

ALLOCATION OF FAULT AND PRODUCTS LIABILITY: A COMMENT ON SAFETY PRODUCTS AND HUMAN ERROR

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This Comment examines Alaska law regarding products liability and the application of allocation of fault principles. It begins with an analysis of products liability as a non-fault based doctrine that nevertheless encounters fault-based principles when comparative fault is evaluated. The Comment describes a subcategory of products that the author calls "safety products," those products that are specially designed and conceived to account for human error or negligence. The author contends that within this product subcategory lies the potential to virtually immunize safety product manufacturers for manufacturing defective products when pure allocation of fault principles are applied. The author questions whether the legislature or the courts should examine if such a reduction in potential liability comports with the purposes of products liability law and fundamental fairness.

I. INTRODUCTION

In most litigation involving injury from a defective product, an attempt to allocate fault represents the judicious weighing of factors that allows the trier of fact to assess blame for the real cause of an incident and impose liability for damages. If more than one defendant caused the injuries, then more than one defendant shall be liable. Under Alaska law, each defendant will be allocated a specific percentage of fault.¹ Similarly, if the plaintiff is found through carelessness, drunkenness or some other mistake in judgment to be

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1. ALASKA STAT. § 09.17.080(a) & (b) (Michie 2000).

responsible (in whole or part) for his or her injuries, the trier of fact reduces the recovery accordingly.²

While such pure allocation of fault has its supporters and its opponents, for the moment at least, it is the law in Alaska.³ However, this mechanism for allocating fault does produce an unintended consequence. By reducing the potential damages or eliminating them altogether, the allocation of fault principles may convey partial or whole immunity on safety product manufacturers.⁴

Examples of safety products include airbags,⁵ seat belts,⁶ gun safeties, safety goggles, machine guards, railings, “child-proof” lids,

2. *Id.*

3. *Id.* § 09.17.080 (requiring apportionment of damages in “all actions involving fault of more than one person”).

4. The term “safety products” as used herein means products that are designed to prevent injury or death as a result of human error. Thus, the *sine qua non* for the development of many of these products is a known human propensity to err and the need for a design to minimize the risk of such error or minimize the harm when such an error occurs. This type of product is often corollary to the main product, and may have no real purpose in the function of the underlying product other than safety. The doctrine addressing reasonable alternative design could be defined to include safety products, since, from the consumer’s perspective, the main product and the safety product are one packaged product.

5. “Air bags have been proven effective at saving lives in frontal crashes. Air bags have also been shown to present a risk of death or injury in certain situations.” NATIONAL CONFERENCE ON MEDICAL INDICATIONS FOR AIR BAG DISCONNECTION, THE RONALD REAGAN INSTITUTE OF EMERGENCY MEDICINE, DEPARTMENT OF EMERGENCY MEDICINE AND THE NATIONAL CRASH ANALYSIS CENTER, FINAL REPORT, 1 (1997), available at <http://www.nhtsa.dot.gov/airbags/air%20bag%20cont%20rpt.html> (last visited April 3, 2002). The statistics regarding the benefits of air bags are impressive. The National Highway Traffic Safety Administration (“NHTSA”) calculated that, as of October 1999, 4,758 lives were saved as a result of airbag deployments. NHTSA Safety Fact Sheet, Nov. 2, 1999, available at www.nhtsa.gov/airbags/factsheets/numbers/html. Conversely, 146 deaths have been attributed to airbag deployment. *Id.* Sometimes airbags fail to deploy when they should have. See NHTSA, MONTHLY DEFECT REPORT (2001) (citing 1998-1999 Ford Escort for airbag non-deployment), available at <http://www.nhtsa.dot.gov/cars/problems/defect/monthly/2001/200106.html> (last visited Mar. 22, 2002).

6. The NHTSA also concluded that seatbelts save 11,000 lives annually, a very impressive accomplishment indicative of a remarkable safety product. NHTSA, SAFETY FACT SHEET (1999), available at www.nhtsa.gov/airbags/factsheets/numbers/html (last visited Mar. 22, 2002). However, some seatbelts have been recalled or found defective in circumstances where the webbing was inadequate or the seatbelt separated from the anchor. See, e.g., NHTSA,

lighters⁷ or matches, safety harnesses, helmets or hard hats,⁸ safety glass, safety valves (e.g., pressure release valves), smoke detectors, automatic headlights for motorcycles and cars, roll-bars, fire-extinguishers or sprinkler systems, garage door sensors and emergency locator beacons. Although many more safety products undoubtedly exist, this list conveys the types of products at issue here.⁹

Each of these products was designed (or the main product was redesigned) and manufactured as a result of documented and consistent human error. If people obeyed all traffic laws, the need for seat belts would be minimal.¹⁰ If people obeyed proper gun safety

MONTHLY DEFECT REPORT (2001) (1999-2000 Ford Explorer XLS, seat belt webbing, 1995-1999 GM Tahoe, seat belt anchorage separation).

7. For example, in 1998 the U.S. Consumer Product Safety Commission (“CPSC”), in conjunction with five lighter importers, recalled about 840,000 disposable cigarette lighters. The lighters apparently did not have child-resistant mechanisms to prevent young children from igniting them, or they had defective child-resistant mechanisms in violation of the Consumer Product Safety Act. See CPSC, *CPSC, ERA Intermarketing Co. Inc. Announce Recall of Disposable Lighters* (1998), available at <http://www.cpsc.gov/cpsc/pub/prerel/prhtml98/98094.html> (last visited Mar. 22, 2002).

8. In *Mine Safety Appliances Co. v. Stiles*, the plaintiff alleged that his safety helmet was defective. 756 P.2d 288, 289 (Alaska 1988).

9. In addition to safety products, elements of product design are incorporated within the product specifically to provide additional safety to the consumer, such as a “nonencroachment zone” or “survival space” in a vehicle whereby the roof and body form a safety cage in the event of a crash or rollover. See, e.g., *Larsen v. General Motors Corp.*, 391 F.2d 495, 502 (8th Cir. 1968) (“A manufacturer is under a duty to use reasonable care in the design of its vehicles to avoid subjecting the user to an unreasonable risk of injury in the event of a collision.”). When the alleged design defect is the lack of a safety device, courts may impose a different standard if the defense of comparative negligence is raised. See *Caterpillar Tractor Co. v. Beck*, 593 P.2d 871, 892 (Alaska 1979), *rev’d in part on other grounds*, 624 P.2d 790 (Alaska 1981) (“When the design defect is the lack of a safety device, the jury may be instructed that the plaintiff may be comparatively negligent in the knowing use of a defective product *only* if he voluntarily and unreasonably encounters the known risk.”) (emphasis added); see also *Dura Corp. v. Harned*, 703 P.2d 396, 404-05 (Alaska 1985) (affirming standard requiring proof of the consumer’s actual knowledge of the product’s defect (including the lack of a safety device) and proof that the consumer voluntarily used the product and unreasonably encountered a known risk).

10. Traffic laws almost uniformly prohibit unsafe driving, excessive speed, driving while impaired, following too closely, and just about every type of driving error that results in vehicle accidents. See United States Department of Transportation (“USDOT”) Federal Highway Administration, Part VI of the Manual on Uniform Traffic Control Devices (1995 ed.), available at <http://mutcd.fhwa.dot>.

procedures, even a gun safety mechanism would be superfluous.¹¹ The product design thus has its genesis in human ignorance or just plain carelessness—the usual defenses offered before the trier of fact when arguing comparative fault. Yet these human attributes are the same faults that would, under a pure allocation of fault analysis, reduce, if not eliminate, liability in the event the safety product failed or was otherwise defective.

This Comment questions that result as a normative judgment and posits that neither the legislature nor the judiciary intended this undesirable result as it undermines the basic goals of products liability. The touchstone of products liability is risk allocation.¹² Liability imposed against the product manufacturer for economic and non-economic harm caused to consumers transfers the real costs of defective products to the manufacturers and retailers¹³ (who profit from the products) rather than the injured consumers or society as a whole. The Alaska Supreme Court has emphasized that the fundamental policy supporting products liability is “to insure that the cost of injuries resulting from defective products are [sic] borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves.”¹⁴

The manufacturer is obligated to design a product that considers not only its intended use, but also *any* reasonably foreseeable product use.¹⁵ For safety product manufacturers, this includes the

gov (last visited Mar. 28, 2002). The federal government concluded that, in 1996, there were “[a]pproximately 6,800,000 crashes . . . in the United States each year.” NHTSA, TRAFFIC SAFETY FACTS 1996, USDOT (1997). The NHTSA has a “Speed Management Team” that provides “speed management” information to “improve highway safety.” With 6.8 million vehicle accidents per year, it is abundantly clear that millions of people violate traffic safety laws or practices, or can be deemed negligent.

11. The National Rifle Association has published various safety rules, including the following: “(1) Always keep the gun pointed in a safe direction. . . . A *safe direction* means that the gun is pointed so that even if it were to go off it would not cause injury or damage; (2) Always keep your finger off the trigger until ready to shoot . . . (3) Always keep the gun unloaded until ready to use.” See National Rifle Association, National Rifle Association Gun Safety Rules, *available at* <http://www.nrahq.org/education/guide.asp> (last visited March 29, 2002).

12. *Clary v. Fifth Avenue Chrysler Ctr., Inc.*, 454 P.2d 244 (Alaska 1969).

13. *Id.* at 248; see also *Pratt v. Whitney Can. v. Sheehan*, 852 P.2d 1173, 1176 (Alaska 1993) (using the same language).

14. *Clary*, 454 P.2d at 248.

15. In determining whether a particular use (or misuse) is “foreseeable,” the focus is on what is foreseeable to the manufacturer, not the consumer. See *Hiller*

potential negligence of the consumer or a third party. As noted by some courts, manufacturers “are charged with the knowledge that their automobiles will sometimes be involved in an accident or collision, including accidents involving negligent and sometimes even drunk drivers, and to reasonably design and build safe vehicles based upon that knowledge.”¹⁶

II. THE DECISION IN *GMC v. FARNSWORTH* AS A CASE STUDY

A. The Facts and Ruling

The Alaska Supreme Court’s decision in *GMC v. Farnsworth*¹⁷ presents a good example of what may be at issue when comparative fault principles, particularly pure allocation of fault among all parties, are applied to safety products cases. In *Farnsworth*, the consumer plaintiff—a passenger in a vehicle—sued the vehicle manufacturer for designing a defective seat restraint system.¹⁸ She claimed that the seat belts in the vehicle were defective for shorter than average people and that her indisputably serious injuries “resulted from ‘submarining’ under her lap belt.”¹⁹ The court explained:

Farnsworth argued that she had submarined under the lap belt because GM’s defective design only protected individuals the size of an average man or larger. Therefore, she claimed, Fennie [the driver], who at 175 pounds and 5’11” was slightly larger than an average sized man, walked away from the accident, whereas she, at 129 pounds and 5’3”, nearly died.²⁰

After a trial, the consumer prevailed with a substantial verdict.²¹ The manufacturer primarily defended under a product misuse theory, contending that the consumer’s injuries resulted “from the severity of the accident and her own misuse of the belt.”²²

v. Kawasaki Motors Corp., 671 P.2d 369, 373 (Alaska 1983); Lamer v. McKee Indus., Inc., 721 P.2d 611, 615 (Alaska 1986).

16. D’Amario v. Ford Motor Company, 806 So.2d 424, 439 (Fla. 2002).

17. 965 P.2d 1209 (Alaska 1998).

18. *Id.* at 1211.

19. *Id.* at 1212.

20. *Id.*

21. The court noted that the “jury returned a verdict for Farnsworth, awarding her \$2,138,973 in compensatory damages and \$5,600,000 in punitive damages.” *Id.* at 1214.

22. *Id.* at 1213. (“GM claimed that Farnsworth had misused the belt by wearing it under her arm. GM theorized that due to this misuse, Farnsworth had “jackknifed” over the belt, which in turn had caused all of her significant injuries.”) *Id.*

B. Reasoning Behind the Decision in *GMC v. Farnsworth*

In reversing the verdict, the supreme court made several rulings that form the basis for the safety products issue here. The court held that the trial court “erred in rejecting a comparative negligence instruction and refusing to require the jury to allocate fault to the driver who caused the accident.”²³ The court appropriately concluded that the trial court should have included a jury instruction regarding product misuse, *i.e.*, whether the consumer improperly wore the seat belt.²⁴ Alaska law had previously recognized product misuse as a defense, however, so this aspect of the ruling was predictable.

The court broke new ground, however, on the allocation of fault issue. The court described the manufacturer’s assertion of the following defenses:

GM stressed that even if its seat restraint system were defective, Farnsworth’s injuries were largely the fault of Fennie [the driver of the vehicle with Farnsworth] and Walters [the oncoming driver]. GM argued that Farnsworth did not contest that Walters was under the influence of cocaine at the time of the accident and that his negligence in driving in the wrong lane was the immediate cause of the collision. In fact, GM claimed, Walters had admitted that he was drug impaired, and he was tried and convicted of criminal assault in the fourth degree for causing personal injury to Fennie and Farnsworth. GM also attributed fault to Fennie, arguing that the collision would have been less severe if he had braked more quickly. GM claimed that Fennie’s own driving had been impaired by alcohol.²⁵

The court held that these facts warranted an instruction that the oncoming driver was liable as a matter of law for the consumer’s injuries since the oncoming driver was the original tortfeasor. The court reasoned:

No one disputed that Walters’s negligence in fact caused the accident. Analogizing to other areas of tort law, GM argues that the original tortfeasor is always considered a legal cause of a plaintiff’s further injuries unless there is a superseding cause GM’s position is consistent with related tort principles. [For example,] [a]n original tortfeasor is considered a proximate cause, as a matter of law, of injuries caused by subsequent negligent medical treatment.²⁶

23. *Id.* at 1211.

24. *Id.* at 1217 (noting that the instructions “may have suggested to [the jury] that GM could be held fully liable for Farnsworth’s injuries even if she had worn the belt under her arm”).

25. *Id.* at 1213-14.

26. *Id.* at 1217.

Thus, the court transplanted a tort doctrine from medical malpractice cases to products liability,²⁷ without much reflection on the different nature between the two. The justification for this rule is that it is foreseeable from the perspective of the original tortfeasor that an injured person may be injured again through medical malpractice. Thus, the reasoning goes, the original tortfeasor should be liable for the negligent actions of the treating physicians.

Physicians are not, however, in the business of manufacturing safety products aimed at reducing or eliminating injuries prior to the occurrence of the injuries. Rather, their expertise is called into action only *after* someone has been injured. This is a fundamental difference that renders the tort doctrine of allocating fault to the original tortfeasor essentially meaningless in a safety products case unless the safety products manufacturer is considered the original tortfeasor. In short, the court's analogy begs the question: who is the original tortfeasor in a products liability safety products case? The manufacturer who designed and marketed a product with anticipated errors and accidents in mind or the inevitable careless third party?²⁸ Would not the safety product manufacturer be able to foresee that an injured customer may be injured further by a negligent doctor if their safety product failed?

Even more fundamentally, the court in *Farnsworth* overlooked the established principle that "a reasonably foreseeable occurrence cannot be an intervening/superseding cause if the actor has a duty to prevent that occurrence."²⁹ The safety product manufacturer has intentionally taken on the duty of preventing or reducing the risk of injury to consumers (whether the injury is caused by an oncoming motorist or subsequent medical malpractice after being rushed

27. This doctrine was explained, for example, in *Dumas v. State*, 804 So.2d 813, 815 (La. App. 2001), where the court reasoned that "an original tortfeasor may be held liable not only for the injuries he directly causes, but also for the tort victim's additional suffering caused by inappropriate medical treatment. Under a duty risk analysis, '[t]he original tortfeasor's responsibility may extend to the risk involved in the human fallibility of physicians, surgeons, nurses, and hospital staff which is inherent to the necessity of seeking medical treatment.'"

28. For example, Florida recognizes the rule that the original tortfeasor is liable for all foreseeable harm, and medical malpractice is a foreseeable result when someone has been injured. See *Stuart v. Hertz*, 351 So.2d 703 (Fla. 1977). The court in *Letzter v. Cephas* reasoned that "[w]hen the rule in *Stuart v. Hertz* applies, the initial tortfeasor's remedy against the succeeding negligent health care provider lies in an action for subrogation." 792 So.2d 481, 485 (Fla. Dist. Ct. App. 2001). The concurrence pointed out that under an allocation of fault system, the remedy is for the original tortfeasor to seek allocation of fault against the negligent physician. *Id.* at 488.

29. *Joseph v. State*, 26 P.3d 459, 471 (Alaska 2001).

to the hospital). Thus, in the case of safety products, since the manufacturer has taken on the duty to protect the consumer from foreseeable injuries, then the safety product manufacturer should be deemed the original tortfeasor if that product is defective or failed. In *Farnsworth*, the seatbelt manufacturer should have been deemed the original tortfeasor, not the third-party driver. Thus, even if the analogy was correct, its application was misdirected. Courts do not treat a subsequent malpractice defendant as a joint tortfeasor with the initial tortfeasor.³⁰ A subsequent malpractice defendant is not liable for the initial injuries that sent the injured person to the hospital in the first place: “The essential point is that under the crashworthiness doctrine, as in medical malpractice cases, the initial collision is simply not at issue.”³¹ Unfortunately, the proximate causation theory pertaining to generic tort cases is now engrafted for the moment in safety products cases.

The practical implication of the decision in *Farnsworth* is worth repeating: since *Farnsworth* would not have been injured but for the third-party driver being impaired and driving carelessly, the performance of the seatbelt³² is immaterial. Consequently, a trier of fact could reasonably conclude that the drunk driver is 100 percent liable for the injuries and thus the seatbelt becomes legally immaterial, since it is called into play only after someone else has failed to exercise due care.

The appropriate analysis under these circumstances was developed by the Florida Supreme Court in *D’Amario v. Ford Motor Co.*³³ In *D’Amario*, the court addressed whether allocation of fault

30. *D’Amario v. Ford Motor Co.*, 806 So.2d 424, 435 (Fla. 2002).

31. *Id.* at 437.

32. One medical study addresses the role of seatbelts in diminishing injuries or causing additional injuries:

Among the 15 patients who used a shoulder strap and lap belt device (three-point restraint), 12 patients sustained burst fractures (80%) compared with 4 of the 14 patients (28.6%) restrained with lap seat belts alone. Life-threatening intra-abdominal injuries occurred in 57.1% of lap-belted victims and in 26.7% of patients who used three-point restraints, and the character of these injuries also differed. No patients in an automobile in which an air bag deployed sustained major associated bodily injuries. Among restrained occupants of head-on motor vehicle accidents who have sustained a thoracolumbar fracture, patients using lap belts are more likely to sustain the classic flexion-distraction injury patterns, whereas patients using three-point restraints may sustain a higher incidence of burst fractures. In addition, three-point restraints are associated with a decreased risk of intra-abdominal injury compared with lap seat belts.

Scott T. Ball et al., *Injuries of the Thoracolumbar Spine Associated With Restraint Use in Head-on Motor Vehicle Accidents*, 13 J. SPINAL DISORDERS 297, 297 (2000).

33. 806 So.2d 424 (Fla. 2002).

principles should apply to crashworthiness or enhanced injury cases. The court held that “principles of comparative fault concerning apportionment of fault as to the cause of the underlying crash will not ordinarily apply in crashworthiness or enhanced injury cases.”³⁴ This is, of course, precisely the view proposed in this Comment relative not just to enhanced injury cases but to safety products as well.

The *D’Amario* court defined the scope of its ruling as applying to claims for injuries not arising out of the initial collision, “but for those sustained in the second impact where some design defect caused an exacerbated injury which would not have otherwise occurred as a result of the original collision.”³⁵ As in *Farnsworth*, the driver of the vehicle in *D’Amario* was intoxicated and was speeding. The injured passenger brought suit against the manufacturer alleging product defect regarding a fuel relay switch that allegedly malfunctioned and continued to pump gas, resulting in a fire that severely burned the plaintiff. The manufacturer sought to apportion fault to the driver. However, the court rejected any apportionment of fault to the negligent third party, reasoning that “to permit a manufacturer to apportion fault with a third party . . . in causing the accident, manufacturers would effectively avoid liability for designing and manufacturing a defective product, and would thus counterminate the essential purpose” of products liability.³⁶ Noting Florida’s apportionment of fault statute, which is essentially identical to Alaska’s, the court held that “the initial accident merely furnished the occasion for the manufacturer’s fault to be tested” and “the cause of the initial collision is simply not at issue in the determination of the cause of the second collision” involving product defect.³⁷ The *D’Amario* reasoning is the appropriate analysis under Alaska law as well.

C. Implications of the Decision in *GMC v. Farnsworth*

This decision represents a considerable and somewhat unprincipled expansion of the allocation of fault defense, allowing anyone’s negligence to reduce liability, not just the consumer’s assumption of the risk or awareness of a product defect.³⁸ Now, fault

34. *Id.* at 426.

35. *Id.*

36. *Id.* at 434.

37. *Id.* at 437.

38. See *Caterpillar Tractor Co. v. Beck*, 593 P.2d 871, 892 (Alaska 1979), *rev’d in part on other grounds*, 624 P.2d 790 (Alaska 1981).

can be allocated (and must be to some degree as a matter of law)³⁹ against the “original tortfeasor.” By definition, the original tortfeasor caused the incident and the failure of a safety product—designed with the “original tortfeasor” in mind—becomes secondary at best. In a prior article, I noted the practical effect this ruling may have:

While the court left it open for the jury to determine the actual percentage of fault to be allocated to the original tortfeasor (but noted that at least 1% must be allocated as a matter of law), the practical effect will likely be a complete or majority allocation of fault to the original tortfeasor. When faced with a defective seat belt, brake system or airbag, versus a drunk driver (or a driver impaired by cocaine, as in *Farnsworth*), *it would not be unreasonable for a jury to assign virtually all fault to the impaired third party driver. . . .* By allowing the harm caused by defective safety products to be reduced or offset completely, this decision overlooks the controlling purpose of products liability law: making products safer and allocating risks from the innocent consumer to those who profit from the product. It further glosses over the fact that vehicle safety features assume by their very existence that a driver will act negligently, thus causing an accident. Accordingly, in all but the most bizarre incidents, where a vehicle safety feature proves to be defective in that it fails to perform as an ordinary consumer would expect or fails when compared to the benefits of an alternative design, there may still be no liability for the resulting harm since the “original tortfeasor,” *i.e.*, whoever is the negligent driver, is liable as a matter of law.⁴⁰

Impaired drivers already (and deservedly) face the wrath of the public and the law. In fact, the most recent amendments to Alaska’s drunk driving statutes point out that “Alaska has one of the toughest drunk driving laws in the United States [Drunk drivers] *kill, injure, and maim* Alaskans causing untold grief, pain, suffering, and economic loss.”⁴¹ Given that the law already pun-

39. *GMC*, 965 P.2d at 1217. The court reasoned that the driver of the other vehicle is “liable as a matter of law” for some of the plaintiff’s injuries, notwithstanding the plaintiff’s claim that a defect in the vehicle’s safety features failed to prevent the harm. *Id.*

40. Thomas V. Van Flein, *Prospective Application of the Restatement (Third) of Torts, Products Liability in Alaska*, 17 ALASKA L. REV. 1, 24 n.145 (2000) (emphasis added).

41. The full quote of Representative Norman Rokeberg, sponsor of the legislation, is as follows:

Alaska has one of the toughest drunk driving laws in the United States, but many of our state’s habitual drunk drivers are *not* getting the message. Senate Committee Substitute for Judiciary Committee Amended Substitute for House Bill 4 creates *the toughest* set of driving under the influence (“DUI”) laws in the country.

ishes the socially reprehensible misconduct of drunk drivers, good public policy should not allow the manufacturer to escape its share of liability for exacerbated injuries suffered by the plaintiff. Courts have recognized that allowing a jury to allocate fault to third parties, particularly drunk or impaired drivers, will confuse juries as to the real issue to be tried and that “such confusion is magnified in cases . . . involv[ing] intoxicated drivers, due in large measure to the public’s understandable intolerance for drunk driving.”⁴²

The *Farnsworth* approach to third-party allocation of fault may give rise to considerable unfairness. That there are careless and drunk drivers on the highway is a well-known fact. Manufacturers of automobiles specifically took that fact into account and attempted to provide a product that would reduce or eliminate the risk of serious injury if a consumer was involved in one of the millions of accidents that occur yearly. If its product is defective and if that defect causes injury to a consumer, under present law the manufacturer can simply point to the original tortfeasor (in this case, the third-party drunk driver) and argue that nothing would have happened had the third-party defendant not driven drunk and recklessly. While factually correct, that argument fails to address the product defect and allows the manufacturer of a safety product to escape liability and continue to manufacture and market potentially defective products. Thus, the manufacturer escapes penalty when its product fails in the very purpose for which it was designed and marketed, a purpose upon which the consumer likely relied in purchasing and using the product.

The court in *Farnsworth* appropriately noted that “[t]ort law seeks to deter future behavior that exposes others to injury.”⁴³ In the case of tort actions involving safety products where third-party negligence is invoked, tort law will act as a deterrent largely to the original tortfeasor, not the product manufacturer. This result will not promote product safety.

Poor judgment and chemical dependency are the primary causes of habitual drinking and driving. These people *kill, injure, and maim* Alaskans causing untold grief, pain, suffering, and economic loss.

Sponsor Comments, Rep. Norman Rokeberg, *available at* <http://www.akrepublicans.org/22ndleg/spst/spsthb004.shtml> (last modified May 7, 2001) (emphasis in original).

42. D’Amario v. Ford Motor Co., 806 So.2d 424, 439 (Fla. 2002).

43. *Farnsworth*, 965 P.2d at 1218.

III. AN OVERVIEW OF ALLOCATION OF FAULT IN ALASKA

A. The Genesis of Safety Products

The birth of safety products (and the creation of several industries devoted to safety) was not an isolated event. Safety products share the same source as the legal doctrine of comparative fault—human carelessness and a propensity to err. It requires no citation to establish that humans are prone to error. Disciplines are devoted to this truism, both from an engineering perspective⁴⁴ and a psychological perspective.⁴⁵

The propensity of people to err has led product manufacturers to add safety features to existing products or design safety products from the outset. Not all agree that safety can be sold as an attribute, but the lack of safety can be used as an incentive to improve product performance through product liability judgments or settlements. For example, Judge Posner reasoned that such judgments would encourage the adoption of safer designs:

If advertising and marketing a safety improvement are thus discouraged, the incentive to adopt such improvements is reduced. But make the producer liable for the consequence of a hazardous product, and no question of advertising safety improvements to consumers will arise. He will adopt cost-justified precautions not to divert sales from competitors but to minimize liability to injured consumers.⁴⁶

Other scholars reason that the promotion of safety as a product feature is a key component of some products (*i.e.*, the safety products at issue here). Manufacturers often then tout the additional safety provided by their products as a reason to buy:

All bicycle stores carry helmets and those helmets are virtually always displayed openly and in the same showroom as the bikes Although some consumers do express safety concerns, they generally arrive at the store with those concerns in mind, and the presence of a range of helmets is often a source of some comfort—not the other way around.

44. See generally HENRY PETROSKI, *TO ENGINEER IS HUMAN: THE ROLE OF FAILURE IN SUCCESSFUL DESIGN* (1985).

45. For example, in its landmark study, the National Academy of Sciences reasoned that “human beings, in all lines of work, make errors. Errors can be prevented by designing systems that make it hard for people to do the wrong thing Cars are designed so that drivers cannot start them while in reverse.” NATIONAL ACADEMY OF SCIENCES, *TO ERR IS HUMAN: BUILDING A SAFER HEALTH SYSTEM IX* (2000).

46. Richard A. Posner, *Strict Liability: A Comment*, 2 J. LEGAL STUD. 205, 211 (1973).

The actual marketing of bicycle helmets, moreover, seems more consistent with our story of manufacturers leading consumers to underestimate product risks, in this case by overstating the degree to which the precautionary product will help to prevent harm. Many of the advertisements appear designed to impart to consumers a feeling of control over the risks of cycling through their selection of a helmet. For instance, Bell Sports, the world's largest manufacturer of bicycle helmets, features images of exhilarating off-road mountain biking in its marketing, along with the slogan, "Courage for Your Head." The website for Cratoni Helmets, a leading German manufacturer, sports a video introduction of mountain scenes, a revolving helmet, and alternating flashes of the messages, "Cratoni Helmets" and "No Limits." That company's *Mountain Maniac* line of helmets is described as follows: "What are you—CRAZY? We hope so because this helmet was designed for you. Are you drooling over it yet? . . . The Maniac encourages you to push the limit . . ." Even buyers of the company's less aggressive "Leisure" line of helmets are assured that "[c]asual rides through the city park are more fun when you are confident in your safety."⁴⁷

This type of marketing underscores a consumer's expectations regarding a product's safety features and the heightened sense of safety promoted by a manufacturer.

B. History of Allocation of Fault in Alaska

The history of allocation of fault in Alaska is a history of common law and judicial review, followed by a political modification through legislative enactment. The Alaska Supreme Court in *Smith v. Ingersoll-Rand Co.*⁴⁸ discussed the legislative and common law modifications to products liability law relating to allocation of fault. Because this doctrine "involves issues of distributive justice and has attracted the attention of vocal and aggressive partisans,"⁴⁹ it is no surprise that the current law reflects the political activity that is associated with products liability. More problematic is the courts' willingness to bend, if not capitulate, to the more political aspects of these issues at the expense of legal continuity, logic and basic principles of fairness.

By statute, Alaska law recognizes comparative fault in an action "based on fault" as follows:

47. Jon D. Hanson & Douglas A. Kysar, *Symposium: Taking Behavioralism Seriously: A Response to Market Manipulation*, 6 ROGER WILLIAMS U. L. REV. 259, 333-36 (2000).

48. 14 P.3d 990 (Alaska 2000).

49. GEOFFERY C. HAZARD, JR., *Foreword to RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB.* xv (1998).

In an action based on fault seeking to recover damages for injury or death to a person or harm to property, contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for the injury attributable to the claimant's contributory fault, but does not bar recovery.⁵⁰

A products liability case is not an action "based on fault" because it focuses on the product and not any individual's conduct; thus, this statute ostensibly should not apply to a products liability case. Alaska has refined allocation of fault even further, however, in the context of products liability cases.⁵¹ Under state law, the courts "shall instruct the jury" or make findings establishing the amount of damages and the "percentage of the total fault that is allocated to each claimant, defendant, third-party defendant, person who has been released from liability, or other person responsible for the damages"⁵² The statute requires the trier of fact to "consider both the nature of the conduct of each person at fault, and the extent of the causal relation between the conduct and the damages claimed."⁵³

This statute has been applied in several cases.⁵⁴ Since 1997, the trier of fact under certain circumstances has been able to allocate

50. ALASKA STAT. § 09.17.060 (Michie 2000).

51. In addition to the allocation formula set forth by statute, there is a definition of "fault" that expressly includes product misuse and products liability:

In this chapter, "fault" includes acts or omissions that are in any measure negligent, reckless, or intentional toward the person or property of the actor or others, *or that subject a person to strict tort liability*. The term also includes breach of warranty, unreasonable assumption of risk not constituting an enforceable express consent, *misuse of a product for which the defendant otherwise would be liable*, and unreasonable failure to avoid an injury or to mitigate damages. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.

Id. (emphasis added).

52. *Id.* § 09.17.080(a).

53. *Id.* § 09.17.080(b).

54. *See, e.g.*, GMC v. Farnsworth, 965 P.2d 1209 (Alaska 1998). A prior version of the statute was applied in *Benner v. Wichman*, 874 P.2d 949 (Alaska 1994). In *Benner*, the court ruled that in order to invoke the allocation of fault principles set forth in the pre-1997 statute, the party to whom fault was to be allocated had to be made part of the action. *Id.* at 958. Thus a "party" within the meaning of § 09.17.080 was restricted to "parties to an action, including third-party defendants and settling parties." *Id.* The *Benner* court also concluded that "equity requires that defendants have an avenue for bringing in others who may be liable to the plaintiff." *Id.* at 956. Such an action against a potentially responsible person can be brought after the statute of limitations has expired and that party is neverthe-

fault even to non-parties, with the proportionate reduction in the defendant's liability and plaintiff's recovery for any such allocation.⁵⁵ Importantly, any allocation of fault to a non-party may operate to reduce the award to the plaintiff; however, there can be no civil liability to the non-party, and the finding of fault "may not be used as evidence of civil liability in another action."⁵⁶

While several states reject this approach and do not allow allocation of fault in products liability cases,⁵⁷ Alaska recognized early in its products liability decisions, starting with *Butaud v. Suburban Marine and Sporting Goods, Inc.* in 1976,⁵⁸ that comparative fault principles should be applied, particularly where there is product misuse.⁵⁹ The Ninth Circuit followed the Alaska Supreme Court's lead and held "that comparative fault (*i.e.*, contributory negligence) concepts can be applied to the doctrine of strict products liability."⁶⁰ Subsequently, the Alaska Supreme Court recognized in *Dura Corp. v. Harned*⁶¹ and *Caterpillar Tractor Co. v. Beck*,⁶² two types of comparative negligence in products liability cases: product misuse and unreasonable and voluntary assumption of risk. The court in *Ingersoll-Rand* changed its reasoning by concluding that as of 1986, with the enactment of the first statutory tort reform legislation, even "ordinary negligence" is an affirmative defense in a products liability action.⁶³ The court reasoned that "[p]rior to the Act, comparative negligence in products liability cases was limited to product misuse and unreasonable assumption of risk. The Act

less obligated for damages to the plaintiff. *Alaska Gen. Alarm v. Grinnell*, 1 P.3d 98, 104 (Alaska 2000).

55. ALASKA STAT. § 09.17.080(c) (Michie 2000).

56. *Id.*

57. *See, e.g.*, *Frey v. Harley Davidson Motor Co., Inc.*, 734 A.2d 1, 10 (Pa. 1999) ("[T]his case falls within the general rule that contributory and comparative negligence are not defenses to a strict product liability action."); *Kimco Dev. Corp. v. Michael D's Carpet Outlets*, 637 A.2d 603, 605 (Pa. 1993); *McCown v. Int'l Harvester Co.*, 342 A.2d 381, 382 (Pa. 1975).

58. 555 P.2d 42 (Alaska 1976).

59. The court in *Bachner v. Pearson* established that contributory negligence was not a defense to a products liability claim unless "the plaintiff voluntarily and unreasonably encounter[ed] a known risk." 479 P.2d 319, 329-30 (Alaska 1970).

60. *Pan-Alaska Fisheries, Inc. v. Marine Constr. & Design Co.*, 565 F.2d 1129, 1138 (9th Cir. 1977).

61. 703 P.2d 396, 403 (Alaska 1985) (recognizing the misuse defense).

62. 593 P.2d 871, 890-92 (Alaska 1979), *rev'd in part on other grounds*, 624 P.2d 790 (Alaska 1981) (recognizing the defense of unreasonable and voluntary assumption of risk).

63. *Smith v. Ingersoll-Rand*, 14 P.3d 990, 996 (Alaska 2000).

expands that definition to include other types of comparative fault, including a plaintiff's ordinary negligence."⁶⁴

C. Conflict Between Allocation of Fault and Strict Liability

In *Lewis v. Timco, Inc.*,⁶⁵ Judge Politz of the Fifth Circuit aptly reasoned that the concept of "products strict liability [is] based on the concern that the injured party cannot adequately protect himself from the potential harm. Strict liability is based on a theory of responsibility which requires no finding of fault."⁶⁶ In contrast, he noted that allocating fault is determining blameworthiness:

Fault is blameworthiness. "'Fault' in legal literature is the equivalent of negligence." The concept of fault in negligence law presupposes a particular duty or obligation to conform to a certain standard of conduct and focuses upon the nature of the act itself. It notes only inferentially the instrument the actor uses to bring about the result and the result itself.

Although fault may be present, there is no requirement of traditional fault in a strict liability situation. The theory of strict liability does not lend itself to a comparison of fault. Some courts and commentators have characterized the attempt as involving "apples and oranges." A more accurate analysis might characterize the effort as an attempt to measure the amount of water in an empty glass. I find it simply illogical to attempt to quantify fault where admittedly none exists.⁶⁷

Notwithstanding the doctrinal conflict, the Alaska Supreme Court has traditionally allowed comparative negligence in products liability cases, noting that "it would be anomalous in a products liability case to have damages mitigated if the plaintiff sues in negligence, but allow him to recover full damages if he sues in strict liability."⁶⁸ The court stated that "the public policy reasons for strict product liability do not seem to be incompatible with comparative negligence. The manufacturer is still accountable for all the harm from a defective product, except that part caused by the consumer's own conduct."⁶⁹

This position has been criticized as incompatible with the application of products liability:

The Supreme Court of Alaska applied comparative negligence in a strict liability case, stating "[a]lthough it is theoretically diffi-

64. *Id.*

65. 716 F.2d 1425, 1433 (5th Cir. 1983).

66. *Id.*

67. *Lewis*, 716 F.2d at 1434-35 (citations omitted).

68. *Butaud v. Suburban Marine & Sporting Goods, Inc.*, 555 P.2d 42, 46 (Alaska 1976).

69. *Id.*

cult for the legal purist to balance the seller's strict liability against the user's negligence, this problem is more apparent than real." I cannot agree. This is more than simply a problem of "legal purity." It presents a very practical problem, which the court does not address. Comparative fault assumes a real comparison. The percentage of the plaintiff's fault is determined in relation to the defendant's fault. The amount of fault of a plaintiff is not determinable in a vacuum; it can only be measured as against the culpability of the defendant. I struggle to understand how the fact-finder can appreciate and apply the concept of liability without fault and, at the same time, compare relative percentages of fault when one of the parties is perhaps free of fault. It appears that the fact-finder will be forced to make an ad hoc determination of presumed fault on the part of the strictly liable party and then factor this into a calculus of relative responsibility.⁷⁰

Regardless of the merits of this criticism, this historical perspective is provided primarily to set the stage for the current issues relating to safety products. This Comment assumes that fault will be allocated in products liability cases in the same manner as it is allocated in negligence cases. As is more fully addressed below, in the area of safety products, the consumer's own conduct is the very purpose for the safety product.

D. Current Application of Comparative Fault Principles in Products Liability Cases Involving Safety Products

Alaska law recognizes three forms of product defect: a manufacturing defect, a design defect, or a failure to contain adequate warnings.⁷¹ If one of these defects is established, the manufacturer will be liable for that product defect if it caused injury, because proof of a defect is "tantamount to 'fault' in the sense that we will impose legal responsibility for it."⁷² As discussed above, the "concept of risk allocation has been the primary policy rationale" supporting products liability,⁷³ transferring the costs of product injuries to the manufacturers⁷⁴ rather than the injured consumers.

Notably, a products liability action isolates the condition of the product itself from the question of the reasonableness of the manu-

70. *Lewis*, at 1436-37 (quoting *Butaud*, 555 P.2d at 45-46).

71. *See Shanks v. Upjohn Co.*, 835 P.2d 1189, 1194 (Alaska 1992); *see also Caterpillar Tractor Co. v. Beck*, 593 P.2d 871, 878 n.15 (Alaska 1979), *rev'd in part on other grounds*, 624 P.2d 790 (Alaska 1981).

72. *Beck*, 593 P.2d at 889.

73. *Id.*

74. *See supra* nn.12-14 (discussing *Clary v. Fifth Avenue Chrysler Ctr., Inc.*, 454 P.2d 244 (Alaska 1969)).

facturer's conduct.⁷⁵ Decision-making or marketing is not material to whether the product is defective.⁷⁶ Consistent with this, the Alaska Supreme Court has rejected the incorporation of any type of negligence terminology into products liability.⁷⁷ The Alaska Supreme Court has also made clear that compliance with industry standards or practices is not a defense in a products liability action.⁷⁸ The manufacturer is obligated to design a product that considers not only the intended use of the product, but also *any* reasonably foreseeable product use.⁷⁹ In the case of safety products,

75. The reasonableness, or lack thereof, of a defendant's conduct would be relevant, however, if there is a claim for punitive damages, which by definition focuses on the defendant's conduct and knowledge. *See* *Sturm, Ruger & Co., Inc. v. Day*, 594 P.2d 38, 46 (Alaska 1979).

76. *See Beck*, 593 P.2d at 883 ("The focus of strict products liability is on the condition of the product, not on the manufacturing and marketing decision of the defendant.") (citing *Bachner v. Pearson*, 479 P.2d 319, 325 (Alaska 1970)); *see also* *Keogh v. W.R. Grasle, Inc.*, 816 P.2d 1343, 1352 (Alaska 1991) ("The focus in a strict product liability case is on the product, not on the conduct of the defendant."). The Alaska Supreme Court has admonished the trial courts that jury instructions in products liability cases should avoid negligence concepts and negligence language by eliminating references to a defendant's reasonableness. *See* *Shanks v. Upjohn Co.*, 835 P.2d 1189, 1199-200 (Alaska 1992); *Patricia R. v. Sullivan*, 631 P.2d 91, 102-03 (Alaska 1981) (reversing verdict because of negligence language in jury instructions); *Heritage v. Pioneer Brokerage & Sales, Inc.*, 604 P.2d 1059, 1062-63 (Alaska 1979).

77. *Heritage*, 604 P.2d at 1062 (citations omitted). The court in *Heritage* reasoned:

In the *Beck* case, we expressly rejected the approach taken by some legal commentators of reinserting negligence terminology into the jury's inquiry into the "diverse factors related to the product's desirability and to its dangerousness," which is the crucial analysis in the jury's overall determination that a product's design is defective and the manufacturer should bear legal responsibility for the mistake.

Id.

78. *Beck*, 593 P.2d at 886 (noting that it is no defense even if "the manufacturer took reasonable precautions in an attempt to design a safe product or otherwise acted as a reasonably prudent manufacturer") (quoting *Barker v. Lull Eng'g Co.*, 573 P.2d 443, 457 (Cal. 1978)).

79. In determining whether a particular use (or misuse) is "foreseeable," the focus is on what is foreseeable to the manufacturer, not the consumer. Such proof includes what a reasonable manufacturer would have, or should have, known, which is largely a negligence principle. *See* *Hiller v. Kawasaki Motors Corp.*, 671 P.2d 369, 373 (Alaska 1983); *Lamer v. McKee Indus., Inc.*, 721 P.2d 611, 615 (Alaska 1986).

the reasonably foreseeable uses include, by definition, someone's negligence or carelessness.⁸⁰

Some safety products, particularly those products used in or by vehicles, are referred to in the context of "crashworthiness."⁸¹ The "crashworthiness doctrine," also known as the "enhanced injury doctrine" or "second collision doctrine," is an evolving area of products liability law nationally⁸² and a recent development in Alaska.⁸³ This doctrine recognizes that a vehicle occupant may be injured by, or have enhanced injuries from, the very product that was supposed to prevent or reduce injuries, such as a seatbelt or an airbag.⁸⁴ The crashworthiness doctrine acknowledges that injuries sustained in an accident may occur not only because of the initial impact of the vehicle, but also because of a subsequent impact of the occupant with the vehicle itself.⁸⁵ The crashworthiness of a vehicle can be measured by the degree to which it protects the occupants from injury inside the vehicle during this "second collision." The doctrine has been applied to cars, motorcycles, trucks, airplanes, helicopters and boats.⁸⁶ Liability may be imposed for product defects if the occupants' injuries were enhanced as a result of a design defect in the vehicle. Studies have examined safety products, such as head restraints, for effectiveness and the possibility of exacerbating injuries.⁸⁷ The focus on safety products is whether the

80. See, e.g., *Larsen v. GMC*, 391 F.2d 495, 502 (8th Cir. 1968) ("[An automobile] should provide a means of safe transportation or as safe as is reasonably possible under the present state of the art Collisions with or without fault of the user are clearly foreseeable by the manufacturer and are statistically inevitable.").

81. RESTATEMENT (THIRD) OF TORTS § 16 cmt. a (1997); see *id.* § 17, § 2 cmt. p ("[A]n automobile may be defectively designed so as to provide inadequate protection against harm in the event of a collision."). See generally *General Motors Corp. v. Farnsworth*, 965 P.2d 1209, 1219 (Alaska 1998).

82. In one of the earliest cases in this area, the court held that a "manufacturer is under a duty to use reasonable care in the design of its vehicle to avoid subjecting the user to an unreasonable risk of injury in the event of a collision." See *Larsen*, 394 F.2d at 502.

83. See generally *Farnsworth*, 965 P.2d at 1209. *Farnsworth* is the first Alaska case to address the crashworthiness doctrine directly.

84. See generally *Larsen*, 391 F.2d at 501-02; see also *Farnsworth*, 965 P.2d at 1219 (noting that "a crashworthiness claim rests on the idea that a defect enhanced the plaintiff's injuries").

85. *Sumnicht v. Toyota Motor Sales, USA, Inc.*, 360 N.W.2d 2, 7 (Wis. 1984) (noting that the plaintiff's injury was not from the accident but occurred "as a result of his impact with defective seats").

86. Lory J. Kraut, *Crashworthiness, Strict Liability: On a Collision Course*, 57 DEF. COUNS. J. 150, 150 (1990).

87. One study summarized its findings on head restraints, reasoning:

product worked as designed, *i.e.*, whether it reduced or eliminated the risk of injury or death, and in defect cases, whether the product enhanced injuries or failed.

IV. SAFETY PRODUCTS: CONSUMER MARKETING AND PRODUCT DESIGN THAT ANTICIPATES NEGLIGENCE

A. Role of Human Error in Product Development

Each discrete line of safety products referenced in this Comment involves, in some manner, a marketing and design program that expressly accounts for human error, misjudgment, carelessness, and the many circumstances summarized as comparative negligence or third-party negligence. A leading engineering group issued a report that discussed the role of error and human factors in designing products:

Despite great advances in technology, computational tools, information transmission and even our understanding of human factors, many designs still do not live up to user expectations or they fail in service for a variety of reasons. Interestingly enough, while the current legal climate in the United States encourages the most detailed and expensive investigations into design failures it doesn't always help in forestalling future occurrences of the same nature Whether a design failure results in accidental injury to a user or simply an argument over monetary loss, the underlying problems very often boil down to defects in the engineering design process itself.

Techniques such as safe-life design, fail-safe design, redundant design and hazard analysis *must be considered as integral parts of the product development*, and not simply as "add-ons" at the end of the project.⁸⁸

It is generally accepted that the incidence of whiplash associated disorders is increasing in all industrialised countries, despite the almost universal fitment of head restraints in at least the front seats of cars. This is usually attributed to the fact that few people can be observed to follow the standard recommendations as regards head restraint positioning, that is, level with the head vertically and as close to the head as possible horizontally. This study set out to determine whether any other factors, in addition to head restraint adjustment, could be found which would influence the severity of whiplash injury . . . *The beneficial effects of good head restraint adjustment could not be clearly demonstrated, and some trends, especially in rear impacts, where the benefits of a well-adjusted restraint should have been very clear, indicated that larger distances from head to restraint were associated with lower disability.*

R. Minton et al., *Whiplash Injury—Are Current Head Restraints Doing Their Job?*, 32 ACCIDENT ANALYSIS & PREVENTION 177, 177-85 (2000) (emphasis added).

88. Crispen Hales, *Ten Critical Factors in the Design Process*, in SAFETY BRIEF VOL. 19, NO. 1, at 1-7 (2001) (emphasis added).

Thus, design engineers are expected to account for human error as an “integral part of the product development.” In assessing a design defect case involving a safety product, consumer negligence and third-party negligence should be factored in as elements of the defective design at least equally and perhaps more so than simply as factors to allocate fault.

B. The Role of Human Error and Safety Helmets

Helmets are designed and marketed for bicycle safety,⁸⁹ motorcycle safety, mountaineering, skiing and construction work, among other uses. Studies have concluded, for example, that bicycle “helmets decrease the risk of head and brain injury by 70 to 88 percent and facial injury to the upper and mid face by 65 percent.”⁹⁰ Independent and manufacturer-sponsored studies are then touted in promotional campaigns by manufacturers. For example, one manufacturer advertises that its bicycle helmet provides “[t]op-protection for children and teens with proven safety design providing particular protection for temples and neck.”⁹¹ It would not be unreasonable for a consumer to buy this helmet for a child or a teen because it has a “proven safety design” and provides “particular protection for temples and neck,” two likely areas for bicycle injuries. Other manufacturers⁹² point out that they follow the

89. In one study, the authors noted the problem of bicycle injuries where no helmets were used:

Each year, approximately 750 persons die from injuries due to bicycle crashes and over 500,000 persons are treated in emergency departments. While over 90% of deaths from bicycle-related injuries are caused by collisions with motor vehicles, these collisions cause less than 25% of non-fatal head injuries. Head injury is by far the greatest risk posed to bicyclists, comprising one-third of emergency department visits, two-thirds of hospital admissions, and three-fourths of deaths.

Unfortunately, the ubiquity of the bicycle lends the greatest risk of injury to children, who often do not practice proper riding habits or wear bicycle helmets. Consequently, 30 percent of bicyclist deaths occur in the 5-14 year old age group. At least 125 children die from bicycle-related brain injuries each year (NCHS 1998). Approximately one-fifth of the 100,000 children who sustain a non-fatal injury to the head or face while riding each year, sustain a traumatic brain injury (USCPSC 1999).

Harborview Injury Prevention and Research Center, University of Washington, *Systematic Reviews of Childhood Injury Prevention Interventions - Bicycle Injuries Scope of the Problem*, at <http://depts.washington.edu/hipre/childinjury/topic/bicycles> (last updated July 5, 2001).

90. *Id.*

91. See Promotional Material for Firesprinter Zoom 2, available at www.abus.de/ez/ezfh44.htm (last visited Mar. 22, 2002).

92. According to the Bicycle Helmet Safety Institute, Bell, a manufacturer of helmets, “is the only helmet manufacturer who has joined the Consumer Product

Consumer Product Safety Commission's "Ten Safety Principles"⁹³ as part of their marketing and design programs.

The Bicycle Safety Helmet Institute notes that "[f]rom the consumer's point of view there are very protective helmets out there for reasonable prices."⁹⁴ The Institute notes, however, that there are design differences that relate to safety, including, for example, that "the aero shape is a less than optimal design for crashing."⁹⁵

A hypothetical situation involving an "aero" design helmet illustrates this situation.⁹⁶ The helmet is one which at least some in-

Safety Commission's ("CPSC") Product Safety Circle. We are not sure how much that actually means to the consumer, but they have pledged to follow [the] ten safety principles, designate a corporate safety officer and publicize their successes in implementing the principles." Bicycle Helmet Safety Institute, *Bicycle Helmets for the 2002 Season*, at <http://www.bhsi.org/helmet02.htm> (last visited Feb. 20, 2002). Certainly a consumer could argue that this manufacturer was promoting its safety practices and the focus on safety design with its product.

93. On October 5, 2000, the CPSC announced a "Top Ten List" of corporate product safety principles and urged manufacturers to voluntarily comply with these principles. The principles are:

- (1) Build safety into product design.
- (2) Do product safety testing for all foreseeable hazards.
- (3) Keep informed about and implement latest developments in product safety.
- (4) Educate consumers about product safety.
- (5) Track and address your products' safety performance.
- (6) Fully investigate product safety incidents.
- (7) Report product safety defects promptly.
- (8) If a defect occurs, promptly offer a comprehensive recall plan.
- (9) Work with CPSC to make sure your recall is effective.
- (10) Learn from mistakes - yours and others'.

Press Release, U.S. Consumer Product Safety Commission, *CPSC Chairman Ann Brown Unveils Product Safety Institute "Top Ten List" of Safety Principles Aimed at Reducing Number of Recalls* (Oct. 5, 2000), available at <http://www.cpsc.gov/cpscpub/prerel/prhtml01/01003.html>.

94. Bicycle Safety Helmet Institute, *supra* note 92.

95. *Id.*

96. Design defects in bicycling helmets have been the subject of several cases. See *Wilson v. Bicycle South, Inc.*, 915 F.2d 1503, 1507-08 (11th Cir. 1990) (holding that the district court properly granted manufacturer's motion for a judgment notwithstanding the verdict because the plaintiff assumed the risk of injury to parts of her body not covered by the helmet); *Braverman v. Kucharik Bicycle Clothing Co.*, 678 N.E.2d 80, 82 (Ill. App. Ct. 1997) (noting that consumer's expert testified that the helmet "was defectively designed, unreasonably dangerous, and not fit for its intended use. The leather polyester-filled helmet failed to provide any protection around and above the ear area."); *Berkner v. Bell Helmets, Inc.*, 822 F. Supp. 721, 724 (N.D. Ga. 1993) (holding that summary judgment was ap-

dustry experts have reason to believe contains a design defect because the design allows the “helmet to snag on the surface when you hit . . . [and this] can shove the helmet aside as you hit.”⁹⁷ Imagine a consumer, wearing such a helmet, who is riding too fast to control the bicycle, crashes, and is rendered quadriplegic because his helmet “snagged on the surface.”⁹⁸ Experts are willing to testify that the “aero” design is defective and had a different design been used, the plaintiff would not have been injured. Applying the allocation of fault principles adopted by statute and as employed by the court in *Farnsworth*,⁹⁹ the trier of fact would be asked to determine the fault of both parties. Since the hypothetical bike rider was riding too fast and lost control, it would not be unfair for the trier of fact to assign 100 percent of the liability to this carelessness. Had the consumer been riding more slowly, he would not have lost control, and had he not lost control, he would not have been injured. The defect in the design of the helmet would be secondary because its “fault” arises only after the plaintiff fails to exercise reasonable care.

In *Mine Safety Co. v. Stiles*,¹⁰⁰ decided before *Farnsworth*, a worker on an oil drilling platform was hit in the head while wearing a safety helmet designed to protect against such blows. Stiles was hit when a metal hole cover fell from the floor above.¹⁰¹ The helmet cracked and the suspension clips broke upon impact.¹⁰² Under current law, the helmet manufacturer could shift fault away from any product defect and instead focus on the initial cause of the injury—negligent co-workers who dropped a 58-pound hole cover from two stories above his head. If this case had been decided on its merits, the trier of fact would probably have little doubt that the injury would never have happened if these workers were properly trained or supervised. Thus, under current law, the co-workers would bear most, if not all, of the culpability when compared to the helmet manufacturer. Their negligence essentially trumps any po-

propriate for manufacturer because it was open and obvious that helmet was not a lighter color and did not have reflective material).

97. Bicycle Helmet Safety Institute, *available at* <http://www.helmets.org/helmet01.htm> (last modified Nov. 26, 2001).

98. *Id.*

99. *GMC v. Farnsworth*, 965 P.2d 1209 (Alaska 1998).

100. 756 P.2d 288 (Alaska 1988). The decision in *Stiles* turned on whether he timely filed his products liability suit (he did not), but the facts are worth discussing here because the manner of injury was obviously caused by someone’s carelessness. *Id.* at 292.

101. *Id.* at 289.

102. *Id.*

tential defect in the helmet; determining whether the helmet is defective is more an academic exercise than a substantive attempt to ascertain potential responsibility for a defective product. The current law allows a trier of fact to conclude that the helmet defect is superfluous and assign 100 percent fault to the negligent co-workers.

Though not a helmet case, *Caterpillar Tractor Co. v. Beck* presents a good example of the inappropriate application of allocation of fault principles to negligent users of safety products if modified slightly for purposes of discussion.¹⁰³ In *Beck*, the estate of the decedent, a construction worker who died when the loader that he was operating rolled over an embankment, claimed that construction equipment was defectively designed because the manufacturer failed to install a protective roll bar.¹⁰⁴ A roll bar is, of course, a safety product. If we change the facts, for purposes of discussion, we can see the impact the current allocation of fault paradigm may have on a similar case. Assume a roll bar was installed, and assume that when the loader rolled, the roll bar collapsed because of a product defect, and the driver was injured or killed.

The purpose of installing the roll bar in the first place is the knowledge that loaders can tip and roll if the loader driver misjudges the incline of a slope or improperly carries a load in the bucket. The loader could roll for other reasons as well, such as unstable soils. It would not be difficult to establish that, in any of these circumstances, either the driver or the employer was negligent in causing the loader to roll because of unsafe driving or improper soil preparation. Under post-*Farnsworth* reasoning and application of the statute,¹⁰⁵ the negligence of the driver or of the employer could readily account for 100 percent of the cause in fact of the injuries, notwithstanding a defective roll bar. Again, such a result would provide no incentive to manufacturers to produce non-defective safety products, even though the manufacturer had the potential negligence of other individuals in mind when it designed the product.

The end result is that pure allocation of fault, when applied to safety products, may result in such a dramatically reduced potential for liability that the essential purposes of products liability could be thwarted. Thus, the true costs of product-related injuries may not

103. *Caterpillar Tractor Co. v. Beck*, 593 P.2d 871 (Alaska 1979), *rev'd in part on other grounds*, 624 P.2d 790 (Alaska 1981).

104. *Id.* at 874-75.

105. ALASKA STAT. § 09.17.080 (Michie 2000). This statute describes how the court allocates a specific percentage of fault to each defendant when more than one defendant is liable for causing injury.

be transferred to the manufacturers, and the incentive to produce safer products may be eliminated. A fair examination of this issue should convince either the courts or the legislature that this result is not desirable.

V. CONCLUSION

Society is served when manufacturers design products that include safety features and safety products. The goals of products liability are undermined when a manufacturer of a safety product is allowed to essentially escape liability by allocating fault to the “original tortfeasor” because the safety product was designed with that original tortfeasor in mind.

A more appropriate resolution of the issues in *Farnsworth* may have been the conclusion that the “original tortfeasor” was the safety product manufacturer whose product allegedly failed to work for the passenger. The product was designed just in case one or more drivers were negligent. Allowing allocation of fault to the negligent drivers allows the manufacturer to transfer the costs of its defective product to others and eliminates any incentive to produce a safer product. This result undermines products liability doctrine and erodes consumer protection. A common law modification and interpretation of the products liability laws could extend the statutory allocation of fault only to circumstances that do not involve safety products. The application of the “original tortfeasor” doctrine to pure allocation of fault was done as a matter of common law; it can certainly be revised on the same basis. Additionally, the legislature could expressly address this issue and determine that it should not be the public policy of Alaska to diminish the incentive for product manufacturers to address defects in their safety products and reduce injuries to Alaskans.