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Ford Motor Co. v. Evancho, 327 So. 2d 201 (Fla. 1976)

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CASE COMMENTS

Products Liability—AUTOMOBILE MANUFACTURER MUST DESIGN AND BUILD A CRASHWORTHY AUTOMOBILE—*Ford Motor Co. v. Evancho*, 327 So. 2d 201 (Fla. 1976).

On March 1, 1970, Michael Evancho was a passenger in the rear seat of a 1970 Mercury Montego traveling on State Road 826 in Dade County, Florida. The Mercury collided with a parked car, and Michael was thrown forward against the back of the front seat. The locking device securing the seat failed, allowing it to slide forward. Michael then fell to the floor, and his head struck the exposed sharp edges of the seat rail. The resulting injuries caused his death.¹

Mary Evancho, Michael's wife, filed a wrongful death action against the drivers of both automobiles, the Hertz Corporation, and the Ford Motor Company.² Her complaint alleged that Ford Motor Company negligently designed and manufactured the track and rail mechanism, and that as a result the seat could not withstand the impact of a person thrown forward in a collision.³

Ford moved to dismiss the complaint on grounds that the automobile was operated in a manner beyond its intended use and Ford therefore owed no duty to Michael Evancho.⁴ The Circuit Court for Dade County dismissed the complaint and Mrs. Evancho appealed.⁵ The Third District Court of Appeal reversed the order dismissing Mrs. Evancho's complaint against Ford and remanded the cause for further proceedings.⁶ In addition, the district court certified as a matter of great public interest⁷ the following question: "Whether a manufacturer of automobiles may be liable to a user of the automobile for a defect in manufacture which causes injury to the user when the

1. This synopsis of facts is drawn from Respondent's Brief at 2-4, *Ford Motor Co. v. Evancho*, 327 So. 2d 201 (Fla. 1976). Petitioner, Ford Motor Co., simply incorporated by reference the statement of the case and facts from the Third District Court of Appeal. Petitioner's Brief at 1. Petitioner did not dispute respondent's statement of facts. Reply Brief for Petitioner at 2. Petitioner was a co-defendant in the circuit court and a co-appellee in the district court of appeal. The supreme court opinion did not include a comprehensive statement of the facts.

2. *Ford Motor Co. v. Evancho*, 327 So. 2d 201 (Fla. 1976).

3. Brief for Respondent at 2. The complaint sought relief on the theories of breach of warranty, negligence in design and construction, and strict liability in tort. *Id.* at 4.

4. 327 So. 2d at 202.

5. *Evancho v. Thiel*, 297 So. 2d 40 (Fla. 3d Dist. Ct. App. 1974).

6. *Id.* at 44.

7. FLA. CONST. art. V, § 3(b)(3), provides: "[The supreme court] [m]ay review by certiorari any decision of a district court of appeal that . . . passes upon a question certified by a district court of appeal to be of great public interest"

injury occurs as the result of a collision and the defect did not cause the collision?"⁸

On writ of certiorari, the Supreme Court of Florida held that a manufacturer of automobiles may be found liable under a theory of common-law negligence for a design or manufacturing defect which causes injury but which is not the cause of the collision.⁹ In reaching its decision, the court focused on two landmark cases illustrating the opposing viewpoints on the issue: *Evans v. General Motors Corp.*¹⁰ and *Larsen v. General Motors Corp.*¹¹ In both cases the plaintiffs sought damages from General Motors (GM) for a death caused by the allegedly negligent design of a GM automobile, and in both cases the design features which allegedly caused the fatal injuries did not cause the collision. The Seventh Circuit in *Evans* and the Eighth Circuit in *Larsen* recognized the pivotal issue of law: "The major question before us is the nature of the duty which an automobile manufacturer owes to users of its product. This presents an issue of law for the Court."¹²

In *Evans*, the plaintiff argued that the 1961 Chevrolet in which Roy Evans was killed had been negligently designed because it had an "X" frame with no side rails to protect the driver.¹³ When the automobile was struck broadside, the left side collapsed on Evans, causing fatal injuries. The plaintiff contended that broadside collisions were foreseeable and that GM created an unreasonable risk of harm to the occupants by omitting side rails.¹⁴ The court and the parties agreed that the manufacturer "had a duty to design its automobile to be reasonably fit for the purpose for which it was made, without hiding defects which would make it dangerous to persons so using it."¹⁵

The Seventh Circuit held, however, that GM's duty of design did not include protecting a passenger from the effects of a broadside collision, for the frame of the automobile need only be fit for its intended purpose and "[t]he intended purpose of an automobile does not include its participation in collisions with other objects, despite the manufacturer's ability to foresee the possibility that such collisions

8. 327 So. 2d at 202.

9. *Id.*

10. 359 F.2d 822 (7th Cir. 1966).

11. 391 F.2d 495 (8th Cir. 1968).

12. 359 F.2d at 824. The Eighth Circuit stated the issue in *Larsen*: "Both parties agree that the question of a manufacturer's duty in the design of an automobile or of any chattel is a question of law for the court. The decisional law is in accord." 391 F.2d at 498 (citations omitted).

13. 359 F.2d at 823.

14. *Id.* at 824.

15. *Id.*

may occur.”¹⁶ This narrow interpretation of intended use may have originated in doubts about the effectiveness of a perimeter frame, for the court noted that the decedent might have been killed or injured even if his automobile had been constructed with a perimeter frame.¹⁷ A finding of negligence would have required a costly redesign of all GM automobiles on the speculative basis that side rails would protect most occupants in most broadside collisions. The Seventh Circuit relied solely on *Campo v. Scofield*¹⁸ in holding that a manufacturer need not make its automobiles safer in collisions or make them crash-proof. *Campo* involved a farmworker whose hands were injured by the open, unprotected roller mechanism of an “onion-topping” machine. The Court of Appeals of New York held that a manufacturer has no duty to design his machinery to protect a user from obvious hazards or to provide safeguards against a user’s careless conduct.¹⁹ Apparently the Seventh Circuit reasoned, by analogy to *Campo*, that a collision was an obvious hazard and being involved in a collision was careless conduct.

Two important considerations were ignored by the Seventh Circuit in *Evans*. First, although accidents are not an *intended* use of automobiles, they commonly occur in normal use and thus are fairly within the contemplation of the designer.²⁰ Second, it is widely recognized that a particular design feature of an automobile can exacerbate the injuries of an occupant after the initial collision between an automobile and another object and that an automobile can be

16. *Id.* at 825.

17. *Id.* at 824.

18. 95 N.E.2d 802 (N.Y. 1950).

19. *Id.* at 806. The *Campo* doctrine that a manufacturer has no duty to protect a user against open and obvious defects has been widely followed in products liability law. It retains its vitality despite the criticism that it encourages dangerous design in an obvious form. See *Collins v. Ridge Tool Co.*, 520 F.2d 591 (7th Cir. 1975). But see *Davis v. Fox River Tractor Co.*, 518 F.2d 481 (10th Cir. 1975) (where knowledge of a dangerous condition cannot prevent injury, the manufacturer cannot avoid liability by claiming that the dangerous condition was obvious). The *Campo* doctrine has been applied to automobile design cases. *Bolm v. Triumph Corp.*, 305 N.E.2d 769 (N.Y. 1973).

In *Farmhand, Inc. v. Brandies*, 327 So. 2d 76 (Fla. 1st Dist. Ct. App. 1976), the First District Court of Appeal cited *Campo* but noted that it would be reasonable to modify the patent danger rule so a manufacturer could not market unreasonably dangerous machines with impunity. *Id.* at 81. The First District also certified the following question of great public interest: “May the manufacturer of a machine in a defective condition unreasonably dangerous to the user be held liable to an injured user notwithstanding that the condition was obviously dangerous?” *Id.* at 82. The parties did not petition for certiorari, however.

Despite its acceptance in other jurisdictions, the *Campo* doctrine was substantially altered—if not overruled—by the New York Court of Appeals. *Micallef v. Miehle Co.*, Div. of Miehle-Goss Dexter, 348 N.E.2d 571 (N.Y. 1976).

20. See O’Connell, *Taming the Automobile*, 58 Nw. U.L. REV. 299 (1963).

designed to expose the occupant to fewer risks in collisions.²¹ This aspect of automobile design is termed "crashworthiness."²² Both automakers and the public know that automobiles can presently be designed to be more crashworthy,²³ and the Eighth Circuit considered this issue in reaching its decision in *Larsen v. General Motors*.²⁴

In *Larsen*, the plaintiff received severe head injuries in a head-on collision which occurred while he was driving a 1963 Corvair.²⁵ The impact caused a violent rearward movement of the steering shaft into the plaintiff's head. The plaintiff alleged negligence in the Corvair's design: the solid steering shaft extended beyond the front tires, and thus the rearward displacement in a head-on collision was much greater than it would have been in other automobile models not so constructed.²⁶ GM rested its defense on the narrow *Evans* concept of intended use.²⁷ The *Larsen* court took a different view, however, holding that the manufacturer has a duty of reasonable care in light of foreseeable hazards, based on common-law negligence.²⁸ The court first noted that the manufacturer's duty in design extends not only to the intended use of a product but also to any foreseeable emergency situation.²⁹ The court went on to find that although automobiles are made for use in transporting persons and cargo, "[t]his intended use cannot be carried out without encountering in varying degrees the statistically proved hazard of injury-producing impacts of various types."³⁰ Thus, injuries due to collisions are foreseeable as incident to normal use, and

[w]here the injuries or enhanced injuries are due to the manufacturer's failure to use reasonable care to avoid subjecting the user of its products to an unreasonable risk of injury, general negligence principles should be applicable. The sole function of an automobile is not just to provide a means of transportation, it is to provide a means of safe transportation or as safe as is reasonably possible under the present state of the art.³¹

21. *Id.* at 348-56.

22. The Motor Vehicle Information and Cost Savings Act, 15 U.S.C. § 1901(14) (Supp. IV 1975), defines "crashworthiness" as "the protection that a passenger motor vehicle affords its passengers against personal injury or death as a result of a motor vehicle accident."

23. O'Connell, *supra* note 20, cites numerous industry studies in crashworthiness design which have been published in national magazines and professional publications of the automobile industry.

24. 391 F.2d 495 (8th Cir. 1968).

25. *Id.* at 496.

26. *Id.* at 497.

27. *Id.* at 498.

28. *Id.* at 503.

29. *Id.* at 501.

30. *Id.* at 501-02.

31. *Id.* at 502 (footnote omitted).

The court stressed, however, that the manufacturer is subject only to a duty to use reasonable care and is not required to design an accident-proof or crashproof vehicle.³²

The Eighth Circuit's stress on the foreseeability of collisions has led to a criticism that the court relied on foreseeability alone in extending the duty of the manufacturer³³ and ignored the considerations of fairness and public policy which are also involved.³⁴ A close reading of the opinion discloses, however, that the Eighth Circuit stressed the foreseeability and statistical inevitability of accidents to justify its departure from the previous narrow interpretation of intended use. The court evidently felt that the same justification which allows recovery when the defect causes the accident applies when the defect causes injury even though the collision resulted from other causes.³⁵ Thus the *Larsen* court concluded that a manufacturer does have a duty to use reasonable care in the design and manufacture of an automobile

32. *Id.* at 503.

33. Hoening and Goetz, *A Rational Approach to "Crashworthy" Automobiles: The Need for Judicial Responsibility*, 6 Sw. U.L. Rev. 1 (1974), stating: "The *Larsen* decision reflects a basic conceptual error. The primary assumption of the decision was that duty should be coextensive with foreseeability." *Id.* at 22 (footnote omitted).

34. See, e.g., *Goldberg v. Housing Authority*, 186 A.2d 291 (N.J. 1962). In *Goldberg*, the New Jersey Supreme Court dismissed a claim brought against the operator of a public housing development by a person who had been assaulted and robbed in the development. Plaintiff contended that the operator had a duty to provide protection against foreseeable criminal assaults. The court stated:

The question is not simply whether a criminal event is foreseeable, but whether a *duty* exists to take measures to guard against it. Whether a *duty* exists is ultimately a question of fairness. The inquiry involves a weighing of the relationship of the parties, the nature of the risk, and the public interest in the proposed solution.

Id. at 293 (emphasis in original). The *Goldberg* court found that the operator had no such duty. But an apartment operator was held to a duty to provide protection under very similar facts in *Kline v. 1500 Massachusetts Ave. Apt. Corp.*, 439 F.2d 477 (D.C. Cir. 1970).

35. 391 F.2d at 502 ("No rational basis exists for limiting recovery to situations where the defect in design or manufacture was the causative factor of the accident . . ."). Dean Prosser agrees that the extension of liability is reasonable:

The current lively controversy over automobile design is over whether the maker is under a duty to make the car "crashworthy," or in other words, to prevent injury from what has been called the "second collision," when the plaintiff comes in contact with some part of the automobile after the crash. The greater number of decisions have denied any duty to protect against the consequences of collisions, on the rather specious ground that collision is not the intended use of the car, but is an abnormal use which relieves the maker of responsibility. It is, however, clearly a foreseeable danger arising out of the intended use; and it cannot be expected that this reasoning will continue to hold.

W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 96, at 646 (4th ed. 1971) (footnotes omitted).

to protect against unreasonable risk of injury or enhancement of injury in the event of a collision.³⁶

In *Ford Motor Co. v. Evancho*,³⁷ the Supreme Court of Florida adopted the reasoning of the *Larsen* decision, quoting extensively from the *Larsen* court's analysis of intended use and the liability of a manufacturer for failing to exercise reasonable care in design.³⁸ The Florida court joins the courts of eleven other states which have ruled that a manufacturer will be liable for design defects which expose passengers to unreasonable risk of harm in a collision.³⁹

The adoption of the *Larsen* doctrine is a timely and consistent development in Florida products liability law, especially as it pertains to automobile accident cases. The landmark Florida case on a manufacturer's liability for design defects is *Matthews v. Lawnlite Co.*⁴⁰ In *Matthews* a manufacturer of lawn chairs was held liable when the rocker mechanism of a chair amputated a potential purchaser's finger. In this 1956 decision, the Supreme Court of Florida adopted section 398 of the Restatement of Torts as a "doctrine more in line with reason and justice."⁴¹ Section 398 provides that a manufacturer is liable "for bodily harm caused by his failure to exercise reasonable care in the adoption of a safe plan or design."⁴² In 1968, the Third District Court of Appeal noted that "[t]he age old doctrine of *caveat emptor* [has] a limited utility in an age of highly sophisticated products when users are forced to rely without inspection or knowledge upon the competence and

36. 391 F.2d at 504.

37. 327 So. 2d 201 (Fla. 1976).

38. *Id.* at 204.

39. *Badorek v. General Motors Corp.*, 90 Cal. Rptr. 305 (Ct. App. 1970); *Friend v. General Motors Corp.*, 165 S.E.2d 734 (Ga. Ct. App. 1968), *cert. dismissed*, 167 S.E.2d 926 (Ga. 1969); *Volkswagen of America, Inc. v. Young*, 321 A.2d 737 (Md. 1974); *Brandenburger v. Toyota Motor Sales, U.S.A., Inc.*, 513 P.2d 268 (Mont. 1973) (applying strict liability); *Friedrich v. Anderson*, 217 N.W. 2d 831 (Neb. 1974); *Bolm v. Triumph Corp.*, 305 N.E.2d 769 (N.Y. 1973); *Storey v. Exhaust Specialties and Parts, Inc.*, 464 P.2d 831 (Ore. 1970); *Mickle v. Blackmon*, 166 S.E.2d 173 (S.C. 1969); *Engberg v. Ford Motor Co.*, 205 N.W.2d 104 (S.D. 1973) (applying strict liability); *Arbet v. Gussarson*, 225 N.W.2d 431 (Wis. 1975) (applying strict liability). A number of federal courts have construed state law. The decisions are collected in *Annot.*, 42 A.L.R.3d 560 (1972).

40. 88 So. 2d 299 (Fla. 1956).

41. *Id.* at 300.

42. RESTATEMENT OF TORTS § 398 (1934), quoted in *Matthews v. Lawnlite*, 88 So. 2d 299, 300 (Fla. 1956), as follows:

A manufacturer of a chattel made under a plan or design which makes it dangerous for the uses for which it is manufactured is subject to liability to others whom he should expect to use the chattel lawfully or to be in the vicinity of its probable use for bodily harm caused by his failure to exercise reasonable care in the adoption of a safe plan or design.

specialized knowledge of manufacturers."⁴³ In 1973, the Supreme Court of Florida adopted the doctrine of comparative negligence to foster a more equitable system of recovery for personal injuries and property damage⁴⁴ and stated this view of the automobile accident problem:

One of the most pressing social problems facing us today is the automobile accident problem, for the bulk of tort litigation involves the dangerous instrumentality known as the automobile. Our society must be concerned with accident prevention and compensation of victims of accidents [W]e must recognize the problem of determining a method of securing just and adequate compensation of accident victims who have a good cause of action.⁴⁵

The *Evancho* decision places part of the burden of preventing accidents and compensating accident victims on the manufacturer.

In *Evancho*, the Florida Supreme Court posed, but did not answer, two other important questions: first, whether the manufacturer may be a joint tortfeasor; and second, whether a manufacturer can plead the lack of use of safety devices as a defense.⁴⁶ Decisions in other cases, however, shed some light on these questions.

A reading of Florida law suggests that if there is no logical and reasonable way to apportion damage resulting from a collision, a manufacturer may be a joint tortfeasor and thereby jointly and severally liable for all the damage. The Eighth Circuit's *Larsen* decision⁴⁷ expressly provided that a manufacturer should be liable only for the damage or injury caused by the defective design and not for the damage or injury that probably would have occurred absent the defective design.⁴⁸ Florida decisions on apportionment of damages suggest that Florida courts will reach the same result as *Larsen*—provided that damages can be apportioned in a logical and reasonable manner.⁴⁹

43. *Royal v. Black & Decker Mfg., Co.*, 205 So. 2d 307, 308 (Fla. 3d Dist. Ct. App.) (footnote omitted), *cert. denied*, 211 So. 2d 214 (Fla. 1968).

44. *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973).

45. *Id.* at 436.

46. 327 So. 2d at 204 n.4.

47. 391 F.2d 495 (8th Cir. 1968).

48. *Id.* at 503.

49. *Randle-Eastern Ambulance Serv., Inc. v. Millens*, 294 So. 2d 38, 39 (Fla. 3d Dist. Ct. App.), *cert. denied*, 302 So. 2d 416 (Fla. 1974), approving the following jury instruction:

The court charges you that if a plaintiff has suffered injuries as a result of two accidents occurring almost simultaneously, a jury should apportion the damages if they can do so in a logical and reasonable manner, but if there can be no apportionment then the defendant is liable for the entire damages [citations omitted.]

In *Wm. G. Roe & Co. v. Armour & Co.*, 414 F.2d 862, 869 (5th Cir. 1969), the Fifth

Where the damages are inseparable, however, Florida courts follow the rule announced in *Feinstone v. Allison Hospital*: "The rule is well settled that if two or more wrongdoers negligently contribute to the personal injury of another by their several acts, *which operate concurrently*, so that in effect the damages suffered are rendered inseparable, they are jointly and severally liable."⁵⁰ But before joint and several liability can be imposed the plaintiff must prove a causal connection between the design defect and the injury.⁵¹ In other words, the plaintiff need not prove the exact amount of the damage caused by the defective design, but he must show with reasonable certainty that the defective design caused damage.⁵²

Circuit, applying Florida law, noted that "[i]n the absence of concert of action or the breach of a joint duty by the defendants, joint and several liability will be imposed only where the resulting harm is of an indivisible nature and is not subject to rational apportionment." Dean Prosser has pointed out that it is actually incorrect to call a concurrent but independent wrongdoer a joint tortfeasor when joint and several liability is imposed. Liability is not based on a presumed concert of action or vicarious liability, but on the principle that "the defendant is liable for all consequences proximately caused by his wrongful act." W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 47, at 297 (4th ed. 1971).

For a contrary view as to crashworthiness cases, see *Huddell v. Levin*, 537 F.2d 726 (3d Cir. 1976). A three-judge panel applying New Jersey law held that a manufacturer who is sued for injuries caused by a design defect cannot be considered a joint tortfeasor due to the absence of *contemporaneous* action. *Id.* at 738. In *Huddell*, the driver of the other vehicle involved in the collision could be held liable for *all* the damages, but the manufacturer only for the enhanced injury. *Id.*

50. 143 So. 251, 252 (Fla. 1932). *Accord*, *De La Concha v. Pinero*, 104 So. 2d 25 (Fla. 1958) (separate acts of two automobile drivers concurred to produce a single indivisible injury to plaintiff); *Randle-Eastern Ambulance Serv., Inc. v. Millens*, 294 So. 2d 38 (Fla. 3d Dist. Ct. App.), *cert. denied*, 302 So. 2d 416 (Fla. 1974) (separate automobile collisions causing inseparable injuries resulted in joint and several liability for ambulance service involved in the second collision).

51. *Asgrow-Kilgore Co. v. Mulford Hickerson Corp.*, 301 So. 2d 441, 444 (Fla. 1974) states:

The *sine qua non* of a negligence action is an actual causal connection between the negligent act and the injury. More easily defined than applied, the concept of proximate cause can be quite difficult. Incapable of precise proof as it sometimes may be in a given case, it must be shown by competent proof to be a "material and substantial factor in bringing it [the injury] about." [citation omitted.] See *Volkswagenwerk Aktiengesellschaft v. Merritt*, 531 S.W.2d 938 (Ark. 1976) (plaintiff failed to prove that the allegedly defective design feature had been a proximate cause of his injury).

52. *But see* *Smith v. Fiat-Roosevelt Motors, Inc.*, 402 F. Supp. 116 (M.D. Fla. 1975). The plaintiff claimed that he was injured when his automobile was struck from the rear and the back of his seat collapsed rearward. The district court, applying Florida law, ruled that the plaintiff did not establish "beyond mere speculation that the defendant's act [in making a defective seat back] in fact caused the plaintiff's injury." *Id.* at 118. It appears from the opinion, however, that the court relied on plaintiff's doctor's testimony that he could not separate the injuries caused by the impact from those which may have been caused by the collapse of the seat. This was an overly strict application of Florida law as set out in *Asgrow-Kilgore Co.*: plaintiff should not

If joint and several liability is imposed and the manufacturer pays more than his equitable share of the common liability based on the tortfeasors' relative degrees of fault, or if he enters into a settlement and satisfies the total liability, the manufacturer has a right to seek contribution from the other tortfeasors under the Uniform Contribution Among Tortfeasors Act.⁵³ His right to contribution is limited to the amount paid in excess of his proportionate share, and a recent amendment to the Act provides that the proportionate shares of joint tortfeasors will be based on their relative degrees of fault.⁵⁴ Thus, where the damages are inseparable the manufacturer's share of the common liability will depend on a court or jury apportionment of fault between the negligent parties.⁵⁵

Florida courts have consistently held that a person is not protected from his own careless use of a dangerous instrument.⁵⁶ Thus, under Florida law a manufacturer should be entitled to raise as a defense the plaintiff's failure to use available safety devices that a reasonably pru-

have been required to separate the injuries but only to prove that the collapse of the seat was a material and substantial factor in bringing about the injuries.

53. FLA. STAT. § 768.31 (1975) provides in pertinent part:

(2) RIGHT TO CONTRIBUTION.—

(a) Except as otherwise provided in this act, when two or more persons become jointly or severally liable in tort for the same injury to person or property, or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them.

(b) The right of contribution exists only in favor of a tortfeasor who has paid more than his pro rata share of the common liability, and his total recovery is limited to the amount paid by him in excess of his pro rata share. No tortfeasor is compelled to make contribution beyond his own pro rata share of the entire liability.

54. FLA. STAT. 768.31(3)(a) (1976 Supp.) provides:
768.31 Contribution among tortfeasors.—

(3) PRO RATA SHARES.—In determining the pro rata shares of tortfeasors in the entire liability:

(a) Their relative degrees of fault shall be the basis for allocation of liability.

55. It is an obvious paradox to say that a concurrent tortfeasor may be jointly and severally liable because there is no logical and reasonable way to apportion damages, but then will have a right of contribution based on relative degrees of fault. However, this system does strike a balance between competing policies. It is more equitable to allow a plaintiff to recover from any one of several negligent tortfeasors than to deny him relief because of an inability to prove the share of damages attributable to each tortfeasor. Once plaintiff's recovery is assured, however, contribution among the tortfeasors based on the court's or jury's apportionment of fault is the fairest way to spread the burden of loss. *See Hoffman v. Jones*, 280 So. 2d 431, 436 (Fla. 1973). Difficulties in proving the apportionment or obtaining satisfaction of the resulting judgment will fall on the tortfeasors rather than on the injured plaintiff. *But see Huddell v. Levin*, 537 F.2d 726 (3d Cir. 1976).

56. *Matthews v. Lawnlite Co.*, 88 So. 2d 299 (Fla. 1956); *Farmhand, Inc. v. Brandies*, 327 So. 2d 76 (Fla. 1st Dist. Ct. App. 1976); *Royal v. Black & Decker Mfg. Co.*, 205 So. 2d 307 (Fla. 3d Dist. Ct. App., cert. denied, 211 So. 2d 214 (Fla. 1968)).

dent person would have used, if that failure was a proximate contributing cause of the plaintiff's injuries. A reasonable person can fairly be assumed to appreciate the risk of being injured in an automobile collision, and if a manufacturer is held to a duty of care because collisions are foreseeable and statistically inevitable, certainly a driver or passenger should be required to use ordinary care to protect himself. A driver who unreasonably failed to use a safety device and was thereby injured in a collision should bear some responsibility for his injury. The only Florida District Court of Appeal to consider such a defense, however, refused to permit a defendant to present evidence of a plaintiff's failure to use a seatbelt.⁵⁷

Since Florida now has comparative negligence, a plaintiff's unreasonable failure to use a safety device will not completely bar recovery, but the plaintiff will be prevented from recovering the portion of the damages for which he is responsible.⁵⁸ In the instant case, for example, had Michael Evancho been restrained by a seatbelt, he might not have fallen on the exposed seat rail that allegedly caused his fatal injury. If the manufacturer could offer proof that a seat belt was available but not used, a jury might find that Michael Evancho bore a share of responsibility.

Although the *Evancho* decision based the automaker's liability solely on common-law negligence,⁵⁹ it now appears that crashworthiness claims can be brought in Florida under a strict liability theory as well. In *West v. Caterpillar Tractor Co.*,⁶⁰ decided six months after *Evancho*, the Supreme Court of Florida adopted the doctrine of strict liability as stated in section 402A of the Restatement (Second) of Torts.⁶¹ Numerous crashworthiness decisions in other jurisdictions have been based on strict liability,⁶² and Dean Wade has noted that "a court which appears to be taking the radical step of changing from negligence to strict liability for products is really doing nothing more than adopt-

57. *Brown v. Kendrick*, 192 So. 2d 49 (Fla. 1st Dist. Ct. App. 1966). In *Brown*, the court held such evidence inadmissible because the "defendant had not shown, except by conjecture, that the use of the seat belts would have prevented the injury complained of." *Id.* at 51. *Evancho* has clearly eroded the basis of the *Brown* decision.

58. *Hoffman v. Jones*, 280 So. 2d 431, 436 (Fla. 1973).

59. 327 So. 2d at 203. The court noted that the manufacturer's liability was not based on a theory of breach of warranty or strict liability, but solely on a theory of common law negligence.

60. 336 So. 2d 80 (Fla. 1976).

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

62. *See, e.g.*, *Polk v. Ford Motor Co.*, 529 F.2d 259 (8th Cir.), *cert. denied*, 426 U.S. 907 (1976); *Dyson v. General Motors Corp.*, 298 F. Supp. 1064 (E.D. Pa. 1969); and cases annotated "strict liability" in note 39 *supra*.

ing a rule that selling a dangerously unsafe chattel is negligence within itself."⁶³

Section 402A states two requirements for liability: (1) that the product be in a defective condition and (2) that it be unreasonably dangerous. In a crashworthiness case brought under common-law negligence principles, the plaintiff normally attempts to prove that the design of the automobile exposed him to an unreasonable risk of injury,⁶⁴ from which it follows that the design was defective and the manufacturer negligent. Clearly the same proof would establish that the automobile was defective and unreasonably dangerous, and thus would support a claim under section 402A.

Note that in both negligence and strict liability claims, the automobile may be defective only because it is unreasonably dangerous: the sole factual question is whether the automobile is unreasonably dangerous.⁶⁵ Dean Wade observes that in cases involving dangerous designs it would be better "not to refer to any requirement of defectiveness."⁶⁶ Note, too, that section 402A does not require a finding that the manufacturer behaved negligently, but such a finding is clearly implied where the plaintiff proves that the manufacturer's conscious design choice was unreasonably dangerous.

The application of section 402A will affect crashworthiness cases in Florida in two additional respects. First, it will expand the class of defendants available to the injured plaintiff. Comment f makes it clear that strict liability should apply to "any manufacturer [or] . . . any wholesale or retail dealer or distributor . . ." ⁶⁷ The Restatement bases this extended liability on the special responsibility for

63. Wade, *Strict Tort Liability of Manufacturers*, 19 Sw. L.J. 5, 14 (1965).

64. See, e.g., *Larsen v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968); *Evans v. General Motors Corp.*, 359 F.2d 822 (7th Cir. 1966).

65. See *Reyes v. Wyeth Laboratories*, 498 F.2d 1264, 1272 (5th Cir. 1974); Montgomery & Owen, *Reflections on the Theory and Administration of Strict Tort Liability for Defective Products*, 27 S.C. L. REV. 803 (1976); Wade, *supra* note 63, at 14-15.

66. Wade, *supra* note 63, at 15; see text accompanying notes 78-80 *infra*.

67. RESTATEMENT (SECOND) OF TORTS § 402A, comment f (1965):

f. *Business of selling.* The rule stated in this Section applies to any person engaged in the business of selling products for use or consumption. It therefore applies to any manufacturer of such a product, to any wholesale or retail dealer or distributor, and to the operator of a restaurant. It is not necessary that the seller be engaged solely in the business of selling such products. Thus the rule applies to the owner of a motion picture theatre who sells popcorn or ice cream, either for consumption on the premises or in packages to be taken home.

. . . The basis for the rule is the ancient one of the special responsibility for the safety of the public undertaken by one who enters into the business of supplying human beings with products which may endanger the safety of their persons and property, and the forced reliance upon that undertaking on the part of those who purchase such goods.

consumer safety assumed by the supplier of potentially dangerous products.⁶⁸ This extension of liability is consistent with Florida law; Florida courts have long used a similar rule of special responsibility to impose strict liability on the owners of products classified as "dangerous instrumentalities."⁶⁹

Comment n of section 402A also provides that:

[T]he form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, *he is barred from recovery.*⁷⁰

This approach is contrary to the recent decision of the Florida Supreme Court in *Blackburn v. Dorta*, holding that assumption of risk has been merged with contributory negligence and no longer serves as a complete defense.⁷¹ The court noted that when a person voluntarily and unreasonably exposes himself to a known danger "his conduct can just as readily be characterized as contributory negligence. It is the failure to exercise the care of a reasonably prudent man under similar circumstances."⁷²

It is unlikely that any defense based on knowledge of the risk and voluntary use of the dangerous product will have extensive application in crashworthiness cases, because automobiles often are the only reasonable means of transportation and the risks of use are not obvious to a casual observer. Although the public may have information indicating that some automobile designs are dangerous, often only an automotive safety engineer would know and appreciate the risk of injury associated with a particular design feature when assessed in light of

68. *Id.*

69. *Keller v. Eagle Army-Navy Dep't Stores, Inc.*, 291 So. 2d 58, 60 (Fla. 4th Dist. Ct. App. 1974):

Florida has long recognized that certain instrumentalities are "dangerous instrumentalities" *per se*, such as an automobile driven on the highways (*Southern Cotton Oil Co. v. Anderson*, 1920, 80 Fla. 44, 86 So. 629), an airplane in operation, (*Shattuck v. Mullen*, Fla. App. 1959, 115 So. 2d 597), an operated motorcycle, (*Western Union Telegraph Co. v. Michel*, 1935, 120 Fla. 511, 163 So. 86) . . . , and strict liability has been imposed upon the owners thereof for their improper use.

70. RESTATEMENT (SECOND) OF TORTS § 402A, comment n (1965) (emphasis added). The Florida Supreme Court quoted comment n with approval in *West v. Caterpillar Tractor Co.*, 336 So. 2d 80, 90 (Fla. 1976).

71. *Blackburn v. Dorta*, No. 46,621, slip op. at 10 (Fla. May 5, 1977).

72. *Id.*, slip op. at 8.

the range of potential collisions. It would be unreasonable to expect the public to recognize dangerous designs either before purchasing an automobile or in the course of normal use.⁷³ Even assuming that following purchase an automobile owner becomes aware of a particular risk, driving an automobile with a dangerous design feature does not satisfy the requirement of voluntariness,⁷⁴ for a consumer has little chance of having a dealer or manufacturer replace the automobile or make it more crashworthy. For an act to be voluntary there must be a reasonable alternative, and in most Florida cities there is no reasonable alternative to automobile transportation. The automobile is one of the most complex products used by the general public, and as the Florida Supreme Court in *West* said: "In today's world it is often only the manufacturer who can fairly be said to know and understand when an article is suitably designed and safely made for its intended purpose."⁷⁵

Whether Florida courts apply strict liability or negligence principles to crashworthiness cases, the courts must define standards to determine fairly and consistently a manufacturer's liability for injuries caused by a particular design feature. The standards presently used for both negligence and strict liability are inadequate. The strict liability provisions of section 402A and the general negligence principles of Florida's products liability law require that the plaintiff's injury be caused by some *defect* in the product. Under section 402A a product must be "in a defective condition unreasonably dangerous to the user"⁷⁶ before the seller is liable. Florida negligence law generally holds that "when [an] injury is in no way attributable to a defect, there is no basis for imposing product liability upon the

73. This comment does not address the question of whether a manufacturer could limit his liability by warning a potential purchaser of certain risks, or whether a manufacturer has a duty to warn of hidden dangers. The *Larsen* court found that a manufacturer does have a duty to warn. 391 F.2d at 505. The author did not find a crashworthiness case in which the manufacturer's failure to warn or the consumer's specialized knowledge were the deciding issues.

74. See *Ellithorpe v. Ford Motor Co.*, 503 S.W. 2d 516 (Tenn. 1973).

75. 336 So. 2d at 88.

76. RESTATEMENT (SECOND) OF TORTS § 402A, comment g (1965) notes: "The rule stated in this Section applies only where the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him." The Restatement's definition appears to equate a defect with an unreasonably dangerous condition. Such a broad definition would encompass design features, but in *West* the Florida Supreme Court stressed that the plaintiff must establish both "the defect and unreasonably dangerous condition of the product . . ." 336 So. 2d at 87.

manufacturer. It is not contemplated that a manufacturer should be made the insurer of *all* physical injuries caused by his products."⁷⁷

A requirement that liability be tied to a manufacturing defect is unrealistic in a crashworthiness case. Dean Keeton has defined defect of manufacture as a "condition of the property of which the manufacturer was unaware at the time of sale" which made the product "different from products of like kind."⁷⁸ A design feature, on the other hand, is probably exactly as the manufacturer intended and common to all similar models of that product.⁷⁹ A design may be adjudged defective only because it causes injury in a collision. As one writer has commented: "If 'defectiveness' of a car is to be judged by its performance in a collision, then every car is arguably 'defective' in some way since one can always contend in retrospect that it could have been made 'safer,' depending on the circumstances."⁸⁰ In other words, the design is not unreasonably dangerous because it is defective; it is defective because it is unreasonably dangerous. The important characteristic of the design is its *unreasonable* dangerousness.⁸¹

The manufacturer's conscious design choices can be judged solely by a standard of reasonableness. The court must balance the likelihood and the seriousness of the injury against the burden of designing the automobile to prevent that injury. Such a test was applied by Judge Learned Hand in 1947,⁸² and a similar test was recently approved by the Tenth Circuit Court of Appeals in a case involving the liability of a designer and manufacturer of farm machinery:

In determining whether a machine is defective in design, the jury is entitled to weigh the ease of construction of a safety device against the magnitude of threatened harm in not constructing it. If the latter is of great magnitude and the former is relatively inconsequential, the trier may determine that the machine was defectively designed.⁸³

Typically the parties introduce expert testimony relating to the ease of incorporating a safer design,⁸⁴ but the jury's decision in weighing the

77. *Royal v. Black & Decker Mfg. Co.*, 205 So. 2d 307, 309 (Fla. 3d Dist. Ct. App.), cert. denied, 211 So. 2d 214 (Fla. 1968).

78. Keeton, *Products Liability—Liability Without Fault and the Requirement of a Defect*, 41 TEX. L. REV. 855, 859 (1963).

79. *Id.*

80. Hoenig and Goetz, *supra* note 33, at 24.

81. Wade, *supra* note 63, at 14-15.

82. *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947).

83. *Davis v. Fox River Tractor Co.*, 518 F.2d 481, 484 (10th Cir. 1975). See also *Micallef v. Miehle Co.*, Div. of Miehle-Goss Dexter, 348 N.E.2d 571 (N.Y. 1976).

84. See, e.g., *Spurlin v. General Motors Corp.*, 528 F.2d 612, 616 (5th Cir. 1976); *Huddell v. Levin*, 395 F. Supp. 64, 75 (D.N.J. 1975), *vacated*, 537 F.2d 726 (3d Cir. 1976).

design against the magnitude of threatened harm reflects a community judgment of reasonableness. In effect, the jury puts itself in the place of the "reasonable manufacturer." Based on the evidence presented by the parties and within the limits of legal duty as prescribed by the judge, the jury decides whether the manufacturer has made a reasonable design choice. The jury's decision will reflect whether the manufacturer has created a risk of injury which the community is not willing to accept.

The court must insure that the jury's findings do not unreasonably burden the manufacturer,⁸⁵ and a number of courts have set out guidelines for determining the reasonableness of an automobile design. Some of these are

1. the state of the art when the automobile was designed;⁸⁶
2. the necessity for a design to be competitive;⁸⁷
3. whether the risk is (should be) obvious to the user;⁸⁸
4. the attractiveness of the design;⁸⁹
5. the price, since "a Cadillac may be expected to include more in the way of both convenience and 'crashworthiness' than the economy car";⁹⁰
6. the inherent characteristics of various models, since a convertible could not be as safe as a sedan in a rollover accident;⁹¹ and
7. the circumstances of the accident, since any automobile may collapse in a collision with a large truck.⁹²

The courts have attempted to balance these factors in deciding if the manufacturer created an unreasonable risk of injury. This complex balancing process has obvious limitations. An ongoing, independent judicial review of automobile crashworthiness must be supported by a body of consistent safety standards; but the ability of the courts to establish such standards is doubtful.⁹³ Rather than engage in a futile effort to set workable standards on a case-by-case basis, some courts

85. See Note, *Manufacturer's Liability for Design Choices*, 56 NEB. L. REV. 422 (1977), discussing a court's responsibility to set legal criteria for determining the existence of a design defect.

86. *Spurlin v. General Motors Corp.*, 528 F.2d 612 (5th Cir. 1976).

87. *Wooten v. White Trucks*, 514 F.2d 634 (5th Cir. 1975).

88. *Dreisonstok v. Volkswagenwerk, A.G.*, 489 F.2d 1066 (4th Cir. 1974). See also note 19 *supra*.

89. *Id.*

90. *Id.* at 1073.

91. *Dyson v. General Motors Corp.*, 298 F. Supp. 1064 (E.D. Pa. 1969).

92. *Id.*

93. Henderson, *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COL. L. REV. 1531 (1973).

have refused to find automobile manufacturers liable until the legislature establishes definitive safety standards to apply.⁹⁴ Nonetheless, jury decisions reached under strict judicial supervision can indicate to the industry what the community regards as unreasonably dangerous design features. The inability of the courts to fully police the industry does not justify a failure to provide a forum for the injured plaintiff. The Supreme Court of Florida made it clear in *Hoffman* that the most pressing task of the courts is not to regulate manufacturers but to secure just and adequate compensation to accident victims who have a good cause of action.⁹⁵ The *Evancho* decision is a substantial step in that direction.

ROBERT C. APGAR

Criminal Law—ARREST—COURT UPHOLDS THE RIGHT TO RESIST AN UNLAWFUL ARREST, BUT ISSUE SHOULD BE REVISITED UNDER NEW STATUTE—*Burgess v. State*, 313 So. 2d 479 (Fla. 2d Dist. Ct. App. 1975), cert. denied, 326 So. 2d 441 (Fla. 1976).

While on a routine midmorning patrol, Officer Gary Hitchcox observed two men walking down a street in St. Petersburg. One man left the other and cut through a yard, thereby arousing the officer's suspicion. Officer Hitchcox circled the block twice and again came upon the same two men walking together. One of the two split off and started to cross a field. When the remaining man, Leon Norman Burgess, spotted the officer's police cruiser, he yelled something to

94. E.g., *Schemel v. General Motors Corp.*, 384 F.2d 802 (7th Cir. 1967); *Evans v. General Motors Corp.*, 359 F.2d 822 (7th Cir. 1966); *Alexander v. Seaboard Air Line R.R.*, 346 F. Supp. 320 (W.D.N.C. 1971).

95. In 1966 the United States Congress enacted the Traffic and Motor Vehicle Safety Act, 15 U.S.C. §§ 1381-1431 (1970), authorizing the Secretary of Transportation to establish mandatory federal motor vehicle safety standards. Since then seatbelts, padded interiors, collapsible steering columns, and other safety devices have become commonplace. In the Safety Act, Congress specifically provided that "[c]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." 15 U.S.C. § 1397(c) (1970).

Apparently no court has yet considered whether a private remedy exists under the Traffic and Motor Vehicle Safety Act. *Doak v. City of Claxton, Ga.* 390 F. Supp. 753, 761 (S.D. Ga. 1975). Federal courts have inferred the existence of a civil remedy under some federal safety statutes, however, if certain enumerated conditions are met. *Id.* at 759-61.

95. 280 So. 2d 431, 436-37 (Fla. 1973). See text accompanying notes 44-45 *supra*.