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Products Liability - Second Collision - Enhanced Injuries - Apportionment of Damages

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PRODUCTS LIABILITY—SECOND COLLISION—ENHANCED INJURIES—APPORTIONMENT OF DAMAGES—The United States Court of Appeals for the Third Circuit has held that when a driver of an automobile is injured by a "second collision" with a defectively designed automobile headrest caused by a collision with another car whose driver was negligent, the plaintiff has the burden of showing how the damages should be apportioned between the manufacturer of the headrest and the negligent driver.

Huddell v. Levin, 537 F.2d 726 (3d Cir. 1976).

On March 24, 1970, Dr. Benjamin Huddell was driving his car, manufactured by defendant General Motors Corporation (GM), across the Delaware Memorial Bridge between New Jersey and Delaware. Before he got across the bridge, his car ran out of gasoline, came to a stop,[1] and defendant George Levin's[2] car crashed into its rear.[3] Huddell died from brain injuries caused when the force of the collision threw his head against his car's headrest.[4]

In an action for wrongful death,[5] Mrs. Huddell alleged that GM was strictly liable for defectively designing the headrest,[6] and that

1. Huddell remained in his seat with the safety belt fastened, turned on the hazard warning lights, and placed the car in park. Huddell v. Levin, 537 F.2d 726, 732 (3d Cir. 1976).

2. Levin was acting in the course of his employment for S. Klein Department Stores, Inc. (Klein), also a defendant in the case. *Id.* at 732.

3. Levin's speed was estimated at 50 miles per hour by his expert witness, 60 miles per hour by the plaintiff's expert, and 68.5 miles per hour by GM's expert. The impact of the collision caused Huddell's stationary automobile to accelerate to a speed of 31.7 miles per hour. *Id.* The force of the collision so crushed the car that the rear passenger seat was pushed nearly to the back of the front seat. The entire rear passenger compartment was crushed, and Huddell's car was compacted to nearly five feet less than its original length. Brief for Appellant General Motors Corp. at 9, 10, Huddell v. Levin, 537 F.2d 726 (3d Cir. 1976).

4. An autopsy performed within two and one-half hours of Huddell's death revealed "extensive fracture" to the occipital (rear) region of the decedent's skull. This fracture resulted from the impact with the headrest. The frontal region of Dr. Huddell's brain was also extensively damaged from a medical phenomenon known as "contrecoup," by which the brain of a moving head striking a stationary object sustains injury opposite the point of the impact. Huddell otherwise sustained only superficial injuries, there being no damage whatsoever to the neck, skeletal or internal organs. 537 F.2d at 732.

5. Jurisdiction was based on diversity of citizenship. *See* Huddell v. Levin, 395 F. Supp. 64 (D.N.J. 1975).

6. The plaintiff contended the headrest consisted of "a sharp edge of unyielding metal" covered with soft foam, and was defectively designed. She asserted that in anything but a minor impact, the foam would collapse, exposing the head to the "ax-like" metal plate, and concentrating the force of the impact on one small portion of the skull. The plaintiff's expert witness gave uncontradicted testimony that the accident would have been survivable had the

Levin was liable for driving negligently.[7] The jury found that the headrest was defectively designed and entered a judgment against GM. In answer to special interrogatories, the jury found that Levin was negligent, but that his conduct was not a proximate cause of death.[8] The district court entered judgment against Levin[9] notwithstanding the verdict.[10] All defendants appealed to the Court of Appeals for the Third Circuit.

Judge Aldisert, writing for the court and applying New Jersey law, vacated the judgments entered by the district court and ordered a new trial.[11] He interpreted the state's law[12] to require, in an orthodox products liability case, proof of a defective product causing injury.[13] In a second collision case alleging defective design by an automobile manufacturer, however, the court interpreted New Jersey law to require the plaintiff to apportion the damages between the two defendants by proving for which portion of the damages each was responsible. In order to do this, the court stated, the plain-

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restraint been designed and built with a larger surface so as to spread the focus of the impact over a larger area of the skull. Brief for Appellee at 6, 8, 9, Huddell v. Levin, 537 F.2d 726 (3d Cir. 1976).

GM based its defense at trial on testimony which allegedly proved that Huddell's head never hit the restraint. It noted that three of the plaintiff's experts testified that approximately 1,500 pounds of force per square inch would have been required to cause the skull fracture. GM's expert testified that tests he performed revealed that only 180-230 pounds of force per square inch would deform the front interior metal of the head restraint. Since the restraint was not deformed, GM concluded that Huddell's head did not hit the restraint but the metal above the crushed vehicle's rear window which contained a depression similar to that caused by a human dummy skull in tests GM performed. The court expressed "uneasiness" about the jury's finding that Huddell's head hit the restraint, but found there was enough evidence to support the jury's decision. 537 F.2d at 736.

7. Levin's employer, Klein, was also joined as a defendant on the theory of respondeat superior. 395 F. Supp. at 69.

8. *Id.*

9. The jury had also found in favor of Klein. The court of appeals cited the jury's findings in favor of Klein and Levin, yet against GM, as the result of confusing and incorrect jury instructions. This was one of the reasons for reversal. 537 F.2d at 739-41.

10. Judgment notwithstanding the verdict was also ordered against Klein. The circuit court observed that it was implicit in the district court's judgment notwithstanding the verdict that the jury, once having found Levin negligent, could not properly conclude that his acts were not a proximate cause of Huddell's death. 537 F.2d at 741.

11. *Id.* at 744.

12. Judge Aldisert noted that the court was required to apply New Jersey law, but was "without the specific guidance of viable New Jersey precedents. This appeal requires us to predict how the New Jersey Supreme Court would react when presented with novel and difficult questions of tort law." *Id.* at 733.

13. *Id.* at 737.

tiff must show: (1) there existed an alternative design that was safer, yet practical; (2) what enhanced injuries would have occurred had this safer design been used; and (3) a method of establishing the extent of these enhanced injuries.[14] The plaintiff in this case had not met the last two requirements—she failed to show both the existence and extent of enhanced injuries.[15]

It was apparent the court had reservations about applying this three-step rule; Judge Aldisert expressed the belief that the second collision theory of liability required fresh legal thinking.[16] He mentioned that upon retrial, the district court may request the parties to consider whether the New Jersey Supreme Court would be receptive to an apportionment rule similar to the one adopted by New York courts.[17] The rule states that where a third party is found to have been responsible for a part, but not all, of the damages for which the primary defendant is held liable, the primary defendant may recover that portion of the damages from the third party. This requires an apportionment of responsibility. It is a question of fact which may be adjudicated in a separate action, or as a separate issue by joining the third party as defendant.[18] Judge Aldisert reasoned that as applied to the second collision cases,[19] the rule would

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14. *Id.* at 737-38.

15. The court stated:

> Without proof to establish what injuries would have resulted from a non-defective head restraint, the plaintiff could not and did not establish what injuries resulted from the alleged defect in the head restraint. Without such proof, the jury could not have properly have [*sic*] assessed responsibility against G.M. for the death of Dr. Huddell.

Id. at 738.

16. *Id.* at 742.

17. *See* notes 18-20 *infra.* Even if the parties agreed the New Jersey Supreme Court would be receptive to the New York rule, it is not certain the federal court would have the power to declare it applicable. Judge Aldisert, bothered by the "constraints" placed on the federal system, noted that he was placed in the position of having to make a prediction of state law without guidance from state precedents. 537 F.2d at 733. *See* note 12 *supra.*

18. *See* Dole v. Dow Chem. Co., 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972), in which plaintiff's decedent, following orders from his employer, entered a grain elevator which had been recently fumagated with Dow's highly poisonous gas. Plaintiff's suit was based on the negligently insufficient warnings given by Dow. Dow, in turn, sought to join the plaintiff's employer. Dow alleged that the employer had received sufficient warnings from Dow, but did not follow them. Both Dow and the employer were found liable and the court invoked the "apportionment according to responsibility" rule. *See also* Kelly v. Long Island Lighting Co., 31 N.Y.2d 25, 286 N.E.2d 241, 334 N.Y.S.2d 851 (1972) (applying the rule to cross-claims among co-defendants).

19. The New York rule has only been applied to cases involving the common law distinction between active and passive negligence and not second collision cases. Without explaining why, Judge Aldisert stated that the second collision area was sui generis. 537 F.2d at 742.

require the defendants to apportion the damages, thus lessening the plaintiff's burden of demonstrating which injuries would have been suffered had a properly designed headrest been installed.[20]

In a concurring opinion, Judge Rosenn argued that the burden of apportioning damages should shift to the defendants once the plaintiff has proved a prima facie case against both. In reaching this conclusion, he looked beyond New Jersey law to general tort law regarding joint tort-feasors,[21] concurrent tort-feasors,[22] and multiple automobile collisions,[23] and ascertained a rationale that defendants should not escape liability because the innocent plaintiff cannot prove which defendant caused which portion of his injury.[24] Analogizing this to a second collision situation,[25] Judge Rosenn reasoned

20. Under the New York rule, the plaintiff's rights are not affected by the apportionment process. The *Huddell* court apparently determined that since the primary defendant is potentially liable for all of the plaintiff's injuries, it does not make sense to require the plaintiff to prove the case against the other defendant. *See* note 45 and accompanying text *infra.*

21. Judge Rosenn quoted Judge Learned Hand in Navigazione Libera T.S.A. v. Newtown Creek Towing Co., 98 F.2d 694, 697 (2d Cir. 1938): "[T]he law imposes upon each tortfeasor the impossible burden of proof, contenting itself with limiting the injured person's total recovery to one indemnity. . . . Let [each tort-feasor] unravel the casuistries resulting from his wrong." 537 F.2d at 744 (concurring opinion).

22. As illustrative of the law surrounding concurrent tort-feasors, Judge Rosenn cited Bowman v. Redding & Co., 449 F.2d 956 (D.C. Cir. 1971) (plaintiff killed in fall for which two defendants held liable, one for negligently helping to operate a hoist and the other for violating safety regulations), and Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948) (plaintiff hit by one of two defendants who shot in same direction). He also cited the Second Restatement of Torts which states:

> Where the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon each such actor to prove that he has not caused the harm.

RESTATEMENT (SECOND) OF TORTS § 433B(3) (1965).

23. As illustrative of the law in this area, Judge Rosenn cited Hill v. Macomber, 103 N.J. Super. 127, 246 A.2d 731 (1968) (plaintiff's car hit twice in rapid succession, producing indivisible injuries).

24. Judge Rosenn stated that New Jersey courts have adopted this rationale. As an example of how far courts are willing to protect the innocent plaintiff, he cited Anderson v. Somberg, 67 N.J. 291, 338 A.2d 1 (1975) (plaintiff injured while being operated on due to negligence of either hospital staff, defect in instrument, or some other unknown cause; burden shifted to defendants to prove who is not the wrongdoer). Judge Rosenn believed the reason for the rule was to protect the plaintiff, since without the rule, if he failed in his burden against any one defendant, it would free both from liability. 537 F.2d at 744.

Judge Aldisert disagreed with this assumption, and the two judges' disagreement over this point was a major reason for the difference in their analyses. *See* note 45 and accompanying text *supra.*

25. Judge Rosenn noted that several courts and commentators have supported the idea that the plaintiff's burden of apportionment should be relaxed in cases involving multiple

that once the plaintiff has shown a defect had caused an "otherwise survivable accident" to be fatal, the burden of apportionment should shift to the defendants.[26] Since the plaintiff in *Huddell* introduced uncontroverted expert testimony that the accident would have been survivable but for the defective headrest, the burden of apportionment should have been shifted to the defendants.[27]

Second collision automobile injuries are those that occur when as the result of the force of a collision of one car with another, a passenger is thrown against some part of the inside of his car, sustaining injury. It has only been since 1960 that courts have begun to hold manufacturers of defectively designed products[28] liable for these second collision injuries[29] and much controversy still exists.[30] Some

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wrongdoers, including second collision cases. *See e.g.*, Turcotte v. Ford Motor Co., 494 F.2d 173 (1st Cir. 1974); Larsen v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968); Kelly v. Long Island Lighting Co., 31 N.Y.2d 25, 286 N.E.2d 241, 334 N.Y.S.2d 851 (1972); Dole v. Dow Chem. Co., 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972); Ausubel, *The Impact of New York's Judicially Created Loss Apportionment Amongst Tortfeasors,* 38 ALB. L. REV. 155 (1974); Nader & Page, *Automobile Design and the Judicial Process,* 55 CALIF. L. REV. 645 (1967) [hereinafter cited as Nader & Page]; Sklaw, *"Second Collision" Liability: The Need for Uniformity,* 4 SETON HALL L. REV. 499 (1973) [hereinafter cited as Sklaw].

26. "Otherwise survivable accident" means the plaintiff must prove that the collision would have been survivable if the part of the car defectively designed had been designed correctly. This requires proof of an alternative design that is safer and practical. *See* 537 F.2d at 747 (Rosenn, J., concurring).

27. *Id.*

28. Presumably, the manufacturer has the "deeper pocket" and is therefore a more desirable defendant than the negligent driver. In *Huddell,* Levin was acting in the scope of his employment for Klein, once a successful chain store operation. Klein, however, a subsidiary of McCrory Corporation, was in deep financial trouble at the time of trial.

29. *See e.g.*, Larsen v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968). *See generally* Annot., 42 A.L.R.3d 560, 564 n.6 (1972).

30. The seminal case holding the manufacturer liable for second collision injuries is Larsen v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968). There, the plaintiff alleged negligence on the part of the defendant manufacturer in designing a steering column extending 2.7 inches beyond the frontmost point of the front tires. As a result of this design, in a severe head-on collision the entire steering mechanism was thrust backwards into the plaintiff-driver, injuring him. The plaintiff contended that the injuries would not have occurred had the car been properly designed. The district court granted summary judgment for the manufacturer. The court of appeals reversed:

> We think the "intended use" construction urged by General Motors is much too narrow and unrealistic. Where the manufacturer's negligence in design causes an unreasonable risk to be imposed upon the user of its products, the manufacturer should be liable for the injury caused by its failure to exercise reasonable care in the design. These injuries are readily foreseeable as an incident to the normal and expected use of an automobile. While automobiles are not made for the purpose of colliding with each other, a frequent and inevitable contingency of normal automobile use will result in collisions and injury-producing impacts. . . . The sole function of an automobile is

courts, focusing on causation, are reluctant to hold the manufacturer liable, reasoning that the defect involved in the "second collision" did not cause the accident.[31] Others have reasoned that the manufacturer is not under a duty to build a crash-proof vehicle,[32] or that collisions are not an intended use of the car and therefore the defendant manufacturer cannot be held liable.[33]

Following the Eighth Circuit's decision in *Larsen v. General Motors Corp.*,[34] some courts have held the manufacturer liable,[35] rea-

> not just to provide a safe means of transportation, it is to provide a means of safe transportation or as safe as is reasonably possible under the present state of the art.

Id. at 502. *See also* Perez v. Ford Motor Co., 497 F.2d 82 (5th Cir. 1974) (normal use of a pick-up truck broad enough to include 30 mile per hour collision, and manufacturer not free from liability as a matter of law); Turcotte v. Ford Motor Co., 494 F.2d 173 (1st Cir. 1974) (defendant manufacturer liable for injuries caused by gas tank design allowing for an unreasonable risk of explosion in a rear-end collision); Anton v. Ford Motor Co., 400 F. Supp. 1270 (S.D. Ohio 1975) (manufacturer liable for defectively designed gasoline tank and rear bumper allowing tank to rupture upon collision).

A case often cited in support of the nonliability of the manufacturer in second collision cases is Evans v. General Motors Corp., 359 F.2d 822 (7th Cir.), *cert. denied*, 385 U.S. 836 (1966). In *Evans*, the defendant manufacturer designed its 1961 Chevrolet station wagons with an "X" frame. While driving this model car through an intersection, plaintiff's decedent was hit broadside in the driver's door by another vehicle. The car collapsed inward, killing the driver. The plaintiff theorized that the design of the frame was negligent because it would not sustain a collision of this type, even though the result was foreseeable to the manufacturer. The court did not agree, stating "a manufacturer is not under a duty to make his automobile accident-proof or fool-proof. . . . The intended purpose of an automobile does not include its participation in collisions with other objects, despite the manufacturer's ability to foresee the possibility that such collisions may occur." *Id.* at 824-25. *See also* Yetter v. Rajeski, 364 F. Supp. 105 (D.N.J. 1973) (manufacturer had no duty to design nonrigid or collapsible steering column for the purpose of reducing injuries in a head-on collision in which decedent was thrust against the steering wheel); Alexander v. Seaboard Air Line R.R., 346 F. Supp. 320 (W.D.N.C. 1971) (manufacturer not liable for design of gasoline tank cap that would fly off, nor for gasoline tank that would crush upon collision); Shumard v. General Motors Corp., 270 F. Supp. 311 (S.D. Ohio 1967) (no duty to design automobile that would be fireproof upon collision and explosion); Hoenig & Geotz, *A Rational Approach to "Crashworthy" Automobiles: The Need for Judicial Responsibility*, 6 Sw. U.L. Rev. 1 (1974) [hereinafter cited as Hoenig & Geotz]; Hoenig & Werber, *Automobile "Crashworthiness": an Untenable Doctrine*, 20 Clev. St. L. Rev. 578 (1971).

31. *E.g.*, Walton v. Chrysler Motor Corp., 229 So. 2d 568, 572 (Miss. 1969) (plaintiff injured when, in a rear-end collision, seat back broke and fell backwards, causing plaintiff to fall to prone position and be thrust into steering wheel).

32. *See, e.g.*, Evans v. General Motors Corp., 359 F.2d 822, 824 (7th Cir.), *cert. denied*, 385 U.S. 836 (1966).

33. *Id.* at 825.

34. 391 F.2d 495 (8th Cir. 1968).

35. Many commentators have expressed the belief that *Larsen* will begin a trend in this area. For example, Dean Prosser has stated:

> The current lively controversy . . . is over whether the maker is under a duty to

soning that the collision, although not an intended use, is nonetheless foreseeable and something the manufacturer has a duty to reasonably guard against.[36] Once it is established in a jurisdiction that the manufacturer may be held liable in these circumstances,[37] it is generally accepted that the manufacturer is liable only for the enhanced injuries resulting from the second collision.[38] Liability extends only to those injuries for which the manufacturer was strictly liable because of its defectively designed and unreasonably dangerous product. If the plaintiff proves that the driver of the other car was negligent and that the manufacturer was strictly liable, it must then be determined for what part of the total injuries each tort-feasor was responsible. Three possible methods for such apportionment emerge from the majority and concurring opinions in *Huddell*.

The first approach, adopted by the majority, places the burden of apportionment entirely on the plaintiff. In order to prove the manufacturer liable, the plaintiff must show a defect, an alternative design that is safer yet practical, and, most importantly, what injuries would have occurred had this alternative design been used.[39]

> make the car "crashworthy," or in other words, to prevent injury from what has been called the "second collision," when the plaintiff comes into contact with some part of the automobile after the crash. The greater number of decisions have denied any duty to protect against the consequences of collisions, on the rather specious ground that collision is not the intended use of the car, but is an abnormal use which relieves the maker of responsibility. It is, however, clearly a foreseeable danger arising out of the intended use; and it cannot be expected . . . to hold. In a small number of late decisions, the duty has been recognized, and the driver or passenger has been allowed to recover.

W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 96, at 646 (4th ed. 1971). Since this writing, the cases demonstrate that Dean Prosser's view was apparently correct; the *Larsen* approach now appears to have become the majority position. *See* Huddell v. Levin, 395 F. Supp. 64 (D.N.J. 1975); 1 R. HURSH & H. BAILEY, AMERICAN LAW OF PRODUCTS LIABILITY § 1:31 (2d ed. 1974); Sklaw, *supra* note 25.

36. *See* 391 F.2d at 503.

37. Where strict liability in tort has been adopted by the jurisdiction, it is generally the best theory upon which to bring the case. *See* Sklaw, *supra* note 25, at 517, 519-20 (tracing the transition from negligence to strict liability). *See generally* Annot., 42 A.L.R.3d 560 (1972).

38. As the *Larsen* court observed:

> Any design defect not causing the accident would not subject the manufacturer to liability for the entire damage, but the manufacturer should be liable for that portion of the damage or injury caused by the defective design over and above the damage or injury that probably would have occurred as a result of the impact or collision absent the defective design.

391 F.2d at 503. *See also* Nader & Page, *supra* note 25, at 658; 118 U. PA. L. REV. 299, 303 (1969).

39. *See* note 14 and accompanying text *supra*. In *Huddell*, the plaintiff's alternative

This rule finds support in the court's reading of the Federal District Court for the District of New Jersey's decision in *Yetter v. Rajeski*,[40] where, "enhanced injuries" were defined as those injuries that did occur over those that would have occurred had the plaintiff's alternative design been used in place of the defective design causing the injury.[41] Applying this interpretation of New Jersey law in *Huddell*, Judge Aldisert read it to require the three-step apportionment formula.

The second theory, the New York rule,[42] shifts the burden of apportionment to the defendants once both are proven to be wrongdoers. Although Judge Aldisert implied that this rule could be used in *Huddell*, he did not say how it would apply, nor what effect, if any, it would have on the case. He did not say what burden of proof must be met for manufacturer liability. Presumably, the burden would be the same as under the *Huddell* majority's approach, since there is no apparent reason why the requirement of proof should be lighter simply because it rests on a co-defendant rather than a plaintiff. But under this rule, the primary defendant, rather than the plaintiff, would have to satisfy the three-step apportionment test.

A third formulation, espoused by Judge Rosenn, would shift the burden from the plaintiff once he proves both defendants are wrongdoers and the accident would have been survivable but for the manufacturer's defective design.[43] Most importantly, it would remove the requirement that the plaintiff or either defendant prove what injuries would have resulted from the use of the alternative design. This theory employs a definition of "enhanced injuries" differing from that used in the majority and New York theories. Enhanced injuries are those that did occur over those that resulted from the

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design broadened the headrest's area of impact on the metal brace. Brief for Appellee at 6, 8, 9, Huddell v. Levin, 537 F.2d 726 (3d Cir. 1976). If, using this alternative, it could be proven that serious brain injury or death would have resulted, the plaintiff's recovery against General Motors would have been little or nothing.

40. 364 F. Supp. 105 (D.N.J. 1973).

41. In *Yetter*, the court stated: "[W]hen we are dealing with a claim for enhanced injuries, it is absolutely necessary that the jury be presented with some evidence as to the extent of injuries, if any, which would have been suffered by [the plaintiff] had the plaintiff's hypothetical design been installed . . . ." *Id.* at 109.

42. *See* notes 18-20 and accompanying text *supra*.

43. *See* note 26 *supra*. Judge Rosenn distinguished *Yetter* since there the plaintiff had failed to prove the accident was survivable absent the defect. Also, the plaintiff had settled with the primary defendant, who was no longer a party to the action. 537 F.2d at 747.

first collision alone,[44] without considering what effect the alternative design would have had.

The crux of the difference between the majority and New York approaches on the one hand, and the Rosenn approach on the other, is the potential liability of the defendants. In the first two, the negligent driver is potentially liable for the whole of the injuries,[45] while the manufacturer is potentially liable only for the enhanced injuries arising from the second collision. The plaintiff is limited to a single recovery. This necessarily implies that the manufacturer and primary defendant are not potentially liable for the same or equal parts of the plaintiff's injuries since at most, the manufacturer could be held liable only for the enhanced injuries. The negligent driver, in contrast, is potentially liable for all the injuries, unless the plaintiff under the majority approach, or primary defendant under the New York rule, meets the difficult burden of apportioning the damages. If that burden is met, the primary defendant is freed of responsibility only for the enhanced injuries attributable to the second collision.[46] Because of the differing degrees of potential liability, these theories require that the three-step apportionment formula be met before the manufacturer can be held liable.

A possible shortcoming of the majority approach lies in the speculative nature of the plaintiff's claim to damages; it is a well-settled rule that for damages to be recoverable, they cannot be speculative.[47] Yet the plaintiff under the majority formula is forced to devise some method of proving what injuries would have occurred had an alternative, safer design been used. Although such a method is

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44. This definition is consistent with the one given by the *Larsen* court. *See* note 38 *supra*. The *Larsen* court defined enhanced injuries as those injuries caused by the defective design over those that would have occurred as a result of the collision absent the defective design. 391 F.2d at 503. This does not require a showing of what injuries would have occurred had the alternative design been used. Some writers, however, have read *Larsen* to require such a finding. *See* Hoenig & Geotz, *supra* note 30, at 43-44.

45. *See* 537 F.2d at 738-39. Judge Rosenn, concurring, said: "A failure in apportionment must then needs excuse both wrongdoers." *Id.* at 744. Judge Aldisert answered this argument by stating: "[T]he burden of apportionment applies only to plaintiff's claim against General Motors. 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.

46. One result of this plan may be that, in a case involving a proven negligent driver with limited financial resources, the plaintiff and primary defendant will find themselves allied in trying to prove large enhanced damages caused by the manufacturer's defect.

47. Fleming, *Damages in Accident Cases*, in DAMAGES IN PERSONAL INJURY AND WRONGFUL DEATH CASES 22-25 (S. Schreiber ed. 1965).

grounded almost entirely upon speculation, to recover from the manufacturer the plaintiff must persuade the trial judge that his proof amounts to more than mere conjecture, and convince the jury that the suggested alternative injuries would have been sustained.[48] In the larger number of cases where this cannot be done, the effect will be to insulate from liability the manufacturer and restrict any recovery to the negligent driver.

The Rosenn approach, in contrast, sees the primary defendant and the manufacturer each potentially liable only for his own part of the injuries.[49] The primary defendant is potentially liable only for the injuries resulting from the first collision, and the manufacturer only for those resulting from the second collision with the defectively designed part of the car; neither is potentially liable for the whole.[50] Because of this equality, the plaintiff need only make out a prima facie case against both in order to have the burden shift to the defendants to prove what portion of the total damages was attributable to the part of the collision for which he is responsible.[51] The Rosenn approach, however, is not without its difficulties. For

48. *See* Hoenig & Geotz, *supra* note 30, discussing the difficulty of meeting this burden of proof. The authors argue:

> Under *Larsen*, the plaintiff's experts must prove *beyond speculation and conjecture* what portion of damage or injury was caused by the negligent design, "over and above" the damage or injury that probably would have occurred in the collision, absent the defective design.
>
> Intricate factual and medical hair-splitting of this nature quite obviously contemplates expert testimony of a specialized, medical nature and qualified technical experts of the highest caliber. Otherwise, a jury would have absolutely no reasonable basis for determining the injury caused by the negligent design "over and above" what would normally have resulted, and a court applying such a test would have to safeguard scrupulously against a descent into speculation and conjecture. This poses a vast challenge to judicial responsibility. The court would have to screen carefully the permissible evidence, in order that the jury receive the appropriate testimony with suitable guidelines. It would also have to weigh the effect of other relevent considerations which are implicit in the design of each vehicle, such as cost, weight, size, function, maneuverability and a host of other considerations. Assuming that such a role could be effectively discharged, it does not seem likely that any expert could supply all the answers with a reasonable degree of professional certainty.

Id. at 43-44.

49. *See* 537 F.2d at 744-45 (concurring opinion).

50. This theory justifies Judge Rosenn's comment that if the apportionment burden was on the plaintiff and he failed to meet it, the failure would excuse both wrongdoers. *See id.* at 744.

51. Because the defendants have equal degrees of potential liability does not mean that either party could not completely exculpate itself from liability. For the burden of proof to shift, the plaintiff must make out a prima facie case against both defendants. Should the plaintiff fail to do so against either party, there is no apportionment question.

example, in most collisions little or no substantial harm is done by the first collision alone. Injury occurs when, because of the force resulting from the first collision, the passenger is thrust against some part of the inside of his car.[52] Thus, although under this approach it is theoretically liable only for a certain part of the injuries, the manufacturer, in reality, stands to be held liable for most or all of the damages.[53]

A possible middle ground was overlooked by the *Huddell* court. The court could have accepted the proposition that a negligent driver is potentially liable for the whole of the injuries, leaving the burden of proof and the requirement of showing an alternative design on the plaintiff. The court would then remove the onerous requirement that the plaintiff prove what injuries would have been caused had the safer, alternative design been used, but would allow the manufacturer to do so to rebut the plaintiff's case. The plaintiff would only have to show what portion of the total damages were attributable to the defective design, and what portion could be traced to the first collision. The manufacturer could mitigate his damages by showing the inadequacy of the plaintiff's alternative

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52. *See* Hoenig & Geotz, *supra* note 30, at 44-51.

53. It is not inconsistent for one party to be liable for all the damages when the parties have equal degrees of potential liability. For example, if the jury found that the first collision caused no injury to the plaintiff, but that in a second collision with a defectively designed steering column the plaintiff was seriously injured, the manufacturer would be liable for all of the damages since the injury resulted from the only part of the collision for which the manufacturer was responsible. Of course the manufacturer will only be liable when it is proven, at the least, that it designed a *defective* product. In the absense of such proof, the manufacturer cannot be held liable, and presumably, the plaintiff would then be able to recover all damages from the driver under traditional negligence law.

A more enticing non-apportionment problem not addressed by the *Huddell* court is the case where the driver of a car causing an accident is found not negligent, but the manufacturer is found strictly liable. No apportionment question exists, but the question becomes for what damages, if any, can the manufacturer be held. This raises the problem of whether strict liability law could be expanded to cover the case of an injury-causing defect that comes into play only as the result of an accident that the defect had no part in causing. If so, proximate cause limitations might relieve the manufacturer from liability for those injuries caused by the first collision, but the manufacturer may be liable for the enhanced injuries caused by the second collision.

Another problem is whether this situation is also present with the differing degrees of liability theory of the majority. Assuming the plaintiff succeeds in satisfying the strict liability requirements needed to hold the manufacturer liable, but fails to prove the driver negligent, can the manufacturer be held liable for the enhanced injuries? Arguably it could be, since the potential liability of the manufacturer, though less than that of the driver of the other car, is not dependent on a finding of negligence on that driver's part; the question would be decided by standard principles of strict product liability law.

design by proving what injuries would have been caused had the plaintiff's alternative design been used.[54] The underlying rationale is a combination of the definition of enhanced injuries used in the Rosenn approach, that is, those injuries that did occur, over those caused by the first collision alone, and the differing degrees of potential liability of the defendants used in the Aldisert and New York methods.

This compromise formulation, borrowing aspects from both the majority and concurring opinions, resolves several problems which inhere in both those views. Once the jurisdiction has decided a manufacturer can be held liable, it is contradictory to then place on the plaintiff a burden of proof that will probably exonerate the manufacturer. The compromise approach makes it easier for the plaintiff to prove the injuries attributable to the manufacturer's defectively designed product, while allowing total recovery from the negligent driver should the plaintiff fail to do so. One criticism of the Rosenn approach—that by the nature of automobile accidents most damages will result from the second collision—is still applicable here.[55] This approach would nonetheless be more equitable to the manufacturer than the concurring judge's theory, since the manufacturer will be able to disprove all or part of the damages by showing the inadequacy of the plaintiff's alternative design.

Shortly after the Third Circuit's decision in *Huddell*, the author of the majority opinion remarked that conceptually, the case was one of the most difficult with which he had ever dealt.[56] Serious policy decisions must be resolved before a consistent pattern of

54. Proving the injuries that would have occurred had the plaintiff's alternative design been used is a very difficult burden of proof. *See* note 48 *supra*. Here, however, the proof is being offered to rebut the plaintiff's case by showing that his proposed design may not be as safe as suggested. Thus, the defendant will not be using it as a method of satisfying a required burden of proof, but as a means of questioning the alternative design of the plaintiff, who has the burden of establishing the existence of such a design.

The advantage of this procedure is to remove the possibility of holding the manufacturer liable for most or all of the damages when the only safer alternative that could have been used would have resulted in injuries only slightly less serious than those caused by the defective design. In addition, since the procedure is used to rebut the plaintiff's case, the degree of proof needed to convince the judge and jury might not be as strong as where a plaintiff has the affirmative duty to so prove. Finally, it may be more sensible to place on the manufacturer the responsibility for proving what injuries would have occurred using the alternative design, since the manufacturer has the needed experts and testing facilities.

55. *See* notes 52 & 53 and accompanying text *supra*.

56. Seidelson, *The 402A Defendant and the Negligent Actor*, 15 DUQ. L. REV. 371, 396 n.62 (1977).

decisional law can be developed in this area. One such question is whether a defendant who had no part in causing the original accident should be put on equal footing with one who did. On the other hand, a defendant against whom a prima facie case of strict products liability has been made arguably should not be allowed to escape liability simply because a plaintiff (or co-defendant) is unable to properly apportion damages due to the nature of the accident.

The two opinions in *Huddell,* as well as the New York rule, present three ways of solving these difficult problems. Which of these theories will be adopted by the courts, if any, may ultimately depend on the particular jurisdiction faced with the issue. Many states still do not hold the manufacturer of defectively designed products liable for second collision injuries.[57] Disagreement is certainly likely among those that do as to how the damages should be apportioned. As the *Huddell* opinions demonstrate, the second collision/enhanced injury problem is one which promises to engender considered, and hopefully innovative, judicial thought in a difficult area of law.

Carl Harvison

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57. *See* note 30 *supra.*