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ENHANCED INJURY: A DIRECTION FOR WASHINGTON

Most jurisdictions recognize products liability claims for what are commonly termed enhanced injuries. Enhanced injuries occur when a plaintiff sustains injuries in addition to those which would have been sustained with a product of reasonably safe design. Thus, the enhanced injury claim recognizes liability for defective designs even when the defect does not cause the underlying accident.

Enhanced injury claims require the same general proofs common in all products liability actions. They are unique, however, because they may require greater levels of substantiated evidence regarding the extent of injury enhancement or "apportionment." Once causation is shown in an enhanced injury case, one party must bear the burden of proving apportionment of the harm attributable to the defective design. This apportionment, while simple in theory, is often difficult to prove in practice. Hence, the placing of the burden may, in practical effect, determine whether the plaintiff will recover on the claim. The issue of whether this burden should rest with the plaintiff or the defendant has raised great controversy and division among the jurisdictions, and is the primary focus of this Comment.

This Comment emphasizes automotive design. This is for two reasons. Most enhanced injury cases arise in this context, and, more significantly, no other product is associated with stronger public policy considerations nor affects society more broadly than the automobile.

When faced with a case of first impression involving enhanced injury, courts can and should draw from many sources in developing an approach to the apportionment problem. First, the courts should look to the treatment enhanced injury cases have received in other jurisdictions. Second, they should seek guidance and analogize, if possible, from established tort

1. Other courts and commentators have, alternatively, termed the claim as one involving "crashworthiness" or "second collision." For a more complete description and discussion of these terms, see generally Harris, Enhanced Injury Theory: An Analytic Framework, 62 N.C.L. REV. 643, 647-51 (1984).

2. Most courts that have addressed the issue have recognized the right to recover for enhanced injuries. The landmark decision allowing recovery was Larsen v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968). The leading decision rejecting the concept of enhanced injury liability, Evans v. General Motors Corp., 359 F.2d 822 (7th Cir.), cert. denied, 385 U.S. 836 (1966), was overruled in Huff v. White Motor Corp., 565 F.2d 104 (7th Cir. 1977). In Seese v. Volkswagenwerk A.G., 648 F.2d 833, 840 (3d Cir.), cert. denied, 454 U.S. 867 (1981), the court noted that most jurisdictions considering the issue have adopted the Larsen approach. See also infra text accompanying notes 67-92.

3. See infra text accompanying note 25.

4. See infra notes 54-92 and accompanying text (Part II.B).
doctrines. Finally, and most importantly, they should examine and weigh the policies that underlie the claim. Policy considerations may be found by examining case law, statutes, and legislative history.

The search for useful guidance in Washington is somewhat complicated. One reason for this is that, although Washington has recognized the enhanced injury claim, it has not explored issues concerning placement of the burden of apportionment. Another complication is that, although Washington has extensive experience with products liability claims arising under negligence, strict liability, and warranty, recent statutory revisions may change the doctrinal significance of these cases and alter the focus and emphasis of underlying product liability policies. These possible changes

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5. Baumgardner v. American Motors Corp., 83 Wn. 2d 751, 522 P.2d 829 (1974) (a manufacturer may be held liable in negligence and/or strict liability for designs or defects in the seatbelt and seat anchoring which proximately cause enhanced injuries). See also infra notes 6-7.

6. In Baumgardner v. American Motors Corp., 83 Wn. 2d 751, 522 P.2d 829 (1974), the court did not address apportionment and other enhanced injury issues. The court did note, however, that with respect to negligence theory, the plaintiff "has the usual burdens of proof as in any negligence action including proof of the nature and extent of the injuries proximately caused or enhanced by the defect." Id. at 758, 522 P.2d at 833. With respect to the application of strict liability, the court stated in dicta: "There is no reason why the theory should not be applied in these enhanced injury cases if a plaintiff can prove the necessary elements set forth in Ulmer." Id. at 759, 522 P.2d at 834 (referring to Ulmer v. Ford Motor Co., 75 Wn. 2d 522, 452 P.2d 729 (1969)).

Ulmer consists of a five-part test. The plaintiff must prove in a strict liability action: (1) that a defect, (2) existed at the time the product left the hands of the manufacturer (3) which was not contemplated by the user, (4) which rendered the product unreasonably dangerous, and (5) which was the proximate cause of the plaintiff's injury. 75 Wn. 2d at 535, 452 P.2d at 736 (1969). For an analysis of these elements, see Comment, Products Liability—Tort Reform: An Overview of Washington's New Act, 17 Gonz. L. Rev. 357, 379-80 & nn.99-103 (1982).

7. See Seattle-First Nat'l Bank v. Tabert, 86 Wn. 2d 145, 148-50, 542 P.2d 774, 776-77 (1975). Plaintiff alleged a claim against the importer of a Volkswagen microbus based solely on strict liability, contending that a design defect either caused or enhanced the injuries to the driver and passenger, resulting in their deaths. The trial court granted a summary judgment for the defendant, apparently finding as a matter of law that the decedents voluntarily and unreasonably encountered a known danger. The court of appeals, finding this a factual issue, reversed, and the supreme court affirmed the court of appeals. No consideration of the apportionment issue is presented in the opinion.

Neither the courts nor the legislature have further defined the parameters of the state's enhanced injury claim. See, e.g., Bernal v. American Honda Motor Co., 87 Wn. 2d 406, 553 P.2d 107 (1976) (the only issue properly before the court was the viability of plaintiff's enhanced injury theory). The Tort Reform Act of 1981, Wash. Rev. Code §§ 7.72.010-.060 (1985), does not address enhanced injury theory and the need for treatment different from that in ordinary tort cases with respect to burdens of proof in apportionment.


It should be noted that another, more recent legislative enactment "repeals" the Washington Tort Reform Act's treatment of joint and several liability, as well as imposes damage limits, attorney fee limits, and periodic payments for awards of future damages. The Liability Reform Act of 1986, E.S.S.B. 4630, 49th Leg., Reg. Sess. [hereinafter cited as 1986 Act], eliminates joint and several liability and instead imposes only several liability, except where the plaintiff has not contributed to the fault, the harm is indivisible, or the defendants were acting in concert. In cases where the plaintiff has contributed to the fault, the defendant(s) would only have to pay their portion of the damage award
complicate the analysis of product liability actions in Washington, and necessarily constrain development of enhanced injury doctrines. 9

I. THE TORT REFORM ACT OF 1981

Negligence, 10 strict liability, 11 and warranty 12 represent the three general theories by which injured parties might pursue a products liability action in Washington. 13 The Tort Reform Act of 1981, which applies to claims arising after July 26, 1981, made substantial changes in the application of these doctrines. 14 Under the Act, liability for product injuries differs for manufacturers and other product sellers. Section 7.72.040(1) of the Revised Code of Washington (RCW) provides that a product seller other than a manufacturer ordinarily is liable to the claimant “only if” the claim comes within three narrow exceptions. The exceptions which impose
determined according to their percentage of fault. Any risk of insolvency would be borne by the plaintiff. This scheme is directly contrary to current law, which allows the plaintiff to recover from any defendant the full amount of his damages.

The 1986 Act will significantly change both the focus and outcome of Washington tort doctrines and policy. In essence, the legislation places protection of defendants above the interests of providing full recovery to an injured plaintiff. Indeed, discussion drafts indicate an intention to reduce the exposure of defendants to “unlimited . . . distorted awards.” Such a damage-limitation policy places a premium on the defendant’s proving an amount of fault attributable to the plaintiff. Some degree of fault of the plaintiff, however small (one percent is mentioned in the discussion draft), can almost always be demonstrated. Hence, in practical effect, the legislation will eliminate joint and several liability in this state. See generally, Discussion Draft, 1986 Legislative Session (copy on file with the Washington Law Review).

It is also interesting that the 1986 Act, which limits damages for pain and suffering (non-economic damages), is more severe than comparable reforms in other states. Under prior Washington law, juries rendered large awards under the guise of compensation for pain and suffering to punish “bad actors,” as Washington does not recognize punitive/exemplary damages. Only six other states disallow punitive damages (Louisiana, Massachusetts, Michigan, Nebraska, Puerto Rico, and Virginia). Of these, none place limits on non-economic damages.

The elements to be proven in a products liability case based upon the alleged negligence of a seller of a product are (a) the offer of sale of the product by a retailer, (b) a duty of care in the retailer, (c) a failure by act or omission to perform the duty, (d) an injury occurring from use of the product and (e) the proximate cause of the injury was a failure to perform the duty.
Id. at 54, 533 P.2d at 442.
13. For further discussion, see Comment, supra note 6, at 372–73.
liability on the sellers arise when the harm is caused by: (1) the negligence of the product seller; (2) the breach of an express warranty made by the seller; or (3) the seller's intentional misrepresentation of facts about the product or intentional concealment of information concerning the product.

Prior to enactment of the statute, the Washington courts had allowed recovery for harm to persons not in privity with a manufacturer or seller on both negligence and strict liability principles. The statute bases liability of manufacturers solely upon negligence, with an exception for strict liability when a product deviates in some material way from the design specifications or performance standards of the manufacturer, or from otherwise identical units of the same product line.

It is possible, however, that two subsections of the Act preserve prior common law. The first, RCW 7.72.020, directs that the statute limit existing common law "only to the extent" set forth in the Act. The second, RCW 7.72.030, states a set of conditions under which a product manufacturer is liable, but does not state that a product manufacturer is only liable on the conditions stated in the section. This is in marked contrast with RCW 7.72.040, which imposes liability on product sellers other than manufacturers only if specified conditions are met.

The statutory language, when combined with indications that the Washington Supreme Court will give a restrictive reading to legislation attempting to limit the effect of its judicially developed tort law, supports the


To recover under common law strict product liability theory, the plaintiff had to show that a defect existed at the time the product left the hands of the manufacturer, which (1) was not contemplated by the user; (2) rendered the product unreasonably dangerous to the user or consumer; and (3) was the proximate cause of the plaintiff's injury. E.g., Jackson v. Standard Oil Co., 8 Wn. App. 83, 505 P.2d 139 (1972). Express and implied (merchantability and fitness) warranty are other theories under which one might pursue a claim for injury due to a defective product. See Wash. Rev. Code § 7.72.030(2) (1985). See also Berg v. Stromme, 79 Wn. 2d 184, 196, 484 P.2d 380, 386 (1971) (dealer "impliedly warrants that the automobile . . . is fit to transport the driver and his passengers with reasonable safety."). See also supra note 12.

For an extensive treatment of Washington products liability, see Comment, supra note 6. The Comment discusses Washington development in this area and changes brought by the 1981 Tort Reform Act.

16. Such deviations or defects might include those due to improper construction or breach of warranty. See Wash. Rev. Code §§ 7.72.030(1), (2) (1985).


argument that common law actions may coexist with rights created under the Act. Nonetheless, some commentators take an opposite view, citing the Final Report of the Washington State Senate Select Committee on Tort & Product Liability Reform, which states that the standards of liability set forth in RCW 7.72.030 are the exclusive grounds for relief as to the kind of product defects covered by that section.

The implications of the Act are many and far-reaching. Not only does the Act possibly affect precedential value of prior common law, it may change underlying policies the legislature deems important and perhaps overriding. In the enhanced injury context, the analysis is more complicated because such claims are not addressed in the Act. Hence, courts must carefully scrutinize the interaction of common law doctrines with policies enunciated by the Act to properly address the standards by which claims for enhanced injuries are to be resolved.

II. THE ENHANCED INJURY: BASIC CONCEPTS

Enhanced injury liability is based on the premise that products, while not manufactured for the purpose of undergoing impact, should be designed to minimize injury in the event of an impact. A design defect may enhance the injury sustained in an accident in two basic ways: (1) the defect may cause a second collision itself, such as where a defective design allows an occupant to be thrown from a vehicle; or (2) the defect may cause additional injuries through deficiencies in the vehicle's interior surface with which the occupant collides during a second collision.

Enhanced injury cases involve proof of the same basic elements required in any tort case. Under negligence theory, for instance, in order to state a cause of action a plaintiff must establish: (1) that the defendant owed a duty to the plaintiff; (2) that the defendant breached that duty; (3) that the breach proximately caused the injury claimed; and (4) that the plaintiff has suffered damage.

595 P.2d 919 (1979) (reinstating the rule of Helling v. Carey, 83 Wn. 2d 514, 519 P.2d 981 (1974), after enactment of a statute believed by many to have overturned that rule).


21. Id. at 3 (§ IV A) (citing WASHINGTON STATE SENATE SELECT COMMITTEE ON TORT & PRODUCT LIABILITY REFORM, FINAL REPORT 1, at 33 (Jan. 1981)). See also supra note 18.

22. See infra notes 141-48 and accompanying text. But see supra note 8.

23. For further discussion, see infra text accompanying notes 133-48.

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


Difficulties in the enhanced injury context arise not with the elements of the torts, but with how the courts interpret and utilize them. In particular, the courts have struggled with, and perhaps confused issues related to, breadth of duty and apportionment. Consequently, though perhaps inadvertently, they have limited the viability of enhanced injury claims.

The issues relating to apportionment comprise the more complex aspects of the enhanced injury question. Nevertheless, confusion surrounding breadth of duty issues adds to the uncertainty and lack of uniformity found in the enhanced injury context.

A. The Breadth of the Duty

Before plaintiffs may recover for enhanced injuries they must show that the manufacturer has breached a duty regarding some aspect of the vehicle's safety. Courts have held that manufacturers have a duty to take reasonable steps to minimize the injury-producing effects of contact with their products or conduct. However, courts have stopped short of requiring that products be as safe as technologically possible.

While the courts have uniformly recognized the existence of this duty, they have had difficulty in agreeing upon or defining how “safe” a product must be—determining the breadth of the duty. Resolution of this issue has depended on both the facts of each case and the tort doctrines of the jurisdiction. Few consistent guidelines have emerged. Courts may use concepts of foreseeability and reasonableness to limit liability or recovery. However, confusion arises when courts mix analysis of the existence of

28. Items 1–3 in the negligence formula quoted in the text accompanying note 26. Breadth of duty suggests that issues of foreseeability and reasonableness of design or risk should be examined. See infra notes 30–53 and accompanying text.
29. Item 4 in the negligence formula quoted in the text accompanying note 26. There must be a causal apportionment between the injuries sustained as a result of the first collision or accident and those due to the alleged defect(s) or “second collision.” See infra text beginning at note 54. Judicially required proof(s) may confuse apportionment with proximate cause issues and ignore underlying tort policies which seek generally to provide full recovery to injured claimants. One such example of poorly drawn proof standards includes that utilized by courts following the decision of Huddell v. Levin, 537 F.2d 726 (3d Cir. 1976), which requires plaintiffs to prove all of the following: (1) that an alternate, safer design was practicable or feasible under the circumstances; (2) what injury, if any, would have been suffered if the alternate design had been used; and (3) the extent to which the injuries actually suffered were enhanced by the alleged design defect. Id. at 737–38. For further discussion, see infra text accompanying notes 67–82, 123–32.
30. See, e.g., Larsen v. General Motors Corp., 391 F.2d 495, 501–03 (8th Cir. 1968).
31. In other words, the product does not have to be absolutely safe. It is in this context that the courts speak of the breadth of the duty. Caiazzo v. Volkswagenwerk A.G., 647 F.2d 241, 247 (2d Cir. 1981); Larsen v. General Motors Corp., 391 F.2d 495, 503 (8th Cir. 1968); Bolm v. Triumph Corp., 33 N.Y.2d 151, 305 N.E.2d 769, 350 N.Y.S.2d 644, 649 (1973).
32. See supra note 31.
duty with other issues more properly resolved in contexts such as apportionment.

For example, in *Dreisonstok v. Volkswagenwerk A.G.*, the Fourth Circuit qualified the manufacturer's liability by recognizing limits of "foreseeability" and what constitutes an "unreasonable risk." The plaintiff, a passenger in a Volkswagen microbus, was injured in a head-on collision with a telephone pole at approximately forty miles per hour. The plaintiff contended the manufacturer was guilty of negligent design resulting in want of crashworthiness of the vehicle. The lower court had found the manufacturer negligent in not designing a vehicle capable of withstanding the forty mile per hour impact with the passenger area remaining intact. The court of appeals reversed, finding the manufacturer innocent of negligent design. Cautioning against overbroad applications of foreseeability and unreasonable risk, the court stated:

The mere fact, however, that automobile collisions are frequent enough to be foreseeable is not sufficient in and of itself to create a duty on the part of the manufacturer to design its car to withstand such collisions under any circumstances. Foreseeability . . . is not to be equated with duty; it is, after all, but one factor, albeit an important one, to be weighed in determining the issue of duty . . . .

The key phrase . . . is "unreasonable risk of injury in the event of a collision," not foreseeability of collision. . . . Whether or not this has

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33. Courts have added confusion to the development of apportionment doctrines by not clearly delineating their discussions and by casual treatment of the apportionment issue—often developing tests and standards without focusing on the effects of their implementation. See, e.g., Larsen v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968), discussed infra text accompanying notes 68–72; Huddell v. Levin, 537 F.2d 726 (3rd Cir. 1976), discussed infra text accompanying notes 76–82.

34. For instances where the courts have in effect negated the apportionment requirement, see infra note 92 and accompanying text.

35. 489 F.2d 1066 (4th Cir. 1974) (negligence theory, applying Virginia law).

36. "Crashworthiness" is a term of art by which engineers describe the performance of a structure or vehicle during a collision.

37. More specifically, plaintiffs contended that the lack of crush distance available to absorb energy rendered the design defective. *Dreisonstok*, 489 F.2d at 1068–69. Given the size, weight, dimensions, and cost of the microbus, it was technically and economically infeasible to provide sufficient crush characteristics, and hence energy absorption, which would have ensured integrity of the front compartment at 40 miles per hour. For technical background, see generally N. Jones & T. Wierzbicki, *Structural Crashworthiness* (1983); I Mech. Eng’g Conference Publications 1980-3, Toward Safer Passenger Cars (1980); S.A.E., Proceedings of Twenty-Third Stapp Car Crash Conference (1979); U.S. Dep’t of Transp., Seventh International Technical Conference on Experimental Safety Vehicles (1979).

38. *Dreisonstok*, 489 F.2d at 1068–69. Given the size, weight, dimensions, and cost of the microbus, it was technically and economically infeasible to provide sufficient crush characteristics, and hence energy absorption, which would have ensured integrity of the front compartment at 40 miles per hour. For technical background, see generally N. Jones & T. Wierzbicki, *Structural Crashworthiness* (1983); I Mech. Eng’g Conference Publications 1980-3, Toward Safer Passenger Cars (1980); S.A.E., Proceedings of Twenty-Third Stapp Car Crash Conference (1979); U.S. Dep’t of Transp., Seventh International Technical Conference on Experimental Safety Vehicles (1979).

occurred should be determined by general [tort] principles, which involve a balancing of the likelihood of harm, and the gravity of harm if it happens against the burden of the precautions which would be effective to avoid the harm. . . . In every case, the utility and purpose of the particular type of vehicle will govern in varying degree the standards of safety to be observed in its design.\textsuperscript{40}

The court considered many factors in weighing the reasonableness of risk inherent to the van design including utility, purpose, price, size, attractiveness, and type of vehicle.\textsuperscript{41} The court further provided that, in a crashworthiness case it is necessary to consider the circumstances of the accident itself.\textsuperscript{42} Taking these factors into account, the court found the manufacturer had not breached its duty of ordinary care in its design of the vehicle.\textsuperscript{43}

In this instance the court held that the manufacturer owed no duty to the plaintiff. Were certain factors more favorable to the plaintiff, the most important perhaps being the speed of impact,\textsuperscript{44} a closer case would have been presented.\textsuperscript{45} In such an instance, the court must determine whether issues of duty, causation, or apportionment proofs will be the basis of its decision in finding or rejecting liability. Regardless of the result of its decision, however, in order to provide useful guidance to manufacturers and officers of the court, the basis should be clearly articulated.

Washington's common law test for product defect cases creates a consumer-oriented standard based on the reasonable expectations of the ordinary user of a product.\textsuperscript{46} In determining whether a product's level of safety meets the reasonable expectations of the ordinary consumer, a trier of fact must consider, along with the intrinsic nature of the product, a number of factors including the relative cost of the product, the gravity of the potential harm from the claimed defect, and the cost and feasibility of eliminating or minimizing the risk.\textsuperscript{47}

\textsuperscript{40} Id. at 1071–72 (emphasis in original) (footnotes omitted).
\textsuperscript{41} Id. at 1071–76.
\textsuperscript{42} Id. at 1073. Although the court referred to "circumstances" as another factor to be utilized in weighing what constitutes an unreasonable risk, circumstances are more properly considered not as a risk factor, but as a limit on foreseeability, or as a defense to the claim. See, e.g., W. Prosser & W. Keeton, supra note 26, §§ 42–3, at 272–301.
\textsuperscript{43} 489 F.2d at 1073.
\textsuperscript{44} See Annot., 9 A.L.R. 4th 494, 497–98 (1981) (noting that plaintiffs are generally successful in proving enhanced injuries where the injured party's vehicle was moving at 35 miles per hour or less at the time of the accident). See also Annot., 42 A.L.R. 3d 560 (1972).
\textsuperscript{45} See supra note 44. See also infra text accompanying notes 50–51.
\textsuperscript{47} E.g., Lamon v. McDonnell Douglas Corp., 91 Wn. 2d 345, 588 P.2d 1346 (1979).
The Products Liability Statute also bases liability on products which are not "reasonably safe." The statute’s definition of "reasonably safe" varies, depending upon whether the alleged defect arises from the design, warnings, instructions, construction, or warranty of the item.49

Applying common law standards in a case very similar to Dreisonstok, the Washington Supreme Court found an importer liable for damages sustained by the plaintiffs when their Volkswagen microbus collided with the rear of another vehicle at twenty miles per hour.50 The court found that improper design of the frontal area caused their deaths, but cautioned that "[t]he purchaser of a Volkswagen cannot reasonably expect the same degree of safety as would the buyer of the much more expensive Cadillac. . . . [W]e are dealing with a relative, not an absolute concept."51

In this instance the Washington court found the manufacturer’s breach of duty to be the proximate cause of the injury. Beyond this, however, little is clear. Although the court labels the claim as one for enhanced injury,52 the court does not discuss levels of enhancement or apportionment. This lack of discussion could result only if the court neglected or overlooked this important issue or, in the alternative, found the entire injury to be due to the defective design—in which case, by definition, no enhanced injury exists. Such a casual treatment of terminology can only add confusion to the development of enhanced injury doctrine, and should be avoided. Once a court resolves duty and proximate cause issues in favor of the plaintiff, and thus determines that the defendant’s design has caused some damage, it must then focus on the more problematic area of enhanced injury claims—apportionment.

B. Apportionment of the Injury: Enhanced Injury Underpinnings and Historical Judicial Treatment

1. Enhanced Injury Underpinnings

In an enhanced injury negligence case, the claimant has the burden of proving each of the following three elements by a preponderance of the

51. Tabert, 86 Wn. 2d at 154, 542 P.2d at 779.
52. Id. at 150, 542 P.2d at 776.
53. The problems of duty and proximate cause are common to all tort actions. See supra notes 25–29 and accompanying text.
evidence: (1) a breach of a duty owed to the claimant; (2) that the breach proximately caused an enhancement of damage over and above that which would otherwise have occurred; and (3) the extent to which the damage was enhanced as a result of the breach of duty.

It is the third element, apportionment, which has been controversial. This is, in part, due to attempts to apply existing legal concepts to new problems. Established tort concepts such as joint tortfeasor liability, concerted action, common duty, and vicarious liability are, however, quite different from the concept of enhanced injury. Each involves the infliction of an injury for which all actors may be held completely liable because of their direct, active conduct.

The law of successive tortfeasors, although more similar to the enhanced injury than other traditional tort doctrines is, nonetheless, inapplicable to the enhanced injury concept. Under successive tortfeasor law, when successive acts of independent tortfeasors produce a single harm that is unrelated in time or causation, the tortfeasors must try to disprove their responsibility for the injury. Although each defendant is responsible only for the portion of the injury that each caused, the burden of allocating that causation is placed on the defendants. If the defendants fail in this burden,
they may be held jointly and severally liable.64

Enhanced injury differs from the concept of successive tortfeasors in that the manufacturer is never the cause of, nor legally accountable for, the entire injury.65 The manufacturer is liable for that portion of the injury over and above that which the initial accident would have caused if the product had been reasonably safe.66 The issue of which party should bear this burden of apportionment has raised great controversy and diversity between the courts and commentators.

2. Historical Judicial Treatment in the Enhanced Injury Context

It was not until relatively recently that the courts recognized claims for enhanced injury.67 Since that time, courts and counsel have struggled with issues related to the burden of apportionment, often rendering inequitable results and confusing doctrine.

In the landmark case of Larsen v. General Motors Corp.68 the Eighth Circuit held a manufacturer liable for aggravated injuries sustained in a second collision as a result of a negligently defective design. Most courts,69 including those of Washington,70 have adopted the reasoning of Larsen.

Larsen found that although the manufacturer was liable for injuries caused by the defective design, it should be liable only for that portion of

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64. See supra note 63. See also supra note 8.

65. The fact that proof of enhancement is a necessary element of the enhanced injury case requiring affirmative proof is similar to the evaluation made in Dillon v. Twin State Gas & Elec. Co., 85 N.H. 449, 163 A. 111 (1932). There, a boy sitting on a bridge lost his balance and fell off. The court assumed he was substantially certain to be killed or seriously injured even if the defendant had not been negligent in its placement of electrical wires. Because the fall was completed before the defendant's negligence caused any harm, the court allowed damages against the defendant for only the additional impairment of life or health, if any, attributable to the defendant. The same principle must apply in an enhanced injury case; in order to assess the liability of the manufacturer there must be a causal apportionment. For further discussion, see infra notes 123–31 and accompanying text (Part III.B).

66. See, e.g., Huddell v. Levin, 537 F.2d 726, 738 (3rd Cir. 1976) ("Clearly, if the theoretical underpinnings for liability . . . are to be given effect, [the party causing the accident] may be held liable for all injuries, but [the manufacturer] may only be held liable for 'enhanced injuries.'") (emphasis in original). See also infra notes 76–82 and accompanying text.

67. Although earlier cases may be found, enhanced injury claims were not fully recognized until the 1970's, in cases interpreting Larsen v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968).

68. 391 F.2d 495 (8th Cir. 1968) (negligence action, applying Michigan law).


the injury over and above that which would probably have occurred absent the defective design.71 In effect, this holding excludes the possibility of finding the manufacturer jointly and severally liable with other defendants for all of the damages except, perhaps, in the rare case where the defective design can be shown to have caused all of the plaintiff's injury.

The Larsen court did not indicate which of the parties has the burden of apportioning the damages.72 However, subsequent cases interpreting Larsen—the Fifth Circuit in Higginbotham v. Ford Motor Co.,73 and the Third Circuit in Huddell v. Levin74—held the burden of proving the proper apportionment of damages rests upon the plaintiff.

In Higginbotham, the plaintiff's 1970 Ford Maverick collided head-on with another automobile. The force of impact bent the left frame rail of the Maverick, rotating the engine compartment into the front seat, injuring Higginbotham and killing his wife.75 The court held for the defendant, implying that if the plaintiff does not prove the extent of the aggravated injuries in the second collision, the manufacturer will escape liability for defective design. The court did not discuss, and perhaps overlooked the fact that in many cases it will be impossible to apportion damages.

In Huddell v. Levin,76 the driver suffered fatal brain damage when his car was rear-ended, thrusting his head against an allegedly defective headrest. The Third Circuit ruled that the plaintiff's expert witnesses had provided sufficient evidence regarding the head restraint to justify submitting to the jury the issues of whether the head restraint was defectively designed and had proximately caused the plaintiff's injuries. However, the court held that the plaintiff must prove three additional elements in order to establish the manufacturer's liability in the enhanced injury context. First, in order to demonstrate defective design, the plaintiff must offer proof of an alternative, safer design practicable under the circumstances.77 Second, the plaintiff must prove what injuries, if any, would have resulted had the manufacturer used the alternative, safer design.78 Finally, as a corollary to

71. Larsen v. General Motors Corp., 391 F.2d 495, 503 (8th Cir. 1968).
72. The court merely stated:
   The manufacturer argues that [the proper allocation] is difficult to assess. This is no persuasive answer and, even if difficult, there is no reason to abandon the injured party to his dismal fate as a traffic statistic, when the manufacturer owed, at least, a common law duty of reasonable care in the design and construction of its product. The obstacles of apportionment are not insurmountable.
   Id.
73. 540 F.2d 762 (5th Cir. 1976) (strict liability, applying Georgia law; inconsistent jury findings as to proximate cause required retrial).
74. 537 F.2d 726 (3rd Cir. 1976) (strict liability, applying New Jersey law).
75. Higginbotham, 540 F.2d at 765–66.
76. 537 F.2d 726 (3d Cir. 1976).
77. Id. at 737–38.
78. Id. at 737.
the second aspect of proof, the plaintiff must offer some method of establishing the extent of enhanced injuries attributable to the defective design. The plaintiff's experts had testified "unequivocably" that Dr. Huddell would have survived the accident in a properly designed car, but the court demanded medical evidence of the precise injuries Dr. Huddell would have received had he survived with a headrest of different design.

Although the Huddell court held that the plaintiff must prove the proper apportionment of injuries, there is no indication that the court, as a matter of policy, desired to prohibit recovery unless such an apportionment could be established. However, Huddell assumes that the enhanced injuries in a second collision will be factually separable from other "normal" injuries typically sustained in an accident. Many times this will not prove correct. For instance, with brain injuries such as those sustained by Dr. Huddell, the plaintiff would, in essence, have to demonstrate the threshold energies below which the decedent would not have been injured or, conversely, what effects the higher energy impact would have had on the brain given a reasonably safe design. In operation, this onerous burden may resolve against the injured litigant not only those cases where apportionment is impossible, but also many cases where apportionment proof is prohibitively expensive.

A minority of other courts have rejected this rigid requirement primarily on public policy grounds. In Fox v. Ford Motor Co., the Tenth Circuit placed the burden on the defendant to prove the amount of enhancement. In Mitchell v. Volkswagenwerk, AG, the Eighth Circuit followed the Fox policy so as not to "relegate [victims] to an almost hopeless state of never being able to succeed." These cases recognize that once plaintiffs establish proof of wrong, they should be allowed a recovery, and the fact that the jury must decide uncertain quantities should not, by itself, prohibit recovery. These courts analogize to other areas of law where courts have recognized that once the "fact" of wrongful damage has been established, the plaintiff is entitled to recover even if the amount is not susceptible to exact proof. For instance,

79. Id. at 738.
80. The court does little more than acknowledge that this burden may be "difficult." Id. at 737, 743.
81. See id. at 737–38.
82. See infra text accompanying notes 126–31.
83. 575 F.2d 774 (10th Cir. 1978) (applying Wyoming law).
84. Id. at 787.
85. 669 F.2d 1199 (8th Cir. 1982) (applying Minnesota law).
86. Id. at 1204.
in *May v. Portland Jeep, Inc.*, the court candidly recognized that enhanced injury cases produce inexact situations that cannot be translated into mathematically precise awards:

> There is no way of determining, of course, what the exact extent of plaintiff's injuries would have been had the roll bar not collapsed. However, we allow juries to make somewhat similar inexact determinations, such as the extent of pain and suffering and its value in money. We do so because we believe such pain and suffering should be compensable, and there is no way of determining its extent and value other than to allow the jury to use its best judgment. The only alternative in this case is to say that plaintiff probably was additionally injured by the collapse of the bar, but that, because we cannot determine exactly what his injuries would have been if it had not collapsed, he cannot recover at all. This is not an acceptable alternative, and it is usual to allow the jury to use its judgment in similar inexact situations.

The difference between the apportionment issue approaches of the courts in the *Huddell* and *Mitchell* cases may reflect differences in underlying policies endorsed by the respective courts. However, the practical significance of these differences is perhaps unimportant in most cases. The majority of courts, while placing the burden of proof on the plaintiff, have mitigated its effects by finding the plaintiff's burden of proving apportionment satisfied so long as there is some fixed estimate of injury enhancement introduced. Hence, in practical effect, many cases negate the *Huddell* requirement by permitting only rough estimates, and in some cases allowing superficial allegations relating to the extent of enhancement as sufficient to meet the burden. This reluctance to deny the injured plaintiff a

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89. *Id.* at 309-10, 509 P.2d at 26-27.
91. In general, courts since *Huddell* have been quick to find the plaintiff's burden of apportionment satisfied as long as some "credible" evidence is admitted relevant to the issue. This has resulted in many technically dubious, even ludicrous, "expert" opinions. See infra note 92. From a physical/engineering standpoint, it is impossible to calculate force magnitudes occurring in accident situations with the precision claimed in most cases, see *supra* note 38, suggesting that it may be easier to bypass the *Huddell* apportionment problems by simply postulating a figure, regardless of its scientific accuracy. The ethical considerations related to such a decision are beyond the scope of this Comment.
92. A few cases may illustrate this point:

In *Horn v. General Motors Corp.*, 17 Cal. 3d 359, 551 P.2d 398, 131 Cal. Rptr. 78 (1976), the court held the evidence sufficient to establish that injuries suffered when the motorist's face struck three prongs on the horn assembly after the horn cap had come off were greater than would have occurred had the horn cap remained in place. The motorist's expert testified that the force with which she struck the prongs was 100 times greater than the force with which she would have struck the surface of the horn cap. The defendant automobile manufacturer presented evidence that the force of the collision was such that the motorist would have broken her jaw even if the horn cap had been in place and argued that,
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recovery suggests that other unarticulated factors bearing on the question of which party should carry the burden of proof of apportionment may be important to the courts in placing such a burden.

III. USEFUL GUIDELINES AND POLICIES IN PLACING THE BURDEN OF APPORTIONMENT

Commentators have suggested many sources upon which courts might draw in resolving the issue of which party should carry the burden of therefore, the defect actually caused no injury. Noting that the jury had an opportunity to observe the exposed prongs and could reasonably have inferred from such observation that more damage would be done to a face striking the prongs than to a face striking the horn cap, the court concluded that the jury was warranted in finding that the exposed prongs enhanced the motorist’s injuries. It added that the jurors were entirely free to reject the manufacturer’s evidence to the contrary. 17 Cal. 3d at 369, 551 P.2d at 402.

In Buccery v. General Motors Corp., 60 Cal. App. 3d 533, 132 Cal. Rptr. 605 (1976), plaintiff’s expert testified that the absence of a head restraint exposed the occupant of the pickup truck in a low speed rear-end collision to a cranial impact some 16 times greater than that which would have occurred with a head restraint. In responding to defendant’s attack upon the sufficiency of the proof of causal connection between the defect and the enhanced injury, the court stated: “The jury was certainly entitled to infer that if the magnitude of the impact had been reduced to 1/16 of that experienced by plaintiff, even a person of his susceptibility would not have been injured or, in any event, the degree of his injury would have been substantially reduced.” Id. at 540, 132 Cal. Rptr. at 614.

In Stahl v. Ford Motor Co., 64 Ill. App. 3d 919, 381 N.E.2d 1211 (1978), involving a defectively designed seatbelt, the court pointed to evidence indicating that the kinetic energy of an unrestrained moving body is five times greater than that of a restrained moving body, hence increasing the energy to be absorbed on impact. Expert witnesses had testified that it was very probable that the motorist’s injuries were five times greater than they would have been had he been restrained. Affirming a judgment for the motorist, the court acknowledged that the plaintiff has the burden of presenting sufficient evidence so that the jury may apportion damages between the original injury and the aggravation of that injury. The court concluded, however, that the motorist had satisfied this burden in the present case.

In Fietscher v. Ford Motor Co., 590 F.2d 215 (7th Cir. 1978) (applying Wisconsin law), the court held that there was sufficient evidence to raise a jury question as to whether a defect in the design of the fuel tank in the plaintiff’s vehicle was the cause of the plaintiff’s burns. In rejecting the manufacturer’s contention that the plaintiff had presented no credible evidence to support the finding that the defect was a cause of the plaintiff’s injuries, the court pointed out that the plaintiff’s expert described the defects he found, gave an opinion that the defect was a substantial factor in causing the plaintiff’s injuries, and explained how the defective portions of the fuel tank system failed, allowing the fire to spread into the passenger compartment. Noting that the manufacturer produced expert testimony that no design would have withstood an impact of similar force and argued that no opposing testimony was couched in similar terms, the court declared that expert testimony framed in the particular terms suggested by the manufacturer was not essential to making out a case.

In Engberg v. Ford Motor Co., 87 S.D. 196, 205 N.W.2d 104 (1973), overruled on other grounds, Smith v. Smith, 278 N.W.2d 155 (1979), the court affirmed a judgment for the representative of a decedent who was killed when the car he was driving overturned and, due to an allegedly defective seat belt, he was thrown from the vehicle. The evidence showed that the driver’s compartment of the vehicle had remained essentially intact in the accident. A professor of physics testified that this absence of internal damage to the vehicle indicated that the fatal injury occurred outside of the car and that had the seat belt remained intact and the decedent remained inside the car, the extent of the injury would have been minor.
apportionment in the enhanced injury context. Such sources include established tort doctrines and policy considerations.

When examining these sources in light of the enhanced injury situation, many aspects of the claim may present unique limits on the usefulness of their application. First, proof of the amount of enhancement may often be difficult or expensive, so that placement of the burden may be outcome determinative. Second, since the theoretical foundation for the claim is the enhancement of injuries, the manufacturer should be responsible only for that portion of the injuries attributable to the defective design. While these aspects of the claim seem relatively simple, they may conflict when applied within existing doctrines, particularly when accommodation of other goals and policies is desirable.

A. Tort Doctrines

General tort rules, concurrent liability doctrines, and the Restatement provide the three standard sources one might use when formulating treatment of apportionment issues in the enhanced injury context. These sources, while perhaps not directly applicable, may nevertheless provide useful insight.

1. General Tort Rules

Tort principles generally place the burden upon plaintiffs to prove damages which are not speculative. Since the manufacturer is analytically liable for only a portion of the injuries in the enhanced injury context, if the burden of allocation is placed with the plaintiff, the defendant manufacturer will generally argue that the plaintiff has failed to adequately demonstrate causally related damages.

94. See, e.g., supra text accompanying notes 76–82.
95. See id.
96. See supra notes 65–66.
97. See infra notes 123–31 and accompanying text (Part III.B).
100. E.g., Olympia Oyster Co. v. Rayonier, Inc., 229 F. Supp. 855, 861 (W.D. Wash. 1964) ("Washington law demands that . . . every plaintiff claiming damages has the burden of proof to
been successful in many instances. Indeed, *Huddell* explicitly adhered to this position without examining the practical considerations which might weigh against imposing such a burden.

The plaintiff normally bears the burden of proving damages because it is a necessary element of the cause of action. More fundamentally, the justification generally espoused is that under our adversary system someone must lose. The risk of nonpersuasion, called the burden of proof, is uniformly placed upon the plaintiff because it is that party which is asking the court for relief.

The issue of damages should not, however, be directly equated with the concept of apportionment. In many instances the plaintiff can demonstrate total damages. This is generally all the law requires. When indivisible damages are attributable to multiple tortfeasors, for instance, courts generally hold defendants liable for the total loss, regardless of culpability, leaving the defendants to determine among themselves the proper apportionment. Hence, while the “general tort doctrine rule” appears superficially appealing, it does not support placing the burden of apportionment on the plaintiff.

2. *Concurrent Liability Doctrines*

Existing doctrines applicable to cases involving joint or concurrent tortfeasors provide another source upon which to base apportionment guidelines in the enhanced injury context. These doctrines generally place the burden of apportionment on the defendants, particularly if the harm is indivisible. This result is founded on the premise that the court must make a choice as to where the loss due to a failure of proof will fall. The choice between an innocent plaintiff and defendants whose fault has been clearly proven is generally felt to balance in favor of placing risks in failures of proof upon the latter.

Three factors typically affect the rules of apportionment in cases involving joint tortfeasors: (1) the relationship between the tortfeasors; (2) the present sufficient evidence from which damages can be determined on some rational basis and other than by pure speculation and conjecture.").

102. *Id.* at § 38.
103. *Id.* at § 52. It should also be noted that the Washington Liability Reform Act of 1986, E.S.S.B. 4630, 49th Leg. Reg. Sess., retains joint and several liability for claims involving indivisible harm, and only “repeals” joint and several liability when the harm is divisible, the defendants were not acting in concert, and the plaintiff is partially at fault. *See supra* note 8.
105. W. Prosser & W. Keeton, *supra* note 26, § 52. *See also supra* note 103.
divisibility of the injury; and (3) the contribution of each to the injury. In turn, these factors would be expected to affect the burden of apportionment in three different instances, including where each tortfeasor's act alone: (1) would not have caused any injury to the plaintiff but for its concurrence with the other tortfeasors' actions; (2) could have caused the entire injury; or (3) would have caused part, but not all, of the injury.

In the first instance, where a concurrence of action causes injury, joint and several liability is imposed because each tortfeasor is responsible for causing the entire indivisible injury. This is because no injury would have occurred but for the concurrence of both or all of the actions. Courts allowing total recovery from an accident-causing driver follow this doctrine. However, in many automobile accidents the occupants suffer not only enhanced injuries, but injuries which would have occurred even in a properly designed automobile. In such cases, application of concurrent tortfeasor decisions would make the manufacturer a joint tortfeasor and unfairly impose total liability on the manufacturer where the basis of the claim is the enhancement of injury.

In the second instance, each independent tortfeasor alone could have caused the entire indivisible injury. This situation never arises in an enhanced injury case. The defective design alone does not cause any injury. The first collision, which is attributable to another cause, must occur before the design can injure the plaintiff in the "second collision." Without the first accident, the defect would not produce any injury. The apportionment rules from cases falling within this category are therefore distinguishable, and provide little logical basis upon which to assess the enhanced injury claim.

The third instance, in which the actor causes part but not all of the injury, is also distinguishable from the enhanced injury case. The manufacturer's defect does not actively and directly cause the plaintiff's injury; the first collision must intervene before the design can cause any injury. Thus, the


108. See generally W. PROSSER & W. KEETON, supra note 26, ch. 8; Doyle, supra note 107; Comment, supra note 104.


111. The rule of concurrent liability provides that where the separate wrongful acts of two defendants concur, and it appears that the plaintiff would not have been injured but for the concurrence, then both of the defendants are liable. This is inconsistent with the enhanced injury claim which holds the manufacturer liable only for his contribution to the injury. The application of concurrent liability to enhanced injury becomes even more inequitable where the non-manufacturer defendant proves insolvent.

112. See supra notes 65-66 and accompanying text.
direct, active, and unaided conduct which justifies imposing joint and several liability on each defendant in the first and second factual situations, and in the third situation if apportionment is not reasonably possible, is absent in the enhanced injury case. Furthermore, because concurrent tortfeasor decisions assign the burden of allocation to the plaintiff when apportionment is "reasonably" possible in the third situation, application of those principles might adversely affect the ability of the plaintiff to recover for his injuries in some instances, particularly where such proof is difficult or expensive.

The joint and concurrent tortfeasor rules fail to provide satisfactory results for apportionment of damages in the enhanced injury context because they do not, and cannot, adequately address concerns fundamental to the enhanced injury claim itself. The successive tortfeasor situation most closely parallels the enhanced injury context because multiple defendants each cause separate, although perhaps indivisible, damage. Here, the imposition of joint and several liability suggests that public policy might favor placing the burden of apportionment upon the defendant when it is not clear which "collision" was the cause of the damage in question.

3. The Restatement of Torts

The Restatement also provides insight into the issue of apportionment. Section 433A of the Restatement requires apportionment only when the plaintiff's various injuries are distinct or when a "reasonable basis" exists for determining the contribution of each cause to a single harm. In other

114. Id.
115. See infra text accompanying notes 126-31; see also supra text accompanying notes 80-82.
117. It is important to note that there are situations in which the earlier wrongdoer will be liable for the entire damage, but the later one will not. If an automobile negligently driven by defendant A strikes the plaintiff, causing a skull fracture, and leaves the plaintiff helpless on the highway, where shortly afterward a second automobile, negligently driven by defendant B, runs over the plaintiff and breaks a leg, A will be liable for both injuries. This is because when the plaintiff was left in the highway, it was reasonably to be anticipated that a second car would run the plaintiff down. But defendant B should be liable only for the broken leg, since B had no part in causing the fractured skull, and could not foresee or avoid it. On the same basis, an original wrongdoer may be liable for the additional harm inflicted by the negligent treatment of the victim by a physician, but the physician will not be liable for the original injury. W. PROSSER & W. KEETON, supra note 26, § 52, at 352.
118. See infra text accompanying notes 137-38. See also supra notes 8, 103.
119. RESTATEMENT (SECOND) OF TORTS § 433A (1965). Apportionment of Harm to Causes:
   (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.
cases the trier of fact may not apportion damages.\textsuperscript{120} Section 433B provides that in multiple causation cases the defendants must bear the burden of proving the proper allocation of damages.\textsuperscript{121}

Thus, the Restatement never allocates the burden of apportionment to the plaintiff. Although this approach holds the manufacturer liable when apportionment is not feasible, the Restatement justifies this result by allowing the manufacturer to limit its liability through apportionment proofs and by recognizing that apportionment is only in issue after the plaintiff has already proved the manufacturers’ design has caused some harm.\textsuperscript{122}

\textbf{B. Policy Considerations}

Courts have drawn on a variety of tort doctrines in resolving enhanced injury claims.\textsuperscript{123} Often, however, these doctrines only imperfectly parallel the concepts or issues involved, or render inequitable or inconsistent results. Consequently, courts should, and often do, look to underlying policies and social implications of their decisions, particularly when novel claims or issues are presented. The enhanced injury apportionment issue represents such an instance.

The present state of products liability law reflects society’s desire to compensate an accident victim for injuries attributable to defective design or due to concomitants associated with activities or products society deems too important to prohibit. The courts, in dealing with enhanced injury, have uniformly held that the plaintiff should bear the initial burden of proving defectiveness, safer alternatives, and the aggravation of injuries due to the defect(s).\textsuperscript{124} A lighter burden would tend to place the manufacturer in a position similar to that of an insurer.\textsuperscript{125} However, once the plaintiff

\footnotesize{\textsuperscript{120} Id.}
\footnotesize{\textsuperscript{121} Id. at § 433B. Burden of Proof:}
\footnotesize{(2) Where 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.}
\footnotesize{(3) Where the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon each such actor to prove that he has not caused the harm.
\textsuperscript{122} Hence, the plaintiff need not show the exact amount of the defendant’s contribution, but rather, that there was, in fact, some contribution. The defendant need not pay all damages, but only those damages for which the plaintiff’s quantifications cannot be rebutted. See id. § 433B and related comments. See also infra note 147.
\textsuperscript{123} See supra notes 98–122 and accompanying text (Part III.A).
\textsuperscript{124} See, e.g., Huddell v. Levin, 537 F.2d 726 (3d Cir. 1976).
\textsuperscript{125} See Larsen v. General Motors Corp., 391 F.2d 495, 502–03 (8th Cir. 1968); Comment, supra note 25, at 116. See also infra text accompanying note 132 (Part III.B.2).}
adequately demonstrates these three factors, causation exists, and the court should require the manufacturer to account for the contribution to the plaintiff's injuries. Apportionment policies should focus upon whether the manufacturer should avoid all liability when the plaintiff cannot apportion or sufficiently isolate the damage occasioned by the faulty design.

1. Difficulty of Proof

The difficulty of proving a given issue will often be considered by courts when allocating the burden of proof on that issue. As in many products liability cases, in the enhanced injury context the manufacturer knows or can learn far more about essential aspects of the product than the injured litigant. Automobile manufacturers, in particular, have an even greater advantage over the plaintiff. They command impressive resources, including vast testing facilities and top engineers skilled in, among other things, accident reconstruction and safety analysis. Moreover, many of these skills and tests are utilized to meet required governmental safety regulations and certifications. Hence, much existing data may be available to the manufacturer which is specific to the type of vehicle involved in the litigation.

In addition, the physical, medical, and engineering aspects of an automobile accident are extremely complex. Even if one could determine the exact response of an automobile in a particular accident pattern, the resulting medical implications would be as variable and unique as the individual involved. Thus, if any "quantification" is made, it is unlikely


Culpability may also influence allocation of the burden of proof. E.g., Scott v. Rainbow Ambulance Serv., Inc., 75 Wn. 2d 494, 452 P.2d 220 (1969):

We are concerned with a single injury, one claimed tort-feasor and a plaintiff who apparently contributed to the single injury through her own fault. . . . This material fault of the plaintiff, contributing substantially to the single injury, removes this case from that field of lawsuits where the legal principles applied were appropriate to the situation of an innocent plaintiff faced with multiple wrongdoers. There is a tendency in the latter cases to relax the usual rule that the burden of proof as to causation is upon the plaintiff. . . . [T]he burden of proof is upon the plaintiff. . . .

When the facts of the case are such that plaintiff is clearly one of the two persons responsible for the injury involved, and plaintiff makes no attempt to segregate those damages, we find no overriding reason in justice for shifting that burden of proof to the defendants.

127. Indeed, "what might have happened is rarely susceptible of proof." Caiazzo v. Volkswagen-
to be accurate except within very wide limits,\textsuperscript{128} rendering such estimates little better than speculation in many instances.\textsuperscript{129}

These facts, when combined with the fact that apportionment is appropriate only after the plaintiff has proved the manufacturer was in some way responsible for causing or aggravating the plaintiff's injuries, suggest that manufacturers more capable of proving apportionment should not escape liability merely because the plaintiff cannot establish the "correct" apportionment.\textsuperscript{130} This is in accord with the Restatement, which bases its position on the underlying premise that between proved tortfeasors who have clearly caused some harm, and the entirely innocent plaintiff, any hardship due to lack of evidence as to the extent of harm caused should fall upon the former.\textsuperscript{131}

2. Societal Implications

Other interests of society are also important in shaping the court's policy. Liability is imposed upon manufacturers in the hope that it will promote the design of safer products and thereby afford consumers the maximum protection from hazardous designs.\textsuperscript{132} If the injured litigant bears the burden of apportioning damages, especially when apportionment is impossible, many parties will be denied compensation for their causally-related injuries, and the manufacturer who thereby escapes liability will have less incentive to develop safer products.

On the other hand, the imposition of excessive liability on the manufacturer may also conflict with the public interest. Manufacturers will pass the costs of liability and of designing safer products on to consumers, in the form of higher prices. These higher prices are only justified to the extent that they reflect design modifications reasonably necessary to promote safety. If the apportionment rules in operation make manufacturers liable for injuries not actually caused by defective designs but instead due to burdens of proof or presumptions that heavily favor the plaintiff, all consumers in effect become insurers for injuries sometimes attributable not to the manufacturer, but to the product users.

\begin{itemize}
\item \textsuperscript{128} Volkswagenwerk A.G., 647 F.2d 241, 245 (2d Cir. 1981) (quoting Caiazzo v. Volkswagenwerk A.G., 468 F. Supp. 593, 598 (E.D.N.Y. 1979)).
\item \textsuperscript{129} See supra notes 91–92 and accompanying text.
\item \textsuperscript{130} But see D. Noel & J. Phillips, supra note 126.
\item \textsuperscript{131} Restatement (Second) of Torts § 433B comment d (1965). See also supra text accompanying notes 119–22.
\item \textsuperscript{132} See, e.g., Prosser, The Assault Upon the Citadel (Strict Liability to the Consumer), 69 Yale L.J. 1099, 1122 (1960); Prosser, The Fall of the Citadel (Strict Liability to the Consumer), 50 Minn. L. Rev. 791 (1966).
\end{itemize}
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This imposition of additional liability may occur in two ways. First, the added burden of proof regarding apportionment may significantly increase the manufacturers' costs associated with enhanced injury litigation. Second, fear of excessive liability, when coupled with the uncertain standard of "reasonably safe," may cause the manufacturer to "overdesign" products to the extent that the increased costs are no longer justified by the small increases in safety. This may be unfair to both manufacturers and consumers. It may be unfair to manufacturers in that they may be sacrificing competitiveness in the market and profits for increased litigation costs and unwarranted design changes. It may be unfair to the consumers because they may bear increased design costs without gaining corresponding benefits in safety. In the net analysis, society has competing interests: imposing the burden of apportionment on the manufacturer would promote safer design, but would also likely increase product prices.

IV. WASHINGTON CONSIDERATIONS

Washington products liability decisions have always taken an expansive view of the manufacturer's liability and often look to the Restatement for guidance.\textsuperscript{133} As previously discussed,\textsuperscript{134} the Restatement would never allocate the burden of apportionment to the plaintiff.\textsuperscript{135}

Placing the burden of apportionment on the defendant would also seem consistent with Washington's treatment of successive tortfeasors. While the two situations are not completely analogous, Washington's treatment of successive tortfeasors indicates a policy of placing the burden upon defendants where uncertainties in apportionment exist.\textsuperscript{136} For instance, in \textit{Phennah v. Whalen},\textsuperscript{137} the plaintiff was involved in two auto accidents within several months. In a suit against both drivers, the court held each jointly and severally liable. The court determined the issue of joint liability on the basis of the resulting injury rather than on any characterization of the tortfeasors as joint or concurrent. It went on to conclude that because of the indivisibility of the injury, each defendant should be entirely liable.\textsuperscript{138}

\begin{itemize}
\item \textsuperscript{134} See supra notes 119–22 and accompanying text.
\item \textsuperscript{135} The Restatement's view is that any hardship associated with burden of apportionment should rest with the defendants. See also supra notes 119–22 and accompanying text.
\item \textsuperscript{136} See supra text accompanying notes 63–64. See also infra text accompanying notes 116–18. It should be noted that the Washington Liability Reform Act of 1986, E.S.S.B. 4630, 49th Leg., Reg. Sess., should not change this analysis. See supra notes 8, 103.
\item \textsuperscript{137} 28 Wn. App. 19, 621 P.2d 1304 (1980).
\item \textsuperscript{138} Id. at 29, 621 P.2d at 1310.
\end{itemize}
Washington courts have also given expansive treatment to the doctrine of joint and several liability. Injured parties may sue one or all joint or concurrent tortfeasors and obtain a full recovery from any one of them without regard to the relative degree of damage caused by each. The courts have rejected arguments to the contrary, noting that what is equitable between multiple tortfeasors is an issue totally divorced from what is fair to injured plaintiffs.

The Tort Reform Act preserves joint and several liability. This is consistent with the Act's liability principles, which are based generally on the concept that each actor should ultimately bear the proportion of the loss caused by his or her conduct. In those instances where the actor cannot respond in damages, such loss is born by the other defendants rather than by the injured party. The Select Committee conceded that the effect of the rule might be to require partially-at-fault defendants to pay more than their share of the joint defendants' liability in certain cases. However, the Committee felt that the creation of a right of contribution among tortfeasors would ameliorate any resulting unfairness. In those cases where it did not, the Select Committee felt that defendants rather than plaintiffs should bear the burden of that unfairness.

To further dispel any remaining doubts that the Committee desired defendants to bear any problems associated with apportionment, it provided that where the claim or injury is indivisible with


The Washington Liability Reform Act of 1986, E.S.S.B. 4630, 49th Leg., Reg. Sess., substantially changes Washington law in this area. Under the 1986 Act, joint and several liability is repealed when the plaintiff has contributed to the fault unless the harm is indivisible or the defendants are acting in concert. See supra note 8.

140. Seattle-First Nat'l Bank at 235-36, 588 P.2d at 1312-13:

[H]arm caused by both joint and concurrent tort-feasors [may be] indivisible. The distinguishing factor between these types of tort-feasors is the duty breached. Joint tort-feasors breach a joint duty whereas concurrent tort-feasors breach separate duties . . . . .

. . . . [However,] we have long held that such tort-feasors are each liable for the entire harm caused . . . .

[W]e can conceive of no reason for relieving that tort-feasor of his responsibility to make full compensation for all harm he has caused the injured party. What may be equitable between multiple tort-feasors is an issue totally divorced from what is fair to the injured party.

Id. (emphasis in original) (footnote omitted).

See also Boeing Co. v. State, 89 Wn. 2d 443, 448, 572 P.2d 8, 12 (1978) ("[I]f two individuals commit independent acts of negligence which concur to produce the proximate cause of an injury to a third person . . . each is liable as if solely responsible for the injury.") But see supra note 139.

141. For a more complete discussion of this aspect of the Act, see Comment, Contribution Among Tortfeasors in Washington: The 1981 Tort Reform Act, 57 WASH. L. REV. 479 (1982). But see supra notes 8, 103, 139.

142. See WASHINGTON STATE SENATE SELECT COMMITTEE ON TORT AND PRODUCT LIABILITY REFORM FINAL REPORT 1 (Jan. 1981). But see supra note 139.
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respect to contribution, the “court may determine that two or more persons are to be treated as a single person for purposes of contribution.”

The statutory guidance contained in the preamble to the Product Liability Tort Reform Act of 1981 provides further insight. The preamble focuses on protecting industrial incentives to develop new products through lower premiums for product liability insurance while seeking to lower consumer costs without “unduly impair[ing]” consumer rights to recovery for injuries sustained as the result of unsafe products. Placing the burden of apportioning damages on the defendant accomplishes these goals. The plaintiff must first establish that the defective design enhanced the injury above that which would have occurred with a safer design. Once the wrong to the plaintiff has been established, the goal of not “unduly impairing” the plaintiff’s right to recovery requires that the burden shift to the defendants. This scheme allows the wrong to be redressed while

144. WASH. REV. CODE ch. 7.72 (1985). This preamble was not modified by the Liability Reform Act of 1986, E.S.S.B. 4630, 49th Leg., Reg. Sess. See supra note 8.
146. One commentator has forcefully argued to the contrary—that the differences in approaches to apportionment reflect varying court views and policies toward product liability claims. In this regard, “Huddell reflects a traditional fault-based approach to products liability. Mitchell, on the other hand . . . seems consistent with the trend toward . . . strict liability.” See Note, supra note 90, at 830.
147. Another positive feature of placing the burden of apportionment upon the defendants is that it lends certainty to case preparation. Moreover, because manufacturers uniformly perform crash tests, once it is clear that they will be required to quantify injury enhancement in litigation, they can incorporate such data collection in existing test procedures.

Standard defenses and relevant evidence in products liability actions are discussed in WASHINGTON STATE BAR ASSOC., supra note 146, at 3-42, 4-1 to 4-17, and include: (1) plaintiff’s fault; (2) third party’s fault; (3) compliance with industry custom; (4) technological feasibility; (5) compliance with non-governmental standards; (6) compliance with legislative or administrative regulatory standards; (7) compliance with specific mandatory government specifications; (8) expiration of the product’s useful safe life; and (9) expiration of the statute of limitations.
enabling defendants, who are often more capable, both technically and economically, to limit their liability through apportionment proofs. 148

V. CONCLUSION

Placing the burden of apportionment upon the defendant represents the most flexible and efficient mechanism with which to satisfy the goals and requirements of the enhanced injury claim. Existing concurrent liability doctrines only imperfectly parallel the enhanced injury case and may render inequitable and inconsistent results in certain instances. Placing the burden on defendants assigns it to the most capable parties—they may limit their liability through apportionment proofs. This avoids the harsh approach of the Huddell doctrine, which would deny recovery to an injured plaintiff not only in all cases where apportionment is “impossible,” but also in many cases where proof is merely difficult or expensive.

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148. Uniformly placing this burden upon the defendant(s) clarifies and delineates legal responsibilities which, in turn, provides a firmer foundation upon which manufacturers may decide issues relating to both design and litigation. But see Comment, supra note 25, at 116. The Comment argues that placing the burden on the defendant would increase the “nuisance value” of joining manufacturers as defendants. See also supra note 8.