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History Uprooted: Georgia Applies Apportionment to Strict Liability Claims

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I. INTRODUCTION

Adrienne Johns had experience riding motorcycles for over 20 years when in 2013, total failure of the front brake on his 2006 Suzuki GSX-R1000 caused him to hit a curb, throwing him from his bike and knocking him unconscious. The accident resulted in Johns being hospitalized for over two months following spinal fusion surgery and surgery to repair his hand. Subsequent to the accident, he discovered that there had been a recall notice from Suzuki related to his bike model's front brake. At trial, Johns proved that a design defect in the front brake had ultimately caused the brake to fail, resulting in Johns' accident. The jury awarded Johns $10.5 million in compensatory damages.[1] Under common law principles of strict liability, Johns would receive the verdict in whole. However, the Georgia Supreme Court upheld the jury's apportionment of 49% of the fault to Johns himself for his failure to properly maintain the brake fluid.[2] This may seem at odds with common law principles of strict liability because it is.

Apportionment and contributory negligence in tort law have been evolving bodies of statutes and judicial law throughout legal history. However, one thing that has historically remained steadfast in the state of Georgia has been the common law principle that a plaintiff's comparative negligence is not a defense to a claim based upon strict liability.[3] But now, as we have seen in the illustration above, that has changed for the state of Georgia and is up for debate in other jurisdictions.[4] This reassessment of the appropriateness of

* I would like to thank my faculty advisor, Professor Jarome Gautreaux, for his feedback and collaboration throughout the writing of this Comment. I would also like to thank my student writing editor, Sandy Davis, for her feedback, critique, and patience.

[1] Suzuki Motor of Am., Inc. v. Johns, 351 Ga. App. 186, 189, 830 S.E.2d 549, 554 (2019).

[2] Johns v. Suzuki Motor of Am., No. S19G1478, 2020 Ga. LEXIS 760, 2 (Oct. 19, 2020).

[3] Deere & Co. v. Brooks, 250 Ga. 517, 520–21, 299 S.E.2d 704, 707 (1983).

[4] See *Suzuki*, 351 Ga. App. 186 at 198, 830 S.E.2d at 560.

apportionment in strict liability cases in Georgia follows on the heels of numerous states reconsidering a similar long standing common law principle—the rule against apportionment among intentional and negligent tortfeasors.[5] Following tort reform in Georgia that reshaped the apportionment statute, courts have been tasked with interpreting the changes with the backdrop of years of Georgia case law following common law principles. Other states, including Pennsylvania, have been facing similar tasks of statutory interpretation in relation to apportionment in strict liability and inevitably reaching varying results.

The topic examined in this Comment is where Georgia law now stands in regard to applying apportionment in strict liability cases compared to other jurisdictions and what this new direction may mean for practitioners and plaintiffs in the state. This Comment will consider the development of tort law in the areas of contributory negligence and strict liability from common law to present. Specifically, Part II will provide an historical overview of apportionment in tort law, looking at the history of contributory negligence, joint and several liability, and contribution. Part III will track the development and implementation of the body of law known as strict liability and the historical applicability of apportionment to strict liability claims. Part IV will then compare and contrast how various states have approached the applicability of apportionment in strict liability cases following various versions of tort reform. Part V will compare this change in approach to how some states have progressed to allowing apportionment to intentional tortfeasors. Finally, Part VI will address how the recent Georgia Supreme Court decision will affect plaintiffs and practitioners in their approach to cases involving strict liability claims in Georgia and argue why the common law principles should have been maintained.

II. THE WORLD OF APPORTIONMENT: CONTRIBUTORY NEGLIGENCE, JOINT AND SEVERAL LIABILITY, AND CONTRIBUTION

A. The Transition from Contributory Negligence to Systems of Comparative Negligence

Originating in England in 1806, the common law doctrine of contributory negligence completely barred a plaintiff from recovering if

[5] See Couch v. Red Roof Inns, Inc., 291 Ga. 359, 359, 729 S.E.2d 378, 379 (2012) (allowing jury to consider the "fault" of criminal assailant and include the assailant when apportioning its damages award to the plaintiff); Slack v. Farmers Ins. Exchange, 5 P. 3d 280, 285 (Colo. 2000) (holding that Colorado's comparative fault statute was applicable even though the defendant committed an intentional tort).

his or her own negligence contributed to the injury.[6] The doctrine is often referred to as the "all-or-nothing" rule for its hallmark of awarding a plaintiff damages or denying them any recovery whatsoever due to contributing to the injury via their own negligence.[7] Although at first glance this rule may seem based in fairness by disallowing negligent plaintiffs from recovering from others for their own carelessness, the all-or-nothing approach often denies justice in practice. Under this rule a plaintiff who is severely injured, yet barely negligent, would be barred from recovering from a very negligent defendant. A good example is a jaywalker who tries to cross an intersection late at night and is hit by a driver who is speeding, has his headlights off, and runs a red light.[8] The jay walker's negligence pales in comparison to the acts of the driver, yet the driver would be barred from recovery under the common law contributory negligence doctrine. Some jurisdictions attempted to mitigate the harshness of this rule by implementing exceptions such as the last clear chance doctrine, which finds a defendant liable where a plaintiff is also negligent if the defendant had the last clear chance to avoid the accident, hence the name.[9]

Although the doctrine of contributory negligence was initially popular, by the early 1900's the tide was turning for the doctrine that completely bars recovery for even negligibly negligent plaintiffs.[10] The Federal Employers' Liability Act of 1908,[11] which allowed a plaintiff to recover from a negligent defendant despite his own negligence, was influential in this shift.[12] Through either judicial enactment or statute, forty-six states have now replaced contributory negligence with some version of the doctrine of comparative negligence.[13]

The states that have adopted comparative negligence have typically implemented one of two main types, pure or modified.[14] Under pure comparative negligence, a plaintiff can recover the amount of his damages reduced by a percentage of his causal negligence, and every person that contributes to the damage is only liable for the percentage of

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[6] James McMillan. Comment: *Contributory Negligence and Statutory Damage Limits—An Old Alternative to a Contemporary Movement?*, 42 IDAHO L. REV. 269, 274 (2005).

[7] Li v. Yellow Cab., Co., 532 P.2d 1226, 1233 (1975).

[8] Andrew White, Comment, *Perpetuating Injustice: Analyzing the Maryland Court of Appeals' Refusal to Change the Common Law Doctrine of Contributory Negligence*, 78 MD. L. REV. 1043, 1045 (2019).

[9] Sinclair v. Record Press, 323 P. 2d 660, 663 (1958).

[10] White, *supra* note 8 at 1042.

[11] 45 U.S.C. § 51–59 (1908).

[12] Thomas R. Trenkner, *Modern development of comparative negligence doctrine having applicability to negligence actions generally*, 78 A.L.R.3d 339, 2a.

[13] White, *supra* note 8 at 1042.

[14] Trenker, *supra* note 12 at 2b.

negligence apportioned to him or her.[15] It matters not whether the plaintiff contributed one percent or ninety-nine percent in a pure comparative negligence system. They may still recover. However, in a modified comparative negligence state, such as Georgia, a plaintiff may only recover if his percentage of contributed negligence is less than that contributed by the defendant, or numerically, less than 50% percent.[16]

B. Joint and Several Liability

The common law doctrine of joint and several liability developed in a way similar to that of contributory negligence.[17] The doctrine originally allowed multiple tortfeasors who acted in concert to be subject to joint liability, meaning each tortfeasor could potentially be liable for the entire amount of damages.[18] In the early twentieth century, joint and several liability expanded to include defendants who caused an indivisible injury to the plaintiff.[19] The idea behind this doctrine was to allow a practical way to ensure that the plaintiff was able to recover for their damages from some source. In states where defendants can be joint and severally liable, it is left to the defendants to sort out their respective proportions of liability and payment between each other. For example, if Defendant A and Defendant B are held joint and severally liable and Defendant A pays the plaintiff damages of $100,000, Defendant A can then seek contribution, or in other words partial reimbursement, from Defendant B.

C. Contribution

Under common law, it was believed that injuries were indivisible and as such, fault could not be apportioned. As a result, contribution among joint tortfeasors was staunchly prohibited. A plaintiff would be more apt to seek to recover from a defendant with monetary resources, regardless of his degree of fault, because of the likelihood that the wealthier defendant would be able to pay the damages. This left one defendant carrying the burden of all involved with no ability to seek help from others who also contributed to the damages. As such, Defendant A from

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[15] Gross v. Denow, 212 N.W.2d 2, 7 (1973).

[16] O.C.G.A. § 51-11-7 (2020).

[17] See Kathleen M. O'Conner & Gregory P. Sreenan, *Apportionment of Damages: Evolution of Fault-Based Systems of Liability for Negligence*, 61 J. AIR. L. & COM. 365, 368 (1995).

[18] See W. Page Keeton et al., Prosser and Keeton On The Law of Torts, § 46 at 323 n.3 (5th ed. 1984 & Supp. 1988); see also Frank J. Vandall, *A Critique of The Restatement (Third): Apportionment as it Affects Joint and Several Liability*, 49 EMORY L.J. 565, 565–66 (2000).

[19] Vandall, *supra* note 18 at 567–68.

the example above, at common law, would not be able to seek contribution from Defendant B if there was a judgement against him, thus making Defendant A shoulder the $100,000 alone. This innate unfairness led to criticism of the rule against contribution and by the 1960s a majority of jurisdictions in the United States had enacted statutes to allow contribution among joint tortfeasors.[20]

III. THE DEVELOPMENT OF THE DOCTRINE OF STRICT LIABILITY

Strict liability holds a unique place in the world of apportionment. Under the doctrine of strict liability, certain conduct and activities are so inherently dangerous that a defendant will be liable regardless of fault. In other words, strict liability, in a nutshell, is liability without fault; the plaintiff need only prove that the tort occurred and that the defendant is responsible. As a result, this area of tort law is very limited. The three main categories of strict liability are: (1) the keeping of wild animals; (2) ultrahazardous activities; and (3) consumer product liability. The common denominator of these three categories is that each is dangerous in some way and requires a high level of responsibility by the defendant. As such, strict liability principles are distinct from those of negligence.[21] In negligence, liability is imposed for the failure to exercise reasonable care, whereas in strict liability, liability may be imposed even when reasonable care is exercised.[22]

A. Strict Liability for Animals

Strict liability is applicable to the keeping of wild animals for obvious reasons. One, there is no real need for people to keep such exotic animals like bobcats, lions, and tigers as pets.[23] Further, there is a clear high risk of injury resulting from the keeping of such animals and as such the owner does so at his own peril.[24] Strict liability has also been applied to trespassing domesticated animals which are capable of causing substantial harm when forcing their way onto another's property. The

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[20] Michael D. Green, Essay: *The Unanticipated Ripples of Comparative Negligence Superseding Cause in Products Liability and Beyond*, 53 S.C. L. REV. 1103, 1113 n.16 (2002) (citing RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 23 cmt. a (AM. L. INST. 2000)).

[21] Kenneth S. Abraham, *Strict Liability in Negligence*, 61 DEPAUL L. REV. 271, 271 (2012).

[22] *Id.* at 274.

[23] *See* Collins v. Otto, 369 P.2d 564, 566 (Colo. 1962) (stating that the keeping of a wild animal is unjustified).

[24] *See* Charles E Cantu, *Distinguishing the Concept of Strict Liability in Tort from Strict Product Liability: Medusa Unveiled* 33 U. MEM. L. REV. 823 (2003) (citing Smith v. La Farm Bureau Cas. Ins. Co., 603 So. 2d 199, 202 (La. Ct. App. 1992) (jury charge stated that keeping a wild animal is done so at your own peril)).

final category of animals to which strict liability is applicable is domestic animals with vicious tendencies. The idea that the keepers of these animals should be responsible for their actions that cause injuries is quite clear—the onus should be on the one choosing to keep such animals, not the victims of their attacks. As a result, strict liability in this arena has been consistently applied.

B. Strict Liability for Ultrahazardous Activities

Strict liability as applied to ultrahazardous activities is a fairly new concept and can be traced to *Rylands v. Fletcher*,[25] a Nineteenth-century English case. In *Rylands*, the defendant erected a reservoir on his land to supply his mill with hydroelectricity. He worked with an engineer and a contractor to ensure the project was done properly. However, the weight of the water was too great, and the tanks collapsed. The escaped water flooded the plaintiff's coal mine. Although there was a total absence of fault on the part of the defendant, the House of Lords decided that the defendant was responsible for the damage caused by the unnatural use of his land.[26]

In tort law today, an abnormally dangerous activity is one that is not in common usage and which creates a foreseeable and significant risk of harm even when reasonable care is taken by the one engaging in the activity.[27] In a more recent case, a court applied strict liability to a gas truck driver defendant who was in an accident that caused the death of the plaintiff because the transportation of gas is an inherently dangerous activity due to the risks involved.[28] The idea behind applying strict liability to these type of activities is similar to that which supports applying the doctrine to the keepers of wild animals. The danger of these activities creates a higher risk to the public for the benefit of those performing them, and as such, those engaging in such activities should be held responsible and carry the burden when the activities inevitably lead to injury or harm. The law agrees.

C. Strict Liability for Consumer Products

Finally, what may be categorized as the broadest area of law involving strict liability is consumer products liability. The development of strict liability's application to product manufacturers developed in response to manufacturers insulating themselves from liability for breach of warranty or contract by arguing lack of privity, a requirement to recover

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[25] 3 L.R.-E. & I. App. 300 (H.L. 1868); *see also* Cantu, *supra* note 24, at 839 n. 83.

[26] *Rylands*, 3 L.R.-E. & I. App. at 331–40.

[27] *See* RESTATEMENT (THIRD) OF TORTS § 20(b) (2009).

[28] Siegler v. Kuhlman, 502 P.2d 1181, 1187 (Wash. 1972).

in either action.[29] As courts began to develop the body of law known as strict liability, the following rationales and policies in favor of this application of liability without fault developed:

> (1) Manufacturers convey to the public a general sense of product quality through the use of mass advertising and merchandising practices, causing consumers to rely for their protection upon the skill and expertise of the manufacturing community.
>
> (2) Consumers no longer have the ability to protect themselves adequately from defective products due to the vast number and complexity of products which must be "consumed" in order to function in modern society.
>
> (3) Sellers are often in a better position than consumers to identify the potential product risks, to determine the acceptable levels of such risks, and to confine the risks within those levels.
>
> (4) A majority of product accidents not caused by product abuse are probably attributable to the negligent acts or omissions of manufacturers at some stage of the manufacturing or marketing process, yet the difficulties of discovering and proving this negligence are often practicably insurmountable.
>
> (5) Negligence liability is generally insufficient to induce manufacturers to market adequately safe products.
>
> (6) Sellers almost invariably are in a better position than consumers to absorb or spread the costs of product accidents.
>
> (7) The costs of injuries flowing from typical risks inherent in products can fairly be put upon the enterprises marketing the products as a cost of their doing business, thus assuring that these enterprises will fully "pay their way" in the society from which they derive their profits.[30]

These rationales are illustrative of the underlying public policy in favor of shifting the burden of defective products from the consumer onto the manufacturer. Not only are the manufacturers in a better position to identify and remediate such defects, but they also have the unique ability to treat the cost of these accidents as part of doing business. The plaintiff in a strict liability claim must show that the defendant manufactured the product and that the defective product was the proximate cause of their

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[29] *Tort Action for Strict Liability in Products Liability Cases*, 26 WASH. & LEE L. REV. 143, 144 (1969).

[30] David G. Owen, *Rethinking the Policies of Strict Products Liability*, 33 VAND. L. REV. 681, 684–85 (1980).

injury. It is irrelevant whether the manufacturer exercised due care, as strict liability is liability regardless of fault.

D. Common Law Principles of Apportionment in Strict Liability Claim in Contrast to Negligence Claims

Traditionally, if liability is imposed upon a defendant manufacturer under strict liability, the defenses of contributory and comparative negligence are not applicable, and the award should not be apportioned between the plaintiff and the defendant.[31] This is unlike negligence, where comparative and contributory negligence are applicable, and the awards are apportioned according with the proportion of fault assigned by the jury to each negligent party.[32]

IV. VARIOUS STATE APPROACHES TO LEGISLATIVE CHANGES TO APPORTIONMENT

A. Pennsylvania's Approach to Apportionment in Strict Liability Asbestos Cases Following Enactment of the Fair Share Act

In 2011, Pennsylvania enacted Pennsylvania's Fair Share Act,[33] which provided for apportionment of liability among tortfeasors.[34] The act intended to plainly abolish joint and several liability, with a few exceptions, but also made changes to apportionment.[35] The language of the act appeared to make it applicable to strict liability actions, stating the following:

> Where recovery is allowed against more than one person, including actions for strict liability, and where liability is attributed to more than one defendant, each defendant shall be liable for that portion of the total dollar amount awarded as damages in the ratio of the amount of that defendants liability to the amount of liability attributed to all defendants and other persons to whom liability is apportioned under subsection (a.2).[36]

This suggests a change from the former Pennsylvania Supreme Court precedent that in strict liability cases, the defendant's responsibility for

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[31] Patterson v. Long, 321 Ga. App. 157, 161, 741 S.E.2d 242, 247 (2013).

[32] *Id.*

[33] 42 PA. CON. STAT. § 7102(a.1) (1) (2011).

[34] *Id.*

[35] David R. Zaslow and Mark Paladino, *Pennsylvania's Fair Share Act: Reshaping Apportionment in Strict Liability Cases* (November 16, 12:12 PM) https://www.whiteandwilliams.com/resources-alerts-Pennsylvanias-Fair-Share-Act-Reshaping-Apportionment-in-Strict-Liability-Cases.html.

[36] 42 PA. CON. STAT. § 7102(a.1) (1) (2011).

damages was to be calculated on a per capita basis, meaning divided equally among strictly liable joint tortfeasors.[37]

Although the Fair Share Act seemed to be applicable to strict liability cases, some Pennsylvania courts refused to apply the Fair Share Act to strict liability claims in asbestos actions and possibly other strict liability cases.[38] However, in the 2017 case *Roverano v. John Crane, Inc*,[39] Pennsylvania's Supreme Court clarified the issue of the Fair Share Act's applicability to strict liability claims, or at least those involving asbestos.

In *Roverano*, the plaintiff, Mr. Roverano, was exposed to a variety of asbestos products through the course of employment with PECO Energy Company. Mr. Roverano was also a smoker for approximately thirty years. He received a diagnosis of lung cancer in both lungs in November of 2013. Subsequently, in March of 2014, Mr. Roverano initiated a strict liability lawsuit against thirty defendants asserting that exposure to their asbestos products caused his lung cancer. Before trial, a number of defendants filed a motion in limine seeking a ruling that the Fair Share Act, which required that the jury allocate liability to each defendant depending on what percentage of total harm it caused, applied to asbestos cases. The trial court denied the motion, finding that asbestos exposure cannot be quantified.[40]

On appellate review, the Pennsylvania Superior Court unanimously reversed the trial court's ruling that the Fair Share Act was not applicable in strict liability cases, stating that "the Fair Share Act explicitly applies in tort cases in which 'recovery is allowed against more than one person, including actions for strict liability.'"[41] The Superior Court quoted legislative history to support its holding that the Fair Share Act intends to apportion liability among liable defendants and to eliminate the previous method of per capita allocation.[42]

Approaching the issue as one of statutory interpretation, the Pennsylvania Supreme Court held that the Superior Court's interpretation of the Fair Share Act's applicability to strict liability cases was wrong.[43] The court explained that its rejection of percentage apportionment in strict liability basis is based on the theory that strict

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[37] Baker v. AC&S Inc., 755 A.2d 664, 669 (Pa. 2000).

[38] Hogan v. John Crane Inc., No. 120802323, 2014 WL 5490067 (Pa. Ct. Com. Pl., Phila. Cnty., order entered June 10, 2014) (granting plaintiff's motion in limine requesting per capita apportionment among strictly liable asbestos defendants).

[39] 226 A.3d 526 (Pa. 2020).

[40] *Id.* at 528.

[41] Roverano v. John Crane, Inc., 177 A. 3d 892, 907 (Pa. 2018) (quoting 42 PA. CON. STAT. § 7102(a.1)(1)).

[42] *Id.* (quoting 2002 Pa. Leg. J. (house) 1199 (June 4, 2002)).

[43] *Roverano*, 226 A.3d at 538.

liability torts do not contain an element of fault.[44] Pennsylvania common law holds that "[i]n strict liability actions, liability is indeed apportioned equally among joint tortfeasors."[45] The court ruled that the language of the Fair Share Act did not preempt the states common law as to equal apportionment in strict liability cases, drawing a distinction between apportionment in negligence cases and apportionment in strict liability cases.[46]

Pennsylvania is one of a number of states that have been faced with interpreting and applying the changes implemented through tort reform, which has been wide sweeping over the last half century. While Pennsylvania's Supreme Court interpreted the state's tort reform act as not preempting or deviating from a common law principle associated with strict liability cases, the Georgia Court of Appeals reached the opposite conclusion in the *Suzuki* case mentioned in the introduction of this Comment.[47]

B. Georgia's Approach to Apportionment in Strict Liability Cases Following Amendment to Georgia Statute Governing Apportionment

Georgia statute governs the reduction and apportionment of an award, or bars recovery altogether, according to percentages of fault of parties and nonparties.[48] In 2005, portions of the statute received amendments, including sections dealing with apportionment.[49] At issue in *Suzuki Motor of America, Inc. v. Johns* was the amended act's effect on apportionment in strict liability cases.[50] Following an accident due to break failure on his motorcycle, the plaintiff, Johns, brought claims including a strict products liability claim, along with negligent failure to warn and negligent recall, seeking both compensatory and punitive damages from the manufacturer of the defective bike. At the conclusion of trial, the jury awarded Johns $10.5 million in compensatory damages, finding in favor of Johns on each claim, including the strict liability claim. The jury also found in favor of Johns' wife on her derivative claim of loss of consortium and awarded her $2 million.[51] The issue discussed by the court was the jury's apportionment of fault and the resulting apportionment of the damages awarded.[52]

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[44] *Id.*

[45] *Id.* (quoting *Baker*, 755 A.2d at 669).

[46] *Id.* at 539.

[47] *Suzuki*, 351 Ga. App. at 187, 830 S.E.2d at 560.

[48] O.C.G.A. § 51-12-33 (2020).

[49] *Suzuki*, 351 Ga. App. at 197, 830 S.E.2d at 559.

[50] *Id.* at 198, 830 S.E.2d at 560.

[51] *Id.* at 188–89, 830 S.E.2d at 554.

[52] *Id.* at 198, 830 S.E.2d at 560.

The jury, upon being asked to assign the relative fault to the involved parties, found that Johns was 49% at fault, with Suzuki bearing 45% of the fault and the related party, Suzuki Motor Inc. of America, being 6% at fault. The trial court proceeded to apportion the damages awarded by the jury according to the amount of fault assigned to each party.[53] Johns argued on appeal that the court erred by using O.C.G.A. § 51-12-33[54] to reduce the jury's award in accordance with its assessment of fault and accompanying apportionment of damages.[55]

Historically in Georgia, comparative negligence has not been a defense to strict liability claims such as products liability actions.[56] More specifically, an injured party's careless act with respect to the product is not a defense, where the actual cause of the injury was an unanticipated defect in the product itself.[57] However, the Georgia Court of Appeals in *Suzuki* held that the amended Georgia statute governing apportionment was applicable to strict liability cases, thus overturning the common law principle disallowing contributory negligence as a defense in strict liability claims.[58]

The applicable Georgia statute interpreted by the court, O.C.G.A. § 51-12-33(a),[59] reads as follows:

> Where an action is brought against one or more persons for injury to person or property and the plaintiff is to some degree responsible for the injury or damages claimed, the trier of fact, in its determination of the total amount of damages to be awarded, if any, shall determine the percentage of fault of the plaintiff and the judge shall reduce the amount of damages otherwise awarded to the plaintiff in proportion to his or her percentage of fault.[60]

In interpreting the legislative intent behind this statute, the court of appeals began by looking at its plain terms which are that the statute governs actions for "injury to person."[61] There is no distinction made here as to the theories of the claims involved, i.e. negligence, strict liability, and so on.[62] The court abided by the presumption that when the

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[53] *Id.* at 189, 830 S.E.2d at 554.

[54] O.C.G.A. § 51-12-33 (2020).

[55] *Suzuki*, 351 Ga. App. at 197, 830 S.E.2d at 559.

[56] Barger v. Garden Way, 231 Ga. App. 723, 727, 726 S.E.2d 737, 742 (1998); *see also Deere & Co.*, 250 Ga. at 520, 299 S.E.2d at 707.

[57] *Deere & Co.*, 250 Ga. at 520, 299 S.E.2d at 707.

[58] *Suzuki*, 351 Ga. App. at 198, 830 S.E.2d at 560.

[59] O.C.G.A. § 51-12-33(a) (2020).

[60] *Id.*

[61] *Suzuki*, 351 Ga. App. at 198, 830 S.E.2d at 560.

[62] *Id.*

legislature spoke, "[it] meant what it said and said what it meant."[63] The statute then goes on to state that the amount of damages awarded to the plaintiff should be reduced in accordance with "his or her percentage of fault."[64]

Beyond applying methods of statutory interpretation, the court of appeals also relied heavily on the Georgia Supreme Court's ruling in *Couch v. Red Roof Inns*, [65] which also provided statutory interpretation of the statute at issue in *Suzuki,* O.C.G.A. § 51-12-33. In *Couch*, the plaintiff alleged that the defendant's failure as a property owner to prevent a criminal attack caused his injury. The issue in the case was whether the jury should apportion the awarded amount between the intentional tortfeasor; the criminal assailant in this case; and the negligent defendant, the property owner.[66] Under Georgia common law, apportionment between the negligent and intentional tortfeasors would not be allowed. However, in light of the statute there was confusion as to the applicability of the statutory changes to apportionment to circumstances involving both intentional and negligent tortfeasors. The United States District Court for the Northern District of Georgia certified the following two questions to the Supreme Court of Georgia:

> (1) In a premises liability case in which the jury determines a defendant property owner negligently failed to prevent a foreseeable criminal attack, is the jury allowed to consider the "fault" of the criminal assailant and apportion its award of damages among the property owner and the criminal assailant, pursuant to O.C.G.A. § 51-12-33?
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> (2) In a premises liability case in which the jury determines a defendant property owner negligently failed to prevent a foreseeable criminal attack, would jury instructions or a special verdict form requiring the jury to apportion its award of damages among the property owner and the criminal assailant, pursuant to O.C.G.A. § 51-12-33, result in a violation of the plaintiff's constitutional rights to a jury trial, due process or equal protection?[67]

As to the first certified question, the court answered that "the jury is allowed to apportion damages among the property owner and the criminal assailant . . . ."[68] The answer to this first certified question

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[63] *Id.* (quoting Deal v. Coleman, 294 Ga. 170, 172–73, 751 S.E.2d 337, 340 (2013)).

[64] O.C.G.A. § 51-12-33(a).

[65] 291 Ga. 359, 729 S.E.2d 378 (2012).

[66] *Id.* at 359, 729 S.E.2d at 379.

[67] *Id.*

[68] *Id.*

turned on how the court interpreted the statute's use of the word "fault."[69] Section (a) of the statute addresses what to do in cases where the plaintiff is also partially at fault, directing the jury on how to reduce the amount of damages in proportion to the fault of the plaintiff and that of the other at fault parties.[70] Section (b)[71] of the statute addresses all of the tortfeasors involved, parties and nonparties, and dictates what is to happen to the total amount of damages to be awarded relative to fault.[72] The court attempted to put all of this in simple terms stating that the jury should "take the total amount of damages to be awarded to the plaintiff, identify the persons who are liable, and apportion the damages to each liable person according to each person's percentage of fault."[73]

Under this interpretation, fault includes intentional conduct as well as negligent conduct, with no distinction between the two in terms of apportionment of the award.[74] The court supported this interpretation by citing to "direct evidence from the statute . . . that fault is not meant to be synonymous with negligence" but should interpreted to include other types of wrongdoing, such as intentional acts.[75] This result contravened the common law previously followed in Georgia that disallowed apportionment among negligent and intentional tortfeasors.[76]

The second certified question asked whether an apportionment of the award among the negligent and intentional tortfeasors, pursuant to O.C.G.A § 51-12-33, would violate the plaintiff's constitutional right to a jury trial.[77] The answer was no.[78] The court held that the statute did not abdicate any part of a party's due process and that it was not unconstitutionally vague.[79] The court further stated, "with regard to equal protection, as set forth above, the statute is certainly supported by a rational basis of apportioning damages among all tortfeasors responsible for harming a plaintiff in an efficient and orderly manner."[80]

In applying the holding in *Couch* to support its ruling in *Suzuki*, the court of appeals cited specifically to part of the holding interpreting

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[69] *Id.*

[70] O.C.G.A. § 51-12-33(a).

[71] O.C.G.A. § 51-12-33(b) (2020).

[72] *Id.*

[73] *Couch*, 291 Ga. at 361, 729 S.E.2d at 380.

[74] Id. at 361–62, 729 S.E.2d at 381.

[75] *Id.* at 362, 729 S.E.2d at 381.

[76] *Id.* at 364, 729 S.E.2d at 382.

[77] *Id.* at 359, 729 S.E.2d at 379.

[78] *Id.* at 367, 729 S.E.2d at 384.

[79] *Id.*

[80] *Id.*

fault.[81] The court interpreted the term "fault," as used in the statue, as not synonymous with negligence, but to include all types of wrongfulness.[82] Further, in reference to the effect of O.C.G.A § 51-12-33 on the common law principles currently followed by the state, the court agreed with the court in *Couch* that the statute was intended by the General Assembly to displace the common law of apportionment.[83] In the closing of the court's opinion in *Suzuki*, the court stated the following: "[r]eading the plain language of the statute in conjunction with Supreme Court's holding in *Couch*, we conclude that the trial court did not err in apportioning John's damage award on his claim for strict liability."[84]

In a ruling that may have been a surprise to practitioners in Georgia, the Georgia Supreme Court affirmed the court of appeals' *Suzuki* decision in *Johns v. Suzuki Motor of America, Inc.*, upholding the trial court's application of apportionment to Johns' strict liability claim.[85] The court based its ruling upon reading O.C.G.A. § 51-12-33(a) as applying to "actions 'for injury to person' without distinguishing between . . . theories," and thus including claims based upon strict liability.[86] The court also rejected Johns' argument relying on case law supporting the prohibition of apportionment in strict liability cases, stating, "we conclude, as the Court of Appeals did, that the statute supplanted the no-responsible comparative-negligence holdings of the pre-2005 cases."[87]

The court also disagreed with the arguments that applying comparative negligence to strict liability claims will essentially end the application of the strict liability doctrine in the state and is in opposition to the public policy underlining the doctrine.[88] Although the court acknowledged the public policy argument that protecting consumers is important, it agreed with scholars who have argued that is it "unwise to relieve users and consumers of all responsibility for safe product use and consumption."[89] The opinion of the supreme court addressed other arguments and ultimately reflected a wholesale adoption of the court of appeals' decision to affirm the trial court's application of apportionment in a strict liability claim.[90] The result is a complete upheaval of what has

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[81] *Suzuki*, 351 Ga. App. at 198, 830 S.E.2d at 560 (citing *Couch*, 291 Ga. at 362, 729 S.E.2d at 381.

[82] *Id.* at 198, 830 S.E.2d at 560.

[83] *Id.*

[84] *Id.*

[85] *Johns*, 2020 Ga. LEXIS 760 at *2.

[86] *Id.* at *4 (quoting *Suzuki*, 351 Ga. App. at 198, 830 S.E.2d at 560).

[87] *Id.* at *7.

[88] *Id.* at *12.

[89] *Id.* at *16 (quoting RESTATEMENT (THIRD) OF TORTS § 17 (2009)).

[90] *Id.* at *17.

been Georgia precedent for over the last half century with regard to apportionment.

C. A Closer Look at the Related Phenomenon of Apportionment Between Intentional and Negligent Tortfeasors

The wide sweep of comparative negligence has had an effect beyond raising questions of apportionment in strict liability claims. The broad acceptance of the doctrine has led to some courts expressing willingness to include intentional tortfeasors and negligent tortfeasors in the assessment of comparative responsibility.[91] Although comparisons in instances involving high culpability tortfeasors are less common, a more prevalent example is courts' willingness to compare fault where a defendant's intentional tort did not involve physical harm to others, such as nuisance claims.[92] An example of a court allowing apportionment between a negligent tortfeasor was highlighted in the previous section in the *Couch* case in which the Georgia Supreme Court held that a jury may apportion damages among the property owner and a criminal assailant in a premises liability action.[93] This shift in apportionment principles is not unique to the state of Georgia.

In *Slack v. Famers Insurance Exchange*,[94] the Supreme Court of Colorado reached a conclusion similar to the Supreme Court of Georgia's conclusion in *Couch* as to apportionment between intentional and negligent tortfeasors in light of their interpretation of a state apportionment statute.[95] In fact, the Supreme Court of Georgia noted the Colorado court's decision in its opinion in *Couch*.[96] The Colorado court in *Slack* approached the question of whether the state statute required pro rata distribution of liability among intentional and negligent tortfeasors who cause indivisible injury.[97] The applicable Colorado statute "states that a tort-feasor shall only be liable for damages to the extent of her negligence or fault."[98]

The plaintiff in *Slack* suffered injuries in an automobile accident caused by the driver of green car running a red light while the plaintiff was attempting to make a right-hand turn, forcing the plaintiff to stop suddenly. The abrupt stop caused the plaintiff to hit her chin on the

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[91] Green, *supra* note 20 at 1118.

[92] Ellen M. Bublick, *The End Game of Tort Reform: Comparative Apportionment and Intentional Torts*, 78 NOTRE DAME L. REV. 355, 369–70 (2003).

[93] *Couch*, 291 Ga. at 366, 729 S.E.2d at 384.

[94] *Slack v. Farmers Ins. Exch.*, 5 P.3d 280 (Colo. 2000).

[95] *Id.* at 282.

[96] 291 Ga. at 363, 729 S.E.2d at 382 n.6 (citing *Slack*, 5 P.3d at 285).

[97] *Slack*, 5 P.3d at 282.

[98] *Id.* (citing COLO. REV. STAT. § 13-21-111.5(1) (2020)).

steering wheel and her head on the headrest. Following the accident, the plaintiff saw a chiropractor to assess her injuries who then submitted the charges for treatment to the plaintiff's insurance company, the defendant Farmers Insurance. The defendant wanted a second opinion as to the plaintiff's injury and scheduled her an appointment to see another chiropractor, Dr. Lloyd Lachow. Unbeknownst to the plaintiff, another insured of the defendant had filed a sexual assault allegation against Dr. Lachow. During the plaintiff's examination, Dr. Lachow touched the plaintiff inappropriately and exacerbated her injuries by violently shaking her head from side to side. The plaintiff filed a complaint with the local police and ultimately brought suit against Lachow for assault, battery, and negligence among, other claims.[99] The plaintiff also brought suit claiming the defendant "acted improperly by sending her to a [doctor] [the defendant] knew or should have known would injure her."[100]

At trial, the jury awarded a verdict in favor of the plaintiff against the defendant, finding that it acted willfully and wantonly. The plaintiff was awarded $40,000 for her injuries and $16,000 in exemplary damages.[101] The court apportioned the damages among Farmers Insurance and Dr. Lachow, finding them to be forty and sixty percent at fault respectively.[102] The plaintiff appealed the apportionment of her award, arguing that Colorado Statute § 13-21-111.5(1)[103] does not require apportionment between a negligent actor (Farmers Insurance) and an intentional tort-feasor (Dr. Lachow).[104] The Supreme Court of Colorado disagreed.[105]

In holding that the apportionment of damages between a negligent and intentional tortfeasor was appropriate, the Colorado Supreme Court relied on its interpretation of the apportionment statute, Colo. Rev. Stat. § 13-21-111.5(1), which resulted from the tort reform movement in Colorado.[106] The Court interpreted the first part of the statute, § 13-21-111.5(1), as encompassing a "wide variety of situations" and therefore as applicable to the intentional tort of assault and battery involved in *Slack*.[107] The court then moved to the second part of the statute which states, "no defendant shall be liable for an amount greater

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[99] *Id.* at 282–83.

[100] *Id.* at 283.

[101] *Id.* at 283 (the jury also found in favor of the plaintiff's husband's loss of consortium claim and awarded him $6,000 for his loss and $2,400 in exemplary damages.).

[102] *Id.*

[103] COLO. REV. STAT. § 13-21-111.5(1) (2020).

[104] *Slack*, 5 P.3d at 283.

[105] *Id.*

[106] *Id.* at 284.

[107] *Id.*

than that represented by the degree or percentage of the negligence or fault attributable to such defendant that produced the claimed injury, death, damage, or loss."[108] The court held that the use of the word "fault" in the statute encompassed both negligent and intentional wrongdoing.[109] As a result of this interpretation, the court held that the apportionment statute "applies even when one of the several tortfeasors commits an intentional tort that contributes to an indivisible injury."[110]

The court further supported its holding by quoting the following from a previous case addressing the abolishment of the common law principle of joint and several liability:

> [t]he adoption of [the pro-rata division of liability] was intended to cure the perceived inequality under the common law concept of joint and several liability whereby wrongdoers could be held fully responsible for a plaintiff's entire loss, despite the fact that another wrongdoer, who was not held accountable, contributed to the result.[111]

The court held that neither the reasoning nor the result should differ when an intentional tortfeasor contributes to the loss.[112] As a result, the court affirmed the apportionment of damages among the negligent and intentional tortfeasors.[113] Thus, the court displaced the common law rule against such apportionment in Colorado.[114]

V. THE FUTURE OF STRICT LIABILITY CLAIMS IN GEORGIA

A. An Argument Against the Georgia Supreme Court's Affirming the Application of Apportionment to Claims Based in Strict Liability

At its core, strict liability is liability without fault. It is based on our belief as a society that those who are engaging in certain activities that pose a risk to others should be held responsible for the result, regardless of whether they exercised reasonable care or not. In the realm of products liability, holding a manufacturer strictly liable for defective products is based on a theory of cost sharing. When a consumer is injured by a defective product, who is better positioned to bear the costs of such harm? The average consumer or the manufacturer profiting from the sale of the product? These are the ideas behind the doctrine of strict liability today.

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[108] *Id.* at 284–85 (quoting COLO. REV. STAT. § 13-21-1115(1)).

[109] *Id.* at 286.

[110] *Id.*

[111] *Id.* (quoting Barton v. Adams Rental, Inc., 938 P.2d 532, 535 (Colo. 1997)).

[112] *Id.*

[113] *Id.* at 288.

[114] *Id.*

The Georgia Supreme Court should have reversed the decision of the court of appeals to allow apportionment in strict liability claims in light of the intent of the strict liability statute in the state. The Georgia strict liability statute reads, in part, as follows:

> The manufacturer of any personal property sold as new property directly or through a dealer or any other person shall be liable in tort, irrespective of privity, to any natural person who may use, consume, or reasonably be affected by the property and who suffers injury to his person or property because the property when sold by the manufacturer was not merchantable and reasonably suited to the use intended, and its condition when sold is the proximate cause of the injury sustained.[115]

The enactment of this statute, which created strict products liability in the state, intends to replace the previous common law system which "'adhered generally to traditional concepts requiring proof of negligence in tort actions and privity in contract actions on warranties' to hold manufacturers of defective products liable."[116] Through enacting this statute, the Georgia legislature expressed clear intent to replace the previously followed common law principles with a medium through which to hold the manufacturer responsible for the safety of its products.

The shift of placing the burden of loss caused by defective products onto the manufacturer, rather than the consumer, is based on a theory of cost sharing. Manufacturers are in the unique position to be able to absorb the cost of loss from defective products as a cost of doing business. In having to so do, the manufacturers are presented with an economic incentive to ensure that the production, designs, and products themselves are safe for consumers—safer products mean a lower chance of liability. Further, the manufacturer is in a better position to detect and remediate dangerous product defects through research and development and quality control procedures. These theories in support of shifting the burden onto the manufacturer are acknowledged in the Restatement (Second) of Torts[117] which includes the following:

> On whatever theory, the justification for the strict liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed special responsibility toward any member of the consuming public who may be injured by it;

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[115] O.C.G.A. § 51-1-11 (2020).

[116] Brief of Amicus Curiae Georgia Trial Lawyers Association in Support of Petitioners at *7, *Johns v. Suzuki Motor of Am.*, 2020 GA S. Ct. Lexis 760 (2020) (No. S19G1478), 2020 GA S. Ct. Briefs LEXIS 1233 (quoting Ellis v. Rich's, Inc., 233 Ga. 573, 576, 212 S.E.2d 373, 376 (1975)).

[117] RESTATEMENT (SECOND) OF TORTS § 402A cmt. c (Am. Law Inst. 1965).

> that the public has the right to and does expect, in the case of products which it needs and for which it forced to rely upon the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitles to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products.[118]

By providing a medium through which the costs of defective products are to be placed on the manufacturer, the Georgia General Assembly adopted a public policy in favor of protecting consumers injured by defective products.

The argument that through the amendment of the apportionment statute in response to health care issues in the state, the General Assembly intended to reverse the public policy of burdening manufacturers in strict liability claims rather than consumers is thin at best. The argument is further weakened by the fact that the Georgia Constitution[119] places the power to alter public policy in the hands of the legislature, not the judiciary.[120] Here, the Georgia Supreme Court's affirming of apportionment in a strict liability case, resulting in a consumer bearing almost half of what the statute intended to be the manufacturer's burden, has illuminated a shift in public policy and not by the specific action of the legislature.

Not only does this statutory interpretation by the court "invert the proper constitutional order,"[121] but it should be noted that the same justifications for the public policy of protecting consumers recognized by the legislature through the enactment of the strict liability in 1968 are very much present today. In today's society consumers are inundated with the marketing of consumer products. In fact, the science of consumer marketing has reached new levels which go as far as curating consumer-specific ad content to be shown on identified consumers' social media platforms. Marketing has increased, and the availability of products has greatly expanded. Retailers like Amazon make it possible for consumers to access products located across the country in as few as two days. As the market grows, so does the business of manufacturing. With this expanded market for consumer products, why would this be the time to alter the paramount purpose of strict liability—the protection of otherwise defenseless victims? In an age of multimillion dollar companies

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[118] *Id.*

[119] GA. CONST.

[120] GA. CONST. Art. III, § 1, para. 1.

[121] Amicus Brief for the Petitioners, *supra* note 116, at *12.

selling more products than ever with increasing profit margins, manufacturers are likely in the best position in recent history to absorb the cost of defective products.

B. Alternative Statutory Interpretation of O.C.G.A. § 51-12-33 as Inapplicable to the Doctrine of Strict Liability

The rejection of common law principles in favor of applying apportionment to strict liability claims and among negligent and intentional tortfeasors has clearly been a result, at least in part, of courts' interpretations of various statutory amendments and acts catalyzed by the national tort reform movement of the past few decades. However, there is dissent among justices as to whether the interpretations of these statutes as rejecting common law principles truly effectuate the intent of the legislatures. In *Couch*, the Georgia case discussed above which upheld apportionment between negligent and intentionally tortfeasors, Justice Benham dissented to the opinion stating, "I cannot agree with the majority when it opines that the General Assembly intended to eviscerate more than a century of Georgia's common law simply by using 'fault' in O.C.G.A. § 51-12-33."[122]

Unlike Georgia, other states that have enacted comparative fault statutes have provided a definition for "fault" as used in the statutes to limit it to acts of negligence.[123] However, the Georgia assembly did not provide a definition, leaving the interpretation of the term to the courts.[124] The term "fault" has a litany of definitions that make it unclear where the line should be drawn—does the term extend beyond negligence to intentional acts, to strict liability, to breach of warranty and so on?[125]

The following presumption in construing a statute is noted by Justice Benham in his dissent:

> All statutes are presumed to be enacted by the legislature with full knowledge of the existing condition of the law and with reference to it. They are therefore to be construed in connection with and in harmony with the existing law, . . . and their meaning and effect is to be determined in connection, not only with the common law and the constitution, but also with reference to other statutes and the decisions of the courts.[126]

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[122] *Couch*, 291 Ga. at 367 (Benham, J., dissenting).

[123] See 10 DEL. CODE ANN. § 8132 (2012); *see also* S.D. CODIFIED LAWS § 20-9-2 (2011).

[124] *Couch*, 291 Ga. at 370–71, 729 S.E.2d at 386.

[125] *Id.* at 370–71, 729 S.E.2d at 387 (Benham, J., dissenting).

[126] *Id.* at 372, 729 S.E.2d at 387–88 (Benham, J., dissenting) (quoting Thornton v. Anderson, 207 Ga. 714, 718, 64 S.E.2d 186, 189 (1951)).

When O.C.G.A § 51-12-33 was amended in 2005 as part of a group of reforms to address issues in health care services in the state, both the common law rule against apportionment among negligent intentional tortfeasors and against apportionment in strict liability claims were very much followed and recognized by Georgia courts.[127] In regards to the applicability of the statute to strict liability, the 2005 reforms did not once mention the term "strict liability" nor did it mention O.C.G.A. § 51-1-11,[128] the Georgia strict liability statute.[129] Given the above presumption used in construing statutes, this is jarring evidence that it is highly unlikely the legislature intended the statute to alter or overturn the common law rule against apportionment in strict liability claims followed by the state. It perhaps even suggests that the legislature did not even consider the possible implication of such as a result of the reforms.

Further, another canon of interpretation is that "statutory construction requires that a statute in derogation of the common law be construed strictly by the courts."[130] In application, because the term "fault" as used by the general assembly can be defined expansively or narrowly, strict construction precludes construing the term in a manner that would overturn common law.[131] In application here, the term should have been interpreted as not extending all the way to strict liability—a result of what can be classified as an incredibly broad interpretation.

VI. THE INEVITABLE EFFECT OF APPLYING APPORTIONMENT IN STRICT LIABILITY CASES IN GEORGIA

A. Comparison of the Common Law Principles and the Actions of the Georgia Supreme Court in Suzuki

Under the common law principles which have historically been followed in Georgia, contributory negligence by a plaintiff is not a defense available in strict liable claims for product-caused harms.[132] This is partly because the principles underlying strict liability are distinct from those of negligence. Strict liability is liability without *fault*, and as such, the fault of the defendant is considered to be irrelevant if the actual cause

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[127] Amicus Brief for the Petitioners, *supra* note 116, at *2.

[128] O.C.G.A. § 51-1-11 (2020).

[129] Amicus Brief for the Petitioners, *supra* note 115, at *2.

[130] *Couch*, 291 Ga. at 374, 729 S.E.2d at 389 (citing Tampa Investment Group v. Branch Banking and Trust, 290 Ga. 724, 725–28, 723 S.E.2d 674, 677–79 (2012)) (Benham, J., dissenting).

[131] *Id.*

[132] *Deere & Co.*, 250 Ga. at 520, 299 S.E.2d at 707.

of the injury is a defect in the product, not the plaintiff's carelessness.[133] In *Suzuki*, if the common law was followed, Johns' failure to properly maintain his bike's brake fluid would have no effect on the damages awarded by the jury. By finding the product defect to be the proximate cause of the injuries he sustained, the defendant would be entirely liable for the amount awarded by the jury. The application of apportionment of fault to Johns by the jury however makes a substantial difference in the amount he stands to collect from the product manufacturer, Suzuki. The jury awarded Johns $10.5 million in compensatory damages for the harm he suffered. Apportioning 49% of the fault to Johns himself results in a reduction of $5,145,000, or in other words, one percent less than half of the entire award.

Although contributory negligence has historically not been available as a defense to strict liability claims in Georgia, other recognized defenses related primarily to the element of proximate cause put into place barriers to recovery for those injured by consumer products. In order to hold a defendant strictly liable, the plaintiff must show that the defendant is (1) the manufacturer of the product; (2) that the product when sold by the manufacturer was defective; and (3) that the defect was the proximate cause of the injury sustained by the plaintiff.[134] One defense available to the defendant, known as product misuse, allows the defendant to argue that the plaintiff's misuse of the product was the proximate cause of the injury they sustained.[135] The plaintiff's alleged misuse of the product must be significant enough to break the chain of causation between the defect in the product and the plaintiff's injury. In this sense, the plaintiff's negligence in misusing the product is only being considered as it relates to the causation element of the injury. The negligence is not being used as a way to reduce recovery by comparing fault, as it was in *Johns*.[136]

Another available defense to strict products liability is assumption of the risk.[137] Under this affirmative defense, a defendant must establish the plaintiff (1) had knowledge of a condition inconsistent with his or her safety; (2) the plaintiff appreciated the danger presented by the condition; and (3) the plaintiff deliberately and voluntarily chose to expose him or herself to that danger in a manner that is consistent with assent to the continuance of the dangerous condition.[138] Whether a

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[133] *Id.*

[134] Chi Hardware & Fixture Co. v. Letterman, 236 Ga. App. 21, 23, 510 S.E.2d 875, 877–78 (1999).

[135] *Id.*

[136] 351 Ga. at 186, 830 S.E.2d at 552.

[137] Dean v. Toyota Indus. Equip. Mfg., 246 Ga. App. 255, 255, 540 S.E.2d 233, 234 (2000).

[138] *Id.*

plaintiff assumed the risk of injury is ultimately a question to be decided by the jury. Further, courts in Georgia apply the risk utility test to determine whether the risks inherent in a product design outweigh the utility of the product. In other words, the jury must decide whether by choosing a specific "design, the manufacturer exposed the consumer to a greater risk than it should have."[139] The factors considered in this analysis include: "the usefulness of the product; the gravity and severity of the danger" the design poses; the likelihood of the danger; the extent to which the danger is avoidable; the efficacy of the product's warning; the manufacture's ability to eliminate the danger without impeding on the product's usefulness or price; etcetera.[140]

The implications of the availability of these defenses to product manufacturers is that when someone in Georgia is somehow injured by a consumer product, there is not automatically a slam-dunk strict products liability claim. Plaintiffs face an uphill climb to recovery. With the additional component of the applicability of apportionment to strict liability claims, the ascent to recovery has now become even steeper. Apportionment may now allow manufacturers to further avoid liability through the ability to reduce the percentage of their fault through apportionment to not just the plaintiff for their degree of fault, but also to other third parties who may become involved. Under the common law principles which have been followed for the past-half century in Georgia, plaintiffs rightfully avoided this additional barrier to seeking justice.

B. The Concerns for Practitioners and Plaintiffs in Response to the Application of Apportionment in Strict Liability Claims

The Georgia Supreme Court's upholding of the *Suzuki* decision in the court of appeals has left many Georgia trial lawyers scratching their heads. As previously stated, the supreme court's affirming of the court of appeals' displacement of common law principles in favor of allowing apportionment in strict liability claims has upturned over fifty years of Georgia precedent. The Georgia Trial Lawyers Association filed an Amicus Curiae brief with the supreme court in favor of the petitioners asking the court to reverse the judgement of the Court of Appeals.[141]

The brief expressed one fear held by many practitioners, that the court of appeals' decision "if left standing, [will] prevent people injured by defective products who sue the manufacturer in strict liability from recovering if the trier of fact finds that the injured person's percentage of fault was at least 50 percent."[142] This results in a manufacturer bearing

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[139] *Id.* at 259, 540 S.E.2d at 237.

[140] Banks v. ICI Americas, 264 Ga. 732, 736 n.6, 450 S.E.2d 671, 675 n.6 (1994).

[141] Amicus Brief for the Petitioners, *supra* note 116, at *1.

[142] *Id.* at *12–13.

no responsibility or cost whatsoever, when the basis of strict liability as imposed by Georgia statute is for the manufacturer to bear all of that burden.[143]

The affirmation of the court of appeals also makes it more difficult for plaintiffs injured by defective products to recover from the manufacturer by allowing fault to be apportioned not only to the plaintiff themselves, but also to third parties. This is in addition to the already available defenses of product misuse, other proximate cause, and assumption of the risk. Distinctively, these defenses work in harmony with the public policy that shifts the burden onto the manufacturer because they should not be liable where the proximate cause of the injury was not the defective product itself. However, the application of the doctrine of comparative negligence allows the manufacturer to avoid all or part of the damages where the defective product *is* at least one proximate cause of the plaintiff's injury. As a result, the application of apportionment to strict liability has simply placed another barrier between a plaintiff injured by a defective product and recovery from the manufacturer of said product. Nonetheless, there is one victor at the expense of injured Georgians: the product manufacturers.

Carey Sartain

[143] *Id.* at *13.