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Defective Design: Second Collision Injuries and the Burden of Producing Evidence

Anthony J. Sposaro
University of Dayton

DEFECTIVE DESIGN: SECOND COLLISION INJURIES AND THE BURDEN OF PRODUCING EVIDENCE—*Nanda v. Ford Motor Co.*, 509 F.2d 213 (7th Cir. 1974)

Nanda v. Ford Motor Co.[1] involved an action against the Ford Motor Company for injuries sustained in a second collision[2] with the proximate cause being a defect in design. The facts were as follows: At about 3:30 P.M. on October 29, 1967, plaintiff Chitta R. Nanda, driving alone in his 1967 Ford Cortina, stopped in the inner northbound lane of Route 45 in Urbana, Illinois, to wait for an opening in southbound traffic so that he could turn left into an access road. While his vehicle was stopped, the Cortina was struck in the rear by a 1962 Oldsmobile traveling at a speed as low as ten miles per hour. This collision injured no one and caused only relatively minor damage to the front of the Oldsmobile. The Cortina, however, was spun around and pushed into the southbound lanes, where it was struck in the rear by a southbound Rambler. The Rambler was traveling at about forty miles per hour when the driver saw the Cortina and applied the brakes, which grabbed before the collision with the Cortina.

There was evidence that the collision with the Oldsmobile caused a small fire which was the size and shape of a grapefruit with a stream coming up from it on the rear of the Cortina and which,

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1. 509 F.2d 213 (7th Cir. 1974).

2. "In the jargon of automobile tort law, the 'first collision' is the accident in which the vehicle strikes another vehicle or object, and the 'second collision' occurs when the occupants of the vehicle are exposed to an unreasonably dangerous condition because of the design of the vehicle. The 'first collision' is not caused by the allegedly defective design, but the 'second collision' is. A second collision with still another vehicle, which occurred in the case at bar, is not necessarily a part of a 'second collision' case and is not the 'second collision' to which that term refers." *Id.* at 217 n.1.

3. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

Special Liability of Seller of Produce for Physical Harm to User or Consumer.

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

The term "unreasonably dangerous" is such a nebulous concept, its definition is subject to a multitude of interpretations and exceptions by courts. *See* Mieher v. Brown, 54 Ill. 2d 539, 301 N.E.2d 307 (1973); Cunis v. Brennan, 56 Ill. 2d 372, 308 N.E.2d 617 (1974).

when the Rambler struck the Cortina, grew into a huge ball, enveloping the Cortina and the front of the Rambler. Almost instantaneously after the second collision the inside of the Cortina was engulfed in flames. Plaintiff suffered permanently disfiguring and disabling burns. The plaintiff was faced with the alternative of pursuing an action in strict liability,[3] warranty,[4] or common law negligence. The plaintiff elected strict liability, and a federal district court verdict[5] in his favor was appealed to the Seventh Circuit Court of Appeals which affirmed the district court's decision.

The states that come within the jurisdiction of the Seventh Circuit in diversity cases are Illinois, Indiana and Wisconsin. Jurisdiction in *Nanda* was based on diversity with the law of Illinois[6] applicable.[7] In 1966, in *Evans v. Ford Motor Co.*,[8] another diversity case with the law of Indiana applicable, the Seventh Circuit had established a conservative trend in design liability.[9] Not only did the court disclaim liability in strict liability and warranty, they also denied liability in common law negligence. Their basic premise was that since a collision was not a foreseeable use of an automobile, a manufacturer could not be held liable for injuries sustained in a collision where the design was the proximate cause of the injury.[10]

Evans was highly criticized in many legal periodicals.[11] Nevertheless, a few jurisdictions did align themselves with the pro-manufacturer stand.[12] The court in *Nanda*, although it was applying

4. UNIFORM COMMERCIAL CODE § 2-314.

5. Not reported.

6. Illinois has firmly established its strict liability doctrine. *See* Sutkowski v. Universal Marion Corp., 5 Ill. App. 3d 313, 281 N.E.2d 749 (1972); Rivera v. Rockford Mach. & Tool Co., 1 Ill. App. 3d 641, 274 N.E.2d 828 (1971); Dunham v. Vaughn & Bushnell Mfg. Co., 86 Ill. App. 2d 315, 229 N.E.2d 684 (1966). *See also* Mieher v. Brown, 3 Ill. App. 3d 802, 805, 278 N.E.2d 869, 872 (1972), *rev'd on other grounds*, 54 Ill. 2d 539, 301 N.E.2d 307 (1973).

7. The statute of limitations for Illinois is two years. ILL. ANN. STAT. Ch. 83, §15 (Smith-Hurd 1972).

8. 359 F.2d 822 (7th Cir. 1966).

9. *But cf.* Schemel v. General Motors Corp., 384 F.2d 802, 807 (7th Cir.), *cert. denied*, 390 U.S. 945 (1968) (Kiley, J. dissenting); *Id.* at 825 (Kiley, J. dissenting).

10. 359 F.2d at 825.

11. *See* 80 HARV. L. REV. 688, 689, 692 (1967) (result in *Evans* derives from "excessively narrow assumption" that purpose of an automobile does not include collisions; basic assumption that a manufacturer's duty is narrower in design cases than in other negligence cases is an anachronism and illogical; 42 NOTRE DAME LAWYER 111 (1966); 55 ILL. B.J. 238 (1966); 16 DE PAUL L. REV. 261 (1966); 4 HOUSTON L. REV. 311 (1966); 1966 UTAH L. REV. 698 (1966). These articles were collected in Schemel v. General Motors Corp., 384 F.2d 802 n.6.

12. Schemel v. General Motors Corp., 384 F.2d 802 (7th Cir.), *cert. denied*, 390 U.S. 945 (1968); Shumard v. General Motors Corp., 270 F. Supp. 311 (S.D. Ohio 1967)(applying Ohio law); Walton v. Chrysler Motor Corp., 229 So. 2d 568 (Miss. 1970); Ford Motor Co. v. Simpson, 233 So. 2d 797 (Miss. 1970); General Motors Corp. v. Howard, 224 So. 2d 726 (Miss. 1971). *See also* Edgar v. Nachman, 37 App. Div. 2d 86, 323 N.Y.S.2d 53 (3d Dep't 1971),

Illinois law, had an excellent opportunity through dicta to further justify its position enunciated in *Evans* or to disregard it. But the court did neither, hiding behind technical diversity considerations.[13] The issue that is immediately raised is that of the propriety of the Seventh Circuit in ignoring, under the guise of choice of law, its own controversial precedent.

Plaintiffs' attorneys would be understandably reluctant to bring a second collision case in federal courts when an appeal would be heard by the Seventh Circuit. They are still faced with the question of where the Seventh Circuit stands in a diversity suit with the law of Indiana applicable.[14] First, the *Evans* decision is mentioned in *Nanda* as posing the query whether it would still be valid for the Seventh Circuit Court of Appeals to rely on *Evans* when applying Indiana law. Secondly, an opportunity has been afforded them to retain their pro-manufacturer stand by the tone of the majority opinion in *Cornette v. Searjeant Metal Products, Inc.*[15] which adopted the strict liability doctrine for Indiana. Cited in *Cornette* are a number of cases decided by the Federal District Court for Indiana and the Seventh Circuit Court of Appeals which are "[a]n excellent series of cases."[16] *Evans* tops the list.[17]

The Supreme Court of Indiana cited with approval the *Cornette* decision without being at all critical of its language concerning narrow construction.[18] How will the Seventh Circuit Court of Appeals construe *Cornette* in their application of Indiana law? Because of the Seventh Circuit's failure to repudiate *Evans* we are forced to interpret this as a continued assent to the *Evans* doctrine. The decision to go into federal court, with Indiana law applicable and

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where the Supreme Court of New York, Appellate Division, although not relying on *Evans*, held that under New York law there is no cause of action against a manufacturer for negligent design where the design was not the initial cause of the injury but only aggravated it. Mieher v. Brown, 54 Ill. 2d 539, 301 N.E.2d 307 (1973) n.2.

13. "We are, of course, not bound by *Evans*, because in this case the law of Illinois rather than Indiana is controlling." 509 F.2d at 217.

14. The statute of limitations for Indiana is two years. IND. ANN. STAT. Ch. 34, § 1-2-2 (Burns 1951).

15. 147 Ind. App. 46, 258 N.E.2d 652 (1970).

16. *Id.* at 656 n.2.

17. The opinion in *Cornette* while adopting strict liability in one breath removes its potency and value in the next by stating that strict liability should be strictly construed and narrowly applied. Justice Sharp in a concurring opinion was highly critical of the majority's treatment of the strict liability issue.

18. Ayr-way Stores, Inc. v. Chitwood, ___ Ind. ___, 300 N.E.2d 335 (1973). *See also* Lewis v. Strain Steel Corp., 6 Ill. App. 3d 142, 285 N.E.2d 631 (1972), an Illinois court's interpretation of *Cornette*. This court found the *Cornette* opinion analogous to Suvada v. White Motors, Inc., 32 Ill. 2d 612, 210 N.E.2d 182 (1965). *Suvada*, however, is void of the construction limitations enunciated in *Cornette*.

the Seventh Circuit having appellate jurisdiction, may well be an example of plaintiff's jumping from the frying pan into the fire. The Seventh Circuit Court of Appeals has failed the consumer procedurally by failing to state unequivocally its position with regard to the *Evans* doctrine in *Nanda*. Furthermore, it has failed the consumer in its substantive approach by adopting such a reactionary posture.

In analyzing where plaintiffs may stand in the Seventh Circuit with Wisconsin law applicable, consumers will find little solace.[19] Wisconsin, as well as Indiana, has afforded the Seventh Circuit Court of Appeals the opportunity to further its conservative position. This has been made possible through its puzzling interpretation and limited recognition of the strict liability doctrine. In *Dippel v. Sciano*,[20] Wisconsin's highest court adopted the strict liability doctrine, but made no mention of subsection (2)(a) of *Restatement (Second) of Torts* §402A,[21] which is the heart of the *Restatement* section on strict liability. However, the Wisconsin court continues to speak in terms of negligence on the part of the defendant. Furthermore, contributory negligence is recognized as a partial defense to strict liability averments.[22]

In *Powers v. Hunt-Wesson Foods, Inc.*,[23] Chief Justice Hallows clarified Wisconsin's interpretation of strict liability. Thus, Wisconsin in reality does not truly recognize strict liability since defendants are not foreclosed from proving that they were not negligent.[24] In light of the fact that Wisconsin courts continue to speak in terms of negligence, the Seventh Circuit may have the opportunity to reiterate its position in *Evans*, namely that a collision is not a foreseeable use of an automobile.

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19. The statute of limitations for Wisconsin is three years. WIS. STAT. ANN. § 893.205 (1965).

20. 37 Wis. 2d 443, 155 N.W.2d 55 (1967). In Grundmanis v. British Motor Corp., 308 F. Supp. 303 (E.D. Wis. 1970), the issue presented was whether the plaintiff had stated a cause of action, on facts remarkably similar to those in *Nanda*. The court, in applying Wisconsin law, rejected the *Evans* doctrine. The court pointed out that although no Wisconsin court had addressed itself to the second collision issue, Wisconsin had followed the trend in adopting strict liability. The court, therefore, held that the plaintiff had stated a cause of action.

21. *Supra* note 3.

22. WIS. STAT. ANN. § 895.045 (1965).

"Contributory negligence; when bars recovery. Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to their amount of negligence attributable to the person recovering."

23. 64 Wis. 2d 532, 219 N.W.2d 393 (1974).

24. Their adaptation of strict liability is a form of negligence per se and shifts the burden to the defendant to prove he was not negligent.

Appellate courts by nature and design are conservative entities, with stability and predictability being their two most important objectives.[25] There comes a point, however, when relatively unprotected interests become so compelling that the courts must intervene. A second collision is one that most courts have recognized as being compensable when caused by a defect in design.[26] Recognizing that an injury is compensable, however, is only the first step in a dual process. The second step is to insure that there is compensation for the injury. The potential harm to both life and property proximately caused by a defect in design can be devastating. When presented with such a compelling interest, the courts should, in formulating their procedural and substantive policies, insure that this interest is well protected, contrariwise to the pro-manufacturer position taken by the Seventh Circuit Court of Appeals in *Evans*.

The role of the courts has increased tremendously in the field of consumer protection since *MacPherson v. Buick Motor Co.*[27] Judge Cardozo realized that it was as necessary then as it is now for the courts to assume an active role in shaping public policy where the legislature either neglects or refuses to act. The question thus raised is to what extent the courts should, through the adaptation of legal principles and procedural devices foster the safety of the consumer.[28]

The development of strict liability[29] has significantly helped the plaintiff consumer in tort actions against manufacturers. This doctrine itself has helped balance the scales between consumers and manufacturers in many areas of tort law. It is, however, apparent to many that the scales remain unequally balanced in favor of the manufacturer in second collision cases.[30] It is, therefore, incumbent

25. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 19 (1921).

26. *See, e.g.*, Larsen v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968).

27. 217 N.Y. 382, 111 N.E. 1050 (1916).

28. This question is extensively reviewed in Nader and Page, *Automobile Design and the Judicial Process*, 55 CAL. L. REV. 645, 673-77 (1967) [hereinafter cited as Nader].

29. Justice Traynor was the first to enunciate the justifications for strict liability in Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944). They are as follows:

(1) Public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health interests in defective products that reach the market.

(2) Those who suffer injury are unprepared to meet its consequences.

(3) The risk of injury can be insured by the manufacturer and distributed among the public.

(4) The consumer no longer has means or skill enough to investigate for himself the soundness of a product; and

(5) Consumers no longer approach products warily but accept them on faith, relying on the reputation of the manufacturer or the trademark.

30. (1) The private nature of the remedy; (2) the plaintiff may have no need of monetary

upon the courts to re-evaluate their role in such cases.

The first hurdle to be crossed is the determination of whether this is a proper judicial function or whether it is within the exclusive domain of the legislature. Federal legislation[31] has dealt with safety standards, but automobiles are so complex that various parts or designs often elude legislative scrutiny. Notice should be taken not only of the number of automobile accidents resulting in serious personal injury each year[32] but also of the number of recalls.[33] Pressure has been exerted upon Congress by lobbyists for the automobile manufacturers;[34] further, President Ford's support of Congressional legislation[35] should not be relied upon.

Pressure has been exerted upon manufacturers through various mediums, *i.e.*, the legislatures, judgments and consumer activism, to modify their position with respect to automobile safety. Consumers are, however, for the most part, unorganized as a collective entity. The courts can find justification for balancing the scales between manufacturers and consumers in an adversary setting. This justification becomes apparent when courts analyze the problem of automobile safety in the way that it would appear manufacturers do: as a problem involving economic considerations.[36]

Sensible business management often entails formulating an economic equation to accurately evaluate alternatives. The cost of an automobile is influenced by two important extra-production fac-

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compensation; (3) the plaintiff may have no desire to litigate; (4) the plaintiff may not suspect he has a cause of action; (5) the cost of litigation; (6) the plaintiff must link the injury to the defective design; (7) the difficulty plaintiffs have in obtaining expert witnesses in design; (8) deficiencies in accident reporting; (9) tactics of delay and obstruction; (10) if the car is fixed or destroyed the evidence is lost. Nader.

31. National Traffic and Motor Vehicle Safety Act, 15 U.S.C. §§ 1381-1431 (1966). *Cf.* National Traffic and Motor Vehicle Safety Act, 15 U.S.C. § 1397(c) (1966), which states that compliance does not exempt the manufacturer from common law liability.

32. The number of serious injuries caused by automobile accidents in 1973 was 2,050,000. THE WORLD ALMANAC AND BOOK OF FACTS 1975 at 954 (1974).

33. There were 7,000,996 recalls in 1973. *Id.* at 140.

34. The controversy with regard to crashworthiness in Congress has been centered primarily around the inflating air bag. Manufacturers' lobbyists have not fared well concerning this issue. Gregory, *Detroit and Washington Near Deadlock On Rules*, N.Y. Times, Oct. 12, 1975, §11, at 8, col. 1. Such legislation is welcome; however its limited scope would probably not have helped the plaintiff in *Nanda*.

35. "The recent word from the White House, however, has not been 'regulation.' The Ford Administration—headed by a man who is not only a conservative Republican but a Michiganian as well—has been unequivocal in urging less Federal intervention in business." *Id.*

36. *See generally* R. POSNER, ECONOMIC ANALYSIS OF LAW (2d ed. 1974); Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961); Calabresi and Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055 (1972); Posner, *Strict Liability: A Comment*, 2 J. LEG. STUDIES 205 (1973).

tors: (1) the costs of research and design, and (2) the cost of litigation, judgments and settlements. To a degree, these two general costs are inversely related. If less money is funneled into research and design, the incidence of design defects should be greater, resulting in a greater number of compensable claims. If more money is channeled into research and design, it seems likely that the incidence of compensable claims will diminish. Most would agree that no automobile manufacturer wants to manufacture an unsafe car. The reason that automobile manufacturers allocate a large amount of capital for litigation, judgments and settlements is that in the final analysis their costs may be less and subject to more accurate calculation. This can be seen by considering important corollaries accompanying the cost of research and design: (a) producing an automobile that consumers can afford; (b) producing an automobile that consumers want to purchase; and (c) keeping pace with the developments of competitors. Manufacturers generally do not favor channeling funds into research and design for a number of reasons, the most basic being that the corollaries under this cost, by their nature, defy accurate calculation. Inflation and unemployment with the resulting financial inability to purchase, as exemplified in the last few years, cannot be calculated with certainty over a long period of time.[37] Consumers may be unimpressed with newly developed safety features.[38] Probably most important there is a genuine fear that once one manufacturer initiates his own research, excluding that required by statute, competitors will also be forced to do so. Once this happens, research may perpetuate itself and costs may increase for the initiator who then has to keep up with his competitors' research advances.

An alternative cost which is now favored most often by manufacturers is the incurring of the costs of litigation, judgments and settlements. Again, there are a number of corollaries. They are: (a) insurance costs; (b) advertising to counteract unfavorable publicity; (c) lobbying costs; (d) attorneys' fees; (e) settlement costs; and (f) judgments. Most of the corollaries under Variable (2) are unlike those under Variable (1) since they are subject to accurate calculation except for settlement costs and judgment costs. Because of the advantage the defendant manufacturer presently has, these last two costs have been kept to a minimum in second collision injury cases. By increasing the incidence of success on the plaintiffs' part the

37. TIME, July 14, 1975, at 52.

38. Abrahamson, *Fuel Economy Counts Most In New Cars*, N.Y. Times, Oct. 12, 1975, § 1, at 1, col. 1.

courts may be able to effectively force the manufacturer to reconsider the election of the cost of research and design as a more pragmatic economic alternative.[39]

The court in analyzing the manufacturers' equation must consider a factor not present in that equation and the importance of which cannot be over emphasized: social cost. The courts and the consumer must come to grips with the reality that the costs will be high. A safe automobile will be an expensive automobile.[40] The consumer will have to bear this cost; but he is in any event now bearing the cost of an unsafe automobile.

A trend has developed whereby the courts have, through the relaxation[41] and modification[42] of evidentiary requirements, helped the plaintiff overcome some of his disadvantages[43] in design defect cases. This relaxation has occurred when the defect has been the proximate cause of the accident. However, in second collision injuries, causal connection between defect and injury is not so readily apparent. Circumstantial evidence which has been held sufficient when the malfunction is the proximate cause of the accident may well be insufficient in second collision cases such as *Nanda*. In applying the facts of *Nanda* we observe that if elaborate testing had

39. In *Economic Analysis of Law* and *Strict Liability: A Comment, supra* note 36, Posner points out factors of importance if plaintiffs are more successful. They are: (1) reduction of the potential victims' willingness to finance activity in research; (2) elimination of the potential victims' incentive to take cost justified precautions; (3) encouraging the plaintiff to spend more on litigation. Factors (1) and (2) would be displaced by the manufacturers if it became more pragmatic for them to invest in research and design. If this does indeed happen, factor (3) would be unavoidable since it would reflect a shift in the incidence of successful litigation.

40. A corollary to the cost factor is that consumers will have to pay for safety features they do not want because of design and performance modification.

41. *See* Franks v. National Dairy Prod. Corp., 414 F.2d 682 (5th Cir. 1969); Greco v. Bucciconi Eng'r Co., 407 F.2d 87 (3d Cir. 1969); North American Aviation, Inc. v. Hughes, 247 F.2d 517 (9th Cir. 1957); McCann v. Atlas Supply Co., 325 F. Supp. 701, 703 (W.D. Pa. 1971); Stewart v. Budget Rent-A-Car Corp., 57 Hawaii 71, 470 P.2d 240 (1970); Jacobson v. Broadway Motors, Inc., 430 S.W.2d 602 (Mo. Ct. App. 1968); Williams v. Ford Motor Co., 411 S.W.2d 443 (Mo. Ct. App. 1967); Jakubowski v. Minnesota Mining & Mfg., 42 N.J. 177, 199 A.2d 826 (1964); Brownell v. White Motor Corp., 490 P.2d 184 (Ore. 1971); MacDougal v. Ford Motor Corp., 214 Pa. Super. 384, 257 A.2d 676 (1969). In these cases the courts allowed the proof of both a defect and the existence of a defect at the time the product left the defendant's possession to be made by circumstantial evidence. Lindsay v. McDonnell Douglas Aircraft Corp., 460 F.2d 631, 638 n.4 (8th Cir. 1972).

42. "As the substance of strict liability in tort is akin to that of the law of warranty, the evidentiary requirements to establish breach of warranty rather than those to prove negligence should prevail in an action in strict liability in tort." Greco v. Bucciconi Eng'r Co., 283 F. Supp. 978, 982 (W.D. Pa. 1967). *See also* Noel, *Strict Products Liability Compared with No-Fault Automobile Accident Reparations*, 38 TENN. L. REV. 297, 325 (1971). *Cf.*, Note, 21 STAN. L. REV. 1777 (1969).

43. *See* note 3 *supra*.

not been done and expert testimony had not been procured, proof of a defect may well have been insufficient as a matter of law.

Therefore, it is worthy of consideration to have the plaintiff offer all of the evidence pertaining to his action that can be obtained through a reasonable effort and is peculiar to the knowledge of the plaintiff, excluding, of course, evidence that could only be obtained through expert testimony. Coupled with this the plaintiff should then have to make at least a reasonably plausable showing that a defect in design is the proximate cause of his injury.

In applying this standard to *Nanda*, the plaintiff would be required to offer evidence of the existence of a small fire after the initial collision and aggravation thereof by the subsequent collision. At this point, the burden of producing evidence should shift, creating a presumption in favor of the plaintiff. The presumption should persist until evidence is offered that places the balance of probabilities in equilibrium.[44]

Some of the positive effects would be as follows:

1. Force the manufacturer to keep statistics of defect-related injuries and their incidence or lack thereof, resulting in better quality control of its product;
2. Make these statistics available for public consumption;
3. Create a rational allocation of the burden of proof as far as statistical and technical information are concerned;
4. Reduce the cost of preparation for trial;
5. Help destroy the conspiracy of silence by forcing the manufacturers to bring their design experts in to testify. In the past they have been extremely reluctant witnesses for plaintiffs;
6. Increase the incidence of settlement, thus placing a larger percentage of the judgment in the hands of the plaintiff and less with the attorney;
7. Allocate the cost of such injury more proportionately throughout society; and
8. Make it a more economically viable alternative for an automobile manufacturer to invest its money in design and research rather than in attorneys' fees and judgment costs.

One important factor which would deter the courts from adopting this proposed shift in the burden of producing evidence would be a fear that the result would lead to a flood of litigation. However, the long range net effect may be to reduce the number of cases that come to trial since (1) there will be fewer claims and (2) the rate of

44. *See* Hinds v. John Hancock Mut. Life Ins. Co., 155 Me. 349, 155 A.2d 721 (1959); ANNOT., 85 A.L.R.2d 703 (1962).

settlement will be greater. Furthermore, it may be feared that this great number of cases would be laced with fraudulent claims. It would be inequitable for courts to deny plaintiffs, with bona fide claims, a reasonable chance of success because of the fraudulent claims of others. After an expected period of overreaction and testing of the courts' stand on the issue by plaintiffs' attorneys, there is no reason to suspect that the incidence of fraudulent claims will be any greater in this area of tort law than others. In addition, costs to consumers would be affected since the manufacturer would pass the cost of his frequent court appearances on to the consumer. While no one welcomes an increase in the cost of automobiles, it is more advantageous for all of society to bear the plight of an innocent party than for that person to bear it alone.

If this transitional period does indeed take place as it has in other areas affected by legislation and the evolution of the strict liability doctrine, the costs to the manufacturer and the consumer during the period will both be high. A recent article has stated[45] that because of government control of emissions the consumer has realized a net loss. But such short term analysis neglects social cost. Consumers cannot expect automobile manufacturers to operate at a loss. The price will be high, but in the final analysis the result may be a safer automobile and a more equitable loss distribution.

Anthony J. Sposaro

45. Riccardo, *Regulation: A Threat to Prosperity*, The New York Times, July 20, 1975, §3, at 12, col. 2.