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I. INTRODUCTION

The history of tort law is one of courts creating new causes of action. Never are the courts praised more than when a complaint alleging a novel harm is held to state a cause of action. Witness the applauded growth of strict liability for defective products. In contrast, courts act more slowly to recognize, or create, appropriate defenses in these new actions. California was the first state to adopt strict liability in products liability in 1963;[1] California adopted the defense of comparative fault 15 years later.[2] In strict liability, defenses based on a plaintiff's lack of reasonable care were slow to develop because manufacturer liability was "strict," not based on a lack of reasonable care in the product's manufacture. Any defense to manufacturer liability that required a jury to compare the negligent conduct of a plaintiff with the strict liability of a manufacturer appeared, for over a decade in California, to be a misapplication of strict liability principles. The apparent reluctance of the courts to recognize defenses based on a plaintiff's lack of reasonable care in strict liability claims is nowhere more evident than in second collision cases.[3]

In 1968 the Eighth Circuit Court of Appeals held that a manufacturer is liable to the occupants of a motor vehicle for injuries enhanced by a defectively designed component (second collision), even though the defective design did not cause the initial vehicle

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1. Greenman v. Yuba Power Prod., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

2. Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978).

3. "Second collision," also known as "second impact" refers to the impact of a vehicle occupant with the interior of his vehicle when it suddenly stops or changes direction. Because the occupant is not rigidly attached to the vehicle, the occupant suffers harm a fraction of a second after the initial impact of the exterior of his vehicle with an obstruction. For example, when an automobile strikes a tree, the vehicle receives instantaneous exterior damage (first collision) followed a millisecond later by the driver's body striking the steering wheel (second collision).

This note is not intended to be an introduction to second collision liability; rather, it assumes a limited degree of familiarity with products liability in general, and second collision liability in particular. For background information on this issue the reader is referred to W. KIMBLE & R. LESHER, PRODUCTS LIABILITY § 253 (1979) [hereinafter cited as KIMBLE], and Foland, *Enhanced Injury—Problems of Proof in "Second Collision" and "Crashworthy" Cases*, 16 WASHBURN L.J. 600 (1977).

accident (first collision).[4] By the late 1970s the vast majority of courts[5] recognized a plaintiff's right to recover for second collision enhanced injuries. However, no consensus exists concerning the conduct of a plaintiff that may limit manufacturer liability.[6]

The purpose of this comment is to determine what conduct of a plaintiff, if any, should limit manufacturer liability in second collision claims. The current lack of consensus concerning plaintiff conduct is a consequence of the courts' failure to understand the basis of manufacturer liability for second collision injuries. Therefore, this comment will first analyze the nature of second collision injuries and the basis of manufacturer liability. Next, the elements of a *prima facie* claim for second collision injuries are examined. Finally, this comment considers the limitations on manufacturer liability that follow from the suggested analysis.

II. JUDICIAL HISTORY

In *Larsen v. General Motors Corp.*,[7] the Eighth Circuit recognized a manufacturer's duty to use reasonable care in the design of its vehicle to protect a user from an unreasonable risk of injury in a collision. The statement of liability articulated in *Larsen* is the foundation of manufacturer liability in second collision.

> 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.[8]

In 1973 Montana adopted the *Larsen* rule in *Brandenburger v. Toyota Motors Sales*.[9] Plaintiff Brandenburger was a passenger in a Toyota Land Cruiser that crashed and rolled because of the neg-

4. Larsen v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968). *See* Annot., 42 A.L.R.3d 560 (1972).

5. One commentator has counted 30 jurisdictions, including Montana, that have adopted a rule similar to the *Larsen* rule, and nine jurisdictions that have refused to apply the *Larsen* rule. Golden, *Automobile Crashworthiness — The Judiciary Responds When Manufacturers Improperly Design Their Cars*, 46 INS. COUNSEL J. 335 (1979).

6. *See, e.g.*, Elli Thorpe v. Ford Motor Co., 503 S.W.2d 516 (Tenn. 1973) (only assumption of risk is a defense in second collision). *But see* Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978) (all aspects of the plaintiff's conduct that may have contributed to the vehicle crash or plaintiff's injuries may be considered by the jury in apportioning fault); Trust Corp. of Montana v. Piper Aircraft Co., 506 F. Supp. 1093 (D. Mont. 1981) (all of plaintiff's conduct is compared with defendant's liability).

7. 391 F.2d 495 (8th Cir. 1968).

8. *Id.* at 503.

9. 162 Mont. 506, 513 P.2d 268 (1973).

ligence of Oltz, the driver. When the vehicle rolled, the top came off; both occupants were thrown from the vehicle. The vehicle rolled over Brandenburger but not Oltz. Neither occupant was wearing the manufacturer-installed seat belts.[10] Brandenburger's counsel successfully argued for the adoption of both second collision liability as stated in *Larsen* and strict liability.[11] Toyota raised no defenses based on Brandenburger's conduct.

Two years later the Montana Supreme Court again addressed second collision liability in *Oltz v. Toyota Motor Sales.*[12] *Oltz* is the second collision action brought by the driver of the vehicle in which Brandenburger was riding. Oltz sued Toyota for alleged second collision enhanced injuries. The court held that the negligence of Oltz (established by the trial court and affirmed in *Brandenburger*) in causing the crash prevented any recovery from Toyota:

> [W]here, as here, in a strict liability case involving an alleged manufacturing defect that was unknown to the operator and which had nothing to do with causing the accident in question, but merely contributed to the operators injuries, his own contributory negligence in the operation of the vehicle so as to cause it to leave the highway is a proper defense.[13]

The only other reported decision in Montana dealing with second collision is the 1981 case *Trust Corp. of Montana v. Piper Aircraft Co.*,[14] decided by United States District Judge Hatfield. *Trust Corp.*, is a ruling on the kinds of second collision defenses permissible in a trial on the merits. Marlin Wagner, represented by Trust Corporation of Montana, piloted a small plane that attempted to take-off while overloaded and in air that was too hot to provide sufficient lift. Wagner died from injuries received in the crash. Trust Corporation argued that Wagner's death resulted from enhanced injuries caused by the manufacturer's, Piper's, failure to install shoulder harness restraints.[15] Piper countered that

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10. *Id.* at 508-09, 513 P.2d at 270.
11. RESTATEMENT (SECOND) OF TORTS § 402A (1965), provides in relevant part:
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.
12. 166 Mont. 217, 531 P.2d 1341 (1975).
13. *Id.* at 220, 531 P.2d at 1343.
14. 506 F. Supp. 1093 (D. Mont. 1981).
15. *Id.* at 1094.

Wagner's conduct amounted to assumption of risk, contributory negligence and misuse.[16] Judge Hatfield ruled that the plaintiff cannot be excused from the reasonable operation of his aircraft and, therefore, that the conduct of Wagner (although not labeled assumption of risk, contributory negligence or misuse) could be considered by the jury using pure comparative fault to apportion liability for damages.[17]

Montana courts have twice addressed the issue of manufacturer defenses in second collision cases. In both *Oltz* and *Trust Corp.*, the courts allowed a comparison between the accident-producing fault of the plaintiffs (negligent driving, negligent flying) and the manufacturers' liability for the injuries allegedly enhanced because of a defective design (poor roof design, failure to equip the airplane with a shoulder harness). In determining a manufacturer's liability for second collision injuries, is it proper to mitigate liability on the basis of a plaintiff's conduct? The following analysis of manufacturer liability for second collision injuries provides the answer.

III. Analysis of Second Collision Liability

A. *The Basis for Second Collision Liability*

The *Larsen* decision recognizes the injustice of allowing a manufacturer to escape liability for a defectively designed component that causes injury over and above that which would have occurred if the component had been properly designed. For example, if the driver of an automobile dies in a 15 mph collision because his head strikes protruding, arrowhead-shaped control knobs, then regardless of the accident-causing fault of the driver, the manufacturer is, to some degree, responsible for the driver's death in what should have been a survivable crash. No one can claim in the above hypothetical accident that the manufacturer should be liable in second collision for the property damage to the exterior of the vehicle. Nor should the manufacturer be liable if, altering the hypothetical, the plaintiff's car collides with a bridge abutment at 130 mph. Control knobs as soft as marshmallows would be as "dangerous" to the plaintiff as arrowhead-shaped control knobs at 130 mph; death could not have been avoided by changing the shape or composition of the control knobs.

Against the background of these hypothetical accidents, the reason for imposing manufacturer liability for second collision in-

16. *Id.* at 1095.
17. *Id.* at 1098-99.

juries emerges: but for a manufacturer's failure to use a practical, alternative design, the plaintiff would have suffered less extensive injuries. The axiom, or starting point, of second collision liability as established in *Larsen* may be stated as follows: a manufacturer is only liable for that portion of a plaintiff's injury enhanced by a defective design.[18]

Two additional concepts complete the analytic framework for second collision liability; they are *accident-causing fault* and *injury-enhancing fault*.[19] Accident-causing fault refers to liability apportioned on the basis of contribution to the proximate cause of the first collision. For example, when a plaintiff deliberately drives his car into a tree, the accident-causing fault lies wholly with the plaintiff; when a plaintiff is involved in a two car collision and a jury determines the plaintiff is 30 percent negligent and the defendant is 70 percent negligent, the jury apportions liability on the basis of the proximate cause of the first collision. Injury-enhancing fault refers to liability apportioned on the basis of contribution to the proximate cause of the second collision enhanced injuries. For example, when a plaintiff is injured in a 15 mph crash because his shoulder harness fails, allowing the plaintiff's head to strike the steering wheel in what would otherwise have been an injury-free collision, the manufacturer of the defective harness has injury-enhancing fault for the injuries caused by the harness failure.

In every second collision case there are two kinds of proximate cause: the proximate cause of the first collision (associated with accident-causing fault) and the proximate cause of second collision enhanced injuries (associated with injury-enhancing fault). Just as a plaintiff and a vehicle-driving defendant may both cause a first collision, so too may a manufacturer and a plaintiff both causally contribute to second collision enhanced injuries.[20]

B. *Elements of a Second Collision Cause of Action*

The elements of a plaintiff's *prima facie* second collision case are similar to any strict liability action; the major difference is the

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18. *See* text accompanying note 8 *supra*.

19. Judge Hatfield briefly refers to "accident-causing fault" and "injury-causing fault" in Trust Corp. of Montana v. Piper Aircraft Co., 506 F. Supp. 1093, 1098 (D. Mont. 1981). *See also* Galerstein, *A Review of Crashworthiness*, 45 J. AIR L. & COM. 187, 210 (1979). This writer prefers "injury-*enhancing* fault" to "injury-*causing* fault" because it more clearly limits the question of liability to enhanced injuries. "Injury-causing fault" obscures the fact that a vehicle-driving defendant, or an accident-causing plaintiff are liable for all non-enhanced injuries on the basis of contribution to the proximate cause of the *first* collision. Accident-causing fault, then, is synonymous with non-enhanced injury-causing fault.

20. *See* Part IV, § B *infra* for a discussion of a plaintiff's injury-enhancing fault.

problem of proof of defective design.[21] Proving defective design is more difficult in second collision cases than the usual products liability case because a manufacturer's liability is limited to enhanced injuries. In second collision cases, a defective design is the cause of enhanced injuries; absent enhanced injuries there is no design defect. Therefore, proof of enhanced injuries implies the existence of a defect and a causal relationship between the defect and enhanced injuries.

Because "enhanced" is a relative term, a plaintiff must compare his injuries allegedly caused by a defective design with the injuries he probably would have suffered had the manufacturer used an equally feasible design. Only those injuries that are greater than the injuries that would have resulted had a proper design been used are compensable as enhanced injuries.[22]

The basis of comparison for determining the existence of enhanced injuries is established when a plaintiff proves:[23] (1) the existence of an alternative design practicable under the circumstances that could have been used by the manufacturer and (2) the extent of the injuries that would probably have been caused by the alternative design had it been used. In order to prove what part of the second collision injuries are enhanced injuries a plaintiff must show:[24] (3) the extent of the injuries caused by the design used by the manufacturer. By "subtracting" the extent of the injuries that would have been caused by the alternative design (2) from the extent of the injuries caused by the actual design (3), a plaintiff proves the existence and measure of enhanced injuries. That is, if the injuries of (3) are greater than the injuries of (2) then these injuries are enhanced injuries. If there are enhanced injuries, then the design was defective. Because proof of enhanced injuries requires a plaintiff to prove which injuries were caused by the design used and also the injuries that would have been caused by the alternative design, proof of (1), (2) and (3) establishes that the defective design was a proximate cause of the enhanced injuries. But for the defective design the enhanced injuries would not have occurred.

When a plaintiff dies of injuries suffered in the second colli-

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21. A second collision action may also be based on a production defect (improper manufacture) as well as design defect. The suggested analysis applies with minor changes to production defects. For example, a plaintiff need not prove the existence of an alternative design (*see* text accompanying note 23 *infra*) but must prove the product in question was not made in accordance with manufacturer specifications.

22. Larsen v. General Motors Corp., 391 F.2d 495, 503 (8th Cir. 1968).

23. Huddell v. Levin, 537 F.2d 726, 737 (3rd Cir. 1976).

24. *Id.* at 738.

sion an additional element of proof is required. His representative must show:[25] (4) the second collision injuries were survivable but for the alleged defective design. To show (4) a plaintiff proves that the design defect was the sole cause of death, or that the non-enhanced injuries did not cause death. Non-enhanced injuries are the total of all injuries a plaintiff would have received in the second collision had the alternative design been used.[26] This additional requirement of "survivability"[27] is necessary to avoid manufacturer liability for a death that could not have been prevented by use of an alternative design. For example, a plaintiff dies when his arrowhead control knob equipped automobile collides with a bridge abutment at 130 mph. No design change could have prevented the plaintiff's death in an unsurvivable 130 mph crash. To hold a manufacturer liable for death caused by non-enhanced injuries makes the manufacturer an insurer because no action by the manufacturer could have prevented death.

One consequence of requiring a plaintiff to show enhanced injuries is that when injuries are not capable of apportionment into those caused by a defect and those injuries not caused by a defect, a manufacturer is free from liability. The axiom from which second collision liability is derived limits manufacturer liability to enhanced injuries; if the injuries suffered by a plaintiff cannot be identified as caused by an alleged design defect they cannot, by definition, be injuries enhanced by an alleged defect. The opposite argument—that there are enhanced injuries, but a plaintiff cannot prove them—arises from "cart-before-the-horse" logic; the existence and magnitude of an alleged enhanced injury cannot be determined until a plaintiff provides a nonspeculative means to identify injuries caused by an alleged design defect.

C. *Burden of Proof*

The key element of manufacturer liability is proof of enhanced injuries. Which party has the burden of proving enhanced injuries? Applying traditional legal principles, the party that initiated the complaint and stands to benefit from the proof—the plaintiff—has

25. Trust Corp. of Montana v. Piper Aircraft Co., 506 F. Supp. 1093 (D. Mont. 1981). "[The] plaintiff must first prove the crash was survivable [but for the alleged defect] . . . ." *Id.* at 1094.

26. Liability for non-enhanced injuries is based on accident-causing fault.

27. "Survivability" is determined independent of accident-causing fault and injury-enhancing fault. It is irrelevant to a determination of survivability who or what caused the first and second collision; the question of survivability is a factual one, to be inferred from actual and probable non-enhanced injuries, and is in no way related to fault.

the burden.[28] In all strict liability actions it is the plaintiff's burden to prove the defective design; in second collision cases, the plaintiff proves defective design by establishing the existence and magnitude of enhanced injuries.

One commentator has suggested that manufacturers should carry the burden of establishing the lack or measure of enhanced injuries.[29] The consequences of placing this burden on a manufacturer make this approach unacceptable. It would greatly encourage litigation because every injury suffered in an automobile accident is a second collision injury. Therefore, this cause of action is available to every plaintiff. A plaintiff would have nothing to lose, and everything to gain, by joining a manufacturer as a defendant in every case. This would increase the nuisance value of second collision claims because manufacturers would bear the risk of failing to carry the burden. To escape liability, a manufacturer would have to bear the costs of accident reconstruction and medical testimony. The cost of this indirect insurance system for plaintiffs would be passed on to consumers of the manufactured product.

IV. Limitations on Manufacturer Liability

A. *Rebuttal of Plaintiff's* Prima Facie *Case*

A manufacturer can begin the attempt to limit liability by clarifying the circumstances under which it should be held liable. Because second collision actions are rare in most jurisdictions, courts must be educated concerning each element of a plaintiff's case. Armed with an understanding of the key concepts of second collision liability, a manufacturer should be able to convince a court to adopt the proof requirements of design defect, enhanced injury and causation suggested above in Part III. Once a court has determined the extent of a plaintiff's burden, a manufacturer may challenge each element of a plaintiff's *prima facie* case.

B. *Defenses to Liability*

1. *Introduction*

In determining the extent of a manufacturer's liability for enhanced injuries, should the trier of fact be allowed to consider

28. W. Prosser, Law of Torts § 38 (4th ed. 1971). "The burden of proof . . . is quite uniformly upon the plaintiff, since he is asking the court for relief, and must lose if his case does not outweigh that of his adversary." *Id.* at 208-09.

29. Note, *Apportionment of Damages in the "Second Collision" Case*, 63 Va. L. Rev. 475, 500-01 (1977).

every aspect of a plaintiff's conduct? Because the question ignores the distinction between accident-causing fault and injury-enhancing fault, it has no single correct answer. Assume a plaintiff disconnects the device that activates a manufacturer-installed airbag and is later injured when he strikes a defectively designed steering wheel. In this situation the trier of fact should be allowed to consider the plaintiff's conduct because he took affirmative action to increase his risk of harm. However, if *all* of a plaintiff's conduct is considered, how could liability be apportioned between a plaintiff and a manufacturer when a plaintiff is 100 percent at fault in causing the first collision? An application of the concepts and distinctions developed in the preceding sections of this note demonstrate that while accident-causing fault cannot be compared with injury-enhancing fault, a plaintiff's injury-enhancing fault should be compared with a manufacturer's injury-enhancing fault.

2. *Accident-causing Fault Cannot be Compared with Injury-enhancing Fault*

Accident-causing fault and injury-enhancing fault must be clearly distinguished in second collision actions. Because accident-causing fault and injury-enhancing fault are related to two different proximate causes (first and second collisions) of two different harms (non-enhanced and enhanced injuries), these two faults must be kept separate in any analysis of second collision claims. The following argument demonstrates that the two faults cannot be compared without contradicting the axiom on which second collision liability is based.[30]

Assume the accident-causing fault of a plaintiff and the injury-enhancing fault of a manufacturer are compared equally. The only possible way accident-causing fault may be "compared" with injury-enhancing fault is by treating accident-causing fault as a prior cause of sufficient magnitude to relieve the manufacturer of liability; in other words, by treating the accident-causing fault of a plaintiff as an intervening superseding cause[31] of his enhanced injuries. A comparison of a plaintiff's accident-causing fault with a manufacturer's injury-enhancing fault is not, as it may first ap-

30. The argument is of the form *reductio ad absurdum*, that is, a premise is assumed to be true and from this premise a contradiction of a known truth is derived. The contradiction logically implies the falsity of the assumed premise.

31. For a discussion of the defense of superseding cause to a plaintiff's *prima facie* case in a products liability action, *see* Rost v. C. F. & I. Steel Corp., ___ Mont. ___, 616 P.2d 383 (1980) and Survey, *Montana Supreme Court Survey of 1980 Tort Decisions*, 42 MONT. L. REV. 423, 435 (1981). *See also* KIMBLE, *supra* note 3, at § 252.

pear, an affirmative defense. It is an attack on the element of causation in a plaintiff's *prima facie* case, an attack claiming a defect did not cause the plaintiff's injuries; simply, the accident-causing fault of the plaintiff caused all of his injuries. Consideration of a plaintiff's accident-causing fault is not an affirmative defense because an affirmative defense grants the plaintiff a *prima facie* case.[32] Once accident-causing fault comparison is recognized as the defense of superseding cause, the limitation imposed by considering only a plaintiff's accident-causing fault is seen as highly artificial. Whenever superseding cause is raised as a defense it is raised without regard to the status of the person contributing the superseding cause as a plaintiff, a co-defendant or a non-party.[33] Therefore, whenever accident-causing fault is considered in mitigation of second collision liability, consideration must not be limited solely to a plaintiff's accident-causing fault.

But by definition, a manufacturer in a second collision action has zero percent accident-causing fault, so there is always 100 percent accident-causing fault to be considered in mitigation of a manufacturer's injury-enhancing fault. One hundred percent accident-causing fault compared with a manufacturer's injury-enhancing fault will always constitute a superseding cause of enhanced injuries, thereby insulating a manufacturer from liability in every second collision action and contradicting the holding in *Larsen* and the axiom.

When second collision claims were first raised, a defense of superseding cause based on the causation of the first collision was often successfully raised.[34] *Larsen* established a new precedent by holding that a manufacturer would be liable for enhanced injuries even though the design defect did not cause the first collision. Implicit in this holding is the rule stated above: accident-causing fault cannot be compared with injury-enhancing fault.

Trust Corp. illustrates the contradiction in treating accident-causing fault as a superseding cause. The facts that gave rise to *Trust Corp.* suggest that the plaintiff was 100 percent at accident-causing fault.[35] That is, absent the plaintiff's alleged negligence the crash would not have occurred.

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32. *See* BLACK'S LAW DICTIONARY 55 (5th ed. 1979).

33. *See* note 31 *supra.*

34. *See, e.g.*, Tamburello v. Traveler's Indem. Co., 206 F. Supp. 920 (E.D. La. 1962); Walton v. Chrysler Corp., 229 So.2d 568 (Miss. 1969); Ford Motor Co. v. Simpson, 233 So. 2d 797 (Miss. 1970). *But see* Larsen v. General Motors Corp., 391 F.2d 495, 502 (8th Cir. 1968).

35. *See* text accompanying notes 14-16 *supra.*

> Under the facts alleged, the accident-causing fault of the [plaintiff] and the injury-causing defects of the manufacturer are to be compared equally. Both manufacturer Piper and [plaintiff] Wagner should be held responsible when, but for the action of both, injury would have been less *or none at all.*[36]

Clearly, the plaintiff's 100 percent accident-causing fault is treated as a superseding cause relieving the manufacturer of liability.

Nevertheless, can one infer from the holding in *Trust Corp.* that if another person, a pilot of another plane, caused the crash that the plaintiff could recover from the manufacturer? Or, equivalently, is the accident-causing fault of a third party irrelevant to manufacturer liability for the plaintiff's alleged enhanced injuries? No, logical consistency, policy and precedent require that if a plaintiff's accident-causing fault is compared with a manufacturer's injury-enhancing fault, all other "contributors" to the accident-causing fault must be considered. First, from the perspective of the manufacturer who asserts the superseding cause defense, it makes no difference who created the superseding cause. There is no cause of action that limits a defense of superseding cause to a plaintiff's conduct. Second, no good reason exists for limiting the effectiveness of strict liability in encouraging manufacturers to make safe products to only those instances in which a third party causes the accident, when one considers that the alleged defect is never causally related to the first collision. Third, if a plaintiff's accident-causing fault is 30 percent, a manufacturer's liability is, presumably, reduced proportionally—a proportion dependent on causal contributions to the first collision and wholly without relation to the proximate cause of the enhanced injuries. Thus, once a court acknowledges second collision liability for enhanced injuries, the chain of events that caused the first collision must be disregarded in determining liability for second injuries.

The mistake of comparing a plaintiff's accident-causing fault with a manufacturer's injury-enhancing fault is made for numerous reasons, primarily because of a failure to distinguish between accident-causing fault (proximate cause of the first collision and non-enhanced injuries) and injury-enhancing fault (proximate cause of second collision enhanced injuries). A plaintiff assumes responsibility for whatever portion of his injuries is attributable to his own conduct, namely, the non-enhanced injuries attributable to his accident-causing fault and the enhanced injuries attributable to his

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36. Trust Corp. of Montana v. Piper Aircraft Co., 506 F. Supp. 1093, 1098-99 (1981) (emphasis added).

injury-enhancing fault. Secondly, it may not be recognized that the uniqueness of second collision claims place these actions outside the current trend toward comparison of all a plaintiff's conduct with a manufacturer's strict liability.[37] Third, a comparison of accident-causing fault with injury-enhancing fault may be motivated by the erroneous belief that if a plaintiff's accident-causing fault is not considered to reduce a manufacturer's liability, the plaintiff would receive a windfall and the manufacturer would be a virtual insurer. This "belief" overlooks a sound manufacturer defense: comparison of a plaintiff's injury-enhancing fault with a manufacturer's injury-enhancing fault.

3. *Comparison of Injury-enhancing Faults*

Liability for enhanced injury is apportioned on the basis of contribution to the proximate cause of the enhanced injuries. This apportionment is done by a jury when it compares the injury-enhancing fault of a manufacturer with the injury-enhancing fault of a plaintiff. A manufacturer has injury-enhancing fault when a plaintiff has proved the existence and magnitude of enhanced injuries. A plaintiff has injury-enhancing fault when he fails to conduct himself in a reasonable manner to avoid unnecessary injury in the event of a collision, that is, when a plaintiff's action or inaction is a contributing proximate cause of his enhanced injuries. Because a plaintiff's claim against a manufacturer is for enhanced injuries and not for all a plaintiff's harm, under the suggested analysis, the conduct of a plaintiff in enhancing his own injuries must be taken into consideration.

4. *Traditional Defenses*

Conduct of a plaintiff contributing to his injury-enhancing fault (not accident-causing fault) may be labeled contributory negligence. Perhaps the best example of contributorily negligent injury-enhancing conduct is the failure to use a seat belt in a situation where a reasonable person would have used one. Contributory negligence implies a duty not met; the duty of reasonable care to avoid second collision injury is analogous to the duty to use reasonable care to avoid a first collision. Just as the courts have recognized a manufacturer's duty to society to produce safe products, the courts should recognize that if a plaintiff sues for *enhanced* injuries his duty to avoid unnecessary injury should be considered

37. *See* text accompanying notes 54-55 *infra*.

to mitigate a manufacturer's liability. Failure to recognize this duty in a suit for enhanced injuries is equivalent to ignoring a plaintiff's injury-enhancing fault.

Why should a plaintiff have a duty to protect himself from injury in a suit against a manufacturer, but not in a suit against a vehicle-driving defendant? A plaintiff's injury-enhancing fault is irrelevant in a claim against a vehicle-driving defendant because that claim is litigated on the basis of proximate cause of the first collision (accident-causing fault) and is not concerned with enhanced injuries. Only in a second collision claim where the injury-enhancing fault of a manufacturer is at issue is the injury-enhancing fault of a plaintiff considered.

Assumption of risk can be a defense to second collision liability, but its use would be infrequent. Within the context of a second collision claim, assumption of risk must be with respect to injury-enhancing fault and not accident-causing fault. Because assumption of risk requires a subjective awareness of the risk[38] (in this case, of a defective design) a plaintiff must know of the possibility of enhanced injuries from a defective design and proceed unreasonably in the face of that risk. While it is conceivable that a plaintiff's conduct might qualify as assumption of risk, it is not clear that a distinction needs to be made between assumption of risk and contributory negligence.

A defense often raised in second collision cases is misuse of the vehicle. According to the above analysis, misuse that leads to the first collision, or accident-causing fault, is irrelevant. However, misuse that affects the reasonableness of a plaintiff's conduct to protect himself from second collision injury is a defense because it is injury-enhancing fault.[39] Misuse that is injury-enhancing fault is best dealt with by allowing a jury to consider all the plaintiff's injury-enhancing conduct and not by giving each aspect of injury-enhancing fault a separate name. The analytic artillary necessary to distinguish between accident-causing misuse and injury-enhancing misuse is a potential source of confusion to a jury.

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38. Brown v. North American Mfg. Co., 176 Mont. 98, 110-11, 576 P.2d 711, 719 (1978).

39. For example, injury-enhancing misuse might include using a single seat belt for two persons. Misuse of a vehicle in causing the first collision (accident-causing fault) may be relevant to the reasonableness of a plaintiff's care to protect himself from unnecessary harm. For example, reasonable care required of a driver who hill-climbs in a Honda Civic might include installation of a roll cage and an automatic fire extinguishing system.

5. *Comparative Fault*

The traditional defenses—contributory negligence, assumption of risk, misuse—describe circumstances created by a plaintiff that contribute to the proximate cause of the enhanced injuries. Conceptual parsimony suggests that all the circumstances of a plaintiff's injury-enhancing fault be considered as a single factor in determining a plaintiff's causal contribution to the enhanced injuries. The term "comparative fault" is well suited to replace the traditional defenses in strict liability actions. Comparative fault describes the balancing of the injury-enhancing fault between a plaintiff and manufacturer, irrespective of whether the injury-enhancing fault of a plaintiff is contributory negligence, assumption of risk or misuse.[40]

The semantic change to comparative fault is desirable if only to avoid the spurious negligence versus strict liability argument[41] that frequently appears whenever manufacturer defenses are raised in products liability. The term comparative fault emphasizes the distinction between the issue of comparative negligence of a plaintiff with respect to a vehicle-driving defendant, and the issue of the comparative fault of a plaintiff and a manufacturer regarding injury-enhancing fault.

6. *Instruction Referring to Plaintiff's Injury-enhancing Fault*

By allowing consideration of a plaintiff's injury-enhancing fault, each party is liable only to the extent he caused enhanced injuries. A jury instruction reflecting this comparison of faults might read as follows: Taking responsibility between the plaintiff and the manufacturer for the enhanced injuries to be a total of 100 percent, what percentage of the enhanced injury is the result of plaintiff's failure to take reasonable action to protect himself from unnecessary harm in the event of a collision?

The suggested instruction uses the phrase "reasonable action to protect himself from unnecessary harm." The word "reasonable" provides another way to measure the injury-enhancing fault of

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40. In *Trust Corp.* Judge Hatfield addressed the problem of defense terminology and labeled all conduct (accident-causing and injury-enhancing fault) of the plaintiff that mitigates a manufacturer's liability to be comparative fault. Trust Corp. of Montana, 506 F. Supp. at 1098-99.

41. The argument is as follows: Since the plaintiff's actions were contributory negligence, and the action is in strict liability, the contributory *negligence* of the plaintiff cannot be considered to mitigate the defendant's *strict liability*. For a thorough rebuttal of this argument, *see* Daly v. General Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978).

a plaintiff. "Reasonable protection" may require a driver to use a seat belt. A jury can best make the determination whether a failure to wear a seat belt is unreasonable. Failure to use a seat belt for a four block residential drive may be reasonable, whereas it may be unreasonable on a temporary, two-lane interstate highway. A jury would evaluate all conduct constituting a plaintiff's injury-enhancing fault. Examples of a plaintiff's injury-enhancing fault might include:

(1) failure to lock the car door (injuries suffered because plaintiff did not remain in the vehicle).[42]
(2) failure to use a seat belt or shoulder-harness.[43]
(3) loading items into the interior of a vehicle in a way that increases the risk of injury in a collision.[44]

If, in applying the suggested instruction, a jury finds a plaintiff to be 30 percent at fault for the enhanced injury, the manufacturer is liable for the remaining 70 percent of the enhanced injury damages. In a suit that involves both a vehicle-driving defendant (negligence action) and a manufacturer (second collision action), will the plaintiff nevertheless be compensated by the vehicle-driving defendant for the plaintiff's 30 percent liability for the enhanced injuries? In a jurisdiction[45] where a vehicle-driving defendant cannot raise the seat-belt defense,[46] the vehicle-driving

42. Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978) (on remand jury could consider the effect of plaintiff's failure to lock his door in comparing the liability of the plaintiff and the manufacturer-defendant).

43. Horn v. General Motors Corp., 34 Cal. App. 3d 773, 110 Cal. Rptr. 410 (1973) (seat-belt defense available to manufacturer in second collision liability).

44. Friend v. General Motors Corp., 118 Ga. App. 753, 165 S.E.2d 734 (1968), *cert. denied*, 225 Ga. 290, 167 S.E.2d 926 (1969) (luggage placed behind front seat shifted and struck front seat, causing seat to collapse injuring plaintiffs; the injury-enhancing fault of the plaintiffs in placing the unsecure luggage in the rear seat was not considered by the trial court).

45. *See, e.g.*, Kopischke v. First Continental Corp., ___ Mont. ___, 610 P.2d 668 (1980). Because a vehicle-driving defendant cannot raise the seat-belt defense in Montana, a plaintiff may choose when his injury-enhancing fault will be considered to reduce his award. The following two hypothetical situations illustrate this result. Situation 1: Plaintiff's accident-causing fault is 100 percent and he suffers enhanced injuries. Here, a plaintiff will certainly argue that accident-causing fault is wholly independent of injury-enhancing fault so that he may recover for the enhanced injuries. Situation 2: Plaintiff is injured in a collision where the vehicle-driving defendant has 100 percent accident-causing fault, but the plaintiff suffers injuries only because he failed to use a seat belt (injury-enhancing fault). Plaintiff will certainly argue that there is no distinction between the accident-causing fault of the vehicle-driving defendant and the unnecessarily enhanced injuries of the plaintiff. On the one hand, a plaintiff argues complete independence of accident-causing fault and injury-enhancing fault when he is the proximate cause of the first collision. On the other hand, when a plaintiff is not primarily at accident-causing fault, he will argue for the identity of accident-causing fault and injury-enhancing fault.

46. The "seat-belt defense" describes a showing by the defendant that the plaintiff

defendant will be liable for the plaintiff's 30 percent of the total enhanced injury. This liability is based on the vehicle-driving defendant's accident-causing fault and is unrelated to second collision liability. In a jurisdiction where a vehicle-driving defendant can raise the seat-belt defense,[47] a defendant will have the burden of showing the failure to use a seat belt contributed to a plaintiff's injuries; the defendant will not be liable for the increased injuries caused by a plaintiff's failure to use a seat belt.[48]

Use of a seat-belt defense between a plaintiff and a manufacturer is justifiable even in a jurisdiction that denies this defense to defendants in negligence. A manufacturer is entitled to have the alleged design defect examined in its proper perspective: the totality of the injury-enhancing circumstances, which must include the safety devices installed by a manufacturer that are designed to reduce the risk of injury.

C. *Montana's Second Collision Cases Reexamined*

The Montana Supreme Court has addressed the defenses available to a manufacturer in a second collision case only once, in *Oltz v. Toyota Motor Sales.*[49] Oltz was the driver of the vehicle in which Brandenburger was riding. The court held in *Oltz* that as a matter of law, Oltz's negligence in causing the accident (accident-causing fault) was a complete bar to his recovery in a second collision action.[50] The suggested analysis of second collision liability demonstrates that the accident-causing fault of Oltz is irrelevant as a defense in a second collision action.

Interestingly enough, the *Brandenburger* opinion does mention a fact in passing that would support a defense based on injury-enhancing fault, but the manufacturer failed to raise it. "The

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was not wearing an available seat belt or other restraining device, and that had the device been worn, the plaintiff would not have sustained injuries as severe as those received, thereby reducing the defendant's liability. KIMBLE, *supra* note 3, at § 254.

47. *See, e.g.*, Sams v. Sams, 247 S.C. 467, 148 S.E.2d 154 (1966) (failure to use a seat belt may constitute a contributing proximate cause of plaintiff's injuries); Benteler v. Braun, 34 Wis.2d 362, 149 N.W.2d 626 (1967) (failure to use an available seat belt may mitigate defendant's liability for damages).

48. The seat-belt defense relieves a vehicle-driving defendant of liability for all injuries that could have been avoided had a seat belt been used; whereas the seat-belt defense when applied to second collision liability may relieve a manufacturer of liability for part, or all, of enhanced injuries caused by a defective design. Any vehicle-driving defendant who raises the second collision liability of a manufacturer as an affirmative defense, in an indirect attempt to take advantage of a manufacturer's right to assert a seat-belt defense, could, at most, be excused from liability for enhanced injuries.

49. 166 Mont. 217, 531 P.2d 1341 (1975).

50. *Id.* at 220, 531 P.2d at 1343.

vehicle was equipped with seat belts, but neither man was wearing one at the time of the accident."[51] Brandenburger and Oltz were thrown from the vehicle. Both plaintiffs claimed the roof of the Toyota was defective because it flew off on impact. Brandenburger, a passenger, recovered damages; Oltz, the negligent driver, did not. Apparently, the theory of the case was that the roof should have served as a passive restraining device to keep the occupants within the vehicle. Toyota did not raise the seat-belt defense, and neither Toyota nor the plaintiffs presented any direct evidence on the probable injury that would have resulted had the roof remained on the vehicle. In fact, Toyota failed to present any expert evidence; it was content to cross-examine Brandenburger's experts.[52]

The decision in *Trust Corp.* considers the pilot's negligence in causing the crash (accident-causing fault) as part of a comparative fault defense.[53] This holding is contrary to the analysis of second collision liability, which demonstrates that the accident-causing fault of a plaintiff is irrelevant in second collision cases. A comparison of accident-causing fault and injury-enhancing fault contradicts *Larsen* and the axiom by basing manufacturer liability on the proximate causation of the first collision and not on the proximate cause of the enhanced injuries. Because second collision claims are often brought when a plaintiff's conduct is the proximate cause of the first collision, the comparison of accident-causing fault and injury-enhancing fault emasculates second collision liability.

Trust Corp. cites with approval the adoption of comparative fault in *Zahrte v. Sturm, Ruger & Co.*,[54] a decision by United States District Judge Murray. A recent national trend, exemplified in Montana by *Zahrte*, sanctions the comparison of a plaintiff's negligence with a manufacturer's strict liability.[55] Does this prece-

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51. Brandenburger v. Toyota Motor Sales, 162 Mont. 506, 508-09, 513 P.2d 268, 270 (1973).

52. *Id.* at 518, 513 P.2d at 275.

53. Trust Corp. of Montana v. Piper Aircraft Corp., 506 F. Supp. 1093, 1098-99 (D. Mont. 1981).

54. 498 F. Supp. 389 (D. Mont. 1980) (adoption of "pure" comparative fault in product liability actions).

55. The objection to comparing the contributorily negligent conduct of a plaintiff with the strict liability of a manufacturer in products liability has often been phrased in terms of trying to compare "apples" and "oranges." Those courts that have adopted comparative fault in strict liability have had to deal with this criticism.

> The inherent difficulty in the "apples and oranges" argument is its insistence on fixed and precise definitional treatment of legal concepts . . . [;] furthermore, the "apples and oranges" argument may be conceptually suspect . . . . Fixed semantic consistency at this point is less important than the attainment of a just and equitable result.

dent imply that accident-causing fault should be compared with injury-enhancing fault? No, there is a clear distinction between the nature of manufacturer liability in *Zahrte* and *Trust Corp.*— *Zahrte* is not a second collision case.

In *Zahrte*, the plaintiff claimed the manufacturer's defective product was the proximate cause of his injuries; comparison of Zahrte's conduct with the manufacturing defect was justified because *both* parties causally initiated the harm. The distinction between *Zahrte*, a typical products liability action for injuries caused by an alleged defect, and second collision cases is apparent: in second collision cases the manufacturing defect, by definition, never causally initiates the harm, the first collision. This distinction is a reasonable basis for the courts to allow comparison of "apples" and "oranges" in the typical products liability action and still refuse to compare accident-causing fault with injury-enhancing fault in a second collision action.

Zahrte does, however, contribute to the understanding of comparative fault in second collision actions. Comparative fault, as adopted in *Zahrte*, compares a plaintiff's accident-causing fault (negligence) with a manufacturer's accident-causing fault (strict liability). Comparative fault in a second collision case compares a plaintiff's injury-enhancing fault (negligence) with a manufacturer's injury-enhancing fault (strict liability). The comparison of apples and oranges in *Zahrte* relates to comparing negligent conduct with strict liability as advocated in this comment. *Zahrte* provides no support for comparing accident-causing fault with injury-enhancing fault.

D. *Special Verdict Form*

It is essential that a manufacturer request a special verdict form that accurately reflects the unique nature of second collision liability. The special verdict form should require a jury to examine each element of a plaintiff's strict liability claim, with special emphasis on the requirement that a plaintiff prove the design defect caused the enhanced injuries, and the extent of a plaintiff's injury-enhancing fault. The following abbreviated special verdict form deals only with the second collision aspect of liability and damages.

Liability:

(1) Has the plaintiff proved by a preponderance of the evi-

Daly v. General Motors Corp., 20 Cal. 3d 725, 735-37, 575 P.2d 1162, 1167-68, 144 Cal. Rptr. 380, 385-86 (1978).

dence (i.e., more likely than not) that there is a practical alternative to the design of the [alleged defectively designed component]? Yes ____; No ____.[56]

(2) Has the plaintiff proved by a preponderance of the evidence (i.e., more likely than not) the probable injuries that would have been caused by the alternative design had it been used? Yes ____; No ____.[57]

(3) Has the plaintiff proved by a preponderance of the evidence (i.e., more likely than not) the extent of the injuries to the plaintiff caused by the design of the [alleged defectively designed component]? Yes ____; No. ____.[58]

(4) Were the injuries caused by the design of the [alleged defectively designed component] greater than the injuries that would probably have been caused had the alternative design been adopted by the manufacturer? Yes ____; No ____.[59]

(5) [Optional: to be used when the plaintiff died as a result of his second collision injuries.] Excluding the injuries caused by the [alleged defectively designed component] and including the probable injuries caused by the alternative design together with all other actual injuries, were these injuries survivable? Yes ____; No ____.[60]

(6) Taking the responsibility between the plaintiff and the manufacturer for the enhanced injuries to be 100%, what percentage (%) is the result of the plaintiff's failure to take reasonable action to protect himself from unnecessary harm in the event of a collision? ____%.[61]

Damages:

(1) What is the dollar value that will fully compensate the plaintiff for all his actual harm? $ ____.

(2) What would have been the dollar value of all the plaintiff's harm if the alternative design suggested by the plaintiff had been used by the manufacturer? $____.[62]

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56. *See* text accompanying note 23 *supra*. This abbreviated special verdict form omits the standard direction, "If the answer is 'No' you need go no further."

57. *Id.*

58. *See* text accompanying note 24 *supra*.

59. *Id.* An affirmative answer establishes that there were enhanced injuries.

60. An affirmative answer would show that the plaintiff failed to prove that the collision was survivable absent the defective design. *See* text accompanying notes 25-27 *supra*.

61. This question requires the jury to determine the comparative fault, or injury-enhancing fault, of the plaintiff. *See* Part IV, § B *supra*.

62. When the dollar figure in this question is subtracted from a plaintiff's total dollar damages, the result is the dollar value of the enhanced injuries. Note that to reach the issue of damages a plaintiff must have proven, when applicable, that the second collision injuries were survivable but for the defect.

Although this subtraction method can be applied to the calculation of damages, it would be error to allow a plaintiff to prove enhanced injuries by simply "subtracting" the

V. CONCLUSION

Perhaps the most novel suggestion made in this comment is that the conduct of a plaintiff in protecting himself from avoidable harm should be considered in determining a plaintiff's injury-enhancing fault. The most important factor in a plaintiff's injury-enhancing fault is his failure to use manufacturer-installed safety devices such as a seat belt. Should a plaintiff be responsible in some measure for his own safety beyond accident avoidance? Recently the United States government has answered that question in the affirmative. On October 23, 1981, President Reagan's Secretary of Transportation announced that proposed government regulations requiring automobile manufacturers to install passive restraint systems in all 1983 motor vehicles will be withdrawn.[63] The announcement emphasized that ours is not a risk free society; part of the burden to lessen that risk is placed on the individual. The message is clear: fasten your seat belt because neither the government nor the auto manufacturers will do it for you.[64] One might consider this policy a governmental attempt to decentralize life-saving decision making.

This comment focuses on the distinction between accident-causing fault and injury-enhancing fault and concludes that the two faults cannot be compared to determine liability for enhanced injuries. This conclusion may appear to be too lenient to the plaintiff who negligently caused the first collision and then sues for second collision enhanced injuries. However, a plaintiff's burden of establishing a *prima facie* case is not a light one; he must prove that the use of an alternative design would have resulted in less injury than the design used, that the design used was defective by causing enhanced injuries and that the second collision was survivable but for a design defect. If a plaintiff can prove his case there is no windfall for a plaintiff or injustice to a manufacturer because accident-causing fault cannot be compared with injury-enhancing fault. Compensation is limited to enhanced injuries, injuries that

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probable injuries a plaintiff would have received had the alternative design been used, from the total actual injuries. To allow a plaintiff to establish his *prima facie* case without offering affirmative evidence is unacceptable because it would permit a plaintiff to infer precisely the claim he must prove: that the presence of a defective design caused his enhanced injuries.

63. Washington Post, Oct. 24, 1981, at 1, col. 3.

64. A growing number of nations now require automobile drivers to use their seat belts. These nations include Australia, Canada, France, Israel, Japan, Sweden and in summer of 1982, Great Britain. CONSUMER REPORTS, Nov. 1981, at 612. Montana requires that all operating automobiles built after 1966 be equipped with seat belts. MONTANA CODE ANNOTATED § 61-9-409 (1981).

would not have occurred had a proper design been used.

We must admire the courts for creating new causes of action like second collision liability to compensate those who are unfortunate enough to be harmed by others. Nevertheless, the courts must support the desirable goal of encouraging members of our society to be responsible for their own safety. By limiting manufacturer liability in second collision actions in a principled and fair manner, and requiring individuals to take affirmative action to guard against unnecessary injury, the courts will continue to serve the interests of society.