only fair, logical and equitable approach.[10] Consequently, with the enactment of paragraph 2-1116 the conflicting goals of the judiciary and the legislature have collided.

Because the action of the legislature and the prior common law are diverse, Illinois courts will soon have to interpret and construe paragraph 2-1116.[11] A crucial issue the court will resolve is the

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1986 Ill. Laws vol. 2, at 3755. Public Act 84-1431 is titled "An Act in relation to the insurance crisis." *Id.* at 3740. Paragraph 2-1116 is named "Limitation on recovery in tort actions." ILL. REV. STAT. ch. 110, ¶ 2-1116 (1987). Additionally, other sections expressly indicate the legislature's purpose. One example of an intention to handle the "insurance crisis" is in paragraph 2-1205.1. The paragraph is simply titled "Reduction in amount of recovery." ILL. REV. STAT. ch. 110, ¶ 2-1205.1 (1987).

8. Prior to the enactment of paragraph 2-1116, Illinois was a pure comparative fault state. *See* Alvis v. Ribar, 85 Ill. 2d 1, 421 N.E.2d 886 (1981) (replaced contributory negligence with comparative negligence); Kionka, *Comparative Negligence Comes to Illinois*, 70 ILL. B.J. 16 (1981) (Illinois 37th state adopting pure comparative negligence). For a discussion of *Alvis*, see *infra* note 23.

9. *See* Coney v. J.L.G. Indus., Inc., 97 Ill. 2d 104, 118, 454 N.E.2d 197, 203 (1983) (equitable principles require comparative negligence); *Alvis*, 85 Ill. 2d at 27, 421 N.E.2d at 898 (comparative negligence more just and socially desirable).

10. *Coney*, 97 Ill. 2d at 118, 454 N.E.2d at 203.

11. Since the enactment of paragraph 2-1116, Illinois courts have taken an opportunity to comment on the statute even though the statute was not applicable to the cases being decided. Erickson v. Muskin Corp., 180 Ill. App. 3d 117, 535 N.E.2d 475 (1989), was a strict products liability action brought to recover for injuries suffered when the plaintiff dived into a shallow above ground swimming pool and broke his neck. At trial the jury found the plaintiff assumed the risk to the extent of 96%, and the court reduced the damage award accordingly. The plaintiff appealed, raising several issues including whether assumption of risk was applicable to a failure to warn strict liability case. While discussing assumption of risk principles, the court espoused its disapproval of the decision in Coney v. J.L.G. Indus., Inc., 97 Ill. 2d 104, 454 N.E.2d 197 (1983), which rejected mere contributory negligence as a factor in reducing recovery in strict products liability. The court stated:

> If Illinois had followed the majority trend in these cases by adopting the principles of "pure" comparative fault (or causation) in strict liability cases, thus eliminating assumption of risk, we would not be confronted with resolving the oft-times extensive litigation issues arising out of such actions. Moreover, such causes of action accruing on or after November 25, 1986, are further complicated by enactment of a provision in the "tort reform" legislation in which a plaintiff's misuse or assumption of the risk to the extent of more than 50% will absolutely bar strict liability (citation omitted).

Erickson, 180 Ill. App. 3d at 123, 535 N.E.2d at 478.

In regard to the court's conclusion that paragraph 2-1116 further complicates strict liability actions, the court overlooks the fact paragraph 2-1116 will simplify strict products liability if it actually does away with the assumption of risk principles the court loathed.

In Carter v. Chicago & Illinois Midland Ry. Co., 168 Ill. App. 3d 652, 522 N.E.2d 856 (1988), the court held that siblings could not recover for loss of society and companionship in wrongful death claims. *Id.* at 660, 522 N.E.2d at 861. In so doing, the court noted that the legislature recently imposed limitations upon tort liability with paragraphs 2-1116 and 2-1117. *Id.* Further, there was no indication of public policy

meaning of the word "fault" as the word is used in paragraph 2-1116. In the context of strict tort products liability actions,[12] the court must decide whether the phrase contributory fault[13] includes negligence in addition to plaintiffs' misuse[14] and assumption of risk,[15] thus abolishing the old common law distinctions. Because the validity of many suits will largely depend on the meaning of the word "fault", the judicial determination of this issue will substantially impact strict tort products liability actions in Illinois.[16]

This comment asserts that paragraph 2-1116 abolishes the common law distinctions between negligence, misuse and assumption of risk in strict products liability actions. Section II of this comment traces the historical development of contributory fault in Illinois up to the adoption of paragraph 2-1116 and illustrates the ambiguity present in its language.[17] Section III examines and interprets paragraph 2-1116 using a two step traditional approach and determines that the legislature intended to dispense with the common-law distinctions for different types of culpable conduct.[18] In support of this determination, Section IV reviews how other jurisdictions have ad-

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directing it to interpret a statute expansively. *Id.*

A few other decisions also briefly noted the adoption of modified contributory fault in Illinois. *See* Dunn v. Baltimore & Ohio R.R. Co., 127 Ill. 2d 350, 537 N.E.2d 738 (1989) (noting legislature adopted modified comparative negligence); King v. Petefish, 185 Ill. App. 3d 630, 541 N.E.2d 847 (1989) (trial court mistakenly applied modified when pure was in effect at time of death); *see also* Tompkins v. Isbell, 543 N.E.2d 680 n.1 (Ind. Ct. App. 1989) (noting Illinois adopted modified comparative fault similar to Indiana).

12. Illinois first recognized strict tort liability in Suvada v. White Motor Co., 32 Ill. 2d 612, 201 N.E.2d 313 (1965). The *Suvada* court explained the policy reason for strict tort liability is preserving human health and life by imposing the loss caused by a defective product on those creating the risk and receiving the benefits. *Id.* Strict tort products liability theory concentrates on a product's condition, not the conduct of the defendant. Christopherson v. Hyster Co., 58 Ill. App. 3d 791, 374 N.E.2d 858 (1978). A defendant supplier or manufacturer who was not negligent and even exercised the utmost care is liable under strict tort products liability for injuries caused by the defective product. Sweeney v. Matthews, 94 Ill. App. 2d 6, 236 N.E.2d 439 (1968). For a discussion of the development of strict tort liability in other jurisdictions, see Wade, *The Continuing Development of Strict Liability in Tort*, 22 ARK. L. REV. 233 (1968).

13. For definitions of the word fault, see *infra* note 106.

14. For a discussion of misuse and its application in Illinois, see *infra* note 29.

15. For a discussion of the assumption of risk defense and its application in Illinois, see *infra* note 30.

16. If fault encompasses negligence, misuse and assumption of risk, recoveries theoretically will be less in strict products liability suits where the plaintiff is merely negligent. Additionally, the number of suits should be less because the statute may deter any plaintiff whose fault is likely more than 50% of the proximate cause of the injury from filing suit.

17. *See infra* notes 23-48 and accompanying text, for the background of paragraph 2-1116.

18. *See infra* notes 50-114 and accompanying text, for the interpretation of paragraph 2-1116.

dressed this issue when confronted with similar statutes.[19] This comment concludes that in strict tort products liability actions, Illinois courts should interpret the word "fault" in paragraph 2-1116 as any wrongful conduct, including negligence, misuse and assumption of risk.

II. BACKGROUND

> 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.[20]

Illinois' modified contributory fault principles developed from the English common law doctrine of contributory negligence.[21] The doctrine of contributory negligence bars recovery by plaintiffs whose negligence contributes to their own injuries.[22] Until recently, this archaic rule, with its harsh consequences, was the law Illinois courts applied.[23]

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19. *See infra* notes 116-143 and accompanying text, for a discussion of other jurisdictions.

20. Placek v. City of Sterling Heights, 405 Mich. 638, 653, 275 N.W.2d 511, 515 (1979).

21. The phrase contributory negligence denotes any negligence or lack of due care which is a proximate cause of the injury. Honaker v. Crutchfield, 247 Ky. 495, 57 S.W.2d 502 (1933); *see also* Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 261 N.E.2d 305 (1970) (contributory negligence when lack of due care for one's own safety). The development of contributory negligence traces back to the case of Butterfield v. Forrester, 11 East 60, 103 Eng. Rep. 926 (1809). In *Butterfield*, the plaintiff was riding his horse at eight o'clock at night in a violent manner. Although it was still light enough to see a pole the defendant put across the road, the plaintiff did not observe the pole. Consequently, the plaintiff was hurt when he rode into the pole and fell with his horse. *Id.* at 60, 103 Eng. Rep. at 927. The court held that the plaintiff could not recover because "[o]ne person being at fault will not dispense with another's using ordinary care . . . ." *Id.* at 61, 103 Eng. Rep. at 927.

The contributory negligence doctrine arrived in the United States in 1824. See Turk, *Comparative Negligence on the March*, 28 CHI.[-]KENT L. REV. 189, 198 (1950). In 1852, Illinois adopted contributory negligence principles. *See* Aurora Branch R.R. v. Grimes, 13 Ill. 585 (1852) (plaintiffs must show both defendant was negligent and the plaintiff was not). A temporary switch to a form of comparative negligence occurred six years later in Galena & Chicago Union R.R. v. Jacob, 20 Ill. 478 (1858). The *Galena* court stated that contributory negligence was not fair to one only slightly at fault. *Id.* The switch lasted until 1885, when Illinois adopted contributory negligence as a complete bar to recovery in Calumet Iron and Steel Co. v. Martin, 115 Ill. 358, 3 N.E. 456 (1885). Under the contributory negligence doctrine, the plaintiff was again required to prove freedom from contributory negligence as an element of his cause of action. Carter v. Winter, 32 Ill. 2d 275, 204 N.E.2d 755 (1965).

22. *See* Alvis v. Ribar, 85 Ill. 2d 1, 5, 421 N.E.2d 886, 887-88 (1981) (doctrine of contributory negligence bars recovery).

23. The Illinois Supreme Court abolished contributory negligence in *Alvis*, *Id.* In *Alvis*, the plaintiff was a passenger in a motor vehicle the defendant was operating. Alvis was injured when the vehicle skidded out of control and hit a metal barrel which anchored a temporary stop sign on the road. Alvis' complaint to recover for his injuries was dismissed because he was found contributorily negligent. The appellate court affirmed. 78 Ill. App. 3d 1117, 398 N.E.2d 124 (1979). The Illinois Supreme

In 1965, while Illinois was still a contributory negligence state, the Illinois Supreme Court adopted strict liability in tort for injuries resulting from the use of unreasonably dangerous products.[24] Termed strict products liability, this concept holds a manufacturer or seller of a product liable even without the presence of negligence or privity between parties.[25] The policy underlying strict products liability, the protection of human health and life, is attained by imposing liability for harm resulting from defective products on those who create the risk and derive benefit from the sale of the defective products.[26]

Following the adoption of strict products liability, the Illinois appellate courts split over whether mere contributory negligence barred a plaintiff's recovery in strict products liability actions as it did in negligence actions.[27] The Illinois Supreme Court resolved the controversy in 1970 when it denounced contributory negligence as a bar to recovery in strict products liability actions.[28] The court held that only conduct rising to a level of misuse[29] or assumption of risk[30]

Court allowed leave to appeal on the issue of whether it should abolish contributory negligence in Illinois and reversed the appellate court decision. *Alvis*, 85 Ill. 2d at 28, 421 N.E.2d at 898.

24. Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965). The *Suvada* court set forth the following requirements for establishing a strict products liability cause of action: a plaintiff must show that 1) the injury resulted from a condition of the product; 2) the condition was unreasonably dangerous; and 3) the condition existed at the time the product left the manufacturer's control. *Id.* at 623, 210 N.E.2d at 188.

25. *Id.* at 618, 210 N.E.2d at 185-86.

26. *Id.* at 619, 210 N.E.2d at 186.

27. In 1967, the Illinois Supreme Court implied that contributory negligence applied to strict products liability. *See* People *ex. rel.* General Motor Corp. v. Bua, 37 Ill. 2d 180, 196, 226 N.E.2d 6, 16 (1967) (stating that proof of due care necessary). The *Bua* decision lead to differing opinions in the appellate courts of what constituted contributory negligence. *See* Adams v. Ford Motor Co., 103 Ill. App. 2d 356, 360, 243 N.E.2d 843, 846 (1968) (contributory negligence defined as voluntary and unreasonable proceeding to encounter a known danger); Sweeney v. Matthews, 94 Ill. App. 2d 6, 24-25, 236 N.E.2d 439, 448 (1968) (distinguished and defined contributory negligence and assumption of the risk); Vlahovich v. Betts Machine Co., 101 Ill. App. 2d 123, 126-28, 242 N.E.2d 17, 19 (1968) (contributory negligence an issue in determining proper basis of liability); *Vlahovich*, 101 Ill. App. 2d at 130, 242 N.E.2d at 20 (Alloy, J., concurring) (advocated adopting restatement application of contributory negligence in strict liability); Brandenburg v. Weaver Mfg. Co., 77 Ill. App. 2d 374, 379, 222 N.E.2d 348, 350-51 (1967) (plaintiff barred by lack of due care); Dunham v. Vaughan & Bushnell Mfg. Co., 86 Ill. App. 2d 315, 330-31, 229 N.E.2d 684, 692 (1967) (contributory negligence or lack of due care proper issue in strict products liability).

28. Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 261 N.E.2d 305 (1970).

29. Misuse of a product is a use for a purpose neither intended nor reasonably foreseeable by the manufacturer or defendant. *Williams*, 45 Ill. 2d at 425, 261 N.E.2d at 309; Gallee v. Sears, Roebuck & Co., 58 Ill. App. 3d 501, 503, 374 N.E.2d 831, 834 (1978). An objective standard is used to determine whether conduct amounts to misuse of a product. Nelson v. Hydraulic Press Mfg. Co., 84 Ill. App. 3d 41, 47, 404 N.E.2d 1013, 1018 (1980). Misuse, however, is not an affirmative defense. Illinois State Trust Co. v. Walker Mfg. Co., 73 Ill. App. 3d 585, 589-90, 392 N.E.2d 70, 73 (1979). Misuse is the negation of either 1) the existence of proximate cause or 2)

could operate to prevent recovery in strict products liability proceedings.[31] In 1981, the Illinois Supreme Court struck a deathblow to the doctrine of contributory negligence.[32] In accordance with the eradication of the contributory negligence doctrine in strict products liability, the court abolished the doctrine in negligence actions[33] and replaced it with pure comparative negligence principles.[34] Illinois' pure comparative negligence system reduced a plaintiff's recovery by

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proof of an unreasonably dangerous condition, or both. *Williams*, 45 Ill. 2d at 431, 261 N.E.2d at 312; *Gallee*, 58 Ill. App. 3d at 503, 374 N.E.2d at 834; Kiselis, *Defenses To Products Liability In Illinois Arising Out of Plaintiff's Conduct*, 10 LOY. U. CHI. L.J. 229, 230 (1979). The plaintiff must prove that a product was used in a reasonably foreseeable or intended manner. *Walker Mfg.*, 73 Ill. App. 3d at 590, 392 N.E.2d at 73. A separate jury instruction is not given on the issue of misuse. Lundy v. Whiting Corp., 93 Ill. App. 3d 244, 252, 417 N.E.2d 154, 162 (1981); I.P.I. CIVIL 2D 400.08 (1986 Supp.).

30. Assumption of risk is an affirmative defense to a strict products liability action. *Williams*, 45 Ill. 2d at 430, 261 N.E.2d at 312. When Illinois instituted assumption of risk as a defense to strict products liability actions, the courts purported to adopt the Restatement view. *See Williams*, 45 Ill. 2d at 425-26, 261 N.E.2d at 309-10 (citing RESTATEMENT (SECOND) OF TORTS § 402A comment n and § 496D (1965)); Doran v. Pullman Standard Car Mfg. Co., 45 Ill. App. 3d 981, 989, 360 N.E.2d 440, 446-47 (1977) (quoting the RESTATEMENT (SECOND) OF TORTS). The Restatement states that "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 . . . in . . . cases of strict liability." RESTATEMENT (SECOND) OF TORTS § 402A, comment n (1965) (emphasis added). Illinois, however, has not followed the unreasonable requirement in the language of the Restatement. *See Lundy*, 93 Ill. App. 3d at 253-55, 417 N.E.2d at 162-63 (rejected plaintiffs' contention that he must act unreasonably to assume risk); I.P.I. CIVIL 2D 400.03.01 (1986 Supp.) (no unreasonable requirement in jury instruction). Establishment of the defense, before the enactment of paragraph 2-1116, required that a defendant show the plaintiff knew the product was in a dangerous condition and proceeded to use the product in disregard of the known danger. Thomas v. Kaiser Agric. Chems., 81 Ill. 2d 206, 213, 407 N.E.2d 32, 35 (1980); Sweeney v. Matthews, 46 Ill. 2d 64, 66, 264 N.E.2d 170, 171 (1970); *Williams*, 45 Ill. 2d at 430, 261 N.E.2d at 312. The omission of the term *unreasonably* in Illinois' definition appears to make the assessment of whether a plaintiff assumed the risk a completely subjective determination. *See Williams*, 45 Ill. 2d at 430, 261 N.E.2d at 312 (test is fundamentally subjective). The determination is one in which a plaintiffs' own knowledge, understanding and appreciation of the danger is assessed, not that of a reasonable and prudent person. *Id.*

The Illinois Supreme Court, however, espoused that objective factors such as a user's age, experience, knowledge and understanding are also relevant in assumption of risk determinations. *Id.* Because of these factors, Illinois seems to require a fact finder to make a subjective determination whether a plaintiff had knowledge by objectively determining whether a reasonable and prudent person would have had knowledge.

31. See *Williams*, 45 Ill. 2d at 425-26, 261 N.E.2d at 309-10. Because the court adopted the misuse and assumption of the risk defenses, the court held that contributory negligence no longer acted as a bar to a plaintiffs' recovery. *Williams*, 45 Ill. 2d at 426, 261 N.E.2d at 310. The court decided contributory negligence resulted in harsh consequences which defeated the purposes underlying strict products liability. *Id.*

32. *See supra* note 23, for a discussion of the judicial abolishment of contributory negligence.

33. Alvis v. Ribar, 85 Ill. 2d 1, 24-27, 421 N.E.2d 886, 896-97 (1981).

34. *Id.* at 27-28, 421 N.E.2d at 898.

the percentage of negligence attributable to the plaintiff, regardless of the percentage.[35]

Two years after the adoption of pure comparative negligence principles for negligence, the Illinois Supreme Court applied these standards to strict products liability actions.[36] Misuse and assumption of risk under the new pure system reduced, but did not bar, a plaintiff's recovery by the percentage of fault attributable to the plaintiff.[37] A plaintiff's conduct which did not rise to the level of misuse or assumption of risk did not reduce a damage claim even if it constituted a major cause of the injury.[38] The pure comparative system, as it operated in Illinois, favored injured plaintiffs in the same way contributory negligence principles favored defendants before Illinois abolished contributory negligence.[39]

Although the Illinois Supreme Court's past decisions favored plaintiffs, paragraph 2-1116 reverses that trend.[40] The legislature made paragraph 2-1116 applicable to all negligence and strict products liability actions involving bodily injury, death, or physical damage to property.[41] Under paragraph 2-1116, a plaintiff's recovery is barred if the plaintiff's contributory fault is more than 50% of the proximate cause of the harm.[42] If the plaintiff's contributory fault is 50% or less of the proximate cause of injury, paragraph 2-1116 reduces the plaintiff's recovery by the percentage of the plaintiff's own contributory fault.[43]

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35. *Id.*

36. *See* Coney v. J.L.G. Indus., Inc., 97 Ill. 2d 104, 118, 454 N.E.2d 197, 204 (1983) (plaintiff's misconduct operates to reduce recovery). Misuse and assumption of risk were intended to relieve plaintiffs of some of the harsh consequences of contributory negligence. However, because they could operate to bar recovery for an injury even if the culpable conduct was only a minor cause of the injury, plaintiffs were still unfairly treated. In contrast, not holding plaintiffs accountable for their own acts which are a major cause of their injuries was unfair to the manufacturers and sellers. The *Coney* court resolved the conflict by holding that fairness required reduction of recovery by the amount a plaintiff causes his own injury. *Coney*, 97 Ill. 2d at 118, 454 N.E.2d at 203-04. Notwithstanding the courts policy to reduce recovery by the amount the plaintiff caused his own injury, the *Coney* court retained misuse and assumption of risk. *Id.*

37. *See Coney*, 97 Ill. 2d at 119, 454 N.E.2d at 204 (plaintiff's recovery reduced but not barred by fault).

38. *See id.* (only misuse or assumption of risk compared to apportion damages).

39. "The adoption of pure comparative negligence was believed to increase the chances for a plaintiff to win at trial from about 50% to 60%, even though it tended to reduce the amount of damage awards made at trial." ILL. ANN. STAT. ch. 110, ¶ 2-1116 (Smith-Hurd 1987) (Historical Note). In *Alvis*, Justice Underwood argued that pure comparative negligence was the opposite extreme of contributory negligence. Alvis v. Ribar, 85 Ill. 2d 1, 30, 421 N.E.2d 886, 899 (1981) (Underwood, J., dissenting) (quoting Bradley v. Appalacian Power Co., 256 S.E.2d 879, 883-85 (W. Va. 1979).

40. *See* ILL. ANN. STAT. ch. 110, ¶ 2-1116 (Smith-Hurd 1987) (Historical Note) (prohibits recovery in tort actions where plaintiff's fault greater than 50%).

41. ILL. REV. STAT. ch. 110, ¶ 2-1116 (1987).

42. *Id.*

43. *Id.*

Fault is a key word in paragraph 2-1116. Because the scope of paragraph 2-1116 includes negligence and strict products liability actions,[44] the question arises as to what fault means in the context of paragraph 2-1116. There are two possible answers. One possibility is that fault refers to negligence of any kind.[45] The other possibility is that fault refers to negligence of any kind in negligence actions, but refers only to conduct rising to the level of misuse or assumption of risk in strict products liability actions.[46] It is clear from the text and history of the statute that the legislature acted to limit recoveries in law suits.[47] To what extent the legislature intended to limit recovery, however, is not clear. The Illinois courts must interpret and construe paragraph 2-1116 to determine the true meaning the legislature intended the word "fault" to convey.[48]

III. INTERPRETATION

[I]nterpretation is inescapably a kind of legislation.[49]

There is no one right way to interpret statutes.[50] The method is only as good as the result. The goal of interpretation is determining what a word or phrase means, and the standard criterion for proper statutory interpretation is determining and effecting legislative intent.[51] This comment's interpretation of paragraph 2-1116 is based

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44. For the text of paragraph 2-1116, see *infra* note 89.

45. This is the position taken by most other jurisdictions. *See infra* notes 116-43, for a discussion of the positions of various jurisdictions.

46. For a discussion of one state that came to this conclusion, see *infra* note 138.

47. For the text of the statute, see *infra* note 89. For a discussion of the legislative history, see *infra* notes 75-85 and accompanying text.

48. The phrase true legislative meaning denotes the meaning carried by the language when it is read in light of its proper legislative context. For a discussion of the concept of meaning, see F. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 34-42 (1975).

49. *Id.* at 238 (quoting J. Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 COLUM. L. REV. 1259, 1269 (1947)).

50. The following quote is a fitting characterization of statutory interpretation in our system: "The hard truth of the matter is that american courts have no intelligible generally accepted, and consistently applied theory of statutory interpretation." F. DICKERSON, *supra* note 48, at 1 (quoting H. HART, JR. & A. SACKS, THE LEGAL PROCESS 1201 (10th. ed. 1958)).

Commentators have offered a variety of approaches to statutory interpretation. *See* Easterbrook, *Statutes' Domain*, 50 U. CHI. L. REV. 533, 544 (1983) (unless the statute plainly gives courts power to revise common law, it should be restricted to cases expressly resolved in the legislative process); Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 COLUM. L. REV. 1259 (1947) (making analogy to putting words to music); LaRue, *Statutory Interpretation: Lord Coke Revisited*, 48 U. PITT. L. REV. 733 (1987) (advocating a modern analogy to *Heydon's case*); Posner, *Economics, Politics, and the Reading of Statutes and The Constitution*, 49 U. CHI. L. REV. 263 (1982) (discussing the economic approach to legislation).

51. *In re* Marriage of Kate C. Logston, 103 Ill. 2d 266, 277, 469 N.E.2d 167, 171 (1984); SUTHERLAND STATUTORY CONSTRUCTION § 45.05 (4th ed. 1984). Because all the

on a traditional two step approach.[52] The first step is a cognitive process designed to obtain an understanding of the reason for the statute.[53] The second step is construction of the statute which involves applying the words of the statute to the reason for it to ascertain the legislative intent.[54]

A. *Understanding the Statute*

To effectuate the legislative intent, a court must understand the reason why the legislature enacted paragraph 2-1116. The cognitive process of developing a knowledge and understanding of paragraph 2-1116 is a four step inquiry.[55] The first step involves examining the common law before the enactment of the paragraph to obtain a historical foundation for the analysis.[56] To gain an understanding of what the legislature tried to change, the second step consists of deciding what the legislature regarded as evil in the common law.[57] The third step is to read[58] paragraph 2-1116 with an eye toward how it differs from the common law remedy, the perceived evil.[59] Following the historical development of paragraph 2-1116, the fourth step is to search for the true reason behind enacting paragraph 2-1116 to determine why it was chosen to remedy the deficiency in the common law.[60] This four step process should produce an understanding of the common law evils the legislature sought to suppress and the remedy a court should advance to effectuate the legislature's true intention.[61]

Application of this four step process to paragraph 2-1116 begins

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individuals in a legislature will not have the same reasons for enacting a statute or even agree to enact a statute, legislative intent is a legal fiction. *See* R. HURST, DEALING WITH STATUTES, 32-33 (1982) (legal fiction of intent serves useful purpose); *see also* Farber and Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 889 (1987) (citing three goals of legislature as re-election, gaining influence and good public policy).

52. The traditional approach is founded in an interpretation of *Heydon's Case*, 76 Eng. Rep. 637, 638 (Ex. 1584). *See* La Rue, *supra* note 50, at 740 (*Heydon's Case* is routinely cited by scholars writing on statutory construction).

53. *See* F. DICKERSON, *supra* note 48, at 15 (first step is ascertain meaning).

54. *See* F. DICKERSON, *supra* note 48, at 15 (second step is assignment of meaning).

55. *See* LaRue, *supra* note 50, at 745. (setting forth four resolutions of *Heydon's Case*).

56. *Id.*

57. *Id. See also* Kozak v. Retirement Bd. of Fireman's Annuity and Benefit Fund, 95 Ill. 2d 211, 217-18, 447 N.E.2d 394, 397-98 (1983) (courts may consider evils sought to be remedied).

58. "[F]rankfurter's three-fold imperative to students: (1) Read the statute; (2) read the statute; (3) read the statute!" *See* F. DICKERSON, *supra* note 48, at 217(quoting H. FRIENDLY, BENCHMARKS 202 (1967)).

59. LaRue, *supra* note 50, at 745.

60. *Id.*

61. *Id.*

with an examination of the common law pure comparative negligence principles that existed before paragraph 2-1116's enactment.[62] Under pure principles, conduct rising to a level of misuse or assumption of risk operated to reduce a plaintiff's recovery, but a consumer's mere negligent failure to discover or guard against defects did not reduce recovery.[63] Plaintiffs, therefore, were not responsible for all their wrongful conduct even though the harsh consequences of contributory negligence, which misuse and assumption of risk mitigated, no longer haunted judicial decisions.

In contrast to the court's thinking, the legislature thought pure comparative negligence was deficient because it did not adequately limit recoveries.[64] The legislature did not want the person whose contributory fault was more than 50% of the proximate cause of his own injuries to recover.[65] This is the evil the legislature sought to remedy. The idea propounds the thought that a wrong-doer is not entitled to ask for justice.[66] Although this concept has its critics,[67] it is apparent that the Illinois law-makers support this view.[68]

To remedy this common law deficiency, the legislature enacted modified contributory fault principles.[69] Modified principles favor the party whose fault is only a minor cause of injury.[70] This middle

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62. *See* Coney v. J.L.G. Indus., Inc., 97 Ill. 2d 104, 454 N.E.2d 197 (1983) (in products liability cases, damages apportioned relative to conduct causing injury); Alvis v. Ribar, 85 Ill. 2d 1, 421 N.E.2d 886 (1981) (comparative negligence applied in negligence action).

63. *See Coney*, 97 Ill. 2d at 118, 454 N.E.2d at 204. The *Coney* court stated that "the consumer or user is entitled to believe that the product will do the job for which it was built." *Id.* This statement, although a sound proposition, does not justify allowing a person full recovery where his own negligence is a contributory cause.

64. *See* EIGHTY-FOURTH GENERAL ASSEMBLY OF ILLINOIS, SENATE DEBATES, at 124 (May 21, 1986) [hereinafter DEBATES] (statement of Senator Schuneman) (gross tort awards doubled after pure form adopted).

65. *See* DEBATES, *supra* note 64, at 125 (statement of Senator Schuneman) (modified comparative fault better because one more at fault cannot recover).

66. Wade, *Uniform Comparative Fault Act*, 14 FORUM 379, 385 (1979). Opponents of the modified form of comparative fault assert that the modified form provides only partial justice. *Id.* They argue that the modified form leaves out half the cases in order to be sure that nobody whose negligence exceeds that of the other party can recover. *Id.* This is a distortion of the modified principle. Half the cases are not left out. Only those plaintiffs who are a major cause of their own injury are prevented from recovering.

67. *See* Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 494 (1953) (modified result a pure political compromise); Sobelsohn, *"Pure" vs. "Modified" Comparative Fault: Notes On The Debate*, 34 EMORY L.J. 65, 84 (1985) (denying recovery when plaintiff 50% at fault only partial justice); Wade, *supra* note 66, at 385 (offers rough and crude justice); *see also* V. SCHWARTZ, COMPARATIVE NEGLIGENCE 47 (2d ed. 1986) (modified system more complicated and difficult to administer than pure system).

68. *See* ILL. REV. STAT. ch. 110, ¶ 2-1116 (1987); *see also* Alvis v. Ribar, 85 Ill. 2d 1, 30, 421 N.E.2d 886, 900 (1987) (Underwood, J., dissenting) (most states adopt a modified form of comparative negligence).

69. For the text of the statute, see *infra* note 89.

70. For a discussion of the slight and gross distinction and the problems Illinois

ground position between contributory negligence and pure comparative fault precludes plaintiffs from taking advantage of their own wrongs.[71]

With this historical backdrop in mind, a court can disentangle the true reason for modified contributory fault from the legislative process. Paragraph 2-1116 was a compromise of interests[72] which produced language adjustments not spelled out in its text.[73] Perhaps to ensure passage, the legislature intentionally left the language of paragraph 2-1116 in a measure of uncertainty.[74] The legislative process leading to paragraph 2-1116's adoption provides some insight to resolve this uncertainty.

In the midst of a lobbying blitz at the Illinois General Assembly, sparked by the "insurance crisis", modified contributory fault principles emerged in one of seventeen amendments to a senate bill proposing massive tort reform legislation.[75] Those principles later

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experienced with the doctrine, see Posner, *Comparative Negligence*, 51 MICH. L. REV. 465, 484 (1953).

71. *See* Alvis v. Ribar, 85 Ill. 2d 1, 30, 421 N.E.2d 886, 899 (1981) (Underwood, J., dissenting) (not willing to abandon tort concept, party who substantially contributes to own harm should not recover); *see also* V. SCHWARTZ, *supra* note 67, at 47 (legislators may believe it morally wrong to compensate one more at fault than the defendant).

72. *See* DEBATES, *supra* note 64, at 130 (May 21, 1986) (statement of Senator Barkhausen) (modified comparative negligence a compromise solution). "Almost all statutes are compromises and the cornerstone of many a compromise is the decision, usually unexpressed, to leave certain issues unresolved." Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 540 (1983).

73. The bill that was proposed and adopted in the Senate defined fault. *See* 1986 SENATE JOURNAL OF ILLINOIS, vol. 1, at 1854-55 (1987) (fault any negligent act or omission). Paragraph 2-1116 subsequently passed the General Assembly, however, without any definition for fault. ILL. REV. STAT. ch. 110, ¶ 2-1116 (1987).

74. *See* Frankfurter, *Some Reflections on The Reading of Statutes*, 47 COLUM. L. REV. 527, 528 (1947) (statutes sometimes unexpressed for future unfolding).

75. Senators Schuneman and Rupp offered the amendment. DEBATES, *supra* note 64, at 123 (May 21, 1986). This amendment was titled the Illinois Comparative Fault Law. The purpose of the amendment was to allocate responsibility for damages according to the fault of persons who proximately caused the damage. DEBATES, *supra* note 64, at 125 (May 21, 1986) (statement of Senator Schuneman). The amendment defined fault as "any act or omission which is negligent, willful or reckless or a breach of an express or implied warranty, or which gives rise to strict liability in tort . . . ." 1986 SENATE JOURNAL OF ILLINOIS, vol. 1, at 1854-55 (1987). The provisions of the amendment barred recovery if a plaintiff's fault was equal to or greater than the aggregate fault of other tortfeasors. *Id.* at 1855. Further, the amendment stated that the burden of proving fault of a defendant was on the plaintiff. *Id.*

In addition to the modified comparative fault amendment, two other proposed amendments provide useful background to paragraph 2-1116. One amendment was meant to be the Illinois Modified Joint and Several Liability Act. *Id.* at 1850. The amendment defined fault as "an [a]ct or omission by any person that is a proximate cause of injury or death to a person or damage to property, tangible or intangible." *Id.* Under this definition of fault, misuse and assumption of risk would not be the only conduct that would operate to reduce a plaintiffs' recovery in strict products liability actions.

In contrast to the joint and several liability amendment, the provisions of an-

became part of the Illinois Tort Reform Act.[76] The "insurance crisis" pitted medical associations, insurance groups and lawyers in a heated battle.[77] On the one side, medical associations and insurance groups claimed that insurance was either not affordable or not available to business and local government.[78] On the opposite side, lawyers lobbied to protect citizens' rights because the proposals for massive reform legislation would effectively prevent many citizens from recovering for their injuries.[79] In the middle of this insurance

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other proposed amendment set forth that a defendant in a strict products liability action would not be liable if "the plaintiff knew that the product was in an unreasonably dangerous condition and proceeded to use the product notwithstanding such knowledge." *Id.* at 1857-59. These provisions were not part of the final bill.

In addition to the Senate, the House developed its own comparative fault act. LEGISLATIVE SYNOPSIS AND DIGEST, 1986 Session of the Eighty-Fourth Illinois General Assembly, at 1602 (1987). This version was introduced to the House on April 2, 1986. *Id.* The bill was very similar to paragraph 2-1116. *Id.* It provided for barring recovery only when the fault of a plaintiff exceeded the fault of others. *Id.* The bill, however, did not expressly state that it applied to negligence or strict products liability actions. *Id.* The bill just stated that it allocated responsibility in actions brought on account of death, bodily injury or physical damage to property. *Id.* After the first reading, the House referred the bill to a committee. *Id.*

76. For the text of Illinois' Modified Contributory Fault Statute, see *infra* note 89.

77. Chicago Tribune, June 16, 1985, § 2, at 1, col. 4. They assembled in record numbers in what law makers called "the most intensely lobbied session in memory." *Id.* "The list of lobbyists working on the malpractice issue read like a 'Who's Who' of Illinois politics." Chicago Tribune, June 16, 1985, § 2, at 3, col. 1. The doctors utilized a Chicago public relations firm to make known their predicament. *Id.* They also organized a lobby day that resulted in 4000 doctors packing the capitol. *Id.* The lawyers, though not short on lobbying power, did not possess the numbers like the doctors. *Id.*

78. *See* DEBATES, *supra* note 64, at 78 (June 30, 1986) (statement of Senator Rock) (unaffordability and unavailability of insurance mandated action); Wermeil, *Costs of Lawsuits Growing Blamed for Rising Insurance Rates*, Chicago Daily L. Bull., Aug. 4, 1986, at 1, col. 3 (rise in damage awards making insurance hard to obtain). Senator Rock was particulary concerned with the fact that local governments were uninsurable because the counties, park districts and municipalities could not afford the insurance offered. *Id.* The bills were designed to relieve the crisis by gaining control of escalating insurance. *Id.*

These reform bills targeted two areas. Articles I-VII were aimed at cutting down the number of lawsuits. DEBATES, *supra* note 64, at 80 (June 30, 1986) (statement of Senator Rock). Articles VIII-XXVI were aimed at regulating the industry itself. *Id.* Major insurance companies declared that insurance would become more available if the bills were passed. DEBATES, *supra* note 64, at 95 (June 30, 1986). Opponents of the bill argued that the insurance industry contrived the insurance crisis. *See* DEBATES, *supra* note 64, at 95 (June 30, 1986) (statement of Senator DeAngelis) (absolutely convinced "insurance crisis" contrived). The American Bar Association proposed a series of reforms for personal injury claims on January, 1987. Chicago Tribune, Jan. 12, 1987, § 1, at 5, col. 5-6. In regard to the so-called insurance crisis, the association doubted that there was a litigation explosion. *Id.*

79. *See* DEBATES, *supra* note 64, at 131 (May 21, 1986) (statement of Senator Rock) (taking away rights of injured people just because more than 50% negligent); Chicago Tribune, June 16, 1985, § 2, at 3, col. 1 (lawyers fighting reduction of client damage awards); *see also* Decker, *Insurance Industry Has Transformed Its Problems Into Tort System Crisis*, Chicago Daily L. Bull., Apr. 26, 1986, at 5, col. 1 (insurance crisis arose from problems within industry).

crisis sat the legislature trying to work out a fair compromise.[80]

In prior years, when record numbers of lobbyists were not present, modified comparative negligence bills repeatedly failed.[81] This time, because of the intense lobbying, modified contributory negligence legislation was destined to pass.[82] With strong pressure emanating from both sides, all the "insurance crisis" bills, including paragraph 2-1116, went to a joint conference.[83] The Senate, House and Governor's office met at that conference to develop one consolidated bill acceptable to everyone concerned.[84] The product of that consolidated effort, the Tort Reform Act, passed the General Assembly on June 30, 1986.[85]

The legislative process of paragraph 2-1116 illustrates modified comparative fault arrived in Illinois riding the tail of massive reform legislation aimed at ultimately lowering insurance rates. Because paragraph 2-1116 survived, one must consider it a necessary component of the reform legislation. As such paragraph 2-1116 carries with it the same reasons for passage. Thus, the Tort Reform Act's purpose of lowering insurance rates by reducing recoveries in lawsuits ascribes to paragraph 2-1116 and is the true reason behind the statute.[86]

B. Construction of the Statute

Once a court has ascertained an understanding of the statute, it

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80. *See* Comment, *Rumors of Crisis: Considering The Insurance Crisis and Tort Reform in an Information Vacuum*, 37 EMORY L.J. 401 (1988) (nationwide crisis put heat on lawmakers to address tort reform). For additional commentary on the insurance crisis, see *Perspectives On The Insurance Crisis*, 5 YALE J. ON REG. 367 (1988); *The Need For Legislative Reform Of The Tort System: A Report On The Liability Crisis From Affected Organizations*, 10 HAMLINE L. REV. 345 (1987).

81. At least six bills offered to abolish contributory negligence failed prior to Illinois' adoption of pure comparative negligence. Alvis v. Ribar, 85 Ill. 2d 1, 22, 421 N.E.2d 886, 895 (1981). The *Alvis* court expressed the opinion that the failure to pass the bills resulted from the legislatures feeling that it was a judicial question. *Id.* This statement by the *Alvis* court met with sharp criticism in the Senate. *See* DEBATES, *supra* note 64, at 127-28 (May 21, 1986) (statement of Senator Keats) (court saying legislature too stupid to pass a law).

82. Senator Rock, while offering the reform legislation, stated that although the legislation had many inadequacies it was a start. DEBATES, *supra* note 64, at 79-80 (June 30, 1986). The general consensus was that something had to be done that session. DEBATES, *supra* note 64, at 78 (June 30 1986).

83. DEBATES, *supra* note 64, at 79 (June 30, 1986).

84. DEBATES, *supra* note 64, at 79 (June 30, 1986).

85. 1986 Ill. Laws 3389. Senator Rock, the sponsor of the consolidated bill, opposed the bill with modified comparative negligence when it was in the Senate. DEBATES, *supra* note 64, at 131-32 (June 30, 1986). One reason for the senator's opposition was the modified comparative fault amendment that the bill carried with it. DEBATES, *supra* note 64, at 94-95 (June 30, 1986).

86. *See* SUTHERLAND STATUTORY CONSTRUCTION § 46.05 (4th ed. 1984) (statute must be construed as a whole).

can determine the legislative intent through the process of construction. The process of construction involves examining the words of paragraph 2-1116 and applying them to the true reason for the statute.[87] By synthesizing the words with the true reason for the statute and information external to the statutory text, this comment determines the legislative intent behind paragraph 2-1116.[88]

An examination of paragraph 2-1116 begins with the initial clause in the first sentence which states, "[i]n all actions on account of bodily injury or death or physical damage to property."[89] This clause uses the word "or" to connect the types of harm: bodily injury, death, and physical damage to property. "Or" is a function word indicating the alternative.[90] By using "or", this clause makes paragraph 2-1116 applicable without distinction to actions involving bodily injury, death, and physical damage to property.

The second clause of the first sentence states, "based on negligence, or product liability based on strict tort liability."[91] This clause limits paragraph 2-1116 to negligence and strict tort products liability actions. It therefore excludes products liability actions based on warranty.[92] In this second clause, negligence and strict products liability actions are also connected by the function word "or".[93] The legislature's use of "or" again integrates both negligence and strict products liability actions into paragraph 2-1116 without distinction. Therefore, paragraph 2-1116 affects both negligence and strict products liability actions in the same manner.

The final clause of the first sentence states, "the plaintiff shall be barred from recovering damages if the trier of fact finds that the

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87. *See* Stewart v. Industrial Comm'n, 115 Ill. 2d 337, 504 N.E.2d 84 (1987) (court may consider language of statute and reason for law).

88. *See* C.S. Johnson Co. v. Champaign Nat'l Bank, 126 Ill. App. 3d 508, 467 N.E.2d 363 (1984) (courts may look to extrinsic sources where language does not adequately convey legislative intent).

89. The modified comparative fault statute states:

> [i]n all actions on account of bodily injury or death or physical damage to property, based on negligence, or product liability based on strict tort liability, the plaintiff shall be barred from recovering damages if the trier of fact finds that the contributory fault on the part of the plaintiff is more than 50% of the proximate cause of the injury or damage for which recovery is sought. The plaintiff shall not be barred from recovering damages if the trier of fact finds that the contributory fault on the part of the plaintiff is not more than 50% of the proximate cause of the injury or damage for which recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of fault attributable to the plaintiff.

ILL. REV. STAT. ch. 110, ¶ 2-1116 (1987).

90. People v. Vraniak, 5 Ill. 2d 384, 125 N.E.2d 513 (1955); BLACKS LAW DICTIONARY 987 (5th ed. 1979).

91. ILL. REV. STAT. ch. 110, ¶ 2-1116 (1987).

92. *See* City Sav. Ass'n v. International Guar. & Ins. Co., 17 Ill. 2d 609, 162 N.E.2d 345 (1959) (expression of one thing in statute excludes any other).

93. ILL. REV. STAT. ch. 110, ¶ 2-1116 (1987).

contributory fault on the part of the plaintiff is more than 50% of the proximate cause of the injury or damage for which recovery is sought."[94] As this clause sets forth, paragraph 2-1116 looks to what percentage of the plaintiff's fault is a cause of the injury. In so doing, the clause also bars recovery where the fault of the plaintiff is more than 50% of the cause of the injury.[95]

The second and final sentence of paragraph 2-1116 addresses situations where the plaintiff's fault "is not more than 50% of the proximate cause of the injury."[96] In such situations, recovery is reduced by the fault attributable to the plaintiff which is a cause of the injury.[97] Fault is the key to this paragraph as it relates to strict products liability. Fault is not defined in the statute. Keeping in mind that lowering insurance rates was the true reason for paragraph 2-1116, this comment next examines information external to the text of paragraph 2-1116 to determine whether the legislature intended for mere contributory negligence as well as misuse of a product and assumption of risk to reduce or bar recovery in strict products liability actions.

In evaluating information external to the text of paragraph 2-1116, this comment first compares the proposed "modified" bills to paragraph 2-1116.[98] After comparing the proposed bills with paragraph 2-1116, this comment discerns whether the legislature knew ambiguity beset paragraph 2-1116.[99] This comment next examines another chapter of the Illinois statutes for analogical support.[100] Throughout this process, Illinois' rules of construction help put paragraph 2-1116 in context with the legislative thought process.[101]

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94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *See infra* notes 102-07 and accompanying text, for a comparison of proposed modified bills with paragraph 2-1116.
99. *See infra* notes 108-10 and accompanying text, for an analysis of legislative awareness of ambiguity.
100. *See infra* notes 111-13 and accompanying text, for an analysis of other chapters of the Illinois Revised Statutes.
101. Throughout the interpretation of paragraph 2-1116, this comment refers to many rules of construction. These rules do not provide a method for certain results through mechanical application. *See* Posner, *Statutory Interpretation-in the Classroom and in the courtroom*, 50 U. CHI. L. REV. 805-06 (1983) (courts pretend principles may be mechanically applied). Even so, they provide a guide to interpretation. *Id.* at 806. Therefore, this comment only uses the rules of construction to aid putting paragraph 2-1116 in context with the legislative thought process. *See* F. DICKERSON, *supra* note 48, at 228 (canons useful in carrying out legislatures meaning).

There are a few basic rules applicable to most interpretation. The primary rule of is that construction must effect legislative intent. *In Re* Marriage of Logston, 103 Ill. 2d 266, 469 N.E.2d 167 (1984). In Illinois, courts may consider the language used, the reason and necessity for the law, the evils sought to be remedied, and the purposes achieved. Kozak v. Retirement Bd. of Fireman's Annuity and Benefit Fund, 95 Ill. 2d 211, 447 N.E.2d 394 (1983). In this light, courts read each statute as a whole and the

The legislative history shows that two proposed bills contained a definition of the word "fault".[102] The definitions indicated that fault encompasses any wrongful conduct causing injury.[103] These working definitions are evidence of the meaning the legislature accords fault.[104] Because the legislature dropped the definitions from the proposed statutes, the legislature could have intended fault to have more than one meaning depending on whether a negligence or strict products liability action was involved.[105] Such an analysis, however, is contrary to the fact the legislature did not distinguish negligence from strict products liability for purposes of paragraph 2-1116. Legislatures introduce definitions with bills to illustrate what a certain word means, and these definitions often do not become part of the statute.[106] Furthermore, the working definitions are also consistent with the Commercial Code's definition.[107] Therefore, in the absence of evidence to the contrary, these working definitions help impart meaning to the word fault.

Because paragraph 2-1116 emerged without addressing fault, misuse or assumption of risk, the question arises as to whether the legislature was aware of the ambiguity in paragraph 2-1116.[108] Illinois case law and the canons of construction advise that courts

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terms of the statute are given their plain and ordinary meaning. Hernandez v. Fahner, 135 Ill. App. 3d 372, 487 N.E.2d 1004 (1985). This comment cites to other rules of construction which help put paragraph 2-1116 in its proper context.

102. 1986 SENATE JOURNAL OF ILLINOIS, vol. 1, at 1850 and 1854.

103. *Id.*

104. *See* Morris v. Broadview, Inc., 385 Ill. 228, 52 N.E.2d 769 (1944) (courts may use historical source material).

105. *See* People *ex. rel.* Callahan v. Marshall Field & Co., 83 Ill. App. 811, 404 N.E.2d 368 (1980) (deletion of a proposed provision a factor in considering legislative intent).

106. The legislature does not always define common words in a statute. Such words are assumed to have "their popular meaning, as used in the common speech of men." Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 536 (1947). The only definition of the word fault in the Illinois Revised Statutes speaks of any wrongful conduct. *See* ILL. REV. STAT. ch. 26, ¶ 1-201(16) (1987). Other authorities have also attributed the same meaning to fault. For example, courts define fault as that party's blameworthy conduct which contributes to the proximate cause of loss or injury. *See e.g.*, Pan-Alaska Fisheries, Inc. v. Marine Constr. and Design Co., 565 F.2d 1129, 1139 (9th Cir. 1977). Similarly, the Uniform Comparative Fault Act § 1(b) defines fault as including assumption of risk, misuse and any act or omission that is in any measure negligent. Woods, *Products Liability: Is Comparative Fault Winning The Day?*, 36 ARK. L. REV. 360, 365 (1982).

Because fault seems to have a common ordinary meaning, any wrongful conduct which is a contributing cause of the loss, the legislature must not have considered it necessary to define fault.

107. *See infra* notes 112-13 and accompanying text, for an analysis of the Commercial Code's definition of fault.

108. At one point misuse and assumption of risk were proposed as part of a products liability act. 1986 SENATE JOURNAL, vol. 1, at 1857-59. Paragraph 2-1116 emerged from the committees, however, with no mention of misuse or assumption of risk. ILL. REV. STAT. ch. 110, ¶ 2-1116 (1987).

should presume legislative awareness of prior case law.[109] Assuming the legislature was aware of the case law, the legislative drafts and debates do not indicate the legislature considered the effect 2-1116 may have on misuse and assumption of risk. Thus, it's reasonable to infer the legislature was not aware of any ambiguity in the statute as far as misuse and assumption of risk were concerned. The legislature's lack of omniscience, therefore, further supports the use of the legislature's working definitions to define the word "fault".[110]

The next step in construction of paragraph 2-1116 focuses on the Commercial Code chapter of the Illinois Revised Statutes, which defined the word fault and provides analogical support.[111] The Commercial Code defines fault as any "wrongful act, omission or breach."[112] Although this definition is only applicable to the Commercial Code, it is an example of the meaning the legislature confers on the word "fault". Additionally, the word "fault" has the same meaning in all actions based on the Commercial Code.[113] By analogy, fault, whether in the context of a negligence or a strict products liability setting, refers to the same standard of conduct. Thus, wrongful acts, omissions or breaches reduce or bar recovery the same way in both negligence and strict products liability actions.

The preceding analysis reveals that the legislature integrated

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109. *See* Cruz v. Puerto Rican Soc'y, 154 Ill. App. 3d 72, 78, 506 N.E.2d 667, 671 (1987) (legislature presumed aware of common law). The Professions and Occupations chapter of the Illinois Revised Statutes abolished assumption of risk in suits against private employment agencies. *See* ILL. REV. STAT. ch. 111, ¶ 902 (1987) (involving negligence actions). In contrast, the Injuries chapter of the Illinois Revised Statutes states that the paragraph dealing with volunteers in sports programs shall not affect assumption of risk. *See* ILL. REV. STAT. ch. 70, ¶ 701 (1987) (does not modify assumption of risk or comparative fault). From these chapters it is evident when the legislature knew an ambiguity may exist, the legislature explained the intended affect on assumption of risk. Therefore, the logical conclusion is the legislature was not aware of the ambiguity and used fault to encompass all culpable conduct.

110. *See* Lake County Bd. of Review v. Property Tax Appeal Bd., 119 Ill. 2d 419, 519 N.E.2d 459 (1988) (term not defined given its plain, ordinary and popularly understood meaning).

111. In addition to the Commercial Code chapter, the limitations section of the Code of Civil Procedure, has a paragraph devoted to defining terms relating to products liability. ILL. REV. STAT. ch. 110, ¶ 13-213 (1987). There is no mention of misuse or assumption of risk. *Id.* The omission of misuse and assumption of risk may be because they are well established common law principles. *See* SUTHERLAND STATUTORY CONSTRUCTION § 50.03 (4th ed. 1984) (well defined common law meanings carry over to statutes). Another possibility, however, is that the legislature considers misuse and assumption of risk to be archaic principles left over from the days of contributory negligence. *See* V. SCHWARTZ, *supra* note 67, at 153 (comparative negligence may trigger re-examination of assumption of risk). There are other possible explanations for the omissions. Therefore, no useful analogy emanates from the limitations section.

112. ILL. REV. STAT. ch. 26, ¶ 1-201(16) (1987).

113. The Commercial Code does hold merchant's to a higher standard of conduct in some situations. *See* ILL. REV. STAT. ch. 26, ¶ 2-104(3) (1987) ("Between merchants" means parties chargeable with skill of merchants).

negligence and strict products liability without distinction,[114] defined the word "fault" as any wrongful conduct, was not aware of any ambiguity, and the legislature's definition in another chapter of the statute encompasses all types of culpable conduct. Synthesizing the intended meaning, any wrongful conduct, with the true reason for paragraph 2-1116, lowering insurance rates, and the fact the actions are not distinguished in the statute yields strong support for the conclusion that the legislature intended paragraph 2-1116 to abolish Illinois' common law distinctions for wrongful conduct.

IV. OTHER JURISDICTIONS

> Where our legislature has adopted a statute from from another jurisdiction, that jurisdiction's precedents are useful in interpreting our own statute.[115]

As this comment illustrates, statutory interpretation is not a mechanical process that achieves definitive results. Today, a majority of states apply some form of modified comparative negligence.[116]

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114. *See supra* notes 89-97 and accompanying text, for a discussion of the language of paragraph 2-1116.

115. Austin v. Raybestos-Manhattan, Inc., 471 A.2d 280, 284 (Me. 1984).

116. *See* ARK. STAT. ANN. § 16-64-122 (1987) (fault is any act, omission, conduct, or risked assumed); COLO. REV. STAT. § 13-21-111 (1973) (repealed 1986) (comparative negligence no application to products liability); CONN. GEN. STAT. ANN. § 52-572h (West 1980) (retained misuse and assumption of risk); GA. CODE ANN. § 105-603 (1968) (duty to exercise ordinary care to avoid injury, if avoidable no recovery); HAW. REV. STAT. § 663-31 (1985) (negligence not greater than or barred); IDAHO CODE § 6-801 (1979) (negligence not as great or barred); ILL. REV. STAT. ch. 110, ¶ 2-1116 (1987) (barred if more than 50% proximate cause); IND. CODE ANN. §§ 34-4-33-1 to 34-4-33-13 (Burns 1986) (barred if fault greater than all persons contributing to damage); IOWA CODE ANN. § 619.17 (Supp. 1988) (defendant must prove contributory fault); KAN. STAT. ANN. § 60-258a (1983) (negligence must be less than or barred); ME. REV. STAT. ANN. tit. 14, § 156 (1980) (if claimant equally at fault may not recover); MASS. GEN. L. ch. 231, § 85 (1978) (only applied to negligence); MINN. STAT. ANN. § 604.01 (West 1988) (fault encompasses any measure of negligence); MONT. CODE ANN. § 27-1-702 and 27-1-719 (1987) (not greater than or barred, misuse and assumption of risk retained); NEB. REV. STAT. § 25-21,185 (1985) (not barred if slight and defendant gross in comparison); NEV. REV. STAT. § 41.141 (1987) (not greater than or barred); N.H. REV. STAT. ANN. § 507:7-a (1983) (Repealed 1986) (not greater than or barred); N.J. STAT. ANN. § 2a:15-5.1 (West 1987) (not greater than or barred); N.D. CENT. CODE § 9-10-07 (1987) (not greater than or barred); OHIO REV. CODE ANN. § 2315.19 (Anderson Supp. 1988) (not greater than); OKLA. STAT. ANN. tit. 23, § 13-14 (West 1987) (negligence must be greater than to bar); OR. REV. STAT. § 18.470-490 (1988) (not greater than or barred); 42 PA. CONS. STAT. ANN. § 7102 (Purdon 1982) (not greater than); R.I. GEN. LAWS § 9-20-4 and 9-20-5 (1985) (applied to strict liability, assumption of risk for certain activities bars); S.D. CODIFIED LAWS ANN. § 20-9-2 (1987) (negligence not bar when slight); TEX. CIV. PRAC. & REM. CODE ANN. § 33.001 (Supp. 1989) (less than or equal to 50% bars); UTAH CODE ANN.§ 78-27-38 (1989) (may recover from defendants who are more at fault); VT. STAT. ANN. tit. 12, § 1036 (Supp. 1988) (negligence not greater than causal total negligence); W. Va. - Bradley v. Appalachian Power Co., 256 S.E.2d 879 (W. Va. 1979) (not exceed or equal); WIS. STAT. ANN. § 894.045 (West 1983) (not greater than other); Wyo. Stat. § 1-1-109 (1977) (not more than 50%). *See also* V. SCHWARTZ, *supra* note 67, app. at 387-428 (comprehensive state analysis).

Thus, Illinois courts might look to other jurisdictions to supplement construction of paragraph 2-1116.[117] Other statutes and court decisions therefore provide insight into how Illinois courts will construe paragraph 2-1116.[118]

States generally have either retained misuse and assumption of risk distinctions or merged them into a concept of fault. Among the statutes and decisions of other jurisdictions, Wisconsin warrants special consideration. Reference to the Wisconsin modified contributory negligence statute is in the legislative history of paragraph 2-1116.[119]

The Wisconsin statute bars recovery only if the negligence of the claimant is greater than that of the defendant.[120] Otherwise, the claimants' own negligence operates to reduce his recovery.[121] The Wisconsin Supreme Court interpreted negligence to include contributory negligence and assumption of risk.[122] The court concluded

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117. *See* SUTHERLAND STATUTORY CONSTRUCTION § 52.03 (4th ed. 1984) (reference to other jurisdictions may provide guidance); *but see* F. DICKERSON, *supra* note 48, at 28-29 (literature suggests statutes unique).

118. Although modified comparative negligence is almost exclusively a product of legislative action, at least one state, West Virginia, adopted a modified system by judicial action. Bradley v. Applachian Power Co., 256 S.E.2d 879 (W.Va. 1979). The *Bradley* court stated that pure contributory negligence seemed to be the opposite extreme to common law comparative negligence. *Bradley*, 256 S.E.2d at 883-84. Rejecting the premise that a party should recover as long as he is not 100% at fault, the court stated that a party should not be able to recover if he substantially contributes to his own injury. *Id.* at 885.

Notwithstanding the West Virginia oddity, courts generally adopt the pure form of comparative negligence. *Eg.*, Kaatz v. State, 540 P.2d 1037 (Alaska 1975); Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973); Kirby v. Larson, 400 Mich. 585, 256 N.W.2d 400 (1977). The reason commonly expounded is that the pure form "is the only system which truly apportions damages according to the relative fault of the parties and, thus achieves total justice." Alvis v. Ribar, 85 Ill. 2d 1, 27, 421 N.E.2d 886, 898 (1981). Modified comparative negligence statutes, however, reflect overwhelming legislative disagreement with the "total justice" view.

119. Senator Schuneman, the Senator offering the modified comparative negligence amendment, described it as the same kind of law that was in effect in Wisconsin. *See* DEBATES, *supra* note 64, at 124 (May 21, 1986) (statement of Senator Schuneman) (works well in other states such as Wisconsin). The Wisconsin modified system was also mentioned by the Illinois Supreme Court in Alvis v. Ribar, 85 Ill. 2d 1, 26-27, 421 N.E.2d 886, 897 (1981). The court stated that Wisconsin was criticized because many cases were appealed on the single issue whether a plaintiffs' negligence was not greater than the aggregate of the other defendant's. *Id.*

120. The Wisconsin statute states:

> [c]ontributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not greater than the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering.

WIS. STAT. ANN. § 895.045 (West 1983).

121. *See id.* (damages diminished by negligence of plaintiff).

122. *See* Powers v. Hunt-Wesson Foods, Inc., 64 Wis. 2d 532, 535-36, 219

that the ordinary rules of causation and negligence defenses were applicable to strict products liability.[123] As a result, Wisconsin's law imposes a duty on any plaintiff to use ordinary care to protect himself from known or readily apparent dangers.[124]

The Wisconsin modified contributory negligence statute is similar to Illinois' statute.[125] Wisconsin, however, uses the word negligence to describe recovery-reducing conduct, while Illinois incorporates the broad term fault. One reason Illinois uses the word fault may be that negligence carries connotations of the old common law contributory negligence principle.[126] Legislators that lack legal training might not recognize the difference.[127] In contrast, Wisconsin recognized assumption of risk as a form of negligence for many years.[128] Therefore, the phrase does not carry the same negative connotations in Wisconsin as it does in Illinois.

Another difference is that the Wisconsin statute compares the negligence of the claimant with that of the defendant.[129] Illinois' paragraph 2-1116, however, looks at the percentage of the claimant's fault that caused the harm without comparison.[130] Not comparing the conduct of the plaintiff and defendant may alleviate some of the complexity of applying recovery-reducing statutes to strict products liability.[131]

In addition to Wisconsin, other states such as Arkansas,[132]

N.W.2d 393, 395 (1974) (contributory negligence and assumption of risk are defenses); Dippel v. Sciaro, 37 Wis. 2d 443, 460-61, 155 N.W.2d 55, 63-64 (1967) (unreasonable assumption of risk is negligence).

123. *Powers*, 64 Wis. 2d at 537, 219 N.W.2d at 395.

124. *Dippel*, 37 Wis. 2d at 460, 155 N.W.2d at 63.

125. For the text of the Illinois statute, see *supra* note 89. For the text of the Wisconsin statute, see *supra* note 120.

126. A majority of states have adopted comparative fault for products liability actions. V. SCHWARTZ, *supra* note 67, at 196.

127. *See* Kionka, *Implied Assumption of the Risk: Does It Survive Comparative Fault?*, 3 S. ILL. U. L.J. 371, 400 (1982) (use contributory fault to distinguish from contributory negligence)

128. Wisconsin treated assumption of risk as contributory negligence to bring it within the scope of the comparative negligence statute. *Dippel*, 37 Wis. 2d at 461, 155 N.W.2d at 64. It seems Wisconsin had comparative negligence before assumption of risk became an issue in strict products liability. *Id.* Consequently, assumption of risk principles, which are designed to protect the consumer by only barring conduct rising to a level of assumption of risk, would have favored sellers and manufacturers. If comparative negligence existed in Illinois before assumption of risk, Illinois likewise would not have adopted assumption of risk separate from negligence. No reason exists to have assumption of risk principles in a comparative negligence system.

129. *See* WIS. STAT. ANN. § 895.045 (West 1985) (can recover if negligence not greater than defendant's negligence).

130. ILL. REV. STAT. ch. 110, ¶ 2-1116 (1987).

131. For a discussion of comparative negligence issues in strict liability in tort, see H. WOODS, COMPARATIVE FAULT §§ 14:18-14:56 (2d ed. 1987).

132. In Arkansas, a comment to the state's statute explained that assumption of risk, like negligence, was embraced within the concept of fault. *See* W.M. Bashlin Co. v. Smith, 277 Ark. 406, 416, 643 S.W.2d 526, 530 (1982) (quoting from comment to

Idaho,[133] New Jersey[134] and Oregon[135] merged assumption of risk into their own forms of fault. Although each of these states incorporated distinct permutations into their comparative laws, underlying all these statutes and subsequent court decisions is the idea that a plaintiff should be responsible for his own negligence.[136]

In contrast to the states that merged negligence, misuse and assumption of risk, some states maintained distinctions between them. Nevada,[137] Maine,[138] Minnesota[139] and Montana[140] are examples of

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Arkansas statute).

133. In Idaho, causal conduct is compared. Sun Valley Airlines, Inc. v. Avco-Lycoming Corp., 411 F. Supp. 598, 603 (D. Idaho 1976). The labels denoting the quality of the act are unimportant. *Id.* at 603 n.3. The court stated that comparing all causal conduct was consistent with the policies underlying strict products liability. *Id.* at 603.

134. In Rivera v. Westinghouse Elevator Co., 107 N.J. 256, 526 A.2d 705 (1987), the New Jersey Supreme Court held that the recovery reducing conduct in products liability was contributory negligence in the ordinary sense. *Rivera*, 107 N.J. at 259, 526 A.2d at 707. The court went on to explain that "the failure to allocate any degree of fault . . . is . . . a miscarriage of justice under the law." *Id.* New Jersey, therefore, holds a plaintiff to a standard of a reasonably prudent person in both products liability and negligence actions. *Id.*

135. In Oregon, conduct causing injury, including negligence, reduces recovery in strict products liability. Peterson v. Lebanon Mach. Works Inc., 61 Or. App. 258, 258, 656 P.2d 323, 324 (1981). Negligence consisting of unobservant, inattentive, ignorant or awkward failure to discover or guard against the defect in the product, however, is not considered. *Id.* This creates the same problems that are found with assumption of risk when trying to distinguish a "minimal" amount of negligence. The more logical approach is to reduce recovery by any negligent conduct which is a cause of harm. If the conduct is "minimal," then recovery reduction will also be minimal.

136. For a discussion of these decisions, see *supra* nn. 132-35.

137. In Nevada, with the exception of an express assumption of risk, the doctrine was subsumed by the Nevada comparative negligence statute. Mizushima v. Sunset Ranch, Inc., 737 P.2d 1158, 1161 (Nev. 1987). Express assumption of risk in Nevada is a contractual undertaking that relieves one of any duty owed another. *Id.* at 1159. The Nevada court explained that assumption of risk is not favored in Nevada because "[i]t continues to vex and confuse as a masquerade for contributory negligence." *Id.* at 1161. Even though the assumption of risk classification partially survived in Nevada, assumption of risk as it is known in Illinois merged into the Nevada statute.

138. In Maine, the comparative negligence statute defined fault as "negligence . . . or other act . . . which . . . apart from this section, gives rise to the defense of contributory negligence." ME. REV. STAT. ANN. tit. 14, § 156 (1980). In Austin v. Raybestos-Manhattan Inc., 471 A.2d 280 (Me. 1984), the Supreme Judicial Court of Maine noted that negligence was one variety of fault. *Id.* at 282 n.3. The court, however, stated that by definition, fault consisted only of conduct that, absent the statute gave rise to the defense of contributory negligence. *Id.* The court reasoned that because assumption of risk was the defense before the statute, fault for strict liability purposes consisted only of assumption of risk. *Id.* at 286.

139. In Minnesota, the statute expressly states that fault encompasses negligence and assumption of risk. MINN. STAT. ANN. § 604.01 (West 1988). In a negligence action the Minnesota Court of Appeals distinguished primary and secondary assumption of risk. Swagger v. City of Crystal, 379 N.W.2d 183 (Minn. Ct. App. 1985). Primary assumption of risk relates to whether a defendant owed a duty to an injured party. *Id.* at 185. Secondary assumption of risk relates to fault on a plaintiffs' part. *Id.* Only secondary assumption of risk was held subsumed by the statute. *Id.* Secondary, however, is the type of assumption of risk Illinois applies. Therefore, an analogy

states that retained some concept of misuse and assumption of risk under comparative negligence. Each of these states also have unique permutations in their statutes. There are three ways other jurisdictions have retained some form of assumption of risk. Some state statutes expressly mandated retention.[141] In other states, courts used convoluted reasoning to preserve common law their legislatures intended to abolish.[142] Still others use an assumption of risk label to signify concepts that are not related to Illinois' assumption of risk principles. Instead, they are substantial equivalents of negligence.[143]

These other statutes and court decisions indicate a trend toward abolishing distinctions for negligence, misuse and assumption of risk. This trend in other jurisdictions is setting forth a consensus policy to hold plaintiffs responsible for their own wrongful conduct. Accordingly, if Illinois follows the trend, fault in the context of Illi-

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to Minnesota supports the position that fault encompasses misuse, assumption of risk and negligence.

140. In Montana, the statute expressly retained assumption of risk. MONT. CODE ANN. §§6142, 27-1-702, 27-1-719 (1987). Therefore, the courts will not be called on to grapple with the assumption of risk issue. *See* Zahrte v. Sturm, Ruger and Co., 661 P.2d 17 (Mont. 1983) (assumption of risk an available defense).

141. For a discussion of the state of Minnesota, which expressly retained assumption of risk in its statute, see *supra* note 139.

142. *See supra* note 138. The Supreme Judicial Court of Maine stated that the sole purpose of the comparative negligence statute was to eliminate the all or nothing rule of contributory negligence principles. *Austin*, 471 A.2d at 286. The Maine statute states:

> [w]here any person suffers death or damage as a result partly of the fault of any other person or persons, a claim in respect of that death or damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the jury thinks just and equitable having regard to the claimant's share in the responsibility for the damage.
>
> . . .
>
> Fault means negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this section, give rise to the defense of contributory negligence. If such a claimant is found by the jury to be equally at fault, the claimant shall not recover.

ME. REV. STAT. ANN. tit. 14, § 156 (1980).

In construing the Maine statute, the *Austin* court reasoned that the definition of fault in the statute had two meanings. *Austin*, 471 A.2d at 283. The court stated that fault in a strict liability context meant assumption of risk. *Id.* at 286. The court said that because the legislature was silent it elected to leave to the court the task of setting forth the available defenses. *Id.* at 286-87.

The Maine statute is very different from paragraph 2-1116. Paragraph 2-1116 groups negligence and products liability actions together for purposes of the statute. ILL. REV. STAT. ch. 110, ¶ 2-1116 (1987). In contrast, Maine does not even mention products liability. ME. REV. STAT. ANN. tit. 14, § 156 (1980). Unlike Illinois, Maine defined fault in the statute. *Id.* The definition refers to what, apart from the statute, would give rise to a defense. *Id.* This definition was interpreted to preserve assumption of risk. *Austin*, 471 A.2d at 286. Illinois has not defined fault in this way. Therefore, the interpretation of the Maine statute is not analogous to paragraph 2-1116.

143. For a discussion of a state where assumption of risk is a lable for what Illinois considers negligence, see *supra* note 137.

nois' strict product liability actions will include negligence, misuse and assumption of risk.

V. Conclusion

[N]o man shall take advantage of his own wrong or negligence.[144]

The stage is set for Illinois courts to bring paragraph 2-1116 to life. Illinois' common law evolved from the harsh concepts of contributory negligence into a system of total permissiveness under pure comparative negligence. The legislature responded by turning back the evolution. The court must now decide how far the legislature intended to go. In regard to strict products liability actions, the fate of misuse and assumption of risk principles hinges on the courts interpretation of paragraph 2-1116.

An objective interpretation of paragraph 2-1116 yields several decisive facts. The text of paragraph 2-1116 does not distinguish negligence actions from strict products liability actions for contributory fault purposes. There is no indication that the legislature realized the text of paragraph 2-1116 was ambiguous. Inspired by unprecedented interest group pressure, the legislature acted to reduce the number of suits, the amount of damage awards and ultimately insurance rates, by holding plaintiff's accountable for their own actions. Additionally, the trend in other jurisdictions is to abolish the distinctions for different levels of negligence. Amassing these factors leads to the conclusion that old common law principles of misuse and assumption of risk are no longer the only types of wrongful conduct which reduce recovery in Illinois strict products liability actions. Today, any wrongful or negligent conduct that is a proximate cause of injury will reduce or bar a plaintiff's recovery.

Although it is not certain whether modified contributory fault will actually lower insurance rates, limiting recoveries does eliminate one cause of high insurance rates by calling for damage reduction in proportion to the amount of the plaintiff's fault. Additionally, the labels and distinctions of the pure system only lead to confusion, and paragraph 2-1116 remedies the judicial preservation of these antiquated concepts. Therefore, the Illinois courts should follow the lead of the Illinois legislature and other jurisdictions and find that in both negligence and strict tort products liability actions fault includes any wrongful conduct including negligence, misuse and assumption of risk.

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144. Galena & Chicago Union R.R. Co. v. Jacobs, 20 Ill. 478, 490-91 (1858) (quoting Sheppard v. Hees, 12 Johns., 434; Bush v. Brainard, 1 Cow., 78.).