Achieving True Strict Product Liability (But Not For Plaintiffs With Fault)

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ACHIEVING TRUE STRICT PRODUCT LIABILITY (BUT NOT FOR PLAINTIFFS WITH FAULT)*

Luke Meier*

Under modern tort law, the “strict” product liability cause of action does not impose true strict liability (liability without fault). This Article suggests that this counterintuitive development is not the byproduct of a policy choice. Instead, an unresolved doctrinal difficulty is responsible for the modern requirement that a plaintiff prove fault before winning on a “strict” product liability claim. The doctrinal difficulty is this: How can tort law impose liability on faultless product manufacturers while simultaneously preventing plaintiffs with fault from being able to recover under a true strict liability standard? This Article posits that both results are desirable—true strict product liability, but not for plaintiffs with fault—but that it is analytically difficult to assemble tort doctrine to get both results. Without a doctrinal solution that allows for both results, courts have (mostly) retreated from a true strict product liability standard. This Article offers a simple solution to this analytical/doctrinal riddle: Restoring the strict product liability cause of action such that it truly imposes liability without fault, while allowing defendants a contributory negligence (flat-bar) defense to this strict liability claim. Under this doctrinal change, plaintiffs without fault would be able to recover from manufacturers on a true strict product liability claim. Plaintiffs with fault, however, would be forced to pursue a negligence claim, meaning that their ability to recover would require them to show that the defendant also had fault. This doctrinal fix uses tools and concepts already familiar to modern tort law and is thus easily achievable. In fact, all that is necessary to effectuate this result is a simple, minor change to the current comparative fault jury instructions used in most jurisdictions.

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I. INTRODUCTION

In the 1944 case of Escola v. Coca Cola Bottling Co., California Supreme Court Justice Roger Traynor made the classic case for strict liability in tort for injuries resulting from products. The argument is intuitive and easy to understand: A product’s true cost to society must include all of the injuries caused by the product. By imposing liability for all injuries caused by a product (even when the injury is not the result of a defendant’s fault), these costs are passed on to consumers, who then pay a price reflecting the true cost of the product involved. In this way, the liability costs from a product are spread across all users of a product rather than being shouldered by the unlucky few who are injured by a product.

In the decades that followed Justice Traynor’s famous concurrence in Escola, court after court adopted the new tort cause of action for strict product liability.

Today, however, true strict product liability—that is, liability without fault—is nearly nonexistent. A plaintiff pursuing a modern strict product

1. 150 P.2d 436 (Cal. 1944).
2. See Stephen Sugarman, Justice Roger J. Traynor, Pragmatism, and the Current California Supreme Court, 71 HASTINGS L.J. 975, 978 (2020) (“Rather than approach Escola as a negligence case, as the majority did, Traynor proposed that it would be far better social policy to impose liability on the makers/sellers of defective products for injuries caused by their products, regardless of whether plaintiffs could prove that those makers/sellers were at fault.”); Michael D. Green & Joseph Sanders, In Defense of Sufficiency: A Reply to Professor Twerski and Mr. Sapir, 23 WIDENER L. REV. 663, 673 (2014) (“Justice Traynor’s famous concurrence in Escola v. Coca Cola Bottling Co. of Fresno advocated the adoption of strict product liability.”) (internal quotations omitted).
5. See Alani Golanski, Paradigm Shifts in Products Liability and Negligence, 71 U. PITTL. L. REV. 673, 680 (2010) (stating that the “fault-based approach has seemed inevitable”); Ellen Wertheimer, The Biter Bit Unknown, the Third Restatement, and the Reinstatement of Liability Without Fault, 70 BROOK. L. REV. 889, 892-93 (2005) (discussing the “retreat” of courts away from true strict product liability and towards a fault-based standard, but also noting that this trend could be reversing); James A. Henderson, Jr. & Aaron D. Twerski, Doctrinal Collapse in Products Liability: The Empty Shell of Failure to
liability claim must show that a product is “defective,” and in most cases the test for whether a product is defective is indistinguishable from the test for determining whether a defendant has breached the negligence duty of reasonable care. Some jurisdictions have even entirely disavowed the strict product liability cause of action, reasoning that the modern strict product liability claim is analytically indistinguishable from a negligence claim.

What happened? Why were jurisdictions fifty years ago so keen to adopt a liability-without-fault cause of action, only to alter that cause of action to a no-fault claim but allowing defendants a contributory negligence defense, it would no longer be necessary to distinguish between the different theories of product defect; in this way, then, strict product liability law would be simplified. Although this simplification is not the impetus for the suggestions contained in this Article, it is a nice collateral benefit. In any event, because this Article’s approach would eliminate the need for distinguishing between warning, design, and manufacturing defect cases are less common than design and warning defect cases.

Under the approach advocated for in this Article (restoring the strict product liability cause of action to a no-fault claim but allowing defendants a contributory negligence defense), it would no longer be necessary to distinguish between the different theories of product defect; in this way, then, strict product liability law would be simplified. Although this simplification is not the impetus for the suggestions contained in this Article, it is a nice collateral benefit. In any event, because this Article’s approach would eliminate the need for distinguishing between warning, design, and manufacturing defect cases, these categories will mostly be ignored for the remainder of this Article.

See Benefic v. Hinkenk Tire Co., 235 F.Supp.3d 632 (E.D. Vir. 2018) (“Virginia largely has abandoned the distinctions between negligence and non-negligence causes of action in products liability actions. And Virginia decisional law has done so notwithstanding the fact that Virginia officially does not recognize the doctrine of strict products liability.”); Ottley et al., supra note 7, at 20 (asserting that five states, including Virginia, had refused to adopt strict product liability in 2012); see also Peter M. Gerhart, The Death of Strict Liability, 56 B.U. L. Rev. 245, 246 (2006) (“[S]trict liability is an unjustified and superfluous doctrinal container for addressing non-intentional harms. All of the legitimate ‘work’ of strict liability can be—and is being—done better under the negligence regime by asking whether the injurer made reasonable decisions about activity-based matters.”). Cf. Olson v. Prosoco, Inc., 522 N.W.2d 284, 289 (Iowa 1994) (“Maintaining the distinction to justify submission of failure to warn claims under both strict liability and negligence theories is a vain effort.”).
action and render it virtually indistinguishable from negligence. Has Justice Traynor’s original argument in favor of liability without fault been exposed as unwise? Should the strict product liability claim be terminated? Has the experiment proven to be a failure?

I believe the answer to these questions is “no.” Justice Traynor’s risk-spreading argument in favor of strict product liability is still as powerful as ever. Indeed, the notion that product price must reflect true cost (including resulting injuries) is perhaps more relevant now than it was eighty years ago. And courts have not systemically refuted or rejected the fundamental logic and policy advanced by Justice Traynor in Escola.

So why do modern courts generally require a plaintiff to show fault before prevailing on a strict product liability claim? I believe the answer to this question perhaps has more to do with a doctrinal/analytical riddle rather than a rejection of the policy behind true strict liability (liability without fault).

During the time period in which courts were morphing the strict product liability claim into a fault-based claim, they were simultaneously wrestling with two other doctrinal questions: First, should a victim-fault defense eliminate a plaintiff’s recovery (contributory negligence) or reduce a plaintiff’s recovery (comparative negligence)? Second, should the victim-fault defense (contributory or comparative) be available to a defendant sued on a strict product liability claim?

As these questions percolated, a consensus was reached as to whether a plaintiff who was with fault should be allowed to recover in strict product liability against a defendant without fault. The conclusion was this: A

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9. See John C.P. Goldberg & Benjamin C. Zipursky, The Easy Case for Products Liability Law: A Response to Professors Polinsky and Shavell, 123 Har. L. Rev. 1919, 1919 (2010) (“A mere half-century later, American law is perhaps becoming distinctive for its hostility to the idea that consumers should have the right to obtain redress against manufacturers who have injured them through the sale of defective products.”); David G. Owen, The Fault Pit, 26 Ga. L. Rev. 703, 704 (1992) (“And by the 1970s, the dominance of fault in the law of torts was being challenged on many fronts—as its nemesis, strict liability, rapidly gained scholarly support and doctrinal ground. As the twentieth century closes its doors, however, fault is once again reasserting its sovereign role in the law of torts.”).


11. As will become apparent later in this Article, this analytical/doctrinal riddle is deceptively tricky and complex. The use of the word “riddle” is not hyperbole.


13. See David Owen, Products Liability in a Nutshell 400–01, 406 (9th ed. 2015) (describing how courts had to decide whether contributory negligence and then comparative negligence was a defense to a strict product liability claim in the latter decades of the twentieth century).
plaintiff with fault should not be able to recover in strict product liability against a defendant without fault. Indeed, there are good policy reasons to prevent recovery in this type of case—adopting Traynor’s risk-spreading hypothesis in this type of case would reduce the legal incentive for consumers to use reasonable care to protect themselves.

There are different doctrinal paths to achieving the desired result of preventing a plaintiff with fault from recovering against a defendant without fault. For jurisdictions with contributory negligence, a court could prevent a plaintiff with fault from recovering against a fault-less defendant by concluding that contributory negligence was a defense to a strict product liability claim. This achieved the goal of preventing a plaintiff with fault from recovering against a defendant without fault. It also meant, however, that a plaintiff with fault was prevented from recovering against a defendant with fault.

In any event, contributory negligence was soon replaced with comparative negligence in almost every jurisdiction. And comparative negligence—unlike contributory negligence—cannot be used to prevent plaintiffs with fault from recovering in strict product liability against defendants without fault. Under comparative negligence, plaintiffs with fault are not precluded from recovery. Rather, their recovery is simply reduced by whatever assignment of fault was given to them by the jury.

While jurisdictions moved from contributory to comparative fault, they also started requiring fault in a strict product liability claim. I do not believe this was an accident. Requiring a plaintiff to show fault achieved the objective of preventing a plaintiff with fault from recovering against a defendant without fault, an objective that had formerly been possible through the contributory negligence defense. The fault requirement was simply a different doctrinal tool to achieve this desired result.

Lost in this shuffle, however, was a different type of case: A case in which neither the plaintiff nor the defendant was at fault. By requiring a

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14. See infra Section III(C).
15. See Ashley M. Votruba, Dividing Responsibility: The Role of Psychology of Attribution, 69 DEP. L. REV. 721, 723 (2022) (“According to the strict common law doctrine of contributory negligence, a plaintiff would be barred from recovery if she contributed in any amount to her own injuries. Comparative negligence, in contrast, still allows a plaintiff to recover even when she contributed to her own harm.”).
16. Roughly speaking, the switch to comparative fault occurred mostly in the 1970s and 1980s, and the change to the strict product liability claim began in the 1980s. See ONEW, supra note 13, at 180 (“Slowly, almost imperceptibly, courts and state legislatures in the late 1970s and 1980s began to move the basis of a seller’s liability for harm from defective products in most cases away from truly ‘strict’ liability back towards principles of fault.”); Lee A. Wright, Utah’s Comparative Apportionment: What Happened to the Comparison?, 1998 UTAH L. REV. 543, 550–51 (1998) (“The transition away from contributory negligence began early in the twentieth century, with the majority of states adopting comparative negligence in the 1970s and 1980s.”).
plaintiff to prove the defendant’s fault to recover in a strict product liability claim, courts achieved the objective of preventing a plaintiff with fault from recovering against a defendant without fault. But this rule also had the effect of preventing plaintiffs without fault from recovering against defendants without fault. I am not sure this result was necessarily intended or appreciated. Although Justice Traynor’s risk-spreading argument in favor of strict product liability suffers from a moral hazard when applied to plaintiffs with fault, there is no similar moral hazard problem for cases in which a plaintiff is without fault. In this type of case, Justice Traynor’s risk-spreading argument remains persuasive—and seemingly unimpeached by the courts that have created doctrinal hurdles for recovery in this type of case.

Thus, I believe the history in which the strict product liability cause of action developed into a fault-based cause of action can be partially understood as an instance in which the baby was thrown out with the bathwater. Courts did not want plaintiffs with fault (the bathwater) to be able to use the strict product liability cause of action to recover against a defendant without fault. Courts thus began requiring a plaintiff to prove the defendant’s fault to recover on a strict product liability cause of action. This achieved the objective of disposing of the bathwater (plaintiffs with fault). But, in the process of disposing the bathwater, the baby (plaintiffs without fault) was also thrown out. Courts and commentators simply could not create rules that satisfactorily separated the baby from the bathwater.

My objective in this Article is twofold.

First, I aim to offer a fresh perspective on how the strict product liability cause of action came to be a cause of action that generally requires a plaintiff to demonstrate fault, despite the initial strict liability justifications advanced by Justice Traynor (and others).

Second, for courts that are inclined to retain true strict product liability for faultless plaintiffs, I offer an easy mechanism that will allow courts to achieve this objective while simultaneously precluding plaintiffs with fault from recovering against a defendant without fault. This result can be achieved through a very simple modification of the jury instructions regarding the allocation of fault under a modern comparative fault system. In short, in a strict product liability case, the jury would be instructed that they are free to assign 0% fault to both the plaintiff and the defendant, even if the elements of a true strict product liability claim have been established against the defendant. This very easy fix would allow for product liability against faultless defendants, but only in cases where the plaintiff was also without fault.
The organization of this Article is as follows: Part II describes and discusses the four categories of product liability cases. Part III then discusses the analytical complexity involved in applying a victim fault defense to a strict product liability claim. Next, Part IV considers the shift towards requiring a plaintiff to prove the defendant’s fault to recover on a strict product liability claim. Part V proposes a modified verdict form and jury instructions that would preserve strict liability for fault-less plaintiffs while preventing plaintiffs with fault from recovering against fault-less defendants. Part VI concludes.

II. Four Categories of Tort Cases

Tort disputes occur between plaintiffs and defendants; each may be with or without fault. The combination of these factors is depicted below in Figure 1 with a very simple factorial design table.

**Figure 1**

<table>
<thead>
<tr>
<th>Defendant Without Fault</th>
<th>Defendant With Fault</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Plaintiff Without Fault</strong></td>
<td>1</td>
</tr>
<tr>
<td><strong>Plaintiff With Fault</strong></td>
<td>3</td>
</tr>
</tbody>
</table>

17. The term “fault” within tort law usually refers to either a defendant’s nefarious state of mind or behavior by the defendant that is “negligent” when judged according to a utilitarian, cost-benefit analysis. See Kenneth J. Vandevelde, A History of Prima Facia Tort: The Origins of a General Theory of Intentional Tort, 19 Hofstra L. Rev. 447, 448 (1990) (tracing this structure to Oliver Wendell Holmes). This Article—which deals with product liability disputes—focuses on the “negligence” version of “fault.” Thus, in discussing whether a party acted with “fault,” it is the utilitarian calculus that is intended. It is very rare for a defendant in a product liability case to have the type of subjective state of mind that would satisfy the requisite elements of an intentional tort. See, e.g., Philip Combs & Andrew Cooke, Modern Products Liability Law in West Virginia, 113 W. Va. L. Rev. 417, 424–25 (2011) (listing the causes of action that are available in a product liability suit but excluding intentional torts).
A number has been assigned to each category (1–4).

The argument for allowing the plaintiff to recover in tort from the defendant gets stronger as you move from the bottom left to the top right of the chart. Generally speaking, courts are unanimous in believing that a plaintiff should recover in tort in a Category 2 case. On the other end of the spectrum, courts are reluctant to allow recovery in a Category 3 case. The conclusion as to the appropriate resolution of Category 1 and 4 cases has been more difficult, with courts generally striving to reach some sort of compromise in these categories.

Some tort disputes involve products sold or distributed by a seller or distributor. The set of “product liability cases” is thus a subset of all tort disputes. Within the subset of product liability cases, however, the same four Categories of cases exist. This is depicted below.

**Figure 2**

A number has been assigned to each category of product cases (1P–4P).

Within the subset of product liability cases, the observations made above regarding the four types of tort cases hold true. Thus, the argument for recovery in a Category 2P case is very strong, while the argument for recovery in a Category 3P case is very weak. Regarding Category 1P and 4P, there are persuasive arguments for and against recovery, including an argument for a partial recovery.

Mostly, this Article addresses the subset of product liability cases (Categories 1P–4P). To facilitate discussion of the different types of product liability cases, a representative fact pattern for each category is detailed below.
Category 1P Case (Plaintiff Without Fault, Defendant Without Fault)

Defendant Delta Pharmaceutical manufactures a drug that is used by stroke victims who have lost the use of their left arm. The drug is a "miracle" drug: it restores full use of the victim’s left arm if taken within one week of a stroke. The drug is highly effective: for every 100,000 people who use the drug, 99,999 will regain complete function in their left arm. However, for the 1/100,000 in which the drug is not effective, there is a serious side effect: Those patients lose function in their right arms, rendering the patient without use of either arm. There is no way to predict which patients will experience the negative side effect. Delta has attempted to redesign the drug to eliminate the side effect but has been unable to maintain the effectiveness of the drug while also eliminating the side effect. The success rate and side effect rates are well-known by Delta and patients who use the product. An overwhelming number of potential patients decide to use the product, despite the 1/100,000 risk that the drug will not restore use of the left arm and will instead destroy use of the right arm.

Patty had a stroke and lost the use of her left arm. Her doctor informed her of Delta’s drug, as well as the likelihood of success and failure. Patty understood these risks. Patty decided to take Delta’s drug. The use of her left arm was not restored, and Patty lost the use of her right arm.

Patty has brought a tort suit against Delta.

Analysis

If Patty must prove Delta’s fault, she will not be able to recover, as Delta is without fault in this situation. The particular drug ingested by Patty was manufactured as it was intended to be manufactured. The warnings given to Patty clearly conveyed the risk. Moreover, there is no alternative design that would eliminate the drug’s random side effect while preserving its effectiveness for the overwhelming number of patients who benefit from the drug.

Patty is also without fault in this fact pattern. Patty took a calculated risk that turned out poorly for her. This is the risk taken by all others who choose to use the drug.

18. Under the learned intermediary doctrine, the manufacturing would only need to warn physicians rather than the ultimate consumers. See Samuel D. Hodge, Jr., The Medical and Legal Implications of Artificial Intelligence in Health Care—An Area of Unsettled Law, 28 RICH. J. L. & TECH. 405, 445 (2022) (asserting that under the learned intermediary doctrine the “seller fulfills its duty to warn by giving adequate notice to the physician.”).
Although Patty cannot recover in tort if she is required to show Delta's fault, there is a strong case for nevertheless allowing Patty to recover. Patty's loss of the ability to use her right arm is a serious cost associated with the drug. Patty took a risk that everybody else who uses the drug took; in this sense, Patty is simply an unlucky user of the drug. To deny Patty recourse against Delta would saddle her with all the costs associated with this side effect. To allow Patty to recover would require Delta to charge more for the drug to cover its liability exposure. Almost surely, Delta would still return a profit at this increased price, reflecting the fact that the drug is socially beneficial despite the unfortunate side effect. If recovery is allowed and as consumers continue to buy at the higher price, however, the costs associated with the side effect are spread across all users of the drug rather than being borne solely by unlucky Patty. (If Delta cannot return a profit charging at the higher price, the drug is not socially beneficial).

**Category 2P Case (Plaintiff Without Fault, Defendant With Fault)**

Delta makes a rocking lounge chair. Patty orders one for use on her back porch. One night, Patty is rocking in the lounge chair with her left hand gripping the left arm rest. The moving parts on the lounge chair clip the end of Patty's middle finger on her left hand, severing it completely. Delta did not warn that the moving parts might sever a finger gripping the arm rests, although it was aware of the risk. Delta could have put a cover over these moving parts to eliminate the risk, at a cost of ten cents/chair. Patty did not recognize the risk associated with the moving parts of the chair, nor would a reasonable person have appreciated this latent risk.

Patty has brought a tort suit against Delta.\(^{19}\)

**Analysis**

Patty has a sympathetic case and will be able to recover in tort. If Patty needs to prove Delta's fault under the controlling tort law, she will be able to do so. (Eliminating the risk of even one severed finger, for ten cents/chair, seems like a precaution well worth taking.) Even if the defendant is permitted to assert a victim fault defense, this defense will not absolve or reduce Delta's liability because Patty is without fault.

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\(^{19}\) This fact pattern is based on the case of *Matthews v. Lawnlite Co.*, 88 So.2d 299 (Fla. 1956).
Category 3P Case (Plaintiff With Fault, Defendant Without Fault)

Patty is preparing dinner and chopping vegetables; she is also watching Jeopardy! on television while chopping. As Patty is looking up at the television, she severs the tip of her left thumb while chopping. The knife Patty was using was produced by Delta. It was a standard knife intended (and marketed) for cutting vegetables or meat. Delta even included a warning on the packaging for the knife that the knife was sharp and should be used with caution.

Patty has brought a tort suit against Delta.

Analysis

Patty clearly has fault in this scenario; she failed to exercise reasonable care while chopping. Conversely, Delta clearly has no fault in this fact pattern. The knife was suitable for its intended use of cutting/chopping. It is probably not necessary to warn that a knife is sharp, but in any event, that warning was given in this case.

Thus, Patty will only be able to recover in full if (1) she does not need to prove Delta’s fault, and (2) Delta does not have a victim-fault defense. Stated differently: Delta (1) will avoid liability if strict liability is not available to Patty or (2) will avoid full liability (and maybe all liability) if Delta is able to assert Patty’s fault as a defense.

From a policy standpoint, the argument in favor of Patty’s recovery is relatively weak. Allowing Patty to recover in full would excuse her fault and would reduce Patty’s incentive to be careful to protect herself. Granted, Judge Traynor’s risk-spreading argument in favor of strict liability can still be applied to this fact pattern. Thus, allowing recovery here would force Delta to raise the price of knives to reflect Delta’s liability exposure for the true cost of knives. In this scenario, though, the higher cost of knives that is spread out to all knife users is a byproduct of Patty’s fault. Thus, under strict liability, careful knife users would pay a higher price for knives and would effectively subsidize careless knife users like Patty. The risk-spreading argument is most persuasive when the risk is spread amongst consumers who have engaged in indistinguishable conduct (like in Category 1P); that is clearly not true regarding Patty’s careless chopping.
Category 4P Case (Plaintiff With Fault, Defendant With Fault)

Patty is intoxicated and driving her car (manufactured by Delta) on the highway. Patty is not wearing a seatbelt. Patty collides with a guard rail on the highway. The impact with the guard rail causes the driver’s side front door to throw open. Patty is ejected and dies from her injuries. Had Patty not been thrown from the car she would have survived the accident.

Delta was aware that its vehicles would sometimes be involved inside collisions (usually a result of careless driving) and that drivers do not always wear their seat belts. For relatively little cost, Delta could have designed its doors so that they were less inclined to fly open during a side collision. Had Delta adopted this alternative design, Patty would not have been thrown from the car and would have survived the accident.

Patty has brought a tort suit against Delta.\(^{20}\)

Analysis

By driving while intoxicated (and not buckling her seatbelt), Patty clearly has fault. Because Delta could have designed its car such that it was safer during a side collision, at almost no cost, Delta also clearly has fault.

Because Patty can show Delta’s fault, her ability to recover does not necessarily require strict liability. However, because Patty is at fault, her ability to recover (and for how much) greatly depends upon whether Delta has a victim-fault defense and, if so, the effect of the victim-fault defense.

From a policy perspective, holding Delta liable will incentivize it to use reasonable care in designing its cars. Holding Delta fully liable for Patty’s injuries, however, would excuse Patty’s fault and reduce her incentive to use reasonable care to protect herself. Completely precluding Patty from recovering would incentivize her not to engage in careless behavior. If Patty cannot recover, however, Delta’s fault is excused (in this case at least) and Delta’s incentive to use reasonable care is reduced.

In this type of case, a conclusion in favor of full recovery or against any recovery will excuse one party’s fault.

\(^{20}\) This fact pattern is based on Daly v. General Motors Corp., 575 P.2d 1162 (Cal. 1978).
III. ELIMINATING RECOVERY IN CATEGORY 3P CASES THROUGH A VICTIM-FAULT DEFENSE

Even as commentators were advocating for the new tort of strict product liability, and even as courts were adopting it, there seemed to be an implicit understanding that this new cause of action would not allow for recovery in a Category 3P case. Early courts and commentators routinely discussed this type of fact pattern, and all concluded (or assumed) that there would be no liability. The ALI Council discussions over Section 402A of the Second Restatement of Torts demonstrated widespread agreement that a consumer who abuses whiskey should not be able to recover in strict product liability against the manufacturer or seller of the whiskey.\textsuperscript{21} The Texas Supreme Court famously reasoned that “[w]e cannot charge the manufacturer of a knife when it is used as a toothpick and the user complains because the sharp edge cuts.”\textsuperscript{22} Professor Noel explained that the manufacturer of a roller skate would not be liable when the skate “is left at the top of a dark flight of stairs and the plaintiff falls as a result.”\textsuperscript{23} Dean Wade observed that “[a] simple instrument like a hammer, for example, will not infrequently smash a finger or thumb if used unskillfully”\textsuperscript{24} and presumed that there would be no liability in this instance.\textsuperscript{25} The Third Restatement, in recognizing the policy arguments in favor of strict product liability, assumes that the doctrine would only be available to “innocent victims.”\textsuperscript{26}


\textsuperscript{22} General Motors Corp. v. Hopkins, 548 S.W.2d 344, 349 (Tex. 1977).

\textsuperscript{23} Dix W. Noel, Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk, 25 VAND. L. REV. 93, 95 (1972). I am assuming that it was the plaintiff who left the skate at the top of the stairs; if it was a third party, and if the plaintiff was not otherwise at fault for not noticing the roller skate, then it becomes a Category 1 case, albeit with the complicating factor of fault by a person other than the plaintiff or the defendant. This type of case—a plaintiff without fault, a defendant without fault, but a third party with fault—can be saved for future consideration. Cf. generally Jean Macchiaroli Eggen & John G. Culhane, Gun Torts: Defining a Cause of Action for Victims in Suits Against Gun Manufacturers, 81 N.C. L. REV. 115, 115–209 (2002) (discussing the liability of gun manufacturers to plaintiffs injured by the conduct of a third-party tortfeasor).

\textsuperscript{24} John Wade, Strict Tort Liability of Manufacturers, 19 SMU. L.J. 5, 16 (1965).

\textsuperscript{25} See id.

\textsuperscript{26} See RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 cmt. A; see also KARL N. LLEWELLYN, CASES AND MATERIALS ON THE LAW OF SALES 341 (Chicago: Callaghan and Company 1930) (“The consumer, barring his own fault in use, should have no negligence to prove.”) (internal citation omitted). Modern proponents of strict liability for automated vehicles (“contact liability”) have similarly waffled on whether plaintiffs with fault can take advantage of their proposed approach in Category 3P cases. See, e.g., Kenneth S. Abraham & Robert L. Rabin, Automated Vehicles and Manufacturer Responsibility for Accidents: A New Legal Regime for a New Era, 105 VA. L. Rev. 127, 166–67 (2019) (suggesting that plaintiffs with “egregious negligence” could not recover against the manufacturer of an automated vehicle under the proposed strict liability-type system they propose); Jeffrey K. Gurney, Sue My Car Not Me: Products Liability and Accidents Involving Autonomous Vehicles, 2013 UNIV. ILL. J.L.
A. Was Liability Without Fault Ever Really Intended?

Given the widespread agreement that a plaintiff with fault would not be able to take advantage of the new strict product liability cause of action in a case against a defendant without fault, it is reasonable to wonder whether courts and commentators ever really envisioned true strict liability (liability without fault) for product liability cases. For all the talk of strict liability, given the consensus that recovery should not occur in a Category 3P case, did the courts and commentators ever really mean to impose liability without fault when they spoke of this new “strict liability” cause of action?

The notion that perhaps true strict liability was never really intended is bolstered by the fact that the new strict product liability cause of action offered plaintiffs advantages over the traditional negligence cause of action other than liability without fault. Thus, plaintiffs benefited from this new cause of action, even if they were not excused from showing the defendant’s fault. There were four primary benefits (other than liability without fault) that the new cause of action offered plaintiffs.

First, it was abundantly clear that the new strict product liability cause of action would not be shackled with the ancient notions of privity that had historically been used to deny recovery in negligence claims.27 Second, early caselaw suggested that a lack of foreseeability would not absolve or reduce the defendant from liability;28 negligence law, of course, judges the defendant according to a foreseeability standard.29

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28. See DAVID OWEN, PRODUCTS LIABILITY LAW 533 (3d ed 2015) (“[A] number of courts . . . picked up quite early on the hindsight test [for strict product liability claims,]”) (internal citations omitted).

usually be the fault of the manufacturer that was relevant.\textsuperscript{30} It was clear, however, that a non-selling manufacturer could be liable under this new cause of action.\textsuperscript{31} Even so, under negligence law, absent vicarious liability, it is the fault of the party against whom the plaintiff wants to recover that is relevant.\textsuperscript{32} In this way, then, strict product liability was a theory that allowed a plaintiff to recover against a seller, even though the fault (if any) was that of the manufacturer. This was not a result that could be achieved under negligence law. Fourth, the strict product liability cause of action offered courts an opportunity to come to a different conclusion as to whether the defendant was allowed to assert contributory/comparative negligence. Under the negligence cause of action, of course, defendants have long been allowed to turn the tables on the plaintiff and point the fault finger back at the plaintiff.\textsuperscript{33} By creating a new strict product liability cause of action, courts could have rejected the victim-fault defense in the product context (particularly the harsher contributory negligence version of this defense).

Thus, there are a host of reasons—other than allowing a plaintiff to recover without showing the defendant’s fault—for recognizing the new strict product liability cause of action. So perhaps courts never meant the whole "liability without fault" bit? A world in which only defendants with fault are liable in tort is depicted below in Figure 3, with "red" representing no recovery for the plaintiff and "green" representing recovery for the plaintiff:

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{figure3}
\caption{Diagram showing the liability without fault concept.}
\end{figure}

\textsuperscript{30} See David G. Owen, Design Defect Ghosts, 74 Brook. L. Rev. 948 (2009) (explaining that the liability of retailers and sellers for strict product liability claims is usually based on the conduct of manufacturers in manufacturing or designing the product or creating warnings for the product).

\textsuperscript{31} See Frank J. Cavico, Jr., The Strict Tort Liability of Retailers, Wholesalers, and Distributors of Defective Products, 12 Nova L. Rev. 213, 218 (1987) ("Retailers have been a subject for strict liability consideration from the very onset of the doctrine.").

\textsuperscript{32} See Agnieszka A. McPeak, Sharing Tort Liability in the New Sharing Economy, 49 Conn. L. Rev. 171, 190 (2016) (explaining that a negligence claim usually requires a plaintiff to show the defendant’s fault unless the plaintiff is asserting vicarious liability); John Charles Kunich, Shock Torts Reloaded, 6 App. J. L. 1, 18 (2006) ("In a sense, vicarious liability is a species of strict liability, in that it entails a finding of liability without actual fault on the part of the [defendant].").

\textsuperscript{33} See Frank L. Maraist, H. Alston Johnson III, Thomas C. Galligan, Jr., William R. Corbett, Answering a Fool According To His Folly: Ruminations on Comparative Fault Thirty Years On, 70 La. L. Rev. 1105, 1105–06 (2010) (discussing how the common law negligence claim has always been associated with a victim fault defense).
In Figure 3, the area shaded red represents the type of case in which the plaintiff is unable to recover, while the area shaded green represents the type of case in which the plaintiff is able to recover. If courts adopted the strict product liability cause of action but never meant to allow for recovery without fault, Category 1 and Category 3 would be completely eliminated from recovery. A plaintiff cannot recover under a negligence cause of action in Category 1 and 3 because the negligence cause of action requires the plaintiff to show the defendant’s fault. Category 1P and 3P are not recoverable under a strict product liability cause of action (even though the sale of a product by a seller satisfied some of the elements of the strict product liability claim), because the claim is not truly “strict liability” but rather requires the plaintiff to show the defendant’s fault. Thus, the plaintiff is only able to recover in Category 2 and Category 4 cases, because in these types of cases, the defendant has fault.

The approach depicted in Figure 3—in which only defendants who are at fault can be held liable in tort—is roughly the current state of the law in most jurisdictions. Is this what courts initially intended when they adopted the new strict product liability cause of action?

34. Of course, a plaintiff in a product liability case can pursue a negligence claim against the defendant. Because the negligence claim requires the plaintiff to show the defendant’s fault, however, the availability of the negligence cause of action does not help the plaintiff recover in a Category 1P or Category 2P case.

35. See generally Owen, supra note 28, at 325–26 (describing how the strict product liability claim mostly requires a plaintiff to prove the defendant’s fault).
Retracing history can often be hard, particularly when trying to pinpoint the precise motivations for changes in the law. It is fair to say that some of the courts and commentators pushing for the new strict product liability cause of action were motivated (partly, primarily, or solely) by some of the factors (other than liability without fault) listed above.\footnote{For an excellent history on the strict product liability cause of action, and all the separate reasons pushing courts towards adoption, see generally Kyle Graham, \textit{Strict Products Liability at 50: Four Histories}, 98 MARQ. L. REV. 555, 555–624 (2014).} One of the more influential articles in the strict product liability movement was “Strict Tort Liability of Manufacturers” by Dean John Wade.\footnote{See Wade, supra note 24; see also David G. Owen, \textit{supra} note 30, at 927, 946 (describing Dean Wade as one of the three most prominent scholars in the 1960s in the product liability field); George Conk, \textit{Punctuated Equilibrium: Why Section 402A Flourished and the Third Restatement Languished}, 26 REV. LIT. 799, 817–19 (2007) (discussing the influence of Dean Wade); Gary Myers, \textit{Dean John Wade and the Law of Torts}, 65 MISS. L.J. 29, 30 (1998) (“Dean Wade and his work stand out in this crowd of academics and their writings because of his powerful influence in shaping tort law . . . . His work dramatically affected the direction that tort law has taken in the last several decades.”).}

Much of Wade’s article, which generally discusses the virtues of the new strict product liability cause of action,\footnote{See generally Wade, supra note 24, at 13–21 (extolling the virtues of strict product liability).} focuses on the benefits of divorcing this new cause of action from (1) contract principles\footnote{See id. at 11 (describing the advantages of creating a new tort-based cause of action that is divorced from contract law).} and (2) privity requirements.\footnote{See id. (“It eliminates completely the whole problem of the requirement of privity of contract.”).} Liability without fault is mentioned, but it is not the centerpiece of Wade’s argument (and, indeed, the notion of true strict liability—liability without fault—is heavily tempered in his article).\footnote{See at 13 (“Is it sufficient for a plaintiff to show that he used the defendant’s product and that he was injured? The answer to this is no . . . . [T]hus, the liability is not that of an insurer; it is not absolute in the literal sense of that word.”.).} There are countless articles to the same effect,\footnote{See, e.g., Owen, \textit{supra} note 28, at 320–21 (describing the mixed academic commentary regarding product liability in the 1960s).} and even Justice Traynor’s classic argument in favor of liability without fault mentions (1) the elimination of privity and (2) the liability of the retailer “conduit” as benefits of the new strict product liability cause of action.\footnote{See Escola v. Coca Cola Bottling Co. of Fresno, 150 P.2d 436, 442–44 (Cal. 1944) (discussing the elimination of privity and retailer liability).}

If courts never really intended liability without fault, the reasons for adopting the new strict product liability cause of action must have been the “other” benefits that this new cause of action afforded plaintiffs (described above). But these attributes of the new strict product liability cause of action—other than liability without fault—have mostly disappeared in the following decades. Whatever was left of the privity
requirement in negligence law has now completely vanished.\textsuperscript{44} Modern caselaw now affords a strict product liability defendant the same foreseeability argument that is available to defendants sued in negligence.\textsuperscript{45} Statutes in many states severely restrict the liability of a seller for the fault of a manufacturer, often allowing relief against the seller only if the manufacturer is insolvent or not subject to the court’s jurisdiction.\textsuperscript{46} And, as will be explained more below, the modern trend is to permit a defendant to raise the victim fault defense regardless of whether the plaintiff’s claim is based on negligence law or strict product liability.\textsuperscript{47}

Thus, even if there were reasons (apart from liability without fault) for courts to create the new strict product liability cause of action, those reasons have largely disappeared. As both the strict product liability claim and negligence claims have developed under modern law, strict product liability is useful if it imposes liability without fault; if strict liability requires fault, it is duplicative of the negligence cause of action and should be eliminated. (This is why some jurisdictions that have rejected liability without fault under strict product liability have eliminated the strict product liability cause of action.\textsuperscript{48})

Moreover, even though some courts and commentators might have been attracted (wholly or partially) to the strict product liability cause of action for reasons other than liability without fault, there is no question that many courts and commentators truly believed in liability without fault.\textsuperscript{49} Justice Traynor’s liability-without-fault discourse was

\begin{footnotesize}


\textsuperscript{46} See Michael J. Cahalane, Hayley Kornachuk, & Erica A. Dumore, Stuck in the Middle: The Case for a National Innocent Seller Defense to Protect Retailers and Distributors, 68 FED. LAW. 14, 15 (2021) (“Approximately 28 states have adopted some version of an innocent seller statute that offers various levels of protection for retailers [in product liability cases].”).

\textsuperscript{47} See infra at Part III.

\textsuperscript{48} See supra note 8.

\textsuperscript{49} See OWEN, supra note 28, at 329 (“Surely the dominant concern was the idea of holding manufacturers responsible for harm that was not their fault. . . .”).
\end{footnotesize}
cited, repeated, mimicked, and expanded upon by countless courts and commentators.\textsuperscript{50}

Thus, it is fair to assert there were at least some true believers in liability without fault when the new strict product liability cause of action was being adopted. Regardless of the original intent surrounding the claim, the idea that a strict product liability claim allows for liability without fault is worth pondering, particularly when other potential benefits of the claim have been rendered obsolete. If the strict product liability claim does not now allow for recovery against a faultless defendant, it essentially replicates the results that are already available under a negligence claim and should be eliminated as a separate cause of action.

In a jurisdiction that is inclined to interpret a strict product liability claim as meaning true strict liability, this liability must be appropriately limited. Recall that even the most fervent believers in true strict product liability (liability without fault) did not want this concept being used by plaintiffs who were with fault. An analytical/doctrinal question thus arises: How to limit true strict product liability to instances in which a plaintiff is also\textsuperscript{51} without fault? In other words, how can a true strict product liability claim be limited such that recovery in Category 1P cases is allowed while recovery in Category 3P cases is denied?

\textsuperscript{50} See Joshua Halpern, Robin Hood Realism: An Economic Critique of Modern Tort Adjudication, 24 Tex. Rev. L. & Pol. 395, 406–07 (2020) ("His concurrence has since been celebrated as among the doctrine’s most canonical, clear, and persuasive justifications." (internal quotes omitted)); Ryan Martins, Shannon Price, & John Fabian Witt, Contract’s Revenge: The Waiver Society and the Death of Tort, 41 Cardozo L. Rev. 1265, 1277 (2020) ("Two years later, the American Law Institute’s Second Restatement of Torts embraced the Traynor theory of no-fault liability.").

\textsuperscript{51} As described above, if the defendant has fault, then liability is available under a negligence cause of action. The strict product liability claim is thus only useful if it permits recovery against a defendant who is without fault (or allows a type/amount of recovery in a Category 2 or 4 case that is not available under a negligence claim).
Recall the factorial design table introduced in Part II of this Article:

**FIGURE 4**

<table>
<thead>
<tr>
<th>Defendant Without Fault</th>
<th>Defendant With Fault</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td>Products Cases</td>
</tr>
<tr>
<td>3</td>
<td>4</td>
</tr>
</tbody>
</table>

If the goal is to make sure that a plaintiff cannot recover in a Category 3P case, the doctrine/rule used to achieve this result must also be evaluated in terms of how the doctrine/rule affects the disposition of other cases, particularly Category 1 cases (in which neither the plaintiff and the defendant are with fault) and Category 4 cases (in which both the plaintiff and the defendant are with fault).52 Whatever the rule/doctrine that results in no recovery in a Category 3P case must also produce palatable results in Category 1 and Category 4 cases.

**B. Contributory Negligence**

The seemingly straightforward “fix” to preventing plaintiffs in Category 3P cases from recovering is to permit the defendant to raise the victim-fault defense. At the time that courts started adopting the strict product liability cause of action, most states had the contributory negligence version of the victim-fault defense.53 Under contributory

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52. Category 2 cases—where the plaintiff is without fault and the defendant has fault—are the strongest case for liability, so any doctrine/rule that prevents recovery in this type of case is presumably a non-starter.

negligence, plaintiffs are completely barred from recovery if their fault caused their own foreseeable injuries.54

Allowing a defendant sued in strict product liability to raise the contributory negligence defense thus seems like a straightforward route by which to preclude plaintiffs with fault from recovering on the strict product liability cause of action against defendants without fault. Recovery in Category 3P cases is completely precluded by the contributory negligence defense. Mission accomplished.

However, although contributory negligence seems like a simple solution towards preventing plaintiffs with fault from recovering in a strict liability cause of action against a defendant without fault, many jurisdictions have not permitted defendants sued in strict product liability to assert contributory negligence.55 Indeed, the official position of the Second Restatement was to deny the contributory negligence defense to a defendant sued in strict product liability (with some qualifications and complications discussed below).56 Thus, although allowing a defendant the defense of contributory negligence effectively precludes recovery for a plaintiff with fault against a defendant without fault, many courts (and the Second Restatement) have denied this defense to defendants sued in strict product liability. Why wouldn’t courts use this simple tool to achieve the desired result of precluding recovery in Category 3P cases?

Although contributory negligence seems like a simple solution towards preventing recovery in a Category 3P case, allowing a defendant sued in strict product liability to raise the contributory negligence defense raises some very complex doctrinal issues. Allowing contributory negligence as a defense to strict product liability claims prevents recovery for a plaintiff with fault against a defendant without fault, but it also has ramifications for the ability of a plaintiff with fault to recover against a defendant with fault. In other words, allowing the defense of contributory negligence in a strict product liability claim has consequences not just for Category 3P cases but also for Category 4P cases.

54. See Jeffrey Abramson, Second-Order Diversity Revisited, 55 WM. & MARY L. REV. 739, 749 n.33 (2014) (stating that contributory negligence was a complete bar to a plaintiff’s recovery).

55. Precluding contributory negligence as a defense to a strict product liability claim was often rationalized by reasoning that fault was not part of the strict product liability claim and thus was irrelevant as a defense. See, e.g., JOHN L. DIAMOND, LAWRENCE C. LEVINE, & M. STUART MADDEN, UNDERSTANDING TORTS 296 (3d ed. 2007) (“Thus, the thinking continues, where negligence is not a requisite of plaintiff’s proof, contributory negligence should not be a categorical defense.”).

To appreciate this point, it is first necessary to consider the effect of contributory negligence outside the product liability subset. Outside the product liability subset (that is, the plaintiff’s injury does not arise from a product sold by a seller/distributor), the negligence cause of action will usually be the only tort claim available to a plaintiff.\(^\text{57}\) (Notice, however, that the converse of this is not necessarily true: There is nothing within the product liability subset that precludes a plaintiff from relying upon the negligence cause of action. Outside of the product liability subset, however, the strict product liability cause of action will not be available to the plaintiff.) During the period in which courts were being asked to determine whether contributory negligence was a defense to the new strict product liability claim, the question as to whether contributory negligence was a defense to a negligence claim was firmly resolved: a defendant sued in negligence could assert contributory negligence as a defense and, if it was established, the plaintiff was completely barred from recovery.\(^\text{58}\)

This result—contributory negligence barring a plaintiff with fault outside the product liability subset—is depicted below, with red shade indicating that no recovery is permitted.

\begin{figure}
\centering
\includegraphics[width=\textwidth]{figure5.png}
\caption{Figure 5}
\end{figure}

\end{document}
Although contributory negligence was firmly entrenched as a defense to a negligence cause of action, courts were not necessarily enamored with the result that barred a plaintiff with fault from recovering against a defendant also at fault (a Category 4 case). In many instances, this result seemed harsh. Thus, courts started chipping away at this doctrine, creating rules that sometimes prevented defendants from asserting the contributory negligence defense. These rules were often called “ameliorative doctrines” in the sense that they softened the harshness of the contributory negligence defense by sometimes preventing defendants from asserting it. But, of course, these ameliorative doctrines were only valuable to plaintiffs suing defendants with fault; a plaintiff suing a faultless defendant for negligence could not establish the prima facia breach element and thus could not recover, regardless of whether an ameliorative doctrine to the contributory negligence defense was available. Thus, ameliorative doctrines affected the results in Category 4 cases but not in Category 3 cases.

The ameliorative doctrine’s effect in negligence cases brought outside of the product liability subcategory is depicted below, with green shade representing the recovery permitted by the ameliorative doctrines to contributory negligence.

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59. See G. Edward White, The Emergence and Doctrinal Development of Tort Law, 1870-1930, 11 U. St. Thomas L.J. 463, 493 (2014) (stating that American courts saddled with the existing contributory negligence defense often did not agree with the policy supporting the rule, often trying to “ameliorate the harsh policy consequences...of contributory negligence.”).


Earlier, we observed that the case for recovery in tort in Category 1 (neither party is at fault) and Category 4 cases (both parties are at fault) is the most contentious. In a Category 2 case (defendant at fault, plaintiff not at fault), the argument in favor of recovery is very strong. In a Category 3 case (defendant not at fault, the plaintiff with fault), the argument in favor of recovery is very weak. But Category 1 and 4 cases are closer calls.

Under contributory negligence, the plaintiff is completely barred from recovery in a Category 4 case brought outside the product liability subcategory. In general, the ameliorative doctrines were an attempt by courts to reach a compromise in Category 4 cases: Some plaintiffs would be allowed a full recovery while others would be completely denied from recovery. This compromise—some Category 4 plaintiffs can recover, other cannot—arose as a byproduct of the binary character of the contributory negligence defense. Usually, such compromises involve instances in which each party gets roughly half of what they want. This sort of compromise could not be available under contributory negligence (it would be, later, under the modern comparative negligence defense). due to the all-or-nothing characteristic of contributory negligence. So courts resolving Category 4 cases outside the product liability subset

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62. Cf. Gideon Parchomovsky, Peter Siegelman, & Steve Thel, Of Equal Wrongs and Half Rights, 82 N.Y.U. L. Rev. 738, 740 (2007) ("The scarcity of compromise remedies is puzzling. As we demonstrate in this Article, a split-the-difference remedy can effect a more efficient and more just result in many classes of property, contracts, and torts disputes, and its use should be extended.").
reached the only sort of compromise that was possible under contributory negligence: Some plaintiffs could recover, while others could not.\textsuperscript{63}

But then the new strict product liability cause of action entered the scene, and courts were presented with an opportunity to adjust the compromise that then existed for Category 4 cases. If contributory negligence was \textit{not} available as a defense to strict product liability claims, then the existing Category 4 compromise could be adjusted in favor of allowing \textit{more} plaintiffs to recover; a plaintiff with fault could recover against a defendant with fault if the injury resulted from the sale of a product. In this sense, the new strict product liability cause of action—if it was immune to the contributory negligence defense—was functionally equivalent to a new ameliorative doctrine that could soften the harshness of the contributory negligence defense in Category 4 cases.

Thus, there were good reasons why courts might not want to allow the defense of contributory negligence in a strict product liability claim.\textsuperscript{64} If courts denied the defense, more plaintiffs with fault would be allowed to recover against defendants with fault (Category 4 cases). That is, the compromise that existed in Category 4 cases could be adjusted in favor of more recovery.


This result is depicted below:

**Figure 7**

Disallowing contributory negligence as a defense thus produces a result in Category 4 cases that courts might find desirable. If plaintiffs with fault are allowed to recover (on a strict product liability claim) in product liability disputes against defendants with fault, then the previously existing compromise about recovery in Category 4 cases adjusts in favor of allowing more plaintiffs to recover.

Notice, however, the flip side to disallowing contributory negligence as a defense to a strict product liability claim. If defendants are not allowed to assert contributory negligence as a defense to a strict product liability claim, then plaintiffs will be able to recover in 3P cases against defendants without fault. Unlike applying the ameliorative doctrines to contributory negligence in negligence suits, which only apply when a defendant is with fault (a plaintiff cannot win a negligence suit in Category 3 because the plaintiff cannot establish fault), disallowing the contributory negligence defense in product liability claims enables plaintiffs in Category 3P cases to recover.

Thus, the question as to whether contributory negligence is a defense to a strict product liability claim might be viewed as a mixed bag—if contributory negligence is not a defense to a strict product liability claim, this produces a result that courts might find desirable (allowing recovery in Category 4P cases and thus adjusting the balance as to when recovery is allowed in Category 4 cases). But it also produces a result that most courts would find undesirable (allowing a plaintiff with fault to recover against a defendant without fault—a Category 3P
case). On the other hand, if contributory negligence is a defense to a strict product liability cause of action, there is (again) a result that courts might find desirable and undesirable. The desirable result of disallowing recovery in a 3P case is achieved. But contributory negligence also precludes recovery in a 4P case, meaning that plaintiffs with fault are prevented from recovering against a defendant with fault. This result is depicted below:

**Figure 8**

Thus, in conclusion, although the defense of contributory negligence precludes recovery in a Category 3P case, this result comes with baggage (no recovery in a Category 4P case). For this reason, many courts elected not to permit contributory negligence as a defense. These courts, in rejecting the contributory negligence defense, concluded that allowing recovery in both a Category 3P case and Category 4P case was better than preventing recovery in both Category 3P and Category 4P cases.

Notice that a “yes” or “no” answer to the question of whether contributory negligence is a defense to strict product liability claims results in uniformity across Category 3P and Category 4P cases. If it is a defense, a plaintiff cannot recover in either a Category 3P case or a

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Category 4P case. If it is not a defense, a plaintiff can recover in both Category 3P and Category 4P cases. But some courts (and the Second Restatement\textsuperscript{66}) resisted giving a flat “yes” or “no” to whether contributory negligence was a defense to a strict product liability cause of action.\textsuperscript{67} Instead, some courts answered with a “sometimes yes” and “sometimes no.”

The Second Restatement contained just such a compromise. Under the Second Restatement, the fault of a plaintiff in “fail[ing] to discover the defect in the product, or to guard against the possibility of its existence” was not a defense to a strict product liability claim.\textsuperscript{68} On the other hand, the fault of a plaintiff in “voluntarily and unreasonably proceeding to encounter a known danger” was a complete defense to a strict product liability cause of action (sometimes under the label of “assumption of the risk”).\textsuperscript{69} Many states adhered to this scheme.\textsuperscript{70} Many included “misuse of the product” as a type of plaintiff fault that would preclude the plaintiff from recovering.\textsuperscript{71} Other states worked out other versions of a “sometimes” response to whether contributory negligence was a defense to a strict product liability claim.\textsuperscript{72}

The “sometimes” response to whether contributory negligence was a defense to a strict product liability cause of action is depicted below in Figure 9:

\textsuperscript{66}. See \textsc{Restatement (Second) of Torts § 402A cmt. n (Am. L. Inst. 1965)}; see also \textsc{J. Denny Shupe & Todd R. Steggerda, Toward a More Uniform and "Reasonable" Approach to Products Liability Litigation: Current Trends in the Adoption of the Restatement (Third) and Its potential Impact on Aviation Litigation, 66 J. Air L. & Com. 129, 143 (2000) (describing the Restatement position as a compromise position).  

\textsuperscript{67}. See \textsc{Mark D. Oshinskie, Tanks for Nothing: Oil Company Liability for Discharges of Gasoline From Underground Storage Tanks Divested to Station Owners, 18 Va. Env. L.J. 1, 35, 36 (1999) (explaining that contributory negligence is only sometimes available as a defense in a strict products liability case).  

\textsuperscript{68}. \textsc{Restatement (Second) of Torts § 402A cmt. n (Am. L. Inst. 1965)}.  

\textsuperscript{69}. Id.  

\textsuperscript{70}. See Owen, supra note 28, at 808, 809 (stating that the Restatement approach was “widely adopted” by courts).  

\textsuperscript{71}. See \textsc{Marshall S. Shapo, Responsibility for Injuries: Some Sketches, 100 Nw. U. L. Rev. 481, 495 (2006) ("[A] defense mostly peculiar to products liability is the defense of misuse.")}.  

\textsuperscript{72}. See, e.g., \textsc{Robert C. Lukes, The Defense of Assumption of Risk Under Montana’s Product Liability Law, 58 Mont. L. Rev. 249, 250 (1997) (describing Montana’s “solitary position among the many states” as to when contributory negligence is a defense to a strict products liability claim).
In Figure 9, the instances in which a defendant is not able to assert the contributory negligence defense are shaded green to reflect the plaintiff’s entitlement to a full recovery. The instances in which the contributory negligence defense is allowed are depicted in red, to reflect the plaintiff’s inability to recover. Many courts (and the Second Restatement) viewed this compromise as a better result than completely allowing or precluding recovery in both Category 3P and Category 4P cases.

But notice that the “sometimes” response to whether contributory negligence is a defense to a strict product liability cause of action still affects both Category 3P and Category 4P cases in a similar fashion. In this sense, then, the “problem” identified above still exists: Whatever rule exists for Category 3P also exists for Category 4P. Thus, eliminating recovery for Category 3P through the contributory negligence defense (either all the time or “sometimes”) also eliminates recovery in Category 4P. Conversely, permitting recovery in a Category 4P case by disallowing the contributory negligence defense (either all the time or “sometimes”) also results in permitting recovery in a Category 3P case.

In conclusion, the contributory negligence defense offers courts a route by which to achieve the desired result of eliminating recovery in a Category 3P case. But unless the contributory negligence defense is limited only to those defendants who are without fault, a court deciding on contributory negligence in Category 3P will produce the same result in a Category 4P case.
From an analytical perspective, there is nothing that would have prevented courts from limiting the availability of the contributory negligence defense to those defendants who were without fault. Even though a true strict product liability cause of action would not require the plaintiff to show the defendant’s fault, it would nevertheless be possible for the jury to resolve whether the defendant did have fault for purposes of determining whether the defendant is entitled to the defense of contributory negligence. If this had been done, the contributory negligence defense would have permitted courts to achieve the desired result of preventing recovery in a Category 3P cases only while allowing plaintiffs in Category 4P to recover. To my knowledge, however, no court or commentator ever advocated for this approach. Perhaps courts and commentators would have eventually reached this result, given enough time.

But time ran out. As courts were still wrestling with the question of whether contributory negligence was a defense to a strict product liability cause of action (and the complications detailed above), the contributory negligence defense was eliminated in favor of comparative negligence. And comparative negligence was a less-useful tool by which to achieve the desired objective of preventing recovery in a Category 3P case.

C. Comparative Negligence

The replacement of the contributory negligence defense by the comparative negligence defense occurred suddenly, at least judged against the usual crawl of the common law. (Some of this haste can be attributed to the fact that the switch to comparative negligence was by statute in some states). There are now only a few states that continue to adhere to the contributory negligence scheme, a testament to the fact that most states viewed comparative negligence as a clearly superior rule compared to contributory negligence.

Comparative negligence allows a different sort of compromise in a Category 4 case (both a plaintiff and defendant with fault) in which the plaintiff is asserting a negligence cause of action. Under contributory

73. See David A. Fischer, William C. Powers, Jr., Richard L. Cupp, Jr., Michael D. Green, & Joseph Sanders, Products Liability: Cases and Materials 702 (5th ed. 2014) (“With few exceptions, contributory negligence held sway until the 1970s. Then, with rather startling swiftness, a tide of judicial and legislative changes quickly altered the tort landscape [in favor of comparative negligence.”].

74. See Joseph W. Glannon, The Law of Torts: Examples and Explanations 25 (6th ed. 2020) (“In many states, however, comparative negligence has been introduced by statute.”).

75. Carey Sartain, History Uprooted: Georgia Applies Apportionment to Strict Liability Claims, 72 Mercer L. Rev. 501, 504 (2020) (“Through either judicial enactment or statute, forty-six states have now replaced contributory negligence with some version of the doctrine of comparative negligence.”).
negligence, the only sort of compromise available to courts was to turn off contributory negligence by ameliorative doctrines.\textsuperscript{76} This compromise allowed some plaintiffs full recovery while other plaintiffs were completely denied recovery. Under comparative negligence, however, a compromise is available such that a plaintiff with fault can recover some of the damages against a defendant with fault.\textsuperscript{77} The ameliorative doctrines, which had allowed some plaintiffs recovery in negligence in Category 4 cases during the contributory negligence era, were thus no longer needed under the new comparative negligence defense; most jurisdictions thus abolished the ameliorative doctrines that had existed under contributory negligence.\textsuperscript{78} The effect of the comparative negligence defense on negligence cases in Category 4 is depicted below.

\begin{figure}[h]
\centering
\begin{tikzpicture}
\draw[step=1cm, color=gray, line width=0.5pt] (0,0) grid (4,4);
\draw[thick, color=black] (0,0) -- (1,0) -- (1,1) -- (0,1) -- cycle;
\draw[thick, color=black] (1,0) -- (1,1) -- (2,1) -- (2,0) -- cycle;
\draw[thick, color=black] (0,1) -- (1,1) -- (1,2) -- (0,2) -- cycle;
\draw[thick, color=black] (1,1) -- (1,2) -- (2,2) -- (2,1) -- cycle;
\draw[thick, color=black] (2,0) -- (2,1) -- (3,1) -- (3,0) -- cycle;
\draw[thick, color=black] (2,1) -- (2,2) -- (3,2) -- (3,1) -- cycle;
\draw[thick, color=black] (3,0) -- (3,1) -- (3,2) -- (3,3) -- (3,2) -- cycle;
\draw[thick, color=black] (3,1) -- (3,2) -- (4,2) -- (4,1) -- cycle;
\draw[thick, color=black] (3,2) -- (3,3) -- (4,3) -- (4,2) -- cycle;
\draw[thick, color=black] (4,0) -- (4,1) -- (4,2) -- (4,3) -- (4,2) -- cycle;
\draw[thick, color=black] (4,1) -- (4,2) -- (4,3) -- (4,4) -- (4,3) -- cycle;
\draw[thick, color=black] (1,0) -- (1,1) -- (2,1) -- (2,0) -- cycle;
\draw[thick, color=black] (1,1) -- (1,2) -- (2,2) -- (2,1) -- cycle;
\draw[thick, color=black] (1,2) -- (1,3) -- (2,3) -- (2,2) -- cycle;
\draw[thick, color=black] (1,3) -- (1,4) -- (2,4) -- (2,3) -- cycle;
\node at (0.5,0.5) {1};
\node at (1.5,0.5) {2};
\node at (0.5,1.5) {3};
\node at (1.5,1.5) {4};
\node at (0.5,2.5) {1P};
\node at (1.5,2.5) {2P};
\node at (0.5,3.5) {3P};
\node at (1.5,3.5) {4P};
\node at (0.5,3.5) {Products Cases};
\end{tikzpicture}
\caption{Defendant Without Fault \hspace{1cm} Defendant With Fault}
\end{figure}

\begin{itemize}
\item \textsuperscript{76} See Adam J. Kolber, \textit{Smooth and Bumpy Laws}, 102 CALIF. L. REV. 655, 667 (2014) ("Contributory negligence is bumpy because if a plaintiff’s negligence contributes to his injury, he cannot recover from the defendant at all. Though a plaintiff’s negligence is a matter of degree, it gets converted to a binary output: the plaintiff was either contributorily negligent or not.").
\item \textsuperscript{77} See Saul Levmore, \textit{Public Choice and Law’s Either/Or Inclination}, 79 U. CHI. L. REV. 1663, 1671 (2012) ("Contributory negligence is either/or in exactly the way Katz means. Where that doctrine governs, a plaintiff found contributory negligent has her recovery from a negligent defendant, or a manufacturer of a defective product, reduced to zero. But law has moved rather dramatically from contributory negligence to comparative negligence, introducing a continuum where there had been either/or categorization."); William E. Westerbeke, \textit{In Praise of Arbitrariness: The Proposed 83.7% Rule of Modified Comparative Fault}, 59 U. KAN. L. REV. 991, 994 (2011) ("Dean William Prosser viewed modified comparative fault as merely the result of political compromise.").
\item \textsuperscript{78} See David W. Robertson, William Powers, Jr., David A. Anderson, & Olin Guy Wellborn III, \textit{Cases and Materials on Torts} 376 n. 1 (5th ed. 2017) (discussing the abolition of ameliorative doctrines after the shift from contributory to comparative negligence).
\end{itemize}
The orange shade in Figure 10 represents the plaintiff's ability to recover some—but not all—of the damages based on how much fault was assigned by the jury to the plaintiff and the defendant.

When jurisdictions were shifting from contributory negligence to comparative negligence, they were mostly concerned with the result in Category 4 cases outside the product liability subset. In other words, the shift from contributory to comparative negligence was made without regard to product liability cases. But courts were eventually forced to resolve whether the new comparative negligence defense would be available to defendants sued on a strict product liability cause of action, much like they had previously been with the contributory negligence defense. And, much like the decision with regard to contributory negligence affected both Category 3P and Category 4P cases, the decision with regard to comparative negligence would also affect both Category 3P and Category 4P cases.

In the depiction above, Category 4P has been shaded orange. After the switch to comparative negligence, the plaintiff in a Category 4P case will—at the very least—be able to recover a partial amount. After all, a plaintiff in a Category 4P case can pursue a claim through a negligence cause of action, which means that the plaintiff will be able to recover at least a partial amount in a 4P case.

But a plaintiff in a Category 4P case can get a full recovery if comparative negligence is not a defense to a strict product liability cause of action. If comparative negligence is not a defense to a strict product liability claim, a plaintiff in a Category 4P case can simply pursue a claim in strict product liability rather than negligence and thus avoid the recovery-reducing effects of comparative negligence.

If comparative negligence is not a defense to a strict product liability claim, this also means that the plaintiff in a Category 3P will be allowed a full recovery. This result is depicted below in Figure 11.

79. See Mark E. Roszkowski & Robert A. Prentice, Reconciling Comparative Negligence and Strict Liability: A Public Policy Analysis, 33 ST. LOUIS U. L.J. 19, 20–21 (1988) (calling strict product liability and comparative negligence “two doctrines that have most changed American tort litigation” in the 1970s and 1980s but noting that “neither was developed with the other in mind.”). 80. See Ottley et al., supra note 7, at 261 (“The adoption of comparative negligence forced states to consider whether [it would be a defense to a strict product liability claim].”); Daly v. Gen. Motors Corp., 20 Cal. 3d 730, 734 (Cal. 1978) (“We stand now at the point of confluence of these two conceptual streams . . . .”).
Notice that disallowing the defense of comparative negligence to a strict product liability claim means that a full recovery will be available for Category 3P cases. Thus, plaintiffs with fault will be allowed to recover (in full) against defendants without fault. But this is the result that all courts and commentators seemed to assume would not be available under the new strict product liability cause of action. No one anticipated that Patty could recover against the knife manufacturer when she severed her finger while chopping vegetables and watching *Jeopardy!*, and nobody has seriously argued for this result.

What happens if comparative negligence is a defense to a product liability claim? For Category 4P cases, this means that plaintiffs asserting a strict product liability claim will get the same result as they would asserting a negligence claim (and the same result that plaintiffs in non-product Category 4 cases get)—recovery is allowed, but only in a partial amount (based on the jury’s apportionment of fault). This is certainly a sensible result in the sense that all Category 4 cases would be treated the same, both within and outside the product liability subset. Recovery is allowed, but in a reduced amount—regardless of whether the case involves a product or not and regardless of the cause of action asserted by the plaintiff. This result is depicted below in Figure 12.

Allowing comparative negligence as a defense to contributory negligence raises some interesting questions in Category 3P cases, however. The end result is certainly defensible; a plaintiff is allowed to recover (based on true strict liability principles), but the recovery is reduced because of the plaintiff's fault. (This result is depicted above with orange shading in Category 3P). But the comparative negligence scheme is based on the idea of comparing a defendant's fault to a plaintiff's fault. How is that supposed to work when the defendant does not have any fault?

Many courts and commentators have noted this analytical peculiarity, and some have even used it as a basis for denying the comparative negligence defense to a strict product liability claim. Other courts, however, have ignored the issue or presumed that juries could figure out how to compare apples to oranges. Most courts eventually reached the

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82. See Donald G. Gifford & Christopher J. Robinette, Apportioning Liability in Maryland Tort Cases: Time to End Contributory Negligence and Joint and Several Liability, 73 Md. L. Rev. 701, 709 (2014) (“Many statutes and some judicial opinions suggest that the jury should consider only the plaintiff’s and defendants’ respective degrees of fault.”).

83. See, e.g., Mark A. Geistfeld, Principles of Products Liability 326 (3rd ed. 2020) (“Fault cannot be compared with strict liability.”).


conclusion that comparative negligence is a defense to a strict product liability claim.\textsuperscript{86} For these courts, allowing plaintiffs in Category 3P and Category 4P cases a partial recovery was a better result than allowing plaintiffs in Category 3P and Category 4P cases a full recovery.

As with the discussion of contributory negligence, the adoption of comparative fault as a defense to a strict product liability claim is somewhat complicated by the possibility that courts could take a “sometimes” approach. And many courts have taken this approach. Some of these complications have worked to the benefit of plaintiffs while others have worked to the benefit of defendants. For instance, some jurisdictions hold that a defendant cannot assert comparative negligence if the plaintiff’s only fault is in failing to discover a problem with a product.\textsuperscript{87} These plaintiffs are thus allowed a full recovery. Conversely, some jurisdictions hold that assumption of the risk (or product misuse) is a complete defense to a strict product liability claim.\textsuperscript{88} Defendants in these jurisdictions are thus completely insulated from liability in these instances, benefiting from what is effectively a remaining pocket of contributory negligence in a comparative negative world. The clear trend, however, is for these nuances to be pushed aside in favor of an approach that treats all plaintiff fault the same.\textsuperscript{89}

\textsuperscript{86} See Aaron D. Twerski, An Essay on the Quieting of Products Liability Law, 105 CORNELL L. REV. 1211, 1212 (2020) (suggesting that the application of comparative fault in strict product liability cases is “settled”); RESTATEMENT (THIRD) OF TORTS § 17 Reporter’s Note cmt. a. (AM. L. INST. 1998) (“A minority of courts...refuse to recognize the doctrine of comparative fault as a defense to strict products liability.”).

\textsuperscript{87} See RESTATEMENT (THIRD) OF TORTS (PRODUCTS LIABILITY) § 17 cmt. d (AM. L. INST. 1998). Under the Second Restatement, this type of fault could not be the basis of a contributory negligence defense. Some courts have simply extended this principle to the comparative negligence era. In these jurisdictions, this rule effectively operates as a sort of ameliorative doctrine that “turns off” the comparative negligence defense. See RESTATEMENT (SECOND) OF TORTS § 402A cmt. n (AM. L. INST. 1998).

\textsuperscript{88} See Kenneth S. Abraham, The Forms and Functions of Tort Law 235 (6th ed. 2022) (“[M]issue itself can also be a defense.”); RESTATEMENT (THIRD) OF TORTS § 17 cmt. d (AM. L. INST. 1998) (listing Colorado, Connecticut, Indiana, Ohio, and Rhode Island as states in which assumption of the risk still constitutes a complete bar to recovery). These same questions arise outside of the strict product liability cause of action. See Alexander B. Lemann, Assumption of Flood Risk, 51 ARIZ. ST. L.J. 163, 194 (2019) (“Some courts considering the move from contributory to comparative negligence on assumption of risk have thus concluded that assumption of risk should continue to operate as a complete bar to a plaintiff’s recovery.”).

\textsuperscript{89} See Victor E. Schwartz & Cary Silverman, The Case in Favor of Civil Justice Reform, 65 EMORY L. J. ONLINE 2065, 2070 (2016) (“After adopting comparative fault, some courts eliminated long-recognized affirmative defenses such as assumption of risk . . . and product misuse.”); see also Robert L. Rabin, Stephen Sugarman and the World of Responsibility for Injurious Conduct, 109 CAL. L. REV. 369, 376 (2021) (“Assumed risk as a categorial defense adds nothing conceptually because it is redundant of the [standard victim fault defense].”). The nuances discussed in the textual paragraph
Notice, though, that regardless of what a jurisdiction decides regarding comparative negligence being a defense to a strict product liability claim, the comparative negligence defense is not a tool by which recovery is completely denied in a Category 3P case. And recall the unanimous opinion that the strict product liability claim would not be used as a vehicle by which a plaintiff with fault could recover against a defendant without fault.90 This result was possible under the old contributory negligence defense (if a court decided that contributory negligence was a defense to a strict product liability claim). But once jurisdictions moved to comparative negligence, courts would need to rely on other doctrines to achieve the desired result of completely precluding a plaintiff with fault from recovering against a defendant without fault. One way to achieve this result, of course, is to require that a plaintiff prove a defendant’s fault before recovering in a product liability claim. And this was the direction that tort law drifted.

IV. ELIMINATING RECOVERY IN CATEGORY 3P CASES BY REQUIRING THE PLAINTIFF TO PROVE DEFENDANT’S FAULT

When the strict product liability cause of action was introduced and adopted, it was understood as an attractive new legal weapon for plaintiffs injured by products.91 Plaintiffs injured by products would no longer have to rely only on a negligence cause of action (or the other assorted contractual and tort-based claims that plaintiffs had used in product litigation). The new strict product liability claim took all the “best” bits of each of these existing causes of action, while eliminating the “baggage” associated with each cause of action.92

create little pockets of full recovery and no recovery in Category 3P and Category 4P cases. Thus, a completely accurate depiction of comparative negligence for Category 3P and Category 4P cases would require mostly orange (comparative negligence) with some pockets of red (no recovery under the surviving pockets of contributory negligence) and some pockets of green (full recovery under the ameliorative doctrines that turn off comparative negligence). I have neglected to include this depiction, mostly because of the clear trend noted in the last sentence of the textual paragraph. Because most jurisdictions are moving towards an across-the-board comparative negligence defense, a solid orange across Category 3P and Category 4P (as depicted in Figure 12 is probably a more accurate portrayal of the modern comparative negligence defense).

90. See supra text accompanying notes 18–23.
92. See Dominick Vetri, Order Out of Chaos: Products Liability Design-Defect Law, 43 U. RICH. L. REV. 1373, 1374–75 (2009) (discussing the desire of courts to create a new cause of action that was more useful to plaintiffs than a negligence claim).
As time went on, however, the strict product liability cause of action started to look more and more like a negligence cause of action. Some of this was attributable to changes in the negligence cause of action. For instance, negligence lost its privity requirement.93 This change was viewed as a major attribute of the new strict product liability cause of action.94 The strict product liability cause of action also changed, however. Originally, the strict product liability cause of action did not involve a foreseeability analysis;95 most jurisdictions, however, now use a foreseeability standard for strict product liability claims.96 Thus, the convergence of these two claims is an instance where both claims are moving towards the other.

But the biggest change has been the injection of a fault requirement into the strict product liability cause of action. This development did not occur overnight or by dramatic gesture.97 Rather, the law has crept in this direction in fits and starts. Under the present law of most jurisdictions, however, it is mostly accurate to say that a plaintiff cannot recover in a strict product liability claim without showing the defendant’s fault.

This development—which occurred roughly during the time in which jurisdictions were also shifting from contributory negligence to comparative negligence98—is at least partly attributable to the desire of

93. See J. Stanley McQuade & Olivia L. Weeks, Restructure and Reform: Products-Liability Law in North Carolina, 37 CAMPBELL L. REV. 475, 476 (2015) (“[T]he tort of negligence was first modified by eliminating the privity requirement.”).


96. See David G. Owen & Mary J. Davis, Products Liability and Safety: Cases and Materials 449 n.5 (8th ed. 2020) (describing the decline of a hindsight standard in favor of a foreseeability standard); Gregory C. Keating, Is Cost-Benefit Analysis The Only Game in Town?, 91 S. CAL. L. REV. 195, 210 n.43 (2018) (“The outcome under the risk-utility test depends greatly on whether that test is applied with foresight or hindsight. The trend is to apply the test with foresight.”); Steven A. Schwartz, “A Distinction Without a Difference”: Bartlett Going Forward, 84 FORD. L. REV. 325, 339 (2015) (“Some jurisdictions continue to adhere to the hindsight test.”).

97. See Owen, supra note 13, at 180 (“Slowly, almost imperceptibly, courts and state legislatures in the late 1970s and 1980s began to move the basis of a seller’s liability for harm from defective products in most cases away from truly ‘strict’ liability back towards principles of fault.”).

courts to prevent recovery in a Category 3P case. As explained earlier in this Article, nobody anticipated that the new strict product liability cause of action would permit recovery by a plaintiff with fault against a faultless defendant. (Recall the Category 3P prototype case, where Patty cuts finger with a regular kitchen knife while chopping vegetables and then brings suit against the knife manufacturer.) After jurisdictions moved to comparative fault, it was no longer possible to achieve the result of completely eliminating recovery in a Category 3P case based on a victim fault defense. Requiring a plaintiff to prove the fault of a defendant, however, *does* completely eliminate recovery in a Category 3P case. This result is depicted below in Figure 13.

![Figure 13](image)

In Figure 13, recovery in Category 1 and Category 3 is precluded because the plaintiff must show fault in either a negligence claim or a strict product liability claim, and the defendant in these Categories is without fault. In Category 2 cases, full recovery occurs because the defendant is with fault and the plaintiff is faultless. And a partial recovery occurs in a Category 4 case, because the plaintiff can show the defendant’s fault but the plaintiff also has fault and thus has a diminished recovery under comparative fault.

Figure 13 mostly represents the current law of most jurisdictions, with one complication that needs to be mentioned.

Modern products liability law only allows a plaintiff to recover for products that are defective. 99 Courts distinguish between three different

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types of defects: design, warning, and manufacturing.\textsuperscript{100} For design and warning cases, the plaintiff must demonstrate the manufacturer’s fault to prove that the product is defective.\textsuperscript{101} But this fault showing is not necessary in a manufacturing defect case.\textsuperscript{102}

A manufacturing defect occurs when a product is manufactured such that it is not consistent with the manufacturer’s internal prototype for the product.\textsuperscript{103} Thus, if a product is supposed to have no cracks in the plastic but the product that injured the plaintiff did have a crack, a manufacturing defect exists. In manufacturing defect cases, it is not necessary to inquire as to how the defect occurred.\textsuperscript{104} Thus, the plaintiff need not show who was at fault for the resulting crack. And the defendant is not excused from liability for demonstrating that the process for identifying or removing cracked products is not worth the costs involved.\textsuperscript{105} The fact that the product does not conform to the prototype is sufficient—this establishes a manufacturing defect.

A manufacturing defect thus operates as a tiny pocket of true strict liability within a cause of action that otherwise requires the plaintiff to demonstrate fault.\textsuperscript{106} In some sense, this remaining pocket of true strict liability is analogous to some of the compromises mentioned above regarding the contributory and comparative negligence defenses and than that the defendant’s product injured him. He also must prove that the product was defective.”).

\textsuperscript{100} See Tim Kaye, \textit{Products Liability Law} 65 (2015) (“Whatever substantive position taken by each state, they have all effectively adopted the labels introduced by the Third Restatement, which refers to manufacturing defects, ‘design defects,’ and ‘failures to warn.’” (emphasis in original)).


\textsuperscript{104} See Andrew D. Selbst, \textit{Negligence and AI’s Human Users}, 100 B.U. L. Rev. 1215, 1224 (2020) (“A manufacturing defect leads to strict liability and [design and warning cases] receive reasonableness or cost–benefit analyses.”).


\textsuperscript{106} See Rebecca Crootof, \textit{The Internet of Torts: Expanding Civil Liability Standards to Address Corporate Remote Interference}, 69 Duke L.J. 583, 623 n.211 (“Manufacturing defect cases tend to apply a strict liability standard; design- and warning-defect cases usually apply some variant of a negligence analysis.”).
Category 3 and 4 cases. This result—in which recovery for manufacturing defects is permitted even without the defendant’s fault—is depicted below in Figure 14.

**Figure 14**

<table>
<thead>
<tr>
<th>Plaintiff</th>
<th>Defendant Without Fault</th>
<th>Defendant With Fault</th>
</tr>
</thead>
<tbody>
<tr>
<td>Without Fault</td>
<td>1</td>
<td>2P</td>
</tr>
<tr>
<td>With Fault</td>
<td>3P</td>
<td>4P</td>
</tr>
</tbody>
</table>

Notice that—with the exception of manufacturing defect cases—the results of product liability cases replicate the results in non-product liability cases. In other words, the new strict product liability cause of action, under modern law, is only relevant in manufacturing defect cases. In design defect and warning cases, the results for plaintiffs asserting a strict product liability claim are the same results that occur under a negligence claim.

Perhaps this is all that was ever intended for the strict product liability cause of action. In reading early cases and commentary on the new strict product liability cause of action, it is often obvious that the speaker or writer has a manufacturing defect case in mind, even if that term had not yet been invented.107

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The current state of affairs, in which there is true strict liability only for manufacturing defect cases, is thus clearly defensible. And perhaps manufacturing defects are the only type of true strict liability that was ever intended by the early advocates of the new strict product liability claim.

That said, there clearly is a convincing policy argument in favor of true strict liability outside the manufacturing defect fact pattern. This is the cost-spreading argument that Justice Traynor made decades ago in Escola. The idea that product price must reflect all injuries resulting from a product—even when the product has been manufactured exactly how it was intended to be manufactured—is a defensible position.

Indeed, strict liability even outside the product liability subset is a defensible position. Granted, after Brown v. Kendall, American tort law has mostly been a fault-based system. Either the plaintiff needs to show that the defendant has a particular state of mind or show that the defendant acted with “fault” by breaching the duty of ordinary care. But arguments in favor of across-the-board strict liability—you cause it, you pay—are not crazy, and many commentators have concluded that across-the-board strict liability is a better system than a fault-based system, except for some of the administrative problems that accompany an across-the-board true strict liability system. Within the subset

108. See, e.g., Peter Zablotsky, Eliminating Proximate Cause as an Element of the Prima Facie Case For Strict Products Liability, 45 CATH. U. L. REV. 31, 36–37 (1995) (“This author joins a third group of commentators who believe that strict liability has always been, and continues to be, the appropriate theory of liability for all products liability causes of action.”).


113. See generally Charles O. Gregory, Trespass to Negligence to Absolute Liability, 57 VA. L. REV. 359, 359–96 (1971) (discussing the merits of a torts system in which recovery does not require the plaintiff to prove fault). Justice Traynor himself thought that strict liability for product cases was but the first step in a move towards a tort system that generally did not require the plaintiff to demonstrate fault. See Roger Traynor, The Ways and Meanings of Defective Products and Strict Liability, 32 TENN. L. REV. 363, 376 (1965) (“The cases on product liability are emerging as early chapters of a modern history on strict liability that will take long in the writing.”). Indeed, until the middle of the nineteenth century, American tort law (such as it was) was a strict liability system. See generally Donald G. Gifford, Technological Triggers to Tort Revolutions: Steam Locomotives, Autonomous Vehicles, and Accident Compensation, 11 J. TORT L. 71, 72–105 (2018).
of product cases, however, the administrative problems associated with true strict liability (you cause it, you pay) are mostly eliminated.\textsuperscript{114}

Even though across-the-board strict liability is a defensible position, that is not a result advocated for herein. True strict liability only for the subset of product liability cases would not be a total rejection of the usual fault-based approach of American tort law. Rather, it would be a compromise. Although fault would usually be required, liability without fault would be permitted only in the subset of cases in which a product sold by a seller causes injury.

The challenge—as it has always been—is preventing recovery in Category 3P cases. Even though there are persuasive arguments in favor of true strict liability, nobody seriously believes that a plaintiff with fault should be able to use true strict liability principles to recovery against a defendant

\textsuperscript{114}. A true strict liability system requires a rethinking of the cause in fact requirement. Under our current fault-based system, the cause in fact element requires the plaintiff to show that the injury was connected to the defendant’s fault. Whether this connection exists is usually measured under the but for test, which asks, “What would have happened to the plaintiff if the defendant had acted without fault instead of with fault?” Obviously, this approach is nonsensical under a true strict liability regime, which holds the defendant liable without fault. Thus, cause in fact necessarily must mean something different under a strict liability regime. Instead of asking whether the defendant’s fault was a but for cause of the plaintiff’s injury, the causation question under a true strict liability regime is simply whether the defendant (or an instrumentality of the defendant) was the force that injured the plaintiff. Thus, in a true strict product liability regime, that causation question would be whether the defendant’s product was an agent or instrument that produced the plaintiff’s physical injury. Thus, when Patty severs her thumb while chopping vegetables, the knife is an agent of the injury and thus true strict product liability (for this Category 3P case) would require the manufacturer of the knife to pay for the injury its knife caused. (Notice that but for considerations—would Patty have severed her thumb with another manufacturer’s knife?—become irrelevant under a true strict liability approach.) This true strict product liability approach—you cause it (as defined above), you pay—depends upon being able to identify a defendant as the physical source of the harm. This works fairly well in the product liability arena, as there will be a product that is the instrumentality of the defendant’s harm. (It also works well with regard to autonomous vehicles, creating the possibility of a system in which the manufacturer of an autonomous vehicles is liable for all accident injuries in which its vehicle was involved, regardless of fault.) A plethora of scholarship has advocated for this approach. See, e.g., Antonio Davola, \textit{A Model for Tort Liability in a World of Driverless Cars: Establishing a Framework for the Upcoming Technology}, 54 \textit{IDAHO L. REV.} 591, 603–04 (2018) (summarizing the arguments in favor of strict liability for autonomous vehicles).

Outside the product liability arena, however, a true strict liability approach—for all tort cases—can create analytical problems. If I am sitting on a park bench and you run in to me, there is no difficulty in stating that you (the active force) were the agent that produced my injury. But what if you and I collide while both walking on the sidewalk? If I am injured, a true strict liability approach would allow me to recover from you because you were an instrument of the collision. But our instincts revolt at that result. How can it be said that you “caused” the incident when both of us were walking on the sidewalk and trying to occupy the same space at the same time? In this type of accident, with two parties in motion, we need the fault concept to sort out liability. A true strict liability approach requires a scenario in which we can easily conclude that a defendant (or their agent) was the “cause” of the plaintiff’s injury (regardless of fault). In short, strict liability only works where there is an intuitive “do-er” and “do-ee.”
without fault. When jurisdictions started injecting a fault requirement into the strict product liability cause of action, they achieved the result of preventing recovery in a Category 3P case. In requiring the plaintiff to prove fault, however, courts also eliminated recovery for Category 1P cases. The analytical riddle is this: Assuming a jurisdiction is attracted to the idea of true strict liability in product cases (which is definitely a defensible position), how can a jurisdiction achieve the result of allowing recovery in a Category 1P case while also precluding recovery in a Category 3P case? Are the results depicted below in Figure 15 achievable?

**Figure 15**

These results are achievable. In fact, no major change to existing law is needed. Nor is a new rule or doctrine required. All that is necessary to achieve this result is a slight modification as to how the jury is instructed in applying the comparative fault defense. Properly instructed, juries can use the assignment of fault step to indicate to a trial judge whether the dispute before the court is a Category 1P, 2P, 3P, or 4P case. The trial

115. In Figure 15, recovery in Category 3P cases for manufacturing defects is eliminated. For the simple scheme I propose in Section V to work best, recovery for manufacturing defects by plaintiffs with fault must be sacrificed. The flip side of this coin, of course, is that plaintiffs without fault are now able to recover in true strict product liability in all Category 1P cases (manufacturing, design, and warning). This seems like more than a fair tradeoff for plaintiffs. In any event, eliminating recovery in Category 1P cases for manufacturing defects will avoid the result where juries are asked to compare a plaintiff’s fault against a defendant that has no fault. In this sense, then, the approach I advocate for in the next Section will make the strict product liability cause of action more compatible with comparative negligence principles, which are based on the notion of comparing relative degrees of fault. Under my scheme, a jury would not be asked to compare a plaintiff with fault to a defendant without fault.
judge can then apply that jurisdiction’s rules as to whether recovery is permitted under that Category. And those rules could allow for recovery in a Category 1P cases while precluding recovery in a Category 3P cases.

V. Achieving True Strict Product Liability in Category 1P While Preventing Recovery in Category 3P

In most jurisdictions, when a plaintiff asserts a strict product liability claim against a defendant and the defendant raises the defense of comparative negligence, the jury is instructed to compare the fault of the defendant and the plaintiff if the jury believes that (1) the plaintiff has satisfied the prima facia elements of the claim against the defendant and (2) the defendant has established a comparative negligence defense against the plaintiff. It is expected that the jury’s assignment of fault will total 100%. In some jurisdictions, the jury is led to believe that they are not free to give a party 0% fault if the claim against that party has been established.

A simple change to this approach, however, would allow jurisdictions to recognize recovery in Category 1P cases while simultaneously preventing recovery in a Category 3P case: If a jury does not believe that fault exists, it should have the option of assigning 0% fault to that party, including a defendant against whom a true strict product liability claim has been established. This simple adjustment to comparative fault would allow jurisdictions to recognize liability in Category 1P cases while simultaneously denying recovery in Category 3P cases. The jury, based on its apportionment of fault, would tell the judge which Category a case fell into. A trial judge would then apply the governing rules of that jurisdiction for each Category. Jurisdictions could then allow for recovery in a Category 1P case but not in a Category 3P case. The goal of preventing

116. See, e.g., ARKANSAS MODEL JURY INSTRUCTIONS—CIVIL, CHAPTER 21 (2021) (explaining that a comparative fault analysis is only necessary “if the occurrence was proximately caused by negligence of both plaintiff and defendant”); DAVID W. ROBERTSON, WILLIAM POWERS, JR., DAVID A. ANDERSON, & OLIN GUY WELLBORN III, CASES AND MATERIALS ON TORTS 421–22 (5th ed. 2017) (explaining that the comparative fault questions only become relevant if the plaintiff has established a prima facia case against a defendant and the defendant has successfully proven comparative negligence on the part of the plaintiff).

117. See MASSACHUSETTS JURY INSTRUCTION, NEGLIGENCE RESULTING IN PERSONAL INJURY 10 (2021) (“You express that comparison in percentages of negligence which, when added together, equal 100%.”).

118. See, e.g., MISSISSIPPI JURY INSTRUCTIONS 2512 (indicating that a 0% fault assignment is only appropriate when the defendant’s fault did not cause the plaintiff’s injury); IDAHO JURY INSTRUCTION 1.43.1 (same); cf. TEXAS PATTERN JURY INSTRUCTIONS 4.3 (stating that “percentages must be expressed in whole numbers” and leaving jury to wonder whether zero is a whole number). Most jury instructions simply do not address the issue at all.
recovery in a Category 3P case would be achieved, with no external consequences on Category 1P and 4P cases.

Here is how this simple system would work. (At the end of this Article is an Appendix containing a sample jury verdict form that would incorporate the approach described below).

In a case in which the plaintiff is asserting a true strict product liability claim against a defendant, the jury would be asked whether the elements of a strict product liability claim have been established against the defendant. (In most jurisdictions, this would require (1) a seller/distributor (2) selling/distributing (3) a product that (4) causes (5) bodily injury or property damage other than damage to the product itself).

If the jury answers “yes” to this question, it proceeds to the issue of whether the defendant has established the comparative negligence of the plaintiff. (In most jurisdictions, this would require (1) breach of the duty of ordinary care which (2) causes in fact (3) foreseeable injuries to the plaintiff). If the jury answers “yes” to this question, the instruction would then address the comparative fault issue.

The jury would be instructed that if a party does not have “fault” the jury should assign 0% fault to that party. If a party does have fault, it must be assigned a percentage of fault of at least 1%. If only one party has fault, 100% fault would be assigned to that party. If more than one party has fault, the fault would be divided amongst (compared between) the parties with fault, with the total fault equaling 100%. If no party has fault, then each party would be assigned 0% fault and the total fault will be 0%.

Fault would then be defined (this is the important step). Fault consists of either (1) breaching the duty of ordinary care (for a defendant sued in negligence or for a plaintiff against whom comparative fault has been asserted) or (2) selling a product with a design defect or (3) selling a product with a defective warning.

Under this scheme, the jury would come to different apportionments of fault for each of the four Categories of product liability cases. These results are depicted below in Figure 16:

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119 See Peter Y. Kim, Where We’re Going, We Don’t Need Drivers: Autonomous Vehicles and Al-Chaperone Liability, 69 CATH. U. L. REV. 341, 351 (2020) (“A cause of action for [strict] products liability arises when one engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect.” (internal quotations omitted)). Because this Article considers a true strict product liability claim, the “defective” element would be eliminated from the list of elements that need by proven.
Under this scheme, the jury (through its assignment of fault) informs the judge as to what type of case exists. Once the jury does this work for the trial court judge, the judge could implement a set of rules that allow for full recovery in a Category 1P case while also preventing recovery in a Category 3P case (assuming that a jurisdiction wants to reach this result).

The advantage of this approach is that it achieves the objective of precluding recovery in a Category 3P case without using an overbroad rule that affects recovery in either Category 1P or Category 4P cases. Previously, courts have attempted to achieve the result of preventing recovery in Category 3P cases with rules that were based on either the plaintiff’s fault or the absence of the defendant’s fault. These rules, however, affected the disposition of cases outside the Category 3P context. Previous efforts at precluding recovery in Category 3P cases were clumsy (or “overbroad”) in the sense that the rules used to eliminate recovery in a Category 3P case also affected recovery in Category 1P and 4P cases.

Under the scheme advanced herein, a jurisdiction could simply have a rule that recovery is not allowed in a Category 3P case. The jury—properly instructed—would then inform the judge as to what type of case existed. The judge would then apply that jurisdiction’s rules about whether recovery is allowed for that Category of case.

These rules would be pretty straightforward. Indeed, for Category 2P, 3P, and 4P cases, jurisdictions would likely have the exact same rules. If a defendant is assigned a percentage of fault, the case would either be a Category 2P case or a Category 4P case. If the plaintiff is also assigned a percentage of fault (a Category 4P case), the defendant would be liable
but for a reduced amount under comparative fault. If the plaintiff is not assigned a percentage of fault (a Category 2P case), the defendant would be liable for the full amount. If the defendant is not assigned a percentage of fault, and the plaintiff is, then it is a Category 3P case and recovery would be denied.

The only difference amongst jurisdictions would be in whether to allow recovery in a Category 1P case. For jurisdictions that do not want to allow recovery in this type of case, a jury allocation of 0% to both the plaintiff and the defendant would result in no liability. But for jurisdictions that do want liability in Category 1P cases (and, as detailed above, there are legitimate arguments for recovery in this type of case), the trial judge would enter a judgment for the plaintiff in the following scenario:

1. The jury assigns 0% fault to the plaintiff;
2. The jury assigns 0% fault to the defendant; and
3. The jury concludes that the elements of a true strict product liability claim are satisfied.

If not, the defendant would not be liable. But, if so, the defendant would be liable under a true strict liability theory.

This approach does not require the jury to answer any questions that it does not answer under current law. Trial judges would just have to know that an apportionment of 0% to both the plaintiff and the defendant results in recovery if the jury has determined that the elements of a true strict product liability claim have been established. Mistakes by trial judges could be corrected on appeal.

This scheme is also effortlessly applied to cases in which the plaintiff has sued the defendant under both negligence and product liability theories. In these cases, it would (of course) be necessary to ask the jury an additional question as to whether the plaintiff has established the elements of a prima facia negligence claim against the defendant. But the comparative fault instructions would remain the same.

A rough sample jury form demonstrating this approach is included in Appendix A.

120. In jurisdictions with modified comparative fault, a plaintiff would be barred from recovery if the plaintiff's share of fault is above that jurisdiction's threshold.
VI. Conclusion

The argument advanced by Justice Traynor in favor of true strict product liability remains as persuasive now as it was when it was first advanced. But this argument is not persuasive in cases in which the plaintiff’s fault caused the plaintiff’s injury. Thus, a true strict product liability scheme must preclude recovery in cases in which the plaintiff’s fault—and not the defendant’s fault—caused the plaintiff’s injury.

Courts have struggled to adopt rules that prevent recovery in these Category 3P cases while also achieving palatable results in Category 1P and Category 4P cases. The contributory negligence defense provided one route by which courts could preclude recovery in Category 3P cases, but this door closed when contributory negligence was replaced with comparative negligence. Gradually, states moved towards requiring fault in strict product liability cases. This change achieved the result of preventing recovery in a Category 3P case, but it also eliminated recovery for Category 1P cases.

Jurisdictions that are inclined to allow recovery in Category 1P cases can achieve this result (while also preventing recovery in Category 3P cases) by adopting the simple jury instructions proposed in this Article. Recovery would be precluded in Category 3P cases but allowed in Category 1P cases; the jury (properly instructed) would determine which Category a dispute belonged to.

Of course, some jurisdictions might not desire recovery in Category 1P cases. Those that do, however, should not have this result foreclosed because of doctrinal/analytical hurdles. By adopting the comparative negligence jury instructions contained in this Article, jurisdictions can achieve results in product liability cases based on policy preferences rather than doctrinal handcuffs.
APPENDIX

Sample Jury Verdict Form

We, the jury, answer the questions submitted by the court as follows:

Question 1: Do all the elements of a strict product liability claim exist against Defendant? Check either “yes” or “no.”
   Yes_____
   No_____

Question 2: Do all the elements of the comparative negligence defense exist against Plaintiff? Check either “yes” or “no.”
   Yes_____
   No_____

Question 3: How do you apportion fault (if any) in this case?
   Plaintiff______%
   Defendant______%

Instructions accompanying Question 3

“Fault” exists when a party (1) breaches the standard of ordinary care, (2) manufacturers a product with a design defect, or (3) manufacturers a product with a defective warning. If a party has fault, the party must be assigned at least 1% fault. If only one party has fault, that party’s assignment of fault must be 100%. If two (or more) parties have fault, the total fault assigned must equal 100%. If a party does not have fault, that party must be assigned 0% fault. If no party has fault, all parties will be assigned 0% fault and the total fault assigned will equal 0%.

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121. This sample assumes a case by a plaintiff against a manufacturer. In many states, liability against a non-manufacturing seller is prevented by statute, except in rare cases. To the extent that a case against a seller is permitted, the instruction here would need to be amended. Some of these amendments raise somewhat complex, technical points. The underlying question a jurisdiction would need to address, however, is whether a non-manufacturing seller is charged with the fault of a manufacturer in designing a product or the accompanying warnings. Presumably, if a jurisdiction desires seller liability in product liability litigation, it would charge the fault of a manufacturer to a seller in a case brought against the seller.