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# Second Impact Liability in Nebraska: *Friedrich v. Anderson*, 191 Neb. 724, 217 N.W.2d 831 (1974)

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Note

# Second Impact Liability in Nebraska

*Friedrich v. Anderson, 191 Neb. 724, 217 N.W.2d 831 (1974).*

## I. INTRODUCTION

*Friedrich v. Anderson*[1] represents Nebraska's entry into the continuing national battle for supremacy between the conflicting doctrines of automobile crashworthiness represented by *Evans v. General Motors Corp.*[2] and *Larsen v. General Motors Corp.*[3]

> Their clashing concept as to the appropriate legal principle controlling manufacturers' liability for design defects producing enhanced injuries in motor vehicle accidents but not causing or contributing to the initial collision, has led to a "War between the States" unsurpassed since 1865.[4]

The concept of "enhanced injury" refers to essentially two types of cases.[5] First, there are those cases in which the injuries inflicted

1. 191 Neb. 724, 217 N.W.2d 831 (1974).
2. 359 F.2d 822 (7th Cir. 1966), *cert. denied*, 385 U.S. 836 (1966). In *Evans*, plaintiff's decedent suffered injuries and death while driving a car which was struck on the side by another. Plaintiff claimed decedent's injuries were enhanced because the automobile manufactured by the defendant was designed with an "X" frame, rather than the supposedly superior perimeter frame used by their competitors. The action was grounded on specific negligence, implied warranty, and strict tort liability. The suit was dismissed for failure to state a claim against defendant upon which relief could be granted.
3. 391 F.2d 495 (8th Cir. 1968). In *Larsen*, the plaintiff-driver's injuries, sustained in a head-on collision, were enhanced by due to the rearward displacement of the claimed defectively designed steering shaft of a Corvair automobile. The Eighth Circuit reversed the lower court decision granting the defendant's motion for summary judgment, stating that collisions were the foreseeable result of normal use of autos and therefore defendants owed users of its product a duty of due care. The court further stated that where injuries are caused by the manufacturer's failure to use reasonable care to avoid subjecting the user of its products to an unreasonable risk of injury, general negligence principles should apply.
4. Frericks v. General Motors Corp., 317 A.2d 494 (Md. Spec. App. 1974).
5. *See* Houser, *Crashworthiness: Defective Product Design—Secondary Impact Liability in Texas*, 4 ST. MARY'S L. REV. 303 (1972); Katz, *Liability of Automobile Manufacturers for Unsafe Design of Passenger Cars*, 69 HARV. L. REV. 863 (1956); Nader & Page, *Automobile Design and the Judicial Process*, 55 CALIF. L. REV. 645 (1967); Comment,

upon a person not occupying the automobile are enhanced by the vehicle's design.[6] The second type, more commonly known as "crashworthiness" or "second impact" cases, concern enhanced injuries to the occupant of a vehicle whose design is at issue.[7] Currently state or federal courts in twenty-seven jurisdictions have been confronted with automobile accident cases involving enhanced injury. These jurisdictions are almost evenly divided on the issue of allowing injured plaintiffs to recover. Thirteen deny recovery,[8] basically following the *Evans* rationale, and fourteen allow recovery, looking to *Larsen* for guidance.[9] Nebraska's position in this align-

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*Torts: Automobile Manufacturer's Liability for "Secondary Impact Injuries,"* 23 OKLA. L. REV. 296 (1970); Comment, *Manufacturer's Liability for Defective Automobile Design*, 42 WASH. L. REV. 601 (1967); Note, 80 HARV. L. REV. 688 (1967); Note, 1969 ILL. L.F. 396 (1969); Note, 52 IOWA L. REV. 953 (1967); Note, 42 NOTRE DAME LAW. 111 (1966); Note, 21 S.C.L. REV. 451 (1969); Note, 118 U. PA. L. REV. 299 (1969); Note, 24 VAND. L. REV. 862 (1971).

6. *See* Passwaters v. General Motors Corp., 454 F.2d 1270 (8th Cir. 1972); Mieher v. Brown, 3 Ill. App. 3d 802, 278 N.E.2d 869 (1972).
7. *See* Larsen v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968) and Evans v. General Motors Corp., 359 F.2d 822 (7th Cir.), *cert. denied*, 385 U.S. 836 (1966).
8. Marshall v. Ford Motor Co., 446 F.2d 712 (10th Cir. 1971); Schemel v. General Motors Corp., 384 F.2d 802 (7th Cir. 1967), *cert. denied*, 390 U.S. 945 (1968) (applying Indiana law); Alexander v. Seaboard Air Line R.R., 346 F. Supp. 320 (W.D.N.C. 1971); McClung v. Ford Motor Co., 333 F. Supp. 17 (S.D. W. Va. 1971); Schumard v. General Motors Corp., 270 F. Supp. 311 (S.D. Ohio 1967); Willis v. Chrysler Corp., 264 F. Supp. 1010 (S.D. Tex. 1967); Mieher v. Brown, 3 Ill. App. 3d 802, 278 N.E.2d 869 (1972); Perez v. Ford Motor Co., CCH Prod. Liab. Rptr. ¶ 6901 (E.D. La. 1972); Frericks v. General Motors Corp., 317 A.2d 494 (Md. Spec. App. 1974); General Motors Corp. v. Howard, 244 So. 2d 726 (Miss. 1971); Ford Motor Co. v. Simpson, 233 So. 2d 797 (Miss. 1970); Walton v. Chrysler Motor Corp., 229 So. 2d 568 (Miss. 1970); Devaney v. Sarno, 299 A.2d 95 (N.J. Super. Ct. 1973); Burkhard v. Short, 28 Ohio App. 141, 275 N.E.2d 632 (1971); O'Connor v. American Honda Motor Co., CCH Prod. Liab. Rptr. ¶ 6930 (Super. Ct., King County, Wash. 1973).
9. State appellate courts, or federal district and circuit courts of appeals declaring state law following *Larsen* include: Turcotte v. Ford Motor Co., 494 F.2d 173 (1st Cir. 1974) (applying Rhode Island law); Passwaters v. General Motors Corp., 454 F.2d 1270 (8th Cir. 1972) (applying Iowa law); Bremier v. Volkswagen of America, Inc., 340 F. Supp. 949 (D.D.C. 1972); Grundmanis v. British Motor Corp., 308 F. Supp. 303 (E.D. Wis. 1970); Dyson v. General Motors Corp., 298 F. Supp. 1064 (E.D. Pa. 1969); Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972); Badorek v. General Motors Corp., 11 Cal. App. 3d 902, 90 Cal. Rptr. 305 (1970); Friend v. General Motors Corp., 118 Ga. App. 763, 165 S.E.2d 734 (1968), *cert. denied*, 225 Ga. 240, 167 S.E.2d 926 (1969); Brandenburger v. Toyota Sales, USA, Inc., 513 P.2d 268 (Mont. 1973); Bolm v. Triumph Corp., 341 N.Y.S.2d 846 (N.Y. Ct. App. 1973); May v. Portland Jeep, Inc., 509 P.2d 24 (Ore. 1973); Mickle v. Blackmon, 252 S.C. 202, 166 S.E.2d 173 (1969); Eng-

ment is stated in *Friedrich*. This note will first examine the Nebraska Supreme Court's[10] pronouncement of automobile crashworthiness law, and then will analyze the possible effect of *Friedrich* on Nebraska's doctrine of strict liability.

## II. AUTOMOBILE CRASHWORTHINESS LAW IN NEBRASKA

On January 5, 1969, the plaintiff was a passenger in his automobile being driven by his wife. The auto was struck from the left by another automobile, throwing plaintiff forward and to the left so that his head struck the gearshift lever knob which was in reverse position.[11] The plaintiff, previously suffering from a diabetic condition which impaired his vision, is now limited to light perception as a result of his impact with the knob. Suit was brought against Chrysler Motors Corporation and Chrysler Corporation as seller and manufacturer of plaintiff's auto, respectively. The petition alleged that the knob was defectively designed, that the "second impact" caused specific injuries to plaintiff's eye, and that defendants were liable on theories of specific negligence, breach of warranty and strict liability. Defendants moved for summary judgment on all three of plaintiff's theories, and the trial court sustained these motions ruling that

> shift lever knob so as to be incapable of producing the injury to this plaintiff or incapable of causing injury in the event of colli-

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berg v. Ford Motor Co., 205 N.W.2d 104 (S.D. 1973); Ellithorpe v. Ford Motor Co., 503 S.W.2d 516 (Tenn. 1973).

10. The case was decided by a division of the Nebraska Supreme Court consisting of Judges Spencer, Smith and Clinton, and District Judges Brodkey and Hastings. Judge Smith did not participate in the decision. Article 2, section 5 of the Nebraska Constitution provides:

> Whenever necessary for the prompt submission and determination of causes, the supreme court may appoint judges of the district court to act as associate judges of the supreme court, sufficient in number, with the judges of the supreme court [seven in number], to constitute two divisions of the court of five judges in each division. Whenever judges of the district court are so acting the court shall sit in two divisions, and four of the judges thereof shall be necessary to constitute a quorum.

In view of the circumstances surrounding the decision, that is, Judge Smith's failure to participate and the accession of Judge Brodkey to the Supreme Court shortly after this decision, the opinion represents, at most, the views of three Nebraska Supreme Court Judges.

11. The Court stated that the gear shift was in "low position." 191 Neb. at 725, 217 N.W.2d at 833. The appellant's brief, however, states that the gear shift was in reverse, citing the trial court's record. Brief for Appellant at 8, Friedrich v. Anderson, 191 Neb. 724, 217 N.W.2d 831 (1974).

sion with another vehicle.[12]

Plaintiff appealed the decision.

The Nebraska Supreme Court formulated the issue in the case as follows:

> [T]he precise question before us is the nature or extent of the duty which an automobile manufacturer owes to the users of its products in the event of injury or enhanced injury resulting from a "second impact" or collision of a passenger with the inside of an automobile following an initial external collision.[13]

By framing the question in this manner, the court suspended itself[14] between the poles of *Evans*, which states that a manufacturer's duty is to produce a vehicle reasonably fit for its intended purpose (such intended purpose not including collisions)[15] and *Larsen*, which states a manufacturer's duty is to use reasonable care in design so as to make an auto safe for its foreseeable and intended use (including the foreseeable possibility of collision).[16] Both *Evans* and *Larsen* are negligence cases and their resolution of the duty issue and connected foreseeability issue necessitates a discussion of basic negligence concepts.

In most products liability cases, the court is not troubled by the task of explicitly determining whether the defendant owes the plaintiff a duty of reasonable care. The general scope of such duty is well established: manufacturers must provide products that are reasonably safe for their foreseeable use.[17] In "second impact" cases, however, the manufacturer contends that the plaintiff-occupant's injuries resulted from an unintended use[18] or misuse of the product—the auto's collision with another object—and therefore the injuries were "unforeseeable" as a matter of law and outside the scope of their duty.

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12. Friedrich v. Anderson, No. 238 (Dist. Ct. Knox County, Neb., Feb. 27, 1973).
13. 191 Neb. at 727, 217 N.W.2d at 833-34.
14. *Id.* The court stated that two distinct theories of "second impact" duty were urged by the respective parties. However, it appears that the cases urged by the parties were reversed by the court. Plaintiff's position is supported by *Larsen* and defendant's position is supported by *Evans*.
15. 359 F.2d at 825.
16. 391 F.2d at 504.
17. *See e.g.*, MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916); RESTATEMENT (SECOND) OF TORTS § 395 (1965); 2 HARPER & JAMES, THE LAW OF TORTS §§ 28.3-.9 (1956).
18. "'Intended use' is only a convenient adaptation of the basic test of 'reasonable forseeability' framed to more specifically fit the factual situations out of which arise questions of manufacturer's liability for negligence." Spruill v. Boyle-Midway, Inc., 308 F.2d 79, 83 (4th Cir. 1962).

The arguments presented by the litigants in *Friedrich* illustrate the contrasting application of the term "foreseeability" and the effect which the respective formulations have on determining the duty of reasonable care in "second impact" cases.[19] Foreseeability of risk is usually based on two related elements—likelihood or probability of harm if reasonable care is not exercised and the manufacturer's actual or constructive knowledge of the risk.[20] The requisite degree of probability necessary to activate the duty of reasonable care has been formulated in various ways. Learned Hand stated that "[the injurious result] has got to be one of those consequences which is not entirely outside the range of expectation or probability, as ordinary men view it."[21] The Restatement (Second) of Torts limits the requirement of reasonable care by the manufacturer of chattels "to those who use [the product] for a purpose for which the manufacturer should expect it to be used and to those whom he should expect to be endangered by its probable use."[22] If these authorities are read to indicate that the duty of reasonable care of a manufacturer of chattels is strictly limited to "intended use," that is, that an automobile is intended to provide transportation for persons and goods—but does not include predictable contingencies which are statistically known to arise in the course of such operation—then clearly the *Evans* formulation of a manufacturer's duty should prevail.[23]

The concept of "intended use," however, has been accorded broader application by several jurisdictions and has been held not

19. Defendant argued that foreseeability of harm is one factor to consider in determining duty, but is not the only test. Policy and social requirements of the time and community must be considered. Assuming that accidents are reasonably foreseeable, should that be the sole test, the manufacturer's duty would be intolerably extended. Brief of Appellee at 24-27, Friedrich v. Anderson, 191 Neb. 724, 217 N.W.2d 831 (1974). Plaintiff, conversely, argued that even the slightest degree of foreseeability of harm creates a duty on the part of a manufacturer to protect against injuries to plaintiff. Since auto accidents are reasonably foreseeable, and occupants of autos are injured by "second impact" collisions, a manufacturer owes a duty to prevent same. Brief of Appellant at 36, Friedrich v. Anderson, 191 Neb. 724, 217 N.W.2d 831 (1974).

20. Hall v. E.I. Du Pont de Nemours & Co., 345 F. Supp. 353, 361 (E.D.N.Y. 1972).

21. *The Mars*, 9 F.2d 183, 184 (S.D.N.Y. 1914).

22. RESTATEMENT (SECOND) OF TORTS § 395 (1965). *See also* comment *j*, "*Unforeseeable use or manner of use.*"

> The liability stated in this Section is limited to persons who are endangered and the risks which are created in the course of uses of the chattel which the manufacturer should reasonably anticipate. In the absence of special reason to expect otherwise, the maker is entitled to assume that his product will be put to normal use, for which the product is intended or appropriate . . . .

23. *See* note 14, *supra*.

to preclude manufacturers' responsibility for the probable ancillary consequences of normal use.[24] A manufacturer cannot ignore probable "misuse" of his product.

> "Intended use" is not an inflexible formula to be apodictically applied to every case. Normally a seller or manufacturer is entitled to anticipate that the product he deals in will be used only for the purposes for which it is manufactured and sold; thus he is expected to reasonably foresee only injuries arising in the course of such use. However, he must also be expected to anticipate the environment which is normal for the use of his product . . . .[25]

The *Larsen* court applied this concept to the use of automobiles in the following manner:

> Automobiles are made for use on the roads and highways in transporting persons and cargo to and from various points. This intended use cannot be carried out without encountering in varying degrees the statistically proved hazard of injury-producing impacts of various types.[26]

After looking at authorities on both sides of the "intended use" or foreseeability of harm issue, which is a determinant of the manufacturer's duty of care, the resolution of the question seems to turn on the court's determination of public policy.[27]

The Nebraska Supreme Court, after weighing the competing arguments and policy considerations raised by the duty issue in *Friedrich*, referred to Nebraska Jury Instruction 11.03[28] for guidance. The court held that the accidental collision of an automobile with another automobile or object, while the automobile is being used for its intended purpose, is a use which a manufacturer should reasonably expect.[29] This holding brings Nebraska under the *Larsen* umbrella. Thus, in Nebraska a manufacturer's duty to use reasonable care in designing its vehicle includes the duty not to subject the user to unreasonable risk of injury from the foreseeable possibility of collision with other automobiles. In other words, the auto manufacturer must exercise reasonable care to protect

24. *See* Turcotte v. Ford Motor Co., 494 F.2d 173 (1st Cir. 1974); Larsen v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968); Mazzi v. Greenlee Tool Co., 320 F.2d 821 (2d Cir. 1963); Spruill v. Boyle-Midway, Inc., 308 F.2d 79 (4th Cir. 1962); Hall v. E.I. Du Pont de Nemours & Co., 345 F. Supp. 353 (E.D.N.Y. 1972); Dyson v. General Motors Corp., 298 F. Supp. 1064 (E.D. Pa. 1969).
25. Spruill v. Boyle-Midway, Inc., 308 F.2d 79, 83 (4th Cir. 1962).
26. 491 F.2d at 501-02.
27. Green, *The Causal Relation Issue in Negligence Law*, 60 MICH. L. REV. 543, 562-69 (1962).
28. "A manufacturer of goods has a duty to use reasonable care in the design of goods to protect those who will use the goods from unreasonable risk of harm while the goods are being used for their intended purpose or any purpose which could be reasonably expected." NEB. JURY INSTRUCTION No. 11.03 (1969).
29. 191 Neb. at 732, 217 N.W.2d at 836.

persons using his product from possible injuries sustained in "second impact" collisions. In so holding, the Nebraska court specified that it did not require an auto manufacturer to design a product incapable of producing harm. This result comports with current legal thought, no court, to date, having held that an automobile manufacturer must build a "crashproof" product.[30]

Having held that an accidental automobile collision while the car was being used for its intended purpose was reasonably foreseeable and that an automobile manufacturer must protect the user of its product from unreasonable risk of harm, the court affirmed the trial court's decision. According to the decision, the evidence concerning the gear shift lever knob was "not sufficient that reasonable minds could properly find that the defectively designed product created a forseeable and *unreasonable* risk of harm."[31]

One difficulty presented by the supreme court's decision is that the trial court based its decision to grant the defendant's motions for summary judgment on the absence of a duty to design a shift knob incapable of producing or causing injury in the event of collision.[32] That is, since collisions were not an "intended use" of the product, the manufacturer had no duty to protect the plaintiff from an unreasonable risk of harm. It was this point which the litigants briefed to the supreme court and to which, presumably, their evidence in the trial court was addressed. Clearly the supreme court resolved the duty issue in favor of the plaintiff, finding automobile collisions reasonably foreseeable. By proceeding to resolve the negligence issue, however, the court decided the factual question of Chrysler's possible breach of duty. Such a decision was made upon meager evidence since the plaintiff had not been allowed to proceed to the merits in the lower court; rather, summary judgment had been granted based on the absence of the defendants' duty to protect the plaintiff from unreasonable risk of harm when its product was subjected to an unintended use—a question of law.

A further difficulty with the decision is that the plaintiff framed his petition in the alternative, alleging defendants were liable on theories of specific negligence, breach of warranty and strict liability.[33] Assuming the supreme court correctly proceeded to decide the factual question—that the shift knob design did not create a foreseeable and unreasonable risk of harm, and thus that Chrysler was not negligent as a matter of law—the court's rationale in affirming the summary judgment must have been that second impact liability will be recognized in Nebraska only upon a showing of

30. Comment, 12 DUQUESNE L. REV. 603, 607 (1974).
31. 191 Neb. at 732-33, 217 N.W.2d at 836 (emphasis added).
32. *See* note 12, *supra.*
33. 191 Neb. at 725, 217 N.W.2d at 833.

negligence and not when the theory of recovery is strict liability or breach of warranty.

There are no apparent means to ascertain whether the court considered the merits of plaintiff's breach of warranty theory in *Friedrich*. Although the syllabus indicates that warranty was a basis for the decision,[34] there is no mention of the Nebraska warranty statutes[35] in the opinion, and the word "warranty" was mentioned in passing at only three points.[36] It can only be assumed, since the court acknowledged the existence of plaintiff's warranty allegation, that the court considered sub silentio whether an allegation of manufacturer's breach of warranty constituted a valid basis for recovery in a second collision suit. Subsequent denial of relief to the plaintiff would at least indicate that no breach existed in *Friedrich*, and potentially could point to the court's decision that a warranty theory is an improper basis for recovery in any second collision suit in Nebraska.[37] However, any conclusion on this aspect of the case is so speculative that further examination would be of questionable value. Nevertheless, there is room for more constructive analysis of the possible implications of *Friedrich* for the law of strict liability in Nebraska.

## III. STRICT LIABILITY IN NEBRASKA AFTER *FRIEDRICH*

There can be little doubt that the supreme court decided *Fried-*

34. 191 Neb. at 724, 217 N.W.2d at 832.
35. NEB. U.C.C. §§ 2-313 to -315.
36. The court noted that one of the bases of plaintiff's action in *Evans* was implied warranty. 191 Neb. at 727, 217 N.W.2d at 834. However, the Evans court stated: "It is not alleged that General Motors expressly warranted its auto to have side rails or to be capable of protecting a driver in broadside collisions; nor can such warranty be implied from the allegations in plaintiff's amended complaint." 359 F.2d at 825. Implied warranty was also mentioned in the court's reference to Garst v. General Motors Corp., 207 Kan. 2, 484 P.2d 47 (1971). Finally, the court acknowledged that breach of warranty was one of plaintiff's theories for relief. 191 Neb. at 725, 217 N.W.2d at 835.
37. There appears to be no instance in which the warranty theory has been successfully employed in a *second collision case*. This is the expected result, especially in instances of express warranty, because with the existing state of the art it would be absurd to expect an auto manufacturer or dealer to warrant expressly that the purchaser of its product would not be injured in any collision involving that product. Further, courts in two cases have taken the position that in situations where the law does not require a manufacturer to make an automobile that will fully protect its occupants in a collision, the law does not imply that a manufacturer warrants his product to be adequate for such a purpose. See Schumard v. General Motors Corp., 270 F. Supp. 311 (S.D. Ohio 1967); and McClung v. Ford Motor Co., 333 F. Supp. 17 (S.D. W. Va. 1971), *aff'd per curiam*, 472 F.2d 240 (4th Cir. 1973).

*rich* on the basis of negligence theory. The court's holding tracks the language of Nebraska Jury Instruction 11.03,[38] which in turn looks to section 395 of the Restatement (Second) of Torts for authority.[39] The court clarified the basis for its decision by stating: "[T]here was no substantial competent evidence from which one reasonably could draw an inference of *negligence* on the part of defendants proximately causing plaintiff's injuries."[40] Given this formulation, it may seem that the case has no impact on Nebraska's law of strict liability. But such a conclusion is contrary to the fact that the plaintiff set forth three causes of action in his petition,[41] and motions for summary judgment were granted by the trial court dismissing all three causes. The supreme court, in ruling on the correctness of the trial court's decision, could reasonably be expected to have examined whether the plaintiff's case should have proceeded to trial on any or all causes of action, thus necessarily considering the strict liability question.

The Nebraska Supreme Court adopted strict liability in tort with its holding in *Kohler v. Ford Motor Co.*[42]

> We hold that a manufacturer is strictly liable in tort when an article he placed in the market, knowing that it is to be used without inspection for defects, proves to have a defect which causes an injury to a human being rightfully using that product.[43]

This broad rule was bolstered by the court two years later in *Hawkins Construction Co. v. Matthews Co.*[44] Chief Justice White, in the majority opinion, pointed out that the doctrine of strict liability in tort was designed to place the risk of defect-caused injuries on the manufacturer of the chattel, thus easing the burden of injury for plaintiffs who were often less able to bear the costs of the loss.[45] From these two cases which set forth Nebraska's strict liability law prior to *Friedrich*, it can be seen that the key element for a plaintiff to establish for recovery on a strict liability theory is that a defect in the product caused his injury.

38. *See* note 28, *supra.*
39. That section is entitled, "Negligent Manufacture of Chattel Dangerous Unless Carefully Made." RESTATEMENT (SECOND) OF TORTS § 395 (1965).
40. 191 Neb. at 733, 217 N.W.2d at 836-37 (emphasis added).
41. *See* note 33, *supra.*
42. 187 Neb. 428, 191 N.W.2d 601 (1971).
43. 187 Neb. at 436, 191 N.W.2d at 606. The court cited as the rationale for its holding: RESTATEMENT (SECOND) OF TORTS § 402A (1965); Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791 (1966); Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).
44. 190 Neb. 546, 209 N.W.2d 643 (1973). *See also* Note, 7 CREIGHTON L. REV. 396 (1974); Note, 53 NEB. L. REV. 114 (1974).
45. 190 Neb. at 562, 209 N.W.2d at 653.

If the court considered sub silentio the merits of plaintiff's claim for recovery under the strict liability theory, its decision must have been that the product which injured plaintiff (the shift knob), placed on the market and used without inspection for defects, was not defective. The court's language at the conclusion of the opinion, however, suggests that it accepted the fact that the product was defectively designed.[46] If the court actually disposed of the case on strict liability grounds, as well as negligence theory, and if the court agreed that the shift knob was defectively designed and still decided against the plaintiff, an element not present in *Kohler* and *Hawkins* may have been added to Nebraska's law of strict liability.

The guiding lights of strict liability theory have been, and are, *Greenman v. Yuba Power Products, Inc.*[47] and cases based on section 402A of the Restatement (Second) of Torts.[48] These decisions have been cited side by side as standing for the same formulation of strict liability law. It has been asserted, however, that each prescribes a different burden for the plaintiff to sustain if he is to recover under a strict liability theory. *Greenman* sets forth the rule that a "manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects proves to have a defect which causes injury to a human being."[49] In an attempt to prevent the manufacturer from becoming the absolute insurer of every injury resulting from the use of its products,[50] section 402A places a further burden on the plaintiff to prove the product was "unreasonably dangerous."[51]

46. "[The evidence] is not sufficient that reasonable minds could properly find that the *defectively designed product* created a foreseeable and unreasonable risk of harm." 191 Neb. at 733, 217 N.W.2d at 836 (emphasis added).
47. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).
48. RESTATEMENT (SECOND) OF TORTS § 402A (1965).
    (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to property, if
        (a) the seller is engaged in the business of selling such a product, and
        (b) it is expected to and does reach the consumer without substantial change in the condition in which it was sold.
    (2) The rule stated in Subsection (1) applies although
        (a) the seller has exercised all possible care in the preparation and sale of his product, and
        (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.
49. 59 Cal. 2d at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700. This rule is mirrored in Kohler v. Ford Motor Co., 187 Neb. 428, 191 N.W.2d 601 (1971).
50. *See* RESTATEMENT (SECOND) OF TORTS § 402A, comment c (1965).
51. *See* note 49, *supra.*

This element of "unreasonable danger" may have been injected into Nebraska's law of strict liability by the supreme court when it stated in *Friedrich* that it could not be found "that the defectively designed product created a foreseeable and *unreasonable risk of harm.*"[52] The difficulty with this language is that it closely parallels the negligence standard. To determine whether a reasonable manufacturer should have produced the product (a necessary inquiry to decide negligence) or whether the product is unreasonably dangerous (a necessary inquiry to decide strict liability) requires the utilization of the same criteria—probability of injury, degree of possible harm, and cost of the design implementation.[53] These criteria, however, are viewed from different perspectives. The negligence standard looks to the manufacturer's *conduct.* Assuming the manufacturer possessed knowledge of the product's condition, would he then have acted unreasonably by placing it on the market? Conversely, the strict liability standard looks to the *product* and whether a reasonable manufacturer would have placed the product on the market knowing of its defective condition. Thus, in strict liability, except for the lack of defendant-manufacturer's scienter, the test to determine liability is the same as that for negligence.[54] Stressing the importance of this distinction, the California Supreme Court recently refused to place on a plaintiff the additional burden of proving the product "unreasonably dangerous" as a prerequisite to recovery for injuries suffered in a second collision accident because such an element "rings of negligence."[55] The absence of the burden upon the plaintiff to establish defendant's scienter is a significant benefit to be derived from the use of strict liability. Thus, if the Nebraska Supreme Court, by its holding in *Friedrich,* added the "unreasonably dangerous" requirement to the plaintiff's burden for recovery on a strict liability theory this would be a significant change from the previously enunciated law of strict liability in Nebraska.

In the final analysis, the effect the court's decision was intended to or will have upon this state's law of strict liability is uncertain. The court did not cite *Kohler* or *Hawkins,* which, as previously mentioned, constitute the foundation of existing strict liability law on Nebraska. Indeed, the court did not talk in terms of strict liability in its opinion.

52. 191 Neb. at 733, 217 N.W.2d at 836 (emphasis added).
53. United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947).
54. Wade, *Strict Tort Liability of Manufacturers,* 19 S.W.L.J. 5, 15 (1965).
55. Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 133, 501 P.2d 1153, 1162, 104 Cal. Rptr. 433, 442 (1972). *See also* Note, 61 CALIF. L. REV. 656 (1973); Note, 7 CREIGHTON L. REV. 434 (1973); Note, 11 DUQUESNE L. REV. 726 (1973).

## IV. CONCLUSION

In *Friedrich*, the court clearly decided that an automobile's collision with other objects during its intended use is a reasonably foreseeable occurrence and therefore the auto manufacturer has a duty to design its product to protect users from an unreasonable risk of harm. In so holding, the supreme court has allied Nebraska with the growing number of states following the *Larsen* decision.

The court's decision on the merits, however, raises troublesome issues. The most reasonable reading of *Friedrich* leads to the conclusion that the defendants' conduct was judged solely on the basis of negligence theory and no violation of the standard of care was found. If this is the case, the court failed to consider the additional theories of breach of warranty and strict liability advanced by the plaintiff. Thus, the full meaning of this decision awaits further articulation and clarification in future second impact cases.

*Paul M. Schudel '75*