

Brooklyn Law Review

Volume 74

Issue 3

SYMPOSIUM:

The Products Liability Restatement: Was it a
Success?

Article 4

2009

The Tort-Proof Plaintiff: The Drunk in the Automobile, Crashworthiness Claims, and the *Restatement (Third) of Torts*

Ellen M. Bublick

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/blr>

Recommended Citation

Ellen M. Bublick, *The Tort-Proof Plaintiff: The Drunk in the Automobile, Crashworthiness Claims, and the Restatement (Third) of Torts*, 74
Brook. L. Rev. (2009).

Available at: <https://brooklynworks.brooklaw.edu/blr/vol74/iss3/4>

This Article is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Law Review by an authorized editor of BrooklynWorks.

The Tort-Proof Plaintiff

THE DRUNK IN THE AUTOMOBILE, CRASHWORTHINESS CLAIMS, AND THE *RESTATEMENT (THIRD) OF TORTS*

Ellen M. Bublick[†]

State courts face a difficult challenge when they review crashworthiness claims that arise in conjunction with drunk driving. Under ordinary doctrines of crashworthiness, if a product defect causes enhanced injury, the product seller is subject to liability for the enhanced portion of the injury.¹ For example, if an airbag fails to deploy during a car accident, the car maker may be required to compensate for increased injury caused by the defect.²

At the same time, courts are increasingly asked to apportion responsibility among all tortfeasors involved in a single injury. Although apportionment traditionally included only negligent torts, in the last decade a growing number of states have expanded the divisors to include strict liability, recklessness, and even intentional torts.³

In a claim involving both crashworthiness and drunk driving the two sets of doctrines—crashworthiness liability and comparative apportionment—appear set for a collision course. The liability that one doctrine provides, the other takes away. The mechanism through which this conflict is created works as follows: juries in crashworthiness cases involving drunk drivers are asked to determine the defendants' liability to the plaintiff, but also are asked to compare the responsibility of the car maker that produced the defective airbag with that of the drunk driver

[†] Dan B. Dobbs Professor of Law, University of Arizona James E. Rogers College of Law. Thanks to Aaron Twerski for inviting me to consider this engaging topic, and to Anita Bernstein and the Brooklyn Law School for hosting this thought-provoking conference. Thanks also to Barbara Atwood, Kathie Barnes, Mark Geistfeld, Mark Jacobs, Ellen Jacobs and Brent White for comments on an earlier draft, to Tim Reppucci for his excellent research assistance, and to the editors of the *Brooklyn Law Review* for their careful work.

¹ RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 16(a) (1998). In certain cases, if proof does not support determination of the enhanced harm, the manufacturer may be liable for all of plaintiff's harm. *Id.* § 16(c).

² See, e.g., *Estep v. Mike Ferrell Ford Lincoln-Mercury, Inc.*, 672 S.E.2d 345, 355 (W. Va. 2008) (holding that evidence by engineer was sufficient to support finding that truck in which airbag failed to deploy during accident was defective); *Batiste v. General Motors Corp.*, 802 So. 2d 686, 689-90 (La. App. 2001) (holding that expert testimony was required to show that properly functioning airbag would have deployed and *res ipsa loquitur* did not apply).

³ See generally Ellen M. Bublick, *The End Game of Tort Reform: Comparative Apportionment and Intentional Torts*, 78 NOTRE DAME L. REV. 355, 364-67 (2003) (tracking the development of comparative apportionment).

who caused the initial accident. Given a comparative metric that uses fault as a central measure⁴ and requires zero-sum trade-offs of responsibility, the moral blame inherent in a reckless tort like drunk driving may simply swamp the apportionment process. Even if a jury finds that the manufacturer's product is not crashworthy and that the defective product led to enhanced injury, the product seller's liability may be buried under the moral blame assigned to the drunk driver in the apportionment.

Accordingly, crashworthiness cases involving drunk drivers present one instance of a crucial but newly configured challenge in tort law: how to preserve the structural accountability of negligent and strictly liable tortfeasors within an apportionment system that is not only dominated by several liability, but for the first time in the long history of tort law, apportions responsibility not only to negligent actors but to strictly liable, reckless, and intentional wrongdoers as well.

The problem of preserving structural accountability after strict liability, reckless, and intentional torts are added to the comparative apportionment mix is not a problem exclusive to the case of the drunk driver and the automobile.⁵ Indeed, the concern permeates many contexts in which the high moral blame of one actor can unmake the systemic responsibility for care of another.⁶ Nevertheless, vanishing structural liability—creating tort-proof plaintiffs through apportionment—is well-illustrated by and inadequately addressed in this setting.

The term “tort-proof plaintiff” recalls an analogous doctrine from mid-1970s defamation law: the libel-proof plaintiff. The libel-proof plaintiff was a person whose reputation was so poor that even actionable false and defamatory statements heaped on could not count as extra damage.⁷ When a drunk driver is the crashworthiness plaintiff, the tort-proof plaintiff analogy is most complete. When the plaintiff's misconduct is highly blameworthy in itself, as in the case of drunk driving, why should even actionable manufacturer negligence give rise to a cause of action to any significant degree? The answer, of course, depends on the nature of the interest that the tort law seeks to protect. Are crashworthiness protections designed to benefit all drivers and passengers, even the negligent and reckless, or only those drivers and passengers who are exercising reasonable care for themselves?

An extra wrinkle makes apportionment's tort-proof plaintiff more difficult to dismiss than her defamation-proof kin. The tort-proof plaintiff in a crashworthiness case may not be the drunk driver, but rather the innocent victim of that driver. Even when the plaintiff with the failed

⁴ RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 8 (2000).

⁵ See, e.g., Ellen M. Bublick, *Upside Down? Terrorists, Proprietors and Civil Responsibility for Crime Prevention in the Post-9/11 Tort-Reform World*, 41 LOYOLA L. REV. 1483, 1518-28 (2008) (describing a related concern in the negligent security context).

⁶ RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 14 (2000).

⁷ See Note, *The Libel-Proof Plaintiff Doctrine*, 98 HARV. L. REV. 1909, 1909 (1985).

airbag is the victim of the drunk driver, the plaintiff may find that, with respect to the manufacturer, she is tort-proof.⁸ Actionable misconduct of the manufacturer that causes the plaintiff injury, even severe injury, may not afford the plaintiff any significant cause of action against the manufacturer after responsibility has been apportioned.

This result—recognizing crashworthiness liability but then realizing it only to the extent that the high moral blame of a drunk driver does not lay it to rest in the apportionment process—is not prescribed by any single legal rule, but rather stems from a combination of separate products liability rules and comparative apportionment rules. In fact, this combined approach appears to hold sway from the face of the three completed projects of the *Restatement (Third) of Torts*.⁹

Yet courts concerned about preserving crashworthiness liability have crafted a doctrine that avoids apportioning away that liability. Specifically, in the ten years since the *Restatement (Third) of Torts: Products Liability* (“*Restatement Third of Products*”) was adopted, several state courts have embraced a doctrine that refuses to apportion liability between the crashworthiness defendant and the driver who occasioned the original crash.¹⁰

In this Article, I argue that this court-created doctrine of non-apportionment preserves the structural liability of manufacturers and provides incentives for baseline safety protections for product users as a whole. Courts have embraced the doctrine in two related but distinct contexts of crashworthiness and apportionment: cases in which a drunk driver hits the crashworthiness plaintiff and cases in which the drunk driver is the crashworthiness plaintiff. Each context raises somewhat different concerns and will be addressed in turn.

Although state court decisions that refuse to apportion responsibility between those responsible for initial and secondary collisions appear on their face to reject the *Restatement (Third) of Torts*, at a deeper level, the decisions are quite consistent with Restatement principles. In particular, the state court decisions reflect two important types of ameliorative rules incorporated into the *Restatement (Third) of Torts: Apportionment Liability* (hereinafter *Restatement Third of Apportionment*) after the *Restatement Third of Products* was enacted—

⁸ See, e.g., *D’Amario v. Ford Motor Co.*, 806 So. 2d 424, 427-28, 431-33 (Fla. 2001) (per curiam) (acknowledging that the majority view is that “the fault of the plaintiff or a third party in causing the initial accident is recognized as a defense to a crashworthiness case against a product manufacturer”).

⁹ The term “Restatement Third of Torts” refers collectively to all of the segments of the Restatement (Third) of Torts project. As of 2008, those projects include the *Restatement (Third) of Torts: Products Liability*, the *Restatement (Third) of Torts: Apportionment of Liability*, and the *Restatement (Third) of Torts: Physical and Emotional Harm*.

¹⁰ *Gianinni v. Ford Motor Co.*, No. 3:05CV244 (SRU), 2007 WL 3253731, at *3-*4 (D. Conn. Nov. 2, 2007) (holding that plaintiff negligence that leads to the underlying accident should not be available as a comparative fault defense to a crashworthiness claim); *D’Amario*, 806 So. 2d at 433-35 (reviewing the reasoning behind cases that do not apportion between initial causes of the accident and crashworthiness claims and adopting the view that refusing to apportion is preferable).

defendant “very duty” rules and plaintiff “no-duty” rules. Defendant “very duty” rules define a defendant’s duty to use reasonable care to protect against specific types of risk.¹¹ Plaintiff “no-duty” rules limit defenses of plaintiff comparative negligence based on special reasons of principle or policy.¹²

Rather than urge courts to conform their decisions to the facially applicable doctrines of the *Restatement (Third) of Torts*, this Article urges the *Restatement (Third) of Torts* to confront more systematically the structural accountability issues that lie at the intersection of the Restatement projects but may have fallen in between them.

I. PRESERVING STRUCTURAL LIABILITY: MANUFACTURER CRASHWORTHINESS ACCOUNTABILITY TO THE VICTIM OF THE DRUNK DRIVER

Perhaps the case that best illustrates the problem with the *Restatement (Third) of Torts* approach to comparative apportionment in crashworthiness cases is the Florida Supreme Court case, *D’Amario v. Ford Motor Co.*¹³ That case examined two consolidated claims.¹⁴ One was a claim filed by Maria Nash, who was driving to church with her two children when a drunk driver crossed over the center line and crashed head-on into her vehicle.¹⁵ Because the seatbelt in her Chevy Corsica failed, Nash’s head struck a metal post that separated the windshield from the driver’s door. Nash later died from her injuries.¹⁶ Nash’s estate sued General Motors, the maker of her car, for “a design defect which had been discovered in the seatbelt of the 1990 Chevrolet Corsica.”¹⁷

At trial against GM on the crashworthiness claim, Nash’s estate sought to exclude evidence of the other driver’s .15 blood alcohol content. According to the estate, the driver-intoxication information was irrelevant and prejudicial to the jury’s consideration of comparative fault.¹⁸ Despite the estate’s objection, the trial court ruled that the jury should apportion responsibility between General Motors and the drunk driver who hit Ms. Nash. Given this mandate to apportion responsibility, the court found that the jury should be permitted to hear evidence of the driver’s intoxication. When presented with that evidence at trial, the jury found no liability on the part of General Motors. On appeal, the estate

¹¹ RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 14 cmt. b (2000).

¹² RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 7 cmt. h (Proposed Final Draft No. 1, 2005).

¹³ 806 So. 2d 424 (Fla. 2001).

¹⁴ *Id.* at 426-30 (addressing the claims of Clifford Harris and Maria Nash).

¹⁵ *Id.* at 429.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 429-30.

argued that the evidence of the other motorist's intoxication had been "unduly prejudicial to the issue of whether General Motors was negligent in designing a defective seatbelt."¹⁹

Before discussing the Florida Supreme Court's disposition of the case, it is useful to examine the *Restatement (Third) of Torts* approach to the problem. That approach to apportionment in crashworthiness cases bridges two separate segments of the *Restatement (Third) of Torts* project—the *Restatement Third of Products* and the *Restatement Third of Apportionment*.

The *Restatement Third of Products* adopts crashworthiness liability of manufacturers.²⁰ When a product is defective at the time of commercial sale and the defect is "a substantial factor in increasing the plaintiff's harm beyond that which would have resulted from other causes, the product seller is subject to liability for the increased harm."²¹

In cases in which harm is caused by multiple actors, as it nearly always is in crashworthiness cases, the *Restatement Third of Products* then provides a structure for two types of apportionment. First, causal apportionment is undertaken when proof supports a determination of the harm that would have resulted from other causes in the absence of the product defect.²² When causal apportionment cannot divide the harms, the crashworthiness defendant is either jointly and severally liable or severally liable for the harms, in accordance with the rules of the applicable jurisdiction.²³ Next, the *Restatement Third of Products* leaves further apportionment of responsibility among multiple defendants to "generally applicable rules apportioning responsibility."²⁴ Those generally applicable rules of apportionment can be found in the *Restatement Third of Apportionment*. The *Restatement Third of Apportionment* instructs courts to apportion "responsibility" between all causes of action—intentional, reckless, negligent or strict liability—according to a metric that compares fault and causation.²⁵

Given these combined rules, if a court wanted to follow the *Restatement (Third) of Torts* in *Nash*, it would first segregate any harm that the defendant could prove was attributable only to the drunk driver and not the manufacturer—harm that would have occurred even if Ms. Nash's seatbelt had not failed. Liability for that harm would be assigned to the drunk driver alone. Then harm caused by both the drunk driver's collision and the seatbelt's failure—apparently, the plaintiff striking her head against the car and her ultimate death from the head injury—would

¹⁹ *Id.* at 430.

²⁰ RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 16 cmt. a (1998).

²¹ *Id.* § 16(a).

²² *Id.* § 16(b).

²³ *Id.* § 16(d).

²⁴ *Id.* § 17.

²⁵ RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 1 cmts. b, c (2000); *id.* § 8.

be left to local rules of joint and several or several liability. In most jurisdictions, including Florida, several liability typically would apply.²⁶ Accordingly, whatever percentage of the remaining responsibility was assigned to other parties in the action, GM would not be required to pay.

With respect to the responsibility apportionment, the *Restatement Third of Apportionment* would in turn advise a jurisdiction to compare the responsibility of all actors involved in the crash, whether strictly liable, negligent, reckless, or intentional.²⁷ Under this approach, a jury would be instructed to hear evidence regarding each party's fault and assign percentages of responsibility for the harm in turn. In this case, the jury would assign responsibility to the drunk driver and the car manufacturer respectively. These percentage assignments would be required to equal 100%. The factors that the jury would be instructed to use in its responsibility assignment include "the nature of the person's risk creating conduct" and "the strength of the causal connection" between that conduct and the harm.²⁸

After testimony, the jury might assign percentages of responsibility to the two defendants in a few different ways. First, a jury asked to weigh the risk-creating conduct of drunk driving against the risk-creating conduct of negligent seatbelt design or manufacture might assign most or all of the responsibility to the reckless drunk driver based on a calculus of moral blame. The zero-liability ruling in *Nash* may have been a result of such a comparative calculation. Of course, the reverse is also possible. A jury could assign more responsibility to the manufacturer responsible for the car's defect than it did to the drunk driver. In either scenario, the apportionment result presents some significant problems.

If juries weight apportionments heavily toward the morally blameworthy misconduct of drunk driving, apportionment becomes a back-door route to eliminate crashworthiness liability in a significant percentage of cases. Just how significant the apportionment-based reduction might be is suggested by Center for Disease Control estimates that drunk driving causes nearly a third of all vehicle fatalities.²⁹ The evisceration of crashworthiness liability in such a large percentage of claims threatens the very purpose of imposing crashworthiness liability as an initial matter.

²⁶ See *id.* § 17, at 151-59; FLA. STAT. ANN. § 768.81 (West 2009).

²⁷ RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 8 (2000).

²⁸ *Id.*

²⁹ NAT'L CTR. FOR STATISTICS AND ANALYSIS, NHTSA, DOT HS 810 801, TRAFFIC SAFETY FACTS 2006 DATA: ALCOHOL IMPAIRED DRIVING 1 (2008), available at <http://www-nrd.nhtsa.dot.gov/Pubs/810801.PDF> (alcohol-related traffic fatalities account for 32% of all traffic fatalities in the United States); Ctrs. for Disease Control and Prevention, Dep't of Health and Human Servs., Impaired Driving, <http://www.cdc.gov/ncipc/factsheets/driving.htm> (last visited Apr. 2, 2009) (noting that drugs other than alcohol are involved in 18% of motor vehicle driver deaths).

The purpose of crashworthiness liability is described by the *Restatement Third of Products* as follows: “[a]lthough accidents are not intended uses of products, they are generally foreseeable. A manufacturer has a duty to design and manufacture its product so as reasonably to reduce the foreseeable harm that may occur in an accident brought about by causes other than a product defect.”³⁰ To the extent that crashworthiness liability is designed to require manufacturers to reduce damage in foreseeable collisions, that liability must allow for collisions caused by drunk driving, which are constantly if tragically foreseeable.³¹ If apportionment eviscerates crashworthiness liability in the large percentage of accidents caused by drunk driving, manufacturers’ duty will demand little institutional attention. To the extent that crashworthiness liability promotes vehicle safety, diminution of liability may produce significant reductions in vehicle safety protections. Also, while crashworthiness liability plus comparative apportionment might net a no-liability or small-liability rule, the uncertain process of apportionment may result in large litigation costs on the path to that limited return—a lose-lose situation for manufacturers and injured consumers.

Though sold as a means for holding manufacturers liable only for their own fault or for the harm that they caused, apportionment does neither. Apportionment mechanisms in drunk driving cases do not exonerate car manufacturers based on the manufacturers’ own right conduct, but based on the additional culpable misconduct of a drunk driver. Imagine a driver injured by a collision in which his airbag fails to inflate because of a product defect. The driver suffers enhanced physical injuries valued at \$100,000. If the cause of the car accident was not negligence, perhaps bad weather, the driver might recover in full from the manufacturer. If the accident was instead caused by another driver’s negligent act, perhaps looking away from the roadway, the driver might recover a portion of the damages from the manufacturer, perhaps 50%, or \$50,000. Yet if the accident was caused by a drunk driver, a large percentage of responsibility, perhaps 90%, might be assigned to the drunk. Consequently, the victim might recover only one tenth of any enhanced injury from the manufacturer. In each case, the manufacturer created the same defective product which resulted in the same enhanced injury to the victim. In each case, the victim acted without fault. And yet, the victim of the drunk driver, by virtue of being the victim of both a reckless and a negligent actor, becomes tort-proof.

It might be argued that the *Restatement (Third) of Torts* itself did not create the inconsistency in the previous scenario. One way to resolve

³⁰ RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 16 cmt. a (1998).

³¹ Ctrs. for Disease Control and Prevention, Dep’t of Health and Human Servs., National Drunk and Drugged Driving Prevention Month, <http://www.cdc.gov/ncipc/duip/spotlite/3d.htm> (last visited Apr. 2, 2009) (stating that three in every ten Americans will be involved in an alcohol related crash in their lifetimes).

the problem would be through state-enacted legislation embracing joint and several liability in the case of single, indivisible harms. Yet this argument glosses over the role the *Restatement Third of Apportionment* played in dramatically magnifying the problem by adding strict liability, recklessness, and intentional torts to the apportionment mix *after* several liability was firmly established as the rule in most U.S. jurisdictions. Adding highly blameworthy conduct to the apportionment threatens the underlying structural liability more consistently, and to a far greater degree, than did previous comparisons because of the high moral blame associated with that conduct. Moreover, adding strict liability and specifically crashworthiness liability to the apportionment calculations broadens the possibility that liability imposed to assure structural safety will be undermined by the apportionment process.

In the years after crashworthiness liability was adopted but before comparative apportionment included torts beyond negligence, juries would not have been asked to apportion responsibility between the drunk driver and the manufacturer for either of two reasons. The first reason was the existence of joint and several liability. However, a second reason for absence of apportionment in these cases was the fact that intentional and reckless torts (and even at one point strict products liability) were not included in comparative fault systems.

Confronted with the concern that adding others' highly blameworthy conduct to comparative apportionment calculations will eviscerate defendants' duties of care, some courts have sustained jury verdicts that assign more responsibility to the negligent or strictly liable defendant than to the reckless or intentional tortfeasor.³² Under these rulings, a jury in a case like *Nash* could say that GM had 90% of the overall responsibility given its defective seatbelt, while the drunk driver shared only 10% of the total. Although upholding these institution-heavy apportionments may be a second-best solution for courts that want to preserve structural liability,³³ those counterintuitive judgments also raise problems. In particular, allowing jurors to assign the full range of possible percentages of responsibility in a given case can magnify inconsistencies between the outcomes of different juries. Moreover, the normative statement of a jury in this case seems so contrary to public understanding of fault that the verdicts might further erode support for the tort system. Courts of appeal must then struggle with the question of whether such results can be justified under fault-based metrics, or whether, perhaps, these comparative metrics can be understood in a way that is not entirely fault-based.³⁴

³² See, e.g., *Nash v. Port Auth. of N.Y. & N.J.*, 856 N.Y.S.2d 583, 586-88 (App. Div. 2008).

³³ Bublick, *supra* note 5, at 1530-43.

³⁴ See, e.g., *Nash*, 856 N.Y.S.2d at 586-88.

Courts that want to retain crashworthiness liability but not face the vagaries endemic to an “any-apportionment-calculation-goes” system may refuse altogether to apportion responsibility in crashworthiness cases. This is the approach ultimately taken by the Florida Supreme Court in *D’Amario*. The *D’Amario* court held that “the principles of comparative fault involving the causes of the first collision do not generally apply to crashworthiness cases.”³⁵

In reaching its determination, the court placed great weight on the purpose of crashworthiness liability and the concern that apportionment in this context would reduce or obliterate the defendant’s duty.³⁶ The court drew an analogy to medical malpractice cases, in which an injury that occasioned the need for treatment is not apportioned with a doctor’s subsequent negligent care.³⁷ Finally, the court rejected the specific argument that drunk driving falls into the state’s statutory intentional tort exception to comparative fault; drunk driving falls short of purpose or substantial certainty of harm—a necessary element of an intentional tort.³⁸ Nevertheless, the court found the intentional tort exception analogous to the concern presented in the case of apportionment and drunk driving.³⁹ The court expressed concern that without an exception to apportionment where the other defendant was a drunk driver, defendants were “permitted to effectively shift the focus of the trial from the existence of a defect to the driver’s conduct in driving while intoxicated, even though the existence of a defect was the fundamental liability issue to be tried in these cases.”⁴⁰ Accordingly, the court ruled that the trial court’s focus on the evidence of drunk driving in *Nash* unduly confused the issues in the case. It therefore upheld the intermediate court’s reversal of that ruling.⁴¹

Although the *Restatement (Third) of Torts* does not formally embrace the doctrine cited in *D’Amario*, principles from the *Restatement (Third) of Torts* lend support to that decision. The support stems from changes to the *Restatement Third of Apportionment* made after the *Restatement Third of Products* was adopted in 1997. At the time the *Restatement Third of Products* was enacted, the *Restatement Third of Apportionment* sought comparison of intentional, reckless, negligent, and strict liability torts without any ameliorative rules to blunt the effects of the assessment.⁴² The effects of unmitigated apportionment doctrines on

³⁵ *D’Amario v. Ford Motor Co.*, 806 So.2d 424, 441 (Fla. 2001).

³⁶ *Id.* at 434.

³⁷ *Id.* at 436-37.

³⁸ *Id.* at 438-39.

³⁹ *Id.* at 439 n.15.

⁴⁰ *Id.* at 441.

⁴¹ *Id.* at 441-42.

⁴² See RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. 9-23 (Proposed Changes to Proposed Final Draft, 1998) (proposing to “[i]nsert the following new section [24.1]” entitled “Tortfeasors with a Specific Duty to Protect the Plaintiff From an Intentional Tort”).

substantive tort law subsequently became a flashpoint of controversy surrounding the *Restatement Third of Apportionment*. Although that Restatement had endeavored to leave “‘first-order’ questions involving the basic rules of liability” out of the Restatement and address only “‘second-order’ questions of apportionment, the Reporters conceded that the “line between first-order and second-order issues has been difficult to maintain.”⁴³

Consequently, the Reporters subsequently crafted additional black letter rules to preserve “first-order” rules of substantive liability. One of the most important of these ameliorative rules protected negligence liability in cases involving highly blameworthy intentional tortfeasor defendants. In particular, *Restatement Third of Apportionment* section 14 made tortfeasors jointly and severally liable for “failure to protect the [plaintiff] from the specific risk of an intentional tort.”⁴⁴ Under this rule, for example, if a defendant’s duty was to provide adequate security to prevent a criminal attack, the defendant that provided negligent security could not apportion responsibility against the criminal assailant.

The Restatement Reporters justified this rule on the ground that application of comparative responsibility in the context of intentional tortfeasors and several liability creates “a difficult problem.”⁴⁵ Specifically, “the great culpability of the intentional tortfeasor may lead a factfinder to assign the bulk of responsibility for the harm to the intentional tortfeasor,” leaving the negligent tortfeasor with little liability and the injured plaintiff with little compensation.⁴⁶

Because the rule is limited to intentional torts, section 14 would not directly address the problem of drunk driving. Moreover, to the extent that the *Restatement Third of Apportionment*’s ameliorative rule is premised on an intentional tortfeasor’s likely insolvency, the context of drunk driving may differ because some forms of insurance coverage may be available. Nevertheless, as the Florida Supreme Court noted, the concern for apportionment in the context of intentional torts shares many similar facets with the concern about apportionment in the context of drunk driving. Specifically, courts are appropriately concerned that the second-order rules of apportionment will have too great an effect on the first-order issues of crashworthiness liability.

The *Restatement Third of Apportionment* itself acknowledges that the ameliorative rule for intentional torts might appropriately stretch beyond the intentional torts context. Specifically, *Restatement Third of Apportionment* commentary suggests that there may be situations in

⁴³ RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 1, Reporters’ Note cmt. a (2000).

⁴⁴ *Id.* § 14.

⁴⁵ *Id.* § 14 cmt b.

⁴⁶ *Id.*

which courts “extend the rule stated in this Section to those who fail to protect against less than intentional tortious conduct.”⁴⁷ Apropos of the concern that drunk driving might present a case of high moral blame akin to an intentional tort, the *Restatement Third of Apportionment* lists negligent-entrustment and dram-shop liability in its list of potential extensions to the category.

Yet while adoption of the *D’Amario* ruling and an extension of *Restatement Third of Apportionment* section 14 would lead to similar results in the *Nash* case, the two approaches would yield somewhat different answers in other instances. Specifically, *D’Amario* would prevent apportionment in crashworthiness law regardless of the cause of the initial accident. That would preclude apportionment between a drunk driver and the car company in *Nash*, but it would also preclude apportionment between a *careless* driver and the car maker. As such, apportionment would be barred not only when it might eviscerate crashworthiness liability, but when it might merely reduce it. Also, under *D’Amario*, evidence of intoxication would be irrelevant to the case because no apportionment between the parties would be required. Under an extension of the *Restatement Third of Apportionment* Rule 14, on the other hand, a multi-party apportionment would still be made. However, under Restatement Rule 14, after the apportionment, the negligent defendant might be jointly and severally liable for the harm indivisibly caused by the manufacturer’s defect and the drunk driver’s misconduct.⁴⁸ This latter approach of the Restatement might be easier to apply in the context of a multiple-party action.⁴⁹ It also might better address the concern that apportioning between initial and second collisions is more of a legal fiction than a real description of separate injuries.⁵⁰

Although these two solutions to the problem of preserving crashworthiness liability in cases of drunk driving are attractive, other solutions are equally plausible. For example, a special exception to apportionment rules might be designed for crashworthiness cases, which almost always involve another underlying accident. A different option would be to fix manufacturer reductions for the other driver’s fault at a constant percentage (as is done in cases involving driver failure to wear a seatbelt) or at a set dollar amount.⁵¹ The dollar amount option might be particularly attractive given auto insurance coverage, which tends to have determinable award limits. Still another approach would be to adopt a guidelines system under which the manufacturer’s crashworthiness

⁴⁷ *Id.* § 14, Reporters’ Note cmt. a.

⁴⁸ *Id.*

⁴⁹ See, e.g., *Bearint ex rel Bearint v. Dorel Juvenile Group, Inc.*, 389 F.3d 1339, 1346 (11th Cir. 2004); *Polisano v. General Motors Corp.*, 744 A.2d 679 (N. J. Super. 2000).

⁵⁰ *Dannenfelser v. DaimlerChrysler Corp.*, 370 F. Supp. 2d 1091, 1094 (D. Hawaii 2005) (“[T]he line between injuries caused by the primary collision and the secondary collision is rarely so clear as to permit a bright-line exclusion.”).

⁵¹ OWEN ET AL., *MADDEN & OWEN ON PRODUCTS LIABILITY* 1116-18 (3d ed. 2000).

liability might be reduced or expanded by various percentages based on mitigating and exaggerating factors concerning the manufacturer's own misconduct, not based on any necessary relationship with the misconduct of another defendant. Finally, if comparisons are made, those comparisons might be less anchored to moral blame, and the importance of structural liability explained to the jury (as the Restatement suggests in a related context).⁵²

It is impossible to fully evaluate the many options for ameliorative doctrines in this Article. However, cases like *D'Amario*, and doctrines developed to alleviate the effects of apportionment on substantive doctrines, create an effective method to preserve structural liability in the crashworthiness context and highlight the need for further review of methods of maintaining structural accountability.

II. DEFINING THE BASELINE DUTY OF CARE: CRASHWORTHINESS LIABILITY TO THE DRUNK DRIVER

The more difficult case for preserving crashworthiness liability is not when the crashworthiness plaintiff is hit by a drunk driver, but when the crashworthiness plaintiff is the drunk driver. Such was the case in *Giannini v. Ford Motor Co.*⁵³ In *Giannini*, the plaintiff was leaving a restaurant. Although subject to dispute, Giannini claimed that despite pressing the brake pedal, her vehicle accelerated uncontrollably, slamming into a concrete barrier and a lamp post. Giannini also claimed that the seatbelt she was wearing failed to restrain her in the crash, causing her injuries. Ford disputed the plaintiff's story. It claimed instead that Giannini did not depress the brake pedal. Furthermore, Ford maintained that Giannini either was not wearing her seat belt or would have suffered the same injuries even if the seatbelt had not failed. Finally, Ford claimed that Giannini's alcohol consumption that night contributed to the accident.⁵⁴

In a products liability action against Ford, the District Court of Connecticut granted Ford's motion for summary judgment with respect to the brake system's alleged failure to function properly. However, the trial court found sufficient evidence to preserve plaintiff's claim that the seatbelt had malfunctioned in the crash. At the pretrial conference in the case, Ford proposed that it would present evidence at trial of the plaintiff's intoxication that led to the single-car accident. The court examined the issue closely—should evidence of plaintiff fault in causing the initial accident be a defense in a crashworthiness case?⁵⁵

⁵² RESTATEMENT (THIRD) OF PRODS. LIAB. § 16 cmt. f (1998).

⁵³ No. 3:05CV244, 2007 WL 3253731 (D. Conn. Nov. 2, 2007).

⁵⁴ *Id.* at *1.

⁵⁵ *Id.* at *1-*4.

This issue, whether plaintiff fault was a valid defense to a crashworthiness claim, was also an important if controversial issue addressed in the *Restatement Third of Products*. The answer to the question varied in different drafts of the project. The initial *Restatement Third of Products* embraced the view that a crashworthiness defendant owed a duty of care to even negligent or reckless drivers. Accordingly, although plaintiff fault would reduce plaintiff recovery in most types of products liability actions, plaintiff fault *would not* reduce the plaintiff's recovery in a crashworthiness case.⁵⁶ When a car manufacturer had an obligation to create a crashworthy vehicle, a jury might find that the obligation was met or not met. However, why the plaintiff driver got into the accident in the first place—an icy road, talking on a cell phone, or driving drunk—wouldn't enter into the assignment of liability and damages against the manufacturer, at least with respect to the enhanced portion of the injury.⁵⁷

The theory underlying the *Restatement Third of Products* initial position was that “the requirement that an automobile be reasonably crashworthy” called for a different rule with respect to plaintiff fault defenses.⁵⁸ “[I]f the risks created by plaintiff's conduct are within the range that justifies crashworthiness protection, plaintiff's conduct creates the very situation in which the plaintiff has a legitimate right to expect the automobile to provide reasonable protection.”⁵⁹ Accordingly, the initial draft of the *Restatement Third of Products* would ignore plaintiff fault even though the situation might trouble courts “who find it objectionable that drunken drivers or drug abusers be allowed full recovery for increased harm.”⁶⁰

The position that the Reporters originally espoused on crashworthiness and apportionment was subsequently overruled by a motion on the floor of the ALI.⁶¹ The motion was introduced and supported by a member of the defense bar.⁶² However, the Reporters of the *Restatement Third of Apportionment* also recommended backing away from the original rule.⁶³ In light of the carried motion to amend the draft, the *Restatement Third of Products* changed course to provide, contrary to its original recommendation, that “the contributory fault of the plaintiff in causing an accident that results in defect-related increased harm [be] relevant in apportioning responsibility between or among the parties, according to applicable apportionment law.”⁶⁴ In commentary,

⁵⁶ RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 6 (Tentative Draft No. 1, 1994).

⁵⁷ *Id.*

⁵⁸ *Id.* § 6 cmt. f.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ 71 A.L.I. PROC. 203-14 (1994).

⁶² OWEN ET AL., *supra* note 51, at 1105.

⁶³ *Id.* at 206.

⁶⁴ *Id.*

the *Restatement Third of Products* acknowledges that this is a particularly “difficult issue” and the subject of a “sharp[] split” between jurisdictions.⁶⁵ In a nod to that difficulty, the *Restatement Third of Products* lists as an important factor to the apportionment that a crashworthiness requirement “aims to protect persons in circumstances in which they are unable to protect themselves.”⁶⁶

In *Giannini*, the Connecticut District Court cited the final rules adopted by the *Restatement Third of Products* and noted the split of authority discussed in that document. But while citing the final *Restatement Third of Products* rules, the court adopted the *Restatement Third of Products*’ initial view—that plaintiff negligence leading to the underlying accident should not be available as a comparative fault defense to the enhanced portion of the injury. Tracking the *Restatement Third of Products*’ original sentiment, the *Giannini* court reasoned that the crashworthiness doctrine presupposes that injuries will occur. In fact, the court viewed the duty to protect against enhanced injuries as an outgrowth of the inevitability of operator negligence.⁶⁷ In light of foreseeable collisions, “a manufacturer’s duty is that of minimizing the injurious effects of contact however caused.”⁶⁸ Given that definition of the defendant’s duty, the court limited the trier of fact’s analysis “to the nature and severity of the contact and the object’s response.”⁶⁹ This focus on the crashworthiness issue, not on the origin of the crash, stems from the underlying principle that “[a] negligent operator is entitled to the same protection against unnecessary injury as the careful user of the same product is entitled.”⁷⁰

Ironically, in the ten years since the *Restatement Third of Products* was enacted, most of the courts that have cited final *Restatement Third of Products* section 16(f) have not embraced the Reporters’ final position.⁷¹ A number of recent cases have held that the manufacturer’s duty in a crashworthiness case encompasses care for all drivers or that evidence of the cause of the initial injury is irrelevant to the enhanced injury case.⁷² However, while the majority of cases decided

⁶⁵ See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 16, Reporters’ Note, cmt. f (1998).

⁶⁶ *Id.* § 16 cmt. f.

⁶⁷ Ford v. Gianinni, Civil Action No. 3:05cv244, 2007 WL 3253731, at *3-*4 (D. Conn. Nov. 2, 2007).

⁶⁸ *Id.* at *3.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ See *id.*; Polisano v. General Motors Corp., 744 A.2d 679 (N. J. Super. 2000); Norwest Bank New Mexico, N.A. v. Chrysler Corp., 981 P.2d 1217 (N.M. Ct. App. 1999). But see Davis v. Daimler Chrysler Corp., No. HHDX04CV065015721S, 2009 WL 323428 (Conn. Super. Ct. Jan. 12, 2009).

⁷² See, e.g., Bearint *ex rel* Bearint v. Dorel Juvenile Group, Inc., 389 F.3d 1339, 1346 (11th Cir. 2004) (stating that “allowing a jury to allocate some of the fault to the initial tortfeasor would partially and unfairly absolve the manufacturer of liability for making a faulty device”); Ricci v. AB Volvo, 106 Fed. App’x 573, 574 (9th Cir. 2004); Black v. M & W Gear Co., 269 F.3d 1220,

after the *Restatement Third of Products* was passed adopt the Reporters' original view, some cases have embraced the view taken in the final *Restatement Third of Products*.⁷³

Again, on one level, the courts' decisions not to allow plaintiff comparative fault defenses conflict with the *Restatement (Third) of Torts*' formal position. However, at a deeper level, the decisions can be seen as a reflection of principles embraced by the *Restatement (Third) of Torts*. In particular, subsequent doctrines from the *Restatement Third of Apportionment* and the *Restatement Third of Physical and Emotional Harm* suggest limits on the view that plaintiff comparative fault must always serve as a defense. In particular, subsequent *Restatement Third of Physical and Emotional Harm* provisions adopt "plaintiff no-duty rules" rules that bar plaintiff comparative fault defenses in light of special reasons of principle or policy.⁷⁴

A plaintiff with a high level of fault, such as a drunk driver, whose conduct might appropriately be sanctioned in any number of ways, would seem an unlikely prospect for special reasons of principle or policy to bar a comparative fault defense. Why might the tort law recognize an interest in allowing a highly blameworthy plaintiff to recover from a product manufacturer?

A previous examination of cases in which state courts bar plaintiff comparative fault claims after the turn to comparative fault defenses suggests that courts limit plaintiff fault defenses based on six different types of principle or policy considerations.⁷⁵ Two of these policy rationales are particularly salient in the context of a drunk driver's crashworthiness claim.

First, courts sometimes limit plaintiff fault defenses in structural safety cases—when systemic differentials in knowledge, experience, or control suggest that the defendant can take better care of the plaintiff's safety than can the plaintiff herself. The cases involve defendants who can foresee that some people in plaintiff's position will not exercise adequate self-care, and the defendants can control system-wide decisions to ensure greater safety for the group.

In the crashworthiness cases, barring plaintiff comparative fault claims may well promote greater driver and passenger safety. While driving under the influence of alcohol is dangerous and distressing,

1236 (10th Cir. 2001); *Gianinni v. Ford Motor Co.*, No. 3:05CV244 (SRU), 2007 WL 3253731, at *3-*4 (D. Conn. Nov. 2, 2007); *Dannenfelser v. Daimler Chrysler Corp.*, 370 F. Supp. 2d 1091, 1095 (D. Haw. 2005); *Green v. General Motors*, 709 A.2d 205 (N.J. Super. 1998); *see also OWEN ET AL.*, *supra* note 51, at 1106 n.33 (citing a trial court opinion of Judge Posner's).

⁷³ *See, e.g., Smith v. Toyota Motor Corp.*, 105 Fed. App'x 47, 50 (6th Cir. 2004); *Davis*, 2009 WL 323428; *Bravo v. Ford Motor Co.*, 29 Conn. L. Rptr. 676 (Conn. Super. 2001).

⁷⁴ RESTATEMENT (THIRD) OF TORTS: PHYSICAL HARM § 7 (Proposed Final Draft No. 1, 2005); RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 3; *see, e.g., Christensen v. Royal School Dist. No. 160*, 124 P.3d 283 (Wash. 2005) (employing plaintiff no duty rules in the context of a teen victim of sexual abuse).

⁷⁵ *Bublick, supra* note 3, at 989-90.

accidents from that conduct are certainly foreseeable. In fact, impaired driving is the single greatest risk factor for injury-producing automobile accidents.⁷⁶ Given the great foreseeable risk and the defendant's control over systemic safety decisions about driver and passenger protection, courts may feel that efforts to heighten plaintiff care through comparative fault defenses might be counterproductive to driver and passenger safety by undermining more important incentives for defendant care.⁷⁷

Another policy factor that courts have recognized as a limit on comparative fault defenses is one related to the role of the defendant. At times, even when defendants are not better situated than are plaintiffs to provide care for plaintiffs' safety, courts may limit plaintiff fault defenses so that defendants cannot litigate away contractual or social obligations of care for even a faulty plaintiff. In this category, limits are placed on defendants' use of comparative fault defenses in order to set baseline levels of care owed to even plaintiffs guilty of wrongdoing. Often, these cases involve a plaintiff's right to receive subsequent aid.

This sort of principle and policy limit may apply to crashworthiness cases with drunk drivers. A person who drinks and drives may legitimately face many types of adverse consequences. The driver might have her driver's license revoked, get into an accident and be jailed, be fined or required to pay tort damages, or be injured or killed herself. But even with all of these potential consequences, the drunk driver may still have some entitlements to care from others. For example, doctors must provide adequate emergency care,⁷⁸ which may not be negligent.⁷⁹ Moreover, police may not abuse the driver.⁸⁰

A manufacturer's obligation to provide crashworthiness protection appears to fit within this category of subsequent protection owed to an even negligent or reckless person. The clearest analogy may be to a doctor's obligation to provide non-negligent care to patients who were injured by their own fault. In the medical context, if a patient causes his own injury by drunk driving, a doctor cannot assert the plaintiff's negligence in causing the accident as a basis for a comparative fault claim in an action for subsequent malpractice.⁸¹

⁷⁶ See *supra* notes 29, 31 and accompanying text.

⁷⁷ See W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 65, at 452 (W. Page Keeton ed., 5th ed. 1984) ("It has been said that . . . the rule [of contributory negligence] is intended to discourage accidents by denying recovery to those who fail to use proper care for their own safety. But the assumption that the speeding motorist is, or should be meditating on the possible failure of a lawsuit for his possible injuries appears contrary to human experience; and it might be as reasonable to say that the rule promotes accidents by encouraging the negligent defendant to hope that the person he injures will be negligent too.")

⁷⁸ *Lewellen v. Schneck Med. Ctr.*, No. 4:05-CV-00083-JDT-WGH, 2007 WL 2363384, at *5 (S.D. Ind. Aug. 16, 2007).

⁷⁹ *Mercer v. Vanderbilt Univ.*, 134 S.W.3d 121, 130 (Tenn. 2004); RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 7 cmt. m (2000).

⁸⁰ See *City of Hobbs v. Hartford Fire Ins. Co.*, 162 F.3d 576, 579 (10th Cir. 1998) (comparative fault does not apply to section 1983 action).

⁸¹ RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 7 cmt. m (2000).

The special rule excluding comparative-fault defenses in these cases can be understood in part by the nature of the duty to provide rescue protections that could not be waived by contract. A thought experiment might be useful here. Imagine that a car dealer knows that five of its cars have airbags that have a high risk of failing to open on impact in a collision. Anticipating potential liability but not wanting to pay for repairs, the dealer decides to sell the defective cars only to people known to be alcoholics because with comparative fault, the damage payouts will be slight. Would the dealer be permitted to make such a calculation?

Even if the dealer gave adequate disclosure of the defect to the specific purchasers, such a decision would violate the dealer's legal and contractual obligations. Laws requiring car makers to provide airbags in all cars after a certain date are designed to minimize injuries to drivers and passengers as a whole, not only to careful drivers.

Similarly, a doctor could not tell a patient that she was going to exercise less care than she would for other patients because of the patient's prior carelessness for her own health. The policy interest here is in providing a level of care to all patients, not just those who have occasioned their injuries and illnesses without fault.

Plaintiff no-duty rules may not have been applied to comparative fault claims in crashworthiness cases in part because these rules were not well-developed or defined at the time the *Restatement Third of Products* was enacted. There is no reason that plaintiff no-duty rules could not be used to reach the result reached by the court in *Giannini*. If plaintiff no-duty rules are applied, the plaintiff may recover in full from the manufacturer for the crashworthiness case.

But the potential for adopting plaintiff no-duty rules to the crashworthiness and drunk driving context is not an open-and-shut case. The shift to comparative fault from contributory negligence not only undermines but was meant to undermine all-or-nothing results.⁸² With both parties in the case at fault to some degree, contemporary norms suggest some form of splitting.

While splitting is plausible in theory, the history of apportionment cases in this area provides less reassurance that splitting is a feasible option. In practice, when courts ask juries to apportion responsibility between a crashworthiness defendant and a drunk driver, comparison of the two types of conduct seems generally to resemble a no-liability rule for the crashworthiness defendant.⁸³ Even if a product defect causes injury to the plaintiff, when faced with the moral blameworthiness of a drunk driver, it is not clear that juries can balance structural safety interests in maintaining crashworthy vehicles with moral blame for drunk drivers. Instead, the many 100-0 results in cases

⁸² See *id.* § 3 cmt. b.

⁸³ See, e.g., *D'Amario v. Ford Motor Co.*, 806 So. 2d 424, 437 (Fla. 2002) (per curiam).

involving one highly blameworthy party suggests that plaintiff's highly blameworthy conduct may swamp all other factors.⁸⁴

In essence then, when juries compare a plaintiff's reckless conduct and a defendant's failure to design a crashworthy vehicle, the plaintiff may well be tort-proof. This is true even though the injuries are not, in the words of one famous case, "entirely" the fault of the plaintiff.⁸⁵ For courts that want to preserve some crashworthiness liability even to reckless parties, comparative apportionment becomes a poor option. Plaintiff no-duty rules, or the equivalent doctrine, refusing to apportion fault between the causes of the first and second collision, preserves a more robust doctrine of crashworthiness liability.

There are other viable options for creating a real split solution. One would be to proceed as seatbelt cases do, with fixed percentage reductions for plaintiff fault. However, this sort of compromise would have to be drawn by legislative solution. Given political currents, however, plaintiffs may not receive anything under these statutes either.⁸⁶

A different option would be to allow reckless plaintiffs to obtain full recovery in cases involving manufacturing defects, which are often more clear in terms of wrongs done to the plaintiff, and an apportioned (or typically zero recovery) in design defect cases.

CONCLUSION

The *Restatement Third of Products* has now turned ten. In terms of the project's contribution to products liability defenses, there is much to celebrate. The project's framework of causal and then fault apportionment is conceptually clear and analytically sound.⁸⁷ The disappearance of special defenses like misuse promises to simplify adjudication.⁸⁸ The removal of disclaimers as a bar to liability reduces manufacturers' ability to waive liability to uninformed consumers who, for the most part, do not consciously choose added product risk.⁸⁹ And where fault lines emerge in the case law, the Reporters not only mark those hazards, but supply cogent explanations of the various routes that might be taken.

⁸⁴ Richard C. Ausness, *Products Liability's Parallel Universe: Fault-Based Liability Theories and Modern Products Liability Law*, 74 BROOK. L. REV. 635 (2009) (discussing ways in which courts avoid comparative apportionment and revert to all-or-nothing solutions when plaintiffs are guilty of highly blameworthy conduct).

⁸⁵ *Butterfield v. Forrester*, (1809) 103 Eng. Rep. 926, 927 (K.B.) (U.K.).

⁸⁶ See, e.g., FLA. STAT. ANN. § 337.195 (West 2006).

⁸⁷ RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. §§ 16, 17 (1998).

⁸⁸ DAN B. DOBBS, THE LAW OF TORTS § 370, at 1026-29 (2000).

⁸⁹ As Mark Geistfeld shows in the context of products liability and Ken Simons demonstrates in the broader context of assumption of risk, a small number of consumers may actually choose added risk. See generally Mark A. Geistfeld, *The Value of Consumer Choice in Products Liability*, 74 BROOK. L. REV. 781 (2009); Kenneth W. Simons, *Assumption of Risk and Consent in the Law of Torts: A Theory of Full Preference*, 67 B.U. L. REV. 213 (1987).

Yet, as this round of celebrations ends, a wish for the future seems in order. After ten years of case law following the *Restatement Third of Products* and a more complete *Restatement (Third) of Torts* project, it is time to reexamine how structural liability can survive the advent of comparative apportionment's inclusion of highly blameworthy torts. Crashworthiness cases with drunk drivers are the first example.

In part, the need for reexamination of the structural liability issue stems from the fragmentary nature of the *Restatement (Third) of Torts* project. From the beginning of the project, the American Law Institute made an important decision that the subject of Torts had "become too broad and too intricate to be encompassed in a single project."⁹⁰ The decision to proceed in "segments" was pragmatic, perhaps essential to the project's completion.⁹¹ But now that three segments—the *Restatement Third of Products* in 1998,⁹² the *Restatement Third of Apportionment* in 2000,⁹³ and the *Restatement Third of Physical and Emotional Harm*, likely in this coming year⁹⁴—questions of fit remain.

If the *Restatement (Third) of Torts* meant to obliterate structural liability it could have staked this position in an outright claim. But it will be unfortunate if this is truly the way crashworthiness liability ends, not with a bang but a whimper.

⁹⁰ Geoffrey C. Hazard, Jr., *Foreword* to RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB., at xv, xv (1998).

⁹¹ *Id.*

⁹² RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. (1998).

⁹³ RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. (2000).

⁹⁴ *Maintaining Our Collaborative Culture in an Online Community*, THE A.L.I. REPORTER (A.L.I., Philadelphia, Pa), Winter 2009, at 1, 4; *see also* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM (Proposed Final Draft No. 1, 2005).