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SECOND COLLISION LAW—WISCONSIN*

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I. INTRODUCTION

No aspect of the burgeoning law of products liability has generated more controversy than the so-called "second collision" doctrine. Under the second collision, or "crashworthiness" doctrine, the manufacturer of a motor vehicle may be liable for design defects which do not cause the initial accident but which cause additional or more severe injuries when the motor vehicle is involved in a crash or collision.

The doctrine, if not conceived by, was largely brought into being by federal courts in the guise of applying state law to resolve diversity jurisdiction cases. *Erie v. Tompkins*[1] requires that a federal court in a diversity jurisdiction case apply the law that would be applied in a court of the state where it sits.

Nevertheless, the "second collision" doctrine is primarily the creation of the federal court purporting to apply state law in diversity jurisdiction cases. Initially, the Seventh Circuit Court of Appeals, supposedly applying Indiana law, rejected the second collision doctrine.[2] But the tide turned when the Eighth Circuit Court of Appeals proclaimed the second collision doctrine to be the law in a case in which it was supposedly applying the law of Michigan.[3] Later, the Seventh

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1. 304 U.S. 64 (1938).

2. Evans v. General Motors Corp., 359 F.2d 822 (7th Cir.) (Kiley, J., dissenting), *cert. denied*, 385 U.S. 836 (1966). *See* Kircher, *Second Thoughts on "Second Collision,"* 19 FOR THE DEFENSE 64 (1978).

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

Circuit Court of Appeals overruled the view of Indiana law contained in its *Evans* decision and declared that, now, Indiana would follow the *Larsen* decision.[4]

The second collision or crashworthiness doctrine imposes liability on a manufacturer whose product does not cause the initial accident, but where an alleged defect in the product enhances those injuries that otherwise would have occurred from the accident. The older view was that involvement in a collision was outside the intended use of the product; therefore, resulting injuries were not considered to be the responsibility of the manufacturer.[5]

In the *Larsen* case, the driver of an automobile claimed injury as a result of an alleged negligent design of the steering assembly. The head-on collision of the automobile caused a severe backward thrust of the steering wheel into the plaintiff's head. The plaintiff conceded that the design did not cause the accident, but alleged that because of the design he received injuries he would not have otherwise received or, in the alternative, that his injuries would not have been as severe without the alleged defective design. The general rule has been stated as follows:

> [T]he manufacturer has a duty to use reasonable care under the circumstances in the design of a product but is not an insurer that his product is incapable of producing injury, and this duty of design is met when the article is safe for its intended use and when it will fairly meet any "emergency of use" which is foreseeable.[6]

The issue in the *Larsen* case dealt with whether or not a collision was within the "intended use" of the automobile. The court held that the automobile manufacturer is under a duty to use reasonable care in the design of its vehicle to avoid subjecting the user to an unreasonable risk of injury in the event of a collision. The court of appeals in *Larsen* reversed a summary judgment in favor of General Motors and remanded the case for trial. The original trial court had granted summary judgment on the basis that there was no common law duty owed by the manufacturer of a vehicle to protect the plaintiff

4. Huff v. White Motor Corp., 565 F.2d 104 (7th Cir. 1977).

5. *See Evans*, 359 F.2d at 825.

6. *Larsen*, 391 F.2d at 500. *See also* RESTATEMENT (SECOND) OF TORTS § 398 (1965); Annot., 76 A.L.R.2D 83 (1961).

from injury in the event of a head-on collision. On remand the jury returned a verdict in favor of General Motors.

Although the allegations in the *Larsen* case were in terms of negligence, other courts adapted the theory to strict liability. *Huff v. White Motors Corp.*,[7] involved a truck-tractor which jackknifed on the highway, sideswiped a guardrail, and collided with an overpass support. Aside from the structural damage to the tractor, the fuel tank ruptured and caught fire. The flames engulfed the cab area occupied by Huff. Severe burns received in the fire caused his death nine days later. His widow subsequently brought a wrongful death action based on the theory that the defective design of the fuel system caused the fire that took Huff's life. The trial court granted summary judgment, and this was reversed on appeal by the Seventh Circuit. The court stated, "One who is injured as a result of a mechanical defect in a motor vehicle should be protected under the doctrine of strict liability even though the defect was not the cause of the collision which precipitated the injury."[8] Thus, the court adopted the *Larsen* rationale in a strict liability case purportedly decided under Indiana law. The court stressed that this did not make the manufacturer an insurer of its products, but merely required that the manufacturer take precautions against an unreasonable risk of injury. The court further stressed that the plaintiff would have to prove that the defect created an unreasonable risk of harm and that such defect was the proximate cause of the injury.

The Wisconsin court adopted the *Larsen* rule in *Arbet v. Gussarson*.[9] *Arbet* involved facts similar to *Huff*. The plaintiffs were burned when their vehicle's gasoline tank ruptured after the vehicle was rear-ended by another driver. The Wisconsin Supreme Court overruled the trial court's demurrer to the complaint, holding that an automobile manufacturer "may incur liability for injuries to occupants of a car arising from the manufacturer's negligence in designing the car such that it is unreasonably unsafe in an accident."[10] The Wisconsin court adopted the rationale of the *Larsen* court and re-

7. 565 F.2d 104 (7th Cir. 1977).
8. *Id.* at 109.
9. 66 Wis. 2d 551, 225 N.W.2d 431 (1975).
10. *Id.* at 553, 225 N.W.2d at 433.

jected several public policy arguments: (l) the possibility of a large flood of litigation against automobile manufacturers; (2) the difficulty that juries would have in properly evaluating the complex economic engineering data that would be presented; and (3) that the issue should be exclusively a legislative rather than a judicial one.

Larsen, *Huff*, and *Arbet* merely held that an automobile manufacturer owed a duty to the occupants of an automobile to avoid causing "enhanced injuries" in a "second collision" resulting from a defective design of the automobile. The cases did not deal with the issues of burden of proof and the apportionment of damages between the original wrongdoer and the manufacturer. These issues were to be governed by the rules applicable to "successive tortfeasors."

II. SUCCESSIVE TORTFEASORS

The liability allocation to a "successive tortfeasor" must be understood in relation to the meaning of "joint tort" and "joint tortfeasors." The terms have been surrounded by uncertainty and confusion. The attempts to define them andto propose tests for their existence have led to the conclusion that the terms may mean different things to different courts. The result often depends upon the different senses in which the terms are used:

> Thus, the identity of a cause of action against each of two or more defendants; the existence of a common, or like, duty; whether the same evidence will support an action against each; the single, indivisible nature of the injury to the plaintiffs; identity of the facts at the time, place or result; whether the injury is direct and immediate, rather than consequential; responsibility of the defendants for the same *injuria*, as distinguished from the same *damnum*.[11]

The significance of a "joint tort" depends on the particular legal issue or result that is involved. The issue may be whether there is a "concert of action," or it may be a question of joinder, or joint and several liability. The issue could also involve judgment, satisfaction, release, or contribution and indemnity. The problems created by the "joint tort" or "joint

11. W. PROSSER & R. KEETON, LAW OF TORTS § 46, n.2 (5th ed. 1984) (citations omitted).

tortfeasors" doctrines existed prior to the emergence of the modern doctrines of comparative negligence and comparative contribution and continued after "joint tortfeasors" was expanded to encompass those independent and separate acts that combine to impact concurrently upon the accident victim. In *Olson v. The Phoenix Manufacturing Co.*,[12] the Wisconsin Supreme Court stated that when two or more independent causes together produce an injury, each proceeding from a responsible source, the respective authors are liable severally and jointly.

As early as 1920 in *Fisher v. Milwaukee Electric Railway & Light Co.*,[13] the Wisconsin Supreme Court had expressed the basic theory governing the liability allocation between "successive tortfeasors." Fischer sued the street railway company (referred to in the opinion as the Light Company) for injuries sustained in a streetcar accident. The defendant appealed from an order dismissing its third-party complaint against the treating physician for malpractice which aggravated the plaintiff's injuries.

> Under the facts that appear from the pleadings, it is plain that the plaintiff may recover her entire damages from the [Light Company], even though they may have been caused in part by the negligent treatment given the plaintiff by the defendant [doctor]. Selleck v. Janesville, 100 Wis. 157, 75 N.W. 975. It is contended on behalf of the defendant [doctor] that the principles applicable to suits against joint tortfeasors apply here. The argument in support of this contention is unsound. It appears that the liability of the defendant [doctor], if any there be, is due to his want of care and skill as a surgeon, while the liability against the [Light Company] is due, if any there be, to its failure to exercise ordinary care. They are not in any sense of the term joint tortfeasors. The liability of the defendant [doctor] to the [Light Company] does not arise by reason of his liability for contribution in the event of a recovery against the [Light Company]. His liability is a liability over, and arises in favor of the [Light Company] by reason of the fact that the [Light Company] is compelled to pay damages which are primarily due to the alleged negligence of the defendant [doctor], and

12. 103 Wis. 337, 79 N.W. 409 (1899).

13. 173 Wis. 57, 180 N.W. 269 (1920).

> for which the plaintiff might have maintained an action against the defendant [doctor].[14]

The court then explained the nature of the liability of the doctor and what loss was to be apportioned to him.

> In this case, if the plaintiff prevails, the [Light Company] will not have a cause of action over against the defendant [doctor] for the full amount of the plaintiff's recovery against it, for, under such circumstances, a part of the injuries are admittedly due to the negligence of the [Light Company]. It can at most have a right of action over against the defendant [doctor], upon principles of subrogation for only a part of the recovery.[15]

The subsequent introduction of comparative negligence, comparative contribution, and the adoption of the "substantial factor" test for causation, have not affected the basic doctrine that successive tortfeasors are liable only for the enhanced damages that they cause. The original tortfeasor can be held liable for all of the damages, including the enhanced damages caused by the second defendant. The source of the Wisconsin court's insistence upon division of damages in cases of sequential injury has been its understandable reluctance to force the subsequent tortfeasor "to pay for damages for injuries not shown to have been caused by his own wrongful act or by the act of another under such circumstances as to be attributable to him."[16]

Despite its 1920 recognition, the Wisconsin law of "successive tortfeasors" has been surrounded with controversy. The issue came to a head in the case of *Johnson v. Heintz*,[17] and after retrial in the second *Johnson* case.[18] As a result of the *Johnson* decisions, the Civil Jury Instructions Committee of the Board of Circuit Judges was faced with the problem of developing appropriate standard instructions and verdict questions to be used in these cases. After much effort, the Board of Circuit Judges synthesized over 60 years of legal development into two sections: Section 1722 (Appendix A) and

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14. *Id.* at 60, 180 N.W. at 270-71.

15. *Id.* at 62, 180 N.W. at 271.

16. Caygill v. Ipsen, 27 Wis. 2d 578, 589, 135 N.W.2d 284, 290 (1965) (quoting 100 A.L.R.2D 16, 32 (1965)).

17. 61 Wis. 2d 585, 213 N.W.2d 85 (1973).

18. Johnson v. Heintz, 73 Wis. 2d 286, 243 N.W.2d 815 (1976).

Section 1722A (Appendix B) of the Wisconsin Jury Instructions - Civil. Section 1722 is to be used when there are only two parties, plaintiff and defendant. Section 1722A is to be used when there are several tortfeasors. The two instructions are the same in all other respects. Section 1722A reads in part as follows:

> Where a person has received injuries from separate acts which are not related to each other, the total damages sustained by the injured person must be divided among the separate acts which caused such damages.
>
> You should not be concerned that you cannot divide the damages exactly or with mathematical precision. In answering these questions, you should use your best judgment, based on the evidence received during the trial, to apportion the percentages of any damage sustained by (*plaintiff*) to the separate accidents.[19]

In drafting the instructions and preparing the comments, the Board of Circuit Judges was aware of the difficult issues created by the adoption of the *Larsen* rule in second collision cases. The instructions and the comments deal with the issues of burden of proof, the nature of the liability of the "successive tortfeasors," and the apportionment of damages among them.[20]

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19. Wis. JI-Civil 1722A (1984).

20. In earlier case law, the Wisconsin Supreme Court had suggested that nonconcurrent tortfeasors were jointly liable for all injuries to the victim where it was impossible to divide the harm caused by each defendant. *Heims v. Hanke*, 5 Wis. 2d 465, 93 N.W.2d 455 (1958); *Bolick v. Gallagher*, 268 Wis. 421, 67 N.W.2d 860 (1955). Those two cases stood for the general proposition that because allocating responsibility for indivisible injuries would place an impossible burden on juries, contribution was appropriate for the actual injury, even though the injury was the result of successive (not joint) tortious acts. This suggestion in *Heims* and *Bolick* that joint liability could arise from the indivisibility of the injuries was expressly rejected by the court in *Butzow v. Wausau Memorial Hosp.*, 51 Wis. 2d 281, 187 N.W.2d 349 (1971). Justice Hallows, who authored that opinion, stated that juries should have no more difficulty in allocating damages to the respective negligence of two tortfeasors than they do in allocating contribution of negligence of two tortfeasors to the injury and damages.

In the first *Johnson v. Heintz* decision, the supreme court reaffirmed the holding in *Butzow* that inseparability of damages could not create joint liability of successive tortfeasors. *Johnson* No. 1, in rejecting 1721, clearly stated that a tortfeasor is only responsible for the percentage of the damages and injury as was caused by his negligence, even though the injury itself is indivisible. The term "joint liability," as employed in earlier cases, was used in the generic sense. It is not a joint and several liability concept as in the typical two-car accident case

The comments indicate that the following are established legal principles in Wisconsin:

1. Nonconcurrent or "successive tortfeasors" are not jointly liable for all the injuries to the victim merely because of difficulty of apportionment;
2. Juries should have no more difficulty in allocating damages to the respective conduct of the original and the "successive tortfeasor" than they do in allocating the percentage of negligence to joint tortfeasors;
3. Inseparability of damages does not create joint liability of the "successive tortfeasor" with the original tortfeasor;
4. A "successive tortfeasor" is only responsible for that percentage of the damages and injury caused by his negligence even though the injury itself is indivisible;
5. Juries should be required to apportion all damages received in nonconcurrent tort cases.

Justice Hallows stated the Wisconsin rule on apportionment of damages as follows:

> We think the idea of the inseparability of damages is an importation from other states and is foreign to our jurisprudence, at least since 1931 when our comparative negligence statute was enacted. . . . We see no more difficulty in allocating damages to the respective negligence of two tort-

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where two sources of negligence concur in time and combine to produce one accident. There, of course, contribution will lie and the liability is joint and several.

In the second *Johnson v. Heintz* decision, the court noted that in *Johnson* No. 1 it had stated that an "allocation of damages as to the impact was necessary." Nevertheless, the court, in dicta, suggested that expert testimony could be used to establish the indivisibility of the plaintiff's injuries and, consequently, the joint liability of nonconcurrent tortfeasors. This suggestion was dicta because the jury verdict after the retrial determined that all damages were occasioned by the first impact and that the defendant Heintz was solely responsible for all damages in the case.

After reviewing the case law on this issue, the Committee believes that the jury should apportion all damages received in nonconcurrent torts. As such, Wis JI-Civil 1721 and 1723 are withdrawn. Wis JI-Civil 1722 has been simplified so that it applies where only one tortfeasor is a party. Wis JI-Civil 1722A has been added for use in cases where multiple tortfeasors are actually in the lawsuit. This instruction requires the jury to apportion the plaintiff's damages between the nonconcurrent tortfeasors. This conforms to the supreme court's decision in the first *Johnson* decision and to Justice Hallows' statement in *Butzow* that the concept of inseparability of damages "is an importation from other states and is foreign to our jurisprudence, at least since 1931 when our comparative negligence statute was enacted."

Wis. JI-Civil 1722A.

> feasors than we do in allocating the contribution of negligence of two tort-feasors to the injury and damages. While the problems are not identical, they are similar. It is quite true in some cases the proof is difficult but the law does not demand the impossible.[21]

From the foregoing, it is clear that in second collision cases the damages are to be apportioned between those caused by the driver and/or third party, and those caused by the defective design.[22] The original wrongdoer can be liable for all the injuries that result from the first impact and the defective design, but the manufacturer is to be held liable only for those damages resulting from the defective design.

III. APPORTIONMENT

The apportionment of both fault and causation is a commonplace event in Wisconsin. Wisconsin law has been influenced greatly by the general principle that damages should be apportioned among the various causes and parties. Illustrative examples are:

A. Passive Negligence Versus Causal Negligence

The passive negligence of a guest passenger is to be compared to the active negligence of the host driver as well as the active negligence of a third party if one is involved. The jury must consider the conduct of the parties as a whole and in doing so must consider the standard of care and the conduct of all the parties.[23]

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21. Butzow v. Wausau Memorial Hosp., 51 Wis. 2d 281, 290-91, 187 N.W.2d 349, 354 (1971). The Wisconsin rule was recognized in Larsen v. General Motors Corp., 391 F.2d 495, 503-04 (8th Cir. 1978).

> The obstacles of apportionment are not insurmountable. It is done with regularity in those jurisdictions applying comparative negligence statutes and other factual situations as condemnation cases, where in some jurisidictions the jury must assess the value of the land before and after a taking and then assess a special benefit accruing to the remaining property of the condemnee.

See WIS. STAT. § 32.09(3), (6) (1984) as to the jury's duty to assess the value of the land before and after the taking.

22. "[T]he law of this state does not recognize any concept of 'joint but successive' tort-feasors." Voight v. Aetna Casualty & Sur. Co., 80 Wis. 2d 376, 385, 259 N.W.2d 85, 89 (1977).

23. *See* Lovesee v. Allied Dev. Corp., 45 Wis. 2d 340, 173 N.W.2d 196 (1970); Theisen v. Milwaukee Auto. Mut. Ins. Co., 18 Wis. 2d 91, 118 N.W.2d 140 (1962); Walker v. Kroger Grocery & Baking Co., 214 Wis. 519, 252 N.W. 721 (1934).

B. Causally Negligent Plaintiff Versus Causally Negligent Defendant

In a situation where the plaintiff driver sues one or more defendant drivers, the jury is to fix the percentage attributable to each party in proportion to the fault that each contributed to cause the accident.[24] If a plaintiff is guilty of both causal [active] and passive negligence, this total will be compared with the causal negligence of the defendant in order to determine the liability and the amount of recovery by the plaintiff.[25]

C. Derivative Actions — Husband and Wife

In *White v. Lunder*,[26] the wife sued for her personal injuries, and her husband sued for loss of consortium and medical expenses. The jury apportioned 30% of the causal negligence to the wife, 33% to the husband, and 37% to the defendant. The trial court dismissed the husband's cause of action because the combined causal negligence of the husband and wife was 63%, thereby exceeding the causal negligence of the defendant. The Wisconsin Supreme Court reversed and devised a method for apportioning the damages equitably. The result was as follows: The husband's right to recover for medical expenses and loss of consortium was reduced by the 30% causal negligence allocable to his wife. The total recovery was again reduced by the amount of causal negligence attributable to the husband (33%) so that the total amount of recovery was reduced by 63%, and the husband was allowed to recover 37% of the medical expenses and his loss of consortium.

D. Derivative Actions — Parent and Child

In *Theama v. City of Kenosha*,[27] the Wisconsin Supreme Court recognized the right of a minor child to recover for loss of care, society, companionship, protection, training, and guidance due to an injury to a parent(s) caused by the negligent acts of third parties. The court indicated that the child's cause of action was subject to the defenses permitted against

24. *See* Wis. JI-Civil 1580 (1981).
25. *See Walker*, 214 Wis. 519, 252 N.W. 721.
26. 66 Wis. 2d 563, 225 N.W.2d 442 (1975).
27. 117 Wis. 2d 508, 344 N.W.2d 513 (1984).

the injured parent, and, of course, the amount recoverable would be reduced by any negligence attributable to the injured child (although in *Theama*, no negligence existed).

E. Strict Liability — Products

In a products liability case based upon strict liability, there is no finding of negligence, as such, on the part of the defendant, although the Wisconsin version of strict liability amounts to a determination that a defect is negligence per se. Yet, the jury is asked to determine the percentage of responsibility for causing the harm and attribute it to the plaintiff and to the product in order to provide a basis for the allocation of the damages. Thus, an apportionment is made not on the basis of negligence but on the basis of the amount that each contributed to the harm.[28]

The same result is achieved when the jury is asked to allocate the loss among the various defendants: the manufacturer, the assembler, the dealer, and the seller. Although the question is framed in the form of negligence, the finder of fact is asked to determine the amount that each party contributed to the harm.[29]

F. Seatbelt Negligence

In *Foley v. City of West Allis*,[30] the court held that juries could reasonably apportion the damages attributable to the "seatbelt negligence" of the plaintiff between the first incident (the actual collision) and the second incident (the collision within the plaintiff's car). Clearly, this is an example of apportionment based upon instantaneous and practically simultaneous events, not reasonably distinguishable from the sequential injuries in "second collision" cases.

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28. *See* Wis. JI-Civil 3290 (1975). *See also* Nelson v. Hansen, 10 Wis. 2d 107, 102 N.W.2d 251 (1960).

29. *See* Wis. JI-Civil 3290 (1984). *See also* City of Franklin v. Badger Ford Truck Sales, Inc., 58 Wis. 2d 641, 207 N.W.2d 866 (1973).

30. 113 Wis. 2d 475, 335 N.W.2d 824 (1983).

G. Tortious and Non-Tortious Acts

In *Johnson v. Ray*,[31] the plaintiff brought an action for assault and battery against the police for excessive use of force in making an arrest. The court held that the plaintiff should have been limited in his recovery to the damages sustained by application of such force, and that the trial court erred in not submitting an instruction to the jury requiring them to determine which injuries were caused by *excessive* force. The court stated, "The issue then was what injuries were caused by the use of excessive force: (1) physical injury to the neck, back and arm or (2) aggravation of a depressive condition or (3) both."[32] Failure to instruct the jury as to what damages should be apportioned to the excessive force versus the damages caused by the use of reasonable force resulted in reversible error.

H. Comparative Contribution

The apportionment of harm between defendants has become a routine matter in Wisconsin since *Bielski v. Schulze*.[33] The amount of liability for contribution between tortfeasors who sustain a common liability is determined in proportion to the percentage of causal negligence attributable to each. Thus, the jury is apportioning the right to contribution among defendants based upon the amount that each contributed to the harm.

Thus, Justice Hallows was correct in his conclusion in *Butzow v. Wausau Memorial Hospital* when he stated that the concept of inseparability of damages is foreign to Wisconsin jurisprudence since the enactment of Wisconsin's comparative negligence law in 1931. It would appear that the apportionment of damages among the parties in a second collision or crashworthiness case is consistent with Wisconsin jurisprudence. *Foley v. City of West Allis*[34] (seatbelt negligence) and *Johnson v. Ray*[35] (tortious and non-tortious acts) were a con-

31. 99 Wis. 2d 777, 299 N.W.2d 849 (1981).
32. *Id.* at 786, 299 N.W.2d at 854.
33. 16 Wis. 2d 1, 114 N.W.2d 105 (1962).
34. 113 Wis. 2d 475, 335 N.W.2d 824 (1983).
35. 99 Wis. 2d 777, 299 N.W.2d 849 (1981).

tinuation of the developing Wisconsin law of apportionment of damages.

IV. THE *SUMNICHT* DECISION

The case of *Sumnicht v. Toyota Motor Sales, U.S.A., Inc.*[36] involved a "second collision" or "crashworthy case." The terms are often used interchangeably although subtle differences exist. "The crashworthiness doctrine imposes liability upon a manufacturer in a vehicular collision case for design defects which do not cause the initial accident but which cause *additional or more severe* injuries when the driver or passengers subsequently impacts with the defective interior or exterior of the vehicle."[37] The *Sumnicht* case involved a vehicle which was negligently driven into a tree. The accident caused injuries to the driver, death to the front seat passenger, and permanent injuries to the rear seat passenger. The jury verdict ultimately resulted in a judgment against the defendant, Toyota. The case reached the Supreme Court of Wisconsin on certification from the court of appeals. The certification provided:

> Answering the issue presented in this case will fill an existing void in Wisconsin law as to the standard of proof requirements in products liability/ vehicular crashworthiness cases. These types of cases usually involve claims of serious injury or death. Their impact upon both plaintiff and defendant is substantial. Although the crashworthiness theory of recovery may be said to still be in its infancy, these types of cases are appearing with greater frequency. It would be helpful at this relatively early point in the development of Wisconsin law to have the instruction and ruling of the Wisconsin Supreme Court as to the appropriate standard of proof upon a plaintiff in a products liability/vehicular crashworthiness case.[38]

The decision affirmed the trial court's judgment and order. However, the precedential value of the decision is questionable. Three justices addressed the issue of the burden of proof of apportioning damages in "second collision" cases. Three

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36. 121 Wis. 2d 338, 360 N.W.2d 2 (1984).

37. *Id.* at 348-49, 360 N.W.2d at 6 (emphasis added).

38. Sumnicht v. Toyota Motor Sales, U.S.A., Inc., No. 83-812 (Wis. Ct. App., Dist. 2, Mar. 27, 1984).

different justices, in a concurring opinion, concluded that the jury finding was to the effect that there were no distinct harms or damages to apportion. Since there were no enhanced injuries as a result of the collision, the concurring opinion concluded that the issue of the burden of proof on apportionment of damages was not to be addressed. Chief Justice Heffernan, writing for Justices Abrahamson and Bablitch, stated, "[B]ecause the facts of this case do not present the issue of the apportionment of damages, the majority opinion's discussion of the *Huddell* standard of proof of enhanced injuries and of Wisconsin law on the apportionment of damages constitutes dicta unnecessary to the holding."[39]

Justice Steinmetz dissented to the affirmation of the trial court's opinion, stating: "This is a difficult legal case made more difficult by the majority's opinion which I find to be confusing and without precedential value, and in this respect, I agree with the concurring opinion."[40]

Thus, the *Sumnicht* decision results in four justices stating that the law pertaining to apportionment of damages in second collision or crashworthiness cases has not been decided, albeit three justices attempted to do so. It is elementary that before a case can be considered as authority for a principle of law and precedent, there must be a concurrence of a majority of the judges upon the principles or rules of law announced in the case.[41]

A particularly effective statement of the rule is found in *State ex rel. Vesper-Buick Automobile Co. v. Daues*:[42]

> The opinion in the *Barz* case [*Barz v. Fleischmann Yeast Co., 308 Mo. 288, 271 S.W. 361 (1925)] is not authoritative or controlling as a ruling* or announcement of any rule or principle of law by this court, inasmuch as the *opinion* in that case did not have the concurrence of a majority of the judges of this court, only three of the judges having concurred in the *opinion*, an equal number of the judges having dissented to the opinion, and one of the judges concurring only in the result of the decision in the case. Thus, while there was a *decision* reached by this court in the *Barz* Case, there was no

39. *Sumnicht*, 121 Wis. 2d at 380, 360 N.W.2d at 21.
40. *Id.* at 381, 360 N.W.2d at 21 (Steinmetz, J., dissenting).
41. 20 AM. JUR. 2D *Courts* § 195 (1965).
42. 323 Mo. 388, 19 S.W.2d 700 (1929).

> authoritative *opinion*, or announcement of the law of the case, made by a majority of the members of this court.[43]

Wisconsin follows the rule that unless a majority agrees, there can be no authoritative or controlling announcement of a rule of law.[44]

Thus, the *Sumnicht* decision is not of precedential value on the issues of proof and apportionment of damages. However, in view of the fact that three of the justices dealt with the issues of apportionment and burden of proof in a "second collision" case, it is imperative that the various opinions be examined and clarified so that the courts, counsel, and the public will be able to deal fairly and effectively with "second collision" situations.

A. Opinion I

The three justices (Ceci, Callow, and Day) joining in this opinion adopted *Larsen* as the basis for their decision:

> Any design defect not causing the accident would not subject the manufacturer to liability for the entire damage, but the manufacturer should be liable for that portion of the damage or injury caused by the defective design *over and above* the damage or injury that probably would have occurred as a result of the impact or collision absent the defective design.[45]

Justice Ceci went on to state that a defendant's liability is to be limited to that portion of the harm which he has in fact caused, as distinguished from harm arising from other sources. Recognizing that the plaintiff (Sumnicht) had a cause of action against Toyota for all injuries in which the alleged defective seat system was a substantial factor in causing, Justice Ceci clearly acknowledged that Toyota would not be liable for any injuries sustained solely in the "first collision," since the allegedly defective seat system was not a legal cause of the automobile's crashing into the tree. Thus, Justice

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43. *Id.* at ___, 19 S.W.2d at 707.

44. *See* Estate of Todd, 16 Wis. 2d 635, 115 N.W.2d 551 (1962); Hagenah v. Milwaukee Elec. Ry. & Light Co., 136 Wis. 300, 116 N.W. 843 (1908); Jacobs v. Queen Inc. Co., 123 Wis. 608, 101 N.W. 1090 (1905); Walker v. Rogan, 1 Wis. 511 (1853).

45. Sumnicht v. Toyota Motor Sales, U.S.A., Inc., 121 Wis. 2d 338, 350, 360 N.W.2d 2, 7 (1984) (quoting Larsen v. General Motors Corp., 391 F.2d 495, 503 (8th Cir. 1968)).

Ceci recognized that Sumnicht had to distinguish between the damages sustained in the first and the second collision as part and parcel of his burden of proving causation.

> [O]nly after Sumnicht has proven what injuries were caused by Toyota is the issue of apportionment of damages properly raised. The precise issue here is not which party bears the burden of apportioning damages in cases involving joint tortfeasors, but what quantum of evidence must a plaintiff bring forth in a "second collision" products liability case to prove that his injuries were proximately caused by the manufacturer's defect.[46]

Justice Ceci then went on to discuss the opposing views expressed in the federal cases of *Huddell v. Levin*,[47] *Fox v. Ford Motor Co.*,[48] and *Mitchell v. Volkswagenwerk, AG.*[49] Justice Ceci rejected the *Huddell* view as being contrary to Wisconsin law but stated that he did not intend to change Wisconsin law at this time.

> In keeping with the law of this state, we hold that in a "second collision" products liability case, the plaintiff must prove that the defective product was a substantial factor in causing the harm from which damages are claimed. The degree to which the plaintiff will be required to distinguish between the injuries sustained in the "first collision" and those sustained in the "second collision" will be governed by his burden of proving causation via the substantial factor test. This requirement is necessarily dependent upon the particular facts of the case. For instance, Toyota's defective seat system did not cause the accident in this case, and, therefore, Toyota is not liable for injuries caused solely from the "first collision."[50]

At this point in the decision Justice Ceci went on to misstate the applicable law of Wisconsin in "second collision" fact situations. The opinion states that if the plaintiff proves that the defect was a cause of Sumnicht's injuries, he need not prove what portion of *indivisible* harm is attributable solely to the manufacturer. The parties become joint tortfeasors, and their liability is joint and several.

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46. *Sumnicht*, 121 Wis. 2d at 353-54, 360 N.W.2d at 9.
47. 537 F.2d 726 (3d Cir. 1976).
48. 575 F.2d 774 (10th Cir. 1978).
49. 669 F.2d 1199 (8th Cir. 1982).
50. *Sumnicht*, 121 Wis. 2d at 358-59, 360 N.W.2d at 11.

In successive tort situations, the law in Wisconsin is clear that the initial tortfeasor is liable for all of the injuries that flow therefrom as a direct chain from the initial accident. Therefore, the driver of the vehicle in *Sumnicht* would be liable for all injuries incurred by his passengers as well as any property damage that may have resulted. The successive tortfeasor (Toyota) is liable only for those damages that would have been caused "*over and above* the damage or injury that probably would have occurred as a result of the impact or collision absent the defective design."[51] As to the "enhanced injuries," the initial tortfeasor and the manufacturer are jointly and severally liable. However, the manufacturer is not responsible for the initial injuries. Therefore, the status of the parties differs depending on what injuries are involved. It is at this point that the first opinion becomes confusing and creates the impression that in all "second collision" cases, once it is proven that the manufacturer's defective design was a substantial factor in producing the enhanced injuries, he would be responsible for all loss on the basis of joint and several liability.

> In any event, once the plaintiff has proven that the defect was a cause of his injuries, he need not prove what portion of indivisible harm is attributable solely to the manufacturer. If there is more than one tortfeasor who contributed to the injury, Wisconsin's law concerning joint and several liability applies.[52]

Justice Ceci cites *Butzow* and the first *Johnson* decision as authority. Neither case supports this rule. Both cases held that the successive tortfeasor was liable only for the aggravated damages. The court concluded its discussion of the rule in "second collision" cases as follows: "As discussed above, only after the plaintiff establishes that there are joint tortfeasors can the issue of apportionment of damages be raised."[53] If this statement is limited to the holding that they are jointly and severally liable for the enhanced injuries, then it is a correct statement of the law. On the other hand, if the language is interpreted to mean that the manufacturer and the driver are joint tortfeasors and liable jointly and severally for all inju-

51. *Id.* at 350, 360 N.W.2d at 7 (quoting *Larsen*, 391 F.2d at 503).
52. *Sumnicht*, 121 Wis. 2d at 359, 360 N.W.2d at 11.
53. *Id.* at 360, 360 N.W.2d at 12.

ries suffered by Sumnicht, then the law is stated incorrectly. If the decision means that under the facts of the case the injuries to the rear seat passenger (Sumnicht) were not caused by the initial collision, but were caused when the first impact combined with the second impact, then the parties are joint tortfeasors. Perhaps this is what the court meant when it stated, "we recognize that a plaintiff will not have to distinguish between injuries in every case because not all 'second collision' cases involve multiple injuries capable of division."[54] On the other hand, if this language is intended to mean that the damages are not to be apportioned when enhanced injuries are involved, then the law is misstated.

B. Opinion II (Concurring)

The foregoing analysis is buttressed by the view of the three justices (Heffernan, Abrahamson, and Bablitch) joining in the concurring opinion wherein they approved the outcome of the case in the trial court on the theory that the initial impact would not have caused injuries to the rear seat passenger, and that the defective seat system did not enhance the injuries but actually caused all of the injuries. Under this view of the facts, the justices are saying that the parties were joint tortfeasors and that there were no distinct harms or damages to apportion. "This court, therefore, need not address the issue of the burden of proof of apportioning damages in 'second collision' cases."[55]

Thus, the concurring justices rejected the first opinion's discussion of the federal court's standard of proof of enhanced injuries and its statement of what the law is as to the apportionment of "second collision" damages in Wisconsin.

C. Opinion III (Dissenting)

The dissenting opinion, by Justice Steinmetz, agreed with the concurring opinion that the first opinion had no precedential value. The effect, therefore, is that four justices of the Wisconsin Supreme Court state that the first opinion's language relative to the proof necessary to impose liability on a

54. *Id.* at 359, 360 N.W.2d at 11.

55. Sumnicht v. Toyota Motor Sales, U.S.A., Inc., 121 Wis. 2d 338, 380, 360 N.W.2d 2, 21 (1984) (Heffernan, J., concurring).

manufacturer for "second collision" injuries, is not the law in Wisconsin. The dissent pointed out that the first opinion adopted the "second impact — enhanced injury doctrine in that the defendant is only liable for damages (injuries) sustained in the second impact and the plaintiff must separate in his proof the injuries sustained in the first and second impact."[56]

V. THE *MASKREY* DECISION

The case of *Maskrey v. Volkswagenwerk, AG* was being tried to verdict and judgment in the Circuit Court of Milwaukee County while the *Sumnicht* case was awaiting decision. Subsequent to the *Sumnicht* decision, the *Maskrey* case was appealed to the court of appeals and a decision was rendered in *Maskrey v. Volkswagenwerk, AG*.[57] The *Maskrey* decision involved a two-vehicle collision wherein the plaintiff, Maskrey, was seriously injured. The jury found that the defendant driver (Szuta) was causally negligent and that Volkswagen was causally negligent as to design and testing of the campmobile and also that the campmobile was defective as to design and testing which was causal to Maskrey's enhanced injuries. Maskrey was also found negligent for failing to wear a seat belt. The jury found that 57% of Maskrey's damages were "enhanced injuries," that 28% of the injuries would have occurred without any defect in the campmobile, and that 15% of Maskrey's injuries were caused by his failure to wear a seat belt.

The *Maskrey* court confirmed that Volkswagen was a successive tortfeasor and that Volkswagen should be liable for only that portion of the injuries and damages *over and above* the damage that would have occurred as a result of the impact or collision absent the defective design. Relying on the second *Johnson* case the court stated:

> [T]he plaintiff has the burden of proof to show injury and damages caused by the negligence of the tortfeasors, but that it is the defendants' burden to allocate the damages from two or more impacts, and that separate verdict questions for the

56. Sumnicht v. Toyota Motor Sales, U.S.A., Inc., 121 Wis. 2d 338, 383, 360 N.W.2d 2, 23 (1984) (Steinmetz, J., dissenting).

57. 125 Wis. 2d 145, 370 N.W.2d 815 (Ct. App. 1985).

> comparative negligence damages are mandated in this circumstance.[58]

The Board of Circuit Judges in analyzing the second *Johnson* decision, and in commenting on it relative to the allocation of damages, stated that the court's suggestions were dicta because the jury verdict after the retrial determined that all damages were occasioned by the first impact and that the defendant, *Heintz*, was solely responsible for all damages in the case. It is a sad commentary on the development of Wisconsin law when dicta, by force of repetition, becomes the rule. Relative to the *Sumnicht* decision, the *Maskrey* court stated as follows:

> [*Sumnicht*] decided the proper method for trial courts to apply in products liability cases where the claimant alleges that he suffered enhanced injuries because a vehicle was not crashworthy. In *Sumnicht*, the enhanced injuries and the injuries resulting from the crash itself were found to be indivisible. Two caveats must be noted before we proceed: (1) we acknowledge that the resultant injuries and damages in *Sumnicht* were indivisible; and (2) the concurring opinion criticizes the majority opinion for unnecessary and extensive dicta. We note, however, that the concurring opinion does not criticize the reasoning of the dicta, only its necessity.[59]

Perhaps the injuries in *Sumnicht* were indivisible, but the basis of the decision was not indivisible injuries but causal harm. The approval of the trial court decision by both the first opinion and the second opinion (concurring) was to the effect that the evidence supported a finding that the defective design was the cause of all of the injuries suffered by Sumnicht.

The statement in *Maskrey* that the concurring opinion merely criticized the majority is inaccurate in that the first opinion is not a majority opinion but, in fact, a minority one. Further, the concurring opinion's criticism relative to the first opinion, was not only that it was unnecessary dicta, but that there were no distinct harms or damages to apportion, and, therefore, the court had no occasion to address the issue of burden of proof in apportioning damages in second collision cases. Thus, the facts did not present the issue of apportion-

58. *Id.* at 153-54, 370 N.W.2d at 819-20.
59. *Id.* at 154-55, 370 N.W.2d at 820.

ment. The dissenting opinion found the first opinion to be without precedential value. The effect of the *Maskrey* decision is to take a three judge opinion, which has no precedential value and is unnecessary dicta, and make it the law. The result of the *Sumnicht* appeal was merely to affirm the judgment of the trial court and not to establish any binding legal precedent.

Maskrey states that in a second collision or crashworthiness case, the plaintiff has the burden to prove that the defective product was a substantial factor in causing the harm for which the plaintiff is claiming damages. Once the trial court determines that the plaintiff has met the burden of proof, then the burden to apportion the damages is placed upon the manufacturer of the defective product. This bootstrap result is based upon the dicta in the second *Johnson* case and the RESTATEMENT (SECOND) OF TORTS Section 433B and shifts to the manufacturer the burden of proving a negative — what damages were not caused by the defective product. Wisconsin has never required the plaintiff to prove a negative; thus, in justice and fairness, a defendant should not be required to do so.

VI. SUMMARY

The law of liability allocation between successive tortfeasors was first promulgated in *Fischer v. Milwaukee Electric Railway & Light Co.*[60] The rule is summarized in second collision cases as follows:

> Any design defect not causing the accident would not subject the manufacturer to liability for the entire damage, but the manufacturer should be liable for that portion of the damage or injury caused by the defective design *over and above* the damage or injury that probably would have occurred as a result of the impact or collision absent the defective design.[61]

The Wisconsin court has adopted the foregoing rule and has stated the policy basis for the rule as follows: "[T]he basic premise behind all tort law [is that] which limits a defendant's

60. 173 Wis. 57, 180 N.W. 269 (1920).

61. Larsen v. General Motors Corp., 391 F.2d 495, 503 (8th Cir. 1968) (emphasis added).

liability to that portion of harm which he has in fact caused, as distinguished from harm arising from other sources."[62]

The scope of a manufacturer's liability in a "second collision" case was first decided by the Wisconsin Supreme Court in *Arbet v. Gussarson.*[63] The *Arbet* court relied on *Schnabl v. Ford Motor Co.*[64] and quoted from *Schnabl* as follows: "[A]ppellant is not suing for total injuries but for the death alleged to have been caused by the incremental injury which occurred because of the faulty seat belt."[65] Thus, the second collision doctrine involves the issue of the successive tortfeasor's extent of liability. The second collision doctrine extends the manufacturer's liability to include design defects that do not cause accidents but may increase the severity of the injuries that would have occurred absent the defective design. "Under the second collision doctrine, the manufacturer theoretically is not liable for the entire damage incurred in the collision. Rather, the manufacturer is liable only for that portion of a claimant's injuries representing the amount by which the alleged defect 'aggravated' or 'enhanced' the injuries."[66] Enhanced injuries are injuries aggravated by reason of an alleged defect over and above those that otherwise would have been sustained in a collision.[67] Thus, the principle of the second collision or crashworthiness cases is based on the concept that the manufacturer of a design defect can be held liable for the "enhanced" or "aggravated" injuries. However, the difficulty in determining the extent to which the alleged manufacturing defect contributed to the injuries has caused some courts to blur the distinction between sucessive tortfeasors and joint tortfeasors. The problems of proof are more difficult in the second collision or crashworthiness situations because of the time sequence that is involved, which is usually much shorter than the traditional successive tortfeasor situation.

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62. Sumnicht v. Toyota Motor Sales, U.S.A., Inc., 121 Wis. 2d 338, 350, 360 N.W.2d 2, 7 (1984).

63. 66 Wis. 2d 551, 225 N.W.2d 431 (1975).

64. 54 Wis. 2d 345, 195 N.W.2d 602 (1972).

65. *Arbet*, 66 Wis. 2d at 557-58, 225 N.W.2d at 435.

66. Note, *Second Collision Liability: A Critique of Two approaches to Plaintiff's Burden of Proof*, 68 IOWA L. REV. 811, 812 (1983).

67. *See* Foland, *Enhanced Injury: Problems of Proof in "Second Collision" and "Crashworthy" Cases*, 16 WASHBURN L.J. 608 (1977).

> In a head-on collision between an automobile traveling at moderate speed and a stationary object, the first collision lasts less than one tenth of a second. Immediately after the initial impact, the driver and passengers move forward until they [are restrained or] strike some part of the car's interior. This second collision also lasts less than one tenth of a second.[68]

During the trial, the role that the aspects of the design or individual components of the automobile play in the occupant's fate, during those fleeting moments, is "recreated" by an expert. The expert's calculations as to the trajectory of the occupants' bodies, as well as other events, depend upon assumptions as to the original positions of the bodies in addition to a variety of other uncertain variables.[69]

In a "second collision" situation there must be proof of a causal connection between the alleged defect and the injury. In addition, the proof of such a causal connection is an element of the plaintiff's case; therefore, the plaintiff bears the burden of proving it. As a result, alternate approaches to defining the standards of proof under the second collision doctrine have developed.[70]

It is apparent that the issue of what must be proven and which party has the burden of proof in "second collision" injuries involves public policy considerations. Justice Heffernan stated the policy issue in *Caygill v. Ipsen*,[71] as follows:

> [A] question of social and judicial policy arises. Stated from a plaintiff's viewpoint, the problem is said to be whether the injured plaintiff shall recover nothing because he is unable to carry the impossible burden of proving the respective shares of harm caused by each tortfeasor, or whether a tortfeasor may be required to pay more than his theoretical share of the

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68. Note, *Apportionment of Damages in the "Second Collision" Case*, 63 VA. L. REV. 475, 476 n.9 (1977).

69. *See* O'Donnell, *The Burden of Proof In Second Collision Litigation*, 1983 S.M.U. PRODUCTS LIABILITY INST. § 6.01 (1983).

70. *See* Caiazzo v. Volkswagenwerk A.G., 647 F.2d 241 (2d Cir. 1982); Fox v. Ford Motor Co., 575 F.2d 774 (10th Cir. 1978); Huddell v. Lefvin, 537 F.2d 726 (3d Cir. 1976); *See* Note, *supra* note 66; Foland, *supra* note 67; Hoenign, *Resolution of "Crashworthiness" Design Claims*, 55 ST. JOHN'S L. REV. 633 (1981); Lambert, *A Secondary Impact Product — Caused Injury — Hostile Exterior Design and the "Uncrashworthy" Product*, 1983 S.M.U. PRODUCT LIABILITY INST. § 7.01-.04 (1983).

71. 27 Wis. 2d 578, 135 N.W.2d 284 (1965).

> damages accruing out of a confused situation which his wrong has helped to create.
>
> Stated from a defendant's viewpoint, the question is whether the defendant will be forced to pay damages for injuries not shown to have been caused by his own wrongful act or by the act of another under such circumstances as to be attributable to him.[72]

The Board of Circuit Judges[73] recognized the difficulties and policy issues in second collision cases. They resolved the issues by requiring the jury to divide the damages even though such a division may be difficult because of the nature of the plaintiff's injuries. In other words, the division of damages becomes a question of fact in every second collision injury, and the damages are to be divided by the trier of fact upon proof that the alleged defective design was a substantial factor in causing some harm to the plaintiff.

The plaintiff must prove that the defendant's negligence was a substantial factor in contributing to the result. This rule was stated as follows in *Schnabl*:[74] "Whether the delivery in Wisconsin of a faulty seat belt could have been a substantial factor in causing the death of deceased, even if it played no part in the accident, is a question of fact to be determined by the trier of fact."[75]

The plaintiff is required to prove that the defendant's alleged defective design of the automobile was a "substantial factor" in causing some of the plaintiff's injuries. The burden of proof does not shift. If the plaintiff can prove the injuries that were "enhanced" by the defective design, then the defendant is to be held liable for the amount of the enhanced injuries. If the plaintiff cannot prove the actual amount of enhancement but does prove that the defendant's conduct was a "substantial factor" in causing some of the plaintiff's injuries, then the trier of fact is required to apportion the damages as equitably as it can between the respective parties. This equitable apportionment could involve the author of the first collision, the manufacturer of the automobile, and the injured party's own conduct. In this way each party would be re-

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72. *Id.* at 589, 135 N.W.2d at 290 (quoting Annot., 100 A.L.R. 2D 16, 31 (1965)).
73. Wis. JI-Civil 1722A (1984).
74. 54 Wis. 2d 345, 195 N.W.2d 602 (1972).
75. *Id.* at 354, 195 N.W.2d at 607.

quired to introduce as much evidence as was available to assist the jury in arriving at its apportionment.

If the courts would follow this procedure, then any appearance of conflicting rules of law would disappear, and Wisconsin would be able to continue its traditional course of allowing the trier of fact to apportion the various parties' contributions to the injuries. Thus, Wisconsin could offer a simple solution to the confusion created by the federal courts. In view of the fact that forty-two states have now adopted some form of comparative negligence, the same result could be achieved uniformly throughout these states to the benefit of injured parties, the manufacturers of products, and the general public.

Much of the difficulty in the second collision or crashworthiness cases stems from the fact that the courts are trying to include in the comparative negligence formula both the conduct of a defendant(s) which is causal of the accident and the injuries, and the conduct of a defendant which is merely causal of the injuries. The solution to the problem would be to follow the procedure outlined in *Foley v. City of West Allis*,[76] *White v. Lunder*,[77] and *Johnson v. Ray*.[78] The trier of fact should distinguish between conduct which is causal of both the accident and the injuries and conduct which is causal only of the injuries. The following procedure is suggested:

1. The trier of fact is to determine whether or not the injured party has a cause of action against the defendant who caused the accident. In *Sumnicht* that would have been the host driver (Conner) and in *Maskrey* the driver of the second car (Szuta). The jury would be asked to compare the causal and contributory negligence, other than seat belt negligence, of the plaintiff with that of the defendant who caused the accident. If the plaintiff has a cause of action against the defendant because the plaintiff's negligence is not greater than the defendant's, then the trier of fact should be required to determine the total damages suffered by the plaintiff (property and personal injury) as a result of the collision.

76. 113 Wis. 2d 475, 335 N.W.2d 824 (1983).

77. 66 Wis. 2d 563, 225 N.W.2d 442 (1975).

78. 99 Wis. 2d 777, 299 N.W.2d 849 (1981).

2. The trier of fact would then be asked to determine if the manufacturer's defective design was a substantial factor in causing injury to the plaintiff. That is, did the second collision enhance the plaintiff's injuries? Once the trier of fact has determined that the manufacturer of the product was negligent and/or strictly liable for a defective design and that this negligence or defective design was a substantial factor in enhancing the plaintiff's injuries, then the trier of fact would be asked to determine what percentage of the total harm was to be allocated to the plaintiff, to the defendant who caused the accident, and to the manufacturer who enhanced the injuries. The jury would be required to make a percentage finding in every instance where the conduct of the defendant manufacturer was a substantial factor in causing the injuries. This means that the defendant who caused the accident would be liable severally for all of the injuries, less any percentage allocable to the plaintiff. As to the injuries that were enhanced, the defendant who caused the accident and the manufacturer would be jointly and severally liable for that percentage.

3. If the injured plaintiff was also guilty of seat belt negligence, then the trier of fact would be required to follow the *Foley*[79] formula.

As between the defendant who caused the accident and the manufacturer who enhanced the injuries, there would be no right of contribution or apportionment between them as to the injuries caused solely by the initial collision, but as to the enhanced injuries, the *Bielski*[80] formula of comparative contribution would then come into operation.

79. *Foley*, 113 Wis. 2d at 485-86, 335 N.W.2d at 831.

80. Bielski v. Schulze, 16 Wis. 2d 1, 6, 114 N.W.2d 105, 107 (1962).

APPENDIX A*

1722 WIS JI-CIVIL 1722

1722 DAMAGES FROM NONCONCURRENT OR SUCCESSIVE TORTS

Subdivision ____ of Question ____ asks what sum will fairly and reasonably compensate (*Plaintiff*) for any damages he incurred in the accident involving (*Plaintiff*) and (*Defendant*).

Where a person has received injuries from separate acts which are not related to each other, the total damages sustained by the injured person must be divided among the separate acts which caused such damages.

You should not be concerned that you cannot divide the damages exactly or with mathematical precision. In answering this question (these questions), you should use your best judgment, based on the evidence received during the trial, to determine the damages incurred by (*Plaintiff*) in the accident involving (*Defendant*).

COMMENT

This instruction was originally approved by the Committee in 1963. The instruction and comment were revised in 1983.

See Comment to Wis JI-Civil 1722A. 184 , Regents Univ. of Wis.

APPENDIX B*

1722A WIS JI-CIVIL 1722A

DAMAGES FROM NONCONCURRENT OR SUCCESSIVE TORTS

(To Be Used Where Several Tortfeasors are Parties)

Evidence has been received during the trial that (the plaintiff) may have received injuries from separate accidents.

Subdivision ____ of question ____ asks what percentage of any damages incurred by (plaintiff) was attributable to the accident involving (plaintiff) and (defendant A). Subdivision ____ of question ____ asks the same question as to what percentage of any damages incurred by (plaintiff) was attributable to the accident involving (plaintiff) and (defendant B).

Where a person has received injuries from separate acts which are not related to each other, the total damages sustained by the injured person must be divided among the separate acts which caused such damages.

You should not be concerned that you cannot divide the damages exactly or with mathematical precision. In answering these questions, you should use your best judgment, based on the evidence received during the trial, to apportion the percentages of any damage sustained by (plaintiff) to the separate accidents. 1984, Univ. of Wis.

1722A WIS JI-CIVIL 1722A

COMMENT

This instruction and comment were approved in 1983.

WIS JI-CIVIL 1722 and 1722A are to be used where the plaintiff has suffered injuries from nonconcurrent torts, also referred to as successive torts. This instruction (1722A) is to be used where more than one tortfeasor is in the lawsuit as a party.

The Committee recognizes the difficulties, in some cases, in apportioning damages between or among nonconcurrent tortfeasors. This instruction requires the jury to divide the damages even though such a division may be difficult because of the nature of the plaintiff's injuries.

Formerly, *Wisconsin Jury Instructions - Civil* contained a series of three instructions which dealt with the issue of apportioning damages from nonconcurrent torts. These instructions were: (1) WIS JI-CIVIL 1721, Damages: Indivisible Injuries from Nonconcurrent or Successive Torts: Expert Testimony; (2) WIS JI-CIVIL 1722, Damages: Divisible Injuries From Nonconcurrent or Successive Torts; and (3) WIS JI-CIVIL 1723, Damages: Conflict As To Whether Injuries Are Divisible or Indivisible. These instructions were revised by the Committee in 1978 to decisions in *Johnson v. Heintz*, 61 Wis. 2d 585, 213 N.W.2d 85 (1973), and after retrial in *Johnson v. Heintz*, 73 Wis. 2d 286, 243 N.W.2d 815 (1976). According to its comment, WIS JI-CIVIL 1721 was to be used where the court determined as a matter of law that the defendants were not joint tortfeasors, and that the accidents were successive, and that there was uncontroverted expert testimony that the plaintiff's injuries were not divisible. WI JI-CIVIL 1722 was to be used where the trial judge determined that the damages were divisible. WIS JI-CIVIL 1723 was to be used where there was a conflict in the trial testimony on whether the injuries were divisible.

In earlier case law, the Wisconsin Supreme Court had suggested that nonconcurrent tortfeasors were jointly liable for all injuries to the victim where it was impossible to divide the harm caused by each defendant. *Heims v. Hanke*, 5 Wis. 2d 465, 93 N.W.2d 455 (1958); *Bolick v. Gallagher*, 268 Wis. 421,

67 N.W.2d 860 (1955). Those two cases stood for the general proposition that because allocating responsibility for indivisible injuries would place an impossible burden on juries, contribution was appropriate for the actual injury, even though the injury was the result of successive (not joint) tortious acts. This suggestion in *Heims* and *Bolick* that joint liability could arise from the indivisibility of injuries was expressly rejected by the court in *Butzow v. Wausau Memorial Hosp.*, 51 Wis. 2d 281, 187 N.W.2d 349 (1971). Justice Hallows, who authored that opinion, stated that juries should have no more difficulty in allocating damages to the respective negligence of two tortfeasors than they do in allocating contribution of negligence of two tortfeasors to the injury and damages.

In the first *Johnson v. Heintz* decision, the Supreme Court reaffirmed the holding in *Butzow* that inseparability of damages could not create joint liability of successive tortfeasors. *Johnson* No. 1, in rejecting 1721, clearly stated that a tortfeasor is only responsible for the percentage of the damages and injury as was caused by his negligence, even though the injury itself is indivisible. The term "joint liability," as employed in earlier cases, was used in the generic sense. It is not a joint and several liability concept as in the typical two-car accident case where two sources of negligence concur in time and combine to produce one accident. There, of course, contribution will lie and the liability is joint and several.

In the second *Johnson v. Heintz* decision, the court noted that in *Johnson* No. 1 it had stated that an "allocation of damages as to the impact was necessary." Nevertheless, the court, in dicta, suggested that expert testimony could be used to establish the indivisibility of the plaintiff's injuries and, consequently, the joint liability of nonconcurrent tortfeasors. This suggestion was dicta because the jury verdict after the retrial determined that all damages were occasioned by the first impact and that the defendant Heintz was solely responsible for all damages in the case.

After reviewing the case law on this issue, the Committee believes that the jury should apportion all damages received in nonconcurrent torts. As such, Wis. JI-Civil 1721 and 1723 are withdrawn. Wis. JI-Civil 1722 has been simplified so that it applies where only one tortfeasor is a party. Wis. JI-Civil 1722A has been added for use in cases where multiple

tortfeasors are actually in the lawsuit. This instruction requires the jury to apportion the plaintiff's damages between the nonconcurrent tortfeasors. This conforms to the supreme court's decision in the first *Johnson* decision and to Justice Hallows' statement in *Butzow* that the concept of the inseparability of damages "is an importation from other states and is foreign to our jurisprudence, at least since 1931 when our comparative negligence statute was enacted."

In *Foley v. City of West Allis*, 113 Wis. 2d 475, 485-86, 335 N.W.2d 824 (1983), the court stated that "as a general rule, when there is a logical basis to allocate damages between two or more incidents and among various parties, courts attempt to do so." *Citing*, Prosser, *Law of Torts* § 65 (4th ed. 1971) and Restatement (Second) Torts §§ 433A and 465 (1975). *Foley* involved the apportionment of damages to "seat-belt negligence" by the plaintiff. The court noted that since failure to wear seat belts generally causes incremental injuries, damages should be allocated between the first incident (the actual collision) and the second incident (the collision within the plaintiff's car).

Section 433A of Restatement (Second) Torts, quoted in *Foley*, states:

> 433A. Apportionment of Harm to Causes
> (1) Damages for harm are to be apportioned among two or more causes where
> (a) There are distinct harms or
> (b) There is a reasonable basis for determining the contribution of each cause to a single harm.
> (2) Damages for any other harm cannot be apportioned among two or more causes.

For a further discussion of the indivisibility of injuries under Wisconsin tort law, see Scott, "The Apportionment of 'Indivisible' Injuries," 61 Marq. L. Rev. 559 (1977).

SPECIAL VERDICT

If you have answered "yes" to both questions ____ and ____ (*i.e.*, casual negligence of both nonconcurrent tortfeasors), what percentage of all the damages received by the (plaintiff) do you attribute to:

SUBDIVISION A — The accident involving (plaintiff) and and (defendant A)? ____%

SUBDIVISION B — The accident involving (plaintiff) and (defendant B)? ____%

TOTAL 100%