BY ANN LARIMER ROBERTSON

WHEN WORLDS COLLIDE

A young man in the prime of his life is killed in a horrendous automobile accident. The undisputed culprit is a bad tire that was defectively manufactured by a large international corporation, Tires Inc. The defect is not apparent unless you rip apart and x-ray the tire.

Mom and Pop's Tire Store bought the tire from Tires Inc. and sold it to the young man who was ultimately killed. Unfortunately for the young man's survivors, Tires, Inc. is in bankruptcy, and its insurance coverage has lapsed.

Now what? Should Mom and Pop's, a struggling family business, be required to stand in the shoes of Tires, Inc. and pay the entire judgment to the plaintiffs? Or should the family be left uncompensated for their loss due to their inability to collect from the manufacturer?

The public policy supporting strict product liability requires Mom and Pop to pay for Tires, Inc.'s portion of fault. The public policy supporting pure comparative fault leaves the victims out in the cold. These two legal theories work fine exclusively, but they inevitably conflict when there are multiple defendants in the product liability case. One must trump.

The law of Arizona is plainly set forth in A.R.S. § 12-2506—pure comparative fault wins. And although in certain cases this leaves victims with no practical remedy, there is no way to avoid this result. Arizona's clear

STRICT LIABILITY AND COMPARATIVE FAULT

choice is to apply pure comparative fault in all tort cases.

Since the adoption of pure comparative fault in Arizona, plaintiffs in strict liability cases have struggled with the language of § 12-2506. This statute provides that each tortfeasor—party and nonparty alike—shall only be "responsible for paying for his or her percentage of fault *and no more*."[1] Subsection (D) specifically provides that the statute applies to strict and product liability cases. This seems pretty simple. We allocate fault among the manufacturer, seller and plaintiff in a strict liability case just as we would any other tort case.

This plain application of the statute has been challenged by plaintiffs in cases in which the target defendant (manufacturer) is unavailable. In our global economy, we often have bad nuts that come out of mass-production countries such as China and Mexico. It may be incredibly difficult for a plaintiff to properly serve and bring in such a defendant. Another common scenario is the one presented in the preceding example—a horrific injury and a bankrupt defendant with no insurance. When the manufacturer is out of the picture, plaintiffs commonly argue that the seller should be jointly liable for that portion of fault attributed to the manufacturer.

Strict liability cases often are misunderstood by attorneys and laypeople alike.

It is a common law creature, not statutory.[2] Strict liability is also a tort that requires certain elements of proof, just like negligence. In a negligence case, the plaintiff must prove duty, breach, causation and damages. Strict liability simply removes the "breach" element from the plaintiff's case. If the product is defective, breach is presumed. This does not relieve the plaintiff from proving duty, causation or damages. The causation element is where the confusion often sets in regarding the application of comparative fault. Just as in any other tort case, product liability plaintiffs have the burden to prove what damages were caused by whom.

Joint and Several Liability Abolished

Joint and several liability is a common law doctrine that, for the most part, is outdated.

Arizona's clear choice is to apply pure comparative fault in all tort cases. . . . Defendants are allowed some fairness and equity, too.

For years, tort defendants were held responsible for an entire damage award even when they were minimally at fault.[3]

In 1987, finally recognizing the inequities of this system, the Arizona Legislature enacted § 12-2506, which adopts a purely comparative fault tort system. The language of § 12-2506(A) provides that joint liability is now the exception, not the rule. The jury is to consider the fault of "all persons who contributed to the alleged injury," regardless of whether they were or could have been named as a party. A.R.S. § 12-2506(B). Moreover, everyone's comparative fault—plaintiffs, defendants and nonparties—is to be assessed at the same time. A.R.S. § 12-2506(C). Since the passage of this statute, Arizona courts have applied comparative fault consistently as between plaintiffs and product liability defendants.[4] This application is just as easily extended to co-defendants in the chain of distribution.

Fault

Though this statute is straightforward, one feature must be highlighted. A.R.S. § 12-2506(F) specifically defines the term *fault* to include those persons subject to product liability and strict liability claims: "Fault means an actionable breach of legal duty, act or omission proximately causing or contributing to injury or damages sustained by a person seeking recovery, including negligence in all of its degrees, contributory negligence, assumption of risk, strict liability, breach of expressed or implied warranty of a product, products liability and misuse, modification or abuse of a product."

Thus, defendants subject to strict and product liability claims are to be assessed only their own degree of fault along with everyone else, all at the same time.

Listed in subsection (D) are exceptions to the "several only" rule, which have changed a bit over time. Neither strict liability nor product liability theories ever have been listed in subsection (D), nor have they ever been excepted from the "several only" rule of A.R.S. § 12-2506(A). To the contrary, as noted previously, subsection (F) specifically defined and continues to define fault to include product liability and strict liability theories.

It is not necessary to read between the lines when interpreting this statute: Under its plain language, the jury may apportion fault between the seller and manufacturer of a defective product in a strict liability case.

But *should* this be the law?

Product Liability Statutes

It has been argued that there is no way to reconcile A.R.S. § 12-2506 with Arizona's "Product Liability Statutes," §§ 12-681 *et seq.*

I have included the quotation marks because it is often forgotten that product liability is a common law, not a statutory, claim. The product liability statutes are in place to address definitions, defenses, contribution and indemnification issues. If the Arizona legislature were to repeal the entire Product Liability Chapter, one could still bring a product liability lawsuit in Arizona. If we keep in mind that the product liability statutes are secondary to the cause of action itself, it is easier to harmonize them with the comparative fault statute.

A.R.S. § 12-681 *et seq.* did not, and does not, create any joint liability between the manufacturer and the seller in a product liability action. The pre-1988 joint liability as between a manufacturer and seller was a creature of the common law. Joint liability is no longer the rule. Simply because A.R.S. § 12-684 refers to contribution/indemnification principles that were in place pre-UCATA, this does not somehow override the new several liability scheme.

This does not mean that A.R.S. § 12-684 is no longer applicable. If two statutes seemingly conflict, they are to be construed in harmony if at all possible.[5]

For instance, assume that the manufacturer of a defective tool is a family-owned operation with a small plant, but the seller is a huge, faceless conglomerate with outlets across the country. The defective product was a one-time aberration, and the husband-and-wife plant owners are very sweet, sympathetic witnesses. A jury may well believe that the chain hardware store was in a better position to find and prevent the defect than was the manufacturer. Or the jury may simply think that it is better able to afford the judgment. As a result, the jury finds the seller to be 75 percent liable and the plant owners to be 25 percent liable. Pursuant to § 12-684,

the seller can still go after the small manufacturer for the 75 percent. The existence of these contribution provisions does not preclude the jury from assessing fault. They simply allow the "less liable" defendant to recover their percentage of fault from the "more liable" defendant, whatever that percentage may be.

Why Vicarious Liability Does Not Apply

Plaintiffs trying to keep product liability cases in the "joint liability" realm have argued that vicarious liability should apply as between sellers and manufacturers. This does not work.

To find a party vicariously liable, there must either be (1) a master–servant (employer–employee), (2) principal–agent or (3) employer–independent contractor relationship between the parties.[6] We rarely find such relationships as between commercial manufacturers and retailers of products.

Beyond the strict definitional argument, vicarious liability and strict liability are two different animals. Strict liability is a cause of action. Vicarious liability is an application effectuated after the fact. The idea behind vicarious liability is that the superior entity, who has the benefit of management, selection and control, ultimately should bear the burden of having their inferiors working for the financial benefit of the superior.

This rationale does not fit with the product case. We have two separate entities, Ford and Joe's Auto Dealership. Why should Joe's Auto Dealership be punished if Ford makes a lemon? What right of control did Joe have over good old Henry?

The rationale for allowing strict liability claims against product manufacturers and sellers is to make products safer. To hold a seller vicariously liable for a manufacturer's fault would do nothing to make products safer. To the contrary, the ultimately wrongful party, the manufacturer, would be let off the hook. Arizona's product liability indemnification statute holds the manufacturer ultimately liable (in most cases) for making a defective product.[7] Thus, to hold a seller vicariously liable for a manufacturer's percentage of fault flies in the face of Arizona's stated public policy. At the end of the day, the manufacturer pays.

Wiggs v. City of Phoenix[8] has been cited to advance the argument that vicarious liability should apply in the product scenario. *Wiggs*, even according to its authors, does nothing more than clarify existing law on the liability of the retainer of an independent contractor. It held that the independent contractor of an employer with a non-delegable duty would be treated the same as an employee. It has nothing to do with product liability or expanding the exceptions regarding joint liability. It just says that some independent contractors may in fact also be agents, subject to the direction of their superior, and thus the superior is vicariously liable. It is frankly so inanalogous to the product case that it is difficult to address *Wiggs* in this context.

Juries' Capability To Assess Fault

Another argument that often arises in this context is, "Juries are not capable of assessing fault as between the manufacturer and the seller. How can this be done?" Relieving plaintiffs from proving breach does not somehow make juries incapable of adding up to 100. Why is it any harder for juries to allocate fault in a product case than any other type of tort case?

Juries are asked to allocate fault in the most difficult types of tort cases. Complex injuries, multiple defendants, medical malpractice, subsequent accidents, different torts, intervening causes: The list goes on.

The jury found in *Hutcherson v. City of Phoenix*[9] that the 911 operator who did not correctly prioritize a call for police assistance was 75 percent responsible for the murders of two people. The murderer was only 25 percent at fault. How unbelievable is that? Our Supreme Court upheld this allocation, because it has the utmost confidence in jurors to sort things out as they see fit. Each case has different facts and different faces. Plaintiffs ask, "If I prove that a seller sold a defective product, he is automatically at fault, right?" The answer is, Yes. But not automatically 100 percent at fault. Defendants are allowed some fairness and equity, too. That's why the legislature enacted pure comparative fault and specifically included strict liability in the definition thereof.

Fairness

It is the public policy of this state that nothing shall abrogate a person's right to sue for damages. It is the public policy of this state that plaintiffs can sue everyone in the chain of distribution if they are injured by a defective product, and they need not prove breach of duty. However, it is also the public policy of this state that a tortfeasor shall pay for their percentage of fault *and no more*.

Critics of the comparative fault scheme argue that when the target defendant is unavailable, the burden should fall on the others in the chain of distribution rather than on the injured plaintiff. A bankrupt defendant in a product case is no different from a bankrupt defendant in a negligence case. Time and time again we come across a plaintiff who is injured in an automobile accident in which the other driver has no money and no insurance. Is the outcome there, an uncompensated plaintiff, violative of public policy? No, it is simply an unfortunate outcome. The outcome is the same with the product plaintiff whose target defendant is a bankrupt corporation from Singapore.

The law in this state is clear. To change the law and require Mom and Pop to pay the entire verdict just because the manufacturer is bankrupt may seem fair to the victims. What about Mom and Pop? Moving backward and expanding the applicability of joint and several liability to product cases simply makes victims out of Mom and Pop, as well.

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endnotes

1. *Dietz v. General Electric Co.*, 821 P.2d 166 (Ariz. 1991).
2. *Colvin v. Superior Equipment Co.*, 392 P.2d 778 (Ariz. 1964).
3. *See, e.g., Gehrea v. City of Phoenix*, 753 P.2d 174 (Ariz. Ct. App. 1987) (city and tavern jointly and severally liable for entire judgment even though their comparative fault was only two percent and three percent, respectively).
4. *See Jimenez v. Sears Roebuck and Company*, 904 P.2d 861 (Ariz. 1995) (plaintiff's misuse, if a cause of his injury, must be compared with defendants' fault and his damages reduced thereby); *Larsen v. Nissan Motor Corp.*, 978 P.2d 119 (Ariz. Ct. App. 1998) (nonparty driver's fault may be compared to reduce plaintiff's damages in strict product liability case against car manufacturer); *Zuern v. Ford Motor Co.*, 937 P.2d 676 (Ariz. Ct. App. 1996) (upholding 70 percent fault apportionment to nonparty driver in strict product liability case against car manufacturer; stating, "our supreme court has made clear that comparative fault principles apply to strict product liability actions"); *Dietz*, 821 P.2d at 166 (in personal injury case alleging defendants' negligent manufacture and distribution of appliances, fault may be apportioned to allegedly negligent employer).
5. *State v. Thomas*, 996 Ariz. 113 (1999).
6. *See Hernandez v. Maricopa County*, 673 P.2d 341, 344 (Ariz. Ct. App. 1983); *Wiggs v. City of Phoenix*, 10 P.3d 625 (Ariz. 2000). *See also* JEFFERSON L. LANKFORD AND DOUGLAS A. BLAZE, THE LAW OF NEGLIGENCE IN ARIZONA (2d ed. 1997) at § 6.1 *et seq.* (defines vicarious liability as an exception to Arizona's general rule of several-only liability in negligence cases).
7. *See* A.R.S. § 12-684 *et seq.* ("In any product liability action where the manufacturer refuses to accept a tender of defense from the seller, the manufacturer shall indemnify the seller for any judgment rendered against the seller").
8. 10 P.3d 625 (Ariz. 2000).
9. 961 P.2d 449 (Ariz. 1998).