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Comparative Negligence and Strict Liability in Illinois: The Applicability of Comparative Fault to the Structural Work Act, 17 J. Marshall L. Rev. 493 (1984)

Robert G. Black

COMPARATIVE NEGLIGENCE AND STRICT LIABILITY IN ILLINOIS: THE APPLICABILITY OF COMPARATIVE FAULT TO THE STRUCTURAL WORK ACT

The Structural Work Act,[1] commonly known as the "Scaffold Act," constitutes an aspect of strict liability[2] in Illinois tort law that has been criticized by the bar[3] and the construction and

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1. ILL. REV. STAT. ch 48, § 60 *et seq.* (1979). The Act was passed into law on June 3, 1907; in relevant part it currently reads:

> §60. That all scaffolds, hoists, cranes, stays, ladders, supports, or other mechanical contrivances, erected or constructed by any person, firm or corporation in this State for the use in the erection, repairing, alteration, removal or painting of any house, building, bridge, viaduct, or other structure, shall be erected and constructed in a safe, suitable and proper manner, and shall be so erected and constructed, placed and operated as to give proper and adequate protection to the life and limb of any person or persons employed or engaged thereon . . . .

ILL. REV. STAT. ch. 48, § 60 (1969).

> §69. Any owner, contractor, sub-contractor, foreman or other person having charge of the erection, construction, repairing, alteration, removal or painting of any building, bridge, viaduct or other structure within the provisions of this Act, shall comply with all the terms thereof. . . .
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> For any injury to person or property, occasioned by any willful violations of this Act, or willful failure to comply with any of its provisions, a right of action shall accrue . . . and in the case of loss of life by reason of such willful violation or willful failure as aforesaid, a right of action shall accrue to the surviving spouse of the person so killed . . . .

ILL. REV. STAT. ch. 48, § 69. The specific legislative intent of the Act, as represented by its preamble, is that the Act was for "the protection and safety of persons in and about the construction, repairing, alteration, or removal of buildings, viaducts and other structures." ILL. REV. STAT. ch. 48, § 60 (1979). Section 60 describes the persons protected under the Act as well as the types of structural work that are included in the Act's provisions. Section 69 defines the duty under the Act, identifies what parties operate under that duty, and creates the cause of action.

2. Illinois courts have interpreted the Structural Work Act as imposing strict liability for the willful violation of its provisions because it is a statute specifically designed to protect a particular segment of the public which was traditionally unable to protect itself. *See* Barthel v. Illinois Cent. G. R.R., 74 Ill. 2d 213, 384 N.E.2d 323 (1979); *see also* RESTATEMENT (SECOND) OF TORTS § 483, comment c (1971).

3. Legal commentary has focused on the fact that the Structural Work Act imposes almost limitless liability which, although scaffold workers regularly encounter dangerous working conditions, goes beyond the actual purpose of the Act. For arguments focused on the possible amendment of the Structural Work Act or of its incorporation into the Worker's Compensation Act as means of bringing the provisions of the Act more in line with

insurance industries.[4] Enacted in 1970 during a period characterized by increased legislative concern for workplace safety legislation,[5] the Scaffold Act was intended to protect workers in their "extrahazardous occupation."[6] Four years later, the Illinois workmen's compensation laws were passed,[7] which provided a guaranteed statutory recovery for workers injured within the scope of their employment. Because of the exclusive remedy provided by the Worker's Compensation Act,[8] the number of actions brought under the Scaffold Act diminished. In 1952, however, the Illinois Supreme Court allowed injured workers to maintain actions against third parties independent of their right of recovery against employers provided by worker's compensation.[9] The Scaffold Act, thus makes available a full range of common law damages as remedies for injuries suffered in construction settings; remedies above and beyond the limited recovery mandated by the worker's compensation schedules.[10]

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its original function as drafted, see Strodel, *The Illinois Structural Work Act,* 1967 U. ILL. L.F. 72.

Of major concern is the recognition that, while the Act affords needed protection for workers in ultrahazardous occupations, there is no way to allocate responsibility for damages based on the actual culpable conduct of the parties in causing the injuries. Interviews with Attorneys, June through August, 1983.

4. The Act as it is applied today is a source of confusion and consternation for the insurance and construction industries. *See* Strodel, *supra* note 3, at 72. Insurance companies object to the Act's blanket coverage of individuals involved at construction sites regardless of any actual participation in the accident and regardless of any fault. Interviews with Chicago-area insurance industry officers, June 1983 through January 1984.

Furthermore, business and construction concerns, recognize the unique potential for liability under the Act creates a barrier to new construction within the state and results in higher insurance premiums. Even large union organizations have called for a review of the Structural Work Act, largely because it restricts the number of construction jobs available in an area. *E.g.*, Building Trades Council television commercials aired in late 1983 and early 1984.

5. A. LARSON, LAW OF WORKMEN'S COMPENSATION § 4.50 (1972).

6. Schultz v. Henry Ericcson Co., 264 Ill. 256, 264, 106 N.E. 236, 239 (1914).

7. The Workmen's Compensation Act was passed four years later, in 1911. ILL. REV. STAT. ch. 48, § 138 *et seq.* (1973).

8. Under the Worker's Compensation Act, ILL. REV. STAT. ch. 48, § 138 *et seq.* (1979), employees surrendered all rights of action against their employer in return for a guaranteed right of recovery under the statute.

9. In Grasse v. Dealers Transp. Co., 412 Ill. 179, 106 N.E.2d 124 (1952), the Illinois Supreme Court determined that Section 29 of the Worker's Compensation Act which forbids employees from suing parties other than their employer, was unconstitutional. Injured workers could thereafter bring a worker's compensation claim against their employers and still maintain an action against other parties under different theories of recovery.

10. The Scaffold Act supplements the Worker's Compensation Act by allowing injured structural workers to obtain full common law damages beyond the limited recovery available under Worker's Compensation fee

Once strict liability for a violation of the Scaffold Act is imposed, the plaintiff's damage award is not diminished by his own culpable conduct. Although the Act itself is silent concerning the common law defenses of contributory negligence and assumption of risk, both have been held inapplicable so as not to defeat the avowed purpose of the Act—protection of workers.[11] Thus a Structural Work Act plaintiff retains his full recovery of common law damages despite the fact that he may have been at fault in causing the accident.

Judicial construction of the Act has been inconsistent at best. Liability is imposed in almost any setting, stretching the Act beyond what was originally intended when drafted. Indeed, the Act's effect on Illinois tort law cannot be overlooked; its effect has been characterized as second only to that of products liability.[12]

An equitable solution to the perceived problems of the Structural Work Act may rest with the recent application of comparative fault[13] to another strict liability setting—products liability.[14] In jurisdictions such as Illinois which have recognized

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schedules. Comment, *The Illinois Structural Work Act*, 1975 U. ILL. L.F. 393, 394. However, the plaintiff is not permitted double recovery. The employer has a statutory lien against the employee's recovery to the extent of payments made under the Worker's Compensation Act. ILL. REV. STAT. ch. 48, § 138.5(h) (1973).

11. It has been routinely held since the Act's inception that the statute should protect workers in their dangerous and extra-hazardous occupations. *See supra* note 6 and accompanying text. Indeed, to maximize protection of workers, courts have interpreted the Act as disallowing the defenses of contributory negligence and assumption of risk as complete bars to a plaintiff's recovery. *See infra* note 78 and accompanying text.

12. Strodel, *supra* note 3, at 72. According to the author, the Structural Work Act has "made an impact upon the reviewing courts of this state in the field of tort law which is second only to the blossoming and dynamic field of products liability." *Id.* at 72. Further, the author noted the Act has "created consternation in the insurance and construction industries . . . ." *Id.*

13. Comparative fault or negligence is concerned with apportioning damages between two parties. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 67 at 434 (4th ed. 1974). The doctrine has been adopted in recent years in answer to the harsh "all-or-nothing" rule of contributory negligence under which a plaintiff, even partially at fault, was completely barred from recovery for his injuries. *See* Fisher, *Products Liability—Applicability of Comparative Negligence*, 43 MO. L. REV. 431 (1978). Although comparative negligence, or comparative fault as it is otherwise termed, has existed in this country as a method of comparing relative fault for a number of years, it has become widely accepted only recently. *See* Fleming, *Foreward: Comparative Negligence At Last—by Judicial Choice*, 64 CAL. L. REV. 239 (1976).

14. The doctrine that the manufacturer or seller of a defective product made unreasonably dangerous to the user or consumer will be strictly liable in tort for the injuries thereby caused is the majority rule today. *See infra* note 43 and accompanying text. Traditional negligence and warranty theories historically proved inadequate to protect injured persons from

both principles,[15] comparative fault and strict liability, courts have grappled with whether the two may properly be merged

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dangerously defective products in a highly-mechanized society. As a result, the strict products liability theory arose as a means to circumvent recognized limitations in recovery.

Initially, privity was a mandated prerequisite for maintaining any action in tort for injuries. *See* Witterbottom v. Wright, 152 Eng. Rep. 402 (1842), for the English rule subsequently followed in the United States. In addition, even if an injured user of a product could maintain an action by meeting the privity requirement, the manufacturer could nonetheless plead "due cause" to escape liability.

As the country became more industrialized, society and the law recognized a need to protect the public from the inherent dangers of mechanization. As a result, exceptions to the "citadel" of privity began to be carved out. In McPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916), the court abolished the privity limitation as it applied to sellers of negligently made products that were inherently dangerous. The holding in *McPherson* soon afterwards became the majority rule. However, the manufacturer or seller still had available as a defense that it had acted with due care.

Warranty theory next emerged as a method of recovery for injured consumers. Courts held that manufacturers were bound by an implied warranty of fitness for a particular purpose even when the manufacturer had not expressly warranted his product. *See* Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).

Dean Prosser recognized, however, that negligence and warranty theories still did not adequately protect injured consumer. Relying on public policy concerns in the interest of health and life, he argued that strict liability for a defective product should be the rule. Prosser, *Assault Upon the Citadel*, 69 YALE B.J. 7 (1960). Dean Prosser maintained that as long as defective food and drink were subject to strict liability, so should other defective products. *Id.*

Products liability first emerged as a basis of recovery with the decision in Greeman v. Yuba Power Products, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

The accepted definition of strict liability is outlined in the RESTATEMENT (SECOND) OF TORTS § 402A (1977). The sections reads in full:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
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> (a) the seller is engaged in the business of selling such a product, and
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> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
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> (2) The rule stated in Subsection (1) applies although
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> (a) the seller has exercised all possible care in the preparation and sale of his product, and
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> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Id. Thirty-four states, including Illinois, have adopted strict liability as outlined in § 402A or its functional equivalent. *See infra* note 44. Note also that subsection (2) makes the doctrine applicable regardless of the due care and privity defenses.

15. For a list of states that have already decided to merge the two principles, *see infra* notes 111-12.

despite their apparent incompatability.[16] The Illinois Supreme Court answered this question affirmatively in *Coney v. J.L.G. Industries*.[17] The *Coney* court held that once a defendant's strict liability for a defective product was established, the total damages for a plaintiff's injuries may be apportioned according to the relative degree of the defective product in relation to the plaintiff's conduct as the proximate cause of those injuries.[18]

The Illinois Supreme Court's determination in *Coney* that the principles underlying strict liability are best promoted by the comparative fault approach may provide a solution to the inequitable treatment of defendants under the Structural Work Act. This comment will analyze the law which has evolved interpreting the Act and the problems which have arisen under it. This comment will then look at the *Coney* decision and compare the similar policy justifications behind products liability and the Scaffold Act and propose that because the harsh all-or-nothing rule of the defenses of assumption of risk and misuse have given way to a more equitable distribution of damages based on comparative fault, that result should also extend to Scaffold Act liability.

THE ILLINOIS STRUCTURAL WORK ACT

Background and elements Under the Act

The Structural Work Act was passed in 1907 to provide for the "protection and safety of workers in and about the construction . . . of buildings . . . and other structures."[19] The Act eliminated the common law defenses of assumption of risk and contributory negligence, which had previously immunized employers from workplace liability.[20] The passage of the Worker's Compensation Act in 1911, however, relegated the Scaffold Act to the role of a rarely-invoked form of recovery. A cause of action arising from a workplace injury fell within the ambit of worker's compensation. In return for a guaranteed recovery

16. *See generally* Feinberg, *The Applicability of a Comparative Negligence Defense in a Strict Products Liability Suit Based on Section 402A of the Restatement of Torts 2d (Can Oil and Water Mix?)*, 42 INS. COUNCIL J. 39 (1975); Fisher, *supra* note 13; Levine, *Strict Products Liability and Comparative Negligence: The Collision of Fault and No-Fault*, 14 S.D.L. REV. 337 (1977).

17. Coney v. J.L.G. Industries, 97 Ill. 2d 104, 454 N.E.2d 197 (1983).

18. *Id.* at 118, 454 N.E.2d at 203, *quoting*, Skinner v. Reed-Prentice Div. Package Mach. Co., 70 Ill. 2d 1, 374 N.E.2d 437 (1977), *cert. denied* 436 U.S. 946 (1978).

19. ILL. REV. STAT. ch. 48, § 60, *supra* note 1.

20. J. BOYD, THE LAW OF COMPENSATION FOR INJURIES TO WORKERS §§ 33-50 (1913).

under the compensation act, the injured worker surrendered all other possible actions against third parties.

In 1952, an immense change in Illinois law occurred when Section 29 of the Worker's Compensation Act, forbidding workers from suing third parties, was declared unconstitutional.[21] Once this limitation on suits against parties other than the employer was removed, use of the Structural Work Act by plaintiffs was revived. Injured construction workers were then presented with an additional means of recovery; thereafter, actions could be maintained against contractors, owners and other parties for violations of the Scaffold Act.[22] Moreover, the compensatory benefits of an action under the Scaffold Act encouraged its use. Because of the availability of the normal common law measure of damages, a Structural Work Act plaintiff's award could dwarf recovery under worker's compensation schedules.[23]

Heightened concerns for the safety of scaffold workers were recognized as early as 1914 in the first major case decided under the Act. In *Schultz v. Henry Ericsson Co.*,[24] the Illinois Supreme Court determined that the Act was intended "to prevent injuries to persons employed in this dangerous and extrahazardous occupation."[25] Consistent with this purpose, the Act has been liberally construed so that a broad range of conduct can be found

21. Grasse v. Dealer's Transp. Co., 412 Ill. 179, 106 N.E.2d 124 (1952). *See also supra* note 10, at 393.

22. *See* Strodel, *supra* note 3, at 88.

23. *Structural Work Act*, *supra* note 10, at 393-394.

24. 264 Ill. 156, 106 N.E. 236 (1914). The plaintiff instituted an action for personal injuries sustained when he fell from a runway on which he was working while employed by the defendant. The plaintiff, along with other workers, would take a wheelbarrow full of motar along the runway to bring it to masons working along the north wall of the building being constructed. *Id.* at 159, 106 N.E. at 238. In doing so, workers with loaded wheelbarrows would pass those returning with empty wheelbarrows at various points along the runway. No guardrails or other contrivances were erected to prevent men or materials from falling off; only a single plank laid eighteen inches east of the runway existed for workers to stand on in case any of them lost their balance. *Id.*

The plaintiff, while wheeling a load past another worker, was hit by a wire protruding from the rim of the latter's wheelbarrow and was caused to fall. The plaintiff was severely injured when he fell to the first floor along with most of the motar. *Id.* at 160, 106 N.E. at 238.

Although *Schultz* was decided in 1914, the Act was first construed by the Illinois Supreme Court in 1911 in Claffy v. Chicago Dock & Canal Co., 249 Ill. 210 (1911). The court in *Claffy* set forth the reasoning in a New York case, Rooney v. Brogan Const. Co., 107 App. Div. 258, 194 N.Y. 32 (1909), which had construed a New York statute similar in form to the Structural Work Act.

25. *Schultz*, 264 Ill. at 164, 106 N.E. at 239. The court made no attempt to define what is meant by a safe, suitable or proper scaffold under the language of the Act, instead leaving it up to the jury as a question of fact. *Id.* at 166, 106 N.E. at 240.

actionable.[26]

Along this line, the word "willful" in the Act was defined by the supreme court as synonymous with "knowingly."[27] A party would therefore be liable not only when dangerous conditions were actually known to him, but also "when by the exercise of reasonable care the existence of such dangerous conditions could have been discovered and become known to him."[28] This definition of "willful" equates breach of a duty under the Act with the law of unintentional torts generally, and imposes liability not only on parties with actual notice of dangerous conditions, but also on those who had a reasonable opportunity to know of the danger by careful inspection of the job-at-site.[29]

The party whose willful violation could become the basis of liability under the Act was not limited to the employer. In *Kennerly v. Shell Oil Co.*,[30] the supreme court interpreted the Scaffold Act as fixing an "independent, nondelegable duty of compliance" on owners and contractors irrespective of their actual roles in construction.[31] Additionally, *Kennerly* solidified

26. The Act is uniformly given a liberal interpretation to effectuate its purpose. Strodel, *supra* note 3 at 88, 89. Under this liberal interpretation, almost any structural device or form of work at a job site has been held to fall under the Act. *See, e.g.*, Ring, *The Scaffold Act: Its Past, Present, and Future*, 64 ILL. B.J. 666, 671 (1976); *Structural Work Act*, *supra* note 10 at 411.

27. *Schultz*, 264 Ill. at 166, 106 N.E. at 240. *See* ILL. REV. STAT. ch. 48, § 69, *supra* note 1.

28. *Schultz*, 264 Ill. at 166, 106 N.E. at 240. This interpretation has remained consistent.

29. The dictionary definition of "willful" represents something more akin to reckless and wanton conduct or maliciousness. BLACK'S LAW DICTIONARY 1434 (Rev. 5th ed. 1979). However, "willful" in this context does not include a "reckless disregard" for dangerous conditions, as is the rule in willful and wanton torts. The court in *Schultz* was very careful to distinguish a "willful" violation under the Act from a "reckless disregard" of its provisions. *Schultz*, 264 Ill. at 166, 106 N.E. at 240.

However, Justice Klingbiel refuted this definition of "willful." In Kennerly v. Shell Oil Co., 30 Ill. 2d 431, 434, 150 N.E.2d 134, 141 (1958) (Klingbiel, J., dissenting), he noted that a willful violation exists where the defendant, by the exercise of reasonable care, should have discovered the condition of the scaffold. "This is the test of mere negligence, not of willfulness." *Id.*

30. 13 Ill. 2d 431, 150 N.E.2d 134 (1958). The plaintiff was injured while working as a welder for a company which was constructing a large distillation unit for the Shell Oil Company on Shell's property. Plaintiff was welding a water line when he fell from a scaffold erected by other employees of the company he worked for.

Apart from the facts of the case, the court upheld the constitutionality of the Act in the face of the passage of the Worker's Compensation Act. The court found that the Scaffold Act did not violate the due process clauses of either the state or federal constitutions and was not so vague or indefinite as to fail to establish a clear standard of duty. *Id.* at 437-49, 150 N.E.2d at 138-39.

31. *Id.* at 436, 150 N.E.2d at 137-38. This theory of "collective responsibility" under the Act was severely criticized by Justice Klingbiel in his dissent. *Id.* at 441, 150 N.E.2d at 140.

the *Schultz* definition of "willful."[32] Owners of construction sites and others could, under the *Kennerly* interpretation of the Act, be collectively liable regardless of their actual participation, if any, in the work.

In 1961, a subsequent decision limited this broad application of the Act by holding that liability should be imposed only on those actually "in charge of" the work.[33] The owner of a construction site was no longer absolutely liable for injuries based on the mere fact of his ownership. Still, a definition was promulgated by which responsibility for control over work, and therefore liability, could be established.

The "having charge of" language has been said to hold the key to all liability under the Act.[34] In *Larson v. Commonwealth Edison Co.*,[35] the court concluded that this phrase is a "generic term of broad import,"[36] and refused to establish a rigid test under that language. The determination of who is in charge of the work was a factual matter for the jury to decide.[37] While the actual exercise of control over the work is important, the court suggested that such a factor is not determinative;[38] the right to control the work, whether exercised or not, is sufficient to establish a duty under the Act.[39] A contractual right to control the

32. In agreeing that a "willful" violation properly triggers liability under the Act, the majority in *Kennerly* stressed that a defendant could not escape "the mandatory duty that the statute impose[d] by closing its eyes to [the] conditions." *Id.* at 439, 150 N.E.2d at 146.

33. Gannon v. Chicago, St. P. & Pac. Ry., 22 Ill. 2d 305, 175 N.E.2d 785 (1961) (plaintiff was injured when ladder slipped as he was about to step onto scaffold). It followed, the court in *Gannon* reasoned, that liability should not be extended merely by virtue of ownership of the premises. *Id.* at 320, 175 N.E.2d at 793.

34. *See* Sorenson, *Strategy and Proof under the Illinois Structural Work Act*, 59 ILL. B.J. 550 (1971); Strodel, *supra* note 3, at 75.

35. 33 Ill. 2d 316, 211 N.E.2d 247 (1965) (plaintiff was injured when the scaffold on which he was working broke, causing him to fall to the ground).

36. *Id.* at 321, 211 N.E.2d at 251.

37. *Id. Accord*, Ring, *supra* note 26, at 668 ("The Illinois decisions subsequent to Gannon have refused to establish a rigid test for deciding whether an individual or entity has charge of the work, and following *Gannon*, have allowed the jury to decide the matter as a question of fact."); Larson v. Commonwealth Edison, 33 Ill. 2d 316, 211 N.E.2d 247 (1965) (no need to define the term "having charge of" since it is a term of broad import for interpretation); Miller v. DeWitt, 59 Ill. App. 2d 38, 208 N.E.2d 247 (1965) (party "having charge of" the work is for the jury to determine).

In fact, the Illinois Pattern Jury Instructions have refused to define what is meant by the term "having charge of." *See* I.P.I. § 180.14 (1971).

38. Larson v. Commonwealth Edison, 33 Ill. 2d 316, 324-25, 211 N.E.2d 247, 252 (1965). *See also infra* note 39.

39. *Larson*, 33 Ill. 2d at 324-25, 211 N.E.2d at 252. A number of factors, though, have been emphasized in determining whether a party actually had "charge of" the work. *See* Ring, *supra* note 26, at 668-69. First, the party must have had an overall right of supervising. The right is important, and

work is all that is necessary to establish a duty and therefore, liability for a violation of the Act. The issue of control is to be decided by the jury as a question of fact on a case-by-case basis.[40]

Another important issue in determining liability, and one of the most litigated areas under the Act, is whether the scaffolding device falls within the purview of the statute.[41] The language of the Act itself mentions "scaffolds, hoists, cranes, stays, ladders, supports or other mechanical contrivances."[42] Prior to 1968, courts construed this language literally and refused to apply the Act to devices not specifically mentioned. In the 1968 decision of *Louis v. Barenfanger*,[43] however, the court expanded the Act's definition by finding that a permanent structure, if used as a temporary support during construction, will fall within the purview of the statute.[44] The intent of the party furnishing the device rather than the exact "contrivances" mentioned in the Act determines whether the structure actually serves as a support.[45] If the defendant intended that a permanent part of a structure be used to support workers or function in the manner of a scaffold, he will be liable if the trier of fact finds that the structure was unsafe.[46] The danger involved must be evaluated to determine whether the hazard is one which the legislature attempted to alleviate in passing the Act.[47] The court in *Louis* held that

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the party need not have control over the minutiae of details of the work. *Id.* Second, the defendant should have a right to inspect the work to see that it conformed to the plans and specifications. *Id.* Next, the right to stop the work is important. *Id.* Finally, a right to fire or terminate the employment of an employee on the job is relevant. *Id.* The fact that more than one person was in charge is of no consequence, as is the fact that a party did nothing for safety, for a party cannot close his eyes to conditions so as to escape liability. *Id.* at 669.

40. *Larson*, 73 Ill. 20 at 325, 211 N.E.2d at 254. *See also* Ring, *supra* note 26, at 668-69.

41. *See* Sorenson, *supra* note 34, at 72.

42. ILL. REV. STAT. ch. 48, § 60, *supra* note 1.

43. 39 Ill. 2d 445, 236 N.E.2d 724, *cert. denied*, 393 U.S. 935 (1968). The plaintiff, Charles Louis, was working for a subcontractor in the construction of a school building when he fell and sustained injuries. The plaintiff alleged in his complaint that he was not standing on any type of planking when he fell because no such support was ever placed for his use. *Id.* at 447, 236 N.E.2d at 726.

44. *Id.* at 450, 236 N.E.2d at 727. The court said that "if the apparatus in question was being put to a temporary use as a support for workmen at the time of the accident, it is a scaffold regardless of its ultimate use as a part of the permanent structure." *Id.*

45. *Id.* This is consistent with the Illinois courts' policy of liberally construing the Act. *See* Ring, *supra* note 26, at 671.

46. *Louis*, 39 Ill. 2d at 450, 236 N.E.2d at 727. *See also* Ring, *supra* note 26, at 671.

47. *Louis*, 39 Ill. 2d at 450, 326 N.E.2d at 727. Examples of contrivances held to be scaffolds under the Act before *Louis* include: an overhead crane

failure to provide a scaffold could also be the basis of a cause of action[48] because parties could otherwise defeat the purpose of the Act simply by failing to provide supports.[49] *Louis*, therefore, stands for the proposition that there exists a positive duty to provide scaffolds when necessary.

The Act mandates that scaffolds be constructed in a "safe, suitable and proper" manner to afford "proper and adequate protection."[50] The Illinois Supreme Court has purposefully refrained from defining this amorphous standard,[51] and Illinois Pattern Jury Instructions offer no aid.[52] Consequently, violation of the safety standards in each case is a question of fact for the jury. Similarly, the issue of proximate cause between a violation of the Act and the plaintiff's injuries is a jury question.[53]

As in any products liability or negligence-based tort action, a successful plaintiff under the Structural Work Act must plead and prove the elements of his cause of action. Five essential fac-

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which ran the length of a steel mill in Bounougias v. Republic Steel Corp., 277 F.2d 726 (7th Cir. 1960); an airplane hangar door in Skinner v. United States, 209 F. Supp. 424 (E.D. Ill. 1962); and a shovel extension mounted on a tractor in Oldham v. Kubinski, 37 Ill. App. 2d 65, 185 N.E.2d 270 (1962).

Subsequent to the *Louis* decision, a myriad of items have qualified as scaffolds. *See, e.g.*, Schroeder v. C.F. Braun & Co., 502 F.2d 235 (7th Cir. 1974) (permanent water cooling tower held to fall within Act); Wood v. Commonwealth Edison Co., 343 F. Supp. 1270 (N.D. Ill. 1972) (wooden utility pole); St. John v. R.R. Donnelly & Sons, 54 Ill. 2d 271, 296 N.E.2d 740 (1973) (roof of a nearly completed building); Juliano v. Oravec, 53 Ill. 2d 566, 293 N.E.2d 897 (1973) (plywood subflooring); Navlyt v. Kalinich, 53 Ill. 2d 137, 290 N.E.2d 219 (1972) (shorings of a sewer system); Ashley v. Osman & Assocs., 114 Ill. App. 3d 293, 448 N.E.2d 1011 (1983) (wooden planks over muddy area of ground used to unload materials to get to construction). *See also* McNellis v. Combustion Eng'g, Inc., 58 Ill. 2d 146, 317 N.E.2d 573 (1974) ("erection" under the statute includes unloading materials from a railroad car one-half mile from construction). *But see* Long v. City of New Boston, 91 Ill. 2d 456, 440 N.E.2d 625 (1982) (string of Christmas lights combined with utility pole did not fall within the Act).

48. *Louis*, 39 Ill. 2d at 449, 236 N.E.2d at 726. *Contra*, Morck v. Nicosia, 91 Ill. App. 2d 327, 235 N.E.2d 287 (1968) (failure to provide scaffolding for the plaintiff, who fell from subflooring, was held not to violate the Act).

49. *Louis*, 39 Ill. 2d at 448-49, 236 N.E.2d at 726. In reaching its conclusion, the court noted that the failure to furnish a scaffold could be actionable at common law in many negligence settings. To hold the Act did not impose such a duty to provide a scaffold, the court reasoned, would be to construe a statute enacted to broaden a common law duty as instead imposing a lesser duty, which the court noted would be an "absurd result." *Id.* at 448, 236 N.E.2d at 726.

50. ILL. REV. STAT. ch. 48, § 60 (1979).

51. *See Louis*, 39 Ill. 2d 445, 236 N.E.2d 724; Schultz v. Henry Ericsson Co., 264 Ill. 156, 106 N.E. 236 (1914).

52. Illinois Pattern Jury Instructions do not define these standards for a jury, instead leaving it up to them on a case-by-case basis. *See* I.P.I. § 180.14 (1971).

53. *See, e.g.*, Ring, *supra* note 26, at 675; Sorenson, *supra* note 34, at 560; Strodel, *supra* note 3, at 72.

tors, according to the case law and legal commentary, must be present:[54] first, the device must be covered by the Act;[55] second, the device must have been used in the erection of a building "or other structure;"[56] third, the device must be unsafe or unsafely placed or operated;[57] fourth, there must have been a willful violation of the Act;[58] and fifth, proximate cause between the plaintiff's injuries and the violation of the Act must be established.[59] Damages will then become the responsibility of the party found to have been in charge of the work when the accident occurred.[60] The burden of liability falls upon this party in order to insure safety at jobsites regardless of whether he was actually involved in the day-to-day operations. It should also be noted that many of these elements are undefined and left up to each jury to resolve in its particular fact setting. Coupled with the directive that the Act be liberally construed, liability under the Act has increased dramatically.

The Policy Behind the Act and Problems Which Now Exist

The original purposes of the Structural Work Act were to provide increased safety in hazardous working conditions and to facilitate a successful tort action by an employee for injuries sustained under those dangerous working conditions. Liberally construed in order to effectuate its purposes, the Act was in-

54. Ring, *supra* note 26, at 670. The list given here, however, is not the definitive statement of elements under the Act. It has also been said that the elements of proof under the Act include a showing by the plaintiff of injury to person or property; that the injury was proximately caused by erection, construction, operation or placement of certain equipment in an unsafe, unsuitable, or improper manner; that the defendant charged with liability was "in charge of" the work; and that the injury was caused by a willful or knowing violation. *See* Strodel, *supra* note 3. Case law itself has never rendered a consistent listing of elements. *See also Structural Work Act*, *supra* note 10, at 395.

55. *See* Ring, *supra* note 26, at 670. *See also supra* notes 41-47 and accompanying text.

56. *See* Ring, *supra* note 26, at 670. Structural work must be performed on a "house, building, bridge, viaduct, or other structure." ILL. REV. STAT. ch. 48, § 60. Under the doctrine of *ejusdem generis*, the generalized term "other structure" should be construed to include only things of the same quality or species as those items specifically enumerated in the statute; however, this has not always been the case. *See Structural Work Act*, *supra* note 10, at 397.

57. *See* Ring, *supra* note 26, at 670. *See also supra* notes 50-52 and accompanying text. Note that the characterization of "unsafe" sounds suspiciously like the "unsafe product" terminology used in strict products liability cases.

58. *See* Ring, *supra* note 26, at 670. *See also* notes 27, 28, 32 and accompanying text.

59. *See* Ring, *supra* note 26, at 670, 675.

60. *See supra* notes 34-40 and accompanying text.

tended to shift the risk of on-the-job injuries from the employee to those who caused the dangerous condition. The threat of financial loss from civil actions, and the possibility of criminal sanctions,[61] was expected to force compliance with the Act's safety provisions. To insure greater responsibility for jobsite safety, the Act was held to apply when a violation was "willful," i.e., when there was actual knowledge of a dangerous condition or when a party should have known of the condition and corrected it. Furthermore, the traditional defenses of contributory negligence and assumption of risk did not bar the action so that the parties in charge of the work could not escape liability. Broadly stated, the Act imposes a duty to provide safe, nondefective scaffolds and to encourage safety in the workplace within Illinois.

Yet the Structural Work Act may have evolved into a form of recovery not contemplated by legislators who passed it in 1907. Designed to compensate injured workers at a time when the Worker's Compensation Act did not yet exist, the Scaffold Act now represents an additional remedy against parties in charge of work at construction sites. Although worker's compensation does not allow recovery for pain and suffering,[62] such damages are recoverable under the Scaffold Act. The employer is still entitled to recoup the worker's compensation damages under a statutory lien.[63] Such a result should encourage safer construction practices while allowing a severely injured worker to obtain a larger recovery more closely approximating his actual loss. Nevertheless, the Structural Work Act has gone from an obscure turn-of-the-century statute to an important vehicle for imposing liability on a no-fault basis. The actual fault or culpable conduct of the plaintiff in bringing about his injuries, however, does not affect his recovery unless it is the sole proximate cause of his injuries.[64]

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61. Section 69 of the Act provides for a fine not to exceed $500 or imprisonment for not more than two years, or both for a conviction for its violation. The Director of Labor is charged with the duty of enforcing the Act through the State's Attorney's Office. These criminal sanctions, however, have rarely, if ever, been invoked.

62. Pain and suffering are considered common law damages; Worker's Compensation only provides recovery under its statutory schedules for disability pay.

63. This statutory lien against third parties for the amount paid under Worker's Compensation schedules theoretically prevents double recovery. ILL. REV. STAT. ch. 48, § 138.5(h) (1973).

64. Traditionally, the only true defense to a Structural Work Act cause of action was if the plaintiff's conduct was so negligent that it broke the causal connection between violation of the Act and the injuries and, therefore, rose to the level of the sole proximate cause of the accident. *See* Sorenson, *supra* note 34, at 559. *See also* Merlo v. Public Service Co., 381 Ill. 300, 45 N.E.2d 665 (1943).

Decisions under the Act are as perplexing as any dealing with statutory tort liability. Responsibility for a willful violation, regardless of actual knowledge of a dangerous scaffold, and liability for those in charge of the work, whether by contractual right or actual operation, extend the Act's coverage beyond reasonableness. The Act is a source of consternation to the insurance and construction industries alike. Because none of the standards are defined with any particularity, and because triers of fact decide many of the crucial issues of liability, recovery is the rule rather than the exception. Juries have generally been more sympathetic to the plight of the injured worker as opposed to the large contractor or insurance company.[65] This usually means that defendants are anxious to settle rather than to litigate the issues.

The nickname "Scaffold Act" is a misnomer and does not truly represent the range of devices for which an employer may incur liability. Today virtually any scaffolding device may fall within the parameters of the Act. Subsequent to the decision in *Louis*, a myriad of items had qualified as scaffolds, including: a permanent water cooling tower,[66] a wooden utility pole,[67] the roof of a newly-completed building,[68] plywood subflooring,[69] and the shorings of a sewer system.[70] The Act has also been found to apply to wooden planks placed over a muddy area of ground for unloading materials at a construction site,[71] and to a situation where materials were unloaded from a railroad car one-half mile from the actual construction site.[72] To further demonstrate some of the absurdities that are recognized as scaffolds, the Act specifically mentions "ladders" as contrivances falling within its protection,[73] conceivably, therefore, a short fall from a wobbly ladder will be treated in the same manner as a twenty-story plunge from a building.

The Structural Work Act, like other safety statutes, imposes strict liability for a violation of its terms. As a general rule in

65. The Illinois Supreme Court recently recognized the impact of "forum shopping" and potentially sympathetic juries in Madison or Cook County when it disallowed intrastate use of *forum non conveniens*. *See* Torres v. Walsh, 98 Ill. 2d 338, 456 N.E.2d 601 (1983).

66. Schroeder v. C.F. Braun & Co., 502 F.2d 235 (7th Cir. 1974).

67. Wood v. Commonwealth Edison Co., 343 F. Supp. 1270 (N.D. Ill. 1972).

68. St. John v. R.R. Donnelly & sons, 54 Ill. 2d 271, 296 N.E.2d 740 (1973).

69. Juliano v. Gravec, 53 Ill. 2d 566, 293 N.E.2d 897 (1973).

70. Navlyt v. Kalinich, 53 Ill. 2d 137, 290 N.E.2d 219 (1972).

71. Ashley v. Osman & Assoc., 114 Ill. App. 3d 293, 448 N.E.2d 1011 (1983).

72. McNellis v. Combustion Eng'g, Inc., 58 Ill. 2d 166, 317 N.E.2d 573 (1974).

73. *See* ILL. REV. STAT. ch. 48, § 60, *supra* note 1.

Illinois, proof of the violation of a statute is *prima facie* evidence of negligence.[74] The plaintiff need only prove that he is a part of the class of persons intended to be protected by the statute from the type of injury actually suffered.[75] The defenses of contributory negligence and assumption of risk are normally available under these statutes unless the language expressly disallows their use.[76]

Under other statutes designed to protect a segment of the public generally unable to protect itself, Illinois courts have imposed strict tort liability by finding a legislative intent.[77] Consistent with this policy, the defenses of contributory negligence and assumption of risk have been held inapplicable under those statutes.[78] The Illinois Supreme Court determined that the Structural Work Act was a special safety statute in *Barthel v. Illinois Central Gulf Railroad*.[79] The court postulated that "employees are considered unable to exercise constant vigilence to protect themselves from hazardous working conditions;"[80] such statutes have "long been interpreted to exclude the defense of contributory negligence."[81]

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74. Davis v. Marathon Oil, 64 Ill. 2d 380, 356 N.E.2d 93 (1976). Illinois is in the minority in this viewpoint. The majority of jurisdictions hold that a violation of statute which proximately causes an injury is negligence *per se*; a conclusive presumption of duty and breach of that duty. W. PROSSER, *supra* note 13, § 36. In Illinois, however, a defendant may still escape liability if he shows that he acted reasonably under circumstances since the violation is only *prima facie* evidence.

75. Ney v. Yellow Cab, 2 Ill. 2d 74, 117 N.E.2d 74 (1954).

76. Browne v. Siegel, Cooper & Co., 191 Ill. 226, 60 N.E. 815 (1901).

77. *See* Barthel v. Illinois Cent. G. R.R., 74 Ill. 2d 213, 384 N.E.2d 323 (1979); *see also* :Loschiavo v. Greco Constr., Inc., 106 Ill. App.3d 556, 435 N.E.2d 702 (1981).

Illinois courts have thus followed the rule as stated in the RESTATEMENT (SECOND) OF TORTS § 383, comment c (1971): "There are . . . exceptional statutes which are intended to place the entire responsibility for the harm which has occurred upon the defendant. A statute may be found to have that purpose particularly where it is enacted in order to protect a certain class of persons against their own inability to protect themselves." *Id.*

78. It has been held in Illinois that when the legislature creates a cause of action by means of a safety statute making willfulness the standard of liability, a proper construction of the statute prevents the use of contributory negligence as a defense. This is the rule even though the statute is silent on the point. *See, e.g.*, Carterville Coal Co. v. Abbott, 181 Ill. 495, 58 N.E. 131 (1899), interpreting the Coal Mining Act, after which the Structural Work Act was patterned. *See also* Vegich v. McDougal Hartmann Co., 84 Ill. 2d 461, 419 N.E.2d 918 (1981); Gannon v. Chicago, M., St. P. & Pac. Ry. Co., 22 Ill. 2d 305, 175 N.E.2d 185 (1961).

79. 74 Ill. 2d 213, 384 N.E.2d 323 (1978).

80. *Id.* at 222, 384 N.E.2d at 327, describing the Coal Mining Act and the Illinois Structural Work Act.

81. *Id. See* also Vegich v. McDougal Hartmann Co., 84 Ill. 2d 461, 419 N.E.2d 918 (1981).

Given the broad interpretation and application of the Act, and the perceived problems under it, some measures of reform should be considered. The acceptance of the doctrine of comparative negligence in Illinois and its recent application in strict product liability cases may provide a just and equitable solution.

COMPARATIVE FAULT AND STRICT PRODUCTS LIABILITY

Comparative Negligence as Adopted in Illinois

Comparative fault principles play a major role today in apportioning damages in tort actions. Although some elements of the doctrine have existed in this country for many years,[82] comparative fault or negligence has only recently become the rule in a majority of states.[83] The doctrine arose as an equitable alter-

82. During the mid-1900's, Illinois courts proceeded with their own form of comparative negligence. Galena & C. Union R.R. v. Jacobs, 80 Ill. 478 (1858). *See also* V. SCHWARTZ, COMPARATIVE NEGLIGENCE, § 1.5 at 18; Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 485 (1953). The accepted rule at this time, however, was the doctrine of contributory negligence. *See infra* note 84.

The Illinois courts' new approach made no effort to apportion damages, but merely allowed recovery where comparison revealed that "[t]he plaintiff's negligence [was] comparatively slight, and that of the defendant gross." *Galena & C. Union R.R. Co.*, 20 Ill. 478, 497. This reasoning was subsequently followed in several Illinois Supreme Court cases. *See* Illinois Cent. R.R. Co. v. Hammer, 72 Ill. 347 (1874); Indianapolis & St. Louis R.R. Co. v. Evans, 88 Ill. 63 (1878); Wabash, St. L. & Pac. Ry. Co. v. Moran, 13 Ill. App. 72 (1883). *See also* Alvis v. Ribar, 85 Ill. 2d 1, 421 N.E.2d 886 (1981) for a lengthy discussion on the trepid acceptance of this crude form of comparative negligence.

Illinois courts subsequently abandoned this experimental form of comparative negligence in the late 1800's and returned to the generally accepted doctrine of contributory negligence. *See* Calumet Iron & Steel Co. v. Martin, 115 Ill. 358, 3 N.E. 456 (1855) (negligence of plaintiff defeats his action); City of Leonard v. Dougherty, 153 Ill. 163, 38 N.E. 892 (1894) (any fault on the part of the plaintiff will bar his recovery).

Comparative negligence became a permanent part of American jurisprudence at the federal level with the adoption of the Federal Employers' Liability Act (FELA) in 1908. 45 U.S.C. § 53 (1979). Under the FELA, the negligence of an employee working for an interstate railroad carrier would not bar the worker's claim for injuries against his employer. Rather, recovery would be diminished in proportion to the amount of negligence attributable to the employee. V. SCHWARTZ, *supra*, § 1.4 at 11. The Act remains the law today, and is applied in both state and federal courts. *Id.* Additionally, the Act furnished the genesis for a myriad of state statutes establishing comparative negligence standards for actions by railroad employees and laborers. Prosser, *Comparative Negligence, supra* at 478-479. Congress later incorporated comparative negligence into the Jones Act in 1920, which provided similar protection to sailors who suffered physical injury or death in the course of their employment. 46 U.S.C. § 688 (1982).

83. Mississippi was the first state to adopt comparative negligence when it adopted the "pure" form in 1929. MISS. CODE ANN. § 11-7-15 (1972). For a discussion of "pure" comparative negligence, *see infra* note 90. Two years later, Wisconsin adopted the fifty percent or "modified" form of comparative negligence, also by statute. WIS. STAT. ANN. § 895.045 (1980). *See infra* note

native to the harsh rule that the contributory negligence of a plaintiff was a complete bar to his recovery.[84]

The Illinois Supreme Court adopted comparative negligence in the 1981 decision of *Alvis v. Ribar*.[85] In *Alvis*, the court deter-

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90. These legislatively enacted comparative negligence systems, however, failed to gain widespread support. By the mid-1960's, only six states had substituted comparative negligence for the harshness of contributory negligence; the four other states to do so were Maine, South Dakota, Washington and Arkansas. V. SCHWARTZ, *supra* note 82, § 1.1 at 1,2.

During the late 1960's, a new and concerted attack was undertaken on existing fault systems as inadequate methods of apportioning damages. The modification or abolition of contributory negligence was recognized during this time as an effective means for reforming such fault systems. Thereafter, numerous comparative fault statutes were adopted to achieve a more equal distribution of damages. Beginning in 1969 and continuing through the early 1970's, a large number of states accepted comparative negligence, leading to the conclusion that widespread use of the doctrine is a rather recent phenomenon in the law. *See* V. SCHWARTZ, *supra* note 82, at § 1.1 for a list of states and adoption dates.

It has been speculated though, that comparative negligence as a method of apportioning damages preceded contributory negligence, possibly dating as far back as the law of ancient Rome. *See* V. SCHWARTZ, *supra* note 82, § 1.3 at 9 (1974). Comparative negligence was particularly used in admirality settings. *Id.* The general rule that the contributory negligence of a plaintiff acted as a complete bar to recovery originated in the 1809 English case of Butterfield v. Forrester. 11 East 60, 103 Eng. Rep. 926 (1809). In *Butterfield*, the defendant had placed a pole across part of a public road. The plaintiff, riding his horse too fast to see the obstruction, rode into the pole and was injured. Chief Justice Lord Ellenborough introduced the concept of contributory negligence by holding, "[t]wo things must concur to support this action, an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff." *Id.* at 61, 103 Eng. Rep. at 927. However, it should be noted that England, where contributory negligence originated, has long since abandoned the doctrine in favor of a system of comparative negligence. For a discussion, *see, e.g.*, Maki v. Frelk, 85 Ill. App.2d 439, 229 N.E.2d 284 (1967), *rev'd on other grounds*, 40 Ill.2d 193, 239 N.E.2d 445 (1968).

The *Butterfield* rule was readily accepted in the United States primarily to protect young industries from the burdensome costs of successful negligence claims. Contributory negligence was first adopted in America in Smith v. Smith, 19 Mass. (2 Pick.) 621 (1824). The doctrine became the general rule towards the turn of the century, or at the height of the Industrial Age. For an historical perspective on the evolution of contributory negligence in America, and the concerns surrounding its approval in the late eighteenth and early nineteenth centuries, see Turk, *Comparative Negligence on the March*, 28 CHI. KENT L. REV. 189 (1950). The Illinois Supreme Court initially adopted the *Butterfield* approach in 1852.

84. Aurora Branch R.R. Co. v. Grimes, 13 Ill. 585 (1852). In *Grimes* the court held that there must be "no want of ordinary care on the part of the plaintiff" to allow him to recover. *Id.* at 587. This language is similar to that used by Chief Justice Lord Ellenborough in *Butterfield*. Further, the court in *Grimes* held the plaintiff must prove freedom from fault to recover, a practice still required by some courts. *Id.*

85. 85 Ill. 2d 1, 421 N.E.2d 886 (1981). However, in the earlier case of Maki v. Frelk, 40 Ill. 2d 193, 239 N.E.2d 445 (1968), the Illinois Supreme Court refused to take up the issue of whether comparative negligence should be adopted in Illinois. Instead, the court held that such a "far-reaching

mined that comparative negligence "produces a more just and socially desirable distribution of loss [as] demanded by today's society."[86] The "protective barrier" of contributory negligence, the court continued, was no longer necessary,[87] and Illinois could "continue to ignore the plight of plaintiffs who, because of some negligence on their part, [were] force[d] to bear the entire burden of their injuries."[88] While the court conceded that percentage allocations of fault under the doctrine are approximations, it nonetheless concluded that these results were superior to the harsh "all-or-nothing" rule of contributory negligence.[89] The court adopted the "pure" form of comparative negligence, finding that it was the only system which truly apportions damages according to the relative fault of the parties and consequently achieves "total justice."[90] Finally, the court recognized

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change" in the law should be effected by the General Assembly." *Id.* at 196, 239 N.E.2d at 447.

In so deciding, the court failed to follow an appellate court opinion which had considered the issue at the direct request of the high court. Maki v. Frelk, 40 Ill. 2d 439, 229 N.E.2d 284 (1967), *rev'd on other grounds*, 40 Ill. 2d 193, 239 N.E.2d 445 (1968).

The Illinois Supreme Court had originally received the case on direct appeal, but directed the action to the appellate court for a recommendation on whether or not to abolish contributory negligence. The appellate court was convinced that the contributory negligence defense did not meet modern demands because it resulted in a poor distribution of loss for an accident. Maki v. Frelk, 85 Ill. App. 2d 439, 229 N.E.2d 284 (1967), *rev'd on other grounds*, 40 Ill. 2d 193, 239 N.E.2d 445 (1968). The appellate court rejected the argument that the change should be left up to the legislature, instead reasoning that contributory negligence was created by the courts and could be abolished by the courts. *Id.* at 452, 229 N.E.2d at 291.

Although the appellate court entered judgment accepting comparative negligence in a lengthy opinion citing historical aspects, the supreme court reversed in a short and tersely-worded five-to-two majority opinion. *Maki*, 40 Ill. 2d 193, 293 N.E.2d 445. Several years later, the Florida Supreme Court became the first state high court to adopt comparative negligence by judicial action. Hoffman v. Jones, 280 So.2d 431 (Fla. 1973).

86. Alvis v. Ribar, 85 Ill. 2d at 17, 421 N.E.2d at 893.

87. *Id.* The court said that Illinois "cannot continue to ignore the plight of plaintiffs who, because of some negligence on their part, are forced to bear the entire burden of their injuries." *Id.* at 24, 421 N.E.2d at 896. The court also noted that contributory negligence protects the nation's industries at the expense of deserving litigants. While the doctrine originally evolved to protect young industries at the height of the Industrial Age, today most cases against industrial defendants are brought under worker's compensation acts for which the plaintiff's negligence does not act as a bar. *Id.* at 16, 421 N.E.2d at 893.

88. *Id.* at 24, 421 N.E.2d at 896.

89. *Id.* at 18, 421 N.E.2d at 893.

90. The court reasoned that this was the "only system which truly apportion[ed] damages according to the relative fault of the parties and, thus, achieve[d] total justice." *Id.* at 27, 421 N.E.2d at 898.

Many other states adopting comparative negligence have applied the "modified" form, which allows a plaintiff to recover for his injuries only if his negligence was not as great as that of the defendant. Some forms allow

that a jury would disdain the harshness of contributory negligence and apportion damages according to its own measure of relative fault.[91] The court found this "proclivity of juries to ignore the law to be a compelling reason for abolition of that law."[92]

Under *Alvis*, the Illinois Supreme Court decided it could no longer defer the decision on comparative negligence to the legis-

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the plaintiff to recover as long as his negligence did not amount to either forty-nine or fifty percent of the fault. Other forms still look to a "slight-gross" approach under which a plaintiff may recover only if his negligence was "slight" while that of the defendant was "gross," however, few jurisdictions have adopted this approach.

Most states adopting the modified form have done so by legislative enactment: Arkansas, ARK. STAT. ANN. §§ 27-1763 to 27-1765 (1979); Colorado, COLO. REV. STAT. § 13-21-111 (1973); Connecticut, CONN. GEN. STAT. ANN. § 52-572h (West 1980); Hawaii, HAWAII REV. STAT. § 663-31 (1976); Idaho, IDAHO CODE §§ 6-801, 6-82 (1979); Kansas, KAN. STAT. ANN. § 60-258a (1976); Maine, ME. REV. STAT. ANN. tit. 14, § 165 (1980); Massachusetts, MASS. GEN. LAWS ANN. ch. 231, § 85 (West 1978); Minnesota, MINN. STAT. ANN. § 604.01 (West 1981); Montana, MONT. CODE ANN. § 27-1-702 (1983); Nebraska, NEB. REV. STAT. § 25-1151 (1979) ("slight-gross"); Nevada, NEV. REV. STAT. § 41.141 (1979); New Hampshire, N.H. REV. STAT. ANN. § 507:7-1 (1983); New Jersey, N.J. STAT. ANN. § 2A:15-5.3 (West 1980-81); North Dakota, N.D. CENT. CODE § 9-10-07 (1975); Oklahoma, OKLA. STAT. ANN. tit. 23, §§ 13 to 14 (West 1980-81); Oregon, OR. REV. STAT. §§ 18.470, 18.480, 18.490 (1979); Pennsylvania, PA. STAT. ANN. tit. 42, § 710a (Purdon 1980); South Dakota, S.D. COMP. LAWS ANN. § 20-9-2 (1979) ("slight" versus "gross"); Utah, UTAH CODE ANN. § 78-27-37 (1977); Vermont, VT. STAT. ANN. tit. 12, § 1036 (1973); Wisconsin, WIS. STAT. ANN. § 895.045 (West 1980); Wyoming, WYO. STAT. § 1-1-109 (1977). West Virginia adopted the "modified" approach by judicial decision. Bradley v. Appalachian Power Co., 256 S.E.2d 879 (W. Va. 1979).

On the other hand, under the "pure" form of comparative negligence, the plaintiff is allowed to recover even if his negligence is more responsible than the defendant's. The plaintiff's damages are then reduced by his percentage fault.

In addition to Illinois, the states adopting the "pure" comparative negligence approach include: Alaska, in Kaatz v. State, 540 P.2d 1037 (Alaska 1975); California, in Li v. Yellow Cab Co., 13 Cal. 3d 804, 119 Cal. Rptr. 858, 532 P.2d 1226 (1975); Florida, in Hoffman v. Jones, 280 So.2d 431 (Fla. 1973); Michigan, in Placek v. City of Sterling Heights, 405 Mich. 638, 275 N.W.2d 511 (1979); and New Mexico, in Claymore v. City of Alberquerque, 96 N.M. 682, 634 P.2d 1234 (1980).

States adopting the "pure" form by statute include: Louisiana, LA. CIV. CODE ANN. art. 2323 (West 1981); Mississippi, MISS. CODE ANN. § 11-7-15 (1972); New York, N.Y. CIV. PRAC. LAW §§ 1411-1413 (McKinney 1976); Rhode Island, R.I. GEN. LAWS § 9-20-4 (1980).

The pure form is not without its critics, in spite of what the Illinois Supreme Court said in *Alvis*. The chief criticism is that a plaintiff who is more at fault than the defendant should not be allowed to recover.

91. Alvis v. Ribar, 85 Ill. 2d at 20, 421 N.E.2d at 894.

92. *Id.* Indeed, one commentator has suggested that one reason for the change to contributory negligence is the fact that juries had been "compromising" by returning verdicts for the plaintiff with substantially reduced damage awards instead of completely barring the plaintiff's recovery. Fleming, *supra* note 13, at 242-43.

lature.[93] The doctrine had become the majority approach in this country, with an increasing number of states accepting comparative fault principles by judicial fiat.[94] Recognizing the absurd harshness of denying a plaintiff full recovery if he was even slightly at fault, the court in *Alvis* settled on a more preferred equitable course. A plaintiff's relative culpability will now be compared to the defendant's fault, with the ultimate damage award reduced proportionately.

Alvis did not make comparative negligence applicable in every tort action, but only in negligence actions. The question remained whether this theory of the equitable apportionment of damages according to the relative culpability of the parties could be extended to other areas of tort law. Fault between joint tortfeasors had recently been distributed proportionately under the Contribution Act.[95] Strict products liability then became a prime target for the possible imposition of comparative fault.

Strict Products Liability and the Application of Comparative Fault in Coney

Under the doctrine of strict products liability, the manufacturer or seller of a defective product which was unreasonably dangerous to the user or consumer will be held strictly liable for the injuries proximately caused.[96] The first case to allow recovery based on strict liability was *Greenman v. Yuba Power Products*.[97] The American Law Institute subsequently drafted Section 402A of the Restatement (Second) of Torts in 1964 to coincide with this emerging doctrine.[98] Today, products liability has been adopted by a majority of the states[99] including

93. *See supra* note 85.

94. *See* V. SCHWARTZ *supra* note 82, § 1.1 at 2-3.

95. *See* ILL. REV. STAT. ch. 70 § 302(a), which was enacted after the decision in Skinner v. Reed-Prentice Div. Pack Mach. Co., 70 Ill. 2d 1, 374 N.E.2d 442 (1978), which allowed contribution among joint tortfeasors.

96. *See supra* note 14.

97. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). In *Greenman*, the California Supreme Court said that a manufacturer was strictly liable in tort when an article he placed on the market "knowing that it [was] to be used without inspection for defects, prove[d] to have a defect that cause[d] injury to a human being." *Id.* at 63, 377 P.2d at 900, 27 Cal. Rptr. at 700. *See also* Hennsingsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).

98. *See supra* note 14 for the accepted statement of products liability theory as promulgated by the American Law Institute in the RESTATEMENT (SECOND) OF TORTS § 402A (1977).

99. Some states have specifically adopted § 402A by judicial decision. They include: Arizona, Connecticut, Florida, Hawaii, idaho, Indiana, Iowa, Kentucky, Mississippi, Missouri, Montana, New Hampshire, New Mexico,

Illinois.[100]

The Illinois Supreme Court adopted strict products liability in *Suvada v. White Motor Co.*[101] The *Suvada* court cited public policy concerns in holding that strict products liability is a proper cause of action in Illinois.[102] Specifically, the controlling concerns were public health and safety, the inducement to buy, and the justice of imposing loss on the party who creates the risk and also reaped the benefit of the defective product.[103] The court in *Suvada* found strict liability for defective products effectively distributes the individual's loss to the entire consumer market while still providing an incentive for the manufacturer to produce safer products.[104]

With the judicial recognition of both strict products liability and comparative negligence in Illinois, a decision had to be made whether the two could be merged. The supreme court had already determined that contributory negligence was not a bar to a products liability action,[105] although misuse and assump-

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Oklahoma, Oregon, Pennsylvania, Rhode Island, Texas, Washington and Wisconsin.

Other states have adopted the substantial equivalent of § 402A by judicial decision. They include: Alaska, California, Illinois, Louisiana, Michigan, Minnesota, Nebraska, Nevada, New Jersey, New York, Ohio and Tennessee.

In addition, two federal courts have predicted that § 402A will be adopted in the following states: Utah (10th Circuit Court of Appeals) and Vermont (2d Circuit Court of Appeals).

For a list of the relevant cases, *see* West v. Caterpillar Tractor Co., 336 So.2d 80, 87 (Fla. 1976).

100. Suvada v. White Motor Co., 32 Ill. 2d 618, 210 N.E.2d 182 (1963).

101. 32 Ill. 2d 612, 210 N.E.2d 182 (1965). In *Suvada*, the court first noted that strict liability previously existed in the law against the seller of unwholesome food solely based on public policy. The court then reasoned that there was no reason not to impose strict liability in cases involving products other than food. *Id.* at 617-19, 210 N.E.2d at 185-86. Strict liability, the court continued, would neither be based on negligence or warranty theories, and lack of privity would be no defense. *Id.* at 622, 210 N.E.2d at 190. Yet the court recognized that strict liability does not make a manufacturer or seller an absolute insurer of a product. In order to recover, the court said, a plaintiff must prove: the injury was proximately caused by the defective condition of the product; the condition was unreasonably dangerous; and the defect existed at the time the product left the defendant's control. *Id.* at 623, 210 N.E.2d at 188.

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

103. *Id.*

104. *Id.* at 624, 210 N.E.2d at 191. *See also Fisher*, *supra* note 13, at 432. *See generally* West v. Caterpillar Tractor Co., 336 So.2d 80 (Fla. 1976).

105. Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 261 N.E.2d 305 (1970). In doing so, the court agreed with the reasoning of comment n of § 402A, which reads in part:

> Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. On the other hand the form of contributory negligence which consists in voluntarily and

tion of risk remained complete defenses. After analyzing and comparing the policy considerations behind each doctrine, legal scholars, however, advocated application of comparative fault in strict product liability actions.[106]

The main contention against merger of the two principles was that no adequate basis of comparison exists between them.[107] Strict products liability is predicted on liability for a defective product without regard to fault, conversely, comparative negligence is concerned with blameworthy conduct. Both case law and legal commentators have, nonetheless, devised methods of bypassing this apparent lack of compatability. Such methods include redefining the defendant's conduct in placing a defective product on the market as "fault" and comparing this

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unreasonably proceeding to encounter a known danger, and commonly passes under the name assumption of risk, is a defense under this Section as in other cases of strict liability.

RESTATEMENT (SECOND) OF TORTS § 402A, comment n (1977).

See also Liberty Mut. Ins. Co. v. Williams Mach. & Tool Co., 62 Ill. 2d 77, 84, 338 N.E.2d 857, 861 (1975). The court held the purposes of strict products liability were "best accomplished by eliminating negligence as an element of any strict liability action, including indemnity actions in which the parties are all manufacturers or sellers" *Id.* at 82, 338 N.E.2d at 860. Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 261 N.E.2d 305 (1970) (policy behind strict liability compels elimination of contributory negligence as a bar to recovery).

But see Skinner v. Reed-Prentice Div. Package Mach. Co., 70 Ill. 2d 1, 14, 374 N.E.2d 437, 442 (1978) (the Illinois Supreme Court, adopting contribution among tortfeasors in a products liability case, said that the "ultimate liability for [the] plaintiff's injuries [should] be apportioned on the basis of the relative degree to which the defective product and the employer's conduct proximately caused [the injuries]"), *cert. denied, 436 U.S. 946.*

106. *See* Brewster, *Comparative Negligence in Strict Liability Cases*, 42 J. AIR L. COM. 107 (1976); Carestia, *The Interaction of Comparative Neglience and Strict Products Liability—Where Are We?*, 47 INS. COUNCIL 53 (1980); Feinberg, *supra* note 16; Freedman, *The Comparative Negligence Doctrine Under Strict Liability: Defendant's Conduct Becomes Another "Proximate Cause" of Injury, Damage of Loss*, 1975 INS. L.J. 486; Razook, *Merging Comparative Fault and Strict Liability: The Case for Judicial Innovation*, 20 AM. BUS. L.J. 511 (1983); Schwartz, *Strict Liability and Comparative Negligence*, 42 TENN. L. REV. 171 (1974); Vetri, *Products Liability: The Developing Framework for Analysis*, 54 OR. L. REV. 293 (1975).

Contra, Levine, *supra* note 16. *See also* Twerski, *The Use and Abuse of Comparative Negligence in Products Liability*, 10 IND. L. REV. 797 (1977), in which the author suggested that there are some unique instances in which comparative negligence is properly applied to strict liability cases. However, more often than not comparative fault should not be uniformly extended without considering other factors, the author concluded.

107. Basically, it has been advocated that comparing both principles is like attempting to compare "apples to oranges" or trying to mix oil and water. *See* Feinberg, *supra* note 16, at 52; Fisher, *supra* note 13, at 434; Twerski, *supra* note 106 at 806. On the other hand, comparative determinations have long been made in admissability cases, another form of strict liability. *See* Calley & Thomas, *Comparative Negligence Principles and Strict Liability—Practice Confluence or Confusion?* 19 TRIAL 58, 60 (Nov. 1983). *See also* Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953).

fictitious fault with the plaintiff's actual fault.[108] The relative causative roles the plaintiff and defendant had in producing the injury could also be compared.[109] Finally, once the defendant is found guilty, damages may merely be apportioned according to the quantum of the plaintiff's fault.[110]

Despite the apparent incompatability and obvious semantic difficulties, jurisdictions have found the doctrine of comparative fault applicable in strict liability cases either by judicial mandate[111] or by statute.[112] Moreover, many courts have consistently expressed confidence that juries, as the triers of fact, can make meaningful comparisons without confusion.[113] Following this line of authority, the Illinois Supreme Court was persuaded to merge comparative fault with strict liability in *Coney v. J.L.G. Industries*.[114] In so doing, the court acknowledged that although it appears theoretically impossible to balance the strict liability

108. *See* Fisher, *supra* note 13, at 442, for an excellent summary of the accepted methods of comparison. The author here conceptualizes the defendant's fictitious fault as falling into two general categories: "social fault" for marketing defective products or "legal fault" arising from a breach of the duty to market defect-free products. *Id.*

109. *See* Fisher, *supra* note 13, at 444-47. However, the author vehemently argued against this approach, calling it "random" and insisting that it yields inappropriate results. *Id.*

This appears, though, to be the basic approach adopted by the Illinois Supreme Court in *Coney*. *See infra* notes 117, 118 and accompanying text. *See also* Murray v. Fairbanks Morse, 610 F.2d 149 (3d Cir. 1979).

110. *See* Fisher, *supra* note 13, at 449-50. This approach was suggested by the author as resulting in the most equitable distribution of costs and damages. *Id.*

111. *See also* Murray v. Fairbanks Morse, 610 F.2d 149 (3d Cir. 1979); Edwards v. Sears, Roebuck & Co., 512 F.2d 276 (5th Cir. 1975) (applying Mississippi law); Zahrte v. Sturm, Ruger & Co., 498 F. Supp. 389 (D. Mont. 1980) (interpreting Montana law); Sun Valley Airlines, Inc. v. Avco-Lycoming Corp., 411 F. Supp. 598 (D. Idaho 1976) (applying Idaho Law); Butand v. Suburban Marine & Sporting Goods, 55 P.2d 42 (Alaska 1976); Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978); West v. Caterpillar Tractor Co., 336 So.2d 80 (Fla. 1976); Kennedy v. City of Sawyer, 228 Kan. 439, 168 P.2d 788 (1980); Tulkun v. Macksworth Rees, 101 Mich. App. 709, 301 N.W.2d 46 (1980); Busch v. Busch Const., Inc., 262 N.W.2d 377 (Minn. 1977); Thibault v. Sears, Roebuck & Co., 118 N.H. 802, 395 A.2d 843 (1978); Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 406 A.2d 140 (1979); Scott v. Rizzo, 96 N.M. 682, 634 P.2d 1234 (1981); Wilson v. B.F. Goodrich, 292 Or. 3, 597 P.2d 351 (1982); General Motors Corp. v. Hopkins, 548 S.W.2d 344 (Tex. 1977); Mulherin v. Ingersoll-Rand Co., 628 P.2d 1301 (Utah 1981); Sands v. A.B. Chance Co., 635 P.2d 728 (Wash. 1981); Dippel v. Sciano, 37 Wis.2d 443, 155 N.W.2d 55 (1967).

112. *See* ARK. STAT. ANN. §§ 27-1763 and 27-1765 (1979); ME. REV. STAT. ANN. tit. 14, § 156 (1964); MICH. COMP. LAWS ANN. § 600.2949 (1982); N.Y. CIV. PRAC. LAW § 1411 (McKinney 1976); R.I. GEN. LAWS § 9.20-4 (1980); WASH. REV. CODE ANN. § 4.22.005-4.22.015 (1982).

113. *See* Colley and Thomas, *supra* note 107, at 60. Specifically, the use of special interrogatories to the jury on the issue of comparative fault would act as a central measure by the court. *Id.*

114. 97 Ill. 2d 104, 454 N.E.2d 197 (1983).

of a defendant against a user's negligence, "other courts and their juries have been able to do so."[115]

The court in *Coney* found that "equitable principles" required a plaintiff's total damages be apportioned according to the relative degree by which his conduct caused the injuries.[116] Citing with favor the opinion of the Third Circuit Court of Appeals in *Murray v. Fairbanks Morse*,[117] the court decided that the defendant's defective product and the plaintiff's misconduct should be compared in terms of the causative contribution of each in bringing about the injury.[118] Once a defendant's liability is established, and it is determined that both the defective product and the plaintiff's misconduct contributed to cause the injury, then the doctrine of comparative fault will merely reduce the plaintiff's recovery in proportion to the amount of his fault.[119]

Further, the court held that the defenses of assumption of risk and misuse will no longer completely bar recovery as each will now be compared in terms of the apportionment of damages.[120] Conduct amounting to a failure to discover or guard against a defect, however, will not be compared as a damage-reducing factor.[121] Comparative fault under *Coney* then in-

115. *Id.* at 116, 454 N.E.2d at 202. While this assertion may seem to beg the question, the court cited Professor Schwartz as support for its finding. *Id.* at 117, 454 N.E.2d at 202. Professor Schwartz wrote that while a jury might have some difficulty making the calculation required under comparative negligence where a defendant's responsibility was based on strict liability, "this obstacle is more conceptual than practical." *Id.*, *quoting*, V. SCHWARTZ, *supra* note 82, § 12.7 at 208-09. "Triers of fact are apparently able to do this, and the benefits for this approach suggest it be applied in all comparative negligence jurisdictions." *Id.*

116. Coney v. J.L.G. Industries, 97 Ill. 2d at 118, 454 N.E.2d at 203. The California Supreme Court called the difficulty more semantic than conceptual. *See* Daly v. General Motors Corp., 26 Cal. 3d 725, 825 P.2d 1162, 144 Cal. Rptr. 380 (1978).

117. 610 F.2d 149 (3d Cir. 1979).

118. Coney v. J.L.G. Industries, 97 Ill. 2d at 117, 454 N.E.2d at 203. "The only conceptual basis for comparison is the causative contribution of each to the particular loss or injury. In apportioning damages we are really asking how much of the injury was caused by the defect in the product versus how much was caused by the plaintiff's own actions." *Id.* at 118, 454 N.E.2d at 204, *citing*, Murray v. Fairbanks Morse, 610 F.2d 149, 159 (3d Cir. 1979). *See also* Thibault v. Sears, Roebuck & Co., 118 N.H. 802, 395 A.2d 843 (1978).

119. Coney v. J.L.G. Industries, 97 Ill. 2d at 118, 454 N.E.2d at 204. "Thus, the defendant remains strictly liable for the harm caused by its defective product, except for that part caused by the consumer's own misconduct." *Id.*

120. *Id.*

121. Coney v. J.L.G. Industries, 97 Ill. 2d at 119, 454 N.E.2d at 344. In Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 261 N.E.2d 305 (1970), the court adopted misuse and assumption of risk as complete bars to a products liability action, but held that the "mere failure to discover a defect in the product, or to guard against the possibility of its existence," was not a defense.

cludes only conduct by the plaintiff amounting to misuse or assumption of risk. Arguably, failure to discover or guard against a defect, which will not affect the plaintiff's recovery, is conduct akin to traditional contributory negligence.[122] Therefore, misuse and assumption of risk, while no longer absolute defenses, will be compared as culpable conduct, yet the plaintiff's contributory negligence will continue to operate as a complete defense.

A careful analysis of the *Coney* decision reveals that the court relied upon the underlying policy reasons behind both strict products liability and comparative neglience to find the two compatible. The court noted that privity and a manufacturer's negligence would continue to be irrelevant and that comparative fault would in no way lessen the manufacturer's duty to produce reasonably safe products.[123] Moreover, the risks associated with a defective product would still be spread among consumers after *Coney*, but the loss associated with the plaintiff's own fault would not.[124] Most importantly though, the essential cause of action would remain unchanged. A strict products liability plaintiff would still be relieved of proof problems inherent in negligence and warranty actions.[125] A defendant's liability would remain strict after the merger, because only his responsibility for damages would be lessened by the consumer's contribution to the injuries. Moreover, the *Coney* court determined that misuse and assumption of risk will no longer act as complete bars, but rather will be interpreted as damage-reducing factors.[126]

Id. at 423, 261 N.E.2d at 310. *See also supra* note 106. This position has been continuously followed by Illinois courts.

The court in *Coney* adhered to this statement of law, holding "that a consumer's unobservant, inattentive, ignorant or awkward failure to discover or guard against a defect should not be compared as a damage-reducing factor." *Coney*, 97 Ill. 2d at 119, 454 N.E.2d a 344.

122. *See* Dripps, *Comparative Fault and Comparative Negligence—Is There a Difference?* ILL. B.J. 16 (Sept. 1983). The author theorizes that the *Coney* court's consistent reference to "comparative fault" in its opinion was excepting acts of contributory negligence as it has evolved in Illinois, or failure to guard against or discover unknown defects, from the computation of damages. *Id.* at 19.

123. *Coney*, 97 Ill. 2d at 116, 454 N.E.2d at 202. Indeed, the court said that the application of comparative fault in strict liability actions "would not frustrate the court's fundamental reasons for adopting products liability as set out in *Suvada*." *Id.* Therefore, due care and privity continue to be irrelevant to a manufacturer or seller's defense in a product liability action.

124. *Id.* In this regard, the court noted, "[w]here the allocation of losses properly can be apportioned, we see no reason to spread the cost of the loss resulting from plaintiff's own fault on to the consuming public." *Id. See also* Fisher, *supra* note 13, at 433.

125. *Coney*, 97 Ill. 2d at 116, 454 N.E. at 202.

126. *Id.*

THE CASE FOR EXTENSION OF COMPARATIVE FAULT TO THE STRUCTURAL WORK ACT

Now that Illinois has broken the barrier and applied the doctrine of comparative negligence to a strict liability setting, the groundwork is set to extend comparative fault to the Structural Work Act. The fears that led to the abolition of assumption of risk and contributory negligence as defenses to scaffold actions, i.e., that workers would be precluded from recovery where they were partially at fault, no longer exist in a comparative fault system.[127]

Potential inequities exist for both plaintiffs and defendants if comparative fault is not extended to the Structural Work Act. Damages are to be apportioned according to the plaintiff's relative culpability after *Coney* and *Alvis*, and the fault of the plaintiff in producing the injury will not preclude recovery.[128] If comparative fault is to be applied to the Structural Work Act, the level of a plaintiff's culpable conduct arising from his failure to discover or guard against a defective scaffold, or traditional contributory negligence, will not be compared in determining the final damage award. However, misuse will no longer bar the course of action and require a severely injured plaintiff to bear the entire burden of his injury.

As for defendants, they would have the defense of comparative fault available to proportionately reduce the plaintiff's recovery when appropriate. Pragmatically, juries would be more likely to find instances of misuse and reduce a damage award instead of barring it completely. Defendants would be entitled to a "set off" based on a plaintiff's relative fault, resulting in a more equal distribution of damages.

The considerations in *Coney* that led to the application of comparative fault to strict products liability are analogous to those behind the Structural Work Act. Each is concerned with

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127. Comparative negligence, of course, would be used merely to apportion damages between parties and would not result in a bar to the plaintiff's recovery based on his own conduct. Assumption of risk, normally a complete defense in a Scaffold Act cases, has also been held to fall under comparative negligence as a damage-apportioning factor. Therefore, these fears no longer exist. *See* Coney v. J.L.G. Industries, 97 Ill.2d 104, 454 N.E.2d 197 (1983). *See also supra* text accompanying note 11.

128. This indeed "produces a more just and socially desirable distribution of loss [as] demanded by today's society." *See* Alvis v. Ribar, 85 Ill. 2d 1, 7, 421 N.E.2d 886, 893 (1981).

Comparative negligence was adopted in ordinary negligence cases in *Alvis*. *See supra* note 85 and accompanying text. In *Coney*, the court determined that, once a defendant is found strictly liable, comparative negligence will act to reduce the plaintiff's damage award by the degree of the plaintiff's own relative fault. *See supra* notes 114, 119 and accompanying text.

promoting health and safety, although products liability is more concerned with the general consuming public. Each may exert economic pressure to force compliance. Both areas of law would impose strict liability on a defendant that supplied a defective device, be it a product or a scaffold. Courts have already held that liability in a Structural Work Act case may be shifted to the party which placed a defective scaffold in the stream of commerce, following the reasoning in *Suvada*.[129]

The policy decisions and judicial intent behind passage of the Structural Work Act would no more be frustrated by application of comparative fault, than would the concerns underlying strict products liability. Comparative fault does not reduce the manufacturer's duty to produce safe products and it would not lessen the contractor's or owner's duty to provide safe scaffolds. Contractors would still be required by statute to furnish safe working conditions subject to civil action. Parties "in charge of" construction work would be no less responsible for providing safe, non-dangerous, non-defective scaffolds, and the protection of construction workers in their "extrahazardous occupations" would continue.

Most importantly, though, the Structural Work Act cause of action would itself remain unchanged. A plaintiff under the Act would still be relieved of proof problems associated with common law negligence actions in much the same way as in a products liability action. A defendant would remain liable for a willful violation once the elements were met, but damages would merely be apportioned according to the approximate amount by which a worker's unforseeable conduct contributed to his injury. The costs resulting from injuries to workers would be spread throughout the industry and consequently to the general public, achieving the same risk-spreading goals established under products liability theory,[130] and the public would not be required to absorb those costs that were associated with the plaintiff's own fault.

The argument that there exists no adequate basis of comparison between comparative fault and the no-fault liability of

129. In Texaco, Inc. v. McGrew Lumber Co., 117 Ill. App. 2d 351, 254 N.E.2d 584 (1969). The plaintiff filed a Structural Work Act complaint against a lumber company which had supplied lumber for a scaffold that broke, causing the plaintiff to fall and sustain severe injuries. The defendant responded with a third-party action against the lumber company which had supplied them with the defective lumber. The court held that the supplier of a defective scaffold will be ultimately liable in a Structural Work Act case, citing public policy considerations announced in *Suvada* as controlling. *Id.* at 372, 254 N.E.2d at 598.

130. *See supra* notes 118-19 and accompanying text.

the Scaffold Act was resolved in *Coney*.[131] The relative contributory fault of each party in causing the injury would be compared in terms of the apportionment of damages, much the same as in a products liability action. The amount by which the plaintiff's own misconduct reduced the damage award would be a proper determination for the jury under the proximate cause issue of the Act. Juries have been approximating culpable conduct since 1981 under the *Alvis* decision and now, after *Coney*, they are doing so in products liability cases. It can hardly be said, then, that juries could not perform that same function in Structural Work Act cases.[132]

Application of comparative fault would also resolve inconsistencies in the law which arise depending on which theory of recovery is pleaded. Negligence still plays a viable role in both products liability and Structural Work Act cases, despite the fact that both are based on strict liability. In a single case, alternative counts of common law negligence and strict products liability may be alleged. Prior to *Coney*, conduct by the plaintiff which amounted to contributory negligence would have reduced his recovery on the negligence count, yet it would have still allowed for total recovery on the strict liability count. The *Coney* decision rectified this inconsistency in the law, as comparative fault now apportions recovery according to culpability. An anamolous situation currently exists under the Structural Work Act. Comparative fault by the plaintiff would still result in a complete recovery under the Act, yet that same conduct might diminish his recovery on the negligence count. Common sense suggests an approach which is consistent in its treatment, whether founded in negligence or strict liability.

Third party actions for contribution or indemnity also cause the degree of fault or negligence to enter scaffold cases, thereby creating another incongruity in the law. A defendant charged with willful violation of the Act may file a third-party action for contribution and indemnity against another party alleging that party's negligence was the cause of the accident. Although the primary action against the defendant may be framed in strict liability, the subsequent contribution claim could be based in ordinary negligence. The application of comparative fault would further recognize the overall culpability of the conduct that contributed to the injury and apportion responsibility accordingly.

131. *See supra* notes 117-19 and accompanying text.

132. Implicit to comparative negligence is its dependence on the jury as triers of fact in making rational and equitable allocations of responsibility. *See* Colley & Thomas, *supra* note 107, at 60. The jury can make these decisions in product liability settings and there is no reason to believe they could not do the same under the Scaffold Act.

Considering the amorphous definitional aspects of the Act, and the fact that it exists as a remedy beyond that contemplated by its drafters, the Scaffold Act is in need of reform. The lack of guidelines to determine a violation of the Act's provisions has produced vacillating and erratic results, much to the chargrin of those who must defend the actions. The range of products found to fall within the Act's duty to provide safe scaffolds "and other devices" permits almost limitless liability. Incongruously, the plaintiff's conduct, which may be an integral factor in causing the accident, is virtually immaterial in computing damages.

The retention of industry and the attraction of new construction within a state are legitimate goals of any government. Yet due in part to the Structural Work Act, which imposes a potential liability unlike that found in any other state,[133] insurance rates for construction projects in Illinois are among the highest in the country.[134] These inflated rates, in turn, cause higher construction costs within the state, arguably imposing a barrier to new construction starts here. Given the state-wide concern that industry is moving out of Illinois while little new business is being generated in the state,[135] courts should re-evaluate the Act.

The recent case of *Doyle v. Rhodes*[136] may have signaled the approval of the application of comparative fault to the Structural Work Act. The Illinois Supreme Court in *Doyle* allowed comparison of the relative culpability of parties under a safety statute similar to the Structural Work Act in a contribution setting.[137]

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133. With the advent of Worker's Compensation Acts, other states with statutes similar to the Scaffold Act have not relied on them to the extent that Illinois has. For example, the New York statute, which provided the pattern for the Illinois act, is interpreted as imposing liability only on those directly controlling the work. Similarly, an Oklahoma statute containing the words "having charge of" is held to require direct control over the details of the work. Courts in Oregon have determined that their statute only reaches persons directly in control of the work which causes the injury. *See generally Structural Work Act*, *supra* note 10, at 402-03.

134. Interviews with Chicago-area insurance company officers, executives, and adjusters, July 1983 through January 1984. *See also Structural Work Act*, *supra* note 10, at 402-03. Only New York, with a statute somewhat similar to the Illinois Structural Work Act in form but not in usage, has insurance rates that are as high as those imposed in Illinois. *Id.*

135. The flight of industry from Illinois, particularly to the south and to the sun belt states, has been a topic of much discussion by politicians and the media. Numerous newspaper articles have chronicled this state-wide flight and its impact on the Illinois economy.

136. Nos. 57540, 57554, slip op. (Ill. May 1983).

137. Doyle v. Rhodes, 109 Ill. App. 3d 590, 440 N.E.2d 895 (1982). In *Doyle*, the issue under consideration was a violation of the Road Construction Injuries Act, ILL. REV. STAT. ch. 121, ¶¶ 314.1, 314.2, 314.4 (1981) ("Construction Act"). The court determined that the Construction Act was to be applied in a manner similar to the Structural Work Act, since both make willful violations subject to strict liability though both fail to mention the defense of

The plaintiff in *Doyle*, a highway flagman, filed a negligence claim for injuries sustained when he was struck by an automobile driven by the defendant.[138] The defendant filed a third-party claim for contribution against the plaintiff's employer alleging negligence and violation of the Road Construction Injuries Act.[139]

The court, in *Doyle*, was asked to decide whether a person who failed to comply with a safety statute should be liable for contribution for the entire judgement, or only that portion of the judgment directly attributable to his failure under the act. In addition to holding that third-party contribution was available against an employer,[140] the court found that the Contribution Act "envisions a sharing of liability between two culpable defendants" even though liability is imposed by a safety statute and does not depend upon common law negligence.[141] An action for contribution, the court said, "shifts only part of the loss depending on the comparative responsibility of the parties and can be harmonized with the purpose of a safety statute."[142]

The court in *Doyle*, however, ventured no opinion as to whether a defendant whose liability arose from a safety statute "may be excused from paying damages to the extent that the *injured plaintiff*, rather than a third-party tortfeasor, was concurrently negligent."[143] Thus, although the court stopped short of comparing a plaintiff's fault with the defendant's fault in a safety statute setting, it has, nonetheless, provided precedent for a "sharing" of responsibility where concurrent fault has caused injury. Because the employer is also liable for negligence despite the exclusivity provisions of worker's compensa-

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contributory negligence, and both equate "willful" with "knowingly." *Doyle*, 109 Ill. App. 3d at 596, 440 N.E.2d at 899.

The court also dealt with the Contribution Act, ILL. REV. STAT. ch. 70 § 302(a) (1981), which was enacted in response to the *Skinner* decision adopting contribution among joint tortfeasors. *See supra* note 105.

The defendant, a driver who struck the plaintiff while he was employed as a highway flagman, sued a third-party defendant, the plaintiff's employer, for contribution under a violation of the Construction Act. The court found that "one who [was] culpable in contributing to an injury in the sense that wrongful conduct in some part caused the injury, may be liable for contribution . . ." *Id.* at 594, 440 N.E.2d at 897.

138. *Doyle*, slip op. at 1.

139. *Id.*

140. "[W]e hold that, under the Contribution Act, the employer's immunity from a suit in tort by its employee as plaintiff is not a bar to a claim for contribution against it by a defendant held liable to such a plaintiff." *Id.* at 9.

141. *Id.* at 11.

142. *Id.*

143. *Id.* (emphasis added).

tion, courts should consider the plaintiff-employees fault or negligence as well.

CONCLUSION

Comparative negligence was accepted in Illinois to avoid the harsh inequitites of the "all-or-nothing" contributory negligence doctrine. Similarly, strict products liability was adopted to protect the general public from defective and dangerous products. In *Coney v. J.L.G. Industries*,[144] the supreme court correctly merged these two principles, holding that a plaintiff's recovery should be reduced in relation to the amount that his conduct contributed to his injuries.

A careful evaluation of the justifications for both comparative negligence and products liability shows that the same analysis can be applied to another area of strict liability—the Illinois Structural Work Act. Given that the Act is unique in its application and maintains a peculiar standing in Illinois tort law even in the face of the Worker's Compensation Act, application of comparative fault makes sense. That amount of fault attributable to the plaintiff's own conduct would merely be reduced from his total award once the defendant's liability under the statute has been established, and the original purpose of the Act would not be defeated. Indeed, with the advent of the *Coney* decision, there appears to be no rational reason not to apply comparative negligence to the Structural Work Act. Furthermore, the decision in *Doyle v. Rhodes*[145] seems to signal a judicial recognization of comparative fault under a safety statute similar to the Structural Work Act.

Robert G. Black

144. 97 Ill. 2d 104, 454 N.E.2d 197.
145. Nos. 57540, 57554, slip op. (Ill. May 1983).