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HOLDING TORTFEASORS ACCOUNTABLE: APPORTIONMENT OF ENHANCED INJURIES UNDER WASHINGTON'S COMPARATIVE FAULT SCHEME

Ryan P. Harkins

Abstract: The enhanced-injury doctrine imposes a negligence-based duty to reasonably minimize the foreseeable risk of injury enhancement in the event of primary accidents, regardless of their cause. When apportioning responsibility for enhanced injuries under principles of comparative fault, a majority of courts outside of Washington use a plaintiff's fault in causing the primary accident to reduce recovery for enhanced injuries. A minority of courts, however, rule that because the enhanced-injury doctrine presupposes the occurrence of primary accidents, primary fault is legally irrelevant to apportionment of enhanced injuries. Washington courts have not addressed this issue. This Comment argues that Washington courts should not consider primary fault when apportioning responsibility for enhanced injuries. First, primary fault is not "fault" with respect to enhanced injuries and, therefore, should not reduce a plaintiff's recovery for enhanced injuries. Moreover, Washington's comparative fault scheme and law regarding proximate cause require that responsibility for enhanced injuries be apportioned using enhanced injury fault rather than primary fault. Finally, using primary fault to reduce an enhanced injury recovery will result in decreased product safety.

Mary did not see the stop sign.¹ In the back seat, her two children would not stop making noise. Tired and irritated, she turned around to quiet them as she approached the four-way stop. At fifteen miles per hour, her automobile passed into the intersection without stopping and was struck from the side by an automobile traveling at ten miles per hour. The collision dented the two vehicles and all of the passengers suffered minor bumps and bruises. Mary's negligence was the sole cause of the collision and, for that reason, she is liable for the dented vehicles and the passengers' minor injuries.

Now assume that due to a defect in the gasoline tank, Mary's vehicle exploded when struck by the other automobile. The fire engulfed Mary's vehicle and severely burned all inside. Instead of suffering only minor bumps and bruises, Mary suffered disfiguring and disabling burns and her two children were killed. Assume further that the fire would not have occurred if the gasoline tank had not been defective. Hence, while the gasoline tank defect did not cause the primary accident, it did lead to the

1. Hypothetical created by the author.

fire. The gasoline tank defect enhanced the passengers' injuries from mere bumps and bruises to severe burns.²

Under the doctrine of enhanced injuries, the automobile manufacturer is liable for the enhanced injuries—the burns. The doctrine imposes on product manufacturers a negligence-based duty to use reasonable care in the design and construction of their products to minimize foreseeable risks of harm.³ As in negligence cases generally, the elements of an enhanced-injury cause of action are: (1) a duty to reasonably minimize foreseeable risks of harm, and (2) a breach of that duty (3) which proximately causes the plaintiff (4) to suffer identifiable damages.⁴

In the present example, it is foreseeable that automobiles will be involved in accidents with or without the fault of the plaintiff-driver. Hence, the manufacturer of Mary's automobile owed her a duty to reasonably design and construct her vehicle to minimize risks of harm in such accidents. Production of the defective gasoline tank design constituted a breach of that duty and proximately caused the enhanced injuries. Under the doctrine of enhanced injuries, the manufacturer is liable only for the burns, however, and not for the bumps and bruises, because the bumps and bruises were proximately caused solely by Mary's negligence.

Another layer of analysis is necessary in Washington because Washington courts apply comparative fault, allowing proportionate reduction of a plaintiff's recovery according to the percentage of

2. See *infra* Part I. This Comment employs several terms of art. The initial foreseeable accident—the side-impact automobile collision resulting from Mary's negligence—is termed the primary accident. The fault attributable to the primary accident—Mary running the stop sign—is primary fault. The second accident—the gasoline tank explosion resulting from the defect in the gasoline tank—is the enhanced-injury accident. The fault attributable to the enhanced-injury accident—the manufacturer's fault in producing a defective gasoline tank—is enhanced-injury fault. Other terms, such as “second collision,” or “crashworthiness,” have been used by courts and commentators to describe these same concepts. See, e.g., *Trust Corp. of Mont. v. Piper Aircraft Corp.*, 506 F. Supp. 1093, 1094 (D. Mont. 1981) (second collision); *Reed v. Chrysler Corp.*, 494 N.W.2d 224, 225–30 (Iowa 1992) (crashworthiness). As one commentator has pointed out, however, those terms inaccurately imply that the enhanced-injury doctrine applies only to automobile collisions. See Thomas V. Harris, *Enhanced-Injury Theory: An Analytic Framework*, 62 N.C. L. REV. 643, 647–51 & n.22 (1984). While the hypothetical example and most cases discussed in this Comment involve automobile collisions, the enhanced-injury doctrine applies to product liability cases generally. See *Larsen v. Gen. Motors Corp.*, 391 F.2d 495, 504 (8th Cir. 1968) (enhanced injury liability applies “to all manufacturers”); *Baumgardner v. Am. Motors Corp.*, 83 Wash. 2d 751, 758, 522 P.2d 829, 833 (1974) (holding that “manufacturers” can be liable for product defects that proximately cause enhanced injuries); Harris, *supra*, at 647–51.

3. See *Larsen*, 391 F.2d at 499–506; *Baumgardner*, 83 Wash. 2d at 756–57, 522 P.2d at 832–33.

4. *Baumgardner*, 83 Wash. 2d at 758, 522 P.2d at 833; Harris, *supra* note 2, at 651.

plaintiff fault that proximately caused the plaintiff's damages.⁵ Using comparative fault, the manufacturer will argue that Mary's fault in causing the primary accident should proportionately reduce its monetary responsibility for the burns suffered by Mary and her children. This raises the question whether a Washington court should reduce the damages awarded by the percentage of fault attributed to Mary in causing the primary accident or find that Mary's fault in causing the primary accident is legally irrelevant to the issue of damages resulting from the enhanced-injury burns.

This Comment focuses solely on whether Washington courts should consider primary fault when apportioning responsibility for enhanced injuries under Washington's scheme of comparative fault. Prior to addressing this question, the trier-of-fact in an enhanced-injury case must first find that all elements of an enhanced-injury claim are met. This Comment argues that Washington courts should not use primary fault to reduce a plaintiff's recovery for enhanced injuries. Part I describes the adoption of the enhanced-injury doctrine in Washington State. Part II discusses basic tort law concepts that affect the application of the enhanced injury doctrine in Washington. Part III explains the conflicting resolutions of this issue outside of Washington. Part IV argues that reducing a plaintiff's enhanced-injury recovery by primary fault is inconsistent with basic tort law concepts, violates Washington's comparative fault scheme, and would lead to decreased product safety.

I. THE ENHANCED-INJURY DOCTRINE IN WASHINGTON

In 1974, the Supreme Court of Washington adopted the enhanced-injury doctrine.⁶ In *Baumgardner v. American Motors Corp.*,⁷ the plaintiff sued American Motors after his wife was killed in an automobile accident.⁸ Upon collision, her seat broke loose, crushing her

5. See *infra* Section II.

6. The seminal case recognizing the enhanced-injury doctrine was *Larsen v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968). Prior to *Larsen*, courts were reluctant to permit an enhanced-injury cause of action. See, e.g., *Evans v. Gen. Motors Corp.*, 359 F.2d 822, 825 (7th Cir. 1966); *Campo v. Scofield*, 95 N.E.2d 802, 805-06 (N.Y. 1950); *Yaun v. Allis-Chalmers Mfg. Co.*, 34 N.W.2d 853, 858-59 (Wis. 1948). However, the *Larsen* position has been adopted by virtually all American courts. See, e.g., *Blankenship v. General Motors Corp.*, 406 S.E.2d 781, 782 (W.Va. 1991) (noting that West Virginia became the last state to adopt the enhanced injury doctrine).

7. 83 Wash. 2d 751, 522 P.2d 829 (1974).

8. *Id.* at 752, 522 P.2d at 830.

between the seat and seat belt.⁹ Furthermore, her seat belt could not be unlatched after the accident, severely exacerbating her injuries.¹⁰ The plaintiff alleged that defects in his wife's seat and seatbelt buckle, while not contributing to the cause of the original collision, caused or enhanced his wife's injuries, thereby causing her death.¹¹ The trial court granted summary judgment in favor of American Motors and the plaintiff appealed.¹² The Supreme Court of Washington reversed,¹³ holding that a manufacturer can be liable for product defects that proximately cause enhanced injuries even though the defects do not cause the accident.¹⁴

The *Baumgardner* court held that the enhanced-injury doctrine rests on common law negligence principles.¹⁵ Generally, the elements of a negligence cause of action are duty, breach, causation, and damages.¹⁶ Therefore, the elements in an enhanced-injury cause of action are: (1) a duty to reasonably prevent foreseeable risks of enhanced injuries, and (2) a breach of that duty (3) that proximately caused (4) distinct and identifiable enhanced injuries.¹⁷

Because the enhanced-injury doctrine is based on negligence principles, the *Baumgardner* court stated that the primary determination in an enhanced-injury claim is the imposition of a duty to minimize the risk of injury enhancement.¹⁸ General negligence principles impose a duty to use reasonable care to protect others from foreseeable risk of harm.¹⁹ The imposition of a duty turns on foreseeability.²⁰ Therefore, the

9. *Id.*

10. *Id.*

11. *Id.* at 752–53, 522 P.2d at 830.

12. *Id.* at 753, 522 P.2d at 830.

13. *Id.* at 760, 522 P.2d at 834.

14. *Id.* at 758, 522 P.2d at 833.

15. *Id.* at 757–58, 522 P.2d at 833. In addition, *Baumgardner* held that liability for enhanced injuries may also be established under strict liability. *Id.* at 759, 522 P.2d at 834. Proving an enhanced injury claim under strict liability is beyond the scope of this Comment.

16. *Degel v. Majestic Mobile Manor, Inc.*, 129 Wash. 2d 43, 48, 914 P.2d 728, 731 (1996); see also W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 30, at 164–65 (5th ed. 1984).

17. *Baumgardner*, 83 Wash. 2d at 758, 522 P.2d at 833; see also *Degel*, 129 Wash. 2d at 48, 914 P.2d at 731; KEETON ET AL., *supra* note 16, § 30, at 164–65.

18. *Baumgardner*, 83 Wash. 2d at 756–57, 522 P.2d at 832.

19. KEETON ET AL., *supra* note 16, § 30, at 164–65.

20. See *Baumgardner*, 83 Wash. 2d at 754–57, 522 P.2d at 831–33; see also KEETON ET AL., *supra* note 16, § 43, at 280–81.

imposition of an enhanced-injury duty turns on foreseeability. If a manufacturer should foresee that its product creates a risk of enhancing the injuries suffered in a primary accident, the manufacturer has a duty to reasonably minimize that risk.²¹

Applying this foreseeability analysis, the *Baumgardner* court concluded that it is clearly foreseeable to the manufacturer that automobile collisions will occur²² and that the magnitude of injury to persons involved in such collisions will often depend on the design and construction of the automobile.²³ Therefore, the manufacturer has a duty to design and construct its automobiles to reasonably minimize the risk of enhanced injuries in such collisions.²⁴ This duty is imposed despite the fact that automobiles are not made for the purpose of colliding with other objects, because people cannot use automobiles without encountering the foreseeable risk of injury-producing collisions.²⁵

The *Baumgardner* court recognized that the enhanced-injury duty is not unlimited. It emphasized that a manufacturer's duty is to *reasonably minimize foreseeable risks of harm*.²⁶ It also emphasized that, under basic negligence principles, a manufacturer is liable only for injuries or enhancement of injuries proximately caused²⁷ by product defects.²⁸ Therefore, a breach of an enhanced-injury duty makes a manufacturer liable only for the injury enhancement—i.e., that portion of the plaintiff's damages that would not have occurred had the manufacturer exercised reasonable care.²⁹

Since *Baumgardner*, Washington courts have done little to further define the parameters of the enhanced-injury doctrine and its interaction

21. See *Baumgardner*, 83 Wash. 2d at 754–57, 522 P.2d at 831–33; see also KEETON ET AL., *supra* note 16, § 43, at 280–81.

22. *Baumgardner*, 83 Wash. 2d at 755, 522 P.2d at 831–32 (quoting *Larsen v. Gen. Motors Corp.*, 391 F.2d 495, 501–02 (8th Cir. 1968)).

23. *Id.* at 755, 522 P.2d at 832 (quoting *Mickle v. Blackmon*, 166 S.E.2d 173, 185 (S.C. 1969)).

24. The question faced by the *Baumgardner* court was whether to adopt the enhanced-injury doctrine in automobile collision cases. However, the court phrased its holding in much broader language, implying that the enhanced-injury doctrine applies to product liability cases generally, as recognized by *Larsen*. Specifically, the *Baumgardner* court held that “a manufacturer can be held liable in negligence for design or manufacture defects which proximately cause enhanced injuries due to such defects.” *Baumgardner*, 83 Wash. 2d at 758, 522 P.2d at 833.

25. *Id.* at 754–55, 522 P.2d at 831–32 (quoting *Larsen*, 391 F.2d at 501–02).

26. *Id.* at 756–57, 522 P.2d at 832–33.

27. For a discussion of proximate cause, see *infra* Part III.B.

28. *Baumgardner*, 83 Wash. 2d at 758, 522 P.2d at 833.

29. *Id.*

with other tort principles.³⁰ In *Bernal v. American Honda Motor Co.*,³¹ the Supreme Court of Washington recognized that *Baumgardner* established an enhanced-injury cause of action.³² Furthermore, in *Couch v. Mine Safety Appliances Co.*,³³ the court reiterated that, as in negligence cases generally, the plaintiff must prove the elements of an enhanced-injury claim, including the nature and extent of the injury enhancement.³⁴ However, Washington case law does not provide guidance regarding the role of comparative fault in an enhanced-injury claim. While *Baumgardner* established the negligence-based framework for the enhanced-injury doctrine generally,³⁵ no Washington court has explicitly addressed whether a plaintiff's fault in causing the primary accident should be considered for purposes of reducing recovery for an enhanced injury.³⁶

II. TORT LAW CONCEPTS IN WASHINGTON

Because the enhanced injury doctrine is based on negligence principles, several tort law concepts affect the application of the doctrine to individual cases. The applicable tort concepts include comparative fault, the determination of duty, and proximate causation. This Section provides background knowledge necessary to understand how those concepts shape the application of the enhanced-injury doctrine to a particular case.

30. See, e.g., *Seattle-First Nat'l Bank v. Tabert*, 86 Wash. 2d 145, 148–50, 542 P.2d 774, 776–77 (1975) (recognizing that court has not addressed central issues relating to criteria, definitions, and limitations of enhanced-injury theory).

31. 87 Wash. 2d 406, 553 P.2d 107 (1976).

32. *Id.* at 411, 415, 553 P.2d at 110, 112.

33. 107 Wash. 2d 232, 728 P.2d 585 (1986).

34. *Id.* at 243, 728 P.2d at 591; see also *Baumgardner*, 83 Wash. 2d at 758, 522 P.2d at 833.

35. *Baumgardner*, 83 Wash. 2d at 757–58, 522 P.2d at 833.

36. See *Couch*, 107 Wash. 2d at 246, 728 P.2d at 592–93 (declining to rule on whether plaintiff's fault in causing primary collision was relevant in determining cause of enhanced injury because jury found plaintiff's comparative fault was not a proximate cause of his enhanced injuries); *Amend v. Bell*, 89 Wash. 2d 124, 130–34, 570 P.2d 138, 142–44 (1977) (holding that evidence of seatbelt use is inadmissible in Washington and, consequently, not addressing issue of whether, under comparative fault, a plaintiff's primary fault can reduce recovery for enhanced injuries).

A. Washington's Scheme of Comparative Fault

Under Washington's scheme of comparative fault, tort defendants can claim that the plaintiff was also at fault in order to eliminate or reduce the defendant's responsibility for damages. Proving plaintiff fault involves the same elements of proof required to prove a defendant's fault.³⁷ The defendant must prove that (1) the plaintiff owed herself a duty, (2) breached that duty, (3) and proximately caused (4) damages to herself.³⁸ Over the past thirty years, the Washington State Legislature has repeatedly changed the legal effect that a finding of plaintiff fault has on a plaintiff's claim.

Prior to 1973, a plaintiff's contributory negligence completely barred recovery for damages in a negligence cause of action in Washington.³⁹ In 1973, the Washington State Legislature abolished this complete bar to recovery by adopting a system of pure comparative fault.⁴⁰ Thus, the effect of plaintiff negligence changed from a complete bar to a reduction of recovery in proportion to the plaintiff's percentage of negligence.⁴¹ However, the 1973 act did not affect all tort causes of action; the act referred only to negligence claims and, therefore, did not apply to all product liability causes of action.⁴²

37 See WASH. REV. CODE § 4.22.015 (2000) ("Fault includes acts or omissions . . . that are in any measure negligent or reckless toward the person or property of the actor or others . . ."); see also *Geschwind v. Flanagan*, 121 Wash. 2d 833, 838, 854 P.2d 1061, 1064 (1993) (quoting *Seattle-First Nat'l Bank v. Shoreline Concrete Co.*, 91 Wash.2d 230, 238, 588 P.2d 1308, 1314 (1978) ("A plaintiff's negligence relates to a failure to use due care for his own protection . . .")); *KEETON ET AL.*, *supra* note 16, § 65, at 451 ("Contributory negligence is conduct on the part of the plaintiff, contributing as a legal cause to the harm he has suffered, which falls below the standard to which he is required to conform for his own protection.").

38 *Degel v. Majestic Mobile Manor, Inc.*, 129 Wash. 2d 43, 48, 914 P.2d 728, 731 (1996). See also *KEETON ET AL.*, *supra* note 16, § 30, at 164-65.

39 See, e.g., *Godfrey v. Washington*, 84 Wash. 2d 959, 965, 530 P.2d 630, 633 (1975); *Franklin v. Engel*, 34 Wash. 480, 485, 76 P. 84, 85 (1904).

40 Ch. 137, §1, 1973 Wash Laws 1st Ex. Sess. 949 (codified at WASH. REV. CODE § 4.22.010 (1973)) (repealed 1981) ("Contributory negligence shall not bar recovery in an action . . . but any damages allowed shall be diminished in proportion to the percentage of negligence attributable to the party recovering.").

41 *Godfrey*, 84 Wash. 2d at 965, 530 P.2d at 633.

42 *Seay v. Chrysler Corp.*, 93 Wash. 2d 319, 323, 609 P.2d 1382, 1384 (1980). At the time, a plaintiff could bring a product liability claim under five different theories. See, e.g., *Daughtry v. Jet Aeration Co.*, 91 Wash. 2d 704, 709-11, 592 P.2d 631, 633-34 (1979) (express warranty); *Teagle v. Fischer & Porter Co.*, 89 Wash. 2d 149, 154, 570 P.2d 438, 441 (1977) (strict liability) (citing *Seattle First Nat'l Bank v. Tabert*, 86 Wash. 2d 145, 542 P.2d 774 (1975); *Ulmer v. Ford Motor Co.*, 75 Wash. 2d 522, 452 P.2d 729 (1969)); *Esborg v. Bailey Drug Co.*, 61 Wash. 2d 347, 354-55, 378 P.2d 298, 302-03 (1963) (implied warranties of merchantability and fitness); *Martin v.*

In 1981 the Washington Legislature altered Washington's comparative fault landscape again when it passed the Product Liability and Tort Reform Act.⁴³ The 1981 Act codified Washington product liability law, providing that there shall be a single "product liability claim."⁴⁴ In addition, the Act recodified Washington's scheme of comparative fault, providing that the scheme would apply to all causes of action based on "fault"⁴⁵ and defining "fault" to include both "misuse of a product" and conduct subjecting a party to liability under a product liability cause of action.⁴⁶ Therefore, unlike its 1973 predecessor, the 1981 Act explicitly applied Washington's comparative fault scheme to all product liability causes of action.⁴⁷

The 1981 Act provides that a claimant's fault proportionately diminishes recovery of "compensatory damages for an injury attributable to the claimant's . . . fault."⁴⁸ In addition, it provides that legal causation requirements⁴⁹ apply when considering fault for both plaintiffs and defendants under Washington's comparative fault scheme.⁵⁰ Further, when apportioning fault, the court must consider the nature of each

Schoonover, 13 Wash. App. 48, 54–56, 533 P.2d 438, 442–43 (1975) (negligence); see also Celia E. Holuk & Donna L. Walker, *Products Liability—Tort Reform: An Overview of Washington's New Act*, 17 GONZAGA L. REV. 357, 372–73 (1982). In *Seay*, the Washington Supreme Court held that the 1973 Comparative Fault Act did not apply to strict product liability causes of action, reasoning that it applied only to negligence-based claims. *Seay*, 93 Wash. 2d at 319, 609 P.2d at 1382.

43. Ch. 27, 1981 Wash. Laws 112 (codified at scattered sections of WASH. REV. CODE §§ 4.22, 7.72 (2000)).

44. WASH. REV. CODE § 7.72.010(4). The statute provides, among other things, that a manufacturer's failure to implement a safeguard on a product is negligent where "at the time of manufacturer, the likelihood [P] that the product would cause the claimant's harm or similar harms, and the seriousness [L] of those harms outweighed the burden [B] on the manufacturer" to implement the safeguard. *Id.* § 7.72.030. In other words, a manufacturer's failure to implement a safeguard is negligent where $B < PL$. Thus, the statute defines negligence by using the formula devised by Learned Hand to discuss the incentives to exercise care created by negligence law. See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947). This formula is also relevant to the incentives to exercise care created by the enhanced-injury doctrine. See *infra* Section IV.C.2.

45. WASH. REV. CODE § 4.22.005.

46. *Id.* § 4.22.015.

47. See *id.* §§ 7.72.010(4), 4.22.005–.015; *Lundberg v. All-Pure Chem. Co.*, 55 Wash. App. 181, 186, 777 P.2d 15, 19 (1989) ("Thus, the Legislature has determined that the comparative fault doctrine shall apply to all actions based on 'fault,' including strict liability and product liability claims.").

48. WASH. REV. CODE § 4.22.005.

49. For conduct to be a proximate cause of a plaintiff's damages, it must be both: (1) a cause-in-fact and (2) a legal cause of the damages. See *infra* notes 78–84 and accompanying text.

50. WASH. REV. CODE § 4.22.015.

party's conduct and the extent of the causal relation between that conduct and the resulting damages.⁵¹

In 1986, the Washington State Legislature supplemented the 1981 Product Liability and Tort Reform Act with the 1986 Tort Reform Act.⁵² Previously in Washington, a plaintiff could recover, under joint and several liability, the full amount of her damages from any defendant who contributed to those damages.⁵³ However, the 1986 Act abolished joint and several liability, except in cases where the plaintiff is not at fault.⁵⁴ In making this change, the Act provided that, when apportioning responsibility for a claimant's damages, the fault of every entity that "caused" the claimant's damages shall be considered.⁵⁵ The entities whose fault will be considered include, among others, "the claimant or person suffering personal injury or . . . property damage . . ."⁵⁶ Thus, by forcing courts to apportion percentages of fault among various parties, the legislature intended to hold each party accountable for only that portion of damages caused by its own fault.

B. *Determining the Existence of Duty*

Enhanced-injury claims require the imposition of a negligence-based duty.⁵⁷ The imposition of a duty turns on foreseeability—whether the risk of a harm occurring is foreseeable from the alleged tortfeasor's perspective.⁵⁸ A duty to reasonably minimize enhanced injuries is imposed because the risk of enhanced injuries is foreseeable.⁵⁹ Therefore, foreseeability plays a central role in determining whether certain conduct constitutes a breach of an enhanced-injury duty and,

51. *Id.*

52. Ch. 305, 1986 Wash. Laws 1354 (codified at scattered sections of WASH. REV. CODE §§ 4.16, 4.22, 4.24, 4.56, 5.40, 5.60, 7.70, 48.19, 48.22, 51.24). WASH. REV. CODE § 4.22.070(1).

53. WASH. REV. CODE § 4.22.070.

54. *Id.*

In all actions involving fault of more than one entity, the trier of fact shall determine the percentage of the total fault which is attributable to every entity which caused the claimant's damages Judgment shall be entered against each defendant . . . in an amount which represents that party's proportionate share of the claimant's total damages.

55. *Id.*

56. *Id.* § 4.22.070(1).

57. *See supra* notes 18–21 and accompanying text.

58. *King v. Seattle*, 84 Wash. 2d 239, 248, 525 P.2d 228, 234 (1974); *Wells v. City of Vancouver*, 77 Wash. 2d 800, 802–03, 467 P.2d 292, 294–95 (1970).

59. *Baumgardner v. Am. Motors Corp.*, 83 Wash. 2d 751, 756–57, 522 P.2d 829, 832 (1974).

thus, whether that conduct may be deemed fault with respect to an enhanced injury. Only conduct that constitutes fault with respect to a particular harm can be used to apportion responsibility for that harm under Washington comparative fault law.⁶⁰

The imposition of a negligence duty turns on the foreseeability of the consequences of an act. As Justice Cardozo stated in *Palsgraf v. Long Island R. Co.*,⁶¹ “[n]egligence, like risk, is . . . a term of relation.”⁶² A “bad act,” by itself, does not make a party liable for harm. Rather, a party can be liable for a particular harm only if, from the party’s perspective, the occurrence of that harm was a foreseeable consequence of the “bad act.”⁶³ Hence, the party has no duty to prevent a particular harm and, thus, cannot be liable for the occurrence of that harm unless, from the party’s perspective, the harm was a foreseeable consequence of the act.⁶⁴ Moreover, the exact manner in which the harm occurs need not be foreseeable as long as the occurrence of the harm itself was a foreseeable consequence of the act.⁶⁵

The question of whether a party has a duty to reasonably minimize a particular harm is entirely separate from whether the party has another duty to reasonably minimize a different harm.⁶⁶ Each distinct harm corresponds to a distinct potential duty.⁶⁷ A particular harm imposes a duty to reasonably minimize the risk of that harm only if, from the party’s perspective, that harm is a foreseeable consequence of the party’s behavior.⁶⁸ For example, our hypothetical plaintiff, Mary, has a duty, D₁, to reasonably minimize the risk of the harm, H₁, only if, from Mary’s perspective, the risk of H₁ is foreseeable. Failing to reasonably minimize the risk of H₁, for example by committing an act, A₁, would constitute a

60. See WASH. REV. CODE §§ 4.22.005, .015, .070.

61. 162 N.E. 99 (N.Y. 1928). Washington courts have consistently adopted the reasoning of Justice Cardozo’s *Palsgraf* opinion. See *King*, 84 Wash. 2d at 248, 525 P.2d at 234; *Wells*, 77 Wash. 2d at 802–03, 467 P.2d at 294–95.

62. *Palsgraf*, 162 N.E. at 101.

63. *Id.* (“Negligence in the abstract, apart from things related, is surely not a tort, if indeed it is understandable at all. . . . Negligence is not a tort unless it results in the commission of a wrong, and the commission of a wrong imports the violation of a right.”).

64. *Id.*

65. *King*, 84 Wash. 2d at 248, 525 P.2d at 234.

66. See *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Eng’g Co. Ltd. (the “Wagon Mound #1”)*, [1961] App. Cas. 388, 426 (P.C. 1961).

67. *Id.*

68. *Id.*

breach of D_1 and, therefore, make Mary liable for H_1 .⁶⁹ Further, if it is foreseeable from Mary's perspective that another harm, H_2 , could occur, then Mary has a separate and distinct duty, D_2 , to reasonably minimize the risk of H_2 .⁷⁰ Failing to reasonably minimize the risk of H_2 , for example by engaging in certain conduct, designated A_2 , would constitute a breach of D_2 and, therefore, make Mary liable for H_2 .⁷¹

The fact that Mary has a duty, D_1 , to reasonably minimize the risk of the harm, H_1 , is irrelevant to the question of whether Mary has a duty, D_2 , to reasonably minimize the risk of the harm, H_2 .⁷² As Lord Simonds wrote in the famous *Wagon Mound* case, each duty "rests on its own bottom . . ."⁷³ The risk of each separate harm must be foreseeable from Mary's perspective in order to impose each separate duty.⁷⁴

Correspondingly, the mere fact that Mary has breached a duty, D_1 , for example by committing an act, A_1 , is often irrelevant to whether Mary has breached a duty, D_2 .⁷⁵ A_1 can constitute a breach of D_2 , thereby making Mary liable for H_2 , *only* if it is foreseeable from Mary's perspective that A_1 creates an unreasonable risk of H_2 .⁷⁶ Therefore, if it is foreseeable from Mary's perspective that A_1 creates an unreasonable risk of H_1 , but it is not foreseeable that A_1 creates an unreasonable risk of H_2 , then committing A_1 would make Mary liable for H_1 , but not for H_2 .⁷⁷

C. *Determining Proximate Cause*

In Washington, an actor's conduct must also constitute a proximate cause of a harm in order to make the actor liable for the harm. Proximate cause consists of two elements: cause-in-fact and legal causation.⁷⁸ To satisfy the cause-in-fact element, a breach must produce the harm

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Schooley v. Pinch's Deli Mkt., Inc.*, 134 Wash. 2d 468, 478, 951 P.2d 749, 754 (1998); *Taggart v. Sandau*, 118 Wash. 2d 195, 225, 822 P.2d 243, 258 (1992); *Hartley v. Washington*, 103 Wash. 2d 768, 777, 698 P.2d 77, 82 (1985).

complained of in a direct, unbroken sequence.⁷⁹ This is also referred to as “but for” causation, as the harm would not have occurred “but for” the actor’s breach.⁸⁰

Legal causation involves a determination of whether, as a matter of policy, the connection between the defendant’s breach and the resultant harm is too remote or insubstantial to impose liability.⁸¹ Legal causation and duty are intertwined and virtually identical because some of the policy considerations analyzed in determining whether a duty was owed by a party are also analyzed when determining whether a party’s breach constituted a legal cause of the harm at issue.⁸² However, the questions of duty and legal cause are not identical.⁸³ Rather, even where a harm is foreseeable and, thus, a duty is imposed, a party’s breach of that duty may not be a legal cause of the resulting harm if sound policy reasons require that the party not be liable for the harm.⁸⁴

In *Hartley v. Washington*,⁸⁵ for example, the Supreme Court of Washington found a lack of legal causation in a case where a decedent was killed by a drunk driver.⁸⁶ The drunk driver had previously been arrested numerous times for driving while intoxicated and, therefore, was subject to a revocation of his driver’s license by the State.⁸⁷ The decedent’s estate alleged that the State’s failure to revoke the drunk driver’s license negligently caused the decedent’s death.⁸⁸ The court held that the State’s failure to revoke the drunk driver’s license formed too attenuated a causal connection with—and therefore was not a legal cause of—the decedent’s death.⁸⁹ The court reasoned that (1) revocation of the license would not have prevented the driver from driving, (2) a license

79. *Schooley*, 134 Wash. 2d at 478, 951 P.2d at 754; *Taggart*, 118 Wash. 2d at 226, 822 P.2d at 258; *Hartley*, 103 Wash. 2d at 778, 698 P.2d at 83.

80. *Schooley*, 134 Wash. 2d at 478, 951 P.2d at 754; *Taggart*, 118 Wash. 2d at 226, 822 P.2d at 258; *Hartley*, 103 Wash. 2d at 778, 698 P.2d at 83.

81. *Schooley*, 134 Wash. 2d at 478–79, 951 P.2d at 754; *Taggart*, 118 Wash. 2d at 226, 822 P.2d at 258; *Hartley*, 103 Wash. 2d at 779, 698 P.2d at 83.

82. *Schooley*, 134 Wash. 2d at 479, 951 P.2d at 755; *Taggart*, 118 Wash. 2d at 226, 822 P.2d at 258; *Hartley*, 103 Wash. 2d at 779–80, 698 P.2d at 83–84.

83. *Schooley*, 134 Wash. 2d at 479, 951 P.2d at 755.

84. *Id.*

85. 103 Wash. 2d 768, 698 P.2d 77 (1985).

86. *Id.* at 770, 698 P.2d at 79.

87. *Id.*

88. *Id.* at 770, 698 P.2d at 78.

89. *Id.* at 784–85, 698 P.2d at 86.

does not grant authority to disobey the law, and (3) otherwise, the State would be open to unlimited liability.⁹⁰

*Schooley v. Pinch's Deli Market, Inc.*⁹¹ provides another example of the determination of legal causation. In that case, the Supreme Court of Washington held that a store's illegal sale of alcohol could be a legal cause of an intoxicated minor's injuries. In *Schooley*, a vendor sold alcohol to a minor who then furnished it to the plaintiff, who was also a minor.⁹² After consuming the alcohol and becoming intoxicated, the plaintiff dove into a partially empty swimming pool. The impact fractured her spinal cord, leaving her a quadriplegic.⁹³ The vendor argued that the sale of alcohol was not a legal cause of the plaintiff's injuries; it reasoned that extending the legal consequences of the initial sale of alcohol to the plaintiff's injuries—which the vendor contended were remote and due to the subsequent transfer of the alcohol—would expose the vendor to unlimited liability.⁹⁴ The court rejected the vendor's argument, however, and held that the sale of alcohol could constitute a legal cause of the plaintiff's injuries.⁹⁵ The court reasoned that the vendor could prevent liability by refusing to sell alcohol to a minor or forcing a suspicious potential buyer to fill out and sign a certification card.⁹⁶ Furthermore, the court noted that a minor who consumes alcohol could be found contributorily negligent, and the vendor's liability would be limited by both foreseeability and the doctrine of superseding causes.⁹⁷

An intervening act can constitute a break in the chain of causation and, thus, constitute a superseding cause of a harm, relieving a party of liability for that harm.⁹⁸ An intervening act is a superseding cause when

90. *Id.* at 785, 698 P.2d at 86–87.

91. 134 Wash. 2d 468, 951 P.2d 749 (1998).

92. *Id.* at 472, 951 P.2d at 751.

93. *Id.*

94. *Id.* at 474, 951 P.2d at 752.

95. *Id.* at 483, 951 P.2d at 757.

96. *Id.* at 481, 951 P.2d at 755–56.

97. *Id.*

98. A line of cases from the Washington Court of Appeals has stated that the issue of superseding causes is analyzed under the legal cause prong of proximate cause. *See, e.g.,* Bullard v. Bailey, 91 Wash. App. 750, 758, 959 P.2d 1122, 1127 (1998); Cramer v. Dep't of Highways, 73 Wash. App. 516, 521, 870 P.2d 999, 1001 (1994); Anderson v. Dreis & Krump Mfg. Corp., 48 Wash. App. 432, 442, 739 P.2d 1177, 1184 (1987). However, in *McCoy v. American Suzuki Motor Corp.*, 136 Wash. 2d 350, 358, 961 P.2d 952, 957 (1998), the Supreme Court of Washington stated that superseding causes should be analyzed under the cause-in-fact prong of proximate cause. The question of

it was not reasonably foreseeable.⁹⁹ This typically means that an intervening act constitutes a superseding cause where the act (1) brings about a different type of harm than otherwise would have resulted from the actor's conduct; or (2) operates independently of the situation created by the defendant's conduct.¹⁰⁰ In *McCoy v. American Suzuki Motor Corp.*,¹⁰¹ the plaintiff was struck by a vehicle while stopping to help a motorist whose car had overturned, allegedly due to a defect in the car. The plaintiff sued the car's manufacturer, Suzuki, for his injuries. Suzuki argued that its negligence did not constitute a proximate cause of the plaintiff's damages because it was unforeseeable that a rescuer would be injured by a third vehicle.¹⁰² The court held, however, that whether the plaintiff's rescue attempt and the third driver's negligence constituted superseding causes of the plaintiff's harm was a question for the jury.¹⁰³

III. OTHER COURTS' APPROACHES TO THE APPLICATION OF COMPARATIVE FAULT IN ENHANCED-INJURY CLAIMS

Some federal and state courts outside of Washington have addressed whether, under a scheme of comparative fault, primary fault should be compared with enhanced-injury fault when apportioning damages in enhanced-injury cases. A majority of courts favor comparing¹⁰⁴ primary fault with enhanced-injury fault, thereby reducing the plaintiff's recovery for enhanced injuries in proportion to the plaintiff's primary fault. These courts favor such a comparison for various reasons: some courts fail to distinguish between primary injuries and the enhancement of injuries, others assume that fault for the primary accident is a proximate cause of enhanced injuries, and still other courts state that

whether superseding causes should be analyzed under cause-in-fact or legal cause is beyond the scope of this Comment.

99. *McCoy*, 136 Wash. 2d at 358, 961 P.2d at 957; *Bullard*, 91 Wash. App. at 758–59, 959 P.2d at 1127; *Cramer*, 73 Wash. App. at 520–21, 870 P.2d at 1001; *Anderson*, 48 Wash. App. at 442–43, 739 P.2d at 1184.

100. *Campbell v. ITE Imperial Corp.*, 107 Wash. 2d 807, 813, 733 P.2d 969, 973 (1987); *Anderson*, 48 Wash. App. at 444, 739 P.2d at 1185.

101. 136 Wash. 2d 350, 961 P.2d 952 (1998).

102. *Id.* at 358, 961 P.2d at 957.

103. *Id.*

104. As used in this Comment, the terms “compare” and “comparing” mean that the court uses both the primary fault and enhanced-injury fault to apportion responsibility for a plaintiff's enhanced injuries.

primary fault should be compared with enhanced-injury fault. A minority of courts, however, use only enhanced-injury fault to apportion responsibility for enhanced injuries. The minority courts distinguish between primary injuries and injury enhancement, reasoning that only breach of an enhanced-injury duty may make a party responsible for enhanced injuries.

A. The Majority Approach: Reduction of a Plaintiff's Enhanced Injury Recovery by the Plaintiff's Primary Fault

1. Divisibility of Primary and Enhanced Injury Claims

Many of the majority courts fail to distinguish between injury enhancement and primary injuries when apportioning responsibility for damages.¹⁰⁵ Instead, these courts treat the plaintiff's enhanced injuries and primary injuries as inseparable. Therefore, the plaintiff's primary fault is compared with the manufacturer's enhanced-injury fault and responsibility is apportioned for all of the plaintiff's injuries without differentiating between the primary injuries and the enhancement of the primary injuries. For example, in *Trust Corp. of Montana v. Piper Aircraft Corp.*,¹⁰⁶ the decedent negligently caused his plane to crash but allegedly died as a result of the defendant's failure to provide a shoulder harness restraint system in the aircraft.¹⁰⁷ The plaintiff argued that the primary-accident-causing factors and enhanced-injury-causing factors are qualitatively different and must be considered separately. Therefore, according to the plaintiff, for purposes of apportionment of the enhanced injuries, the court should exclude evidence of the cause of the crash and focus solely on evidence of the plaintiff's injury enhancement.¹⁰⁸ However, the court ruled that, under Montana law, the plaintiff's contributory negligence in causing the initial accident should be compared with the defendant's failure to provide a shoulder harness

105. See, e.g., *Montag v. Honda Motor Co.*, 75 F.3d 1414, 1419 (10th Cir. 1996); *Keltner v. Ford Motor Co.*, 748 F.2d 1265, 1267-68 (8th Cir. 1984); *Hinkamp v. Am. Motors Corp.*, 735 F. Supp. 176, 178 (E.D.N.C. 1989); *Trust Corp. of Mont. v. Piper Aircraft Corp.*, 506 F. Supp. 1093, 1098 (D. Mont. 1981); *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 428 (Tex. 1984).

106. 506 F. Supp. 1093 (D. Mont. 1981).

107. *Id.* at 1094.

108. *Id.*

restraint system.¹⁰⁹ The court stated that, while the view opposing such a comparison has some merit, courts should consider all of the factors that contributed to the event that caused the plaintiff's injuries.¹¹⁰ Consequently, the court declined to draw a clear line between the primary accident and the injury enhancement.

Other courts have offered additional reasons for refusing to analyze injury enhancement as separate and distinct from primary injuries. One court has stated that refusing to compare primary fault with enhanced-injury fault would make it too difficult to instruct the jury on apportionment.¹¹¹ Furthermore, some commentators have argued that, in practice, it is very difficult to distinguish between collision-causing and injury-causing fault.¹¹² Under the laws of physics, the enhancement of injuries correlates to the severity of the collision—the more severe the collision, the more enhanced the injuries.¹¹³ For example, not all injury enhancements can be as clearly defined as burns resulting from an explosion. It is possible that injury enhancement will merely increase the severity of the injuries incurred in the primary accident. Hence, these commentators argue, any conduct influencing the severity of a collision is a proximate cause of enhanced injury and should be compared with a manufacturer's fault.¹¹⁴

2. *Primary Fault as a Proximate Cause of Enhanced Injuries*

Some courts assume that fault for the primary accident is a proximate cause of enhanced injuries. Consequently, these courts compare primary fault with enhanced-injury fault when apportioning responsibility for enhanced injuries.¹¹⁵ For example, in *Meekins v. Ford Motor Co.*,¹¹⁶ the driver of an automobile was involved in an accident in which the

109. *Id.* at 1098.

110. *Id.*

111. *Meekins v. Ford Motor Co.*, 699 A.2d 339, 346 (Del. 1997).

112. Heather Fox Vickles & Michael E. Oldham, *Enhanced Injury Should Not Equal Enhanced Liability*, 36 S. TEX. L. REV. 417, 439 (1995).

113. *Id.*

114. *Id.* at 439–40.

115. *See, e.g.*, *Hinkamp v. Am. Motors Corp.*, 735 F. Supp. 176, 178 (E.D.N.C. 1989); *Zuern v. Ford Motor Co.*, 937 P.2d 676, 681–82 (Ariz. Ct. App. 1996); *Meekins*, 699 A.2d at 346; *Kidron, Inc. v. Carmona*, 665 So. 2d 289, 292 (Fla. Dist. Ct. App. 1995); *Whitehead v. Toyota Motor Corp.*, 897 S.W.2d 684, 694 (Tenn. 1995).

116. 699 A.2d 339 (Del. 1997).

automobile's airbag deployed.¹¹⁷ The driver sued Ford, alleging that a defect in the air bag crushed the fingers in his left hand against the steering wheel when the airbag deployed.¹¹⁸ Ford raised the defense of comparative negligence, claiming that the cause of the driver's injuries was his failure to stop at a stop sign.¹¹⁹ The driver countered that, even if he had caused the accident, his negligence should not be compared with Ford's negligence in defectively designing the airbag that caused his fingers to be crushed.¹²⁰ However, the *Meekins* court ruled that, under comparative fault principles, the driver's negligence in causing the initial accident should be compared with Ford's negligence in defectively designing the airbag.¹²¹ The court reasoned that "[i]t is obvious that the negligence of a plaintiff who causes the initial collision is one of the proximate causes of all of the injuries he sustained," regardless of whether the injuries stem from the initial collision or a product defect.¹²²

Other courts reduce plaintiff recovery by analogizing to the doctrine of subsequent tortfeasors.¹²³ Under this doctrine, negligence by an original tortfeasor exposes that tortfeasor to liability for increased harm caused by the subsequent negligence of other tortfeasors.¹²⁴ For example, a party who is initially at fault for causing an accident can be held liable for additional injuries incurred by the victim through subsequent negligent medical treatment.¹²⁵ Courts that rely on this reasoning state that it is just as foreseeable to a primary accident-tortfeasor that equipment in a car may be defective as it is that a doctor may negligently treat the plaintiff's injuries.¹²⁶ Because the primary tortfeasor is liable in the latter case for the additional injuries caused by the negligent medical treatment, these courts reason that the plaintiff in an enhanced-injury case should be held at least partially responsible for causing the enhanced injuries.¹²⁷

117. *Id.* at 340.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 346.

122. *Id.*

123. *Gen. Motors Corp. v. Farnsworth*, 965 P.2d 1209, 1217–18 (Alaska 1998); *Moore v. Chrysler Corp.*, 596 So. 2d 225, 238 (La. Ct. App. 1992).

124. *KEETON ET AL.*, *supra* note 16, § 44, at 301.

125. *KEETON ET AL.*, *supra* note 16, § 44, at 310.

126. *See, e.g., Farnsworth*, 965 P.2d at 1217–18; *Moore*, 596 So. 2d at 238.

127. *See, e.g., Farnsworth*, 965 P.2d at 1217–18; *Moore*, 596 So. 2d at 238.

3. *Policy Concerns*

Other courts conclude, with little analysis, that primary fault should be compared with enhanced-injury fault. Some of these courts state that comparative fault applies to strict liability, product liability, or enhanced-injury claims.¹²⁸ Then, with little analysis of the manner in which comparative fault should operate in enhanced-injury claims, or the types of “fault” that should be compared in an enhanced-injury case, these courts compare primary fault with enhanced-injury fault.¹²⁹ For example, in *Kidron, Inc. v. Carmona*,¹³⁰ the driver of a pickup truck was killed when he negligently drove into the rear of a delivery truck.¹³¹ The force of the impact shoved the smaller pickup truck under the delivery truck’s rear assembly, which cut through the passenger compartment of the pickup, killing the driver.¹³² The decedent’s estate brought suit against the manufacturer of the delivery truck, alleging negligence and strict liability in assembling the truck without a rear under-ride guard, which allegedly would have prevented the pickup truck from being forced underneath the delivery truck’s bed during the collision.¹³³ *Kidron* raised the defense of comparative negligence, arguing that the decedent’s fault in causing the initial accident should reduce any recovery for the enhanced injuries that caused his death.¹³⁴ The trial court denied *Kidron*’s defense,¹³⁵ but the Florida Court of Appeals reversed, holding that the manufacturer’s defense should have gone to the jury.¹³⁶ The Court of Appeals characterized the issue as “whether the rules of comparative negligence should apply in a claim for strict liability in the context of [an enhanced-injury claim]”¹³⁷ The court then concluded “that principles of comparative negligence should be

128. See, e.g., *Zuern v. Ford Motor Co.*, 937 P.2d 676, 681–82 (Ariz. Ct. App. 1997); *Daly v. Gen. Motors Corp.*, 575 P.2d 1162, 1172 (Cal. 1978); *Kidron, Inc. v. Carmona*, 665 So.2d 289, 292 (Fla. Dist. Ct. App. 1995); *Day v. Gen. Motors Corp.*, 345 N.W.2d 349, 357 (N.D. 1984); *Whitehead v. Toyota Motor Corp.*, 897 S.W.2d 684, 694 (Tenn. 1995).

129. *Zuern*, 937 P.2d at 681–82; *Daly*, 575 P.2d at 1175; *Kidron*, 665 So.2d at 292–93; *Day*, 345 N.W.2d at 358; *Whitehead*, 897 S.W.2d at 694.

130. 665 So. 2d 289 (Fla. Dist. Ct. App. 1995).

131. *Id.* at 290.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* at 291.

137. *Id.* at 292.

applied in the same manner in a strict liability suit, regardless of whether the injury at issue has resulted from the primary or secondary collision.”¹³⁸

Other courts state that fairness and good reason mandate a comparison of primary fault with enhanced-injury fault.¹³⁹ In addition, some commentators have argued that public policy dictates comparing primary fault with enhanced-injury fault in automobile cases in order to deter driver misconduct.¹⁴⁰ Otherwise, they contend, drivers will have insufficient incentives to abstain from negligent driving.¹⁴¹

B. *The Minority Approach: Distinguishing Between the Primary Injuries and the Enhanced Injuries*

A minority of courts do not compare primary fault with enhanced-injury fault when apportioning responsibility for enhanced injuries.¹⁴² These courts focus solely on the enhancement of injuries because the enhanced-injury doctrine presupposes the occurrence of primary accidents, regardless of their cause.¹⁴³ They note that an enhanced-injury duty requires reasonable steps to prevent only the *enhancement* of injuries in such accidents.¹⁴⁴ Furthermore, because an enhanced-injury duty focuses solely on enhancement of injuries, these courts distinguish between proximate cause of the primary accident and proximate cause of enhanced injuries.¹⁴⁵ They further state that only breach of a duty to

138. *Id.*

139. *See, e.g.,* *Montag v. Honda Motor Co.*, 75 F.3d 1414, 1419 (10th Cir. 1996); *Trust Corp. of Mont. v. Piper Aircraft Corp.*, 506 F. Supp. 1093, 1098 (D. Mont. 1981). Some commentators have argued that refusing to compare all of a plaintiff’s conduct places “extraordinary hardships” on manufacturers who are singled out for “discriminatory application” of proximate cause and comparative fault principles. *Vickles & Oldham, supra* note 112, at 439.

140. *Vickles & Oldham, supra* note 112, at 440.

141. *Vickles & Oldham, supra* note 112, at 440.

142. *See, e.g.,* *Kutsuđeras v. AVCO Corp.*, 973 F.2d 1341, 1344–45 (7th Cir. 1992); *Jimenez v. Chrysler Corp.*, 74 F. Supp. 2d 548, 566 (D.S.C. 1999); *Timmons v. Ford Motor Co.*, 949 F. Supp. 859, 862–63 (S.D. Ga. 1996); *Cota v. Harley Davidson, Inc.*, 684 P.2d 888, 895–96 (Ariz. Ct. App. 1984); *Reed v. Chrysler Corp.*, 494 N.W.2d 224, 230 (Iowa 1992); *Andrews v. Harley Davidson, Inc.*, 796 P.2d 1092, 1095–96 (Nev. 1990).

143. *See, e.g.,* *Kutsuđeras*, 973 F.2d at 1344–45; *Jimenez*, 74 F. Supp. 2d at 566; *Cota*, 684 P.2d at 894–95; *Reed*, 494 N.W.2d at 230; *Andrews*, 796 P.2d at 1095–96.

144. *See, e.g.,* *Kutsuđeras*, 973 F.2d at 1344–45; *Jimenez*, 74 F. Supp. 2d at 566; *Cota*, 684 P.2d at 895–96; *Reed*, 494 N.W.2d at 230; *Andrews*, 796 P.2d at 1095.

145. *See, e.g.,* *Kutsuđeras*, 973 F.2d at 1344–45; *Jimenez*, 74 F. Supp. 2d at 566; *Cota*, 684 P.2d at 895–96; *Reed*, 494 N.W.2d at 230; *Andrews*, 796 P.2d at 1095.

prevent enhanced injuries can constitute a proximate cause of such injuries.¹⁴⁶ Moreover, they reason that the cause of the primary accident, while relevant to the cause of the primary injuries, is legally irrelevant to the cause of the enhanced injuries.¹⁴⁷

The Iowa Supreme Court's decision in *Reed v. Chrysler Corp.*¹⁴⁸ provides an example of the minority approach. In *Reed*, the plaintiff was a passenger in a Jeep whose driver, intoxicated and speeding, negligently drove off the road.¹⁴⁹ Once off the road, the Jeep rolled onto its fiberglass top, breaking it, and continued to slide 300 feet in an upside-down position.¹⁵⁰ During the vehicle's slide, the plaintiff's arm became pinched between the Jeep's roll bar and the highway, causing severe fractures.¹⁵¹ The plaintiff alleged that Chrysler negligently designed its hardtop with fiberglass instead of steel, and that this defect caused his arm injury.¹⁵²

Chrysler sought to introduce evidence that the plaintiff and driver were intoxicated prior to the primary collision.¹⁵³ The Iowa Supreme Court held, however, that evidence of the driver's and plaintiff's intoxication was irrelevant to liability for the plaintiff's enhanced injuries.¹⁵⁴ The court reasoned that the enhanced-injury theory presupposes the occurrence of primary collisions, whatever their cause.¹⁵⁵ Therefore, courts should focus solely on the enhancement of the plaintiff's injuries and, for that reason, ought to concentrate only on the manufacturer's fault in enhancing the plaintiff's injuries.¹⁵⁶ Any part that the plaintiff played in causing the primary collision was irrelevant.¹⁵⁷

A United States District Court has also held that primary fault should not be compared with enhanced-injury fault, not only because primary

146. See, e.g., *Kutsuheras*, 973 F.2d at 1344-45; *Jimenez*, 74 F. Supp. 2d at 566; *Cota*, 684 P.2d at 895-96; *Reed*, 494 N.W.2d at 230; *Andrews*, 796 P.2d at 1095-96.

147. See, e.g., *Kutsuheras*, 973 F.2d at 1344-45; *Jimenez*, 74 F. Supp. 2d at 566; *Cota*, 684 P.2d at 895-96; *Reed*, 494 N.W.2d at 230; *Andrews*, 796 P.2d at 1095-96.

148. 494 N.W.2d 224 (Iowa 1992).

149. *Id.* at 225-26.

150. *Id.* at 226.

151. *Id.*

152. *Id.* at 227-28.

153. *Reed v. Chrysler Corp.*, 494 N.W.2d 224, 229-30 (Iowa 1992).

154. *Id.* at 230.

155. *Id.*

156. *Id.*

157. *Id.*

fault is legally irrelevant to the cause of enhanced injuries, but also because the very concept of enhanced injury fairly apportions fault and damages on a comparative basis.¹⁵⁸ The defendant-manufacturer is liable only for that portion of the plaintiff's injuries proximately caused by its breach—the enhanced injuries.¹⁵⁹ The plaintiff is responsible only for that portion of her injuries proximately caused by her breach—the primary injuries.¹⁶⁰

IV. WASHINGTON COURTS SHOULD NOT USE A PLAINTIFF'S PRIMARY FAULT TO REDUCE THE PLAINTIFF'S RECOVERY FOR ENHANCED INJURIES

Washington courts should not use a plaintiff's primary fault to reduce a plaintiff's recovery for enhanced injuries. Under the enhanced-injury doctrine, the primary accident and injury enhancement are two separate torts, each consisting of its own distinct negligence elements. Therefore, the mere fact that a plaintiff has breached a primary duty—and is thus guilty of primary fault—does not mean that the plaintiff has breached an enhanced-injury duty—and, thus, is not necessarily guilty of enhanced injury fault. Furthermore, under Washington's scheme of comparative fault and law of proximate cause, a court cannot reduce a plaintiff's recovery for enhanced injuries if the plaintiff is guilty of only primary fault (and not enhanced injury fault). Finally, using primary fault to reduce a plaintiff's recovery for enhanced injuries will result in decreased product safety, windfalls for manufacturers, and punitive consequences for plaintiffs.

A. Under the Enhanced-Injury Doctrine, Fault for Enhanced Injuries Is Separate and Distinct from Fault for Primary Injuries

Under the enhanced-injury doctrine, the primary accident and injury enhancement are two distinct torts.¹⁶¹ An enhanced-injury duty is a duty

158. *Jimenez v. Chrysler Corp.*, 74 F. Supp. 2d 548, 566 (D.S.C. 1999).

159. *Id.*

160. *Id.*

161. *See Baumgardner v. Am. Motors Corp.*, 83 Wash. 2d 751, 756–58, 522 P.2d 829, 832–33; *see also supra* notes 15–25 and accompanying text; *supra* Section II.B. Enhanced injuries are defined both by the type of harm and by the severity of the harm. Hence, an enhanced injury may be an additional type of harm that occurs—for example burns are a different type of harm than bumps and bruises. However, the enhanced injury may also be an increase in the severity of the same type

to reasonably prevent *only the enhancement* of primary injuries; a separate duty governs the prevention of un-enhanced primary injuries.¹⁶² Moreover, an enhanced injury is, by definition, separate and distinct from a primary injury; it is an enhancement of a primary injury due to some conduct—for example, production of a defective product—that did not cause the primary accident but enhanced the injury suffered in the primary accident.¹⁶³ Proof of injury enhancement is essential for the survival of an enhanced-injury claim; before addressing the question of apportioning fault for an enhanced injury, the trier-of-fact must first find an injury enhancement that is distinct and separate from the primary injuries.¹⁶⁴ Therefore, courts must analyze the negligence elements of the injury enhancement separately from the elements of the primary accident.

Some courts refuse to separate the primary accident from the injury enhancement.¹⁶⁵ For example, in *Trust Corp. of Montana v. Piper Aircraft Corp.*,¹⁶⁶ the decedent negligently caused his plane to crash but allegedly died as a result of the defendant's failure to provide a shoulder harness restraint system.¹⁶⁷ The court ruled that the plaintiff's contributory negligence in causing the initial accident should be compared with the defendant's failure to provide a shoulder harness

of harm—for example, severe whiplash, bumps, and bruises are different than minor whiplash, bumps, and bruises.

162. See *Baumgardner*, 83 Wash. 2d at 756–58, 522 P.2d at 832–33; see also *supra* notes 28–29 and accompanying text; *supra* Section II.B.

163. See *Baumgardner*, 83 Wash. 2d at 752, 522 P.2d 829 at 830 (stating that a court must decide “whether the manufacturer of an automobile involved in a collision is liable for injuries caused or enhanced because of a defect . . . even though the defect did not cause or contribute to the collision itself.”); see also *Harris*, *supra* note 2, at 649 (“The [enhanced injury] theory should be applied to any situation in which an object or conduct does not cause contact, but wrongfully causes the damage from the contact to be greater than it would have been had a deficiency in the object or conduct not existed.”).

164. See *Baumgardner*, 83 Wash. 2d at 758, 522 P.2d at 833 (“[T]he 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.”); see also *KEETON ET AL.*, *supra* note 16, § 30, at 165 (“[P]roof of damage [is] an essential part of the plaintiff's case.”).

165. See, e.g., *Montag v. Honda Motor Co.*, 75 F.3d 1414, 1419 (10th Cir. 1996); *Keltner v. Ford Motor Co.*, 748 F.2d 1265, 1267–68 (8th Cir. 1984); *Hinkamp v. Am. Motors Corp.*, 735 F. Supp. 176, 178 (E.D.N.C. 1989); *Trust Corp. of Mont. v. Piper Aircraft Corp.*, 506 F. Supp. 1093, 1098 (D. Mont. 1981); *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 428 (Tex. 1984).

166. 506 F. Supp. 1093 (D. Mont. 1981).

167. *Id.* at 1094.

restraint system because courts should consider all of the factors that contributed to the event that caused the plaintiff's injuries.¹⁶⁸

Other courts consider the primary accident and the injury enhancement as two separate events and, therefore, two separate torts.¹⁶⁹ For example, in *Reed v. Chrysler Corp.*,¹⁷⁰ an intoxicated plaintiff negligently drove his Jeep off the road, causing a rollover accident.¹⁷¹ Due to an allegedly defective top, the plaintiff's arm became pinched between the Jeep's roll bar and the highway, causing severe fractures.¹⁷² The Iowa Supreme Court held that the initial rollover accident was a separate tort from the arm fractures, reasoning that the enhanced-injury theory presupposes the occurrence of primary accidents, whatever their cause, and therefore focuses solely on the enhancement of injuries.¹⁷³ Unlike the *Piper Aircraft* court, the *Reed* court considered the injury enhancement separately from the primary accident and, consequently, considered the elements of fault for the primary accident separately from the elements of fault for the injury enhancement. The *Reed* approach is consistent with the enhanced-injury doctrine.

Courts that treat the primary accident and injury enhancement as a single, indivisible event gloss over the analytical distinctions between primary accidents and injury enhancement required by the enhanced-injury doctrine. Because only injury enhancement is at issue in an enhanced-injury claim, only enhanced-injury fault is relevant when apportioning fault for enhanced injuries. Many courts that fail to make the distinction between the primary accident and injury enhancement may actually be faced with cases that should be dealt with at the damages stage, prior to the issue of apportionment. For example, in *Piper Aircraft*, it may not have been possible to distinguish between the injuries caused by the plane crash and the allegedly separate injuries that resulted from the defective restraint system.¹⁷⁴ Therefore, there was

168. *Id.* at 1098.

169. *See, e.g.,* *Kutsugeris v. AVCO Corp.*, 973 F.2d 1341, 1344-45 (7th Cir. 1992); *Jimenez v. Chrysler Corp.*, 74 F. Supp. 2d 548, 566 (D.S.C. 1999); *Timmons v. Ford Motor Co.*, 949 F. Supp. 859, 862-63 (S.D. Ga. 1996); *Cota v. Harley Davidson, Inc.*, 684 P.2d 888, 895 (Ariz. Ct. App. 1984); *Reed v. Chrysler Corp.*, 494 N.W.2d 224, 230 (Iowa 1992); *Andrews v. Harley Davidson, Inc.*, 796 P.2d 1092, 1095-96 (Nev. 1990).

170. 494 N.W.2d 224 (Iowa 1993).

171. *Id.* at 225-26.

172. *Id.* at 226.

173. *Id.* at 230.

174. *Trust Corp. of Mont. v. Piper Aircraft Corp.*, 506 F. Supp. 1093, 1094 (D. Mont. 1981); *see also* *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 417 (Tex. 1984) (involving airplane crash).

likely no separate injury enhancement and, consequently, the issue of apportionment would not have arisen.

Once it is established that there is a distinction between primary injuries and injury enhancement, a court must consider the elements of fault for each harm separately. In negligence law generally, each distinct harm corresponds to an equally distinct duty to reasonably minimize that harm.¹⁷⁵ A party's duty to prevent one harm does not necessarily mean that the party has a duty to prevent another harm.¹⁷⁶ Therefore, the duty to prevent an injury enhancement, which by definition is a separate harm from a primary injury, is distinct from the duty to prevent a primary injury. In an enhanced-injury claim, a court must determine which parties had a duty to prevent injury enhancement, which is necessarily a separate inquiry from whether those same parties had a duty to prevent primary injuries.¹⁷⁷

Moreover, breach of a duty to prevent enhanced injury is not necessarily the same as breach of a duty to prevent primary injuries.¹⁷⁸ Conduct constituting breach of an enhanced injury operates independently from conduct constituting breach of a primary duty and brings about a different type of harm.¹⁷⁹ Breach of the primary duty, for example Mary's failure to stop at the stop sign, leads to primary injuries—the bumps and bruises. Breach of the enhanced-injury duty—the gasoline tank defect—brings about an enhancement of the primary injuries—the severe burns. Therefore, a party's conduct must be compared to that party's distinct duty to determine whether the party has breached that duty.

175. See *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Eng'g Co. Ltd. (the "Wagon Mound #1")*, [1961] App. Cas. 388, 426 (P.C. 1961); see also *supra* notes 66–71 and accompanying text.

176. See *Overseas Tankship*, [1961] App. Cas. at 426; see also *supra* notes 72–74 and accompanying text.

177. See *Baumgardner v. Am. Motors Corp.*, 83 Wash. 2d 751, 756–57, 522 P.2d 829, 832 (1974); *Overseas Tankship*, [1961] App. Cas. at 426; see also *supra* notes 66–74 and accompanying text.

178. See *Overseas Tankship*, [1961] App. Cas. at 426; see also *supra* notes 75–77 and accompanying text.

179. See *Overseas Tankship*, [1961] App. Cas. at 426; see also *supra* notes 75–77 and accompanying text.

B. Under Washington's Comparative Fault Scheme, a Court Cannot Hold a Plaintiff Responsible for Enhanced Injuries if the Plaintiff Has Breached Only a Duty To Prevent the Primary Accident

In order to show that the plaintiff was also partially at fault for the enhanced injuries, the defendant must show that the plaintiff had a duty to avoid injury enhancement, the plaintiff breached that duty, and the plaintiff's act was a proximate cause of the enhanced injury.¹⁸⁰ Frequently, a plaintiff will not have a duty to prevent injury enhancement because the enhanced injuries are not foreseeable from the plaintiff's perspective.¹⁸¹ Furthermore, conduct that constitutes breach of a primary duty cannot constitute breach of an enhanced-injury duty.¹⁸² Moreover, a plaintiff's primary fault is not a proximate cause of enhanced injuries under Washington law.¹⁸³ Washington's statutory comparative fault scheme supports this analysis.¹⁸⁴ Finally, plaintiffs can be apportioned responsibility for enhanced injuries only if they are guilty of enhanced-injury fault.¹⁸⁵ Therefore, Washington courts should not reduce a plaintiff's recovery for enhanced injuries based on primary accident fault.

180. An enhanced-injury claim consists of the basic elements of negligence. *Baumgardner*, 83 Wash. 2d at 758, 522 P.2d at 833. The elements of negligence are duty, breach, causation, and damages. *Degel v. Majestic Mobile Manor, Inc.*, 129 Wash. 2d 43, 48, 914 P.2d 728, 731 (1996); *KEETON ET AL.*, *supra* note 16, § 30, at 164–65. A finding of comparative fault involves the same considerations as a finding of negligence. See WASH. REV. CODE § 4.22.015 (2000) (“Fault includes acts or omissions . . . that are in any measure negligent or reckless toward the person or property of the actor or others . . .”); see also *Geschwind v. Flanagan*, 121 Wash. 2d 833, 838, 854 P.2d 1061, 1064 (1993) (quoting *Seattle-First Nat’l Bank v. Shoreline Concrete Co.*, 91 Wash. 2d 230, 238, 588 P.2d 1308, 1314 (1978) (“A plaintiff’s negligence relates to a failure to use due care *for his own protection . . .*”)); *KEETON ET AL.*, *supra* note 16, § 65, at 451 (“Contributory negligence is conduct on the part of the plaintiff, contributing as a legal cause to the harm he has suffered, which falls below the standard to which he is required to conform for his own protection.”). Therefore, to find an enhanced injury plaintiff guilty of comparative fault, a court must find (1) that the plaintiff had a duty to herself to reasonably minimize a foreseeable risk of enhanced injury, (2) that the plaintiff breached her duty, and (3) that the plaintiff’s breach proximately caused (4) an enhanced injury.

181. See *infra* Part IV.B.1.

182. See *infra* Part IV.B.2.

183. See *infra* Part IV.B.2.

184. See *infra* Part IV.B.2.

185. See *infra* Part IV.B.4.

1. *A Plaintiff's Breach of a Primary Duty Cannot Constitute Breach of a Duty To Avoid Injury Enhancement*

To find that a plaintiff has breached an enhanced-injury duty, a court must first determine that the plaintiff had an enhanced-injury duty.¹⁸⁶ Duty depends on foreseeability of the harm.¹⁸⁷ To impose a duty on a plaintiff to avoid enhanced injuries, it must be foreseeable from the plaintiff's perspective that her conduct raises an unreasonable risk of an enhanced injury.¹⁸⁸ Therefore, a plaintiff cannot have a duty to avoid injury enhancement unless she can foresee the injury enhancement.

Frequently, an enhanced injury is simply not foreseeable to a plaintiff and, therefore, the plaintiff will not have a duty to prevent it.¹⁸⁹ For example, it is disingenuous to claim that Mary, our hypothetical plaintiff, should foresee the risk of disabling burns if she runs a stop sign at fifteen miles per hour. Certainly, her conduct raises a foreseeable risk of primary injuries—bumps and bruises. However, Mary can have a duty to prevent the burns only if the risk of burns is foreseeable *to her*. Requiring Mary to foresee the burns would require her to foresee the hidden defect in the gasoline tank; this is inconsistent with imposing an enhanced injury duty on the manufacturer: the manufacturer is liable for enhanced injuries resulting from such defects, but is relieved from such liability due to Mary's failure to foresee the manufacturer's breach.¹⁹⁰

Some commentators have expressed concern that the severity of the primary collision is intrinsically linked to the severity of the resulting enhanced injuries.¹⁹¹ However, this concern pertains to the scope of an enhanced-injury duty, not to the apportionment of enhanced injuries between parties. An enhanced-injury duty necessarily recognizes the foreseeability of not just the *occurrence* of primary accidents, but also

186. *Baumgardner*, 83 Wash. 2d at 756–57, 522 P.2d at 832 (stating that primary determination with enhanced injury doctrine is whether a duty was owed).

187. *King v. Seattle*, 84 Wash. 2d 239, 248, 525 P.2d 228, 234 (1974); *Wells v. City of Vancouver*, 77 Wash. 2d 800, 802–03, 467 P.2d 292, 294–95 (1970).

188. *Baumgardner*, 83 Wash. 2d at 757, 522 P.2d at 832 (stating that key in determining whether an enhanced injury duty is owed is whether risk of enhanced injury is reasonably foreseeable); see also *King*, 84 Wash. 2d at 248, 525 P.2d at 234; *Wells*, 77 Wash. 2d at 802–03, 467 P.2d at 294–95; *Palsgraf v. Long Island R. Co.*, 162 N.E. 99, 101 (N.Y. 1928).

189. See *Baumgardner*, 83 Wash. 2d at 757, 522 P.2d at 832 (stating that imposition of an enhanced injury duty turns on foreseeability of the risk of injury enhancement).

190. See *Baumgardner*, 83 Wash. 2d at 757–58, 522 P.2d at 832.

191. See *Vickles & Oldham*, *supra* note 112, at 439–40.

the *severity* of such accidents.¹⁹² Therefore, an enhanced-injury duty requires reasonable minimization of the risk of injury enhancement in accidents of a foreseeable severity.¹⁹³ For example, it is foreseeable that Mary will cause a side impact collision in which the vehicles are traveling anywhere from one to Y miles per hour. The fact that a primary accident at Y miles per hour will result in greater injury enhancement than a primary accident at Y-1 miles per hour does not change the fact that the Y miles per hour accident was foreseeable and, thus, the manufacturer had a duty to reasonably minimize the risk of injury enhancement in that accident. In addition, the manufacturer need only take reasonable steps to prevent injury enhancement.¹⁹⁴ Hence, if the manufacturer takes reasonable steps, but the plaintiff causes a primary accident at Y+1 miles per hour and, thus, suffers injury enhancement anyway, the manufacturer is not liable for the enhanced injuries because they could not have been prevented by reasonable precautions.¹⁹⁵

Because the primary and enhanced-injury duties are distinct and separate,¹⁹⁶ a plaintiff's conduct that constitutes breach of a primary duty does not necessarily constitute breach of an enhanced-injury duty. Conduct constitutes breach of an enhanced-injury duty when it is foreseeable that the conduct raises the risk of the injury enhancement.¹⁹⁷ Therefore, conduct constituting breach of a *primary* duty could also constitute breach of an *enhanced injury* duty *only* if it is foreseeable that

192. This proposition is implicit in the concept of foreseeing circumstances that give rise to a risk of injury enhancement. A side-impact automobile collision at thirty miles per hour might raise a foreseeable risk of injury enhancement, while the same collision at two miles per hour might not. *See, e.g., Larsen v. Gen. Motors Corp.*, 391 F.2d 495, 502-03 (8th Cir. 1968):

The intended use and purpose of an automobile is to travel on the streets and highways, which travel more often than not in close proximity to other vehicles and at speeds that carry the possibility, probability, and potential of injury-producing impacts. . . . [Therefore,] the manufacturer should . . . be held to a reasonable duty of care . . . to minimize the effect of accidents.

193. *See id.*

194. *See Baumgardner*, 83 Wash. 2d at 756, 522 P.2d at 832 (stating that, as with negligence defendants generally, "a manufacturer is not expected to produce an accident-free product, it is not an insurer of the users of its product and it need not adopt every possible safety device").

195. *See id.* at 756-57, 522 P.2d at 832-33. In this hypothetical example, the manufacturer could also seemingly avoid liability because the Y+1 miles per hour collision was not foreseeable.

196. *See id.* at 756-58, 522 P.2d at 832-33; *see also supra* notes 161-164 and accompanying text.

197. *See Baumgardner*, 83 Wash. 2d at 754-57, 522 P.2d at 831-33; *Palsgraf v. Long Island R. Co.*, 162 N.E. 99, 101 (N.Y. 1928); *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Eng'g Co. Ltd.* (the "Wagon Mound #1"), [1961] App. Cas. 388, 426 (P.C. 1961); *KEETON ET AL.*, *supra* note 16, § 43, at 280-81; *see also supra* notes 18-21, 59-65, 75-77 and accompanying text.

the conduct in question also raises the risk of injury enhancement. Many courts that compare primary fault with enhanced-injury fault skip this foreseeability analysis. Without an additional duty to prevent enhanced injuries, a plaintiff cannot breach a duty to prevent enhanced injuries.¹⁹⁸

Even if an enhanced injury is foreseeable to a plaintiff, however, conduct constituting breach of a duty to prevent primary injuries, by definition, cannot constitute breach of a duty to prevent enhancement of primary injuries because it is the breach of a primary duty that gives rise to the imposition of an enhanced-injury duty. An enhanced-injury duty presupposes the occurrence of primary accidents; an enhanced-injury duty requires reasonable minimization of the risk of injury enhancement *because* it is foreseeable that a primary accident will occur, regardless of its cause. Therefore, the risk of enhanced injuries—the only harm at issue in an enhanced-injury claim—cannot arise until a primary accident and primary injuries have already occurred.¹⁹⁹ Given that primary injuries may occur, a duty to prevent injury enhancement requires additional conduct to prevent enhancement of the primary injuries. Therefore, in order for there to be a breach of an enhanced-injury duty, there must be some conduct other than that constituting breach of a primary duty.

2. *Plaintiff's Primary Fault Cannot Be a Proximate Cause of Injury Enhancement*

The statutory changes made to Washington's comparative fault scheme support the separation of primary fault from enhanced-injury fault required under the enhanced-injury doctrine. Washington's comparative fault statutes indicate that a plaintiff is responsible only for injuries that she actually caused.²⁰⁰ The statutes make no reference to the enhanced-injury doctrine.²⁰¹ However, the 1981 Tort Reform Act provides that a claimant's contributory fault proportionately diminishes a claimant's recovery of damages only "for an injury *attributable to the claimant's contributory fault.*"²⁰² Furthermore, the 1981 Tort Reform

198. See *Baumgardner*, 83 Wash. 2d at 758, 522 P.2d at 833; *Overseas Tankship*, [1961] A.C. at 426; see also *supra* notes 29, 57–60, 66–77 and accompanying text.

199. See *Baumgardner*, 83 Wash. 2d at 757, 522 P.2d 833; see also *supra* notes 15–25 and accompanying text.

200. See WASH. REV. CODE §§ 4.22.005, .015, .070 (2000).

201. See *supra* Part II.A.

202. WASH. REV. CODE § 4.22.005 (emphasis added).

Act adds that, when apportioning fault under Washington's comparative fault scheme, a court must consider the extent of the causal relation between each party's conduct and the resulting damages.²⁰³ Finally, under the 1986 Tort Reform Act, when apportioning responsibility for a plaintiff's damages, only the fault of entities that "caused" the plaintiff's damages is relevant when apportioning responsibility for the damages.²⁰⁴ By definition, primary fault is not "fault" with respect to enhanced injuries because primary fault constitutes the breach of a duty to prevent primary injuries, not the breach of a duty to prevent enhanced injuries.²⁰⁵ Therefore, under Washington's comparative fault scheme, a plaintiff's primary fault cannot be considered during apportionment of enhanced injuries; only breach of an enhanced-injury duty—enhanced-injury fault—may be considered during enhanced-injury apportionment.

Some courts have ruled that a plaintiff's primary fault is a proximate cause of enhanced injuries, thereby reducing a plaintiff's enhanced-injury recovery.²⁰⁶ Many of these courts assume that primary fault is a proximate cause of enhanced injuries.²⁰⁷ Other courts analogize to the doctrine of subsequent tortfeasors.²⁰⁸ These courts reason that it is just as foreseeable to a tortfeasor who causes a primary automobile accident that equipment in a car may be defective as it is that a doctor may negligently treat the plaintiff's injuries, thereby causing additional injuries.²⁰⁹ Because the primary tortfeasor is liable in the latter case for the additional injuries caused by negligent medical treatment, these courts reason that the plaintiff in an enhanced-injury claim should be held at least partially responsible for causing the enhanced injuries.²¹⁰

However, even if a plaintiff has a duty to prevent injury enhancement, primary fault is not a proximate cause of enhanced injuries under Washington law because enhanced-injury fault constitutes a superseding

203. *Id.* § 4.22.015.

204. *Id.* § 4.22.070(1).

205. *See id.* §§ 4.22.005, .015, .070; *see also supra* Section II.B.

206. *See, e.g.,* *Hinkamp v. Am. Motors Corp.*, 735 F. Supp. 176, 178 (E.D.N.C. 1989); *Zuern v. Ford Motor Co.*, 937 P.2d 676, 681–82 (Ariz. Ct. App. 1996); *Meekins v. Ford Motor Co.*, 699 A.2d 339, 346 (Del. 1997); *Kidron, Inc. v. Carmona*, 665 So. 2d 289, 292 (Fla. Dist. Ct. App. 1995); *Whitehead v. Toyota Motor Corp.*, 897 S.W.2d 684, 694 (Tenn. 1995).

207. *See, e.g., Hinkamp*, 735 F. Supp. at 178; *Zuern*, 937 P.2d at 681–82; *Meekins*, 699 A.2d at 246; *Kidron*, 665 So. 2d at 292; *Whitehead*, 897 S.W.2d at 694.

208. *See, e.g.,* *Gen. Motors Corp. v. Farnsworth*, 965 P.2d 1209, 1217–18 (Alaska 1998); *Moore v. Chrysler Corp.*, 596 So. 2d 225, 238 (La. Ct. App. 1992).

209. *See, e.g., Farnsworth*, 965 P.2d at 1218; *Moore*, 596 So. 2d at 238.

210. *See, e.g., Farnsworth*, 965 P.2d at 1218; *Moore*, 596 So. 2d at 238.

cause of enhanced injuries.²¹¹ An intervening act is a superseding cause when the act is not reasonably foreseeable.²¹² Typically, an act is a superseding cause when (1) the act brings about a different type of harm than otherwise would have resulted from the actor's conduct; or (2) the act operates independently of the situation created by the defendant's conduct.²¹³ By definition, enhanced injuries are distinct from primary injuries; enhanced injuries are an enhancement of primary injuries.²¹⁴ Furthermore, breach of an enhanced-injury duty operates independently of the cause of a primary accident; an enhanced-injury duty presupposes the occurrence of a primary accident.

Even if a breach of an enhanced-injury duty was not a superseding cause of an enhanced injury, primary fault should not constitute a legal cause of an enhanced injury under Washington law. In Washington, legal causation involves a determination of whether, as a matter of policy, the connection between the defendant's breach and the resultant harm is too remote or insubstantial to impose liability.²¹⁵ This question is similar, but not identical, to the question of duty.²¹⁶ By imposing an enhanced-injury duty, the Supreme Court of Washington has said that plaintiffs have the right to be free from unreasonable risks of enhanced injuries in primary accidents.²¹⁷ Because plaintiffs maintain this right, and because it is foreseeable that primary accidents will occur, manufacturers must take reasonable care to prevent further injuries.²¹⁸ Therefore, to penalize the plaintiff for the manufacturer's failure to reasonably minimize a foreseeable risk of injury enhancement is

211. See *McCoy v. American Suzuki Motor Corp.*, 136 Wash. 2d 350, 358, 961 P.2d 952, 957 (1998); *Bullard v. Bailey*, 91 Wash. App. 750, 758–59, 959 P.2d 1122, 1127 (1998); *Cramer v. Dep't of Highways*, 73 Wash. App. 516, 520–21, 870 P.2d 999, 1001; *Anderson v. Dreis & Krump Mfg. Corp.*, 48 Wash. App. 432, 442–43, 739 P.2d 1177, 1184 (1987).

212. *McCoy*, 136 Wash. 2d at 358, 961 P.2d at 957; *Bullard*, 91 Wash. App. at 758–59, 959 P.2d at 1127; *Cramer*, 73 Wash. App. at 520–21, 870 P.2d at 1001; *Anderson*, 48 Wash. App. at 442–43, 739 P.2d at 1184.

213. *Campbell v. ITE Imperial Corp.*, 107 Wash. 2d 807, 813, 733 P.2d 969, 973 (1987); *Anderson*, 48 Wash. App. at 444, 739 P.2d at 1185.

214. See *Baumgardner v. Am. Motors Corp.*, 83 Wash. 2d 751, 752, 522 P.2d 829, 830; *Harris*, *supra* note 2, at 649; see also *supra* note 163 and accompanying text.

215. *Schooley v. Pinch's Deli Mkt., Inc.*, 134 Wash. 2d 468, 478–79, 951 P.2d 749, 754 (1998); *Taggart v. Sandau*, 118 Wash. 2d 195, 226, 822 P.2d 243, 258 (1992); *Hartley v. Washington*, 103 Wash. 2d 768, 779, 698 P.2d 77, 83 (1985).

216. *Schooley*, 134 Wash. 2d at 479, 951 P.2d at 755; see also *supra* notes 82–84 and accompanying text.

217. See *Baumgardner*, 83 Wash. 2d at 758, 822 P.2d at 833.

218. *Id.*

inconsistent with imposing an enhanced-injury duty in the first place. In addition, because it is foreseeable that primary accidents will inevitably occur, the manufacturer is almost always in the better position to prevent enhancement of the primary injuries sustained in primary accidents.²¹⁹ Therefore, the manufacturer should be responsible for minimizing the risk of injury enhancement in such accidents.

3. *Courts That Use Primary Fault To Reduce Recovery for Enhanced Injuries Often Mischaracterize the Relevance of Primary Fault During Apportionment of Enhanced Injuries*

Courts that compare primary and enhanced-injury fault under apportionment for enhanced injuries mischaracterize the primary issue presented when applying comparative fault to enhanced-injury claims: what conduct may be considered fault with respect to enhanced injuries. Some courts incorrectly frame the issue as whether comparative fault should apply to product liability, strict liability, or enhanced-injury claims.²²⁰ In Washington, comparative fault is the law and, therefore, should apply to enhanced-injury claims. The real issue is the relevance of primary fault when comparative fault is applied to an enhanced-injury claim. Put another way, the issue is whether primary fault may be considered “fault” with respect to enhanced injuries. Prior to reducing a plaintiff’s recovery for enhanced injuries, a court must, at minimum, address this question. Consequently, the court must address the elements required to prove “fault”—duty, breach, causation and damages—with respect to the enhanced injuries.²²¹

219. In some cases, a plaintiff is also in a good position to reduce the risk of injury enhancement. For example, a motorcyclist can reduce the risk of enhancement of injuries sustained in a motorcycle accident by wearing a helmet. However, product users are typically unable to prevent injury enhancement once primary accidents occur. For example, Mary could do little about the defect in the gasoline tank that caused severe burns.

220. See, e.g., *Zuern v. Ford Motor Co.*, 937 P.2d 676, 681–82 (Ariz. Ct. App. 1997); *Daly v. Gen. Motors Corp.*, 575 P.2d 1162, 1172 (Cal. 1978); *Kidron, Inc. v. Carmona*, 665 So. 2d 289, 292 (Fla. Dist. Ct. App. 1995); *Day v. Gen. Motors Corp.*, 345 N.W.2d 349, 357 (N.D. 1984); *Whitehead v. Toyota Motor Corp.*, 897 S.W.2d 684, 694 (Tenn. 1995).

221. *Baumgardner*, 83 Wash. 2d at 758, 522 P.2d at 833 (stating that elements of an enhanced injury claim are the negligence elements of duty, breach, causation, and damages); *Geschwind v. Flanagan*, 121 Wash. 2d 833, 838, 854 P.2d 1061, 1064 (1993) (noting that a plaintiff’s negligence is failure to exercise due care toward herself); *KEETON ET AL.*, *supra* note 16, § 65, at 451 (“Contributory negligence is conduct on the part of the plaintiff, contributing as a legal cause to the harm he has suffered, which falls below the standard to which he is required to conform for his own

4. *Plaintiffs Can Be Apportioned Responsibility for Enhanced Injuries, but Only If Guilty of Enhanced-Injury Fault*

At least one commentator has argued that a plaintiff's enhanced-injury recovery should be reduced by the plaintiff's primary fault based on the erroneous notion that, otherwise, plaintiffs are not deterred from misconduct.²²² However, the fact that a plaintiff's primary fault cannot be used to reduce a plaintiff's recovery for enhanced injuries does not mean that a plaintiff can never be apportioned responsibility for her enhanced injuries. If a primary accident is foreseeable to a plaintiff, *and* it is foreseeable that the accident will give rise to a risk of injury enhancement, then the plaintiff must take reasonable steps to minimize the risk of injury enhancement in the event that the primary accident occurs.²²³ If the plaintiff fails to take such steps, her recovery for enhanced injuries should be proportionately reduced by such failure. For example, if a plaintiff sues the manufacturer of a motorcycle helmet, alleging a defect in the helmet caused an enhancement of her injuries in a motorcycle accident, the manufacturer should be permitted to introduce evidence, if any, that even though the helmet was defective, the plaintiff wore it incorrectly, thereby contributing to the enhancement of her injuries. Moreover, plaintiffs are deterred from misconduct by the legal consequences of their primary fault; a plaintiff's recovery for primary injuries is reduced proportionately by the plaintiff's primary fault.²²⁴

protection."); WASH. REV. CODE § 4.22.015 (2000) (defining "fault" to include negligent actions toward oneself); *see also supra* note 180.

222. *See* Vickles & Oldham, *supra* note 112, at 440.

223. *See Baumgardner*, 83 Wash. 2d at 754–57, 522 P.2d at 831–33; *Palsgraf v. Long Island R. Co.*, 162 N.E. 99, 101 (N.Y. 1928); *KEETON ET AL.*, *supra* note 16, § 43, at 280–81; *see also supra* notes 18–21, 61–65 and accompanying text.

224. *See* WASH. REV. CODE §§ 4.22.005, 4.22.015, 4.22.070 (detailing reduction of a plaintiff's recovery under Washington's comparative fault scheme); *Degel v. Majestic Mobile Manor, Inc.*, 129 Wash. 2d 43, 48, 914 P.2d 728, 731 (1996) (stating elements of negligence are duty, breach, causation and damages); *Geschwind*, 121 Wash. 2d at 838, 854 P.2d at 1064 (noting that plaintiff's negligence relates to failure to use due care for her own protection); *KEETON ET AL.*, *supra* note 16, § 30, at 164–65 (stating elements of negligence).

C. *Reducing a Plaintiff's Enhanced-Injury Recovery by Primary Fault Will Decrease Product Safety*

1. *The Purpose of the Enhanced-Injury Doctrine Is To Require Tortfeasors (Not Victims) To Pay for Enhanced Injuries*

By adopting the enhanced-injury doctrine, the Washington Supreme Court has provided that product users are entitled to be free from unreasonable risks of injury enhancement in the event of primary accidents.²²⁵ Courts that compare primary fault with enhanced-injury fault when apportioning responsibility for enhanced injuries undermine the enhanced-injury duty by contradicting this bedrock principle of the enhanced-injury doctrine. The purpose of the enhanced-injury doctrine is to hold parties responsible for failing to take reasonable steps to prevent foreseeable risks of enhanced harm.²²⁶ A duty to reasonably minimize enhanced harm is imposed because it is foreseeable that Mary will be involved in a side-impact collision.²²⁷ Therefore, a court that uses a plaintiff's primary fault to reduce her enhanced-injury recovery uses the very reason for imposing an enhanced-injury duty to reduce the penalty for breach of that duty. Such a reduction is logically inconsistent with the imposition of an enhanced-injury duty. The enhanced-injury tortfeasor (manufacturer) escapes liability due to conduct for which the law has already determined it should be liable, and the reason that the tortfeasor escapes liability is the same reason for which the law imposed liability.²²⁸

225. See *Baumgardner*, 83 Wash. 2d at 758, 522 P.2d at 833. This is merely the correlative of duty. By imposing a duty of care on one party to reasonably minimize the risk of harm to another party, a court is effectively granting the latter party the right to be free from the unreasonable risk of that harm. See Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions As Applied in Judicial Reasoning*, 23 Yale L.J. 16, 28–32 (1913); Arthur L. Corbin, *Legal Analysis and Terminology*, 29 Yale L.J. 163 (1919).

226. See *Baumgardner*, 83 Wash. 2d at 756–58, 522 P.2d at 832–33.

227. See *Baumgardner*, 83 Wash. 2d at 757, 522 P.2d at 833.

228. This is akin to the following scenario: a duty is imposed to stop at a red light (D) because of the foreseeable risk of collision (FR) if drivers do not stop at red lights. However, the existence of the foreseeable risk of collision (FR) is then used to reduce the punishment for breaching the duty to stop at the red light (D). In other words, D is imposed because of the existence of FR, but the penalty for breaching D is reduced because of the existence of FR.

2. *Permitting Reduction of an Enhanced-Injury Recovery by a Plaintiff's Primary Fault Reduces Incentives for a Manufacturer To Create Safer Products*

Reducing a plaintiff's enhanced-injury recovery by a plaintiff's primary fault will decrease manufacturers' incentives to implement safety precautions in products and, therefore, lead to decreased product safety. Washington's product liability law imposes liability on a manufacturer where the burden of implementing a safeguard (B) is less than the probability that injury will occur absent the safeguard (P) multiplied by the magnitude of injury that will occur (L).²²⁹ This creates an incentive for a manufacturer to undergo the burden of designing and constructing a safety precaution into its product where $B < PL$.²³⁰ Therefore, when $B < PL$, the result is increased product safety. If a plaintiff's enhanced-injury recovery is reduced by a plaintiff's primary fault, however, the amount of damages that a manufacturer is required to pay for causing enhanced injuries is correspondingly reduced. Instead of the formula reading $B < PL$, it reads $B < PL - X$, where X is the amount of reduction.²³¹ Hence, the manufacturer's incentive to implement the safety precaution is reduced by the factor X, making the incentive $PL - X$ instead of PL. In cases where the value of B is between PL and $PL - X$, the "X factor" is determinative. The manufacturer will suffer no liability for failing to implement the safety precaution because, while B is less than PL, B is greater than $PL - X$. Therefore, the manufacturer lacks the incentive to implement the safety precaution and the result is a more dangerous product.

Some commentators have argued that reducing a plaintiff's enhanced-injury recovery by a plaintiff's primary fault is necessary to encourage safety on the part of product users.²³² However, there is no need to add this extra layer of incentive for product users to use reasonable care. Product users already have sufficient incentives to use reasonable care, as they are already held accountable for the damages foreseeably caused

229. See WASH. REV. CODE § 7.72.030 (2000).

230. See generally *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

231. "X" is the amount of damages for which the tortfeasor is not legally responsible. It is calculated in the following manner: from the total amount of fault determined to have proximately caused the enhanced injuries, take the percentage erroneously attributed to the primary fault (C_f) and divide it by 100. Then multiply the answer by P. Finally, multiply this second answer by L. In other words, $X = (C_f/100)PL$.

232. *Vickles & Oldham*, *supra* note 112, at 440.

by their fault.²³³ For example, Mary is fully responsible for the primary damages resulting from her failure to stop at the stop sign—the passengers’ bumps and bruises, and the dented automobiles. It is extremely undesirable not only to suffer primary damages, but also to be responsible for those primary damages. For that reason, product users will use reasonable care to avoid primary accidents, and an additional layer of incentive is unnecessary.

3. *Precluding the Use of Primary Fault To Reduce a Plaintiff’s Recovery for Enhanced Injuries Would Avoid Windfalls for Defendants and Punitive Consequences for Plaintiffs*

Using primary fault to reduce the amount that an enhanced-injury tortfeasor must pay for causing enhanced injuries gives the tortfeasor a windfall. Such a reduction relieves the tortfeasor from paying for all of the damages caused by its conduct and, therefore, fails to hold the tortfeasor fully accountable for the consequences of its actions. On the other hand, separating primary fault from enhanced-injury fault prevents plaintiffs from effectively paying punitive damages. A plaintiff who has breached a duty to prevent primary injuries, but not a duty to prevent injury enhancement, is legally responsible for the primary injuries, but not the injury enhancement. Therefore, reducing the plaintiff’s recovery for enhanced injuries by her primary fault forces her to pay for harm for which she is not responsible and, in effect, punishes her for being a victim of enhanced injuries.

As one court has recognized, if properly applied, the enhanced-injury doctrine itself prevents windfalls because it inherently apportions fault on a comparative basis.²³⁴ The primary accident tortfeasors are liable only for that portion of the plaintiff’s injuries proximately caused by their breach—the primary injuries—while the enhanced-injury tortfeasors are liable solely for the portion of the plaintiff’s injuries proximately caused by their breach—the enhanced injuries. Thus, the enhanced-injury doctrine implicitly incorporates comparative fault principles and thereby prevents windfalls to both enhanced-injury victims and enhanced-injury tortfeasors.

233. This is basic negligence law, which holds a party responsible for harm when (1) a party had a duty to reasonably minimize a foreseeable risk of harm, (2) the party breached that duty, and (3) proximately caused (4) harm. KEETON ET AL., *supra* note 16, § 38, at 239.

234. *Jimenez v. Chrysler Corp.*, 74 F. Supp. 2d 548, 566 (D.S.C. 1999).

V. CONCLUSION

Washington courts should not use primary fault to reduce a plaintiff's recovery for enhanced injuries. The enhanced-injury doctrine is merely an application of basic negligence law; parties are liable for failing to reasonably minimize foreseeable risks of harm. Hence, the adoption of the enhanced-injury doctrine recognizes that manufacturers should be accountable for failing to reasonably minimize foreseeable risks of injury enhancement. Since its adoption, however, many courts have undermined the enhanced-injury doctrine by improperly applying comparative fault schemes to enhanced-injury claims. In Washington, comparative fault law requires courts to hold parties responsible for only the consequences of their actions. Thus, when applying comparative fault to enhanced injury claims, Washington courts must take care to determine what conduct constitutes fault with respect to enhanced injuries. Only breach of a duty to minimize injury enhancement—enhanced injury fault—can be considered when apportioning responsibility for enhanced injuries. Permitting use of primary fault to reduce a plaintiff's recovery for enhanced injuries constitutes a violation of established tort law principles (foreseeability, proximate causation and comparative fault), will result in decreased product safety, and undermines a fundamental purpose of the enhanced injury doctrine and tort law generally: holding tortfeasors responsible for the consequences of their actions.