Personal Responsibility in Product Liability: Who Is Responsible for What and Why?

D. Alan Thomas[†]
John Isaac Southerland[††]
Gardner M. "Chip" Jett, Jr.[†††]

Abstract

Many practitioners argue that evidence of contributory negligence or comparative fault is inadmissible in product liability cases, but is this really true? As it turns out, the answer sometimes is yes and sometimes is no. Under the different methods by which a plaintiff may bring a product liability lawsuit, the facts of that same plaintiff's involvement, or a non-party's involvement, in the incident from which the injuries occurred can, at times, be admissible and, at other times, inadmissible. This Article attempts to answer the question of when such evidence is admissible, but also seeks to equip practitioners with the necessary tools regarding how to navigate, and correctly present such evidence, in various jurisdictions. This Article is not intended to advocate any particular variation of the rule but rather to observe the trends as well as common themes.

Introduction

Every case originates with the claim that the plaintiff has suffered "harm." The complaint names one or more defendants who are alleged to be the "who" in asking "who caused the harm." "Why" the harm occurred is the "proximate cause," the "cause in fact," the "but for" linking the other two. Without *why*, the harm does not occur.

As simple as this concept may seem, there have historically been attempts in certain situations to limit the jury's consideration of who is

---

[†] B.S. (1982), Auburn University; J.D. (1985), Cumberland School of Law of Samford University. Mr. Thomas is a partner with Huie, Fernambucq & Stewart, LLP in Birmingham, Alabama.

[††] B.S. (2000), University of North Carolina-Chapel Hill; J.D. (2004), Cumberland School of Law of Samford University. Mr. Southerland is a partner with Huie, Fernambucq & Stewart, LLP in Birmingham, Alabama.

[†††] B.S.B.A. (2008), Auburn University; J.D. (2011), Cumberland School of Law of Samford University. Mr. Jett is an associate with Huie, Fernambucq & Stewart, LLP in Birmingham, Alabama.

responsible for the harm. If the "*who*" also happens to be the person bringing the lawsuit, then there has seemed to be disparate treatment. All jurisdictions recognize there can be multiple "*whos*" responsible. One *who* may be the plaintiff. Another may be a non-party. Is it fair to ask a jury to decide without being able to consider all potential "whos" or having all the evidence of "why?"

The notion of fundamental fairness is, and always has been, a cornerstone of American jurisprudence.[1] In a civil context, it is the backbone of equity; it is why we attempt to make a plaintiff whole, why a defendant is held accountable, and why *all* parties hopefully bear responsibility for their own actions. As a practical matter, we all know that juries assess responsibility or fault based primarily on what they individually perceive as being fair. Judges make their rulings pursuant to the precedent by which they are bound, which is intended to incorporate some level of fairness based on the foundational concept of right and wrong. Equally as important, lawyers, and their clients, often evaluate cases based on principles of fairness, including how these principles relate to the responsibility of all parties involved, as well as non-parties. For example, a plaintiff driving 100 miles per hour at the time of a crash potentially lowers the value of a case, while a defendant manufacturer allegedly cutting corners in the manufacturing or design process may raise the value of a case. Why, then, should these same principles of fairness and personal responsibility not carryover into a trial on the merits, arbitration, mediation, or any other potentially dispositive legal arena? They should and, in the majority of American jurisdictions, they do.[2]

The trends in this area of the law began by admitting all evidence of why the harm occurred and who caused it.[3] If the *who* happened to be the plaintiff, recovery was barred entirely.[4] As the law progressed in

---

[1] Stephen A. Stallings, *Rule 11: What Process Is Due?*, 62 ST. JOHN'S L. REV. 586, 586 (1988).

[2] Thomas R. Trenkner, Annotation, *Modern Development of Comparative Negligence Doctrine Having Applicability to Negligence Actions Generally*, 78 A.L.R.3D 339 (1977); *see* 21 AM. JUR. TRIALS 715 § 4 (1974).

[3] 65A C.J.S. *Negligence* § 973 (2013).

[4] *See* William B. L. Little, *"It Is Much Easier to Find Fault with Others, Than to be Faultless Ourselves": Contributory Negligence as a Bar to a Claim for Breach of the Implied Warranty of Merchantability*, 30 CAMPBELL L. REV. 81, 85-86 (2007).

most jurisdictions, this potentially harsh outcome pushed courts and legislatures toward admissibility standards that excluded evidence of *why* and *who*, especially when *who* was the plaintiff.[5] As the trends continued to evolve, courts began favoring admissibility of *why* and *who* evidence in response to newer fault allocation that did not lead to a complete bar of recovery.[6]

Most recently, the Indiana Supreme Court reaffirmed these basic foundational building blocks of personal responsibility and fundamental fairness by recognizing the admissibility of a plaintiff's incident-causing actions in an "enhanced injury" product liability action.[7] The opinion prompted these authors to re-examine not just the various methods by which a party's acts are considered in a product liability perspective, but most importantly, some practical arguments for, hopefully, ensuring that every party's personal responsibility is put to the test when a client, and their attorney, find themselves in a potential end-game scenario.

I. Issue

The perception that one party's harm causing actions are inadmissible is an often made argument, yet a common misnomer in product liability litigation.[8] Indeed, these acts are admissible in most every instance. Thus, the question facing the attorney is not *whether* these acts are admissible in each respective case. Rather, the questions are *how* are these acts properly admissible in each respective case and *how* are they considered under the applicable law in each jurisdiction. The practitioner should not simply be asking these questions; she should also be developing the answers throughout the pendency of the litigation.

At the end of the day, a lawyer's goal must always be to properly present evidence to the jury, or finder of fact, which will empower each

---

[5] Ellen M. Bublick, *Comparative Fault to the Limits*, 56 VAND. L. REV. 977, 990-91 (2003).

[6] Trenkner, *supra* note 2, at 347.

[7] Green v. Ford Motor Co., 942 N.E.2d 791, 796 (Ind. 2011); *see also* Gartman v. Ford Motor Co., No. CV-13-183, 2013 WL 6001932 (Ark. Ct. App. Nov. 13, 2013) (affirming the trial court's allowance of intoxication evidence in a wrongful death trial against the manufacturer of the subject vehicle in a single vehicle rollover accident).

[8] *See* Romualdo P. Eclavea, Annotation, *Applicability of Comparative Negligence Doctrine to Actions Based on Strict Liability in Tort*, 9 A.L.R.4TH 633 (1981).

respective fact finder, to make a decision based on the desire to fairly apply the facts to the law; all so that the best possible outcome may be achieved for the client. The goal of all tort-based lawsuits is to answer two basic questions: "why did the harm occur?" and "who caused the harm?" With these ideas in mind, practitioners should attempt to present evidence to the jury to assist in their answering these questions.

Simply stated, one must never lose sight of understanding the fact finder's perspective and how they ultimately desire to answer these *who* and *why* questions, based on the facts and law presented to them. Depending on the jurisdiction, there are numerous methods by which this can happen. Thus, the goal of this Article is to provide a practical guide-post for the litigant, whether plaintiff or defendant, so that the lawyer is equipped with the necessary tools to achieve the "fairest" and "best" outcome in a product liability setting.

II. History of the Rule[9]

No one can reasonably argue against the fundamental premise that fault should be considered as a central element when determining legal liability.[10] The concept of considering a plaintiff's fault, in addition to a defendant's fault, developed early. In fact, it is widely acknowledged that the notion was first recognized in the nineteenth century English case of *Butterfield v. Forrester*.[11] There, the plaintiff brought suit for negligence after being thrown from his horse when, riding at a high speed, the horse ran into a pole left in the roadway.[12] Finding for the defendant, Lord Ellenborough, Lord Chief Justice of the King's Bench

---

[9] The overall concepts and philosophies of contributory/comparative negligence have been discussed at length by renowned legal scholars and the authors of this Article in no way intend to repeat these discussions. However, for the purpose of this Article, a brief overview of comparative fault is in order. *See* Jim Hasenfus, *The Role of Recklessness in American Systems of Comparative Fault*, 43 OHIO ST. L.J. 399 (1982).

[10] *See*, *e.g.*, Butterfield v. Forrester, (1809) 103 Eng. Rep. 926, 927 (K.B.); Union Pac. Ry. Co. v. McDonald, 152 U.S. 262, 271 (1894); Stokes v. Saltonstall, 38 U.S. 181, 188 (1839); Tanner's Ex'r v. Louisville & Nashville R.R. Co., 60 Ala. 621, 640 (1877) (quoting Macon & W. R.R. Co. v. Davis, 18 Ga. 679, 686 (1855)).

[11] (1809) 103 Eng. Rep. 926 (K.B.).

[12] *Butterfield*, 103 Eng. Rep. at 926.

in England and Wales at the time, decided the plaintiff's excessive rate of speed was a complete bar to his recovery.[13] The doctrine of contributory negligence was born.[14]

Within a matter of years, this rule of law made its way into American courts.[15] Both Massachusetts and Vermont adopted the affirmative defense in 1824.[16] The Massachusetts court held, "this action cannot be maintained, unless the plaintiff can show that he used ordinary care; for without that, it is by no means certain that he himself was not the cause of his own injury."[17] Following the same logic, the Vermont court stated, "if it appear[s] that the injury complained of would not have happened, *but for* a want of ordinary care and diligence in the plaintiff, the plaintiff is not entitled to recover."[18]

Within a few decades, the doctrine of contributory negligence swept its way across American jurisprudence and became "a recognized part of American common law."[19] In fact, contributory negligence became so ingrained in American jurisprudence that in 1854, a justice of the Pennsylvania Supreme Court boldly described the defense as "a rule of law from time immemorial . . . not likely to be changed in all time to come."[20] Thereafter, contributory negligence was the general rule for over 100 years in the United States.[21] For instance, in 1950, all but five states

---

[13] *Id.* at 927.

[14] *Id.*; *see also* Campbell v. Ala. Power Co., 567 So. 2d 1222, 1229 (Ala. 1990) ("Most scholars attribute the origin of this rule to the English case of *Butterfield v. Forrester* . . . .").

[15] *See* Smith v. Smith, 19 Mass. (2 Pick.) 621, 664-65 (1824); Washburn v. Tracy, 2D. Chip. 128, 136 (Vt. 1824).

[16] *Smith*, 19 Mass. (2 Pick.) at 664-65; *Washburn*, 2D. Chip. at 128.

[17] *Smith*, 19 Mass. (2 Pick.) at 664.

[18] *Washburn*, 2D. Chip. at 128 (emphasis added). Unlike most modern jurisdictions, however, the burden of proof rested on the plaintiff to prove that his or her negligence was not a contributing factor to the complained of injuries. *See* Aurora Branch R.R. Co. v. Grimes, 13 Ill. 585, 587 (1852) (citing Lane v. Crombie, 29 Mass. (12 Pick.) 177, 182 (1831)).

[19] Peter Nash Swisher, *Virginia Should Abolish the Archaic Tort Defense of Contributory Negligence and Adopt a Comparative Negligence Defense in Its Place*, 46 U. RICH. L. REV. 359, 361 (2011) (alteration in original) (quoting 3 STEWART M. SPEISER, ET AL., THE AMERICAN LAW OF TORTS § 12:2, at 250 (1983)).

[20] *Id.* at 361 (quoting Pa. R.R. Co. v. Aspell, 23 Pa. 147, 149 (1854)).

[21] *Id.* at 361-64.

still employed contributory negligence as a complete bar to recovery.[22] Then, a shift began to take place, resulting in all but five United States jurisdictions (including the District of Columbia) applying some version of "comparative" negligence by 1995.[23]

Although the majority of jurisdictions have moved away from contributory negligence,[24] it is important to note that the minority not only exists, but that some of these jurisdictions have clearly stated their intention to retain contributory negligence.[25] In fact, the Court of Appeals of Maryland recently issued a lengthy opinion reaffirming their continued use of contributory negligence.[26] As stated by the court in *Coleman v. Soccer Association of Columbia*, it is not the intent of these authors to take a position on the appropriateness of comparable negligence versus strict contributory negligence.[27] This court held it was the role of the legislature to adopt such a change and the defense of contributory negligence would remain in force.[28] It is important to note that the minority's logic in their approach to contributory negligence is the same logic applied by the majority regarding the admissibility of harm-causing evidence.[29]

III. Different Variations, Same Concept

Although the logic behind the admissibility of evidence to support contributory or comparative negligence defenses remains the same, the outcome may differ greatly depending on which version of the rule each jurisdiction chooses to apply. Only five jurisdictions still employ the original contributory negligence rule,[30] wherein, theoretically, any

---

[22] *Id.* at 364-65.

[23] *Id.* at 360.

[24] *Id.*

[25] *See* Coleman v. Soccer Ass'n of Colom., 69 A.3d 1149, 1158 (Md. 2013); Williams v. Delta Int'l Mach. Corp., 619 So. 2d 1330, 1333 (Ala. 1993).

[26] *Coleman*, 69 A.3d at 1158.

[27] 69 A.3d 1149, 1158 (Md. 2013).

[28] *Coleman*, 69 A.3d at 1157-58.

[29] *Id.* at 1153-54, 1159.

[30] Swisher, *supra* note 19, at 360.

negligence on the part of the plaintiff bars recovery entirely.[31] Stated differently, if a plaintiff is found to be even one percent at fault, the plaintiff cannot recover, regardless of whether a defendant may be ninety-nine percent at fault for the same harm.[32]

For example, take the hypothetical case in which Kramer is "driving while texting" down Main Street in his 1977 Gremlin. Elaine is driving her 1980, full-size conversion van on First Avenue, which intersects Main Street. While texting, Kramer drives through the intersection in a "reasonable" and "prudent" manner. Elaine, who has run the stop sign, is struck in the side by Kramer's Gremlin. Unfortunately, Kramer is injured. Kramer sues Elaine for his injuries. Applying the law stated above, even though Elaine drove through the stop sign without stopping, if the jury finds that Kramer's texting caused his reaction time to be delayed and that he was even one percent at fault for the crash, Kramer would not recover from Elaine, who was ninety-nine percent at fault. However, if the jury finds Leslie 100% liable, as opposed to ninety-nine percent, then Kramer can recover from Elaine.

As stated previously, a majority of jurisdictions now recognize some form of comparative negligence, wherein, instead of placing the ultimate liability on one party or the other, in theory, comparative negligence apportions each party's fault into enumerated percentages and each party is assigned liability accordingly.[33] However, not every jurisdiction applies comparative negligence the same way as the next. Rather, the most prevalent doctrines can be divided into three subcategories or variations: (1) pure comparative negligence, (2) fifty percent comparative negligence, and (3) fifty-one percent comparative negligence.[34] None

---

[31] *See Williams*, 619 So. 2d at 1334 (Hornsby, C.J., dissenting) (By 1993, "46 American states have replaced the outmoded doctrine of contributory negligence with some form of the doctrine of comparative negligence."); *see also* Campbell v. Ala. Power Co., 567 So. 2d 1222, 1228 (Ala. 1990) (Hornsby, C.J., dissenting).

[32] *See* CHRISTOPHER M. ERNST ET AL., 7 BALDWIN'S OHIO PRACTICE, OHIO TORT LAW § 66:2 (2d ed. 2012).

[33] *See generally* Yount v. Deibert, 147 P.3d 1065, 1076 (Kan. 2006) (discussing comparative fault and the "all or nothing" concept); Miller v. Lammico, 973 So. 2d 693, 700 (La. 2008) (finding comparative fault percentages apply "regardless of whether the plaintiff is assigned any portion of fault"); Baer v. Regents of Univ. of Cal., 972 P.2d 9, 14-15 (N.M. Ct. App. 1998) (discussing the fifty percent rule when calculating damages).

[34] *See* ERNST ET AL., *supra* note 32, §§ 66:7, 66:8, 66:9.

of these variations affect the actual allocation of fault, only the ultimate monetary liability of each party.[35]

Under pure comparative negligence, a plaintiff may recover regardless of the amount of fault apportioned to her.[36] Thus, as long as a defendant is assessed some level of culpability, the defendant will be held liable proportionately.[37]

For example, in the earlier scenario, Kramer is still texting while entering the intersection of Main Street and 1st Avenue. This time, however, instead of Elaine running the stop sign at the intersection, she is sitting at the red light as Kramer drives up behind her. Kramer crashes into the rear end of Elaine. In the ensuing litigation, Kramer alleges that Elaine's brake lights were out, thus making Elaine liable because Kramer did not see the stopped vehicle in front of Elaine. At trial, the jury determines that Elaine is only one percent at fault, but that, because of his texting, Kramer is ninety-nine percent at fault. Currently, in the thirteen states that recognize pure comparative negligence,[38] Kramer will still recover one percent of his damages from Elaine, despite the fact that Kramer was the far more culpable party.

The second comparative negligence variation is followed by eleven states and is commonly referred to as the "modified (50%) system."[39] This rule follows the pure comparative negligence equation, but bars a plaintiff's recovery if her culpability rises to a level equal to, or greater

---

[35] *See id*. § 66.1.

[36] Trenkner, *supra* note 2, at 339.

[37] *Id*.

[38] The states that use a pure comparative fault system are: Alaska, Arizona, California, Florida, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, New York, Rhode Island, South Dakota, and Washington. *See, e.g*., ALASKA STAT. §§ 09.17.060, 09.17.080 (West 2013 legislation); ARIZ. REV. STAT. ANN. § 12-2505 (1984); FLA. STAT. ANN. § 768.81(2) (West 2013); KY. REV. STAT. ANN. § 411.182 (West 2013); LA. CIV. CODE ANN. art. 2323 (West 2012); MISS. CODE ANN. § 11-7-15 (West 2013); N.Y. C.P.L.R. 1411 (McKinney 2013); R.I. GEN. LAWS ANN.§ 9-20-4 (West 2013); S.D. CODIFIED LAWS § 20-9-2 (2013); WASH. REV. CODE ANN. §§ 4.22.005-015 (West 2013); Li v. Yellow Cab Co. of Cal., 532 P.2d 1226 (Cal. 1975); Gustafson v. Benda, 661 S.W.2d 11 (Mo. 1983), Baer v. Regents of Univ. of Cal., 972 P.2d 9 (N.M. Ct. App. 1998).

[39] Michael T. Raupp, Note, *The Multiplication of Indivisible Injury*, 90 TEX. L. REV. 259, 271-72 (2011).

than, the fault of all defendants.[40] Thus, as its title implies, if a plaintiff is found to be fifty percent or more at fault, she cannot recover.[41]

However, should a plaintiff's fault fall below the fifty percent mark, then the plaintiff's recovery will be the total damages less whatever percentage of fault is assigned to the plaintiff.[42]

Lastly, the most widely accepted variation of comparative negligence, which is currently the law in twenty-one states, is known as the "fifty-one percent rule."[43] Under this rule, if a jury determines that a plaintiff is fifty-one percent or more at fault, her recovery is barred.[44] Anything less than fifty-one percent allows a total recovery minus whatever percentage of fault is assigned to the plaintiff.[45]

The logic behind the one percent difference in the two variations, while subtle, shows two distinct approaches to a plaintiff's recovery. The fifty percent rule is based on the foundation that the plaintiff must be lesser at fault than the sum or collective fault of the other parties or non-parties. Therefore, the non-plaintiff actors in the incident are the majority of the cause for the plaintiff's injuries. The mindset behind the fifty-one percent rule allows for the plaintiff to be half the cause of the harm. This means, so long as the plaintiff is not the predominant cause of the harm, she may recover. Although it seems small, this difference can often mean the difference between a verdict for the plaintiff and no recovery.

Re-examining the rear-end collision hypothetical between Kramer and Elaine, if the jury apportions fifty percent liability to Kramer for his driving while texting, then Kramer can recover under the fifty-one percent rule, yet he would not recover in a fifty percent rule jurisdiction.[46] In the event Kramer did recover, the recovery would be reduced by the jury's fifty percent apportionment of liability to him.[47]

---

[40] *Id.* at 272.

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *See generally id.*

[47] *Id.*

Central to both contributory and comparative negligence is the idea of individual responsibility and the logic behind the admissibility of a party's fault is the same.[48] No matter what the jurisdiction, the fact finder must understand the actions of all involved parties. It is how those actions are considered under the law that is the question. Thus, although the outcome in a contributory negligence jurisdiction may vastly differ from that of a comparative negligence jurisdiction, the bases for admissibility do not.

IV. The Rule Applied in a Product Liability Context

The application of these principles can become more complicated in the context of product liability, in part because of various jurisdictional approaches to, and implementation of, this area of the law. Perhaps even more important is the instruction to the jury (or even knowledge of the jury) as to the effect of their apportionment decision. Therefore, as a practitioner, it is important to understand how the actions of parties and non-parties are considered when assessing liability.

A. Strict Liability

The concept of personal responsibility within the product liability realm has been addressed by the American Law Institute for many years. The *Restatement (First) of Torts*, and a vast majority of states, utilized traditional contributory negligence as a complete bar to recovery.[49] In fact, the *Restatement (First) of Torts* encouraged the admission of evidence of a plaintiff's fault.[50]

However, a greater emphasis on the theory of strict liability in product related actions closely followed a change to the *Restatement (Second)*

---

[48] *See* John Scott Hickman, Note, *Efficiency, Fairness, and Common Sense: The Case for One Action as to Percentage of Fault in Comparative Negligence Jurisdictions That Have Abolished or Modified Joint and Several Liability*, 48 VAND. L. REV. 739, 744 (1995).

[49] RESTATEMENT (FIRST) OF TORTS § 482 (1934).

[50] *See id.* § 465.

of Torts § 402A in the 1960s.[51] At that time, section 402A was amended in an effort to, theoretically, alleviate a plaintiff's burden in proving lack of due care on the part of a defendant.[52] As a result of this amendment, some argued that, because proof of lack of due care was no longer required against a defendant, then there could no longer be any proof of a lack of due care by a plaintiff.[53] In fact, comment n suggested that traditional contributory negligence was not favored, but assumption of known risks continued to be a defense.[54] Although the intent of the amendment was recognized (that is, to eliminate the element of due care), a resulting consequence of the amendment (the alleged complete abolishment of contributory negligence) also gained favor in some jurisdictions.[55] The resulting combined effect of eliminating proof of due care *and* de-emphasizing contributory fault, theoretically, paved a much smoother road for a plaintiff in product liability actions. The result in those jurisdictions that chose to literally follow § 402A of the *Restatement (Second) of Torts* was to significantly deviate from the foundations of personal responsibility.[56] Thus, as much as the *Restatement (First) of Torts* favored the defendant, the *Restatement (Second) of Torts* favored the plaintiff.[57]

In an effort apparently to find middle ground between its two predecessors, the *Restatement (Third) of Torts* shifted toward comparative fault.[58] Supporting the theory that the plaintiff's recovery should be reduced if and when the plaintiff's own conduct combined to cause the complained of harm.[59] Section seventeen of the *Restatement* (*Third) of*

---

[51] RESTATEMENT (SECOND) OF TORTS § 402A(1) (1965).

[52] *See id*. § 402(A)(2).

[53] *See* Herbert W. Titus, *Restatement (Second) of Torts Section 402A and the Uniform Commercial Code*, 22 STAN. L. REV. 713, 714-15 (1970).

[54] *See* RESTATEMENT (SECOND) OF TORTS § 402A cmt. n (1965).

[55] *See* William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1147 (1960).

[56] *See id.* at 1147-48.

[57] *See* RESTATEMENT (FIRST) OF TORTS § 467 (1934); *see also* RESTATEMENT (SECOND) OF TORTS § 402A (1965).

[58] *See* RESTATEMENT (THIRD) OF TORTS § 17(a) (1998).

[59] *Id.* ("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.").

Torts expressly "recognizes that the fault of the plaintiff is relevant in assessing liability for product-caused harm."[60] This middle-ground approach seemingly coincided with the gain in popularity of some form of comparative negligence being adopted by many states between the publication of the *Restatement (Second) of Torts* and the *Restatement (Third) of Torts*.[61] As a result, courts in a comparative negligence jurisdiction seem more willing to admit evidence of a plaintiff's negligent acts as they no longer bar complete recovery, but instead simply reduce the amount of recovery.[62]

Still central to both contributory and comparative negligence is the idea of individual responsibility.[63] As a result, comparative negligence can either eliminate the need for or co-exist with joint and several liability.[64] "If it is unjust for a plaintiff who is ten percent negligent to recover nothing [in a modified format], it is equally unacceptable to require a defendant who is ten percent at fault to pay the entire recovery, especially when the plaintiff's fault is greater."[65] Some jurisdictions retain joint and several liability in situations where the defendant's fault is relatively large in comparison to that of co-defendants or plaintiffs, even after adopting comparative negligence.[66]

---

[60] *Id.* § 17 cmt. a.

[61] *Id.*; *see, e.g.*, Cleveland v. Piper Aircraft Corp., 890 F.2d 1540, 1548 (10th Cir. 1989) (holding the fact that a plaintiff would not have received any injuries absent the crashworthiness defect did not establish that the negligence of the original tortfeasors was not a proximate cause of those injuries); Gen. Motors Corp. v. Lahocki, 410 A.2d 1039, 1050 (Md. 1980) ("Contee would have us hold that because the injuries . . . came as a result of [a crashworthiness defect], this relieves Contee of any obligation. This argument fails to recognize that there may be more than one proximate cause of injuries.") (citing Karns v. Liquid Carbonic Corp., 275 A.2d 251, 262 (Md. 1975)); Meekins v. Ford Motor Co., 699 A.2d 339, 345 (Del. Super. Ct. 1997) ("The existence of other proximate causes of an injury does not relieve a plaintiff driver under Delaware's comparative negligence statute from responsibility for his own conduct which proximately caused him injury."); Moore v. Chrysler Corp., 596 So. 2d 225, 238 (La. Ct. App.), *writ denied*, 599 So. 2d 316 (La.), *writ denied*, 599 So. 2d 317 (La. 1992) (finding a driver who fell asleep at the wheel "cannot be absolved of responsibility just because someone else's fault served to worsen the injury").

[62] RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 17 cmt. a (1998).

[63] Hickman, *supra* note 48, at 746.

[64] *Id.* at 747.

[65] *Id.* at 746.

[66] *Id.*

B. Affirmative Defenses

In different jurisdictions, contributory and comparative negligence have taken different forms. Many of the intricacies of these defenses, however, are beyond the intended scope of this Article. Nonetheless, a brief overview of some of the more widely used defenses is necessary to understand the role they play in product liability litigation.

C. Product Misuse, Alteration, and Modification: Contributive Fault or Not?

Some jurisdictions couched the contributory/comparative defenses into misuse of the product.[67] Much like contributory negligence, the defenses of product misuse, alteration, and modification formerly acted as a complete bar to recovery in many jurisdictions, and still remain so in others.[68] Presently, they may assist the jury in determining whether the product is defective and in determining legal causation. With the advent of comparative fault, these defenses may now be considered by the jury to potentially reduce the plaintiff's recovery.[69] Misuse is the objective use of a product not contemplated by the manufacturer. It may be misused by either the plaintiff or by a third-party.[70] Misuse at times has been stretched to only contemplate a theoretical use that could never have possibly been anticipated by the manufacturer. However, a plaintiff driving 100 mph while under the influence of alcohol is an obvious misuse, although it could possibly be anticipated by the manufacturer.

Alteration and modification of a product are founded under the concept that the product is in the same or substantially same condition as the time it left the hands of the manufacturer for the manufacturer to be liable. Again, this is an objective standard not dependent upon whether the modification was made by the plaintiff or a third-party. Depending upon the jurisdiction, this can be couched either as an

---

[67] Keogh v. W.R. Grasle, Inc., 816 P.2d 1343, 1350-51 (Alaska 1991).

[68] RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 17 cmt. a (1998).

[69] *Id.*

[70] *See* David G. Owen, *Products Liability: User Misconduct Defenses*, 52 S.C. L. REV. 1, 45-58 (2000).

affirmative defense to be proven by the defendant or an element that must be proven by the plaintiff, or both.

Contributory or comparative negligence are negligence-based affirmative defenses. The argument has been made that in a warranty (contract-based) context that such negligence-based defenses are not applicable. However, misuse, whether couched in the terms of comparative fault or breach of contract, remains applicable. For example, in a jurisdiction in which the statute of limitations for strict liability or negligence actions is shorter than that for a warranty (contract) based cause of action, a case based solely under warranty and contributory/comparative defenses should be allowed. However, clearly, misuse remains a defense in a contract-based warranty action.[71]

Interestingly, the defense of misuse may either be asserted by the defendant against the plaintiff, or may be implemented to show fault on the part of a non-party.[72] As such, the fault of a non-party is one way to reduce a defendant's exposure, in that it reduces fault attributable to that defendant.[73]

D. Assumption of the Risk

The defense of assumption of the risk is occasionally confused with product misuse, alteration, and modification. This is understandable as there appears to be some overlap. However, when broken down logically, the differences are distinct and practitioners can easily determine which, if either, apply to their product liability case. Assumption of the risk implies that the actor or plaintiff is aware of the present risk, understands that risk, and accepts that risk in proceeding.[74] Therefore, assumption of the risk requires a somewhat heightened mental state than that of product misuse, alteration, and modification.[75] Furthermore, a third-party cannot assume the risk for a plaintiff.[76] Stated

---

[71] *Id*. at 49-51.

[72] RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 17 cmt. c (1998).

[73] *Id.*

[74] David G. Owen, *Products Liability: User Misconduct Defenses*, 52 S.C. L. REV. 1, 25 (2000).

[75] *Id.* at 24.

[76] *Id.* at 43.

differently, assumption of the risk may not be asserted against the plaintiff when a third person assumed the risk leading to plaintiff's injuries.[77] For example, a defendant manufacturer could assert an assumption of the risk defense against Kramer, our texting driver, when Kramer drives the vehicle off the road and it rolls. However, that same manufacturer may not assert the defense against a passenger in Kramer's vehicle unless the passenger assumed the risk of riding with Kramer.

The real question is from which viewpoint is the assumption of risk made? The argument is whether it is the individual plaintiff's subjective knowledge of the risk that is assumed or whether it is a reasonable person's standard of knowledge. Imputing the negligence of the driver to the passenger varies in different jurisdictions.

E. Enhanced Injury

Although the traditional product liability case often hinges on what part each actor played in causing the particular incident at issue, product liability matters may also focus on what happens during and after the incident or crash occurs. These matters are generally referred to as "enhanced injury" cases, or in an automotive context, the so-called "second-collision" or "crashworthiness."[78] At its most basic level, an enhanced injury claim rests on the notion that the manufacturer could and should have foreseen that the underlying incident would occur by and through the use of its product.[79] Furthermore, due to the foreseeable nature of the incident, that same manufacturer should design and produce its product to ensure the product will protect the user from harm.[80] Put another way, "in light of the statistical inevitability of [incidents], a [product] manufacturer must use reasonable care in designing a [product] to avoid subjecting the user to an unreasonable risk of injury in the event of a[n] [incident]."[81] As explained by the Supreme Court of Alabama,

---

[77] *Id.*

[78] Charles E. Reynolds & Shane T. Costello, *The Enhanced Injury Doctrine: How the Theory of Liability is Addressed in a Comparative Fault World*, 79 DEF. COUNS. J. 181, 182 (2012).

[79] *Id.*

[80] *Id.*

[81] Green v. Ford Motor Co., 942 N.E.2d 791, 793 (Ind. 2011).

"while a manufacturer is under no duty to design an accident-proof vehicle, the manufacturer of a vehicle does have a duty to design its product so as to avoid subjecting its user to an *unreasonable risk* of injury in the event of a collision."[82] In other words, the manufacturer is held liable for the "enhanced" injuries the plaintiff receives as a result of the alleged defective design of the product.[83]

It follows then, that a claim brought pursuant to an enhanced injury theory is often used as a mechanism by which to combat the admissibility of comparative fault, due to the theory's diversion from the "separate and distinct . . . circumstances relating to the initial . . . event."[84] In fact, some would argue the fact that the initial incident happened at all and the circumstances that combined to bring about the incident itself, including actions of parties or non-parties other than the defendant, are irrelevant.[85] For its part in adopting the enhanced injury doctrine, the Supreme Court of Alabama maintained the availability of affirmative defenses, including contributory negligence.[86] Even further, the *Alabama Pattern Jury Instructions* now explicitly recognize this key concept, stating, "Negligence by the plaintiff in the use of the product in question is a defense to [a] [product liability] claim, but plaintiff's negligence in causing the accident is not a defense to a claim under Alabama Extended Manufacturers Liability Doctrine (AEMLD), Alabama's form of stsrict liability, when the alleged contributory negligence does not relate to plaintiff's use of the product."[87] Equally as important, the new edition of the *Alabama Pattern Jury Instructions* does not distinguish between a traditional product liability claim and an enhanced injury, or crashworthiness, claim.[88]

---

[82] Gen. Motors Corp. v. Edwards, 482 So. 2d 1176, 1181 (Ala. 1985) (emphasis added) (citing Larsen v. Gen. Motors Corp., 391 F.2d 495, 501 (8th Cir. 1968)).

[83] Reynolds & Costello, *supra* note 78, at 182.

[84] *Green*, 942 N.E.2d at 794.

[85] Reynolds & Costello, *supra* note 78, at 183.

[86] *Edwards*, 482 So. 2d at 1192.

[87] *See* 2 ALA. PATTERN JURY INSTR. CIV. § 32.13 (2d ed. 2009).

[88] *See* 2 ALA. PATTERN JURY INSTR. CIV. § 32.07 (3d ed. 2012) ("There is no distinction between 'crashworthiness' and an AEMLD design defect claim."). There is, and has been, great debate in Alabama concerning what exactly constitutes a plaintiff's "use of the product" for admission of a plaintiff's negligence in causing the incident in an "enhanced injury" case. The authors acknowledge this debate and do not

This issue of whether evidence of comparative fault is admissible in enhanced injury cases was more recently addressed by the Indiana Supreme Court in *Green v. Ford Motor Co*.[89] In *Green*, the court, while discussing the crashworthiness doctrine, admitted that up to that point, these claims allowed a plaintiff to recover "for the enhanced injuries caused by the lack of reasonable care in designing a crashworthy product. And the fact that the initial collision was not caused by the product's uncrashworthy design did not preclude such a claim for enhanced injuries."[90] The court further acknowledged "the logical appeal to extend this analysis so as to view any negligence of a claimant in causing the initial collision as therefore irrelevant to determining liability for the 'second collision.'"[91]

At this point, however, the court's analysis regarding the admissibility of a plaintiff's comparative fault took a sharp, and even more logical,

---

advocate one position or another for purposes of this Article. *See* D. Alan Thomas et al., *Crashworthiness-Based Product Liability and Contributory Negligence in the Use of the Product*, 73 ALA. LAW. 268, 269-70 (2012); D. Alan Thomas et al., *The Limited Scope of Contributory Negligence in AEMLD-Crashworthiness Cases*, 73 ALA. LAW. 436, 438 (2012); *see also* Ray v. Ford Motor Co., No. 3:07CV175-WHA-TFM, 2011 WL 6182531, at *2 (M.D. Ala. Dec. 13, 2011) (denying a motion in limine to preclude accident causation or accident fault because the plaintiff claimed negligence in automobile and jury could find that the plaintiff used the automobile in a negligent way); Culpepper v. Weihrauch, 991 F. Supp. 1397, 1402 (M.D. Ala. 1997) (granting summary judgment as to a contributory negligence defense related to the plaintiff's use of a handgun as opposed to a hammerblock safety); Garrie v. Summit Treestands, LLC, 50 So. 3d 458, 467 (Ala. Civ. App. 2010) (citing Burleson v. RSR Group Florida, Inc., 981 So. 2d 1109, 1114 (Ala. 2007)) (noting that the plaintiff's contributory negligence was in not engaging the safety device); *Burleson*, 981 So. 2d at 1114 (affirming summary judgment for the defendant based on the plaintiff's contributory negligence in storing a gun with a live round in the chamber and failing to engage the safety); Gen. Motors Corp. v. Saint, 646 So. 2d 564, 566 (Ala. 1994) (stating that the contributory negligence defense, with respect to use of seat belt, is available when seat belt alleged defective); Haisten v. Kubota, 648 So. 2d 561, 565 (Ala. 1994) (affirming a jury charge on contributory negligence related to the plaintiff's causing incident by driving a tractor on a sloped bank); Williams v. Delta Machinery, 619 So. 2d 1330, 1332 (Ala. 1993) (citing Dennis v. Am. Honda Motor Co., 585 So. 2d 1336, 1336 (Ala. 1991)) (clarifying that the error in *Dennis* was in not limiting contributory negligence to use of the allegedly defective helmet, instead of motorcycle); *Dennis*, 585 So. 2d at 1342 (holding that contributory negligence in operating a motorcycle not admissible when different product (motorcycle helmet) alleged to be defective).

[89] 942 N.E.2d 791, 796 (Ind. 2011).

[90] *Green*, 942 N.E.2d at 794.

[91] *Id.*

turn. Specifically, the court emphasized the importance of "[t]he process by which a jury analyzes the evidence, reconciles the views of its members, and reaches a unanimous decision," and recognized that this process is "inherently subjective and is entitled to maximum deference."[92] Thus, the allocation of fault should be entrusted to the sound judgment of the fact-finder who must be given the benefit of all available evidence regarding the actions of all parties involved in the harm causing incident. Highlighting this principle, the *Green* court concluded "that, in a crashworthiness case alleging enhanced injuries . . . it is the function of the fact-finder to consider and evaluate the conduct of *all relevant actors* who are *alleged to have caused or contributed to cause* the harm for which the plaintiff seeks damages."[93] Clearly, "the conduct of all relevant actors" must include the conduct of the plaintiff in their use of the alleged defective product, and even the conduct of a non-party in their contribution to causing the harm.[94]

Although its analysis is premised on Indiana statutory law, the underlying logic and ultimate conclusion of the *Green* court is applicable to any enhanced injury case, no matter the jurisdiction. Still, many continue to argue that evidence of comparative fault, specifically relating to the initial cause of the incident, is irrelevant.[95] These arguments are, most likely, rooted in the common misconception that enhanced injury cases involve different damages or different elements than any other product liability case, which they do not. As observed by the Tennessee Supreme Court, "[a]ny claim for 'enhanced injuries' is nothing more than a claim for injuries that were actually and proximately caused by the defective product."[96] At the time this is written, the vast majority of courts likewise embrace the concept of comparative/contributory fault in enhanced injury cases.[97] Of the few courts initially holding otherwise,

---

[92] *Id*. at 795 (internal quotation marks omitted).

[93] *Id.* (emphasis added).

[94] *Id*.

[95] Reynolds & Costello, *supra* note 78, at 182-83.

[96] Whitehead v. Toyota Motor Corp., 897 S.W.2d 684, 694 (Tenn. 1995).

[97] *See generally* Smith v. Toyota Motor Corp., 105 F. App'x 47 (6th Cir. 2004) (applying Kentucky law); Montag v. Honda Motor Co., 75 F.3d 1414 (10th Cir. 1996) (applying Colorado law); Cleveland v. Piper Aircraft Corp., 890 F.2d 1540 (10th Cir. 1989) (applying New Mexico law); Harvey v. Gen. Motors Corp., 873 F.2d 1343 (10th Cir. 1989) (applying Wyoming law); Keltner v. Ford Motor Co., 748 F.2d 1265 (8th

the cases in those jurisdictions have since been abrogated by statute, are based upon decisions that have since been overruled, or have been overruled themselves.[98]

F. Proximate Cause

One common thread throughout any personal injury or product liability action is the element of proximate cause that must be proven by a plaintiff

---

Cir. 1984) (applying Arkansas law); Fietzer v. Ford Motor Co., 590 F.2d 215 (7th Cir. 1978) (applying Wisconsin law); Willis v. Kia Motors Corp., No. 2:07CV062-P-A, 2009 WL 2134359 (N.D. Miss. July 14, 2009) (applying Mississippi law); Hinkamp v. Am. Motors Corp., 735 F. Supp. 176 (E.D.N.C. 1989), *judgment aff'd without opinion*, 900 F.2d 252 (4th Cir. 1990) (applying North Carolina law); Huffman v. Caterpillar Tractor Co., 645 F. Supp. 909 (D. Colo. 1986), *decision aff'd*, 908 F.2d 1470 (10th Cir.), *reh'g denied*, (June 12, 1990); Dannenfelser v. DaimlerChrysler Corp., 370 F. Supp. 2d 1091 (D. Haw. 2005) (applying Hawaii law); McNeil v. Nissan Motor Co., 365 F. Supp. 2d 206 (D.N.H. 2005) (applying New Hampshire law); Day v. Gen. Motors Corp., 345 N.W.2d 349 (N.D. 1984); Trust Corp. of Montana v. Piper Aircraft Corp., 506 F. Supp. 1093 (D. Mont. 1981); Gen. Motors Corp. v. Farnsworth, 965 P.2d 1209 (Alaska 1998); Zuern v. Ford Motor Co., 937 P.2d 676 (Ariz. Ct. App. 1997); Doupnik v. Gen. Motors Corp., 225 Cal. App. 3d 849 (Ct. App. 1990); Daly v. Gen. Motors Corp., 575 P.2d 1162 (Cal. 1978); Bravo v. Ford Motor Co., No. CV000594807, 2001 WL 477275 (Conn. Super. Ct. Apr. 16, 2001); Meekins v. Ford Motor Co., 699 A.2d 339 (Del. Super. Co. 1997); Jahn v. Hyundai Motor Co., 773 N.W.2d 550, 559 (Iowa 2009); Aberston v. Volkswagenwerk, 634 P.2d 1127 (Kan. 1981); Moore v. Chrysler Corp., 596 So. 2d 225 (La. Ct. App. 1992); Zalut v. Anderson & Assocs., 463 N.W.2d 236 (Mich. Ct. App. 1990); Estate of Hunter v. Gen. Motors Corp., 729 So. 2d 1264, 1273-75 (Miss. 1999); Dahl v. BMW, 748 P.2d 77 (Or. 1987); Norwest Bank New Mexico, N.A. v. Chrysler Corp., 981 P.2d 1215 (N.M. Ct. App.); Harsh v. Petroll, 887 A.2d 209, 218 (Pa. 2005); *Whitehead*, 897 S.W.2d 684; Duncan v. Cessna Aircraft Co., 665 S.W.2d 414, 428 (Tex. 1984); Payne v. Ford Motor Co., 588 N.W.2d 927 (Wis. Ct. App. 1998), *review denied*, 590 N.W.2d 489 (Wis. 1999). *See also* Reynolds & Costello, *supra* note 78, at 182-89 (offering additional comparative discussion regarding the various jurisdictions' treatment of the admissibility of comparative fault in crashworthiness cases, see and this negligence).

[98] *See* D'Amario v. Ford Motor Co., 806 So. 2d 424 (Fla. 2001), *abrogated by statute*, Fla. Laws c.2011-215, § 2.; Jimenez v. Chrysler Corp., 74 F. Supp. 2d 548 (D.S.C.1999), *reversed in part and vacated*, 269 F.3d 439 (4th Cir. 2001); Reed v. Chrysler Corp., 494 N.W.2d 224 (Iowa 1992), *overruled by* Jahn v. Hyundai Motor Co., 773 N.W.2d 550 (Iowa 2009); *see also* Cota v. Harley Davidson, 684 P.2d 888, 895-96 (Ariz. Ct. App. 1984) (Declined to follow by the *Jahn* court.); Andrews v. Harley Davidson, 796 P.2d 1092, 1095 (Nev. 1990); Green v. Gen. Motors Corp., 709 A.2d 205, 212-13 (N.J. Sup. Ct. App. Div. 1998) (Note that the court allowed evidence of plaintiff's comparative fault for purposes of proximate causation, but did not allow the same for purposes of the defect determination) (the *Jahn* court also declined to follow).

to recover, or a defendant to assert an affirmative defense.[99] As the Indiana Supreme Court clearly explained in *Green*,

> while a jury in a crashworthiness case may receive evidence of the plaintiff's conduct alleged to have contributed to cause the claimed injuries, the issue of whether such conduct constitutes proximate cause of the injuries for which damages are sought is a matter for the jury to determine in its evaluation of comparative fault.[100]

The jury should take all the evidence and "following the argument of counsel and proper instructions from the court, determine whether such conduct satisfies the requirement of proximate cause."[101]

For example, the plaintiff may present evidence of impairment or distraction on the part of a defendant or non-party, which arguably led to causing the plaintiff's vehicle to leave the road.[102] Additionally, the defendant may present evidence of impaired or distracted driving on the part of the plaintiff, which, arguably, contributed to the vehicle leaving the roadway.[103] The standards simply do not differ for introducing evidence of comparative fault in an enhanced injury case, as opposed to a traditional product liability or personal injury case, when but for the combined negligence of the plaintiff, non-party or defendant, the ultimate injury would never have occurred.[104]

Whether the lawsuit is based on a traditional product liability claim or an enhanced injury claim, the ultimate determination is still the same.[105] The jury must decide: *"but for" which of the contributing actions (why), of those involved (who), would the injury or harm have occurred?*[106] In the scenario above, the defendant manufacturer's contribution is its design, testing and manufacturing of the product

---

[99] Green v. Ford Motor Co., 942 N.E.2d 791, 796 (Ind. 2011).

[100] *Id.*

[101] *Id*. at 795.

[102] *Id.* (allowing the fact finder to consider a "broad range of potentially causative conduct").

[103] *Id.* at 796 (allowing the jury to hear evidence of "the plaintiff's conduct alleged to have contributed to the claimed injuries").

[104] *Id*. at 795.

[105] *Id*. at 793.

[106] *Id*. at 794-95.

alleged to be defective. The co-defendant, or non-party's, contribution is their action of running plaintiff off the road. Finally, the plaintiff's contribution is his distracted driving while using the allegedly defective product. As can be surmised from the *Green* court's decision, there can be no "fair" determination if the contributing actions of the plaintiff and other parties or non-parties are removed from the jury's analysis.[107]

Admissibility of evidence of each party's negligence is first and foremost necessary to show *why* the harm was caused and *who* proximately caused the harm.[108] All claims alleging injury caused by a defective product require plaintiffs to prove proximate cause.[109] *If plaintiffs must prove that defendant(s) proximately caused the harm, why can defendant(s) not display evidence that plaintiff also proximately caused the harm?* Taken one step further, in two identical crashes (one product-related and the other not), why is harm-causing evidence admissible in one type of action but not in another when the questions remain the same—*why* was the harm caused and *who* proximately caused the injury?

For example, take again the situation where Kramer is texting as he approaches an intersection. Again, Elaine runs a stop sign, pulls out in front of Kramer, and Kramer strikes the side of Elaine's vehicle. Kramer is injured as a result and sues the manufacturer of his vehicle for the injuries he sustained under a strict liability theory. Following some historical arguments, the fact that Kramer was driving while texting is inadmissible, despite the fact that it was a proximate cause of the crash.[110] Does this make sense? Is this "fair"? Let us explore the same question from another perspective.

Assume the same incident occurs in our hypothetical, except instead of Kramer suing the manufacturer, this time he sues Elaine for running the stop sign and causing his injuries. We will apply the rule of the *Restatement (Second) of Torts* § 402A, arguendo, regarding the inadmissibility of contributory/comparative negligence.[111] Under these rules,

---

[107] *Id*. at 795.

[108] *Id*.

[109] *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 15 (1998).

[110] *See* WILLIAM L. PROSSER, HANDBOOK ON THE LAW OF TORTS §§ 41, 42 (4th ed. 1971).

[111] RESTATEMENT (SECOND) OF TORTS § 402A (1965).

Kramer would be permitted to present evidence that Elaine ran the stop sign, yet Elaine would not be permitted to present facts about Kramer's driving while texting.[112] Simply because Kramer is the plaintiff in the suit, his actions that potentially proximately caused the accident are arguably inadmissible.[113] Allowing a case to proceed in this manner would deviate from all notions of fairness as well as avoid answering the basic "why" and "who" questions, while ignoring the notion that everyone should be responsible for their own actions. Plaintiff and defense lawyers alike would agree that this approach is illogical in a negligence action, and that the proximate causation evidence is admissible in that context.

Should there be a difference between negligence and strict liability cases when it comes to the admissibility of this evidence? Recent trends indicate that, regardless of the allegation made by the plaintiff, the two main questions remain—"why?" and "who?"[114] The jury should not be forced to answer these questions while wearing blinders as to the proximate cause of the harm. Rather, the jury should be presented with all relevant facts responsible for the harm and decide accordingly.

V. Practical Indivisible Harm

Why is proximate cause such an important element in any personal injury or product liability action? It is because, as a practical matter, in the majority of situations, while multiple injuries may be divisible, the ultimate harm is indivisible.[115] For example, look again at Kramer and Elaine. Using the scenario in which Kramer, who is again texting while driving, collides, on a separate occasion, with the rear of Elaine's vehicle. Elaine still has not replaced the brake lights. Kramer breaks his arm as a result of the crash. The majority of jurisdictions that follow *Larsen v. General Motors Corp*.[116] do not place a burden on the plaintiff to prove

---

[112] *Id*.

[113] *Id*.

[114] *See*

[115] *See generally* Raupp, *supra* note 39, at 271, 272.

[116] 391 F.2d 495, 502 (8th Cir. 1968).

the actual "enhanced injury" in an enhanced injury case.[117] In other words, the majority of courts do not require a plaintiff to show that the break in the arm, although it may have occurred as a result of the crash, was worse as a result of the defective product. Rather, the plaintiff's burden is simply to prove that the arm broke, the product was defective, and the defect was a proximate cause of the harm.[118]

In a traditional personal injury or product liability case, no matter what law applies, Kramer must always meet his burden of proximate cause whether or not an affirmative comparative fault defense is available to Elaine.[119] Likewise, to assert an available comparative fault defense, Elaine must equally meet her burden of proximate cause.[120] In this regard, the law in most jurisdictions is clear that the finder of fact can consider the actions of both actors when making its determination.[121] It is only after the determination is made that the various comparative fault principles apply that the parties are able to settle the ultimate outcome of the case.[122]

As aptly pointed out by the Indiana Supreme Court, the evidence a jury is allowed to consider also should be no different in an "enhanced injury" context.[123] Suppose instead of colliding with the rear end of Elaine's vehicle, Kramer strikes a light pole. Kramer alleges that his seat belt failed to restrain him and he received his broken arm by contacting the windshield. In the resulting lawsuit, Kramer files claims against the automobile manufacturer under the "enhanced injury" doctrine.[124] Prior

---

[117] Heather Fox Vickles & Michael E. Oldham, *Enhanced Injuries Should Not Equal Enhanced Liability*, 36 S. TEX. L. REV. 417, 426 (1995).

[118] *Larsen*, 391 F.2d at 502.

[119] *See* Green v. Ford Motor Co., 942 N.E.2d 791, 795 (Ind. 2011).

[120] *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 15 (1998); Green v. Ford Motor Co., 942 N.E.2d 791, 795-96 (Ind. 2011).

[121] *See* Murray v. Fairbanks Morse, 610 F.2d 149 (3d Cir. 1979); *See* Duncan v. Cessna Aircraft Co., 665 S.W.2d 414 (Tex. 1984).

[122] *See* Nicholas v. Homelite Corp., 780 F.2d 1150 (5th Cir. 1986).

[123] *See Green*, 942 N.E.2d at 795-96.

[124] *See* Reynolds & Costello, *supra* note 78, at 181-82 ("Under the 'enhanced injury doctrine', also sometimes called the 'crashworthiness' or 'second collision' doctrine, a manufacturer or seller of a product may be liable under strict liability, negligence, or breach of warranty principles for injuries sustained in an accident where a defect in the product either aggravated or caused additional injury to the plaintiff, even though the defective product did not cause the initial harm.").

to trial, Kramer's attorney moves to dismiss the manufacturer's comparative fault defenses and preclude any evidence of his texting while driving because his actions are irrelevant in causing the crash.

The harm is, for all practical purposes, indivisible with respect to proximate cause.[125] *Why then should the jury's ability to assess his actions in causing his own injury be any different in an "enhanced injury" case than in any other case?* The element of proximate cause is the same.[126] Fundamental fairness dictates that it should, and the majority of courts that follow *Larsen* do not place a heightened burden on Kramer to show that the injury to his arm was greater because of the defect.[127] Because of this, neither the practitioner, nor the court, nor the fact-finder can ignore all other potential but-for proximate causes of that harm, including Kramer, the plaintiff.

Therefore, no matter what comparative fault precedent is applied and no matter whether any affirmative defenses are available, all actions that reasonably and proximately lead to the harm are admissible, even in an enhanced injury case, whether they caused the incident or not, because of proximate cause. So the question is not whether there was an injury, but rather whose conduct proximately caused the indivisible harm. In other words, *but for* whose conduct would the harm not have occurred? It is this question that we as practitioners must fully equip the finder of fact to answer by understanding and utilizing each respective jurisdiction's analysis of these issues to best represent our client, whether we represent a plaintiff or a defendant.

VI. Verdict Form

Verdict forms may vary greatly across jurisdictional lines and even case to case within the same court.[128] Still, answering the "why?" and "who?" questions clearly should be the goal of all parties. Although a general verdict form may be customary in most instances, in a product

---

[125] *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 15 (1998).

[126] *Id.*

[127] *See* Mitchell v. Volkswagenwerk, 669 F.2d 1199, 1204-05 (11th Cir. 1982); Tauber v. Nissan Motor Corp., USA, 671 F. Supp. 1070, 1074 (D. Md. 1987); Polston v. Boomershine Pontaic-GMC Truck, Inc. 423 S.E.2d 659, 662 (Ga. 1992).

[128] *See* Sdorra v. Dickinson, 90 P.2d 1328 (Wash. Ct. App. 1996).

liability case, a specific verdict form utilizing appropriate interrogatories can be a useful way to ensure clarity and avoid inconsistent verdicts.[129] Ideally, the parties and court would agree on a verdict form with interrogatories that clearly state each element of each claim and simple yes-no questions to indicate if each element was adequately established.

Given the specific law of the jurisdiction, fairness may suggest that all actors who potentially contributed to the harm be present on the verdict form, including the defendants, plaintiffs, and non-parties. This is the only way the jury is presented the opportunity to answer the questions of *why* and *who* and to properly allocate fault.

Conclusion

In just roughly one hundred years, the law in this country swung from holding all parties responsible for their actions to ignoring the harm-causing inputs of individuals when trying product liability cases.[130] This counterintuitive deviation from our legal foundation seemed to have forgotten the idea that people are, in fact, responsible for their own actions. The more recent trends towards allowing all relevant harm-causing facts into evidence, coupled with the comparative negligence foundation holding each party responsible for its respective causation percentage, all flows back to two basic foundational building blocks of this country's legal system—personal responsibility and fundamental fairness.

---

[129] *See* Stewart & Stevenson Servs., Inc. v. Pickard, 749 F.2d 635, 644 (11th Cir. 1984); Ware v. Reed, 709 F.2d 345, 355 (5th Cir. 1983); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 279 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980); Cote v. Estate of Butler, 518 F.2d 157, 160 (2d Cir. 1975).

[130] *See* Smith v. Smith, 19 Mass. (2 Pick.) 621, 664-65 (1824); Washburn v. Tracy, 2D. Chip. 128, 136 (Vt. 1824); RESTATEMENT (FIRST) OF TORTS § 467 (1934). *But see Green*, 942 N.E.2d at 795-96; RESTATEMENT (THIRD) OF TORTS § 17 (1998).