MARYLAND DEFENSE COUNSEL
POSITION PAPER ON COMPARATIVE FAULT LEGISLATION

Contributory negligence has been the law of Maryland for over 150 years[1]. The proponents of comparative negligence have no compelling reason to change the rule of contributory negligence. Maryland Defense Counsel (MDC) opposes the abolition of contributory negligence.

In order to be fair, there are three aspects of comparative fault which any bill abolishing contributory negligence needs to address. (1) It would have to address all fault-based torts, not just those which have traditionally been called "negligence." (2) The allocation of fault inherent in comparative fault must, in fairness, extend to all parties to the tort, thereby abolishing joint and several liability among defendants. (3) Finally, statutes which have grown up around contributory negligence would need to be amended if contributory negligence is abolished.

COMPARATIVE FAULT REQUIRES ABOLITION OF JOINT & SEVERAL LIABILITY

Contributory negligence is a policy choice, one which entails the policy of not allocating or apportioning fault among potentially responsible persons. If the plaintiff is at fault, the plaintiff does not recover. If more than one defendant is at fault, there is no apportionment of blame among them. Each defendant is jointly and severally liable for the judgment. Joint and several liability flows from the determination that the defendants are each responsible in full for the harm caused to the faultless plaintiff.

A comparative fault system allows some recovery by a plaintiff at fault. This policy choice requires the allocation of fault among potentially responsible persons. Once recovery is allowed to flow to the at-fault plaintiff, there is no reason to require the at-fault defendant to pay for more than his or her portion of blame. Joint and several liability does not make sense if an at-fault plaintiff is allowed compensation. A large majority of comparative fault states have abolished pure joint and several liability[2].

The no-allocation rule embodied in contributory negligence is central to the Maryland statute permitting joint tortfeasors to recover excess payments from one another[3]. Currently a defendant with joint and several liability who contributed 10% of the harm can be made to pay 100% of the liability, and then recover 50% of the liability

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[1] *Irwin v. Spriggs*, 6 Gill 200 (1847); *Negligence Systems: Contributory Negligence, Comparative Fault, and Joint and Several Liability*, p. 11, Department of Legislative Services (2004) (hereafter, *Negligence Systems*).

[2] *Negligence Systems*, p. 17 and Appendix 2.

[3] Courts & Jud. Proc. Art., §§ 3-1401 – 3-1409, Md. Code Ann (hereafter, Contribution Act).

if there is one other joint tortfeasor and collection can be obtained[4]. Whatever fairness there is in this situation flows from the lack of contributory negligence on the part of the plaintiff, because the faultless victim is allowed to collect from any at-fault defendant.

A comparative fault statute that retains pure joint and several liability is hopelessly flawed. Consider what happens in the following scenario to the deep pocket defendant who contributes a marginal share of fault to the plaintiff's harm: Plaintiff is 40% at fault, Defendant 1 is 50% at fault, Defendant 2 is 10% at fault, and the verdict is for $100,000. The two defendants would owe 60% of the verdict to the plaintiff. Defendant 2 can be made to pay $60,000 for contributing $10,000 of harm, and then try to collect $30,000 from the defendant who was most at fault. *When both plaintiff and defendants are at fault for causing an accident, there is no reason to protect only the plaintiff from collection risks.* In the example used above, Plaintiff caused 4 times as much harm as Defendant 2, but Defendant 2 bears the risk of collection from Defendant 1. Comparative fault would require the abolition of pure joint and several liability.

COMPARATIVE FAULT SHOULD APPLY TO PRODUCT LIABILITY CASES

As expressed by the Department of Legislative Services, "Tort liability occurs in a wide variety of factual contexts, including careless driving resulting in an automobile accident, medical malpractice, a product that injures a consumer, an environmental nuisance, or a defamatory newspaper publication[5]." Product liability cases usually are pleaded by asserting negligence, "strict" product liability, and UCC warranty claims. The minor distinctions between these theories are dwarfed by their sharing of fault as the basis of liability[6]. Each of these theories can be pleaded in the same product liability suit, and each will be proved with the same evidence[7]. As the law stands today in Maryland, contributory negligence is a complete defense to the negligence and warranty counts, and no defense at all to the strict liability count[8].

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[4] *Lahocki v. Contee Sand & Gravel Co.*, 41 Md. App. 579, 398 A.2d 490 (1979), *rev'd on other grounds*, 286 Md. 714, 410 A.2d 1039 (1980).

[5] *Negligence Systems*, p. 1.

[6] *Phipps v. General Motors*, 278 Md. 337, 350-352 (1976); *see also Owens-Illinois v. Zenobia*, 325 Md. 420, 432-438 (1992); *Klein v. Sears, Roebuck & Co.*, 92 Md. App. 477, 492, 608 A.2d 1276, 1284 (stating, "Maryland's view of strict liability in tort for injuries caused by a dangerous and defective product is that such tort is akin to negligence.").

[7] *Restament (Third) of Torts: Products Liability*, § 2, comment n (hereafter *Restatement (Third)*).

[8] *See*, Duvall, *Plaintiffs' Fault in Products Liability Cases: Why are they Getting Away with it in Maryland*, 30 U. Balt. L. Rev. 255 – 271 (2001) (hereafter, *Plaintiffs' Fault*).

The exclusion of the contributory negligence defense from a strict product liability case is a purely historical accident. The purpose of seminal § 402A of the *Restatment (Second) of Torts* was to lower plaintiffs' burden of proving how or why a product deviated in the course of manufacturing from its intended design[9]. With regard to plaintiff's fault in manufacturing defect cases, this purpose of § 402A was furthered by excluding as contributory negligence the plaintiff's failure to detect the manufacturing defect[10].

The lack of a meaningful distinction in Maryland between a negligence count and a strict liability count in a products case is manifested by the difference that has been identified by the Court of Appeals. *The only meaningful distinction between negligence and strict liability products claims in Maryland is the effect of plaintiffs' fault*[11]. In the decision permitting strict product liability claims, the Court of Appeals emphasized, "[T]he major distinction between an action in strict liability in tort and one founded on traditional negligence theory relates to the proof which must be presented by the plaintiff[12]." The difference between negligence and strict product liability is not a difference in the type of fault giving rise to liability, it is a difference in the type of evidence required to prove fault. Any difference in available defenses should flow from a meaningful difference in the elements of the action. Instead, Maryland distinguishes these product liability causes of action by a historical accident in the defenses to each count[13].

A large majority of states with comparative fault apply that doctrine to product liability cases[14].

For these reasons, any comparative fault bill that does not extend to all fault-based torts should be rejected.

FAILURE TO WEAR A SEAT BELT IS FAULT WHICH ANY COMPARATIVE FAULT BILL SHOULD ADDRESS

If comparative fault is going to be the law of Maryland, then the failure to use seat belts should be fault which a jury can find. Maryland law generally requires the

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[9] *Restatement (Third)*, Introduction, p. 3, and § 1, comment a.

[10] *Id.*, § 17, comment d.

[11] *Zenobia*, 325 Md. at 435, n. 7 and accompanying text.

[12] *Phipps v. General Motors*, 278 Md. 337, 350, 363 A.2d 955 (1976).

[13] *See* nn. 9 and 10 and accompanying text; *Plaintiffs' Fault*, n. 8.

[14] *Negligence Systems*, p. 16.

use of seat belts, but does not now treat violation of this law as contributory negligence[15]. Comparative fault, however, ought to allow a jury to consider whether violation of the statutory requirement of seat belt use is fault. The lack of due care inherent in violating this statute is a cause of injury, and if there is a fault allocation, then this fault should be included in the allocation.

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[15] Transportation Art., § 22-412.3., Md. Code Ann.

APPENDIX – THE ROLE OF FAULT IN MARYLAND STRICT PRODUCT LIABILITY LAW

This appendix details legal concepts expressed in Maryland cases concerning the lack of any meaningful distinction between negligence strict product liability.

Maryland adopted strict product liability in *Phipps v. General Motors*, 278 Md. 337, 363 A.2d 955 (1976). The case discussed the relationship between negligence and a strict liability claim for a defective product:

> *[T]he major distinction* between an action in strict liability in tort and one founded on traditional negligence theory *relates to the proof which must be presented* by the plaintiff. Although the plaintiff need not prove any specific act of negligence on the part of the seller, as in other product liability cases, proof of a defect existing in the product at the time it leaves the seller's control must still be presented. As one commentator has observed, the doctrine of strict liability is really but another form of negligence per se, in that it is a judicial determination that placing a defective product on the market which is unreasonably dangerous to a user or consumer is itself a negligent act sufficient to impose liability on the seller (Wade, Strict Tort Liability of Manufacturers, 19 SW.L.J. 5, 14 (1965)):
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> > In essence, strict liability in this sense is not different from negligence per se. Selling a dangerously unsafe product is the equivalent of negligence regardless of the defendant's conduct in letting it become unsafe…. Thus, a court which appears to be taking the radical step of changing from negligence to strict liability for products is really doing nothing more than adopting a rule that selling a dangerously unsafe chattel is negligence within itself.
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> Thus, the theory of strict liability is not a radical departure from traditional tort concepts. Despite the use of the term 'strict liability' the seller is not an insurer, as absolute liability is not imposed on the seller for any injury resulting from the use of his product. *Dippel v. Sciano*, supra, [37 Wis.2d 443], 155 N.W.2d at 63 [(1967)]; Wade, supra, 19 SW.L.J. at 13. Proof of a defect in the product at the time it leaves the control of the seller implies fault on the part of the seller sufficient to justify imposing liability for injuries caused by the product.

> Where the seller supplies a defective and unreasonably dangerous product, the seller or someone employed by him has been at fault in designing or constructing the product.

Phipps v. General Motors, 278 Md. 337, 350-352 (emphases added).

"[I]n an action founded on strict liability in tort, as opposed to a traditional negligence action, the plaintiff need not prove any specific act of negligence on the part of the seller. The relevant inquiry in a strict liability action focuses not on the conduct of the manufacturer but rather on the product itself." *Id.* 278 Md. at 344 (citation omitted).

This fundamental identification in Maryland of strict product liability with negligence has endured for the thirty years since it was first articulated. In 1991 the Court of Appeals stated,

> It is clear that Maryland espoused the doctrine of strict liability in tort in order to relieve plaintiffs of the burden of proving specific acts of negligence by permitting negligence to be implied where plaintiffs can prove a product is defective and unreasonably dangerous when placed in the stream of commerce. While the "equity" of shifting the risk of loss to those better able to bear it financially was a policy consideration, it was neither the sole nor the predominant factor. It is clear from our decisions that inherent in our recognition of strict products liability is the concept that sellers who place defective and unreasonably dangerous products on the market are at fault when a user is injured by that activity and should bear responsibility.

Nissen Corporation v. Miller, 323 Md. 613, 624, 594 A.2d 564 (1991). *Nissen* cited in this regard *Harig v. Johns-Manville Products*, 284 Md. 70, 83-84, 394 A.2d 299 (1978) (quoting *Phipps*, 278 Md. at 350-351), and *Miles Laboratories v. Doe*, 315 Md. 704, 556 A.2d 1107 (1989) (quoting *Phipps*, 278 Md. at 351-352).

In 1992 the Court of Special Appeals visited the relation between strict product liability and negligence. *Klein v. Sears, Roebuck and Co.*, 92 Md.App. 477, 608 A.2d 1276 (1991). *Klein* said, "Maryland's view of strict liability in tort for injuries caused by a dangerous and defective product is that such tort is akin to negligence." *Id.* at 492 (citing *Phipps*, 278 Md. at 350-351, and *Nissen*, 323 Md. at 624).

That court then revisited the subject in 1995. *Mazda Motor Of America, Inc. v. Rogowski*, 105 Md.App. 318, 659 A.2d 391 (1995). It said:

> [I]t is true that a strict liability claim based on failure to warn bears a strong resemblance to a claim of negligence. Concepts of duty, breach, causation, and damages are present in both. Indeed, one judge has commented that distinguishing between negligence and strict liability in failure to warn cases should be left to those who count angels on the head of a pin. *Nigh v. Dow Chemical Co.*, 634 F.Supp. 1513, 1517 (W.D.Wis.1986).
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> Professors Henderson and Twerski state that "it is no easy matter in design and warning cases to discover a difference between strict liability and negligence." J. Henderson and A. Twerski, Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn, 65 N.Y.U.L.Rev. 265, 272 (1990).

Id. at 325 (holding that plaintiff's dismissal of his negligence count did not automatically dismiss his strict product liability count). Professors Henderson and Twerski were the reporters for the American Law Institute's *Restament (Third) of Torts: Products Liability.*

For all these reasons, it makes no sense to treat plaintiff's fault differently in a strict product liability than it is treated in a negligence claim.

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