TORTS I

MITCHELL v. VOLKSWAGENWERK, A.G.: APPORTIONING DAMAGES IN A SECOND COLLISION CASE

INTRODUCTION

In 1968, the Eighth Circuit Court of Appeals rendered a landmark decision which held automobile manufacturers liable for injuries enhanced by a defective design, even though the design did not cause the initial car accident. The case, Larsen v. General Motors Corp., is today considered the principal supporting precedent for imposition of liability on manufacturers for enhanced injuries due to a defective design. The Larsen decision, however, did not address the issue of whether the trier of fact should in all cases apportion the damages, and if apportionment would be required, which party should bear the burden of proof of apportionment.

In 1982, in Mitchell v. Volkswagenwerk, A.G., the Eighth Circuit, sitting en banc, addressed these apportionment issues. The court held that if injuries are considered indivisible, the damages cannot be apportioned. In addition, the burden of proving that the injuries are divisible and the damages are capable of apportionment is borne by the defendants.

This article examines the "second collision" doctrine from its inception in Larsen through the recent decision by the Eighth Circuit in Mitchell. As analysis shows, the "second collision" doctrine articulated in Larsen is susceptible to varying interpretations. Nevertheless, the decision in Mitchell may be viewed as consistent with the overall spirit of Larsen, which re-

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1. Larsen v. General Motors Corp., 391 F.2d 495, 503 (8th Cir. 1968).
2. 391 F.2d 495 (8th Cir. 1968).
3. According to one commentator, 30 jurisdictions have adopted a version of the rule articulated in Larsen. Nine jurisdictions have refused application. Golden, Automobile Crashworthiness—The Judiciary Responds When Manufacturer's Improperly Design Their Cars, 46 INS. COUNS. J. 335, 343 (1979).
4. See notes 82-86 and accompanying text infra.
5. 669 F.2d 1199 (8th Cir. 1982).
6. Id. at 1209.
7. Id. at 1208.
8. See notes 36-39 and accompanying text infra.
9. This article focuses upon the second collision doctrine within the traditional negligence framework. For an interesting discussion of second collision liability within the strict liability context see, Note, 10 FLA. ST. U.L. REV. 149 (1981).
10. See Mitchell v. Volkswagenwerk, A.G., 669 F.2d 1199 (8th Cir. 1988); but see Huddell v. Levin, 537 F.2d 726 (3d Cir. 1976). See notes 84-88 and accompanying text infra.
reflects a concern for the consumer in an era of increasing technological complexity. 11

FACTS AND HOLDING

On October 14, 1967, Mockenhaupt and his passenger, Mitchell, were involved in an automobile accident near Moorhead, Minnesota. The vehicle, for an unknown reason, left the road, struck an embankment, rolled over, and Mitchell was ejected from the car. As a result of this accident, Mitchell is a paraplegic and suffers from a seventy-five to eighty percent disability of his right arm; Mockenhaupt sustained only minor injuries. 12

In an action brought by Mitchell against both Mockenhaupt and the manufacturer of the car, Volkswagen, for damages as the result of the accident, a Minnesota federal district court awarded damages to Mitchell. The verdict apportioned the damages between Mockenhaupt, the driver of the car, and Volkswagen. 13 Judgment was entered on the apportioned verdict, and Mitchell's motion for a new trial was overruled. 14

On appeal to the Eighth Circuit, Mitchell asserted that the apportionment of damages was speculative and inconsistent with the evidence. He also asserted that the paraplegic injury was indivisible, which therefore required both Mockenhaupt and Volkswagen to be liable for the damages on a joint and several basis. 15

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11. The concern expressed in *Larsen* was not to leave the injured victim as a mere traffic statistic. 391 F.2d at 503.
13. *Id.* at 1201. The jury found total damages were $570,000 and apportioned the award as follows: $360,000 against Volkswagen and $210,000 against Mockenhaupt.
14. *Id.* at 1201.
15. *Id.* at 1201-02. Although it is not specifically noted in *Mitchell*, a judgment against Mockenhaupt would probably present difficulties in collection for Mitchell. Recovery against Mockenhaupt would probably be limited to the coverage limit of his automobile liability insurance policy. States which require liability insurance generally require $10,000 for any one person injured or $20,000 maximum for all injuries resulting from one accident. M. Woodruff, J. Fonseca & A. Squillante, *Auto-mobile Insurance and No-Fault Laws* § 1:61, at 36 & nn.77-78 (1974). See also Note, *Apportionment of Damages in the “Second Collision” Case*, 63 VA. L. REV. 475, 475 n.3 (1977). One commentator suggests that there are three instances when a plaintiff might choose to try to prove a crashworthy second collision case. He suggests:

As a practical matter, there are three instances in which a plaintiff might elect to undertake the rigorous task of proving a crashworthy second collision case. Most obvious is the situation in which the tortfeasor responsible for the initial collision is either uninsured or without sufficient insurance or personal resources to compensate the injured party. The second situation arises when either the other party to the collision is free of negligence or the injured party is contributorily negligent so that recovery is precluded as a matter of law. The third encompasses those situations in which there is no other party against whom negligence may be asserted. In the first situation, the crashworthy-second collision theory merely provides
alternative, Mitchell asserted that the verdict was inadequate and requested a new trial. The defendants, Mockenhaupt and Volkswagen, however, asserted that the evidence on damages was contested and that the jury had a basis upon which to apportion the damages.

The Eighth Circuit vacated the judgment and remanded the case for a new trial. The appellate court, applying both Minnesota law and the Restatement (Second) of Torts, held that failure of the trial court to decide whether the damages could reasonably be apportioned was plain error and that the apportioned verdict was totally inconsistent with the evidence. Since the paraplegic injury was indivisible as a matter of law, it was not capable of apportionment. The jury, therefore, should have been instructed that if the driver of the car was negligent and the sole, proximate cause of the injury, then only the driver was to be assessed damages. On the other hand, if the manufacturer's negligent design was a substantial factor in producing the injury, then the manufacturer and the driver should be jointly and severally liable for the damages.

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BACKGROUND

In order to effectively analyze the decision in Mitchell, it is important to outline the development of the second collision doctrine, particularly as it relates to apportionment of damages. Every automobile collision involves essentially two collisions. The first collision, during which most property damages occurs, happens when the vehicle collides with either a moving or stationary external object.25 The second collision, during which most personal injuries occur, happens when the occupants of the vehicle are thrown against some part of the automobile.26 Under settled tort principles, there is general agreement that a tortfeasor who causes the initial collision may be jointly and severally liable for the entire damages even though the original collision did not cause all of the damage.27 A problem arises when a manufacturer's design defect does not cause the initial collision but enhances the injuries sustained in the second collision.28

Prior to Larsen v. General Motors Corp.,29 an automobile manufacturer would escape liability unless the plaintiff could show that a design defect caused the initial collision.30 The rationale

25. In a head-on collision, the first collision lasts less than one-tenth of a second if the vehicle is moving at a moderate speed and collides with a stationary object. 2 M. Barzelay—G. Lacy, Personal Injury Scientific Automobile Accident Reconstruction 1404.110 (1982).

26. This second collision, in a head-on situation as described in note 25 supra, also generally lasts less than one-tenth of a second. See Comment, Auto Design: Manufacturer's Duty to Reasonably Protect Occupants Against the Effects of Collision, 1969 U. Ill. L.F. 396, 405-06. An excellent description of what happens to a passenger inside a car appears as follows:

"A body in motion will continue in a straight line until something stops it."
The passengers continue to move at the braking speed of 30 mph at impact until they are stopped by the instrument panel, the header bar or the steering wheel, or possibly the pavement via an open door. This is the so-called second accident which actually produces the injuries.

27. RESTATEMENT (SECOND) OF TORTS § 435 (1965).

28. Mitchell, 669 F.2d at 1203. Second collision liability, as referred to in this article, does not include situations where the design defect causes both the initial and second collisions. This article focuses only upon liability created when a defective design causes second collision injuries and does not cause the initial collision.

29. 391 F.2d 495 (8th Cir. 1968).

30. Evans v. General Motors Corp., 359 F.2d 822, 824 (7th Cir. 1966) (denied recovery because purpose of automobile does not include collisions); accord Shumard v. General Motors Corp., 270 F. Supp. 311, 313 (S.D. Ohio 1967) (held that manufacturer has duty to design automobile fit for normal use); Willis v. Chrysler Corp., 264 F. Supp. 1010, 1012 (S.D. Tex. 1967) (held that manufacturer is not an insurer and has no duty to design an accident-proof vehicle); Kahn v. Chrysler Corp., 221 F. Supp. 677, 679 (S.D. Tex. 1963) (manufacturer has no obligation to design a car so that it is safe for a child to ride his bicycle into the automobile while parked).
used to refuse imposition of liability on a manufacturer had been clearly articulated in Evans v. General Motors Corp.\textsuperscript{31} In that case, the Seventh Circuit held that since the design defect had not caused the original collision, the manufacturer had breached no duty.\textsuperscript{32} Further, since the intended purpose of an automobile does not include collisions, even though foreseeable, the manufacturer had breached no duty if the car was fit for normal operations on the road.\textsuperscript{33}

However, in an era of heightened consumer awareness of automobile safety and awareness that design defects in automobiles enhance injuries,\textsuperscript{34} allowing manufacturers to escape liability altogether became an increasingly difficult position to maintain.\textsuperscript{35} In 1968, the Eighth Circuit in Larsen\textsuperscript{36} held that a manufacturer is liable for enhanced injuries caused by a defective design even though the design did not cause the original collision. In articulating what is today considered the foundation of second collision liability the court stated:

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.\textsuperscript{37}

In rejecting the restrictive view taken in Evans, the court in Larsen stated that a manufacturer should be held to a duty of reasonable care in the design of automobiles because collisions are foreseeable\textsuperscript{38} as a part of the environment of normal use.\textsuperscript{39}

The decision in Larsen has today become the principal sup-

\textsuperscript{31} 359 F.2d 822 (7th Cir.), cert. denied, 385 U.S. 856 (1966).
\textsuperscript{32} Id. at 825.
\textsuperscript{33} "The intended purpose of an automobile does not include its participation in collisions with other objects, despite the manufacturer's ability to foresee the possibility that such collisions may occur." Id.
\textsuperscript{35} See, e.g., Katz, supra note 26, at 864-66; Nader, supra note 34, at 645; Comment, Manufacturer's Liability for Defective Automobile Design, 42 Wash. L. Rev. 601, 604 (1967).
\textsuperscript{36} 391 F.2d 495 (8th Cir. 1968).
\textsuperscript{37} Id. at 503.
\textsuperscript{38} For an interesting discussion of the use of foreseeability as the basis for defining a duty on a negligence issue, see Green, Forseeability in Negligence Law, 61 Colum. L. Rev. 1401, 1417-18 (1961). Dean Green urges that foreseeability is inadequate as a basis for determining the duty issue and its scope.
\textsuperscript{39} 391 F.2d at 503.
porting precedent for the majority position allowing plaintiffs to recover from manufacturers for second collision injuries. There are, however, still a minority of jurisdictions which follow the Evans approach. While much has been written regarding the con-

40. Huddell v. Levin, 537 F.2d 726, 737, 740 (3d Cir. 1976) (denied recovery to the plaintiff for second collision injuries because the burden of proof was not satisfied); Melia v. Ford Motor Co., 534 F.2d 795, 797 (8th Cir. 1976) (held that the manufacturer has the duty to use reasonable care in design, citing Larsen as support); Polk v. Ford Motor Co., 529 F.2d 259, 264 (8th Cir.) (applying Missouri law, held Larsen to be controlling), cert. denied, 426 U.S. 907 (1976); Perez v. Ford Motor Co., 497 F.2d 82, 87 (5th Cir. 1974) (held that manufacturer was under a duty to provide a reasonably safe automobile); Turcotte v. Ford Motor Co., 494 F.2d 173, 180-82 (1st Cir. 1974) (automobile manufacturer can be held strictly liable for design defects which do not cause highway collisions but rather exacerbate injuries); Dreisonstok v. Volkswagenwerk, A.G., 489 F.2d 1066, 1069-70 (4th Cir. 1974) (accepted the second collision doctrine, but denied recovery to a plaintiff whose injuries were caused by his inattention while driving); Passwaters v. General Motors Corp., 454 F.2d 1270, 1273-74 (6th Cir. 1972) (extended second collision doctrine to include an individual who was not an occupant of the vehicle); Anton v. Ford Motor Co., 400 F. Supp. 1270, 1281 (S.D. Ohio 1975) (in a diversity action, predicted the Ohio Supreme Court would follow the Larsen rule); Bremer v. Volkswagen of America, Inc., 340 F. Supp. 949, 952 (D.D.C. 1972) (predicted Maryland law would more probably than not follow the Larsen rule); Grundmanis v. British Motor Corp., 308 F. Supp. 303, 306 (E.D. Wis. 1976) (applied Wisconsin law and followed the Larsen rule); Dyson v. General Motors Corp., 298 F. Supp. 1064, 1073 (E.D. Pa. 1969) (held that a plaintiff’s claim was not barred because it involved a “second collision”); Badorek v. General Motors Corp., 11 Cal. App. 3d 902, 925, 90 Cal. Rptr. 305, 320 (1970) (automobile manufacturer held strictly liable for enhanced injury caused by defective design); Friend v. General Motors Corp., 118 Ga. App. 763, —, 165 S.E.2d 734, 736-37 (1968) (manufacturer has a duty to provide reasonably safe automobile but not to provide “collision safe” vehicle), cert. denied, 225 Ga. 240, 167 S.E.2d 926 (1969); Volkswagen of America, Inc. v. Young, 272 Md. 196, —, 301 N.E.2d 307, 310 (1973) (manufacturer’s duty to provide safe roof was not eliminated because design did not cause accident); Bolm v. Triumph Corp., 33 N.Y.2d 151, —, 305 N.E.2d 769, 773, 356 N.Y.S.2d 644, — (1973) (stated that Larsen properly refuted Evans); Mickel v. Blackman, 252 S.C. 202, —, 166 S.E.2d 173, 186 (1969) (adopted rationale of Larsen); Engberg v. Ford Motor Co., 87 S.D. 196, —, 205 N.W.2d 104, 107 (1973) (held product defective when not reasonably fit for its intended purpose, citing Larsen as support); Turner v. General Motors Corp., 514 S.W.2d 497, 506-07 (Tex. Civ. App. 1974) (held manufacturer liable for defectively designed automobile roof even though design did not cause accident); Abert v. Guussarson, 66 Wis. 2d 551, —, 225 N.W.2d 431, 433 (1975) (held automobile manufacturer liable for enhanced injuries because of defective design). For additional authority accepting the second collision doctrine, see Sealey v. Ford Motor Co., 499 F. Supp. 475, 478-79 (E.D. N.C. 1980).


Although Larsen set the stage for imposing liability on manufacturers,\footnote{43. It is interesting to note that a few years after the decision was rendered in Larsen, the Michigan courts rejected its basis for liability as inconsistent with state law. See Wall v. Volkswagenwerk, A.G., PROD. LIAB. REP. (C.C.H.) ¶ 6865 (W.D. Mich. Oct. 17, 1972).} factual and conceptual hurdles regarding the apportionment of damages were not directly addressed.\footnote{44. In dicta, the court in Larsen stated that the obstacles of apportionment are not surmountable. 391 F.2d at 503.} It was not until some years later that these issues were decided. This is generally because most of the cases dealing with second collision liability were decided on preliminary motions dealing with the general theory.\footnote{45. J. BEASLEY, PRODUCTS LIABILITY AND THE UNREASONABLY DANGEROUS REQUIREMENT 461 (1981).}

In 1976, both the Fifth and Third Circuits addressed the problems and difficulties associated with apportionment of damages. In Higginbotham v. Ford Motor Co.,\footnote{46. 540 F.2d 762 (5th Cir. 1976).} the Fifth Circuit held that the trier of fact must apportion damages between the manufacturers and other defendants in the suit.\footnote{47. Id. at 765.} However, the court did not directly confront the issue of which party bears the burden of proof regarding apportionment of the damages.\footnote{48. Id. at 765-66. Higginbotham alleged that Ford defectively designed the Ford Maverick, and if it had been designed otherwise the injuries would not have been so severe.} The plaintiff in Higginbotham sustained severe injuries in a collision with another
vehicle, which also resulted in the death of his wife. The court held that the injuries sustained by the plaintiff must be apportioned between the manufacturer and the other defendants. The court echoed dictum in Larsen which stated that a manufacturer should only be held liable for injuries caused or aggravated by the defective design. The implication of the Higginbotham decision therefore effectively placed upon the plaintiff the burden of proving how the damages should be apportioned; if the plaintiff can not prove the extent of the aggravated injuries, the manufacturer will escape liability.

In that same year, 1976, the Third Circuit in Huddell v. Levin also addressed the issues regarding apportionment. The court, interpreting New Jersey law, held that a plaintiff bears the burden of proof as to the proper apportionment of damages in a second collision case. The court further established three elements a plaintiff must prove to establish a manufacturer's liability. First, the plaintiff must prove that an alternative, safer design was practicable under the circumstances. Second, the plaintiff must prove what injuries would have resulted even if the safer design had been used. Third, the plaintiff must establish the extent of the enhanced injuries attributable to the defective design. Since the essence of the manufacturer's liability was the enhanced injuries attributable to the defective product, the court held that the burden of proof could not properly be placed on the defendant manufacturer. The court rejected orthodox tort principles applicable to joint and concurrent tortfeasors because it viewed the Larsen decision as requiring fresh legal thinking.

In 1978, the Tenth Circuit, in Fox v. Ford Motor Co., rejected the approach taken by the Third Circuit in Huddell. The court, relying upon the doctrine articulated in Larsen, stated that Huddell was incorrect in assuming that fresh legal thinking was required. Second collision liability follows "orthodox doctrines of
joint liability of concurrent tort-feasors for injuries which flow from their concurring in one impact." The court stated that when a suit is brought for wrongful death and the decedent would have survived the second collision absent a defect, no apportionment problem exists. This is so because death is not a divisible injury for which apportionment is either appropriate or possible.

In 1981, the Second Circuit in Caiazzo v. Volkswagenwerk, A.G., adopted in principle the approach taken by the Third Circuit in Huddell. In Caiazzo, the plaintiffs were thrown from their van as the result of a rear-end collision; neither passenger was wearing a seat belt at the time. The court, predicting New York law, held that proof only of the existence of damage was inadequate. The plaintiff, rather, should be required to prove the extent of the enhanced injuries due to the defective design, particularly where wearing seat belts would have eliminated most, if not all, of the enhanced injuries. The court reasoned that to allow the plaintiff only to prove the existence of damage would give the jury too much latitude and cause it to engage in undue speculation.

The case which is relied on by Ford to illustrate its position is Huddell v. Levin, 537 F.2d 726 (3d Cir. 1976). There the holding was that plaintiff in a collision case such as the present one had the burden of proving enhanced injuries and that the presentation of evidence that the accident was survivable did not meet this burden. The thesis of this case was that collision cases are to be treated differently from others to follow the orthodox doctrines of joint liability of concurrent tort-feasors for injuries which flow from their concurring in one impact.

We fail to see any difference between this type of case and the other case in which two parties, one passive, the other active, cooperate in the production of an injury. Each one's contribution in a causal sense must be established. Damages may be apportioned between the two causes if there are distinct harms or a reasonable basis for determining the causes of injury. Restatement of Torts, Second, § 433A.

But death is a different matter. It is not a divisible injury in which apportionment is either appropriate or possible. See Restatement, supra, § 433A, comment i; Prosser, Law of Torts 315 (4th ed. 1971). The Huddell court addressed this question by holding that plaintiff could not assert that death was divisible by saying that decedent would not have died but for the defects, and "then assert that it is indivisible in order to deny to General Motors the opportunity of limiting damages." This position, however, fails to recognize that wrongful death is different from a cause of action for injuries, which has different elements and a different measure of damages such as pain and suffering.

Id. See also Mitchell, 669 F.2d at 1206.
63. Fox, 575 F.2d at 787.
64. Id.
65. Id.
66. 647 F.2d 241 (2d Cir. 1981).
67. Id. at 250.
68. Id. at 243.
69. Id. at 250.
70. The court noted that allowing the jury to speculate in this manner was dan-
The conclusion that may be drawn from the line of cases prior to *Mitchell* is that the apportionment issues, not specifically addressed in *Larsen*, have produced two conflicting lines of authority. The Second, Third, and Fifth Circuits impose liability on manufacturers only for the enhanced injuries in a second collision and place the burden of proving apportionment on the plaintiff.\(^7\) In contrast, the Tenth Circuit has compared the *Larsen* rule of second collision liability to the orthodox principles of concurrent tortfeasors and found them similar.\(^7\)

**ANALYSIS**

The issue raised in *Mitchell*\(^7\) was the effect of the second collision doctrine on the manufacturer's liability in situations where the injuries sustained by the plaintiff are considered indivisible.\(^7\) The court in *Mitchell*, faced with the difficulty of damage apportionment, did not foreclose a plaintiff's opportunity to recover from a manufacturer when the injuries sustained were considered indivisible.\(^7\) Rather, the court held that if a plaintiff can show that the manufacturer's design defect was a substantial factor in producing the injuries, the manufacturer may be held jointly and severally liable with the other defendants for the total amount of the damages.\(^7\) Additionally, the burden of proving that the injuries are capable of apportionment is shifted from the injured plaintiff to the defendants.\(^7\) Although there are some difficulties with the *Mitchell* decision, it does properly balance the interests of the plaintiff against those of the manufacturer and is consistent with the overall spirit of the *Larsen* decision.

Chief Judge Lay, writing for the Eighth Circuit, stated that an injured plaintiff should not be denied an opportunity for recovery because it would be tempted to assign responsibility according to the deepest pocket. *Id.* at 250-51. For an interesting discussion of Caiazzo, see Comment, *Caiazzo v. Volkswagenwerk, A.G.: Plaintiff Bears the Burden of Apportioning Injuries in a Second Collision Case*, 48 BROOKLYN L. REV. 177 (1981). The author suggests that *Caiazzo* differed from *Huddell* in that it did not explicitly require the plaintiff to show an alternative practicable design. *Id.* at 188 n.45.

71. Comment, supra note 70, at 186-87, n.42-43 (discussing additional authorities supporting both conflicting lines of authority).

72. See notes 60-65 and accompanying text supra.

73. 669 F.2d 1199 (8th Cir. 1982).

74. *Id.* at 1203 n.2. The court's definition of an indivisible injury was that type of injury which is incapable of any logical, reasonable or practical division. *Id.* As the court noted, it would be ludicrous to suggest that a jury could determine how much of a bone each tortfeasor broke. *Id.*

75. *See id.* at 1204-1205.

76. *Id.* at 1209-1210.

77. *Id.* at 1208.
from a manufacturer where certainty of apportionment is impossible, and a denial would result in complete exoneration of a negligent manufacturer. The court's analysis was predicated on the view that the doctrine of second collision liability tracks the traditional principles of concurrent tortfeasors. Under the traditional concurrent tortfeasor rationale, if two or more defendants cause an indivisible injury, such injury is incapable of apportionment and results in the defendants each being held jointly and severally liable for the total amount of the damages. If the harm sustained is to be apportioned, the defendants, rather than the plaintiff, bear the burden of apportionment. As a result of this premise, the Eighth Circuit rejected the approach taken by the Third Circuit in Huddell.

The court in Mitchell relied upon its previous decision in Ford Motor Co. v. Zahn. In Zahn, traditional rules of negligence and proximate cause were applied to establish that liability of a negligent manufacturer in a second collision case had been imposed prior to Larsen. Establishment of this factor allowed the Mitchell court to conclude that second collision liability is not a deviation from orthodox tort principles. Similarly, the court concluded that the concept of apportionment for enhanced injuries in Larsen was nothing new. The court viewed enhanced injuries as analogous to the situation of a negligent physician who played no part in causing the original injury. Traditionally, the physician was liable for only the injury resulting from medical negligence. Thus,

78. Id. at 1204. The court also indicated that Huddell forces the parties to try a hypothetical case which requires obvious speculation and proof of the impossible. Id. at 1204-1205. However, as noted in Ciazzio v. Volkswagenwerk, A.G., 647 F.2d 241, 250-51 (2d Cir. 1981), allowing the plaintiff to prove only the fact of damage, as suggested by Mitchell, also produces undue speculation. The jury must speculate as to the various causes and is given a great deal of discretion to speculate which defendant is better able to satisfy a judgment. Thus, either theory seems to involve undue speculation.
79. Mitchell, 669 F.2d at 1207-1208.
80. The traditional approach in dealing with multiple causes producing an indivisible harm is articulated in §§ 443A-B of the Restatement (Second) of Torts.
81. Restatement (Second) of Torts § 433A (1965).
82. Id. at § 433B(2).
83. 669 F.2d at 1208.
84. 265 F.2d 729 (8th Cir. 1959). However, as one commentator has noted, the Zahn decision may have been misconstrued by the Larsen court because Zahn involved a defective component part, not an alleged defective design. See Hoenig & Werber, supra note 42, at 593.
85. 669 F.2d at 1207 n.7.
86. Id. at 1207.
87. Id.
88. Id.
89. However, it should be noted that while the physician is not liable for the
where the injury is considered indivisible, the physician also bears
the burden of proof in regard to limiting personal liability.

Having determined that Mitchell's injury could not be appor-
tioned, as a matter of law, the court proceeded to address the issue
of which party should bear the burden of proving that the injuries
are capable of apportionment. Again, relying upon traditional tort
principles, the court determined that the defendants bear the bur-
den of proving that the injuries are capable of apportionment.90
This conclusion is consistent with the court's view that second col-
losion liability is essentially no different than the traditional con-
current tortfeasors rationale.

The plaintiff, as a result of the application of the orthodox tort
principles, avoids the almost impossible burden of proving what
portion of the indivisible harm was caused by each party.91 The
plaintiff has to show that the design defect was a substantial factor
in producing injuries over and above those probably caused as the
result of the original collision.92 This requirement was viewed by
the court in Mitchell as consistent with the decision in Larsen and
the concern of the Eighth Circuit not to leave the injured plaintiff
as little more than a traffic statistic.93

Although there are other difficulties with the Mitchell decision,
the court is essentially correct in its result because it properly bal-
anced the interest of the plaintiff in adequate compensation
against the manufacturer's interest in avoiding excessive liability.94
This balance becomes evident when the Mitchell approach is

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original injury, his actions are treated as an intervening cause which cuts off liabil-
ity of the original wrongdoer for the additional injury. RESTATEMENT (SECOND) OF
TORTS § 457(d)(c) (1965). In a second collision case, the original tortfeasor's liabil-
ity is not cut off, even if the defect is the cause of the enhanced injury. Polk v. Ford
90. 669 F.2d at 1208.
91. Id. at 1205.
92. Id.
93. Id. at 1208, n.10. The court stated that the Huddell approach fails to recog-
nize that the injured victim has difficulty in receiving just compensation, and that a
manufacturer has the ability to pay compensation for the injury it helped cause.
The implication of this statement is that the manufacturer is the deep pocket. Al-
lowing a plaintiff to recover primarily because the defendant is better able to bear
the cost should be weighed against the general proposition that the wealth of a
defendant should not play a role in determining ultimate liability because wealth is
not a reliable indicator of fault. See Note, Policy and Proof: Shifting the Burden of
Proof in a Products Liability Case, 34 BAYLOR L. REV. 83, 101 (1982). It should also
be noted that under the common law there was not attempt to achieve full compen-
sation. See DeParca Comment: In Defense of the Fault Principle, 43 MINN. L. REV.
94. Ehrenzweig, A Psychoanalysis of Negligence, 47 NW. U. L. REV. 855, 856
(1953) (suggesting that the trend in tort law is to give consideration to the compara-
tive equities of the parties).
contrasted with the *Huddell* approach.

Had the court employed the *Huddell* approach of requiring apportionment in all cases and placing the burden of proof upon the plaintiff, the balance would extend too far in protecting the manufacturer's interest in avoiding excessive liability. In a complex products liability case involving second collision liability, automobile manufacturers have a great advantage over an injured plaintiff. In addition to monetary resources, they also have access to the most experienced experts in the automotive field and have greater facilities and equipment available for accident reconstruction. As a result, there is an incentive for manufacturers not to settle a second collision case, but rather to force expensive litigation in an effort to avoid all liability. Since proof of apportionment requires great expense and evidentiary resources, placing the burden upon the plaintiff effectively resolves the case in favor of the manufacturer where proof is difficult or expensive. Such a result does not protect the plaintiff's interest in adequate compensation.

There is, however, a problem with the decision in *Mitchell*. Although it may be viewed as consistent with the spirit of *Larsen*, it does not reflect the reasoning of *Larsen*. If the theoretical underpinnings of the second collision doctrine as articulated in that landmark case were given effect, the decision in *Mitchell* appears theoretically inconsistent. *Larsen* stood for the proposition that a manufacturer would never be liable for the total amount of the damages, but only for that portion caused by the defective design. *Larsen* reinforced this position by stating that the obstacles of apportionment are not insurmountable. Integral, therefore, to the concept of second collision liability is the concept of apportionment. The injuries must be apportioned among the

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97. See Note, supra note 15, at 487 n.60.
98. Id. at 488.
99. 669 F.2d at 1208. The court rejected Huddell because it "effectively erodes the reasoning which this court enunciated in Larsen." Id.
100. 391 F.2d at 503. See notes 36-37 and accompanying text supra.
101. 391 F.2d at 503. The court stated:
   It is done with regularity in those jurisdictions applying comparative negligence statutes and in other factual situations as condemnation cases, where in some jurisdictions 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.
   Id. at 503-504.
defendants in order to establish the extent of the manufacturer's liability. Thus, in a situation in which the plaintiff sustains an indivisible injury, it appears inconsistent to allow the plaintiff to assert the divisibility of that injury in order to establish the manufacturer's liability and later to assert the indivisibility of the injury to deny the defendants an opportunity to limit their respective liability.

Although the Larsen decision did not specifically address the issue of which party bears the burden of proving that the injuries are capable of apportionment, it appears consistent on a theoretical level to leave it with the plaintiff. In a second collision case, the defendant manufacturer has no liability absent proof that the design defect enhanced the injury. Therefore, since it is the plaintiff who relies upon the enhanced injury in order to state a cause of action against the manufacturer, the plaintiff should bear the burden of proof.

An additional consideration is that second collision liability, as articulated in Larsen, is very limited and narrow in scope. It appears inconsistent, therefore, in the situation where indivisible harm is sustained to convert it into plenary liability for all of the damages sustained in an accident which the automobile manufacturer did not precipitate. Such a notion contravenes the reasoning in Larsen that the obstacles of apportionment are not insurmountable. The decision in Mitchell implies, however, that when apportionment of damages is complicated by an indivisible

103. One commentator has noted:
One consequence of requiring a plaintiff to show enhanced injuries is that when injuries are not capable of apportionment into those caused by a defect and those injuries not caused by a defect, a manufacturer is free from liability. The axiom from which second collision liability is derived limits manufacturer liability to enhanced injuries; if the injuries suffered by a plaintiff cannot be identified as caused by an alleged design defect they cannot, by definition, be injuries enhanced by an alleged defect. The opposite argument—that there are enhanced injuries, but a plaintiff cannot prove them—arises from ‘cart-before-the-horse’ logic; the existence and magnitude of an alleged enhanced injury cannot be determined until a plaintiff provides a nonspeculative means to identify injuries caused by an alleged design defect.


104. Huddell, 537 F.2d at 739.

105. Placing the burden of proof upon the defendant effectively forces him or her to prove part of the plaintiff's case. Caiazzo v. Volkswagenwerk, A.G., 647 F.2d 241, 246 (2d Cir. 1981).


107. 537 F.2d at 739.

108. Id.

109. Larsen, 391 F.2d at 503.
injury, the obstacle of apportionment has income insurmountable. As Professor Wigmore has aptly stated: "Ignorance of history sometimes builds up a rule of thumb, which when applied by mere logic, does cruel wrong."\textsuperscript{110}

CONCLUSION

As this article has demonstrated, the court in \textit{Mitchell} is essentially correct in its result. Relieving the injured plaintiff of the burden of proving which of multiple defendants caused which portion of the damages substantially increases the probability of recovery. Such a result remains consistent with the spirit of the \textit{Larsen} decision, although not consistent with the theoretical underpinnings of the second collision doctrine.

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\textsuperscript{110} Wigmore, \textit{Joint Tort-feasors and Severance of Damages; Making the Innocent Party Suffer Without Redress}, 17 Ill. L. Rev. 458, 458 (1922).