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Survey of Utah Strict Products Liability Law: From Hahn to the Present and Beyond

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INTRODUCTION

According to the Utah Supreme Court, the notion of holding a manufacturer strictly liable for its defective products is premised "on the proposition that the cost of injuries caused by defective products . . . sold for profit should be considered a cost of doing business to be borne by manufacturers . . . rather than by the injured individuals."[1] The Utah court views strict products liability as a doctrine that aligns the public interest in promoting the production of safer products with the individual's interest in remaining free from injury caused by defective goods.[2] If nothing else, then, a broad-based policy orientation has guided the Utah court in its formulation of Utah strict products liability law.

Notwithstanding its broad policy orientation, the Utah court has not decided a substantial number of cases dealing with strict products liability. In fact, since its 1979 adoption of the Restatement's section 402A[3] formulation of strict products liability,[4] the Utah Supreme Court has heard relatively few cases in which the doctrine of strict products liability was a central issue. Still, the Utah court continues to affirm its long-standing adherence to section 402A, and there is little doubt that section 402A remains the basic formulation of strict products liability law in Utah.[5]

This comment surveys the Utah Supreme Court's decisions in the area of strict products liability law since its adoption of section 402A in *Hahn*. In addition, this comment reviews the impact several recent legislative enactments have on strict products liability law in Utah. Section I outlines the basic ele-

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1. Berry v. Beech Aircraft Corp., 717 P.2d 670, 673 (Utah 1985).
2. *Id.*
3. RESTATEMENT (SECOND) OF TORTS § 402A (1965) [hereinafter RESTATEMENT].
4. Ernest W. Hahn, Inc. v. Armco Steel Co., 601 P.2d 152 (Utah 1979). For a discussion of the Utah court's adoption of § 402A in *Hahn*, see Lynn S. Davies, Comment, *Strict Products Liability in Utah Following* Ernest W. Hahn, Inc. v. Armco Steel Co., 1980 UTAH L. REV. 577.
5. *See* Grundberg v. Upjohn Co., 813 P.2d 89, 91 (Utah 1991).

ments of a section 402A cause of action and the various decisions of the Utah court that discuss and apply those elements. Section II discusses the affirmative defenses to strict liability actions that are recognized in Utah. Section III briefly discusses peripheral issues, including injuries to bystanders, statutes of limitations, and injuries to real property, which are nevertheless important to an overview of Utah strict products liability law. Finally, because Utah is one of the relatively few jurisdictions that has not adopted some form of the second collision doctrine, Section IV explores this "subset" of strict products liability law and suggests the form of the doctrine that the Utah court will ultimately adopt when provided with the opportunity to do so.

I. THE ELEMENTS OF A SECTION 402A CAUSE OF ACTION AND THEIR APPLICATION UNDER UTAH LAW

The specific language of section 402A provides that:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in Subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.[6]

In considering the implications and application of this section in Utah, a review of the essential elements of a strict products liability action is helpful because the Utah court appears unwilling to effectuate a wholesale adoption of section 402A[7] or its official comments. Through selective adoption of those comments, the court has left open opportunities to interpret the

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6. RESTATEMENT, *supra* note 3, § 402A.
7. *See* Davies, *supra* note 4, at 579-80.

section's language in ways that differ from those found in the official comments themselves.[8] Furthermore, judges have substantial discretion in applying the comments because their language is not always precise.[9]

A. "One who sells"[10]

The language of section 402A extends strict products liability to anyone who *sells* a defective product that is unreasonably dangerous to a consumer.[11] Hence, section 402A's language is broad enough to extend liability to several different entities or individuals within a distribution chain as "sellers," and the plaintiff is not limited to a product's manufacturer in seeking a recovery pursuant to a strict products liability theory.[12]

The Utah Supreme Court has not specifically addressed the question of who or what constitutes a "seller" for section 402A purposes, but there are indications that the court would extend liability to the seller of a particular product even if the seller was not the product's manufacturer. For example, the court has specifically adopted the language of section 402A,[13] and as noted above, the plain language of that section is broad enough to extend liability to a non-manufacturing seller. In addition, the court has frequently used the terms "seller" or "sold" in the strict liability context,[14] and the court appears willing to accept the full import of its language.[15]

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8. *See Grundberg*, 813 P.2d at 92-95 (adopting the basic policy of comment k, but dictating an alternative application of that comment).

9. *See, e.g., id.* at 100-04 (Stewart, J., dissenting) (disagreeing with the majority's interpretation and application of comment k).

10. RESTATEMENT, *supra* note 3, § 402A(1).

11. *Id.* § 402A(1)(a) cmt. f.

12. *Id.*

13. Ernest W. Hahn, Inc. v. Armco Steel Co., 601 P.2d 152, 158 (Utah 1979).

14. *See* Grundberg v. Upjohn Co., 813 P.2d 89, 91-92 (Utah 1991) ("the seller of such products"); Mulherin v. Ingersoll-Rand Co., 628 P.2d 1301, 1302 (Utah 1981) ("manufacturer or seller"); *Hahn*, 601 P.2d at 158 ("defendant sold products").

15. The Utah Court of Appeals has held that, under certain circumstances, retail sellers may seek indemnification from a defective product's manufacturer in strict products liability actions.

In Hanover Ltd. v. Cessna Aircraft Co., 758 P.2d 443 (Utah Ct. App. 1988), a retail seller sought indemnification from an airplane's manufacturer for attorney's fees, costs, and expenses that the retailer incurred in defending a strict products liability action brought against the retailer, the manufacturer, and several others. *Id.* at 444. Before trial, a settlement was reached between the *Hanover* plaintiff and all of the named defendants. *Id.* at 444-45. The retail seller paid no part of the settlement, but the retailer sought indemnification from the airplane's manufacturer for the above-stated costs. *Id.* at 445. The trial court granted summary judg-

Finally, the Utah court has implicitly acknowledged that non-manufacturing sellers can be held liable under a strict products liability theory. In *Raithaus v. Saab-Scandia of America, Inc.*,[16] the plaintiff brought a strict products liability action against the manufacturer of his automobile three and one-half years after his wife was tragically killed when the car caught fire. While the court focused its attention on the applicable statute of limitations,[17] it made no suggestion that the inclusion of either the vehicle's American distributor or the local dealer as co-defendants in the cause of action was improper. Similarly, in *Dowland v. Lyman Products for Shooters*,[18] a plaintiff injured when the breech of a rifle he was shooting exploded in his hand brought a products liability action against the firearm distributing company that sold him the rifle. As in *Raithaus*, the court did not address the appropriateness of naming non-manufacturing sellers as defendants in actions brought pursuant to a strict products liability theory,[19] but the court's silence on the matter indicates at least some implicit justification for holding non-manufacturing sellers liable.[20]

B. "engaged in the business of selling"[21]

Section 402A also requires the seller to be "engaged in the business of selling" the defective product.[22] Comment f indicates that section 402A liability does not extend to

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ment in favor of the manufacturer. *Id.*

On appeal, the court of appeals reversed the trial court, holding that in a strict products liability action, a retail seller may seek equitable indemnification from a product's manufacturer if (1) the retailer was free from wrongdoing; (2) the manufacturer was either an active wrongdoer or produced a defective product; *and* (3) the manufacturer was given notice of the retailer's claim for indemnity. *Id.* at 447. Moreover, the retailer's claim for indemnification may extend to any judgment it is required to pay, as well as attorney's fees, costs, and expenses incurred in defending the suit. *Id.* at 446-47. Accordingly, because the manufacturer had clearly been notified, the court remanded the action for further proceedings wherein the trial court was to determine whether the manufacturer had produced a defective product, and whether the retail seller "was simply an innocent 'passive' link in the chain of commerce." *Id.* at 450.

16. 784 P.2d 1158 (Utah 1989).

17. *Id.* at 1160-62.

18. 642 P.2d 380 (Utah 1982).

19. The issue before the court was improper admission of expert testimony. *Id.*

20. *See also* UTAH CODE ANN. § 78-15-6(1) (1992) ("sold by the manufacturer or other initial seller").

21. RESTATEMENT, *supra* note 3, § 402A(1).

22. *Id.* § 402A(1)(a).

> the occasional seller of food or other such products who is not engaged in that activity as part of his business. Thus it does not apply to the housewife who, on one occasion, sells . . . a jar of jam . . . . [or] to the owner of an automobile who, on one occasion, sells it to his neighbor.[23]

The Utah court has never published a decision addressing strict products liability wherein the factual pattern was anything but decisive as to this element in a section 402A cause of action. As a result, the court has never addressed the proper scope of this element as a matter of law.

For example, in *Ernest W. Hahn, Inc. v. Armco Steel Co.*,[24] the court reviewed the evidence supporting the jury's finding that the defendant manufacturer was strictly liable to the plaintiff in light of the elements of a section 402A cause of action. The court expressly found that there was "credible, substantial evidence in [the] record" supporting the jury's finding that the defendant "engaged in the business of selling" the defective product.[25] Such language reinforces the argument that the court accepts this element as a necessary part of a section 402A cause of action. The facts of *Hahn*, however, decisively established that issue. There was simply no reason to doubt that the manufacturer of the defective steel joists in *Hahn* produced them with the intention of selling them to others, and that it was "engaged," not only in the manufacturing business, but also in the "business of selling" its product. However, because factual patterns may not always be so clear-cut, and because the Utah court has not indicated what kind of activity does or does not fall within the scope of the "engaged in the business of selling" element, a definitive standard cannot be articulated.[26]

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23. *Id.* § 402A cmt. f.

24. 601 P.2d 152 (Utah 1979).

25. *Id.* at 158.

26. *But see* discussion *infra* part I.C. While the decision of the Utah Court of Appeals in Conger v. Tel Tech, Inc., 798 P.2d 279 (Utah Ct. App. 1990), is most appropriately characterized as a decision defining the term "defective product," it is at least possible to view the court's decision as one finding that the defendant was not "engaged in the business of selling" integrated cleaning systems. This interpretation of *Conger* indicates a rather strict reading of the "engaged in the business of selling" element of a § 402A cause of action. Because the court of appeals did not address the facts before it in those terms, however, this interpretation of *Conger* would be a decidedly unstable platform upon which to build an entire argument.

C. "any product"[27]

Pursuant to section 402A, the sale of "any product" sold in a defective condition unreasonably dangerous to a consumer or the consumer's property can give rise to strict products liability.[28] In light of the decisions reached by the Utah court, it does not appear that the scope of this element is any narrower for purposes of Utah law than the plain language of the section indicates. The court has heard a number of cases wherein various types of products were either alleged, or actually found to be, both defective and dangerous, and with the exception of a limited exemption for prescription drugs, it has never indicated that products within a particular category are exempt from strict products liability.[29]

The notion of a "product" is not limitless however. In *Conger v. Tel Tech, Inc.*,[30] the plaintiff sued pursuant to a strict products liability theory and argued that a manufacturer's installation of non-defective "spray balls" in an integrated cleaning system for a milk tanker without providing grit strips along the top of the tank created an unreasonably dangerous condition.[31] The Utah Court of Appeals held that the negligent installation of non-defective products does not give rise to strict products liability.[32] The court agreed with the plaintiff's assertion that the failure to install grit strips may have rendered the tanker unreasonably dangerous, but in the court's view, it did not cause the spray balls themselves to become defective.[33]

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27. RESTATEMENT, *supra* note 3, § 402A(1).

28. *Id.*

29. *See* Atwood v. Sturm, Ruger & Co., 823 P.2d 1064 (Utah 1992) (firearm); Grundberg v. Upjohn Co., 813 P.2d 89 (Utah 1991) (prescription drug); Whitehead v. American Motors Sales Corp., 801 P.2d 920 (Utah 1990) (automobile); Berry v. Beech Aircraft Corp., 717 P.2d 670 (Utah 1985) (aircraft); Mulherin v. Ingersoll-Rand Co., 628 P.2d 1301 (Utah 1981) (winch throttle control valve); *Hahn*, 601 P.2d at 152 (steel joists).

30. 798 P.2d 279 (Utah Ct. App. 1990).

31. *Id.* at 281.

32. *Id.* at 283. In support of its position, the court cited a decision by the South Carolina Supreme Court, DeLoach v. Whitney, 273 S.E.2d 768 (S.C. 1981) (refusing to extend strict liability to defendant who installed non-defective tire but failed to install new valve stem or tell plaintiff that the old valve stem had deteriorated).

33. *Conger*, 798 P.2d at 282 & n.3. The court made reference to both supporting and contrary authority in drawing this conclusion. *See* Hoover v. Montgomery Ward & Co., 528 P.2d 76 (Or. 1974) (refusing to extend strict liability to defendant who installed non-defective tire but failed to tighten the lug nuts when placing the

Under *Conger*, then, it appears that providing installation services in connection with the sale of a product does not, in and of itself, fall within the rubric of "product" for purposes of strict products liability. Of course, because the Utah Supreme Court did not address the *Conger* fact pattern, its adoption of the reasoning employed in *Conger* remains uncertain, as does the court's willingness to apply similar reasoning in slightly different factual settings.

D. "in a defective condition"[34]

The Utah Supreme Court has recognized "three types of product defects: manufacturing flaws, design defects, and inadequate warnings regarding use."[35] In *Dowland v. Lyman Products for Shooters*,[36] the court stated that the plaintiff bears the burden of proving a product defect in a strict products liability cause of action and that the burden is met only upon a showing that the product at issue had an unreasonably dangerous defect.[37] The court upheld a jury finding in favor of the defendant because the plaintiff had failed to establish that the rifle causing his injuries was dangerously defective upon the date it was delivered.[38] While the plaintiff's expert established that the rifle's breech was designed so that its construction created a danger of explosion at pressures greater than 23,000 pounds per square inch, his experts did not establish that pressures even close to that magnitude are produced when the appropriate powder is used.[39]

In a later decision, the court characterized its decision in *Dowland* as an application of, and adherence to, official comment g of section 402A.[40] However, because the standard articulated by the *Dowland* court does not specifically incorporate all of the comment's requirements, the court's adoption of that comment is less than straightforward. Comment g indicates

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wheel on the hub and axle). *But see* Bailey v. Montgomery Ward & Co., 690 P.2d 1280 (Colo. Ct. App. 1984) (defendant's failure to warn about the dangers of installing a used inner tube in a non-defective new tire could itself constitute a product defect).

34. RESTATEMENT, *supra* note 3, § 402A(1).
35. Grundberg v. Upjohn Co., 813 P.2d 89, 92 (Utah 1991).
36. 642 P.2d 380 (Utah 1982).
37. *Id.* at 381.
38. *Id.* at 381-82.
39. *Id.* at 381.
40. *Grundberg*, 813 P.2d at 91.

that strict products liability extends

> 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. The burden of proof that the product was in a defective condition at the time that it left the hands of the particular seller is upon the injured plaintiff; and unless evidence can be produced which will support the conclusion that it was then defective, the burden is not sustained.
>
> Safe condition at the time of delivery by the seller will, however, include proper packaging, necessary sterilization, and other precautions required to permit the product to remain safe for a normal length of time when handled in a normal manner.[41]

A careful reading of this passage indicates that the standard set forth in comment g is twofold. In order for strict products liability to be extended to a particular defendant, the plaintiff must first establish that the defendant's product contained a defect unreasonably dangerous to the consumer. The *Dowland* decision and the standard articulated by the court in that decision clearly establish the Utah court's adoption of this first requirement.[42]

Comment g requires more however. Having established an unreasonably dangerous product defect, the plaintiff must also establish that the defective condition was present when the product left the defendant seller's hands. While the Utah court's adoption of this requirement is not as clear, the court's affirmation of the jury's findings implies that the product must be defective when it leaves the seller's hands.[43] This second requirement has also been codified at section 78-15-6 of the Utah Code:

> In any action for damages for personal injury, death, or property damage allegedly caused by a defect in a product:
>
> (1) No product shall be considered to have a defect or to be in a defective condition, unless *at the time the product*

41. RESTATEMENT, *supra* note 3, § 402A cmt. g.
42. *See supra* text accompanying notes 36-37.
43. *See supra* text accompanying note 38.

> *was sold* by the manufacturer or other initial seller, there was a defect or defective condition in the product unreasonably dangerous to the user or consumer.[44]

Finally, there is some indication in *Dowland* that the Utah court approves of the "mishandling" and "other causes" language of comment g as well.[45] While the court did not address whether precautionary measures were provided or needed upon delivery of the rifle, it did note that the defendant had introduced evidence suggesting that the plaintiff used a powder with a far greater explosive charge than the rifle was designed to utilize.[46] In connection with its observation that normal use of the rifle did not create an actual danger of explosion,[47] the court's reference to the defendant's evidence indicates the court's willingness to accept evidence that the plaintiff was mishandling the defendant's product and that the actual cause of his injury was the use of an inappropriate powder. Thus, at least implicitly, the court has accepted the "mishandling" and "other causes" exceptions to strict products liability that comment g enunciates.

E. "unreasonably dangerous"[48]

The Utah Code provides a definition of "unreasonably dangerous" that essentially elaborates on a similar definition found in official comment i. Section 78-15-6(2) of the Utah Code defines "unreasonably dangerous" as a

> product [that] was dangerous to an extent beyond which would be contemplated by the ordinary and prudent buyer, consumer or user of that product in that community considering the product's characteristics, propensities, risks, dangers and uses together with any actual knowledge, training, or experience possessed by that particular buyer, user or consumer.[49]

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44. UTAH CODE ANN. § 78-15-6(1) (1992) (emphasis added).
45. *See also* RESTATEMENT, *supra* note 3, § 402A cmt. h (indicating that a product is not defective if it is safe for "normal handling and consumption" and that a seller is not liable for any injuries or damages if the consumer misuses a product or handles it in an abnormal fashion). Available affirmative defenses are discussed *infra* at section II.
46. *Dowland*, 642 P.2d at 382.
47. *Id.* at 381.
48. RESTATEMENT, *supra* note 3, § 402A(1).
49. UTAH CODE ANN. § 78-15-6(2) (1992).

This definition does more than elaborate, however, for the language relating to the actual knowledge, experience, or training of a particular buyer, user, or consumer is not found in comment i. This language suggests that Utah courts are required to make factual inquiries into the subjective abilities and knowledge of a product's user when determining if a product is "unreasonably dangerous." Such an inquiry is not contemplated in section 402A or its accompanying comments; thus, when presented with identical fact patterns, a court conducting the additional inquiry suggested by the Utah statute may reach a different conclusion than a court applying only the principles enunciated in section 402A.

For example, assume that manufacturer *Z* sells product Y to consumers *A* and *B*. Assume also that under the Utah statute, Y contains a defect that is unreasonably dangerous to *A*, an ordinary consumer, but not to *B* because of special knowledge, training, and experience that *B* possesses. Finally, assume that both *A* and *B* sustain identical injuries caused by a defect in Y. Pursuant to section 402A, both *A* and *B* could recover from *Z* because a determination that the defect in Y is unreasonably dangerous turns on an objective inquiry based upon *A*, the ordinary consumer.

On the other hand, under the Utah statute, *B* could not recover from *Z* pursuant to a strict products liability theory because *B*'s special knowledge, experience, and training would lead to a finding that Y was not unreasonably dangerous to *B*. Thus, *B* could not satisfy this essential element in a strict products liability claim. Whether the Utah Legislature actually intended this result is not clear from the notes accompanying the statute, but its language is certainly broad enough to support such an outcome. Until the Utah court has an opportunity to interpret the statute, however, the degree to which Utah law varies from that of other jurisdictions on this issue is unclear.

1. Plaintiff's special knowledge and involuntary encounters with a defective condition

Interpreting Utah's statutory definition of "unreasonably dangerous" in *Beacham v. Lee-Norse*,[50] the Court of Appeals for the Tenth Circuit found that the Utah statute "only lists

50. 714 F.2d 1010 (10th Cir. 1983).

factors to be considered in determining whether a product is unreasonably dangerous."[51] The plaintiff in *Beacham* lost four of his fingers when he instinctively reached out to break a fall and grabbed a piece of machinery at its "pinch point."[52] Defendants argued that the trial court's exclusion of evidence showing that plaintiff had actual knowledge of the pinch point and special training was erroneous because that evidence tended to show that the machinery was not "unreasonably dangerous."[53] The *Beacham* court found that other evidence before the jury was sufficient to establish plaintiff's actual knowledge of the danger, and accordingly, it concluded that the exclusion of additional evidence was not unduly prejudicial.[54]

The court also indicated that Utah's statutory definition was not necessarily applicable where, as in *Beacham*, the plaintiff encountered the danger involuntarily.[55] The court stated that

> [w]here a user encounters the defect involuntarily because a safety device was not provided, evidence of his actual knowledge, training, or experience is of only limited value: "We have difficulty seeing how the knowledge of the dangerousness can alleviate the dangerous condition inasmuch as the performance by plaintiff of his assigned tasks subjected him to injury regardless of the care exercised."[56]

Thus, at least in situations where the plaintiff involuntarily encounters a defective condition, there is some case law supporting the position that his actual knowledge, training, or experience regarding that condition is of little weight in determining whether a product is "unreasonably dangerous" pursuant to the Utah statute.[57]

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51. *Id.* at 1016.
52. *Id.* at 1012-13.
53. *Id.* at 1015.
54. *Id.* at 1016.
55. *Id.* (the *Beacham* plaintiff was an employee in a coal mining operation).
56. *Id.* (quoting Davis v. Fox River Tractor Co., 518 F.2d 481, 485 (10th Cir. 1975)). It should be noted that the *Beacham* court's language was overly broad. At least in some sense, all consumers injured by a defective product "encounter[] the defect because a safety device was not provided." *Id.* Thus, if the court's language was given full effect, Utah's statutory definition of "unreasonably dangerous" would be rendered a nullity.
57. *But see* Conger v. Tel Tech, Inc., 798 P.2d 279, 282 n.4 (Utah Ct. App. 1990) (listing assumption of risk as a defense to strict products liability and finding that employee who used cleaning system after recognizing danger assumed risk of continued use).

2. What constitutes adequate directions or warnings?

Comment j indicates that a seller may be required to provide directions or warnings in order to avoid a finding that its product is unreasonably dangerous.[58] As noted earlier, the Utah court views "inadequate warnings about a product's use" as a product defect,[59] and a manufacturer who "knows or should know of a risk associated with its product . . . is directly liable to the [user] if it fails to adequately warn . . . of [the] danger."[60] However, while these statements clearly establish a duty to warn, the court has not articulated any standards as to what actually constitutes an adequate warning.

The language of comment j suggests that directions or warnings are adequate if a consumer can safely use a product by following those warnings or directions.[61] Because the adequacy of a warning is largely a factual inquiry that turns on the specific attributes of a particular product, the Utah court will probably adopt a similar generalized standard if ever confronted with the issue. Likewise, the Utah court will probably adopt a related rule that there is no duty to warn when the danger or potentiality of danger is generally known and recognized, or when the product is dangerous only if excessively used or used over a long period of time.[62]

3. Unavoidably unsafe products

The Utah Supreme Court has adopted the "basic policy" of official comment k "as the law to be applied" in the state of Utah.[63] Comment k states that

> [t]here are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use . . . . Such a product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it *unreasonably* dangerous . . . . The seller of such products . . . is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an

58. RESTATEMENT, *supra* note 3, § 402A cmt. j.
59. Grundberg v. Upjohn, 813 P.2d 89, 92 (Utah 1991).
60. *Id.* at 97.
61. RESTATEMENT, *supra* note 3, § 402A cmt. j.
62. *Id.*
63. *Grundberg*, 813 P.2d at 92.

> apparently useful and desirable product, attended with a known but apparently reasonable risk.[64]

As examples of "unavoidably unsafe products," comment k lists vaccines and experimental drugs, and it is in the prescription drug context that the Utah court addressed the unavoidably unsafe product exception.

In *Grundberg*, the plaintiff argued that she had "shot [and killed] her mother as a result of ingesting the drug Halcion, a prescription drug manufactured by [the] defendant Upjohn to treat insomnia."[65] In considering the application of comment k, the court noted that its express terms only excepted unavoidably unsafe products to the extent that they were allegedly defective in their design.[66] If the seller of an unavoidably unsafe product mismanufactured its product or failed to provide adequate warnings for its use, it could still be held strictly liable notwithstanding the fact that its product could not be designed so as to possess a greater degree of safety.[67] The court stated that "[t]his limitation on the scope of comment k immunity is universally recognized."[68]

The court then went on to decide how comment k should be applied when a design defect is clearly alleged and considered several different approaches that have been followed in other jurisdictions.[69] These approaches can essentially be divided into two major groups. One approach requires the trial court to make a case-by-case determination of whether a product is unavoidably unsafe, either as a matter of fact, or by utilizing some form of risk/benefit analysis.[70] A second approach was adopted by the California Supreme Court in *Brown v. Superior Court*,[71] wherein the court extended comment k immunity to all prescription drugs as a matter of law and thereby over-

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64. RESTATEMENT, *supra* note 3, § 402A cmt. k.
65. *Grundberg*, 813 P.2d at 90.
66. *Id.* at 92.
67. *Id.*
68. *Id.* (citations omitted).
69. *Id.* at 92-95.
70. *See, e.g.*, Toner v. Lederle Lab., 732 P.2d 297, 305-06 (Idaho 1987), *cert. denied*, 485 U.S. 942 (1988) (case-by-case risk/benefit analysis: not unavoidably unsafe if any feasible alternative design would accomplish same purpose with less risk); Savina v. Sterling Drug, Inc., 795 P.2d 915, 924 (Kan. 1990) (case-by-case as a matter of fact); Castrignano v. E.R. Squibb & Sons, Inc., 546 A.2d 775, 781-82 (R.I. 1988) (case-by-case risk/benefit analysis: if reasonable minds could differ, then send to jury; if not, directed verdict as to comment k immunity).
71. 751 P.2d 470 (Cal. 1988).

turned a previous decision to apply a risk/benefit analysis on a case-by-case basis.

After reviewing the two alternatives, the Utah court opted for the second.[72] Unlike the court in *Brown*, however, the Utah court did not find that the language of comment k supports the position that all prescription drugs are unavoidably unsafe products. The court recognized that "by characterizing all FDA-approved prescription medications as 'unavoidably unsafe,' [it was] expanding the literal interpretation of comment k."[73] Nevertheless, the court found that policy justifications and the FDA's elaborate regulatory scheme for drug approval and distribution justified its holding.[74] In addition, the court noted that the Utah Legislature had extended special protection to FDA-approved drugs and indicated that compliance with applicable government standards at the time a product is marketed raises a rebuttable presumption that a product is not defective.[75]

Finally, the *Grundberg* court expressed its view that the FDA approval process was a better forum for utilizing a risk/benefit analysis than a trial court.[76] While the court said it did not believe "that courts [were] unsuited to address design defect claims in any product liability action,"[77] it found that

> [i]n light of the strong public interest in the availability and affordability of prescription medications, the extensive regulatory system of the FDA, and the avenues of recovery still

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72. *Grundberg*, 813 P.2d at 95.

73. *Id.* at 90.

74. *Id.* at 94-98. In support of its position, the court cited, as policy justifications, society's substantial need for and the unique benefit of prescription drugs, the increased cost and curtailment of drug development that would result from greater liability, and the extensive screening mechanisms, careful scrutiny, premarket review, and post-market surveillance employed by the FDA. *But see* Barson v. E.R. Squibb & Sons, Inc., 682 P.2d 832, 836 (Utah 1984) (FDA standards are minimums—even after FDA requirements are met, liability may extend if manufacturer knew or should have known about dangers).

75. *Grundberg*, 813 P.2d at 97. The Utah Code provides that "punitive damages may not be awarded if a drug causing the claimant's harm: (a) received premarket approval or licensure by the [FDA] . . . ." UTAH CODE ANN. § 78-18-2(1) (1992). The Utah Code also provides that a rebuttable presumption that a product is nondefective arises "where the alleged defect in the plans or designs for the product or the methods and techniques of manufacturing, inspecting and testing the product were in conformity with government standards established for that industry which were in existence at [that] time." UTAH CODE ANN. § 78-15-6(3) (1992).

76. *Grundberg*, 813 P.2d at 98-99.

77. *Id.* at 98.

> available to plaintiffs by claiming inadequate warning, mismanufacture, improper marketing, or misrepresenting information to the FDA . . . *a broad grant of immunity from strict liability claims based on design defects should be extended to FDA-approved prescription drugs in Utah.*[78]

Thus, the court concluded that "a drug approved by the [FDA], properly prepared, compounded, packaged, and distributed, cannot as a matter of law be 'defective' in the absence of proof of inaccurate, incomplete, misleading, or fraudulent information furnished by the manufacturer in connection with FDA approval."[79]

F. "to the user or consumer or to his property"[80]

The Restatement does not require a plaintiff to be in contractual privity with the defendant or to have purchased the product in order to bring a strict products liability cause of action.[81] Furthermore, the Restatement provides that a user may be only passively enjoying or working upon a product in order to state a claim.[82] While the Utah court has not specifically addressed this issue, its decisions do not suggest that the class of potential plaintiffs in strict products liability actions is any narrower than the Restatement's language indicates.[83]

The Utah decisions also indicate that recovery is available for damage to property. In fact, the decision wherein the Utah court adopted the section 402A formulation of strict products liability was an action to recover property damages.[84] However, the language of section 402A indicates that recovery can only be obtained for "*physical harm* . . . caused to the ultimate user or consumer, or to his property."[85] Thus, whether a plaintiff may recover under a strict products liability theory for economic injuries alone, or economic injuries in connection with damages to the plaintiff's person or property, remains an open question in Utah.[86]

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78. *Id.* at 99 (emphasis added).
79. *Id.* at 90.
80. RESTATEMENT, *supra* note 3, § 402A(1).
81. RESTATEMENT, *supra* note 3, § 402A cmt. l.
82. *Id.*
83. *See, e.g.*, Whitehead v. American Motors Sales Corp., 801 P.2d 920 (Utah 1990) (passenger in vehicle); Mulherin v. Ingersoll-Rand Co., 628 P.2d 1301 (Utah 1981) (employee of purchaser).
84. Ernest W. Hahn, Inc. v. Armco Steel Co., 601 P.2d 152 (Utah 1979).
85. RESTATEMENT, *supra* note 3, § 402A(1) (emphasis added).
86. *See* W.R.H., Inc. v. Economy Builders Supply, 633 P.2d 42, 43-46 (Utah

II. AVAILABLE AFFIRMATIVE DEFENSES IN A STRICT PRODUCTS LIABILITY ACTION

While the Utah court's adoption of section 402A results in the extension of liability to a manufacturer of a defective product without regard to the manufacturer's fault, the court has carefully pointed out that strict products liability does not render manufacturers absolutely liable.[87] A manufacturer is not an insurer of its product and the product's use.[88]

The Utah Supreme Court has formally recognized two affirmative defenses that a defendant may assert in a strict products liability action.[89] First, the defendant may argue that the user or consumer misused the product.[90] Second, the defendant may argue that the user or consumer unreasonably used the product "despite knowledge of the defect and awareness of the danger."[91]

In the Utah court's view, these affirmative defenses do not completely bar plaintiff's recovery—even if the plaintiff's fault exceeded that of the defendant's.[92] The *Mulherin* court stated

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1981) (allowing plaintiff to recover for economic injuries associated with damage to property pursuant to a negligence theory, but expressly leaving open the question of "[w]hether or not a manufacturer should be held to a standard of strict liability for economic losses resulting from the failure of [its] product to fulfill the commercial needs of the purchaser").

The court noted several jurisdictions that had denied recovery for economic damages in strict products liability actions. *See* State *ex. rel.* Western Seed Prod. Corp. v. Campbell, 442 P.2d 215 (Or. 1968), *cert. denied*, 393 U.S. 1093 (1969); Nobility Homes of Texas, Inc. v. Shivers, 557 S.W.2d 77 (Tex. 1977); Berg v. General Motors Corp., 555 P.2d 818 (Wash. 1976), *superseded by statute as stated in* Washington Water Power Co. v. Graybar Elec. Co., 774 P.2d 1199, 1205-06 (Wash. 1989).

87. Mulherin v. Ingersoll-Rand Co., 628 P.2d 1301, 1302 (Utah 1981).

88. *Id.*

89. *Id.* at 1302-03. For a discussion of the Utah court's adoption of comparative principles in the strict products liability setting, see Jeff L. Mangum, Note, *The Merger of Comparative Fault Principles with Strict Liability in Utah:* Mulherin v. Ingersoll-Rand Co., 1981 B.Y.U. L. REV. 964; Mark E. Wilkey, Comment, Mulherin v. Ingersoll: *Utah Adopts Comparative Principles in Strict Products Liability Cases*, 1982 UTAH L. REV. 461.

90. *Mulherin*, 628 P.2d at 1303.

91. *Id.*; *see also* Ernest W. Hahn, Inc. v. Armco Steel Co., 601 P.2d 152, 158 (Utah 1979) (citing RESTATEMENT (SECOND) OF TORTS § 402A cmts. g & n (1965), in support of these defenses); Conger v. Tel Tech, Inc., 798 P.2d 279, 282 n.4 (Utah Ct. App. 1990) (listing assumption of risk as a defense to strict products liability and finding that employee who used cleaning system after recognizing danger assumed risk of continued use).

92. *Mulherin*, 628 P.2d at 1303-04.

that circumstances "where the faults of both plaintiff and defendant . . . unite[] as concurrent proximate causes of an injury . . . [,] both faults should be considered by the trier of fact in determining the relative burden each should bear for the injury they have caused."[93] Thus, even if a plaintiff's misuse of a product is responsible for 95% of the injury, the plaintiff could still sue the product's manufacturer in a strict products liability cause of action. While this result differs decidedly from that allowed by the Utah comparative negligence statute effective at the time *Mulherin* was decided, the court expressly found that statute inapplicable to the facts before it.[94]

Subsequent to *Mulherin*, however, the Utah Legislature rewrote the statutes governing the application of "comparative negligence." Section 78-27-38 of the Utah Code provides that

> the fault of a person seeking recovery shall not alone bar recovery by that person. He may recover from any defendant or group of defendants whose fault exceeds his own. However, no defendant is liable to any person seeking recovery for any amount in excess of the proportion of fault attributable to that defendant.[95]

Initially, it should be emphasized that this statute is a comparative fault statute, not a comparative negligence statute as its title indicates. Moreover, because the definition section defines the term "fault" very broadly, this statutory language expands the scope of available affirmative defenses beyond that implicated in a narrowly tailored comparative negligence statute. At the same time, the statute's language eliminates a defendant's liability when the fault of the plaintiff exceeds that of the defendant.

Section 78-27-37(2) defines "fault" as "any actionable . . . act, or omission proximately causing or contributing to injury or damages sustained by a person seeking recovery, including, but not limited to . . . contributory negligence, assumption of risk, strict liability, . . . products liability, and misuse, modifi-

93. *Id.* at 1303.

94. *Id.* at 1303-04 (citing UTAH CODE ANN. § 78-27-37 (1953) (barring recovery when defendant's negligence does not exceed plaintiff's, but applying only to negligence actions)); *see also* RESTATEMENT, *supra* note 3, § 402A cmt. n (user or consumer barred from recovery if aware of danger but proceeds unreasonably to make use of product).

95. UTAH CODE ANN. § 78-27-38 (1992).

cation or abuse of a product."[96] Hence, the same comparative fault principles appear to govern whether the plaintiff's cause of action sounds in negligence or strict products liability. If the degree of fault attributed to a defendant for manufacturing a defective product unreasonably dangerous to the consumer is not greater than the degree of fault attributed to a plaintiff who has misused that product, then the plaintiff cannot recover damages for the injury. This directly contradicts the Utah court's position in *Mulherin* and represents a change in Utah law.

Furthermore, while the court has expressly recognized the two affirmative defenses to strict liability discussed above, nothing in the statutory language prohibits a defendant in a strict products liability action from asserting the defense of contributory negligence as well. While the Utah court has not specifically addressed this issue in the context of a strict products liability action, it has done so with regard to the Utah dramshop statute.

In *Reeves v. Gentile*,[97] the court stated that "[t]he fact that the dramshop statute is a strict liability statute does not preclude comparison of the negligence of the intoxicated person and of the person seeking recovery."[98] The court then reasoned that given a factual pattern where the plaintiff's negligence was greater than that of the intoxicated driver, holding the dramshop defendant liable for the full amount of damages "would subvert the intent and purpose of the comparative negligence statute" and would constitute absolute rather than strict liability.[99] At the same time, however, the court stated that "comparative negligence does not have application to dramshop defendants."[100] These statements can be reconciled if the defendant's culpability is considered apart from the issue of causation.

To establish a defendant's culpability in a strict products liability cause of action, the plaintiff need only show that the defendant engaged in the particular activity that gives rise to

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96. UTAH CODE ANN. § 78-27-37(2) (1992).
97. 813 P.2d 111 (Utah 1991).
98. *Id.* at 117.
99. *Id.* (the court had previously asserted that the purpose of the comparative negligence statute was to limit recovery in proportion to the fault of the person seeking recovery).
100. *Id.* at 116 (several of the dramshop defendants sought a finding of comparative fault among themselves).

strict liability—that the defendant acted negligently, purposefully or with extreme malice is irrelevant. Thus, because the defendant is strictly liable, there is no need to assess the relative degree of fault attributable to the plaintiff or defendant, and comparative negligence is consequently inapplicable for culpability purposes.

On the other hand, the comparative negligence of the plaintiff is very relevant when considering whether the defendant's actions caused the plaintiff's injuries. It is entirely possible for a defendant's actions to render him culpable under a strict liability theory, but at the same time, contribute only marginally to the actual injury of the plaintiff. To allow the plaintiff a full recovery from the defendant in such a situation would render the defendant absolutely liable and a virtual insurer of the plaintiff's actions. The Utah Supreme Court was unwilling to accept absolute liability with regard to the dramshop act in *Reeves*, and given the similar purpose underlying strict products liability law, the court is unlikely to impose absolute liability on a defendant in a strict products liability action.[101]

In sum, while *Mulherin* extends the use of comparative principles to strict products liability actions through the affirmative defenses of misuse or unreasonable use of a product, the Utah comparative negligence statutes provide a court with a potential avenue for allowing the defense of comparative negligence in strict products liability actions as well.[102] While this would not necessarily signal a dramatic departure from prior common law precedent, it does potentially expand the number of available defenses.[103]

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101. *See id.* at 117 (citing statutory language and purpose in support of extending contributory negligence defense).

102. It should be noted that "[t]he failure to wear a seat belt does not constitute contributory or comparative negligence, and may not be introduced as evidence in any civil litigation on the issue of injuries or on the issue of mitigation of damages." UTAH CODE ANN. § 41-6-186 (1988). The Utah Supreme Court reached the same conclusion in Whitehead v. American Motors Sales Corp., 801 P.2d 920 (Utah 1990), but the court did hold that for purposes of establishing the safety of a vehicle's design, evidence that seatbelts were provided is admissible. *Id.* at 927-28.

103. Section 78-15-5 of the Utah Code also bears directly on the affirmative defense of comparative fault in strict products liability actions. That section provides that for the purposes of evaluating the comparative fault of the plaintiff,

> fault shall include an alteration or modification of the product, which occurred subsequent to the sale by the manufacturer or seller to the initial user or consumer, and which changed the purpose, use, function, design, or intended use or manner of use of the product from that for which the

III. OTHER CONSIDERATIONS

A. Injuries to Casual Bystanders, Non-consumers, Non-users and Others

Comment o indicates that casual bystanders and others injured by a defective product who are not "users or consumers" have not been allowed to recover against a seller pursuant to a strict liability theory.[104] While comment o neither supports nor criticizes this position, the Tenth Circuit has indicated that non-user plaintiffs may sue pursuant to a strict products liability theory in some settings.

In *Julander v. Ford Motor Co.*,[105] the plaintiffs were injured when their car collided with a Ford Bronco.[106] The plaintiffs brought a strict products liability action against Ford, alleging that the accident was caused by defects in the Bronco's design that caused the driver to lose control of his vehicle.[107] Ford argued that non-users of a product could not bring an action for strict products liability, but the Tenth Circuit disagreed.[108] The court stated that "the post-Restatement evolution" of strict products liability law persuaded it to allow the plaintiffs in *Julander* to proceed under such a theory of recovery.[109]

While the court's decision in *Julander* certainly indicates

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product was originally designed, tested, or intended.

UTAH CODE ANN. § 78-15-5 (1992). While similar language can be found in § 78-27-37(2), the above quoted section sets forth the standards in greater detail.

The Tenth Circuit indicated that a previous version of this statute required "some sort of physical alteration or modification of the product itself which leaves the product in a different condition or form than it was in when it left the manufacturer's . . . hand." Beacham v. Lee-Norse, 714 F.2d 1010, 1016 (10th Cir. 1983). Accordingly, the *Beacham* court held that the elevation of a "roof bolter" on crib blocks did not constitute an "alteration or modification" for purposes of the statute. *Id.* Moreover, in the event it did, the alteration was not a "substantial contributing cause of the injury." *Id.* The "substantial contributing cause" standard is no longer relevant. The current language of § 78-15-5 substituted "[f]or purposes of Section 78-27-38, fault shall include" for "[n]o manufacturer or seller of a product shall be held liable for any injury . . . sustained as a result of an alleged defect . . . in the use or misuse of that product, where a substantial contributing cause of the injury, death, or damage to property was."

104. RESTATEMENT, *supra* note 3, § 402A cmt. o.

105. 488 F.2d 839 (10th Cir. 1973) (interpreting Utah law).

106. *Id.* at 841.

107. *Id.*

108. *Id.* at 845.

109. *Id.*

an expansion of the class of plaintiffs able to sue pursuant to a strict products liability theory, the Tenth Circuit did not articulate any reason for its conclusion that Utah should follow the move towards expanded liability and adopt the position it articulated. Accordingly, because the Utah Supreme Court has not had an opportunity to either specifically address the question or adopt the Tenth Circuit's reasoning, strict products liability law on this issue remains uncertain.

B. Further Processing and Component Parts

The Utah court has yet to directly confront a factual pattern wherein a manufacturer's product undergoes further processing or other change before reaching the ultimate consumer, or where the manufacturer's product is a component part in a larger product. Comment p of section 402A indicates that "[t]he question is essentially one of whether the responsibility for discovery and prevention of the dangerous defect is shifted to the intermediate party who is to make the changes."[110] Taking no official position, the comment suggests that the outcome of such inquiries will ultimately turn on the varied factual scenarios presented to the court. Accordingly, until the Utah court addresses these issues, it is difficult to determine what direction Utah law will take.

C. Statute of Limitations

In *Atwood v. Sturm, Ruger & Co.*,[111] the plaintiff was injured when a pistol he was carrying discharged inadvertently after falling out of its holster and landing on the running board of the plaintiff's truck. Several months prior to the expiration of the statute of limitations, the plaintiff learned that he might have a cause of action against the manufacturer due to manufacturing defects in the pistol.[112] The plaintiff filed his action two days after the statute of limitations period had expired.[113] The Utah Supreme Court held that the statute of limitations in a strict products liability action begins to run on the date of injury, and that the discovery rule is inapplicable when the plaintiff learns of a possible cause of action prior to

110. RESTATEMENT, *supra* note 3, § 402A cmt. p.
111. 823 P.2d 1064 (Utah 1992).
112. *Id.*
113. *Id.*

the expiration of the statute of limitations.[114]

While *Atwood* is a recent decision, the statute of limitations interpreted by the court in that case no longer governs strict products liability actions. Because the action in *Atwood* was filed in October of 1988 and the injury occurred some four years prior to that date, it was governed by section 78-12-25(3), a catch-all statute of limitations for actions "for relief not otherwise provided for by law."[115] As of April 24, 1989, however, a new statute of limitations for products liability actions became effective.[116] Section 78-15-3 states that a "civil action under [the Product Liability Act] shall be brought within two years from the time the individual who would be the claimant in such action discovered, or in the exercise of due diligence would have discovered, both the harm and its cause." Because section 78-15-3 contains language indicating that a plaintiff must be aware of both the harm and cause, the applicability of *Atwood* in future strict products liability actions may be limited.[117]

D. Real Property

In *Loveland v. Orem City Corp.*,[118] the plaintiffs argued that residential developers should be held strictly liable for deficiencies in real estate the plaintiffs had purchased.[119] The court stated that "[a]lthough such a theory has some appeal from a risk-spreading standpoint and because of the obvious reliance house buyers place on developer expertise," strict products liability should not be extended to real estate transactions.[120]

IV. SECOND COLLISIONS, ENHANCED INJURIES, AND CRASHWORTHINESS

"Second collisions," "enhanced injuries," and "crashworthiness"[121] are buzzwords associated with a legal doctrine that

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114. *Id.* at 1064-65.
115. UTAH CODE ANN. § 78-12-25(3) (1992).
116. *Id.* § 78-15-3 (1992).
117. Previous versions of the Product Liability Act contained a six-year statute of repose. As a result, the Utah Supreme Court declared the Act unconstitutional in light of the Utah Constitution's open court provision in Berry v. Beech Aircraft Corp., 717 P.2d 670 (Utah 1985). *See also* Raithaus v. Saab-Scandia of America, 784 P.2d 1158 (Utah 1989) (declaring the six-year time period a statute of repose).
118. 746 P.2d 763 (Utah 1987).
119. *Id.* at 770-71.
120. *Id.* at 770.
121. Where possible, I will utilize the term "second collision doctrine" to refer to

results in the extension of liability for design or manufacturing defects that do not cause an accident, but nevertheless increase the severity of a plaintiff's injuries when an accident occurs.[122] Enhanced injuries are generally sustained when a design defect causes a second collision, a structural defect fails to protect a plaintiff in a reasonably foreseeable accident, or when a design defect is incorporated in the surface or object with which the plaintiff collides in a second collision.[123]

The second collision doctrine originated in *Larsen v. General Motors Corp.*,[124] an Eighth Circuit decision upon which courts rely for the proposition that plaintiffs should recover for enhanced injuries caused by a defective design.[125] Obviously, all courts adopting *Larsen* agree with this fundamental proposition. These courts also agree, at least ostensibly, on two important corollaries of the second collision doctrine:

> First, because the allegedly defective product played no role in causing the plaintiff's initial accident, the manufacturer can be held liable only for enhanced or aggravated injuries that would not have occurred absent the alleged defect in the product, and *cannot* be held liable for injuries attributable to the initial collision. Second, the plaintiff bears the burden of proving that the alleged defect caused the enhanced injuries.[126]

However, courts adopting the second collision doctrine do not agree on what constitutes adequate proof that a defective product caused an enhanced injury.[127] More precisely, they differ on which party bears the burden of apportioning the respective injuries among the first and second collisions.

In deciding this question, courts are confronted with two

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this doctrine.

122. *See, e.g.*, Craigie v. General Motors Corp., 740 F. Supp. 353, 356 (E.D. Pa. 1990); James O. Pearson, Jr., Annotation, *Products Liability: Sufficiency of Proof of Injuries Resulting from "Second Collision,"* 9 A.L.R. 4TH 494 (1981). While the second collision doctrine is most commonly applied in cases involving some kind of vehicle, it is not necessarily restricted to that application. *See* Couch v. Mine Safety Appliances Co., 728 P.2d 585 (Wash. 1986) (unsafe design of hardhat gave rise to products liability for enhanced injuries incurred when tree fell on logger's head).

123. Barry Levenstam & Daryl J. Lapp, *Plaintiff's Burden of Proving Enhanced Injury in Crashworthiness Cases: A Clash Worthy of Analysis*, 38 DEPAUL L. REV. 55, 57 (1989); *see also* Pearson, *supra* note 122, at 497-98.

124. 391 F.2d 495 (8th Cir. 1968).

125. Levenstam & Lapp, *supra* note 123, at 60-61.

126. *Id.* at 62.

127. *Id.*

important considerations. First, there is a problem of proof. Second collision cases often involve complex patterns of causation that are very difficult to trace. Moreover, the underlying theory of second collision cases is to impose liability upon a manufacturer only for those injuries that are actually enhanced, or injuries that are over and above what the injured party would have received absent the design defects. Analytically, such a theory requires "proof" of what would have occurred absent the defect. Thus, in order to apportion the injuries between a first and second collision, one party or the other must "prove" a hypothesis that has no basis in the occurrence's actual facts. Courts are naturally uncomfortable with that kind of speculation—and some simply declare that "proving" such matters is impossible.[128]

Second, there is the need to strike a balance between important public policies that are often at odds with one another in the second collision context. On the one hand, courts want to protect consumers from enhanced injuries actually caused by defective products; on the other, courts want to avoid the imposition of absolute liability for a product's use on its manufacturer. Where a court decides to strike the balance dictates the emphasis, and ultimately the outcome, of its opinion—both as to the policy considerations and as to the problem of proof. As a result, courts adopting the second collision doctrine apply it in two fundamentally different ways, neither commanding a clear majority.[129]

A. Plaintiff Bears the Burden of Apportioning Damages Between the First and Second Collision

One approach to the application of the second collision doctrine is sometimes referred to as the "sole factor" approach.[130] The "sole factor" approach requires a plaintiff to prove that the enhanced injuries sustained in a second collision were caused by a defective condition in the applicable product.[131] In order to do so, the plaintiff must establish what injuries would have been received absent the design defect, and show that the defective product was the sole factor contributing

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128. *See* Fox v. Ford Motor Co., 575 F.2d 774, 788 (10th Cir. 1978).

129. In application, there is actually a range among the levels of proof required. *See* Levenstam & Lapp, *supra* note 123, at 62 n.35.

130. *Id.*

131. *Id.*

to the enhanced injuries sustained. Stated differently, the plaintiff bears the burden of apportioning the injuries to the first and second collision and proving those injuries that are actually enhanced injuries.[132]

The jurisdictions adopting this approach generally employ reasoning similar to that of the Court of Appeals for the Third Circuit in *Huddell v. Levin*.[133] In *Huddell*, the driver of a Chevrolet Nova was killed when his car was hit from behind after running out of gas on the Delaware Memorial Bridge.[134] While most of his other injuries were superficial, the driver's skull was extensively fractured when his head struck the head-

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132. For example, in Harvey *ex rel.* Harvey v. General Motors Corp., 873 F.2d 1343 (10th Cir. 1989), the plaintiff established that he was injured when he was ejected from his car during a rollover, but he did not establish that the injuries he sustained "were over and above those which would have been sustained had the T-Top [on his car] remained in place and had [he] remained inside the vehicle." *Id.* at 1350. The jury found that the plaintiff's car was "in a defective condition unreasonably dangerous" to the plaintiff, and that the defective condition was a proximate cause of his injuries. *Id.* at 1346 n.1. The jury also found that the plaintiff and the defendant were each 50% at fault, and that the fault of each was a proximate cause of plaintiff's injuries. *Id.* Notwithstanding these findings, however, the jury did not award any damages to the plaintiff. *Id.*

On his motion for a new trial and later on appeal, the plaintiff argued that the jury's failure to award any damages was inconsistent with its findings of multiple liability and proximate causation against the defendant. *Id.* at 1346. The Tenth Circuit upheld the trial court's finding that the jury's failure to award damages was "consistent with the proposition that the plaintiff did not establish the extent of enhanced injuries, if any, attributable to the defective design of the T-Top on [plaintiff's car]." *Id.* at 1351. In other words, because the plaintiff offered no evidence that his ejection from the car resulted in injuries of greater severity than he would have sustained had he remained in the car during the accident, the jury was not able to determine what plaintiff's enhanced injuries actually were. Because under Wyoming law plaintiff bears the burden of establishing such injuries, and because the defendant is only liable for those injuries that are actually enhanced injuries, the jury's award of zero damages was all the plaintiff's proof could sustain.

For other examples of decisions adopting some formulation of this position, see Chretien v. General Motors Corp., 959 F.2d 231 (4th Cir. 1992) (unpublished opinion), *available in* LEXIS & Westlaw databases (holding that plaintiff had burden of proof, but declining to decide if "crashworthiness" cause of action existed in Virginia); Habecker v. Clark Equip. Co., 942 F.2d 210 (3d Cir. 1991) (applying Pennsylvania law that it had previously interpreted); Curtis v. General Motors Corp., 649 F.2d 808 (10th Cir. 1981) (applying Colorado law); Caiazzo v. Volkswagenwerk A.G., 647 F.2d 241 (2d Cir. 1981) (applying New York law); Huddell v. Levin, 537 F.2d 726 (3d Cir. 1976) (interpreting New Jersey law); Crispin v. Volkswagenwerk AG, 591 A.2d 966 (N.J. Super. Ct. App. Div.), *cert. denied*, 599 A.2d 162 (N.J. 1991); Couch v. Mine Safety Appliances Co., 728 P.2d 585 (Wash. 1986).

133. 537 F.2d 726 (3d Cir. 1976).

134. *Id.* at 732.

rest after impact.[135] The driver's estate brought a diversity action for enhanced injuries against General Motors Corporation pursuant to a strict liability theory, arguing that the headrest was defective in design because "its relatively sharp edge of unyielding metal allowed for excessive concentration of forces against the rear of [the driver's] skull."[136] The jury found that the headrest was defective and that it was a substantial contributing factor in the driver's death.[137] Accordingly, the jury awarded a judgment in favor of the plaintiffs and against the defendant in excess of two million dollars.[138]

On appeal, the Third Circuit held that a plaintiff must prove three specific elements in an enhanced injury cause of action:

> First, in establishing that the design in question was defective, the plaintiff must offer proof of an alternative, safer design, practicable under the circumstances . . . . Second, the plaintiff must offer proof of what injuries, if any, would have resulted had the alternative, safer design been used . . . . Third, as a corollary to the second aspect of proof, the plaintiff must offer some method of establishing the extent of enhanced injuries attributable to the defective design.[139]

As to the first element, the court noted that the plaintiff had offered sufficient proof to submit the issue of defective design to the jury and sustained its finding that the headrest was defective.[140] As to the second and third elements, the court acknowledged that the plaintiffs had established that the accident would have been "survivable" absent the defective design, but that alone was insufficient apportionment of the injuries between the first and second collision.[141] "It was not established whether the hypothetical victim of the survivable crash would have sustained no injuries, temporary injuries, permanent but insignificant injuries, extensive and permanent injuries, or, possibly, paraplegia or quadriplegia."[142] For this and

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135. *Id.*
136. *Id.* at 735.
137. *Id.* at 732.
138. *Id.*
139. *Id.* at 737-38.
140. *Id.* at 736.
141. *Id.* at 738.
142. *Id.*

other reasons, the court ordered a new trial.[143]

In support of its allocation of the burden of proof, the Third Circuit stated that while the driver of the car striking Huddell's car may be liable for all injuries arising out of the accident, the theory underlying the enhanced injury doctrine dictates that General Motors is only liable for those injuries that are actually enhanced injuries.[144]

> Analogies to concurrent actions combining to cause a *single impact* are simply not applicable. Similarly, analogies to chain collisions are not applicable, where, as [in *Huddell*], one party is sued on a fault theory for the collision and the other party is sued on the theory of strict liability for the "second collision."[145]

In other words, because " '[s]econd collision' cases do not implicate 'clearly established double fault' for the *same* occurrence,"[146] the court simply did not believe that traditional tort theories relating to accidents involving concurrent proximate causes of a single collision should govern enhanced injury cases.[147]

Finally, the court rejected the plaintiff's argument that the indivisibility of Huddell's death precluded General Motors from attempting to divide responsibility and limit its liability.[148] While noting that the New Jersey Death By Wrongful Act statute treated death as an indivisible injury, the court pointed out that it is the plaintiff who suggests divisibility by arguing the enhanced injury theory.[149] In fact, the "apportionment . . . contemplated [in a second collision case] is not a division among the injuries that the plaintiff sustained, but rather the difference between the injuries actually incurred and the injuries that would have resulted in the collision in the absence of the alleged defect."[150] That being the case, the court was sim-

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143. *Id.* at 731.
144. *Id.* at 738.
145. *Id.*
146. *Id.*
147. The court also reasoned that while the plaintiff should bear the burden of apportioning the injuries, the plaintiff's failure to do so would not excuse all wrongdoers. *Id.* at 738-39. "Should plaintiff fail to meet her burden on this claim, the brute fact is that the negligent driver would *not* escape liability on the same ground." *Id.* at 739.
148. *Id.*
149. *Id.*
150. Levenstam & Lapp, *supra* note 123, at 84.

ply unwilling to "accept the proposition that suing for wrongful death suffices to convert limited, second collision, enhanced injuries liability into plenary liability for the entire consequences of an accident which the automobile manufacturer played no part in precipitating."[151]

In sum, pursuant to the "sole factor" approach, the plaintiff's burden of establishing causation is not met unless the plaintiff can prove injuries resulting from the second collision over and above those which would have been received absent the defective condition. In the event the injuries are actually indivisible, the plaintiff will be unable to meet this burden of proof and the cause of action against the product's manufacturer will fail. While this may be a difficult burden to meet, the jurisdictions adopting this approach view it as analytically consistent with the enhanced injury theory and the generally accepted notion that manufacturers should not be held to a standard of absolute liability.

B. Defendant Bears the Burden of Apportioning Damages Between the First and Second Collision

Another approach to the application of the second collision doctrine is sometimes referred to as the "substantial factor" approach[152] and, like the "sole factor" approach, also requires a plaintiff to prove that the enhanced injuries sustained in a second collision were caused by a defective condition in the applicable product. However, the "substantial factor" approach does not require the plaintiff to establish what injuries would have been sustained absent the defect. A plaintiff need only establish that the defective product was a substantial factor contributing to the injury.[153] After the plaintiff establishes that the injuries were caused by a defective product, the burden of proof shifts to the defendant to apportion the injuries resulting from the first and second collisions.[154]

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151. *Huddell*, 537 F.2d at 739.

152. Levenstam & Lapp, *supra* note 123, at 69-70.

153. *Id.* at 70.

154. For example, in Fouche v. Chrysler Motors Corp., 646 P.2d 1020 (Idaho Ct. App. 1982), *aff'd*, 692 P.2d 345 (Idaho 1984), the plaintiff was injured when he drove his car at 55 miles per hour into the back of a parked car. *Id.* at 1022. Plaintiff sued pursuant to a strict products liability theory and argued that his injuries were enhanced as a result of a defective seat belt and energy-absorbing steering column. *Id.* at 1021. After the plaintiff presented his evidence, the trial court held that the plaintiff "had failed to make a prima facie case for en-

Jurisdictions adopting this approach generally look to the Tenth Circuit's decision in *Fox v. Ford Motor Co.*[155] for guidance. In *Fox*, two passengers in the rear seat of a Ford Thunderbird were killed when the car in which they were riding was struck head-on by another vehicle.[156] The plaintiffs brought a strict liability action against Ford Motor Co., alleging that both women sustained enhanced injuries because of defective seat belts and passenger compartment padding.[157] The jury found that the car was defective and that the defects were the proximate cause of death.[158] Accordingly, the jury awarded a judgment of $650,000 in favor of the plaintiffs.[159]

On appeal, the Tenth Circuit found that Wyoming would adopt the enhanced injury doctrine if presented with the question,[160] and then considered the application of that doctrine. The Tenth Circuit stated that the duty to prove enhanced damages is generally a "part of the plaintiff's responsibility to prove proximate cause, that is, that the defendant in such a case is liable only for those damages which are within the orbit of risk

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hancement of injuries" because he "had not proven what his injuries would have been if the seat belt and steering column had functioned properly." *Id.* at 1023.

On appeal, the Idaho Court of Appeals reversed the trial court and held that

> [i]f the defects are shown to be a substantial factor, then the burden of proving apportionment falls on the defendants. Where no apportionment is established, the plaintiff is entitled to recover fully from any defendant whose defective product was a substantial factor in producing the injuries. However, where the injuries are apportioned, the plaintiff is entitled to recover only for injuries in excess of those which probably would have occurred absent the defects.

Id. at 1024-25. The court then went on to find that, although the plaintiff had failed to specifically establish a causal connection between his injuries and the alleged defects in his car, he had presented sufficient evidence to support a legitimate inference that a causal relationship existed. *Id.* at 1025. Accordingly, he met his burden of establishing a prima facie case, and the trial court's directed verdict was reversed. *Id.* at 1025-26.

For other examples of decisions adopting this approach, see Mitchell v. Volkswagenwerk AG, 669 F.2d 1199 (8th Cir. 1982) (applying Minnesota law); Fox v. Ford Motor Co., 575 F.2d 774 (10th Cir. 1978) (interpreting Wyoming law); General Motors Corp. v. Edwards, 482 So. 2d 1176 (Ala. 1985); Lahocki v. Contee Sand & Gravel Co., 398 A.2d 490 (Md. Ct. Spec. App. 1979), *rev'd on other grounds*, 410 A.2d 1039 (Md. Ct. App. 1980); Blankenship v. General Motors Corp., 406 S.E.2d 781 (W. Va. 1991).

155. 575 F.2d at 774.
156. *Id.* at 777.
157. *Id.*
158. *Id.* at 788.
159. *Id.* at 777.
160. *Id.* at 781.

created by him."[161] Nevertheless, unlike the Third Circuit in *Huddell*, the Tenth Circuit could not

> see any difference between [an enhanced injury] case and the other case in which two parties, one passive, the other active, cooperate in the production of an injury. Each one's contribution in a causal sense must be established. Damages may be apportioned between the two causes if there are distinct harms or a reasonable basis for determining the causes of injury.[162]

Furthermore, the Tenth Circuit adopted a different position with regard to the divisibility of death. In the court's view, death "is not a divisible injury in which apportionment is either appropriate or possible."[163] The court stated that the Third Circuit's position in *Huddell* failed "to recognize that [a] wrongful death [action] is different from [a] cause of action for injuries, which has different elements and a different measure of damages such as pain and suffering."[164]

Finally, because it considered the apportionment issue irrelevant, the court approved the trial court's unwillingness to provide jury instructions on enhanced injuries and apportionment of damages between the first collision and defective design.[165]

> [T]he jury had found Ford liable for the deaths and thus there was little basis for contending that apportionment continued to be relevant. There is no evidence in the record, in any event, as to how much damage the collision produced assuming the decedents survived, but it is not only an impossible question to answer, it is a moot one, since Ford was adjudicated to have caused the deaths which produced the damages for which suit was brought. Since the damages were limited to those allowed under the wrongful death act and Ford was responsible for the deaths and the damages related to the deaths, no apportionment problem remained.[166]

In other words, the Tenth Circuit held that the proof offered by the plaintiffs establishing that the car's defects were the prox-

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161. *Id.* at 787.
162. *Id.*
163. *Id.* (citations omitted).
164. *Id.*
165. *Id.* at 787-88.
166. *Id.* at 788.

imate cause of death, and that the women would have survived absent those defects, was sufficient to impose liability upon the defendant.

In short, pursuant to the "substantial factor" approach, a plaintiff satisfies the burden of proving causation if the plaintiff shows that the defective product was a substantial factor contributing to the injury. Once the plaintiff has established a prima facie case, the defendant manufacturer is treated as a concurrent tortfeasor and is held jointly and severally liable. The defendant manufacturer may then attempt to limit its liability by apportioning divisible injuries between the first and second collisions. In the event the injuries are not divisible, the manufacturer is jointly and severally liable for the total injury—liability that is essentially absolute.

C. *Predicting the Future: Which Approach Will Utah Adopt?*

The Utah Supreme Court has not specifically addressed the second collision doctrine; thus, articulating a definitive rule of law for the State of Utah is impossible. There is little reason to doubt, however, that the Utah court will adopt the doctrine in some form or another. When *Larsen v. General Motors Corp.*[167] was decided, a line of authority originating in the Seventh Circuit's decision in *Evans v. General Motors Corp.*[168] essentially held that a manufacturer does not have a responsibility to foresee collisions in designing and building its product.[169] Since *Larsen*, however, the jurisdictions which embrace the *Evans* reasoning are becoming increasingly few in number.[170] Still, assuming that the Utah court will adopt some form of the second collision doctrine, the particular approach the court will take in applying that doctrine remains to be seen.

An initial question that the Utah court will face in the enhanced injury context is whether application of the enhanced injury doctrine is appropriate in strict products liability actions

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167. 391 F.2d 495 (8th Cir. 1968).

168. 359 F.2d 822 (7th Cir.), *cert. denied*, 385 U.S. 836 (1966), *overruled*, Huff v. White Motor Corp., 565 F.2d 104 (7th Cir. 1977).

169. *Id.* at 824.

170. *See* Levenstam & Lapp, *supra* note 123, at 61 nn.32-33 (noting only two jurisdictions adopting *Evans* since *Larsen* (however, those two have now adopted *Larsen* as well, *see* Blankenship v. General Motors Corp., 406 S.E.2d 781 (W. Va. 1991)), and listing 35 states and the District of Columbia as having affirmatively adopted *Larsen*).

or in negligence actions alone. While many jurisdictions apply the enhanced injury doctrine in the negligence context, some courts are hesitant to extend it to a strict liability setting—particularly if they are not required to do so.[171] Other courts view the enhanced injury doctrine as a particular species of products liability law[172] and never concern themselves with the appropriateness of extending liability for enhanced injuries in the strict products liability context.

As to the Utah court's treatment of this issue, it should be noted that the broad-based policy justifications underlying its extension of strict products liability in other areas are certainly broad enough to support the extension of such liability pursuant to an enhanced injury theory of recovery. Holding a product's manufacturer strictly liable for enhanced injuries caused by its products is certainly consistent with the "proposition that the cost of injuries caused by defective products" should be borne by the manufacturer profiting from their sale.[173] Likewise, liability for enhanced injuries promotes both the "production of safer products" and the public's interest in avoiding injuries "caused by defective goods."[174] Given this policy orientation, the Utah court will probably have little difficulty in applying both the enhanced injury doctrine and strict products liability within a single conceptual framework.

The more difficult question, of course, is where to place the burden of proof for the enhanced injuries. Which party will bear the burden of apportioning the injuries to the first and second collision and proving those injuries that are actually over and above what the plaintiff would have received absent the defective product? As stated earlier, the jurisdictions adopting the second collision doctrine split on this issue. The Utah Supreme Court, however, is likely to place that burden upon the plaintiff.

In jurisdictions requiring the defendant to apportion the injuries, the defendant in a second collision case is viewed as a

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171. *See* Fox v. Ford Motor Corp., 575 F.2d 774, 782 (10th Cir. 1978) (deciding it was unnecessary to determine whether strict liability applied to enhanced injury cases); *Larsen*, 391 F.2d at 503 n.5, 506 (stating that the duty in enhanced injury cases "should and can rest, at this time, on general negligence principles," and leaving the decisions as to strict liability open for states to decide on their own).

172. *See* Habecker v. Clark Equip. Co., 942 F.2d 210, 213 (3d Cir. 1991); General Motors Corp. v. Edwards, 482 So. 2d 1176, 1181 (Ala. 1985).

173. Berry v. Beech Aircraft Corp., 717 P.2d 670, 673 (Utah 1985).

174. *Id.*

concurrent tortfeasor. So long as the defects are a substantial factor contributing to the plaintiff's injuries, the manufacturer is liable for those injuries that its defective product caused. If the injuries the plaintiff receives are indivisible, then the manufacturer is held jointly and severally liable for the unfortunate consequences of the entire accident.[175]

This result is flatly inconsistent with the Utah comparative negligence statute, particularly in light of the fact that many second collisions are initiated by first collisions resulting from the negligent or reckless behavior of the party seeking recovery. Utah's comparative negligence statute provides that "no defendant is liable to any person seeking recovery for any amount in excess of the proportion of fault attributable to that defendant."[176] In other words, there is no joint and several liability for actions covered by that section. Moreover, because the section applies to any person seeking recovery, and because "a person seeking recovery" is defined as anyone "seeking damages or reimbursement on its own behalf, or on the behalf of another,"[177] it would clearly be applicable in an action for damages resulting from enhanced injuries caused by a defective product.[178]

Holding a manufacturer jointly and severally liable in an enhanced injury case involving indivisible injuries also violates the Utah court's position that manufacturers are not subject to absolute products liability.[179] Considering the court's predis-

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175. *See* discussion *supra* part IV.B.

176. UTAH CODE ANN. § 78-27-38 (1992).

177. *Id.* § 78-27-37(3).

178. *Id.* § 78-27-38. In fact, the Utah statutes governing comparative fault suggest that some form of the second collision doctrine may already be present in Utah law. The statutes define fault as any "act, or omission proximately causing or *contributing* to" a plaintiff's injury. UTAH CODE ANN. § 78-27-37(2) (1992) (emphasis added). The term "contributing" could be construed to include the enhancement of a particular injury. Accordingly, a plaintiff would only need to establish that a defective product "contributed" to her injury for the apportionment of fault to become an issue appropriate for jury deliberation. While apportioning fault is semantically different from apportioning injuries between first and second collisions, it probably makes little substantive difference. Because the party who must apportion fault would likely need to apportion injuries between the first and second collision to establish that a product defect was or was not a factor "contributing" to the user's injuries, the central issue is essentially the same. Hence, unless the court construes the term "contributing" so broadly that the defective product's manufacturer is liable simply because the product was somehow within the chain of causation, it will ultimately still be required to decide who bears the apportionment burden.

179. *See* Mulherin v. Ingersoll-Rand Co., 628 P.2d 1301, 1302 (Utah 1981); *see*

position against requiring a product's manufacturer to function as a virtual insurer of the product and its use,[180] it is unlikely that the court would extend absolute liability in the enhanced injury setting.

Finally, the policy arguments advanced in support of the "substantial factor" approach are not likely to be persuasive enough to draw the Utah court away from its established policy orientation. For example, in adopting the "substantial factor" approach, the Idaho Court of Appeals pointed out that the defendants in *Larsen* had opposed the enhanced injury doctrine because apportioning the damages between a first and second collision is difficult.[181] The court then noted language from *Larsen*, wherein the Eighth Circuit said:

> "This is no persuasive answer and, even if difficult, there is no reason to abandon the injured party to his dismal fate as a traffic statistic, when the manufacturer owed, at least, a common law duty of reasonable care in the design and construction of its product. The obstacles of apportionment are not insurmountable."[182]

The Idaho Court of Appeals does not explain, however, why this quote from *Larsen* requires the surmountable burden of apportionment to fall upon the defendant; nor does the court offer any policy justification for extending what amounts to absolute liability to defendant manufacturers when the injury is indivisible.

Furthermore, as noted earlier, second collision cases involve the apportionment between the injuries actually sustained and those that would have resulted absent the defect, not the apportionment of injuries actually received by the injured party.[183] A plaintiff upon whom the burden of apportionment falls in a second collision case is not required to divide an indivisible injury such as death; what the plaintiff is required to do is offer some evidence that establishes what injuries would have been received absent the design defect.

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also Reeves v. Gentile, 813 P.2d 111, 117 (Utah 1991) (refusing to disallow comparative negligence defense in dramshop case because it would result in absolute liability of dramshop defendants).

180. *Mulherin*, 628 P.2d at 1302. *See supra* text accompanying notes 86-87.

181. Fouche v. Chrysler Motors Corp., 646 P.2d 1020, 1024 (Idaho Ct. App. 1982), *aff'd*, 692 P.2d 345 (Idaho 1984).

182. *Id.* (quoting *Larsen*, 391 F.2d at 503).

183. Levenstam & Lapp, *supra* note 123, at 84.

While this suggests "proof" of a counter-factual hypothetical, it would be no less counter-factual if the defendant were required to "prove" it. In addition, absolute proof and precise detail as to the injuries is not required; the plaintiff need only establish the alternative injuries by a preponderance of the evidence.

Thus, given the policy orientation evidenced in recent decisions of the Utah Supreme Court and the likelihood that it will adopt the second collision doctrine in some form, the court will probably place the burden of apportioning injuries between the first and second collision squarely upon the plaintiff. However, it is possible that the Utah court will choose an alternative application, especially when one considers the substantial split of authority on the issue and the lack of any binding precedent to guide the court.

CONCLUSION

As noted at the outset, the Utah Supreme Court has adopted the strict products liability theory found in section 402A as the basic formulation of strict products liability law in Utah. For the most part, then, Utah strict products liability law essentially reflects the law from other jurisdictions adopting the section 402A formulation. In the absence of a contrary Utah decision that is directly on point, counsel should be be relatively safe in arguing the majority rule as set forth in the official comments accompanying section 402A.

There are, however, some variations and elaborations of section 402A in Utah law that should be particularly noted. First, pursuant to the Utah Court of Appeals decision in *Conger v. Tel Tech, Inc.*,[184] negligent installation of a non-defective product does not give rise to strict products liability in Utah.[185] Second, section 78-5-6(2) of the Utah Code appears to require factual inquiries into the subjective abilities and knowledge of a product's user in determining if the product is unreasonably dangerous. Third, pursuant to the unavoidably unsafe exception, the Utah Supreme Court has extended a blanket exemption from strict products liability for design defects in prescription drugs approved by the Food and Drug Administration. Finally, the comparative fault principles extended to strict products liability actions through the Utah

184. 798 P.2d 279 (Utah Ct. App. 1990).
185. *Id.* at 281-83.

court's decision in *Mulherin v. Ingersoll-Rand Co.*[186] and section 78-27-38 of the Utah Code may provide for defenses or immunities from strict products liability not recognized in other jurisdictions.

Additionally, while the Utah court is likely to adopt some form of the second collision doctrine, just how it will apply that doctrine is uncertain. Nevertheless, in light of the policy orientation exhibited in its recent decisions, the Utah court is most likely to place the burden of apportioning the damages between the first and second collision upon the plaintiff in a strict products liability action.

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186. 628 P.2d 1301 (Utah 1981).