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# The North Dakota Equity for Tortfeasors Struggle - Judicial Action vs. Legislative Over-Reaction

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# THE NORTH DAKOTA EQUITY FOR TORTFEASORS STRUGGLE — Judicial Action vs. Legislative Over-Reaction

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## I. INTRODUCTION

Tort litigation has experienced unprecedented growth during the last ten years. Tortfeasors, many only recently immune or impervious to suit, are now regularly subjected to innovative substantive and procedural theories yielding seven figure damage awards. Not surprisingly, potential defendants are expressing dissatisfaction with the system. A few years ago the most vocal and most organized group was the medical profession. Today, however, the complaints of all others are overshadowed by those of well-organized groups of product manufacturers.

The common denominator on all lists of complaints is that the uncertainty of the tort system has created a rate-making nightmare for insurance companies. After decades of extracting moderate liability insurance premiums from whole industries by raising the spectre of the occasional lawsuit, insurance companies are finding that they may have underestimated the scope of their salespersons' self-fulfilling prophecy. To guarantee the insurer's continued existence, current rate structures have been radically modified

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1. *See* Nelson, *Products Liability: New Directions and Practical Approaches*, 2 CORP. L. REV. 179 (1979).

upward. The resulting high cost of liability insurance has, according to some,[1] created a crisis for product sellers.[2]

Ironically, it is the phenomenal success of a prior generation of insurance salespersons that is the most often-cited explanation for the tort explosion. An unending succession of court opinions list the prevalence of insurance as a primary reason for expanding liability,[3] thereby achieving the social goal of spreading the cost of injuries. Moreover, modern day juries are much more inclined than were their predecessors to assume the presence of liability insurance. They, too, have been sold on the importance of insurance.

Products liability tort defendants, as well as tort defendants in general, have reason to complain. They are not criminals, as were tortfeasors in earlier times; yet detritus of the criminal foundation upon which early tort law developed continues to impede equitable treatment. Nor should the tort system foist upon product sellers social responsibilities not created by their own conduct; that is exactly what happens, however, when product sellers are required to pay for consumer injuries caused by consumers' culpable conduct.

Evidence of the tort system's inclination to excise these and other impediments to the normal and healthy development of tort law is mounting. This article will emphasize recent action of the Supreme Court of North Dakota which revolutionizes the contribution and indemnity rules applicable to joint tortfeasors. There is every indication that, given the opportunity, the court would make other equitable revisions. Several possible revisions are discussed in this article.

The adversary approach to the resolution of private conflicts is slow, because it assures microscopic analysis and objective consideration of all aspects of the conflict under study. Unfortunately for insurers, litigation of the question of whether

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2. "Product seller" means any person or entity, including a manufacturer, wholesaler, distributor, or retailer, who is engaged in the business of selling such products, whether the sale is resale, or for use or consumption. The term "product seller" also includes lessors or bailors of products who are engaged in the business of leasing or bailment of products.

DRAFT UNIFORM PRODUCT LIABILITY LAW § 102 (1), *reprinted in* 44 Fed. Reg. 2996, 2997 (1979)-[hereinafter U.P.L.L.].

3. *See, e.g.*, Coulter v. Superior Court of San Mateo County, 145 Cal. Rptr. 534, ____, 577 P.2d 669, 674 (Cal. 1978) ("availability, cost and prevalence of insurance"); Rowland v. Christian, 69 Cal. 2d 108, 113, 70 Cal. Rptr. 97, 100, 443 P.2d 561 564 (1968) ("availability, cost, and prevalence of insurance"); Gelbman v. Gelbman, 23 N.Y.2d 434, 297 N.Y.S.2d 529, 245 N.E.2d 192, 193-94 (1969) ("[i]nsurance effectively removes the argument favoring continued family harmony as a basis for prohibiting this suit").

1979 products liability defendants were unjustly enriched when charged bargain rates for liability insurance in the past has not yet even commenced. Actions involving the real parties in interest, however, are before every high court in the country. In what is for the evolution of law a very short time, the judiciary would eliminate the deficiencies in the tort system that now are the cause of the injustices suffered by the product liability tortfeasor.

An ominous threat, however, seems certain to adversely affect, if not destroy, the fine balance being struck between competing interests. Powerful and angry forces have successfully bullied confused legislatures into passing ill-considered and irresponsible self-serving legislation. If left unchecked, a chaotic situation that will take the judiciary and legislature years to untangle is certain to follow. Examples of this type of legislation are discussed herein.

This article then, is about the orderly evolution of several tort principles. The major focus is on *Bartels v. City of Williston,*[4] unquestionably the most significant multiple-defendant case ever decided by the North Dakota Supreme Court. Also discussed are two bills passed by the 1979 North Dakota legislature which threaten to impede the progress of many developments which would logically flow from the *Bartels* decision.

## II. BARTELS V. CITY OF WILLISTON

### A. BACKGROUND

Viewed from a historical perspective,[5] the common law "no contribution among joint tortfeasors" rule is acceptable. Joint tortfeasors were wrongdoers who intentionally caused injury or damage, and the judicial system was unavailable as a forum for adjudicating disputes betweeen parties considered akin to criminals. A wronged plaintiff could proceed to judgment against any one or more of the tortfeasors of his choice, and the tortfeasor who satisfied the judgment was without recourse against his partners.

English law limited the rule to willful and intentional tortfeasors,[6] as did the early American cases. Americans soon,

4. 276 N.W.2d 113 (N.D. 1979).

5. *See generally* W. PROSSER, LAW OF TORTS § 50 (4th ed. 1971); Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130 (1932). *See also* the articles cited note 7 *infra*.

6. Even where the common law prohibition against contribution has been modified, contribution between intentional wrongdoers is not allowed. *See, e.g.*, North Dakota Century Code

however, extended the rule to include simple negligence. This extension has been universally criticized.[7] Prosser, for example, has noted:

> There is [an] obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants were equally, unintentionally responsible, to be shouldered onto one alone, according to the accident of a successful levy of execution, the existence of liability insurance, the plaintiff's whim or spite, or his collusion with the other wrongdoer, while the latter goes scotfree.[8]

A substantial majority of jurisdictions have responded to these concerns by modifying the common law rule.[9] As one state supreme court recently put it:

> We are of the opinion that there is no valid reason for the continued existence of the no-contribution rule and many compelling arguments against it. . . .
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> . . . Where this court has created a rule or doctrine which, under present conditions, we consider unsound and unjust, we have not only the power, but the duty, to modify or abolish it.[10]

Although recognizing the inequities associated with the no-contribution rule, some jurisdictions are not willing to modify the rule, citing difficulty of administration[11] or reasoning that modi-

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section 32-38-01(3): "There is no right of contribution in favor of any tort-feasor who has intentionally (willfully or wantonly) caused or contributed to the injury or wrongful death." N.D. CENT. CODE § 32-38-01 (3) (1976).

7. *See, e.g.*, Appel & Michael, *Contribution Among Joint Tortfeasors in Illinois; An Opportunity for Legislative and Judicial Cooperation*, 10 LOY. CHI. L.J. 169 (1979); Gregory, *Contribution Among Tortfeasors: A Uniform Practice*, 1938 WIS. L. REV. 365; Hodges, *Contribution and Indemnity Among Tortfeasors*, 26 TEXAS L. REV. 150 (1947); Note, *Does Connecticut Comparative Negligence Statute Abrogate Common Law No-Contribution Rule?* 10 CONN. L. REV. 526 (1978); Note, *Contribution Among Joint Tort-feasors, Washington Retains the Common Law Rule Prohibiting Claims for Contribution Among Joint Tort-feasors*, 14 GONZ. L. REV. 495 (1979); Note, *North Dakota Contribution Among Tortfeasors Act*, 38 N.D.L. REV. 586 (1962); Note, *Reconciling Comparative Negligence, Contribution and Joint and Several Liability*, 34 WASH. & LEE L. REV. 1159 (1977); Comment, *Indemnity and Contribution Among Joint Tortfeasors*, 15 HOUS. L. REV. 1004 (1978).

8. W. PROSSER, LAW OF TORTS § 50 at 307 (footnote omitted) (4th ed. 1971).

9. Recent surveys of state laws are found at Note, *Does Connecticut Comparative Negligence Statute Abrogate Common Law No-Contribution Rule?*, 10 CONN. L. REV. 526, 541-43 nn. 75-79 (1978), and Note, *Contribution Among Joint Tort-feasors, Washington Retains the Common Law Rule Prohibiting Claims for Contribution Among Joint Tort-feasors*, 14 GONZ. L. REV. 495, 497 n.11 (1979). Contribution, comparative negligence, and strict liability have become so intertwined that no survey is accurate for long. *See, e.g.*, Skinner v. Reed-Prentice Div. Pkge. Mach. Co., 70 Ill.2d 1, 374 N.E.2d 437 (1977), *modified*, 70 Ill.2d 16 (1978); Bartels v. City of Williston, 276 N.W.2d 113 (N.D. 1979).

10. Skinner v. Reed-Prentice Div. Pkge. Mach. Co., 70 Ill. 2d 1, 13-14, 374 N.E.2d 437, 442 (1977).

11. Wenatchee Wenoka Growers Ass'n v. Krack Corp., 89 Wash. 2d 847, 850-52, 576 P.2d

fication is a legislative function.[12]

Assuming a right of contribution is recognized, there remains the matter of devising a system to apportion damages. There is little uniformity in the manner in which this has been accomplished, largely because of diversity in rules of procedure and the existence of other theories, such as comparative negligence and strict products liability, which also affect apportionment of damages. There is also general disagreement as to the manner of apportionment — should pro-rata shares be determined simply by an equal division of damages, or should relative fault of the tortfeasors be considered in determining apportionment of damages?[13]

As to this latter concern, the Uniform Contribution Among Joint Tortfeasors Act did little to encourage uniformity.[14] In the 1939 version, the Uniform Law Commissioners provided this option: "[w]hen there is such a disproportion of fault among joint tortfeasors as to render inequitable an equal distribution among them of the common liability by contribution, the relative degrees of fault of the joint tortfeasors shall be considered in determining their pro rata shares."[15] When the 1939 version was revised in 1955, however, a provision was inserted prohibiting consideration of relative degrees of fault.[16]

North Dakota was one of the states which adopted the 1955 version of the Uniform Contribution Among Joint Tortfeasors Act.[17] Section 32-38-02(1) of the North Dakota Century Code pro-

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388, 389-91 (1978). Notwithstanding the wide acceptance of the abolition of the common law rule, the court concluded that an acceptable prototype would be difficult to find given the lack of uniformity in the contribution practices found in other jurisdictions. *Id.* at ____, 576 P.2d at 390. The Washington Supreme Court refused to depart from the no-contribution position in the absence of some kind of model system of dealing with the many collateral issues such a departure creates.

12. Howard v. Spafford, 132 Vt. 434, 321 A.2d 74, 76 (1974). "We are urged. . . that a relaxation of the rule is indicated by. . . [t]he prevalence of automobile liability insurance. . . and our comparative negligence statute. . . . We find neither reason compelling enough to substitute judicial fiat for legislative action." *Id.* at 435, 321 A.2d at 75.

13. *See* W. PROSSER, J. WADE, V. SCHWARTZ, TORTS 385 n.7 (6th ed. 1976) which states the following:

> There is sharp disagreement as to the basis for making division of damages among the tortfeasors. The majority rule, by analogy to contribution among sureties, has adopted an equal-division basis — half and half if there are two tortfeasors, by thirds if there are three, and so on. A growing number of jurisdictions, however, are deciding to make the division according to the relative fault of the parties. With the widespread adoption of a comparative negligence principle in substitution for the common law rule of contributory negligence, this position is expected to become even more significant. It seems necessary in a state which administers pure comparative negligence, and the Uniform Contribution Act may be amended to provide for it.

*Id.*

14. *See generally* V. SCHARTZ, COMPARATIVE NEGLIGENCE § 16.7 (1974).

15. *Id.* at 261.

16. *Id.* at 262.

17. The Act was adopted in 1957, and was codified at N.D. CENT. CODE ch. 32-38 (1976). *See*

vided that "[i]n determining the pro-rata shares of tort-feasors in the entire liability. . . [*t*]*heir relative degrees of fault shall not be considered.*"[18]

The matter of devising a system to apportion damages is further complicated by releases. At common law the release of one joint tortfeasor is a release of all joint tortfeasors. The Uniform Contribution Among Joint Tortfeasors Acts (1939 and 1955) modified this rule by allowing the claimant to proceed against non-released tortfeasors; the 1939 version allowed the non-released tortfeasor contribution from the released tortfeasor, while the 1955 version did not allow contribution unless the release was not given in good faith, but by way of collusion.[19]

An emerging trend precludes contribution from released tortfeasors,[20] instead reducing the claimant's total claim by the proportionate share attributable to the released tortfeasor. But even here there is a lack of uniformity, as some jurisdictions reduce the claim by the absolute dollar amount received in consideration for the release, while others reduce the claim by the percentage of fault of the released tortfeasors.[21]

Against the backdrop of the problems of apportioning damages among joint tortfeasors, and apportioning damages when one or more joint tortfeasors have been released, the adoption of comparative negligence by North Dakota has further complicated the situation. When North Dakota abolished the no-contribution among joint tortfeasors rule in 1957, the state was still firmly committed to the all or nothing "contributory negligence bars recovery" rule.[22] Except for a handful of states,[23] most other jurisdictions also followed the rule at that time. Shortly thereafter attacks on the fault system began to mount,[24] resulting in a stampede toward comparative negligence. In the ten year period from 1965 to 1975, at least twenty-five jurisdictions, including North Dakota, turned to comparative negligence.[25]

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*generally* Note, *North Dakota Contribution Among Tortfeasors Act,* 38 N.D.L. REV. 586 (1962).

18. N.D. CENT. CODE § 32-38-02(1) (1976) (emphasis added). This section has been repealed by judicial fiat. *See infra* notes 34 through 54 and accompanying text.

19. *See* Comment § 6, Uniform Comparative Fault Act (1978).

20. For articles concerning this trend, *see supra* note 7.

21. *Id.*

22. For discussions of that rule *see* James, *Contributory Negligence,* 62 YALE L.J. 691 (1953); Bohlen, *Contributory Negligence,* 21 HARV. L. REV. 233 (1908).

23. One source suggests that in the mid-1960's only six states had a general comparative negligence system: Arkansas (1955), Georgia (1904), Mississippi (1910), Nebraska (1913), South Dakota (1941) and Wisconsin (1931). W. PROSSER, J. WADE & V. SCHWARTZ, TORTS 608 (6th ed. 1976).

24. *Id.*, citing R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM — A BLUE PRINT FOR REFORMING AUTOMOBILE INSURANCE (1965).

25. W. PROSSER, J. WADE & V. SCHWARTZ TORTS 608 (6th ed. 1976). The jurisdictions are not

After being chastised by the Supreme Court of North Dakota for its inaction on the issue,[26] the legislature in 1973 adopted the comparative negligence act which Minnesota had borrowed from Wisconsin in 1969.[27] Obviously overlooked or ignored was the fact that Minnesota's contribution among joint tortfeasors law was embodied in its comparative negligence statute. As a result, when North Dakota adopted the Minnesota statute, including its contribution provision, a statutory conflict was created with North Dakota's *existing* contribution law, embodied in chapter 32-38 of the North Dakota Century Code. Chapter 32-38 enacted in 1957 specifically prohibited consideration of the relative degrees of fault of the tortfeasors in determining contribution;[28] the 1973 statute, codified as section 9-10-07 of the North Dakota Century Code, however, specifically provides for "contributions to awards. . . in proportion to the percentage of negligence attributable to each" tortfeasor.[29] Furthermore, chapter 32-38 contained specific provisions governing the effect of settlement and release on contributions,[30] while the 1973 statute did not.[31]

## B. THE BARTELS CASE

The collision between section 9-10-07 and chapter 32-38 of the

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uniform in their approach to comparative negligence. Most jurisdictions adopting comparative negligence by statute prefer one of the modified comparative negligence approaches ("not as great as" or "not greater than"), while those few jurisdictions adopting comparative negligence by judicial fiat seem to prefer the "pure" comparative negligence approach. All approaches are thoroughly discussed in V. SCHWARTZ, COMPARATIVE NEGLIGENCE (1974 & Supp. 1978).

26. *See* Krise v. Gullund, 184 N.W.2d 405, 409 (N.D. 1971).

27. The Wisconsin Statute was enacted in 1931. WIS. STAT. ANN. § 895.045 (West 1966). Minnesota adopted it in 1969. MINN. STAT. ANN. § 604.01 (West Supp. 1978). Both statutes have since been amended, Wisconsin in 1971 and Minnesota in 1978. The text of Minnesota's amended version is found in note 59 *infra*.

The North Dakota version is found at section 9-10-07 of the North Dakota Century Code. That section provides as follows:

> Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person recovering. The court may, and when requested by either party shall, direct the jury to find separate special verdicts determining the amount of damages and the percentage of negligence attributable to each party; and the court shall then reduce the amount of such damages in proportion to the amount of negligence attributable to the person recovering. *When there are two or more persons who are jointly liable, contributions to awards shall be in proportion to the percentage of negligence attributable to each, provided, however, that each shall remain jointly and severally liable for the whole award.* Upon the request of any party, this section shall be read by the court to the jury and the attorneys representing the parties may comment to the jury regarding this section.

N.D. CENT. CODE § 9-10-07 (1976) (Emphasis added).

28. *See supra* note 18, and accompanying text.

29. N.D. CENT. CODE § 9-10-07 (1976). For the text of this section, *see supra* note 27.

30. N.D. CENT. CODE § 32-38-04 (1976). For the text of this section, *see infra* note 36.

31. N.D. CENT. CODE § 9-10-07 (1976). For the text of this section, *see supra* note 27.

North Dakota Century Code was inevitable. A conflict was noted within months after passage of section 9-10-07;[32] that it took six years before the North Dakota Supreme Court was afforded an opportunity to resolve the conflict[33] can only be attributed to a caseload proportionate to the state's low population.

*Bartels v. City of Williston*[34] involved a severely injured plaintiff who had been a passenger in an off-road vehicle that went over a cliff on land under lease from the city of Williston. The plaintiff settled with the driver and the driver's insurance company for $50,000, gave them a release,[35] and subsequently brought an action in United States District Court against the city of Williston. The city in turn brought a third-party action against the driver, and the driver moved for summary judgment, seeking to have the third-party complaint dismissed. Utilizing North Dakota's recently adopted rule 47 of the North Dakota Rules of Appellate Procedure, the United States District Court certified questions to the North Dakota Supreme Court regarding the application of chapter 32-

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32. V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 16.7 at 262 (1974).

When the 1939 Uniform Contribution Among Tortfeasors Act was revised in 1955, degree of fault was abandoned as one of the factors to be considered in apportioning liability. Instead, there was inserted a provision that "their relative degrees of fault shall not be considered." *Id.* Only two of the comparative negligence states — Massachusetts and North Dakota — have adopted the 1955 version of the Uniform Act. In North Dakota, this clause appears to have been superseded, at least in part, by the provision in the comparative negligence statute that "contributions to awards shall be in proportion to the percentage of negligence attributable to each." *Id.*

33. The North Dakota court apparently recognized the existence of the conflict between § 32-38-02(1) in Saylor v. Halstrom, 239 N.W.2d 276, 282-83 (N.D. 1976), but did not resolve the issue, presumably because that action arose prior to enactment of § 9-10-07.

34. 276 N.W.2d 113 (N.D. 1979).

35. Bartels v. City of Williston, 276 N.W.2d 113 (N.D. 1979). [Hereinafter referred to as *Bartels*.]

> The release was a general release which released [the driver] "from all claims, demands, actions, judgments, and executions that Releasor ever had, or now has, or may have, either known or unknown. . . ." The release further provided that it 'is intended to cover only the Releasees named herein with respect to the above-described accident. Releasor expressly reserves all rights, claims, and causes of action that he may have against any other persons, firms, or corporations with respect to the aforementioned accident.

*Id.* at 115N.1.

The release terms should be considered in connection with the *Pierringer* release discussion found *infra* at notes 49 and 50 and accompanying text.

36. The court in *Bartels* quoted the following relevant provisions of chapter 32-38 of the Century Code:

> Section 32-38-01. *Right to Contribution.*
>
> 1. Except as otherwise provided in this chapter, where two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them.
>
> 2. The right of contribution exists only in favor of a tort-feasor who has paid more than his pro rata share of the common liability, and his total recovery is limited to the amount paid by him in excess of his pro rata share. No tort-feasor is compelled to make contribution beyond his own pro rata share of the entire liability.
>
> 3. There is no right of contribution in favor of any tort-feasor who has intentionally (willfully or wantonly) caused or contributed to the injury or wrongful death.

38[36] and section 9-10-07[37] of the North Dakota Century Code to the facts in the case. The questions certified to the court, and the court's responses, were substantially as follows:

> 1. In an action for negligence. . . does a release given in good faith to one of two or more persons liable in tort for the same injury. . . discharge the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor? (yes).
>
> 2. [W]hen determining the right of a tortfeasor to contribution,. . . shall the pro rata shares for the common liability be determined in proportion to the percentage of negligence attributable to each tortfeasor. . .? (yes).
>
> 3. [W]hen a plaintiff in good faith has given one of two or more persons liable in tort for his injury, a release. . . . , shall the finder of fact determine the percentage of negligence attributable to the released tort-feasor together with the percentage of negligence attributable to the parties and, if so, shall the award of damages to the plaintiff be reduced. . . by an amount proportionate to the percentage of negligence allocated to the released tort-feasor? (yes).
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> 4. If there has been an amendment of chapter 32-38,

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4. A tort-feasor who enters into a settlement with a claimant is not entitled to recover contribution from another tort-feasor whose liability for the injury or wrongful death is not extinguished by the settlement nor in respect to any amount paid in settlement which is in excess of what was reasonable.

Section 32-38-02. *Pro rata shares.*
In determining the pro rata shares of tort-feasors in the entire liability:

1. *Their relative degrees of fault shall not be considered.*
2. If equity requires the collective liability of some as a group shall constitute a single share.
3. Principles of equity applicable to contribution generally shall apply.

Section 32-38-04. *Release or covenant not to sue.*
When a release or a covenant not to sue or not to enforce judgment is given in good faith to one or two or more persons liable in tort for the same injury or the same wrongful death:
1. It does not discharge any of the other tort-feasors from liability for the injury or wrongful death unless its terms so provide; but it reduces the claim against the others to the extent *of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, which ever is the greater.*
2. It discharges the tort-feasor to whom it is given from all liability for contribution to any other tort-feasor.

276 N.W.2d at 116 (emphasis added).

37. N.D. CENT. CODE § 9-10-07 (1976). For the text of this section *see supra* note 27.

what is the effective date of the amendment? (July 1, 1973).[38]

The analysis that led Justice Sand to these conclusions was largely one of statutory interpretation. The fact that section 9-10-07 was the later-enacted statute played a dominant role in this analysis. The court reasoned that with its enactment, the legislature had impliedly repealed section 32-38-02(1)[39] and amended section 32-38-04(1) by striking the words "of any amount stipulated by the release or the covenant, or in the amount of consideration paid for it, whichever is the greater" and substituting the language: "*of the relative degree of fault (percentage of negligence) attributable to the released joint tort-feasors.*"[40] Justice Sand gave the following explanation for the changes:

> After analyzing the provisions of § 9-10-07, NDCC, we are of the opinion that it is basically self-sufficient and in that respect we agree with Victor E. Schwartz that North Dakota, in enacting its comparative negligence act (§ 9-10-07). . . , in effect adopted the pure comparative negligence concept at least in instances involving more than one tort-feasor. This concept also embraces related matters and contemplates the allocation of costs on the same percentage basis as the allocation of damages unless justice requires otherwise.[41]

To support his interpretation of the effect of section 9-10-07 on contribution, Justice Sand traced the history of the section to its Wisconsin origin. Recounting the Wisconsin Supreme Court's lonely interpretation struggle,[42] and Minnesota's adoption of the fruits of that struggle,[43] Justice Sand concluded that the North

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38. The full text of the questions and the court's answers appear in 276 N.W.2d at 122.

39. N.D. CENT. CODE § 32-38-02 (1976). For the text of this section *see supra* note 35.

40. 276 N.W.2d at 121. Section 32-38-04 (1) of the North Dakota Century Code as judicially amended, provides as follows:

> When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:
>
> 1. It does not discharge any of the other tort-feasors from liability for the injury or wrongful death unless its terms so provide; but it reduces the claim against the others to the extent *of the relative degree of fault (percentage of negligence) attributable to the released joint tort-feasor.* . . .

276 N.W.2d at 121 (emphasis added).

41. *Id. See supra* note 31 for the Schwartz quote in full.

42. 276 N.W.2d at 118-19.

43. *Id.* at 118.

Dakota legislature, too, adopted the pre-1969 Wisconsin interpretations when the section was enacted by North Dakota in 1973.[44]

Two Wisconsin cases had an especially significant impact on the interpretation of section 9-10-07 contribution, *Bielski v. Schulze*[45] and *Pierringer v. Hoger.*[46] In *Bielski* the Wisconsin court determined that the equity basis of Wisconsin's comparative negligence statute required that statute to be interpreted to require contribution based upon a comparison of fault, rather than equal share contribution by all tort-feasors involved.[47] *Pierringer* established the contribution rules to be applied when a release is involved.[48]

Justice Sand was kind to the North Dakota legislature. It is unlikely that the proponents of section 9-10-07 in the 1973 legislature had intended the section to do anything except neutralize the pro-no-fault forces. Nevertheless, by focusing the analysis on earlier Minnesota and Wisconsin court decisions, and by giving the members of the legislature credit for having read those decisions, Justice Sand achieved the harmony sought without having to reconcile the fundamental differences in the statutory schemes of the three states. Especially relevant is the fact that Wisconsin and Minnesota did not have a statute similar to section 32-38-04 dictating the effect that the amount of settlement would have in determining the non-released tortfeasor's obligation. That statute seems to call for the reduction of the claim against the non-released tortfeasors by the actual dollar amount the plaintiff received from the released tortfeasor,[49] which is the approach recently taken by California.[50]

The post-*Bartels* North Dakota approach is, at least in theory, more equitable to all parties, especially non-released tortfeasors.

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44. *Id.* The court stated as follows:

> Where a statute is taken from another state and adopted without change it is taken with the construction placed upon it by the court of last resort of the state from whence the statute came. It is also presumed that the legislature adopted the construction previously placed upon it by the courts of the state from which the statute was taken.

*Id.*

45. 16 Wis.2d 1, 114 N.W.2d 105 (1962).

46. 21 Wis.2d 182, 124 N.W.2d 106 (1963).

47. Bielski v. Schulze, 16 Wis.2d 1, ____, 114 N.W.2d 105, 108-09 (1962).

48. Pierringer v. Hoger, 21 Wis. 2d 182, ____, 124 N.W.2d 106, 109 (1963).

49. Section 32-38-04 of the North Dakota Century Code provides in part as follows: "When a release . . . is given in good faith. . . *it reduces the claim* against. . . [the non-released tortfeasors] *to the extent of any amount stipulated* by the release. . ., *or* in the amount of the consideration *paid* for it, whichever is the greater." N.D. CENT. CODE § 32-38-04 (1976) (emphasis added). *See supra* note 36 for full text of that section.

50. American Motorcycle Ass'n. v. Superior Court, 65 Cal. App. 3d 694, 135 Cal. Rptr. 497 (1977).

To illustrate, assume that in *Bartels* the plaintiff's damages had been $250,000, the plaintiff's causal fault 10 percent, the driver's causal fault 75 percent, the city's causal fault 15 percent, and the driver had settled with the plaintiff for $50,000. Applying the California approach, the calculation used to determine the maximum dollar amount plaintiff could recover would be: $250,000 less $25,000 (plaintiff's 10 percent), less $50,000 (amount of the settlement) equals $175,000 recovery from the city. Utilizing the new North Dakota approach the calculation would be $250,000 less $25,000 (plaintiff's 10 percent), less $187,500 (driver's 75 percent) equals $37,500 (city's 15 percent) recovery from the city.

It could be argued that the California approach is more likely to further the *Bartels* court's stated policy of encouraging settlement. In the above hypothetical, the city apparently would be more inclined to settle under the California approach, the exposure to liability seeming disproportionally high in comparison to the predicted causal fault. And under the *Bartels* approach, a plaintiff would be less inclined to settle with the most culpable, but possibly least solvent, joint tortfeasor, since by doing so he is limiting his recovery from the other joint tortfeasor. It would seem that, at least in the situation described in the illustration, a plaintiff would want to obtain a judgment against both defendants as joint tortfeasors so that he would be in a position to collect the whole judgment from either.

Under either approach, however, the decision to settle belongs to the plaintiff and the tortfeasors with whom he can effect a settlement. The non-settling tortfeasors are not in a position to complain because they also had the option of settlement. Furthermore, at least when the *Bartels* approach is followed, the non-settling tortfeasors are no worse off after the settlement than they were before.[51]

By settling with one joint tortfeasor the plaintiff has waived the language of section 9-10-07 which provides that "each shall

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51. *Compare, Release of Joint Tortfeasors: Use of the Pierringer Release in Minnesota,* 3 WM. MITCHELL L. REV. 1, 19-22 (1977), with American Motorcycle Ass'n. v. Superior Court, *supra* note 50. *See also* Note, *Products Liability, Comparative Negligence, and the Allocation of Damages Among Multiple Defendants,* 50 SO. CAL. L. REV. 73, 106-07 (1976).

The nonsettling tortfeasor is, however, at a distinct tactical disadvantage. By way of example, Simonett suggests these concerns:

> By allowing the plaintiff to settle with one defendant, the plaintiff is better able to finance his lawsuit against the non-settling party. . . . Also, the non-settling tortfeasor finds himself no longer able to cross-examine the settling tortfeasor as an adverse party. The settling tortfeasor may or may not be adverse but he very definitely is no longer a party, and so must be called as the non-settling tortfeasor's own witness. . . .

3 WM. MITCHELL L. REV. at 21.

remain jointly and severally liable for the whole award."[52] Considering, as the *Bartels* court did, that "North Dakota, in enacting. . . § 9-10-07. . . adopted the pure comparative negligence concept at least in instances involving more than one tort-feasor"[53] what effect would the plaintiff's waiver of joint and several liability have on the application of section 9-10-07 when more than one non-settling tortfeasor remained in the trial? Would each remaining tortfeasor's liability to the plaintiff be determined in accordance with pure comparative negligence principles? What if the plaintiff is determined to be negligent? How would the determination of whether his negligence "was not as great as the negligence of the person against whom recovery is sought. . ." be made? These questions are not answered in *Bartels.* In fact, the court cautioned against reading too much into the court's responses to the certified questions.[54]

At least one collateral concern clearly was resolved. With the decision in *Bartels,* the last obstacle faced by the North Dakota practitioner interested in using the *Pierringer* release has been removed. That release, named after the Wisconsin case initially approving its terms, was described by one source as follows:

> In its simplest form, the *Pierringer* release (1) releases the settling defendant from the lawsuit and discharges a part of the cause of action equal to that part attributable to the settling joint tort-feasor's causal negligence, (2) reserves 'the balance of the whole cause of action' against the non-settling joint tort-feasors, and (3) contains an agreement whereby the plaintiff indemnifies the settling defendant from any claims of contribution made by the non-settling parties and agrees to satisfy any judgment he obtains from the non-settling tort-feasors to the extent the settling tort-feasor has been released.[55]

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52. 276 N.W.2d at 122.
53. *Id.* at 121.
54. *Id.* at 123. The court stated the following:

> While some of the answers to the certified questions may have general application, we must nevertheless caution that they were predicated upon the facts of this case, particularly the general release given to one of the alleged tort-feasors. The absence of a general release or a different set of facts conceivably could produce different answers.

*Id.*

55. Simonett, *Release of Joint Toftfeasors: Use of the Pierringer Release in Minnesota,* 3 WM. MITCHELL L. REV. 1, 3 (1977). Simonett stated "the release was designed to operate in a jurisdiction which has *comparative negligence to apportion liability between defendants,* uses the special verdict form, and allows contribution between joint tortfeasors." *Id.* at 11 (emphasis added).

The *Bartels* court specifically approved the *Pierringer* release concept,[56] and approved by implication the Minnesota practice guidelines found in *Frey v. Snelgrove.*[57] The use of the *Pierringer* release in North Dakota should facilitate the court's stated objective of encouraging compromise and settlement.

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The *Pierringer* release as a settlement device should be distinguished from other commonly used devices. Simonett identifies and distinguishes three such devices:

> A *loan receipt* is a settlement device, by which the settling defendant loans a specific sum of money, without interest, to the plaintiff. The plaintiff promises to repay the loan from any judgment obtained against the non-settling defendant. The plaintiff is not obligated to repay the loan from any portion of a judgment which exceeds the amount of the loan. The plaintiff also agrees to pursue his claim against the non-settling defendant.
>
> A *high-low agreement* is a settlement device, by which a plaintiff and defendant agree to set minimum and maximum limits on the ultimate award regardless of the jury's decision. The defendant pays the minimum sum to the plaintiff at the time of settlement. . . . The parties may also agree to submit to an arbitrator who would award damages within the agreed limits. . . .
>
> A *covenant not to sue* is an agreement entered into by the plaintiff and a settling joint tortfeasor, whereby the plaintiff agrees not to commence or continue to prosecute any action based upon the claim in dispute in return for a specified sum of money. . . . A covenant need not reserve the right to sue other joint tortfeasors for that right to remain effective. But the reservation of such a right is important in determining whether the parties intended the right to exist or whether they intended to settle the claim entirely and release the other joint tortfeasors from the action.

*Id.* at 2-3 nn. 2-4 (emphasis added).

The same commentator also distinguishes the largely discredited "Mary Carter Agreement":

> In a *Mary Carter Agreement,* the plaintiff and one of the defendants agree that (1) the contracting defendant guarantees plaintiff a specific sum if plaintiff loses the case or recovers less than a certain sum; (2) the contracting defendant's maximum liability may be reduced if the liability of a codefendant is increased; and (3) the contracting defendant stays active in the trial as a party but the agreement is kept secret.

*Id.* at 20 n.98 (emphasis added).

Minnesota and North Dakota courts would not tolerate such an agreement. *See* Frey v. Snelgrove, ____ Minn. ____, 269 N.W.2d 918, 923 (1978). "When a settlement or release is entered into, the trial court and other parties should be immediately notified, and the terms of the agreement made a part of the record." *Id.*

For a good discussion of "Mary Carter" type agreements and the question of when the existence of a settlement agreement should be disclosed to a jury *see* General Motors Corp. v. Simmons, 558 S.W.2d 855, 856-59 (Tex. 1977).

56. 276 N.W.2d at 119.

57. ____ Minn. ____, 269 N.W.2d 918 (1978). The release given by the plaintiff in *Snelgrove* and approved by the Minnesota Court, contained two additional provisions not found in a typical *Pierringer* release. "[First,] [t]he indemnity clause covered cross-claims for indemnity as well as contribution and [second] the amount paid for the settlement was contingent upon the amount recovered against the nonagreeing party at trial rather than a sum certain." *Id.* at ____, 269 N.W.2d at 921 n.1.

Following are the practice guidelines suggested by the court for future consideration:

> When a settlement or release is entered into, the trial court and other parties should be immediately notified, and the terms of the agreement made a part of the record. If the plaintiff has agreed to indemnify the settling defendant against all possible cross-claims of the non-settling parties, the trial court should ordinarily dismiss the settling defendant from the case, in accordance with the Pierringer release. Since the settling defendant has fixed his limits of financial liability to the plaintiff by entering into the release, he is deemed also to have relinquished any cross-claims against the remaining defendants.
>
> On the other hand, if a nonsettling party has cross-claims for both contribution and indemnity, either of which is not covered by the terms of the release, then the settling defendant should continue as a party for the limited purpose of defending against the surviving cross-claim.

## C. POST-BARTELS: WHERE TO NOW?

The North Dakota court's equity approach to the resolution of the section 9-10-07 issues raised in *Bartels* should provide the flexibility needed to resolve a number of other concerns which the court will probably face in the very near future. Some of these issues have been considered by both the Wisconsin and Minnesota courts, and, given the approval by the *Bartels* court of a large body of Wisconsin and Minnesota caselaw, it is expected that the law of those states will continue to have a strong influence on the North Dakota Supreme Court. This is especially true of early Wisconsin cases[58] and more recent Minnesota cases.[59]

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> In almost every case the trial court should submit to the jury the fault of all parties, including the settling defendants, even though they have been dismissed from the lawsuit. If there is "evidence of conduct which, if believed by the jury, would constitute negligence [or fault] on the part of the person * * * inquired about," the fault or negligence of that party should be submitted to the jury. [Cite omitted.]
>
> Where the settlement and release agreement is executed during trial, the court should usually inform the jury that "there has been a settlement and release if for no other reason than to explain the settling tortfeasor's conspicuous absence from the court room."
>
> Although a release agreement is admissible under Rule 408 of the Rules of Evidence, where it is offered for a purpose such as proving bias or prejudice of a witness, it is within the trial court's discretion to determine whether to admit the actual agreement into evidence, or the details thereof. The jury should be given those facts necessary to arrive at a fair verdict to all parties, but as a general rule the amount paid in settlement should never be submitted. That figure itself may have little relation to the actual damages of a plaintiff, since it may reflect a compromise, the evaluation of a defendant's potential liability, and many other factors not relevant to a jury's consideration of actual monetary damages.
>
> The foregoing procedures are guidelines to be applied so as to assure a fair trial to all parties and may be modified when that end would not be served. A trial court's deviation would not constitute error if those modifications substantially protect the rights of all parties and preserve the adversary process.

*Id.* at 923.

58. This is especially true of Wisconsin cases that interpreted the Wisconsin comparative negligence statute prior to Minnesota's adoption of that statute in 1969.

59. While the Minnesota cases decided prior to 1973, the year North Dakota adopted the Minnesota (Wisconsin?) comparative negligence statute, are the most relevant, it can be expected that all Minnesota decisions prior to 1978, the year Minnesota amended its comparative negligence statute, will be considered persuasive by the North Dakota Court. *See* 276 N.W.2d at 120. Cases with which the North Dakota lawyer may wish to become familiar include: Frey v. Snelgrove, ____Minn.____, 269 N.W.2d 918 (1978); Anunti v. Payette, ____Minn.____, 268 N.W.2d 52 (1978); Busch v. Busch Constr. Inc. ____Minn.____, 262 N.W.2d 377 (1977); Pacific Indem. Co. v. Thompson-Yaeger, Inc., ____Minn.____ 260 N.W.2d 548; Lambertson v. Cincinnati Corp., ____Minn.____, 257 N.W.2d 679 (1977); Luxenburg v. Can-Tex Indus., ____Minn.____, 257 N.W.2d 804 (1977); Tolbert v. Gerber Indus. Inc., ____ Minn. ____, 255 N.W.2d 362 (1977); Ferguson v. Northern States Power Co., 307 Minn. 26, 239 N.W.2d 190 (1976); Smedsrud v. Brown, 303 Minn. 330, 227 N.W.2d 572 (1975); Kowalski v. Armour and Co., 300 Minn. 301, 220 N.W.2d 268 (1974); Winge v. Minnesota Transfer Ry. Co., 294 Minn. 246, 201 N.W.2d 259 (1972); Keefer v. Al Johnson Constr. Co., 292 Minn. 91, 193 N.W.2d 305 (1971).

Furthermore, because it appears that the 1978 amendments to the Minnesota comparative negligence statute were largely a legislative approval of prior action taken by the Minnesota court (*compare* MINN. STAT. ANN. § 604.01 (Supp. 1978), set out below, *with* Busch v. Busch Constr. Co., ____Minn.____, 262 N.W.2d 377, 393-94 (1977) (discussed *infra* at notes 89 through 105 and accompanying text)), post-1978 decisions should be persuasive as well.

Section 604.01 of Minnesota Statutes Annotated, as amended in 1978, provides as follows:

> 1. Contributory fault shall not bar recovery in an action by any person or his legal

Selected for discussion in the following sections are three such issues:[60]

1. Will the section 9-10-07 amendments to chapter 32-38 set out in *Bartels* affect the immunity from suit which employers covered by workman's compensation now enjoy for workplace injuries to covered employees?

2. Will those amendments affect the scope of tort-feasor's "joint and several" liability?

3. Will "ordinary negligence" be compared with Restatement 402A-type "strict liability"?

### *1. Bartels and Workmen's Compensation Law*

The policies for adopting a workplace compensation plan are well known. The common law was ineffective in resolving disputes between an employer and an employee concerning employee on-the-job injuries. In its place many states have substituted "no fault" compensation plans that exchange the employee's claim against the employer for a no-fault payment based upon a fixed schedule.

Ever present in the workplace, however, are industrial products that account for many serious injuries. Some of these injuries are caused by employee negligence, some are caused by employer negligence, and some are caused by defects in the products themselves; many injuries, however, are caused by a combination of all three.

The problem simply stated is this: under workmen's compensation laws, the employer is immunized from suit by the employee, but the manufacturer of the injury-causing product is

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representative to recover damages for fault resulting in death or in injury to person or property, if the contributory fault was not greater than the fault of the person against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of fault attributable to the person recovering. The court may, and when requested by any party shall, direct the jury to find separate special verdicts determining the amount of damages and the percentage of fault attributable to each party; and the court shall then reduce the amount of damages in proportion to the amount of fault attributable to the person recovering.

1a. "Fault" includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an express consent, misuse of a product and unreasonable failure to avoid an injury or to mitigate damages. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.

MINN. STAT. ANN. § 604.01 (Supp. 1978).

60. This is not to suggest there are only three. Nor should the reader expect an exhaustive discussion of the three mentioned. Each of these issues is a research topic in itself. The discussion that follows appears here for illustrative purposes. For more detailed discussions *see* articles cited at note 86 *infra*.

not. Where *both* the employer and the manufacturer are responsible for the injury they become joint tortfeasors. Because the employer is immune from suit, the manufacturer can be held accountable for *all* of the employee's damages, including, in many states, the amount paid to the employee out of the Workmen's Compensation Fund.[61]

The importance of this concern in the context of the larger "products liability problem" was dramatized in a recent survey. "According to the Insurance Services Office Closed Claims Survey, only 11 percent of product liability incidents involve workers injured on the job. Nevertheless, these incidents account for 42 percent of the total payment of bodily injury claims."[62] The precentage of that payment reflecting sums paid by product-producers for injuries caused by employer negligence has not been determined, but even a small percentage is significant.

The problem is under study on the federal level, and among the solutions suggested is the one found in the Commerce Department Draft Uniform Product Liability Law.[63] Section 113 of this law proposes that an employer be subject to contribution claims from third party tortfeasors for a sum not to exceed the worker compensation lien.[64] Such an "employer contribution" approach was recently taken by the Minnesota Supreme Court in *Lambertson*

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*51. For a good discussion of this problem, see* 2A A. LARSON, WORKMEN'S COMPENSATION § 76.00 (1976).

62. *See* Schwartz, *Federal Action on Product Liability — What Has Occurred and What May Occur*, 14 FORUM 287, 301 (1978). Schwartz states as follows:

> Under the law in a majority of states, the tort system appears to aggravate this situation. When a worker is injured by a product in the workplace and brings a Worker Compensation claim, he is likely to receive some payment. Then, he may obtain counsel (under a contingent fee arrangement) in the hope of receiving additional payment, *e.g.*, full loss of wages, recovery for pain and suffering. When the worker brings a claim, his employer or Worker compensation carrier may join in with a subrogation lien, and attempt to recover all monies that were paid to the worker under the Worker Compensation system. Thus, in a majority of states, if the worker is successful in his claim, the entire cost of the accident may be borne by the product manufacturer, even if the employer has been negligent with respect to the way he maintained the product.

*Id.*

63. U.P.L.L. *supra* NOTE 2. A draft of this model law will likely be released while this article is at the press.

Other solutions suggested include a Federal Worker Compensation plan (*see* Schwartz, *supra* note 62, at 302) and an amendment to OSHA which would allow contribution or indemnity against an employer who violated any OSHA provision or standard. *See* Birnbaum, *Legislative Reform or Retreat? A Response to the Product Liability Crisis*, 14 FORUM 251, 268 (1978).

64. U.P.L.L. *supra* note 2. Section 113 states as follows:

> In the case of any claim brought under this Act by or on behalf of a person who has been or will be compensated for injuries under a state worker compensation law, where an employer's failure to comply with any statutory or common law duty relating to workplace safety shall be subject to a contribution claim provided in Section 112 of this Act for a sum not to exceed the amount of the worker compensation lien.

*v. Cincinnati Corp.*,[65] when it held an employer liable for contribution up to the amount of compensation benefits. Lest the reader become concerned that we are straying from our underlying theme, consider the now-familiar analysis of the Minnesota court:

> Comparative negligence, which is embodied in Minn. St. 604.01 and was substantially borrowed from our sister state of Wisconsin in 1969, introduces yet another dimension to the third-party tort-feasor's predicament. By abolishing the defense of contributory negligence in cases where plaintiff's percentage of total causal negligence is less than defendant's, it permits an injured workman to recover against the third party more frequently. In addition, Minn. St. 604.01, subd. 1, specifies a rule for contribution:
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> > ". . . When there are two or more persons who are jointly liable, contributions to awards shall be in proportion to the percentage of negligence attributable to each, provided, however, that each shall remain jointly and severally liable for the whole award."
>
> Thus, a jointly liable tort-feasor has an interest, at least where the other tort-feasors are solvent and otherwise available for contribution, in contributing no more to the plaintiff's recovery than the percentage of negligence attributable to him.[66]

The court further stated:

> While there is no common liability to the employee *in tort,* both the employer and the third party are nonetheless liable to the employee for his injuries; the employer through the fixed no-fault workers' compensation system and the third party through the variable recovery available in a common law tort action. Contribution is a flexible, equitable remedy designed to accomplish a fair

65. ____ Minn. ____, 257 N.W.2d 679 (1977). *Lambertson* over-ruled Hendrickson v. Minnesota Power & Light Co., 258 Minn. 368, 104 N.W.2d 843 (1960), which had held there was no right of contribution where there was no common liability to the employee, and the exclusive-remedy provision of the Minnesota workers' compensation law precluded that. *Id.* at ____, 258 N.W.2d at 849.

66. Lambertson v. Cincinnati Corp., 257 N.W.2d 679, 686 (1977).

allocation of loss among parties. Such a remedy should be utilized to achieve fairness on particular facts, unfettered by outworn technical concepts like common liability.[67]

Other state courts have recently confronted this issue and reached vastly divergent results.[68] This is due largely to the interaction of infinite combinations of worker compensation laws, comparative negligence laws, products liability laws, and contribution and indemnity laws. Each state, including North Dakota, is unique in its approach to this combination of laws. For that reason the resolution of the problem might best be left to the legislature. *Bartels* does, however, provide a precedential contribution formula for making the necessary modifications, notwithstanding the existence of statutes that on their face seem to prohibit those modifications.[69] The broad-sweeping equity concern that characterizes chapter 32-38, as amended by *Bartels,* would justify the North Dakota court's action, and the *Lambertson* approach seems the likely direction the court would take.[70]

Although the *Lambertson* approach is a good first step, that approach does not go far enough. Workers' compensation benefits are analogous to the consideration given for the release in *Bartels.* While workers' compensation is a mandated settlement foisted on the parties (employer and employee) by the legislature, the release is voluntary in that the claimant chooses whether to settle. Each is, however, a payment given in consideration for the claimant's right

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67. *Id.* at 688.

68. *See* Seaboard Coast Line R.C. Co. v. Smith, 359 So.2d 427 (Fla. 1978); Skinner v. Reed-Prentice Div. Pkge. Mach. Co., 70 Ill.2d 1, 374 N.E.2d 437 (1977), *modified* 70 Ill. 2d 16 (1978); Liberty Mut. Ins. Co. v. Westerlind, ____Mass.____, 373 N.E.2d 957 (1978); Seattle First Nat'l Bank v. Shoreline Concrete Co., 91 Wash.2d 230, 588 P.2d 1308 (1978).

69. *See* N.D. CENT. CODE § 65-01-08 (1960).

70. The *Lambertson* approach seems less complicated and less arbitrary than the approach suggested by Prof. John W. Wade for inclusion in the Uniform Comparative Fault Act. The proposed section 6a titled *Action by Employee Against Third-Party Defendant* states as follows:

> (a) If an employee who has claimed or is entitled to claim against the employer benefits under [the worker's compensation act] brings a tort action against another person to recover additional damages for the injury, the employer may be joined by the defendant as a party for the purpose of determining the percentage of fault allocable in accordance with Section 2 to the employer in comparison with the combined fault of all of the parties, including the claimant.
>
> On the basis of those findings the court shall determine the award to the claimant by subtracting from the amount of the damages half of the amount that, except for the [worker's compensation act], would have been allocated as the primary responsibility of the employer; and it shall render judgment in accordance with the provisions of Section 2. After paying the judgment, the defendant may recover from the employer the other half of the amount that would have been allocated to the employer.

This proposal, and Prof. Wade's justification for its provisions, are found at Wade, *Products Liability and Plaintiff's Fault — The Uniform Comparative Fault Act,* 29 MERCER L. REV. 373, 390-91 (1978). Appended to Wade's article, commencing at page 392, is the full text of the Uniform Comparative Fault Act.

to bring an action against a potential defendant. In the workers' compensation situation that potential defendant is the employer; in the *Bartels* situation it is the released tortfeasor. It follows that the effect on the non-released tortfeasor's obligation should be the same.

Given the modest awards granted under most workers' compensation plans the result suggested may be seen as unfair to the employee-claimant. If it is, however, the fault is not the non-released tortfeasor's; rather, it is the fault of the legislatively mandated compromise *between* the employer and the employee. It is *that* legislation which has removed the remaining tortfeasor's right to contribution from the employer. If the consideration given to the employee is inadequate, it is the compensation system that has unfairly treated the employee, not the non-released tortfeasor. As Justice Sand wrote in *Bartels,* "we should avoid a construction which would permit an imposition of greater liability on a nonreleased tort-feasor with a right of contribution in a multiple-party-tortfeasor situation."[71] There is no more reason to allow a legislatively imposed settlement to increase a non-released tortfeasor's liability than there is to allow a settlement voluntarily entered into by some of the parties to the action to do so.

### *2. Joint and Several Liability*

Nothing in the *Bartels* decision would suggest that North Dakota is inclined toward abolishing its rule that joint tortfeasors are jointly and severally liable to an injured plaintiff. Rather, the case reinforces the state's commitment to this concept by making the contribution rules more equitable.[72]

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71. 276 N.W. 2d at 121.

72. North Dakota should consider making the contribution rules even more equitable by adopting the "reallocation" concept advanced by the Uniform Comparative Fault Act (see Section 2 of the Act). Minnesota has adopted a substantially modified version of the Uniform Act approach. *Compare* Section 604.02 of Minnesota's statute, set out below, *with* Section 2 of the Uniform Comparative Fault Act (1978). Section 604.02 states as follows:

> Subd. 1. When two or more persons are jointly liable, contributions to awards shall be in proportion to the percentage of fault attributable to each, except that each is jointly and severally liable for the whole award.
>
> Subd. 2. Upon motion made not later than one year after judgment is entered, the court shall determine whether all or part of a party's equitable share of the obligation is uncollectible from that party and shall reallocate any uncollectible amount among the other parties, including a claimant at fault, according to their respective percentages of fault. A party whose liability is reallocated is nonetheless subject to contribution and to any continuing liability to the claimant on the judgment.
>
> Subd. 3. In the case of a claim arising from the manufacture, sale, use or consumption of a product, an amount uncollectible from any person in the chain of manufacture and distribution shall be reallocated among all other persons in the chain

In the process of attempting to achieve equity between the tortfeasors, however, the same qualitative judgment that requires that there be a determination of the relative fault of the tortfeasors involved mandates comparison of the relative fault of the *plaintiff* with the relative fault of each of the tortfeasors. With the relative fault of *each* actor determined, the historical bases of some joint tortfeasor categories[73] are eliminated. That certainly is true of the "single indivisible injury rule," especially when the plaintiff is found to have been partially at fault.

The Minnesota Supreme Court faced this issue in a relatively recent case. *Kowalske v. Armour & Co.*[74] involved a plaintiff who contracted brucellosis under circumstances suggesting that the cause could have been traced to either or both of the defendants involved. A jury found the plaintiff to be 10 percent at fault, one defendant 80 percent at fault, and the second defendant 10 percent at fault.[75] The issue was whether the 10 percent at fault defendant's fault was "greater than" the plaintiff's fault,[76] a requirement of the comparative negligence law then in effect in Minnesota. If the defendants were jointly and severally liable, the fault of the two defendants would be added and the plaintiff could recover 90 percent of his injuries from either; if they were not jointly liable the 10 percent at fault plaintiff could recover nothing from the 10 percent at fault defendant. The court held that the two defendants were not jointly and severally liable even though there was concurrent causation of a single indivisible result. The court gave the following explanation for its decision:

> It is true that this court has often held that where two

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> of manufacture and distribution but not among the claimant or others at fault who are not in the chain of manufacture or distribution of the product. Provided, however, that a person whose fault is less than that of a claimant is liable to the claimant only for that portion of the judgment which represents the percentage of fault attributable to him.

MINN. STAT. ANN. §604.02 (West 1978).

73. Dean Prosser lists nine broad categories under which two or more defendants will be liable in tort for the same damages: (1) concerted action; (2) vicarious liability; (3) common duty; (4) concurrent causation of a single, indivisible result, which neither would have caused alone; (5) concurrent causation of a single, indivisible result, which either alone would have caused; (6) successive injuries; (7) damage of the same kind, which is difficult to apportion; (8) acts, innocent in themselves, which together cause damage; and (9) alternative liability.

Note, *Products Liability, Comparative Negligence, and the Allocation of Damages Among Multiple Defendants*, 50 S. CAL. L. REV. 73, 80 n.39 (1976), citing Prosser, *Joint Torts and Several Liability*, 25 CAL. L. REV. 413, 429-41 (1937).

74. 300 Minn. 301, 220 N.W. 2d 268 (1974).

75. Kowalske v. Armour & Co., 300 Minn. 301, 220 N.W.2d 268 (1974).

76. *Id.* at ____, 220 N.W. 2d at 272.

> or more persons are guilty of negligence and cause damage to another, which damage is incapable of being apportioned among the negligent parties, the negligent parties are jointly and severally liable. . . .
>
> It is essential to note that such rule of joint and several liability applies only when plaintiff is free from negligence. . . . "[T]he rule is a result of a choice made as to where a loss due to failure of proof [as to the apportionability of damages] shall fall — on an innocent plaintiff or on defendants who are clearly proved to have been at fault." Such is not the case before us since the plaintiff, deemed 10-percent negligent by the jury, is also at fault in causing the single, indivisible injury.[77]

The single indivisible injury rule developed at a time when contributory negligence of the plaintiff barred the plaintiff's recovery, and defendants were not allowed contribution from each other. In that context it facilitated a measure of equity. Where, however, a jurisdiction not only compares the negligence of all the parties, but also provides for contribution based upon relative fault, there is little justification for applying the rule to every difficult multi-defendant apportionment-of-damage situation. *Bartels* makes it possible for North Dakota to make the *Kowalske* modification of the "single indivisible injury" rule. After that modification is

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77. *Id.* at ____, 220 N.W.2d 272. *Cf.* Seattle First Nat'l Bank v. Shoreline Concrete Co., 91 Wash.2d 230, 588 P.2d 1308 (1978), where the court stated the following:

> Since the harm caused by both joint and concurrent tort-feasors is indivisible, similar liability attaches. We have long held that such tort-feasors are each liable for the entire harm caused and the injured party may sue one or all to obtain full recovery. . . .
>
> While the indivisibility of the harm caused warrants imposition of entire liability upon those tort-feasors, sound policy reasons also support application of the procedural, or several, aspect of the liability rule. The cornerstone of tort law is the assurance of full compensation to the injured party. To attain this goal, the procedural aspect of our rule permits the injured party to seek full recovery from any one or all of such tort-feasors. So long as each tort-feasors's conduct is found to have been *a* proximate cause of the *indivisible* harm, we can conceive of no reason for relieving that tort-feasor of his responsibility to make full compensation for all harm he has caused to the injured party. What may be equitable *between multiple tort-feasors* is an issue totally divorced from what is fair to the injured party. Thus, we cannot accept respondents' suggestion that joint and several liability is appropriate only for "joint" tort-feasors.
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> . . . .
>
> Finally, even when a plaintiff is partially at fault for his own injury, his culpability is not of the same nature as defendant's. A plaintiff's negligence relates to a failure to use due care *for his own protection* whereas a defendant's negligence relates to a failure to use due care *for the safety of others*. While a plaintiff's self-directed negligence may justify reducing his recovery in proportion to his degree of *fault*, the fact remains that such conduct, unlike that of a negligent defendant, is not tortious.

*Id.* at ____, 588 P.2d at 1312-14 (emphasis original).

made, possibly the only convincing argument left for retention of the remnants of the rule is the suggestion that the risk of insolvency of one or more of the tortfeasors should fall upon the remaining tortfeasors rather than the wholly fault-free plaintiff. While that suggestion has a certain amount of appeal, it would seem that equity demands that tortfeasors not acting in concert should be responsible only for the injuries each caused individually.[78]

### *3. Strict Products Liability and Negligence Compared*

It was suggested earlier that the evolution of tort law benefits from the microscopic analysis to which it is subjected by the adversary process. The interpretation problem plaguing Restatement 402A is a good example of what too often happens when that analysis does not take place.

Restatement 402A was the work product of Dean Prosser, and with its adoption by the American Law Institute[79] modern products

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78. By way of illustration, would it have been equitable in *Kowalske* to hold that same 10 percent at fault defendant responsible for 100 percent of the plaintiff's injuries if the other defendant had been 90 percent at fault, and the plaintiff fault-free? If the 90 percent at fault defendant is insolvent that is exactly what would happen. Or, taking the illustration to its extreme, would it be equitable for a 1 percent at fault defendant to be placed in a similar situation if a plaintiff is fault-free, but not if the plaintiff is also 1 percent at fault?

For discussion of joint and several liability and joinder concerns, *see* Seattle First Nat'l Bank v. Shoreline Concrete Co., 91 Wash. 2d 230, 588 P.2d 1308, 1312-14 (1978); Boone, *Multiple-Party Litigation and Comparative Negligence,* 45 Ins. COUNSEL J. 335, 337-40 (1978); Note, *Products Liability, Comparative Negligence, and the Allocation of Damages Among Multiple Defendants,* 50 S. CAL. L. REV. 73, 80-81 (1976); Comment, *Brown and Miles: At last, an end to Ambiguity in the Kansas Law of Comparative Negligence,* 27 KAN. L. REV. 111, 120 (1978).

79. If there is a "law related person" who doubts William Lloyd Prosser deserved the title "Mr. Torts," that person should consider this: in 1965 Dean Prosser convinced the American Law Institute that his revolutionary theory of products liability was in reality only a restatement of existing law. At the time there were only two significant cases that supported his views, Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960), and Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

Two leading torts scholars dedicated the casebook W. PROSSER, J. WADE, & V. SCHWARTZ, TORTS (6th Ed. 1976) to Prosser in these words: "To William Lloyd Prosser, Mr. Torts in the lexicon of any law-related person. Both the editors and the users of this casebook are greatly in his debt."

Prosser's theory became Restatement (Second) of Torts § 402A:

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

RESTATEMENT (SECOND) OF TORTS § 402 (a) (1965).

liability law was born.[80] The idea was apparently a good one, because within ten years the concept had been accepted by the great majority of American jurisdictions.

North Dakota has specifically adopted Restatement 402A.[81] The North Dakota Supreme Court's stated reason for doing so was to avoid any ambiguity as to the form of strict products liability adopted by them.[82] Forgotten by the North Dakota court was the fact that Prosser's formulation was only an outline of a law professor's theory.[83] It contains little to aid courts and juries with the practical problems facing them in products liability actions. Furthermore, the comments to section 402A, and in particular comment n, raised more questions than they answer.[84]

The inherent ambiguities contained in section 402A and its comments are the basis of the difficulties which courts are currently encountering in products liability actions. Section 402A evolved without taking into account the vast amount of societal values it affected.[85] The result has been confusion on one hand and outright rebellion on the other. North Dakota is suffering from a little of both, as are most states which have adopted 402A. Only well-reasoned guidance from courts and sound legislation can restore order. *Bartels* is a good first step; the logical next step will be comparison of negligence with 402A strict liability.

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80. For an historical perspective of the development of products liability law, *see* Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS L.J. 825 (1973); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966); Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L. J. 1099 (1960).

81. *See* Johnson v. American Motors Corp., 225 N.W.2d 57, 66 (N.D. 1974).

82. *Id.*

83. Given the paucity of jurisdictions espousing comparative negligence in 1965, Prosser's failure to resolve in 402A the now important question of whether 402A strict liability can be compared with ordinary negligence, may be excused. Inasmuch as the North Dakota legislature had so recently (within the prior year) passed a comparative negligence statute, it would seem that the North Dakota court should have addressed the question when it adopted 402A. Since the Wisconsin court had done so with the very same comparative negligence statute some six years before (see infra notes 86 through 91 and accompanying text), the members of the court were probably aware that the issue would be raised. It is, of course, possible the court thought that it had answered the question by not raising it.

84. *See infra* note 105 and accompanying text.

85. This article concerns the tort defendant's struggle for equity. In this context it seems appropriate to discuss societal values. Whether or not it is true, the statement has often been made that the policy reason behind 402A is one of loss distribution. It is said that products liability defendants should be held strictly liable for damages to a consumer associated with the use of a product because the business community is in a position to easily spread the cost of those damages by moderate increases in the price of goods sold in the future. However, there appear to be flaws in this reasoning.

First, not all 402 defendants are in a position to spread the loss. Second, why *should* future purchasers pay for damages caused by past mistakes, especially those damages associated with mistakes made by other consumers? Some of the largest products liability awards have been awarded to consumers of drugs and users of automobiles. Who needs drugs and automobiles? The sick, the lame, and the elderly are the biggest consumers of drugs, and every man, woman, and child, rich and poor, is a user of automobiles. Third, why should the future profits of products liability defendants be used to pay all the damages of a negligent person who happens to be injured while using a product? Negligent persons will be injured. They will be injured while using defect-free

The logical starting point of any discussion[86] of comparison of negligence with strict liability is *Dippel v. Sciano*,[87] a 1967 product liability decision which resulted in Wisconsin being the first jurisdiction to apply its comparative negligence statute to strict product liability cases. The *Dippel* court first concluded that "[s]trict liability does not make the manufacturer or seller an insurer nor does it impose absolute liability."[88] The court found that strict liability is a species of negligence, and gives to a plaintiff the same proof and procedural advantages that a plaintiff has if

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products, and they will be injured while using defective products. And when injured, society will, in one manner or another, bear the cost of the careless person's act. The person of means will have insurance, and through insurance the loss will be distributed. The person without means will have welfare, and through the tax system the loss will be redistributed. In addition to these two general loss-distributing devices lie collateral source benefits flowing from the workplace; workman's compensation; social security benefits; hospital, doctor, dentist and disability insurance; sick pay; and unemployment insurance, to name a few. The point may be obvious. The business community pays the cost of work-place benefits (as well as the lion's share of taxes, direct and indirect), and is, therefore, *already* the major "no-fault" loss-distributing agent for an individual's damages for injuries received from *any* cause. To suggest that it should *again* pay, regardless of fault, runs contra to Americans' sense of justice.

That is not to suggest that the American sense of justice is offended when a product's producer is asked to shoulder the responsibility for the damages caused *by* a defect in that product. Any number of social policies suggest that the producer (or other responsible defendant) should do so, but only to the extent of the damages associated with that responsibility.

Had 402A clearly provided for these concerns there would be no need to debate whether strict liability and negligence can be compared under a state's comparative negligence law. *See infra* notes 86 through 107.

86. There have been many such discussions in recent years. *See, e.g.*, Boone, *Multiple-Party Litigation and Comparative Negligence*, 45 INS. COUNSEL J. 335 (1978); Brewster, *Comparative Negligence in Strict Liability Cases*, 42 J. AIR L. & COM. 107 (1976); Feinberg, *The Applicability of a Comparative Negligence Defense in a Strict Liability Suit Based on Section 402A of the Restatement of Torts Second (Can Oil and Water Mix?)*, 42 INS. COUNSEL J. 39 (1975); Fischer, *Products Liability — Applicability of Comparative Negligence*, 43 MO. L. REV. 431 (1978); Hoskins, *Comparative Negligence in a Strict Product Liability Action: Sun Valley Airlines Corp. v. Avco-Lycoming Corp.*, 14 IDAHO L. REV. 723 (1978); Jensvold, *A Modern Approach to Loss Allocation Among Tort-feasors in Products Liability Cases*, 58 MINN. L. REV. 723 (1974); Kroll, *Intra-Industry Joint Liability: A New Era in Products Liability*, INS. L. J. 193 (1979); Levine, *Strict Products Liability and Comparative Negligence: The Collision of Fault and No-Fault*, 14 SAN DIEGO L. REV. 337 (1977); Nelson, *Products Liability: New Directions and Practical Approaches*, 2 CORP. L. REV. 179 (1979); Pinto, *Comparative Responsibility — An Idea Whose Time Has Come*, 45 INS. COUNSEL J. 115 (1978); Schwartz, *Strict Liability and Comparative Negligence*, 42 TENN. L. REV. 171 (1974); Simmonett, *Release of Joint Tortfeasors: Use of the Pierringer Release in Minnesota*, 3 WM. MITCHELL L. REV. 1 (1977); Twerski & Weinstein, *A Critique of the Uniform Product Liability Law — A Rush to Judgment*, 28 DRAKE L. REV. 221 (1979); Note, *Comparative Negligence in a Strict Product Liability Action*, 14 IDAHO L. REV. 698 (1978); Note, *Products Liability, Comparative Negligence, and the Allocation of Damages Among Multiple Defendants*, 50 S. CAL. L. REV. 73 (1976); Note, *Reconciling Comparative Negligence, Contribution, and Joint and Several Liability*, 34 WASH. & LEE L. REV. 1159 (1977); Note, *A Reappraisal of Contributory Fault in Strict Liability Law*, 2 WM. MITCHELL L. REV. 235 (1976); Casenote, 9 TEX. TECH. L. REV. 701 (1978); Casenote, 44 J. AIR L. & COM. 649 (1979).

87. 37 Wis. 2d 443, 155 N.W.2d 55 (1967). This case also made Wisconsin one of the first jurisdictions to adopt a form of Restatement 402A strict liability, and until recent years was cited primarily for that reason. It was in dictum that the *Dippel* court said the comparative negligence statute applied to strict product liability cases. *Id.* at ____, 155 N.W.2d at 64-65.

88. Dippel v. Sciano, 37 Wis. 2d 443, ____, 155 N.W.2d 55, 63 (1967). This seems to be the one point upon which all jurisdictions that will compare non-strict liability fault with strict liability fault seem to agree. *See, e.g.*, Sun Valley Airlines, Inc. v. Avco-Lycoming Corp., 411 F. Supp. 598, 602 (D. Idaho 1976) ("However, strict liability is not absolute liability because a manufacturer is not an insurer or guarantor that no one will be injured in using his product."); Caterpillar Tractor Co. v. Beck, 593 P.2d 871, 889 (Alas. 1979) ("First. . . strict products liability is not absolute liability . . . ."); Morningstar v. Black & Decker Mfg. Co., 253 S.E.2d 666, 684 (W.V. 1979) ("*Rylands* looks only to the resulting harm and creats absolute liability on the part of the defendant and no negligence or defect need be shown. The defendant is an insurer — a standard which the overwhelming majority of courts refuses to impose on the manufacturer of a product.")

negligence as a matter of law or negligence *per se* is involved.[89] The Wisconsin Supreme Court, discussing *Dippel* in a later case, said:

> [T]he effect of the adoption of the rule of strict liability based on this negligence in effect shifts the burden of proof from the plaintiff of proving specific acts of negligence to the defendant to prove he was not negligent in any respect.
>
> Consequently, in Wisconsin where we have comparative negligence, many defenses including contributory negligence and unilateral assumption of risk as a part of contributory negligence are available in determining the apportionment of the negligence by the manufacturer of the alleged defective product and the negligent use made thereof by the consumer. Thus the ordinary rules of causation and defense applicable to negligence are available under our adoption of the Restatement rule. If this were not so, this court would have abolished the doctrine of comparative negligence which in *Dippel* this court said it would not do. . . .[90]

The *Dippel* court had explained its action in these words: "What we mean is that a seller who meets the conditions of sec. 402A, Restatement, Torts 2d, in Wisconsin is guilty of negligence as a matter of law and such negligence is subject to the ordinary rules of causation and the defense applicable to negligence."[91] Thus, approximately two years before Minnesota adopted the Wisconsin comparative negligence statute,[92] and six years before North Dakota adopted the Minnesota version,[93] the Wisconsin court had determined that the comparative negligence statute applied to a negligence-strict liability fact situation.

It was not until ten years after *Dippel,* however, that the Minnesota Supreme Court applied comparative negligence in a strict liability situation. In an analysis similar to the North Dakota Supreme Court's reasoning in *Bartels,* the Minnesota court stated in *Busch v. Busch Constr., Inc.*:[94]

> The Wisconsin Supreme Court in *Dippel*. . . adopted

89. 155 N.W.2d at 64-65.
90. Powers v. Hunt-Wesson Foods, Inc., 64 Wis. 2d 532, 219 N.W.2d 393, 395 (1974).
91. 155 N.W.2d at 66 (Hallows, J., concurring).
92. 1969.
93. 1973.
94. ___Minn. ___, 262 N.W.2d 377 (1977).

> a cause of action for strict liability in tort under Restatement, Torts 2d, § 402A. The Wisconsin Supreme Court further held that its comparative negligence statute applied to such actions. . . . [W]e [have] held that our adoption of the Wisconsin comparative negligence statute presumed our adoption of the Wisconsin Supreme Court's interpretations of the statute up to that point. We therefore adopt the Wisconsin rule that the comparative negligence statute applies to actions brought on a § 402A theory. . . . [95]

Wisconsin has been criticized for having categorized 402A liability as just another form of negligence,[98] and there is every indication that the *Busch* court sought not to place Minnesota in the Wisconsin camp on that point. After agreeing with the Wisconsin court's conclusion that the shared comparative negligence statute applied to 402A forms of liability, the *Busch* court turned sharply toward interpreting Restatement 402A, a legal principle not adopted from Wisconsin.[97] The *Busch* court agreed with the Wisconsin court that reducing the elements of proof was an important policy reason behind adoption of strict liability.[98] The Minnesota court went on, however, to note that the real importance of this reduction of the elements of proof is that it fosters the twin policies of protecting the consumer while shifting the risk of loss to distributors, two universally accepted policy bases behind section 402A.[99] Thus, the Minnesota court determined that section 402A liability has a culpability basis qualitatively different from negligence, and strict product liability cannot be equated with "negligence per se."

Further indication that the *Busch* court did not approve of the Wisconsin "negligence per se" approach to 402A-negligence comparison is found in the court's choice of terminology. Notwithstanding the "comparative negligence" language found throughout what was then Minnesota's comparative negligence statute, the court preferred to refer to the concepts in other terms: "[C]omparative negligence is a misnomer. . . . [T]he comparative negligence statute becomes more than a comparative *negligence* or even a comparative *fault* statute; it becomes a comparative *cause*

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95. Busch v. Busch Constr., Inc., ___ Minn. ___, 262 N.W.2d at 393.
96. *See, e.g.*, Fischer, *Products Liability — Applicability of Comparative Negligence*, 43 Mo. L. Rev. 431, 439-43 (1978).
97. ___ Minn. ___, 262 N.W.2d at 393-94.
98. *Id.* at ___, 262 N.W.2d at 393.
99. *Id.* at ___, 262 N.W.2d at 393-94.

statute under which all independent and concurrent causes of an accident may be apportioned on a percentage basis.''[100]

The court further strayed from the Wisconsin approach by refusing to be bound by the Wisconsin Supreme Court's analysis of available defenses in products liability actions:

> What types of conduct by a user should constitute the kind of contributory fault which is to be compared with a distributor's strict liability?. . . [A]ny solution to this issue must be tailored to protect the consumer's reliance on the product's safety. To insure protection of this interest, we hold that a consumer's negligent failure to inspect a product or to guard against defects is not a defense and thus may not be compared with a distributor's strict liability. All other types of consumer negligence, misuse, or assumption of risk must be compared with the distributor's strict liability under the statute.[101]

The North Dakota court will not be bound by either *Busch* or *Dipple* when it confronts the issues discussed therein. North Dakota had adopted Minnesota's comparative negligence statute prior to the Minnesota Court's decision in *Busch.*[102] Since the North Dakota legislature adopted only the *then existing* Minnesota case law when it adopted the Minnesota statute, the North Dakota court will not have to explain away the *Busch* analysis if it decides to take a different approach. It further appears that the court will not be tied to *Dippel,* either. Although *Dippel* was included in the pre-existing Wisconsin case law which the North Dakota legislature incorporated when it adopted the Minnesota statute, the North Dakota court had not at that time adopted section 402A. Moreover, section 402A was adopted by the *court.* There exists no question of judicial interpretation of legislative intent. The court is free to develop section 402A in any way its sees fit.

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100. *Id.* at ____, 262 N.W.2d at 394 (citations omitted). This terminology found its way into the 1978 amendment of Minnesota's comparative negligence (now "fault") act (*see supra* note 59), and is, of course, used throughout the Uniform Comparative Fault Act.

101. *Id.* (citations omitted.)

102. The chronology is as follows:

1967 — *Dippel* was decided (Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967)).

1969 — Minnesota adopted Wisconsin comparative-negligence statute.

1973 — North Dakota adopted Wisconsin-Minnesota comparative-negligence statute.

1977 — *Busch* was decided (Busch v. Busch Constr., Inc., ____ Minn. ____, 262 N.W.2d 377 (1977)).

It therefore appears that North Dakota is in a good position to take or leave any or all of the analysis in *Busch* and *Dippel,* and still remain consistent with its approach in *Bartels*. The author suggests that as a point of departure it would be wise to follow Minnesota's lead on at least two points: removal of the "negligence" label when the comparative statute is applied in strict liability situations, and adoption of the Minnesota court's interpretation of comment n to section 402A. That interpretation limits application of the ban against consideration of a consumer's contributory fault to situations involving failure to inspect or guard against defects.

Removal of the "negligence" label when applying the comparative statute to strict liability would free the new concepts of negligence trappings[103] and promote unimpeded growth of 402A as a revolutionary tort theory. Moreover, this approach would give to North Dakota the flexibility it will need to deal with the maze of problems currently facing our courts which threaten to arrest orderly development of this area of the law.[104]

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103. For a good review of negligence terminology and concepts in this context *see* Note, *Strict Products Liability: The Irrelevance of Foreseeability and Related Negligence Concepts,* 14 TULSA L. J. 338 (1978). Unfortunately the author tried to do that which cannot be done — *explain* negligence concepts. But then he is in good company. *See* Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928) (Cardozo-Andrews debate) (discussed, 14 TULSA L.J. at 345-46).

104. Prior to the relatively recent comparative negligence-strict liability debate there was little need to discuss the nature of the underlying theory of § 402A liability. If the plaintiff's conduct was of consequence only in the relatively narrow "misuse" and "assumption of risk" context, such conduct would bar all recovery and the distributor's liability simply no longer existed. When, however, the relative fault of the plaintiff is compared with the distributor's responsibility to market a defect free product, the liability "basis" of that responsibility becomes relevant.

Three approaches seem to be emerging. The first is the *negligence per se* approach of *Dippel (See also,* Hagenbuch v. Snap-On Tools Corp., 339 F. Supp. 676 (D.N.H. 1972)). Labeling § 402A liability "negligence" focuses attention on the conduct of the distributor, and because there is often no conduct (except marketing) to focus on, this approach creates conceptual difficulties.

The second approach is a form of "implied warranty" divested of the contractual problems of notice, privity, and disclaimer. This approach focuses on the defective nature of the product, which is as difficult to compare with the consumer's negligence as is the non-existent conduct of the manufacturer. (*See* Daly v. General Motors Corp., 575 P.2d 1162, 1179, 144 Cal. Rptr. 380, 402 (1978) (Jefferson J., concurring and dissenting).

The third approach simply refers to the manufacturer's conduct as a "cause" and comparative causation, and while the debate is far from over, "[c]omparative causation may prove to be the most practical and workable solution to the comparison dilemma." Casenote, 44 J. Air L. & Com. 649 (1979).

As explained in General Motors Corp. v. Hopkins, 548 S.W.2d 344 (Tex. 1977), in applying the approach in a rather narrow "misuse" context:

> [I]f the product is found to have been unreasonably dangerous when the defendant placed it in the stream of commerce, and if that defect is found to have been a producing cause of the damaging event, and if the plaintiff. . . misused the product. . . and. . . that misuse is a proximate cause of the damaging event, the trier of fact must then determine the respective percentages (totaling 100%) by which these two concurring causes contributed to bring about the event. . . .

*Id.* at 352.

The Alaska court chooses not to follow the "comparative causation" approach, referring instead to its newly created comparison device as a "comparative negligence defense." Butaud v. Suburban Marine & Sport. Goods, Inc., 555 P.2d 42, 46 (Alas. 1976).

*We find it unnecessary to conceptualize the theory of the action which strict liability creates* in

Adoption of Minnesota's interpretation of comment n to section 402A is suggested because that interpretation removes a major obstacle in the path of a logical formula for comparing ordinary negligence with strict liability. Comment n provides:

> n. *Contributory negligence.* Since the liability with which this Section deals is not based upon negligence of the seller, but is strict liability, the rule applied to strict liability

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> order for us to apply comparative negligence principles to strict products liability cases which result in personal injuries. . . .
>
> Although it is theoretically difficult for the legal purist to balance the sellers strict liability against the user's negligence, this problem is more apparent than real.

*Id.* at 45 (emphasis added).

> The *comparative negligence defense* would be applied in the same manner as in any negligence case, with the major difference being that in products liability cases it would not be necessary to prove that a defect was caused by negligence.

*Id.* at 46 (emphasis added).

Justice Rabinowitz, concurring in *Butaud,* would have preferred "comparative causation:"

> I generally agree with the court's treatment of the issues which arise in the situation where a plaintiff who is himself negligent asserts a claim founded upon strict liability. Perhaps it is only a semantic difference rather than reflective of a true functional distinction but I prefer adoption of a comparative causation analysis in strict liability cases. Thus, I would require the trier of fact to compare the harm caused by the product's defect with the harm caused by the claimant's own negligence. . . . Adoption of a comparative causation approach would avoid the theoretical problems inherent in any attempt to compare relative degrees of fault where the defendant's negligence, or fault, is determined by principles of strict liability.

*Id.* at 47 (citations omitted) (Rabinowitz, J., concurring).

*Is* there more than a semantic difference? The majority explained how its *comparative negligence defense* works:

> The defendant is strictly liable due to the existence of a defective condition in the product. On the other hand, the plaintiff's liability attaches as a result of his conduct in using the product. It is appropriate, therefore, that the parties' contribution to the injury be apportioned. The defendant is strictly liable for the harm caused from his defective product, except that the award of damages shall be reduced in proportion to the plaintiff's contribution to his injury.
>
> . . . .
>
> In breaking new ground in this area of the law, we feel that the public policy reasons for strict product liability do not seem to be incompatible with comparative negligence. The manufacturer is still accountable for all the harm from a defective product, *except that part caused by the consumer's own conduct.*

*Id.* at 45-47 (emphasis added).

Is the difference one of comparing the causes that brought about the *event* which in turn caused the harm and apportioning the damages accordingly, as opposed to crediting the strictly liable party with 100% of the responsibility for bringing about the event, and then reducing the total damages by that percentage of fault attributable to the plaintiff's own harm producing conduct? And, if it is, would it really make any practical difference which approach is used?

It is suggested that it would. Traditional tort law is better equipped to compare causes of an event than it is to apportion damages caused by an event. It was, in fact, the difficulty in apportioning damages between concurrent tortfeasors that gave rise to procedural devices that made "joint tortfeasors" out of them. (*See supra* note 72 and accompanying text.) Through comparative negligence, are we not simply adding the plaintiff's own conduct to the already existing *concurrent causes?* And is there anything about *that* cause that makes it easier to apportion damages?

> cases (see §524) applies. 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 unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.[105]

What comment n was intended to do is not altogether clear. The great majority of jurisdictions have extended the bar to include contributory negligence in the general sense of a failure to exercise ordinary care for one's own safety. It seems more logical to conclude that what the drafters of section 402A meant to explain in comment n was that "mere failure to discover the defect in the product, or to guard against the possibility of its existence" *is not negligence at all.* In other words, a reasonable and prudent person would be justified in assuming the product was defect free, and failure to look for a defect in every product is simply not negligence. If it is remembered that the basis of 402A liability is a species of warranty, and that in effect the product manufacturer is warranting the product to be defect-free, it follows that a consumer may reasonably expect that the product is in fact defect-free. Under this view, reliance on the manufacturer's representation that the product is safe would not be negligence.

A jurisdiction that has adopted section 402A would be justified in ignoring comment n altogether. Minnesota almost did so when it adopted only that part of comment n which met the needs of Minnesota.[106] This approach clears the way for the allocation of responsibility in an equitable manner. Simply stated, it places the responsibility for manufacturing a defect-free product on the manufacturer, and requires the consumer to exercise ordinary care for his own safety when dealing with a product.[107]

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105. RESTATEMENT (SECOND) OF TORTS § 402 A. Comment n (1965).

106. Busch v. Busch Constr., Inc., ___ Minn. ___, 262 N.W.2d at 394 n.16. "Thus we adopt Restatement, Torts 2d, § 402 (A), comment *n* only insofar as it removes the failure to inspect a product as a defense." *Id.*

107. Given the contribution formula advanced by *Bartels*, adoption of the *Busch* approach would also eliminate the need to resort to indemnity fictions to avoid holding a less-blameworthy distributor of defective products and a more-blameworthy manufacturer equally responsible for the injuries

There are those who suggest the responsibility of the product manufacturer is greater. The manufacturer, they say, is also the proper agent for administering a no-fault insurance plan for injured consumers. The proponents of that view overlook the fact that such an approach is politically unacceptable. The executive and legislative branches of our federal and state governments will respond to the pressure of the business community lobby.[108]

An acceptable solution for North Dakota might be to take the *Busch* comparative approach even a step further to pure comparative fault.[109] Section 402A was judicially adopted by the North Dakota Supreme Court and it is certainly within that court's power to interpret the manner in which section 402A allocates responsibility.[110]

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caused by those products. One such fiction is the "active-passive" indemnity rule. (*See* Skinner v. Reed-Prentice Div., 70 Ill.2d 1, 374 N.E.2d 437 (1977); Tolbert v. Gerber Indus., Inc., ____ Minn.____, 255 N.W.2d 362 (1977).) Another is "partial indemnity." (*See* Dole v. Dow Chemical Co., 30 N.Y. 2d 143, 282 N.E. 2d 288, 331 N.Y.S. 2d 382 (1972)).

By comparing "all" causes of the injury, and then applying the *Bartels* pure comparison approach to contribution, the result should be a straight-forward, understandable, and equitable resolution of a recurring products liability litigation problem.

The resolution, of course, presupposes equitable treatment of each member of the business community *vis-a'-vis* all other members of that group and not merely the claimants. Clear distinctions have to be drawn between the role of each participant, and liability should result only when there can be attached to that role a duty over which that participant has a measure of control. As is demonstrated in the next section, the business community will not, and should not, tolerate less.

108. If one is inclined to doubt this conclusion, consider the fact that consumer tax dollars subsidize the tobacco industry, an industry producing probably the most defective and least utilitarian product in America. Moreover, at this writing hundreds of legislative enactments favoring manufacturers have either been passed by, or are pending before, the legislative bodies around the country. The judiciary cannot much longer ignore the political realities of products liability law.

109. The *Bartels* court seemed to favor a pure comparative fault approach. There are, for example, several references to the Uniform Comparative Fault Act, a model law that is based upon a pure approach. There is also the seemingly extraneous reference in a footnote to California's judicial adoption of pure comparative negligence: "The California court reached this conclusion on the basis that equity demands that the statute be construed in such manner, and, more, that *equity demands that the pure form of comparative negligence be adopted.*" 276 N.W.2d at 117 n.3 (empahsis added). Does this language suggest that same conclusion? "North Dakota, in enacting its comparative negligence act (§9-10-07). . . in effect adopted the pure comparative negligence concept at least in instances involving more than one tortfeasor." *Id.* at 121.

It is not unusual for the judiciary to favor pure comparative negligence. Four states that have adopted comparative negligence by judicial fiat chose the pure approach. (Alaska, Kaatz v. State, 540 P.2d 1037 (Alas. 1975); California, Li v. Yellow Cab Co., 13 Cal.3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); Florida, Hoffman v. Jones, 280 So.2d 431 (Fla. 1973); Michigan, Placek v. City of Sterling Heights, 405 Mich. 638, 275 N.W.2d 511 (1979)).

110. The policy considerations behind strict product liability justify application of pure comparative negligence to products liability actions, notwithstanding the existence of a general comparative negligence legislative enactment calling for a modified approach. A manufacturer should not escape liability simply because its defective product was 50 percent or less responsible for a consumer's injuries. Moreover, the strict products liability action can be distinguished from other kinds of actions in that the transaction that results in injury to the product liability plaintiff does not also result in injury to the product liability defendant, as is often the case in many other kinds of fault-based actions. It is not possible, for example, for a severely injured 95 percent at fault party to collect damages from a less severely injured 5 percent at fault party, while the less at fault party has to bear the cost of his own injuries. (For example, assume the 95 percent at fault party incurred $750,000 in damages, while the 5 percent at fault party incurred $25,000 in damages. The 5 percent at fault party would not only have to bear the burden of his own loss, but would also have to contribute $13,750 toward the 95 percent at fault party's loss.) It is the possibility of this kind of harsh result that has given modified (49% and 50%) forms of comparative negligence their greatest

If the North Dakota legislature were to adopt a pure comparative fault system for *all* actions based upon fault liability, the problem would, of course, resolve itself.[111]

## III. POST-BARTELS: THE LEGISLATURE

When complex public policy concerns affect the law the legislature is thought to be in a better position than the courts to strike the proper balance among the competing interests. Although *Bartels* is the foundation upon which future cases may build a new body of tort law, the court system can only laboriously sand away at society's friction points. By contrast, the legislative process is theoretically geared to respond quickly and in sweeping fashion to the most complicated combinations of issues. The legislature is, after all, composed of representatives of all segments of society, and through hearings, debate, deliberation, and collective impartial judgment, equitable compromises are reached.

Equitable compromise is precisely the approach taken by the *Bartels* court. Given time the court would resolve some of the uncertainty that has fueled the rocketing products liability insurance premiums. Compromises suggested in the preceding section would likely reduce both the number and the size of awards, leading ultimately to an end to the so-called products liability "crisis."

The North Dakota legislature has, however, decided not to wait for the North Dakota Supreme Court to resolve the problem. In 1977 the legislature appointed an interim committee to study products liability concerns and formulate recommendations for consideration during the 1979 legislative session. The recommendations that resulted from the interim committee's two year study came to the full legislature in the form of House Bill No. 1075.[112] It does little for one's confidence in the objectivity of the committee's study to learn that House Bill No. 1075 represents nothing more than a slightly modified version of the Utah Product Liability Act of 1977,[113] an Act drafted and pushed through the Utah legislature by the Utah Manufacturers' Association.[114] That

appeal. In products liability cases the question is always one of how much of the damaged parties' losses should be shared by the non-damaged parties. Equity demands that the pure form of comparative negligence be adopted, at least in products liability actions.

111. *See* note 148, *infra*.

112. Passed in 1979 by the Forty-sixth Legislative Assembly of North Dakota (over Governor Link's veto). House Bill No. 1075 is codified at N.D. CENT. CODE § § 28-01.1-01 through 05 (Supp. 1979).

113. 1977 Utah Laws 643 (codified at UTAH CODE ANN. §§ 78-15-1 through 6 (1977)).

114. *See* Note, *The Utah Product Liability Limitation of Action: an Unfair Resolution of Competing Concerns*, 1979 UTAH L. REV. 149.

association is made up of approximately 500 manufacturing concerns organized to lobby on behalf of manufacturing interests.[115] Given the proliferation of legislation proposed and passed on the state and federal level,[116] it is doubtful that an act designed to meet the needs of one of the most powerful lobbies in the state of Utah is the best model legislation the interim committee could have found. One is inclined to speculate that the same interests that found success in Utah dictated the North Dakota action.[117]

A second products liability statute which wormed its way through the 1979 legislature was House Bill No. 1589.[118] That effort had been proposed (apparently by retailers) to the interim committee, had been wisely rejected by that committee, but then astonishingly was resurrected and passed during the 1979 session. The most constructive general comment that can be offered in favor of House Bill No. 1589 is that it will likely do little damage because it is probably unconstitutional.[119]

Both Acts are designed to limit the liability of products liability defendants. House Bill No. 1589 does so by placing the relatively fault-free seller in what might best be described as a modified "passive" posture under the "active-passive" indemnity fiction which permitted indemnity if the negligence of the person seeking indemnity was "passive" in contrast to the "active" negligence of the other tortfeasor.[120] This fiction was rendered obsolete by the *Bartels* relative fault standard. House Bill No. 1075 limits liability

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115. *Id.* at 149 n.2.

116. *See* Birnbaum, *Legislative Reform or Retreat? A Response to the Products Liability Crisis*, 14 FORUM 251 (1978).

> Most jurisdictions have now adopted some form of strict product liability. The number of product liability cases has proliferated as the plaintiff's burden of proof has lessened and the defendant's traditional common law defenses have been abrogated. As a result of the substantial increase in the frequency of product liability cases, as well as the size of settlements and awards, a so-called "crisis" has occurred in the field of product liability. There have been two major responses to this crisis: a number of intensive studies of the problem have been initiated both on the federal and state levels; and legislation effecting changes in the traditional tort litigation and insurance systems has been introduced in Congress and in many state legislatures.

*Id.* at 251-52 (footnotes omitted).

The U.S. Dept. of Commerce, *Options Paper on Product Liability and Accident Compensation Issues*, 43 Fed. Reg. 14613 (1978) notes that at its publication date over 110 bills concerning product liability were being considered in 42 states. A perusal of recent issues of the *Product Safety & Liability Reporter* would suggest that the trend is continuing.

117. Based upon interviews with state legislators and others, the author is convinced that the "pro-products liability law reform" forces have marshalled one of the strongest lobbies ever to descend upon the North Dakota State Capitol.

118. House Bill No. 1589 is codified at N.D. CENT. CODE §§ 28-01.1-06 to 07 (Supp. 1979).

119. This law could be challenged on due process and equal protection grounds.

120. The "active-passive" indemnity fiction is discussed at *supra* note 107.

by insulating the manufacturer from liability to the consumer,[121] thus focusing attention on the conduct of subsequent handlers of the defective product. Each of these acts is discussed in more detail below, but the introductory point to be made is that each act, by singling out one group of defendants for special treatment, further complicates the contribution and comparative causation developments.

### A. HOUSE BILL NO. 1075

The stated purpose of House Bill No. 1075 is to encourage insurance companies to continue to provide products liability insurance. It attempts to do so by "limiting the time [within which an action may be commenced against manufacturers] to a specific period for which products liability insurance premiums can be reasonably and accurately calculated...."[122] The main device for accomplishing this goal is section 3 of the Act.[123] This section provides:

*Statute of limitation.*

1. There shall be no recovery of damages for personal injury, death, or damage to property caused by a defective product unless the injury, death or damage occurred within ten years of the date of initial purchase for use or consumption, or within eleven years of the date of manufacture of product, where that action is based upon, or arises out of, any of the following:

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121. The Bill consists of a statute of limitations, an ad damnum clause, an alteration defense, a defect definition and a presumption against defects — possibly everything a non-resident manufacturer would want covered in a North Dakota products liability act, but not much more.

If other members of the business community were duped into thinking that the drafters of this legislation had them in mind, consider this language in section 2 of the *Declaration of Legislative Findings and Intent* of the Bill: "3. It is the purpose of this Act to provide a reasonable time within which actions may be commenced against manufacturers. . . ." (codified at N.D. CENT. CODE § 28-01.1-01 (3) (Supp. 1979)). A Freudian slip? Consider the attention given to nomenclature in other parts of the Bill: "If a *manufacturer,* wholesaler, or retailer issues a recall. . . ." (codified at N.D. CENT. CODE § 28-01.1-02 (3) (Supp. 1979) (emphasis added)). "If a complaint filed. . . against a *manufacturer,* wholesaler, or retailer. . . ." (codified at N.D. CENT. CODE § 28-01.1-03 (Supp. 1979) (emphasis added)). "No *manufacturer* or seller. . . ." (codified at N.D. CENT. CODE § 28-01.1-04 (Supp. 1979) (emphasis added)). *Compare with* House Bill No. 1589: "1. 'Manufacturer' means a person or entity who designs. . . . '2. 'Product liability action' means any action brought against a manufacturer or seller of a product. . . . 3. 'Seller' means any individual or entity, including a manufacturer, wholesaler, *distributor,* or retailer. . . . " Codified at N.D. CENT. CODE § 28-01.1-06 (Supp. 1979) (emphasis added).

122. Codified at N.D. CENT. CODE § 28-01.1-01 (3) (Supp. 1979).

123. *Id.* at § 28-01.1-02.

a. Breach of any implied warranties.
b. Defects in design, inspection, testing, or manufacture.
c. Failure to warn.
d. Failure to properly instruct in the use of a product.

2. The provisions of this section shall apply to all persons, regardless of minority or other legal disability, but shall not apply to any cause of action where the personal injury, death, or damage to property occurs within two years after July 1, 1979.
3. If a manufacturer, wholesaler, or retailer issues a recall of a product in any state, modifies a product, or becomes aware of any defect in a product at any time, and fails to notify or warn a user of the product who is subsequently injured or damaged as a result of the defect, the provisions of subsection 1 shall not bar any action against the manufacturer, wholesaler, or retailer based upon, or arising out of, the defect.[124]

The time limitations imposed by House Bill 1075 are longer than those provided in most other states. Because it appears that few products liability actions are baded upon injuries caused by products sold more than six years before an injury occurs,[125] it is probable that few meritorious product liability actions will be barred by House Bill 1075. Some meritorious claims will be barred by the Act, however, which raises the following constitutional issue.

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124. *Id.*

125. *See* U.P.L.L. analysis *supra* note 2, § 109 which states as follows:

> The limited available data show that the concern about older products may be exaggerated. *See* ISO, "Closed Claim Survey," at 105-108 (indicating that over 97 percent of product-related accidents occur within six years of the time the product was purchased and in the captive goods area 83.5 percent of all bodily injury accidents have occurred within ten years of manufacture).

*Id.* at 3009.

These statistics are at best an educated guess. Only the insurance industry has control over the data upon which that guess is based. The North Dakota Legislative Council noted the paucity of reliable insurance claims data in its report. REPORT OF THE NORTH DAKOTA LEGISLATIVE COUNCIL 139 (1979). In response to the Insurance Commissioner's testimony before the Committee on Products Liability, the Council noted: [H]is office lacked information concerning products liability insurance experience for two reasons. The Insurance Services Office (ISO), which prepares rate filings for a number of insurers, does not list the names of insurance companies for which they file rates, and those companies who do list directly with the state do not list products liability insurance as a line item in their rate filings or annual reports. . . .

*1. Is there a sufficiently close correspondence between the statutory classification and legislative goals of the House Bill 1075 so as not to violate the equal protection requirements of the state and federal constitutions?*

The legislative goal can be summarized as one of enticing insurance companies to continue to provide affordable products liability insurance coverage to manufacturers. Sacrificing the meritorious claims of a few North Dakota residents, however, will not achieve that goal. It is doubtful that the losses suffered by insurance companies from injuries caused by relatively old products in this state are statistically significant. The author has reviewed the legislative history of House Bill 1075, and has failed to find evidence considered by the interim committee which would lead to the conclusion that such a sacrifice would achieve the desired effect.[126] Furthermore, there is reason to doubt that barring the claims of *all* persons who are injured by defective products in the state of North Dakota could achieve that goal. Certainly the loss incidence experienced in North Dakota by such companies as Ford Motor Company, General Motors, and International Harvester, to name a few, would not significantly affect the cost or availability of products liability insurance. North Dakota has a population no larger than that of many medium size cities. Given the world-wide exposure of the major manufacturing companies, who stand to benefit little at such great cost to a few,[127] it is unlikely that the "close correspondence" between the "legislative goals" and the "statutory classifications" can be shown.[128] It is, of course, possible

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> rates, and those companies who do list directly with the state do not list products liability insurance as a line item in their rate filings or annual reports. . . .

*Id.* at 138.

The Committee on Products Liability recommended House Bill No. 1076, which was also passed by the legislature in 1979.

> This Bill requires insurance companies that sell products liability insurance in North Dakota to report certain information to the Commissioner of Insurance. Insurers would be required to report the total number of products liability claims, the total amount paid in settlement or discharge of claims, the total amount of premiums paid for products liability insurance, the total number of persons insured, the total number of persons whose insurance was canceled or not renewed, and the reasons therefor. Only information relating to products liability experience in North Dakota would be required to be reported.

*Id.* at 140.

If the North Dakota Legislature had no information upon which it could base its own conclusions, quite obviously the Legislature simply took the insurance industry's word that a problem exists. The insurance industry can hardly be considered an unbiased source.

126. *See* REPORT OF THE NORTH DAKOTA LEGISLATIVE COUNCIL 137-40 (1979).

127. *See* note 132, *infra*.

128. The test applied by the North Dakota Supreme Court in determining that the Medical Malpractice Act was unconstitutional was the "close correspondence between statutory classification

that the manufacturers established the "close correspondence" in the evidence they presented to the Utah legislature before bringing their road-show to North Dakota, but the record is void of any convincing evidence presented to the North Dakota lawmakers.

Then who might benefit from this special classification? Conceivably the manufacturer of products for exclusive distribution and use in the state of North Dakota might.[129] Is there, however, a product manufacturer in the state who can guarantee that its product will not find its way to some *other* state, and *there* cause an injury?[130] Only if a manufacturer could show that liability for injuries caused by its products would be determined exclusively by North Dakota law would there be a close "correspondence" between a law that provides for a preferred class of defendants and the "legislative goal" of reducing insurance premiums. The question remains, however, if there are such manufacturers in the state, are there enough to justify the sacrifice to be made by all

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and legislative goals" test. Arneson v. Olson, 270 N.W.2d 125, 133 (N.D. 1978). That test, the court said, closely approximates the substantive due-process test. *Id.*

The Products Liability Committee had considered the question of whether parts of the North Dakota Products Liability Act were unconstitutional. One of the members of the Committee sought and obtained an opinion from the North Dakota Attorney General's Office questioning the constitutionality of the statute of limitations provision. An Assistant Attorney General suggested the provision was unconstitutional, but that the Medical Malpractice Act contained a similar provision which had not at that time been considered by the North Dakota Supreme Court. (*See* letter from Robert P. Brady, Assistant Attorney General, to State Representative Wayne K. Stenehjem (Jan. 11, 1978)). On August 11, 1978, the North Dakota Supreme Court declared the Medical Malpractice Act to be unconstitutional in *Arneson*, 270 N.W.2d at 138. Months later the legislature considered and passed the Products Liability Act (House Bill 1075) notwithstanding the fact that the Supreme Court's action in *Arneson* made the Act constitutionally suspect.

129. Certainly a manufacturer like Clark-Melroe could not. If a defectively manufactured Clark-Melroe product injures a North Dakota farmer, House Bill 1075 is designed to reduce his chances of recovery. Given the world-wide distribution of Clark-Melroe products, as well as the possibility that a Clark-Melroe product initially sold in North Dakota will find its way out of state, is there *really* any likelihood that the sacrifice made by North Dakota farmers will have a significant effect on Clark-Melroe's products liability insurance?

If reducing a North Dakota farmer's chances of recovery has a positive effect on Clark-Melroe's insurance rates, the fact that other countries are passing laws that will make it easier for their citizens to recover from Clark-Melroe will more than off-set that effect. The nine member countries of the European Economic Community will likely incorporate strict liability into their national laws in the very near future. Moreover, the language of the proposed law should be cause for concern by Americans. Consider this quote:

> Americans Beware
>
> What makes the proposed EEC directive so threatening. . . is Article 1 of the document which provides that a product manufacturer could be held strictly liable not only "whether or not he knew or could have known" of a defect in its product, but also "if the article could not have been regarded as defective in the light of the scientific and technical developments at the time when he put the article into circulation."
>
> This language, in view of European industry, subjects the manufacturer to absolute liability for injuries linked to its product. . . .

7 PROD SAF. & LIAB. REP. (BNA) 316 (1979).

130. Would a builder involved in the mass production and sale of homes be such a manufacturer? (*See* Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965)). Even if it would, is there a North Dakota builder engaged in the "mass production" of homes?

North Dakota consumers?[131] The author found no evidence considered by the lawmakers that would justify their conclusion that there are such manufacturers in the state, or, if there are, that insurance companies are prepared to underwrite special products liability insurance at reduced prices for them.

2. *What kinds of claims are barred by 1075, and against whom?*

The language of 1075 appears to limit its application to claims arising out of the manufacturing process.[132] There is little evidence to suggest that the drafters of 1075 had any other situations in mind.[133] By listing only four possible liability-producing acts, however, it is possible that others have been excluded, especially those that would result in liability to products liability defendants other than the manufacturers. Even as to manufacturers, however, not *all* claims are barred. Furthermore, by including "breach of any implied warranties" as a liability-producing act covered by the

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131. A state that underwrites insurance for losses suffered by its residents involved in accidents with uninsured motorists (see N.D. CENT. CODE CH. 39-17 (1976)) might consider underwriting insurance for those few North Dakota manufacturers that might be subject to suit exclusively by North Dakota residents.

132. As this article is readied for publication a newspaper reports a New York jury has awarded $500,000 to the daughter of a woman who had taken DES in 1953. Some 19 years after the mother had taken the drug the daughter developed cancer. Houston Post, July 22, 1979, at 2A. The action was apparently brought against the manufacturer of the drug on an "intra-industry joint liability" theory (for a discussion of this approach, *see* Kroll, *Intra-Industry Joint Liability: A New Era in Products Liability, Ins. L.J.* 193 (1975)), and could result in many suits by the estimated 500,000 to 2,000,000 sons and daughters of DES users, many of whom have cancer, and many more of whom have a disease called adenosis. Houston Post, July 22, 1979, at 2A. If they happen to live in North Dakota, however, it appears that their claims will be barred.

It is naive to suggest that forcing the North Dakota victims to bear the cost of their own injuries will affect insurance rates. Moreover, is it suggested that if it did affect rates, the drug companies would pass that savings on only to North Dakota users of their products?

Consider this hypothetical. A two year old North Dakota child is burned when the gas tank on a Pinto explodes. On the same day a California child is burned under similar circumstances. Assume the statute of limitations in House Bill 1075 bars the North Dakota child's action, but the more conventional California statute of limitations does not bar the California child's action. Assume damages of $1,500,000 by each child. It is possible that future North Dakota owners of Pintos would pay less for their Pintos than future California owners, but how much less? $100? At that rate Ford would have to sell 15,000 Pintos in North Dakota and guarantee to its insurer that none of the Pintos would be used on non-North Dakota highways. What is more likely is that the savings to Ford's insurance carrier caused by barring the North Dakota child's suit would result in the saving of a few cents by all future purchasers of Pintos in all states.

133. Compare the description of claims found in 1075 with those found in the U.P.L.L.:

> "Product liability claim" includes all claims or actions brought for personal injury, death, or property damage caused by the manufacture, construction, design, formula, preparation, assembly, installation, testing, warnings, instructions, marketing, packaging, or labeling of any product. It includes, but is not limited to, all actions based on the following theories: *strict liability in tort; negligence; breach of warranty, express or implied; breach or failure to discharge a duty to warn or instruct, whether negligent or innocent; misrepresentation, concealment, or nondisclosure, whether negligent or innocent; or under any other substantive legal theory in tort or contract.*

U.P.L.L. *supra* note 2 § 102(2) (emphasis added).

bill, it is probable that the implied warranties contained in the Uniform Commercial Code are affected by the statute of limitations provisions. This would obviously have the effect of extending the statute of limitations period applicable to Uniform Commercial Code implied warranties from four years[134] to ten or eleven years, thereby affording manufacturers less protection than they previously had.

If it is unclear which claims against manufacturers are barred, the extent of protection afforded to downstream sellers is even less certain. Are there not acts that occur and duties that arise *after* the manufacture or initial sale of the product which trigger claims based upon negligence, the Uniform Commercial Code, or governmental regulations, to list a few? And will those downstream defendants be entitled to look back up the stream for indemnity or contribution from the wrongdoer whose act of producing a defective product was the primary cause of the resulting injuries?

Two things do seem clear. First, House Bill 1075 will not be nearly as effective at insulating manufacturers from liability as its drafters intended. Second, in the few situations in which the manufacturer's liability has been limited, it will probably be at the expense of the downstream defendants. The identity of these alternate defendants should be disturbing to the guardians of the North Dakota public interest. Those defendants will be their friends and neighbors, fellow North Dakota residents to whom other North Dakota residents will increasingly be forced to look for compensation for injuries caused by, among others, Detroit manufacturers. Adding insult to injury, *all* North Dakota residents will continue to pay the cost of the premiums paid by Detroit manufacturers for products liability insurance.

*3. Will the claimant who discovers, or should have discovered, an injury during the first few years after manufacture or sale of a product have more time within which to bring an action than he had under previous law?*

There is nothing in 1075 which requires a claimant to commence an action within a given time after the *injury* is discovered,[135] which leads one to conclude that no such

134. U.C.C. 2-725.

135. Such a requirement is provided for in the U.P.L.L.: "All claims under this Act shall be brought within three years of the time the claimant discovered, or in the exercise of due diligence should have discovered, the facts giving rise to the claim." U.P.L.L. *supra* note 2 § 109 (c).

requirement exists.[136] The only time-triggering events are the *manufacture* and *sale* of the product. Thus, it would seem that a claimant injured during the first year after initial purchase would have nearly ten years in which to commence an action, one injured during the second year nearly nine years, and so on. Because the majority of injuries seem to occur shortly after purchase, it would appear that the actuary projecting premiums will be faced with additional variables, all leading to increased exposure to liability.

4. *Does House Bill 1075 violate the North Dakota constitutional provision related to judicial power?*

Section 87 of the North Dakota Constitution provides in part: "The supreme court shall have authority to promulgate rules of procedure, including appellate procedure, to be followed by all courts of this state...."[137]

Since "procedure" includes pleading and evidentiary matters,[138] it would appear that portions of House Bill 1075 are in violation of section 87 of the North Dakota Constitution in at least two respects. Section 4 of House Bill 1075 purports to promulgate a new procedural rule for the form and content of a pleading, which would clearly violate Section 87 of the Constitution. Section 4 states as follows:

> If a complaint filed in a products liability action against a manufacturer, wholesaler, or retailer prays for a recovery of money in an amount equal to or less than fifty thousand dollars, the amount shall be stated. If a recovery of money in an amount greater than fifty thousand dollars is demanded, the pleading shall state merely that recovery of reasonable damages in an amount greater than fifty

136. The old statute of limitation provides for a six year period within which the action must commence after the claim accrues. The claim accrues when the product causes an injury and that injury is discovered or should have been discovered. N.D. CENT. CODE § 28-01-16 (1974). The sponsors of House Bill 1075 assumed the old statute of limitations would continue to apply (*see* REPORT OF THE NORTH DAKOTA LEGISLATIVE COUNCIL 139 (1979)), but that conclusion does not necessarily follow from a reading of House Bill 1075. It is likely that the drafters had in mind superimposing a statute of repose, but it would seem that if that was their intent they would have labeled it accordingly. Moreover, if they intended to have both statutes apply they should have noted that fact in House Bill 1075.

A statute of repose differs from a statute of limitations in that a statute of repose sets a fixed limit after the time of the *wrongful conduct,* rather than a fixed time limit after the discovery of the injury. The product seller will not be liable after this time limit has run, regardless of when the injury occurs. The U.P.L.L. has both a statute of repose and a statute of limitations. *See* U.P.L.L. *supra* note 2 §§ 109B and 109C.

137. N.D. CONST. art. 4, § 87 (1889, amended 1976). *See also* Arneson v. Olson, 270 N.W.2d 125 at 131.

138. *See* Arneson v. Olson, 270 N.W.2d at 131.

> thousand dollars is demanded. This section may be superseded by an amendment to the rules of civil procedure adopted after July 1, 1979.[139]

The second section that seems in clear violation of section 87 of the constitution is section 6 of 1075. The offending portion of that section is subsection 3:

> There is a rebuttable presumption that a product is free from any defect or defective condition where the alleged defect in the plans or designs for the product or the methods and techniques of manufacturing, inspecting, and testing the product were in conformity with government standards established for that industry which were in existence at the time the plans or designs for the product or the methods and techniques of manufacturing, inspecting, and testing the product were adopted.[140]

Because House Bill 1075 purports to promulgate rules of pleading and evidence, it probably is unconstitutional under the North Dakota Constitution.

5. *Does House Bill No. 1075 violate sections 69 and 70 of the North Dakota Constitution?*

Section 69 of the North Dakota Constitution provides in part: "The legislative assembly shall not pass local or special laws in any of the following enumerated cases...: 10. [f]or limitation of civil actions....; 24. [a]ffecting estates of deceased persons, minors or others under legal disabilities."[141]

Section 70 of the North Dakota Constitution provides in part: "In all other cases where a general law can be made applicable, no special law shall be enacted; nor shall the legislative assembly indirectly enact such special or local law by the partial repeal of a general law."[142]

A special law has been defined by the North Dakota Supreme Court as "one which relates only to particular persons or things of a class, as distinguished from a 'general law,' which applies to all things or persons of a class."[143] House Bill No. 1075 seems clearly

139. Codified at N.D. CENT. CODE § 28-01.1-03 (Supp. 1979).
140. *Id.* at § 28-01.1-05 (3).
141. N.D. CONST. art. 2, § 69.
142. N.D. CONST. art. 2, § 70.
143. *See* State v. Lawler, 53 N.D. 278, 287, 205 N.W. 880, 883 (1925).

to fall into the classification "special legislation." It purports to place products liability defendants in an advantageous position when compared with other tort defendants, and it purports to place products liability plaintiffs at a correspondent disadvantage, when compared with the rights of other tort plaintiffs. In that regard 1075 is very much like the Medical Malpractice Act, which the North Dakota Supreme Court apparently was prepared to declare unconstitutional as a violation of sections 69 and 70 of the state constitution, if it had not already done so on other grounds.[144]

### 6. *General observations about House Bill No. 1075*

There is little to commend in 1075. Among other concerns, the Act was poorly drafted. It is replete with ambiguities, certain to invite litigation on questions other than its constitutionality.[145] Moreover, the Act is as inadequate for what it does not cover as it is for the incomplete manner in which it purports to protect the interests of manufacturers. An analysis of what it should have covered to justify being labeled the "North Dakota Products Liability Act" is beyond the scope of this article.[146] It is likely the North Dakota legislature will see how defective their 1979 product is and will repeal it at the first opportunity. In the meantime, House Bill No. 1075 will certainly complicate the orderly resolution of the complex multi-defendant issues certain to confront the North Dakota Supreme Court in the near future.

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144. *See* Arneson v. Olson, 270 N.W.2d at 136-37, discussed *supra* note 137.

145. There is, for example, the matter of the definition of "defect" found in Section 6 of 1075:

> 1. No product shall be considered to have a defect or to be in a defective condition, unless at the time the product was sold by the manufacturer or other initial seller, there was a defect or defective condition in the product which made the product unreasonably dangerous to the user or consumer.
>
> 2. As used in this Act, "unreasonably dangerous" means that the product was dangerous to an extent beyond which would be contemplated by the ordinary and prudent buyer, consumer, or user of that product in that community considering the product's characteristics, propensities, risks, dangers, and uses, *together with any actual knowledge, training, or experience possessed by that particular buyer, user, or consumer.*

Codified at N.D. CENT. CODE § 28-01.1-05 (1) (2) (Supp. 1979).

Even if we assume that the language *"that particular buyer, user, or consumer"* refers to a person other than the *"ordinary and prudent buyer, consumer, or user of that product,"* it is difficult to imagine how the addition of this subjective element could lead to a functional test. Certainly it adds nothing constructive to the debate over what a definition of "defect" should contain. (*See e.g.*, Caterpillar Tractor Co. v. Beck, 593 P.2d 871, 876-87 (Alas. 1979); Morningstar v. Black & Decker Mfg. Co., 253 S.E.2d 666, 680-83 (W.Va. 1979)).

If the reader is still in doubt about whether 1075 should be reconsidered in its entirety, consider this sentence from section 5 which states that "[n]o manufacturer or seller. . . shall be held liable. . . as a result of. . . failure to properly instruct in the. . . misuse of that product." Codified at N.D. CENT. CODE § 28-01.1-04 (Supp. 1979).

146. For a discussion of matters that should be included in such an act, *see* Twerski & Weinstein, *A Critique of the Uniform Product Liability Law — A Rush to Judgment*, 28 DRAKE L. REV. 221 (1979).

B. HOUSE BILL NO. 1589

The second major products liability Act to be passed by the 1979 North Dakota legislature was House Bill No. 1589. That bill purports to provide for indemnification of a retailer by the manufacturer of an allegedly defective product. In relevant part, the Bill provides the following at section 2:

> If a product liability action is commenced against a seller, and it is alleged that a product was defectively designed, contained defectively manufactured parts, had insufficient safety guards, or had inaccurate or insufficient warnings; that such condition existed when the product left the control of the manufacturer; that the seller has not substantially altered the product; and that the defective condition or lack of safety guards or adequate warnings caused the injury or damage complained of; the manufacturer from whom the product was acquired by the seller shall be required to assume the cost of defense of the action, and any liability that may be imposed on the seller.[147]

One wonders how the drafters of House Bill No. 1589 expected the Bill to achieve their goals of requiring a manufacturer to assume the cost of defending products liability actions, and then indemnify the seller should the manufacturer's defense be unsuccessful. The Bill is ambiguous in a number of ways. For example, section 2 suggests that the manufacturer has an obligation to assume the defense of an action commenced against the seller. It is far from clear, however, how or when that obligation arises. The obligation appears to somehow be connected with certain allegations contained in a pleading, but whose pleadings? What happens if the allegations called for are not made? And who makes them? It seems unlikely that in the absence of collusion the plaintiff would allege that "the seller has not substantially altered the product." Does this mean that the seller must file a responsive pleading for the purpose of getting that allegation on the record *before* the manufacturer has an obligation to assume the cost of the defense? At what stage does the manufacturer assume the cost of the defense? Does "cost of the defense" include conducting the defense? What is included in the "cost of defense?" How, when,

147. Codified at N.D. CENT. CODE § 28-01.1-07 (1979).

and by whom are all of these matters to be determined?

A seller inclined to assert any assumed rights under House Bill 1589 will undoubtedly be disappointed. The Bill's deficiencies are too obvious to require further discussion. This is not to suggest the author is unsympathetic with the objectives of its drafters. Except for a few major chain stores, North Dakota retailers should not have been included as strictly liable defendants under 402A. Small retailers are in no better position to "spread the risk" of the consuming public's losses than are consumers. Many can afford neither the cost of product liability insurance nor the cost of defending a claim filed against them. Moreover, the consuming public's insatiable appetite for more and more at affordable prices is as much to blame for the proliferation of defectively produced products as the manufacturer's hunger for profit. Caught in the middle is the small retailer (by far the majority in a rural state) whose very existence depends upon the fickle whims of the consumer on the one hand and the productive ingenuity of the manufacturer on the other. These sellers do little to create demand for products; they merely try to survive by attempting to meet that demand. Unless some fault basis attributable to the seller other than strict products liability exists, the seller should not be a party to a product liability action in North Dakota.[148]

## IV. CONCLUSION

These are turbulent times for torts. Each term of court and each legislative session can be expected to reverse decades of legal and legislative precedent. A glimpse at what has been happening in just a few areas has been provided in these pages. To ask that one predict where it is all going is to ask the impossible.

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148. Other states have limited the liability of sellers. Nebraska, for example, does not allow a strict liability action to be commenced against a seller or lessor who is not also the manufacturer of the defective product. NEB. L.B. 665 § 3 (1978), and Tennessee statute provides that a product liability action may not be commenced against a seller when the product is sold in a sealed container and the seller lacks a reasonable opportunity to inspect the product in a manner which would, or should in the exercise of reasonable care, reveal the existence of the defective product. TENN. CODE ANN. § 23-3706 (1979).

The U.P.L.L. also makes a distinction between the liability of a manufacturer and that of other product sellers at section 114 which provides as follows:

> (a) Manufacturers shall be responsible for defective conditions in their products according to the provisions of this Act. In the absence of express warranties to the contrary, other product sellers shall not be subject to liability in circumstances where they do not have a reasonable opportunity to inspect the product in a manner which would or should, in the exercise of reasonable care, reveal the existence of the defective condition.
>
> (b) The duty limitation of subsection (a) shall not apply, however, if:
>
> (1) The manufacturer is not subject to service of process in the claimant's own state;

One can, however, suggest an approach for North Dakota: enter the turbulent waters cautiously, and then only when they have been tested and charted by others. There is little that a state with a population no larger than that of a medium-sized United States city can do to affect trends having world-wide ramifications.

In the meantime, the *Bartels* relative fault approach, if allowed to develop without undue legislative interference, will strike an acceptable balance. Co-operation from and with the legislature, of course, is imperative. North Dakota might consider following Minnesota's lead in updating its "comparative fault" statute, although this might well be the time for North Dakota to join those jurisdictions embracing "pure comparative fault." The *Bartels* analysis would seem to point in that direction.

Above all, this does not seem to be the time to impose upon the tort system preferred classes of defendants. Rather, the goal should be one of striving for a system that treats all claimants and all tortfeasors equitably. If there was ever a time in which the one word was "compromise," this is it.

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(2) The manufacturer has been judicially declared insolvent;
(3) The court determines that the claimant would have appreciable difficulty enforcing a judgment against the product manufacturer.

U.P.I.L., *supra* note 2 § 114.

An interim committee currently has under study the North Dakota comparative negligence law. Its charge is to bring recommendations to the 1981 session of the North Dakota legislature. The importance of the comparative negligence law to all areas of law discussed in this article cannot be overstated. Every member of the North Dakota legal profession should follow the work of, and give guidance to, that committee. North Dakota tort law cannot absorb another bill like 1075.