FAIRLY ALLOCATING FAULT BETWEEN A PLAINTIFF WHOSE WRONGFUL CONDUCT CAUSED A CAR ACCIDENT AND A AUTOMOBILE MANUFACTURER WHOSE PRODUCT ALLEGEDLY "ENHANCED" THE PLANTIFF'S INJURIES

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Executive Summary

If selected to serve on a jury charged with considering responsibility for injuries in a car accident, most citizens would expect to learn during the course of the trial if a driver involved was intoxicated, on drugs, or driving in a reckless manner. Florida, however, is among a shrinking minority of jurisdictions that preclude the jury from knowing this evidence. This blind spot for Florida's juries occurs in crashworthiness cases and precludes them from fairly apportioning fault among those who are responsible for the plaintiff's injuries.

"Crashworthiness" or "second collision" cases are those in which a driver or passenger seeks to hold an automobile manufacturer liable for "enhanced injuries," those that are in excess of what he would have incurred if the car had greater safety features. In these cases, the plaintiff does not claim that a defect in the automobile, such as defective steering or brakes, caused the accident. Rather, the claim brought against the manufacturer instead alleges that the manufacturer did not use reasonable care to design the vehicle in a way that minimizes injuries in the event of a collision. This theory of liability reflects societal attitudes towards motor vehicle safety, common sense and is settled law. But the implementation of crashworthiness cases by Florida courts has strayed far from common sense.

Florida follows a minority approach that actively conceals from the jury evidence regarding "how" and "why" the accident happened because, the reasoning goes, such evidence is not relevant to a plaintiff's crashworthiness defect theory. It is based on a view that the initial collision of the vehicle and some object, and a second collision of the driver or passenger inside the vehicle are separate and distinct events and injuries. Such nuanced legal theory, while perhaps clever argument, is absolutely unworkable in actual practice.

Some cases involve indivisible injuries. For example, a drowsy, unrestrained driver swerves off the road at 50 mph while texting. The car hits a tree and stops, while the unrestrained driver continues forward unabated until he hits his deploying airbag. The injured driver sues the manufacturer, claiming that the airbag injured him when it deployed and did not adequately protection him from harm. Did the manufacturer's failure to design an airbag to the standards sought by the plaintiff's lawyer cause the injury, or did the impact with the tree cause the injury? And where the vehicle collision into the tree and the occupant collision into the airbag are separated in time by scant milliseconds, when and where is the divisible "second collision" and enhanced injury?

In other cases, a combination of factors cause the accident. For instance, a driver who had a few drinks gets in a head-on collision with another driver who is under the influence of cocaine and driving on the wrong side of the road. How much of the responsibility for a passenger's severe injuries falls on her driver, on the other driver, on herself for not wearing the seatbelt as intended, or on the manufacturer for not designing a seatbelt that better fits smaller women? Because of these difficult questions, the overwhelming majority of courts in other states apply comparative fault, trust the jury to fairly apportion fault among all those who share responsibility for an accident. But the Florida Supreme Court said that providing such information would "confuse the jury," even jurors who are called upon to evaluate the testimony of engineers and scientists and to decide highly technical facts involving complicated engineering in automobile product liability cases.

The Florida minority approach is not only unworkable, it results in absurd results that jeopardize public safety. The jury is not permitted to allocate any portion of fault to the individual who is actually responsible for the accident. A driver who is under the influence of drugs or alcohol, falls asleep at the wheel, or drives far in excess of the speed limit does not even appear on the verdict form. This system rewards drunk drivers and drivers on drugs by essentially creating civil immunity—a plaintiff cannot include the drunk driver as a defendant in a product case and still hope to conceal the facts from the jury, and a plaintiff/driver's own irresponsible conduct is not taken into account. Sound public policy suggests that reckless drivers bare some responsibility for their actions. They are risking the lives of others on Florida's roads.

The Crashworthiness Doctrine

Before 1968, courts did not permit those who were injured in car accidents to hold automobile manufacturers liable for their injuries where the negligence of the driver or another party caused the underlying accident. This included situations in which the injured party claimed that a defect in the car's design or manufacturing contributed in some way to the resulting injury.[1] The reasoning for this rule was that product liability law imposed liability on a manufacturer only for those injuries that occurred during the product's intended use - since cars were not intended to be crashed, courts placed no liability on the manufacturer in such

cases. Instead, the person responsible for the crash (and his or her insurer) was solely liable for injuries stemming from the accident.

This traditional rule changed with a groundbreaking decision from the U.S. Court of Appeals for the Eighth Circuit. In *Larsen v. General Motors Corp*., the plaintiff was injured in a head-on collision in which the steering mechanism of his 1963 Chevolet Corvair thrust backwards and struck him in the head.[2] The *Larsen* court observed that because collisions are inevitable and foreseeable, automobile manufacturers should have a duty to use reasonable care in designing their vehicles to minimize injuries in the event of an accident. The *Larsen* case was followed by many state courts. For this reason, manufacturers today are liable for injuries to a vehicle's occupants for injuries that could have been prevented by a reasonable alternative design of the vehicle.

This rule of law, known as the crashworthiness doctrine, is now recognized in some form in all jurisdictions. In crashworthiness cases, the "first collision" involves an impact with another car, a tree, or a lamppost, for instance, which may have occurred as a result of careless driving, weather conditions, or any other number of factors. It is typically undisputed in such cases that a defect in the automobile was *not* the cause of the crash. For instance, the driver has not alleged that the brakes or steering failed. Rather, crashworthiness cases focus on the "second collision" or "enhanced injury" of the plaintiff. Such lawsuits claim that had the car's design included greater safety features, the plaintiff or his or her passenger would have sustained less severe injuries in the fractions of a second *after* the crash occurred. For example, crashworthiness cases may allege that during a collision, the seatbelt or air bag malfunctioned, the roof was unable to sustain a rollover, or that a door opened and ejected the driver or passenger.

Today, a significant portion of claims brought against automobile companies are crashworthiness cases. The litigation norm is for a severely injured driver to point the liability finger at the manufacturer of the car for the resulting injuries, particularly if the driver's conduct was the indisputable cause of the underlying accident (e.g., the drive was intoxicated, fell asleep at the wheel, or drove in a grossly negligent manner, such as by running a stop sign).

Role of Comparative Fault in Crashworthiness Cases

Injuries often occur due to a combination of factors and this is particularly the case in automobile accidents. In crashworthiness cases, courts and juries are faced with the vexing question of how to apportion responsibility between the driver or other condition that caused the underlying accident and a defect in the car alleged to have enhanced the plaintiff's injuries.

In most jurisdictions until the 1970s, if a plaintiff's negligence played any part in causing his own injury, the rule of "contributory negligence" completely barred him from recovering damages. In fact, the rule, which predates the automobile, stemmed from a case where the plaintiff was riding his horse at a fast pace and fell when he ran into an obstruction left in the road by the defendant.[3] Had he been riding at a more reasonable speed, he would have been able to avoid the obstruction. Because the horseman was negligent in riding too fast, the court precluded him from recovering from the individual who placed the obstruction in his path. So developed the rule of contributory negligence—a plaintiff whose negligence contributed even 1% to the resulting injuries, could not recover from a defendant who was 99% at fault for the harm.

Adoption of Comparative Fault

Over time, courts developed numerous exceptions to avoid the harsh effects of contributory negligence.[4] Eventually, many state legislatures and some courts abandoned contributory negligence as a bar to recovery altogether, replacing it with a more equitable system of "comparative negligence."[5]

Comparative negligence allows the jury to apportion the responsibility for an accident on the basis of relative fault of the responsible parties, including the plaintiff. Thus, the rule permits the plaintiff to recover notwithstanding his own negligence. Several variations of comparative negligence exist around the nation. The most plaintiff-friendly form, "pure" comparative negligence, allows a plaintiff to recover even when he was more responsible for his own injury than the defendant. For instance, under a pure comparative fault system, a plaintiff who drove while intoxicated and is ninety percent at fault for an accident, may still

recover ten percent of his damages against another party that contributed to the crash.[6] This is the rule in Florida.

Application of Comparative Fault to Product Liability Claims

After adoption of comparative negligence, a question arose as to whether a plaintiff's fault reduces his recovery not only in negligence actions, but also in actions alleging injuries stemming from a defective product. Most state courts or legislatures have found that a plaintiff's responsibility for his injuries should be considered irrespective of the type of legal claim. For this reason, "comparative negligence" is more aptly described as "comparative fault" today.[7]

The prestigious American Law Institute's Restatement (Third) of Torts: Products Liability endorses the majority view.[8] The Restatement Third, completed in 1998, recognizes that "[a] plaintiff's recovery of damages for harm caused by a product defect may be reduced if the conduct of the plaintiff combines with the product defect to cause the harm and the plaintiff's conduct fails to conform to generally applicable rules establishing appropriate standards of care.[9] Further, the Restatement observes that "the fault of the plaintiff is relevant in assessing liability for product-caused harm."[10] While the Restatement recognizes that not considering a plaintiff's negligence in product liability actions may have been appropriate when the doctrine of contributory negligence would have acted as a total bar to recovery, there is no sound reason to exclude from the jury's consideration all evidence of plaintiff negligence in products liability claims following adoption of comparative fault.[11] A plaintiff that bears significant responsibility for his own injury should not be treated in the same manner as a blameless plaintiff. For this reason, as further discussed in this report, the modern trend of the majority of jurisdictions is to allow the jury to consider evidence of a plaintiff's comparative negligence in causing the initial collision for purposes of reducing a plaintiff's recovery for enhanced injuries.

Florida Law

Florida has adopted pure comparative fault and applied this principle to product liability claims, but has carved out an exception for crashworthiness cases.

In fact, the Supreme Court of Florida was the first in the nation to replace contributory negligence with pure comparative fault in 1973.[12] As the court ruled:

> If fault is to remain the test of liability, then the doctrine of comparative negligence which involves the apportionment of the loss among those whose fault contributed to the occurrence is more consistent with liability based on a fault premise. . . .
>
> In the field of tort law, the most equitable result that can ever be reached by a court is the equation of liability with fault. Comparative negligence does this more completely than contributory negligence, and we would be shirking our duty if we did not adopt the better doctrine.[13]

The Florida Legislature later codified the doctrine of comparative negligence in 1986. Section 768.81(2) of the Florida Statutes (entitled "comparative fault") currently provides that "any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as economic and noneconomic damages for an injury attributable to the claimant's contributory fault, but does not bar recovery."

Until 2002, Florida courts generally applied comparative fault principles in crashworthiness cases, regardless of whether the injury alleged was part of the initial collision or an enhanced injury through a secondary impact.[14] That year, however, the Florida Supreme Court took a most unusual turn and adopted the minority approach in *D'Amario v. Ford*,[15] an approach that created an exception to the Section 768.81(2) comparative fault that has swallowed the legislative rule. In *D'Amario*, the court considered a consolidation of two cases. In the first, a fifteen-year-old driver who was both intoxicated and speeding slammed into a tree. The plaintiff, Clifford Harris, who was a passenger in the car, was severely injured, while the driver and another passenger died. Harris claimed that Ford was responsible for his injuries, alleging that a relay switch failed to shut off power to the fuel pump after the crash, which allegedly ignited a fire following the collision. The jury, after hearing this evidence, returned a verdict for Ford, rejecting Harris's contention that a vehicle defect caused his injuries—the jury never even apportioned fault to the drunk driver because it did not find liability on Ford. The second case was filed by Maria Nash, who was struck by a drunk driver who had crossed over the center line and crashed head on into her Chevy Corsica. Ms. Nash's estate sued General Motors, claiming that the seatbelt failed in the accident, causing her head to hit the metal post separating the windshield from the driver's door. The jury found the manufacturer, General Motors, was not liable.

The Florida Supreme Court reversed both cases and found that a jury should not consider, indeed, it should not even be told about, the cause of the underlying accidents, namely, the drivers' intoxication and negligent driving. Instead, the court held that the jury should focus exclusively on whether a defect in the vehicle caused enhanced injuries.

The court analogized crashworthiness cases to medical malpractice actions, noting that while a plaintiff may have injured himself, the doctor remains liable for subsequent malpractice that exacerbates the injury or leads to additional harm. In such cases, the court reasoned, a medical professional cannot reduce his fault for a patient's enhanced or aggravated injuries by comparing his medical negligence with the cause of the injuries that required the medical attention in the first place.[16] Legal scholars have appropriately criticized this analogy as false, noting that the underlying injury leading to the need for medical care is wholly separate and distinct from a subsequent injury resulting from medical treatment. These injuries occur at separate times, places, and involve different actors. By way of contrast, crashworthiness claims involve injuries that occur in a split second in a single occurrence.

Most States Permit the Jury to Consider All of the Evidence and Allocate Fault for the Accident

Florida law, which precludes a jury from considering the responsibility of the driver or others in claims alleging that a defect in the car caused enhanced injuries, is among a small and shrinking minority of jurisdictions following this approach.

The Majority Approach

Unlike Florida, courts in an overwhelming majority of states that have considered the issue of whether comparative fault should apply in crashworthiness cases have decided that a jury should be permitted to allocate fault among those who share responsibility for the accident.[17]

These courts recognize that while states adopted the crashworthiness doctrine to encourage automobile manufacturers to make safe products, consideration of the plaintiff's degree of fault in such cases does not weaken that goal.[18] Applying comparative fault to crashworthiness cases fulfills the fundamental public policy purpose of tort law: "to deter future behavior that exposes others to injury." [19] Unless the jury considers the driver's

wrongful conduct, and reduces his recovery in proportion to his degree of fault, tort law would fail to deter negligent drivers and place others at risk of being hit by a drunk, drugged, or otherwise reckless driver.[20] Allowing evidence of a plaintiff's negligence keeps him accountable for his own actions and sends a message to others who would place the public in danger by driving carelessly. As the commentary to the Restatement Third observes, "it is unwise to relieve users and consumers of all responsibility for safe product use and consumption."[21] Courts have also recognized the fundamental unfairness of rewarding a negligent plaintiff with the same amount of damages as a plaintiff who was a careful driver.[22] Courts applying the majority rule properly understand that excluding evidence relevant to establishing the facts of the case "denie[s] the jury the opportunity to fairly judge" the case at hand.[23]

Five examples of the majority approach below show how comparative fault is applied in practice to fairly permit the jury to consider all the facts of the case and allocate fault among those responsible for the plaintiff's injuries:

- In Alaska, Kimberly Farnsworth was a passenger in a GMC Jimmy truck driven by Jon Fennie, who had several drinks at dinner just before driving. As they rounded a curve, her car was hit by Charles Walters, who, under the influence of cocaine, was driving in the wrong lane. Fennie walked away with minor injuries, but Farnsworth, who was improperly wearing her seat belt under her arm rather than over it, suffered significant harm. She sued GM, claiming she suffered enhanced injuries as a result of a defect in the seat belt. Specifically, she claimed that GM did not properly design the belt to fit a small woman and that she "submarined" under the belt, causing her injuries. GM, however, claimed that the force of the crash combined with the plaintiff's improper wearing of the seatbelt, which led to her to "jackknifing" over the belt, caused her injuries. GM also claimed that Fennie could have braked more quickly had his driving not been impaired by alcohol. The jury returned a verdict of $2.1 million in compensatory damages and $5.6 million in punitive damages against GM, to which it allocated 100 percent of the fault. The Alaska Supreme Court ruled that the trial court had improperly precluded the jury from considering Farnsworth's own negligence in her misuse of the seatbelt, failed to instruct the jury that Walters caused Farnsworth's injuries and he was a party to whom they should allocate some degree of fault, and that the jury's punitive damage award could not stand because it did not take into account the role of others in the accident.[24]
- In Colorado, Diane Montag drove her Honda Prelude onto a railroad crossing into the path of a freight train, which broadsided the car. Upon impact, Montag was ejected from the vehicle despite wearing her seat belt. She ultimately died from her injuries. Her husband sued Ford, claiming that the seat belt failed and enhanced her injuries. Recognizing that fault encompasses "a broad range of culpable behavior," the Tenth Circuit found that "no good reason exists not to allow the jury to compare Mrs. Montag's initial negligence with Honda's fault in designing the seat belt." The court also recognized that in every crashworthiness case, "the jury is already

comparing the plaintiff's and defendant's behavior in order to determine causation. Requiring the jury to make a similar determination for the purpose of damages is certainly reasonable and consistent with Colorado's comparative fault statute."[25]

- In Delaware, Barry Meekins drove through a stop sign and hit another car. The air bag installed in his Lincoln Town car inflated upon impact. Meekins, however, sued Ford, claiming that the airbag injured the fingers on his left hand by crushing them against the steering wheel. Ford countered that the injury to Meekins' fingers was caused by the violent turning of the steering wheel engendered by the collision. The court permitted the jury to compare the fault of the driver and responsibility of Ford, recognizing that there are few cases where the injuries from the initial and secondary collisions are so distinct that separating the two "might be workable, even if not advisable." The court also found that there can be several proximate causes of the same injury and comparative fault exists to apportion the fault equitably between multiple parties. "Public policy seeks to deter not only manufacturers from producing a defective product but to encourage those who use the product to do so in a responsible manner."[26]
- In Louisiana, 15-year-old Lizaz Pinegar was driving a Dodge Ram van on a highway with her family at about 55 mph when she fell asleep at the wheel. The van hit a guardrail, breaking a rear side window. Pinegar's stepmother, Mrs. Moore, who had been sleeping across the van's sofa seat, was ejected from the vehicle. Before trial, the family settled with the car dealership and their insurer, and dismissed their claims against Chrysler without prejudice. The plaintiffs' also sued the customizer of the van (which had been sold by Chrysler as a shell), alleging that the vehicle was defective because it lacked seatbelts in the rear sofa seat, had a large, easily breakable picture window, and should have warned passengers not to use that seat when the vehicle was in motion. The appellate court applied comparative fault principles to assign 20% of the fault to the driver and 40% each to the seller and customizer. The appellate court also found that the trial court did not err in assigning no degree of fault to Moore for permitting a young, inexperienced driver to take the wheel late at night after a statutory curfew.[27]
- In North Carolina, Edward Hinkamp, an 18-year-old college freshman, was driving home in his Jeep after a day of heavy drinking when he hit an icy curve. The Jeep rolled over and Hinkamp was thrown from the vehicle, resulting in serious and permanent injures. No one witnessed the accident, but his blood, when drawn several hours later, showed a blood alcohol content of 0.10. Undisputed evidence showed he had been drinking since the afternoon with friends, had vomited twice at the bar, and was described as "inebriated." Hinkamp and his parents sued Chrysler contending that the Jeep's design made it difficult to steer. Although the plaintiffs did not contend that the design caused the accident, they claimed that once the Jeep lost traction, the gear prevented Hinkamp from regaining control. They also alleged that the design was inadequate to protect an occupant in the event of a rollover, enhancing Hinkamp's injuries. A federal court ruled that the jury must be allowed to determine whether Hinkamp's intoxication caused him not to notice the ice or impaired his ability to regain control.[28]

The Minority Approach

Despite the introduction of comparative fault principles and the movement to adopt the approach of the Restatement (Third), a few courts refuse to permit a jury to consider the fault of the plaintiff in crashworthiness cases.[29] The reasoning behind the minority view is that a manufacturer has a duty to minimize the injurious effect of a crash no matter how the crash is caused and has a duty to anticipate foreseeable negligence of users and third parties. These courts attempt to draw a sharp distinction between the plaintiff's accident-causing conduct and the car manufacturer's injury-enhancing defect.

Jurors in states applying the minority view are left totally in the dark as to whether the individual seeking compensation in an accident was speeding, under the influence of alcohol or drugs, or knowingly operating a vehicle while sleep deprived. Jurors would surely want, and expect, to know these facts. Allowing the jury to consider this evidence empowers them to reduce the plaintiff's recovery if they decide that, under all the circumstances, holding the plaintiff partially responsible would be just.

Application of the minority approach in practice demonstrates the absurd result of blindfolding the jury from allocating fault based on the full understanding of the accident:

- In Maryland, David Binakonsky drove his Ford E-150 van at approximately 65 mph in a 30 mph zone, missed a turn and drove through a wooded area head-on into an oak tree. His speed at the time of the collision was estimated at between 40 and 47 mph. Binakonsky was drunk at the time of the collision, and driving without a license or insurance. The crash was so severe that the sides of the van wrapped around the tree, forming a sharp V in the center front bumper area. The tree penetrated the front of the vehicle two to three feet, driving the engine rearward and rupturing the fuel line. The spilling gasoline caught fire and Binakonsky was dead by the time he was removed from the vehicle. His family contended that the fire caused his death, alleging that plastic fuel lines and connectors in fuel system should have withstood excessive heat and pressure, and included a device that would have stopped fuel from flowing into the engine compartment. Ford contended that Binakonsky was killed upon impact with the tree. Maryland law does not permit the jury to consider the plaintiff's fault in product liability actions. The appellate court reversed summary judgment for the manufacturer.[30]
- In New Jersey, 24-year-old Michael Green worked as a "car jockey" for a Chevrolet dealership. He was driving one of his employer's automobiles, a new 1986 Chevrolet Camaro Z28 sports coupe. Evidence suggested they were traveling as fast as 75 mpg and on the wrong side of the road as he came over a slight rise and hit a school van. Green was rendered a quadriplegic from the accident. He claimed that the design of the car caused the T-top to collapse, compressing his spine. The trial judge instructed the jury that it could not consider evidence of accident severity and speed and the jury attributed 100% of Green's injuries to collapse of the T-top. The appellate division upheld this ruling.[31]

- In Iowa, a driver, who was heavily intoxicated and speeding, lost control of his Jeep, which went off the road, slammed into a concrete bridge abutment, rolled onto its fiberglass top, breaking it, and slid upside down for 300 feet on its roll bar. During the vehicle's slide, backseat passenger Jeffrey Reed, who was also intoxicated and not wearing his seatbelt, had his arm momentarily pinched between the Jeep's rollbar and the highway, causing severe fractures. Reed alleged that Chrysler, by designing its removable hardtop with fiberglass instead of steel, was responsible for his arm injury. Accident investigators estimated that the driver had been speeding as fast as 79 mph. The Iowa Supreme Court reversed summary judgment for the manufacturer, found that the jury was precluded from learning of the driver's intoxication and speed, and found that any part the driver or Reed played in causing the accident was irrelevant.[32]

The Minority Approach is Shrinking as Courts Recognize Juries Should Know the Facts

On October 9, 2009, the Iowa Supreme Court abandoned the minority approach and decided to permit a jury to consider the driver's comparative fault in crashworthiness cases.[33] In so doing, the court repudiated a 1992 case, *Reed v. Chrysler Corp*. (discussed on page 10), which the Florida Supreme Court relied upon in *D'Amario.*

In the recent Iowa case, Glen Jahn was driving a Hyundai Elantra when it was struck at an intersection by Grace Burke, who "blew through a stop sign." Jahn suffered significant injuries. After reaching a settlement with Burke and her insurer, Jahn sued Hyundai, claiming that the front airbag, which failed to deploy, was defective and caused her more extensive injuries than she would have otherwise suffered.

The Iowa Supreme Court recognized that the majority rule "imposes upon users the responsibility to safely use products and that it would be unfair to impose costs of substandard plaintiff conduct on manufacturers, who would presumably pass on some or all of those costs to users and consumers, including those who consume products safely and wisely."[34] The court also recognized that the at-fault driver, as the cause of the accident, is responsible for the natural and foreseeable consequences of his conduct, including the possibility that equipment in the car will malfunction in the impact.[35] The court then considered the intent of comparative fault, the Restatement's application of comparative fault in crashworthiness cases, and the evolving case law of other jurisdictions to adopt the majority approach.[36] Florida should likewise follow this course and give the right signals to all drivers in the state.

Responding to Criticism

Some continue to adhere to the view that juries should not have the opportunity to allocate a portion of the fault in crashworthiness cases to a driver whose conduct caused the accident. Those advocating for continuing this minority approach in Florida may make the following four arguments:

1. **There will be less of an incentive for automobile manufacturers to produce safe products if their liability is reduced to reflect reckless driving that caused an accident.**

It is irrational to believe that vehicle manufacturers will place less care into designing safe products on the assumption that, if the product fails, and the accident happens in Florida, they will be able to pin a portion of the blame on a drunk, drugged, or otherwise reckless driver for the injury. Vehicles are designed and developed to comply with motor vehicle safety standards set by the National Highway Traffic Safety Administration, which itself has a Congressional mandate to create and enforce safety regulations to prevent unreasonable safety risk. Vehicles are not design by after-the-fact review of drunk driving accidents in Florida and claims that good comes of such litigation fails to understand both vehicle safety and the profound costs incurred by motor vehicle manufacturers in such litigation. Moreover, this view fails to recognize that reckless drivers also place public safety at risk and should be held accountable for their actions.

2. **Permitting evidence of the blameworthy conduct of the driver will prejudice the jury and render automobile manufacturers and sellers "tort proof."**

Juries have appropriately allocated fault for the negligent conduct of the driver, while continuing to impose liability on those who sell defective products. For instance, in the case of the young, inexperienced driver who fell asleep at the wheel, the jury imposed only 20% of the fault on the driver and 80% of the fault on the seller and customizer of the van for failing to install seat belts in the back seat. We ask far more from juries when we try multi-month complicated product liability cases than simple fault apportionment.

3. The primary and secondary collisions in crashworthiness cases are distinct events with separate causes and injuries. Limiting the jury's consideration to enhanced injury already effectively apportions liability because the manufacturer's liability is limited to the portion of the injury stemming from the defect.

More often than not, "primary" and "secondary" injuries are a legal fiction. An accident occurs in a millisecond and combines a number of potential causes. For example, consider the Alaska case where the evidence included a third-party driver on cocaine, a plaintiff who wore a seatbelt improperly, the reaction time of the intoxicated driver of the plaintiff's car, a claim that the seat belt was not properly fitted for small women, as well as the force of the impact in a head-on collision. In other cases, the injury is indivisible, such as in the Colorado case where an individual who drove onto a railroad crossing and was broadsided by a train and ejected from the vehicle, and her family alleged that a faulty seatbelt was responsible for her death. In these types of cases, a jury should have the opportunity to consider all the facts and allocate fault for the entire event among responsible parties.

4. Comparing the automobile manufacturer's strict liability for a product defect and the negligence of the driver is a comparison of "apples to oranges."

The California Supreme Court closely considered and squarely rejected this argument. The court recognized that while there are "theoretical and semantic distinctions between the twin principles of strict product liability and traditional negligence, they can be blended and accommodated." The reason underlying the creation of strict product liability, the court found, was to protect "injured persons *who are powerless to protect themselves*."[37] This goal would not be frustrated by comparative negligence:

> Plaintiffs will continue to be relieved of proving that the manufacturer or distributor was negligent in the production, design, or dissemination of the article in question. Defendant's liability for injuries caused by a defective product remains strict. The principle of protecting the defenseless is likewise preserved, for plaintiffs recovery will be reduced *only* to the extent that his own reasonable care contributed to his injury. The cost of compensating the victim of a defective product, albeit proportionally reduced, remains on the defendant manufacturer, and will, through him, be 'spread among society.' However, we do not permit plaintiff's own conduct relative to the product to escape unexamined, and as to that share of plaintiff's damages which flows from his own fault we discern no reason of policy why it should . . . be born by others."[38]

Conclusion

Florida should join the majority of courts across the nation that permit a jury to fairly apportion fault among those who contributed to the plaintiff's injury in crashworthiness cases. Such a rule allows the jury to consider both the responsibility of those who caused the accident and the fault of the automobile manufacturer alleged to have designed the vehicle in a manner that enhanced the plaintiff's injuries. The majority rule is consistent with principles of tort law: It encourages the design of safe products by continuing to impose strict liability on manufacturers for product defects, while also holding responsible those who place the public at risk through their careless driving. Florida law should not shield drivers from responsibility when their conduct endangers the lives of passengers, pedestrians, and other drivers on highways and streets of the state.

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Endnotes

[1] *See, e.g., Evans v. General Motors Corp*., 359 F.2d 822 (7th Cir. 1966), *overruled by Huff v. White Motor Corp*., 565 F.2d 104, 110 (7th Cir. 1977).

[2] *See Larsen v. General Motors Corp*., 391 F D'Amario v. Ford.2d 495, 502 (8th Cir. 1968).

[3] *Butterfield v. Forrester*, 11 East 60, 103 Eng. Rep. 926 (1809).

[4] Victor E. Schwartz, Comparative Negligence § 1.02[c] (4th ed. 2002 & Supp. 2009).

[5] Today, only five jurisdictions continue to view the plaintiff's contributory negligence as a bar to recovery including Alabama, Maryland, North Carolina, Virginia, and the District of Columbia. *See* Comparative Negligence § 1.05[e][3].

[6] Florida and eleven other states follow the pure comparative negligence rule, including Alaska, California, Kentucky, Louisiana, Michigan, Mississippi, Missouri, New Mexico, New York, Rhode Island, and Washington. *See* Comparative Negligence §§ 201[a], 3.02. In 1996, the Michigan legislature modified the common law pure comparative fault system by barring noneconomic damages for plaintiffs who were more negligent than defendants. Mich. Comp. Laws Ann. § 600.2959. Most other states have adopted a "modified" comparative fault structure, where a plaintiff may recover damages, minus his percentage degree of fault, so long as the plaintiff's fault is not equal or greater than that of the defendant. Arizona, Arkansas, Colorado, Georgia, Idaho, Kansas, Maine, Nebraska, North Dakota, Tennessee, Utah, and West Virginia does not permit a plaintiff to recover if his contributory negligence is equal or greater than that of the defendant. Connecticut, Delaware, Hawaii, Illinois, Indiana, Iowa, Massachusetts, Minnesota, Montana, New Hampshire, Nevada, New Jersey, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Texas, Vermont, Wisconsin, and Wyoming allow the plaintiff to recover when his negligence is equal, but not greater, than that of the defendant. *See* Comparative Negligence §§ 2.01[b][3], 3.05[b].

[7] Alaska, Arkansas, Colorado, Connecticut, Florida, Idaho, Ilinois, Indiana, Iowa, Kentucky, Louisiana, Michigan, Minnesota, Nebraska, New York, North Dakota, Utah, Washington, and Wyoming enacted "comparative fault statutes," amended their comparative negligence law to apply to all actions, or passed separate product liability statutes including a comparative fault provision. The courts of Hawaii, Kansas, Montana, New Hampshire, North Dakota, Oregon, Rhode Island, Texas, Utah, and Wisconsin have applied a general comparative negligence statute to product liability actions or fashioned a comparative fault rule for such cases. *See* Comparative Negligence §§ 2.01[c]-[d], 11.02.

[8] The minority view finds that product liability focuses solely on whether or not a product is unreasonably dangerous and considers a plaintiff's lack of care in using the product irrelevant to whether the manufacturer could have developed a safer design.

[9] *Id*. at § 17(a).

[10] Restatement Third of Torts: Prods. Liab. § 17 cmt. a (1998) [hereinafter "Restatement Third"].

[11] *See* Restatement Third § 17 cmt. a.

[12] *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973).

[13] *Id*. at 436.

[14] *See Kidron, Inc. v. Carmona*, 665 So. 2d 289 (Fla. 3d DCA 1995).

[15] *D'Amario v. Ford*, 806 So. 2d 424 (Fla. 2002).

[16] *Id*. at 435.

[17] *See Whitehead v. Toyota Motor Corp*., 897 S.W.2d 684, 690-92 (Tenn. 1995) (surveying cases). Among those following this position include courts in Alaska, Arkansas, California, Colorado, Delaware, Louisiana, Indiana, North Carolina, North Dakota, Oregon, Tennessee, Washington, Wyoming, and, most recently, Iowa.

[18] *See Whitehead v. Toyota Motor Corp*., 897 S.W.2d 684, 693 (Tenn. 1995); *Daly v. General Motors Corp*., 575 P.2d 1162, 1167-69 (Cal. 1978).

[19] *General Motors Corp. v. Farnsworth*, 965 P.2d 1209, 1218 (Alaska 1998).

[20] *General Motors Corp. v. Farnsworth*, 965 P.2d 1209, 1218 (Alaska 1998).

[21] Restatement Third § 17 cmt. a, reporters' note.

[22] *See, e.g., Smith v. Goodyear Tire & Rubber Co*., 600 F. Supp. 1561, 1568 (D. Vt. 1985).

[23] *See generally Swajian v. General Motors Corp*., 916 F.2d 31, 34-35 (1st Cir. 1990) (holding that failure to admit evidence of the "dramatic" intoxication of the plaintiff and his deceased spouse constituted clear error requiring a new trial).

[24] *See General Motors Corp. v. Farnsworth*, 965 P.2d 1209 (Alaska 1998).

[25] *Montag v. Honda Motor Corp*., 75 F.3d 1414, 1419 (10th Cir. 1996).

[26] *Meekins v. Ford Motor Co*., 699 A.2d 339, 345-46 (Del. Super. Ct. 1997).

[27] *Moore v. Chrysler Corp*., 596 So. 2d 225 (La. Ct. App. 1992).

[28] *Hinkamp v. American Motors Corp*., 735 F. Supp. 176 (E.D.N.C. 1989).

[29] *See, e.g., Binakonsky v. Ford Motor Co*., 133 F.3d 281 (4th Cir. 1998) (interpreting Maryland law); *Jimenez v. Chrysler Corp*., 74 F. Supp.2d 548, 565 (D.S.C. 1999), *reversed in part and vacated*, 269 F.3d 439 (4th Cir. 2001); *Cota v. Harley Davidson*, 684 P.2d 888, 895-96 (Ariz. Ct. App. 1984); *Andrews v. Harley Davidson, Inc*., 796 P.2d 1092, 1095 (Nev. 1990); *Green v. General Motors Corp*., 709 A.2d 205, 212-13 (N.J. Super Ct. App. Div. 1998); *Alami v. Vockswagen of Am., Inc*., 766 N.E.2d 574, 575 (N.Y. 2002).

[30] *See Binakonsky v. Ford Motor Co*., 133 F.3d 281 (4th Cir. 1998). Since the case involved Maryland law, a finding that the plaintiff was partially responsible for his injury would have barred his recovery under the state's contributory negligence rule. This would not be the case in Florida.

[31] *See Green v. General Motors Corp*., 709 A.2d 205, 212-13 (N.J. Super Ct. App. Div. 1998).

[32] *Reed v. Chrysler Corp*., 494 N.W.2d 224 (Iowa 1992), *abrogated by Jahn v. Hyundai Motor Co*., No. 07-1595 (Iowa Oct. 9, 2009).

[33] *Jahn v. Hyundai*, No. 07-1595, Slip Op. (Iowa Oct. 9, 2009).

[34] Slip Op. at 7 (citing William J. McNichols, *The Relevance of the Plaintiff's Misconduct in Strict Tort Products Liability, the Advent of Comparative Responsibility, and the Proposed Restatement (Third) of Torts*, 47 Okla. L. Rev. 201, 283-84 (1994)).

[35] *See id*. at 17.

[36] *See id*. at 18.

[37] *Daly v. General Motors Corp*., 575 P.2d 1162, 1167-69 (Cal. 1978) (emphasis in original).

[38] *Id*. (emphasis in original).