Evidentiary Problems of Apportionment Under Wisconsin Second Collision Law

James A. Niquet
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I. INTRODUCTION

In 1968, the Eighth Circuit Court of Appeals accepted the “second collision” or “crashworthiness” doctrine.¹ The concept allows recovery against a manufacturer of a vehicle for an injury over and above that caused by the initial collision and that attributable to a design defect.² Since its inception, the second collision doctrine has been accepted by the majority of jurisdictions,³ but with a lack of uniformity as to its application. In particular, two lines of authority have developed relating to the burden of apportionment of injuries.⁴

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1. Larsen v. General Motors, 391 F.2d 495 (8th Cir. 1968).
2. Second collision cases involve an actual secondary impact with a specific part of the vehicle, while crashworthy cases are based on a more generalized complaint that the vehicle was unsafe for a foreseeable collision. See Foland, Enhanced Injury: Problems of Proof in “Second Collision” and “Crashworthy” Cases, 16 WASHBURN L.J. 600, 606-07 (1977).
Because of the difficulty involved in proving the enhanced injury, trial courts have been forced to grapple with a number of complex evidentiary issues. One of the most difficult questions relates to the admissibility of evidence concerning the cause of the original collision as compared to the cause of the plaintiff's enhanced injury. Since, in its theoretical form, the second collision theory only relates to the cause of the enhanced injury, causal responsibility for the underlying accident is irrelevant in the claim against the manufacturer. Therefore, evidence relating strictly to the cause of the original impact is generally irrelevant in proving that the manufacturer's product was defective.

Under Wisconsin's second collision law, however, the plaintiff has the burden of showing injury and damages caused by the defective product, while the manufacturer has the burden of allocating damages between two or more impacts. If the plaintiff proves that the manufacturer's defective product was a cause of his injuries, he need not prove what portion of indivisible harm is attributable solely to the manufacturer. The manufacturer, therefore, is compelled to prove a negative — those damages not caused by the defective product. The query is whether the manufacturer should be permitted to introduce evidence of "accident-causing" negligence in order to satisfy its burden of proving which injuries were enhanced. Wisconsin has not had the opportunity to address this precise issue.

This Article will review the theoretical underpinnings of the enhanced injury concept and discuss the different theories of apportionment. It will also assess the Wisconsin theory of apportionment and the complex evidentiary problems the theory creates for the manufacturer attempting to satisfy its burden of proof.


7. Maskrey v. Volkswagenwerk, A.G., 125 Wis. 2d 145, 153-54, 370 N.W.2d 815, 819-20 (Ct. App. 1985). The language in Maskrey, which places the burden to apportion damages on the manufacturer of the defective product, has been criticized as being based upon the dicta in Johnson v. Heintz, 73 Wis. 2d 286, 243 N.W.2d 815 (1976) and the RESTATEMENT (SECOND) OF TORTS § 433B (1965). See Ghiardi, supra note 4, at 21.

8. See Ghiardi, supra note 4, at 21.

II. The Concept of the Enhanced Injury

Courts and writers have disagreed regarding the distinctiveness of the enhanced injury theory. One court has treated the theory as being *sui generis*. Other courts have employed traditional tort principles in applying the doctrine. It has also been suggested by one author that the theory is neither *sui generis* nor subject to routine application of traditional tort principles, rather it is simply a particularized treatment of the proximate cause issue. Another writer has commented that the doctrine is merely a method of apportioning injuries among multiple defendants.

Much of the confusion in attempting to apply the second collision doctrine stems from the decision in *Larsen v. General Motors*. The plaintiff in *Larsen* claimed a head injury as a result of a negligently designed steering column, which, on impact, caused the steering wheel to thrust backwards into the plaintiff. The plaintiff conceded that the design defect did not cause the accident, but alleged that he received injuries which he would not have otherwise received, but for the defective design. The court stated the general rule regarding manufacturer liability as follows: "Where the manufacturer's negligence in design causes an unreasonable risk to be imposed upon the user of its products, the manufacturer should be liable for the injury caused by its failure to exercise reasonable care in the design."  

The issue in *Larsen* involved a determination of whether a collision was within the "intended use" of the automobile. The court held that the manufacturer had a duty to exercise reasonable care in its design of a vehicle so as to avoid unreasonable risk of injury in the event of a collision. The court then defined the parameters of recovery in a second collision case:

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.

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10. See generally Harris, supra note 6, at 229.
12. Mitchell v. Volkswagenwerk, 669 F.2d 1199, 1207 (8th Cir. 1982); Fox v. Ford Motor Co., 575 F.2d 774 (10th Cir. 1978).
13. See Harris, supra note 6, at 246.
14. See Foland, supra note 2, at 608.
15. 391 F.2d 495 (8th Cir. 1968).
16. Id. at 502.
17. Id.
18. Id. at 503.
Although the manufacturer argued that it would be very difficult to apportion the plaintiff's injury, the court ignored that argument and stated that the "obstacles of apportionment are not insurmountable." The failure of the Larsen court to fully address the complications inherent in apportioning enhanced injuries has resulted in a divergence of authority on the plaintiff's standard of proof and allocation of damages.

III. APPORTIONMENT OF ENHANCED INJURIES

Occasionally, the injuries caused by an alleged design defect are clearly identifiable from those caused by the initial collision. Certain injuries, however, such as death, have been declared indivisible as a matter of law. In the typical tort case involving multiple causes, each tortfeasor is charged with liability for the entire amount of damages even though the injuries may be indivisible to the trier of fact. In a second collision case, however, a manufacturer cannot, as a matter of law, be held liable for the injuries caused by the first collision or impact, since the manufacturer did not cause the collision. Because the second collision doctrine differs from the orthodox product liability action, two opposing views on the standard of proof have developed. These views are set forth in Huddell v. Levin and Mitchell v. Volkswagenwerk, A.G.

In Huddell, the Third Circuit Court of Appeals interpreted New Jersey law as requiring the plaintiff in second collision cases to prove the proper apportionment of damages. At the trial court, Mrs. Huddell presented evidence that the impact of her husband's head against the head restraint severely fractured his skull, causing fatal brain damage. The jury returned a
verdict against General Motors under a strict liability theory, but found no liability on Levin, the other driver, or Levin’s employer under the doctrine of respondeat superior. The trial court entered a judgment notwithstanding the verdict against Levin and his employer. General Motors appealed, charging principally that the trial court should have required the jury to apportion the damages rather than impose joint and several liability on the defendants.

The Third Circuit ruled that the plaintiff had shown that the head restraint system was defectively designed and had caused the plaintiff’s injuries. The court further held that the plaintiff must offer proof of the following:

1. In establishing that the design in question was defective, the plaintiff must offer proof of an alternative, safer design, practicable under the circumstances.
2. Second, the plaintiff must offer proof of what injuries, if any, would have resulted had the alternative, safer design been used.
3. Third, as a corollary to the second aspect of proof, the plaintiff must offer some method of establishing the extent of enhanced injuries attributable to the defective design.

The Third Circuit found that the plaintiff failed to satisfy the second and third elements with respect to the role of the head restraint in contributing to Huddell’s death. The court stated that the plaintiff had failed to introduce sufficient evidence to allow the jury to apportion damages between the driver and the manufacturer.

The Third Circuit further disputed the district court’s finding that the burden of apportionment should rest with the manufacturer: “[T]he automobile manufacturer is liable only for the enhanced injuries attributable to the defective product. This being the essence of the liability, we cannot agree that the burden of proof on that issue can properly be placed on the defendant manufacturer.”

defective design of the restraint system in the Nova increased the severity of the injury. *Huddell*, 537 F.2d at 731-32.
28. *Id.* at 731.
29. *Id.* at 737-38.
30. *Id.*
31. *Id.* The district court avoided deciding which party had the burden of apportionment by stating that death is a single, indivisible injury incapable of apportionment. *Huddell v. Levin*, 395 F. Supp. 64, 79 (D.N.J. 1975), *vacated*, 537 F.2d 726 (1976). The decision was based primarily upon the following language contained in § 433B of the *RESTATEMENT*:

> Where the tortious conduct of two or more actors has combined to bring about harm to the plaintiff, and one or more of the actors seeks to limit his liability on the ground that the harm is capable of apportionment among them, the burden of proof as to the apportionment is upon each such actor.

*RESTATEMENT (SECOND) OF TORTS* § 433B(2) (1965).
Contrary to *Huddell*, the Eighth Circuit Court of Appeals, in *Mitchell v. Volkswagenwerk, A.G.*, concluded that it would be unreasonable for the plaintiff to carry the burden of proving enhancement. The plaintiff in *Mitchell* was a passenger in a vehicle who suffered a spinal cord injury that rendered him a paraplegic. The right front passenger door was found open after the accident. The jury found that the door of the plaintiff’s vehicle was defective and made an allocation of enhancement of injuries. Judgment was entered accordingly.

The Eighth Circuit reversed and held that *Mitchell* did not involve segregation between inevitable injuries and enhanced injuries, and therefore, the damages could not be apportioned. Thus, the manufacturer was held liable for the total amount as a joint tortfeasor.

Instead of remanding the case to the trial court, the court used the opportunity to attack the majority rule of requiring the plaintiff to prove enhancement of injuries:

A rule of law which requires a plaintiff to prove what portion of indivisible harm was caused by each party and what might have happened in lieu of what did happen requires obvious speculation and proof of the impossible. This approach converts the common law rules governing principles of legal causation into a morass of confusion and uncertainty.

The court then went on to reject the manufacturer’s argument that a plaintiff must prove distinct injuries between separate impacts in order to satisfy a prima facie case:

The argument is made that since the manufacturer’s liability is only for the enhanced injury, without plaintiffs proving that the injury would not have occurred in the first collision, there is no proof of an enhanced injury. The difficulty with this reasoning is that where there is but a single indivisible injury (e.g., death, paraplegia) it requires plaintiffs to rely on pure speculation, since in many instances it is impossible to show which tortfeasor caused the indivisible harm. Such a rule ignores common law principles on legal causation. Our

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32. 669 F.2d 1199 (8th Cir. 1982).
33. *Id.* at 1201.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* at 1206. The special verdict answers indicated that the jury did not understand the issues it was asked to resolve. *Id.* at 1202-03.
38. *Id.* at 1205.
statement in Larsen should not be construed so as to subject a jury to a complete conjectural result.\textsuperscript{39}

The Mitchell court's effort to alleviate plaintiff's burden of proving enhanced injuries in indivisible injury cases completely undermines the concept of the enhanced injury. In the absence of affirmative proof of enhanced injuries, the plaintiff has failed to demonstrate the occurrence of a second impact. The existence of two separate and distinct impacts causing indivisible injuries is the core principle behind the second collision doctrine.\textsuperscript{40}

IV. ACCIDENT AND INJURY CAUSING NEGLIGENCE

The Larsen court failed to critically examine the plaintiff's burden of proof and set forth specific guidelines as to the sufficiency of evidence necessary to establish a prima facie case. This has created difficult evidentiary issues in the jurisdictions following the landmark decision. Wisconsin explicitly adopted the Larsen decision in Arbet v. Gussarson,\textsuperscript{41} but did not have the opportunity to address the plaintiff's burden of proof and allocation of damages. These issues were subsequently discussed, however, in Sumnicht v. Toyota Motor Sales, U.S.A., Inc.\textsuperscript{42} and Maskrey v. Volkswagenwerk, A.G.\textsuperscript{43} Sumnicht and Maskrey require the plaintiff to satisfy its prima facie case by introducing evidence that a defective product was a substantial factor in causing harm for which the plaintiff claims damages. Once the plaintiff has established his prima facie case, the burden of apportioning damages shifts to the manufacturer of the product.

Relieving the plaintiff from affirmatively proving the allocation of damages in a second collision case provides the plaintiff's counsel with an opportunity to selectively exclude harmful evidence relating to the cause of the collision. This strategy is typically employed in cases of serious injury or death where the plaintiff has substantial contributory negligence. It is also used in automobile collisions where the defendant-driver is uninsured or insolvent, but the manufacturer of an allegedly defective product has a deep pocket. The plaintiff may attempt to exclude "accident-causing evidence" through a protective order or declaratory ruling on the grounds that

\begin{itemize}
  \item \textsuperscript{39} Id. (citation omitted).
  \item \textsuperscript{40} See supra note 23 and accompanying text.
  \item \textsuperscript{41} 66 Wis. 2d 551, 225 N.W.2d 431 (1975).
  \item \textsuperscript{42} In Arbet, the sole issue on appeal was "whether 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 was unreasonably unsafe in an accident." Id. at 553, 225 N.W.2d at 433. The court relied specifically on Larsen in overruling the demurrer of the manufacturer. Id. at 559, 225 N.W.2d at 436-37.
  \item \textsuperscript{43} 125 Wis. 2d 145, 370 N.W.2d 815 (Ct. App. 1985).
\end{itemize}
the evidence has nothing to do with the manufacturer's responsibility for the plaintiff's enhanced injuries. In other words, plaintiff would argue that comparing evidence of "accident-causing" negligence with "injury-causing" negligence is tantamount to comparing apples and oranges.

There is a clear demarcation between accident-causing fault and injury-enhancing fault. Accident-causing fault relates to liability apportioned on the basis of contribution to the proximate cause of the collision. Injury-enhancing fault refers to liability apportioned on the basis of contribution to the proximate cause of the plaintiff's enhanced injuries. The manufacturer is only liable for enhanced injuries; therefore, it is argued that evidence relating to the cause of the collision is irrelevant and will only confuse and mislead the jury.

The irrelevancy of accident-causing fault in a second collision case has been suggested by several authors. One author has stated the following:

[T]he accident-causing fault of a plaintiff is irrelevant in second collision cases. A comparison of accident-causing fault and injury-enhancing fault contradicts Larsen and the axiom by basing manufacturer liability on the proximate causation of the first collision and not on the proximate cause of the enhanced injuries. Because second collision claims are often brought when a plaintiff's conduct is the proximate cause of the first collision, the comparison of accident-causing fault and injury-enhancing fault emasculates second collision liability.44

Another author has suggested that evidence of the accident-causing negligence of the plaintiff is irrelevant since it cannot reduce the plaintiff's recovery:

In enhanced injury cases, unlike ordinary products liability cases, a claimant's fault in causing the accident is not a basis for reducing his recovery. . . . The cause of the contact has no bearing on the issue of whether an object's response to the contact was a reasonable one. The trier of fact's analysis must be limited to the nature and severity of the contact and object's response. A negligent operator is entitled to the same protection against unnecessary injury as the careful user of the same product is entitled.45

44. Comment, Manufacturer's Liability, supra note 4, at 125. The author of a Michigan Law Review article argues the same proposition. The "plaintiff's negligence should not be a defense for a manufacturer in an action for enhancement of injuries. The manufacturer's affirmative defense based on the plaintiff's contributory negligence is no more persuasive than his similar claim that the collision of the vehicle and the pedestrian constituted an intervening cause." Note, The Automobile Manufacturer's Liability to Exterior Design: New Dimensions in Crashworthiness, 71 Mich. L. Rev. 1654, 1666 (1973).

45. See Harris, supra note 6, at 265-66.
There are few cases which discuss the admissibility of accident-causing negligence in a second collision case. Furthermore, the decisions that have addressed the issue have not explained it thoroughly. Perhaps the most complete examination of the topic appears in *Trust Corp. of Montana v. Piper Aircraft.*

The strict liability action in *Trust Corp.* was a result of an airplane crash. Plaintiff alleged enhanced injuries caused by a lack of a shoulder restraint system. Plaintiff also admitted that the cause of the crash was not the design defect. There was evidence that upon takeoff the plane was overweight and the air temperature too high. The plaintiff moved to strike the defendant's affirmative defenses relating to assumption of risk and contributory negligence, arguing that both were irrelevant in a crashworthiness action.

The court determined that the plaintiff's conduct could be compared to the manufacturer's liability for a defective product. The court then stated that all of plaintiff's contributory negligence should be considered:

Plaintiff's position boils down to this: that the accident-causing factors and the injury-causing factors are qualitatively different and must be considered separately. Plaintiff argues that this court should exclude evidence dealing with the nature and cause of the crash and allow only that evidence pertaining to the enhancement of injuries as a result of Piper's failure to provide shoulder harnesses. Although plaintiff's position has some merit in a second collision type case, the modern trend rejects this piecemeal approach. Rather, inquiry focuses on the product design as an integrated whole, and a consideration of all the factors that contributed to the event which caused the injury. . . . Thus an examination of all the circumstances (e.g., speed, angle, weight, etc.), prior to and after impact is proper in fairness to the parties. In short, all of plaintiff's conduct, regardless of labels attached to that conduct, is to be compared to defendant's liability.

A similar result was reached in *Fietzer v. Ford Motor Co.* The action arose out of a two car accident in which plaintiff's Mercury Comet was rear-ended by defendant Hilker's Plymouth. Plaintiff claimed that Ford's fuel tank design was unreasonably dangerous. Evidence was introduced at trial that Hilker had been drinking throughout the day and that his speed

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47.  Id. at 1094.
48.  Id. at 1098.
49.  Id. (citation omitted).
50.  390 F.2d 215 (7th Cir. 1978).
before impact ranged between forty-five to sixty miles per hour. In a special verdict, the jury found Hilker negligent, but that his negligence was not a cause of plaintiff’s injuries.  

The principal issue on appeal was whether there was credible evidence on which the jury could find that Hilker’s negligence was not a cause of plaintiff’s injuries. The Seventh Circuit Court of Appeals accepted the manufacturer’s argument that Hilker’s negligence must have contributed to plaintiff’s injuries:

We agree with the defendant’s contention as a matter of common sense and are of the opinion that the Wisconsin Court would deal similarly with the facts before us. To find Hilker’s conduct which resulted in such severe impact not causal of plaintiff’s injuries is beyond the bounds of reason.

In addition to Trust Corp. and Fietzer, another court expressly accepted contributory negligence as a defense in a strict liability case involving a second collision. A different court indicated in dicta that evidence of plaintiff’s intoxication was relevant in establishing an affirmative defense of product misuse and failure to use available safety devices.

These cases do not represent a general rule regarding the admissibility of accident-causing negligence in a second collision case. Furthermore, despite the language in Trust Corp., there does not appear to be a trend in jurisdictions allowing the admission of such evidence in second collision cases. The admissibility of accident-causing negligence will be determined by whether the particular jurisdiction recognizes that negligence, in causing an accident to occur, is not a basis for reducing an enhanced injury award.

51. Id. at 217.
52. Id.
53. Id. at 218. The court noted that the cause question is for the jury in all cases where different answers are within the bounds of reason. Id.
Courts will also consider whether the manufacturer carries the burden of apportioning injuries.

V. WISCONSIN THEORY OF APPORTIONMENT

Wisconsin has not had the opportunity to address the admissibility of accident-causing negligence in a second collision case. Because of the lack of precedential appellate authority, there is some confusion as to whether the contributory negligence of the plaintiff and conduct of the other defendant-drivers should be admissible at trial, or even discoverable prior to trial. In the absence of any authority on this precise issue, courts must look to the standards of proof as enunciated in Sumnicht and Maskrey. Although these cases do not address the admissibility of evidence, they set forth the elements of plaintiff's cause of action and the manufacturer's burden of proof.

A number of evidentiary problems relating to apportionment of damages stem from the decision in Sumnicht v. Toyota Motor Sales, U.S.A.\(^57\) Sumnicht was a passenger in a Toyota that left the roadway and collided with a tree. He was rendered a quadriplegic after the collision. Sumnicht settled out of court with the driver under a Pierringer Release.\(^58\) He continued the trial against Toyota on the theory that the front seat system was defective and negligently designed and manufactured. The jury awarded 4.7 million dollars in damages and apportioned the negligence at 50% to the defective seat manufacturer and 50% to the driver.\(^59\) Toyota appealed. On appeal, the Wisconsin Supreme Court distinguished between the burden of proof and causation and the burden of apportioning damages:

[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.\(^60\)

The court then stated that in a second collision case, a plaintiff "must prove that the defective product was a substantial factor in causing harm from which damages are claimed."\(^61\) The court further stated that if the plaintiff proves that the defect was a cause of his injuries, he need not prove

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57. 121 Wis. 2d 338, 360 N.W.2d 2 (1984).
59. Sumnicht, 121 Wis. 2d at 347-48, 360 N.W.2d at 6.
60. Id. at 353-54, 360 N.W.2d at 9.
61. Id. at 358, 360 N.W.2d at 11.
what portion of indivisible harm is attributable solely to the manufacturer; the manufacturer and the defendant drivers become joint tortfeasors and their liability is joint and several. In so holding, the court specifically rejected the tripartite test of *Huddell.*

The *Sumnicht* court concluded that the plaintiff's injuries were indivisible. Accordingly, the language relating to the apportionment of damages has been criticized as having no precedential value. Nonetheless, *Sumnicht*’s dicta and corresponding repudiation of the *Huddell* decision became law in *Maskrey v. Volkswagenwerk, A.G.*

The *Maskrey* decision involved a two car collision in which the plaintiff sustained serious injuries. The jury found that Volkswagen had negligently designed and tested the vehicle, and that such negligence was a substantial factor in causing Maskrey's enhanced injuries. The jury also found Szuta, the defendant driver, causally negligent. Maskrey was found negligent for failing to wear a seatbelt. The *Maskrey* court found that Volkswagen was a successive tortfeasor and placed the burden to allocate damages on the manufacturer:

> [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 comparative negligence damages are mandated in this circumstance.

Therefore, under *Maskrey,* once the plaintiff has established that the defective product was a substantial factor in causing his injuries, the burden of proof shifts to the defendant to apportion the damages between the two impacts. Therefore, the manufacturer must offer evidence segregating the injuries that were proximately caused in the first collision from the enhanced injuries that were proximately caused by the allegedly defective product. Accordingly, not only is the manufacturer required to prove a negative, i.e., which injuries were not enhanced by the product, but it is also required to offer affirmative evidence that enhanced injuries occurred. Under the second collision theory, what should have been the principal ele-

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62. See *supra* note 27 and accompanying text.
64. 125 Wis. 2d 145, 370 N.W.2d 815 (Ct. App. 1985).
65. Id. at 151, 370 N.W.2d at 818.
66. The jury allocated the damages as follows: 57% of Maskrey's damages were "enhanced injuries;" 28% of the injuries would have occurred absent a defect in the vehicle; and 15% of Maskrey's injuries were caused by his failure to wear a seat belt. Id. at 152, 370 N.W.2d at 819.
67. Id. at 153-54, 370 N.W.2d at 818-20 (citing *Johnson v. Heintz,* 73 Wis. 2d 286, 301-07, 243 N.W.2d 815, 825-28 (1976)).
ment of plaintiff’s prima facie case has ironically become the manufacturer’s burden of proof.

VI. EVIDENCE OF ACCIDENT CAUSING NEGLIGENCE

Because under Wisconsin law the manufacturer carries the burden of separating the injuries caused between the successive impacts, one plaintiff’s strategy is to attempt to exclude harmful evidence relating to the cause of the original collision. The type of evidence that is principally related to the cause of the original impact includes the pre-accident conduct or contributory negligence of the plaintiff and the negligence of the other defendant-drivers at or before the point of original impact. The simplistic approach to ruling on the admissibility of “accident-causing” negligence is to reason that it can never be heard by the jury because it is unrelated to the enhanced injuries of the plaintiff. A proper analysis of its admissibility requires the trial judge to examine the type of evidence sought to be introduced by the parties in relation to their respective burdens of proof. This approach should take into account the special verdict used in Maskrey.68

A. Contributory Negligence

A plaintiff assumes responsibility for those injuries attributable to his own conduct, specifically the non-enhanced injuries attributable to his injury-enhancing fault.69 Certain actions by the plaintiff, including contributory negligence, assumption of risk70 and misuse of the product71 may

68. See infra note 75.
69. See generally Comment, Manufacturer’s Liability, supra note 4, at 120-21.
70. The most commonly invoked formulation of this defense in strict liability tort cases is that set out in Restatement (Second) of Torts, which is as follows:

Since the liability with which this Section deals is not based upon negligence of the seller, but is strict liability, the rule applied to strict liability cases (see § 524) applies. Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. On the other hand the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.

Restatement (Second) of Torts § 402A comment n (1965).
71. The most commonly invoked statement of this defense is that set out in Restatement (Second) of Torts § 402A comment g (1965), which is as follows:

The rule stated in this Section applies only where the product is, at the time it leaves the seller’s hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him. The seller is not liable when he delivers the product in a safe condition, and subsequent mishandling or other causes make it harmful by the time it
contribute to the proximate cause of plaintiff's enhanced injuries, and should therefore be admissible at trial in order for the manufacturer to satisfy its burden of proof.

Wisconsin recognizes misuse, abuse or alteration of a product as a defense in a strict liability action. In a second collision case, evidence of a plaintiff’s misuse or nonuse of a product includes failure to use safety belts, shoulder harnesses, or other safety devices installed by the manufacturer to reduce or prevent injuries during a collision. Injury enhancing negligence could also include the use of the vehicle or product for a purpose never intended by the manufacturer, or failure to maintain a product according to manufacturer’s instructions. For example, a plaintiff’s failure to properly maintain brakes on an automobile could constitute a substantial factor in causing an enhanced injury. Similarly, loading the inside of a vehicle with items that increase the risk of injury could also constitute “injury-enhancing” negligence.

The introduction of evidence relating to the contributory negligence of the plaintiff may create difficult evidentiary issues. For example, should evidence of intoxication, lack of sleep or failure to wear prescription glasses be admissible when the only defendant is the manufacturer of the defective product? Pre-accident conduct or contributory negligence of this sort appears to have no logical connection with the proximate cause of plaintiff’s enhanced injuries. However, it relates to the cause of the original collision as well as the injuries that would have been sustained in the accident absent a defective product. Under Wisconsin second collision law, the manufacturer must separate and distinguish these non-enhanced injuries from the enhanced injuries.

is consumed. The burden of proof that the product was in a defective condition at the time that it left the hands of the particular seller is upon the injured plaintiff; and unless evidence can be produced which will support the conclusion that it was then defective, the burden is not sustained. Safe condition at the time of delivery by the seller will, however, include proper packaging, necessary sterilization, and other precautions required to permit the product to remain safe for a normal length of time when handled in a normal manner.

72. Dippel v. Sciano, 37 Wis. 2d 443, 460, 155 N.W.2d 55, 63 (1967).

73. One court has remanded a case for jury consideration of the effect of plaintiff’s failure to lock his door in comparing the liability of the plaintiff and the manufacturer in causing plaintiff’s enhanced injuries. Daly v. General Motors, 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978).

74. Ordinarily a brake failure would be a proximate cause of the collision, not enhanced injuries. However, expert testimony could be adduced to prove that a properly maintained brake system would not have prevented a hypothetical head-on collision, but could have reduced the momentum of one of the vehicles, and therefore reduced the overall severity of the impact and resulting injuries.

Wisconsin has not had an opportunity to address these evidentiary issues. In at least two reported decisions, however, it has discussed whether contributory negligence should be considered by the jury in apportioning damages in the enhanced injury portion of the special verdict.

In *Maskrey*, the jury instructions and special verdict allowed the jury to first allocate a percentage of negligence to each of the actors which caused all of Maskrey's injuries, including the negligence of the plaintiff. The jury was then instructed in a separate portion of the verdict to allocate the percentage of injuries that were enhanced by the presence of a defect as compared with the injuries that would have occurred in the accident absent a defect. Maskrey's contributory negligence was not considered in this portion of the verdict. The jury was asked to assess Maskrey's conduct only with respect to his failure to wear a seat belt. Seat belt negligence is conceptually distinct from contributory negligence insofar as it directly relates to causal responsibility for enhanced injuries.

In a more recent case, the Wisconsin Court of Appeals addressed the issue of whether the trial court erred when it failed to assess the plaintiff's contributory negligence in the enhanced injury portion of the special verdict.

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76. *Maskrey v. Volkswagenwerk*, 125 Wis. 2d 145, 158, 370 N.W.2d 815, 822 (1985). Special verdict question No. 11 read as follows:

Assuming that the total negligence which caused all of Michael Maskrey's injuries to be 100%, what percentage of such negligence do you attribute to:

- A. Thomas Szuta? 43%
- B. Michael Maskrey? 0
  (If you did not answer Question No. 4 or if you answered Question No. 4 "No," then insert "0")
- C. The Volkswagen Defendants? (If you did not answer Question No. 6 or Question No. 8 or if you answered all subdivisions of those questions "No" then insert "0") 57%

Total 100%

77. *Id.* Question No. 12 of the special verdict read as follows:

Assuming the total injuries and damages sustained by Michael Maskrey to be 100%, what percentage of those injuries do you attribute to:

- A. Those enhanced injuries were caused by the presence of a defect, if any, in the Volkswagen van? ___%
  (Answer this subdivision only if you have answered Question No. 6 or Question No. 8 "Yes.")
- B. Those injuries, if any, which would have occurred as a result of the accident without there being any defect in the Volkswagen van, and absent any failure to wear a seat belt/shoulder restraint? ___%
- C. Those injuries which were caused by Michael Maskrey's failure to wear a seat belt/shoulder restraint? ___%
  (Answer this subdivision only if you have answered Question No. 10 "Yes.")

Total ___%
dict. The Farrell case was submitted to a jury in two phases in the special verdict. In the first phase, the jury apportioned responsibility among the parties, including the plaintiff, for the damages caused to Farrell for his entanglement in the husking rolls of a cornpicker. Farrell was determined to be legally responsible for causing his initial entanglement in the product, and the manufacturer was exonerated as to this phase of the plaintiff's claim.

The next portion of the special verdict dealt with the enhancement phase of the accident. The jury was asked if the John Deere Company was responsible for failing to design an emergency shut-off switch on the husker. The jury answered this question in the affirmative and determined such conduct to be causal of Farrell's enhanced injuries. Finally, the special verdict asked the jury to bring the two parts of the verdict together by allocating the percentage of damages and injuries due to the entanglement and that due to the enhancement.

John Deere appealed on the grounds that the negligence of Farrell and the other defendants were not considered in the enhancement phase of the verdict. In upholding the verdict structure, the court stated: "Deere was alleged to have enhanced the injuries through its failure to provide an emergency shut-off device. There was no evidence that Farrell or the other defendants in any way contributed to the design defect that enhanced Farrell's injuries." 79

Although the enhanced injury portion of the special verdicts in Maskrey and Farrell did not assess the plaintiff's contributory negligence in causing enhanced injuries, both cases implicitly recognize the relevance of evidence of plaintiff's contributory negligence in causing the initial impact. The accident-causing phase of both special verdicts inquired into the contributory negligence of the plaintiff. This is a necessary inquiry even in a second-collision case involving a single comparison between a plaintiff-driver and a defendant-manufacturer.

If the special verdict does not assess the accident-causing negligence of the plaintiff, the manufacturer has been denied the right to prove that all of the plaintiff's injuries, enhanced and non-enhanced, were caused by the plaintiff's own conduct. In other words, a special verdict that determines only injury-enhancing fault presupposes the existence of a second impact.

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78. Farrell v. John Deere Co., 151 Wis. 2d 45, 443 N.W.2d 50 (Ct. App. 1989). Farrell involved a products liability and negligence action for damages caused to Gordon Farrell when he was seriously injured in a farm accident involving a John Deere corn picker. Id. at 56, 443 N.W.2d at 53.

79. Id. at 66-67, 443 N.W.2d at 57.
Similarly, evidence of the plaintiff’s contributory negligence must be admitted in order for the manufacturer to prove the affirmative defense that the plaintiff’s own conduct was a substantial factor in causing all of his injuries.

Although perhaps confusing to the jury, inquiry into the plaintiff’s pre-accident conduct is also necessary to permit the manufacturer to separate the plaintiff’s enhanced injuries from non-enhanced injuries. The manufacturer is not responsible for the injuries that would have occurred in the accident absent a defective product. Nonetheless, because of the *Sumnicht* and *Maskrey* decisions, a defendant manufacturer is obligated to prove those injuries. It would be entirely inconsistent for the manufacturer to be required to prove the extent and severity of the non-enhanced injuries in order to satisfy its burden of proof without being able to offer evidence to the jury of their cause. This is particularly evident in a death case, which is qualitatively different from other cases since there does not appear to be a way to measure the extent of enhancement. In such cases, the manufacturer must be entitled to introduce any evidence which proves that death would have occurred in the collision because of the plaintiff’s conduct even absent a defective product. To that end, accident reconstruction and human factors experts often rely on the pre-collision condition of the plaintiff to determine his most likely pre-accident physical reaction or movement to the impending collision and the cause of his particular bodily injuries as sustained between the first and second impacts.  

**B. Negligence of Other Actors**

The admissibility of evidence relating to the negligence of other drivers involved in the collision also creates a complex issue for the trial court in a second collision case. A defendant-driver theoretically should not be responsible for enhanced injuries since his negligence can only cause the initial impact. A defendant-driver cannot proximately cause an enhanced injury unless the plaintiff is a passenger in his vehicle. This presents an attractive opportunity for plaintiff’s counsel to move that the trial court exclude all evidence of accident-causing negligence of the defendant-driver so as to present the jury with evidence of only the manufacturer’s defective product. This is particularly evident in a death case, which is qualitatively different from other cases since there does not appear to be a way to measure the extent of enhancement. In such cases, the manufacturer must be entitled to introduce any evidence which proves that death would have occurred in the collision because of the plaintiff’s conduct even absent a defective product. To that end, accident reconstruction and human factors experts often rely on the pre-collision condition of the plaintiff to determine his most likely pre-accident physical reaction or movement to the impending collision and the cause of his particular bodily injuries as sustained between the first and second impacts.

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80. Occupant kinematics and biomechanics in the nature of reconstruction are two separate fields of expertise offered to prove the apportionment of injury. Some courts have held that expert testimony is necessary to apportion injuries. Trans-Cold Express, Inc. v. Arrow Motor Transit, Inc., 440 F.2d 1216, 1221 (7th Cir. 1971); Rhynard v. Filori, 315 F.2d 176, 179 (8th Cir. 1963).

81. The defendant-driver's negligence in enhancing the plaintiff's injuries includes failing to maintain the vehicle or otherwise misusing the vehicle. *See supra* notes 55 and 56 and accompanying text.
product. This strategy is often the only avenue for recovery where the defendant-driver is 100% at fault for the collision, yet insolvent or uninsured.

Despite the logical appeal of excluding the defendant-driver's negligence in order to simplify the issues for the jury, the manufacturer has the right to introduce evidence of the negligence of all potential tortfeasors whether or not they can be liable as a matter of law. In fact, the Maskrey special verdict required the jury to consider the responsibility of the defendant-driver in causing the plaintiff's injuries.

Exclusion of evidence respecting the defendant-driver's negligence also contravenes the law of apportionment between successive tortfeasors. Under Wisconsin law of apportionment of damages between successive tortfeasors, the original tortfeasor can be held liable for all of the damages, including the enhanced damages caused by the second tortfeasor. If the original tortfeasor can be held liable for all damages, including enhanced injuries, and the subsequent tortfeasor can be liable only for enhanced injuries, then it necessarily follows that the court cannot preclude the subsequent tortfeasor from offering evidence that all of plaintiff's injuries were caused by the negligence of the original tortfeasor. Furthermore, the defendant-driver's negligence should also be admissible to enable the manufacturer to prove that no enhancement occurred. Since it is the manufacturer's burden of proof to apportion injuries, an absolute defense can be established by demonstrating that the defendant-driver was 100% at fault for causing all of the plaintiff's injuries. This could occur in a wrongful death action where the evidence shows that death resulted from the high speed of the vehicles at impact, instead of a defect in the product design.

VII. CONCLUSION

This Article focuses on the admissibility of accident-causing negligence in a second collision case. With the growing number of complex products liability actions, perhaps the concept of the enhanced injury will become more clearly defined and the confusion relating to the admissibility of accident-causing negligence eliminated.

82. When apportioning negligence, a jury must consider the negligence of all parties to the transaction giving rise to the cause of action, whether or not they are immune from liability to the plaintiff either by settlement or operation of law. Conner v. West Shore Equip. Inc., 68 Wis. 2d 42, 44-46, 227 N.W.2d 660, 662-63 (1975).

83. See supra notes 75 and 76 and accompanying text.

84. See generally Johnson v. Heintz, 73 Wis. 2d 286, 243 N.W.2d 815 (1976); Krenz v. Medical Protective Co., 57 Wis. 2d 387, 204 N.W.2d 663 (1973); Butzow v. Wausau Memorial Hosp., 51 Wis. 2d 281, 187 N.W.2d 349 (1971).
At this juncture, Wisconsin trial courts must look to the standards of proof as set forth in *Sumnicht* and *Maskrey* as guidance in addressing the relevancy of evidence of contributory negligence of the plaintiff in causing enhanced injuries. Courts need only refer to the Wisconsin law of comparative negligence and successive tortfeasor liability to determine the admissibility of evidence respecting the negligence of defendant-drivers.

Courts and trial counsel should be encouraged to further develop second collision theory as a viable and sometimes sole means of recovery for the injured plaintiff. The conceptual underpinnings of the doctrine, however, must always remain intact in order to prevent it from evolving into an incomprehensible and overly expansive theory of recovery applicable to cases that do not involve genuine enhanced injuries. Confusion and inconsistency can be minimized through the application of traditional tort principles to the original concept of the enhanced injury.