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## *Automobile "Crashworthiness": an Untenable Doctrine*

*Michael Hoenig\* and Stephen J. Werber\*\**

UNOBTRUSIVELY, BUT WITH INCREASING FREQUENCY, the courts are rejecting a theory of liability being vigorously advanced by some members of the plaintiffs' bar with the apparent intent of opening up a vast new source of contingent fee income. The theory, variously labelled as "crashworthiness" or the "second collision" doctrine seeks to impose common-law liability upon the automobile industry for injurious consequences of automobile collisions despite the fact that no defect or malfunction in the vehicle causes the mishap.

Advocates of the theory contend that the manufacturer, as well as other sellers in the automobile distribution network, should respond in damages to a person injured in a collision caused by his own or another's fault for such injuries as might have been avoided or mitigated by utilizing a vehicular design of different size, shape, construction or assembly.

A sizeable body of case law is now developing on the subject and much of this is in the form of unpublished or unofficially reported decisions. These determinations, considered in conjunction with published decisions on the question, should be brought to the attention of the practitioner to avoid an apparently common misconception that only a few courts have decided the issue. On the contrary, a great number of decisions have held against the imposition of such liability for very sound legal and policy reasons.

It is the purpose of this article to review this decisional law and to place it in the context of important policy considerations which justify such judicial determinations. It will be shown that the great majority of these decisions are entirely consistent with the doctrine of "strict tort liability" as enunciated in § 402A of the Restatement of Torts, Second; that the questions sought to be submitted to juries in these cases are properly the subject of highly technical and complex legislative and administrative action on both a state and federal level; and that the few decisions seemingly holding to the contrary were based upon a fallacious legal premise which, if accepted, would make the automobile industry virtual insurers.

A typical claim of this variety could assume the following facts. A snub-nosed, van type vehicle with two occupants collides with the rear end of a flatbed truck resulting in the deaths of the van's occupants. The evidence shows that the van was proceeding at about 50 miles per hour at the time of impact. The vehicle was purchased used by one of the decedents from an automobile dealer who sells both new and used vehicles. The van is in its eleventh year of use at the time of the

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accident and was used by the decedents for almost four years prior to the date of the mishap.

Suit is commenced against the driver and owner of the truck alleging that the collision was caused by the sudden action of the truck in stopping on the highway and proceeding to ascend the highway shoulder without proper signal. Suit is also filed against the seller and distributor of the van vehicle upon "strict tort liability." The complaint alleges that the vehicle was "defective" because there was no protection in front of the passenger to prevent intrusion into the compartment during the collision. It is also alleged that the occupants were not sufficiently protected in such collisions since the snub-nosed vehicle has only a thin metal separation between the passenger compartment and the truck into which the van collided.

All of the alleged "defects," without exception, relate to the van's performance upon collision or impact with another vehicle. No defect in the vehicle's performance while riding on the highway, stopping, starting or parking is alleged. No defect in its wheels, steering, brakes, lights or any other part is charged with having caused it to collide with the truck. In sum, the whole basis for the claim against the automobile defendants is the charge that the eleven year old vehicle was "unsafe" when smashed head-on into the rear of the truck.

Proponents of the so-called theory of "crashworthiness" would contend that the complaint sufficiently states a cause of action against the sellers of the vehicle and the question of the vehicle's purported "defectiveness" should be resolved by a jury.

On substantially similar facts, however, a Superior Court in the State of Washington granted summary judgment in favor of the automobile sellers.<sup>1</sup> It felt constrained to grant judgment as a matter of law for very compelling reasons. To fully appreciate the soundness of this determination one must first resort to the initial judicial articulation of the essential legal principles which justify such a disposition, including similar precedents.

The natural starting point is the leading case of *Evans v. General Motors Corp.*<sup>2</sup> There the plaintiff's decedent was killed when the station wagon he was driving was struck broadside by another vehicle. Suit was brought against the manufacturer of the station wagon on the theory that the frame of the car provided inadequate protection against impact from the side. The complaint was in three counts charging: negligence in design and testing of the station wagon, breach of implied warranties of merchantability and of fitness for the purpose for which the car was manufactured and strict liability of the manufacturer for

<sup>1</sup> Seattle-First Nat'l Bank v. Tabert, Wash. Super. Ct., Grant County, No. 19076, Aug. 21, 1970 (unpublished). The court's reasoning is discussed *infra*. At the time of publication this case was just unofficially reported in CCH PROD. LIAB. REP. ¶ 6550.

<sup>2</sup> 359 F.2d 822 (7th Cir.), *cert. denied*, 385 U.S. 836 (1966). The car model involved was a 1961 Chevrolet station wagon designed with an "x" frame. The accident occurred in 1964 so the car was presumably used for an extended period without complaint. In a separate suit filed in an Indiana state court against the driver of the other vehicle, plaintiff alleged that the other car was being driven at a speed of 70 to 75 miles per hour at the time of the accident. Defendant-Appellee's Appendix at 18.

a defective and dangerous automobile. The theory underlying the complaint in *Evans* was quite similar to the typical claim described above: that the car was defective because it was allegedly unsafe in a collision. The Seventh Circuit affirmed agreeing with the trial court that the action could not be maintained.

In order to determine whether the automobile manufacturer had in any way failed to meet its obligations to the plaintiff, the Seventh Circuit examined the nature of the manufacturer's duty to users of his product. The defendant conceded that it had a "duty to design its automobile to be reasonably fit for the purpose for which it was made, without hiding defects which would make it dangerous to persons so using it."<sup>3</sup> But it denied that this included a duty to make its automobile so that users will be protected from being injured whenever such automobile strikes or is struck by other vehicles or objects. An automobile manufacturer, the defendant contended, "is not required to design or test the design of an automobile from the standpoint of how it may be misused by a user or bludgeoned by outside forces while being used by a user."<sup>4</sup> The Seventh Circuit agreed.

A manufacturer is not under a duty to make his automobile accident-proof or fool-proof; nor must he render the vehicle "more" safe where the danger to be avoided is obvious to all.

Perhaps it would be desirable to require manufacturers to construct automobiles in which it would be safe to collide, but that would be a legislative function, not an aspect of judicial interpretation of existing law.<sup>5</sup>

Other negligence cases involving automobiles were distinguished by the *Evans* court on the ground that in all of them the facts showed that the products involved "were unfit for their intended use and in precisely that respect were the cause of accidental injuries."<sup>6</sup> *Per contra*, in the case before the court, the vehicle involved was not rendered unfit for its intended use by the fact that it could not safely be employed to collide with other vehicles.

The intended purpose of an automobile does not include its participation in collisions with other objects, *despite the manufacturer's ability to foresee the possibility that such collisions may occur*. As defendant argues, the defendant also knows that its automobiles may be driven into bodies of water, but it is not suggested that defendant has a duty to equip them with pontoons.<sup>7</sup>

<sup>3</sup> *Id.* at 824.

<sup>4</sup> Brief for Appellee at 6. The defendant manufacturer cited the following case authority for this contention: *Poore v. Edgar Bros. Co.*, 90 P.2d 808, 809-10 (Cal. 1939); *Kahn v. Chrysler Corp.*, 221 F. Supp. 677, 678-79 (S.D. Tex. 1963); *Hatch v. Ford Motor Co.*, 329 P.2d 605, 607-08 (Cal. App. 1958); and *Tamburello v. Travelers Indemnity Co.*, 206 F. Supp. 920, 922 (E.D. La. 1962).

<sup>5</sup> *Evans v. General Motors Corp.*, 359 F.2d 822, 824 (7th Cir. 1966).

<sup>6</sup> *Id.* at 825.

<sup>7</sup> *Id.* (Emphasis added.) These conclusions were just as fatal to the plaintiff's claims based on implied warranty and strict liability. It could not be implied, the court said, that defendant had warranted its automobile "to be capable of protecting a driver in broadside collisions."

The *Evans* holding is not an isolated judicial pronouncement. Many published decisions are in accord with the result reached in that case on this fundamental question of the automobile manufacturer's or seller's duty.<sup>8</sup>

Thus in *Schemel v. General Motors Corp.*,<sup>9</sup> the Seventh Circuit affirmed the dismissal of an action for personal injuries sustained by the plaintiff when a car in which he was riding was struck in the rear by an automobile being driven at a speed of approximately 115 miles per hour. The plaintiff had alleged that the manufacturer negligently designed, manufactured and sold a vehicle capable of being driven at dangerous speeds on roads not designed for such speeds, thereby exposing the public to excessive risks. The court held:

The automobile in question was not dangerous for the use for which it was manufactured by its lawful use in the manner and for the purpose for which it was supplied.<sup>10</sup>

A similar situation was presented in *Willis v. Chrysler Corp.*,<sup>11</sup> where summary judgment was granted in favor of the defendant automobile manufacturer. As a result of a high speed collision between two cars all the occupants were killed. The impact had caused the automobile manufactured by the defendant to break into two sections at a point just behind the front seats. The plaintiffs charged breach of implied warranty in that the vehicle's structural integrity was not maintained in a high speed collision. The court stated:

This court is of the opinion that the defendant had no duty to design an automobile that could withstand a high speed collision and maintain its structural integrity . . . This court agrees with the *Evans* case that, "the intended purpose of an automobile does not include its participation in collisions with other objects."<sup>12</sup>

<sup>8</sup> *E.g.*, *Schemel v. General Motors Corp.*, 384 F.2d 802 (7th Cir. 1967), *cert. denied*, 390 U.S. 945 (1968); *Walz v. Erie-Lackawanna R.R.*, CCH PROD. LIAB. REP. ¶5722 (N.D. Ind. 1967); *Shumard v. General Motors Corp.*, 270 F. Supp. 311 (S.D. Ohio 1967); *Willis v. Chrysler Corp.*, 264 F. Supp. 1010 (S.D. Tex. 1967); *Walton v. Chrysler Motor Corp.*, 229 So. 2d 568 (Miss. 1969); *Ford Motor Co. v. Simpson*, 233 So. 2d 797 (Miss. 1970); *General Motors Corp. v. Howard*, CCH PROD. LIAB. REP. ¶6498 (Miss. Sup. Ct. 1971); *Keahl v. General Motors Corp.*, CCH PROD. LIAB. REP. ¶5995, 6042 (Mich. Cir. Ct. 1968); *Snipes v. General Motors Corp.*, CCH PROD. LIAB. REP. ¶6037 (Ohio C. P. 1968); *Enders v. Volkswagenwerk A.G.*, CCH PROD. LIAB. REP. ¶5930 (Wis. Cir. Ct. 1968). A number of other published decisions involving automobile-related injuries, though perhaps in a slightly different factual setting, are nevertheless similarly compelling. See *e.g.*, *Muncy v. General Motors Corp.*, 357 S.W.2d 430 (Tex. Civ. App. 1962), followed in *General Motors Corp. v. Muncy*, 367 F.2d 493 (5th Cir. 1966); *Mondshour v. General Motors Corp.*, 298 F. Supp. 111 (D. Md. 1969); *Kahn v. Chrysler Corp.*, 221 F. Supp. 677 (S.D. Tex. 1963); *Tamburello v. Travelers Indemnity Co.*, 206 F. Supp. 920 (E.D. La. 1962); *Poore v. Edgar Bros. Co.*, 90 P.2d 868 (Cal. 1939); *Hatch v. Ford Motor Co.*, 163 Cal. App. 2d 393, 329 P.2d 605 (1958); *McNally v. Chrysler Motors Corp.*, 55 Misc. 2d 128, 284 N.Y.S.2d 761 (Sup. Ct. 1967). The cases cited herein involved only automobiles. Yet the principles applied by the courts have also been applied in non-automobile cases. See *e.g.*, *Campo v. Scofield*, 301 N.Y. 468, 95 N.E.2d 802 (1950).

<sup>9</sup> 384 F.2d 802 (7th Cir. 1967).

<sup>10</sup> *Id.* at 804-05.

<sup>11</sup> 264 F. Supp. 1010 (S.D. Tex. 1967).

<sup>12</sup> *Id.* at 1012.

On similar grounds the court in *Shumard v. General Motors Corp.*<sup>13</sup> dismissed a complaint charging an automobile manufacturer with negligence in failing to design a vehicle which was fireproof when colliding with other cars. The plaintiff's decedent had been involved in a collision with another vehicle and was killed when his automobile burst into flames. The court stated:

No duty exists to make an automobile fireproof, nor does a manufacturer have to make a product which is "accident-proof" or "foolproof."<sup>14</sup>

After reviewing the applicable authorities the court concluded:

The purpose for which a product is manufactured has reference to its normal and proper use and not to *any use*.

These cases conclusively demonstrate that an automobile is not made for the purpose of striking or being struck by other vehicles or objects and that the duty of an automobile manufacturer does not include the duty to design and construct an automobile which will insure the occupants against injury no matter how it may be misused or bludgeoned by outside forces.<sup>15</sup>

In *Walz v. Erie-Lackawanna R.R.*,<sup>16</sup> a vehicle driven by the plaintiff's decedent collided with a train. The manufacturer of the automobile was named as a co-defendant and charged with negligent design in failing to provide a vehicle which would be safe in collisions. The United States District Court dismissed the complaint and stated:

I agree with the courts that have said that if automobile manufacturers are to be required to build a product safe to collide with trains, automobiles, trees and other objects, then the requirement should be imposed by the policy making bodies, that is, the legislatures, and not by the court.<sup>17</sup>

In *Walton v. Chrysler Motor Corp.*<sup>18</sup> the Supreme Court of Mississippi was faced, as a case of first impression, with the "crashworthiness" issue. The court had only recently adopted the strict tort liability rule enunciated by the Second Restatement of Torts.<sup>19</sup> The plaintiff was injured when the automobile seat he was sitting on broke during a collision with another car which had crashed into the rear end of the plaintiff's stopped vehicle. The plaintiff contended:

that it is the duty of the manufacturer to foresee accidents, and to design its vehicles so as to reduce the possibility of injury to the users of their products . . . although the defect in the design of the

<sup>13</sup> 270 F. Supp. 311 (S.D. Ohio 1967).

<sup>14</sup> *Id.* at 312.

<sup>15</sup> *Id.* at 314.

<sup>16</sup> CCH PROD. LIAB. REP. ¶5722 (N.D. Ind. 1967).

<sup>17</sup> *Id.* at p. 7516. For other CCH-reported decisions rejecting the so-called "crashworthiness" theory, see *Snipes v. General Motors Corp.*, CCH PROD. LIAB. REP. ¶6037 (Ohio C. P. 1968) (head-on collision resulting in fatality; demurrer to complaint sustained); *Keahl v. General Motors Corp.*, CCH PROD. LIAB. REP. ¶¶5995, 6042 (Mich. Cir. Ct. 1968) (two counts of complaint struck with decision reserved on the third).

<sup>18</sup> 229 So. 2d 568 (Miss. 1969).

<sup>19</sup> *State Stove Mfg. Co. v. Hodges*, 189 So. 2d 113 (Miss. 1966).

automobile did not cause the accident, but added to the seriousness or gravity of the injury.<sup>20</sup>

After reviewing the decisional law on the subject, the *Walton* court concluded:

Our study of the authorities (cases, texts and law articles) has led us to the conclusion that the great weight of authority is against the theory presented by the appellant.<sup>21</sup>

A particularly well-reasoned decision was rendered by the Wisconsin state court in *Enders v. Volkswagenwerk A. G.*,<sup>22</sup> an action based upon an alleged failure of the design of a small Volkswagen automobile to withstand a head-on collision. In dismissing the complaint, the court took judicial notice that the Volkswagen was an inexpensive, light, compact automobile and held:

When a G.M.C. tractor and a Mack tractor in head-on collisions do not furnish enough protection to prevent deaths of the respective drivers [citation omitted], to impose the duty of preparing inexpensive cars against head-on collisions seems beyond the realm of sensible public policy. . . .

It must have been perfectly clear to the plaintiff when he bought the car here in question that if he had a head-on collision with a heavier vehicle he would probably come off second best and that it was likely that he and his passenger probably would be seriously injured. He needed no warning when he bought a Volkswagen that a head-on collision in such a small car would be very hazardous.<sup>23</sup>

The foregoing line of published judicial precedents has been joined by a rapidly growing body of unpublished or unofficially reported decisions, many of which were rendered in jurisdictions which have adopted

<sup>20</sup> *Walton v. Chrysler Corp.* 229 So. 2d 568, 572 (Miss. 1969).

<sup>21</sup> *Id.* The Mississippi Supreme Court thereafter followed the rule it had established in *Walton* in two later cases.

In *Ford Motor Co. v. Simpson*, 233 So. 2d 797 (Miss. 1970), the court held that an automobile manufacturer was not liable to an occupant of a motor vehicle involved in a head-on collision with another vehicle for injuries allegedly sustained when the plaintiff's knee came into contact with a heater knob attached to the bottom of the dashboard in the vehicle in which he was travelling. The plaintiff had asserted that the placement of the heater knob was a design defect. The court stated, as had the Seventh Circuit in *Evans and Schemel*, that the imposition of a duty on a manufacturer to make an automobile safe in a head-on collision is a legislative rather than a judicial function.

In *General Motors Corp. v. Howard*, CCH PROD. LIAB. REP. ¶6498 (Miss. 1971), the case arose from a collision between a pickup truck and a tractor-trailer. The driver of the truck claimed that the manufacturer was under a duty to equip its vehicles so as to minimize injuries resulting from such collisions. The court reversed a plaintiff's verdict and entered judgment for the manufacturer.

<sup>22</sup> CCH PROD. LIAB. REP. ¶ 5930 (Wis. Cir. Ct. 1968).

<sup>23</sup> *Id.* at p. 8311. The court's opinion is a model of persuasive judicial reasoning. The court recognized the nature and characteristics of the Volkswagen as a car of light construction and miniature size. *Id.* at pp. 8310-11. It further recognized the speculative nature of the plaintiff's claim and the difficulty of enunciating how far a vehicle must be protected against collisions, noting that even huge vehicles in collisions yield injuries and fatalities. *Id.* at p. 8311. The court noted moreover that the danger of a collision in the vehicle was open, apparent and obvious. *Id.* The court further observed that state public policy, as reflected in statutory enactments on required safety equipment and the manner of operation of vehicles, did not include the alleged duty contended. *Id.* It additionally found that the same result should obtain under the strict tort liability rule. *Id.* at pp. 8311-12. Finally, the court refused to "legislate" in order to impose a duty heretofore non-existent. *Id.* at p. 8311.

the doctrine of strict tort liability. These unreported cases have likewise held that the manufacturer or seller is not liable as a matter of law on the purported theory of "crashworthiness" where the vehicle's alleged design defects did not cause or contribute to the cause of the accident.<sup>24</sup> Reference to the facts and holdings of some of these cases is appropriate.

*Biavaschi v. Frost*<sup>25</sup> involved a suit by occupants of a Corvette vehicle which was hit in the rear by another car. The Corvette's gas tank exploded, severely injuring the driver and passenger. Dismissing the complaint upon motion, the New Jersey court, after reviewing prior judicial precedents, held that an automobile manufacturer had no duty to provide an automobile in which it was safe to collide. The court reasoned that "no liability follows" where the alleged faulty design "was not a proximate cause of the accident which caused the injuries complained of." It further stated:

Where the resulting danger is one arising from outside sources rather than from an inherent danger in an article itself, liability cannot be imposed upon the manufacturer.

The court pointed out that New Jersey law was in accord with the weight of authority in other jurisdictions:

[T]he holdings of *Evans* and *Shumard* . . . reflect the majority view and are consonant with the law of New Jersey and should be relied on in deciding the nature of the duty owed by the manufacturer.

Likewise, in *Burnet v. General Motors Corp.*,<sup>26</sup> the plaintiff contended that the steering column of her 1961 Chevrolet Corvair was defectively designed and that by reason thereof serious injuries were sustained when she drove her vehicle into a tree. U. S. District Judge Coolahan granted the motion of the manufacturer for a directed verdict, stating:

<sup>24</sup> *Billhartz v. Alpha Asphalt Corp.*, No. 67-6991 (Ill. Cir. Ct. St. Clair County, Apr. 21, 1969); *Edgar v. Nachman* (N.Y. Sup. Ct. Saratoga County, June 29, 1970); *Burkhard v. Short*, No. 18399 (Ohio C.P. Williams County, Jan. 7, 1971); *Tuor v. Seattle* No. 717006 (Wash. Super. Ct. King County, Apr. 16, 1971); *Devine v. Crumley*, No. 194794 (Wash. Super. Ct. Pierce County, Feb. 16, 1971); *Seattle-First Nat'l Bank v. Tabert*, No. 19076 (Wash. Super. Ct. Grant County, Aug. 21, 1970); *Mickendrow v. U. S. Homes & Dev. Corp.*, Dkt. No. L-35295-67 (N.J. Super. Ct. Ocean County, May 21, 1970); *Biavaschi v. Frost*, Dkt. No. L-37763-67 (N.J. Super. Ct. Bergen County, June 5, 1970); *Burnet v. General Motors Corp.*, Dkt. No. 833-66 (D.N.J., June 3, 1969). At the time of publication the *Edgar*, *Burkhard*, *Seattle-First Nat'l Bank*, and *Biavaschi* decisions were just unofficially reported in CCH PROD. LIAB. REP., at §§ 6548, 6549, 6550 and 6547, respectively. The *Edgar* case was unanimously affirmed by the N.Y. Appellate Division, 3d Dep't., June 28, 1971.

<sup>25</sup> No. L-37763-67 (N.J. Super. Ct. Bergen County, June 5, 1970). The court's analysis parallels that made by the Wisconsin court in the *Enders* case, *supra* note 23 and accompanying text. After considering applicable legal precedents, the court noted that "several obvious advantages" make legislative establishment of design standards preferable to those created by the courts. "Independent research can give a regulatory body a better understanding of design complexity than judges and juries are able to achieve through expert testimony. Standards promulgated by an administrative body also provide a measure of uniformity and certainty with regard to future application." Now unofficially reported in CCH PROD. LIAB. REP., at § 6547.

<sup>26</sup> No. 833-66 (D.N.J., June 3, 1969). It is interesting to observe that although the vehicle complained of was a 1961 model, the accident occurred in January of 1966. Does not the use of the vehicle successfully for a number of years and over many thousands of miles in and of itself go a long way towards showing that the vehicle is safe for "normal handling" and, therefore, not "defective?"



The intended use of an automobile does not include, as I think we understand it in the law of New Jersey, its participation in collisions with other objects, even though the manufacturer might have foreseen the possibility of such collision.<sup>27</sup>

Another unpublished New Jersey decision, *Mickendrow v. U. S. Homes & Development Corp.*,<sup>28</sup> reached a similar conclusion in favor of the manufacturer, the court concluding that the question of a manufacturer's or seller's duty to provide a "crashproof" or "safer" vehicle was not a matter to be submitted for jury determination but a question of law for the court.

The Washington case<sup>29</sup> described earlier involving collision of the van vehicle with the rear end of a truck is instructive. The court granted summary judgment stating from the bench:

In other words, we have here a case where the automobile had been driven 150,000 miles with no problem whatsoever that we know of. And, also, there is nothing latent about the construction of the front-end of this automobile that I can see. In other words, I think you can see the front of it and you can look under it when you get in and take your seat; you know what your feet are on and you know what is in front of you. And it appears to me that the accident and the death of these people here was due to the manner in which the automobile was being driven at the time of the accident.<sup>30</sup>

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<sup>27</sup> Reference to New Jersey law is most important in both the *Biavaschi* and *Burnet* determinations. This is because the case of *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960), is the acknowledged landmark decision in the United States holding a manufacturer "strictly liable" for product defects. Resort to the opinion in *Henningsen* confirms that the *Biavaschi* and *Burnet* determinations are consistent with New Jersey law. Thus, in *Henningsen*, where a new automobile travelling down a highway veered sharply to the right and crashed into a brick wall, the manufacturer was held liable because the evidence was "adequate to raise an inference that the car was defective and that such condition was causally related to the mishap." 32 N.J. at 409, 161 A.2d at 97 [Emphasis added]. The court further observed that there was nothing in the proof to indicate that the accident was caused by the driver's operation of the vehicle. "Nor," said the court, "is there anything to suggest that any external force or condition unrelated to the manufacturing or servicing of the car operated as an inducing or even concurring factor." 32 N.J. at 410, 161 A.2d at 98. Subsequent New Jersey decisions also indicate that the duty sought to be imposed would not be consonant with New Jersey law. Thus, in *Courtois v. General Motors Corp.*, 37 N.J. 525, 182 A.2d 545 (1962), a truck-tractor from which a wheel had come off collided with a truck. Citing *Henningsen* the court stated, "proof of a defect, however, is not alone sufficient to justify a recovery of damages; it must also appear that the defect was an efficient, producing cause of the mishap." 37 N.J. at 542, 547, 182 A.2d at 554, 556-57. See also *Maiorino v. Weeco Prods. Co.*, 45 N.J. 570, 214 A.2d 18 (1965) (manufacturer or seller entitled to expect a normal use of his product).

<sup>28</sup> No. L-35295-67 (N.J. Super. Ct. Ocean County, May 21, 1970). The case involved a small, imported car which was subjected first to a rear end collision by a pickup truck which then propelled the car into the opposing lane of traffic where it was smashed head-on by a vehicle proceeding in the opposite direction. Once again it is interesting to note that the small vehicle, allegedly defective because it failed to prevent injury in the two collisions, had been used prior to the accident for nearly eleven years. The plaintiff driver purchased the car from his father only some nine months before the accident and in that span operated the automobile over 10,000 to 15,000 miles.

<sup>29</sup> *Seattle-First Nat'l Bank v. Tabert*, No. 19076 (Wash. Super. Ct. Grant County, Aug. 21, 1970). The facts were extensively detailed in the text preceding note 1. Now unofficially reported in CCH PROD. LIAB. REP., ¶ 6550.

<sup>30</sup> The Washington court found persuasive the opinion and conclusions of the New Jersey court in *Biavaschi v. Frost*, cited note 25, *supra*, and quoted from it extensively.

Two additional unpublished decisions by Washington state courts confirm the determination made in the *Seattle-First* case involving the van vehicle.<sup>31</sup>

Likewise, an appellate court in New York,<sup>32</sup> and courts in Ohio<sup>33</sup> and Illinois<sup>34</sup> have held as a matter of law in favor of the defendant manufacturers or sellers.

<sup>31</sup> *Devine v. Crumley*, No. 194794 (Wash. Super. Ct. Pierce County, Feb. 16, 1971); *Tuor v. Seattle*, No. 717006 (Wash. Super. Ct. King County, Apr. 16, 1971). In the *Devine* case a small Volkswagen sedan allegedly failed to minimize injuries sustained in a collision with a heavier vehicle. The court granted summary judgment in favor of the Volkswagen importer, adopting as its opinion the ten basic reasons for judgment as a matter of law which were summarized in the defendant's brief. These reasons were essentially as follows:

- (1) A manufacturer is not required to make an accident-proof or foolproof car;
- (2) A manufacturer is not required to make his cars "more safe" where the danger to be avoided, i.e., collisions, is obvious to all;
- (3) The normal intended use of an automobile does not include its participation in collisions;
- (4) Such design requirements are a legislative and not a judicial function;
- (5) Juries are not properly to be the arbiters of design questions not involving collision causation;
- (6) A manufacturer or seller is not an insurer;
- (7) Imposition of such a duty retrospectively is beyond the realm of sensible public policy;
- (8) A duty to minimize injuries in collisions would be indefinable because of the myriad number and varieties of such occurrences;
- (9) No duty exists to adopt every conceivable safety device;
- (10) Such claims do not allege defects which proximately caused the accident.

The *Devine* court also analogized to motorcycles as vehicles offering little or no protection against the dangers of collisions. "For example, if the rule contended by plaintiff was adopted, it would eliminate all motorcycles from the highways, and that might be a desirable result. But the law cannot enforce that to be done."

In the *Tuor v. Seattle* case, a twelve year old Chevrolet Corvette left the roadway and struck a fire hydrant early on a rainy morning. The collision resulted in the death of the driver and injuries to the passenger. The car had been modified extensively to enhance its performance as a powerful sports car. Plaintiff claimed that the vehicle was improperly designed and built from materials which shattered on impact. It was also alleged that the construction caused the driver's leg to be wedged in during the collision and that the fuel tank ruptured. There was evidence that the driver had been drinking. The court granted summary judgment in favor of the manufacturer on the ground that the alleged faulty design did not cause the event which resulted in injury. The court further reasoned that the duty sought to be imposed was one for the legislature to impose, not the courts. It was also noted that the weight of the case law was against the imposition of such a duty.

<sup>32</sup> *Edgar v. Nachman*, -- App. Div. 2d ---, -- N.Y.S. 2d --- (3d Dep't, June 28, 1971), Affirming CCH PROD. LAB. REP. ¶6548. The case involved a head-on collision at high speed between a small imported car and a heavier vehicle crossing over onto the wrong side of the road. A fire ensued and it was claimed that the smaller vehicle failed to protect against the collision consequences. The vehicle at the time of the accident had been in use nearly six years. The manufacturer and sellers moved to dismiss the complaint and this motion was granted. The lower court stated that "plaintiff here is seeking an extension of responsibility that transcends the cause of an accident's happening and moves to a subsequent occurrence which aggravates the injury or damage without being involved in or responsible for the original happening. To succeed in that direction seems to call for appeal, persuasion and argument to the Legislature rather than the Courts." The lower court quoted extensively from the earlier New York Court of Appeals decision of *Campo v. Scofield*, 301 N.Y. 468, 95 N.E.2d 802 (1950), which, in turn, had been relied upon by the Seventh Circuit Court of Appeals in *Evans v. General Motors Corp.*, cited in note 2 and accompanying text. The Appellate Division also relied upon *Campo* stating that the manufacturer "is not required to make a machine that is accident proof or a car that is crash-worthy." In *Campo*, the New York court stated that the manufacturer "is under no duty to render a machine or other article 'more' safe—as long as the danger to be avoided is obvious and patent to all."

<sup>33</sup> *Burkhard v. Short*, No. 18399 (Ohio C.P. Williams County, Jan. 7, 1971) now unofficially reported in CCH. The case involved an intersection collision in which plaintiff alleged defective design in such a manner that she was thrown forward into the cowl of the vehicle upon impact. It was not contended that the alleged design

(Continued on next page)

There are some cases which apparently look the other way.<sup>35</sup> The most notable of these decisions which attempts to articulate a theory of liability is *Larsen v. General Motors Corp.*<sup>36</sup> The plaintiff alleged that the steering column of the automobile protruded some 2.7 inches forward of the leading surface of the front tires and that this constituted negligent design because it greatly enhanced the danger to the driver in a collision. The trial court granted the manufacturer summary judgment.<sup>37</sup> This determination was reversed on appeal.

Although the Eighth Circuit conceded that "automobiles are not made for the purpose of colliding with each other," it nevertheless concluded that automobile manufacturers should be liable for alleged design defects which are claimed to aggravate the consequences of accident because

Collisions with or without fault of the user are clearly foreseeable by the manufacturer and are statistically inevitable.<sup>38</sup>

The chief case relied on by the court, *Ford Motor Co. v. Zahn*,<sup>39</sup> was misconstrued since *Zahn* involved an allegedly defective component part;

(Continued from preceding page)

defect in any way caused the occurrence. The court granted the manufacturer's motion for summary judgment holding that the vehicle's intended use did not include its collision with other "vehicular impediments," that the definition of design standards was a matter "peculiarly and exclusively within the legislative province" and that there is no cause of action for alleged faulty design which does not "proximately contribute to the cause of the accident which produces the injury-causing impact."

<sup>34</sup> *Billhartz v. Alpha Asphalt Corp.*, No. 67-6991 (Ill. Cir. Ct. St. Clair County, Apr. 21, 1969). Plaintiff alleged that the defendant Ford Motor Company defectively designed the door latches on a 1964 vehicle which left the pavement and overturned. As a result of the upset and impact, plaintiff claimed, the driver's door opened and she was thrown from the vehicle. The court granted the manufacturer's motion to dismiss the counts of the amended complaint directed to it. Defendant's brief had relied upon the *Evans* case and also upon *Gossett v. Chrysler Corp.*, 359 F.2d 84 (6th Cir. 1966).

<sup>35</sup> *Larsen v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968); *Grundmanis v. British Motors Corp. Ltd.*, 308 F. Supp. 303 (E.D. Wis. 1970); *Mickle v. Blackmon*, 166 S.E.2d 173 (S.C. 1969). An intermediate appellate court of California reached a similar result in *Badorek v. General Motors Corp.*, 11 Cal. App. 3d 902, 90 Cal. Rptr. 305 (3rd Dist. 1970). However, said decision is in conflict with the holding of a coordinate court in *Hatch v. Ford Motor Co.*, 163 Cal. App. 2d 393, 329 P.2d 605 (2d Dist. 1958), although the *Badorek* court stated that *Hatch* was distinguishable on its facts. 11 Cal. App. 3d at 923, 90 Cal. Rptr. at 318. In any event, subsequent procedural events in the *Badorek* case negate the decision both as a judgment and a precedent under California law. The Supreme Court of California granted a hearing in *Badorek* on January 14, 1971. See 90 Cal. Repr. at 305. Under California law the grant of a hearing by the Supreme Court abrogates the Court of Appeals decision as judgment or precedent. *E.g.*, *Ponce v. Marr*, 47 Cal.2d 159, 161, 301 P.2d 837, 839 (1956). After retransfer to the intermediate appellate court for reconsideration before Supreme Court consideration, the *Badorek* case was dismissed by agreement of the parties. The Oregon case of *Storey v. Exhaust Specialties & Parts, Inc.*, 464 P.2d 831 (Ore. 1970), although disapproving of a trial court's instruction taken from the *Evans* case, involved merely a claim that an accident was caused by an alleged weakness in the manufacture and design of automobile wheels. The South Carolina decision in *Mickle, supra*, involved a deteriorated gearshift knob in a thirteen year old car so that it is much closer on its facts to manufacturing defect cases like *Ford Motor Co. v. Zahn*, 265 F.2d 729 (8th Cir. 1959), or choice of material cases, rather than "crashworthiness" design cases. In *Grundmanis, supra*, the U.S. District Judge ignored the fact that the law of Wisconsin had already been established, contrary to its decision, in *Enders v. Volkswagenwerk A.G.*, CCH PROD. LIAB. REP. ¶5930 (Wis. Cir. Ct. 1968).

<sup>36</sup> 391 F.2d 495 (8th Cir. 1968).

<sup>37</sup> 274 F. Supp. 461 (D. Minn. 1967).

<sup>38</sup> *Larsen v. General Motors Corp.*, 391 F.2d 495, 502 (8th Cir. 1968).

<sup>39</sup> 265 F.2d 729 (8th Cir. 1959).

it was not a case of alleged defective design. So, too, the court misconstrued the legal concept of "foreseeability" erroneously equating it with the concept of "duty."

The basic assumption of *Larsen* was that liability should be co-extensive with foreseeability. This assumption is fallacious. Actually, foreseeability is only one limited factor in determining "duty." As a noted authority on tort law, Dean Leon Green, has written:

[H]owever valuable the foreseeability formula may be in aiding a jury or judge to reach a decision on the negligence issue, it is *altogether inadequate for use by the judge as a basis of determining the duty issue and its scope*. The duty issue, being one of law, is broad in its implications; the negligence issue is confined to the particular case and has no implications for other cases. *There are many factors other than foreseeability that may condition a judge's imposing or not imposing a duty in the particular case, but the only factors for the jury to consider in determining the negligence issue are expressed in the foreseeability formula.*<sup>40</sup>

The principle that liability or "duty" is distinct from foreseeability has been clearly recognized in cases throughout the country. Foreseeability alone as a basis for a finding of "duty" has been rejected<sup>41</sup> and with good reason. As applied to the so-called "crashworthiness" issue, the court must decide what elements in addition to foreseeability will

<sup>40</sup> Green, *Foreseeability in Negligence Law*, 61 COLUM. L. REV. 1401, 1417-18 (1961) (Emphasis added). If the foreseeability formula "were the only basis of determining both duty and its violation," states Dean Green, "such activities as some types of athletics, medical services, construction enterprises, manufacture and use of chemicals and explosives, serving of intoxicating liquors, operation of automobiles and airplanes, and many others would be greatly restricted." *Id.* at 1418.

<sup>41</sup> *E.g.*, *Tobin v. Grossman*, 24 N.Y.2d 609, 249 N.E.2d 419 (1969); *Goldberg v. Housing Authority*, 38 N.J. 578, 186 A.2d 291 (1962); *Amaya v. Home Ice Fuel & Supplies Corp.*, 59 Cal.2d 295, 309 (1963). In *Tobin*, the New York court held that no cause of action existed for unintended harm sustained by one solely as a result of injuries inflicted directly upon another. The case involved a mother's claim for mental and physical injuries caused by shock and fear for her child who suffered serious injuries in an automobile accident. To resolve the issue of "duty," said the court, "the many converging policy factors must be considered." Foreseeability was only one such factor and could not be deemed dispositive. 24 N.Y.2d at 615. "If foreseeability be the sole test, then once liability is extended the logic of the principle would not and could not be confined." *Id.* at 616.

In the *Goldberg* case, the New Jersey Supreme Court dismissed a claim against the operator of a public housing development brought by a tradesman who had been attacked and robbed in the development by unknown persons. Plaintiff contended that an attack of this type was foreseeable and a duty existed to protect against it in the form of police protection. In finding no such duty as a matter of law, the court stated:

"The question whether a private party must provide protection for another is not solved merely by recourse to 'foreseeability.' Everyone can foresee the commission of crime virtually anywhere and at any time. If foreseeability itself gave rise to a duty to provide 'police' protection for others, every residential curtilage, every shop, every store, every manufacturing plant would have to be patrolled by the private arms of the owner. And since hijacking and attack upon occupants of motor vehicles are also foreseeable, it would be the duty of every motorist to provide armed protection for his passengers and the property of others. Of course, none of this is at all palatable.

The question is not simply whether a criminal event is foreseeable, but whether a *duty* exists to take measures to guard against it. Whether a *duty* exists is ultimately a question of fairness. The inquiry involves a weighing of the relationship of the parties, the nature of the risk, and the public interest in the proposed solution." 38 N.J. at 583, 186 A.2d at 293.

See also FLEMING, *LAW OF TORTS* 140 (2d ed. 1961) (foreseeability not condition precedent or test by which existence of duty is inferred).

create a duty.<sup>42</sup> If foreseeability were the sole test of duty, following Dean Green's exposition,<sup>43</sup> any person cut by a knife would have an action against the knife manufacturer, and a person falling from a bicycle or roller skates, or injured while riding a motorcycle or a scooter could have recourse against the respective manufacturers. These examples could be multiplied by the thousands.<sup>44</sup>

Looking only to automobiles it is foreseeable that there will be front-end, rear-end, sideward, high speed and low speed accidents, because drivers become drowsy, become intoxicated and suffer failing eyesight. It is foreseeable that there will be accidents because roads are narrow and have curves, hills and valleys. It is foreseeable that there will be accidents with heavy trucks or trains or with bicycles or pedestrians. Measures taken to avoid the consequences of some of these accidents will necessarily aggravate the consequences of other accidents. In some cases charges will be made that automobiles are too high powered, in others that the power was too low. Some will claim that vehicles are too small to absorb impacts. Automobile manufacturers would truly be called upon to be insurers.

The proliferation of the types of claims reflected by the foregoing decisions reveals that no particular type of vehicle is being singled out. The claims involve small sports cars, economy compacts, station wagons, van-type vehicles, intermediate sedans, luxury cars and even trucks. No particular type of collision limits the claimants' field of criticism. The claims are filed whether the collision is from the front, rear, side and even the top.<sup>45</sup> There is no limitation on the types of objects being collided with. The claims include collisions with other cars, trees, poles, bridge abutments and even railroad trains. The speeds at which the collisions occurred ranged as high as 115 miles per hour. The vehicles were criticized as "defective" despite the fact that many

<sup>42</sup> Both *Evans* and *Larsen* are in accord that the question of duty in the design of an automobile is a question of law for the court. *Evans v. General Motors Corp.*, *supra* note 2, 359 F.2d at 824; *Larsen v. General Motors Corp.*, 391 F.2d at 498.

<sup>43</sup> *Supra* note 40 and accompanying text.

<sup>44</sup> See *Jamieson v. Woodward & Lothrop*, 247 F.2d 23, 26 (D.C. Cir. 1957), *cert. denied*, 355 U.S. 857 (1957); *Campo v. Scofield*, 301 N.Y. 468, 472 (1950).

<sup>45</sup> See *Dyson v. General Motors Corp.*, 298 F. Supp. 1064 (E.D. Pa. 1969). A 1965 hardtop convertible left the roadway and overturned. Plaintiff contended that the severity of her injuries was enhanced by the failure of the roof to support, even partially, the weight of the overturned car. The court denied defendant's motion to dismiss, holding that a Pennsylvania court, *under the facts of that case*, would not preclude imposition of liability as a matter of law. The court did indicate its accord with the general weight of authority in a true crash situation by stating:

"Of course, the law does not impose any such obligation [duty to manufacture a 'crashproof' automobile] . . . If, for example, a vehicle left the roadway accidentally and came to rest in a river, it could scarcely be argued that the manufacturer should have produced an automobile which would float. Similarly, it could not reasonably be argued that a car manufacturer should be held liable because its vehicle collapsed when involved in a head-on collision with a large truck, at high speed." *Id.* at 1073.

Although the court considered the *Evans* and *Larsen* decisions as well as others, it never adopted *Larsen* as precedent, simply referring to it as a case upon which plaintiff relied. It would be erroneous to categorize *Dyson* as a "crashworthiness" decision beyond the specific facts of that case as the above-quoted language indicates.

were used without mishap for many years. In essence, therefore, the claimants in these cases were suing upon an unrealizable ideal: a "crashproof" car. This constituted an invitation to a jury to make the manufacturer pay in any case.

By submitting to a jury the vague and undefinable issues of crash protection, the Eighth Circuit in *Larsen* abdicated its responsibility to decide questions of law and to submit to juries only questions of fact. After remand and trial, the jury returned a unanimous verdict in favor of the defendant.<sup>46</sup> The jury's verdict, in a sense, cured the *Larsen* court's error in that case.

The vagueness of the concept of foreseeability dictates that it be employed cautiously. That automobile collisions are "foreseeable" must be conceded. But if foreseeability were to be the exclusive test, then an automobile manufacturer and seller would likely be proper party defendants whenever an automobile accident resulted in injury to an occupant of the vehicle involved. Nearly every accident situation, no matter how bizarre, is "foreseeable" if only because in the last fifty years drivers have discovered just about every conceivable way of wrecking an automobile. To base liability on foreseeability alone is to invite improvisations by juries or even by courts on an *ad hoc* basis. The mischief which would result therefrom is enormous.<sup>47</sup>

The rejection of the so-called "crashworthiness" theory by the weight of authority is amply buttressed by the comments to § 402A of the Restatement of Torts, Second.<sup>48</sup> Keeping in mind the "typical" claim made by proponents of the theory, as for example, the van to truck collision described earlier,<sup>49</sup> let us consider the relevant comments. Thus, Comment g to § 402A states:

The rule stated in this Section applies only where the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him. The seller is not liable when he delivers the product in a safe condition, and subsequent mishandling or other causes make it harmful by the time it is consumed.

In the case of the van to truck collision, does not the prior use of the van vehicle for nearly eleven years by the plaintiffs and others demonstrate vividly that the vehicle was "delivered in a safe condition" and that "subsequent mishandling or other causes" caused the collision?

The other comments to § 402A are equally clear that the doctrine is not meant to cover this type of case. Comment h states:

A product is not in a defective condition when it is safe for normal handling and consumption. If the injury results from abnormal handling, as where a bottled beverage is knocked against a

<sup>46</sup> See *Bowman, Defense of an Auto Design Negligence Case*, 10 FOR THE DEFENSE No. 5 (May, 1969).

<sup>47</sup> A recent case in California involved a Falcon automobile which caught fire after being rear-ended by a Buick. Plaintiff filed suit against the manufacturers of both cars, alleging defective design of the Falcon for location of the gas tank in the rear of the car and defective design of the Buick for too pointy or protruding a front end.

<sup>48</sup> Section 402A is the touchstone of the strict tort liability doctrine.

<sup>49</sup> *Supra* note 1 and the preceding text.

radiator to remove the cap, or from abnormal preparation for use, as where too much salt is added to food, or from abnormal consumption, as where a child eats too much candy and is made ill, the seller is not liable.

In the case of the van to truck collision, the prior injury-free use of the van vehicle for eleven years shows that it was a product "safe for normal handling" and therefore not "in a defective condition." The collision of the van at high speed into the rear end of the truck was as much a result of "abnormal handling" as a bottle "knocked against a radiator."

Comment i describes what is meant by the term "unreasonably dangerous":

The rule stated in this Section applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer. Many products cannot possibly be made entirely safe for all consumption, and any food or drug necessarily involves some risk of harm, if only from overconsumption. Ordinary sugar is a deadly poison to diabetics, and castor oil found use under Mussolini as an instrument of torture. That is not what is meant by "unreasonably dangerous" in this Section. The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. . . .<sup>50</sup>

In the case of the van to truck collision it was perfectly clear to anyone that the van vehicle could not "possibly be made entirely safe for all consumption" including collisions with trucks at high speed. The vehicle clearly involved "some risk of harm" if subjected to a collision. Thus, it was not "unreasonably dangerous" within § 402A.

And Comment j notes:

[A] seller is not required to warn with respect to products, or ingredients in them, which are only dangerous, or potentially so, when consumed in excessive quantity, or over a long period of time, when the danger, or potentiality of danger, is generally known and recognized. Again the dangers of alcoholic beverages are an example, as are also those of foods containing such substances as saturated fats, which may over a period of time have a deleterious effect upon the human heart.

In the case of the van to truck collision it was certainly not necessary to warn the purchasers or users of an eleven year old van vehicle of the "danger or potentiality of danger" in collisions because the danger "is generally known and recognized" by all.

These comments reveal convincingly that the "crashworthiness"

<sup>50</sup> The comment continues:

"Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics; but bad whiskey, containing a dangerous amount of fusel oil, is unreasonably dangerous. Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous. Good butter is not unreasonably dangerous merely because, if such be the case, it deposits cholesterol in the arteries and leads to heart attacks; but bad butter, contaminated with poisonous fish oil, is unreasonably dangerous."

theory is beyond the sensible purview of § 402A on strict tort liability. Though we have used the "typical" example of the van to truck collision, the same principles could be shown to apply in virtually all of the collision cases referred to earlier.<sup>51</sup>

One of the strong arguments running through the numerous cases holding against submission to a jury of the question whether an automobile should have been designed to minimize the consequences of a collision not caused by the matters complained of is that the legislature, through agencies created for the purpose, is better able to weigh the various problems involved in how vehicular design might be changed to minimize the consequences of a particular collision.

The obligation which the cases recognize as imposing upon a manufacturer to produce a car reasonably fit for the purpose for which it is sold, *i.e.*, the transportation of persons and property, is an objective standard. The manufacturer knows what he is required to do and a jury can determine whether or not he has succeeded. The duty which the proponents of "crashworthiness" seek to impose, to build a car in which it is "safe" or "reasonably safe" to smash into other vehicles, invites the jury to speculate retrospectively about what "safety" in collisions means.

The word "safe" when applied to automobile collisions is a completely fluid term without meaning. How safe? In collisions with what kinds of vehicles? Small cars, large cars, trucks, railroad trains? At what speeds, 20 mph, 60 mph, 80 mph?

Furthermore, what other desirable characteristics are to be sacrificed in pursuit of "greater" safety? Is the consumer to be denied the right to purchase a relatively low-cost, economical and maneuverable vehicle in favor of an expensive, armored tank? Are the owners of convertibles to be denied the pleasure of open-air driving because in upsets they are more vulnerable than the occupants of hardtops? What should be stressed in terms of the various factors which affect the safety of a vehicle: speed, driver visibility, economy, maneuverability, defense armor? The jury would first have to fix the standard, then determine whether the automobile, as designed, meets this newly-minted criterion.

Plainly, questions of this character are not appropriate for decision by a jury. A legislative body is equipped to evaluate all the pertinent considerations and lay down objective standards for prospective application. A jury whose verdict operates only retrospectively cannot do either. Focusing upon the specific accident before it, it will necessarily forget the myriad others and base its verdict solely upon what hindsight in the particular circumstances may show would have been "safer." The plaintiff in the particular lawsuit may benefit, but the interests of the general public will not be served and may even be prejudiced. As one of the most articulate exponents of auto safety points out:

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<sup>51</sup> It is significant to observe that many of the courts which rejected the "crashworthiness" doctrine as a matter of law were in jurisdictions where strict tort liability or implied warranty without privity had been adopted.



[J]udicially induced reform would of necessity be episodic and disorganized, dependent on the fortuitous circumstances of individual law suits. . . . The imposition of safety standards on the automobile industry can most likely be achieved better by a consistent application of regulatory standards drawn up by experts and kept current by research, rather than by ad hoc decisions of inexperienced judges and juries.<sup>52</sup>

Without a legal standard fixed objectively a manufacturer cannot ascertain what he must do to satisfy the law. Only the legislature can fix such a standard in advance. It can balance conflicting considerations and decide what should be properly sacrificed in terms of other consumer values and what should not be in the interests of a completely "safe" automobile.

Congress has acted to provide such standards by adoption of the National Traffic and Motor Vehicle Safety Act of 1966.<sup>53</sup> Significantly the Act itself defines a "motor vehicle safety standard" as one "which is practicable, which meets the need for motor vehicle safety and which provides objective criteria."<sup>54</sup>

Under the authority of this statute the National Highway Traffic Safety Administration has promulgated and is continuously amending and perfecting motor vehicle safety standards which provide objective criteria so that manufacturers will know what they must build into their cars to protect their occupants from the negligent and reckless conduct of themselves and other persons.<sup>55</sup> These motor vehicle safety

<sup>52</sup> O'Connell, *Taming the Automobile*, 58 NORTHWESTERN UNIV. L. REV. 299, 375 (1963). See also *Hatch v. Ford Motor Co.*, suggesting that submission of such questions to juries would make "the triers of the facts . . . the arbiters of the design of automobiles and the standard of design would be determined not when the automobile was manufactured but after the occurrence of an accident." 163 Cal. App. 2d at 397-98, 329 P.2d at 608.

<sup>53</sup> 15 U.S.C., § 1381 *et seq.* (Supp. IV 1969).

<sup>54</sup> 15 U.S.C., § 1391(2) (Supp. IV 1969).

<sup>55</sup> "Traffic safety is a complex and intricate subject matter involving many variables in the relationship of the vehicle, the driver, the highway, and a constantly shifting environment." S. REP. NO. 1302, 89th Cong., 2d Sess. (1966), reprinted in 1966-2 U. S. CODE CONG. & ADMIN. NEWS 2755.

In a report of the House Public Works Committee on Highway Safety it was noted that statistics indicated clearly that alcohol was a substantial factor in about 50 percent of all automobile accidents. H. R. REP. NO. 1700, 89th Cong., 2d Sess. 26 (1966).

A prominent proponent of automobile safety, Jeffrey O'Connell, has pointed out that "there is no question that better roads means fewer accidents." O'CONNELL & MYERS, *SAFETY LAST* 97 (1966). The Senate Public Works Committee found, for example, that treatment of road surfaces resulted in significant success in reducing accidents caused by skidding on wet pavements. "Grooving" of the pavement at key locations also reduced skidding accidents. S. REP. NO. 1302, 89th Cong. 2d Sess. (1966), reprinted in 1966-2 U.S. CODE CONG. & ADMIN. NEWS 2746. The Committee noted that improved road illumination saved lives. *Id.* at 2745-46. The same Committee found that beginning drivers were associated with accidents to a greater degree than experienced drivers and called for better driver education efforts. *Id.* at 2747. Another factor affecting automotive safety is impaired functions of some 24,000,000 Americans. O'CONNELL & MYERS, *SAFETY LAST*, at 80 (1966). Research showed that some 30 percent of accidents causing death and serious injuries were caused by tire failures. O'CONNELL & MYERS, *SAFETY LAST*, at 198 (1966). If anything is clear from the foregoing, it is that traffic safety is a technical and complex subject which requires efforts in reducing the causes of accidents on a massive scale. O'CONNELL & MYERS, *SAFETY LAST*, at 131 (1966). To impose liability upon the automobile industry for failing to minimize collision consequences where the mishap is not caused by any defect or malfunction in the vehicle is to have that industry underwrite the cost of accidents. The common law cannot impose such a duty; only the legislature can.

standards are published in the Code of Federal Regulations.<sup>56</sup> They include provisions designed to provide for occupant protection in the event of collisions. However, they do so with adequate controls, planning, testing and expert opinion. The standards present objective criteria.

The National Highway Safety Bureau is also charged with responsibility for conducting a program relating to automobile defects and recall campaigns. Auto manufacturers must notify owners of safety related defects discovered in their vehicles, and inform the Secretary of Transportation of such defects, what safety hazards are involved, and what steps are being taken to recall the vehicles and remedy the defects.

A second law, the Highway Safety Act of 1966,<sup>57</sup> authorizes the Highway Safety Bureau to issue standards for developing, improving and expanding a wide variety of state and local highway safety programs. These standards involve periodic motor vehicle inspection, motor vehicle registration, driver licensing and driver education, motorcycle safety, traffic records, courts and laws, alcohol in relation to highway safety, emergency medical services for highway crash victims, police traffic services, pedestrian safety, and others. Under these programs the Federal agency engages in broad-scale research, testing, and development programs designed to obtain basic data on motor vehicles and their performance, on drivers and their performance, and on other factors in the driving environment. In effect, the Federal government has moved forcefully into the area of automotive and highway safety with a comprehensive and balanced legislative program.

State legislation has also been enacted with a view to increasing automotive safety. States have adopted the Vehicle Equipment Safety Compact which, among other things, provides for regulation of automotive equipment which affects the "safety" of a vehicle's operation or the "safety" of its occupants.<sup>58</sup> It is evident, therefore, that the com-

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<sup>56</sup> 49 C.F.R. Part 571. Standards already in effect prescribe safety performance levels for windshield wiping, washing, defrosting, and defogging systems, brakes and brake hoses, lamps, reflective devices, and associated equipment, tires and rims, door latches and hinges, seat anchorages, safety belts, energy absorbing steering columns, head restraints, new laminated windshields, fuel tanks and fittings, and many others. The uniformity of the standards was desirable for obvious reasons, as the Senate Commerce Committee observed:

"The centralized, mass production, high volume character of the motor vehicle manufacturing industry requires that motor vehicle safety standards be not only strong and adequately enforced, but that they be uniform throughout the country." S. REP. No. 1301, 89th Cong., 2d Sess. (1966), reprinted in 1966-2 U.S. CODE CONG. & ADMIN. NEWS 2709, 2720.

<sup>57</sup> 23 U.S.C., §§ 401-404. The purpose of this Act was to provide a "comprehensive nationwide program to reduce the toll of death and destruction on our highways." S. REP. No. 1302, 89th Cong., 2d Sess. (1966), reprinted in 1966-2 U.S. CODE CONG. & ADMIN. NEWS 2743 (1966). Section 401 authorizes and directs cooperation among Federal and state agencies; section 402(a) provides for state highway safety programs "in accordance with uniform standards." Section 403 authorizes Congressionally appropriated funds "to carry out safety research." Section 404 authorizes the establishment of the National Highway Safety Advisory Committee.

<sup>58</sup> *E.g.*, N.C. GEN. STAT. §§ 20-183.13 through .21. The state legislature found that "public safety necessitates continuous development, modernization and implementation of standards and requirements of law relating to vehicle equipment, in accord-

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plex questions of injury-minimization in automobile accidents are properly a function of legislative and administrative action. The invitation to a jury to decide questions of design not involved in collision causation is an invitation to substitute for a balancing of the social and economic questions involved in such design not only the hindsight and inconsistency which would be present in a case by case approach but also sympathy and speculation.<sup>59</sup>

That is why the overwhelming majority of the courts deciding this issue have rightly held that the duty advocated by proponents of the so-called "crashworthiness" theory must be a creature of the legislature and not of the courts.<sup>60</sup> These decisions have merely built upon the strong foundation of earlier cases.<sup>61</sup>

The manufacturer is under no duty, absent legislation, "to guard against injury from a patent peril or from a source manifestly dangerous."<sup>62</sup> It is under no common law duty to render a machine "more safe" when the danger to be avoided is obvious to all.<sup>63</sup> Nothing could be more obvious to purchasers or users of motor vehicles than the danger of serious injury in collisions. Such consequences are clearly as "foreseeable" to vehicle occupants as to the automobile industry. Nothing about the appearance of most automobiles suggests that collisions may be had with impunity. The responsibility, absent legislation, for any resulting injuries in collisions not caused by any defect in the automobile lies with those who drive the cars and cause the collisions.

## Conclusion

For sound reasons the great weight of authority rejects as a matter of law the notion that a manufacturer or seller, absent legislation, ought to be responsible for collision consequences where the accident is not caused by any defect or malfunction in the automobile. This

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ance with expert knowledge and opinion." N.C. GEN. STAT. § 20-183.14(1); that the public safety required that such standards and requirements "be uniform from jurisdiction to jurisdiction." N.C. GEN. STAT. § 20-183.14(2). See *Enders v. Volkswagenwerk A.G.*, CCH PROD. LIAB. REP. ¶5930, at 8311, for reference to Wisconsin's public policy and adoption of the Vehicle Equipment Safety Compact in the context of a "crashworthiness" case.

At least thirty-three (33) states have adopted the Vehicle Equipment Safety Compact including: Ariz., Ark., Cal., Col., Conn., Fla., Ga., Ill., Ind., Iowa, Kansas, Ky., Mich., Minn., Mo., Montana, Nev., N.H., N.J., N.M., N.Y., N.C., N.D., Ohio, Ok., Or., Pa., Tenn., Texas, Utah, Wash., Wisc., and Wy.

<sup>59</sup> *E.g.*, *Miller v. Miller*, 273 N.C. 228 (1968), a case rejecting the "seat belt" defense:

"It is possible for reasonable men to analyze logically the variables presented by the issues of lookout and control, but it is extremely difficult to analyze the variables presented in failing to buckle a seat belt upon entering an automobile for normal, everyday driving. To ask the jury to do so is to invite verdicts on prejudice and sympathy contrary to the law. It is an open invitation to unnecessary conflicts in result and tends to degrade the law by reducing it to a game of chance."

How much more speculative would be the case if the jury is asked to analyze the infinitely more complex variables of general crash design?

<sup>60</sup> See cases cited *supra* notes 5, 18, 17, 21 and 31.

<sup>61</sup> *E.g.*, *Campo v. Scofield*, 301 N.Y. 468, 474-75, 95 N.E.2d 802, 805 (1950); *Jamieson v. Woodward & Lothrop*, 247 F.2d 23, 33 (D.C. Cir. 1957).

<sup>62</sup> *Campo v. Scofield*, 301 N.Y. 468, 472, 95 N.E.2d 802, 804 (1950).

<sup>63</sup> *Id.*

view is entirely consistent with the strict tort liability doctrine since an automobile delivered in a "safe condition" is only potentially harmful in such collisions through "subsequent mishandling or other causes." Automobiles cannot "possibly be made entirely safe for all consumption," including collisions. Vehicles clearly involve "some risk of harm" when involved in such accidents. This does not make them "unreasonably dangerous" or "defective." The few decisions to the contrary apply an erroneous test of "foreseeability," which is legally untenable. The duty contended is so vague and speculative that it cannot be left for retrospective decision by juries unless the automobile industry is to be made insurers against any injury. The complex question of automotive safety requires a balanced, uniform approach which combines measures against accident causation with measures for injury prevention. The Federal and state legislatures have moved forthrightly into this area with massive funds, research and technological expertise, which is really the only approach offering the possibility to reduce the accident toll on our nation's highways.