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Products Liability--Autmomobile Manufacturers Are Strictly Liable in Tort for Defective Design Which Enhances Injuries in a Collision

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PRODUCTS LIABILITY — AUTOMOBILE MANUFACTURERS ARE STRICTLY LIABLE IN TORT FOR DEFECTIVE DESIGN WHICH ENHANCES INJURIES IN A COLLISION. *Perez v. Ford Motor Co.*, 497 F.2d 82 (5th Cir. 1974).

Plaintiff Perez and his daughter were seriously injured and his wife was killed when the passenger compartment of the pickup truck in which they were riding separated from the chassis and overturned after being struck from the rear by another automobile at a speed differential of approximately thirty miles per hour. In his action against the truck manufacturer Perez alleged that a design defect caused loss of control of the truck and thus compounded the injuries sustained by its passengers.[1]

The United States Court of Appeals for the Fifth Circuit reversed the trial court,[2] which had directed a verdict for the manufacturer on the grounds that, as a matter of law, a rear-end collision at a thirty miles an hour speed differential was not "normal use" of the vehicle.[3] After reviewing Louisiana case law the federal appellate court concluded that the "normal use" of a product must be determined by the injured party's actual use of it and not the effect of intervening forces upon that use.[4] The controlling fact was held to be the use to which the truck was being put at the time of the accident and not the accident itself.[5] Therefore, upon proper proof on remand, the plaintiff would be allowed to recover either under a theory of strict liability in tort or under a negligence theory.

While a growing number of jurisdictions have allowed recovery under general principles of negligence in so-called "second collision" cases, the *Perez* case added Louisiana to the few states holding automobile manufacturers strictly liable in tort for defective design which enhances injuries in a collision. Conversely, under the majority view no recovery can be had under any theory—whether negligence, breach of warranty or strict liability—where the defective design did not cause the initial accident. The jurisdictions adhering to this rule rely pri-

1. Perez v. Ford Motor Co., 497 F.2d 82, 84 (5th Cir. 1974).
2. Perez v. Ford Motor Co., No. C.A. 68-737 (E.D. La., Dec. 4, 1972).
3. 497 F.2d at 84.
4. *Id.* at 88.
5. *Id.* at 87.

marily on the leading case of *Evans v. General Motors Corp.*,[6] wherein it was reasoned that an automobile manufacturer is under no duty to make his automobile accident-proof,[7] that the intended purpose of an automobile does not include collisions with other vehicles,[8] and that it would be a legislative rather than a judicial function to require manufacturers to construct automobiles in which it would be safe to collide.[9] Some or all of these propositions were adopted by the courts in other jurisdictions in denying recovery in "second collision" cases.[10]

The Eighth Circuit in *Larsen v. General Motors Corp.*[11] rejected the "intended use" argument of *Evans* as too narrow and unrealistic and held injuries caused by defective design to be readily foreseeable as an incident to the normal and expected use of an automobile.[12] The court then stated an automobile manufacturer's duty in the following terms:

> We perceive of no sound reason, either in logic or experience, nor any command in precedent, why the manufacturer should not be held to a reasonable duty of care in the design of its vehicle consonant with the state of the art to minimize the effect of accidents. The manufacturers are not insurers but should be held to a standard of reasonable care in design to provide a reasonably safe vehicle in which to travel. . . .
>
> This duty of reasonable care in design rests on common law negligence that a manufacturer of an article should use reasonable care in the design and manufacture of his product to eliminate any unreasonable risk of foreseeable injury.[13]

It was at once apparent to the *Larsen* court that the accident-proof theory advanced in *Evans* was not really at issue and thus irrelevant,[14] and

6. 359 F.2d 822 (7th Cir.), *cert. denied*, 385 U.S. 836 (1966).
7. 359 F.2d at 824.
8. *Id.* at 825.
9. *Id.* at 824.
10. Schemel v. General Motors Corp., 384 F.2d 802 (7th Cir. 1967), *cert. denied*, 390 U.S. 945 (1968); Williams v. Cessna Aircraft Corp., 376 F. Supp. 603, 605 (N.D. Miss. 1974); McClung v. Ford Motor Co., 333 F. Supp. 17 (S.D. W. Va. 1971), *aff'd per curiam*, 472 F.2d 240 (4th Cir. 1973); 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); Frericks v. General Motors Corp., 20 Md. App. 518, 317 A.2d 494 (1974); General Motors Corp. v. Howard, 244 So. 2d 726 (Miss. 1971); Ford Motor Co. v. Simpson, 233 So. 2d 797 (Miss. 1970); Walton v. Chrysler Motor Corp., 229 So. 2d 568 (Miss. 1969). *See generally* Annot., 42 A.L.R.3d 560 (1972); Hoenig and Werber, *Automobile "Crashworthiness": An Untenable Doctrine*, 20 CLEV. ST. L. REV. 578 (1971).
11. 391 F.2d 495 (8th Cir. 1968).
12. *Id.* at 502.
13. *Id.* at 503 (footnote omitted).
14. *Id.* at 502. *See also* Comment, *Automobile Design Liability: Larsen v. General Motors And Its Aftermath*, 118 U. PA. L. REV. 299, 301 (1969).

that, despite General Motor's contention to the contrary,[15] the enactment of the National Traffic and Motor Vehicle Safety Act of 1966[16] did not have the effect of making safety standards in automobile design an exclusively legislative function.[17]

As has been mentioned above, the jurisdictions which adopted the *Larsen* approach as the more persuasive one, have generally based the manufacturer's liability in "second collision" cases on negligence principles.[18] However, the *Larsen* opinion had expressly left open the possibility for each state to supplement common law negligence liability with strict liability in tort.[19] Some of the cases following *Larsen* did then in fact extend the application of strict liability to actions based on enhanced injuries caused by defective design.[20] It is worthwhile to note that most of the jurisdictions in which these cases were decided had previously recognized a theory of strict liability in tort in the products liability field based either on case law—as is true in the instant case—or on *Restatement (Second) of Torts*, section 402A (1965).[21]

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15. 391 F.2d at 506.

16. 15 U.S.C. § 1381 *et seq.* (1970).

17. 391 F.2d at 506.

18. Dreisonstok v. Volkswagenwerk, A.G., 489 F.2d 1066 (4th Cir. 1974); Bremier v. Volkswagen of America, Inc., 340 F. Supp. 949 (D.D.C. 1972); Grundmanis v. British Motor Corp., 308 F. Supp. 303 (E.D. Wis. 1970); Dyson v. General Motors Corp., 298 F. Supp. 1064 (E.D. Pa. 1969); Mieher v. Brown, 3 Ill. App. 3d 802, 278 N.E.2d 869 (1972); Volkswagen of America, Inc. v. Young, 272 Md. 201, 321 A.2d 737 (Ct. App. 1974); Bolm v. Triumph Corp., 33 N.Y.2d 151, 305 N.E.2d 769 (Ct. App. 1973); Mickle v. Blackmon, 252 S.C. 202, 166 S.E.2d 173, 42 A.L.R.3d 525 (1969). *See generally* Annot., 42 A.L.R.3d 560 (1972); Katz, *Liability of Automobile Manufacturers for Unsafe Design of Passenger Cars*, 69 HARV. L. REV. 863 (1956); Nader and Page, *Automobile Design and the Judicial Process*, 55 CAL. L. REV. 645 (1967); Sklaw, *"Second Collision" Liability: The Need For Uniformity*, 4 SETON HALL. L. REV. 499 (1973); Wade, *On the Nature of Strict Tort Liability For Products*, 44 MISS. L.J. 825 (1973); Note, *"Intended Use" And The Unsafe Automobile: Manufacturers' Liability For Negligent Design*, 28 MD. L. REV. 386 (1968); Comment, *Automobile Design Liability: Larsen v. General Motors And Its Aftermath*, 118 U. PA. L. REV. 299 (1969); 24 VAND. L. REV. 862 (1971).

19. 391 F.2d at 503 n.5.

20. Turcotte v. Ford Motor Co., 494 F.2d 173 (1st Cir. 1974) (*construing* Rhode Island law); Passwaters v. General Motors Corp., 454 F.2d 1270 (8th Cir. 1972) (*construing* Iowa law); Dyson v. General Motors Corp., 298 F. Supp. 1064 (E.D. Pa. 1969) (*construing* Pennsylvania law); Culpepper v. Volkswagen of America, Inc., 33 Cal. App. 3d 510, 109 Cal. Rptr. 110 (Dist. Ct. App. 1973); Badorek v. General Motors Corp., 11 Cal. App. 3d 902, 90 Cal. Rptr. 305 (Dist. Ct. App. 1970); Brandenburger v. Toyota Motor Sales, U.S.A., Inc., 513 P.2d 268 (Mont. 1973); May v. Portland Jeep, Inc., 265 Or. 307, 509 P.2d 24 (1973); Baumgardner v. American Motors Corp., 83 Wash. 2d 751, 522 P.2d 829 (1974); Seattle-First Nat'l Bank v. Volkswagen of America, Inc., 11 Wash. App. 800, 525 P.2d 286 (1974).

21. RESTATEMENT (SECOND) OF TORTS § 402A (1965) provides:

> Special Liability of Seller of Product for Physical Harm to User or Consumer
>
> (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

Although *Perez* is merely another case extending the *Larsen* approach to the strict liability area, it does have significance especially when considered with a view towards Oklahoma law. First of all, the instant case, taken together with similar decisions over the past few years,[22] seems to confirm the existence of a slight judicial trend in favor of allowing recovery in "second collision" cases on the basis of strict liability, where that theory is already being recognized. The Oklahoma Supreme Court in *Kirkland v. General Motors Corp.*[23] adopted the strict liability in tort doctrine for Oklahoma under the name of "Manufacturers' Products Liability."[24] The standard of proof announced in the *Kirkland* case[25] is very similar to the one outlined in *Perez*,[26] differences in the language employed by the courts notwithstanding.

While Oklahoma has joined the jurisdictions allowing recovery under a strict liability doctrine upon proper proof, its supreme court has not had occasion to decide a controversy involving enhanced injuries caused by defective design. However, the Tenth Circuit, construing Oklahoma law in *Marshall v. Ford Motor Co.*,[27] although affirming a jury verdict in favor of the defendant manufacturer, took notice of the fact that the trial court[28] by its instructions had held the automobile manufacturer to strict liability for a defective product unreasonably

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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.

22. *See* cases cited notes 18 & 20 *supra.*

23. 521 P.2d 1353 (Okla. 1974).

24. *Id.* at 1361.

25. *Id.* at 1363. The Oklahoma court stated the proof requirements as follows:

First of all Plaintiff must prove that the product was the cause of the injury; the mere possibility that it might have caused the injury is not enough.

Secondly, Plaintiff must prove that the defect existed in the product, if the action is against the manufacturer, at the time the product left the manufacturer's possession and control. . . .

Thirdly, Plaintiff must prove that the defect made the article unreasonably dangerous to him or to his property . . . .

26. 497 F.2d at 86. The Fifth Circuit extracted the following standard of proof from Louisiana case law:

The plaintiff first must prove that the manufacturer's product was defective. In order to establish defectiveness, the plaintiff must show that the product was in normal use and that the product was unreasonably dangerous in that use. After proving that the product was defective for normal use, the plaintiff must then show that his injuries were caused by the defect.

27. 446 F.2d 712 (10th Cir. 1971).

28. Marshall v. Ford Motor Co., No. 69-C-57 (N.D. Okla., Apr. 7, 1970).

dangerous to the user.[29] The plaintiff alleged defective design based on the manufacturer's failure to provide a lock or catch on the folding back of a split front seat. Upon collision, a rear passenger was thrown against the folding back of the right front seat, and, since the plaintiff was restrained by his seat belt, his body was compressed by the intensity of the impact resulting in personal injuries. Although it was not alleged that the claimed design defect caused the initial accident but merely that it enhanced the plaintiff's injuries, the appellate court held that it was for jury determination whether defective design proximately caused the injuries to the plaintiff.[30]

Impliedly then at least, *Marshall* seems to follow *Larsen* rather than *Evans* and could be taken as an indication that Oklahoma may adopt the *Larsen* approach once the "second collision" issue presents itself to its courts in a proper case. The following concurring opinion from *Escola v. Coca-Cola Bottling Co.*,[31] as quoted with approval in *Kirkland*, is indicative of the overall progressive spirit in recent Oklahoma products liability cases:[32]

> It is to the public interest to discourage the marketing of products having defects that are a menace to the public. If such products nevertheless find their way into the market it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the market. *However intermittently such injuries may occur and however haphazardly they may strike*, the risk of their occurrence is a constant risk and a general one. Against such a risk there should be general and constant protection and the manufacturer is best situated to afford such protection.[33]

If an attempt be made to select the decisive factor from the rationale underlying the various products liability cases involving enhanced injuries caused by defective design, that factor would have to be the interpretation of "intended purpose" or "normal use." It is the portion of the *Perez* opinion dealing with this issue which may provide a useful guideline for future Oklahoma decisions in this area. A comparison

29. 446 F.2d at 715. This was three years before the Oklahoma Supreme Court adopted strict liability in tort in the *Kirkland* case.

30. 446 F.2d at 715.

31. 24 Cal. 2d 453, 150 P.2d 436 (1944).

32. Moss v. Polyco, Inc., 522 P.2d 622 (Okla. 1974); Kirkland v. General Motors Corp., 521 P.2d 1353 (Okla. 1974).

33. 24 Cal. 2d at —, 150 P.2d at 441 (emphasis added). In *Kirkland* the quote appears in 521 P.2d at 1362.

between Louisiana case law relative to "normal use" as examined in *Perez*[34] and corresponding Oklahoma cases[35] reveals that abnormal use is a complete defense which will defeat recovery in both jurisdictions but no precise definition as to what constitutes "normal use" can be ascertained. It is submitted that the *Perez* court's "normal use" interpretation in regard to "second collision" liability[36] is entirely consistent with Oklahoma's "Manufacturers' Products Liability" doctrine and Oklahoma case law in the products liability field. It should, therefore, obtain in Oklahoma as well, with the result of allowing recovery under theories of negligence and strict liability for enhanced injuries caused by defective design once that issue is properly before the Oklahoma courts.

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34. 497 F.2d 82, 85-87. The court specifically considered Weber v. Fidelity & Casualty Ins. Co., 259 La. 599, 250 So. 2d 754 (1971) and Williams v. Allied Chemical Corp., 270 So. 2d 157 (La. Ct. App. 1972).

35. *See, e.g.*, Helene Curtis Industries, Inc. v. Pruitt, 385 F.2d 841, 859 (5th Cir. 1967) (*construing* Oklahoma law); McCready v. United Iron & Steel Co., 272 F.2d 700, 703 (10th Cir. 1959) (*construing* Oklahoma law); Pryor v. Lee C. Moore Corp., 262 F.2d 673, 674 (10th Cir. 1958) (*construing* Oklahoma law); Marker v. Universal Oil Products Co., 250 F.2d 603, 606 (10th Cir. 1957) (*construing* Oklahoma law); Kirkland v. General Motors Corp., 521 P.2d 1353, 1366 (Okla. 1974); Royse v. Stine, 473 P.2d 923, 925 (Okla. 1970); Barnhart v. Freeman Equipment Co., 441 P.2d 993, 999 (Okla. 1968); Crane Co. v. Sears, 168 Okla. 603, 608-09, 35 P.2d 916, 922 (1934).

36. *See* text accompanying notes 4 & 5 *supra*.