

Manufacturer's Liability for an Uncrashworthy Automobile

Harold T. Commons Jr.

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[E]ven charity itself almost ceases to be a virtue, when they, *whose duty it is* to provide for the poor, make private charity a pretext for public neglect. . . .

. . . . It seems eminently proper and just, that the treasury of the county, which bears the expense of his support, imprisonment and trial, should also be chargeable with his defense.⁷⁹

*Don D. Buchwald**

MANUFACTURER'S LIABILITY FOR AN "UNCRASHWORTHY" AUTOMOBILE

During the year 1965, 49,000 Americans were killed in highway accidents and 1,800,000 were injured, a rate which, if sustained, means that one out of every two living Americans will someday be injured on the highway and one out of 72 will be killed.¹ Research has shown, however, that the traffic casualty rate can be substantially reduced by designing automobiles to provide better protection to passengers during a collision.² The increasing desire on the part of many for this improved protection is indicated by the safety-belt installation campaign of the last decade,³ the recent congressional hearings on automotive safety,⁴

⁷⁹ Webb v. Baird, 6 Ind. 13, 18-19 (1854). [Emphasis added.]

* Editorial Supervisor, J. Philip Hunter.

¹ Time Essay, "Why Cars Must—and Can—Be Made Safer," Time, April 1, 1966, p. 26. This essay further points out that though the number of fatalities has increased 29% since 1961, the death rate has been cut by two-thirds since the 1930's to 5.6 per 100 million vehicle miles in 1965. This decline has been referred to as "an illusion of progress in traffic safety" because of the likelihood that the decline has been affected by such factors as better methods of keeping accident victims alive, increased urbanization, and imprecise methods of acquiring statistics. O'Connell, "Taming the Automobile," 58 Nw. U.L. Rev. 299-300 (1963).

² An example of private research on automobile safety that has been made available to auto manufacturers is the Automotive Crash Injury Research Project of the Cornell Aeronautical Laboratory, Inc. as published in Automotive Crash Injury Research Bulletins, Nos. 1-8 (June 1962 to Jan. 1966). The degree to which traffic casualty statistics are affected by unsafe driving as opposed to unsafe vehicles has been much discussed. Ralph Nader seeks to distinguish between the two when he says: "While the automobile may not be a primary factor in all first collisions—the impacting of the car—it is definitely a primary factor in nearly all of the second collisions—when occupants are thrown against the interior of the vehicle." Nader, "Automobile Design: Evidence Catching Up With the Law," 42 Denver L.C.J. 32, 33 (1965). The problem of the second collision has been graphically described:

The thicket of hard and/or sharp objects inside an automobile, including the metal instrument panel with its protruding controls and knobs, the steering assembly, windshield, windshield pillars, roof, rear-view mirror, door and window knobs, to name only a few, make the automobile a veritable armory of active weapons against a helpless, moving passenger.

O'Connell, *supra* note 1, at 344. For an opinion that the human factor in accidents has been grossly over-emphasized in proportion to the design factor see *id.* at 307-11. It has been estimated that elimination of mechanically hazardous features of interior construction would prevent approximately 75% of traffic fatalities. Moynihan, "Public Health and Traffic Safety," 51 J. Crim. L., C. & P.S. 93, 97 (1960), quoting Dr. C. Hunter Shelden from the Journal of the American Medical Association.

³ For a summary of the degree and effectiveness of seat belt utilization during this period see Stern, "Seat Belt Utilization," Automotive Crash Injury Research Bulletin No. 8 (Jan. 1966) (published by the Cornell Aeronautical Laboratory, Inc.). For an example of recent legislation making the installation of seat belts on new cars mandatory see Wis. Stat. Ann.

⁴ Hearings Before the Senate Commerce Committee, 89th Cong., 2d Sess., ser. 49 (1966). § 347.48 (Supp. 1966).

and the enactment of the National Traffic and Motor Vehicle Safety Act of 1966.⁵ Significantly, the auto manufacturers have played a passive rather than an active role in this quest for more crashworthy vehicles. Seat belts were installed as standard equipment on new cars only after a vigorous public campaign. Dual brakes, anchorages for shoulder harnesses, and collapsible steering columns were made standard equipment on most 1967 models only after the congressional hearings had taken place and the legislation had become inevitable.⁶ Since auto manufacturers must have been aware of the ever-increasing traffic casualty statistics, and since they must have been capable of installing safety features which would have made their vehicles more crashworthy, many persons feel that this passive role is unjustifiable and irresponsible.⁷

It is in this context that the recent case of *Evans v. General Motors Corp.*⁸ was decided. There, the decedent was killed when his 1961 Chevrolet station wagon was hit broadside at an intersection. The personal representative of his estate alleged that, because decedent's car was designed with an X frame instead of a perimeter frame,⁹ the side of the car collapsed upon impact and caused his death. General Motors was charged with negligence in designing the auto, breach of implied warranty, and strict tort liability for equipping the decedent's auto with the inferior X frame. Plaintiff's decision to rely on these three theories of recovery emphasizes the rapid development which has taken place in the products liability field. Some states have candidly adopted the doctrine that a manufacturer is strictly liable for the harm caused by defects in his goods.¹⁰ Many other states have, to varying degrees, accomplished a similar result, either by disregarding the privity restriction in warranty law, or by permitting a liberal utilization of the *res ipsa loquitur* and negligence per se doctrines in negligence law.¹¹ Hence, a manufacturer could conceivably be held liable for producing an uncrashworthy automobile under the negligence, implied warranty, or strict liability theories, depending upon the jurisdiction in which the action is brought.

⁵ Pub. L. No. 89-563 (Sept. 9, 1966). This act directed the Secretary of Commerce to establish safety standards for new motor vehicles and equipment. The initial standards were issued on Jan. 31, 1967, and are to be revised on or before Jan. 31, 1968. The act itself sets up no specific standards to be followed by auto manufacturers. With respect to regulations proposed by the Commerce Department on November 30, 1966, see note 116 infra.

⁶ The safety improvements made on 1967 models are described in "Autos," *Time*, Sept. 9, 1966, p. 91. Further developments programed by Ford for 1969 include cars with collapsible front ends designed to crumple systematically and cushion collisions.

⁷ For criticism of the passive role played by auto manufacturers in auto safety see Keats, *The Insolent Chariots* 97-101 (1958); Nader, *Unsafe at Any Speed* (1965); Moynihan, *supra* note 2; O'Connell, *supra* note 1, at 356-70; *Time* Essay, *supra* note 1.

⁸ 359 F.2d 822 7th Cir., (applying Indiana law,) cert. denied, 87 Sup. Ct. 83 (1966).

⁹ The difference between an X frame and a perimeter frame is that an X frame has no rails running parallel and directly against the body sides of the car between the front and rear axles, while the perimeter frame, on the other hand, incorporates such rails completely around the perimeter of the chassis, under the sheet metal. For discussion of the differences between the two types of frames as advertised by various auto manufacturers including General Motors Corp., see Brief for Plaintiff-Appellant, pp. 4-11, *Evans v. General Motors Corp.* *supra* note 8.

¹⁰ For discussion of which products and in which states the strict liability doctrine applies see Prosser, *Torts* § 97, at 674-78 (3d ed. 1964). For discussion of what constitutes a defect see notes 99-101 *infra* and accompanying text.

¹¹ See Noel, "Manufacturers of Products: The Drift Toward Strict Liability," 24 *Tenn. L. Rev.* 963, 977-80, 985-98 (1957); Wade, "Strict Tort Liability of Manufacturers," 19 *Sw. L.J.* 5-9 (1965); Comment, 64 *Mich. L. Rev.* 1350, 1369-70 (1966).

Negligence

A successful action in negligence against an auto manufacturer would require proof of four elements: (1) that the manufacturer owes the user a duty of due care in the design, construction, and assembly of its vehicles so that they are reasonably safe when involved in collisions, (2) that the manufacturer breached this duty, (3) that the plaintiff was harmed, and (4) that the plaintiff's harm was in fact caused by the manufacturer's breach of duty.¹²

A. *Duty*. There are at least five obstacles which must be overcome if a manufacturer is to be found to owe a duty to design and construct his autos so that they are reasonably safe for occupants when involved in collisions.

1. The Privity Requirement. Prior to *MacPherson v. Buick Motor Co.*¹³ the general rule was that the manufacturer owed no duty to persons not in privity of contract with him.¹⁴ Since most automobiles are purchased from dealers instead of directly from manufacturers, nearly all users were without a cause of action in negligence against the manufacturer who had produced a defective automobile. *MacPherson* held the auto manufacturer liable in negligence for injuries caused by the collapse of a defective wheel, even though the person injured purchased the automobile from a dealer instead of directly from the manufacturer.¹⁵ Today all jurisdictions in the United States have gone at least as far as *MacPherson* in holding that a manufacturer owes the ultimate purchaser of his product a duty to protect against defects which make the product inherently or imminently dangerous.¹⁶ An uncrashworthy automobile, however, might be considered neither inherently¹⁷ nor imminently¹⁸ dangerous. Furthermore, a person injured in an automobile collision may very well not be the original purchaser of the automobile. Nevertheless, though the terms "inherently dangerous" and/or "imminently dangerous" continue to be required by some courts in order to circumvent the privity obstacle,¹⁹ there are decisions in a

¹² See Prosser, *supra* note 10, § 30, at 146.

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

¹⁴ See Prosser, *supra* note 10, § 96, at 659-61; Comment, 64 Mich. L. Rev. 1350, 1356 (1966).

¹⁵ *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916).

¹⁶ See Prosser, *supra* note 10, § 96, at 661. Though Prosser lists Mississippi as a possible exception, *Triplett v. American Creosote Works, Inc.*, 251 Miss. 727, 171 So. 2d 342 (1965) seems to indicate by implication an adoption of the *MacPherson* doctrine. This is pointed out in Comment, 64 Mich. L. Rev. 1350, 1356 n.41 (1966). Also federal courts have for some time interpreted Mississippi law as not requiring privity of contract for recovery in negligence. See *Necaise v. Chrysler Corp.* 335 F.2d 562 (5th Cir. 1964); *Grey v. Hayes-Sammons Chem. Co.*, 310 F.2d 291, 297 (5th Cir. 1962).

¹⁷ 1 Hursh, *American Law of Products Liability* § 6:20, at 545 (1961) defines inherently dangerous products as follows:

For purposes of the rule that privity of contract is not necessary to recovery against a manufacturer or seller of a product for injury to person or property traceable to the inherently dangerous character of the product, a product is held to be inherently dangerous where the danger of injury therefrom stems from the nature of the product itself, and not to any defect in the product.

The term "inherently dangerous" has been used with regard to issues other than privity. See notes 38-43 *infra* and accompanying text.

¹⁸ A product has been described as imminently dangerous "if, although it is not dangerous by its nature and is safe to be used for the purpose intended when properly constructed, it contains a defect which renders it dangerous when applied to its intended use . . ." 1 Hursh, *supra* note 17, § 6:25, at 568. It has been asserted that an automobile involved in a collision is not being used for its intended purpose. See note 31 *infra* and accompanying text.

¹⁹ *Southern Arizona York Refrigeration Co. v. Bush Mfg. Co.*, 331 F.2d 1, 8-9 (9th Cir. 1964); *Casey v. Byrd*, 259 N.C. 721, 131 S.E.2d 375 (1963); *Sutton v. Diimmel*, 55 Wash. 2d

great many jurisdictions in which the manufacturer has been held liable to persons not in privity with him for defective products without regard to whether they are "inherently" or "imminently" dangerous.²⁰ Likewise, there is authority that the duty of due care in the manufacture of products extends to all foreseeable users.²¹ Hence, at least in many of these jurisdictions, the privity obstacle alone will not prevent injured users of an uncrashworthy car from recovering in an action of negligence against the manufacturer.

2. The Design Defect Distinction. Although a manufacturer's duty to protect against defects in construction and assembly of the product has been generally recognized, courts have sometimes been hesitant to impose a duty where alleged design defects are involved.²² This hesitancy probably results from the reasoning that, whereas defects in construction or assembly of a product arise from failure to follow established production procedures, defects in design evolve from creative error and are much more nebulous and difficult to prove. In spite of this difficulty of proof, the overwhelming weight of authority is that a manufacturer owes users the duty of due care in the design of a product.²³ Such a rule is in most cases essential to a recovery in negligence for injuries sustained during a collision in an uncrashworthy car, for the alleged defect will usually be one of design.

3. The Patent-Latent Danger Distinction.²⁴ It has been held that, although

592, 349 P.2d 226 (1960). For additional cases see 1 Frumer & Friedman, Products Liability § 5.03(1), at 30.1 n.2.1 (1964).

²⁰ *Sylvania Elec. Prods., Inc. v. Barker*, 228 F.2d 842 (1st Cir. 1955), cert. denied, 350 U.S. 988 (1956); *Reed & Barton Corp. v. Maas*, 73 F.2d 359 (1st Cir. 1934); *Lill v. Murphy Door Bed Co.*, 290 Ill. App. 328, 8 N.E. 2d 714 (1937). For additional cases see 1 Frumer & Friedman, supra note 19, § 5.03(1), at 30.2-30.5 nn. 3-31.

²¹ *Tomao v. A. P. De Sanno & Son, Inc.*, 209 F.2d 544 (3d Cir. 1954) (applying Massachusetts law); *Liggett & Myers Tobacco Co. v. De Lape*, 109 F.2d 598, 601-02 (9th Cir. 1940) (applying California law); *Lill v. Murphy Door Bed Co.*, 290 Ill. App. 328, 8 N.E.2d 714 (1937); *Okker v. Chrome Furniture Mfg. Corp.*, 26 N.J. Super. 295, 97 A.2d 699 (App. Div. 1953); *Rosebrock v. General Elec. Co.*, 236 N.Y. 227, 140 N.E. 571 (1923). For additional cases see 1 Frumer & Friedman, supra note 19, § 5.03(1) (c), at 34-35 nn. 2-8; Prosser, supra note 10, § 96, at 662-63 nn. 52-55. There are also cases which hold the manufacturer liable in negligence to injured persons who were not even users of the product but were in the vicinity of its probable use. See 1 Frumer & Friedman, supra note 19, § 5.03(1), at 35-36 n.9; Prosser, supra note 10, § 96, at 663 nn. 56-58.

²² See Noel, "Manufacturer's Negligence of Design or Directions for Use of a Product," 71 *Yale L.J.* 816 (1962). See also *Amason v. Ford Motor Co.*, 80 F.2d 265 (5th Cir. 1935); *Davlin v. Henry Ford & Son, Inc.*, 20 F.2d 317 (6th Cir. 1927).

²³ E.g., *Blitzstein v. Ford Motor Co.*, 288 F.2d 738 (5th Cir. 1961); *Carpini v. Pittsburgh & Weirton Bus Co.*, 216 F.2d 404 (3d Cir. 1954); *Goullon v. Ford Motor Co.*, 44 F.2d 310 (6th Cir. 1930); *Bird v. Ford Motor Co.*, 15 F. Supp. 590 (W.D.N.Y. 1936); 2 *Harper & James, Torts* §§ 28.3-28.4, at 1540-42 (1956); *Restatement (Second), Torts* § 398 (1965).

²⁴ Framing this distinction in terms of patent and latent defects is not satisfactory where considerations of negligent design are involved, though such terminology is satisfactory in negligent production cases. This is because in production cases the existence of the defect depends not on the failure to protect against danger but on the product's failure to conform to design specifications, and the requirement that the defect be latent may limit the manufacturer's liability. In design cases, on the other hand, a defect causing personal injury only exists if there is unreasonable failure to protect against the danger, and the requirement that the danger be latent may limit the finding of a defect in the first place. Thus, the patent-latent defect distinction applied to design cases presupposes the answer to the real question of whether a defect exists. The patent-latent danger distinction is not only more appropriate to design cases but it also encompasses production cases because all production defects causing personal injury are necessarily dangerous and therefore such latent defects are also latent dangers.

Illustrative of products which may be classed as patently dangerous are a carving knife, a

a manufacturer owes the duty to users to protect against latent dangers in his product, he is under no duty to protect against those dangers which are patent²⁵ because, in the latter case, the manufacturer has the right to expect that the user will do everything necessary to avoid the danger.²⁶ Accordingly, an auto manufacturer would argue that, because the dangers of a collision are understood by every auto user and are clearly to be avoided, there is no duty to design an automobile capable of withstanding collisions. This argument has two weaknesses. *First*, in most cases which hold that there is no liability for failure to protect against a patent danger, the danger could have been avoided by the exercise of extreme care on the part of the user.²⁷ An automobile collision, on the other hand, may be unavoidable, though the user exercises the utmost caution. *Second*, even where the danger is avoidable and patent, some courts have held a manufacturer liable for failing to reasonably protect against such danger. For example, in *De Eugenio v. Allis-Chalmers Mfg. Co.*²⁸ the plaintiff was injured when he fell against the moving parts of a hay-baling chute which was not equipped with a guard. Recovery against the manufacturer was permitted even though the absence of the guard was patent and the consequent danger was avoidable by the use of extreme care on the part of the user.²⁹

4. The Intended-Unintended Use Distinction. It has been held that a manufacturer has the duty only to make his products safe for their intended use.³⁰

buzzsaw, or an airplane with an exposed propeller. In *Campo v. Scofield*, 301 N.Y. 468, 95 N.E.2d 802 (1950), an onion-topping machine, allegedly defective because it had no stopping device or guard, involved a patent danger. Typical of latent dangers in a product are a defective automobile wheel, see *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916), or an imperfectly constructed scaffold, see *Devlin v. Smith*, 89 N.Y. 470 (1882), or the unwise location of a petcock on a bus, see *Carpini v. Pittsburgh & Weirton Bus. Co.*, 216 F.2d 404 (3d Cir. 1954).

²⁵ *Kahn v. Chrysler Corp.*, 221 F. Supp. 677, 679 (S.D. Tex. 1963); *Stevens v. Allis-Chalmers Mfg. Co.*, 151 Kan. 638, 100 P.2d 723 (1940); *Campo v. Scofield*, supra note 24, at 472, 95 N.E.2d at 804; *Yaun v. Allis-Chalmers Mfg. Co.*, 253 Wis. 558, 34 N.W.2d 853 (1948).

²⁶ *Campo v. Scofield*, supra note 24, at 472, 95 N.E.2d at 804.

²⁷ Thus, in *Campo v. Scofield*, supra note 24, the obvious danger presented by an onion-topping machine without a guard could have been avoided by the exercise of extreme care on the part of the injured plaintiff. This is not to say that the plaintiff was contributorily negligent. See note 59 infra and accompanying text. In *Hatch v. Ford Motor Co.*, 163 Cal. App. 2d 393, 329 P.2d 605 (Dist. Ct. App. 1958) the injury sustained by a boy when he ran into the radiator ornament of a parked car could have been avoided by greater care on the part of the boy. In *Thomas v. Jerominek*, 8 Misc. 2d 517, 170 N.Y.S.2d 388 (Sup. Ct. Ulster County 1957) greater care on the part of an auto passenger could have avoided injury sustained when a door handle was mistaken for a similarly appearing window handle and the rear-hinged door inadvertently blew open while the car was in motion.

²⁸ 210 F.2d 409 (3d Cir. 1954).

²⁹ For other cases holding a manufacturer liable for failing to protect against a patent danger see *Lindroth v. Walgreen Co.*, 338 Ill. App. 364, 87 N.E.2d 307 (1949), aff'd, 407 Ill. 121, 94 N.E.2d 847 (1950); *Karstead v. Phillip Gross Hardware & Supply Co.*, 179 Wis. 110, 190 N.W. 844 (1922). See also 2 Harper & James, *Torts* § 28.5, at 1542-46 (1956); *Noel*, supra note 22, at 836-41.

³⁰ *Mannsz v. MacWhyte Co.*, 155 F.2d 445, 450 (3d Cir. 1946); *Poore v. Edgar Bros. Co.*, 33 Cal. App. 2d 6, 90 P.2d 808 (Dist. Ct. App. 1939); *Zesch v. Abrasive Co.*, 354 Mo. 1147, 1154, 193 S.W.2d 581, 585 (1946); *Restatement, Torts* § 395 (1934). More recently many courts have described a manufacturer's duty to produce safe products as extending to the ordinary or normal use of the product. See, e.g., *McCready v. United Iron & Steel Co.*, 272 F.2d 700, 703 (10th Cir. 1959); *Hentschel v. Baby Bathinette Corp.*, 215 F.2d 102, 105 (2d Cir. 1954). Because these courts continue to talk of a single ordinary or normal use, it is doubtful that this criterion is much different from the older intended use distinction. For consideration of whether the involvement of an automobile in a collision is an ordinary use of the product, see note 91 infra and accompanying text.

Accordingly, it can be argued that, because an auto manufacturer does not intend his vehicles to become involved in collisions, he is not liable for even the most uncrashworthy vehicle.³¹ There is, however, substantial authority holding that a manufacturer owes the user or consumer a duty to make his products safe for reasonably foreseeable, though unintended, uses. For example, in *Phillips v. Ogle Aluminum Furniture, Inc.*,³² a woman, attempting to reach a cupboard, was injured when part of an aluminum chair on which she was standing gave way. The chair had a U-shaped base and tended to tip forward when weight was placed near the front. The court held that, because it could be reasonably anticipated that the chairs would be used to stand upon even though this was not their intended purpose, the manufacturer owed a duty to make them safe for this purpose.³³ Under this line of authority it can be asserted that because the involvement of autos in collisions is reasonably foreseeable, the manufacturer's duty of due care extends to making his autos crashworthy.

It is significant that the typical case involving an allegedly uncrashworthy automobile is distinguishable from other automobile products-liability cases involving accidents caused by such things as defective brakes,³⁴ a defective wheel,³⁵ a defective door-lock mechanism,³⁶ or a car which tends to oversteer.³⁷ In the latter cases the defect caused an otherwise normal and intended set of circumstances, such as routine driving on an average road, to become dangerous. The defects in an allegedly uncrashworthy automobile, on the other hand, arise only in an abnormal and unintended context, an automobile collision.

5. The Inherent Danger Distinction. In the typical automobile products liability case the defect causes the accident. In the case of the uncrashworthy automobile the accident would have occurred wholly apart from any defect, and it is merely better that if the defect had not been present the victim would have been better protected from injury. This distinction is illustrated in the case of *Poore v. Edgar Bros. Co.*³⁸ There the plaintiff was cut by broken glass from his window during an auto accident and the court held that there was no negligence on the part of the manufacturer or vendor because (1) the window glass was not inherently dangerous, but became dangerous only when an outside force intervened, and (2) the window glass was not intended to withstand severe blows as a part of its ordinary use. Authority has been cited which contravenes the intended-unintended use distinction made in *Poore* when the distinction stands alone.³⁹ Likewise, the inherent danger distinction, standing alone, is

³¹ Brief for Defendant-Appellee, p. 2a, *Evans v. General Motors Corp.*, 359 F.2d 822 (7th Cir.), cert. denied, 87 Sup. Ct. 83 (1966). See also *Evans v. General Motors Corp.*, 359 F.2d 822, 825 (1966).

³² 106 Cal. App. 2d 650, 235 P.2d 857 (Dist. Ct. App. 1951).

³³ For other authority that a manufacturer owes the duty to make his product safe for foreseeable but unintended uses see *Tracy v. Finn Equip. Co.*, 310 F.2d 436 (6th Cir. 1962); *Brooks v. Allis-Chalmers Mfg. Co.*, 163 Cal. App. 2d 410, 329 P.2d 575 (Dist. Ct. App. 1958); *Calkins v. Sandven*, 256 Iowa 682, 129 N.W.2d 1 (1964); *Farley v. Edward E. Tower Co.*, 271 Mass. 230, 171 N.E. 639 (1930); *Clement v. Crosby & Co.*, 148 Mich. 293, 111 N.W. 745 (1907); *Steele v. Westinghouse Elec. Corp.*, 107 Ohio App. 379, 159 N.E.2d 469 (1958); *Restatement (Second), Torts* § 395, comments j and k (1965).

³⁴ E.g., *Comstock v. General Motors Corp.*, 358 Mich. 163, 99 N.W.2d 627 (1959).

³⁵ E.g., *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916).

³⁶ E.g., *McKinney v. Frodsham*, 57 Wash. 2d 126, 356 P.2d 100 (1960).

³⁷ *Drummond v. General Motors Corp.*, 35 U.S.L. Weck 2119 (Cal. Super. Ct. July 29, 1966) (case involving a "Corvair" in which manufacturer was held not liable).

³⁸ 33 Cal. App. 2d 6, 90 P.2d 808 (Dist. Ct. App. 1939).

³⁹ See notes 32-33 supra and accompanying text.

vitiated by a substantial number of cases which hold that a manufacturer has a duty to protect users of his product from dangers which would not exist but for some foreseeable intervening cause.⁴⁰

The *Poore* case presents the typical auto collision situation and resolves the simultaneous existence of an extraneously-caused danger and an unintended use in favor of the manufacturer. However, because other courts have found a duty to protect against dangers involving either an extraneous cause or an unintended use alone, it seems that to impose a similar duty where both elements appear together would not be unreasonable. This has been done in at least one case. In *Ford Motor Co. v. Zahn*⁴¹ the driver of the automobile in which plaintiff was a passenger was forced to slam on the brakes when another car suddenly darted in front of him. The plaintiff was thrown forward and his eye was injured on an ash tray with a jagged edge. The court held Ford liable for the negligent manufacture of the ash tray, reasoning that the negligence of the unidentified driver of the other car was foreseeable, and "such acts do not interrupt the connection between the original negligence and the injury."⁴² Significantly, the ash tray was not inherently dangerous, but became dangerous only when an outside force intervened, and the automobile was not being used in a normal or intended manner when the driver slammed on the brakes sufficiently hard to throw his passenger against the dashboard.⁴³

B. Breach of Duty. Should the plaintiff succeed in convincing the court

⁴⁰ For example, in *Carpini v. Pittsburgh & Weirton Bus Co.*, 216 F.2d 404 (3d Cir. 1954), an extraneous object "cooperated" with the faulty design of a petcock causing the brakes on a bus to fail and the plaintiff to be injured. No accident would have occurred if it had not been for the intervening cause of the extraneous object hitting the petcock, yet because this intervening cause was deemed foreseeable, the court held the manufacturer owed a duty to prevent such an accident from occurring. See also *Ford Motor Co. v. Zahn*, 265 F.2d 729 (8th Cir. 1959); *Steele v. Rapp*, 183 Kan. 371, 327 P.2d 1053 (1958); *Haberly v. Reardon Co.*, 319 S.W.2d 859 (Mo. 1958); *Martin v. Bengue, Inc.*, 25 N.J. 359, 136 A.2d 626 (1957).

⁴¹ 265 F.2d 729 (8th Cir. 1959).

⁴² *Id.* at 734.

⁴³ Another example of a case in which a manufacturer has been held to owe a duty to protect against a danger extraneously caused during an unintended use of the product is the lower court decision of *Mickle v. Blackmon*, Cir. Ct., 6th Judicial Cir., York County, S.C. (March 1963) as discussed in *Nader*, supra note 2, at 37. In that case the plaintiff sustained injury when, as the result of a collision, she was thrown against the inadequately protected gear-shift lever of a 1949 Ford. Although the lever was only dangerous when an outside force intervened, and although the automobile was involved in the unintended situation of a collision, the court held the manufacturer liable for the unsafe design of the lever. See also *Bird v. Ford Motor Co.*, 15 F. Supp. 590 (W.D.N.Y. 1936), in which the theory of recovery was negligence, though an express warranty of shatterproof glass was involved.

Underlying the discussion of foreseeability in both the intended-unintended use and inherent danger distinctions is the issue of proximate cause which is usually considered as a limitation on the duty concept in negligence. Proximate cause is discussed at length in *Ford Motor Co. v. Zahn*, supra note 41, at 733, where the rule is stated:

If the negligence was such that the defendant, in the exercise of ordinary care, ought to have anticipated that such negligence was liable to result in injury to others, then the defendant is liable for any injury proximately resulting therefrom, although defendant could not have anticipated the particular injury which plaintiff suffered.

In the *Zahn* case the issue of proximate cause was held to be a jury question. *Ibid.* Likewise in most typical negligence actions against the manufacturer for producing an uncrashworthy automobile, reasonable men could at least differ as to whether the manufacturer should have foreseen that the alleged defect was liable to result in injury to users.

For further discussion of the duty of a manufacturer to produce a crashworthy vehicle see *Nader*, supra note 2; Philo, "Automobile Products Liability Litigation," 4 *Duquesne U.L. Rev.* 181, 183 (1965). Noel, supra note 22, deals more generally with the issue of a manufacturer's negligence of design.

that the auto manufacturer owes the user a duty to produce crashworthy vehicles, the manufacturer must still be shown to have breached this duty by failing to exercise due care in the manufacture or design of the vehicle in question. First it must be shown that some aspect of the vehicle does in fact create undue danger for occupants during a collision. Once this is accomplished, the *res ipsa loquitur* doctrine may be invoked in many cases to raise the presumption or permissible inference⁴⁴ that the defect resulted from negligence on the part of the manufacturer.⁴⁵ The three traditional requirements of the doctrine⁴⁶ can be furnished by arguing: (1) that the defect does not ordinarily exist in the absence of negligence,⁴⁷ (2) that the design and manufacture of the defective vehicle was in the exclusive control of the auto manufacturer, and (3) that the plaintiff was in no way responsible for the presence of the defect. In rebutting this presumption or inference⁴⁸ of negligence, the defendant manufacturer may set forth such evidence as thorough testing of the vehicle without the defect becoming apparent, or industry-wide usage showing conformity with reasonable standards. Custom, however, is not conclusive evidence of reasonable prudence, for negligent conduct may well prevail in an entire community or industry.⁴⁹

C. Cause in Fact. The issue of cause in fact is reached only after it has been determined that the manufacturer breached his duty towards the plaintiff. In the majority opinion of *Evans v. General Motors Corp.*,⁵⁰ Judge Knoch briefly touched on the problem when he said:

Plaintiff does not assert that the "X" frame caused the decedent's auto-

⁴⁴ For discussion of whether the *res ipsa loquitur* doctrine raises a rebuttable presumption or a permissible inference of negligence see 1 Frumer & Friedman, *supra* note 19, § 12.03(6), at 315-16; Comment, 64 Mich. L. Rev. 1350, 1366-67 (1966).

⁴⁵ Representative of products liability negligence cases in which *res ipsa loquitur* has been successfully invoked against the manufacturer are *Becker v. American Airlines, Inc.*, 200 F. Supp. 839 (S.D.N.Y. 1961); *Gandy v. Southwestern Bell Tel. Co.*, 341 S.W.2d 554 (Tex. Civ. App. 1960). For additional cases see 1 Frumer & Friedman, *supra* note 19, § 12.03(2), at 290-93 nn. 2-38. Most cases employing the *res ipsa loquitur* doctrine involve defects in manufacture rather than defects in design. This is probably because in most cases involving alleged design defects, once the plaintiff has established that the design is unreasonably dangerous and that the harm to the plaintiff was foreseeable, the inference of negligence on the part of the designer follows naturally. Such an inference is not natural in the case of an alleged defect in the construction or assembly of a product because of the possibilities that such a defect might ordinarily exist apart from negligence, might occur after the product left the control of the manufacturer, and might have been contributed to by the plaintiff. There seems to be no authority for the position that *res ipsa loquitur* cannot be invoked in the case of an alleged design defect, and in fact at least one case indicates that it can. *Hercules Powder Co. v. Automatic Sprinkler Corp. of America*, 151 Cal. App. 2d 387, 395, 311 P.2d 907, 913 (1957).

⁴⁶ For discussion of the three traditional requirements of the doctrine and the existence in some cases of a fourth requirement of superior knowledge see 1 Frumer & Friedman, *supra* note 19, § 12.03(1), at 285-86; Prosser, *supra* note 10, § 39, at 218.

⁴⁷ More specifically the line of reasoning that could be taken here is that (a) the duty of the manufacturer to produce crashworthy cars has been established, (b) due care in the performance of this duty requires sufficient testing of automobile products to assure their crashworthiness, and (c) such testing would ordinarily lead to detection of the unsafe condition in question.

⁴⁸ See note 44 *supra*.

⁴⁹ What is customary and usual in a particular situation has often been the controlling factor in determining what is reasonably prudent, but, in the words of Judge Learned Hand, "strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices." *The T. J. Hooper*, 60 F.2d 737, 740 (2d Cir.), cert. denied, 287 U.S. 662 (1932).

⁵⁰ 359 F.2d 822 (7th Cir. 1966), cert. denied, 87 Sup. Ct. 83 (1966).

mobile to be driven into the path of the striking car or prevented it from being driven out of that path. Nor does plaintiff contend that the decedent could not have been killed or injured in this same collision had the 1961 Chevrolet station wagon been designed with a perimeter frame.⁵¹

The question can be stated: But for the manufacturer's negligence in producing a defective vehicle, would the plaintiff have been injured as seriously as in fact he was?⁵² Plaintiff may show that his injury would not have been as serious by introducing circumstantial evidence⁵³ and expert testimony.⁵⁴ In order to get the issue to the jury there need be only a reasonable probability that the alleged defect did in fact increase plaintiff's injury.⁵⁵

*D. Defenses.*⁵⁶ Once the negligence of the auto manufacturer for producing an uncrashworthy car is established, he may still escape liability by proving that the plaintiff either was contributorily negligent⁵⁷ or assumed the risk created by the defendant's negligence. These defenses are available in products-liability negligence cases just as in negligence cases generally.⁵⁸ Thus, where a collision involving a defective vehicle is caused by the plaintiff's own negligence, the defense of contributory negligence may bar recovery.⁵⁹ Likewise it could be argued that the uncrashworthy nature of an automobile is in the news daily and the risk of danger created by a rigid steering column or protruding radio knob during a collision is obvious to every automobile rider, and assumed by him. Defendant manufacturers generally prefer, however, to incorporate both these defenses into their initial denial of the existence of a duty.⁶⁰ This is advantageous to the defendant for two reasons. *First*, asserting a defense against negligence may sometimes be interpreted as an indication of defendant's un-

⁵¹ *Id.* at 824.

⁵² For consideration of the "but for" rule see Prosser, *supra* note 10, § 41, at 242-43.

⁵³ See *Lindroth v. Walgreen Co.*, 338 Ill. App. 364, 87 N.E.2d 307 (1949), *aff'd*, 407 Ill. 121, 94 N.E.2d 847 (1950) (circumstantial evidence used to show that a defective vaporizer caused a fire).

⁵⁴ See *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964) (expert testimony on operation of hydraulic automobile brakes is proper evidence to show cause of brake failure).

⁵⁵ See Prosser, *supra* note 10, § 41, at 245. See also note 102 *infra* and accompanying text regarding the advantage an individual plaintiff has once an issue gets before the jury.

⁵⁶ See generally 1 *Frumer & Friedman*, *supra* note 19, §§ 13-14; Keeton, "Assumption of Products Risks," 19 Sw. L.J. 61 (1965); Noel, *supra* note 22, at 873; Comment, 64 Mich. L. Rev. 1350, 1368-69 (1966).

⁵⁷ Contributory negligence is not a complete defense in the few jurisdictions which have adopted the doctrine of comparative negligence. See Prosser, *supra* note 10, § 66, at 443-49 for discussion of which jurisdictions have adopted a comparative negligence doctrine and with regard to what types of cases.

⁵⁸ See *Pinto v. Clairol, Inc.*, 324 F.2d 608 (6th Cir. 1963); *Siemer v. Midwest Mower Corp.*, 286 F.2d 381 (8th Cir. 1961); *Saeter v. Harley Davidson Motor Co.*, 186 Cal. App. 2d 248, 8 Cal. Rptr. 747 (Dist. Ct. App. 1960); *Runnels v. Dixie Drive-It-Yourself Sys., Inc.*, 220 Miss. 678, 71 So. 2d 453 (1954).

⁵⁹ *Saeter v. Harley Davidson Motor Co.*, *supra* note 58. See also *Hixson v. International Harvester Co.*, 219 Cal. App. 2d 88, 32 Cal. Rptr. 905 (Dist. Ct. App. 1963). The last clear chance doctrine is irrelevant in cases involving defective products because the negligent act of the defendant manufacturer must necessarily have preceded the negligent act of the plaintiff. See Prosser, *supra* note 10, § 65, at 437-43. For consideration of the case where plaintiff could have avoided the accident by use of extreme care as distinguished from ordinary care see note 27 *supra* and accompanying text.

⁶⁰ This probably accounts for the dearth of products-liability negligence cases in which the assumption of risk defense has been interposed. 1 *Frumer & Friedman*, *supra* note 19, § 14, at 349.

certainty as to his own freedom from negligence. *Second*, whereas the issue of duty is decided as a matter of law, the issues of contributory negligence and assumption of risk, where in reasonable doubt, are decided by the jury, which is likely to be sympathetic to the plaintiff.⁶¹

The issue of contributory negligence may be translated into duty language by phrasing the question in such terms as whether the manufacturer owed users the duty to make his product safe for unintended uses,⁶² whether the duty existed to protect users from dangers extraneously created,⁶³ or, more generally, whether defendant's negligence proximately caused plaintiff's injury when plaintiff's own negligence was itself a significant cause.⁶⁴ Framing the question in terms of proximate cause, however, usually presents a jury question, and the manufacturer is likely to restrict his argument to the duty issue which presents only a question of law.

The equivalent of assumption of risk is encountered in the holding of many courts that a manufacturer is under no duty to users to protect against patent dangers.⁶⁵ It has been shown, however, that courts are not unanimous in their acceptance of this rule.⁶⁶ The unavoidable automobile collision presents a peculiarly strong case for its abandonment.⁶⁷ The question remains, then, whether the defendant manufacturer could escape liability by asserting plaintiff's assumption of risk or contributory negligence in the event the court determines that the manufacturer owes the duty to protect automobile users from the obvious dangers inherent in a collision. The probable answer is that, if the court feels plaintiff is not entitled to recovery because he assumed the risk or was contributorily negligent, it would interpret defendant's duty accordingly, and the defenses would be disallowed as a matter of law.⁶⁸ As to the assumption of risk defense, this could be justified by arguing that the average automobile user at any given instant considers the likelihood of a collision remote and consequently probably fails to fully appreciate dangers such as those created by hard protruding objects inside the car or the design weakness of an X frame.⁶⁹

⁶¹ Comment, 64 Mich. L. Rev. 1350, 1368 (1966). Regarding the propensity of juries to favor individual plaintiffs over defendant corporations see note 102 infra.

⁶² See notes 30-37 supra and accompanying text.

⁶³ See notes 38-43 supra and accompanying text.

⁶⁴ See note 43 supra.

⁶⁵ See cases cited in note 25 supra.

⁶⁶ See notes 28-29 supra.

⁶⁷ See notes 26 and 27 supra and accompanying text.

⁶⁸ For criticism of the practice of deciding the question in terms of duty instead of assumption of risk see Keeton, supra note 56, at 68.

⁶⁹ For the defense of assumption of risk to be valid the plaintiff must not only have knowledge of the facts which create the danger but he must fully appreciate the danger as well. *Northwest Airlines, Inc. v. Glen L. Martin Co.*, 224 F.2d 120, 126 (6th Cir. 1955), cert. denied, 350 U.S. 937 (1956); *Varas v. Barco Mfg. Co.*, 205 Cal. App. 2d 246, 263, 22 Cal. Rptr. 737, 747 (Dist. Ct. App. 1962); Prosser, *Torts* § 67, at 462 (3d ed. 1964). Where the plaintiff is not actually aware of the danger but in the exercise of ordinary care should have been aware of it, the issue is one of contributory negligence rather than assumption of risk. *Ward v. Knapp*, 134 Cal. App. 2d 538, 540, 286 P.2d 370, 372 (Dist. Ct. App. 1955). Where the assumption of a risk would be unreasonable because the advantage sought is out of proportion to the danger presented, issues of both assumption of risk and contributory negligence are presented and there is an overlap between the two doctrines. Prosser, supra, at 451. In most cases the utility of using an automobile would appear to outweigh the danger of a defect which would make the automobile unsafe in the event of a collision and such use would not be unreasonable.

Warranty

A second theory of recovery which could be asserted against an auto manufacturer by a person injured during a collision in an allegedly uncrashworthy car is breach of warranty. The Uniform Commercial Code, which is the law today in nearly all the states,⁷⁰ deals with express and implied sales warranties in sections 2-312 through 2-318. Section 2-318, however, extends a seller's warranty only to persons in the family or household of the buyer or guests in his home,⁷¹ and the third comment to that section declares that the Code is neutral and is not intended to restrict developing case law on the issue of "whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain."⁷² This "neutral" position on the privity issue raises a question concerning the extent to which the Code controls on other issues in cases where the plaintiff is not in privity with the defendant but succeeds in overcoming this obstacle on the basis of case law. The very fact that the Code asserts neutrality on the privity issue implies that it is not neutral on *other issues* which might arise in such a case.⁷³ If this implication was not intended, the comment would better have simply stated that the Code did not apply to *cases* involving persons in the distributive chain other than those specifically listed. But even if the Code is interpreted as not applying directly to cases involving these persons, it could well be argued that the Code applies by analogy to such cases and should be given substantial weight.⁷⁴ Accordingly, the effect of the Uniform

⁷⁰ As of June 17, 1966, only Louisiana, Idaho, and Arizona had not enacted the Uniform Commercial Code. 1 CCH Installment Credit Guide 4451-52 (1966). [Unless otherwise indicated all references are to the Uniform Commercial Code, 1958 Official text with Comments (hereinafter cited as UCC).]

⁷¹ When California enacted the UCC it omitted section 2-318 in its entirety, criticizing it as "a step backward." Willier & Hart, Uniform Commercial Code Reporter-Digest § 2-318, at 1-100 (1966). Alabama, Colorado, Texas, Utah, and Virginia substantially alter § 2-318 so that a seller's warranty extends to all persons who may be reasonably expected to use, consume, or be affected by the goods. Unif. Laws Ann., Uniform Commercial Code §§ 1-101 to 3-803, pp. 61-62 (Supp. 1965).

⁷² UCC § 2-318, comment 3. The various state legislatures have not enacted into law the comments to the Code, and hence the comments should be given far less weight than the Code's text. Nevertheless, the comments should be considered in interpreting the text where there is more than one possible construction of a provision, since they not only reflect the drafters' intent but they facilitate a uniform construction of the Code by the courts of the various enacting states. Accordingly, comment 3 to UCC § 2-318 would seem to preclude the possible construction of that section that persons apart from the buyer, his family, household, or guests have no action for breach of warranty. The courts have generally considered § 2-318 in light of the comment. See, e.g., Jakubowski v. Minnesota Mining & Mfg. Corp., 80 N.J. Super. 184, 193 A.2d 275 (App. Div. 1963). The Supreme Court of Pennsylvania, however, has recently given the section the restrictive construction seemingly precluded by comment 3, saying: "the comment to the Code . . . which is the basis for the argument that the language of section 2-318 is precatory only was never enacted by the Pennsylvania Legislature." Miller v. Preitz, 422 Pa. 383, —, 221 A.2d 320, 325 (1966). This decision is all the more surprising in light of Webb v. Zern, 422 Pa. 424, 220 A.2d 853 (1966), handed down by the same court on the same day, in which the strict product-liability doctrine of the Restatement (Second), Torts § 402(a) (1964) was adopted in Pennsylvania for the first time. As if to accentuate the anomaly, the majority opinion in Webb cites the dissenting opinion in Miller in support of the need for allowing such recovery in spite of the lack of privity. *Id.* at —, 220 A.2d at 854.

⁷³ Comment 2 to UCC § 2-313 states:

The provisions of Section 2-318 on third party beneficiaries expressly recognize . . . case law development within one particular area. Beyond that, the matter is left to the case law with the intention that the policies of this Act may offer useful guidance in dealing with further cases as they arise.

⁷⁴ Agar v. Orda, 264 N.Y. 248, 190 N.E. 479 (1934) applied the Uniform Sales Act by

Commercial Code upon non-privity issues will be considered in the remaining discussion of auto manufacturer's liability for breach of warranty, even though the typical plaintiff is not in privity with the auto manufacturer.

A. Express Warranty. Where an auto manufacturer expressly warrants his product to be free from a particular defect which has caused harm to the person to whom the warranty was made, the manufacturer is liable for such harm. Successful suits for breach of express warranty, for example, have been maintained for injury sustained in auto collisions where purported shatterproof glass shattered⁷⁵ and where a purported seamless roof actually contained a jagged seam.⁷⁶ However, it is unusual for auto manufacturers to expressly warrant that their automobiles, or parts thereof, are safe in a collision.⁷⁷ The typical breach of warranty action against an auto manufacturer for an uncrashworthy product will most likely be based on a theory of implied warranty.

B. Implied Warranty of Fitness for a Particular Purpose. An implied warranty of fitness for a particular purpose is made where the seller at the time of sale has reason to know that the buyer requires the goods for a particular purpose and is relying on the seller's skill or judgment to select or furnish appropriate goods.⁷⁸ To hold that an auto manufacturer has made such a warranty as to the crashworthiness of his product would require reasoning that his buyer, in most cases the retailer, relied on his skill or judgment to furnish automobiles appropriate for the "particular purpose" of becoming involved in collisions. It seems that this is at most a secondary concern of automobile retailers. Furthermore, the "particular purpose" has been cast in terms of a purpose peculiar to the needs of the particular buyer,⁷⁹ a clarification which makes the finding of this kind of warranty on the part of auto manufacturers all the more difficult.⁸⁰

C. Implied Warranty of Merchantability. Prior to the Uniform Commercial Code merchantable articles were variously described as those which are fit for

analogy to a case involving corporate stock which it intimated were not goods within the meaning of the Act. But see *Wilmington Trust Co. v. Coulter*, 41 Del. Ch. 549, 570-71, 200 A.2d 441, 454 (Sup. Ct. 1964) where the court refused to apply the UCC by analogy because the corporate trustee was not a "merchant" within the meaning of the Code. The reasoning of this case seems unsound since, if the UCC can be applied by analogy at all, the drawing of an analogy between a corporate trustee and a "merchant" would seem reasonable. For further discussion of the applicability of the UCC by analogy see Comment, 8 B.C. Indus. & Com. L. Rev. 81 (1966).

⁷⁵ *Baxter v. Ford Motor Co.*, 168 Wash. 456, 12 P.2d 409, aff'd, 168 Wash. 456, 15 P.2d 1118 (1932). For definitions of an express warranty see UCC § 2-313(1); Uniform Sales Act § 12.

⁷⁶ *Bahlman v. Hudson Motor Car Co.*, 290 Mich. 683, 288 N.W. 309 (1939).

⁷⁷ It is conceivable that a cause of action for breach of express warranty could proceed under the theory that the whole tone of the manufacturer's advertising was such as would naturally lull the consumer into a false sense of security, whereas in reality the product was unreasonably dangerous when involved in a collision.

⁷⁸ UCC § 2-315.

⁷⁹ Comment 2 to UCC § 2-315 states:

A "particular purpose" differs from the ordinary purpose for which the goods are used in that it envisages a specific use by the buyer which is peculiar to the nature of his business whereas the ordinary purposes for which goods are used are those envisaged in the concept of merchantability and go to uses which are customarily made of the goods in question.

But see 1 Williston, Sales § 235, at 605 (rev. ed. 1948).

⁸⁰ An implied warranty of fitness for a particular purpose could exist in such situations as where an automobile is purchased specifically for racing or police work.

the general purpose for which they are sold,⁸¹ those which are suitable for the ordinary use for which they are sold,⁸² or those which are of the general kind described at the time of sale.⁸³ The Uniform Commercial Code requires all merchantable goods to at least be such as "pass without objection in the trade under the contract description," and "are fit for the ordinary purposes for which such goods are used."⁸⁴

The claim that an auto manufacturer breached an implied warranty of merchantability in selling the plaintiff an uncrashworthy car is subject to three difficulties. First, nearly all contracts for the sale of new cars expressly limit the extent of any express or implied warranty to replacement of defective parts and thus seem to negate the possibility of recovery for personal injuries. One such disclaimer was, however, recently held by the New Jersey Supreme Court to be invalid as against public policy because not the result of actual bargaining between the parties to the sale.⁸⁵ Under the Uniform Commercial Code a disclaimer of warranty of merchantability is invalid unless "merchantability" is specifically used in the language of the disclaimer and, in the case of a writing, is conspicuous.⁸⁶

A second difficulty is the concept of privity which has traditionally restricted any breach of warranty action to the parties to the sales contract.⁸⁷ In recent years, however, courts in a number of jurisdictions have, either candidly,⁸⁸ or by invoking one of a number of fictions,⁸⁹ disregarded this requirement, and,

⁸¹ *Burr v. Sherwin Williams Co.*, 42 Cal. 2d 682, 694, 268 P.2d 1041, 1048 (1954); *Twombly v. Fuller Brush Co.*, 221 Md. 476, 491, 158 A.2d 110, 118 (1960); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 370, 161 A.2d 69, 76 (1960).

⁸² *Vincent v. Nicholas E. Tsiknas Co.*, 337 Mass. 726, 729, 151 N.E.2d 263, 265 (1958); *Mead v. Coca Cola Bottling Co.*, 329 Mass. 440, 442, 108 N.E.2d 757, 758 (1953).

⁸³ *Leavitt v. Fiberloid Co.*, 196 Mass. 440, 451, 82 N.E. 682, 687 (1907); Uniform Sales Act § 15(2); 1 Williston, *supra* note 79, § 243, at 642.

⁸⁴ UCC § 2-314(2) in full requires all merchantable goods to at least be such as:

(a) pass without objection in the trade under the contract description; and (b) in the case of fungible goods, are of fair average quality within the description; and (c) are fit for the ordinary purposes for which such goods are used; and (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and (e) are adequately contained, packaged, and labeled as the agreement may require; and (f) conform to the promises or affirmations of fact made on the container or label if any.

Note that failure to meet any one of these criteria renders the goods unmerchantable.

⁸⁵ *Henningsen v. Bloomfield Motors, Inc.*, *supra* note 81 (decided prior to adoption of the UCC in New Jersey). See also *State Farm Mut. Auto. Ins. Co. v. Anderson-Weber, Inc.*, 252 Iowa 1289, 110 N.W.2d 449 (1961); *General Motors Corp. v. Dodson*, 47 Tenn. App. 438, 338 S.W.2d 655 (1960); *Prosser, supra* note 69, § 97, at 680; UCC § 2-302 which states in part, "If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract . . ."

⁸⁶ UCC § 2-316(2).

⁸⁷ For a discussion of the applicability of the UCC to this issue see notes 70-74 *supra* and accompanying text.

⁸⁸ *Vandercook & Son, Inc. v. Thorpe*, 344 F.2d 930 (5th Cir. 1965) (applying Florida law); *Connolly v. Hagl*, 24 Conn. Supp. 198, 188 A.2d 884 (Super. Ct. 1963); *Piercefield v. Remington Arms Co.*, 375 Mich. 85, 133 N.W.2d 129 (1965).

⁸⁹ In some cases manufacturers were held liable on a warranty theory where merchandise did not measure up to advertisements or product labels. See *Pritchard v. Liggett & Myers Tobacco Co.*, 350 F.2d 479 (3d Cir. 1965), cert. denied, 383 U.S. 943 (1966); *Randy Knitwear, Inc. v. American Cyanamid Co.*, 11 N.Y.2d 5, 181 N.E.2d 399, 226 N.Y.S.2d 363 (1962); *Inglis v. American Motors Corp.*, 3 Ohio St. 2d 132, 209 N.E.2d 583 (1965). In other cases liability has been found on the theory that the seller was an agent of the manufacturer or a conduit for the goods. See *Rogers v. U.S. Rubber Co.*, 91 N.H. 398, 20 A.2d 626 (1941); *General Motors Corp. v. Dodson, supra* note 85.

provided the plaintiff finds himself in the right jurisdiction, this obstacle to recovery can be overcome.

The third, and probably the greatest, difficulty lies in convincing the court that an uncrashworthy automobile is, in fact, unmerchantable. A manufacturer has a strong argument in favor of his autos' being merchantable under the Uniform Commercial Code criteria,⁹⁰ since the features which have made automobiles relatively uncrashworthy up to the present time have been found in many, if not all, automobiles produced by all manufacturers. Furthermore, these features become dangerous only in a collision which may not be considered by the court to be an ordinary use of an auto. On the other hand, it could be argued that because such a high percentage of vehicles eventually become involved in accidents,⁹¹ collisions are within the scope of an automobile's ordinary use. Whether or not the automobile in question is found to be merchantable will in the final analysis probably depend on the court's determination of whether an automobile collision constitutes one of "the ordinary purposes for which such goods are used" under the Uniform Commercial Code.⁹²

Strict Liability

Recovery under a theory of strict product liability in tort,⁹³ where adopted,⁹⁴ requires only that a plaintiff show a defective product, the existence of the defect when the product left the control of the manufacturer, injury,⁹⁵ and cause in fact.⁹⁶

In most cases the existence of injury is clear. The problem of cause in fact is identical to the problem previously discussed under negligence and may be handled in the same manner there suggested.⁹⁷ Because in most situations involving a purportedly uncrashworthy automobile the alleged defect is one of design, proving that the defect existed at the time the product left the control of the manufacturer will usually be relatively simple.⁹⁸ Whether or

⁹⁰ See note 84 supra.

⁹¹ More than 1/4 of all American automobiles are involved in injury-producing accidents. Time Essay, "Why Cars Must—and Can—Be Made Safer," Time, April 1, 1966, p. 26.

⁹² See note 84 supra. On sales warranties generally see Hogan, "The Highways and Some of the Byways in the Sales and Bulk Sales Articles of the Uniform Commercial Code," 48 Cornell L.Q. 1, 3-10 (1962); Comment, 64 Mich. L. Rev. 1430 (1966).

⁹³ This theory of recovery has emerged as the result of the parallel evolution of negligence and warranty law in the products-liability field. On the negligence side it is no longer necessary for a plaintiff to show a lack of due care on the part of the manufacturer. On the warranty side a plaintiff need no longer show that a product is not what it was represented to be and the privity restriction does not apply. See note 11 supra and accompanying text. For a discussion of the contrast between the UCC's warranty approach to products liability and the strict products-liability theory see Rapson, "Products Liability Under Parallel Doctrines: Contrasts Between the Uniform Commercial Code and Strict Liability in Tort," 19 Rutgers L. Rev. 692 (1965).

⁹⁴ See note 10 supra.

⁹⁵ Santor v. A & M Karageusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965) extends recovery beyond personal injury loss to pure economic loss. But see Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).

⁹⁶ Regarding these requirements, see generally Restatement, (Second), Torts § 402(a) (1965); Rapson, supra note 93, at 698-99.

⁹⁷ See text accompanying notes 50-55 supra.

⁹⁸ Sometimes where the alleged defect is one of construction or assembly it is extremely difficult, if not impossible, to prove that the condition in question existed when the product left the manufacturer's control. In at least one such case an inference from the circumstances surrounding the accident was permitted. Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964). On this problem see generally Comment, 64 Mich. L. Rev. 1350, 1372-75 (1966).

not the product is defective remains as the major issue under the strict liability in tort doctrine.

A defective product has variously been referred to as one not "reasonably fit for the ordinary purposes for which such articles are sold and used"⁹⁹ or one that is unreasonably dangerous to the user or his property.¹⁰⁰ The criteria for determining if a product is unreasonably dangerous¹⁰¹ are similar to those which are significant in determining whether particular conduct is negligent, but they also illustrate the essential difference between negligence and strict-liability concepts. Negligence is concerned with the reasonableness of the manufacturer's conduct; strict liability ignores his conduct and emphasizes the safety of the product itself, given prudent use. It seems that a plaintiff, not himself negligent, should be able to convince the court at least that reasonable men could differ as to whether an uncrashworthy automobile is unreasonably dangerous or not reasonably fit for ordinary uses. This would get the issue before the jury which tends to favor individual plaintiffs over corporate defendants.¹⁰²

The Evans Decision

The majority and dissenting opinions in *Evans v. General Motors Corp.*¹⁰³ concentrated almost entirely on the negligence theory asserted by plaintiff and virtually ignored the warranty and strict liability theories. Because the privity obstacle to a warranty theory no longer exists in Indiana,¹⁰⁴ and because no mention was made in the opinion of a clause in the sales contract disclaiming liability, the basis of the court's holding that there was no breach of implied warranty is probably that the automobile was of merchantable quality. The plaintiff's strict liability claim was easily met since Indiana courts have not adopted a strict product-liability doctrine as such.¹⁰⁵

In considering the possible negligence of General Motors in designing the X frame, the judges disagreed as to whether an auto manufacturer owes a duty to produce a crashworthy vehicle. The majority opinion written by Judge Knoch inferentially accepted General Motors' argument that its only duty in designing an automobile is to assure that it is "reasonably fit for the purpose for which it was made, without hiding defects which would make it dangerous

⁹⁹ *Santor v. A. & M. Karagheusian, Inc.*, supra note 95, at 67, 207 A.2d at 309. The fact that this language is almost identical to UCC § 2-314(2)(c) suggests that the UCC criteria of merchantability might also be used as a standard by which a product's defectiveness is measured. See *Rapson*, supra note 93, at 700-01.

¹⁰⁰ See Restatement (Second), Torts § 402(a) (1965).

¹⁰¹ Some of these criteria are: (1) the utility of the product despite its alleged defect, (2) the magnitude of the risk created by the alleged defect, (3) the possibility that the plaintiff could have avoided injury by using the product in a more reasonable manner, and (4) the availability of a safer substitute. See Wade, "Strict Tort Liability of Manufacturers," 19 Sw. L.J. 5, 17 (1965). See also Comment, 64 Mich. L. Rev. 1350, 1374 (1966).

¹⁰² *Prosser*, supra note 69, § 36, at 209; Comments, 64 Mich. L. Rev. 1350, 1368 (1966), 74 Yale L.J. 170, 192 (1964).

¹⁰³ 359 F.2d 822 (7th Cir.) (applying Indiana law), cert. denied, 87 Sup. Ct. 83 (1966).

¹⁰⁴ *Dagley v. Armstrong Rubber Co.*, 344 F.2d 245, 254 (7th Cir. 1965) (applying Indiana law).

¹⁰⁵ See *Prosser* supra note 69, § 97, at 674-78; Restatement (Second), Torts § 402(a) (App. 1966). But see *Greeno v. Clark Equip. Co.*, 237 F. Supp. 427 (N.D. Ind. 1965) (applying Indiana law).

to the persons so using it."¹⁰⁶ The opinion cites *Campo v. Scofield*¹⁰⁷ in support of the additional argument that, if it is desirable as a matter of public policy that manufacturers have the higher duty to construct autos in which it is safe to collide, it is the peculiar function of the legislature to create such a duty.

Judge Kiley, dissenting, rejected both arguments. He adopted a higher standard of duty, calling for a manufacturer to "use such care in designing its automobiles that reasonable protection is given purchasers against death and injury from accidents which are expected and foreseeable yet unavoidable by the purchaser despite careful use."¹⁰⁸ As indicated previously, there are cases which rebut the patent danger, inherent danger, and intended use distinctions invoked by the majority and which support this higher duty standard.¹⁰⁹ Judge Kiley cited some of these cases and then argued alternatively that, even if there was no precedent in Indiana establishing the higher standard, yet in the past, federal courts, "as 'Indiana Courts' in diversity cases, participated in developing Indiana law . . . to meet changing conditions."¹¹⁰

The disagreement on the duty standard required of auto manufacturers is understandable in light of the split in authority on each of the issues of the manufacturer's duty to guard against patent dangers, extraneously caused dangers, and dangers encountered during an unintended use.¹¹¹ The disagreement as to the role of the courts in adapting law to meet the changing demands of society reflects the long-standing controversy over the degree to which the judiciary may or should infringe on the constitutionally appointed role of the legislature to create and change the law.¹¹²

Few people would deny that the current needs of our society require that auto manufacturers be given the duty to make their products crashworthy.¹¹³ The court in *Evans* could have imposed this duty either by citing a pertinent line of precedent or by invoking public policy as the critical factor in its decision.¹¹⁴ However, the reluctance of the majority of the court to do either was strategically sound, for a contrary decision would have opened the gates to a flood of litigation avoidable through appropriate legislation. This is because the finding of a duty to construct crashworthy vehicles would relate to a type of automobile already in circulation and possessing identical defects to that alleged in the instant case.

¹⁰⁶ *Evans v. General Motors Corp.*, supra note 103, at 824. General Motors' concept of its duty in the construction of automobiles is discussed at length in Brief for Defendant-Appellee, pp. 20-41, *Evans v. General Motors*, supra note 103.

¹⁰⁷ 301 N.Y. 468, 95 N.E.2d 802 (1950).

¹⁰⁸ *Evans v. General Motors Corp.*, supra note 103, at 827 (dissenting opinion).

¹⁰⁹ See notes 28, 29, 32, 33, 40 supra.

¹¹⁰ *Evans v. General Motors Corp.*, 359 F.2d 822, 826 (7th Cir.) (dissenting opinion), cert. denied, 87 Sup. Ct. 83 (1966), citing *Dagley v. Armstrong Rubber Co.*, 344 F.2d 245 (7th Cir. 1965); *Greeno v. Clark Equip. Co.*, 237 F. Supp. 427 (N.D. Ind. 1965).

¹¹¹ See text accompanying notes 24-43 supra.

¹¹² See *United Steelworkers of America v. R. H. Bouligny, Inc.*, 382 U.S. 145 (1965).

¹¹³ See notes 1 and 2 supra and accompanying text.

¹¹⁴ As to the latter course of action, see *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 404, 161 A.2d 69, 95 (1960); *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916).

CONCLUSION

Under a negligence theory the duty of a manufacturer to produce crashworthy automobiles depends primarily on the resolution of the conflict between authorities as to the duty of a manufacturer to protect against patent dangers, extraneously caused dangers, and dangers occurring during unintended but reasonably foreseeable uses. The success of the claim that the manufacturer breached an implied warranty of merchantability when he produced an uncrashworthy automobile depends on whether a valid disclaimer of such warranty was made at time of sale, whether the particular jurisdiction in which the action is brought requires privity of contract between the parties, and whether the automobile is deemed to be of merchantable quality in spite of its uncrashworthy condition. Under a theory of strict liability, the automobile is defective and recovery will be allowed if it is unreasonably dangerous to the user or his property.

In the recent case of *Evans v. General Motors Corp.*,¹¹⁵ the court determined that a manufacturer neither owes the duty to produce crashworthy automobiles nor breaches a warranty in selling automobiles that are not crashworthy. It also stated that the appropriate method of creating new standards of auto safety is through legislation. The National Traffic and Motor Vehicle Safety Act of 1966 is legislation of the type contemplated by the *Evans* court, and, hopefully, stringent standards will be imposed on the auto manufacturers under it.¹¹⁶ If this occurs, then the *Evans* court will be vindicated, the critical needs of society having been met without unnecessary litigation. On the other hand, should the Secretary of Commerce and the agencies under his control fail to implement the Act effectively so that significant reforms do not materialize, then the legislature may well be considered to have failed in its assigned role, and the courts may be forced to assume a more active role in meeting the public demand for crashworthy automobiles.

*Harold T. Commons, Jr.**

¹¹⁵ 359 F.2d 822 (7th Cir.), cert. denied, 187 Sup. Ct. 83 (1966).

¹¹⁶ Twenty-three proposed safety standards were issued by the National Traffic Safety Agency of the Department of Commerce on November 30, 1966. 31 Fed. Reg. 15212 (1966). Auto manufacturers had until January 3, 1967, to comment upon these proposals and the final standards went into effect on January 31, 1967. See N.Y. Times, Feb. 1, 1967, p. 30, col. 3.

* Editorial Supervisor, Stephen H. Hutzelman.