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**Friedrich II: Nebraska Takes a Closer Look at Automotive Design Defect**


**I. INTRODUCTION**

Americans are killed and injured in motor vehicle accidents in alarming numbers each year. As traffic fatalities nationwide reached a record-breaking 56,000 in 1972, safety authorities began to concentrate on eliminating defects in motor vehicle design and on improving highway engineering.\(^1\) However, by October of 1979, 42,430 Americans had already lost their lives that year on the nation's highways.\(^2\) Automobile accidents are reportedly the leading cause of death among fifteen to thirty-four year-olds in the United States.\(^3\)

In _Hancock v. Paccar, Inc._,\(^4\) the Nebraska Supreme Court once again dealt with the highly controversial issue of manufacturer liability for injuries resulting from automotive design defect.\(^5\) In an opinion written by Chief Justice Krivosha, the court noted similari-

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5. An earlier Nebraska decision, Friedrich v. Anderson, 191 Neb. 724, 217 N.W.2d 831 (1974), paved the way for an occupant of a motor vehicle to recover for
ties between this case and its decision in *Friedrich v. Anderson.*

Both cases involved an attempt to impose liability upon the manufacturer of a motor vehicle which inflicted injuries upon the occupant during a collision. In *Friedrich,* the plaintiff was unable to do so and suffered an adverse summary judgment, whereas a $251,180 verdict in favor of the plaintiff was affirmed in *Hancock.*

The purpose of this note is to examine the concepts of crashworthiness and enhanced injury as they relate to design defect within the context of the facts in *Hancock.* Consideration will be given to a suggestion that an attempt be made by the court in the future to separate true "crashworthiness" cases from those in which the design defect was a causal factor in producing the accident. It is asserted that such an approach may help maintain the distinction between injuries which result from the initial collision and those sustained solely on account of the occupant's impact with the vehicle interior or some other surface. Further, this enhanced injuries sustained in a collision. The plaintiff in *Friedrich,* however, was unable to meet the burden of proof.

6. Speaking for the court, Chief Justice Krivosha pointed out that "this case might have been entitled 'Friedrich II.'" 204 Neb. at 470, 283 N.W.2d at 30.

7. 191 Neb. at 733, 217 N.W.2d at 837.

8. 204 Neb. at 489, 283 N.W.2d at 39. The action was brought for the wrongful death of plaintiff's husband who was killed while operating a cab-over tractor manufactured by the defendant.

9. Although not discussed in this note, the *Hancock* court held that the state of the art defense refers to that which the industry was reasonably and economically capable of doing and not what the industry was in fact doing. 204 Neb. at 479-30, 283 N.W.2d at 35. Neither will this note deal with the court's clarification of misleading language found in Waegli v. Caterpillar Tractor Co., 197 Neb. 824, 251 N.W.2d 370 (1977), and Kohler v. Ford Motor Co., 187 Neb. 428, 191 N.W.2d 601 (1971), regarding the burden of proof with respect to the plaintiff's knowledge of the defect. According to *Hancock:*

No plaintiff should be required to prove the absence of all possible defenses in order to recover. That burden properly belongs to the defendant. To the extent that any confusion still remains we hold that a plaintiff in a strict tort liability case is not required to plead and prove he was unaware of the defect. 204 Neb. at 485-86, 283 N.W.2d at 35.


12. Huddell v. Levin, 537 F.2d 728 (3d Cir. 1976) (driver killed when struck head
note suggests that the Nebraska Supreme Court ought to clearly

restrict; Wooten v. White Trucks, 514 F.2d 634 (5th Cir. 1975) (driver’s leg

crushed when cab struck another truck); Dreisonstok v. Volkswagenwerk,
A.G., 489 F.2d 1066 (4th Cir. 1974) (injuries sustained during 40 mph collision

of van into utility pole); Marshall v. Ford Motor Co., 446 F.2d 712 (10th Cir.

1971) (front seat passenger injured when rear seat occupant thrown against
back of front seat); Gray v. General Motors Corp., 434 F.2d 110 (8th Cir. 1970)

(occupant thrown through windshield); Larsen v. General Motors Corp., 391
F.2d 495 (8th Cir. 1968) (steering shaft shoved backward into driver’s head
during collision); Schemel v. General Motors Corp., 384 F.2d 802 (7th Cir.
1967), cert. denied, 390 U.S. 945 (1968) (injuries sustained by occupant of first
car struck in rear by automobile traveling 115 mph); Evans v. General Motors
Corp., 359 F.2d 822 (7th Cir.), cert. denied, 385 U.S. 836 (1966) (occupant killed
when vehicle struck broadside); Ford Motor Co v. Zahn, 265 F.2d 729 (8th Cir.
1959) (eye injured when occupant thrown against jagged edge of ashtray);

impaled on gear shifter); Horn v. General Motors Corp., 34 Cal. App. 3d
773, 110 Cal. Rptr. 410 (1973), vacated, 17 Cal. 3d 359, 131 Cal. Rptr. 78 (1976)
(occupant struck prongs on steering column exposed when horn knocked
off); Farmer v. International Harvester Co., 97 Idaho 742, 553 P.2d 1306 (1976)
(air suspension seat catapulted driver into cab roof); Rutherford v. Chrysler
Motors Corp., 60 Mich. App. 392, 231 N.W.2d 413 (1975) (front seat slid back-
wards into rear seat passenger’s leg during collision); Ford Motor Co. v.
Simpson, 233 So. 2d 797 (Miss. 1970) (occupant struck knee on heater during
head-on collision); Walton v. Chrysler Motors Corp., 229 So. 2d 568 (Miss. 1969)
(occupant injured when seat broke during collision); Friedrich v. Anderson,
191 Neb. 724, 217 N.W.2d 831 (1974) (eye injured when head struck gear shift
1979) (driver’s leg severed when bumper penetrated van’s front panel during
collision); Huff v. White Motor Corp., 565 F.2d 104 (7th Cir. 1977) (expoding
gas tank); Polk v. Ford Motor Co., 529 F.2d 259 (8th Cir. 1975), cert. denied, 426
U.S. 907 (1976) (fuel tank ruptured and roof supports failed during roll-over);

to failure of roof to support weight of overturned car); Willis v. Chrysler
car to break apart); Buehler v. Whalen, 70 Ill. 2d 51, 374 N.E.2d 460 (1978) (exp-
oding gas tank).

13. Shelak v. White Motor Corp., 581 F.2d 1155 (5th Cir. 1978) (truck step broke
beneath driver’s weight); Mella v. Ford Motor Corp., 534 F.2d 795 (8th Cir. 1976)
(occupant thrown from vehicle when door latch released during broadside
collision); Blevins v. Cushman Motors, 551 S.W.2d 602 (Mo. 1977) (occupant
pinned beneath golf cart which tipped over); Brandenburger v. Toyota Motor
Sales, 162 Mont. 506, 513 P.2d 268 (1973) (passengers ejected when roof came
off in accident); Railway Express Agency, Inc. v. Spain, 249 S.W.2d 644 (Tex.
Knippen v. Ford Motor Co., 546 F.2d 993 (D.C. Cir. 1976) (motorcyclist injured
when struck by sharp metal piece on car’s fender); Passwater v. General Mo-
tors Corp., 454 F.2d 1270 (8th Cir. 1972) (motorcyclist’s leg mangled when
came into contact with ornamental wheel cover on automobile during collis-
ion); Schneider v. Chrysler Motors Corp., 401 F.2d 549 (8th Cir. 1968) (plain-
tiff’s eye lacerated when bent down and came into contact with sharp edge on
window vent); Stueve v. American Honda Motors Co., 457 F. Supp. 740 (D.
Kan. 1978) (motorcycle fuel tank caught fire); Kahn v. Chrysler Corp., 221 F.
Supp. 677 (S.D. Tex. 1963) (bicyclist drove into car tail fin); Hatch v. Ford
distinguish between the doctrines of negligence and strict liability, identifying upon which one a given opinion is based, since a failure to do so tends to blur the standard for determining whether a product is unreasonably dangerous as defined in Hancock. Finally, charges made in a strong dissent by Justice Clinton joined by Justice Boslaugh that the majority's opinion makes the manufacturer an insurer and that the defendant's product was not unreasonably dangerous will be discussed.

II. THE HANCOCK DECISION

A. Facts

Early in the morning of September 12, 1971, plaintiff's husband was killed while operating a Kenworth cab-over tractor manufactured and sold by the defendant. The accident occurred when the tractor struck a deer on the highway while traveling at sixty miles per hour. The impact bent the left side of the unbraced lightweight aluminum bumper into a v-shape at a place where cutouts were located in front of the left wheel. This caused the


15. The supreme court adopted the trial court's jury instruction regarding the meaning of the term unreasonably dangerous: "[T]he product had a propensity for causing physical harm beyond that which would be contemplated by the ordinary user or consumer who purchases it, with the ordinary knowledge common to the foreseeable class of users as to its characteristics." 204 Neb. at 483-84, 283 N.W.2d at 37 (emphasis added). As pointed out in Brief for Appellant in Support of Motion for Rehearing at 16, Hancock v. Paccar, Inc., 204 Neb. 468, 283 N.W.2d 25 (1979), this definition seems to conflict with the court's later citation to RESTATEMENT (SECOND) OF TORTS § 402A, Comment i, (1965) for the rule that "unreasonably dangerous" means dangerous beyond that which would be contemplated by the "'ordinary consumer' with 'ordinary knowledge common to the community.' The section does not refer to experts." 204 Neb. at 484, 283 N.W.2d at 37 (emphasis added).

16. According to some commentators and jurists, acceptance of the crashworthiness theory makes automobile manufacturers virtual insurers since it is arguable in retrospect that every vehicle involved in an accident could have been made safer. Hancock v. Paccar, Inc., 204 Neb. 468, 489-91, 283 N.W.2d 25, 39-40 (1979) (Clinton, J., dissenting); Hoenig & Goetz, supra note 11, passim; Hoenig & Werber, supra note 11, at 578.

17. 204 Neb. at 470-71, 283 N.W.2d at 31.

18. Id. at 471, 283 N.W.2d at 31.
bumper to wedge itself between the wheel and the framerail. With the steering effectively frozen in a left turn the tractor-trailer left the highway, rolled and slid into a guardrail killing the driver.\textsuperscript{19}

Hancock sought recovery based on theories of negligence and strict liability.\textsuperscript{20} First, Hancock alleged that Paccar negligently designed the front bumper by: making it too long, including cutouts and holes in the face of the bumper, failing to brace it at the ends, and failing to test or inspect it. Plaintiff also alleged that the bumper should have been made of a different material, one which would not deform or would break away upon impact.\textsuperscript{21} Second, under a theory of strict liability, Paccar was accused of marketing the bumper without inspecting it for performance in the event of impact at a time when the design was defective and not reasonably fit for ordinary and foreseeable uses.\textsuperscript{22} Following a jury verdict in favor of Hancock\textsuperscript{23} and a denial of Paccar's motion for a directed verdict,\textsuperscript{24} Paccar appealed.\textsuperscript{25}

\section*{B. Holding}

According to the Hancock opinion, Friedrich and Hancock involved an examination of the doctrines of strict liability, design defect and enhanced injury,\textsuperscript{26} plus the similar question of liability under a theory of manufacturer negligence.\textsuperscript{27} The Hancock court noted that in Friedrich it had followed the Eighth Circuit Court of

\begin{itemize}
\item[19.] Id.
\item[20.] Id. at 471-72, 283 N.W.2d at 31.
\item[21.] Id.
\item[22.] Id. at 472, 283 N.W.2d at 31.
\item[23.] Id.
\item[24.] Id.
\item[25.] Id. at 470, 283 N.W.2d at 30.
\item[26.] Id., 283 N.W.2d at 30-31.
\item[27.] Id. at 473, 283 N.W.2d at 32; Friedrich v. Anderson, 191 Neb. at 729-31, 217 N.W.2d at 335. Although the Friedrich court spoke only in terms of negligence, the court in Hancock cited to Friedrich as authority for recovery under the theory of strict liability. 204 Neb. at 474, 283 N.W.2d at 32. \textit{But see} Comment, \textit{Strict Tort Liability in Nebraska: Recent Developments in Perspective}, 12 Creighton L. Rev. 370, 383 n.89 (1978); \textit{Note}, 54 Neb. L. Rev. 172, 179-81 (1975). It is especially curious that the Hancock court viewed Friedrich as a strict liability decision since the principal case relied on in Friedrich was determined on negligence grounds only. In Larsen v. General Motors Corp., 391 F.2d 495, 506 (8th Cir. 1968) the Eighth Circuit Court of Appeals said:
\begin{quote}
On the issue of strict liability or implied warranty of merchantability for intended use, we make no comment as our holding of sufficiency of counts one and two are dispositive. The doctrine of strict liability is one of policy for the various states and the National Congress, and we do not think there has been a sufficient showing on the Michigan law as respects this point, particularly in the automotive field.
\end{quote}
\textit{See} Hoenig & Goetz, \textit{supra} note 11, at 37 n.128, 38 n.130; Noel, \textit{Manufacturer's Negligence of Design or Directions for Use of a Product}, 71 Yale L.J. 816, 818
Appeals' landmark decision in *Larsen v. General Motors Corp.*,\(^{28}\) which held that an automobile manufacturer had a duty to use reasonable care in the vehicle's design to avoid subjecting the occupant to an unreasonable risk of injury in the event of a collision.\(^{29}\) According to *Friedrich*:

\[\text{[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. The subjection of an automobile to accidental collision with another automobile or object while being used for its intended purpose is a use which a manufacturer should reasonably expect.}\(^{30}\)

However, the *Friedrich* court held that there was no substantial evidence from which an inference of negligence could reasonably be drawn regarding the design of a gearshift knob which the occupant struck during a collision.\(^{31}\)

In *Hancock*, the court reaffirmed the expansive *Larsen* standard it had adopted in *Friedrich*. Moreover, the *Hancock* court again rejected the position advanced in *Evans v. General Motors Corp.*,\(^{32}\) which limited design liability,\(^{33}\) noting that the Seventh Circuit had since overruled *Evans*.\(^{34}\)

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28. 391 F.2d 495 (8th Cir. 1968). In *Larsen* the driver was severely injured when a defectively designed steering shaft of a Corvair was shoved rearward into his head during a head-on collision.

29. *Id.* at 502.

30. 191 Neb. at 731-32, 217 N.W.2d at 836.

31. *Id.* at 732-33, 217 N.W.2d at 836-37.

32. 359 F.2d 822 (7th Cir. 1966). In *Evans*, plaintiff's decedent was crushed when the car he was driving was struck broadside by another. The plaintiff alleged that the injuries sustained were enhanced by the "X" frame design of the automobile.

33. According to *Evans*, a manufacturer is under no duty to design a "crash-worthy" vehicle because "[t]he 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.* at 825.

34. Chief Justice Krivosha poetically recognized that:

Time and the realities of life, however have narrowed the differences between *Evans v. General Motors Corporation* . . . and *Larsen v. General Motors Corporation* . . . until in 1977 the Circuit Court of Appeals for the Seventh Circuit, in the case of *Huff v. White Motor*
In *Huff v. White Motor Corp.* a case involving an exploding fuel tank which killed the driver of a tractor-trailer manufactured by the defendant, the Seventh Circuit Court of Appeals took notice of the fact that a majority of jurisdictions had followed Larsen instead of *Evans*. The *Huff* court also recognized that commentators had been decisively critical of its earlier pronouncement in *Evans*. The court relied on policy considerations expressed in the *Restatement of Torts* which calls for placing the burden of accidental injury caused by consumer products upon those who market them. Accordingly, the *Huff* court rejected as "unrealistically narrow" the "intended purpose" rationale of *Evans* which had excluded foreseeable traffic accidents as a possibility to be guarded against in automobile design. *Huff* recognized that a collision is an obvious risk that a manufacturer may take precautions against in order to decrease the potential for occupant injury. In language which became the apparent cornerstone of the *Hancock* opinion the *Huff* court stated:

One who is injured as a result of a mechanical defect in a motor vehicle should be protected under the doctrine of strict liability even though the

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35. 565 F.2d 104 (7th Cir. 1977).
36. Id. at 108. *Huff* conveniently listed those jurisdictions following Larsen and *Evans*, respectively, in appendices following the opinion. The trend clearly favors Larsen. See Comment, *supra* note 10, at 312. See also Nader & Page, *supra* note 14, at 653. *Contra*, Hoenig & Goetz, *supra* note 11, at 13, 20 n.68; but see Hoenig & Werber, *supra* note 11.
37. 565 F.2d at 108.
39. 565 F.2d at 108.
40. Two leading commentators have perceived the fallacy of the *Evans* approach to "intended purpose" in the following manner:
‘[I]ntended use and purpose' as a test to limit the manufacturer's liability applies only to the conscious utilization of the product by its operator. This distinction between such use and unplanned incidents is not difficult to conceptualize. The person who uses his car to knock over shrubbery in his back yard or to ford streams has gone beyond the purposes for which the vehicle was manufactured. But the driver who non-negligently loses control of his car while on the road and crashes into a tree has clearly not transcended the use and purposes for which the car was produced. The abnormal use test should not be used to preclude manufacturers' liability in the latter case.
41. See note 33 *supra*.
43. 204 Neb. at 474-75, 283 N.W.2d at 32-33. *Contra*, notes 61-65 & accompanying text *infra*. 
defect was not the cause of the collision which precipitated the injury. There is no rational basis for limiting the manufacturer's liability to those instances where a structural defect has caused the collision and resulting injury. This is so because even if a collision is not caused by a structural defect, a collision may precipitate the malfunction of a defective part and cause injury. In that circumstance the collision, the defect, and the injury are interdependent and should be viewed as a combined event. Such an event is the foreseeable risk that a manufacturer should assume. Since collisions for whatever cause are foreseeable events, the scope of liability should be commensurate with the scope of the foreseeable risks.44

Affirming the district court's refusal to grant Paccar a directed verdict, the Nebraska Supreme Court held that, unlike the circumstances in Friedrich, the conflicting evidence was sufficient to pose questions of fact regarding the negligent and defective design of the vehicle's bumper.45 The court then discussed several assignments of error raised by Paccar regarding the plaintiff's burdens of proof, instructions given by the trial court, and the allowance of testimony by some of the plaintiff's witnesses.46

III. ANALYSIS

A. "Crashworthiness" or Causation?

Automobile design may be defective in two ways. Design characteristics may either pose an unreasonable risk of initial collision or subject occupants to an unreasonable risk of enhanced injury during the second collision.47 The second collision occurs when a passenger strikes the inside of the passenger compartment, is ejected therefrom or is injured in any other product-related manner such as by fire, water damage or suffocation after the vehicle has already collided with another vehicle or object.48 The injuries so inflicted are called "enhanced injuries" because it is alleged that a defect in design caused the occupant to be injured more seriously during the second collision than he or she would have been had the manufacturer used a vehicular design of a different size, shape, construction or assembly.49

Carpini v. Pittsburgh & Weirton Bus Co.50 involved a design defect which created an unreasonable risk of initial collision. In that case a bus was designed with unprotected petcocks positioned

44. 565 F.2d at 109.
45. 204 Neb. at 479-79, 283 N.W.2d at 34.
46. Id. at 479-89, 283 N.W.2d at 34-39.
47. Comment, supra note 14, at 606-07; Note, supra note 10.
48. See Hoenig & Goetz, supra note 11, at 46; Phillips, supra note 10; Comment, supra note 10, at 299; Note, supra note 10, at 957.
49. Hoenig & Goetz, supra note 11, at 3-4, 7; Hoenig & Werber, supra note 11. See generally Note, Neb. L. Rev. supra note 27, at 172-73. See also Note, supra note 10, at 954.
50. 216 F.2d 404 (3d Cir. 1954).
very low for efficient drainage of the vehicle's air chambers.\textsuperscript{51} Such a design was said to create a risk of failure of the braking system.\textsuperscript{52} When the petcock broke as it struck debris on the highway, air was allowed to escape from the braking system as the bus descended a hill thus causing the vehicle to crash into a retaining wall.\textsuperscript{53} Had it not been for the object striking the defectively designed petcock, the accident would not likely have occurred.\textsuperscript{54} Nevertheless, the court held that the manufacturer had a duty to guard against the likelihood of such an event because the intervening cause was foreseeable.\textsuperscript{55}

In \textit{Hancock}, the lightweight aluminum bumper designed with cutouts directly in front of the wheels and unbraced ends posed an unreasonable risk of interference with the steering of the tractor-trailer.\textsuperscript{56} Just as in \textit{Carpini}, had it not been for the "cooperation" of the defectively designed component striking a foreign object on the highway, the vehicle probably would not have gone out of control.\textsuperscript{57} Similarly, because the intervening cause of an animal damaging the bumper so extensively as to interfere with the vehicle's steering was foreseeable,\textsuperscript{58} Paccar clearly had a duty to design its truck bumpers so that impact with a deer would not cause such an

\textsuperscript{51} Id. at 406. (A petcock is a small drainage valve).
\textsuperscript{52} Id.
\textsuperscript{53} Id. at 405.
\textsuperscript{54} Note, \textit{Cornell L.Q.}, supra note 14, at 450 n.40.
\textsuperscript{55} Id.
\textsuperscript{56} 204 Neb. at 471, 283 N.W.2d at 31.
\textsuperscript{57} See note 65 & accompanying text infra.
\textsuperscript{58} The majority in \textit{Hancock} stated:

\begin{quote}
\hspace{1em} Paccar was aware that the tractor trailer might strike an animal on the highway while traveling at a high speed. Such events are common enough that the various departments of roads of several states frequently post warnings to drivers to watch for animals, especially deer crossing the road. Furthermore, Paccar knew that the makeup of the bumper was such that, upon severe impact, the bumper would bend backward wherever such bending was not otherwise prevented. With that knowledge, it was not unreasonable to expect that the manufacturer had taken steps and made tests to be sure that the steering was not impaired upon impact.
\end{quote}

204 Neb. at 478, 283 N.W.2d at 34. According to Nader & Page, supra note 14: "Traffic accidents from a wide variety of causes are foreseeable to the auto manufacturer, and the absence or inadequacy of design features which might protect vehicle occupants may be a sufficient reason to hold the manufacturer liable for injuries attributable to unsafe design." \textit{Id.} at 658.

During 1969, the year in which Paccar manufactured the truck which Hancock was driving, 100 persons were killed nationwide after colliding with animals. \textit{National Safety Council, Accident Facts} 58 (1976). In that year 1,433 motorists struck animals in Nebraska alone. Three persons were killed and 156 others were injured. In 1,311 of those incidents, property damage exceeding \$100 was sustained. \textit{Nebraska Dept of Roads, Standard Summary of Neb. Motor Vehicle Traffic Accidents} (1969).
The similarities between *Carpini* and *Hancock* are so striking that it is remarkable that the court in *Hancock* did not cite to that decision. Perhaps the court was too anxious to base its opinion on a crashworthiness analysis. Alternatively, the decision may reflect a failure to discern the very subtle distinction between a design defect which is a causal factor in producing an accident and one which creates an unreasonable risk of injury once an accident has occurred. *Hancock* may be characterized as a crashworthiness case if the impact of the deer with the truck's bumper is considered the initial collision and the second collision characterized as when the out-of-control vehicle slid into the guardrail and inflicted fatal injuries upon the driver. The problem with such a characterization is that Hancock sought to impose liability upon the manufacturer on the basis of the bumper's performance when it struck the deer, thus causing a loss of control over the vehicle. The plaintiff's theory of recovery did not specifically draw into question the bumper's performance thereafter in a second collision.

Enhanced injuries may occur at the same time as the original accident-causing event. However, that is quite different from saying that the original accident-causing event enhances injuries within the meaning of crashworthiness. For example, an occupant of a vehicle whose gas tank ruptures on account of being struck from the rear by another automobile may suffer enhanced injuries such as burns from the explosion and flames that occur contemporaneously with the original accident-causing event. However, the enhanced injuries are caused by the defectively designed gas tank

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59. As a general rule of law, foreseeable intervening acts of causation are not deemed superseding causes but must be guarded against by the defendant. See, e.g., W. Prosser, *supra* note 13, at 272; Nader & Page, *supra* note 14, at 658. Furthermore, a manufacturer ought not to be relieved of liability because of an intervening force of nature short of extraordinary. Note, *supra* note 10, at 989.


61. That is apparently how the court viewed the facts as revealed by the following statement: "No good reason exists for not applying the doctrine of strict liability to a case where the defective design results in an enhanced injury to the plaintiff even though the product designed did not cause the initial collision." 204 Neb. at 476, 283 N.W.2d at 33.

62. Compare text accompanying note 47 *supra*, with the facts of *Friedrich* where the complaint was based on the performance of an undersized gear shift lever knob which was struck by the passenger's eye as he was thrown forward when his auto was struck by another, and *Larsen* where a steering shaft was thrust into the driver's head after the car had been struck head-on, and *Huff* where the fuel tank ruptured, caught fire, and burned the driver after the truck had jacknifed and struck an overpass support.

which is unable to protect the occupant from the effect of the impact of the second automobile and not by the original accident-causing event itself, which may have produced its own injury such as whiplash. Recall that "crashworthiness" means the ability of a vehicle to protect its occupant during the second collision and "enhanced injuries" are those which are more serious than the injuries would have otherwise been. Larsen clearly teaches that manufacturer liability for enhanced injury is coextensive with the extent of the injury "over and above the damage or injury that probably would have occurred as a result of the impact or collision absent the defective design." Absent the defectively designed bumper no injury probably would have occurred at all. Therefore, to designate the injuries received by the deceased in Hancock as a result of the original accident-causing event as "enhanced", is a misnomer. Instead, it is clear that Hancock, just like Carpini, involved a design defect which caused the fatal accident and the Nebraska Supreme Court could have decided the case on that ground.

B. "Unreasonably Dangerous" After Hancock

According to most authorities, the theories of negligence and strict liability are distinct. Under a theory of negligence the court is asked to examine the manufacturer's conduct in light of the duty of care owed the consumer. Under strict liability the focus is upon the product, the concern being whether the product is defective and poses an unreasonable risk of danger to the consumer.

Whether a manufacturer acted negligently in the design, manufacture or distribution of a product is determined by comparing the defendant's conduct with that of a reasonable manufacturer under the same or similar circumstances. The maker-seller is liable if the product is reasonably expected to be capable of inflicting substantial harm if defective, since a reasonable manufacturer

64. 391 F.2d at 503.
65. Plaintiff's expert witness testified that had the truck been equipped with an alternative bumper which was shorter, would break away on impact or would not deform, impact with a deer would not have affected the steerability of the vehicle. Brief for Appellee at 25-27, Hancock v. Paccar, Inc., 204 Neb. 468, 283 N.W.2d 25 (1979). Testimony of the defendant's expert witness was contra. Brief for Appellant at 37. However, the jury apparently believed plaintiff's witness and the supreme court chose not to interfere. 204 Neb. at 481, 283 N.W.2d at 35-36.
66. See note 14 & accompanying text supra.
67. Id.
68. Id.
69. W. Prosser, supra note 10, at 644.
70. Id. at 643.
would not have marketed the product\textsuperscript{71} or else would have warned those who might be harmed by it.\textsuperscript{72}

Strict liability requires that the product have been defective while in the control of the manufacturer.\textsuperscript{73} The other requirement is unreasonable danger.\textsuperscript{74} There are two generally accepted standards for determining when a product is unreasonably dangerous. According to the \textit{Restatement}\textsuperscript{75} standard, a product is unreasonably dangerous when it is more dangerous than the ordinary consumer would expect.\textsuperscript{76} The other standard is known as the Wade-Keeton analysis\textsuperscript{77} or the reasonable manufacturer test.\textsuperscript{78} Under that test, a product is unreasonably dangerous if it is so unsafe that a reasonably prudent manufacturer with imputed knowledge of its harmful design would not have placed it on the market.\textsuperscript{79}

In \textit{Hancock}, the Nebraska Supreme Court adopted the trial court’s definition of “unreasonably dangerous” which was a slight variation on the \textit{Restatement’s} ordinary consumer standard.\textsuperscript{80} The court stated that the jury was justified in concluding that the bumper’s design was unreasonably dangerous\textsuperscript{81} since the possibility of the bumper bending so radically upon impact with a deer was not obvious to the deceased.\textsuperscript{82} Furthermore, the court suggested that since a plaintiff does not have a duty to anticipate de-

\begin{itemize}
\item \textsuperscript{71} See Note, \textit{Neb. L. Rev.}, \textit{supra} note 27, at 182.
\item \textsuperscript{72} Nader & Page, \textit{supra} note 14, at 649.
\item \textsuperscript{73} Note, \textit{Cornell L.Q.}, \textit{supra} note 14, at 457. See 204 Neb. at 476, 283 N.W.2d at 33.
\item \textsuperscript{74} \textit{Restatement (Second) of Torts} § 402A (1965).
\item Nebraska law requires that a product be both defective and unreasonably dangerous before recovery is allowed under strict liability. In \textit{Kohler v. Ford Motor Co.}, 187 Neb. at 436, 191 N.W.2d at 607 those requirements were stated separately in the jury instructions. Also, in \textit{Hancock} the court cited to \textit{Nanda v. Ford Motor Co.}, 509 F.2d 213, 218-19 (7th Cir. 1974) for the rule that “[i]n order to recover against the manufacturer under [strict liability], plaintiff must prove that his injury resulted from a condition of the product, that the condition was an unreasonably dangerous one and that the condition existed at the time it left the manufacturer’s control.” 204 Neb. at 482-83, 283 N.W.2d at 36. \textit{But cf.} Nader & Page, \textit{supra} note 14 (defective means unreasonably dangerous).
\item \textsuperscript{75} \textit{Restatement (Second) of Torts} § 402A, Comment g (1965).
\item \textsuperscript{76} \textit{Id.}
\item \textsuperscript{77} Note, \textit{Mo. L. Rev.}, \textit{supra} note 14, at 609.
\item \textsuperscript{78} Note, \textit{supra} note 74, at 1250-51 n.225.
\item \textsuperscript{80} 204 Neb. at 483-84, 283 N.W.2d at 37. See note 15 supra.
\item \textsuperscript{81} 204 Neb. at 484, 283 N.W.2d at 37.
\item \textsuperscript{82} \textit{Id.} at 482, 283 N.W.2d at 36.
\end{itemize}
fects or speculate as to modes of injury, the defective bumper posed a danger beyond that which would be contemplated by the ordinary trucker. The court made the following observation and conclusion:

Paccar knew the wheel was unprotected from the bumper. It also knew it had not designed the bumper to protect the wheel from large objects, likely to be struck by the truck at high speeds, which, upon impact, might bend the bumper impairing steering. Yet no action was taken by the manufacturer to protect the wheel from such impairments. That was sufficient to raise a question of fact as to whether the bumper in its present condition was unreasonably dangerous.

It must be noted, however, that within the definition of “unreasonably dangerous” adopted by the court, Paccar's knowledge should have been irrelevant.

In *General Motors Corp. v. Hopkins*, the Texas Supreme Court held that an “unreasonable risk of harm” could be found under either the consumer expectations test or the reasonably prudent manufacturer test. It is possible that the Nebraska Supreme Court has likewise expanded strict liability to include the reasonable manufacturer test as the foregoing facts concerning what Paccar knew would seem to indicate. However, that possibility is not likely since the *Hancock* court’s definition of “unreasonably dangerous,” closely resembling the *Restatement’s* ordinary consumer test, appears to be exhaustive. Moreover, no mention was made of the reasonable manufacturer test in the opinion. Furthermore, the court admitted that it had not previously defined “unreasonably dangerous” in a strict liability case.

Another possible interpretation is that the court’s recitation of Paccar's knowledge was intended to illustrate that Paccar's failure to test or inspect its bumper was an omission that the ordinary user would not have contemplated. According to *Hancock*, “a consumer may reasonably expect that the manufacturer has performed a minimum number of tests and inspections to assure that a collision at speeds of normal use of the vehicle will not cause an enhanced injury.” However, the facts recited did not address

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83. *Id.* at 483, 283 N.W.2d at 36.
84. *Id.* at 482, 283 N.W.2d at 36.
85. *Id.* at 484, 283 N.W.2d at 37.
86. Paccar's attorney succinctly answered his own question about what Paccar's knowledge had to do with whether the bumper was unreasonably dangerous: "Nothing." Brief for Appellant in Support of Motion for Rehearing at 16, *Hancock v. Paccar, Inc.*, 204 Neb. 482, 283 N.W.2d 25 (1979).
87. 548 S.W.2d 344 (Tex. 1977).
88. *Id.* at 347 n.1.
89. *See* note 15 *supra*.
90. 204 Neb. at 483, 283 N.W.2d at 37.
91. *Id.* at 477, 283 N.W.2d at 34.
Paccar's failure to test or inspect the bumper. Instead, they dealt with Paccar's failure to guard against steering impairment.

Hancock sought recovery under strict liability and negligence and the supreme court allowed plaintiff to proceed on both theories. Thus, the court's concern with Paccar's knowledge of the likelihood that its bumper would bend backward and impair steering upon severe impact was appropriate in order to determine whether Paccar fell below the negligence standard of care. However, since the test for strict liability focuses on the dangerousness of the product and not the negligence of the manufacturer, Paccar's knowledge had nothing to do with whether the bumper was unreasonably dangerous under the consumer expectations test. To say that it did adds unnecessary confusion to a determination of unreasonable danger and illustrates the need for the Nebraska Supreme Court to recognize and formulate the distinction that exists between the doctrines of negligence and strict liability.

C. Dissent's Charges Examined

1. Defect and the Danger

The dissent in Hancock argued that Paccar's bumper was neither negligently designed nor unreasonably dangerous. According to the dissent, this was because "[t]he purpose of a bumper on a motor vehicle is not to guard against damage to either persons or property on high speed impacts." The fallacy of that argument is evident from the statement. Although a bumper's purpose may not be to protect the occupants or the vehicle in an accident, its purpose is also not to bend in such a way that it impairs vehicle steerability and causes an accident. The dissent's emphasis on the purpose of the bumper is misplaced because whatever a bumper's purpose is, Paccar's bumper did not perform in accordance therewith. Therefore it was defective.

92. Id. at 471-72, 283 N.W.2d at 31.
93. According to the opinion: "If the plaintiff could prove that Paccar did in fact design a bumper in a negligent manner and the negligence was the proximate cause of deceased's injury and death, then under a common law theory of negligence, plaintiff could recover." Id. at 472-73, 283 N.W.2d at 32. "The question of liability under a theory of strict liability poses a different question but in the final analysis the same result." Id. at 474, 283 N.W.2d at 32. Furthermore, the Hancock court spoke interchangeably of negligence and strict liability throughout the opinion and syllabus.
95. 204 Neb. at 484, 283 N.W.2d at 37.
96. Justice Clinton wrote the dissenting opinion to which Justice Boslaugh joined.
97. 204 Neb. at 490, 283 N.W.2d at 40.
98. Id.
Although the dangerousness of the bumper's design did not become obvious until the accident, that is no ground for saying that the bumper "had no propensity to cause harm." As the court's opinion noted, the design of the bumper was defective from the time the manufacturer designed it. Therefore, it too had a "propensity to cause harm" despite the dissent's claim to the contrary. Although courts were once hesitant to impose liability where only design defects without accompanying defects in construction or assembly were involved, that is no longer the case. The overwhelming weight of authority recognizes that manufacturers have a duty to guard against design defects.

Not only was the bumper dangerous in the sense that it had a propensity to cause harm, according to the majority it was also unreasonably dangerous. The dissent, on the other hand, considered the bumper an unavoidably unsafe product and not dangerous beyond the contemplation of the ordinary consumer: "[I]t is common knowledge that bumpers on motor vehicles are not designed to avoid damage and injury in high speed impacts." While that may be true, it is not common knowledge that after striking an animal a bumper will bend in such a manner so as to impair steering and cause a tractor-trailer to go out of control.

2. Paccar not an Insurer

Bolstered by a belief that in view of the Friedrich decision neither a cause of action based on strict liability nor negligence had been made out by Hancock, the dissent urged that the majority opinion allowed those doctrines to be extended to the point

99. Id.
100. Id. at 476, 283 N.W.2d at 33.
101. Katz, Liability of Automobile Manufacturers for Unsafe Design of Passenger Cars, 69 HARV. L. REV. 863, 883 (1956); Nader & Page, supra note 14, at 645; Comment, supra note 14, at 601; Note, CORNELL L.Q., supra note 14, at 447. This hesitancy was probably due to judicial reluctance to let juries pass on issues of damage apportionment and evaluate products created by automotive design experts. Undoubtedly there was also some concern with the familiar "flood of litigation" and fears of mass "recalls." Nader & Page, supra note 14, at 663; Comment, supra note 10, at 303-05; Note, supra note 10, at 955-57.
102. Note, CORNELL L.Q., supra note 14, at 447. See also text accompanying note 36; Comment, supra note 10, at 312; Nader & Page, supra note 14, at 653.
103. 204 Neb. at 483-84, 283 N.W.2d at 37.
104. The dissent cited RESTATEMENT (SECOND) OF TORTS § 402A, Comment k (1965) which states in part: "There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use."
105. 204 Neb. at 492, 283 N.W.2d at 41.
106. See text accompanying notes 81-84 supra.
107. 204 Neb. at 489, 283 N.W.2d at 39.
of essentially making the manufacturer an insurer that its product design was incapable of inflicting injury. According to the dissent, the court invented a theory after the fact to impose liability upon Paccar by accepting the plaintiff's contention that an alternative bumper design would have avoided the injury.

The dissent was not alone in its assailment of the court's view. Critics of the crashworthiness doctrine have urged that every imaginable design feature can be questioned after an injury-producing accident has occurred. However, the requirement that a suspected design feature be defective and unreasonably dangerous limits the imposition of liability and prevents the manufacturer from becoming the absolute insurer of its product. In other words, it is not enough for an injured consumer to show that there was a safer alternative design available. The plaintiff must also prove that the design used was dangerous beyond the expectations of the ordinary user. In addition, recovery is dependent upon a showing of injury proximately resulting from the impugned design. The dissent argued strenuously that the same result might have occurred even using the alternative bumper designs offered by the plaintiff. However, the majority correctly held that the evidence on proximate cause was in conflict and thus presented a question for the jury.

Closely related to the issue of a manufacturer as insurer is the often-repeated rule that a manufacturer has no duty to design an

108. Id. at 489-90, 283 N.W.2d at 39. Justice Clinton's appraisal of the court's opinion as being an abdication of judicial responsibility to define the limits of the legal doctrines involved is curious considering that Clinton did not dissent from the Friedrich opinion where the actual doctrinal growth of negligence and perhaps strict liability with respect to vehicular design took place. Hancock simply allowed the jury to decide whether the product design was defective and unreasonably dangerous since there was sufficient conflicting evidence to pose a question of fact: The rule adopted in Friedrich that a second impact case should not be an "open invitation to a jury to speculate as to the issue of foreseeability or the unreasonableness of the risk of harm" is merely the antithesis of the familiar rule that there be sufficient evidence upon which a jury can properly proceed as determined beforehand by the court. 191 Neb. at 732, 217 N.W.2d at 836.

109. 204 Neb. at 491, 283 N.W.2d at 40.

110. Id. at 490, 283 N.W.2d at 40.

111. Hoenig & Goetz, supra note 11, passim; Hoenig & Werber, supra note 11.

112. See note 74 supra.

113. According to Melia v. Ford Motor Co., 534 F.2d 795, 797 n.1 (8th Cir. 1976), a manufacturer would become an insurer only if liability were imposed in the absence of a defect alone.

114. Huff v. White Motor Corp., 565 F.2d 104, 110 (7th Cir. 1977). Regarding all the requirements, see generally W. PROSSER, supra note 10, at 671-76.

115. 204 Neb. at 490-91, 283 N.W.2d at 40.

116. Id. at 491, 283 N.W.2d at 35-36. See note 65 supra.
“accident-proof” or “fool-proof” product. The dissent in Hancock stated the rule as follows: “A manufacturer does not have a duty to design a product which represents the ultimate in safety or design, but rather, has a duty to design a product which is reasonably safe.” The problem with that contention is that the bumper was not reasonably safe. On the contrary, it was unreasonably dangerous and it is clear that the rule was not meant to defeat recovery in that situation.

IV. CONCLUSION

In the opinion of some observers, the Hancock decision represents a fundamental political shift toward liberalism and consumerism in the Nebraska Supreme Court. With respect to the adoption of legal standards governing manufacturer responsibility for design safety, Friedrich is actually more significant. Also, the quarter-million-dollar judgment affirmed in Hancock may be conservative in comparison to multi-million-dollar verdicts for injuries and death caused or enhanced by automobile design defects awarded elsewhere.

One thing is certain: Hancock and its predecessor, Friedrich, clearly signal the motor vehicle industry’s heightened duty to anticipate vehicle accidents and accordingly design its products in order to minimize the chance of injury. If awareness of potential liability prompts the industry toward more thoughtful design, then both decisions will have done much to curb traffic casualties.

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117. E.g., Larsen v. General Motor Corp., 391 F.2d 495, 502 (8th Cir. 1968); Evans v. General Motors Corp., 359 F.2d 822, 824 (7th Cir. 1966); Willis v. Chrysler Corp., 264 F. Supp. 1010, 1011 (S.D. Tex. 1967); Noel, supra note 29; Phillips, supra note 10, at 349.

118. 204 Neb. at 491, 283 N.W.2d at 40.

119. Larsen v. General Motors Corp., 391 F.2d 495, 502 (8th Cir. 1968); Noel, supra note 29; Phillips, supra note 10, at 349. See Nader & Page, supra note 14, at 656.

120. Lincoln Journal, Sept. 5, 1979, at 6, col. 1.

121. Consider, for example, Grimshaw v. Ford Motor Co., Nos. 197761 & 199397 (Super. Ct., Orange County, Cal. Feb. 6, 1978); appeal docketed, No. 20095 (Ct. Civ. App. 4th Dist. April 26, 1978) where $2,341,000 compensatory and $125 million punitive damages were awarded to a young boy who was burned severely when the 1972 pinto in which he was riding burst into flames after being struck from the rear. The verdict was reduced to $6.3 million upon remittitur.