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Jerad Egbert and Emily Egbert, individually and as guardians for Janessa Egbert v. Nissan North America, Inc.; Nissan Motor Co., LTD.: National Auto Plaza Inc.; Carlex Glass Co.; Central Glass Co., LTD.; and John does 1 through 10 : Brief of Appellee

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

JERAD EGBERT and EMILY EGBERT,
individually and as guardians for
JANESSA EGBERT,

Plaintiffs and Appellants,

vs.

NISSAN NORTH AMERICA, INC.;
NISSAN MOTOR CO., LTD.; NATIONAL
AUTO PLAZA INC.; CARLEX GLASS
CO.; CENTRAL GLASS CO., LTD.; and
JOHN DOES 1 THROUGH 10,

Defendants and Appellees.

Case No.: 20080993-SC

Oral Argument Requested

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UTAH APPELLATE COURTS

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COMPLETE LIST OF ALL PARTIES

Pursuant to Rule 24(a)(1) of the Utah Rules of Appellate Procedure, a complete list of the parties named in the federal district court action is as follows:

Plaintiffs

Emily Egbert and Jerad Egbert, individually and as guardians for J.E., a minor.

Defendant

Nissan Motor Co., Ltd., a Japanese corporation.

ISSUES PRESENTED FOR REVIEW

The issues presented were certified by the United States District Court for the District of Utah. (AOB at Addendum A.) This court considers certified questions in light of the facts of the case in which the questions are certified. Richardson v. Navistar Int'l Transp. Corp., 2000 UT 65 ¶¶8-9, 8 P.3d 263 (noting question as phrased was rather ambiguous and therefore giving answer only with respect to specific facts of case at hand); see also Hirpa v. IHC Hosps., Inc., 948 P.2d 785, 787 n.1 (Utah 1997) (selecting version of questions that better characterized legal issues to be resolved in case at hand). Therefore, Nissan describes the second question certified in the context of the facts of this case.

Issue 1: Whether Utah Code section 78-15-6(3) is unconstitutional.

Issue 2: Whether Utah recognizes Restatement (3d) of Torts: Products Liability §16(b)-(d) where one plaintiff is an active tortfeasor and the additional plaintiffs are part of the same economic unit, giving the active tortfeasor an incentive to claim that it is unclear which damages can be attributed to the alleged passive tortfeasor.

STANDARD OF REVIEW

Certified questions of law are reviewed for correctness. Scott v. Hammock, 870 P.2d 947, 949 (Utah 1994).

PRESERVATION

These issues were preserved in trial court motions and memoranda, pre-trial conferences, and the jury instruction conference. (R. 29, 57, 90, 93, 97-98, 306-07, 691-95, 712, 731-36, 573-98, 658-66, 668-89.)

STATUTES AND RULES OF CENTRAL IMPORTANCE

Products Liability Act, Utah Code Ann. § 78-15-6(3).

Liability Reform Act, Utah Code Ann. §§ 78-27-37 to -43.

Copies of these statutes are attached at Addenda A and B.

STATEMENT OF THE CASE

A. The Accident

In March of 2002, plaintiffs Jerad and Emily Egbert (the “Egberts”) were involved in an automobile accident on I-15 between Cedar City and St. George, Utah. Egbert v. Nissan Motor Co., Ltd., 2007 UT 64, ¶2, 167 P.3d 1058 (“Egbert I”). While trying to avoid a slower-moving vehicle, Jerad Egbert lost control of his 1998 Nissan Altima causing it to leave the roadway and roll approximately three times. Id. The driver, Jerad Egbert, wore a seat belt, and the Egbert’s two-year-old son, Cade, was properly restrained in a child seat. Neither received significant injuries. (R. 41, 421.) Emily Egbert, Jerad’s pregnant wife, was not using her seat belt and was ejected through the front passenger window as the car rolled. Egbert, 2007 UT 64 at ¶3; (R. 349.) Emily Egbert suffered a broken pelvis, injuries to her bladder, abrasions and contusions. Egbert, 2007 UT 64 at ¶3. Her child, Janessa Egbert, was delivered by emergency C-section following the accident. Id. Janessa Egbert has a serious brain injury. Id. The parties dispute whether and to what extent the ejection proximately caused Janessa’s brain injury. Id.

B. The Parties’ Claims and Defenses

The Egberts brought products liability claims against Nissan North America, Inc., Nissan Motor Co., Ltd., and Central Glass Co., Ltd., (“Nissan”) for strict liability and

negligence.¹ Id. at ¶4. The Egberts do not claim that any action or omission on the part of Nissan caused the accident. Instead, they assert that the 1998 Altima was defective in design and unreasonably dangerous because the Altima’s side window glass did not prevent Emily from being ejected during the rollover. Id. The Egberts have described their products liability theory as one of “crashworthiness” or “enhanced injury.” They assert that Emily would not have been ejected had the vehicle been designed with side windows made of framed laminated glass, rather than tempered safety glass. Id. The Egberts also contend that had Emily not been ejected, her injuries would have been less serious, and Janessa would not have suffered a brain injury. Id. Plaintiff Jerad Egbert has also made an affirmative claim for loss of consortium.

Nissan denies it was responsible in any way for the accident or injuries. Id. at ¶5. Jerad Egbert was inattentive and lost control of the car, causing the accident and the resulting injuries. Nissan argues that the car was not defective or unreasonably dangerous, that it was not negligent with respect to the design and manufacture of the car, including the choice of tempered safety glass, and that the tempered safety glass was not a proximate cause of any of the alleged injuries. Id. Moreover, Nissan asserts that Emily would not have been contained within the vehicle during this severe rollover accident even if the Altima’s side windows had contained laminated glass, instead of tempered safety glass. Id.

Notably, all passenger cars manufactured in the United States in 1997—when the Egbert’s Altima was manufactured and sold—used tempered safety glass in front side

¹ Nissan North America, Inc. and Central Glass Co., Ltd. were dismissed during pre-trial proceedings.

windows. (R. 42). The tempered safety glass installed in the moveable side windows of the 1998 Nissan Altima met the applicable federal glazing requirements set forth in Federal Motor Vehicle Safety Standard 205 (“FMVSS 205”).

C. Prior Certification to this Court

On May 6, 2006, Judge Cassell certified two questions to this court: (1) whether the jury is to be instructed on the presumption of non-defectiveness that arises in Nissan’s favor under Utah Code section 78-15-6(3) and what evidentiary burden is required to overcome the presumption; and (2) whether Utah law recognizes a “crashworthiness” or “enhanced injury” theory of products liability, as outlined in section 16(a) of the Restatement (Third) of Torts. On August 24, 2007, this court found that the jury should be instructed on section 78-15-6(3)’s rebuttable presumption of nondefectiveness and that section 16(a) of the Restatement (Third) of Torts Products Liability, the enhanced injury theory of products liability, applies in Utah.

Judge Benson has now certified two additional issues to the court—whether Utah Code section 78-15-6(3) is constitutional, and who should bear the burden of proving that the Egberts’ injuries were indeed enhanced by the alleged defect in the Altima’s passenger side window glass.² (AOB at Addendum A.)

² In Egbert I, this court declined to address the burden of proof required in an enhanced injury case as this issue was not specifically certified.

SUMMARY OF ARGUMENT

On the first issue—whether section 78-15-6(3) is constitutional—Nissan asserts that the particular subsection is constitutional, and Utah law supports that finding. On the second issue—who has the burden of proving what damages, if any, were caused by a defect in the Altima—Nissan contends that the Egberts should have the burden of proving all aspects of their case, including enhanced injuries.

Utah Code section 78-15-6(3), part of the Utah Product Liability Act (“UPLA”), is not unconstitutional. In Berry v. Beech Aircraft Corporation, this court held that a different section of the UPLA—Utah Code section 78-15-3—was an unconstitutional statute of repose. 717 P.2d 670, 681-85 (Utah 1985). This court then determined that the remainder of the statute was invalid, not because the other sections were themselves unconstitutional, but because they could not be severed from the offending provision. Id. at 686. Utah Code section 78-15-6(3) is no more unconstitutional now than it was at the time Berry was decided; and the Egberts do not seriously contend otherwise.

Instead, the Egberts argue that section 78-15-6(3) is invalid because it was not properly reenacted. Assuming the court addresses this distinct question, the Egberts’ argument fails. The legislature and this court have implicitly recognized for decades that under Utah law when a court declares a non-severable statutory scheme invalid because one section is unconstitutional, the legislature can make the entire statutory scheme valid by fixing the specific constitutional defect. This is precisely what happened when the legislature amended section 78-15-3 in 1989 by replacing the unconstitutional statute of repose with a statute of limitation to comply with Berry. The remaining sections of the

Act—including section 78-15-6(3)—were still not severable, and therefore, again became operative, which explains why section 78-15-6(3) has been in the Utah Code ever since.

To conclude otherwise leads to absurd results. If the provisions surrounding the unconstitutional section 78-15-3 were not “reenacted” when section 78-15-3 was amended, then there would be no surrounding statutory provisions to which the amended section 78-15-3 statute of limitations would apply. It is difficult to imagine that the legislature would have enacted a statute of limitation to replace the unconstitutional statute of repose if the new provision applied to nothing. Moreover, the legislature, courts, and citizens have recognized the provisions in the UPLA as Utah law for twenty years. This court should not undermine the predictability and uniformity in the law by holding that the UPLA was not technically reenacted as the Egberts would have preferred. As a matter of public policy, the UPLA should remain operative.

As to the second certified issue—who has the burden of proof on the question of whether the Egberts’ injuries were enhanced by the alleged defect—the Egberts seek to shift their causation burden to Nissan and to avoid having any fault apportioned to Jerad Egbert for his (admittedly) having caused the accident. To accept this approach would mean that Nissan, whose product played no role in causing the initial accident, would be held jointly and severally liable for the entire extent of the Egberts’ harm. The better and more straightforward approach follows traditional tort causation law well-established in Utah by requiring a plaintiff to prove the extent of the enhanced injuries attributable to the defective design. This is particularly true under the specific facts of this case where the active tortfeasor is a plaintiff, the additional plaintiffs are part of the same economic unit, and the active tortfeasor therefore has an incentive to claim that it is unclear which

damages are in fact “enhanced” by an alleged product defect. In addition, the approach comports with the abolition of joint and several liability by Utah’s Liability Reform Act. Accordingly, the court should decline to adopt Restatement (Third) of Torts section 16 (b)-(d).

ARGUMENT

I. UTAH CODE SECTION 78-15-6(3) IS NOT UNCONSTITUTIONAL

A. The Egberts Have Not Addressed the Question of Whether Section 78-15-6(3) Is Unconstitutional

The Egberts do not address the first question certified by the district court: whether section 78-15-6(3) is unconstitutional. Instead, the Egberts address the question of whether section 78-15-6(3) was properly re-enacted by the legislature after this court declared it was not severable from 78-15-3, an unconstitutional statute of repose. Berry v. Beech Aircraft Corporation, 717 P.2d 670, 681-85 (Utah 1985). Importantly, Berry did not hold that section 78-15-6(3) was unconstitutional. And this court should not hold that section 78-15-6(3) is unconstitutional now, as the Egberts provide no basis for this court to do so. Therefore, the straightforward answer to the question actually certified—whether section 78-15-6(3) is unconstitutional—is “no.”

Even if the court addresses the distinct question discussed by the Egberts—whether the legislature “re-enacted” section 78-15-6(3)—the answer does not change. When the court invalidates a non-severable statutory scheme on the ground that one section of the scheme is unconstitutional, the legislature can “re-enact” the entire statutory scheme merely by fixing the constitutional defect. If a statutory scheme is non-severable for purposes of judicial review, then it should be non-severable for purposes of

re-enactment. This is especially true here, where there is no dispute that for nearly two decades the legislature has intended, courts have considered, and citizens have relied upon, the statutory scheme containing section 78-15-6(3) to have been “re-enacted.”

B. Section 78-15-6(3) Became Valid When the Legislature Fixed the Constitutional Defect in Section 78-15-3

The Egberts argue that the legislature did not specifically re-enact section 78-15-6(3) after Berry; and therefore, it remains invalid. The flaw in this argument is its exclusive focus on legislative power and whether after Berry the legislature followed the procedure for enacting entirely new statute. The issue, however, is not whether the legislature enacted section 78-15-6(3) after Berry, but whether the legislature fixed the problem identified in Berry such that the entire statutory scheme, including section 78-15-6(3), again became valid. This issue involves the scope and exercise of both judicial and legislative power, i.e., the status of non-severable aspects of a statutory scheme in which one section is declared unconstitutional by the judiciary and how a legislature can fix the constitutional defect identified by the judiciary.

To understand why both judicial and legislative powers are at issue, it is important to understand what is not in dispute. First, if section 78-15-6(3) had never been enacted by the legislature, then it would not be valid. The bulk of the Egberts’ argument concerning legislative power supports this obvious point. (AOB at 10-11.) Second, when the legislature enacted section 78-15-6(3) in 1977, it became valid. Third, in 1985 Berry declared section 78-15-3 unconstitutional and section 78-15-6(3) non-severable from 78-15-3, rendering both sections invalid. And, therefore, had the legislature done

nothing in response to Berry, both section 78-15-3 and section 78-15-6(3) would have remained invalid.

While none of these points are in dispute, they also have nothing to do with the issue before the court. The issue presented here is whether what the legislature, in fact, did in response to Berry was sufficient to make section 78-15-6(3) again valid. To determine whether the legislature's response was adequate, however, first requires this court to determine the status of those sections of a statutory scheme declared invalid, not because they are themselves unconstitutional, but because they are not severable from a section that is unconstitutional. More specifically, this court must initially determine the effect of the court's holding in Berry—(i) whether Berry required the legislature to re-enact the entire statutory scheme just as it had enacted the statutory scheme in the first instance, or (ii) whether Berry required the legislature only to fix the specific constitutional defect identified in Berry for the entire statutory scheme again to become valid. This threshold question involves the effect of the exercise of judicial authority, not merely the constitutional scope of legislative power.

Nissan contends that this court should expressly declare what it has implied for nearly two decades: when Utah appellate courts declare invalid a non-severable statutory scheme, properly enacted in the first instance, because one section of the statutory scheme is unconstitutional, the legislature can make the entire statutory scheme again valid by amending and re-enacting the section that contained the constitutional defect. This approach not only affords appropriate deference to the legislature and the statutory scheme it originally enacted, but it also is the approach both the legislature and courts

have assumed reflects Utah law. This approach is sensible, and there is no reason to chart a new course now.

1. For Two Decades, the Legislature Has Assumed That By Fixing the Constitutional Defect in a Statutory Scheme, the Entire Statutory Scheme Becomes Valid

The Egberts argue the deference to the legislature requires this court to declare unconstitutional a statutory scheme the legislature has considered valid for 20 years. The Egberts' appeal to deference makes no sense. Deference suggests that when the legislature properly enacts a non-severable statutory scheme, and the courts declare the substance of one section unconstitutional, the legislature may, as it did here, merely fix the constitutional defect to make the properly enacted statutory scheme again valid. Deference also suggests that this court expressly declare that this is Utah law because the legislature has assumed that this approach reflects Utah law for two decades. Deference, therefore, suggests exactly the opposite of what the Egberts ask this court to do.

The best indication that the legislature believes that Utah law required them only to fix the specific constitutional defect identified in Berry is that the legislature has assumed that the UPLA, including section 78-15-6(3), has been part of the Utah Code for the last 20 years. Most recently, in February of 2008, when section 78 of the Utah Code was recodified, and revised, the UPLA was renumbered, along with the other provisions in section 78, and approved and codified by the legislature.³

And the fact that the UPLA has remained in the Code for two decades is not an oversight. In 1989, after the legislature amended the UPLA by replacing the statute of

³ The 2008 amendment, effective February 7, 2008, renumbered section 78-15-1 to -6 to section 78B-6-701 to -707 and made some stylistic changes to the Act.

repose declared unconstitutional with a statute of limitation consistent with the court's concern in Berry, the Office of Legislative Research and General Counsel⁴ determined that the UPLA should appear in the Code because the legislature had fixed the problem identified in Berry.⁵ (Senate Bill 25, attached at Addendum C.)⁶ This position is consistent with the fact that section 78-15-3 was not severable from section 78-15-6(3). "Severability, where part of an act is unconstitutional, is primarily a matter of legislative intent." Id. (quoting Salt Lake City v. International Ass'n of Firefighters, Utah, 563 P.2d

⁴ There is an established legislative process by which laws that are enacted become part of the Utah Code. Utah Code section 36-12-12 provides that the Office of Legislative Research and General Counsel, an arm of the legislature, is responsible for seeing that enacted laws are incorporated into the Utah Code. Under section 36-12-(2)(g), the Office of Legislative Research and General Counsel is tasked with reviewing, examining, correcting, and approving the legislation and preparing the laws for publication. Section 36-12-(2)(i) provides that the Office of Legislative Research and General Counsel "is to formulate recommendations for clarification, classification, arrangement, codification, annotation and indexing of Utah statutes" Section 36-12-(3)(g) makes clear that the Office of Legislative Research and General Counsel is responsible for "merging any amendments, enactments or repealers to the same code provisions that are passed by the legislature."

⁵ Rules of statutory construction also underscore the frailty of the Egberts' "resurrection theory." Utah Code section 68-3-6 provides: "The provisions of any statute, so far as they are the same as those of any prior statute, shall be construed as a continuation of such provisions, and not as a new enactment." This section is based on section 14 of the Uniform Statute and Rule Construction Act, which provides that a statute which is revised, whether by amendment or by repeal and reenactment, is a continuation of the previous statute and not a new enactment to the extent that it contains substantially the same language as the previous statute. U.S.R.C.A. § 14. Only the new provisions are to be considered as having been enacted at the time of the amendment. The provisions introduced by an amendatory act should be read together with the provisions of the original section that are reenacted or left unchanged, as if they had been originally enacted as one section. Accordingly, the prior sections of the UPLA that were not amended are deemed to be a continuation of the statute. These provisions remain in the Code, not by re-enactment or implication, but by continuation. Attorney General v. Pomeroy, 73 P.2d 1277 (Utah 1937) (reenactment of statute of limitations by 1933 revision amounted not to a repeal of the antecedent sections, but to a reaffirmation thereof).

⁶ Notably, Senate Bill 25 as introduced or enacted did not alter section 6.

786, 791 (Utah 1977)). If the legislature intended the entire statute to operate together at the time of Berry, then it makes sense that the legislature considered the entire statute again valid once the specific constitutional defect in section 78-15-3 was fixed.

Moreover, as this court has recognized many times, “the best evidence of legislative intent is the plain language of the statute.” Davis v. Provo City Corp., 2008 UT 59, ¶13, 193 P.3d 86, 89 (Utah 2008); Craftsman Builder’s Supply, Inc. v. Butler Mfg. Co., 1999 UT 18, ¶30, 974 P.3d 1194, 1203 (Utah 1999). Tellingly, the reenacted version of section 78-15-3 references the rest of the Act: “A civil action under this chapter shall be brought within two years from the time the individual who would be the claimant in such action discovered, or in the exercise of due diligence should have discovered, both the harm and its cause.” Utah Code Ann. § 78-15-3 (emphasis added). It is apparent from the emphasized language that the Utah legislature intended that the remaining portions of the Act would become operative with section 78-15-3’s elimination of the constitutional problem identified in Berry.

The Egberts therefore cannot seriously dispute that the legislature believes Utah law is that once a court declares invalid a non-severable statutory scheme on the ground that one provision of that statutory scheme is unconstitutional, the legislature need only fix the constitutional defect to make the entire statutory scheme operative. Deference to the legislature suggests that this court declare expressly that this is, in fact, Utah law.

2. For Two Decades, Courts Have Followed the Rule That By Fixing the Constitutional Defect in a Statutory Scheme, the Entire Statutory Scheme Becomes Valid

The legislature’s belief that it only had to fix the constitutional defect in section 78-15-3 to make the entire UPLA, including section 78-15-6(3), valid is reasonable in

light of the fact that Utah courts have implicitly followed this rule in a number of cases. To date, nine Utah appellate decisions, including four decisions of this court, as well as two decisions of the Tenth Circuit, have applied the very statutory provisions that the Egberts contend has been invalid since 1985.⁷ In addition, the United States District Court for the District of Utah has routinely applied the statutory provisions as well,⁸ and has expressly held that section 78-15-6(3) is operative and constitutional.⁹

As this court observed in Grundberg v. Upjohn Co., “[a]lthough section 78-15-6(3) was neither repealed, amended, nor specifically reenacted, there is no indication that the legislature has changed its policy regarding deference to governmental standards.” 813 P.2d 89, 97 (Utah 1999). Grundberg held that a manufacturer of FDA-approved drugs is immune from strict liability claims based on design defect in light of the importance the legislature has placed on “governmental standards in Utah Code Ann. Section 78-15-6(3).” 813 P.2d at 97. As this court observed, “[i]n that section, the

⁷ Egbert v. Nissan N. Am., Inc., 2007 UT 64, 167 P.3d 1058 (Utah 2007); Slisze v. Stanley-Bostitch, 979 P.2d 317, 319-20 (Utah 1999); Nay v. Gen. Motors Corp., 850 P.2d 1260, 1263 (Utah 1993); Grundberg v. Upjohn, 813 P.2d 89, 97-98 (Utah 1991); Dimick v. OHC Liquidation Trust, 157 P.3d 347, 349-51 (Utah Ct. App. 2007); House v. Armor of Am., 886 P.2d 542, 547 (Utah Ct. App. 1994); Burns v. Cannondale Bicycle Co., & The Bicycle Ctr., 876 P.2d 415, 418 (Utah Ct. App. 1994); Maack v. Resource Design & Constr., 875 P.2d 570, 582 (Utah Ct. App. 1993); Kleinert v. Kimball Elevator Co., 854 P.2d 1025, 1027-28 (Utah Ct. App. 1993); Taylor v. Cooper Tire & Rubber Co., 130 F.3d 1295 (10th Cir. 1997); Brown v. Sears & Roebuck Co., 328 F.3d 1274 (10th Cir. 2003).

⁸ See, e.g., Ontiveors v. Danek Med., 1999 U.S. Dist. LEXIS 18873 (D. Utah August 3, 1999); Salt Lake City Corp., v. Kasler Corp., 855 F. Supp. 1560, 1571 (D. Utah 1994); Ghionis v. Deer Valley Resort Co., 839 F. Supp. 789, 794-95 (D. Utah 1993); Allen v. Minnstar, 1989 U.S. Lexis 18395, *5-8 (D. Utah December 20, 1989).

⁹ Henrie Northrup Grumman Corp., 2006 WL 1129399, *4 (D. Utah April 4, 2006) (analyzing Utah law on the constitutionality of section 78-15-6(3) and holding that, although the Utah Supreme Court had not specifically rule on the issue, applicable case law from this court indicated that the statute was constitutional).

legislature declared that there is a rebuttable presumption that a product which fully complies with the applicable government standards at the time of marketing is not defective. Id. Grundberg, therefore, demonstrates that this court has already recognized the legislature’s intent that section 78-15-6(3) became operative in 1989.

Furthermore, Egbert I confirms that the legislature’s reenactment of section 78-15-3 “addressed our constitutional concerns with the original section,” citing Grundberg and Slisze as instances in which the court has sua sponte addressed this provision. Egbert v. Nissan N. Am., Inc., 2007 UT 64, ¶8 n.3, 167 P.3d 1058. The court also held that the jury in this case should be instructed on Utah Code section 78-15-6(3)’s rebuttable presumption: “[T]he jury should be informed of the presumption of nondefectiveness under Utah Code section 78-15-6(3).” Id. The court went on to explain its analysis: “It is common to instruct juries as to the law, and as to presumptions specifically. Presumptions generally must be incorporated into the fact finding process for juries to appropriately discharge their obligations as fact finders. The Egberts do not cite a good reason, and we cannot conceive of one, not to instruct the jury here that the rebuttable presumption of nondefectiveness applies to Nissan.” Id. at 1061 (emphasis added). This analysis presupposes that section 78-15-6(3) is valid.

For all of the reasons set forth above, the court should make express what has been implied in its rulings for decades: section 78-15-6(3) became valid when the legislature amended and re-enacted section 78-15-3 to remove the constitutional defect identified in Berry.

II. PLAINTIFFS SHOULD HAVE THE BURDEN OF PROVING ALL ELEMENTS OF THEIR CASE, INCLUDING ENHANCED INJURY, AND THIS COURT SHOULD NOT APPLY RESTATEMENT (THIRD) OF TORTS SECTION 16 (b)-(d)

There is great debate across the country on the question of where the burden of proof should rest in enhanced injury cases. There are two distinct lines of authority, one known as “Huddell/Caiazzo” and the other, “Fox/Mitchell.” The Fox/Mitchell approach follows Restatement (Third) Section 16(b)-(d) and places the burden of proof on the question of enhanced injury on the defendant. In contrast, the Huddell/Caiazzo approach places the burden of proof of enhanced injury on the plaintiff. Nissan contends that this court should follow Huddell/Caiazzo, which is consistent with Utah law and well-established tort law principles. This is particularly true under the specific facts of this case where the active tortfeasor is a plaintiff and the additional plaintiffs are part of the same economic unit, giving the active tortfeasor an incentive to claim that it is unclear which damages are in fact “enhanced” by an alleged product defect. Adopting Fox/Mitchell would be inconsistent with Utah law and irreconcilable with the Utah Liability Reform Act. Accordingly, the court should apply Huddell/Caiazzo and require the Egberts to prove all aspects of their enhanced injury claim, including the extent to which the injuries were purportedly enhanced by the alleged defect.

A. The “Enhanced Injury” or “Crashworthiness” Doctrine

In a crashworthiness or enhanced injury case, the plaintiff does not claim that a defect in a vehicle caused a collision, but instead claims that a defect in the vehicle caused injuries over and above those which would have been expected in the collision

absent the defect. The claim, in essence, is that the design of the vehicle failed reasonably to protect the occupant in a collision caused by someone else.¹⁰

The seminal case recognizing the enhanced injury doctrine is Larsen v. General Motors Corporation, 391 F.2d 495 (8th Cir. 1968). In Larsen, the Eighth Circuit held that the manufacturer had a duty to design the vehicle to avoid subjecting its users to an unreasonable risk of injury in the event of a collision. Id. at 502. Larsen did not hold that manufacturers are under a duty to design “accident-proof or fool-proof” vehicles, nor did it hold that manufacturers are “insurers” of their products. Id. at 502-03. The overwhelming majority of jurisdictions now follow Larsen’s reasoning—that manufacturers must design cars so that they are reasonably crashworthy. Berry Levenstam & Daryl J. Lapp, Plaintiff’s Burden of Proving Enhanced Injury in Crashworthiness Cases: A Clash Worthy of Analysis, 38 De Paul L. Rev. 55, 61 n.33 (1989). In states that have adopted the crashworthiness doctrine, it is adopted as a subset of the strict liability doctrine of the Restatement (Second) of Torts section 402A, which imposes on a plaintiff “more rigorous proof requirements than a typical section 402A action.” Barris v. Bob’s Drag Chutes & Equip., Inc., 685 F.2d 94, 99 (3d Cir. 1982).

Here, the Egberts are claiming that, although a defect in the vehicle did not cause the crash, Emily Egbert’s injuries, and therefore Janessa’s as well, were enhanced when the subject Altima’s allegedly defective side window glass broke out during the rollover,

¹⁰ Enhanced injury claims are also referred to as “second collision” or “crashworthiness” claims. Jackson v. Warrum, 535 N.E.2d 1207, 1212 (Ind. Ct. App. 1989). In the second collision context, the “first collision” is the vehicle’s collision with another object, and the “second collision” is the occupant’s contact with interior structures or components of the vehicle, or exterior elements in the event of an ejection. Wemyss v. Coleman, Ky, 729 S.W.2d 174, 179 (Ky. 1987).

allowing Emily to be ejected and injured. They correspondingly claim that, had the window been equipped with laminated glass, she would not have been ejected and, even though unrestrained, would have received less severe injuries because she would have remained within the vehicle during the entire crash.

The question raised here is the following: which party bears the burden of proving what would have happened had Emily Egbert remained in the vehicle and unbelted through the entire accident sequence? This is really the crux of the Egberts', and any other, enhanced injury case—the claim that there would have been little or no injury absent the defect in design, and therefore, the defect made the injuries worse than they would have been otherwise. Yet although the Egberts do not dispute that they have to prove that the side window glass was defective and that their laminated glass alternative design was feasible, they contend that Nissan should have the burden of proving the degree to which the Egberts' injuries were enhanced. In other words, the Egberts seek to shift the critical component of causation onto the defendant.

B. The Two Approaches to Proving Enhanced Injury

Although the enhanced injury liability theory is well-established, controversy has arisen over the way in which a plaintiff's burden of proof of causation can be met. One group of cases, known as the "Huddell/Caiazzo" approach, requires a plaintiff to prove not only the injuries attributable to the accident, but also those attributable to the design defect. This approach is based upon Huddell v. Levin, 537 F.2d 726 (3d Cir. 1976) (applying New Jersey law) and Caiazzo v. Volkswagenwerk A.G., 647 F.2d 241 (2d Cir. 1981) (applying New York law).

The Huddle/Caiazzo approach simply follows general tort principles by requiring a plaintiff to bear the burden of proving all aspects of an enhanced injury claim, including the injuries that were enhanced by the alleged defect, i.e., the injuries actually caused by the defendant. In Huddell, the Third Circuit held that the plaintiff failed to satisfy her burden of proving enhanced injury. In so doing, the Third Circuit formulated the following standard: “First, in establishing that the design in question was defective, the plaintiff must offer proof of an alternative, safer design, practicable under the circumstances. . . . Second, the plaintiff must offer proof of what injuries, if any, would have resulted had the alternative, safer design been used. . . . Third, . . . the plaintiff must offer some method of establishing the extent of enhanced injuries attributable to the defective design.” Id. at 737-38 (emphasis added). The Second Circuit reached the same conclusion in Caiazzo v. Volkswagenwerk A.G., holding “the plaintiff should be required to prove the extent of the enhanced injuries attributable to the defective design”, and that such proof requires a showing of the actual nature and the extent of the enhanced injury. 647 F.2d 241, 250-51 (2d Cir. 1981).

The Huddell/Caiazzo approach has been adopted in numerous jurisdictions,¹¹ including the United States District Court for the District of Utah. In Allen v. Minnstar,

¹¹ Toyota Motor Corp. v. Gregory, 136 S.W.3d 35 (Ky. 2004); Sumner v. Gen. Motors Corp., 538 N.W.2d 112 (Mich. Ct. App. 1995) rev’d on other grounds by Lopez v. Gen. Motors Corp., 538 N.W.2d 861 (Mich. Ct. App. 1997); Reed v. Chrysler Corp., 494 N.W.2d 224 (Iowa 1992); Duran v. Gen. Motors Corp., 688 P.2d 779 (N.M. Ct. App. 1983) rev’d on other grounds by Brooks v. Beech Aircraft Corp., 902 P.2d 54 (N.M. 1995); Garcia v. Rivera, 160 A.D.2d 274 (N.Y. App. Div. 199); Masterman v. Veldman's Equipment, Inc., 530 N.E.2d 312, 318 (Ind. App. Ct. 1988) (there is a split of opinion in Indiana appellate courts, see Jackson v. Warrum, 535 N.E.2d 1207, 1216 (Ind. App. Ct. 1989) (adopting Fox/Mitchell)); Mazda Motor Corp. v. Lindahl, 706 A.2d 526, 532 (Del. Supr. Ct. 1998); Armstrong v. Lorino, 580 So.2d 528, 530 (La. App. Ct. 1991); D’Amario

the court cited Huddell and declared: “To make out a prima facie case for enhanced injury, a plaintiff must show the existence of an alternative, safer design, practicable under the circumstances, and what injuries would have resulted had the safer design been utilized.” 1989 WL 434765, *1 (D. Utah Nov. 21, 1989) (emphasis added), attached as Addendum D.¹² The Huddell/Caiazzo approach also has been widely praised by courts and commentators as consistent with both the theoretical underpinnings of Larsen and with broader themes of product liability law.¹³ In sum, the Huddell/Caiazzo approach properly recognizes that a plaintiff asserting an enhanced injury claim must prove all aspects of the claim, including causation, by proving the extent of the injuries enhanced by the alleged product defect.

The alternative approach is known as “Fox/Mitchell.” This approach is based upon Fox v. Ford Motor Co., 575 F.2d 774 (10th Cir. 1978) (applying Wyoming law), and Mitchell v. Volkswagenwerk, AG, 669 F.2d 1199 (8th Cir. 1982) (applying Minnesota law), and later espoused by the Restatement (Third) of Torts, section 16 (c). The Fox/Mitchell approach significantly relaxes the plaintiff’s burden of proof of

v. Ford Motor Co., 806 So.2d 424, 437 (Fla. 2001). See also Caiazzo v. Volkswagenwerk A.G., 647 F.2d 241 (2d Cir. 1981).

¹² Although the Court determined that Allen was not an enhanced injury case, it specifically indicated that the heightened burden provided by Huddell would apply to such a case. Allen, 1989 WL 434765 at *1 (“Apparently Allen resists this characterization because of the evidentiary showing necessary to allow his claim to proceed to trial.”).

¹³ Heather Fox Vickles and Michael E. Oldham, Enhanced Injury Should Not Equal Enhanced Liability, 36 S. TEX. L. REV. 417 (1995), attached as Addendum E; see also Louis R. Frumer & Melvin L. Friedman, Products Liability 21.04[1], at 21-26 (1991) (stating that the Huddell approach clearly represents “the current and better view” and is eminently fair to all litigants in that it places the burden of proof where it properly belongs, on the plaintiff, to prove with particularity the injuries that have been enhanced).

proximate cause, shifts the critical part of that burden to the defendant, and embraces joint and several liability.

Under the Fox/Mitchell approach, a plaintiff must demonstrate only that the alleged defect was a substantial factor in causing some injuries to a plaintiff, at which point the causation burden shifts to the manufacturer to prove which injuries resulted from the initial accident and which injuries resulted from the vehicle's allegedly defective design. In Fox, the court saw no difference between an enhanced injury case and one in which a passive tortfeasor and an active tortfeasor "cooperate" to produce an injury. Fox, 575 F.2d at 787. The court further reasoned that apportionment or segregation of injuries is neither appropriate nor possible where an injury is "indivisible," such as death or paralysis, and in that case, a defendant will be jointly and severally liable for all injuries. Id. Thus, if such injuries cannot be segregated, the manufacturer—whose product played no role in the initial accident—is held jointly and severally liable for the entire extent of the plaintiff's damages.

Although some courts have adopted the Fox/Mitchell approach,¹⁴ critics assert, and Nissan agrees, that this approach erodes the principles upon which Larsen and the

¹⁴ Gen. Motors Corp. v. Edwards, 482 So.2d 1176, 1189-90 (Ala. 1985) overruled on other grounds by Schwartz v. Volvo N. Am. Corp., 554 So.2d 927 (Ala. 1989); Oakes v. Gen. Motors Corp., 628 N.E.2d 341, 349 (Ill. App. Ct. 1993); Valk Mfg. Co. v. Rangaswamy, 537 A.2d 622, 633 (Md. Ct. Spec. App., 1988) rev'd on other grounds Montgomery County v. Valk. Mfg. Co., 562 A.2d 1246 (Md. 1989); Lally v. Volkswagen Aktiengesellschaft, 698 N.E.2d 28, 39 (Mass. App. Ct. 1998); McDowell v. Kawasaki Motors Corp. USA, 799 S.W.2d 854, 867 (Mo. Ct. App. 1990); Kudlacek v. Fiat S.p.A., 509 N.W.2d 603, 611-12 (Neb. 1994); Trull v. Volkswagen of Am., Inc., 761 A.2d 477, 482-83 (N.H. 2000); Harsh v. Petroll, 887 A.2d 209, 217-19 (Pa. 2005); Gen. Motors Corp. v. Castaneda, 980 S.W.2d 777 (Tex. App. 1998); Blankenship v. Gen. Motors Corp., 406 S.E.2d 781, 786 (W. Va. 1991); Maskrey v. Volkswagenwerk A.G., 370 N.W.2d 815, 821 (Wisc. Ct. App. 1985); Chrysler Corp. v. Todorovich, 580 P.2d 1123, 1130 (Wyo. 1978).

enhanced injury doctrine are grounded and unfairly extends manufacturers' potential liability far beyond the actual enhanced injuries to all injury sustained in an accident which the manufacturer played no part in causing.¹⁵

C. The Huddell/Caiazzo Approach is Consistent with Utah Law and Should be Adopted.

Federal courts analyzing the burden of proof in an enhanced injury case must look to the substantive law of the forum state. Wankier v. Crown Equip. Co., 353 F.3d 862, 866 (10th Cir. 2003). Not surprisingly, the Tenth Circuit has reached different results as to what burden to apply in an enhanced injury case depending on the underlying state law. Compare Allen v. Minnstar, 1989 WL 434765 (D. Utah Nov. 21, 1989) (Utah), with Cleveland v. Piper Aircraft Corp., 890 F.2d 1540 (10th Cir. 1990) (New Mexico) (both finding that a plaintiff bears the burden of proving enhanced injury) and Fox v. Ford Motor Co., 575 F.2d 774 (10th Cir. 1978) (Wyoming) (shifting the causation burden to defendant); and Harvey, 873 F.2d 1343 (10th Cir. 1989) (also applying Wyoming law, but moving away from the Fox/Mitchell approach and toward Huddell/Caiazzo). Since this court has only just recognized the enhanced injury doctrine, this court necessarily must look not only to existing Utah law, but also to pertinent authority from other sources for guidance. The Fox/Mitchell approach is in tension with existing Utah tort law and directly conflicts with the Utah Liability Reform Act's prohibition on joint and several liability. In contrast, the Huddell/Caiazzo approach accurately reflects the jurisprudence

¹⁵ 2A Louis R. Frumer & Melvin L. Friedman, Products Liability 21.04[4], at 21-35; Heather Fox Vickles and Michael E. Oldham, Enhanced Injury Should Not Equal Enhanced Liability, 36 S. TEX. L. REV. 417 (1995).

in Utah with respect to causation. In addition, general tort law principles and the direction of the states in the Tenth Circuit favor applying the Huddle/Caiazzo approach.

1. Relaxing the Standard of Proof for Proximate Cause is Contrary to Existing Utah Law

Under Utah law, a plaintiff bears “the ultimate burden of proving all the elements of his cause of action,” including causation. Thayne v. Beneficial Utah, 874 P.2d 120, 124 (Utah 1994); Burns v. Cannondale Bicycle Co., 876 P.2d 415, 418 (Utah Ct. App. 1994). In order to prevail on a claim of product defect, plaintiffs must show that: (1) the product was defective at the time it was sold; (2) the product was unreasonably dangerous at the time it was sold; and (3) the unreasonably dangerous and defective condition caused the plaintiff’s injuries. Utah Code Ann. § 78-15-6 (2007).¹⁶ To meet their burden of proof on causation, the Utah Court of Appeals has said that plaintiffs must adduce sufficient evidence ““from which the fact finder may rationally conclude that plaintiff[s]’ injuries and damages proximately resulted from the product’s failure of performance causally related to its defective condition.”” Burns, 876 P.2d at 418. In other words, in Utah a plaintiff asserting a defect in design must prove that the defect proximately caused her injuries, and that an alternative design would have prevented them.

¹⁶ Lamb v. B & B Amusements Corp., 869 P.2d 926, 929 (Utah 1993); Ernest W. Hahn, Inc. v. Armco Steel Co., 601 P.2d 152, 156 (Utah 1979). In addition, in a design defect case, a plaintiff must prove that a feasible alternative design would have prevented the plaintiff’s injuries. Allen v. Minnstar, 8 F.3d 1470, 1479 (10th Cir. 1993) (“Now, in making our best effort to ascertain and apply Utah law, we conclude that the district judge did not err in holding that the plaintiff did bear the burden of showing that an alternative, safer design, practicable under the circumstances, was available at the time the boat and engine were sold.”); Wankier v. Crown Equip. Corp., 353 F.3d 862, 866 (10th Cir. 2003) (stating that the plaintiff, in a design defect case, “bears the burden of showing that an alternative, safer design, practicable under the circumstances, was available at the time the [products] were sold”).

This causation standard should apply equally to an enhanced injury case based on an alleged design defect. Indeed, this conclusion is supported by the only opinion of a court in Utah to address the issue. As indicated above, in Allen v. Minnstar the Utah District Court cited Huddell and declared: “To make out a prima facie case for enhanced injury, a plaintiff must show the existence of an alternative, safer design, practicable under the circumstances, and what injuries would have resulted had the safer design been utilized. 1989 WL 434765, *1 (D. Utah Nov. 21, 1989) (emphasis added).

The Huddell/Caiazzo approach is fully consistent with Utah product liability law as discussed above. Under Huddell/Caiazzo, plaintiffs must prove the causation element of their claim by demonstrating that there is a difference between the actual injury sustained and the injury that would have occurred under the same circumstances had the design been different. In contrast, applying the Fox/Mitchell approach would erode the causation standard otherwise applicable under Utah tort doctrine. Under traditional legal principles, because the parties initiating complaints—plaintiffs—stand to benefit from the proof, they have the burden to prove each element of their claims. 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); Prosser & Keaton on Torts, § 41, p. 269 (5th ed. 1984).

The Fox/Mitchell approach, however, allows a plaintiff to prevail despite inadequate and speculative proof of proximate cause. This court has held that when proof is “so tenuous, vague, or insufficiently established that determining causation becomes ‘completely speculative,’ the claim fails as a matter of law.” Harline v. Barker, 912 P.2d 433, 439 (Utah 1996) (citation omitted). In practice, the Fox/Mitchell approach

does not meet this threshold because it permits speculative proof of causation. Specifically, the “substantial factor” approach adopted by the Fox/Mitchell approach does not require proof of what a plaintiff’s injuries would have been absent the alleged defect. Without such proof, no basis exists for determining that there is, in fact, an enhanced injury. In effect, the substantial factor approach relieves the plaintiff of the burden of proving a causal relationship between the defect and the injury being claimed. The result is that under Fox/Mitchell, a plaintiff can hold the manufacturer liable—jointly and severally liable—despite the fact that she cannot demonstrate that her injuries were actually enhanced due to the alleged defect. This is “directly at odds with the fundamental doctrine of enhanced injury liability.” Levenstam & Lapp, 38 De Paul L. Rev. 55, 76.

Put another way, limited enhanced-injury liability should not be converted into “plenary liability for the entire consequence of an accident which the automobile manufacturer played no part in precipitating.” Huddell v. Levin, 537 F.2d 726, 739 (3d Cir. 1976). By effectively removing the element of causation from a plaintiff’s case, the “substantial factor” approach leads to the imposition of absolute, rather than strict, liability, contrary to both the established tenets of strict liability and Utah law. Indeed, “[f]rom its inception . . . strict liability has never been, and is not now, absolute liability. As has been repeatedly expressed, under strict liability, the manufacturer does not thereby become an insurer” of its product. Ernest W. Hahn, Inc. v. Armco Steel Co., 601 P.2d 152, 157 (Utah 1979) (quoting Daly v. Gen. Motors Corp., 575 P.2d 1162, 1165-1166 (Cal. 1978)). This principle unquestionably applies in an enhanced injury case. Larsen, 391 F.2d at 502-03. Under Huddell/Caiazzo, this problem is avoided by requiring

plaintiffs to satisfy their ordinary burden on causation by providing specific proof of injury enhancement.

Despite the Egberts' argument to the contrary, this court in Tingey v. Christensen, 987 P.2d 588, 592 (Utah 1999), has not endorsed the Fox/Mitchell approach by adopting Restatement (Second) of Torts Section 433(a) and (b) in the pre-existing injury context. (AOB at 13-14.) In Tingey, the plaintiff suffered from a host of physical problems that were allegedly exacerbated by a car accident. Id. at 591. At trial, her witnesses claimed it was impossible to apportion her pain and suffering between her pre-existing conditions and the injuries suffered in the car accident. Id. The court agreed that a jury instruction should have been given informing that jury that if it "can find a reasonable basis for apportioning damages between a pre-existing condition and a subsequent tort, it should do so; however if the jury finds it impossible to apportion damages, it should find that tortfeasor is liable for the entire amount of damages." Id. at 592. The Egberts argue that this holding is consistent with the adoption of Fox-Mitchell in an enhanced injury case.

This argument fails for at least two reasons. First, Tingey involved a so-called "egg-shell plaintiff," and therefore implicates the unrelated policy that a defendant should not benefit by injuring a person with pre-existing medical conditions rather than a healthy person. Unlike an "egg-shell plaintiff," the Egberts are not entitled to all damages suffered from all causes. Instead, the entire basis of their claim is that Nissan is liable only for the "enhanced" injuries that occurred due to Nissan's alleged failure to manufacture a crashworthy car. (AOB at 14 (admitting that plaintiff "retains the burden of proving defect and increased harm").) Accordingly, the very nature of the Egberts' claim requires that they parse out the "enhanced" damages from the damages that

ordinarily would have flowed from the accident. While an “egg-shell plaintiff,” like the plaintiff in Tingey, is entitled to all damages to the extent they cannot be apportioned, this is not the case here.

Second, the Utah Liability Reform Act was not implicated in Tingey. Unlike Tingey, this case does not involve a situation where there is only one person allegedly at fault. Mr. Egbert admittedly caused the accident and bears fault for his negligent acts. When there are multiple tortfeasors, as in this instance, the Utah Liability Reform Act requires that the damages be apportioned among the multiple tortfeasors. Utah Code Ann. § 78-27-27 (“No defendant is liable . . . for any amount in excess of the proportion of fault attributed to that defendant”). Analogizing the damage caused by Mr. Egbert’s negligence to the “pre-existing condition” of an “egg-shell plaintiff” in Tingey disregards this state’s clear requirement of fault apportionment among multiple tortfeasors and puts Nissan on the hook for all damages regardless of who was responsible for them.

Although the Egberts’ assert that Fox/Mitchell has been adopted by a “strong majority of courts,” this claim is disingenuous. Criticizing the Restatement Reporters, legal scholars have pointed out that “recent decisions on the burden of proof issue are almost evenly split.” Vickles and Oldham, Enhanced Injury Should Not Equal Enhanced Liability, 36 S. Tex. L. Rev. 417, 447 (1995) [hereinafter Vickles, Enhanced Injury]. Indeed, these scholars insist that no “majority” position has yet emerged; and in fact, most states have not yet directly addressed this issue.” Id. To date, only twenty states

have adopted Fox/Mitchell,¹⁷ while the other 30 states have either adopted Huddell¹⁸ or have not yet decided which of the two approaches they will follow.¹⁹ The majority of states that have adopted the Fox/Mitchell approach retain some form of joint and several liability. Thus, contrary to the Egberts' assertions, courts are deeply split on the question of which party has the burden of proof in enhanced injury cases.

As pointed out by Vickles and Oldham, the Restatement Reporters "mischaracterize many states as supportive of the Fox/Mitchell approach when their case law either clearly does not support that approach or has not yet addressed the issue." Vickles, Enhanced Injury at 447. For example, the Reporters include New Jersey and Indiana as states supporting Fox/Mitchell, despite the fact that most courts in New Jersey

¹⁷ See *supra*, note 14.

¹⁸ D'Amario v. Ford Motor Co., 806 So.2d 424, 437-439 (Fla. 2001); Reed v. Chrysler Corp., 494 N.W.2d 224 (Iowa 1992); Toyota Motor Corp. v. Gregory, 136 S.W.3d 35 (Ky. 2004); Sumner v. Gen. Motors Corp., 538 N.W.2d 112 (Mich. Ct. App. 1995) *rev'd on other grounds by* Lopez v. Gen. Motors Corp., 569 N.W.2d 861 (Mich. Ct. App. 1997); Crispin v. Volkswagenwerk, A.G., 591 A.2d 966 (N.J. Super. Ct. App. Div. 1991); See also Huddell v. Levin, 537 F.2d 726 (3d Cir.1976); See also Mclaughlin v. Nissan Motors Corp., 655 A.2d 107 (N.J. Super. Ct. Law Div. 1994) Thornton v. General Motors Corp., 655 A.2d 107 (N.J. Super. Ct. Law Div. 1994); Duran v. General Motors Corp., 688 P.2d 779 (N.M. Ct. App. 1983) *rev'd on other grounds by* Brooks v. Beech Aircraft Corp., 902 P.2d 54 (N.M. 1995); Garcia v. Rivera, 160 A.D.2d 274, (N.Y. App. Div. 1990); Caiazza v. Volkswagenwerk A.G., 647 F.2d 241 (2d Cir. 1981).

¹⁹ These states are Arkansas, Colorado, Connecticut, Delaware, Hawaii, Indiana, Kansas, Louisiana, Maine, Minnesota, Mississippi, Montana, Nevada, North Carolina, North Dakota, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Virginia, and Washington.

that have considered the issue have adopted Huddell/Caiazzo,²⁰ and a clear split of authority exists in Indiana.²¹

Furthermore, the Reporters include Florida as a state that has or will adopt Fox/Mitchell. However, this conclusion is contrary to recent case law and the conclusions of legal scholars and practitioners in Florida. See D’Amario v. Ford Motor Co., 806 So.2d 424, 437-39 (Fla. 2001) (placing the burden on the plaintiff to prove the defect, the defect’s causal relationship to the injuries and the “existence of additional or enhanced injuries caused by the defect.”); and Larry Roth, The Burden of Proof Conundrum in Motor Vehicle Crashworthiness Cases, 80 Fla. Bar J. 10, 16-18 (Feb. 2006) (asserting the Florida Supreme Court must adopted the Huddell/Caiazzo approach following its decision in D’Amario).

Colorado is also cited by the Reporters as a state that would adopt Fox/Mitchell based on case law from the 1980s. The Reporters do not mention, however, that Colorado has since statutorily abolished joint and several liability. See Colo. Rev. Stat. 13-21-406, 13-21-111.5 (2006). The Reporters also fail to acknowledge federal appellate court precedent imposing the burden of proving the extent of enhancement upon plaintiff under Colorado law. Curtis v. General Motors Corp., 649 F.2d 808, 813 (10th Cir. 1981).

²⁰ Crispin v. Volkswagenwerk, A.G., 591 A.2d 966 (N.J. Super. Ct. App. Div. 1991); McLaughlin v. Nissan Motors Corp., 655 A.2d 107 (N.J. Super. Ct. Law Div. 1994); but see Thornton v. General Motors Corp., 655 A.2d 107 (N.J. Super. Ct. Law Div. 1994) (disagreeing with McLaughlin and applying Fox-Mitchell).

²¹ Jackson v. Warrum, 535 N.E.2d 1207 (Ind. Ct. App. 1st dist. 1989) (adopting Fox-Mitchell); vs. Masterman v. Veldman’s Equip., Inc., 530 N.E.2d 312 (Ind. Ct. App. 3rd Dist. 1988) (adopting Huddell).

That the Reporters repeatedly cite questionable and irrelevant state precedent to predict that jurisdictions will adopt the Fox/Mitchell approach entirely undermines the Restatement's adoption of the Fox/Mitchell approach.

The Tenth Circuit's recent interpretation of the law of surrounding states also endorses the Huddell/Caiazzo approach. As explained more fully below, this is in keeping with the trend in the various states toward abolishing joint and several liability in favor of pure comparative fault. In interpreting New Mexico law, which like Utah has abolished joint and several liability, the Tenth Circuit cited Huddell and found that New Mexico law requires a plaintiff to "offer some method of establishing the extent of enhanced injuries attributable to the defective design." Cleveland, 890 F.2d at 1546 (citing Duran v. Gen. Motors Corp., 688 P.2d 779, 787 (N.M. 1983) and Huddell, 537 F.2d at 738.).

Likewise, applying Wyoming law, the Tenth Circuit has now determined that Wyoming does not follow the Fox/Mitchell approach. In Harvey v. General Motors Corporation, seeking to clarify its previous holding under Wyoming law in Fox, the Tenth Circuit substantially modified its prior decision. 873 F.2d 1343 (10th Cir. 1989) (applying Wyoming law). Responding to criticism of the Fox decision, the court held: "In our view, Fox does not tell us that a finding of causation necessitates an award of damages. Rather, Fox permits apportionment of damages if there are distinct harms or there is a reasonable basis for determining the causes of injury." Id. at 1349. Consequently, Harvey held it is not enough to prove that a defect was a substantial factor in producing an injury. A plaintiff must prove that a defect caused injury "over and

above” the injury that “probably would have occurred” absent the alleged defect. Id. at 1348-49. In sum, Harvey requires the plaintiff to prove the injuries he would have suffered but for the injury enhancing defect, moving the Tenth Circuit states (particularly Wyoming) closer to Huddell than Fox. Id.; Louis R. Frumer & Melvin L. Friedman, Products Liability § 21,04[3], at 21-44 n. 66.

This court should likewise follow well-established principles of Utah law on the proof of causation. The court should find that the Egberts must prove all aspects of their product defect claim, including causation of their enhanced injuries.

2. Utah’s Liability Reform Act Abolished Joint and Several Liability

Despite the fact that Utah statutorily abolished joint and several liability thirty years ago, the Egberts ask the court to adopt an approach to the enhanced injury doctrine that is based on joint and several liability.

Utah enacted the Utah Liability Reform Act (“ULRA”) in 1986. It abolished joint and several liability and adopted a comparative fault scheme, requiring the fault of plaintiffs and defendants to be compared by the jury and apportioned accordingly. Utah Code Ann. § 78-27-38(3) (2007). The ULRA provides that “[n]o defendant is liable to any person seeking recovery for any amount in excess of the proportion of fault attributed to that defendant under Section 78-27-39.” Id. at § 78-27-38(3). The statutory abolition of joint and several liability applies to all actions based upon the broad definition of fault, whatever the theory of liability, including strict products liability and negligence. Id. § 78-27-37(2).

The purpose of the Act was to ensure that no defendant pay any more than its “fair share” of damages. Minutes, Utah Senate, State and Local Standing Committee, 46th Leg., 1986 General Sess. (Jan. 27, 1986); Floor Debate, Utah House of Representatives, 46th Leg., 1986 General Sees., Records 17 & 18 (Feb. 26, 1986). As one senator observed, “it is the basic fairness concept we’re driving at. The defendant ought to be on the hook only for its own percentage of damages, but ought not be the guarantor for everyone else’s damages.” Floor Debate, Utah Senate, 46th Leg. 1986, General Sess., Records No. 63 (Feb. 12, 1986) (emphasis added). It is clear from the legislative history that the Act was aimed at, among other things, “abolishing joint and several liability.” *Id.*

Contrary to the ULRA, the Fox/Mitchell approach imposes upon manufacturers joint and several liability when a plaintiff cannot show what enhanced injuries were incurred as a result of the alleged defect. Restatement (Third) of Torts, § 16(b)-(d); cmt. e (stating if plaintiff meets the substantial factor requirement the defendant is held “jointly and severally liable only for the increased harm” under subsection (b), and jointly and severally liable for the entire harm under subsection (c)). Tellingly, unlike Utah, the majority of states that have adopted the Fox/Mitchell approach also retain joint and several liability.²² Yet the Egberts argue that this court should hold that if enhanced

²² These states are Alabama, Georgia, Illinois, Maryland, Massachusetts, Missouri, Nebraska, New Hampshire, Oklahoma, Pennsylvania, Texas, Wisconsin, and West Virginia. General Motors Corp. v. Edwards, 482 So. 2d 1176, 1195 (Ala. 1985) (holding that where two or more tortfeasors act to produce an indivisible injury, apportionment is not allowed and each tortfeasor is jointly and severally liable); Oakes v. General Motors Corp., 628 N.E.2d 341, 349 (Ill. App. Ct. 1993) (finding joint and several liability if injury is indivisible and the defendant’s defective product was a substantial factor in causing the injuries); Consumer Protection Div. v. Morgan, 874 A.2d 919, 950 (Md. 2005) (stating that a single injury incapable of apportionment triggers joint and several liability); Shantigar Found. v. Bear Mountain Builders, 804 N.E.2d 324, 332 (Mass. 2004) (stating that under Massachusetts’s system of joint and several liability, a plaintiff

injuries cannot be proved with exactness, Nissan is liable for all injuries. This position conflicts with the Utah statute.

The cases cited by the Egberts do not address joint and several liability at all. (AOB at 13-14.) Tingey v. Christensen is a negligence case against a single tortfeasor stemming from a traffic accident and Renegade Oil v. Progressive Cas. Ins. Co. is an insurance bad faith case. Tingey involved one tortfeasor and addressed the proper jury instruction to be given when a plaintiff's preexisting injury is aggravated in an accident. Tingey v. Christensen, 987 P.2d 588 (Utah 1999). Renegade Oil is even further removed, addressing the degree to which damages must be proven in an insurance bad faith case. Renegade Oil, Inc. v. Progressive Gas Ins. Co., 101 P.2d 383 (Utah Ct. App. 2004). Neither of these cases addresses the burden of causation applicable to a product liability

injured by more than one tortfeasor may sue any or all of them for her full damages); McDowell v. Kawasaki Motors Corp. USA, 799 S.W.2d 854, 867 (Mo. Ct. App. 1990) (stating that where concurrent or successive negligent acts are in combination the direct and proximate cause of a single injury and it is impossible to determine in what proportion each contributed to the injury, then either negligent actor is responsible for the whole injury); Lindgren v. City of Gering, 292 N.W.2d 921 (Neb. 1980) (holding that if two causes produce a single indivisible injury, joint and several liability attaches); N.H. Rev. Stat. Ann. § 507:7-e (1986) (joint and several liability unless fault is less than 50% and then several liability); Am. Agency Sys., Inc. v. Marceleno, 53 P.3d 929 (Okla. Civ. App. 2002) (finding that joint and several liability is the rule if the injured party is not negligent, despite the existence of a contrary statutory scheme); Menarde v. Philadelphia Transp. Co., 103 A.2d 681, 685 (Pa. 1954) (finding that "if defendant's negligence was a substantial factor in producing the result, in contributing to the injury, defendant is liable for the full amount of damages sustained, without any apportionment or diminution for the other cause or causes"); Tex. Civ. Prac. & Rem. Code Ann. § 33.012-013 (Vernon 1985) (joint and several liability if defendant's fault is more than 50%); Wis. Stat. § 895.045 (1995) (joint and several liability if defendant is more than 51% at fault); W. Va. Code § 55-7-13; Bd. of Educ. of McDowell County v. Zando, Martin & Milstead, Inc., 390 S.E.2d 796 (W.Va. 1990) (stating that the plaintiff may elect to sue any or all of those responsible for his injuries and collect his damages from whoever is able to pay, whatever the percentage of fault. Furthermore, the statute's modified rule for contributory negligence did not remove joint and several liability).

case and neither supports the adoption of the Fox/Mitchell approach in an enhanced injury case.

What the Egberts are asking is to shift what is properly their burden of proof on causation to Nissan, thus depriving the jury of the ability to apportion fault to another tortfeasor, Jerad Egbert. The result would be to make Nissan jointly and severally liable for all the damages attributable to the accident. This is specifically prohibited under the ULRA. The more consistent approach is found in Cleveland, where the Tenth Circuit determined whether fault should be apportioned between alleged tortfeasors that caused the accident and those that were liable for crashworthiness under New Mexico's nearly identical comparative fault scheme: "We are satisfied that the New Mexico Supreme Court would hold that common sense in the fair application of its pure comparative negligence system mandates that the negligence of all parties, including original tortfeasors and crashworthiness tortfeasors, which proximately causes enhanced injuries in a crashworthiness or "second collision" case must be compared." 890 F.2d at 1546.

In sum, under the ULRA, an enhanced injury defendant cannot be held liable, jointly and severally or otherwise, for any harm beyond that for which it is responsible. Because the Fox/Mitchell approach embraces joint and several liability, this approach to the enhanced injury doctrine should be rejected by the court. The court should hold that Plaintiffs continue to bear the burden of establishing enhanced injury and that, if that burden can be met, fault must be apportioned to both Jerad Egbert and Nissan.

D. Public Policy Considerations Support the Adoption of the Huddell/Caiazzo Approach.

1. The Huddell/Caiazzo Approach is Consistent with the Underlying Doctrine of Enhanced Injury Liability

Levanstam and Lapp, in their analysis of the “enhanced injury” doctrine, note that it has two fundamental logical corollaries. First, because the allegedly defective product did not play a role in causing the initial accident, the manufacturer should be held liable only for injuries over and above those that would have been sustained as a result of the initial collision. Second, the plaintiff should bear the burden of proving causation between the alleged defect and the enhanced injury. The Huddell/Caiazzo approach to the element of proximate causation is “the logical extension of these two corollaries.” Levanstam and Lapp, supra at 75.

The Huddell/Caiazzo approach requires that the plaintiff prove the alleged defect is the sole cause of the enhanced injury. and plaintiff must offer proof of what injuries would have occurred as a result of the initial accident in the absence of the alleged defect. The “substantial factor” approach adopted by Fox/Mitchell does not require proof of what a plaintiff’s injuries would have been absent the alleged defect. Without such proof, however, no basis exists for determining that there is, in fact, an enhanced injury. As the court in Larsen stated:

Any . . . 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 for 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.

Under Huddell/Caiazzo, this problem is remedied by requiring specific proof of enhancement. By definition, an enhanced injury defendant has played no part in causing the initial accident. Limited enhanced-injury liability should not be converted into “plenary liability for the entire consequence of an accident which the automobile manufacturer played no part in precipitating.” Huddell v. Levin, 537 F.2d 726, 739 (3d Cir. 1976).

2. Huddell/Caiazzo is a More Fair and Workable Approach to the Enhanced Injury Doctrine

In enhanced injury cases, it is “simpler, fairer, and conceptually more sound” to require plaintiffs to prove the extent of the enhancement.” Caiazzo v. Volkswagenwerk, A.G., 647 F.2d 241, 246 (2d Cir. 1981). Fox/Mitchell presents numerous practical problems.

The manufacturer, in order to defend itself, is compelled to bear the burden of proving a negative—that the allegedly defective product did not cause plaintiffs’ enhanced injuries. Moreover, placing the burden of disproving enhancement on the manufacturer encourages litigation because nearly every auto accident injury could be categorized as a “second collision” injury. Edward T. O’Donnell, Public Policy and the Burden of Proof in Enhanced Injury Litigation: A Case Study in the Dangers of Trends and Easy Assumptions, 17 W. St. U. L. Rev. 325 (1990). A plaintiff could argue while the accident was the fault of the driver of their vehicle or another vehicle, their injuries were enhanced by a vehicle component (i.e. airbag) or by the failure of the vehicle to keep them inside. Plaintiffs would have nothing to lose in joining manufacturers as defendants in nearly every case. Id.

Furthermore, a straightforward application of the Fox/Mitchell approach would result in the likelihood that accident-causing drivers will regularly be compensated by manufacturers for harm some portion of which proximately flow from their own conduct. This will be especially true in single-vehicle accidents, such as this one, where the accident is admittedly the fault of Jerad Egbert. The facts of this case provide a glimpse of the potential inequity of this approach: had Emily Egbert been wearing her seat belt, most if not all of any “enhanced injuries” would have been eliminated.²³ This is particularly true under the facts of this case where the Egberts, including tortfeasor Jerad Egbert, are a single economic unit. Adopting Fox/Mitchell would give Jerad Egbert and those similarly situated every incentive to avoid having to parcel out injuries, as failing to do so would result in a windfall to him. Jerad Egbert has every incentive to sit back and do nothing but rely on the jury feeling sympathetic to his wife and child under the Fox/Mitchell approach, as such an approach allows him to escape his own liability. This court should not adopt an approach that allows a plaintiff to avoid the consequences of his or her own conduct. Utah law and sound public policy both suggest that this court adopt the Huddell/Caiazzo approach.

¹³ The trial court has held that while Nissan may introduce evidence of seatbelt nonuse for purposes of showing overall safe design of the vehicle and the accident sequence, the Utah Seatbelt Nonuse statute prohibits Nissan from asserting Emily Egbert’s seatbelt nonuse was negligent. As Nissan is precluded from arguing that Emily Egbert’s seatbelt nonuse was the proximate cause of her ejection, it would be inherently unfair to allow The Egberts to argue that the tempered glass window was the proximate cause of the Egbert’s enhanced injuries without having to show the enhanced injuries with particularity.

CONCLUSION

The court should hold that the UPLA is constitutional. Following the 1989 enactment of the statute of limitations in section 3, the remaining portions of the UPLA became operative again. This explains why section 78-15-6(3) has been listed in the Utah Code for twenty years. Even during the last legislative session, when the entire section of the code that contained the UPLA was renumbered, the UPLA remained approved and codified by the legislature. It is not by mistake or oversight that the UPLA has remained part of the laws of Utah for twenty years, it is because of defined legislative process and unambiguous statutory requirements.

Predictability and uniformity of law are of paramount importance. Because residents, corporate citizens, and Utah courts have relied on and applied the UPLA consistently throughout the past twenty years, rendering it unconstitutional now would be entirely inappropriate. The UPLA is firmly consistent with the legislature's views. Thus, as a matter of public policy, the court should find that the UPLA remains operative.

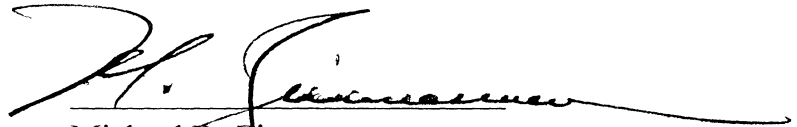
Furthermore, the Court should also adopt the Huddell/Caiazzo approach for determining when a plaintiff can recover for "enhanced injuries." Under the alternative Fox/Mitchell approach, a plaintiff can shift the burden of proving which injuries resulted from the original cause of the accident and which "enhanced injuries" resulted from a design defect. The Fox-Mitchell approach permits a defendant manufacturer to be held jointly and severally liable for a plaintiff's entire injury, even where no party has established a link between any injuries and the allegedly defective product by a preponderance of the evidence. This result is contrary to public policy and the legislative history of the ULRA. This approach is especially harsh under the specific facts of this

case where the plaintiff himself is the cause of the accident. Adopting Fox/Mitchell in this case, where the active tortfeasor and additional plaintiffs are part of the same economic unit, would incentivize plaintiffs to claim that it is unclear which damages can be attributed to the passive tortfeasor.

In contrast, the Huddell/Caiazzo is not only consistent with Utah law, it is the better-reasoned approach to enhanced injury cases, particularly under the facts of this case. Huddell/Caiazzo appropriately requires a plaintiff to bear the burden of establishing causation. Enhanced injury should not equal enhanced liability for manufacturers. Fox/Mitchell should be rejected, and the jury should be instructed that the Egberts must specifically prove which injuries the alleged design defect caused.

DATED this 27th day of May, 2009.

Snell & Wilmer LLP

A handwritten signature in black ink, appearing to read "Michael D. Zimmerman", written over a horizontal line.

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CERTIFICATE OF SERVICE

This is to certify that 2 copies of the foregoing Brief of Appellee were mailed, postage prepaid, this 27th day of May, 2009, to each of the following:

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A handwritten signature in black ink, reading "Beth Johnson", written over a horizontal line.

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ADDENDUM

Tab A

78-15-6 Defect or defective condition making product unreasonably dangerous - Rebuttable presumption.

In any action for damages for personal injury, death, or property damage allegedly caused by a defect in a product:

(1) No product shall be considered to have a defect or to be in a defective condition, unless at the time the product was sold by the manufacturer or other initial seller, there was a defect or defective condition in the product which made the product unreasonably dangerous to the user or consumer.

(2) As used in this act, "unreasonably dangerous" means that the product was dangerous to an extent beyond which would be contemplated by the ordinary and prudent buyer, consumer or user of that product in that community considering the product's characteristics, propensities, risks, dangers and uses together with any actual knowledge, training, or experience possessed by that particular buyer, user or consumer.

(3) There is a rebuttable presumption that a product is free from any defect or defective condition where the alleged defect in the plans or designs for the product or the methods and techniques of manufacturing, inspecting and testing the product were in conformity with government standards established for that industry which were in existence at the time the plans or designs for the product or the methods and techniques of manufacturing, inspecting and testing the product were adopted.

Tab B

78-27-37 Definitions.

As used in Section 78-27-37 through Section 78-27-43 :

- (1) "Defendant" means a person, other than a person immune from suit as defined in Subsection (3), who is claimed to be liable because of fault to any person seeking recovery.
- (2) "Fault" means any actionable breach of legal duty, act, or omission proximately causing or contributing to injury or damages sustained by a person seeking recovery, including negligence in all its degrees, comparative negligence, assumption of risk, strict liability, breach of express or implied warranty of a product, products liability, and misuse, modification, or abuse of a product.
- (3) "Person immune from suit" means:
 - (a) an employer immune from suit under Title 34A, Chapter 2, Workers' Compensation Act, or Chapter 3, Utah Occupational Disease Act; and
 - (b) a governmental entity or governmental employee immune from suit pursuant to Title 63, Chapter 30d, Governmental Immunity Act of Utah.
- (4) "Person seeking recovery" means any person seeking damages or reimbursement on its own behalf, or on behalf of another for whom it is authorized to act as legal representative.

2005

78-27-38 Comparative negligence.

- (1) The fault of a person seeking recovery may not alone bar recovery by that person.
- (2) A person seeking recovery may recover from any defendant or group of defendants whose fault, combined with the fault of persons immune from suit and nonparties to whom fault is allocated, exceeds the fault of the person seeking recovery prior to any reallocation of fault made under Subsection 78-27-39 (2).
- (3) No defendant is liable to any person seeking recovery for any amount in excess of the proportion of fault attributed to that defendant under Section 78-27-39 .
- (4) (a) The fact finder may, and when requested by a party shall, allocate the percentage or proportion of fault attributable to each person seeking recovery, to each defendant, to any person immune from suit, and to any other person identified under Subsection 78-27-41 (4) for whom there is a factual and legal basis to allocate fault. In the case of a motor vehicle accident involving an unidentified motor vehicle, the existence of the vehicle shall be proven by clear and convincing evidence which may consist solely of one person's testimony.
- (b) Any fault allocated to a person immune from suit is considered only to accurately determine the fault of the person seeking recovery and a defendant and may not subject the person immune from suit to any liability, based on the allocation of fault, in this or any other action.

2005

78-27-39 Separate special verdicts on total damages and proportion of fault.

(1) The trial court may, and when requested by any party shall, direct the jury, if any, to find separate special verdicts determining the total amount of damages sustained and the percentage or proportion of fault attributable to each person seeking recovery, to each defendant, to any person immune from suit, and to any other person identified under Subsection 78-27-41 (4) for whom there is a factual and legal basis to allocate fault.

(2) (a) If the combined percentage or proportion of fault attributed to all persons immune from suit is less than 40%, the trial court shall reduce that percentage or proportion of fault to zero and reallocate that percentage or proportion of fault to the other parties and those identified under Subsection 78-27-41 (4) for whom there is a factual and legal basis to allocate fault in proportion to the percentage or proportion of fault initially attributed to each by the fact finder. After this reallocation, cumulative fault shall equal 100% with the persons immune from suit being allocated no fault.

(b) If the combined percentage or proportion of fault attributed to all persons immune from suit is 40% or more, that percentage or proportion of fault attributed to persons immune from suit may not be reduced under Subsection (2)(a).

(c) (i) The jury may not be advised of the effect of any reallocation under Subsection (2).

(ii) The jury may be advised that fault attributed to persons immune from suit may reduce the award of the person seeking recovery.

(3) A person immune from suit may not be held liable, based on the allocation of fault, in this or any other action.

2005

78-27-40 Amount of liability limited to proportion of fault - No contribution.

(1) Subject to Section 78-27-38 , the maximum amount for which a defendant may be liable to any person seeking recovery is that percentage or proportion of the damages equivalent to the percentage or proportion of fault attributed to that defendant.

(2) A defendant is not entitled to contribution from any other person.

(3) A defendant or person seeking recovery may not bring a civil action against any person immune from suit to recover damages resulting from the allocation of fault under Section 78-27-38 .

1994

78-27-41 Joinder of defendants.

(1) A person seeking recovery, or any defendant who is a party to the litigation, may join as a defendant, in accordance with the Utah Rules of Civil Procedure, any person other than a person immune from suit alleged to have caused or contributed to the injury or damage for which recovery is sought, for the purpose of having determined their respective proportions of fault.

(2) A person immune from suit may not be named as a defendant, but fault may be allocated to a person immune from suit solely for the purpose of accurately determining the fault of the person seeking recovery and all defendants. A person immune from suit is not subject to any liability, based on the allocation of fault, in this or any other action.

(3) (a) A person immune from suit may intervene as a party under Rule 24, Utah Rules of Civil Procedure, regardless of whether or not money damages are sought.

(b) A person immune from suit who intervenes in an action may not be held liable for any fault allocated to that person under Section 78-27-38 .

(4) Fault may not be allocated to a non-party unless a party timely files a description of the factual and legal basis on which fault can be allocated and information identifying the non-party, to the extent known or reasonably available to the party, including name, address, telephone number and employer. The party shall file the description and identifying information in accordance with Rule 9, Utah Rules of Civil Procedure or as ordered by the court but in no event later than 90 days before trial as provided in Rule 9, Utah Rules of Civil Procedure.

2005

78-27-42 Release to one defendant does not discharge other defendants.

A release given by a person seeking recovery to one or more defendants does not discharge any other defendant unless the release so provides.

1986

78-27-43 Effect on immunity, exclusive remedy, indemnity, contribution.

Nothing in Sections 78-27-37 through 78-27-42 affects or impairs any common law or statutory immunity from liability, including, but not limited to, governmental immunity as provided in Title 63, Chapter 30d, and the exclusive remedy provisions of Title 34A, Chapter 2, Workers' Compensation Act. Nothing in Sections 78-27-37 through 78-27-42 affects or impairs any right to indemnity or contribution arising from statute, contract, or agreement.

2005

Tab C



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LEGISLATIVE GENERAL COUNSEL

■ ■ ■ S. B. No. 25 ■ ■ ■

Approved for Filing GRD

Date 12-13-88 9:02 AM

(PRODUCTS LIABILITY STATUTE OF LIMITATION)

1989

GENERAL SESSION

S. B. No. 25

By R. S. Cornaby

AN ACT RELATING TO THE JUDICIAL CODE; AMENDING THE PRODUCTS LIABILITY
ACT; PROVIDING A STATUTE OF LIMITATION ON BRINGING CLAIMS; AND
PROVIDING SEVERABILITY.

THIS ACT AFFECTS SECTIONS OF UTAH CODE ANNOTATED 1953 AS FOLLOWS:

AMENDS:

78-15-5, AS ENACTED BY CHAPTER 149, LAWS OF UTAH 1977

REPEALS AND REENACTS:

78-15-3, AS ENACTED BY CHAPTER 149, LAWS OF UTAH 1977

REPEALS:

78-15-2, AS ENACTED BY CHAPTER 149, LAWS OF UTAH 1977

Be it enacted by the Legislature of the state of Utah:

Section 1. Section 78-15-3, Utah Code Annotated 1953, as enacted by
Chapter 149, Laws of Utah 1977, is repealed and reenacted to read:

78-15-3. A civil action under this chapter shall be brought within
two years from the time the individual who would be the claimant in such
action discovered, or in the exercise of due diligence should have
discovered, both the harm and its cause.

1 Section 2. Section 78-15-5, as enacted by Chapter 149, Laws of Utah
2 1977, is amended to read:

3 78-15-5. ~~[No--manufacturer--or--seller--of-a-product-shall-be-held~~
4 ~~liable-for-any-injury,-death-or-damage-to-property-sustained-as-a--result~~
5 ~~of--an--alleged-defect,-failure-to-warn-or-protect-or-failure-to-property~~
6 ~~instruct,-in-the-use-or-misuse--of--that--product,-where--a--substantial~~
7 ~~contributing--cause--of--the-injury,-death-or-damage-to-property-was]~~ For
8 purposes of Section 78-27-38, fault shall include an alteration or
9 modification of the product, which occurred subsequent to the sale by the
10 manufacturer or seller to the initial user or consumer, and which changed
11 the purpose, use, function, design or intended use or manner of use of
12 the product from that for which the product was originally designed,
13 tested or intended.

14 Section 3. Section 78-15-2, Utah Code Annotated 1953, as enacted by
15 Chapter 149, Laws of Utah 1977, is repealed.

16 Section 4. If any provision of this act, or the application of any
17 provision to any person or circumstance, is held invalid, the remainder
18 of this act is given effect without the invalid provision or application.



January 3, 1989

MANAGEMENT AND FISCAL ANALYSIS

S.B. 25

No fiscal impact to the State.

OFFICE OF THE LEGISLATIVE FISCAL ANALYST



STATE OF UTAH

OFFICE OF LEGISLATIVE RESEARCH AND GENERAL COUNSEL

LEGISLATIVE REVIEW LETTER

Date December 14 19 88 1989 GENERAL SESSION

SB No. 25 Title Products Liability Statute of Limitation

Joint Rule 23.16 requires the Legislative General Counsel or his designee to review and approve all legislation and, with the approval of the sponsor, to make those changes necessary to: (a) insure that it is in proper legal form; (b) remove any ambiguities; and (c) avoid constitutional or statutory conflicts.

The Legislative General Counsel or his designee has reviewed and approved this legislation. The following information outlines the considerations on which the approval was given.

☒ yes ☐ no

1. The bill contains a "single subject" which is clearly expressed in the title as required by the Utah Constitution, Article VI, Sec. 22.

☒ yes ☐ no

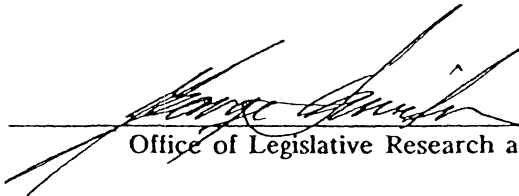
2. The bill meets all the form requirements prescribed by legislative rule.

☒ no conflicts

3. The bill does not have state or federal constitutional conflicts. (Judgments regarding constitutionality address only obvious constitutional problems and do not represent a detailed review of all issues.)

☐ possible conflicts

Explanation (Cite known constitutional or statutory conflicts or problems.)


Office of Legislative Research and General Counsel

1 Section 2. Section 78-15-5, as enacted by Chapter 149, Laws of Utah
2 1977, is amended to read:

3 78-15-5. ~~[No--manufacturer--or--seller--of--a--product--shall--be--held~~
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5 ~~of--an--alleged--defect,--failure--to--warn--or--protect--or--failure--to--properly~~
6 ~~instruct,--in--the--use--or--misuse--of--that--product,--where--a--substantial~~
7 ~~contributing--cause--of--the--injury,--death--or--damage--to--property--was]~~ For
8 purposes of Section 78-27-38, fault shall include an alteration or
9 modification of the product, which occurred subsequent to the sale by the
10 manufacturer or seller to the initial user or consumer, and which changed
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January 3, 1989

MANAGEMENT AND FISCAL ANALYSIS

S.B. 25

No fiscal impact to the State.



1 LEGISLATIVE GENERAL COUNSEL
2 S. B. No. 25
3 Approved for Filing GRD
4 Date 12-13-88 9:02 AM

5 (PRODUCTS LIABILITY STATUTE OF LIMITATION)

6 1989

7 GENERAL SESSION

8 S. B. No. 25

By

[Signature]

11 AN ACT RELATING TO THE JUDICIAL CODE; AMENDING THE PRODUCTS LIABILITY
12 ACT; PROVIDING A STATUTE OF LIMITATION ON BRINGING CLAIMS; AND
13 PROVIDING SEVERABILITY.

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20 78-15-2, AS ENACTED BY CHAPTER 149, LAWS OF UTAH 1977

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24 78-15-3. A civil action under this chapter shall be brought within
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26 action discovered, or in the exercise of due diligence should have
27 discovered, both the harm and its cause.

PRODUCTS LIABILITY STATUTE OF LIMITATION

1989

GENERAL SESSION

Enrolled Copy

S. B. No. 25

By K. S. Cornaby

AN ACT RELATING TO THE JUDICIAL CODE; AMENDING THE PRODUCTS LIABILITY ACT; PROVIDING A STATUTE OF LIMITATION ON BRINGING CLAIMS; AND PROVIDING SEVERABILITY.

THIS ACT AFFECTS SECTIONS OF UTAH CODE ANNOTATED 1953 AS FOLLOWS:

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78-15-5. [~~No--manufacturer--or--seller--of--a--product--shall--be--held~~



S. B. No. 25

~~liable-for-any-injury,-death-or-damage-to-property-sustained-as-a--result~~
~~of--an--alleged-defect,-failure-to-warn-or-protect-or-failure-to-properly~~
~~instruct,-in-the-use-or-misuse--of--that--product,--where--a--substantial~~
~~contributing--cause--of--the-injury,-death-or-damage-to-property-was]~~ For
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modification of the product, which occurred subsequent to the sale by the
manufacturer or seller to the initial user or consumer, and which changed
the purpose, use, function, design, or intended use or manner of use of
the product from that for which the product was originally designed,
tested, or intended.

Section 3. Section 78-15-2, Utah Code Annotated 1953, as enacted by
Chapter 149, Laws of Utah 1977, is repealed.

Section 4. If any provision of this act, or the application of any
provision to any person or circumstance, is held invalid, the remainder
of this act is given effect without the invalid provision or application.



SENATE CHAMBER
STATE OF UTAH
SALT LAKE CITY

March 1, 1989

The Honorable Norman H. Bangerter
Governor, State of Utah

Dear Governor Bangerter:

I have been directed to inform you that S. B. No. 25,
PRODUCTS LIABILITY STATUTE OF LIMITATION, by Sen. K. S. Cornaby,
has been signed by the President of the Senate and the Speaker
of the House in open session and is being transmitted herewith
for your action.

Respectfully,

Sophia C. Buckmiller
Secretary of the Senate

HOUSE OF REPRESENTATIVES

STATE OF UTAH

318 STATE CAPITOL • SALT LAKE CITY 84114



February 20, 1989

Mr. President:

I am directed to inform the Senate that the House of Representatives has this day passed S. B. No. 25, PRODUCTS LIABILITY STATUTE OF LIMITATION, by Senator Cornaby, which has been signed by the Speaker in open session, and the same is transmitted herewith for the signature of the President.

Respectfully,

A handwritten signature in cursive script that reads 'Carole E. Peterson'.

Carole E. Peterson
Chief Clerk

SS



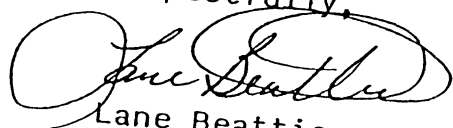
SENATE CHAMBER
STATE OF UTAH
SALT LAKE CITY

February 2, 1989

Mr. President:

The Senate Judiciary Standing Committee, to which was referred S.B. 25, PRODUCTS LIABILITY STATUTE OF LIMITATION, by Senator K. S. Cornaby, has carefully considered the bill and reports it out of committee with a favorable recommendation.

Respectfully,



Lane Beattie
Committee Chairman Pro Tem

SENATOR K. S. CORNABY

By SENATOR K. S. CORNABY
First Time JAN 9 - 1989 READ
Referred to Rules Committee JAN 11 1989
Ordered Printed and Referred to Committee on JUDICIARY JAN 11 1989

Second Time FEB 8 - 1989 Reported Favorable FEB 2 - 1989
Third Time FEB 9 - 1989

AMENDMENTS

Committee _____
Second Reading _____
Third Reading _____

FURTHER ACTION

Remanded from Ind. made
Consent Order FEB 6 - 1989
CIRCLED FEB 8 - 1989 UNCIRCLED
VOTE - 2nd READING : 24 - 3 - 2

FINAL VOTE Years 27 Nays 0 Absent 2 FEB 9 - 1989
Transmitted to House FEB 10 - 1989

RECEIVED FROM HOUSE FEB 20 1989
(date)
Concurred House Amendments _____ (vote) (date)
Concurred Conference Committee _____ (vote) (date)
ENROLLED 3 - 1 - 89 (date)
SENT TO GOVERNOR 3 - 1 - 89 (date)

In The House

RECEIVED FROM THE SENATE FEB 10 1989, 19
READ

First Time FEB 10 1989
Referred to Committee on EDUCATION FEB 15 1989

Second Time FEB 17 1989 Reported FEB 17 1989

Third Time _____

AMENDMENTS

Committee _____
Second Reading _____
Third Reading _____

FURTHER ACTION

FINAL VOTE Years 62 Nays 3 Absent 10, 19 FEB 20 1989

RETURNED TO SENATE FEB 20 1989

Concurred Conference Committee _____ (vote) (date)

Tab D

HOnly the Westlaw citation is currently available.

United States District Court, D. Utah, Central Division.

Scott ALLEN, Plaintiff,

v.

MINNSTAR, INC., dba Genmar Industries, Inc., dba Well-Craft Marine, and Outboard Marine Corporation, Defendant.

GENMAR INDUSTRIES, INC., dba Wellcraft Marine, Defendant and Third-Party Plaintiff,

v.

Mitchell HUFFMAN and Melvin Huffman, Third-Party Defendants.

No. 86-C-1074-S.

Nov. 21, 1989.

Jackson Howard, D. David Lambert, Leslie W. Slauch, Howard, Lewis & Petersen, Provo, UT, for plaintiff.

Todd S. Winegar, Karra J. Porter, Christensen, Jensen & Powell, Salt Lake City, UT, Warren E. Platt, Snell & Wilmer, Phoenix, AZ, Stephen B. Nebeker, Salt Lake City, UT, M. Dayle Jeffs, Jeffs & Jeffs, Provo, UT, for defendant.

SUPPLEMENTAL RULING AND MEMORANDUM DECISION

SAM, District Judge.

*1 Defendant Outboard Marine Corporation ("OMC") moved this court for summary judgment on Plaintiff Scott Allen's ("Allen") strict products liability claim on the basis that Allen failed to satisfy the elements of an enhanced injury claim. This court entered a bench ruling in OMC's favor, but before a written opinion issued, Allen moved for relief from this court's ruling based on Fed.R.Civ.P. 54, 59 and 60. This opinion supplements the court's bench ruling on OMC's motion for summary judgment and addresses Allen's later motion for relief from that decision.

The facts on which this court bases its decision are

not controverted: Mr. Allen was riding as a passenger in a boat on August 30, 1985 when the boat swerved causing him to be thrown from the boat into the water. While Mr. Allen was in the water the propeller passed over him causing severe physical injury. One result of the accident was that Mr. Allen's left leg had to be amputated. He still carries significant scars on his right leg and buttocks area as a result of the propeller cutting into his flesh.

Mr. Allen has since sued OMC, the manufacturer of the engine, claiming that OMC is liable for his injuries under a strict products liability theory. Mr. Allen couches this theory in terms of defective design-alleging that the boat should have been equipped with a propeller guard which, according to Allen, would have prevented an accident of this kind.

OMC moved for summary judgment on the basis that Allen was unable to present evidence on a safer alternative design which would have either prevented or lessened his injuries. OMC's arguments before this court focussed on the "enhanced injury theory" or "second collision" doctrine which is that, while the product defect did not cause the initial accident which gave rise to the injury, some defect in the product caused the injuries suffered by plaintiff to be more serious than they would have been absent such defect.^{FN1} OMC points out that while the exposed propeller did not cause Allen to be thrown into the water (the "first" accident), it did inflict injuries after he was in the water.

Allen, on the other hand, persists in his characterization of this claim as a straightforward strict liability claim.^{FN2} Under either theory, however, Allen's claim concerning the allegedly defective product must be dismissed as a matter of law.^{FN3} Apparently Allen resists this characterization because of the evidentiary showing necessary to allow his claim to proceed to trial. To make out a prima facie case for enhanced injury, a plaintiff must show the existence of an alternative, safer design, practicable under the circumstances, and what injuries would have resulted had the safer design been utilized. Huddell v. Levin, 537 F.2d 726 (3d Cir.1976). As OMC pointed out in its briefs, Allen has been unable to establish a prima facie case for enhanced injury.

According to Allen, such a flaw is not fatal because this is not an enhanced injury case. This court agrees that this is not an enhanced injury case, but a design defect case. However, OMC is still entitled to summary judgment due to Allen's inability to provide this court with evidence that the propeller was defectively designed-the same type of evidence necessary to make out a prima facie enhanced injury case.

*2 The strict products liability theory is not designed to render a manufacturer an insurer of his product. Moreover, liability is not imposed automatically. Instead there must be a finding that the manufacturer somehow breached his duty to the injured party.

In all products liability cases it is required that the plaintiff prove a causal connection between the alleged defect and the injury:

While the language employed with each recovery theory varies, it is now clear that the tests in all 3 is the same: the plaintiff must show 1) the existence of a defect; 2) the attribution of the defect to the seller; and 3) a causal relation between the defect and the injury.

Tauber v. Nissan Motor Corp., 671 F.Supp. 1070, 1073 (D.Md.1987); *see also*, Olsen v. United States, 521 F.Supp. 59, 63 (E.D.Penn.1981)*aff'd* 688 F.2d 820 (3d Cir.1982)*cert. den.* 459 U.S. 1107 (1983); Jensen v. American Motors Corp., 50 Md.App. 226, 437 A.2d 242, 247 (1981).

Utah law creates a rebuttable presumption of non-defectiveness:

There is a rebuttable presumption that a product is free from any defect or defective condition where the alleged defect in the plans or designs for the product or the methods and techniques of manufacturing, inspecting and testing the product were in conformity with government standards established for that industry which were in existence at the time the plans or designs for the product or the methods and techniques of manufacturing, inspecting and testing the product were adopted.

Utah Code Ann. § 78-15-6(3).^{FN4} The evidence before this court as outlined in the parties' undisputed

facts fails to overcome this presumption.

Mr. Allen has pointed to evidence in depositions which, according to Allen, precludes summary judgment on the issue of design defect. OMC, however, maintains that the information contained in those depositions not only fails to preclude summary judgment, but militates in favor of summary judgment.

Allen alleges essentially that OMC is liable for Allen's injuries due to the failure to design a boat with a prop guard which, according to Allen, would prevent objects (including persons) from coming into contact with the propeller. When a party alleges a design defect, the court must determine, not whether some other design would have been safer, but whether that particular design is defective and unreasonably dangerous. Curtis v. General Motors Corp., 649 F.2d 808, 811 (10th Cir.1981); McHargue v. Stokes Division of Pennwalt, 686 F.Supp. 1428 (D.Colo.1988).

A factor central to the determination of whether there is a design defect is the availability of alternative designs. Wilson v. Piper Aircraft Corp., 282 Or. 61, 577 P.2d 1322, 1326 (1978) ("[P]laintiff's burden in a design defect case includes a showing that there was an 'alternative, safer design, practicable under the circumstances,' or that 'in terms of cost, practicality and technical possibility, the alternative design was feasible' ") (citations omitted). If the plaintiff is unable to make such a showing, then it is not proper for the court to submit the question of design defect to the jury. McHargue, 686 F.Supp. at 1441; Wilson, 577 P.2d at 1327.

*3 In Wilson the court held it improper to submit to the jury plaintiff's allegation that the defendant's use of a standard aircraft engine constituted a defect simply because "an engine of a different type, or with a different carburetor system, would be safer in one particular." Wilson, 577 P.2d at 1327. According to the court:

It is not proper to submit such allegations to the jury unless the court is satisfied that there is evidence from which the jury could find the suggested alternatives are not only technically feasible but also practicable in terms of cost and the over-all design and operation of the product. It is part of the required proof that a design feature is a "defect" to present such evidence.

Id.

In resisting the motion for summary judgment, Allen has repeatedly referenced the depositions of its experts which, according to Allen, would testify as to the design and workability of a prop guard. However, Allen offers no evidence that such a design was commercially available at the time the stern drive left OMC's hands. The guard that Allen's expert (Chadwell) testified should have been utilized did not even exist until 1989-more than ten years after OMC's involvement in the manufacturing process and four years after Allen was injured by the propeller. Allen's experts have also admitted that a propeller guard affects boat performance, yet Allen has provided no evidence to this court that consumers would accept the diminished performance. Finally, plaintiff's experts have testified that prop guards are only *theoretically* possible.

Without evidence of technically feasible alternative designs at the time the product was manufactured, a jury trial on the design defect issue is inappropriate. This court is unwilling to set a new precedent in products liability law by imposing liability on manufacturers whose products conform to the safety standards of the industry, but do not incorporate every possible safety feature regardless of cost or effect on performance of the manufacturer's product. For those reasons this court granted summary judgment in favor of defendant OMC.

Allen has moved for reconsideration of the court's decision based on Fed.R.Civ.P. 54(b), 59(a)(2) and 60(b). Allen, however, fails to present this court with compelling reasons which support such a request. Rule 54(b) provides that any judgment on fewer than all of the claims "is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." That rule does not provide a basis which compels this court to reconsider its previous decision, especially when Allen has simply reiterated his previous arguments.

Rule 59(a)(2) applies specifically to motions for new trials. No trial has been had in this case, therefore Allen's reliance on Rule 59(a)(2) is misplaced.

Finally, Allen suggests that Rule 60(b) entitles him to

reconsideration of the court's decision. However, Allen relies on no new arguments in seeking the court's reconsideration of the summary judgment decision. He relies on the fact that the court intended to supplement the earlier ruling disregarding the fact that to supplement means to "explain" not to change. Allen also complains that he had insufficient time in which to respond to OMC's motion. However, the court allowed supplemental briefs after the hearing which, had there been any prejudice, would have effectively negated such prejudice. Furthermore, Allen has taken the opportunity to brief once more for this court the reasons he feels summary judgment should not have been granted. Still he has failed to make any new arguments which might persuade this court to reconsider its earlier decision. Accordingly, the court's decision stands.

FN1. The "enhanced injury" theory is not limited in its application to instances wherein an automobile passenger has been injured, but has also been applied to boating accidents. See Rubin v. Brutus Corp., 487 So.2d 360 (Fla.Dist.Ct.App.1986).

FN2. Allen suggests that an enhanced injury claim can only be thus characterized if a plaintiff suffers an injury in addition to the one for which he sues. For example Allen states that if "the bone in plaintiff's leg had been shattered by a blunt impact with the outdrive system and that same leg was then injured by the propeller, this might be an enhanced injury case...." Plaintiff's Memorandum in Opposition to Defendant OMC's Supplemental Memorandum in Support of its Motion For Summary Judgment, p. 3. However, the enhanced injury theory does not require that an injury precede the one for which a plaintiff sues. Huddell v. Levin, 537 F.2d 726 (3rd Cir.1976) (defective design of head restraint caused fatal head injury when decedent's non-moving car was rear-ended by car moving 50 m.p.h.). The theory is rather that the injury that would have been suffered absent a defect is "enhanced" in terms of its severity due to the alleged defective design of a product.

FN3. Summary judgment is appropriate when there are no issues of material fact

which preclude judgment on the pleadings. All of the evidence before the court, however, must be construed in favor of the non-moving party.

FN4. The same statute also provides that:

(1) No product shall be considered to have a defect or to be in a defective condition, unless at the time the product was sold by the manufacturer or other initial seller, there was a defect or defective condition in the product which made the product unreasonably dangerous to the user or consumer.

(2) As used in this act, "unreasonably dangerous" means that the product was dangerous to an extent beyond which would be contemplated by the ordinary and prudent buyer, consumer or user of that product in that community considering the product's characteristics, propensities, risks, dangers and uses together with any actual knowledge, training, or experience possessed by that particular buyer, user or consumer.

Utah Code Ann. § 78-15-6(1)-(2).

D.Utah,1989.
Allen v. Minnstar, Inc.
Not Reported in F.Supp., 1989 WL 434765 (D.Utah)

END OF DOCUMENT

Tab E

ENHANCED INJURY SHOULD NOT EQUAL ENHANCED LIABILITY

HEATHER FOX VICKLES*

MICHAEL E. OLDHAM**

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I. INTRODUCTION

Since its formal recognition by the Eighth Circuit Court of Appeals nearly thirty years ago,¹ the doctrine variously known as “en-

* Associate, The Oldham Law Firm, Englewood, Colorado; J.D. 1992, University of Colorado; B.A. 1988, Colorado State University, Highest Distinction.

** Owner, The Oldham Law Firm, Englewood, Colorado; J.D. 1963, University of Michigan.

1. *Larsen v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968) (applying Minnesota law).

hanced injury,"² "crashworthiness,"³ or "second collision"⁴ has become firmly entrenched in American product liability law. These three terms are most often used interchangeably to refer to the broad spectrum of cases based on claims that injuries sustained in an accident were aggravated or exacerbated due to a product defect, although the defect itself was not a cause of the original accident.

Enhanced injury liability has grown into one of the most highly litigated and costly areas of tort law today. A successful claim often results in the imposition of multimillion dollar liability. These complex cases, whether successful or not, result in substantial cost to the judicial system and to our society. The uncertainty which presently exists in enhanced injury theory inappropriately encourages litigation, resulting in even greater costs. Thus, unchecked, careless, or confusing expansion of the doctrine poses a genuine threat to the ability of American manufacturers to compete in worldwide markets, as well as to the ability of average Americans to afford products and equipment as rising litigation and settlement costs continue to be passed on to consumers and businesses.

As the American Law Institute prepares to adopt the *Restatement (Third) of Torts: Products Liability (Restatement (Third))*, containing a section entitled "Increased Harm Due to Product Defect," serious

2. The term "enhanced injury" refers to the degree accident injuries are aggravated, due to an alleged defect, over and above that which would otherwise have been sustained absent the alleged defect. 2A LOUIS R. FRUMER & MELVIN I. FRIEDMAN, *PRODUCTS LIABILITY* § 21.03, at 21-28 to 21-29 (1991) (revised by Cary S. Sklarén (1994)); Michael Hoenig, *Resolution of "Crashworthiness" Design Claims*, 55 ST. JOHN'S L. REV. 633, 634 n.3 (1981).

3. "Crashworthiness" is defined in the Motor Vehicle Information and Cost Savings Act as "the protection that a passenger motor vehicle affords its passengers against personal injury or death as a result of a motor vehicle accident." 15 U.S.C. § 1901(14) (1976). For several judicial definitions of the term, see *Dreisonstok v. Volkswagenwerk, A.G.*, 489 F.2d 1066, 1069 n.3 (4th Cir. 1974).

4. "Second collision" usually refers to the actual physical impact between a passenger and an interior part of the vehicle or something exterior to the vehicle following the primary impact. Hoenig, *supra* note 2, at 634 n.2.

Some commentators have attempted to make distinctions between the enhanced injury, crashworthiness, and second collision terms. See W. James Foland, *Enhanced Injury: Problems of Proof in "Second Collision" and "Crashworthy" Cases*, 16 WASHBURN L.J. 600, 606-07 (1977). Mr. Foland describes a "somewhat obtuse" distinction between second collision cases involving an actual secondary physical impact between the injured party and a specific part of the interior or exterior of the vehicle, and crashworthiness cases based upon an "'environmental' definition of intended use." *Id.* However, because the doctrine's broad applicability can be masked by use of the "second collision" or "crashworthiness" labels, "enhanced injury" is the more accurate term to describe such claims and will be utilized throughout this Article. See Thomas V. Harris, *Enhanced Injury Theory: An Analytic Framework*, 62 N.C. L. REV. 643, 647-48 (1984); FRUMER & FRIEDMAN, *supra* note 2, § 21.03, at 21-27 to 21-28.

consideration must be given to underlying policy and the potential long-term effects of such a pronouncement on enhanced injury liability.⁵ A major consideration must be the significant benefits which would inure from a uniform approach, adopted not only by the new *Restatement (Third)*, but also by the courts and perhaps even by the United States Congress.

This Article examines the historical development of the enhanced injury doctrine, discusses elements of the enhanced injury claim, including areas of controversy such as the burden of proof of enhancement, and presents a brief overview of recent case law and trends in the Nineties. Part II of this Article then analyzes the substance and practical effect of the proposed *Restatement (Third)* section on enhanced injury, concluding that it does not accurately reflect important underlying considerations of logic, policy, and theory, nor does it provide a uniform approach fairly balancing the interests of the consumer and industry.

II. DEVELOPMENT OF THE ENHANCED INJURY DOCTRINE

A. 1968: *Larsen v. General Motors Corp.*

The enhanced injury theory was first adopted by the Eighth Circuit Court of Appeals in 1968 in *Larsen v. General Motors Corp.*⁶ At that time, "products liability" was a relatively young body of law and section 402A of the *Restatement (Second) of Torts* was only three years old. The *Larsen* court was highly aware of the events going on around it and the changing attitudes of American society regarding safety, expressly noting National Safety Council statistics regarding automobile accident-related deaths and disabling injuries "since the advent of the horseless carriage."⁷ In addition, the court acknowledged the recently enacted National Traffic and Motor Vehicle Safety

5. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 11, at 253 (Council Draft No. 2, 1994) [hereinafter Council Draft No. 2]. One need look no further than *Restatement (Second) of Torts* § 402A to realize the potential influence of a novel *Restatement* section on enhanced injury. See Charles E. Cantu, *Reflections on Section 402A of the Restatement (Second) of Torts: A Mirror Crack'd*, 25 GONZ. L. REV. 205 (1989-90). Professor Cantu's article reveals that § 402A was not an accepted doctrine when it was adopted in 1965 and has since been a "catalyst to a multitude of litigation" as interpretations of § 402A stray farther and farther from its drafters' intentions. *Id.* at 206-07, 211, 236. The American Law Institute should take care to avoid similar results from the new *Restatement (Third)*.

6. 391 F.2d 495 (8th Cir. 1968) (applying Minnesota law).

7. *Id.* at 502 n.4.

Act of 1966,⁸ emphasizing that the court was merely complementing such legislative activity in the judicial sphere and reflecting the social, political and, economic climate surrounding it.⁹

The *Larsen* case presents a classic example of a true "second collision" injury. The plaintiff sustained severe head injuries in a head-on collision when the impact allegedly caused the steering mechanism of his 1963 Chevrolet Corvair to thrust rearward, striking him in the head.¹⁰ The plaintiff argued that the steering assembly was defectively designed, causing him to receive additional injuries or more severe injuries than he would have otherwise received in the collision absent the defect. The defendant contended that it had no duty to design and manufacture a vehicle that is safe to occupy during a collision.¹¹ The trial court agreed with General Motors and granted summary judgment in its favor.

In the *Larsen* decision, the Eighth Circuit Court of Appeals, rejected *Evans v. General Motors Corp.*,¹² and reversed the trial court holding that manufacturers have a duty to use reasonable care in the design of vehicles to avoid subjecting users to unreasonable risks of injury in the event of a collision. Applying general negligence principles, the court emphasized that a manufacturer's duty extends to producing a product that is reasonably fit for its intended use and free of hidden defects.¹³ Central to the court's holding was its recognition that collisions, with or without the fault of the driver, are a clearly

8. 15 U.S.C. §§ 1381-1431 (1966). The purpose of the Safety Act was "to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents" by establishing safety standards for vehicles and equipment, as well as by undertaking and supporting safety research and development. *Id.* § 1381j. For legislative history of the Act, see H.R. REP. NO. 1776, 89th Cong., 2d Sess. (1966); S. REP. NO. 1301, 89th Cong., 2d Sess. (1966), reprinted in 1966 U.S.C.C.A.N. 2709, 2709; CONF. REP. NO. 1919, 89th Cong., 2d Sess. (1966), reprinted in 1966 U.S.C.C.A.N. 2709, 2731. The National Traffic Safety Bureau (later the National Highway Traffic Safety Administration, or "NHTSA") was created soon after to carry out the legislative mandate. See Exec. Order No. 11,357, 32 Fed. Reg. 8225 (1967).

9. *Larsen*, 391 F.2d at 506; FRUMER & FRIEDMAN, *supra* note 2, § 21.01, at 21-2 to 21-5.

10. *Larsen*, 391 F.2d at 496-97.

11. *Id.* at 497.

12. 359 F.2d 822, 824 (7th Cir.), *cert. denied*, 385 U.S. 836 (1966) (concluding in a divided decision applying Indiana law that manufacturers are under no duty to make automobiles accident-proof nor to render vehicles safer when the danger to be avoided is obvious and collisions are not an intended use of automobiles; such claims are not actionable as a matter of law), *overruled by* *Huff v. White Motor Corp.*, 565 F.2d 104, 110 (7th Cir. 1977).

13. *Larsen*, 391 F.2d at 501.

foreseeable and statistically inevitable result of the "intended use" of automobiles.¹⁴

The *Larsen* court spoke only in terms of *unreasonable risks* of enhanced injury and disclaimed any duty to design accident-proof vehicles or to insure their use.¹⁵ Further, the court pointedly emphasized that:

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.¹⁶

One commentator has described this as a "newly minted liability . . . limited to only those injuries which were actually *enhanced* by the [alleged] defect."¹⁷

B. Post-1968: Acceptance and Expansion of *Larsen*

After some early resistance,¹⁸ the enhanced injury doctrine originally adopted by the *Larsen* court appears to have been unanimously accepted by American jurisdictions.¹⁹ In *Blankenship v. General Motors Corp.*,²⁰ the highest court of West Virginia recognized in 1991 that it had become the final state to accept the doctrine.²¹ Moreover, theo-

14. *Id.* at 501-02. The court cited authority stating that between one-fourth to two-thirds of all automobiles are involved in an accident producing injury or death at some time during their useful life. *Id.* at 502.

15. *Id.* at 503.

16. *Id.* The concept of "enhanced injury" originates from this language in the *Larsen* decision.

17. Hoenig, *supra* note 2, at 637; see also FRUMER & FRIEDMAN, *supra* note 2, § 21.02, at 21-18 (noting that the *Larsen* court was quite careful to limit the portion of liability which affixed to the enhanced injury defect).

18. See FRUMER & FRIEDMAN, *supra* note 2, § 21.02, at 21-14 n.25 & 21-18 n.48.

19. Council Draft No. 2, *supra* note 5, § 11, Reporters' Note to cmt. a, at 265. For exhaustive listings of state and federal decisions following *Larsen*, see FRUMER & FRIEDMAN, *supra* note 2, § 21.02, at 21-19 n.50; Barry Levenstam & Daryl J. Lapp, *Plaintiff's Burden of Proving Enhanced Injury in Crashworthiness Cases: A Clash Worthy of Analysis*, 38 DEPAUL L. REV. 55, 61 n.33 (1988).

20. 406 S.E.2d 781 (W. Va. 1991).

21. The court, however, based its decision to adopt the enhanced injury doctrine principally on the practical realization that, "West Virginians . . . are already paying the product liability insurance premium when they buy a . . . car, so this Court would be both foolish and irresponsible if we held that while West Virginians must pay the premiums, West Virginians can't collect the insurance after they're injured." *Id.* at 785. The court goes on to reject the burden of proof requirements of *Huddell v. Levin*, 537 F.2d 726 (3d Cir. 1976), for the same reasons, stating that although the *Huddell* standard makes a great deal of sense and perhaps should be the national standard in crashworthiness cases, "West Virginians are not going to pay product liability insurance premiums so that all the resi-

ries of enhanced injury have been applied far beyond the realm of automobiles to products ranging from airplanes,²² to fabrics,²³ to riding lawn mowers,²⁴ to water ski bindings.²⁵ This expansion is supported by the *Larsen* decision which made it clear that the duty recognized was one of general application to all products and was not limited to automobiles.²⁶ Indeed, one commentator has stated that enhanced injury is "truly an area limited only by the imagination of counsel."²⁷ Unfortunately, this expansion in application has often been accompanied by an unwarranted expansion of the theory itself as many courts lose sight of the policies underlying *Larsen*, ultimately resulting in the expansion of liability by these courts and now in the proposed *Restatement (Third)*.²⁸

The federal courts, rather than the state courts, have led the way in adopting the enhanced injury theory and in defining its parameters²⁹ under *Erie Railroad Co. v. Tompkins*.³⁰ Many key decisions, including *Larsen*,³¹ *Huddell*,³² *Caiazzo*,³³ *Mitchell*,³⁴ and *Fox*³⁵ were

dents of the 10th Circuit, where *Fox v. Ford Motor Co.* was decided, can collect the benefits." *Blankenship*, 406 S.E.2d at 786 (citation omitted); see *infra* notes 58-127 and accompanying text.

22. *E.g.*, *Cleveland v. Piper Aircraft Corp.*, 890 F.2d 1540, 1550 (10th Cir. 1989) (applying New Mexico law).

23. *E.g.*, *Howard v. McCrory Corp.*, 601 F.2d 133, 137 (4th Cir. 1979) (applying Maryland law).

24. *Tafoya v. Sears Roebuck & Co.*, 884 F.2d 1330, 1338 (10th Cir. 1989) (applying Colorado law). *But see* *Mile Hi Concrete, Inc. v. Matz*, 842 P.2d 198, 206-07 n.17 (Colo. 1992) (disagreeing with the holding in *Tafoya*).

25. *Holdsworth v. Nash Mfg., Inc.*, 409 N.W.2d 764, 768 (Mich. Ct. App. 1987). For an extensive listing of additional products to which plaintiffs have argued the enhanced injury doctrine should apply, although not always successfully, see FRUMER & FRIEDMAN, *supra* note 2, § 21.02, at 21-26 n.1.

26. *Larsen*, 391 F.2d at 504; Hoenig, *supra* note 2, at 647.

27. Foland, *supra* note 4, at 621; see also Harris, *supra* note 4, at 648-49 (noting that the concept of recovery for enhanced injury is broad).

28. See *infra* notes 79-127.

29. See, e.g., Harris, *supra* note 4, at 644; FRUMER & FRIEDMAN, *supra* note 2, § 21.01, at 21-24 to 21-26. Hoenig stated:

In this struggle, [between the *Evans* and *Larsen* approaches] the federal courts seemed to play an important role as they hazarded "Erie-educated guesses," regarding the approach state courts would adopt if faced with the threshold legal issue. Nevertheless, since a court opting to follow *Larsen* will be markedly extending products liability, the *Erie* task has been viewed with discomfort.

Hoenig, *supra* note 2, at 638-39 (footnotes omitted).

30. 304 U.S. 64 (1938).

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

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

33. *Caiazzo v. Volkswagenwerk A.G.*, 647 F.2d 241 (2d Cir. 1981).

34. *Mitchell v. Volkswagenwerk A.G.*, 669 F.2d 1199 (8th Cir. 1982).

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

decided by district and circuit court judges. However, in what some have termed a classic example of "the cart leading the horseless carriage," no state court has disagreed with the adoption of the enhanced injury theory by the federal judiciary.³⁶

Although most often applied to alleged design defects, the enhanced injury theory is equally applicable to manufacturing or warning defects.³⁷ Since 1968 and *Larsen*, the enhanced injury doctrine has also been expanded to apply to causes of action based on strict liability and breach of warranty theories, as well as negligence.³⁸ However, recent developments have seen an increasing rejection of strict liability in judging alleged design and warning defects because increasing numbers of courts and commentators recognize that a single cause of action based on negligence principles and applied through a risk-utility balancing test represents the more equitable approach.³⁹

36. FRUMER & FRIEDMAN, *supra* note 2, § 21.02, at 21-26.

37. See, e.g., *Lahocki v. Contee Sand & Gravel Co.*, 398 A.2d 490, 494 (Md. Ct. Spec. App. 1979), *rev'd on other grounds sub nom.*, *General Motors Corp. v. Lahocki*, 410 A.2d 1039 (Md. 1980) (discussing inadequate roof welds); *Holdsworth v. Nash Mfg.*, 409 N.W.2d 764, 767-68 (Mich. Ct. App. 1987) (discussing manufacturing and testing defects in water ski binding); *Krein v. Raudabough*, 406 N.W.2d 315, 320 (Minn. Ct. App. 1987) (finding in a failure to warn case, that dashboard, steering column, and other components of armored truck had unreasonably dangerous energy-absorbing properties).

38. See, e.g., *Duran v. General Motors Corp.*, 688 P.2d 779, 782 (N.M. Ct. App. 1983) (recognizing that crashworthiness claims are actionable in negligence, strict liability, and breach of warranty); Jeffrey F. Ghent, Annotation, *Liability of Manufacturer, Seller, or Distributor of Motor Vehicle for Defect Which Merely Enhances Injury From Accident Otherwise Caused*, 42 A.L.R.3d 560, § 2[a], at 564 (1972).

39. See, e.g., Hoenig, *supra* note 2, at 659-71. Mr. Hoenig stresses that the appropriate predicate for design defect liability is fault and that case law indicates that negligence-oriented reasonableness criteria must be applied in crash design cases regardless of the strict liability label. *Id.* at 659, 670; see also *Prentis v. Yale Mfg. Co.*, 365 N.W.2d 176, 185-86 (Mich. 1984) (adopting a negligence risk-utility test in design defect cases); MODEL UNIFORM PRODUCT LIABILITY ACT, reprinted in 44 Fed. Reg. 62,714, 62,723-24 (1979) (noting that courts have never imposed strict liability in a design defect case); Council Draft No. 2, *supra* note 5, § 2 cmt. 1, at 49-50 (analyzing the incompatibility of negligence and strict liability in regards to the same facts); WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 96, at 644-45 (4th ed. 1971) (discussing the use of negligence principles in cases purportedly applying strict liability); Sheila L. Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 VAND. L. REV. 593, 603 (1980) (exploring the return to negligence in strict liability actions after California rejected the terminology in § 402A of the *Restatement (Second) of Torts*); James A. Henderson, Jr., *Renewed Judicial Controversy Over Defective Product Design: Toward the Preservation of an Emerging Consensus*, 63 MINN. L. REV. 773, 777-78 (1979) (supporting separation of strict liability and negligence despite substantially identical cost-benefit analysis); Frank J. Vandall, "Design Defect" in *Products Liability: Rethinking Negligence and Strict Liability*, 43 OHIO ST. L.J. 61, 83-84 (1982) (outlining ten factors of a balancing test to be considered in strict liability cases), John W. Wade, *On Product "Design Defects" and Their Actionability*, 33 VAND. L. REV. 551, 577 (1980) (noting combination of negligence, breach of warranty, and strict liability to create a single cause of action).

C. Elements and Troublesome Developments

The elements of the enhanced injury claim, whether in negligence or in strict liability, are the same as the general elements of any other tort claim, requiring the claimant to establish that: (1) the defendant owed a duty to the claimant; (2) the defendant breached that duty; (3) the breach was a proximate cause of injury to the claimant; and (4) the claimant suffered damage.⁴⁰ One commentator has modified these traditional tort elements to reflect the unique aspects of an enhanced injury claim, concluding that an enhanced injury claimant must prove by a preponderance of the evidence: (1) a "breach of a duty owed to the claimant"; (2) that "the breach caused an enhancement of damage over and above what would otherwise have occurred"; and (3) "the extent to which the damage was enhanced as a result of the breach of duty."⁴¹ Like any other traditional tort claim, the claimant bears the burden of proof on each of these elements in order to present a *prima facie* case.⁴²

For the most part, enhanced injury litigation offers no unique problems with respect to these tort elements. However, issues such as the burden of proving the extent of the enhanced injury, the perceived

40. See PROSSER, *supra* note 39, § 30; Harris, *supra* note 4, at 651.

41. Harris, *supra* note 4, at 657. Mr. Harris has further refined these elements to reflect the sequential factual proof that a claimant must offer in order to allow the trier of fact to perform the following six functions:

(1) determine that the defendant breached a duty owed to the claimant; (2) evaluate the full nature, extent, and consequences of the injuries actually received in the accident; (3) quantify the severity of the impact imparted to both the object at issue and to the person or property injured after impact; (4) define, with a meaningful degree of specificity, the alternative, safer design(s) that claimant alleges the defendant should have used; (5) evaluate the full nature, extent, and consequences of the injuries, if any, that the claimant hypothetically would have suffered in the very same accident if the alternative, safer design had been used; and (6) calculate in terms of a damage award the difference between the injuries actually suffered and those that hypothetically would have been suffered if the alternative, safer design had been used.

Id. at 662.

42. See Edward T. O'Donnell, *Public Policy and the Burden of Proof in Enhanced Injury Litigation: A Case Study in the Dangers of Trends and Easy Assumptions*, 17 W. ST. U. L. REV. 325, 353 (1990) ("Whatever its imperfections, the traditional allocation of the burden of proof keeps pressure on each side to come forward with the best evidence it can find. A shift in the burden could destroy that balance."); see also Robert C. Reichert, *Limitations on Manufacturer Liability in Second Collision Actions*, 43 MONT. L. REV. 109, 115-16 (1982) ("Applying traditional legal principles, the party that initiated the complaint and stands to benefit from the proof—the plaintiff—has the burden. 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.").

"indivisibility" of some injuries, the "apportionment" of injuries, and the imposition of joint and several liability have generated controversy among courts and commentators struggling to equitably define and apply the enhanced injury doctrine.

1. Duty

Enhanced injury liability is based on the premise that some products, while not made for the purpose of undergoing impacts or becoming involved in accidents, should nevertheless be reasonably designed to minimize the potential injury-producing effect of such impacts or accidents.⁴³ It is important to note that the duty recognized by the *Larsen* court was limited to *reasonable* care to protect against *unreasonable* risks of enhanced injury.⁴⁴ While foreseeability is an essential element in determining the scope of such a duty, it is not synonymous with duty.⁴⁵ In attempting to establish the parameters of a manufacturer's duty to minimize the risk of enhanced injury, the Fourth Circuit Court of Appeals recognized the limits of foreseeability and struggled to provide a rational approach to the question of unreasonable risk in *Dreisonstok v. Volkswagenwerk A.G.*, stating: "[N]early every accident situation, [involving an automobile] no matter how bizarre, is 'foreseeable' if only because in the last fifty years drivers have discovered just about every conceivable way of wrecking an automobile."⁴⁶ The court further recognized that the concept of unreasonable risk involves the balancing of many factors and depends to some degree upon the circumstances surrounding the particular accident.⁴⁷

A manufacturer's duty to minimize the risk of enhanced injury is clearly not absolute.⁴⁸ Thus, many courts have emphasized that manufacturers do not have a duty to produce an "accident-proof"⁴⁹ or "fool-proof"⁵⁰ vehicle, or even one that "floats on water"⁵¹ or has the "strength and crash-damage resistance features of an M-2 Army

43. Harris, *supra* note 4, at 646.

44. *Larsen*, 391 F.2d at 502.

45. Harris, *supra* note 4, at 654; Hoenig, *supra* note 2, at 638 n.19; Kelly Carbetta-Scandy, Note, *Litigating Enhanced Injury Cases: Complex Issues, Empty Precedents, and Unpredictable Results*, 54 CINN. L. REV. 1257, 1275 (1986).

46. 489 F.2d 1066, 1070 (4th Cir. 1974) (citing Michael Hoenig & Stephen J. Werber, *Automobile "Crashworthiness": An Untenable Doctrine*, 1971 INS. L.J. 583, 595).

47. *Id.* at 1071; see also discussion of *Dreisonstok* and its duty analysis in Foland, *supra* note 4, at 605-06; Carbetta-Scandy, *supra* note 45, at 1275.

48. *Larsen*, 391 F.2d at 503; Harris, *supra* note 4, at 652; Carbetta-Scandy, *supra* note 45, at 1275.

49. *Larsen*, 391 F.2d at 502.

50. *Caiazzo*, 647 F.2d at 247.

51. *Larsen*, 391 F.2d at 502.

tank.”⁵² Ultimately, the question of the scope of a manufacturer’s duty is one of fairness.⁵³

2. Defect

Once it is established that the manufacturer owed a duty to the claimant, the claimant must show a breach of that duty by proving the existence of a defect.⁵⁴ An enhanced injury claimant must prove the existence of a design defect by showing that a reasonable alternative design, practicable under the circumstances, would have provided better protection against enhanced injuries in an accident.⁵⁵ Most courts and commentators agree that a plaintiff alleging a design defect must present qualitative evidence of a safer, alternative design which not only must have been possible, but must have been practicably feasible or reasonably achievable under technology available at the time of the product’s manufacture.⁵⁶ The requirement of proof of the existence of a reasonable alternative design does not enlarge the plaintiff’s burden of proof, as plaintiffs have always borne the burden of proving the existence of a defect, and proof of a reasonable alternative design is merely a part of that burden.⁵⁷

3. Burden of Proof

Following the rationale of *Larsen*, most jurisdictions expressly recognize that the manufacturer is potentially liable *only* for the enhanced injuries over and above those that would have occurred absent the alleged defect, and that the plaintiff bears the burden of proving that the alleged defect caused the enhanced injuries.⁵⁸ However, con-

52. *Roberts v. May*, 583 P.2d 305, 308 (Colo. Ct. App. 1978) (quoting *Melia v. Ford Motor Co.*, 534 F.2d 795 (8th Cir. 1976) (Bright, J., dissenting)).

53. *Harris*, *supra* note 4, at 655.

54. Because the vast majority of enhanced injury cases involve claims of design defect, the following discussion will focus on proof of design defects, rather than manufacturing defects which are proven by a relatively straightforward showing that the product as manufactured did not conform to the manufacturing specifications.

55. *Hoenig*, *supra* note 2, at 634 n.3.

56. Council Draft No. 2, *supra* note 5, § 2 cmt. c, at 22–28 and cmt. d, at 28–34; *Hoenig*, *supra* note 2, at 637 n.17, 685; Stanton P. Beck, Comment, *Enhanced Injury: A Direction for Washington*, 61 WASH. L. REV. 571, 590 (1986); Carbetta-Scandy, *supra* note 45, at 1264 n.36. *Contra* *Kudlacek v. Fiat S.p.A.*, 509 N.W.2d 603, 611 (Neb. 1994) (“Nebraska no longer requires proof of an alternative design for a claimant to recover under a claim of defective design.”).

57. *Hoenig*, *supra* note 2, at 688.

58. FRUMER & FRIEDMAN, *supra* note 2, § 21.04[1], at 21–35; James O. Pearson, Jr., Annotation, *Products Liability: Sufficiency of Proof of Injuries Resulting From “Second Collision,”* 9 A L.R.4th 494 § 2, at 497 (1981); Foland, *supra* note 4, at 608–09; *Harris*, *supra* note 4, at 656; *Levenstam & Lapp*, *supra* note 19, at 62; *Reichert*, *supra* note 42, at

troverly has arisen over the way in which the plaintiff's burden of proof of causation may be met. In fact, the question of who should bear the burden of proving the *extent* of enhanced injuries has generated more controversy than any other single issue arising out of the enhanced injury doctrine.

Decisions faithful to the theoretical underpinnings of the enhanced injury theory require proof of the extent of enhanced injuries as a part of the plaintiff's *prima facie* case.⁵⁹ The seminal case adopting this approach is *Huddell v. Levin*.⁶⁰ In this case Dr. Huddell was sitting in his Chevrolet Nova after it had run out of gas on a bridge. Shortly thereafter, his car was struck from behind by another vehicle traveling at a speed of fifty to sixty miles per hour.⁶¹ The impact allegedly forced Dr. Huddell's head back into the head restraint, resulting in a fatal skull fracture.⁶² Huddell's widow brought suit against the manufacturer, claiming that the defective design of the head restraint caused her husband's death. In reversing a jury verdict in favor of the plaintiff, the Third Circuit Court of Appeals reasoned that enhanced injury cases "require a highly refined and almost invariably difficult presentation of proof"⁶³ which the plaintiff had failed to sustain, including:

1. that there existed at the time of the accident, an alternative, safer, more practicable product design;
2. that plaintiff would have sustained a less severe injury had such alternative design been used, by offering proof of what injuries, if any, would have been sustained with the alternative design; and
3. a method of establishing the extent of enhanced injury attributable to the design defect.⁶⁴

In a concurring opinion that would eventually become quite influential, Judge Rosenn objected to the majority's second and third requirements of proof on the basis that there may be circumstances under which they would be "unreasonably burdensome to an innocent

113-14; Carbetta-Scandy, *supra* note 45, at 1258; Kerry A. Shad, Note, *Warren v. Colombo: North Carolina Recognizes Claim for Enhanced Injury*, 68 N.C. L. REV. 1330, 1338 (1990); see also Higginbotham v. Ford Motor Co., 540 F.2d 762, 774 (5th Cir. 1976); Richardson v. Volkswagenwerk A.G., 552 F. Supp. 73, 81-83 (W.D. Mo. 1982).

59. Harris, *supra* note 4, at 657.

60. 537 F.2d 726, 737-38 (3d Cir. 1976) (applying New Jersey law).

61. *Id.* at 732.

62. *Id.* at 731. An autopsy showed that Dr. Huddell suffered no other significant injuries in the collision. *Id.*

63. *Id.* at 737.

64. *Id.* at 737-38.

plaintiff."⁶⁵ Judge Rosenn believed that the wrongdoer causing the initial accident and the wrongdoer causing the enhanced injury should instead be treated as "concurrent tortfeasors," with the burden of proving apportionment of injury shifting to the defendant pursuant to section 433B(2) of the *Restatement (Second) of Torts*.⁶⁶

The *Huddell* majority, on the other hand, did not perceive that enhanced injury litigation fit into the concepts of concurrent tortfeasor actions which combine, contemporaneously, to cause an injury.⁶⁷ Instead, the court emphasized that "[a]nalogies to concurrent actions combining to cause a *single impact* are simply not applicable" where the driver who caused the original impact is liable for all of the injuries, and the manufacturer is liable only for the enhanced injuries.⁶⁸

The Second Circuit Court of Appeals reached the same conclusion in *Caiazzo v. Volkswagenwerk A.G.*⁶⁹ This case involved a Volkswagen minibus which was rear-ended by a car traveling at a speed of fifty to sixty-five miles per hour. The collision caused the minibus to spin and roll over, ejecting the Caiazzos, who were unrestrained, and causing them serious injury.⁷⁰ In reversing a jury verdict in favor of

65. *Id.* at 744 (Rosenn, J., concurring).

66. *Id.* at 745. *Restatement (Second) of Torts* provides:

[W]here the tortious conduct of two or more actors has combined to bring about harm to the plaintiff, and one or more of the actors seeks to limit his liability on the ground that the harm is capable of apportionment among them, the burden of proof as to the apportionment is upon each such actor.

RESTATEMENT (SECOND) OF TORTS § 433B(2) (1965).

This approach has been criticized as an example of courts:

mistakenly abdicat[ing] [their] responsibility . . . , failing to engage in a critical analysis of either the *Restatement* rule or the theoretical basis on which the second collision doctrine rests. The *Restatement* requires a defendant to go forward with proof of apportionment because he is the one who seeks to rely on it to relieve himself of liability for all or a portion of the damages. However, in a second collision-crashworthy case, the defendant has no liability absent proof of enhanced injury. Therefore the plaintiff is the one who relies on proof of apportionment to establish his cause of action.

Foland, *supra* note 4, at 615. Moreover, if courts are going to look to the *Restatement (Second) of Torts* for guidance in enhanced injury cases, other provisions and their comments are instructive, such as § 879 (dealing with liability for concurring or consecutive independent acts; comment b makes clear that this section does not apply in an enhanced injury setting) and §§ 323 and 324A (dealing with the liability of one providing a service, rather than a product, for increased risk of harm to the claimant or his property).

67. *Huddell*, 537 F.2d at 738.

68. *Id.*; see also Shad, *supra* note 58, at 1338 (arguing that the principles of joint and several liability require the manufacturer be held liable only for the enhanced injury, not the entire injury).

69. 647 F.2d 241, 252 (2d Cir. 1981) (applying New York law).

70. *Id.* at 243-44.

the plaintiffs due to insufficient proof, the Second Circuit Court of Appeals ruled that "the plaintiff should be required to prove the extent of the enhanced injuries attributable to the defective design"⁷¹ and that proof requires a showing of the actual nature and extent of the injuries aggravated.⁷² The court felt that the theoretical underpinnings of the enhanced injury doctrine require the plaintiff to sustain this burden in order to avoid speculation.⁷³

The *Huddell-Caiazzo* approach has been followed by many jurisdictions⁷⁴ and has been widely praised by commentators as consistent with both the theoretical underpinnings of *Larsen* and with broader themes of product liability law.⁷⁵ The *Huddell* and *Caiazzo* courts

71. *Id.* at 250.

72. *Id.* at 251.

73. *Id.* at 246.

74. See, e.g., *O'Bryan v. Volkswagen of Am.*, 39 F.3d 1182, 1994 WL 599450, at *4 (6th Cir. Nov. 1, 1994) (applying Kentucky law in an unpublished disposition); *Chretien v. General Motors Corp.*, 959 F.2d 231, 1992 WL 67356, at *9 (4th Cir. Apr. 6, 1992) (applying Virginia law in an unpublished disposition); *Cleveland v. Piper Aircraft Corp.*, 890 F.2d 1540, 1546 (10th Cir. 1989) (applying New Mexico law); *Barris v. Bob's Drag Chutes & Safety Equip., Inc.*, 685 F.2d 94, 100 (3d Cir. 1982) (applying Pennsylvania law); *Seese v. Volkswagenwerk A.G.*, 648 F.2d 833, 844-49 (3d Cir.) (applying North Carolina law), *cert. denied*, 454 U.S. 867 (1981); *Curtis v. General Motors Corp.*, 649 F.2d 808, 813 (10th Cir. 1981) (applying Colorado law); *Dawson v. Chrysler Corp.*, 630 F.2d 950, 960 (3d Cir. 1980) (applying New Jersey law), *cert. denied*, 450 U.S. 959 (1981); *Stonehocker v. General Motors Corp.*, 587 F.2d 151, 158 (4th Cir. 1978) (applying South Carolina law); *Higginbotham v. Ford Motor Co.*, 540 F.2d 762, 773-74 (5th Cir. 1976) (applying Georgia law); *Endicott v. Nissan Motor Corp.*, 141 Cal. Rptr. 95, 100-01 (Ct. App. 1977); *Masterman v. Veldman's Equip., Inc.*, 530 N.E.2d 312, 317 (Ind. Ct. App. 1988); *Reed v. Chrysler Corp.*, 494 N.W.2d 224, 226 (Iowa 1992); *Hillrichs v. Avco Corp.*, 478 N.W.2d 70, 75 (Iowa 1991); *Wernimont v. International Harvester Corp.*, 309 N.W.2d 137, 140-41 (Iowa Ct. App. 1981); *Armstrong v. Lorino*, 580 So. 2d 528, 530 (La. Ct. App. 1991); *Andrews v. Harley Davidson, Inc.*, 796 P.2d 1092, 1095 (Nev. 1990); *McLaughlin v. Nissan Motor Corp.*, 630 A.2d 857, 860 (N.J. Super. Ct. Law Div. 1993); *Duran v. General Motors Corp.*, 688 P.2d 779, 786-87 (N.M. Ct. App. 1983); *Garcia v. Rivera*, 553 N.Y.S.2d 378, 380 (N.Y. App. Div. 1990); *Cornier v. Spagna*, 475 N.Y.S.2d 7, 10 (N.Y. App. Div. 1984); *Wilson v. Piper Aircraft Corp.*, 577 P.2d 1322, 1326 (Or. 1978); *Kupetz v. Deere & Co.*, 644 A.2d 1213, 1218 (Pa. Super. Ct. 1994); *Baumgardner v. American Motors Corp.*, 522 P.2d 829, 833-34 (Wash. 1974); see also pre-*Huddell* decisions: *Dreisonstok v. Volkswagenwerk A.G.*, 489 F.2d 1066, 1074-76 (4th Cir. 1974) (applying Virginia law); *Jeng v. Witters*, 452 F. Supp. 1349, 1361 (M.D. Pa. 1978), *aff'd*, 591 F.2d 1334 (3d Cir. 1979) (applying Pennsylvania law); *Yetter v. Rajeski*, 364 F. Supp. 105, 107-09 (D.N.J. 1973) (applying New Jersey law); *LiPuma v. County of Rockland*, 367 N.Y.S.2d 149, 153 (N.Y. Sup. Ct. 1975).

75. FRUMER & FRIEDMAN, *supra* note 2, § 21.04[1], at 21-26 (stating that the *Huddell* approach clearly represents "the current and better view" and is eminently fair to all litigants in that it places the burden of proof where it properly belongs, on the plaintiff, to prove with particularity the injuries that have been enhanced); Foland, *supra* note 4, at 613-16; Harris, *supra* note 4, at 660-65; Hoenig, *supra* note 2, at 699-706; Levenstam & Lapp, *supra* note 19, at 75; O'Donnell, *supra* note 42, at 330-36; Reichert, *supra* note 42, at 114-16; Nicholas J. Wittner, *Crashworthiness Litigation: Principles and Proofs* 1992, (PLI Litig. & Admin. Practice Course Handbook Series No. H4-5145, 1992); Carbetta-Scandy,

properly recognized that the plaintiff asserting an enhanced injury claim must prove the extent of the injuries enhanced by the alleged product defect, as well as the injuries which would have been caused by the reasonable alternative design, in order to establish the existence of a defect, proximate causation, and thus, liability.⁷⁶ In other words, there can be no liability unless there is a difference between the actual injury sustained and the hypothetical injury which would have been expected to occur under the same circumstances had the design been different.⁷⁷ If a claimant fails to prove that the injuries sustained were aggravated beyond that which would have occurred had a safer alternative design been used, the claimant fails to prove the fact of enhancement.⁷⁸

However, perceived difficulties of proof under the enhanced injury doctrine have led some jurisdictions to stray from the theoretical

supra note 45, at 1264-69; Jo Anne Clark, Note, *Second Collision Liability: A Critique of Two Approaches to Plaintiff's Burden of Proof*, 68 IOWA L. REV. 811, 812, 815-19 (1983); Shad, *supra* note 58, at 1337-38. But see Gerald F. Tietz et al., *Crashworthiness and Erie: Determining State Law Regarding the Burden of Proving and Apportioning Damages*, 62 TEMP. L. REV. 587, 604 (1989) (suggesting that in requiring the plaintiff to prove the exact extent to which each tortfeasor's conduct caused injury, the *Huddell* court increased the plaintiff's traditional burden of proof and created a new and more burdensome prima facie case not required in other strict liability actions; moreover, the necessity of conjectural evidence converts a crashworthiness action into a trial of a hypothetical case, inviting supposition and speculation by the jury); Beck, *supra* note 56, at 581-85, 596 (rejecting the *Huddell* approach as unfair and too harsh, although the author does recognize the inapplicability of concurrent tortfeasor and joint and several liability concepts under the *Larsen* holding which in effect precludes the possibility of finding a manufacturer jointly and severally liable for all damages except perhaps in the rare case where the defective design can be shown to have caused all the injuries).

However, the Tietz article wrongly predicted that Pennsylvania state courts would not follow *Huddell*. Tietz et al., *supra* at 581; see *Kupetz v. Deere & Co.*, 644 A.2d 1213, 1219 (Pa. Super. Ct. 1994), discussed *infra* notes 152-54 and accompanying text.

76. Clark, *supra* note 75, at 817-18; Reichert, *supra* note 42, at 114. Mr. Reichert explains that because the alleged defective design is the cause of enhanced injuries, absent enhanced injuries, there is no defect. Thus, proof of enhanced injuries implies the existence of the defect and a causal relationship between the defect and enhanced injuries. Because "enhanced" is a relative term, the claimant must compare the injuries allegedly caused by the 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. *Id.*

77. O'Donnell, *supra* note 42, at 339; Hoenig, *supra* note 2, at 692. Mr. Hoenig explains that a claimant must prove that the alleged defect proximately caused enhanced injury; there must be a nexus between the defect and the injuries incurred. "Generally, the existence of such a nexus is proved through a showing that if a different design had been used, enhanced injuries would not have occurred." *Id.*

78. Carbetta-Scandy, *supra* note 45, at 1276; see also *Caiazza v. Volkswagenwerk A.G.*, 647 F.2d 241, 248 (2d Cir. 1981) (applying New York law).

and policy underpinnings justifying application of the theory, which has resulted in an increasing uncertainty in the law and an unwarranted increase in the scope of the manufacturer's liability.⁷⁹ *Fox v. Ford Motor Co.*⁸⁰ is often relied upon as a seminal case in support of the so-called "substantial factor" approach.⁸¹ In *Fox*, two rear-seat passengers were killed in a head-on collision with a truck which had crossed over the center line on an icy road.⁸² Both passengers were wearing lap belts and received fatal abdominal and spinal injuries. The plaintiffs alleged that the design of the rear seat belts was defective in both the angle of the lap belts and the absence of shoulder belts.⁸³ The defendant manufacturer argued that the lap belts were properly positioned and that the severity of the injuries was due to the high speed of the crash.⁸⁴

In affirming jury verdicts in favor of the plaintiffs, the *Fox* court determined that Wyoming would adopt the enhanced injury doctrine but rejected *Huddell* as refusing to follow orthodox principles of joint liability of concurrent tortfeasors for injuries which flow from their concurring in a single impact.⁸⁵ The court saw no difference between an enhanced injury case and one in which a passive tortfeasor and an active tortfeasor "cooperate" to produce an injury.⁸⁶ Citing section 433A of the *Restatement (Second) of Torts*,⁸⁷ the court held that dam-

79. Clark, *supra* note 75, at 812; Carbetta-Scandy, *supra* note 45, at 1272.

80. 575 F.2d 774 (10th Cir. 1978) (applying Wyoming law).

81. The phrase "substantial factor" is actually nothing more than the stock language which is set out in the general proximate cause instruction given by federal courts in ordinary tort cases. Harris, *supra* note 4, at 658 n.108.

82. *Fox*, 575 F.2d at 777.

83. *Id.* at 778.

84. *Id.*

85. *Id.* at 787.

86. *Id.*

87. *Restatement (Second) of Torts* § 433A provides:

- (1) Damages for harm are to be apportioned among two or more causes where
 - (a) there are distinct harms, or
 - (b) there is a reasonable basis for determining the contribution of each cause to a single harm.
- (2) Damages for any other harm cannot be apportioned among two or more causes.

RESTATEMENT (SECOND) OF TORTS § 433A (1965).

Comment *i* explains further:

Certain kinds of harm, by their very nature, are normally incapable of any logical, reasonable or practical division. . . . By far the greater number of personal injuries, and of harms to tangible property, are . . . single and indivisible. Where two or more causes combine to produce such a single result, incapable of division on any logical or reasonable basis, and each is a substantial factor in bringing about the harm, the courts have refused to make an arbitrary apportionment for its own sake, and each of the causes is charged with responsibility for the entire harm.

ages are to be apportioned between the two tortfeasors "if there are distinct harms or a reasonable basis for determining the causes of injury."⁸⁸

The Tenth Circuit Court of Appeals thus held that once a plaintiff shows that the alleged design defect was a substantial factor in producing injuries over and above those which would have resulted absent the defect, the burden shifts to the manufacturer to "apportion"⁸⁹ the injuries if possible. Yet the court further reasoned that apportionment is neither appropriate nor possible where an injury is "indivisible,"⁹⁰ such as death or paralysis, and in that case, the defendants will be jointly and severally liable for all injuries.⁹¹

*Mitchell v. Volkswagenwerk A.G.*⁹² is another case often relied upon in support of the view that a plaintiff need only prove that the alleged defect was a substantial factor in producing enhanced injuries before the burden of proof of enhancement shifts to the defendant manufacturer. In *Mitchell*, an unrestrained front-seat passenger was ejected from the car in which he was riding as it left the road, struck an embankment and overturned.⁹³ The driver, who was not ejected, suffered only minor injuries, while Mitchell was rendered a paraplegic.⁹⁴ The plaintiff asserted that he was ejected through the passenger door which had a defectively designed door latch and was rendered a paraplegic after his ejection from the vehicle. The defendant manufacturer countered that Mitchell was ejected through the rear window, rather than the passenger door, and suffered the paraplegic injury while still in the vehicle during the rollover.

On appeal from a jury verdict in favor of the plaintiff which apportioned damages between the driver and the manufacturer, the Eighth Circuit Court of Appeals reversed, holding that the jury should not have been allowed to apportion an indivisible injury such as paraplegia.⁹⁵ If the plaintiff is able to show that a design defect was a substantial factor in producing an indivisible injury, the manufacturer should be jointly and severally liable for all damages. Despite its recognition that the manufacturer in an enhanced injury case should only

Id. § 433A cmt. i, at 439-40.

88. *Fox*, 575 F.2d at 787.

89. *See infra* notes 121-25 and accompanying text regarding the falsity of the "apportionment" and "indivisibility" issues.

90. *See infra* notes 121-25.

91. *Fox*, 575 F.2d at 787.

92. 669 F.2d 1199 (8th Cir. 1982) (applying Minnesota law).

93. *Id.* at 1201.

94. *Id.*

95. *Id.* at 1201-02.

be liable for the enhanced injuries, the court held that the plaintiff should not bear the burden of proving that the manufacturer was the "sole cause" of the enhanced injury.⁹⁶

The *Mitchell* court indicated that its primary difficulty with *Huddell* and its progeny was with forcing the parties and the jury "to try a hypothetical case."⁹⁷ Thus, the court characterized the *Huddell-Caiazzo* approach as "proving the impossible."⁹⁸

Although the *Fox-Mitchell* approach has been followed,⁹⁹ it has also been criticized on the ground that it is an erosion of the principles asserted in *Larsen* and unfairly extends manufacturers' potential liability far beyond enhanced injury to *all* injury sustained in an accident which the manufacturer played no part in creating.¹⁰⁰ Importantly, the Tenth Circuit Court of Appeals, seeking to clarify its previous holding in *Fox*, substantially modified that decision in *Harvey v. General Motors Corp.*¹⁰¹

In *Harvey*, the plaintiff suffered an amputated leg and brain damage when the 1979 Chevrolet Corvette in which he was riding swerved from the road at high speed and rolled over. Harvey alleged that the Corvette's "T-Top" roof panels separated from the car during the rollover, allowing him to be ejected and causing his injuries. Although

96. *Id.* at 1203.

97. *Id.* at 1204. *Cf.* *Caiazzo v. Volkswagenwerk A.G.*, 647 F.2d 241, 246 (2d Cir. 1981); *supra* note 69-73 and accompanying text. The *Caiazzo* court was similarly concerned that the *Fox-Mitchell* approach forces the manufacturer to show a "plethora of hypothetical and speculative possibilities," forces the manufacturer to prove a part of the plaintiff's case, and allows the jury to engage in undue speculation which tempts them to assign liability on the basis of the deep pockets of the manufacturer. *Caiazzo*, 647 F.2d at 246.

98. *Mitchell*, 669 F.2d at 1203.

99. *See, e.g.*, *Shipp v. General Motors Corp.*, 750 F.2d 418, 424 (5th Cir. 1985) (applying Texas law); *McLeod v. American Motors Corp.*, 723 F.2d 830, 833-34 (11th Cir. 1984) (applying Florida law); *Fietzer v. Ford Motor Co.*, 590 F.2d 215, 217 (7th Cir. 1978) (applying Wisconsin law); *Smith v. Fiat-Roosevelt Motors, Inc.*, 556 F.2d 728, 730 (5th Cir. 1977) (applying Florida law); *Richardson v. Volkswagenwerk A.G.*, 552 F. Supp. 73, 83 (W.D. Mo. 1982); *Fouche v. Chrysler Motors Corp.*, 646 P.2d 1020, 1024 (Idaho Ct. App. 1982); *Lahocki v. Contee Sand & Gravel Co.*, 398 A.2d 490, 500 (Md. Ct. Spec. App. 1979), *rev'd on other grounds sub nom.* *General Motors Corp. v. Lahocki*, 410 A.2d 1039 (Md. 1980); *Lee v. Volkswagen of Am., Inc.*, 688 P.2d 1283, 1289 (Okla. 1984); *Sumnicht v. Toyota Motor Sales USA, Inc.*, 360 N.W.2d 2, 10 (Wis. 1984); *Maskrey v. Volkswagenwerk A.G.*, 370 N.W.2d 815, 821 (Wis. Ct. App. 1985); *Chrysler Corp. v. Todorovich*, 580 P.2d 1123, 1131 (Wyo. 1978).

100. *See FRUMER & FRIEDMAN, supra* note 2, § 21.04[4], at 21-35; *Levenstam & Lapp, supra* note 19; *Carbetta-Scandy, supra* note 45, at 1267-68; *Clark, supra* note 75, at 820, 824 ("*Mitchell* illustrates the mental gymnastics in which courts engage when forced to interpret [the] words [of *Larsen*].").

101. 873 F.2d 1343 (10th Cir. 1989) (applying Wyoming law).

the jury found that the vehicle was defective, that General Motors was negligent, and that the defect caused the plaintiff's injuries, it did not award plaintiff any damages, apparently believing that Harvey "did not establish the extent of *enhanced* injuries attributable to the defective design of the Corvette" ¹⁰²

The court of appeals upheld this verdict, finding that Harvey had not sustained his burden of proving enhancement because he never established that his injuries were over and above those which would have been sustained had the T-Top remained in place. ¹⁰³ The court went on to criticize misinterpretations of the *Fox* decision, stating: "In our view, *Fox* does not tell us that a finding of causation necessitates an award of damages. Rather, *Fox* permits apportionment of damages if there are distinct harms or there is a reasonable basis for determining the causes of injury." ¹⁰⁴

Consequently, *Harvey* reveals that it is not enough to prove that a defect caused or was a "substantial factor" in producing an injury. A plaintiff must prove that a defect caused injury "over and above" the injury that probably would have occurred absent the alleged defect. ¹⁰⁵ Thus, a plaintiff must prove the injury that "probably would have occurred." ¹⁰⁶ As one commentator has stated, "it is not unreasonable to read [the *Harvey*] opinion as requiring the plaintiff to prove the damages he would have suffered but for the injury enhancing defect, moving the Tenth Circuit closer to *Huddell's* third element of proof than to *Fox*." ¹⁰⁷ Others also view *Harvey* as marking "a critical shift in the weight of authority and a reaffirmation of traditional requirements of proof, both quantitative and qualitative." ¹⁰⁸ Thus, reliance on what has been labeled the "*Fox-Mitchell*" approach is misplaced.

Moreover, the *Fox-Mitchell* analysis is flawed in that it allows a plaintiff to establish a *prima facie* case despite inadequate and speculative proof of proximate cause. ¹⁰⁹ It is this gross assumption that liability has already been fixed that supports the application of traditional principles of concurrent tortfeasors and joint and several

102. *Id.* at 1348.

103. *Id.* at 1350.

104. *Id.* at 1349.

105. *Id.* (citing *Larsen*, 391 F.2d at 503).

106. Wittner, *supra* note 75.

107. FRUMER & FRIEDMAN, *supra* note 2, § 21.04[3], at 21-44 n.66.

108. O'Donnell, *supra* note 42, at 328.

109. See Carbetta-Scandy, *supra* note 45, at 1267; Clark, *supra* note 75, at 827; see also Levenstam & Lapp, *supra* note 19, at 79-80, 82 ("Liability without fault never was intended to be construed as liability without causation.").

liability to neatly resolve the issue of apportionment.¹¹⁰ However, the analogy completely ignores the fact that a finding of defect in an enhanced injury case *must* include the jury's determination that defined, specific injuries were unreasonably enhanced.¹¹¹ In other words, in enhanced injury cases, proof of causation and proof of enhancement are inseparable.¹¹² The substantial factor approach, while requiring proof of a reasonable alternative design, does not require proof of the extent of the plaintiff's injuries absent the alleged defect. Thus, the approach does not require actual proof of enhancement, thereby relieving the plaintiff of the burden of proving a causal relationship between the defect and the injury, effectively removing the element of causation, and leaving the plaintiff's case in a morass of speculation.¹¹³

While some argue that the concern the *Fox-Mitchell* approach expresses for plaintiffs faced with difficult issues of proof is legitimate, equally legitimate is the concern that enhanced injury defendants receive fair treatment through the weeding out of those cases lacking a sufficient evidentiary foundation.¹¹⁴ Attacks on the *Huddell-Caiazzo* approach often revolve around a perceived difficulty of plaintiffs in retaining and compensating the expert witnesses usually necessary to prove an enhanced injury claim.¹¹⁵ Such arguments are exaggerated and unfounded. Case law illustrates that plaintiffs do succeed in satisfying the standards enunciated by *Huddell* and *Caiazzo*.¹¹⁶ Indeed, no commentator has offered evidence that any deserving plaintiff has lost

110. Clark, *supra* note 75, at 827; Levenstam & Lapp, *supra* note 19, at 82.

111. See Levenstam & Lapp, *supra* note 19, at 82; Clark, *supra* note 75, at 827.

112. Foland, *supra* note 4, at 612; Levenstam & Lapp, *supra* note 19, at 76, 83-84.

113. See Levenstam & Lapp, *supra* note 19, at 80.

114. See Harris, *supra* note 4, at 659 n.118; Carbetta-Scandy, *supra* note 45, at 1267. Mr. Harris further notes that the plaintiff's burden of proving the extent of enhancement is not impossible or unfair; the theoretical underpinnings of the enhanced injury concept create a practicable balance between the interests of plaintiffs and defendants. Harris, *supra* note 4, at 663.

115. In an enhanced injury case, expert testimony is normally required in areas such as occupant kinematics, biomechanics, human impact tolerance, accident reconstruction, engineering, medicine, etc. See Foland, *supra* note 4, at 617; Carbetta-Scandy, *supra* note 45, at 1277. In order to present a jury issue, it is not sufficient to merely present expert testimony that the accident was "survivable" absent the defect or that the injury "probably" would have been reduced by a design change. See Foland, *supra* note 4, at 617.

116. See O'Donnell, *supra* note 42, at 334 n.51; see also *Seese v. Volkswagenwerk A.G.*, 648 F.2d 833, 845 (3d Cir.), *cert. denied*, 454 U.S. 867 (1981) (applying the *Huddell* standard to alternative design, injury causation, and injury enhancement evidence).

a specific case for lack of an expert witness over the past twenty years.¹¹⁷

Argument about the difficulty the plaintiff faces in proving a hypothetical case is equally unfounded. In products liability litigation, both plaintiffs and defendants routinely retain experts who are able to reach opinions about hypothetical injuries.¹¹⁸ Thus, the assertion that juries are unable to perform the complex calculations required to evaluate and separate enhanced injuries is ludicrous.¹¹⁹ The venerable *Larsen* court was not concerned about this fair requirement of proof. Recognizing that identification of enhanced injuries or damages may at times be difficult, the court nevertheless stated that the obstacles are not insurmountable, noting that similar apportionments are performed with regularity under comparative negligence statutes.¹²⁰

The concepts of "apportionment" and "indivisible injury," borrowed by the *Fox-Mitchell* approach from anachronistic principles of concurrent tortfeasor liability, are simply not applicable in an enhanced injury case.¹²¹ This is because the very nature of the relief sought by the plaintiff must be based on the divisibility of the injury.

117. O'Donnell, *supra* note 42, at 345. (pointing out that whatever was true years ago, today products liability litigation offers great monetary rewards to the plaintiff's bar and its allied experts).

118. An example of this may be seen in the assertion of the seat belt defense where defendants are regularly required to prove the hypothetical injuries which would have occurred had the plaintiff been wearing a seat belt and to compare those to the injuries actually received. See FRUMER & FRIEDMAN, *supra* note 2, § 21.04[4], at 21-52. See generally *Caiazzo v. Volkswagenwerk A.G.*, 647 F.2d 241 (2d Cir. 1981).

119. Indeed, the performance of such apportionment calculations is far more common today than it was in 1968 at the time of *Larsen*. Juries have little difficulty with either the fact or the reality of assessing comparative fault among parties using numerous different formulae. See FRUMER & FRIEDMAN, *supra* note 2, § 21.04[1], at 21-35 n.7, § 21.04[4], at 21-52.

120. *Larsen*, 391 F.2d at 503.

Triers of fact are allowed to make similar inexact determinations in returning awards in personal injury cases involving pain and suffering, in resolving wrongful death cases in which young children's net lifetime earnings are projected, in setting condemnation awards, in making comparative negligence determinations, and in business interruption and lost profits lawsuits in which the trier hypothetically must determine what profits would have been earned absent the defendant's wrongful conduct.

Harris, *supra* note 4, at 664-65. Perhaps use of the term "apportionment" was an unfortunate choice by the *Larsen* court in that it has bred a great deal of confusion among courts struggling to determine exactly what must be apportioned. See *infra* notes 121-25 and accompanying text.

121. See Hoenig, *supra* note 2, at 704. "When viewed in [its] elemental form, the plaintiff's enhancement burden of proof is nothing more than a requirement to prove that which he is claiming: that 'fewer' or 'lesser' injuries would have occurred with a different design.

The apportionment that is demanded is *not* a division among the total injuries which the plaintiff sustained, but rather a showing of the *difference* between the injuries actually incurred and the injuries that would have resulted in the accident absent the alleged defect.¹²² Or, as Michael Hoenig has argued for many years, the debate over the apportionment or the indivisibility of death or paralysis is a false controversy and a basic conceptual error.¹²³ The manufacturer cannot be liable for the entire harm under any theory. Instead the plaintiff must show some basis for a comparison of the actual injury to that different and lesser harm which would have occurred had the design been different. If the plaintiff does not supply that proof, then a basic element of the tort is lacking.¹²⁴

For the same reasons, section 433B(2) of the *Restatement (Second) of Torts* is inapplicable because it merely speaks to the situation of *proven* multiple tortfeasors apportioning total harm among themselves and does not relate to the plaintiff's burden of proving enhanced injuries.¹²⁵ Section 433B was drafted in the context of joint and several liability and was designed to ease the plaintiff's burden of proof at a time when comparative negligence on the part of the plaintiff would bar recovery. In light of the widespread adoption of comparative fault principles, such rules are no longer necessary.

Placing the burden of proving enhancement on the manufacturer encourages litigation because every auto accident injury is in reality a "second collision" injury, prompting plaintiffs with nothing to lose to join manufacturers as defendants in every case.¹²⁶ The nuisance value of such claims is also increased when defendants must bear the risk of failing to sustain the burden of enhancement. In addition, even in the face of speculative proof, defendants are forced to bear the costs of expensive accident reconstruction and medical testimony. Increased litigation and long, complex trials result in increased costs and strain

The plaintiff's burden, therefore, is not one of apportioning harms or dividing up injuries " *Id.*

122. Hoenig, *supra* note 2, at 704; see also Levenstam & Lapp, *supra* note 19, at 84 (arguing that the plaintiff cannot have it both ways by relying on the divisibility of the injury in order to establish liability against the manufacturer for the enhanced injuries, but then arguing that the injury is indivisible in order to hold the manufacturer jointly and severally liable for the entire harm).

123. Hoenig, *supra* note 2, at 700-01 n.292, 703-05; O'Donnell, *supra* note 42, at 336. As Hoenig argues, it is understandable that judges have found the apportionment of death or paralysis between a first and second collision difficult since such apportionment was never in issue in the first place. Hoenig, *supra* note 2, at 700-01 n.292.

124. Hoenig, *supra* note 2, at 703-05; O'Donnell, *supra* note 42, at 336.

125. Hoenig, *supra* note 2, at 704-05.

126. O'Donnell, *supra* note 42, at 352 n.117; Reichert, *supra* note 42, at 116.

on the already overburdened judicial system. All of these costs, naturally termed "indirect insurance" by some, are ultimately passed on to consumers and taxpayers.¹²⁷

4. Comparative Fault

A second area of controversy in enhanced injury theory arises surrounding the applicability of the defense of comparative fault. The modern trend in products liability is toward consolidating defenses and allowing the unitary defense of comparative fault as an award-reducing, rather than an absolute, defense.¹²⁸ In enhanced injury cases, it is widely accepted that a plaintiff's fault which is a proximate cause of enhanced injury,¹²⁹ such as failure to wear a seatbelt, should always be compared to a defendant manufacturer's injury-enhancing fault.¹³⁰ There is no debate over the conclusion that the responsibility to use reasonable care to ensure that injuries are not enhanced applies equally to both manufacturers and consumers.¹³¹

The controversy arises over whether a plaintiff's *accident-causing* fault should also be compared to a defendant manufacturer's *injury-enhancing* fault. Some jurisdictions and commentators have taken the position that a plaintiff's negligence in causing an accident cannot be compared to a defendant's injury-enhancing fault.¹³² They argue that

127. O'Donnell, *supra* note 42, at 352 n.117; Reichert, *supra* note 42, at 116.

128. Harris, *supra* note 4, at 672-73; Reichert, *supra* note 42, at 122; Shad, *supra* note 58, at 1340. *But see* Kupetz v. Deere & Co., 644 A.2d 1213, 1221 (Pa. Super. Ct. 1994) (finding that a plaintiff's contributory negligence may not be utilized to apportion fault between the plaintiff and defendant in an enhanced injury or any other type of products liability action). Some states do still allow the assertion of affirmative defenses such as misuse. *See* States v. R.D. Werner Co., 799 P.2d 427, 430 (Colo. Ct. App. 1990) (holding that if misuse was sole cause of plaintiff's injuries, plaintiff cannot recover under strict products liability theory).

129. A plaintiff has injury-enhancing fault when he fails to conduct himself in a reasonable manner to avoid unnecessary injury in the event of an accident, or, in other words, when a plaintiff's action or inaction is a contributing proximate cause of his enhanced injuries. Reichert, *supra* note 42, at 120.

130. *See* Foland, *supra* note 4, at 620; Harris, *supra* note 4, at 674; Reichert, *supra* note 42, at 117; Carbetta-Scandy, *supra* note 45, at 1280-84; Shad, *supra* note 58, at 1340; *see also* MacDonald v. General Motors Corp., 784 F. Supp. 486, 500 (M.D. Tenn. 1992) (finding evidence of plaintiff's failure to wear seat belt admissible to support defendant's argument that the plaintiff's fault was the proximate cause of his injuries rather than the alleged defect, notwithstanding state statute precluding seat belt defense as evidence of contributory negligence).

131. *See* Carbetta-Scandy, *supra* note 45, at 1280.

132. *See* Harris, *supra* note 4, at 672-73; Shad, *supra* note 58, at 1340; Reichert, *supra* note 42, at 117-18, 125; MODEL UNIFORM PRODUCT LIABILITY ACT, reprinted in 44 Fed. Reg. 62,714, at 62,736 (1979); *see also* Reed v. Chrysler Corp., 494 N.W.2d 224, 230 (Iowa 1992) (holding that evidence of driver's or plaintiff passenger's intoxication at time of acci-

this result is implicit in the holding of *Larsen* which established a new precedent by holding the manufacturer liable for enhanced injuries even though the defect did not cause the initial accident.¹³³

However, a careful analysis of case law and commentary demonstrates that a significant number of courts have concluded that all of a plaintiff's fault must be compared to the injury-enhancing fault of the product manufacturer as long as it can be established that the plaintiff's fault was a proximate cause of the enhanced injury.¹³⁴ The reasons advanced for this position include the fact that the defense of comparative fault is a consideration distinct from the plaintiff's burden of proving causation of the injuries. With proper instruction, juries have no difficulty in assigning percentages of causal fault—whether it be accident-causing or injury-enhancing—to all parties whose conduct proximately contributed to the plaintiff's injuries. In addition, refusing to allow comparison of all of a plaintiff's negligent conduct foists extraordinary hardships on enhanced injury defendants who are singled out among tortfeasors for discriminatory application of proximate cause and comparative fault principles.¹³⁵

In practice, because of the laws of physics and principles of energy management, it is often difficult to distinguish between so-called "accident-causing" and "injury-enhancing" conduct. The enhancement of injuries runs hand in hand with the severity of the accident. For example, each incremental increase in speed results in a corresponding increase in crash consequences because the forces unleashed in the crash are magnified exponentially.¹³⁶ Thus, any conduct which influences the *severity* of an accident, thereby constituting a proximate

dent is inadmissible because plaintiff's or driver's comparative fault is not relevant in an enhanced injury case unless it is a proximate cause of the enhanced injury).

133. See Reichert, *supra* note 42, at 118. Mr. Reichert further explains that the comparison of accident-causing fault and injury-enhancing fault contradicts *Larsen* and the axioms on which enhanced injury liability rests by erroneously basing the manufacturer's liability on the proximate causation of the initial accident rather than on the proximate causation of the enhanced injuries. He believes that accident-causing fault, while clearly a cause-in-fact of enhanced injuries, is not the proximate cause of such injuries. *Id.* at 125; see also MODEL UNIFORM PRODUCT LIABILITY ACT, reprinted in 44 Fed. Reg. 62,714, at 62,736 (1979) (discussing proximate causation versus causation in fact in enhanced injury cases).

134. See *Cleveland v. Piper Aircraft Corp.*, 890 F.2d 1540, 1550 (10th Cir. 1989), *cert. denied*, 114 S. Ct. 291 (1993); *Harvey v. General Motors Corp.*, 873 F.2d 1343, 1349 (10th Cir. 1989); Michael Hoenig, *The American Law Institute Restatement Draft*, N.Y. L.J., May 9, 1994, at 3, 6-7; John M. Thomas, *Comparative Fault in Crashworthiness or Second Collision Cases*, 22 Prod. Safety & Liab. Rep. (BNA) No. 20, at 540, 541-42 (May 20, 1994).

135. See Thomas, *supra* note 134, at 54.

136. Hoenig, *supra* note 134, at 6.

cause of enhanced injury, should be compared with a manufacturer's fault.

Finally, public policy dictates that all of the plaintiff's conduct contributing to enhanced injuries be considered in allocating fault. Driver misconduct, such as driving while intoxicated or under the influence of drugs, must be deterred through the application of comparative fault rules, regardless of the type of tortfeasor the plaintiff chooses to pursue.¹³⁷

D. Recent Decisions and Trends

Enhanced injury cases decided over the past two years clearly demonstrate that the controversial burden of proof issue continues to cause substantial difficulty for courts. The divisive *Huddell-Caiazzo-Fox-Mitchell* split appears irreconcilable at this stage in the development of enhanced injury theory. However, at least over the last two years, it is arguable that more jurisdictions have issued opinions supporting the *Huddell-Caiazzo* approach than the *Fox-Mitchell* approach.¹³⁸ It remains to be seen whether this trend will continue.

1. Pro Fox-Mitchell

The Illinois Court of Appeals recently adopted the *Fox-Mitchell* substantial factor approach in *Oakes v. General Motors Corp.*¹³⁹ The plaintiff in *Oakes*, who was not wearing a seat belt, was paralyzed when his 1982 Chevrolet Camaro was rear-ended at a traffic light by a pickup truck with a snow plow bracket mounted on its front end.¹⁴⁰ The plaintiff brought suit against the driver of the pickup and General Motors, alleging that a defect in the seat mechanism allowed the driver's seatback to collapse upon impact, causing his paralysis, an indivisible injury. On appeal from a jury verdict in favor of the plaintiff, the Illinois Appellate Court held that concepts of enhanced injury do not apply when a plaintiff's injury is indivisible and evidence supports a finding that each defendant proximately caused the plaintiff's injury. Under these circumstances, defendants will be held jointly and severally liable for the entirety of the harm.¹⁴¹ The court rejected the *Hud-*

137. Hoenig, *supra* note 134, at 6; Thomas, *supra* note 134, at 54.

138. The Reporters for the new *Restatement (Third)* have taken the position that most cases supporting the *Huddell* position are dated. See Council Draft No. 2, *supra* note 5, § 11 cmt. d, at 275-76. An analysis of recent case law, however, demonstrates that this assertion is unfounded. See *infra* notes 152-63 and accompanying text.

139. 628 N.E.2d 341 (Ill. App. Ct. 1993).

140. *Id.* at 342.

141. *Id.* at 347-48.

dell standard as being a "nearly insurmountable burden," and instead voiced its support of the *Mitchell* substantial factor approach.¹⁴²

Shortly after the *Oakes* decision, the Seventh Circuit Court of Appeals applied Illinois law in *DePaepe v. General Motors Corp.*¹⁴³ In this case, the plaintiff also was paralyzed when his 1984 Buick Regal was struck on the passenger side by another car. The plaintiff brought suit against the manufacturer, arguing that the sun visor-header system was defectively designed and unreasonably dangerous.¹⁴⁴ Relying on *Oakes*, the Seventh Circuit reversed a jury verdict in General Motors' favor, agreeing with DePaepe's argument that the trial court erred in instructing the jury on enhanced injury because he suffered a single, indivisible injury incapable of apportionment. The court of appeals held that the trial court should have first determined as a matter of law whether the plaintiff's injury was indivisible and then instructed the jury that if it found the alleged defect was a substantial factor in producing the injury, it should return a verdict for the plaintiff.¹⁴⁵

The Nebraska Supreme Court also recently adopted the *Fox-Mitchell* substantial factor approach in *Kudlacek v. Fiat S.p.A.*¹⁴⁶ The plaintiff, having sustained disabling head injuries in a rollover accident, alleged that the Fiat X1-9 he was riding in was defectively designed because it did not provide adequate passenger protection in rollover or side impact collisions. The Nebraska Supreme Court reversed Fiat's directed verdict on the enhanced injury claims, holding that under Nebraska law, proof of a reasonable alternative design which would have resulted in less severe injuries is no longer required for a claimant to recover under a claim of defective design.¹⁴⁷ In addition, the court found that "the substantial factor standard harmonizes with Nebraska law" of proximate causation, and that the plaintiff had presented adequate proof under the substantial factor test to submit his enhanced injury claim to the jury.¹⁴⁸

Similarly, in *Hansen v. Crown Controls Corp.*,¹⁴⁹ the Wisconsin Court of Appeals applied the *Fox-Mitchell* substantial factor approach

142. *Id.* at 348-49.

143. 33 F.3d 737 (7th Cir. 1994) (applying Illinois law).

144. *Id.* at 738.

145. *Id.* at 742.

146. 509 N.W.2d 603, 612 (Neb. 1994).

147. *Id.* at 611.

148. *Id.* at 611-12.

149. 512 N.W.2d 509, 514 (Wis. Ct. App. 1993), *vacated in part on other grounds*, 519 N.W.2d 346 (Wis. Ct. App. 1994).

consistent with prior Wisconsin decisions on enhanced injury.¹⁵⁰ However, the court emphasized that the jury's apportionment of causation for *separately produced* injuries under an enhanced injury theory remains consistent with Wisconsin law.¹⁵¹

2. *Pro Huddell-Caiazzo*

Several recent state and federal court decisions applying Pennsylvania law reaffirm that state's commitment to the *Huddell-Caiazzo* burden of proof approach. In *Kupetz v. Deere & Co.*,¹⁵² a Pennsylvania state court finally formally recognized the enhanced injury theory as a viable "subset of a products liability action" under Pennsylvania law.¹⁵³ *Kupetz* involved a John Deere bulldozer which was alleged to be defective and unreasonably dangerous due to lack of a rollover protection system. On appeal from a judgment in favor of defendants, the court held that although enhanced injury is a viable theory of recovery which requires the claimant to prove each of the three *Huddell* elements, the operator's assumption of the risk in this case completely barred his recovery.¹⁵⁴

Likewise, the New Jersey Superior Court has recently explicitly affirmed that the *Huddell* doctrine applies to enhanced injury cases decided under New Jersey law.¹⁵⁵ In *McLaughlin v. Nissan Motor*

150. See *Sumnicht v. Toyota Motor Sales, USA, Inc.*, 360 N.W.2d 2, 11 (Wis. 1984); *Maskrey v. Volkswagenwerk A.G.*, 370 N.W.2d 815, 821 (Wis. Ct. App. 1985).

151. *Hansen*, 512 N.W.2d at 514 (emphasis added).

152. 644 A.2d 1213 (Pa. Super. Ct. 1994).

153. *Id.* at 1215, 1218.

154. *Id.* at 1218-22. For additional recent case law demonstrating Pennsylvania's support of the *Huddell* approach, see *Habecker v. Clark Equip. Co.*, 36 F.3d 278, 284 (3d Cir. 1994) (recognizing *Kupetz* decision and predicting Pennsylvania Supreme Court would follow its views); *Kolesar v. Navistar Int'l Transp. Corp.*, 815 F. Supp. 818, 821 (M.D. Pa. 1992) (stating that the *Huddell* approach was adopted in *Habecker*), *aff'd*, 995 F.2d 217 (3d Cir. 1993); *Dorsett v. American Isuzu Motors, Inc.*, 805 F. Supp. 1212, 1218 (E.D. Pa.) (stating the plaintiff must prove three *Huddell* elements to prevail), *aff'd*, 977 F.2d 567 (3d Cir. 1992); *Harries v. General Motors Corp.*, 786 F. Supp. 446, 449 (M.D. Pa. 1992) (holding that the manufacturer and the driver of car in which the plaintiff was injured are not joint tortfeasors and the manufacturer cannot sustain third party complaint against the driver where the plaintiff is only seeking damages for his enhanced injuries); *Craigie v. General Motors Corp.*, 740 F. Supp. 353, 361 (E.D. Pa. 1990) (holding that *Huddell* governs the burden of proof until the Pennsylvania Supreme Court speaks on the issue); *Mills v. Ford Motor Co.*, 142 F.R.D. 271, 273 (M.D. Pa. 1990) (holding that the plaintiff had the burden of establishing the three *Huddell* elements).

155. *McLaughlin v. Nissan Motor Corp.*, 630 A.2d 857, 860 (N.J. Super. Ct. Law Div. 1993). New Jersey's commitment to *Huddell* was questioned by the *Restatement (Third)* Reporters in their analysis of case law on the burden of proof issue. See Council Draft No. 2, *supra* note 5, § 11 cmt. d, at 267-78.

Corp.,¹⁵⁶ the court held that the plaintiff's action alleging inadequate padding of the A-pillar should have been dismissed because the plaintiff failed to sustain her burden of proof of enhancement under *Huddell*.¹⁵⁷ Significantly, the plaintiff's medical expert admitted on cross-examination that he was unable to quantify the injury the plaintiff would have received if the A-pillar had been adequately padded, except to say that it would have been less serious.¹⁵⁸

In an unpublished decision applying Kentucky law, the Sixth Circuit recently adopted the *Huddell-Caiazzo* approach. In *O'Bryan v. Volkswagen of America*,¹⁵⁹ the plaintiff alleged that defects in the door latch and passive restraint system of his 1987 Volkswagen Jetta caused or contributed to his paraplegic injuries when he was ejected through the driver's door during a rollover accident occurring at a speed in excess of fifty-five miles per hour.¹⁶⁰ The court of appeals reversed a nearly six million dollar jury verdict in the plaintiff's favor and entered judgment in favor of the defendants, finding that the plaintiff had failed to prove causation. Although the plaintiff suggested a "better" passive restraint design, he did not establish that the alternative system would have prevented his injuries in this accident; nor did he propose a reasonable alternative design for a more crashworthy door lock. The court expressly rejected the plaintiff's argument that his injuries were indivisible, noting Kentucky's statutory adoption of comparative fault which uses the same allocative process.¹⁶¹

In *Dillon v. Nissan Motor Co.*,¹⁶² the Eighth Circuit Court of Appeals affirmed a jury verdict in favor of the defendant manufacturer and held that the trial court did not err in giving a second collision instruction requiring the plaintiff to prove that the alleged defect was the sole cause of his enhanced injuries.¹⁶³

156. 630 A.2d 857 (N.J. Super. Ct. Law Div. 1993).

157. *Id.* at 861.

158. *Id.* at 859.

159. 39 F.3d 1182, 1994 WL 599450 (6th Cir. 1994) (per curiam).

160. *Id.* at *1.

161. *Id.* at *4 n.6.

162. 986 F.2d 263 (8th Cir. 1993) (applying Missouri law).

163. *Id.* at 269 (reasoning that the plaintiffs failed to object to this instruction and also offered a nearly identical instruction themselves). For other recent cases supporting the *Huddell* approach, see *Reed v. Chrysler Corp.*, 494 N.W.2d 224, 228 (Iowa 1992) (holding that the trial court erred by directing verdict for defendant when the plaintiff presented sufficient evidence to reach jury on each of three *Huddell* elements); *Hillrichs v. Avco Corp.*, 478 N.W.2d 70, 75 (Iowa 1991) (holding that the plaintiff offered sufficient evidence under the *Huddell* test to reach the jury even though the extent of enhanced injury was not fixed with certainty and the jury was not precluded from quantifying the enhanced loss within a reasonable margin of error); *Armstrong v. Lorino*, 580 So. 2d 528, 530 (La. Ct.

III. PROPOSED RESTATEMENT SECTION ON ENHANCED INJURY

The purpose of a *Restatement* is to promote greater certainty and uniformity in the law by creating coherent rules and policies through the codification of existing common law, while at the same time eliminating unnecessary complexities. It should be analytical, critical, and constructive.¹⁶⁴

Consistent with these goals, the Reporters for the *Restatement (Third)*¹⁶⁵ envisioned their task as one of "restating" section 402A of the *Restatement (Second) of Torts* by changing the relevant language to conform to current understandings, thereby clarifying much of the confusion that has arisen over the years.¹⁶⁶ The Reporters further emphasized that:

We have . . . chosen a moderate approach in drafting our suggested revision. We intend to stay as close as possible to shared perceptions of the evolved meanings of the original section and its comments. We do not fancy ourselves as radical reformers, although we express preferences, based on widely recognized normative criteria, when choices are appropriate. Finally, we propose to identify those areas in which true controversy reigns and in which neither predictions nor recommendations are in order.¹⁶⁷

The Reporters clearly recognized that a restatement should accurately reflect the law as it has developed and attempt to clarify areas of confusion and inconsistency. A restatement of the law should also attempt to be impartial, logical, and internally consistent.

However, in contradiction to their announced intentions, the Reporters have proposed the following black letter section on enhanced injury:

Increased Harm Due to Product Defect

- (a) When a product is defective within the meaning of § 2 and the defect is a substantial factor in increasing the

App. 1991) (holding that the plaintiff is required to prove existence of defect and extent of enhancement; directed verdict in favor of defendant affirmed where expert evidence established that injuries would have occurred regardless of defective seat latch); *Garcia v. Rivera*, 553 N.Y.S.2d 378, 380 (N.Y. App. Div. 1990) (holding that defendant's motion for summary judgment should have been granted where plaintiff failed to demonstrate his ability to meet the *Huddell* three-prong test).

164. See RESTATEMENT OF TORTS (1934), Introduction at vii-ix; James F. Byrne, Jr., *Reevaluation of the Restatement as a Source of Law in Arizona*, 15 ARIZ. L. REV. 1021, 1022-23 (1973).

165. The Reporters for this revision are Aaron D. Twerski of Brooklyn Law School and James A. Henderson, Jr. of Cornell Law School.

166. James A. Henderson, Jr. & Aaron D. Twerski, *A Proposed Revision of Section 402A of the Restatement (Second) of Torts*, 77 CORNELL L. REV. 1512, 1513 (1992).

167. *Id.*

harm suffered by the plaintiff beyond the harm that would have resulted from nondefect-related causes, the product seller is subject to liability for the increased harm.

- (b) If proof supports the apportionment of liability among responsible actors, the extent of the seller's liability is determined according to such proof and is limited to the increased harm.
- (c) If proof does not support apportionment of liability, then the product seller is liable for all of the harm suffered by the plaintiff from both the defect and the other causes.
- (d) A seller of a defective product who is held liable for part of the harm suffered by the plaintiff under the rule stated in Subsection (b), or all the harm suffered by the plaintiff under the rule stated in Subsection (c), is jointly and severally liable with all other parties who bear legal responsibility for causing the harm, determined by applicable rules of joint and several liability.¹⁶⁸

A. Reasonable Alternative Design

By referring to the definition of defect contained in section 2,¹⁶⁹ the proposed *Restatement (Third)* section on enhanced injury properly requires the plaintiff to prove the existence of a design defect through proof of a reasonable alternative design which would have reduced or

168. Council Draft No. 2, *supra* note 5, § 11, at 253.

169. Section 2 of Council Draft No. 2 of the *Restatement (Third)* provides:

For purposes of determining liability under § 1:

- (a) a product contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product;
- (b) a product is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe;
- (c) a product is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.

Council Draft No. 2, *supra* note 5, § 2, at 13-14.

In relying on § 2, yet shifting the burden of proof of enhancement to the defendant based on inapplicable rules pertaining to concurrent tortfeasors, the Reporters have created a contradiction between sections which many courts will struggle with in the future.

eliminated the enhanced injuries sustained.¹⁷⁰ In addition, the Reporters make clear in their comments that the reasonableness of a given design is properly determined through a balancing of elements of risk against elements of utility.¹⁷¹ The overall safety of the entire product must be considered, and it is not sufficient that the alternative design would have reduced or prevented the harm suffered by the plaintiff if it would result in an increase of other dangers of equal or greater magnitude.¹⁷² The draft *Restatement (Third)* has expressly recognized, as have many courts and commentators,¹⁷³ that a negligence-based reasonableness standard is the only fair method by which to judge alleged design defects.¹⁷⁴

B. Scope of Duty

The body of proposed section 11 does not contain a statement of the duty giving rise to enhanced injury liability. The Reporters' conception of that duty, however, does appear in comment a which states: "A manufacturer has a duty to design and manufacture its product *so as reasonably to reduce the foreseeable harm* that may occur in an accident brought about by causes other than defect."¹⁷⁵

When the Reporters' conception of this duty is compared to the duty described in *Larsen*,¹⁷⁶ it is glaringly apparent that the *Restatement (Third)* duty is much broader in scope. Indeed, this is just the sort of expansion of duty that the *Dreisonstok* court was concerned about when it warned twenty years ago that "[f]oreseeability . . . is not to be equated with duty."¹⁷⁷

Forcing the enhanced injury duty to cover all "foreseeable" accident situations is an unwarranted expansion of the enhanced injury doctrine, has no basis in the law and leads to absolute liability. Thus, although black letter subsection (a) of the enhanced injury section is

170. See also Council Draft No. 2, *supra* note 5, § 11 cmt. b, at 256 (emphasizing that the reasonable alternative design must reduce harm).

171. *Id.* § 2 cmt. c, at 22, § 11 cmt. b, at 256-57. A risk-utility balancing test fairly takes into account such factors as the magnitude of foreseeable risks of harm, instructions and warnings accompanying the product, the nature and strength of consumer expectations, the effects of the alternative design on costs of production and product function, the relative advantages and disadvantages of proposed safety features, product longevity, maintenance and repair, esthetics, and marketability. *Id.* § 2 cmt. d, at 28-29.

172. *Id.* § 2 cmt. d, at 29, § 11 cmt. b, at 256-57.

173. See *supra* note 40 and accompanying text.

174. Council Draft No. 2, *supra* note 5, § 2 cmt. a, at 15-19, cmt. d, at 28-34.

175. *Id.* § 11 cmt. a, at 254 (emphasis added).

176. *Larsen* imposed a duty to use *reasonable* care in design to protect against *unreasonable risks of injury or enhancement of injury*. 391 F.2d at 504 (emphasis added).

177. *Dreisonstok v. Volkswagenwerk A.G.*, 489 F.2d 1066, 1070 (4th Cir. 1974).

an accurate statement of enhanced injury theory as applied by many jurisdictions, the scope of the duty described in the comment goes way beyond the duty contemplated in *Larsen* and must be scaled back.

C. *Shift in Burden of Proof*

The most troubling aspect of the proposed *Restatement (Third)* section on enhanced injury is that it has the practical effect of shifting the burden of proof of the extent of enhanced injury to the defendant once the plaintiff has shown that the alleged defect was a "substantial factor" in increasing the plaintiff's harm, thus adopting the *Fox-Mitchell* approach. Although black letter subsections (b) and (c) do not formally shift this burden, the Reporters explicitly advocate such a shift in their comments and note.¹⁷⁸

In their note, the Reporters engage in a detailed discussion of case law and conclude that a "strong majority" of courts that have considered the issue have adopted a rule supporting the draft *Restatement (Third)* position. As much of the above discussion illustrates, however, the burden of proof issue remains extremely divisive, with recent decisions being almost evenly split. No "majority" position has yet emerged. In fact, most states have not yet directly addressed the issue.

Furthermore, in their case analysis, the Reporters mischaracterize many states as supportive of the *Fox-Mitchell* approach when their case law either clearly does *not* support that approach or has not yet addressed the issue. For example, although the New Jersey Superior Court has expressly held that the *Huddell* standard governs enhanced injury cases decided under New Jersey law,¹⁷⁹ the Reporters question New Jersey's commitment to *Huddell* and incredibly count New Jersey as a state supporting the *Fox-Mitchell* approach.¹⁸⁰ In another example of such mischaracterization, the Reporters include Indiana as supportive of the *Fox-Mitchell* approach even though a clear split of authority exists in that state at the appellate court level.¹⁸¹ Colorado is also characterized as strongly leaning toward the *Fox-Mitchell* camp based on a 1980 successive collision case, *Romero v. Parker*,¹⁸² which

178. See Council Draft No. 2, *supra* note 5, § 11, Reporters' Note to cmt. d, at 267-78.

179. See *McLaughlin v. Nissan Motor Corp.*, 630 A.2d 857, 860 (N.J. Super. Ct. 1993).

180. See Council Draft No. 2, *supra* note 5, § 11 Reporters' Note to cmt. d, at 267-78.

181. Compare *Jackson v. Warrum*, 535 N.E.2d 1207, 1216 (Ind. Ct. App. 1989) (adopting *Fox-Mitchell* approach) with *Masterman v. Veldman's Equip., Inc.*, 530 N.E.2d 312, 318 (Ind. Ct. App. 1988) (adopting *Huddell* approach).

182. 619 P.2d 89, 90 (Colo. Ct. App. 1980).

held tortfeasors jointly and severally liable for the entire harm.¹⁸³ The Reporters fail to mention, however, that Colorado has since statutorily abolished joint and several liability and adopted comparative fault,¹⁸⁴ while also failing to acknowledge federal appellate court precedent imposing the burden of proving the extent of enhancement upon the plaintiff under Colorado law.¹⁸⁵

While acknowledging that "the product seller is responsible only for the increased harm, and not for the harm that would have occurred even had the product been fully adequate,"¹⁸⁶ and that "basic principles of causation limit the damages to those resulting from the increase in plaintiff's harm caused by the defect,"¹⁸⁷ the Reporters nonetheless fail to enforce these concepts through the proposed *Restatement (Third)*. As discussed above, logically, a plaintiff must prove the degree of enhancement in order to prove the existence of a defect (*i.e.*, the availability of a reasonable alternative design), and causation. It is simply not possible to show that a *safer*, reasonable alternative design existed without showing what injuries could have been avoided with that design.

The proposed *Restatement (Third)* section on enhanced injury also relies on section 433B(2) of the *Restatement (Second) of Torts*¹⁸⁸ in justifying its shift in the burden of proof of enhancement and imposition of joint and several liability. As discussed above,¹⁸⁹ however, this reliance is misplaced. Comment *d* of the draft *Restatement (Third)* states, "[d]efendant, a *proved wrongdoer* who has in fact

183. Council Draft No. 2, *supra* note 5, § 11, Reporters' Note to cmt. d, at 268, 274.

184. See COLO. REV. STAT. §§ 13-21-406, 13-21-111.5 (1989 & Supp. 1994).

185. See *Curtis v. General Motors Corp.*, 649 F.2d 808, 813 (10th Cir. 1981); *Tafoya v. Sears Roebuck & Co.*, 884 F.2d 1330, 1339 (10th Cir. 1989). But see *Mile Hi Concrete, Inc. v. Matz*, 842 P.2d 198, 201 n.17 (Colo. 1992) (disagreeing with the holding in *Curtis*). The Reporters repeatedly cite questionable and irrelevant state precedent to predict that jurisdictions will adopt the *Fox-Mitchell* approach. For example, the Reporters cite *Haft v. Lone Palm Hotel*, 478 P.2d 465 (Cal. 1970), as indicating that California will eventually shift the burden of proof of enhancement to the defendant, in spite of the fact that the California Court of Appeals expressly held that the *Haft* decision did not apply to enhanced injury cases and refused to shift the burden of proof of enhancement to the defendant in *Endicott v. Nissan Motor Corp.*, 141 Cal. Rptr. 95, 101 (Cal. Ct. App. 1977). The Reporters rely similarly on an Arkansas successive collision case, *Woodward v. Blyth*, 462 S.W.2d 205, 209 (Ark. 1971), and an Alaska case dealing with the burden of proving that design benefits outweigh risks, *Caterpillar Tractor Co. v. Beck*, 593 P.2d 871, 886 (Alaska 1979), to predict that these two states will follow *Fox-Mitchell*. Council Draft No. 2, *supra* note 5, § 11, Reporters' Note to cmt. d, at 274.

186. Council Draft No. 2, *supra* note 5, § 11 cmt. a, at 254.

187. Council Draft No. 2, *supra* note 5, § 11 cmt. a, at 254.

188. See *supra* note 66 (providing the text of this section).

189. See *supra* note 125 and accompanying text.

caused harm to the plaintiff, should not escape liability because the nature of the harm makes apportionment impossible.”¹⁹⁰ This oft-cited argument refuses to recognize that the enhanced injury defendant *cannot* be a “proved wrongdoer” until the plaintiff has properly proven the existence of a defect and causation, both of which require a comparison of the injuries actually sustained with the injuries which would have been sustained had the reasonable alternative design been used.

Also misplaced is the Reporters’ reliance on arguments of plaintiff hardships in retaining experts and proving hypothetical injuries, as well as juror difficulty in evaluating such issues. In practice, plaintiffs, as well as defendants, have no difficulty whatsoever in obtaining non-speculative expert testimony to establish the hypothetical injuries which would have occurred in an accident absent the alleged defect. As discussed above, defendants are regularly required to prove such hypotheticals in asserting the seat belt defense in those jurisdictions where it is allowed. Likewise, juries have no difficulty comparing such hypothetical injuries with those that actually occurred and making similar determinations of damages. For example, triers of fact are allowed to make comparably inexact calculations in returning awards in personal injury cases involving pain and suffering, in projecting lost future earnings or lost profits, and in making comparative negligence determinations.¹⁹¹ These arguments do not justify relieving plaintiffs from the burden of proving that which they allege in an enhanced injury case—that lesser injuries would have been sustained had a different design been used.

D. Joint and Several Liability

Another troubling aspect of the proposed *Restatement (Third)* provision on enhanced injury is its imposition of joint and several liability, under subsection (d), on product sellers found liable under subsections (b) or (c) for part or all of the harm suffered by a plaintiff. The Reporters state in comment e that “[j]oint and several liability is imposed because there is no practical method of apportioning liability that would reflect the separate causal contributions of those who caused the increased harm.”¹⁹²

The *Restatement (Third)* position does not take into account that the trend in modern tort law is away from joint and several liability

190. Council Draft No. 2, *supra* note 5, § 11 cmt. d, at 261 (emphasis added).

191. See *supra* notes 114–20 and accompanying text.

192. Council Draft No. 2, *supra* note 5, § 11 cmt. e, at 262.

and toward more equitable rules of comparative fault. Indeed, as the Reporters also recognize, many states have statutorily abolished joint and several liability in favor of some sort of comparative fault system.¹⁹³

If the *Larsen* principles are to be honored, an enhanced injury defendant cannot be held liable, jointly and severally or otherwise, for any harm beyond that which is proven to have been increased or aggravated by a product defect. As recognized by the *Larsen* court in 1968,¹⁹⁴ the dilemma of the apportionment of indivisible injuries is nonexistent when viewed from a practical perspective. Experts regularly provide such opinions and juries regularly perform similar apportionments in other contexts. Moreover, it is inequitable to allow plaintiffs to rely on the divisibility inherent in the concept of "enhanced injuries" in order to assert a claim against a product seller, and then argue that such injuries are indivisible in order to hold the product seller jointly and severally liable for all damages.¹⁹⁵

E. Comparative Fault

In Council Draft Number Two, the Reporters for the proposed *Restatement (Third)* correctly recognize the majority view that all types of plaintiff conduct proximately causing enhanced injury should be compared with an enhanced injury defendant's injury-causing fault in allocating responsibility for damages.¹⁹⁶

193. See, e.g., COLO. REV. STAT. §§ 13-21-406, 13-21-111.5 (1989 & Supp. 1994).

194. *Larsen*, 391 F.2d at 503-04.

195. See Levenstam & Lapp, *supra* note 19, at 84.

196. Council Draft No. 2, *supra* note 5, § 11 cmt. f, at 264 and Reporters' Note to cmt. f, at 279-80. This conclusion was reached in the first Council Draft of the proposed *Restatement (Third)*. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 105 cmt. f, at 181-82 and Reporters' Note to cmt. f, at 210-14 (Council Draft No. 1 1993). However, the Reporters then advocated the opposite view in Council Draft No. 1A and Tentative Draft No. 1, arguing that a plaintiff's negligence in causing the initial accident should not be considered in apportioning liability between the plaintiff and the product sellers unless proof did not support apportionment of the injuries and the product sellers were held jointly and severally liable for all injuries. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 6 cmt. f, at 97-99 and Reporters' Note to cmt. f, at 214-18 (Council Draft No. 1A, 1994); RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 6 cmt. f, at 120-22 and Reporters' Note to cmt. f, at 140-43 (Tentative Draft No. 1, 1994). Further debate followed this switch in position, prompting additional analysis of the issue, and ultimately resulting in readoption of the majority view allowing comparison of all forms of plaintiff fault.

IV. CONCLUSION: TOWARD AN EQUITABLE APPROACH

While the enhanced injury doctrine is appropriately here to stay, it should not result in enhanced liability for product manufacturers which are more attentive to safety today than at any other time in history.¹⁹⁷ The current debate over the scope of the enhanced injury duty or the burden of proof of enhancement ultimately comes down to a question of fairness—fairness to those directly involved in enhanced injury litigation as well as fairness to the consuming public. In those difficult and sympathetic cases where seriously injured plaintiffs may be unable to show the existence of a duty or to sustain their burden of proof of enhancement, yet will need extensive care for the remainder of their lives, is it fair that product manufacturers and sellers bear these costs? Or are we allowing these difficult cases to misdirect the law? The burden of proof of enhancement must be clarified and uniformly applied in a manner consistent with the doctrine's theoretical underpinnings in order to make the entire theory workable. Such efforts will certainly result in greater uniformity and predictability in this area of the law, with far-reaching benefits.

As some have pointed out, the law of products liability aims to distribute the "loss" attributable to a product defect, not the total cost of accidents.¹⁹⁸ American manufacturers are already hobbled by the enormous costs of liability insurance and products litigation. Beyond question, these costs have had a detrimental effect on the ability of many American industries to successfully compete in world markets, and have even threatened the continued existence of some industries. It is also likely that these costs have had a chilling effect on the incentives of manufacturers to create new products and new safety devices.¹⁹⁹ The legal system, through the *Restatement (Third)*, the judiciary, and perhaps elected government officials, has an obligation to address these considerations by developing a workable system of products liability law which will compensate deserving plaintiffs, while at the same time treating defendant product sellers and the public fairly.

197. This increased focus on safety is itself in part the result of the development of enhanced injury theory over the last three decades. It is also the result of many other interrelated factors, such as the changing attitudes of the American public (also increasingly concerned with safety), and the growth and refinement of governmental safety organizations (such as the NHTSA, the FDA, and the FAA), which now conduct sophisticated testing and mandate minimum safety standards for numerous products and services.

198. O'Donnell, *supra* note 42, at 350.

199. Many enhanced injury cases are filed based on the development of new safety devices, such as roll bars, air bags, etc., which would have reduced the plaintiff's injuries had the device been developed and installed by the manufacturer earlier.