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APPLYING STRICT LIABILITY TO DEFECTIVE PRODUCTS LITIGATION IN WEST VIRGINIA WITH EXPLANATORY EMPHASIS UPON COAL MINING MACHINERY CASES

RICHARD E. ROWE*

I. INTRODUCTION

The historic oppression of the Appalachian coal miner gave rise to the militant unionism of the 1920's. In response to this labor movement, coal operators endeavored to cut labor costs and boost production. This move to retrench was aided by the advent of workmen's compensation which totally insulated the subscribing mine operator from damages for the frequent injuries and deaths.1 As a consequence, when machinery was developed for the mines, production was the main objective and safety was only a remote consideration. A review of the development of products liability law as it relates to mining machinery demonstrates this lack of concern.

The single largest cause of accidents in the coal fields is the roof fall.2 In the past, miners used posts to support the roof, but with the progress of technology a machine has been developed which drills a hole in the roof and inserts bolts with either glue or an expander bolt on the end to anchor them. This permits the roof

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1 W. Va. Code §§ 23-2-6,-6a (1978 Replacement Vol.) and § 23-4-2 (1978 Replacement Vol.) provide immunity from suit for the employer so long as the injury is not inflicted with deliberate intention. This had been generally interpreted to mean complete immunity, since no case had permitted recovery. However, in Mandolidis v. Elkinst Indus., Inc., 246 S.E.2d 907 (W. Va. 1978), the West Virginia Supreme Court of Appeals held that while deliberate intention excluded negligent conduct on the part of the employer, an employee could sue his employer if the death or injury was caused by wilful, wanton or reckless misconduct.

2 Roof falls have, on the average, accounted for over 50% of the underground fatalities, according to Herschel Potter, Chief, Division of Safety, Office of Coal Mine Health and Safety. Proposed Regulation Concerning the Federal Coal Mine Health and Safety Act of 1969: Public Hearing on Section 317(J) Before John W. Crawford, Assistant Director of Coal Mine Health and Safety, Bureau of Mines 6 (July 31, 1972 at House of Delegates Chambers, State Capitol, Charleston, W. Va.) [hereinafter cited as Public Hearing on Section 317(J)].
to support itself and, therefore, allows better movement in the mine. The early roof bolters were designed with no provision for temporary roof support and thus the operator had to work under an unsupported roof while drilling the hole and inserting the bolt.\(^3\) Later, design concepts such as dual or remote controls were adopted from other machines. Temporary hydraulic jacks and canopies were installed for temporary roof support. While the devices did make the cycle time for placing a bolt a bit longer, they saved many lives and prevented uncounted severe injuries.\(^4\) However, as a general rule, the development of mine safety equipment has been a sporadic and peripheral concern at best.

The haphazard evolution of safety devices is evidenced by one manufacturer’s advertisement of the hydraulic safety jack as a new safety device shortly after being sued for their failure to provide that feature.\(^5\) A review of this company’s literature in years following the lawsuit also revealed the repeated use of the words “safety features” in describing components of their machines.\(^6\) Some items originally touted as production features were later called safety features.

The design and development of most coal mining machinery appears to have been accomplished by persons without the profes-

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\(^3\) An early case decided in favor of a defendant roof bolt manufacturer was Whitacre v. Wilcox Manufacturing Co., No. C-69-19F (N.D.W. Va. Sept. 25, 1972). The plaintiff asserted the absence of safety features such as dual controls, hydraulic safety post and on-off listen button and also contended that the machine’s design required the operator to work in the area of greatest danger, the drilling head, without a protective roof.

\(^4\) Mr. Potter predicted a 38.5% reduction in underground fatalities with this use of protective canopies or cabs. Public Hearing on Section 317(J), supra note 2, at 8. Mr. John McCormick, of the Pittsburgh Health and Technical Support Center, stated that surveys had been done at mines with cabs or canopies and that it was a general consensus of both the operators and miners that the cabs and canopies definitely improved safety. Id. at 11.

\(^5\) See Gallatin v. Fletcher Mfg. Co., No. 6935 (Monongalia County Cir. Ct. April 15, 1974) (order dismissing suit with prejudice following out of court settlement by the parties).

\(^6\) Literature searches of advertisements in industry magazines and company publications are rewarding because one may trace the technological development of these machines. Engineering principles from other types of machinery are applicable to the mechanics of coal mining machinery, and experts can use these to determine how the machinery could have been built more safely. Patent searches on mechanical devices are also helpful to illustrate that many safety devices were technologically feasible long before the manufacturers chose to incorporate them in their products.
sional competence one would expect. It is not unusual to find engineering departments of mining machinery manufacturers which do not employ graduate engineers. The copying of other companies' designs is prevalent in the industry, as is an all too common failure to follow sound engineering principles applicable to moving machinery. It is not surprising, therefore, that mechanical engineers are most useful in exposing this ineptitude in a products liability case.\footnote{Engineering departments of universities seem to be the best source of experts because they are generally not related to the coal industry and can be more objective.} Further fault may be found in the machinery designers' lack of safety training and knowledge of safety principles. Manufacturers of mining machinery have yet to reach the sophistication found in other industries and therefore, the trial lawyers representing injured miners continue to discover myriad product flaws justifying products liability actions. Even though the equipment in coal mines is specially designed, there are many similarities between it and equipment used in other industries. Therefore, as a general rule, the "state of the art" defense\footnote{The "state of the art" defense is roughly based upon the proposition that the particular manufacturer's product is as advanced as human skill and knowledge will allow any similar product to be. \textit{See generally} W. Prosser, \textit{The Law of Torts} § 99 (4th ed. 1971).} which is often employed in products liability cases cannot be used as effectively in mining machinery cases.

Using mining machinery as its keystone, this article explores the application of strict liability to products liability situations. The article also touches upon other issues that will continue to be litigated in products liability cases subsequent to the adoption of strict liability. Section II examines the adoption of strict liability in products cases. The class protected and those who are to be liable in mining machinery and other products cases will be examined in Section III. The defenses of contributory negligence and assumption of the risk will be explored in Section IV. The applicable statute of limitations is scrutinized in Section V, and whether changes in the product may be admissible in evidence is discussed in Section VI.

II. THE ADOPTION OF STRICT LIABILITY

The West Virginia coal miner, worker, and consumer were welcomed into the age of strict liability in 1979 by \textit{Morningstar v.}
Black & Decker Manufacturing Co. Justice Miller, in a splendid opinion, traced the evolution of strict liability in tort in the United States and in West Virginia and concluded that "Once it can be shown that the product was defective when it left the manufacturer and that the defect proximately caused the plaintiff's injury, a recovery is warranted absent some conduct on the part of the plaintiff that may bar his recovery."10

[T]he general test for establishing strict liability in tort is whether the involved product is defective in the sense that it is not reasonably safe for its intended use. The standard of reasonable safeness is determined not by the particular manufacturer, but by what a reasonably prudent manufacturer's standards should have been at the time the product was made.11

In adopting the original rule of Greenman v. Yuba Power Products Inc.,12 rather than the more restrictive and later rule

10 Id. at 680.
11 Id. at 683. The court gave guidance for setting these standards in footnote 20 of the opinion when it quoted from the risk/utility analysis enunciated in Cepeda v. Cumberland Eng'r Co., 76 N.J. 152, 386 A.2d 816 (1978). This analysis gives seven factors to be weighed in determining whether a product is defective:
1. The usefulness and desirability of the product — its utility to the user and to the public as a whole.
2. The safety aspects of the product — the likelihood that it will cause injury, and the probable seriousness of the injury.
3. The availability of a substitute product which would meet the same need and not be as unsafe.
4. The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.
5. The user's ability to avoid danger by the exercise of care in the use of the product.
6. The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.
7. The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.
12 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963), (cited in Morningstar v. Black & Decker Mfg. Co., 253 S.E.2d 666, 684 (W. Va. 1979)). The Greenman rule is: "A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being." 59 Cal. 2d at 60, 377 P.2d at 900, 27 Cal. Rptr. at 700 (1963). This was followed by Vandermark v. Ford Motor Co., 61
announced by the Second Restatement of Torts, the court obviated the necessity of proving that the product was unreasonably dangerous. Proof of the defect thus became easier for the plaintiff, and the standard of conduct which the manufacturers and sellers of products must meet is more stringent.

Applying this distinction in a suit involving a battery powered scoop which the miner operates in low coal by lying on his back with his head and part of his back sticking beyond the frame of the machine, the experts for the plaintiff said the location and manner of operation of the controls created an unreasonable risk of harm to the operator and that the operator's compartment and controls were negligently designed. The defendants contended that the design was safe because it allowed the operator freedom to observe the working area and the controls were easily learned and their functions obvious. To prevail in this type suit under the Restatement rule, the plaintiff would have had to prove that the design resulted in an "unreasonably dangerous condition." Many cases, however, will find the jury and expert more comfortable with the terms "not reasonably safe." Although the distinction may seem more imagined than real, the application of the "not reason-

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Cal. 2d 256, 391 P.2d 163, 37 Cal. Rptr. 896 (1968), which adopted privity-free, strict tort liability against distributors.

13 Restatement (Second) of Torts § 402A (1965). This section provides:

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 the product, and
   b. the user or consumer has not bought the product from or entered into any contractual relation with the seller.

The adoption of this rule by the American Law Institute codified the law of strict liability but a compromise on its adoption added the requirement that the product be unreasonably dangerous. "The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." Id. at Comment i.

ably safe" term may result in recovery for the plaintiff more often than if he has to prove the machine was "unreasonably dangerous."

Although the causes of action founded upon express and implied warranty as well as negligent manufacture and design are still very much alive in West Virginia products liability law, the road has been paved around many of the obstacles. The standard imposed on a manufacturer or seller of goods in strict liability is basically that the product must not be defective at the time it leaves the defendant's possession if employed in the manner in which it was intended to be used. However, if the plaintiff employs a theory of negligent design or defect, he is required to prove that the defect was the result of the defendant's failure to exercise due care. In addition, the defendant in such a negligence action retains the defense of contributory negligence. In warranty, the plaintiff must prove facts which establish an expressed or implied warranty and the defendant has the defenses of lack of notice of the breach, express disclaimer of the warranty, and contractual assumption of the risk. The defense of lack of privity, formerly available in West Virginia, has now been abrogated.

III. The Class of Persons Protected and the Class of Businesses Liable

From the opinion in Morningstar, it appears that the West Virginia Supreme Court of Appeals is prepared to extend the

16 The doctrine of comparative negligence, adopted by the West Virginia Supreme Court of Appeals in Bradley v. Appalachian Power Co., 256 S.E.2d 879, (W. Va. 1979), abolished the use of contributory negligence as an absolute defense. The impact of this defense on products liability cases was greatly lessened, however, by the adoption of strict liability in Morningstar.
17 The legislature in 1976 adopted the Consumer Credit and Protection Act, W. Va. Code §§ 46A-6-101 to -8-102 (1978 Replacement Vol.). § 46A-6-107 prohibits a disclaimer of warranties in consumer transactions. The problem with this is that many products liability cases, especially cases arising in the coal industry, involve transactions between coal companies and suppliers or manufacturers which may not be labeled as consumer transactions.
18 The largest hurdle in the path of strict liability in tort was cleared by the West Virginia Supreme Court of Appeals in Dawson v. Canteen Corp., 212 S.E.2d 82 (W. Va. 1975). This decision abolished both horizontal privity (chain of users) and vertical privity (chain of distribution). The legislature also abolished privity, W. Va. Code § 46A-6-108 (1976 Replacement Vol.).
theory of strict liability to sellers as well as manufacturers. California did this relatively soon after adopting the rule of Greenman. The Second Restatement of Torts also adopted the rule that the seller of a defective product is strictly liable in tort. The logical extension of this doctrine would require that each link in the distributive chain, such as wholesaler, jobber, or distributor, be held strictly liable. The effect of this on cases involving mining machinery will be minimal since most manufacturers sell directly to the coal companies and no middlemen are involved.

The West Virginia court has further obviated the need for legislation to protect the retailer by recognizing that the seller or wholesaler who sells the defective product may be indemnified by the manufacturer if the seller or wholesaler does not contribute to the defect.

Another question which arises in charting the parameters of the application of strict liability concerns the different classes of persons to be protected. The plaintiff in Morningstar was the employee of the purchaser of the Black & Decker saw which injured him. Surely, adopting principles from warranty law, any lawful consumer in the broadest sense of the term, including members of the ultimate purchaser’s family, his guests or lendee, will be protected in West Virginia. Despite the inapplicability of privity to

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19 Morningstar v. Black & Decker Mfg. Co., 253 S.E.2d 666, 683 n.22 (W. Va. 1979). The proposition is stated that the rule applies both to manufacturers and sellers, and the court predicts it would allow indemnity from a manufacturer where the seller does not contribute to the defect.


21 The Restatement defines the word “seller” as any person engaged in the business of selling products for use or consumption. Restatement (Second) of Torts § 402A, Comment f (1965).

22 Dunham v. Vaughan & Bushnell Mfg. Co., 86 Ill. App. 2d 31, 229 N.E.2d 684 (1967), held the distributor of a claw hammer strictly liable. The Restatement (Second) or Torts § 402A, Comment f (1965), also defines seller as “any wholesale or retail dealer or distributor.” See also 2 Frumer & Friedman, Products Liability §§ 19A[1], 20.04[2] (1979) [hereinafter cited as Frumer & Friedman].

23 Seventeen states have recently enacted legislation which involves products liability litigation. One area addressed is limitation of the liability of the retailer. Some states’ statutes bar the suit totally, while others protect the retailer only to the extent that jurisdiction cannot be obtained over the manufacturer, and others protect the seller if the product was sold in a sealed container. See 2 Frumer & Friedman, supra note 22, § 16-C [5].

strict liability cases, those cases have served as precedents for the
extension of strict liability to additional classes of persons. This
matter was first addressed in West Virginia when the legislature
adopted the Uniform Commercial Code (UCC). The legislature
adopted the "neutral" alternative which defines the protected
class as "any natural person who is in the family or household of
his buyer or who is a guest in his home if it is reasonable to expect
that such person may use, consume or be affected by the goods . . . "

The cases decided on the warranty theory, both before and
after the UCC, would only extend protection to members of the
purchaser's household. The late Judge Christie, when attempt-
ing to predict if the West Virginia Supreme Court of Appeals
would extend protection to encompass individuals not in privity
nor in the class specified by section 318 of the UCC, concluded
that the West Virginia court would not further expand the pro-
tected class of persons to include these individuals.

A careful reading of the court's opinion in Morningstar, how-
ever, indicates they do not intend to be bound by these past restric-
tive warranty rules which deal with the class of persons who can
recover in strict liability cases. In reciting the law of strict liability
in West Virginia, the court cited cases which, under a negligence
theory, protected a user or consumer who had not purchased the
product, a son of a purchaser, and an innocent bystander. Of

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25 See 2 Frumer & Friedman, supra note 22, § 16A[4][c].
24 W. Va. Code § 46-2-318. Comment 3 states:
This section expressly includes as beneficiaries within its provisions the
family, household, and guests of the purchaser. Beyond this, the section
is neutral and is not intended to enlarge or restrict the developing case
law on whether the seller's warranties given to his buyer who resells,
extend to other persons in the distributive chain.
486 F.2d 538 (4th Cir. 1973). Judge Christie had previously ruled that where a cause
of action was based on negligence, the employee of a purchaser could recover from
(1966)).
28 Peters v. Johnson, Jackson & Co., 50 W. Va. 644, 41 S.E. 190 (1902) (ac-
quaintance of plaintiff requests epsom, but is given saltpeter, which plaintiff con-
sumes, causing injury).
(1939).
course, *Greenman*\(^3^1\) was a case in which the husband of the purchaser was the plaintiff. Other states have extended strict liability to employees of purchasers,\(^3^2\) users or consumers,\(^3^3\) passengers,\(^3^4\) and innocent bystanders.\(^3^5\) The Restatement does not take a position on how far protection should be extended.\(^3^6\)

The extension of the class to innocent bystanders has met some resistance.\(^3^7\) However, it seems more logical that this class of persons should be entitled to greater protection than the user or consumer who has the opportunity to inspect for defects and to limit purchases and uses to products manufactured by reputable manufacturers and sold by reputable dealers. The bystander ordinarily has no such option.

The extension of the doctrine of strict liability to users, employees and bystanders will have a significant impact on litigation in coal machinery cases. While the operator of the machine is the one most often hurt, others in the immediate vicinity are also subject to great hazards. For instance, some of the mining machinery is now equipped with a "panic bar" which allows the operator to immediately disengage the machine in case of emergency. This safety device protects not only the operator, but fellow employees

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\(^3^1\) *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 897.


\(^3^5\) See, e.g., *Passwaters v. General Motors Corp.*, 454 F.2d 1270 (8th Cir. 1972); *Elmore v. American Motors Corp.*, 70 Cal. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969).

\(^3^6\) *Restatement (Second) of Torts* § 402A (1965). Comment o states that it does not predict whether protection should be extended beyond the class of users and consumers as defined by them. The class of protected persons would include a remote purchaser, a donee of the purchaser — thus a user, a member of the purchaser's family or his guest or his employee. See *Id.* at Comment i.

\(^3^7\) See 2 *Frumer & Friedman, supra* note 22, § 16A[4][c].
who are in the area of danger. On a roof-bolter, this device can also be characterized as a "stop and listen button" which allows the operator to stop the machine to determine whether the roof is adequately supported. This protects not only the workman, but all people in the immediate area. Obviously, any machinery not so equipped puts the bystander, as well as the operator, at risk.

**IV. Assumption of the Risk and Comparative Negligence**

Although there had been a great deal of confusion on the issue of whether contributory negligence and/or assumption of the risk were defenses in products liability cases, Justice Miller, in *Morningstar*, clearly pointed the way for West Virginia by holding that contributory negligence in its traditional sense was not a defense to strict liability, but that assumption of the risk would be.

Judge Haymond in *Wright v. Valan* discussed the difference between contributory negligence and assumption of the risk. Contributory negligence is seen as the failure of the plaintiff to use due care; in essence, it is the carelessness of the plaintiff. Judge Haymond further stated that the essence of assumption of the risk was venturousness, which is a deliberate choice by the plaintiff. Justice Berry added in *Spurlin v. Nardo* that knowledge and appreciation of the danger are necessary elements of the defense of assumption of the risk.

With the adoption of strict liability in tort, West Virginia aligns itself with those states which follow the Restatement of Torts' interpretation that "contributory negligence of the plaintiff is not a defense when such negligence consists merely of the failure to discover the defect in the product or to guard against the possibility of its existence."

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38 This use of this device illustrates the application of sound engineering principles to coal mining machinery. Panic bars and emergency cut-offs have been on many types of machinery for years, but only recently have been used on mining machinery.


41 130 W. Va. 466, 477, 43 S.E.2d 364, 370-71 (1947).


43 Restatement (Second) of Torts § 402A, Comment n (1965).
It is apparent from reading the cases cited by the court in *Morningstar* that the traditional form of contributory negligence, defined as lack of due care for one's own safety as measured by the objective man standard, is no defense.44 That is to say, conduct on the part of the plaintiff which merely amounts to negligence would not be a bar to recovery. For example, in a case cited by the court it was held that the negligence of a driver in failing to take the best action after discovering the defect, which was a stuck throttle that prevented him from steering the vehicle, would not bar recovery. The Texas court further held in the case that the defendant must show that the plaintiff's voluntary exposure to risk was unreasonable.45

Contributory negligence is nearly always raised in mining machine cases. The defense is based on the conduct of the operator in his use of the machine. Since few manufacturers provide instruction booklets or other operating instructions for the machinery, common sense must dictate the proper usage. For instance, in *Everly v. Lee Norse*,46 the injured employee was placing a roof bolt in the mine and had his arm ripped off at the elbow when he placed his gloved hand on the bolt to hold it while it was being inserted into the roof. The roof bolt manufacturer was sued because the roof bolt was rough, which caused the bolt to catch the glove. The machine manufacturer was sued because the machine failed to have dead man levers on the machine which could deactivate it when the operator left the controls, as well as for the failure to have a functional guide to hold the roof bolt in place while it was being inserted. The company which furnished the steel was also sued for its failure to furnish steel without barbs on it. The defense relied upon by each defendant was that the plaintiff was negligent because he put his hand on the roof bolt as it was being inserted. The defendants would have labelled the miner's conduct assumption of the risk or possibly misuse of the product if the case had arisen after *Morningstar* was decided. However, so long as the workmen are using the product as it was intended to be used, and in this instance those familiar with the products knew that men

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45 Henderson v. Ford Motor Co., 519 S.W.2d 87 (Tex. 1975).

46 No. CA 75-1046 (W.D. Pa. 14, 1977) (order dismissing suit with prejudice following out of court settlement by the parties).
often put their hands on the roof bolt, then a defense based on this conduct is inappropriate unless venturesome conduct (true assumption of the risk) is found.

In cases involving workmen using machinery, courts previously made an exception to the traditional principles of contributory negligence when the user of the machine, through inadvertence or inattention, is injured.47 West Virginia also previously recognized that worker inattention would not bar recovery in *Louis v. Smith*.48 The court stated in this case:

Nothing is more common and well known than a faithful servant’s mental absorption in his work to such an extent as to render him at times partially oblivious to his surroundings. A danger that must be kept constantly in mind necessitates a division of the attention of the servant between his work and the danger, and it is obviously difficult to maintain at all times.49

In contrast to the traditional standards for contributory negligence, the defense of assumption of risk has been defined by the court as follows:

Assumption of risk is available as a defense only where one places himself in a posture of known danger with an appreciation of such danger . . . proof of plaintiff’s knowledge and violation are essential pre-conditions to successful invocation of the assumption of risk defense.50

This test is primarily a subjective test in the sense that the knowledge, understanding and appreciation of the danger must be assessed by the jury from the plaintiff’s perspective, rather than by measuring the plaintiff against the ordinary reasonable man. The jury should consider all the facts established by the evidence, such

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47 See, e.g., Bexiga v. Havir Mfg. Co., 60 N.J. 402, 290 A.2d 281 (1972). The plaintiff caught his hand in a punch press while attempting to adjust the metal to be cut and at the same time pressed the foot pedal which set the cutting portion of the machine in motion. The court held contributory negligence was not a defense. Since the defendant was charged with the duty to install a safety device, it would be anomalous to absolve it from liability where the injuries sustained would have been prevented by the installation of the safety device. See also Luneau v. Elmwood Gardens, 22 Misc. 2d 255, 198 N.Y.S.2d 932 (1960).

48 80 W. Va. 159, 92 S.E. 249 (1917).

49 Id. at 163, 92 S.E. at 251.

50 Clements v. Stephens, 211 S.E.2d 110, 115 (W. Va. 1975) (citing Korzun v. Shahan, 151 W.Va 243, 151 S.E.2d 287 (1966)). *Clements* involved a plaintiff who was killed as a guest passenger in a car driven on the turnpike when the driver ran off the road, apparently after he fell asleep at the wheel.
as plaintiff's age, experience, knowledge, and understanding as well as the obvious nature of the defect and the degree of danger it poses.\footnote{Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 261 N.E.2d 305 (1970).}

With the recent adoption of comparative negligence\footnote{Bradley v. Appalachian Power Co., 256 S.E.2d 879 (W. Va. 1979).} the question naturally arises whether or not this principle will apply to actions founded on strict liability and, just as naturally, the answer seems to be no. Since the purpose of strict liability is to impose liability for a defective product upon the person who placed it into the stream of commerce, the emphasis is shifted away from the conduct of the user.\footnote{Kinard v. Coats Co., 37 Colo. App. 555, 553 P.2d 835 (1976); \textit{See also 2 Frumer & Friedman, supra note 22, \$ 16A[5][g].}} Logic would then dictate that since contributory negligence is not a defense, comparative negligence, which also depends upon the negligent conduct of the plaintiff, would not be a defense.\footnote{Melia v. Ford Motor Co., 534 F.2d 795 (8th Cir. 1976)(applying Nebraska law); Kinard v. Coats Co., 37 Colo. App. 555, 553 P.2d 835 (1976).} However, California, the mother of West Virginia products liability cases, when presented with this question, held that comparative fault would apply in all future strict tort liability cases.\footnote{Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978).} The California court declared that:

Plaintiffs will continue to be relieved of proving that the manufacturer or distributor was negligent in the production, design or dissemination of the article in question. Defendants' liability for injuries caused by a defective product remains strict. The principle of protecting the defenseless is likewise preserved, for plaintiff's recovery will be reduced only to the extent that his own lack of reasonable care contributed to his injury. The cost of compensating the victim of a defective product, albeit proportionately reduced, remains on defendant manufacturer, and will through him, be 'spread among society.'\footnote{\textit{Id. at 736-37, 575 P.2d 1162, 1168-69, 144 Cal. Rptr. 380, 386-87 (1978). It appears that assumption of the risk is not a complete bar to recovery with this interpretation. \textit{See 2 Frumer & Friedman, supra note 21, \$ 16A[5][g].}}} It becomes difficult to predict whether West Virginia will follow the more natural course of disallowing comparative negligence or will follow the historical leader. Since other courts presented with the question have had difficulty following what would seem...
to be the logical choice, which is not applying comparative negligence, West Virginia will likely follow California's position and adopt comparative fault in strict liability cases.

V. Statute of Limitations

In the development of strict liability, there has been confusion in many jurisdictions with regard to the appropriate statute of limitation. Because strict liability is a claim for personal injuries, the tort statute of limitations seems applicable. However, the historical warranty background caused some jurisdictions to conclude that the applicable statute was that of contract - four years from the time the product is sold.

The West Virginia statute of limitation for personal injuries is two years. This applies to actions for personal injuries regardless of whether they sound in tort or contract. The statute begins to run from the date of the injury, or the date the plaintiff learns of, or by the exercise of reasonable diligence should have learned of, the injury or damage. The issue of when the plaintiff knew or should have become aware of his injury or damage is for the jury to determine. Although the question was not addressed in


58 FRUMER & FRIEDMAN, supra note 22, § 16A[5][h]. See also 75 W. VA. L. REV. 201 (1972).


60 W. VA. CODE § 55-2-12 provides: "Every personal action for which no limitation is otherwise prescribed shall be brought . . . (b) within two years next after the right to bring the same shall have accrued if it be for damages for personal injuries."


Morningstar, it seems obvious that, in strict liability cases, the West Virginia Supreme Court of Appeals would adhere to past principles and adopt the position that the two year personal injury statute applies from the time of the injury or when the injury should have been discovered.

The view to be adopted in West Virginia has grave implications for mining machinery cases as well as all other products liability cases, since in many instances the injury does not occur until many years after the product is in service. To extinguish the cause of action before it arises by adhering to a statute of limitations based on the sale date of the product ignores current legal development.

Finally, the proper statute of limitations to be applied is a real problem because many miners as well as other workers do not realize they may have a claim against the manufacturer of a machine because of its design, lack of safety features or malfunction. Inquiry is often made initially at an attorney's office only because workmen's compensation benefits are ceasing. Many solo practitioners and small firms who have daily contacts with miners and workmen need to be alert to the possibility of the products liability action as a remedy for the injured client. Additionally, the union could do more to educate the miners on availability of such a remedy.65

VI. Admissibility of Changes in the Product

West Virginia has recognized the general rule that evidence of precaution or changes after an accident or incident is not admissible to prove antecedent negligence.66 However, there have been many exceptions made to this rule which will allow the introduction of such evidence.67 The West Virginia Supreme Court of Appeals has recognized some of the exceptions to this general rule and has allowed the evidence to be admitted when necessary to explain to the jury which saw, on a view to the scene of the accident, a different situation than what existed at the time the accident oc-

67 Two excellent sources for ideas and cases in this area are: 1 FRUMER & FRIEDMAN, supra note 22, §§ 12.04, 16.03[4][b][ii], 16A[4][j]; Annot., 74 A.L.R.3d 1001 (1976).
The court also has ruled such evidence admissible to allow the plaintiff to explain the changes which had been made in a grade crossing after the defendant contended that no changes or only slight changes had been made. In one case, the court refused to expand the rule and admit evidence which would have established that part of a product had been removed from the market immediately after a person had been injured.19

Other jurisdictions have allowed evidence of subsequent changes in the product to be admitted in many situations. One of the most compelling reasons in product liability cases to allow such evidence is that it demonstrates the feasibility or practicality of the modification which would have prevented the accident or would have made the plaintiff aware of the hazard.21

Another important exception to the rule in actions against the manufacturer is the admission of evidence of changes in the product made by others.22 This becomes important in coal mine machinery cases as well as other industrial product liability cases because the products are frequently modified by the employer or sometimes by the workmen themselves, and in many instances these changes make the machinery safer.23 It is certainly not an

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66 Redman v. Community Hotel Corp., 138 W. Va. 456, 76 S.E.2d 759 (1953). Steel supports, which would have prevented the tilting of the boiler which caused the accident, had been installed subsequent to the accident and were present when the jury viewed the premises.


70 Rutherford v. Huntington Coca-Cola Bottling Co., 142 W. Va. 681, 97 S.E.2d 803 (1957). The court reversed because of error in admitting evidence that the remaining soft drinks were removed from the machine immediately after plaintiff ingested glass which was in a soft drink purchased from the machine.


72 See, e.g., Lolie v. Ohio Brass Co., 502 F.2d 741 (7th Cir. 1974) (Metal clips which held a mine cable to the roof failed, killing the plaintiff's decedent; evidence could be admitted that a workman later tied the cable to the roof with polyprene rope.); Steele v. Wiedmann Machine Co., 280 F.2d 380 (3d Cir. 1960) (The defendant successfully proved that the employer had attempted to correct a safety device on a punch press.); Denolf v. Frank L. Jursik Co., 395 Mich. 661, 238 N.W.2d 1 (1976) (Evidence could be admitted that the employer installed a guard which would have prevented the employee from crushing his hand on a machine designed and installed by defendant.).

73 Of course, if the alteration by an employer or workman occurred in the product before the accident and this alteration was the proximate cause of the
admission of negligence by the manufacturer when someone else makes changes in the design of their product, and this evidence should be admitted to prove feasibility.

In *Everley v. Lee Norse,* a coal mine operator whose employee was injured by a roof bolter, designed and installed a device which hydraulically held the roof bolt while it was being inserted into the roof. The employee lost the hand he was using to steady the roof bolt while it was being inserted. The device that the mine owner designed would have prevented the accident. Certainly, evidence of this kind would be useful to a jury trying to determine whether the manufacturer could have placed such a device or a similar safety device on the machine.

The Federal Rules of Evidence have incorporated the general rule for use in federal courts. Remedial measures, while inadmissible to prove negligence, are admissible to show control, ownership or feasibility.

However, it has been recently held that the rule is different in strict liability cases and that post-accident remedial measures are admissible. Courts are now ruling that in strict liability cases the "public policy" assumptions justifying this evidentiary rule are no longer valid.

With the many exceptions to the rule already widely recognized and the recent adoption of strict liability across the nation,
it is anticipated that this rule of admissibility of remedial changes will become widely adopted and will be accepted in West Virginia when the opportunity is presented. At the very least, many of the exceptions recognized by other jurisdictions should be incorporated into our products liability law.

VII. Conclusion

Recent developments in the law of products liability amount to a near revolution. The decisions in many recent West Virginia cases, as well as currently developing case law in the nation, make it imperative that the local practitioner take a fresh approach in advising his client. The lawyer in West Virginia whose clientele includes numerous coal miners must be particularly alert. The responsible practitioner will recognize the laxness in the mining machine industry as an opportunity to obtain compensation for his client as well as a chance to improve the safety of all miners.

That litigation of this type will contribute to the overall safety in the mines has been demonstrated in other industries. Studies show that manufacturers become increasingly safety conscious as the number of products liability claims rise.

With the adoption of strict liability in West Virginia, the coal miners, as well as other persons injured as the result of a defective product, will have their interests protected in a manner which fits the way in which we presently live and work. The means are now at hand for the skilled trial lawyer to correct the deficiencies of the past.


29 Public Hearings on Section 317(J), supra note 2, at 69 (statement of H. Potter). An operating company spokesman even expected the government to shoulder the burden for the miner's safety, "Give us time, show us how it shall be done, how it can be done, and we will do it." Id. at 80 (statement of E. Webb, Safety Director, Eastern Associated Coal).

30 A recent Department of Commerce study concluded that product liability litigation was not only making manufacturers obtain insurance against such occurrences, but has a very positive effect on causing them to devote more time to product liability prevention, such as improved quality control, improved labeling and product redesign. U.S. Department of Commerce, Interagency Task Force on Product Liability: Final Report (1977); 5 Frumer & Friedman, supra note 22, app. 1009-13 (1977).