Crashworthiness: The Collision of Sellers' Responsibility for Product Safety with Comparative Fault

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F. Patrick Hubbard* & Evan Sobocinski**

Abstract

Crashworthiness cases often involve the following issue: should any wrongdoing by the plaintiff in causing the initial collision reduce or bar the plaintiff's recovery for defective crashworthiness? Jurisdictions disagree on the answer to this issue. This disagreement results in large part from differing positions on two questions. First, should products liability law use duty rules to impose liability in a way that ensures efficient accident cost reduction or should it seek fairness through relatively unstructured jury allocations of liability based on fault? Second, in addressing the first issue, should for-profit corporations be viewed as: (1) "tools" to achieve human goals like efficient reduction of accident costs or (2) "persons" entitled to fair treatment in the same way as humans.

Relying on an analysis of doctrine, history, and policy, this Article argues (1) that for-profit corporations are tools, not persons with moral rights, and (2) because these corporations are not "moral persons," the concern for efficient reduction of accident costs by internalizing the cost of injuries from product defects to corporations should prevail over a concern for "fairness" to these corporations in allocating accident costs. Therefore, because reducing manufacturers' liability for crashworthiness also reduces the efficient internalization to manufacturers of the cost of their failure to provide cost-effective safety, the plaintiff's role in causing the initial accident should be irrelevant to plaintiff's claim for defective crashworthiness. This concern for internalization also supports the expansion of plaintiff's rights in other areas of liability for defective vehicle design.

I. INTRODUCTION

II. DONZEV. GENERAL MOTORS, LLC

A. Majority Opinion
B.  
Concurring Opinion .......................... 750

C.  
Analysis of Authorities on Issue of Comparative Fault .. 752
   1.  Majority States .................................. 754
      a. Statutory Resolution .......................... 754
      b. Judicial Decision ............................ 755
   2.  Miscellaneous ................................. 759

III.  
HISTORICAL CONTEXT ........................................... 761
   A.  Restatements of Law .............................. 761
   B.  Products Liability: Imposing “Corporate Responsibility” .. 764
      1.  First Restatement of Torts ..................... 764
      2.  Second Restatement of Torts ................... 765
         a.  Adoption ....................................... 765
         b.  Application .................................... 768
            i. The “tests” for defect ...................... 768
            ii. The defense of voluntarily and unreasonably 
                encountering a known danger ............... 770
         c.  Policy ........................................ 771
      3.  Third Restatement: Products Liability ............. 772
         a.  Defect ........................................ 773
         b.  Strict Liability ............................... 774
         c.  Negligence .................................... 775
         d.  Crashworthiness ................................ 776
      4.  South Carolina .................................... 777
   C.  Comparative Fault: Seeking “Fairness” ............ 779
      1.  The “Fault” Spectrum .......................... 780
         a. Intentional Acts ................................ 781
         b. Recklessness ................................... 781
         c. Negligence .................................... 781
         d. Strict Liability ............................... 782
      2.  Common Law System .............................. 785
         a. Plaintiff:Defendant ......................... 785
         b. Defendant:Defendant ........................... 786
      3.  Third Restatement: Apportionment of Liability .... 786
         a. Plaintiff:Defendant ......................... 787
         b. Defendant:Defendant ......................... 788
      4.  South Carolina .................................... 789
         a. Plaintiff:Defendant ......................... 789
         b. Defendant:Defendant ......................... 791
   D.  Tort Reform ................................. 792
   E.  Importance of Context ............................ 796
I. INTRODUCTION

The crashworthiness doctrine requires automobile manufacturers to use reasonable care in designing a vehicle in a manner that will address not only the initial collision of a vehicle with another object but also the enhanced injury from the second collision that results when occupants collide with the interior of the vehicle or are ejected from the vehicle. It might seem that Donze v. General Motors, LLC, a recent South Carolina Supreme Court decision, simply addressed a narrow issue concerning this doctrine: does comparative fault apply to the enhanced injury resulting from a failure to make an automobile reasonably crashworthy? Comparative fault generally applies to injuries from the initial collision, but the states are split concerning the approach for the second collision.

Donze adopted the minority position on this issue and held that comparative fault did not apply. As a result, fault of the victim or third parties in causing the initial collision is irrelevant. Therefore, manufacturers are liable for the full amount of any enhanced injuries caused by the defective

2. 420 S.C. 8, 800 S.E.2d 479 (2017).
3. See id. at 14–19, 800 S.E.2d at 482–84. For further discussion of this split, see infra notes 58–103 and accompanying text.
crashworthiness of a vehicle. This decision was based largely on the court’s answer to the basic legal issue underlying any plaintiff’s claim: What is the duty that the defendant owes to the plaintiff? The answer of Donze to this question is clear: manufacturers have a duty to address foreseeable collisions by designing reasonably crashworthy vehicles regardless of how a specific foreseeable accident occurs.4

The seemingly narrow focus of Donze is deceptive because, from a broader perspective, the issue involved reflects deep conceptual conflicts between two of the most important developments in tort law in the second half of the twentieth century: (1) the imposition of increased safety obligations on product manufacturers, and (2) the widespread adoption of “comparative responsibility.” The importance of these two areas is reflected in the decisions of the American Law Institute (ALI) to publish two separate volumes of the Restatement (Third) of Torts before publishing the first two volumes of the general Restatement (Third) of Torts.5 One of these separate volumes addressed products liability,6 the other addressed the allocation of liability.7

Moreover, enhanced injury issues arise in other areas as well. For example, if medical malpractice arises in the context of treating a person whose negligence in driving resulted in injuries, will that negligence be compared to the medical negligence? What if the situation arises in the case of a doctor treating a smoker with lung cancer?8

In effect, the disagreement among the states concerning enhanced injury from vehicle collisions results from a disagreement about which of these developments should prevail—i.e., whether: (1) because of the concern for efficient accident reduction, the duty imposed on products manufacturers to address foreseeable enhanced injuries from second collisions will apply so long as the plaintiff’s role, no matter how “wrongful,” in the causal chain of the initial collision is foreseeable, or (2) because of a concern for fairness, comparative fault has the dominant role in addressing the responsibility of all the parties, including plaintiffs and third parties whose wrongs were a cause-in-fact of the injuries from the second collision.

4. See id. at 19–23, 800 S.E.2d at 485–87; see infra notes 16–48 and accompanying text.
8. See infra notes 481–486 and accompanying text for further discussion of enhanced injuries in the context of medical malpractice.
This perspective is important for two reasons. First, because of the partially contemporaneous evolution of products liability and comparative fault, the perspective helps place specific cases within the time frame of both developments.\textsuperscript{9} Second, it highlights two fundamental differences between the two approaches.

The first difference in the approaches involves the techniques used to allocate liability. Products liability utilizes the relatively fixed and precise structure of traditional tort: duty, breach, causation, damages, and defenses. The rules concerning this structure are usually based on explicit policies. Disagreement about the rules can often be understood (and perhaps addressed) in terms of these policies.

In contrast, comparative fault uses a virtually unstructured, ad hoc approach. Where a claim against a vehicle seller satisfies the rules of products liability and at least one party other than the product seller is at fault, the allocation of “fault” in terms of percentages is given to the jury. These percentages are then applied to determine whether the plaintiff can recover and, where some recovery is allowed, how much plaintiff can recover.\textsuperscript{10} Often, comparative fault statutes provide no guidance for this apportionment.\textsuperscript{11} Where guidance is given, it is typically phrased in terms like the following: “In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party at fault, and the extent of the causal relation between the conduct and the damages claimed.”\textsuperscript{12}

\textsuperscript{9} See infra notes 80–84 and accompanying text for discussion of an important example of the need to consider the context of doctrinal development.

\textsuperscript{10} See infra notes 248–249 and accompanying text (discussing types of comparative fault schemes), 309–314 (discussing example of impact of one specific approach to comparative fault).

\textsuperscript{11} For example, the statutes in Colorado, Indiana, Kansas, North Dakota, and Texas provide no guidance. COLO. REV. STAT. § 13-21-406 (2017); IND. CODE § 34-20-8-1(b) (2016); KAN. STAT. ANN. § 60-258a(d) (2016); KY. REV. STAT. ANN. § 411.182(2) (West 2016); N.D. CENT. CODE § 32-03.2-02 (2016); TEX. CIV. PRAC. & REM. CODE ANN. § 33.001 (2016).

\textsuperscript{12} E.g., ALASKA STAT. § 09.17.080(b) (2017); KY. REV. STAT. ANN. § 411.182(2) (West 2016). This language is based on UNIF. COMPARATIVE FAULT ACT § 2(b), 12 U.L.A. 43 (1977). The Apportionment of Liability Restatement adopts a similar approach. See infra note 255 and accompanying text. Comment d to Section 17 of the Products Liability Restatement states as follows: “When evidence of plaintiff fault is established, how much responsibility to attribute to a plaintiff will vary with the circumstances. The seriousness of the plaintiff’s fault and the nature of the product defect are relevant in apportioning the appropriate percentages of responsibility between the plaintiff and the product seller.”
Because of the variety of schemes of allocating recovery, some jurisdictions simply use the term "comparative causation." Depending upon the jurisdiction and, perhaps, the trial judge’s discretion, the jury may not know what the effect of these percentages will be even though the effect in some jurisdictions will be that plaintiff receives no recovery. This vague, open-ended approach is particularly problematic where for-profit corporations are defendants because these corporations focus on liability costs, as opposed to collision costs, in making decisions about the amount of money to spend on crashworthiness.

The second fundamental difference in the two approaches results from a disagreement concerning the answer to the following question: what is the nature of for-profit product manufacturers? Decisions like Donze view these corporations as nonhuman institutions with special social responsibilities, like efficient safety in design, that are defined in terms of tort duties. In contrast, comparative fault treats these corporations as the equivalent of human persons, which means these corporations are entitled to be treated as fairly as humans treat one another and are thus entitled to a fair, though unstructured, allocation of comparative fault.

This Article will use this broad perspective to address the treatment of enhanced injuries. Part II discusses Donze and summarizes the majority and minority approaches to enhanced injuries in the context of products liability. Part III sketches the development of the areas of products liability and comparative fault in terms of both the doctrine and the policies underlying each area. Part IV uses policy to compare the majority view concerning the role of a plaintiff’s fault with the minority view adopted by Donze and to argue that Donze is correct.

More specifically, this Article argues that for-profit corporations should be treated as entities to be utilized in achieving efficient reduction in accident costs. Based on this view, Donze uses the traditional tort structure to impose duties based upon specific policy goals. Because corporations lack the moral right to fairness that humans have, they are not entitled to the application of the unstructured, ad hoc scheme of comparative fault to all aspects of wrongful causation-in-fact. This results in giving products liability and efficient accident cost reduction dominance by explicitly defining duty in

14. See VICTOR E. SCHWARTZ, COMPARATIVE NEGLIGENCE § 17.05 (5th ed. 2010). See infra note 249 and accompanying text for discussion of possibility of loss of any right of recovery under modified comparative negligence schemes.
terms that treat any fault by the plaintiff or third parties in causing the initial collision as irrelevant to the allocation of the costs of the injuries caused by the second collision. As a result of this approach, for-profit corporations must focus on accident costs rather than on liability costs that have been reduced as a result of comparative fault.

Part V addresses important issues not addressed in Donze. Part VI summarizes the arguments and conclusions in this Article.

II. DONZE v. GENERAL MOTORS, LLC

A. Majority Opinion

The facts of Donze v. General Motors, LLC were stated by the court as follows:

...Donze and his friend, Allen Brazell, were driving...in Donze’s...pickup truck....[There was] evidence...indicating Brazell and Donze had been smoking synthetic marijuana earlier that morning....[T]hey came to an intersection controlled by a stop sign. Brazell failed to stop and pulled directly in front of a...truck towing a horse trailer. Unable to stop, the Ford struck Donze’s truck on the driver’s side, and the truck burst into flames. Brazell died as a result of the fire, and Donze suffered severe burns to eighty percent of his body.16

Donze filed suit in federal district court alleging that the truck’s placement of the gas tank outside of the frame of the truck was not a reasonably crashworthy design.17 General Motors (GM) filed a motion for summary judgment on the ground that, given the nature of the impairment of Donze and Brazell, public policy barred recovery. In the alternative, GM argued that comparative negligence should apply to limit Donze’s damages.18

The motion was denied, and the district court certified the following questions to the South Carolina Supreme Court:

I. Does comparative negligence in causing an accident apply in a crashworthiness case when the plaintiff alleges claims of strict

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17. Id.
18. Id. at 11, 800 S.E.2d at 480.
liability and breach of warranty and is seeking damages related only to the plaintiff’s enhanced injuries?

II. Does South Carolina’s public policy bar impaired drivers from recovering damages in a crashworthiness case when the plaintiff alleges claims of strict liability and breach of warranty?19

The South Carolina Supreme Court answered both questions with a “no.”20

As indicated above, Donze v. General Motors adopted the minority position and held that neither comparative negligence nor public policy would bar or limit Donze’s recovery for injuries caused by any crashworthiness defect. In terms of doctrinal categories, both positions agree that manufacturers have a duty to utilize a reasonably crashworthy design to address all foreseeable crash scenarios. However, the opposing positions disagree on which of the following approaches is dominant: (1) the products liability approach focusing on reducing the number and severity of injuries from crashes, or (2) the comparative fault approach focusing on broad notions of “fault” and fairness. Injury cost reduction and spreading prevail under the minority view; comparative responsibility and “fairness” prevail under the majority view.

The preference of Donze v. General Motors for cost reduction is reflected throughout the opinion. South Carolina recognized the reasonable crashworthiness doctrine in Mickle v. Blackmon,21 which was one of the first cases to adopt the doctrine.22 The Donze opinion begins its analysis with the following discussion of Mickle:

In Mickle we recognized the high frequency of roadway accidents is common knowledge such that “an automobile manufacturer knows with certainty that many users of his product will be involved in collisions, and that the incidence and extent of injury to them will frequently be determined by the placement, design and construction of [the vehicle’s] components . . . .” Therefore, we held vehicle manufacturers have a duty “to take reasonable precautions in the light of the known risks, balancing the likelihood of harm, and the gravity

19. Id.
20. Id. at 23, 800 S.E.2d at 487.
22. See, e.g., Ghent, supra note 1 (updated listing of states adopting doctrine with year of decision). The early adoption by South Carolina is also reflected in the discussion in Mickle of the lack of cases addressing the issue. See Mickle, 252 S.C. at 230–31, 166 S.E.2d at 185–86.
of harm if it should happen against the burden of feasible precautions which would tend to avoid or minimize the harm."23

This concern for safety underlies the court’s concern in Donze to ensure that the incentive to adopt “reasonable precautions” would not be reduced by using comparative negligence to “reduce the manufacturer’s liability or shift that responsibility to another party.”24 Incentivizing safety also plays a role in analyzing the nature of the duty in a crashworthiness claim. “[B]ecause an underlying accident is presumed in crashworthiness cases, a manufacturer’s liability is predicated on whether the injuries were enhanced by a defect in the automobile, not on the precipitating cause of the collision.”25 Where “a duty [to prevent a known risk] exists . . . clearly the very act which the defendant has a duty to prevent cannot constitute contributory negligence or assumption of the risk as a matter of law.”26

The court gave two reasons for rejecting arguments that statutes required the application of comparative fault. First, South Carolina judicially replaced contributory negligence with comparative fault in 1991 in Nelson v. Concrete Supply Co.,27 and there is no statute establishing a scheme for addressing plaintiffs’ fault.28 In contrast, strict liability and warranty claims are based on statutes.29 Donze notes that “[i]f the General Assembly intends for comparative negligence to constitute a defense [to a crashworthiness claim]
under either of these [statutory] theories, it is unquestionably capable of amending these statutory schemes accordingly.”

Second, even though strict liability for products was established by statute in South Carolina, it did not matter whether the claim was based on negligence or strict liability because “the heart of the crashworthiness doctrine remains the same—manufacturer liability for enhanced injuries following a foreseeable collision.”

B. Concurring Opinion

The concurring opinion of Justice Kittredge indicates his agreement with the majority opinion. However, he is concerned that the focused nature of the certified questions presents the risk “that even a slight tilting of the facts can impact the analysis and alter the conclusion.” As an example, he asks whether, if a defendant “presents evidence that the plaintiff’s comparative fault in the initial collision was a proximate cause of the so-called ‘enhanced injuries,’ is the manufacturer entitled to present evidence of the plaintiff’s comparative fault?” Justice Kittredge indicates that he “would say yes” to this question. This “yes” answer is problematic for several reasons.

First, because Justice Kittredge gives no reasons for this answer, it is not possible to know, for example, precisely how the evidence might be relevant to proximate cause.

Second, comparative fault and proximate cause operate very differently. If a plaintiff cannot show proximate cause, there is no recovery. In contrast, adopting the majority position concerning the second collision would allow a South Carolina plaintiff to receive at least partial recovery if his fault does not exceed fifty percent of the total fault.

Third, proximate cause in South Carolina is often used to refer to both cause-in-fact and “legal cause,” which is synonymous with the narrower use of the term “proximate cause” in most states. Consequently, given the lack

30. Donze, 420 S.C. at 19, 800 S.E.2d at 485.
33. Id. at 24, 800 S.E.2d at 487.
34. Id.
35. Id., 800 S.E.2d at 487–88.
36. Id., 800 S.E.2d at 488.
37. See infra notes 264–279 and accompanying text for further discussion of this point.
of reasons for his answer of “yes,” it is not clear whether Justice Kittredge is referring to cause-in-fact or “legal cause.”

Clarity on this point is important. Cause-in-fact is certainly relevant in a case like Donze because, if lack of crashworthiness was not the cause-in-fact of plaintiff’s injuries, plaintiff has no claim. On the other hand, if “legal cause” is at issue, then other problems result because terms like “legal cause” and “proximate cause” are infamous for their lack of a clear test or definition and thus for their potential to hinder clear analysis. 39

The closest thing to a test in South Carolina is the concept of foreseeability. 40 For example, an often-cited South Carolina case states:

A reading of any of the host of decisions in this State clearly discloses that the touchstone of proximate cause in South Carolina is foreseeability. “Foreseeability of some injury from an act or omission is a prerequisite to its being a proximate cause of injury for which recovery is sought.” . . . The standard by which foreseeability is determined is that of looking to the “natural and probable consequences” of the complained of act. . . . While it is not necessary that the actor must have contemplated or could have anticipated the particular event which occurred, . . . liability cannot rest on mere possibilities. 41

Though using foreseeability to address both duty and proximate cause (as well as negligence in some instances) has been widely questioned, 42 courts continue to use it in various contexts. 43

However, there is no problem with potential confusion in the crashworthiness context. The decision in 1969, in Mickle v. Blackmon, 44 to


40. HUBBARD & FELIX, supra note 38, at 165–71.


43. Zipursky, supra note 42, at 1255–71 (discussing cases and doctrines).

impose a duty to provide a reasonably crashworthy vehicle was based on the following:

[A] frequent and inevitable contingency of normal automobile use will result in collisions and injury-producing impacts. No rational basis exists for limiting recovery to situations where the defect in design or manufacture was the causative factor of the accident, as the accident and the resulting injury, usually caused by the so-called “second collision” of the passenger with the interior part of the automobile, all are foreseeable.\(^{45}\)

Given the role of foreseeability in \textit{Mickle}, using proximate cause in the sense of legal cause to deny recovery in a crashworthiness case would be somewhat like arguing that the intervention of a thief was so outrageous that a defective burglar alarm could not be the proximate cause of a successful theft.\(^{46}\) Similarly, it would be illogical to view drunk driving by a plaintiff, which is clearly foreseeable conduct, to cancel out the imposition of the duty of due care in addressing crashworthiness.\(^{47}\) As noted by the majority opinion in \textit{Donze}, evidence of a plaintiff’s negligent driving was irrelevant to the crashworthiness issue because, “once the defendant has ‘a duty to protect persons from consequences of their own foreseeable faulty conduct, it makes no sense to deny recovery because of the nature of the plaintiff’s conduct.”\(^{48}\)

\textbf{C. Analysis of Authorities on Issue of Comparative Fault}

Though a majority/minority split has developed on the issue of comparative negligence in crashworthiness claims, simply counting up cases on each side can be deceiving for several reasons. First, it is frequently hard to: (1) find the law for all states, and (2) interpret the law of a state. As a result,

\begin{itemize}
\item \textit{Id.} at 232, 166 S.E.2d at 186 (quoting Larsen v. Gen. Motors Corp., 391 F.2d 495, 502 (8th Cir. 1968)).
\item See, e.g., Accordini v. Sec. Cent., Inc., 283 S.C. 16, 19–20, 320 S.E.2d 713, 714 (Ct. App. 1984) (posing the question, “[W]hy would anyone buy a burglar alarm if a theft of his property was unforeseeable?”).
\item Drunk driving is not “highly extraordinary” like the conduct involved in \textit{Young v. Tide Craft, Inc. See} 270 S.C. 453, 465, 242 S.E.2d 671, 677 (1978) (noting that the court was “appalled at the highly extraordinary” character of the deliberate wrongfulness of the actions of an intervening wrongdoer).
\end{itemize}
judgment calls and errors are inevitable, and reasonable persons could disagree as to how to categorize some states. 49

The second problem is that only twenty states have sufficiently reliable authority to determine whether comparative fault would be included in a case like Donze. Of these states, thirteen have included comparative fault 50 and seven have not included comparative fault. 51

Third, within the states that include comparative fault, there are often significant differences in terms of details concerning defenses and treatment of defenses. 52 For example, some cases limit victim fault to the scheme adopted in 1965 in Section 402A of the Restatement (Second) of Torts (1965), which limits the defense of victim fault to situations where the victim knowingly assumed the risk of the unreasonably defective aspect of a product. 53

The remaining thirty states can be divided into two categories. First, nineteen states have no authority concerning the issues. 54 In some of these

49. See, e.g., infra notes 51–57 and accompanying text.


53. E.g., Day, 345 N.W.2d at 357. See infra notes 147–154 and accompanying text for discussion of cases addressing victim fault under Section 402A.

54. These states are: Alabama, Arizona, Georgia, Idaho, Illinois, Kentucky, Maryland, Massachusetts, Minnesota, Mississippi, Montana, New Mexico, Oklahoma, Rhode Island, South Dakota, Utah, Vermont, Wisconsin, and Wyoming. Some of these states are sometimes listed as “majority” states. However, as indicated infra at notes 67–85, 89–93 and accompanying text, this treatment is based on a failure to analyze these cases accurately. Where a case allows evidence of fault on the part of the plaintiff, but the relevance of plaintiff fault in a
states, a statute is arguably broad enough to cover the issue. However, these were not included because there was no case interpreting or applying the act in terms of crashworthiness. Second, eleven states fall into a miscellaneous category.

1. **Majority States**

   a. **Statutory Resolution**

   The inclusion of comparative negligence as a defense in crashworthiness cases in many states has been based on a statute. For example, the Florida statute explicitly includes crashworthiness claims in the comparative scheme. More commonly, courts find that language like “any” and “all” indicates a legislative intent to include victim fault in causing the initial collision in apportioning fault for the second collision.

   crashworthiness claim is not raised or addressed, the case is placed in the “no authority” category. See, e.g., Harvey v. Gen. Motors Corp., 873 F.2d 1343, 1351–54 (10th Cir. 1989) (applying Wyoming law and ruling that evidence of plaintiff’s fault admissible but not addressing issue raised in Donze).

   55. For example, the Kentucky allocation of fault statute includes “all tort actions, concluding products liability actions, involving fault.” KY. REV. STAT. ANN. § 411.182(1) (West 2016).

   56. This approach was adopted because decisions in states with broad language like “all claims or actions” sometimes construe the statute narrowly. E.g., Giannini v. Ford Motor Co., 616 F. Supp. 2d 219 (D. Conn. 2007) (holding plaintiff’s fault in causing initial collision was irrelevant to crashworthiness claim despite broad statutory language like “all claims or actions,” CONN. GEN. STAT. § 52–572m(b) (2017), and “any claim,” id. § 52-572o(a), (b)).

   57. See infra notes 89–103 and accompanying text.

   58. FLA. STAT. ANN. § 768.81 (West 2017). The statute explicitly includes enhanced injuries in the definitions of “accident” and “products liability action” and provides that apportionment of damages in enhancement cases shall include “the fault of all persons who contributed to the accident.” Section 2 of the Act adopting this approach states that the intent is to “overrule D’Amario v. Ford Motor Co., 806 So. 2d 424 (Fla. 2001), which adopted . . . [the] minority rule.”

For example, the Arkansas Court of Appeals held that its statute was sufficiently broad to require comparing the victim's original fault in an enhanced injury case. A subsequent case relied on this interpretation to include plaintiff's fault in a crashworthiness case. The court in this later case noted:

The comparative-fault statute, Arkansas Code Annotated section 16-64-122(a) (Repl.2005), provides that, in all actions for personal injuries or wrongful death in which recovery is predicated on fault, liability shall be determined by comparing the fault chargeable to a claiming party with the fault chargeable to the party from whom he seeks to recover. The statute additionally provides that "fault" shall include any act, omission, conduct, risk assumed, breach of warranty, or breach of any legal duty which is a proximate cause of any damages sustained by any party.

At other times, the decision is based on the use of a broad interpretation of the term "fault." For example, in Montag v. Honda Motor Co., Ltd., a federal appeals court relied on the broad language of Colorado's products liability statute to address the issue of whether the plaintiff's fault in the initial collision applied in a crashworthiness claim. The statute provided: "In any product liability action, the fault of the person suffering the harm, as well as the fault of all others who are parties to the action for causing the harm, shall be compared by the trier of fact in accordance with this section." The court concluded that the term "fault" was so broad that the plaintiff's fault in the initial collision was to be compared with the defendant's.

b. Judicial Decision

The leading case on the judicial inclusion of the plaintiff's fault in the initial collision in a crashworthiness case is the 1978 decision of the California

61. Id. at 221.
62. Id.
64. 75 F.3d 1414 (10th Cir. 1996).
65. Id. at 1419 (quoting COLO. REV. STAT. § 13-21-406(1) (2017)).
66. Id.
Supreme Court in *Daly v. General Motors Corp.* Daly has been viewed (albeit wrongfully) as being the first case to decide the issue in favor of including victim’s fault in the initial collision. In addition, California had been a pioneer in the development of strict liability for injuries caused by defective products and, to some extent, comparative fault. Though many of the decisions in the majority states have relied on statutes, a number of these decisions also rely on *Daly.* The five states that have judicially adopted the majority position often rely extensively on *Daly.* In addition, the California Court of Appeals relied on *Daly* to limit an intoxicated victim’s recovery in a crashworthiness case. Unfortunately, this wide use of *Daly* has been based on a misreading of the case caused by a failure to note two important features of the case.

First, the evidentiary details of the case are widely ignored. The parties generally agreed on the following facts:

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68. See infra notes 74–85 and accompanying text.
69. See infra notes 123–134 and accompanying text (discussing adoption of Section 402A).
70. See infra notes 201–202 and accompanying text (discussing adoption of comparative fault). The California Supreme Court adopted comparative fault in *Li v. Yellow Cab Co. of California*, 532 P.2d 1226 (Cal. 1975).
73. Doupnik v. Gen. Motors Corp., 275 Cal. Rptr. 715 (Cal. Ct. App. 1990). *Doupnik* does not address the facts and holding of *Daly.* See infra notes 74–83 and accompanying text for discussion of the facts and holding of *Daly.* Instead, the *Doupnik* opinion contains only the following language:

General Motors challenges the adequacy of the instructions on legal cause and the substantiality of the evidence on that issue. The common thread uniting the issues posed by General Motors has to do with the relative contributions of successive wrongs, *Doupnik*’s driving off the road and General Motors’ defective welds, to the injury he suffered. With respect to products liability the issue is one of comparative fault. (See *Daly v. General Motors Corp.* . . . . . . Cases of concurrent cause “fall into three groups: in the first both wrongful acts are necessary conditions of the harm” . . . . . This is a case of the first group, adjusting the doctrine of contributory negligence to that of comparative fault, as required by *Daly v. General Motors Corp.*, supra.)

275 Cal. Rptr. at 719, 725.
In the early hours of October 31, 1970, decedent Kirk Daly, a 36-year-old attorney, was driving his Opel southbound on the Harbor Freeway in Los Angeles. The vehicle, while travelling at a speed of 50-70 miles per hour, collided with and damaged 50 feet of metal divider fence. After the initial impact between the left side of the vehicle and the fence the Opel spun counterclockwise, the driver’s door was thrown open, and Daly was forcibly ejected from the car and sustained fatal head injuries . . . [H]ad the deceased remained in the Opel his injuries, in all probability, would have been relatively minor.74

“The sole theory of plaintiffs’ complaint was strict liability for damages allegedly caused by a defective product, namely, an improperly designed door latch claimed to have been activated by the impact.”75 A proper latch, claimed plaintiffs, would have reduced Daly’s injuries by keeping him within the Opel.76

In response, General Motors (GM) introduced evidence “indicating that: (1) the Opel was equipped with a seat belt-shoulder harness system, and a door lock, either of which, if used, it was contended, would have prevented Daly’s ejection from the vehicle; (2) Daly used neither the harness system nor the lock; (3) the 1970 Opel owner’s manual contained warnings that seat belts should be worn and doors locked when the car was in motion for ‘accident security’; and (4) Daly was intoxicated at the time of collision.”77 The “jury was advised [that this evidence] was admitted for the limited purpose of determining whether decedent had used the vehicle’s safety equipment.”78

The limitation to the use of the “vehicle’s safety equipment” is important. GM was claiming that the crashworthiness system had several components, including a “seat belt-shoulder system” and a “door lock.”79 Even if the system should have had a better door latch, these other parts of the system had to be considered in order to assess crashworthiness and causation. Given this limitation, it is clear that Daly did not hold that wrongdoing by Daly in causing the initial accident was to be compared with a defect in crashworthiness. The entire focus was on Daly’s conduct in relation to the secondary collision.

75. Id.
76. Id.
77. Id. at 1165.
78. Id. (emphasis added) (alteration in original).
79. Id.
The second problem is that Daly has not been considered in terms of historical context. At the time of the decision, the alternative to using comparative fault in Daly was the use of the “all or nothing” approach of the common law. Under this approach, if comparative fault did not apply to strict liability claims, any assumption of risk by Daly would completely bar his recovery. Such a result would frustrate the goals of incentivizing safer design and spreading losses that provided the reasons for adopting strict liability for defective products. Therefore, for reasons of “equity and fairness,” a broader approach to comparative fault was adopted.

It is an unfortunate irony that the Daly case, which was intended to further the goals of strict liability, has been used (or misused, given that negligence in the initial collision was not at issue) to support reducing or denying recovery for plaintiffs. The result is to frustrate the concern of the Daly court to achieve the accident prevention and loss spreading goals of strict liability.

The policy concern of cases like Donze, to maximize the deterrent impact of liability for defective crashworthiness by a judicial refusal to shift any part of that liability to the plaintiff or a third party, is not considered in many cases. For example, the Tennessee Supreme Court simply concluded: (1) A plaintiff’s conduct in causing the initial collision was a proximate cause of an enhanced injury, and (2) “[t]herefore, it is illogical to hold that comparative fault applies to products liability actions generally, but does not to ‘enhanced injury’ claims.” However, as indicated above in the discussion of Justice

80. *Id.* at 1167. See *infra* notes 231–236 and accompanying text for discussion of this approach.
81. *Id.* at 1169.
82. *Id.* at 1168–69. See *infra* notes 326–346 and accompanying text for further discussion of these goals.
83. *Id.* at 1169.
84. *See supra* notes 67–85 and accompanying text.
85. *See infra* note 155 and accompanying text for discussion of goals to be furthered by strict liability.
86. *See supra* notes 27–29 and accompanying text. For an example of another case stressing the concern for incentivizing manufacturers to address crashworthiness, see, for example, *Andrews v. Harley Davidson, Inc.*, 796 P.2d 1092, 1095 (Nev. 1990), which states: “A major policy behind holding manufacturers strictly liable for failing to produce crashworthy vehicles is to encourage them to do all they reasonably can do to design a vehicle which will protect a driver in an accident. Hence, the jury in such a case should focus on whether the manufacturer produced a defective product, not on the consumer’s negligence.”
87. *Whitehead v. Toyota Motor Corp.*, 897 S.W.2d 684, 694 (Tenn. 1995). The Delaware Superior Court also stated in conclusory terms: “It is obvious that the negligence of a plaintiff who causes the initial collision is one of the proximate causes of all of the injuries he sustained, whether limited to those the original collision would have produced or including those enhanced
Kittredge’s concurring opinion in Donze, proximate cause in the sense of legal causes in a crashworthiness case requires analysis and should not be addressed simply by *ipse dixit*.88

2. Miscellaneous

As the title to this Section suggests, the states in this category are simply hard to categorize in terms of the relevance of victims’ fault to a crashworthy claim. Cases from seven states are treated as “not decided” herein because they involve misuse or nonuse of the safety restraint system in the vehicle.89

As indicated above,90 this type of fault has nothing to do with the initial collision. Instead, the nonuse or misuse relates directly to the second collision and the adequacy of the crashworthiness system provided by the manufacturer. As a result, it does not involve the initial collision issue presented in Donze. Analysis of some of these cases can be complicated because evidence of nonuse of the safety restraint system is often barred by statute.91

Because of the failure to recognize the importance of the distinction concerning victim’s fault in the initial collision vis-à-vis misuse or nonuse of restraint systems in the second collision, these states are often miscategorized. For example, Donze lists California, Michigan, and Oregon as majority states even though they are actually in the “not decided” category.92 The Products

88. *See supra* notes 33–48 and accompanying text.


90. *See supra* notes 67–78 and accompanying text.

91. *See supra* note 89 and *infra* notes 468–469 and accompanying text.

Liability Restatement includes California, Oregon, and Wyoming in the majority category.\(^9\) In a case applying New York law, the Second Circuit addressed nonuse of seatbelts in the crashworthiness context.\(^9\) In addition, the New York Court of Appeals held that public policy bars a crashworthiness claim by an intoxicated motorist.\(^9\)

North Carolina and Virginia are hard to categorize because they still use the common law contributory negligence scheme rather than comparative fault.\(^9\) In addition, neither state has recognized the strict liability in tort claim for products liability. While both states avoid the explicit adoption of the crashworthiness doctrine, both allow recovery for enhanced injuries from a crash caused by negligent crashworthiness design.\(^9\) Finally, neither appears to have addressed the issue involved in Donze, though a North Carolina verdict for Ford Motor Company in a claim of defective restraint system was upheld where the evidence supported a finding of nonuse or misuse of the system.\(^9\) In addition, a federal district court opinion indicates the view that North Carolina would totally bar recovery for enhanced injury in a crashworthiness case.\(^9\)

Louisiana appears to use an ad hoc system for addressing victim fault. In an enhanced injury case involving a defective workplace product, the court refused to apply comparative fault on policy grounds.\(^9\) However, a subsequent crashworthiness case indicates that comparative fault should be applied in the circumstances involved.\(^9\)

\(^9\) Restatement (Third) of Torts: Prod. Liab., Reporters' Note, at 255–56 (Am. Law Inst. 1997). The inclusion of Wyoming was based on Harvey v. General Motors, 873 F.2d 1343, 1345, 1346 n.1, 1348, 1353 (10th Cir. 1989), in which the plaintiff was a passenger who was not wearing a seat belt, was ejected from the vehicle, and suffered severe injuries. The case is complicated by the fact that plaintiff was the owner of the vehicle, and the fault of the driver was apparently imputed to the plaintiff/owner. There was also a question of whether plaintiff had adequately proven the extent of enhanced injuries. The jury found plaintiff and defendant were each fifty percent at fault and awarded no damages. Because of these complexities, Wyoming is placed in the undecided category in this Article.

\(^9\) See supra note 89 and accompanying text.


\(^9\) Stark ex rel. Jacobsen, 723 S.E.2d at 761.


West Virginia has a novel approach to products liability. In response to a certified question, the Supreme Court of Appeals stated that West Virginia recognized the crashworthiness doctrine. The court also offered the following holding: “[F]or the guidance of both the state and federal trial courts, we hold today that in any crashworthiness case where there is a split of authority on any issue, as for example the plaintiff’s burden of proof discussed above, we adopt the rule that is most liberal to the plaintiff.” Arguably, this guidance supports placing West Virginia in the group of states that refuse to consider the victim’s negligence involved in the initial collision in a crashworthiness case.

III. HISTORICAL CONTEXT

A. Restatements of Law

The discussion of Products Liability will be structured in terms of three successive Restatements of Torts. The Apportionment of Liability Restatement will be used in addressing comparative fault. Therefore, it is helpful to review the nature and role of the American Law Institute (ALI), which produces the Restatements. The ALI was founded in 1923 to address the uncertainty and complexity in American law. “[T]he law’s uncertainty stemmed in part from a lack of agreement on fundamental principles of common law, while the law’s complexity was attributed to the numerous variations within different jurisdictions of the United States.” The Institute’s charter states that its mission is “to promote the clarification and simplification of the law

103. Id. at 786. The court gave the following reasoning for its position: Our conclusion today to adopt the rule most favorable to the plaintiff in crashworthiness cases is based upon the same actuarial considerations that have prompted us finally to adopt the doctrine of crashworthiness—namely, that we are already paying for full coverage. Indeed, in some world other than the one in which we live, where this Court were called upon to make national policy, we might very well take a meat ax to some current product liability rules. Therefore, we do not claim that our adoption of rules liberal to plaintiffs comports, necessarily, with some Platonic ideal of perfect justice. Rather, for a tiny state incapable of controlling the direction of the national law in terms of appropriate trade-offs among employment, research, development, and compensation for the injured users of products, the adoption of rules liberal to plaintiffs is simple self-defense.

Id.

105. Id.
and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work."

The ALI describes Restatements as follows:

**Restatements** are primarily addressed to courts and aim to clear formulations of common law and its statutory elements, and reflect the law as it presently stands or might appropriately be stated by a court. Although Restatements aspire toward the precision of statutory language, they are also intended to reflect the flexibility and capacity of development and growth of the common law. That is why they are phrased in descriptive terms of a judge announcing the law to be applied in a given case rather than in the mandatory terms of a statute.

The primary work of a Restatement project is done by Reporters, who “structure the project, prepare drafts, and present drafts . . . for discussion. Most Reporters are law professors.” Because of the problems of uncertainty and complexity, preparing a Restatement presents several challenges.

First, from a descriptive point of view, regardless of doctrine, there is virtually no “common law” that is common to all the states. As a result, there will be, at best, a majority view, a minority view, and a group of states in the category of “other”—for example, states that have not addressed an issue. Moreover, states may agree on a substantive rule but disagree, for example, on who has the burden of proof on design defect. Finally, many issues may have been addressed by statute rather than judicial opinion. In short, clarifying and simplifying the common law in our federal system can be, at best, a somewhat quixotic task. At times, like any collective endeavor that imposes a single rule in the context of disagreement concerning ends and means, comparisons to sausage making may be appropriate.

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106. Id.
108. Id.
109. See, e.g., supra notes 49–103 and accompanying text (discussing majority and minority views concerning admissibility of plaintiffs’ fault in crashworthiness cases).
111. See, e.g., Robert Pear, If Only Laws Were Like Sausages, N.Y. TIMES (Dec. 4, 2010), http://www.nytimes.com/2010/12/05/weekinreview/05pear.html. Pear notes:
This situation raises a second challenge: is the goal to be simply descriptive or is it to go further and take a normative position concerning disagreement and uncertainty? Not surprisingly, there are not only disagreements concerning the descriptive versus normative roles of Restatements but also good arguments for both sides.\textsuperscript{112}

Regardless of one's view on this issue, the increasing importance of Restatements as persuasive authorities has led to increased efforts to shape their content and to a concern that the Restatement project has become politicized.\textsuperscript{113} Though such concerns have not been limited to the tort

\textsuperscript{112} See, e.g., V. William Scarpato, "Is" v. "Ought," or How I Learned to Stop Worrying and Love the Restatement, 85 Temple L. Rev. 413 (2013). For a more general review of the operation of the ALI in adopting Restatements, see Kristen David Adams, Blaming the Mirror: The Restatements and the Common Law, 40 Ind. L. Rev. 205 (2007).

Restatements, the Products Liability Restatement generated an unusually large amount of such criticism and of responses to criticism.

B. Products Liability: Imposing “Corporate Responsibility”

1. First Restatement of Torts

At the beginning of the twentieth century, persons injured by defective products faced a substantial hurdle in recovering for their injuries because recovery was limited to those in “privity of contract” with the manufacturer. In the landmark case of MacPherson v. Buick Motor Co., Justice Cardozo laid “the foundation for the modern era of products liability law” by


117. DAVID G. OWEN, PRODUCTS LIABILITY LAW § 1.2, at 20–21 (3d ed. 2015).

118. 111 N.E. 1050 (N.Y. 1916).

119. OWEN, supra note 117, § 1.2, at 21.
replacing the privity limit in favor of a negligence approach based on foreseeability of harm.\textsuperscript{120}

Building on \textit{MacPherson} and subsequent cases, Section 395 of the \textit{First Torts Restatement} provides:

A manufacturer who fails to exercise reasonable care in the manufacture of chattel which, unless carefully made, he should recognize as involving an unreasonable risk of causing substantial bodily harm to those who lawfully use it for a purpose for which it is manufactured and to those whom the supplier should expect to be in the vicinity of its probable use, is subject to liability for bodily harm caused to them by its lawful use in a manner and for a purpose for which it is manufactured.\textsuperscript{121}

Though this section recognizes a claim in negligence, it limits that claim to harm resulting from “lawful” risks of “substantial bodily harm” caused by “a purpose for which” the product was manufactured.

2. \textit{Second Restatement of Torts}

\textit{a. Adoption}

Section 395 of the \textit{Second Torts Restatement} is virtually a verbatim version of the same section in the \textit{First Torts Restatement}.\textsuperscript{122} The Second

\textsuperscript{120} The holding in \textit{MacPherson} was stated as follows:
If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully. 
\textit{MacPherson}, 111 N.E. at 1053.

\textsuperscript{121} \textit{RESTATEMENT (FIRST) OF TORTS} § 395 (AM. LAW INST. 1934). Sections 388–394, 396, 399–408 addressed a variety of other situations involving harm caused by chattels. Section 400 of the \textit{First Torts Restatement} imposed liability on a person who sold a product made by another as if it were his own product, regardless of whether that person was negligent, if the product had not been made in compliance with the rules set forth in Sections 394 to 398. Section 397 imposed a duty of due care on manufacturers utilizing a secret formula, and Section 398 imposed liability for failure to use reasonable care in the adoption of a plan or design. These were viewed as special applications to Section 395. \textit{Id.}, § 397 cmt. a; \textit{id.} § 398 cmt. a.

\textsuperscript{122} \textit{RESTATEMENT (SECOND) OF TORTS} § 395 (AM. LAW INST. 1965). Sections 397 (secret formula) and 398 (design) also parallel the \textit{First Torts Restatement}. As with the \textit{First Torts Restatement}, other sections addressed additional rules concerning chattels. \textit{Id.} §§ 388–394, 396, 399–404.
Torts Restatement also added two new provisions concerning products. Section 402A 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 his product, and

(b) The user or consumer has not bought the product from or entered into any contractual relation with the seller.

Section 402B provides:

One engaged in the business of selling chattels who, by advertising, labels, or otherwise, makes to the public a misrepresentation of a material fact concerning the character or quality of a chattel sold by him is subject to liability for physical harm to a consumer of the chattel caused by justifiable reliance upon the misrepresentation, even though

(1) It is not made fraudulently or negligently, and

(2) The consumer has not bought the chattel from or entered into any contractual relation with the seller.

These sections impose liability regardless of whether negligence or fraud was involved.

Section 402A is a clear example of using a Restatement in a normative rather than descriptive manner. William L. Prosser was the Reporter for the
Second Torts Restatement. He was also Dean of Berkeley Law School for thirteen years, "the foremost torts authority of [the] time," and the author of the torts treatise, which was often cited simply as Prosser on Torts and has been described as "the most influential treatise ever published in tort law."

In 1960, Prosser wrote an article arguing that the strict liability scheme which applied to food should be applied to products generally. As he was drafting the Second Torts Restatement, Prosser gradually extended the generally recognized rule of strict liability for foods to all products, even though there was very little authority for this extension. Just before the adoption of Section 402A in 1964, the California Supreme Court decided Greenman v. Yuba Power Products, Inc., which adopted “strict liability” as the test for tort liability for injuries caused by product defects. The author of the unanimous opinion in Greenman was Chief Justice Roger Traynor, who had argued for strict liability in a concurring opinion in a case decided in 1944, and who was one of the advisors for the Second Tort Restatement. Among the authorities cited in Greenman were Traynor’s 1944 concurring opinion and Prosser’s 1960 article. In 1966, Prosser declared victory by publishing an article that declared the fall of the citadel of priority of contract and negligence to the new regime of strict liability.
b. Application

i. The “tests” for defect

Applying Section 402A was a challenge for courts because the language and comments to Section 402A could support two different “tests” of product defect. First, there is support for the view that the test of defect is determined by reference to normal (common, ordinary, reasonable) consumer expectations.135 If the danger exceeds such expectations, then the product is “unreasonably dangerous.” Second, the language “unreasonably dangerous” in Section 402A(1) parallels traditional negligence terminology, and one comment to the section uses cost-benefit analysis like that in negligence to define defective.136

This lack of clarity was important. Without a test to define the duty imposed on sellers, it is not possible to: (1) determine the nature and scope of sellers’ duty to protect potential victims, or (2) identify the ways in which a seller’s duty under the strict liability approach varies from negligence. In the decades following the adoption of Section 402A, numerous approaches were developed to resolve these problems. Summarizing or analyzing these approaches is beyond the scope of this Article.137 Therefore, because California was the leader in adopting strict liability, this Article will use the California experience to illustrate one possibility.

The California Supreme Court had decided the path-breaking Greenman case138 and, in a later case, had rejected the use of the phrase “unreasonably dangerous” because it “rings of negligence.”139 California also adopted the view that the choice of test depended upon the circumstances. Under this approach, “the consumer expectations test is reserved for [design defect] cases in which the everyday experience of the product’s users permits a conclusion that the product’s design violated minimum safety assumptions and is thus defective regardless of expert opinion about the merits of the design.”140 (In effect, this decision simply reflects the basic rule for opinion evidence by lay

135. RESTATEMENT (SECOND) OF TORTS § 402A cmt. g, h, i, j (AM. LAW INST. 1965).
137. For a summary of the variety of approaches, see, for example, OWEN, supra note 117, §§ 5.3–5.10.
persons.) 141 Where the expectation test is not appropriate, a negligence type cost-benefit approach utilizing expert testimony is used for design defects. 142

In order to go beyond the cost-benefit approach used in the traditional negligence framework, California adopted an approach for design defects that: (1) shifts the burden of going forward and of persuasion to the defendant if the “plaintiff demonstrates that the product’s design proximately caused [the] injury,” and (2) uses a test that “explicitly focuses the trier of fact’s attention on the adequacy of the product itself, rather than on the manufacturer’s conduct.” 143 Given this focus on the product,

. . . the fact that the manufacturer took reasonable precautions in an attempt to design a safe product or otherwise acted as a reasonably prudent manufacturer would have under the circumstances, while perhaps absolving the manufacturer of liability under a negligence theory, will not preclude the imposition of liability under strict liability principles if, upon hindsight, the trier of fact concludes that the product’s design is unsafe to consumers, users, or bystanders. 144

Thus, the strict liability cost-benefit test is applied on the basis of what is known at the time of trial rather than by the “state of the art,” which is often viewed as what is known or reasonably knowable at the time of design. 145

Warning defects are treated differently. California allows defendants in warning defect cases to “present evidence of the state of the art, i.e., evidence that the particular risk was neither known nor knowable by the application of scientific knowledge available at the time of manufacture and/or distribution.” 146

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141. E.g., FED. R. EVID. 701. This rule states:
If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:
(a) rationally based on the witness’s perception;
(b) helpful to clearly understanding the witness’s testimony or to determining a fact in issue; and  
(c) not based on scientific, technical, or other specialized knowledge within the scope of [expert testimony under] Rule 702.
142. Soule, 882 P.2d at 308.
144. Id. at 457.
145. For development of the concept of state of the art, see OWEN, supra note 117, § 10.4. For discussion of other states following the California “time of trial” approach, see RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2, Reporters’ Note, at 83–84 (AM. LAW INST. 1997).
ii. The defense of voluntarily and unreasonably encountering a known danger

Comment n to Section 402A notes:

Since the liability with which this Section deals is not based upon negligence of the seller, but is strict liability...[c]ontributory negligence of the plaintiff is not a defense... [but] the form of contributory negligence which consists in voluntary and unreasonably proceeding to encounter a known danger... passes under the name of assumption of risk, is a defense...\(^\text{147}\)

The treatment of this language has varied. Some jurisdictions still view unreasonable assumption of risk as a total bar, while others include it in comparative fault.\(^\text{148}\) In addition, the approach to a victim’s fault other than assumption of risk varies. Some jurisdictions include all forms of fault, including contributory negligence,\(^\text{149}\) while others only recognize assumption of risk as a defense.\(^\text{150}\) In addition, courts vary in their application of the doctrine to the facts involved.\(^\text{151}\) More specifically, some courts require only a generalized awareness of risk\(^\text{152}\) while others require knowledge and

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\(^{147}\) Comment n provides:

\[^n\]. Contributory negligence. Since the liability with which this Section deals is not based upon negligence of the seller, but is strict liability, the rule applied to strict liability cases applies. Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. On the other hand the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.

RESTATEMENT (THIRD) OF TORTS § 402A cmt. n (AM. LAW INST. 1997). For general discussion of assumption of risk, see infra notes 218–230 and accompanying text.


\(^{149}\) See, e.g., DOBBS, supra note 148, at 1020–23.

\(^{150}\) E.g., Austin v. Raybestos-Manhattan, Inc., 471 A.2d 280 (Me. 1984).

\(^{151}\) See, e.g., DOBBS, supra note 148, at 1020–26 (discussing variations); OWEN, supra note 117, § 13.4, at 806–26 (discussing variations).

appreciation of the specific risks involved,\textsuperscript{153} including specific risks from a crashworthiness defect.\textsuperscript{154}

c. Policy

Even if Section 402A did not provide an adequate test of defect, it reframed the development of products liability law by focusing on the need for a new approach to achieving improved safety for consumers, users, and bystanders. The basis for this strict liability approach is stated in the following language:

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 a special responsibility toward any member of the consuming public who may be injured by it; that the public has the right to and does expect, in the case of products which it needs and for which it is 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 entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products.\textsuperscript{155}


\textsuperscript{155} \textit{RESTATEMENT (SECOND) OF TORTS} § 402A cmt. c (AM. LAW INST. 1965). The policy concerns underlying Section 402A were initially expressed in 1944 in the following selection from Justice Traynor’s concurring opinion in \textit{Escola v. Coca Cola Bottling Co. of Fresno}, 150 P.2d 436, 443–44 (Cal. 1944) (Traynor, J., concurring) (citations omitted):

As handicrafts have been replaced by mass production with its great markets and transportation facilities, the close relationship between the producer and consumer of a product has been altered. Manufacturing processes, frequently valuable secrets, are ordinarily either inaccessible to or beyond the ken of the general public. The consumer no longer has means or skill enough to investigate for himself the soundness of a product, even when it is not contained in a sealed package, and his erstwhile vigilance has been lulled by the steady efforts of manufacturers to build up confidence by advertising and marketing devices such as trade-marks. Consumers no
In short, the manufacturer has a “special responsibility” because it is in the best position to reduce injuries efficiently and, where appropriate, avoid lump sum losses for victims by spreading accident costs among consumers.

3. Third Restatement: Products Liability

Products liability law had an “explosive expansion . . . after the adoption of Section 402A.”156 Though Section 402A obviously had a major role in this expansion,157 it is hard to measure that impact because a number of factors influenced the expansion of products liability. For example, the negligence claim recognized in Section 395 of the First and Second Torts Restatements was also involved because many claims were based on negligence rather than (or in addition to) a Section 402A claim.158 Moreover, many states were using some version of a negligence type of approach rather than strict liability to longer approach products warily but accept them on faith, relying on the reputation of the manufacturer or the trade mark. Manufacturers have sought to justify that faith by increasingly high standards of inspection and a readiness to make good on defective products by way of replacements and refunds. The manufacturer’s obligation to the consumer must keep pace with the changing relationship between them; it cannot be escaped because the marketing of a product has become so complicated as to require one or more intermediaries. Certainly there is greater reason to impose liability on the manufacturer than on the retailer who is but a conduit of a product that he is not himself able to test.


157. See, e.g., Owen, supra note 117, at 270 (“Tort law has probably never witnessed such a rapid, widespread, and altogether explosive change in a rule and theory of legal responsibility.”); Scarpato, supra note 112, at 414; Wolfram, supra note 114, at 820 (noting that Section 402A “can fairly be described as launching . . . the products liability field of litigation”). Scarpato notes:

[5]Section 402A has been cited more than any other restatement section ever published, enjoying a seismic effect in the area of products liability. State courts adopted the Restatement provision at a shocking rate, surprising even Dean Prosser, who had predicted a period of up to fifty years before it would become the dominant viewpoint.

158. Owen, supra note 117, § 1.3, at 26. Owen summarizes a 1985–1986 study of theories used in products liability claims as follows: “Strict liability was the only theory alleged in 22% of the claims; only negligence in 15%; and only breach of warranty in 3%. All three theories of liability were alleged in 30% of the claims. Strict liability was the main theory relied upon in settlement in 60% of the cases, negligence in 31%, and warranty in 8%.” Id. As a practical matter, plaintiffs’ attorneys often prefer a verdict based on negligent wrongdoing rather than strict liability because of a common belief that the amount of a verdict might be higher if wrongdoing caused the injury. For empirical support of this belief, see Richard L. Cupp & Danielle Polage, The Rhetoric of Strict Products Liability Versus Negligence: An Empirical Analysis, 77 N.Y.U. L. REV. 874 (2002).
address design and warning defects. In addition, changes in the plaintiff’s bar, in terms of things like case selection and preparation, probably played a role in the change.

a. Defect

The understanding of the nature and complexity of claims of product defect increased in the decades following the adoption of Section 402A. In particular, it became clear that there were three distinct categories of defect: manufacturing, design, and instructions/warnings. Consequently, Section 2 of the Products Liability Restatement provides:

A product is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings. A product:

(a) contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product;

(b) is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe;

(c) is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.

159. RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2, Reporters’ Note, cmt. d (AM. LAW INST. 1997) (reviewing case law in support of section); Henderson & Twerski, supra note 116, at 673 n.11 (“The case law supporting the [negligence] risk:utility defect as the standard for design defect is overwhelming.”). Henderson and Twerski were the Reporters for the Products Liability Restatement.

160. OWEN, supra note 117, § 1.3, at 27.
b. **Strict Liability**

Pockets of strict liability remain in the *Products Liability Restatement*. As indicated above, Section 2(a) imposes strict liability for manufacturing defects.\(^{161}\) As a result, it does not matter whether due care had been used in trying to discover and repair such defects.\(^{162}\) Several reasons were given in support of this strict liability approach: (1) it creates a better system of safety incentives; (2) it promotes spreading of costs; (3) it reduces administrative costs by eliminating the issue of fault; and (4) the conscious choice of a level of quality control entails a deliberate choice to accept a particular amount of injury.\(^{163}\)

Another example of strict liability is the imposition in Section 2 of liability for injury caused by a product defect on all persons “engaged in the business of selling or otherwise distributing the defective product.”\(^{164}\) The reason for including all sellers/distributors in the chain of distribution is to “assure plaintiffs access to a responsible and solvent product seller or distributor.”\(^{165}\)

Finally, Section 9 adopts the approach of Section 402B\(^{166}\) of the *Second Torts Restatement* and provides:

> One engaged in the business of selling or otherwise distributing products who, in connection with the sale of a product, makes a fraudulent, negligent, or innocent misrepresentation of material fact concerning the product is subject to liability for harm to persons or property caused by the misrepresentation.

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162. Id. at 15.

163. Id. at 14–15.

164. *Restatement (Third) of Torts: Prod. Liab.* § 1 cmt. c (Am. Law Inst. 1997); id. § 2 cmt. o. Technically, because of the need for plaintiff to show a wrongful defect caused by someone in the chain of distribution, it would be more accurate to view this approach as a form of vicarious liability for the wrong of another. For example, such vicarious liability is involved where employers are vicariously liable for the wrongs of their employees. However, at this point in time, the term “strict liability” is so widely used that a change in terms is not likely.

165. Id. § 1 cmt. e; see, e.g., Owen, supra note 117, at 441–45 (discussing reasons for strict liability).

166. Id. § 9 cmt. a. Section 402B is quoted *supra* in text following note 122.
The reason given for strict liability in this instance is that case law has followed the approach of Section 402B.167

c. Negligence

Under Section 2, design defects and instruction/warning defects, which are far more common than manufacturing defects,168 are no longer subject to strict liability. Instead, liability is based on negligence. Sellers are not liable unless the plaintiff can show that, based on the state of the art at that time of design or warning,169 the omission of a reasonable alternative design or of a particular instruction/warning rendered the product not reasonably safe.170 Though consumer expectations may relate to issues like foreseeability,171 they do not constitute an independent standard for or a determinative role in judging defectiveness.172

There is considerable case support for the position that this negligence type of cost-benefit approach to design and instructions/warnings defects reflects the majority view.173 However, there is also considerable support for the view that the Products Liability Restatement overstates the adoption of the cost-benefit approach and fails to adequately recognize the continuing use of expanded liability approaches, including, for example, the use of consumer expectations as a test,174 the use of knowledge at the time of trial,175 and the

167. Id. For a discussion of the policy basis for this strict liability, see Baxter v. Ford Motor Co., 12 P.2d 409, 461–63 (Wash. 1932), which is the classic case for this tort. For a somewhat critical discussion of the basis for this claim, see OWEN, supra note 117, at 132–34.
169. RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 cmt. a, at 16 (AM. LAW INST. 1997); id. § 2 cmt. d.
170. Id. § 2 cmt. a, at 23–25.
171. Id. § 2 cmt. g.
172. Id.
173. See supra note 116 and accompanying text.
174. See supra note 114 and accompanying text. For an example of judicial disagreement concerning the dominance of a negligence approach, see, for example, Halliday v. Sturm, Ruger & Co., 792 A.2d 1145, 1154–55 (Md. Ct. App. 2002) (The view that Section 2 reflects the majority position “is not universally shared, however, and, to the extent it is shared, it has been criticized as representing an unwanted ascendancy of corporate interests under the guise of tort reform.”). For a recent case rejecting the approach of the Products Liability Restatement and reaffirming a commitment to the consumer expectation test, see Ford Motor Co. v. Trejo, 402 P.2d 649 (Nev. 2017).
175. See supra notes 138–146 and accompanying text (discussing California cases). For examples of other states using these approaches, see, for example, Sternhagen v. Dow Co., 935 P.2d 1139 (Mont. 1997); RESTATEMENT (THIRD) OF TORTS: PROD. LIAB., Reporters’ Note, at 83–84 (AM. LAW INST. 1997).
shifting of the burden of proof to the defendant when using the cost-benefit test.  

The Products Liability Restatement also has a somewhat ad hoc approach to the use of negligence vis-à-vis strict liability. For example, the justifications for imposing strict liability for manufacturing defects, for misrepresentation, and for sellers in the chain of distribution would also support using California’s time-of-trial standard for design defect. However, the Products Liability Restatement uses the state of the art approach instead.

\[ \text{176. See supra notes 138–146 and accompanying text (discussing California cases).} \]
\[ \text{177. See supra notes 163, 165, 167 and accompanying text.} \]
\[ \text{178. See supra notes 143–145 and accompanying text.} \]
\[ \text{179. See supra notes 169–172 and accompanying text.} \]
\[ \text{180. RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 16 (AM. LAW INST. 1997).} \]
\[ \text{181. Id. § 17. Comment d to Section 17 states that, in comparing fault, “... how much responsibility to attribute to a plaintiff will vary with the circumstances. The seriousness of the plaintiff’s fault and the nature of the product defect are relevant in apportioning the appropriate percentages of responsibility between the plaintiff and the product seller.” Comment f to Section 17 states: “In apportioning responsibility in such cases, it may be important that requiring a product to be designed reasonably to prevent increased harm aims to protect persons in circumstances in which they are unable to protect themselves.”} \]
\[ \text{182. Id. § 16(d).} \]
\[ \text{183. OWEN, supra note 117, at 1086.} \]
view, a slight majority of the membership voted to deny the Reporters’ exemption of driver fault from apportionment of enhanced injuries in crashworthiness cases. Dutifully deleting this injury exception from the comments to the apportionment rule, together with the relevant portion of their persuasive Reporters’ Note, the Reporters artfully redrafted the pertinent comment to leave wiggle room for courts in appropriate cases to apportion enhanced injuries in toto to manufacturers of uncrashworthy vehicles. 184

4. South Carolina185

As the discussion of the Mickle decision in Donze indicates,186 South Carolina judicially recognized the common law negligence action set forth in Section 395 of the First and Second Tort Restatements.187 In contrast, unlike most states, the strict liability claim in tort was adopted legislatively in South Carolina.188 Instead, the legislature enacted a statute in 1974 containing language that is virtually verbatim to Section 402A.189 The statute also

184. Id. at 1086–88. Language from the final redrafted version of comment f to Section 16 is quoted supra note 181. For language of the original version of comment f, see OWEN, supra note 117, at 1087 n. 220. Owen favors the inclusion of plaintiff's fault adopted in the final version. Id. at 1088–89; infra notes 363–71 and accompanying text.

185. For a more complete discussion of South Carolina products liability law, see HUBBARD & FELIX, supra note 38, at Chapter 4.

186. See supra notes 21–23 and accompanying text for Donze discussion. See supra notes 121, 122 and accompanying text for discussion of Section 395.


188. See Hatfield v. Atlas Enter., Inc., 274 S.C. 247, 248, 262 S.E.2d 900, 901 (1980) (holding that “strict liability in tort, imposed as a result of a product’s defective condition, did not emerge until” the statute was adopted).

189. S.C. CODE ANN. § 15-73-10 (2005) 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 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) shall apply although
(a) The seller has exercised all possible care in the preparation and sale of his product, and
(b) The user or consumer has not bought the product from or entered into any contractual relation with the seller.

Effective June 14, 2000, section 15-73-40 was added to the strict products liability scheme. This statutory provision prohibits recovery for the defective design of firearms and ammunition shells
provided that the comments “to § 402A of the Restatement of Torts, Second, are incorporated herein by reference thereto as the legislative intent of this chapter.”

The intended effect of the statute is to relieve the plaintiff of the requirement of proof of negligence and to render immaterial the demonstration of due care by the defendant. However, the South Carolina courts faced the same problems of applying the “tests” of 402A and of distinguishing strict liability from negligence that other jurisdictions faced. As a result, with respect to some kinds of defect, and perhaps with respect to certain defenses, it is not clear that strict liability under the statute is as “strict” as might first appear.

The statute also follows the scheme of Section 402A in its treatment of the fault of a victim. Comment n to Section 402A states that contributory negligence is not a defense but that unreasonable assumption of risk is a defense. The South Carolina statute states: “If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.”

Given the legislative adoption of Section 402A, the approach of the Products Liability Restatement might seem irrelevant to South Carolina products liability law. However, Branham v. Ford Motor Co. rejected the consumer expectations test in design defect cases in favor of the cost-benefit test of the Products Liability Restatement. This decision was based on the ground that “the Legislature’s foresight in looking to the American Law Institute for guidance in this area is instructive” and that “the Legislature has expressed no intention to foreclose consideration of developments in products liability law.” Thus, it appears that the Third Torts Restatement may play a

based on risk-benefit analysis and requires proof based on the consumer expectation test. Other states have also adopted Section 402A by statute.

An injured victim could also bring a claim for breach of warranty. See, e.g., HUBBARD & FELIX, supra note 38, at 285–301, 346–50. Such claims are not addressed herein.

192. See supra notes 135–146 and accompanying text.
194. See supra notes 147–154 and accompanying text.
197. Branham, 390 S.C. at 220, 701 S.E.2d at 14. There is no mention in Branham of S.C. CODE ANN. § 15-73-40 (2005), which requires the use of the consumer expectation test and prohibits the use of a cost-benefit test where guns and ammunition are involved.
significant role in South Carolina products liability law. Some of the questions raised by this possibility will be addressed at Section IV.A below.

C. Comparative Fault: Seeking “Fairness”

The shift to comparative fault has been based on the desire for fairness in allocating liability and the concern that defendant wrongdoers should not totally escape liability where a plaintiff was at fault to any extent. The shift was felt necessary because the common law apportioned liability between plaintiffs and defendants and among defendants on the basis of the all-or-nothing approach that imposed total liabilities on the plaintiff or defendant even if both had been at fault.

The unfairness of this harsh approach was widely criticized. However, until the late 1960s, only a few states had changed their approach by adopting some form of comparative fault. Thereafter, comparative schemes were

198. E.g., WILLIAM L. PROSSER, LAW OF TORTS § 67, at 433 (4th ed. 1971). Prosser’s critique of the common law system was as follows:

The hardship of the doctrine of contributory negligence upon the plaintiff is readily apparent. It places upon one party the entire burden of a loss for which two are, by hypothesis, responsible. The negligence of the defendant has played no less a part in causing the damage; the plaintiff’s deviation from the community standard of conduct may even be relatively slight, and the defendant’s more extreme; the injured man is in all probability, for the very reason of his injury, the less able of the two to bear the financial burden of his loss; and the answer of the law to all this is that the defendant goes scot free of all liability, and the plaintiff bears it all. Nor is it any answer to say that the contributory negligence rule promotes caution by making the plaintiff responsible for his own safety. It is quite as reasonable to say that it encourages negligence, by giving the defendant reason to hope that he will escape the consequences. Actually any such idea of deterrence is quite unrealistic. In the usual case, the negligence on both sides will consist of mere inadvertence or inattention, or an error in judgment, and it is quite unlikely that forethought of any legal liability will in fact be in the mind of either party. No one supposes that an automobile driver, as he approaches an intersection, is in fact meditating upon the golden mean of the reasonable man of ordinary prudence, and the possibility of tort damages, whether for himself or for another.

199. See infra notes 231–236 and accompanying text.


201. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 6, Reporters’ Note, at 73–74 (AM. LAW INST. 2000); DOBBS, supra note 148, at 503–04; MARC A. FRANKLIN ET AL., TORT LAW AND ALTERNATIVES: CASES AND MATERIALS 438 (9th ed. 2011); PROSSER,
increasingly adopted, and by 1990, the majority of states had adopted some form of comparative fault for allocating liability between plaintiff and defendants by statute or judicial decision.\textsuperscript{202}

At this point, a similar pattern began to emerge in the treatment of multiple wrongdoers who had combined in some way to cause the plaintiff’s harm. The common law rule was that each of these “joint tortfeasors” could be held solely liable for all the harm suffered by the plaintiff.\textsuperscript{203} This sole liability scheme was increasingly replaced by diverse comparative schemes for allocating a proportionate share to each wrongdoer.\textsuperscript{204}

1. The “Fault” Spectrum

Because of the diversity of items included in many comparative schemes,\textsuperscript{205} “comparative fault” is an unfortunate misnomer for many current approaches to allocating injury costs between plaintiffs and defendants and among defendants. Better terms might be comparative allocation or apportionment of liability or comparative responsibility for damages. The title of the Apportionment of Liability Restatement is an example of the use of such broader terms.

This Article addresses this terminological problem by adopting the view that a broad concept of “fault” can be applied to many situations to determine how to allocate liability. More specifically, “fault” can be applied to a spectrum of “wrongful” conduct, ranging from intent, to recklessness, to negligence, and to strict liability.

\textsuperscript{supra} note 198, § 67. Admiralty and some federal statutes concerning interstate commerce allowed comparative fault. Prosser, \textsuperscript{supra} note 200, at 477–80.


\textsuperscript{203} See \textit{infra} notes 237–244 and accompanying text for further discussion of this doctrine.

\textsuperscript{204} See, e.g., RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 17 (AM. LAW INST. 2000); Hubbard & Felix, \textsuperscript{supra} note 202, at 329–43; \textit{infra} notes 256–263 and accompanying text. The “tort reform” movement also played a role. See \textit{infra} notes 307–314 and accompanying text.

\textsuperscript{205} See, e.g., RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. §§ 1, 3, 5–6, 8 (AM. LAW INST. 2000).
a. Intentional Acts

An intentional act can be defined as acting “with the intent to produce a consequence if (a) the person acts with the purpose of producing that consequence; or (b) the person acts knowing that the consequence is substantially certain to result.”

b. Recklessness

Recklessness exists where “(a) the person knows of the risk of harm created by the conduct or knows facts that make the risk obvious to another in the person’s situation, and (b) the precaution that would eliminate or reduce the risk involves burdens that are so slight relative to the magnitude of the risk as to render the person’s failure to adopt the precaution a demonstration of the person’s indifference to the risk.” Reckless acts can also be defined as “doing a negligent act knowingly” or as actions which are “willful” or “wanton.”

c. Negligence

“A person acts negligently if the person does not exercise reasonable care under all the circumstances.” “Reasonable care” can be defined as acting like a reasonable person would act under the circumstances or failing to take safety precautions where such precautions are less costly than the amount of harm likely to occur.
d. Strict Liability

The term “strict liability” generally applies where liability is imposed even though the conduct was not intentional, reckless, or negligent,\textsuperscript{212} all of which fit the normal usage of the term “fault” as wrongful conduct “based on blameworthiness in a moral sense.”\textsuperscript{213} How can fault be compared with strict liability, which does not involve blameworthy actions? Courts and legislatures have answered (or avoided) this question by referring to a need for “the attainment of a just and equitable result,” by a shift in terminology to “equitable apportionment or allocation of loss,” and by a faith in the jury’s ability to achieve a just and equitable result.\textsuperscript{214}

Most comparative schemes use this approach to include strict liability for defective products in their comparative scheme.\textsuperscript{215} The Apportionment of Liability Restatement also views comparative fault as appropriate for strict liability, including strict products liability.\textsuperscript{216} Such inclusion is one reason the ALI chose the term “Apportionment of Liability” for addressing comparative fault. As indicated above, there are pockets of strict liability in products liability in the Products Liability Restatement even though most situations involve negligence analysis.\textsuperscript{217}

Another important area of strict liability involves conduct by plaintiffs. The doctrine of “implied assumption of risk” provides a defense to a tort claim for negligence, recklessness, or strict liability if the plaintiff encounters a risk with knowledge of the nature and extent of that risk.\textsuperscript{218} Though a specific

\textsuperscript{212} \textit{E.g.,} \textbf{RESTATEMENT (THIRD) OF TORTS: PROD. LIAB.} §§ 20–25 (AM. LAW INST. 1997) (addressing four doctrines where such liability is imposed, scope of liability, and comparative responsibility where strict liability is involved).

\textsuperscript{213} \textit{Daly v. Gen. Motors Corp.}, 575 P.2d 1162, 1165 (Cal. 1978).

\textsuperscript{214} \textit{Id.} at 1168, 1172–73.

\textsuperscript{215} \textbf{RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB.} § 1, Reporters’ Note, at 12 (AM. LAW INST. 2000).

\textsuperscript{216} \textit{Id.} § 1, Reporters’ Note, cmt. b, j; \textit{Hubbard & Felix, supra} note 202, at 341–43.

\textsuperscript{217} \textit{See supra} notes 161–179 and accompanying text.

\textsuperscript{218} \textbf{RESTATEMENT (SECOND) OF TORTS} §§ 496A, 496C, 496D (AM. LAW INST. 1965). The risks from recklessness and strict liability are included in the types of risk that may be assumed. Implied assumption of risk is sometimes divided into two types: primary and secondary. Primary involves those risks that are inherent in an activity and is treated as an issue of “whether the defendant’s legal duty encompasses the risk encountered by the plaintiff.” \textit{Davenport v. Cotton Hope Plantation Horizontal Prop. Regime}, 333 S.C. 71, 508 S.E.2d 565, 570 (1998). Secondary assumption of risk is an affirmative defense that focuses on the plaintiff’s conduct. \textit{Id.} at 82, 508 S.E.2d at 571. For discussion of assumption of risk in the context of Section 402A of the \textit{Second Torts Restatement}, \textit{see supra} notes 147–154 and accompanying text.
instance of assumption of risk can also be negligent, negligence is not necessary for the encountering of the risk to be negligent; reasonable risks are also included in the defense.\footnote{219}

Though the basis of this strict liability is not always clear, it appears to be based on the ancient maxim, ‘\textit{Volenti non fit injuria}’ (which signifies that “No wrong is done to one who consents”).\footnote{220} From this perspective, the doctrine is viewed as fair because it makes a person liable for his or her deliberate choices, and thus fosters freedom and imposes accountability by barring a shift of the cost of injuries from individual choices to other persons.\footnote{221}

An initial problem with this asserted fairness is that the consent is implied rather than explicitly voluntary. More specifically, the reasonable choice to encounter a risk imposed by defendants’ negligence, rather than take an even less desirable alternative, is treated as a \textit{legally binding choice to accept any injuries that result}. There is a doctrine of express (or explicit contractual) assumption of risk which totally bars recovery from the risk.\footnote{222} However, such contracts are construed narrowly\footnote{223} and barred in certain situations.\footnote{224}

Unlike express assumption of risk, the implied “acceptance” of the loss of the right to injuries resulting from the choice to encounter a reasonable risk is neither consensual nor voluntary in the normal sense of these terms. Instead, the terms are used in the Pickwickian sense that one “voluntarily” gives money to a thief who says, “Your money or your life.”

Such a perverse use of concepts like “consensual” could apply to all reasonable choices. Life involves constant choices among risks of action (and inaction). As a result, without a limiting principle, the implied assumption of risk doctrine could apply to all our reasonable choices. For example, driving an automobile to work with the knowledge of the nature and extent of negligent driving by others is usually a reasonable choice among risks because the costs of not driving can be very high.

\footnote{219. RESTATEMENT (SECOND) OF TORTS § 496A cmt. c, d (AM. LAW INST. 1965); id. § 496C cmt. g.}
\footnote{220. Id. § 496A cmt. b.}
\footnote{221. E.g., HUBBARD & FELIX, supra note 38, at 213.}
\footnote{222. The doctrine of express assumption of risk is not included in comparative fault.}
\footnote{RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 2 (AM. LAW INST. 2000); HUBBARD & FELIX, supra note 38, at 213.}
\footnote{223. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 2 cmt. c, d (AM. LAW INST. 2000).}
\footnote{224. E.g., Tunkl v. Regents of the Univ. of Cal., 383 P.2d 441 (Cal. 1963); Hanks v. Powder Ridge Rest. Corp., 885 A.2d 734 (Conn. 2005); RESTATEMENT (SECOND) OF TORTS § 496B cmt. e-g (AM. LAW INST. 1965).}
To avoid applying the doctrine of implied assumption of risk to everyday reasonable choices, the doctrine includes the following limitation:

The plaintiff’s acceptance of a risk is not voluntary if the defendant’s tortious conduct has left him no reasonable alternative course of conduct in order to:

(a) Avert harm to himself or another, or
(b) Exercise or protect a right or privilege of which the defendant has no right to deprive him.225

Unfortunately, because of the lack of a clear guide as to rights and privileges, this limit appears to be applied in an ad hoc manner to choices among risky alternatives. For example, why is taking a faster, more direct (but riskier) route to drive to work generally viewed as a right, 226 but a similar choice concerning walking from one’s car to one’s home is not?227

Finally, denying recovery to a plaintiff who chooses to take a reasonable risk is unfair when compared to a defendant who takes a reasonable risk that results in a harm to a plaintiff. Unless a strict liability doctrine applies, the plaintiff would have no claim because a defendant who acts reasonably is not negligent.

Because of these problems, at least one state has held that “reasonable ‘assumption of risk’ is so apt to create mistakes that it is better banished from the scene,”228 and that, it is better to “stay with ‘negligence’ and ‘contributory negligence.’”229 In addition, the Apportionment of Liability Restatement appears to exclude reasonable assumption of risk as a defense.230

225. Restatement (Second) of Torts § 496E (Am. Law Inst. 1965); see, e.g., Wallace v. Owens-Illinois, Inc., 300 S.C. 518, 525, 389 S.E.2d 155, 159 (Ct. App. 1989) (holding that having to choose between two choices that “involved a risk of harm no matter which choice” was made was not voluntary).

226. See, e.g., Crouch v. Charleston & Savannah Ry. Co., 21 S.C. 495 (1884) (implicitly recognizing right to use river despite knowledge of risk that bridge overview was defective); Restatement (Second) of Torts § 496E (Am. Law Inst. 1965).


229. Id. at 241.

2. **Common Law System**

   a. **Plaintiff-Defendant**

   The common law tort rule for using fault to allocate responsibility for injuries can be roughly described as follows:

   Defendants are liable for all the legal damage caused by their negligence unless one of the defenses of contributory negligence or assumption of risk applies.\(^2\) If either defense applies, plaintiff has no recovery even if the role of any plaintiff’s negligence of risk was minor compared to the defendant’s negligence.\(^3\)

   There were no exceptions to this rule for assumption of risk. However, there were two fault-based exceptions to this rule where contributory negligence was involved.

   First, a contributorily negligent plaintiff could recover if the defendant acted recklessly or intentionally in causing the injury.\(^2\) However, this exception did not apply in the case of a reckless defendant unless the plaintiff was contributorily reckless.\(^3\)

   Second, the negligent plaintiff could recover if the defendant had the “last clear chance” to prevent the injury.\(^2\) In order to prevail under this doctrine, the plaintiff was required to show: “(1) the defendant knew (or in some cases, should have known) that, because of the plaintiff’s negligence, plaintiff was in a predicament from which he might not extricate himself; and (2) the defendant had an opportunity to avoid the injury in spite of the conduct of the plaintiff.”\(^3\)

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231. *E.g.*, HUBBARD & FELIX, supra note 38, at 201. There are other defenses. *E.g.*, *id.* at 220–44. However, these are not subject to comparative fault approaches.

232. *Id.* at 204, 212.

233. *RESTATEMENT (SECOND) OF TORTS §§ 481–482 (AM. LAW INST. 1965); HUBBARD & FELIX, supra note 38, at 207–08.

234. *RESTATEMENT (SECOND) OF TORTS § 482 (AM. LAW INST. 1965); HUBBARD & FELIX, supra note 38, at 207–08.


236. HUBBARD & FELIX, supra note 38, at 209.
b. Defendant: Defendant

“Joint tortfeasor” is a term of art which applies not only to persons who are literally acting jointly or in concert but also to persons whose independent actions have “joined” to cause an indivisible injury to the plaintiff.237 (If it is possible to identify separate damages caused by each tortfeasor, they would only be liable for the damages they caused.)238 One important aspect of the common law doctrine of joint and several liability was that the plaintiff could elect to sue one, some, or all the joint tortfeasors.239 Moreover, the plaintiff could sue them jointly in one suit or individually in separate suits.240

At common law, a defendant who was sued separately could not join other joint tortfeasors in the action; this right of joinder was the plaintiff’s exclusively.241 Each joint tortfeasor was individually liable for the full amount of the plaintiff’s loss.242 The plaintiff’s award from one defendant was not reduced because other defendants were also “jointly” liable.243 A defendant who paid damages for all or part of a plaintiff’s injuries did not have a right of “contribution.” As a result, the paying defendant could not force other joint tortfeasors to pay him anything for the damages paid.244

3. Third Restatement: Apportionment of Liability

The Apportionment of Liability Restatement addresses the use of comparative fault in terms of allocating proportionate shares of fault to plaintiffs and among defendants. This Restatement “applies to all claims (including lawsuits and settlements) for death, personal injury (including emotional distress or consortium), or physical damage to tangible property, regardless of the liability.”245 Though this Restatement recognizes that

237. Id. at 709.
238. Id. at 161–63.
239. Id.
240. Id.
241. Id. at 710.
242. Id.
243. Id. Plaintiffs were not overcompensated because they were limited to a single full recovery for injuries, and defendants were entitled to a set-off if another defendant had made partial payment. Id. at 710–11.
244. Id. at 714. At common law, a joint tortfeasor might have a right of indemnity from another person. DOBBS, supra note 148, at 1079. Indemnity is not addressed herein.
245. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 1 (AM. LAW INST. 2000).
jurisdictions disagree concerning strict liability and intentional torts, it includes such claims because of a view that the “adoption of comparative responsibility somewhat undermines the rationale” for different treatment.

a. Plaintiff-Defendant

Comparative fault systems use four approaches to the treatment of a plaintiff’s fault. First, under an equal-to-or-less-than “modified” system, the plaintiff can recover a reduced amount of damages if the plaintiff’s percentage of fault is equal to or less than the defendant’s. Second, in the less-than modified system, the plaintiff recovers some damages if the plaintiff’s percentage of fault is less than the defendant’s. Third, pure systems allow the plaintiff to recover, less the plaintiff’s share of fault, regardless of the percentage of the plaintiff’s fault. Finally, the slight-gross system allows the plaintiff to recover damages, less the plaintiff’s share of fault, only if the plaintiff’s fault is slight and the defendant’s fault is gross. Under all four systems, plaintiff’s recovery, if any, is reduced by plaintiff’s percentage share of fault. Within each of these four types, there is further variation as to the type of claims covered and the treatment of the common law exceptions to the total bar to recovery of the common law.

As with the Products Liability Restatement, the Apportionment of Liability Restatement reflects a strong normative position. More specifically, it adopts a pure system of allocating liability between plaintiffs and defendants even though it recognizes that the two modified systems are widely adopted by legislatures and that modified systems “can be supported by several rationales . . . [and are] not without principled support.”

Where legislation does not require a modified system, the pure system is recommended by the Apportionment of Liability Restatement for the following reasons:

246. Id. § 1, Reporters’ Note, at 12–17.
247. Id. § 1 cmt. b.
248. Id. § 1, Reporters’ Note, at 74–75; DOBBS, supra note 148, at 505–06; Hubbard & Felix, supra note 202, at 277–78, 329–30. For an example of the slight-gross scheme, see the South Dakota scheme at S.D. CODIFIED LAWS § 20-9-2 (2016).
250. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 6, Reporters’ Note, at 76 (AM. LAW INST. 2000). The reasons in support of the modified systems are said to be: promotion of settlements, use of comparison only in clear cases of increased fairness, and, in jurisdictions that already use such a system, high administrative costs of change. Id. Seven of ten judicially adopted schemes use the pure system; six of twenty-nine legislative schemes use pure comparative allocation. Id. at 75.
Pure comparative responsibility reflects the overwhelming majority of common-law decisions, and it better reflects the underlying goal of comparative responsibility: apportioning losses among various parties according to their respective shares of responsibility. Modified comparative responsibility retains some of the unfairness imposed by contributory negligence as an absolute bar.\textsuperscript{251}

Express contractual assumption of risk is excluded from comparative fault allocation.\textsuperscript{252} This approach is taken to enable “parties to agree which of them should bear the risk of injury . . . .”\textsuperscript{253} These contracts are subject to strict construction and unenforceable where public policy bars such contracts.\textsuperscript{254}

Section 8 adopts two factors for assigning percentages of responsibility:

(a) the nature of the person’s risk-creating conduct, including any awareness or indifference with respect to the risks created by the conduct and any intent with respect to the harm created by the conduct; and

(b) the strength of the causal connection between the person’s risk-creating conduct and the harm.\textsuperscript{255}

\textit{b. Defendant:Defendant}

In the years preceding the adoption of the \textit{Apportionment of Liability Restatement}, the common law system for allocating liability among joint tortfeasors\textsuperscript{256} was changed by two types of statutory schemes. First, either by statute or judicial decision, the states granted the right to a tortfeasor who had paid a judgment or settlement to a plaintiff to seek contribution from other joint tortfeasors.\textsuperscript{257} Second, comparative fault schemes were established that

\begin{itemize}
  \item \textsuperscript{251} \textit{Id}.
  \item \textsuperscript{252} \textit{Id.} § 2.
  \item \textsuperscript{253} \textit{Id.} § 2 cmt. b.
  \item \textsuperscript{254} \textit{Id.} § 2 cmt. d, e, h.
  \item \textsuperscript{255} \textit{Id.} § 8.
  \item \textsuperscript{256} See \textit{supra} notes 237–244 and accompanying text for discussion of the common law scheme.
  \item \textsuperscript{257} DOBBS, \textit{supra} note 148, at 1078–79.
\end{itemize}
used comparative fault to allocate liability between the plaintiff and defendants and among defendants.\textsuperscript{258}

Because of the wide variation in these schemes,\textsuperscript{259} the Apportionment of Liability Restatement defers to the law of each jurisdiction\textsuperscript{260} and addresses the liability of multiple tortfeasors in terms of multiple tracks.\textsuperscript{261} To the extent that contribution is involved, a comparative system is adopted.\textsuperscript{262} Where each defendant caused a different injury to the plaintiff, each distinctly caused injury is allocated to each defendant separately.\textsuperscript{263}

4. South Carolina

\textit{a. Plaintiff:Defendant}

South Carolina adopted comparative fault in a somewhat roundabout fashion. In 1984, the South Carolina Court of Appeals adopted “comparative negligence” in \textit{Langley v. Boyter}.\textsuperscript{264} On appeal, the supreme court quashed the opinion because the supreme court had previously denied plaintiff’s petition to argue against precedent.\textsuperscript{265} Six years later, the supreme court adopted the following comparative negligence scheme in \textit{Nelson v. Concrete Supply Co.}\textsuperscript{266}:

For all causes of action arising on or after July 1, 1991, a plaintiff in a negligence action may recover damages if his or her negligence is not greater than that of the defendant. The amount of the plaintiff’s recovery shall be reduced in proportion to the amount of his or her negligence. If there is more than one defendant, the plaintiff’s

\textsuperscript{258} Id. at 1079–91.
\textsuperscript{259} RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 17, Reporters’ Note, at 149–59 (AM. LAW INST. 2000) (using series of tables to illustrate range of alternatives).
\textsuperscript{260} Id. §§ 10, 17.
\textsuperscript{261} Id. §§ A18–E19.
\textsuperscript{262} Id. § 23.
\textsuperscript{263} Id. § 26.
\textsuperscript{264} 284 S.C. 162, 325 S.E.2d 550 (Ct. App. 1984).
\textsuperscript{265} Langley v. Boyter, 286 S.C. 85, 332 S.E.2d 100 (1985). The court of appeals was aware of this denial but rejected “the suggestion that this denial constituted a decision by the [South Carolina Supreme] Court on the merits of this case.” \textit{Langley}, 284 S.C. at 182, 325 S.E.2d at 562.
\textsuperscript{266} 303 S.C. 243, 399 S.E.2d 783 (1991).
negligence shall be compared to the combined negligence of all defendants.\textsuperscript{267}

The adoption of this scheme in Nelson was unusual in two ways. First, it was done in the form of dictum because the court found “as a matter of law [there was] no negligence on the part of” the defendant.\textsuperscript{268} Second, the court’s decision was extremely brief. Rather than provide reasons, the opinion simply states: “For an exhaustive analytical discussion of the history and merits of comparative negligence, we refer the bench and bar to the opinion of Chief Judge Sanders in Langley v. Boyter . . . ”\textsuperscript{269}

The reasons given by the court of appeals in Langley parallel those given in other states. More specifically, in addition to noting the widespread support for, and adoption of, comparative negligence, the opinion relies on the desirability of using comparisons of fault rather than allowing a defendant to escape all liability where a plaintiff’s conduct was no greater than the defendant’s, the confusion that often resulted from the application of the exceptions, and the permissibility of judicial adoption.\textsuperscript{270}

The reason for the choice of the no-greater-than comparative scheme in Langley was as follows:

Unlike the pure version, it does not allow a plaintiff to recover when he has been the most at fault in causing an accident. But, unlike the not-as-great-as version, it does not allow a defendant to escape all responsibility for an accident which he was equally at fault in causing. Instead, the not-greater-than version of the doctrine strikes the reasonable balance of providing that parties equally at fault in causing an accident share equally in its cost.\textsuperscript{271}

The court was “also influenced by the conservative approach taken by our Supreme Court in abrogating doctrines of common law.”\textsuperscript{272}

Numerous issues concerning comparative fault were not addressed in Langley. Thus, in the years after the decision, it was necessary for other decisions to address many of these issues. Donze is an example of this process.

\textsuperscript{267} Id. at 245, 399 S.E.2d at 784 (citations omitted).
\textsuperscript{268} Id. at 245 n.1, 399 S.E.2d at 784 n.1.
\textsuperscript{269} Id. at 244, 399 S.E.2d at 784.
\textsuperscript{270} Langley, 284 S.C. at 169–79, 182–86, 325 S.E.2d at 554–60, 562–64.
\textsuperscript{271} Id. at 189, 325 S.E.2d at 565.
\textsuperscript{272} Id.
Other decisions addressed the role of the following doctrines in comparative fault.

1. Implied assumption of risk is included in comparative fault. 273
2. Express assumption of risk is not included. 274
3. Recklessness, gross negligence, and willful or wanton conduct are included. 275
4. Intentional torts are not included. 276
5. Last clear chance is included. 277
6. Punitive damages awards are not included. 278

As more items became included in the comparative scheme, it became clear that the term “comparative negligence” was no longer accurate. In 2001, the South Carolina Supreme Court noted that South Carolina’s approach “is essentially a comparative fault system” and that comparative fault and comparative negligence are equivalent. 279

b. Defendant

In 1988, the South Carolina legislature changed the common law rule barring a joint tortfeasor who had paid an award of damages as a settlement from seeking contribution from another joint tortfeasor. 280 The statute provides a right of “pro rata” contribution 281 among persons “jointly or severally liable in tort” 282 except for cases involving an intentional tort 283 or “breaches of trust or other fiduciary obligation.” 284 The right of contribution must be asserted against the other joint tortfeasors in a separate action, unless the plaintiff has included the defendants involved in the suit by the plaintiff,

274. Davenport, 333 S.C. at 79–80, 508 S.E.2d at 569–70.
276. Id. at 293 n.3, 709 S.E.2d at 615 n.3.
282. Id. § 15-38-20(A).
283. Id. § 15-38-20(C).
284. Id. § 15-38-20(G).
in which case, the contribution issues are addressed after the plaintiff’s suit for liability has been resolved.\textsuperscript{285}

In 2005, as a part of a comprehensive “tort reform” package, the legislature adopted a comparative fault scheme for joint tortfeasors. Under this scheme, traditional common law joint and several liability applies to the following types of defendant: (1) any defendant whose fault was fifty percent or more of the combined fault of all defendants and the plaintiff; and (2) any defendant whose conduct was “willful, wanton, reckless, grossly negligent, or intentional or conduct involving the use, sale, or possession of alcohol or drugs.”\textsuperscript{286} As to all other defendants, joint and several liability is abolished and each of these defendants is liable only for that defendant’s percentage of fault.\textsuperscript{287}

The statute provides that percentages of fault are to be determined in a two-step process. First, the fact finder will determine plaintiff’s recoverable damages using the comparative fault scheme described in Section II.C.4 above.\textsuperscript{288} Second, where the preceding determination indicates that two or more defendants are liable for plaintiff’s damages, and at least one defendant has moved for an allocation between or among defendants, the court will determine the percentage share of each defendant as follows: (a) allow oral argument by the parties (but not new evidence) on the issue; and (b) specify in a special verdict the percentage of fault of each defendant whose conduct proximately caused the plaintiff’s injuries.\textsuperscript{289} Where a settlement is involved, “setoff from any settlement received from any potential tortfeasor prior to the verdict shall be applied in proportion to each defendant’s percentage of liability. . . .”\textsuperscript{290}

\textit{D. Tort Reform}

Another important development of the latter part of the twentieth century was the emergence of the “tort reform” movement. This movement consisted of a diverse group of repeat players on the defense side of tort litigation who worked to “reform” tort doctrine in their favor. Initially, these efforts consisted of ad hoc efforts to address a series of “crises,” primarily in terms of the cost and availability of liability insurance, including products liability

\textsuperscript{285} HUBBARD & FELIX, supra note 38, at 716.
\textsuperscript{286} Id. at 712.
\textsuperscript{287} Id.
\textsuperscript{288} Id.
\textsuperscript{289} Id. at 712–13.
\textsuperscript{290} Id.
insurance. In the 1980s, the tort reform movement began to develop a more permanent institutionalized approach to the push for "reform," primarily through legislation at the state level.

Traditionally, reform of tort law proceeded slowly as courts addressed arguments based on policy and changing times. Legislative reforms were relatively rare and often consisted of adopting alternatives to tort, like workers' compensation, rather than specific changes in tort doctrine.

The tort reform movement has changed the nature and techniques of reform in many ways. For example, it has relied on the use of legislation, politics, and massive publicity campaigns that use rhetorical references to crises, "lawsuit abuse," and "judicial hellholes." These techniques had considerable success in shaping both products liability and comparative fault. The goals, techniques, and success of this movement were part of a broader effort begun in the 1970s by large corporations to reduce both regulatory and judicial limits on corporate actions.

Several examples illustrate the success of the tort reform movement in changing rules concerning products liability. Some states have adopted a rebuttable presumption that a product that complied with government regulations was not defective and that punitive damages should not be imposed. Statutes of repose were adopted to bar suit for product defect after a set time from the sale of the product. Because product manufacturers tend to be the "deep pocket" in a products liability claim, there was a concern not only to eliminate joint and several liability for joint tortfeasors but also to eliminate it in particular ways. The movement's push to reduce both

291. OWEN, supra note 117, § 1.3, at 23–24.
294. Id. at 468–69.
295. Id. at 472–74.
297. See Hubbard, supra note 292, at 514.
298. Id.
299. Id. at 513. See infra notes 307–314 and accompanying text for discussion of this point.
compensatory and punitive damages awards was designed in part to help products sellers.\textsuperscript{300} In 2011, the Florida legislature adopted a statute explicitly mandating comparative fault in crashworthiness cases.\textsuperscript{301} The Act containing this statute explicitly indicates its intent to “overrule” \textit{D’Amario v. Ford Motor Co.},\textsuperscript{302} which held that comparative fault would not apply in crashworthiness cases.\textsuperscript{303} The movement was also involved in shaping the \textit{Products Liability Restatement}.\textsuperscript{304} The tort reform movement was involved in South Carolina legislation, including the replacement of joint and several liability with a comparative allocation scheme in 2005\textsuperscript{305} and limitations on the imposition of punitive damages in 2011.\textsuperscript{306}

The push for changes in joint and several liability provides an example of the negative impact of tort reform on recovery for plaintiffs. “Until the tort reform movement appeared, joint and several liability was not controversial.”\textsuperscript{307} Where no statute controls, “the majority of courts . . . have held that comparative fault does not require modification of joint and several liability.”\textsuperscript{308} Within the legislative arena, however, the techniques of the tort reform movement resulted in the widespread abolition of joint and several liability. The importance of the way these changes are made can be seen by comparing the common law scheme with the comparative scheme.

Under the common law doctrine, a plaintiff injured in an automobile accident who was not at fault could recover from a negligent driver for damages caused by the initial collision and for the second collision. The plaintiff could also recover damages for the second collision from the seller of a vehicle which had a defect in terms of crashworthiness that resulted in

\begin{itemize}
  \item \textsuperscript{300} DOBBS, supra note 148, § 391; Hubbard, infra note 422, at 485–88 (collateral source rule), 492–509 (damages).
  \item \textsuperscript{301} See FLA. STAT. ANN. § 768.81(d) (West 2017).
  \item \textsuperscript{302} 2011 Fla. Laws, ch. 2011-215 § 2.
  \item \textsuperscript{303} D’Amario v. Ford Motor Co., 806 So. 2d 424 (Fla. 2001); see 2011 Fla. Laws, ch. 2011-215 § 2.
  \item \textsuperscript{304} See, e.g., Halliday v. Sturm, Ruger & Co., 792 A.2d 1145, 1154–55 (Md. Ct. App. 2002) (noting that Section 2 “has been criticized as representing an unwanted ascendency of corporate interests under the guise of tort reform”); supra notes 183–184 (discussing successful effort by defense bar membership to change a draft of comment f to Section 16 to the adopted version, which is more favorable to sellers).
  \item \textsuperscript{305} See supra notes 286–290 and accompanying text.
  \item \textsuperscript{306} See HUBBARD & FELIX, supra note 38, at 641, 644–45, 650–52, 750 (discussing “Fairness in Justice Act”).
  \item \textsuperscript{307} DOBBS, supra note 148, at 1085. Dobbs notes that the arguments for eliminating joint and several liability are “overrated.” Id. at 1086.
  \item \textsuperscript{308} RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § C21, Reporters’ Note, at 214 (AM. LAW INST. 2000).
\end{itemize}
enhanced injuries. The recovery from the seller for injuries in the second collision would not be reduced by any negligence by the negligent driver. This recovery could be crucial because, as a case like Donze v. General Motors illustrates, the enhanced injuries can be much greater than the injury that would have occurred without the product defect.

The change from joint and several liability to comparative fault can have a tremendous impact on a plaintiff’s recovery in a case like this. Assuming, for example, that damages of $1,000,000 result from the second collision, a fault-free plaintiff under the common law system could sue the manufacturer for the full $1,000,000. In contrast, if a comparative fault scheme is used to allocate the liability, and the jury found the driver was 60% at fault and the manufacturer was 40% at fault, each would be liable for only the respective percentage shares of $600,000 for the driver and $400,000 for the seller. It is likely that the driver may have had, at most, $50,000 in liability insurance to handle the liability. As a result, the plaintiff would only get a total of $450,000. (With the common law system of joint and several liability and a contribution scheme, plaintiff would receive $1,000,000 from the seller, who would get $50,000 from the driver.)

This effect results because the problem of uncollectibility of judgments presents “the critical question . . . [of] who should bear the risk of insolvent parties.” The Uniform Comparative Fault Act provided for proportional reallocation of uncollectible amounts. However, only one of the five existing schemes addressed in the Apportionment of Liability Restatement provides for reallocation based on comparative fault of the uncollectible portion of $450,000. The South Carolina approach, which has no provision for uncollectibility of judgments, is an example of most of the schemes that have been adopted. Where proportional reallocation of an uncollectible judgment is used, because the plaintiff in the example was not at fault, a proportional reallocation scheme would result in the seller being liable for the entire uncollectible amount of $450,000.

309. See DOBBS, supra note 148, at 203–08 and text accompanying note 252 for a discussion of contribution.


312. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § C21 (AM. LAW INST. 2000).


314. See DOBBS, supra note 148, at 1085.
This approach to the uncollectable amount has two beneficial effects. First, the imposition of the additional $550,000 forces the manufacturer to apply the cost-benefit test to design in terms of a liability cost ($950,000) that is closer to the full accident costs of $1,000,000 rather than the lower liability figure of $400,000. Second, it provides a better approach for addressing the impact of the accident on the plaintiff.

E. Importance of Context

The historical context of developments in products liability is important for a number of reasons. For example, the decision in the influential California case of Daly v. General Motors Corp., which held that comparative fault applied to strict liability, was shaped in part by the desire to avoid a possible total bar to recovery for the plaintiff. If comparative fault had already been applied to strict liability, this concern would not have existed.

The tort reform movement also has had an impact on tort law. In terms of products liability, this impact is reflected in a wide range of areas, including statutory change and the adoption of the Products Liability Restatement.

IV. POLICY

Tort is a judicially administered system of corrective justice for allocating injury costs resulting from a “wrong,” defined as a breach of duty in tort, to a victim. Because this definition encompasses a broad range of “duties” (and thus of “wrongs”), there is no single test or definition of duty or of wrong in tort law generally or in some of the specifics of products liability. The determination of the duty imposed on a person is “a purely legal question” for courts and legislatures; factual issues concerning whether a legal duty existed in a particular case is a matter for the jury. Section 7 of the Third Restatement states the basic framework for the duty of due care as follows:

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315. See infra notes 325–337, 416–420 and accompanying text.
316. See infra notes 337–345 and accompanying text.
318. See supra notes 80–83 and accompanying text.
319. See supra notes 297–314 and accompanying text.
320. See supra notes 113–116 and accompanying text.
321. See, e.g., Hubbard, supra note 292, at 445–52 (discussing three goals of tort law: deterrence/efficiency, corrective justice/fairness, and compensation, and arguing that compensation is a means of achieving the other two goals, not a goal in itself).
323. Id. § 7 cmt. a (emphasis added).
(a) An actor ordinarily has a duty to exercise reasonable care when the actor’s conduct creates a risk of physical harm.

(b) In exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification.

A judicial ruling “that no liability should be imposed on actors in a category of cases... should be explained and justified based on articulated policies or principles that justify exempting these actors from liability or modifying the ordinary duty of reasonable care.”

Though “[o]rdinary language makes it awkward to speak of a person having a duty of care to himself or herself... cases arise in which courts hold that a plaintiff’s recovery should not be affected by [comparative responsibility rules regarding] the plaintiff’s own negligent conduct.” The approach adopted in Donze is an example of a case where a court makes such a legal determination that comparative fault will not affect a plaintiff’s recovery. The following part of this Article argues that two basic policy concerns of tort law—efficiency and fairness—support the Donze approach and satisfy the Restatement’s concern that this approach “should be explained and justified on articulated policies or principles.”

A. Efficiency

Accident law, including products liability, can be viewed in terms of three efficiency goals. One goal is the reduction of the number and severity of accidents in a cost-effective manner. Second, after accidents have occurred, the costs of these accidents should be allocated efficiently. Finally, the administrative costs of addressing the first two goals should be addressed in a

324. Id. § 7 cmt. j, at 82.
325. Id. § 7 cmt. h.
326. GUIDO CALABRESI, THE COSTS OF ACCIDENTS 26 (1970) (“[I]t is axiomatic that the principal function of accident law is to reduce the sum of the costs of accidents and the costs of avoiding accidents.”). Because of space limitations, the discussion of goals in this Article does not examine many of the important complexities of efficient accident cost reduction. Calabresi’s book contains an excellent review of these details.
327. Id. at 27–28.
fair, efficient manner. Because these efficiency goals can conflict with one another and with other types of goals, balancing and choices are necessary.

Tort law is only one part of the overall system used to address these diverse goals. Therefore, administratively efficient reduction of accident costs requires coordination within the total system of accident law. Such coordination is beyond the scope of this Article.

Tort law addresses the reduction of the number and severity of injuries with a market approach. Where products are concerned, the use of the market approach is complicated by the need to address an underlying issue that is often overlooked: when are product-caused injuries a cost of selling (sellers incur the costs) or a cost of living (victims incur the cost)? In part, debates about strict liability and comparative fault are about the answer to this question.

One answer to this question is to use the cost-benefit test for design and warnings/instructions adopted by the Products Liability Restatement. The effect of this test is that sellers incur accident costs when the costs of a safety measure are less than the injuries prevented. Where the safety measure’s cost exceeds the accident costs, victims incur the costs.

In terms of the corrective justice approach of tort law, requiring cost-effective expenditures on safety plays a central role in defining the duties to potential victims owed by product sellers. Given this role, corrective justice and the efficient reduction of product-caused injury costs are not necessarily in conflict with each other. Instead, where efficiency defines duties, the corrective justice system of products liability tends to promote efficiency in reducing the number and severity of accidents.

The role for efficiency in defining duty can be illustrated in simplified terms of economic analysis by considering two possible situations. First, accident costs could be avoided with a cost-effective design. In this case, liability for lack of that design incentivizes the manufacturer to use that efficient safety design. In other words, this liability deters manufacturers from giving inadequate weight to accident prevention.

Second, it is efficient not

328. Id. at 28.
329. Id. at 28–33.
331. CALABRESI, supra note 326, at 133–73.
to incur safety costs if these costs exceed the accident costs that would be prevented. Therefore, victims bear the costs of injuries in such cases. The result is that the manufacturer has a privilege to impose efficient accident costs on victims. Moreover, under both traditional and comparative fault schemes, victims may bear part (or all) of the loss where victim fault is also a cause even though the manufacturer did not use an efficient safety design.

This simplified model has two shortcomings that are relevant in a case like *Donze v. General Motors*.

First, partial or total denial of recovery for a victim whose fault was a cause of the injury is based on the assumption that humans are rational. Such an assumption simplifies analysis but ignores human psychology. The concern to incorporate a realistic view of humans has given rise to a new approach of “behavioral economics,” which has had such an important impact that its “founder” recently received the Nobel Prize. This field is too vast to address herein. Therefore, for the purposes of this Article, it is sufficient to note that actual behavior is sufficiently important that we need to address it in considering the efficient allocation of accident costs. In particular, humans are not very good at assessing risk and are, therefore, likely to make inefficient (negligent) choices.

Given their weakness in making and implementing risk...
assessments, imposing liability on humans often has very little effect on incentivizing them to be rational and efficient.\textsuperscript{337}

In assessing efficient accident cost reduction, it is important to consider an important difference between humans and corporations. Corporate manufacturers must act through humans, but automobile manufacturers are able to set up administrative systems to focus on rational assessment of risk and to incentivize human employees to use these systems. As a result, corporations faced with negligence or strict liability regimes are much better at evaluating options. Therefore, the liability incentive has more effect on their actions than it does on individual humans.\textsuperscript{338}

The second problem with the efficient accident prevention model is that the manufacturer’s privilege to impose efficient accident costs on victims can conflict with the concern for addressing the post-accident costs. After an accident, spread losses (for example, through insurance) have a much lesser effect on victims (and on persons with relationships with victims) than lump sum losses.\textsuperscript{339} In other words, the distributional impact of the privilege to impose accident costs on victims if it is inefficient to avoid those costs matters: (1) in terms of efficiency because of the reduced overall costs resulting from spreading, and (2) in terms of a fair distribution.\textsuperscript{340} Such spreading can be achieved if the manufacturer includes an “insurance premium” in the price of each car to cover the costs of nonnegligent injuries in a strict liability scheme.\textsuperscript{341}


\textsuperscript{338} See CALABRESI, supra note 326, at 245–46 (discussing workers’ compensation and accident costs); Popper, supra note 336, at 181–200; Schwartz, supra note 336, at 386–87, 405–13, 422–23; Shuman, supra note 336, at 127–29 (distinguishing “impulsive” behavior of humans with “deliberate” behavior of corporate entities like automobile manufacturers).


\textsuperscript{340} For a critique of the fairness of the distributional impacts of tort law, see, for example, George P. Fletcher, \textit{Fairness and Utility in Tort Theory}, 85 HARP. L. REV. 537 (1972) (contrasting two paradigms for addressing tort liability: reciprocity (based on fairness) and reasonableness (based on maximizing social utility)).

\textsuperscript{341} See, e.g., Kimco Dev. Corp. v. Michael D’s Carpet Outlets, 637 A.2d 603, 606 (Pa. 1993) (quoting Azarello v. Black Bros. Co., 391 A.2d 1020, 1023 (Pa. 1978)) (“The realities of our economic society as it exists today forces the conclusion that the risk of loss for injury resulting from defective products should be borne by the suppliers, principally because they are in a position to absorb the loss by distributing it as a cost of doing business.”); supra note 155 and accompanying text.
Generally, using common law tort rather than legislation to spread losses for accidents in this way is subject to two basic objections. First, using a judicially administered liability system like tort involves far higher administrative costs than using first party insurance like health insurance or life insurance. Second, serious questions of competency and legitimacy are raised if courts, rather than legislatures, compel a defendant to compensate a victim’s lump sum loss simply because the defendant is in a better position to spread the loss.

Despite these objections, spreading can play a legitimate role as a “tie-breaker” where the manufacturer and victim are both at fault or are both innocent of any wrongdoing. For example, partly because manufacturers are usually better at spreading costs than individuals, the Products Liability Restatement uses spreading to justify strict liability for manufacturing defects. For similar reasons, all sellers in the chain of distribution, including those who had no role in design or manufacturing, are strictly liable for injury from product defects and from misrepresentation. The California approach of using time of trial rather than state of the art also illustrates the use of spreading as a tie-breaker.

342. A third objection is sometimes raised. The following selection from Coney v. J.L.G. Indus., Inc., 454 N.E.2d 197 (Ill. 1983), indicates this objection to spreading a basis for imposing liability where a victim is partly at fault:

Further, the risk associated with the product defect is still spread among all consumers. Only that portion due to plaintiff’s own conduct or fault is borne by the plaintiff. Where the allocation of losses properly can be apportioned, we see no reason to spread the cost of the loss resulting from plaintiff’s own fault on to the consuming public.

This type of argument assumes that the “consuming public” is composed of “reasonable persons” who are never negligent. This assumption is not valid because no human satisfies this standard consistently. See supra notes 335–336 and accompanying text. Consequently, being “at fault” is, to a considerable extent, a matter of luck rather than being evidence of a character trait. See infra notes 374–380 and accompanying text.

As a result of the somewhat random nature of victims’ fault, all of the “public” is “insured” under a loss spreading liability scheme. Ignoring this public coverage of loss spreading is like complaining that, because only sick persons get payments from hospital insurance, well persons are unfairly subsidizing the payments.

344. Id. at 450–52.
345. See supra notes 161–163 and accompanying text.
346. See supra notes 164–165, 166–167 and accompanying text.
347. See supra notes 143–145 and accompanying text.
B. Fairness

Arguments based on fairness often overlook the following issue: who is entitled to fairness in terms of law or morals? One reason for ignoring this question is that we simply assume that fairness applies only to humans, who obviously have a right to fair treatment by other humans. However, because automobile manufacturers are corporate enterprises, another question arises: corporations are legal persons, but are they entitled to fairness in the same way as humans? This Section of the Article addresses this question and argues that corporations are not entitled to fairness in the same way as humans.

1. Humans

In A Theory of Justice, John Rawls develops his concept of justice as fairness. Rawls views an autonomous person in terms of “a human life lived according to a plan.” The “notion of a plan” is used to “characterize the coherent, systematic purposes of the individual, what makes him a conscious, unified moral person.” Rawls uses this notion to define “a person’s good as the successful execution of a rational plan of life.” Though there are various ways to view the relationship between expectations and a life plan, a person’s life plan is affected by the extent to which expectations are satisfied. Consequently, fairness-based views of morality and justice should be concerned with the extent to which the legal system protects reasonable expectations underlying humans’ life plans.


349. Id. at 358; see id. at 450–56 (discussing autonomy); JOHN RAWLS, POLITICAL LIBERALISM 18–22 (1993) [hereinafter RAWLS, LIBERALISM]. Rawls’s concept of a life plan was adapted from the views of Josiah Royce set forth in THE PHILOSOPHY OF LOYALTY (1908).

350. RAWLS, THEORY, supra note 348, at 380.

351. See, e.g., id. at 80–81 (comparing “satisfactions to be expected when plans are executed” with knowing “how the distribution of goods to the more favored affects the expectations of the most disfavored”).
Justice concerns are also involved in the substantive context of expectations. Consequently, the manner in which a legal system addresses the goals of accident law should be just. The arguments given in support of “strict liability” for product-caused injury reflect a scheme of justice that attempts to balance the concern for efficiency and innovation in manufacturing with a distributive concern for the protection of the reasonable expectations of humans.\textsuperscript{353} In terms of this balanced scheme, the approach of the \textit{Products Liability Restatement} to design defects is arguably unjust because it places so much emphasis on efficiency that human injuries and frustrated expectations are viewed simply as unfortunate but necessary costs that, in effect, subsidize cheaper products.

2. \textit{Corporations}

Products liability law focuses on the responsibilities of commercial product sellers, which are almost always for-profit corporate entities. In the case of automobiles, these corporations also tend to be very large. Products liability rules are often based on a concern for this corporate nature.\textsuperscript{354} In contrast, comparative fault schemes address “issues of apportioning liability among two or more persons.”\textsuperscript{355} Their “underlying goal . . . [is] apportioning losses among various parties according to their respective shares of responsibility.”\textsuperscript{356} These comparative schemes focus on parties and show little or no concern for whether human persons or corporate persons are the parties involved.\textsuperscript{357} This difference from products liability in considering the nature and role of corporate entities has an important impact in the treatment of the comparative allocation of liability between corporate defendants and human plaintiffs.

Corporations have been recognized as nonnatural persons for centuries. However, because these “corporate persons” lack the physical dimensions necessary to act and think as a human person, their decisions and actions can only be undertaken by human agents acting on behalf of the entity. As noted

\textsuperscript{353} See supra note 155 and accompanying text.
\textsuperscript{354} See, e.g., supra note 155 and accompanying text.
\textsuperscript{355} \textit{RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB.} § 1 (AM. LAW INST. 2000).
\textsuperscript{356} Id. § 7, Reporters’ Note, at 76.
\textsuperscript{357} See id. § 8 (discussing factors for assigning percentages of responsibility without regard to nature of persons involved). This Restatement arguably shows some concern for the cost-spreading ability of corporate liability insurance companies in Section 9, which provides for offsetting judgments except where a liability insurer is involved.
centuries ago, a corporation “has no soul to be damned, and no body to be kicked.”

Because they lack the characteristics required for human personhood, the rights granted to corporate persons are extremely limited. For example, corporations have owners, who can buy, sell, or dissolve (kill) a corporation with virtually no substantive restraints. Though corporations are persons for some purposes under the Constitution, they do not have a right to life or physical liberty. Nor do they have the right to vote under the provisions of the Thirteenth Amendment.

Corporate personhood is simply a fictional legal status designed to implement a set of complex legal relationships among human persons. When the treatment of the corporation as a separate legal entity does not further this goal, its personhood is often abandoned. Thus, for example, because the ability to buy, sell, and dissolve corporations is crucial to implementing the rights and duties of the humans involved, we view the corporation as a thing, not a person, in terms of this ability.

Fairness arguments about tort law often rely on moral arguments that emphasize human rights and values like freedom and equality. Such

358. John C. Coffee, Jr., “No Soul to Damn: No Body to Kick”: An Unscandalized Inquiry into the Problem of Corporate Punishment, 79 Mich. L. Rev. 386, 386 (1981) (quoting the Lord Chancellor of England, Edward, First Baron Thurlow); see, e.g., Citizens United v. FEC, 558 U.S. 310, 466 (2010) (Stevens, J., dissenting) (noting that “corporations have no consciences, no beliefs, no feelings, no thoughts, no desires”); Elizabeth Wol gast, Ethics of an Artificial Person: Lost Responsibility in Professions and Organizations 86 (1992) (concluding that “it is implausible to treat a corporation as a member of the human community, a member with a personality (but not a face), intentions (but no feelings), relationships (but no family or friends), responsibility (but no conscience), and susceptibility to punishment (but no capacity for pain”).

359. See, e.g., Citizens United, 558 U.S. at 385 (holding that corporations’ First Amendment right to free speech was violated by statutory restrictions on use of corporate funds to support or oppose political candidates within thirty days of elections).

360. See, e.g., Robert Charles Clark, Corporate Law § 1.2 (1986) (listing advantages of corporate form as a legal entity, separate and distinct from its owners (shareholders) as: limited liability, transferability of assets, efficiency in carrying out legal actions, and centralized managerial power); J. Storrs Hall, Beyond AI: Creating the Conscience of the Machine 237 (2007) (noting one advantage of a corporate firm is that “[a] subsection of the market process is frozen into an encapsulated pattern of contractual relationships, which eliminates the market overhead for commonly repeated transactions”); Larry D. Soderquist, Theory of the Firm: What a Corporation Is, 25 J. Corp. L. 375, 381 (2000) (“While the conception of the corporation as an artificial person has great utility . . . , it is . . . actually a quick, shorthand reference to a corporation’s rights and obligations.”); see also Citizens United, 558 U.S. at 466 n.72 (Stevens, J., dissenting) (reviewing several theories of the corporation and concluding that “[i]t is not necessary to agree on a precise theory of the corporation to agree that corporations differ from natural persons in fundamental ways. . . .”).
arguments raise difficult threshold questions concerning the definition and nature of morality as well as the relationships among the concepts of morality, law, and justice. Addressing such questions is beyond the scope of this Article. However, it is useful to keep in mind that, though concepts (and conceptions) like justice and morality are important, they are also extraordinarily challenging to articulate, organize, and apply. In addition, multifactor tests of morality that capture the complexity of the world present the challenge of balancing the factors in a way that is not simply ad hoc.

David Owen, a leading products liability scholar, has constructed a multifactor approach for addressing the relationship between morality and products liability law. His approach is based on a blend of: (1) the views of rights-oriented philosophers like Immanuel Kant, John Rawls, and Ronald Dworkin with (2) the views of utilitarian philosophers like Jeremy Bentham and John Stuart Mill. Owen uses this blend to argue that fault (negligence) is a necessary requirement for imposing liability for accidental injury, including liability for design and warning defects. To Owen, negligence is best expressed by the efficiency formula in Learned Hand’s calculus of risk, which imposes liability only where the defendant failed to use a cost-effective

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362. See, e.g., RONALD DWORKIN, LAW’S EMPIRE 70–72 (1986) (illustrating distinction between concept and conception by comparing concept of courtesy with conceptions of the conduct required by the concept).


Owen argues in The Fault Pit, supra at 704, that strict liability for product defects was the work of “well-meaning but misguided reformers” whose “infatuation . . . with a rule of strict liability, in opposition to a rule of fault or negligence, is now beginning to take on an air of quaintness, reflecting the exuberant excesses of youth.” However, he later argues for strict liability in some aspects of products liability. David G. Owen, The Moral Foundations of Products Liability Law, 68 NOTRE DAME L. REV. 427, 463–68, 482–83, 502–03 (1993) [hereinafter Owen, Moral Foundations] (discussing strict liability for innocent misrepresentation and manufacturing defects, which are viewed as most likely to result from negligence).
approach to accident prevention and which is applied on the basis of reasonable foreseeability.\textsuperscript{365}

In support of his claim that his use of the calculus of risk approach is a moral scheme that blends rights and utility,\textsuperscript{366} Owen relies on concepts of each human’s equal right to freedom and autonomy and of the corresponding responsibilities that he asserts go with freedom and autonomy.\textsuperscript{367} He uses these responsibilities to support the following claim concerning products liability: “[M]ost consumers are generally capable of acting reasonably, and so their failure to conform their conduct to normal, proper standards ordinarily reflects a moral failure of responsibility.”\textsuperscript{368} Using this claim of humans’ general capability to act reasonably, Owen argues that product users should “bear responsibility for harm that results from uses that fall below a norm that fairly may be expected of ordinary persons”\textsuperscript{369} and “should be responsible for

\begin{itemize}
  \item 367. \textit{See} Owen, \textit{Foundations of Fault}, \textit{supra} note 364, at 202–04 (discussing freedom), 206–12 (discussing equality), 212–15 (discussing common good), 216–20 (discussing conflicts among persons), 223–28 (arguing for fault as proper way of achieving moral equality for accidental harm); Owen, \textit{Moral Foundations}, \textit{supra} note 364 (presenting arguments similar to those in \textit{Foundations of Fault}, \textit{supra} note 364, with focus on products liability and with a different organizational scheme); Owen, \textit{The Fault Pit}, \textit{supra} note 364, at 703–16 (arguing that courts generally reject strict liability for accidental harm), 716–24 (arguing that fault, defined in terms of Learned Hand’s calculus of risk, is the proper scheme for allocating accidental losses among autonomous persons).
  \item 368. Owen, \textit{Moral Foundations}, \textit{supra} note 364, at 505. Owen supports this claim with the following argument:
    To hold otherwise would derogate the dignity of consumers as autonomous beings who are morally accountable for the harmful consequences of their chosen actions that they should know to be unsafe. Consumers cannot fairly demand to be relieved of the harmful consequences of mistakes attributable to their moral failures, nor to have such harm imposed instead upon other persons free of moral blame. Shifting and spreading losses in such cases would deny the equal worth of other, blameless persons, and it would deny as well the moral responsibility of the careless consumer. But moral responsibility for product accidents often is shared between the user and the maker, for often product accidents are attributable to moral failings of both parties. In such cases, legal responsibility generally should be apportioned according to some fair and practicable standard of comparative fault.
  \item 369. \textit{Id}.
\end{itemize}
foreseeable harm caused by product uses that they should know to be unreasonably dangerous.”

Owen uses this scheme of the moral responsibilities of users to address the issue presented in Donze as follows:

Although for many years I thought that a plaintiff’s conduct in causing a collision was entirely unrelated to a manufacturer’s prior responsibility to adopt reasonable design precautions against that eventuality, I now believe that both auto makers and auto drivers have roughly equivalent responsibilities to take reasonable steps to avoid and minimize injuries in automotive collisions—at bottom, quite like the duty of care all actors owe to one another when they interact in the world. Tort law, that is, broadly and fairly requires people to act with reasonable care to protect the interests of those who may be expected to be affected by their conduct.

Owen’s adoption of and use of his fault framework has three basic problems. First, negligence systems have serious problems in terms of morality because, to a considerable extent, tort liability is based on luck, which is a very questionable basis for imposing personal responsibility for accidental injuries. Humans may be, as Owen asserts, “generally capable of acting reasonably.” However, as indicated above, despite this general capability, humans consistently encounter problems in acting reasonably because they often act on the basis of flawed risk assessments. As a result, consistent compliance with the negligence standard of care, whether expressed in terms of the infallible reasonable person or of the rational application of the calculus of risk, is not possible for humans. For all of us, no matter how much we try to use due care, negligent conduct is inevitable.

As a result, it is simply a matter of luck whether: (1) an injury occurs as a result of our inevitable negligent acts; and (2) the injury that occurs is major

370. Id. at 502.
371. OWEN, supra note 117, at 1088 (emphasis added).
372. See, e.g., DWORKIN, supra note 361, at 2–3. Dworkin asserts: “People are not responsible for much of what determines their place in . . . [a market] economy. They are not responsible for their genetic endowment and innate talent. They are not responsible for the good and bad luck they have throughout their lives. There is nothing . . . about personal responsibility, that would entitle government to adopt . . . a posture” that ignores the impact of luck. Id. at 3.
374. See supra note 337 and accompanying text.
375. See supra notes 209–211 and accompanying text.
or minor.\textsuperscript{376} Thus, whether stated in terms of calculus of risk or the reasonable person, liability based in negligence results, to a considerable degree, in liability based on being unlucky in terms of the results of negligent actions. This liability is imposed despite our inability to meet the standard consistently.\textsuperscript{377} Though the use of an objective standard in the negligence system can be defended in terms of providing legal redress for injuries,\textsuperscript{378} this arbitrary luck dimension raises serious questions concerning the moral basis for imposing liability for negligence because \textit{moral} standards for blame or liability should not depend on luck.\textsuperscript{379}

Luck also has an impact on accident victims in three ways.\textsuperscript{380} First, with a negligence system, a manufacturer who designs a vehicle’s crash safety system in an efficient manner faces no liability. This privilege of manufacturers to injure efficiently means that victims of the efficient design are unlucky and, as a result, must bear a lump sum cost so that social utility can be maximized.\textsuperscript{381} Second, luck determines whether a negligent defendant can satisfy a judgment for victim’s injuries. Third, with comparative fault schemes, the victim’s right to recover is often reduced or denied because human plaintiffs, like human defendants, are not capable of consistently satisfying the negligence standard of care.

Second, Owen’s attempt to blend rights and utilitarianism is, at best, only partially successful. In terms of a moral approach to human’s responsibility for accidental harm to one another, the utilitarian calculus of risk approach based on foreseeability is a useful \textit{part} of an egalitarian scheme of liability.\textsuperscript{382} Arguably, this type of argument could also be applied to the test for design defect as follows: at the time of design/manufacture, the number and nature of potential victims are simply statistics that should be used in applying the calculus of risk; therefore, part of the “moral” solution is to include a \textit{role} for utilitarianism, which gives each “statistical person” equal concern and respect.

\textsuperscript{376} See supra notes 209–211 and accompanying text.


\textsuperscript{378} Goldberg & Zipursky, supra note 377, at 1149–63; Keating, supra note 377.


\textsuperscript{380} Goldberg & Zipursky, supra note 377.


\textsuperscript{382} See, e.g., Dworkin, supra note 361, at 290–91.
As an argument for torts generally and for the substantive cost-benefit test of design defect, these two limited statements have some merit. The need for limiting the role of fault and foreseeability in determining liability is recognized by Owen and reflected by the strict liability aspects of the Products Liability Restatement. However, Owen and the Restatement do not limit the efficiency approach in ways that address the effects of the cost-benefit approach on the victims of product-caused injuries, particularly in terms of the challenges of litigation, the lack of spreading of costs, and the impact of the application of comparative fault to achieve a “fair” allocation of the costs of injuries from products.

Regardless of whether the calculus of risk has a determinative role as a necessary requirement for liability or as part of a larger scheme, the cost-benefit approach encounters the difficulty, recognized by Learned Hand, that the three factors of probability, seriousness of injury, and cost of accident avoidance “are practically not susceptible of any quantitative estimate, and the second two are generally not so, even theoretically. For this reason a solution always involves some preference or choice between incommensurables. . . .” On the other hand, product design decisions are perhaps an area where quantitative estimates are useful.

In addition to the difficulties of application, any broader statement of the role of utilitarian measures in allocating liability effectively eliminates the fundamental concern for human rights underlying the schemes of Rawls, Dworkin, and Kant. Rawls was a critic of utilitarianism and made clear that his goal was to replace utilitarianism with a rights-based social contract scheme based on Locke, Rousseau, and Kant. Dworkin explicitly treats corporations differently where tort liability is concerned. Moreover, one basic tenet of Dworkin’s views is that human rights “trump” collective goals

383. See supra notes 161–167 and accompanying text (discussing Products Liability Restatement); supra note 364 (discussing Owen).
384. See supra notes 21–26, 143–145, 309–316, 332–347 and accompanying text. For Owen’s reasons for not including spreading of costs, see infra note 400.
385. Conway v. O’Brien, 111 F.2d 611, 612 (2d Cir. 1940), rev’d on other grounds, 312 U.S. 492 (1941).
386. No pun intended.
387. See, e.g., RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2, cmt. f (AM. L. INST. 1997).
388. See, e.g., supra notes 349–352 and accompanying text (discussing Rawls’s view of persons and role of expectations); RAWLS, THEORY, supra note 348, at xvii–xviii (criticizing utilitarianism and stating his intent to replace it with a social contract scheme based on Locke, Rousseau, and Kant); id. at 160–78 (comparing his scheme with utilitarianism).
389. See infra notes 424–427 and accompanying text (discussing Dworkin’s view of corporate responsibility).
like maximizing utility. He has also explicitly stated: “The common law of

torts is better explained by... [its] set of interwoven ethical and moral

principles than it is by any assumption that the law aims at some stipulated

version of economic efficiency.” For a number of reasons, a full discussion

of Kant is beyond the scope of this Article. However, Kant’s concern that

humans be treated as ends, rather than as means to an end, clearly conflicts

with utilitarian schemes. On some issues, Owen recognizes that the rights of humans necessitate

limits on the calculus of risk approach and, because of these limits, argues for

strict liability in the context of manufacturing defects and innocent

misrepresentation. However, his test for design defects is based on

efficiency and on utilitarianism because of his view that this approach does

not violate rights. As a result, his test for design defects is simply a

tort approach that ignores the basic problems with seeking the efficient

maximation of “good” without addressing the distribution of the costs and

benefits of that maximation. Because of the importance of design defect

claims, a rights-based scheme should have greater concern for victims—

for example, by placing the burden of proof on the defendant by using the


(viewing rights as “trumps held by individuals” in the face of collective goals like maximizing

utility).

391. DWORKIN, supra note 361, at 291.

392. See, e.g., George P. Fletcher, Why Kant, 87 COLUM. L. REV. 421, 428 (1987) (noting

that one of the basic premises of the Kantian approach is that “individuals have rights that ‘trump’

the demands of utility and efficiency”); Robert Johnson & Adam Cureton, Kant’s Moral

Philosophy, STANFORD ENCYCLOPEDIA OF PHILOSOPHY § 8, at 8, 14 (Edward N. Zalta ed., Fall


views in terms of the following: “One should ‘act only in accordance with that maxim through

which you can at the same time will that it become universal law.’ A human person “must be

treated always as an end in itself.”).

393. See supra note 364. This strict liability approach is contrary to his argument in an

earlier article that fault is a necessary requirement for tort liability and that, therefore, strict

liability for product defects is “misguided.” Id

394. See discussion of Owen, Moral Foundations, supra note 364.

395. See, e.g., Fletcher, supra note 340; supra note 384 and accompanying text. For
discussion of lack of concern with distribution in utilitarianism, see, for example, NORMAN E.

BOWIE & ROBERT L. SIMON, THE INDIVIDUAL AND THE POLITICAL ORDER: AN INTRODUCTION

to Social and Political Philosophy 29–50 (4th ed. 2008) (critiquing utilitarianism);

RAWLS, THEORY, supra note 348, at 65–73 (discussing distribution); id. at 160–78 (comparing

his system to utilitarianism).

396. See, e.g., OWEN, supra note 117, at 477 (stating that the “concept of design
defectiveness lies at the heart of products liability law”), 479 (stating that “design defectiveness

is still the dominant claim in most major products liability cases”).

397. See supra note 143 and accompanying text.
time-of-trial standard for design defects,\textsuperscript{398} and by limiting the role of comparative fault.\textsuperscript{399}

Owen justifies his choice for utilitarianism as a test for design defect by the use of rational choices in “a hypothetical consent perspective” like that in Rawls’s conception of the “original position” where persons, who are behind “a veil of ignorance” of their actual views and condition in life, choose principles of justice.\textsuperscript{400} However, Owen’s use of the original position is so different from Rawls’s approach that it is not consistent with Rawls’s theory, which uses the original position in a particular way as a part of a much larger, more complex alternative to utilitarianism.\textsuperscript{401} Two points illustrate how much Owen diverges from Rawls’s scheme.

First, the original position is not designed for addressing specific issues and doctrines. Instead, the original position provides a framework for adopting the basic principles of justice.\textsuperscript{402} This adoption is the first of four chronological stages. The other three stages are: (1) adoption of a constitution; (2) passage of legislation; and (3) application of rules to particular cases.\textsuperscript{403} Depending on one’s view of common law development, crashworthiness could be viewed as legislation or as application of rules.

Second, Owen asserts that persons choosing a scheme of justice in the “original position” “would be risk neutral.”\textsuperscript{404} He then argues that, given this neutrality, they would choose to promote “the general benefit of the community as a whole” by placing on the victims “the risk of harmful consequences that inevitably flow from reasonable efforts of manufacturers to protect the public good.”\textsuperscript{405} However, Rawls argued that, in order “to set up a fair procedure so that any principles agreed to will be just,” persons in the original position should be behind a “veil of ignorance” concerning

\begin{itemize}
  \item \textsuperscript{398} See \textit{supra} notes 143–145 and accompanying text.
  \item \textsuperscript{399} See \textit{supra} notes 21–26, 337–346, \textit{infra} notes 432–437 and accompanying text.
  \item \textsuperscript{400} Owen, \textit{Moral Foundations}, \textit{supra} note 364, at 503–04. He also uses this approach to reject spreading of losses as a concern for products liability because private and social insurance schemes would be selected in the original position. \textit{Id.} at 504.
  \item \textsuperscript{401} See, e.g., \textit{RAWLS, Theory}, \textit{supra} note 348, at 52–53 (discussing principles of justice); \textit{Id.} at 62 (“efficiency alone cannot serve as a principle of justice”); \textit{Id.} at 65–73 (discussing distribution); \textit{Id.} at 160–78 (comparing his system to utilitarianism); \textit{Id.} at 171–76 (discussing four-stage sequence with original position as first stage). For a useful discussion of the problems of applying Rawls’s theory to tort law, see Benjamin C. Zipursky, \textit{Rawls in Tort Theory: Themes and Counterthemes}, 72 \textit{Fordham L. Rev.} 1923 (2004).
  \item \textsuperscript{402} \textit{RAWLS, Liberalism}, \textit{supra} note 349, at 118–23, 172.
  \item \textsuperscript{403} \textit{Id.} at 171–76.
  \item \textsuperscript{404} Owen, \textit{Moral Foundations}, \textit{supra} note 364, at 503.
  \item \textsuperscript{405} \textit{Id.} at 503–04.
\end{itemize}
individual characteristics like gender, race, and intelligence. As a result, they would not know whether they would be winners or losers in society. Consequently, argues Rawls, they would not be risk neutral. Instead, they would be highly risk averse and choose a maximin strategy which would maximize the minimum that would result if they were losers in the “lottery of birth” and thus could lack the resources necessary for a meaningful life.

The third problem with Owen’s approach is his claim that “auto makers and auto drivers have roughly equivalent responsibilities.” This assertion of equivalence is not supported by any arguments to support the position that it is moral or just to expand schemes which are designed and used for guiding human interactions with one another to include nonhuman “corporate persons” on an equivalent basis. Such supporting arguments are needed because attempts to adopt such equivalence and expand moral schemes as the basis for legal rights of animals, including primates with language skills, have been soundly rejected.

The lack of moral equivalence is important because it provides the basis for providing recovery despite the causal role of extremely risky behavior like that involved in Donze, which can be appropriately labeled as immoral in terms of human obligations to one another. However, if concern for personal safety, possible criminal and regulatory sanctions, and possible tort liability as a defendant did not deter the conduct, the only possible reason for denying recovery for defective crashworthiness is a moralistic desire to scapegoat and punish the injured plaintiff, without regard for the injury costs.

406. RAWLS, THEORY, supra note 348, at 118–19.
407. Id. at 132–35. Technically, the term comes from the maximum minimorum. Id. at 133 n.19. For notion of “lottery of birth,” see, for example, id. at 89 (referring to “the natural lottery in native assets,” endowments, and advantages).
408. See supra note 371 and accompanying text.
410. See, e.g., State v. LeVasseur, 613 P.2d 1328, 1332–34 (Haw. Ct. App. 1980) (rejecting attempt to defend charge of theft of dolphins on ground of lesser of two evils where dolphins had been “liberated” from research facility where they were allegedly depressed by being captive subjects for experiments); RAWLS, LIBERALISM, supra note 349, at 19 (Persons participating in a system of social cooperation must have a “capacity for a sense of justice and a capacity for a conception of the good.”); F. Patrick Hubbard, Do Androids Dream: Personhood and Intelligent Artifacts, 83 TEMPLE L. REV. 405, 413–18 (2011) (discussing denial of personhood to animals and limited nature of human obligations to animals).
411. See supra note 16 and accompanying text for discussion of facts in Donze.
incurred by the victim, even though this treatment produces virtually no tangible benefits in terms of reduction of accident costs.

Given this lack of deterrence, Owen’s approach actually reduces the efficient reduction of accident costs. Because manufacturers focus on liability costs rather than accident costs in comparing safety costs and accident costs, an inefficiently low expenditure on safety is likely when comparative fault reduces plaintiffs’ recoveries. As a result, Owen’s approach does not satisfy his utilitarian concern with efficiently maximizing utility.

Similar rejections of “equivalent responsibilities” where corporations are concerned can be illustrated by considering privacy, a widely recognized basic human value in our society. This broad value encompasses both physical space and nonphysical private data and enables humans to engage in self-reflection, to focus on creativity and learning, to relax and “be yourself” and experience a sense of élan and joie de vivre, to share private, intimate relationships, and to pursue shared goals. An attempt by a corporation to claim this uniquely human personal right was recently rejected by the Supreme Court in Federal Communications Commission v. AT&T Inc., which partly relied on common meanings in finding that the statutory phrase “personal privacy” did not include corporate persons. The Court also relied on comment c to Section 6521 of the Second Torts Restatement which states: “A corporation, partnership, or unincorporated association has no personal right of privacy."

In Kantian terms, personal concerns and values like fairness and privacy are designed for relationships among human persons as ends in themselves. Nonhuman corporations are not ends in themselves. Instead, they are, by design, simply a means for humans to seek human goals. In the case of a for-profit corporation, the goal is maximizing profits, and the officers and

415. FCC v. AT&T Inc., 562 U.S. at 406. The Court also relied on similar language from the second edition of Prosser’s Law of Torts. Id. at 406–07.
416. See discussion of Kant, supra note 392.
directors of the company are required to pursue only this goal.\textsuperscript{417} This characterization of for-profit corporations is virtually undisputed. For example, Owen agrees that, because for-profit corporations focus on maximizing profits, they need to be incentivized by products liability to seek efficient accident cost reduction.\textsuperscript{418}

One way to increase profits is to externalize costs to persons outside the corporation—for example, by simply dumping harmful pollutants into the air or water rather than incurring more expensive measures. If fines for pollution or liability payments for injuries caused by defective products are less than the costs that are externalized, a for-profit corporation will choose to externalize the costs.\textsuperscript{419} Similarly, automobile manufacturers can externalize costs by reducing or avoiding liability for injuries caused by defective automobiles.\textsuperscript{420} Imposing liability for defective crashworthiness, regardless of the fault of victims or third parties in causing the initial collision, prevents


A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes.

\textit{Dodge}, 170 N.W. at 684. The difference in behavior between for-profit and non-profit corporations can be extraordinarily striking. For example, a report on a study of U.S. Department of Education data concerning student loan forgiveness requests alleging fraud revealed:

Of the more than 98,800 complaints received by the department as of mid-August, 98.6 percent came from students at for-profit schools, while only 1.4 percent of them were filed by those who attended non-profit institutions. For-profit schools account for only 10 percent of national enrollment and 18 percent of federal student debt, according to government data.

Maria Danilova, Study: Most Student Loan Fraud Claims Involve For-Profits, ASSOCIATED PRESS (Nov. 9, 2017), https://www.apnews.com/2f357cc6162b49febd56de912ef750d. One of the authors of the report noted that for-profits “are motivated to maximize their profits . . . .” \textit{Id.}

\textsuperscript{418} Owen, Moral Foundations, supra note 364, at 477 (“Maximizing profits is the manufacturer’s classic measure of success in satisfying the welfare of its shareholders.”); \textit{id.} at 479–81 (Because of “the inherent primacy of the manufacturer’s allegiance to its shareholders,” products liability law is necessary to impose liability in order to promote cost-effective safety design “by ‘detering’ manufacturers from selling products that contain excessive dangers.”).

\textsuperscript{419} BAKAN, supra note 296, at 60–84.

such externalization and harnesses the profit motive as a way to reduce accident costs efficiently.

A human concerned solely with personal profit in this manner would be viewed as a psychopath.\textsuperscript{421} Given the nature of for-profit corporations, it is wrong to use moral notions of fairness to argue for treating these corporations “fairly” vis-à-vis humans.\textsuperscript{422}

Because human shareholders are entitled to be treated as ends, it is often argued that this should entitle the corporation to be a proxy for its innocent human shareholders.\textsuperscript{423} Such an argument ignores the fact that the payment of a tort award by a large corporation impacts shareholders in a limited, indirect manner. They will, for example, usually suffer only a modest reduction, if any, in dividends. At worst, only their equity could be lost. There will be no moral censure of shareholders for a large publicly held corporation’s tortious actions. Moreover, to the extent that we are concerned with fairness, it must be remembered that the shareholder receives a number of benefits from the use of the corporate form of business. By investing in a large corporation, the shareholder has elected to take advantage of limited liability and of the increased efficiency of the complex structure of a modern large-scale corporate organization. The shareholder may also benefit financially from corporate torts that are not discovered.

Ronald Dworkin, who adopted a view of human persons like that of John Rawls,\textsuperscript{424} argued that where corporations and morality are concerned, we

\textsuperscript{421} BAKAN, supra note 296, at 2 (“pathological institution”); id. at 56 (“[c]orporate operatives can be characterized as psychopathic . . . [even though] they can function normally outside the corporation . . . .”); id. at 56–57 (corporations have “psychopathic traits”); see, e.g., Louis K. Liggett Co. v. Lee, 288 U.S. 517, 548–68 (Brandeis, J., dissenting in part) (criticizing corporate power and referring to corporation as “Frankenstein monster”).


\textsuperscript{423} RESTATEMENT (SECOND) OF TORTS § 909 cmt. b (AM. LAW INST. 1965) (discussing punitive damages awards against corporations); Owen, Moral Foundations, supra note 364, at 468–69 (“Manufacturers must act paternalistically to protect—with equal concern and respect—the freedom and other interests of competing constituencies: shareholders are entitled to a fair return on their investments; potential accident victims are entitled to a fair measure of product safety; and users are entitled to a fair measure of usefulness in their products, a proper but not excessive level of product safety, and the availability of products at a fair price.”).

Owen also argues that the moral rights of “other consumers” are violated by a negligent “victim’s greed in demanding greater usefulness from the product than other consumers sought and greater usefulness than was reflected in the price he paid.” Id. at 476. However, where crashworthiness is involved, the victim who negligently caused the initial collision is only “demanding” the same level of cost-effective crashworthiness as other users.

\textsuperscript{424} Hubbard, supra note 410, at 412–13. For discussion of Rawls, see supra notes 349–352, 388, 401 and accompanying text.
should “frame our question in the first instance as a question about corporate responsibility.” If we are to take “the corporation seriously as a moral agent” with an accepted role as an institution, then the corporation controlling the manufacturing of the defective product has a moral responsibility to compensate victims. The issue, therefore, is: what is the best way to impose this responsibility on corporations?

This Article argues that the best way to impose this responsibility is to treat for-profit corporations as complex “machines” that can be used to enhance human life in many ways. In terms of cost-effective reduction of accident costs, this treatment of for-profit corporations supports recovery for defective crashworthiness regardless of the plaintiff’s fault in causing the original collision. This approach would also apply in other areas of products liability law.

C. Implementation

Moral notions like efficiency and fairness among humans are complex mixtures of philosophy and social attitudes. As a result, agreement on a normative approach to accident law is, at best, difficult to find. The issue in Donze illustrates this difficulty because there are two competing positions—efficiency and fairness—concerning the proper approach. However, as indicated above, corporations are not entitled to fairness in the way humans are. Consequently, the primary concerns in terms of products liability should be on efficient accident reduction and fairness to humans.

425. DWORKIN, supra note 362, at 170.
426. Id.
427. Id. at 171.
428. See, e.g., supra notes 359–360 and accompanying text.
429. See, e.g., supra notes 134–145 and accompanying text (discussing California approach to design defect); 315–316 and accompanying text (discussing joint and several liability).
430. CALABRESI, supra note 326, at 291–92, 294.
431. See supra notes 354–427 and accompanying text.
1. Efficiency

One position is reflected in the adoption of Section 402A of the Second Torts Restatement. One reason for this adoption was a desire to achieve two policy concerns: (1) the adoption of safety measures which are cost-effective, and (2) the reduction of the lump sum costs imposed on victims injured by products. The expansion of the liability for inefficient safety design of sellers was based on the view that sellers, particularly manufacturers, would be incentivized by that liability to provide safer products in order to avoid the increased liability costs that would result where unreasonably dangerous defects are involved. This view is based on the ability of corporate manufacturers to use their institutional structures to coordinate “rational conduct” to select designs to address safety costs efficiently. Though it might be theoretically cheaper to achieve accident reduction by safer driving by humans, it is unrealistic to expect such change in conduct. For this reason, crashworthiness liability should be based on foreseeability of crashes regardless of cause. In order for this scheme to incentivize the manufacturer adequately, the costs of inefficient safety decisions must be internalized to the manufacturer rather than externalized to victims or third parties.

2. Fairness

The alternative position is that liability should be allocated fairly. However, fairness is extraordinarily vague and there is often disagreement about what is fair, particularly where for-profit corporations are involved. For example, jurisdictions disagree concerning whether it is fair to assess defective design based on knowledge at the time of trial. Nevertheless, there are occasional points of agreement. For example, it is generally agreed that some forms of comparative fault are more fair than the old common law system. However, there is considerable disagreement

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432. See supra notes 155, 327–346 and accompanying text.
433. See supra notes 331–346 and accompanying text.
434. See supra notes 338 and accompanying text.
435. See supra notes 327–346 and accompanying text.
436. See supra notes 21–26 and accompanying text.
437. See supra notes 21–26, 332–346 and accompanying text.
438. See supra note 175 and accompanying text.
439. Compare supra notes 198–202 and accompanying text (discussing objections to common law system for treating plaintiffs’ fault), with supra notes 248–251 and accompanying text (discussing types of comparative fault for plaintiffs and problems with simply abolishing joint and several liability).
concerning the best approach for achieving fairness in allocating liability. For example, should a pure or modified system be used for comparing plaintiffs’ fault with defendants’ fault? This type of issue also arises in allocating responsibility among defendants.

Initially, as comparative fault evolved, some argued that it is not possible to compare strict liability with fault, which is “based on blameworthiness in a moral sense.” This argument noted “that ‘apples and oranges’ cannot be compared, and that ‘oil and water’ do not mix . . . .” This argument was rejected on the ground that such “insistence on fixed and precise definitive treatment of legal concepts” and “fixed semantic consistency” was not appropriate. Instead, the better approach was to use a “judicial posture that is flexible rather than doctrinaire” and to seek “the attainment of a just and equitable result.” Given this approach, “the term ‘equitable apportionment or allocation of loss’ may be more descriptive than ‘comparative fault.’”

Two somewhat contradictory points of agreement support this shift to equitable allocation of loss. First, there is a widely shared acceptance of the use of juries to apportion responsibility fairly in terms of precise percentages of responsibility based on the consideration of extraordinarily vague factors like nature of the person’s risk-creating conduct and strength of causal connection between that conduct and the harm. Second, it is also widely agreed that this task of precisely measuring incommensurable actions and causal roles is virtually impossible, particularly for lay juries. Though the

440. See supra notes 248–251 and accompanying text (discussing comparative fault schemes for allocating losses between plaintiffs and defendants).
441. See supra notes 307–314 and accompanying text (discussing comparative fault schemes for allocating losses among defendants).
443. Id. at 1167.
444. Id.
445. Id. at 1168.
446. Id.
447. Id.
448. Id.
449. See supra notes 11–12, 14, 255 and accompanying text.
450. See, e.g., Sandford v. Chevrolet Div. of Gen. Motors, 642 P.2d 624, 628–35, 638–44 (Or. 1982) (addressing difficulty of jury assessment of comparative fault); DOBBS, supra note 148, § 202 (discussing factors relevant to responsibility and potential problems in application); SCHWARTZ, supra note 14, at 384–86 (discussing jury guidelines and noting that comparative fault systems “have had to allow for the fact that comparisons of fault cannot be made scientifically”); Ray J. Aiken, Proportioning Comparative Negligence: Problems of Theory and Special Verdict Formulation, 53 MARQ. L. REV. 293, 295 (1970); David W. Robertson, Eschewing Ersatz Percentages: A Simplified Vocabulary of Comparative Fault, 45 ST. LOUIS U. L.J. 831 (2001) (discussing difficulty of communicating factors to jury); David C. Sobelsohn,
arbitrary nature of using juries to do the impossible has been noted, it appears it has been accepted because of a view that: (1) it is less unfair than the traditional common law system; and (2) given the lack of precise objective standards, there is no alternative.

Nevertheless, it has been argued that “[r]ough approximation is no substitute for justice.” In addition, no matter how fair or just an apportionment may be, any reduction in the liability of for-profit corporate manufacturers will reduce their incentive to spend money on efficient cost reduction.

An “apples to oranges” problem, like that addressed in the decision to include strict liability in comparative allocations of loss, arises in comparing human fault with corporate conduct by for-profit corporations. Jurors arguably have sufficient experience with human behavior to evaluate in some rough sense degrees of moral wrongdoing—for example, by referring to an attitude toward risk (a “state of mind”) to determine if a human was negligent. Determining state of mind of a mindless entity like a corporation is a different matter. Despite this difference, there has been virtually no concern with the problem of using individualistic morality-based measures of human conduct to evaluate the conduct of nonhuman institutional corporations motivated solely by profit maximization which, partly because of this motivation, are much better than humans at evaluating risk.

V. ISSUES NOT ADDRESSED IN DONZE

A. Branham v. Ford Motor Co. and the Products Liability Restatement

As indicated above, Branham v. Ford Motor Co. rejected the consumer expectation test and adopted the cost-benefit approach of the Products

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Comparing Fault, 60 IND. L.J. 413 (1984) (noting problems of giving guidance for comparing a variety of types of “wrongful” causal conduct to diverse parties).


453. DOBBS, supra note 148, at 508 (discussing negligence as a state of mind in the comparison of fault).

454. For an example of an article showing such concern, see Mary J. Davis, Individual and Institutional Responsibility: A Vision for Comparative Fault in Products Liability, 39 VILL. L. REV. 281 (1994).

455. See supra notes 417–420 and accompanying text.

456. See supra notes 335–338 and accompanying text.
Liability Restatement as the sole test of design defect. In contrast, Donze does not mention the Products Liability Restatement even though Section 17 explicitly addresses crashworthiness. Given the number of differences between Section 402A of the Second Torts Restatement and the Products Liability Restatement, the apparently ad hoc approach in the court’s use of the Products Liability Restatement results in considerable uncertainty as to the direction of products liability in South Carolina.

Crashworthiness cases always present the issue of determining which injuries are caused by the initial collision and which are caused by the second collision. In Donze, it was fairly easy to apportion damages between the injuries caused by the physical impact in the first collision and the burns caused by the fire after the first collision. In other situations, it may be harder to apportion damages. Subsection 16(c) of the Products Liability Restatement addresses apportionments in harder cases. Will this subsection play a role in apportioning damages in South Carolina?

The South Carolina products liability statute totally bars recovery where the plaintiff assumes the risk by unreasonably using the product after discovering the defect and becoming aware of the danger. Assumption of risk has been merged with comparative fault in South Carolina. Will the total statutory bar continue to apply?

Negligence and statutory claims for design defect appear to have been merged by the decision in Branham v. Ford Motor Co. to adopt Section 2(b)

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457. See supra notes 196–197 and accompanying text.
458. See supra notes 180–184 and accompanying text.
459. Section 16 provides:

**Increased Harm Due to Product Defect**

(a) When a product is defective at the time of commercial sale or other distribution and the defect is a substantial factor in increasing the plaintiff’s harm beyond that which would have resulted from other causes, the product seller is subject to liability for the increased harm.

(b) If proof supports a determination of the harm that would have resulted from other causes in the absence of the product defect, the product seller’s liability is limited to the increased harm attributable solely to the product defect.

(c) If proof does not support a determination under Subsection (b) of the harm that would have resulted in the absence of the product defect, the product seller is liable for all of the plaintiff’s harm attributable to the defect and other causes.

(d) A seller of a defective product that is held liable for part of the harm suffered by the plaintiff under Subsection (b), or all of the harm suffered by the plaintiff under Subsection (c), is jointly and severally liable or severally liable with other parties who bear legal responsibility for causing the harm, determined by applicable rules of joint and several liability.

**RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 16 (AM. LAW INST. 1997).**

of the *Products Liability Restatement*. Donze also reflects this view in stating that negligence, strict liability, and warranty are all the same for purposes of crashworthiness. Given this merger, how will ordinary negligence be treated in terms of a defense? Will this merger affect whether comparative negligence applies to the statutory limitation of defenses to a person’s unreasonable use with knowledge and awareness of the defect and risk?

Issues of product misuse have been raised in several South Carolina cases. It is not clear whether misuse in these cases related to the existence of a defect, cause-in-fact, legal cause, or all of the above. Regardless of relevance, the alleged misuse was rejected in each case largely because the use involved was foreseeable.

The *Products Liability Restatement* treats misuse (along with product alteration and modification) as relevant to “the issue of defect, causation, and comparative responsibility.” Foreseeability of misuse is relevant to whether an alternative design should have been adopted. The *Products Liability Restatement* also provides that the treatment of any misuse, modification, or alteration “is to be resolved under the prevailing rules and principles governing [defect and] causation or the prevailing rules and principles governing comparative responsibility, as the case may be.” Determining what “the case may be” in South Carolina involves far too many variables to be addressed in this Article.

### B. Seatbelt Use

Section 56-5-6520 of the South Carolina Code imposes a statutory duty to use safety belts and child restraint systems. Section 56-5-6460 provides: “A
violation of this article does not constitute negligence per se or contributory negligence and is not admissible as evidence in a civil action. In Sims v. Gregory, the South Carolina Court of Appeals held that the language in section 56-5-6460 “clearly states a violation of the mandatory seatbelt law cannot be used as evidence in a civil action to show that a driver or occupant of a motor vehicle failed to use a safety belt.”

In Jimenez v. DaimlerChrysler Corp., the Fourth Circuit Court of Appeals reversed a decision by the district court which had upheld the exclusion of seatbelt use evidence. Though this involved the common law bar of seatbelt use that was in effect before the adoption of the seatbelt statute, Jimenez was used in the Donze decision and contains a useful review of the two arguments for admitting evidence of nonuse in a crashworthiness case.

The first argument is that misusing or failing to use the restraint system could have been a cause-in-fact of all or part of the increased injury. Therefore, evidence of that failure is relevant to the amount of damages caused by the crashworthiness defect. A similar cause-in-fact argument may have been raised in the concurring opinion in Donze. Will Sims v. Gregory bar admission of the evidence of nonuse for this purpose?

The second argument is that the restraint system is relevant to the issue of defectiveness of the crashworthy system as a whole because proper use of the system reduces the need for more costly alternative protections. Arguably, this use would not be barred by section 56-5-6460 because nonuse of the system is not directly involved. However, this argument encounters problems with the foreseeability of injuries which provides the basis of the crashworthiness doctrine. The argument also presents the problem that juries may make inferences concerning the possible role of nonuse in the extent of the injuries to the plaintiff.

468. A similar provision in section 56-5-6460 also bars the admission of a failure to satisfy South Carolina Code section 56-5-6410, which requires child restraint systems for children less than six years old. S.C. CODE ANN. § 56-5-6410, -6460 (2018).

469. Sims v. Gregory, 387 S.C. 169, 173, 691 S.E.2d 480, 481 (Ct. App. 2010). Sims was interpreting section 56-5-6540(c) of the code applicable at the time. The language of this section is the same as that in S.C. CODE ANN. § 56-5-6460 (2018).

470. 269 F.3d 439, 457–59 (4th Cir. 2001). Other courts have also addressed the concerns raised in Jimenez. See supra notes 89–91 and accompanying text.

471. Jimenez, 269 F.3d at 459.

472. See supra note 39 and accompanying text.


474. See supra notes 23–32 and accompanying text.
VI. SUMMARY AND CONCLUSION

In large part, the disagreements among the states concerning enhanced injuries reflects a divergence in opinion about the relative importance of efficient accident reduction vis-à-vis fairness in addressing injuries caused by defective products. Some states still emphasize efficiency and the responsibility of corporations to address the policy goals of accident reduction and cost spreading underlying Section 402A. In order to further these goals, these states define the manufacturer’s duty in a way that precludes considering the fault of the plaintiff or third parties in determining the manufacturer’s liability. Other states place greater weight on fairness to corporations by defining defect by, for example, allowing “state of the art” to be the measure of defect and in using juries to apportion liability equitably on the basis of vague standards like nature of wrongdoing and strength of causal relationship. Thus, the split among jurisdictions reflects a disagreement about whether to pursue the efficient reduction of accident costs by incentivizing efficient safety decisions by manufacturers or to seek a fair result by an unstructured proportional allocation of responsibility by juries. Underlying this disagreement is a difference in view concerning for-profit corporations: are they amoral machines whose profit motive must be harnessed by imposing a social role for enhancing safety through the imposition of tort duties, or are they moral entities, like humans, with a moral and legal right to a fair allocation of responsibility?

Because manufacturers make design decisions on the basis of their liability costs, not on the basis of the total accident costs resulting from their decisions, states concerned with efficient accident cost reduction focus on the social role of corporations and, therefore, impose a duty that will internalize inefficient accident costs to manufacturers. This imposition is necessary because, to the extent that these costs can be externalized, the manufacturer’s liability costs are lowered. In turn, the safety cost breakeven point in terms of profitability will be lowered to the level of the liability costs. Therefore, neither the plaintiff’s nor a third party’s fault should be used to reduce the manufacturer’s liability. This Article takes the position that this approach is the correct treatment of the crashworthiness issue in Donzé.

475. See supra notes 169–170 and accompanying text.
477. See supra notes 326–353 and accompanying text.
addition, efficient accident cost reduction supports human-centered approaches in other areas of products liability. 478

The states that apply comparative fault to the initial cause of the accident rely on fairness, even though: (1) this application reduces manufacturers’ incentives to choose efficient levels of crashworthiness, 479 and (2) it is clear that juries have virtually unlimited discretion to decide what is fair. 480 The argument for this reliance starts with the point that the fault of the other parties is also a cause-in-fact of the injuries. Though this point is valid, it does not, by itself, justify lessening the incentives for safety on manufacturers. The crashworthiness doctrine is built on the realistic view that human wrongdoing is foreseeable in large part because humans are not very good at rationally assessing risk or at acting on rational assessments. As a result, using comparative fault to impose accident costs on humans is a relatively ineffective way to reduce accident costs. Instead, because corporations are better at assessing risks, imposing liability for inefficient safety decisions on sellers is a better way to reduce accidents efficiently.

The fairness argument for this reduction in efficient accident prevention is flawed in two ways. First, it ignores the basic difference between humans and corporations: for-profit corporations exhibit an immoral pathology of focusing only on profits. It is unfair to treat such entities on an equal moral basis with humans. Second, the comparative allocation of liability has the problem that the jury allocation is virtually unstructured. In contrast, the use of duty in tort to impose liability, regardless of the fault of the victim or third parties, not only reduces injuries, it also provides a clear answer that is defended on the basis of well-established policy goals of tort law.

A similar approach to duty has been widely used in addressing enhanced injury resulting from medical malpractice. Where the malpractice occurs in addressing an injury from an automobile collision, the majority view is that any fault of the patient is irrelevant to the determination of the liability of the medical provider. 481 The reasons for this approach include the following:

Such . . . [an approach] is in accord with sound principles of social policy. “The improper or inappropriate imposition of the defense of

478. See, e.g., supra notes 138–145 (discussing California approach to design defect); 161–167 (discussing strict liability approaches in Products Liability Restatement); 315–316 (discussing joint and several liability) and accompanying text.
480. See supra notes 307–314, 417–420 and accompanying text.
[comparative] negligence can lead to the dilution or diminution of a duty of care.” . . . It would be anomalous to posit, on the one hand, that a health care provider is required to meet a uniform standard of care in its delivery of medical services to all patients, but permit, on the other hand, the conclusion that, where a breach of that duty is established, no liability may exist if the patients’ own preinjury conduct caused the illness or injury which necessitated the medical care.\footnote{482}

The approach of products liability and medical malpractice is similar in another important way. In contrast to the negligence causing the need for medical care, comparative fault applies to wrongful failure by the victim patient to, for example, follow a physician’s instructions concerning treatment of the injury that resulted in the need for treatment.\footnote{483} This approach parallels the approach to seatbelt nonuse in crashworthiness cases.\footnote{484} In both medical malpractice and products liability, the need to promote important policy concerns supports the imposition, based on the defendant’s relationship with the victim, of a duty to prevent enhanced injury to victims. This responsibility is implemented in terms of duty, which is perhaps the most basic and distinctly legal aspect of the structure of a tort.\footnote{485} Where a defendant breaches a duty in tort to protect a plaintiff from a specific category of risk, the general rule is:

[T]he defendant cannot defend on the ground of contributory negligence, since that was the very thing he was obliged to prevent. Another way to state essentially the same idea is to say that what counts as contributory negligence is determined largely by the scope of the defendant’s duty.\footnote{486}

The approach used in imposing role responsibility in \textit{Donze} and in medical malpractice is consistent with this general rule, is solidly grounded in policy, and should be the rule for all crashworthiness cases.