# Multi-Defendant Strict Product Liability Cases: Making the Case for Application of ORS 31.605(4)

**Nicholas E. Wheeler**
*Cosgrave Vergeer Kester LLP*

Like other tort claims, claims for strict product liability are subject to the comparative fault statutes, ORS 31.600 *et seq.*[1] Application of those statutes typically gives each qualifying at-fault party its own "slot" on the verdict form, and the jury uses those "slots" to apportion fault.[2] Complications arise in applying these statutes to strict product liability cases, because a product seller's liability is not premised upon negligence or "fault" in the traditional sense. That complication is compounded when the jury is asked to compare the fault of multiple defendants in the product's chain of distribution, especially in light of the Oregon Supreme Court's recent abrogation of common-law indemnity in *Eclectic Investment, LLC v. Patterson.*[3]


*Nicholas E. Wheeler*

This article advocates for the application of ORS 31.605(4) in multi-defendant strict product liability cases as a mechanism to achieve results consistent with both pre-*Eclectic Investment* case law and the theory of strict product liability.

## Oregon's Strict Liability Approach

Oregon's approach to strict product liability is modeled on Restatement (Second) of Torts, § 402A.[4] Liability attaches when one "sells or leases any product in a defective condition unreasonably dangerous to the user or consumer."[5] Liability is "strict" in that it attaches "even though the seller or lessor has exercised all possible care in the preparation and sale or lease of the product."[6] Further, unlike other jurisdictions,[7] the claim may be automatically brought against any "manufacturer, distributor, seller or lessor" of the product. [8]

## Defining the "Fault" in Strict Product Liability Cases

Comparative fault has been recognized as a defense to a claim for strict product liability since 1982.[9] Instead of being based on negligence, however, that "fault" flows from "putting a dangerously defective product on the market."[10] To quantify that "fault" relative to the plaintiff's negligence, the jury considers "the magnitude of the defect rather than the negligence or moral 'blameworthiness'" of the defendant.[11]

## Complications Arising in Multi-Defendant Product Cases

The interplay of the comparative fault statutes and the meaning of "fault" in strict product liability becomes problematic in multi-defendant product cases. Although each defendant's liability is expressly not premised upon negligence, under the comparative fault statutes, each defendant is given its own "slot" on the verdict form. That effectively necessitates an apportionment among the defendants based on a negligence-based analysis, because the duty breached by each strictly liable defendant is typically identical—putting the same dangerously defective product on the market. Phrased differently, it will be the very rare case where the "magnitude of the defect" in a product changes as it passes through the chain of distribution, justifying apportionment of the jointly breached duty among the chain-of-distribution defendants.

## The Historical Solution

The historical solution for non-manufacturing defendants apportioned a percentage of fault with the manufacturer was a derivative claim for common-law indemnity.[12] The historical right to indemnity in such circumstances is well established.[13] For example, in *Irwin Yacht Sales, Inc. v. Carver Boat Corp.*, the court permitted a defendant found to be 40 percent at fault to pursue a claim for indemnity from a co-defendant who was 45 percent at fault.[14] The court reasoned "the allocation of fault [by the jury] did not determine whether plaintiff's fault was active or passive," which was the relevant inquiry under the indemnity analysis.[15]

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***Eclectic Investment, LLC v. Patterson***

On March 19, 2015, the Oregon Supreme Court in *Eclectic Investment, LLC v. Patterson* abrogated common-law indemnity in tort claims in which the fault of all tortfeasors is compared by the jury under ORS 31.600 *et seq.*[16] The court reasoned:

> The doctrine of common-law indemnity was developed before comparative responsibility and is inconsistent with its framework. In cases in which the Oregon comparative negligence statutes apply and in which jurors allocate fault—and thereby responsibility—for payment of damages between tortfeasors, and each tortfeasor's liability is several only, a judicially created means of allocating fault and responsibility is not necessary or justified.[17]

In reaching its decision, the court noted that "a clear majority" of other comparative negligence states considering the issue had reached the same result.[18] However, it further footnoted "the exception to those [out of state] lines of cases appears in the context of strict liability. Courts are reluctant to permit apportionment of damages in cases in which one party's liability results from the manufacture of an unreasonably dangerous product."[19]

While the court's footnote might lead to a future recognized exception to the abrogation of common-law indemnity claims in the context of strict product liability, *Eclectic Investment's* holding otherwise clearly encompasses such claims, as they are subject to ORS 31.600 *et seq.*[20]

**The ORS 31.605(4) Solution**

Since 1995, ORS 31.605(4) has provided that "the court may order that two or more persons be considered a single person for the purpose of determining the degree of fault of the persons specified in ORS 31.600(2)."[21] When applied, this stat-



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ute effectively makes the liability of the combined parties joint, notwithstanding Oregon's several liability-only statutory scheme otherwise applicable to claims for strict product liability.[22] Further, application of this statute would appear to avoid the holding in *Eclectic Investment,* in that its abrogation of common-law indemnity only applies in cases premised on several liability.

In the 20 years that ORS 31.605(4) has been on the books, no Oregon appellate decision has analyzed the circumstances under which the statute should or should not be applied. The statute's use of the word "may" shows the trial court has discretion over when to apply it, and the statute's legislative history confirms that understanding.[23] The legislative history also suggests it was intended to apply in the context of multi-defendant strict product liability cases,[24] and *Eclectic Investment's* footnote on strict product liability further supports its application.

Finally, ORS 31.605(4) is consistent with the generally recognized purpose of strict product liability:

> An often-cited rationale for holding wholesalers and retailers strictly liable for harm caused by manufacturing defects is that, as between them and innocent victims who suffer harm because of defective products, the product sellers as business entities are in a better position than are individual users and consumers to insure against such losses. In most instances, wholesalers and retailers will be able to pass liability costs up the chain of product distribution to the manufacturer.[25]

## Conclusion

Traditional application of the comparative fault statutes is problematic in the context of multi-party strict liability cases, especially in light of *Eclectic Investment's* abrogation of common-law indemnity. ORS 31.605(4) is a logical mechanism to be used by non-manufacturer strict product liability defendants to achieve results not only consistent with pre-*Eclectic Investment* case law, but also with the theory behind strict product liability.

**Liability is "strict" in that it attaches "even though the seller or lessor has exercised all possible care in the preparation and sale or lease of the product." Further, unlike other jurisdictions, the claim may be automatically brought against any "manufacturer, distributor, seller or lessor" of the product.**

## Endnotes

1 *Sandford v. Chevrolet Div. of Gen. Motors,* 292 Or 590, 598 (1982).
2 ORS 31.605(1)(b).
3 357 Or 25 (2015).
4 ORS 30.920(3).
5 ORS 30.920(1).
6 ORS 30.920(2)(a).
7 In Washington, subject to certain exceptions, a non-manufacturing reseller is generally not subject to a claim for strict product liability. RCW 7.72.040.
8 ORS 30.900.
9 *Sandford,* 292 Or at 598.
10 *Id.* at 597.
11 *Id.* at 607.
12 *See Rains v. Stayton Builders Mart, Inc.,* 264 Or App 636, 640 (2014), rev allowed 357 Or 111 (March 26, 2015) (trial court awarded retailer indemnity following jury's finding that the retailer was 30 percent at fault and the manufacturer was 45 percent at fault; on appeal, indemnity awarded reversed for lack of evidence of discharge element on indemnity claim).
13 *See* Restatement (Third) of Torts: Prod. Liab. § 2, Comment a (1998) ("wholesalers and retailers will be able to pass liability costs up the chain of product distribution to the manufacturer . . . [and] local retailers can pay damages to the victims and then seek indemnity from manufacturers.").
14 98 Or App 195, 198 (1989).
15 *Id.*
16 357 Or 25 (2015).
17 *Id.* at 38.
18 *Id* at 37.
19 *Id.* at 37 n 7.
20 *Sandford,* 292 Or at 598.
21 Or Laws 1995, ch 696, § 696. Prior to 2003, ORS 31.605 was numbered ORS 18.480.
22 ORS 31.610(1).
23 Hearing before Oregon Senate Committee on Judiciary, May 17, 1995, transcribed from Tape 17IA, pp. 28-30, testimony of Robert J. Neuberger and Thomas H. Tongue.
24 *Id. See also* Uniform Comparative Fault Act, Comment to § 2 ("In situations such as that of . . . manufacturer and retailer of a product, the court may under appropriate circumstances find that the two persons should be treated as a single party for purposes of allocating fault.").
25 Restatement (Third) of Torts: Prod. Liab. § 2, Comment a (1998).