Mississippi College Law Review

Volume 2 | Issue 4 Article 3

1-1-1982

The Second Accident Impact on Products Liability in Mississippi

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Custom Citation
2 Miss. C. L. Rev. 347 (1980-1982)

THE SECOND ACCIDENT IMPACT ON PRODUCTS LIABILITY IN MISSISSIPPI

Introduction

There exists in Mississippi case law a distinct gap between the protective rights of a consumer and the liability of a manufacturer who sells a defective product which causes an injury to a consumer. This gap is variously referred to as the "second impact", the "second accident", and the "crash worthiness" doctrine,[1] but by any name, the principle insulates and immunizes a manufacturer from liability where the product did not contribute to the initial cause of an accident or collision.

The second impact doctrine made its debut in Mississippi in 1969, when it was first espoused in *Walton v. Chrysler Motor Corporation,*[2] a case involving an automobile manufacturer. The rule, however, has been extended to all types of manufactured goods including airplanes[3] and tractors.[4] The results have significantly altered the course of products liability in this state, whether the action is based on negligent design,[5] implied or expressed warranty,[6] or strict liability theories.[7] When applied to each theory, the second impact doctrine removes the potentially dangerous and injury producing product from the case on a "quasi-proximate cause" theory.[8]

The persistent adherence to this theory in a "pure" comparative negligence state such as Mississippi,[9] particularly in light of the adoption of RESTATEMENT (SECOND) OF TORTS §402A (1965) by the supreme court,[10] reveals more than mere inconsistency. It will be shown that *Walton,* in pronouncing a policy decision concern-

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1. *See* Note, *Manufacturer's Liability for an "Uncrashworthy Automobile"*, 52 CORNELL L. Q. 444 (1967); Comment, *Automobile Design Liability: Larsen v. General Motors and its Aftermath,* 118 U. PA. L. REV. 299 (1969).
2. 229 So. 2d 568 (Miss. 1969).
3. Pattillo v. Cessna Aircraft Corporation, 379 So. 2d 1225 (Miss. 1980).
4. Landrum v. Massey-Ferguson, Inc., 473 F.2d 543 (5th Cir. 1973).
5. Ford Motor Co. v. Simpson, 233 So. 2d 797 (Miss. 1970).
6. General Motors Corporation v. Howard, 244 So. 2d 726 (Miss. 1971).
7. Walton v. Chrysler Motor Corporation, 229 So. 2d 568 (Miss. 1969).
8. In *Walton,* proximate cause of *accident* is substituted for proximate cause of the *injury.*
9. Mississippi is the only state which has adopted "pure" comparative negligence. In other words, no degree of contributory negligence will bar plaintiff's claim unless that negligence contributed 100% to the cause of the injury. *See* MISS. CODE ANN. §11-7-15 (1972); Annot., 32 A.L.R. 3d 463, 473 (1970).
10. State Stove Mfg. Co. v. Hodges, 189 So. 2d 113, 118 (Miss. 1966).

ing automobile manufacturers, in effect, adopted a "Trojan Horse" theory from the Seventh Circuit, which is not only ill-suited, but contradictory to the general principles of *negligence, warranty,* and *strict liability* previously expounded by the court.

SECOND IMPACT IN PERSPECTIVE

Evans

In 1966, the same year that Mississippi recognized the doctrine of strict products liability,[11] the Seventh Circuit Court of Appeals created the controversial second accident rule in the case of *Evans v. General Motors Corporation.*[12] In that case, the plaintiff charged that the death of her husband was caused by the failure of their 1961 Chevrolet station wagon, which had been manufactured with an "X" frame, to provide side frame rails for protection of a driver involved in side impact collisions. Her husband was killed following an impact which caused the left side of the station wagon to collapse upon her husband.[13] The complaint charged, in three counts, negligence, breach of implied warranty, and strict tort liability.[14] The court, however, took a different view and denied the plaintiff recovery on all counts because "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."[15]

The court noted that in all of the cases relied upon by the plaintiff, some defect was "[t]he cause of the accidental injuries."[16] Thus was born the principle that because a manufacturer has no duty to produce an "accident-proof" automobile, no defect in an automobile which is the cause of enhanced or consequential injuries will be the basis of liability unless that defect played some role in the initial cause of the accident.[17]

Citing *Campo v. Scofield,*[18] the court expressed the view that

11. *Id.*

12. 359 F.2d 822 (7th Cir. 1966).

13. *Id.* at 823.

14. *Id.*

15. *Id.* at 825.

16. *Id.* The court cited one of the plaintiff's cases, Ford Motor Company v. Zahn, 265 F.2d 729 (8th Cir. 1959) where an ashtray caused the injury but not the accident, in contradiction to this statement.

17. *Id.* at 824. *Evans* never expressly stated that a defect must be the cause of the *accident,* but this was the subsequent interpretation of courts following *Evans. See, e.g.,* Schemel v. General Motors Corp., 384 F.2d 802 (7th Cir. 1967); Schumard v. General Motors Corp., 270 F. Supp. 311 (E.D. Ohio, 1967).

18. 301 N.Y. 468, 95 N.E. 2d 802 (1950). *Campo* involved a privity of contract issue; thus, its import loses a great deal of thrust in transition to second accident. *Campo* was overruled by the Court of Appeals in Micallef v. Miehle Co., Div. of Miehle-Goss Dexter, 39 N.Y.2d 376, 348 N.E. 2d 571, 384 N.Y.S.2d 115 (1976).

despite the desirability of "collision-protective" designs of vehicles, the duty to so design must be imposed by the legislative branch of the government, and not the judicial.[19]

Larsen

Two years later, the Eighth Circuit, in *Larsen v. General Motors Corporation*,[20] rejected the logic of *Evans* and held that the intended use of an automobile does encompass accidents because they are "readily foreseeable as an incident to the normal and expected use of an automobile."[21] In *Larsen*, the plaintiff charged that his injuries were caused by a rearward thrust of the steering merchanism into the plaintiff's head following a head-on collision. As in *Evans*, the plaintiff did not allege that the design of the steering merchanism *caused* the accident, but he alleged that the defective design caused injuries he would not have otherwise received, or alternatively, that the injuries sustained were enhanced because of the defect.[22] While the complaint charged three counts,[23] the court held General Motors liable on theories of negligent design and failure to warn.[24] In imposing liability, the court reviewed numerous cases on manufacturer liability, including two cases cited by the plaintiff in *Evans*.[25] The court ultimately observed that:

> No rational basis exists for limiting recovery to situations where the defect in design or manufacture was the causative factor of the accident, as the accident and resulting injury, usually caused by the so called "second collision" of the passenger with the interior part of the automobile, are all foreseeable. Where the injuries or enhanced injuries are due to the manufacturer's failure to avoid subjecting the user of its products to an unreasonable risk of injury, general negligence principles should be applicable.[26]

In reply to General Motors' argument that it would be difficult to assess that portion of the injuries caused by defective design over and above the injuries that would have occurred as

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19. 359 F.2d at 824.
20. 391 F.2d 495 (8th Cir. 1968).
21. *Id.* at 502.
22. *Id.* at 496-97.
23. *Id.*
24. *Id.* at 505-06.
25. Carpini v. Pittsburgh and Wierton Bus Co., 216 F.2d 404 (3rd Cir. 1954); Ford Motor Co. v. Zahn, 265 F.2d 729 (8th Cir. 1959).
26. 391 F.2d at 502. In footnote 3, the court quoted an article, Noel, *Manufacturer's Negligence of Design or Directions for Use of a Product*, 71 YALE L. J. 816 (1962). According to Noel, "unreasonable danger" is determined by general negligence principles which involve a balancing of likelihood, gravity, and precautions effective to avoid harm. Noel, *supra.* at 818.

a result of the collision, the court replied "[t]he obstacles of apportionment are not insurmountable. It is done with regularity *in those jurisdictions applying comparative negligence statutes*"[27] (emphasis added). Additionally, the *Larsen* court pointed out that neither reason, nor logic, nor any precedent bound the court to force a distinction between negligent design and negligent construction of an automobile.[28]

In contrast to *Evans*, *Larsen* acknowledged the fact that intended use includes obviously foreseeable risks incident to the utility of a product,[29] and emphasized that legislative safety standards imposed on automobile design by Congress were not made exclusive to the common law jurisdiction of the courts.[30] Thus, *Larsen* held General Motors liable on a common law standard of duty to use reasonable care in light of existing circumstances, leaving the legislature to impose higher standards, or the courts to expand the doctrine of strict liability for tort.[31]

Abdication of Evans

Subsequent to the *Evans* and *Larsen* decisions, a controversy raged concerning the extent of a manufacturer's duty to design a safe product. While *Evans* took an early lead in the duel,[32] the decisive trend turned and remained in the *Larsen* camp.[33] Present-

(text continued on page 352)

27. 391 F.2d at 502.

28. *Id.* at 504.

29. The court cited numerous articles relating statistics on the high probability of automobile collisions. The safety engineer for General Motors was quoted: "The two car collision . . . is so important statistically that car structure has to be evaluated under these conditions." 391 F. 2d at 504 n. 7. *See also* 391 F.2d at 502.

30. National Traffic and Motor Vehicle Safety Act of 1966, §108(c), 15 U.S.C. §1397(c) (1976): "Compliance with any federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." *See* 391 F.2d at 506.

31. 391 F.2d at 506. In respect to Michigan law, the court noted that there is no dispositive showing on the doctrine of strict liability, especially as to automobiles.

32. Schemel v. General Motors Corp., 384 F.2d 802 (7th Cir. 1967); McClung v. Ford Motor Co., 333 F. Supp. 17 (S.D. W.Va. 1971), *aff'd*, 472 F.2d 240 (4th Cir. 1973); Alexander v. Seaboard Airline Railroad Co., 346 F. Supp. 320 (W.D. N.C. 1971); Shumard v. General Motors Corp., 270 F. Supp. 311 (S.D. Ohio 1967); Walton v. Chrysler Motor Corp., 229 So. 2d 568 (Miss. 1970).

33. JURISDICTIONS FOLLOWING LARSEN OR THE EQUIVALENT

JURISDICTION	CASE
Alabama	Atkins v. American Motors Corp., 335 So. 2d 134 (Ala. 1976).
Alaska	Clary v. Fifth Avenue Chrysler Center, Inc., 454 P.2d 244 (Alaska, 1969).
Arizona	Vineyard v. Empire Mach. Co., Inc., 119 Ariz. 502, 581 P.2d 1152 (Ariz. 1978).
California	Horn v. General Motors Corp., 17 Cal. 3d 359, 131 Cal. Rptr. 78, 551 P.2d 398 (1976).

Colorado	Roberts v. May, 41 Colo. App. 82, 583 P.2d 305 (1978).
District of Columbia	Knippen v. Ford Motor Co., 546 F.2d 993 (D.C. Cir. 1976).
Florida	Ford Motor Co. v. Evancho, 327 So. 2d 201 (Fla. 1976).
Georgia	Friend v. General Motors Corp., 118 Ga. App. 706, 165 S.E. 2d 734 (1968).
Idaho	Farmer v. International Harvester Co., 97 Idaho 742, 553 P.2d 1306 (1976).
Illinois	Nanda v. Ford Motor Co., 509 F.2d 213 (7th Cir. 1974). Buehler v. Whaler, 70 Ill. 2d 51, 374 N.E.2d 460 (1978).
Indiana	Huff v. White Motor Corp., 565 F.2d 104 (7th Cir. 1977).
Iowa	Parwaters v.General Motors Corp., 454 F.2d 1270 (8th Cir. 1972).
Kansas	Gorst v. General Motors Corp., 207 Kan. 2, 484 P. 2d 47 (1971).
Kentucky	Wooten v. White Trucks, 514 F.2d 634 (5th Cir. 1975) (federal court considering how a Florida court would think a Kentucky court would decide).
Louisiana	Perez v. Ford Motor Co., 497 F.2d 82 (5th Cir. 1974).
Maryland	Volkswagen of America, Inc. v. Young, 272 Md. 201, 321 A.2d 737 (1974).
Michigan	Rutherford v. Chrysler Motors Corp., 60 Mich. App. 392, 231 N.W.2d 413 (1975).
Minnesota	Ford Motor Co. v. Zahn, 265 F.2d 729 (8th Cir. 1959).
Missouri	Polk v. Ford Motor Co., 529 (8th Cir.), *cert. denied,* 426 U.S. 907 (1976).
Montana	Brallenburger v. Toyota Motor Sales, U.S.A., Inc., 102 Mont. 506, 513 P.2d 268 (1973).
Nebraska	Friedrich v. Anderson, 191 Neb. 724, 217 N.W.2d 831 (1974).
New Jersey	Huddel v. Levin, 395 F. Supp. 64 (D. N.J. 1975).
New York	Bolm v. Triumph Corp., 41 A.D.2d 54, 341 N.Y.S. 2d 846, *aff'd,* 33 N.Y.2d 151, 305, N.E.2d 769, 341 N.Y.S.2d 846 (1973) (defect must be latent).
North Carolina	Isaacson v. Toyota Motor Sales, 438 F. Supp. 1 (E.D. N.C. 1976). Sealey v. Ford Motor Co., 499 F. Supp. 475 (E.D. N.C. 1980) (no strict liability in N.C. law).
North Dakota	Johnson v. American Motors Corp., 225 N.W.2d 57 (N.D. 1974).
Ohio	Anton v. Ford Motor Co., 400 F. Supp. 1270 (S.D. Ohio 1975).
Oregon	McMullen v. Volkswagen of America, 274 Or. 83, 545 P.2d 117 (1976) (en banc).
Pennsylvania	Dyson v. General Motors Corp., 298 F. Supp. 1064 (E.D. Pa. 1969).
Rhode Island	Turcotte v. Ford Motor Co., 494 F.2d 173 (1st Cir. 1974).
South Carolina	Michle v. Blackmon, 252 S.C. 202, 166 S.E.2d 173 (1969).
South Dakota	Engberg v. Ford Motor Co., 87 S.D. 196, 205 N.W.2d 104 (1973).

ly, thirty-seven jurisdictions apply the *Larsen* rule or its equivalent, and only two others which have considered it, Mississippi and West Virginia, fail to follow *Larsen.*[34]

This trend can probably be best attributed to the growing sophistication of the courts with products liability[35] and the awareness that consumer protection cannot be adequately provided for by so narrow a view of intended use as defined in *Evans.* Another significant factor has been the adoption by many jurisdictions of the concept of strict tort liability as embodied in the RESTATEMENT (SECOND) OF TORTS §*402A (1965).*[36] This section obviates any requirement of showing negligence in the manufacture of a product. Defective result is sufficient, no matter how carefully a product is manufactured. Interestingly enough, the Seventh Circuit, the same court which created the second accident theory, recognized and concluded, ten years after its *Evans* decision, that no rational basis exists for limiting recovery to situations where the product defect was the immediate cause of the accident.

In *Huff v. White Motor Corporation,*[37] *Evans* was reversed after a detailed analysis of the state of the law in Indiana, most notably, the adoption by the state of §402A of the Restatement.

Tennessee	Ellithorpe v. Ford Motor Co., 503 S.W. 2d 516 (Tenn. 1973).
Texas	Turner v. General Motors Corp., 514 S.W.2d 497 (Tex. Cir. App. 1974).
Virginia	Dreisontok v. Volkswagenwerk, A.G., 489 F.2d 1066 (4th Cir. 1974).
Washington	Baumgardner v. American Motors Corp., 83 Wash. 2d 751, 522 P.2d 829 (1974).
Wisconsin	Arbet v. Gussarson, 66 Wis. 2d 551, 225 N.W.2d 431 (1975).
Wyoming	Chrysler Corp. v. Todorovich, 580 P.2d 1123 (Wyo. 1978).

34. *Walton,* 229 So. 2d 568. McClung v. Ford Motor Co., 333 F. Supp. 17 (S.D. W.Va. 1971), *aff'd,* 472 F.2d 240 (4th Cir. 1973).

35. *See* Keeton, *Product Liability and the Meaning of Defect,* 5 ST. MARY'S L. J. 30 (1973); Wade, *On the Nature of Strict Tort Liability for Products,* 44 MISS. L. J. 825 (1973); Dohaner, Piehler, Twerski, Weinstein, *The Technological Expert in Products Liability Litigation,* 52 TEX. L. REV. 1303 (1974); James, *Products Liability,* 34 TEX. L. REV. 192 (1955).

36. §402A: Special Liability of Seller of Product for Physical Harm to User or Consumer.

(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 his 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 user or consumer without substantial change in the condition in which it is 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.

37. 565 F.2d 104 (7th Cir. 1977).

The court reviewed the abandonment of *Evans* by a majority of jurisdictions,[38] the numerous criticisms it had received from commentators, and the trend in products liability law to increase the duty owed by manufacturers for injury-causing products.[39] Recognizing that the tide had turned since the *Evans* decision, it was concluded:

> One who is injured as a result of a mechanical defect in a motor vehicle should be protected under the doctrine of strict liability *even though the defect was not the cause of the collision which precipitated the injury* . . . . [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 . . . . Since collisions for whatever cause are foreseeable events, the scope of liability should be commensurate with the scope of foreseeable risk.[40] (emphasis added).

Thus, *Huff* did away with *Evans*. While *Larsen* was decided on a theory of negligence, *Huff* went one step further and completely rejected the narrow *Evans* view of intended use as it applied to strict liability.[41] A number of jurisdictions have carried over this *Huff* rejection, using the same "foreseeability" aspect of intended use as determining liability[42] with no apparent dichotomy resulting from the injection of this negligence concept into a construction of the doctrine of strict products liability. One court has suggested that *Evans*, if interpreted literally, fails to recognize that intended use was first employed in products liability cases "merely to illustrate the broader central doctrine of foreseeability. The phrase was not meant to preclude manufacturer responsibility for the probable ancillary consequences of normal use."[43] Further, *Larsen* and its progeny, including *Huff* and the strict liability decisions, have all recognized that the *environment* in which a product is used is a necessary corollary to the definition of intended use of a product.[44] By broadening the scope

38. *Id.* at 108. It was noted that, "Moreover, no court has followed *Evans* since 1969 when the Mississippi Supreme Court decided Ford Motor Corporation v. Simpson, 233 So. 2d 797 (Miss. 1970)." *Id.*

39. *Id.* at 108-09.

40. *Id.* at 109.

41. Circuit Judges Pell and Bauer disagreed with the denial for rehearing and stated: "I do not regard 'used as intended' to include jackknifing a truck-tractor." *Id.* at 109 n. 7.

42. *See, e.g.*, Bremier v. Volkswagen of America, Inc., 340 F. Supp. 949 (D. D.C. 1972) (construing Maryland law); Dyson v. General Motors Corp. (E.D. Pa. 1969) (construing Pennsylvania law).

43. Turcotte v. Ford Motor Company, 494 F.2d 173, 181 (1st Cir. 1974).

44. Most of their decisions involved automobiles, *but see* Raymond v. Riegel Textile Corp., 484 F.2d 1025 (1st. Cir. 1973) (a manufacturer was held strictly liable when a child's nightgown burst into flames after contact with a hot electric range).

of intended use, these decisions have not imposed absolute liability on manufacturers,[45] but have allowed awards to plaintiffs for *injury* producing defects, predicated on the general principles governing tort law.

THE EFFECT OF WALTON

Initial Cause of Accident

Mississippi, in the *Walton* decision,[46] was one of the first jurisdictions to give allegiance to the enhanced injury rule propounded in *Evans*. The court's ruling is significant in that it has effectively closed the courthouse door to second impact cases in this state, despite the great weight of authority adhering to the contrary *Larsen* view, in contradiction to the court's adoption of the strict liability doctrine, and in deference to prior negligence principles adhered to by the court, including the parameters applicable to the concepts of foreseeability and multiple proximate cause of *injury*.

Reviewing *Walton*, it is clear that the court relied almost entirely on the logic of *Evans* in asserting a policy decision that automobile manufacturers would not be liable for defects which did not cause the initial accident, even though such defects "when combined with the force put in motion by the accident, [did] add to, or become a part of the cause of injury to a human being."[47]

The plaintiff in *Walton* was involved in an automobile collision, the force of which propelled him against the back of the seat of his automobile so that the plaintiff was flung forward in a prone position against the steering wheel.[48] He charged that his injury was caused by the joint negligence of the other driver and the manufacturer for negligent design and improper manufacture of the seat "which was not reasonably safe for its intended use."[49] With no explanation, the court completely ignored the charge of negligence and concluded that the issue was strictly a question of law, of whether the strict liability rule would be expanded to include manufacturer liability for enhanced injury.[50] The *Walton* court included a lengthy discussion of both the *Evans* and *Larsen*

45. *See, e.g.*, Mickle v. Blackmon, 252 S.C. 202, 166 S.E. 2d 173 (1969).
46. Walton v. Chrysler Motor Corp., 229 So. 2d 569 (Miss. 1970).
47. *Id.* at 570.
48. *Id.*
49. *Id.*
50. *Id.* The court stated that because the issue in *Walton* was a question of law, there was no reason to discuss whether Chrysler Motor Corporation would be liable in a proper case "where *knowledge* of an alleged defect is shown in evidence." *Id.* (emphasis added).

points of view, but concluded that the majority of jurisdictions favored the theory of *Evans*.[51] Accordingly, the court determined that "intended use" of an automobile does not include the foreseeable event of collisions, and thus defects which do not cause initial accidents cannot be held accountable under strict liability in tort. The actual holding of the court in *Walton* was narrowly drawn in reference to automobiles and was prefixed with an implication at least that manufacturers of other types of products would be judged on a case by case basis.[52]

Paradoxically, in contrast to *Walton*, the scope of intended use of a product was given broad dimension in the analysis of strict liability by the court in *State Stove* where it was simply stated that the manufacturer is strictly liable if he markets a product which is not reasonably safe, and the plaintiff is injured because of a *contemplated* use of that product.[53] Further, *State Stove* emphasized the fact that "whether a product is reasonably safe or not is a flexible standard responsive to the facts of each case" and the product in question.[54]

Expansion of Walton

The curious alignment of intended use with the idea of the initial cause of the accident as outlined by *Walton* proved to be an unresponsive duo to the plaintiff in a products action, for as it developed, the plaintiff was required to first pass the hurdle of "initial cause" before the "intended use" of the product would even be discussed. The flexible standard "responsive to the facts of each case" became the axiom; "the defect must cause the initial accident," and the "intended use" concept was effectively foreclosed by the court as a basis of liability.

For example, in *General Motors Corporation v. Howard*,[55] the plaintiff charged manufacturer responsibility for injury resulting from the failure of a telescopic steering column to telescope during a collision. Admitting that the telescopic steering column was a safety feature designed and advertised as such to lessen injury on collision, the court did not decide on "intended use" but overturned the lower court's vedict for the plaintiff

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51. *Id.* at 572.

52. *Id.* The holding begins: "Although it is true that the manufacturer is liable for defects in its intended use. . . ." *Id.*

53. 189 So. 2d at 121 (citing Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L. J. 5 at 15, 25 (1965)).

54. *Id.* (citing Wade, *supra* note 53, at 17).

55. 249 So.2d 726 (Miss. 1971).

because the steering wheel and steering column did not *proximately cause the accident.*[56] Also, in *Williams v. Cessna Aircraft Corp.*[57] the district court, bound to apply Mississippi law, held that the failure of an airplane seat and restraining harness to function on impact, which allowed the plaintiff's decedent to be thrown violently into the plane's instrument panel, was not actionable because the plaintiff's allegations required the initial accident to be defined as the crash of the aircraft and not the failure of the seat and harness or the death of the pilot.[58] Notably, *Williams* cited the *Howard* rationale as being contrary to the statement in *Walton* that manufacturer liability arose from "intended use". The court also noted the sharp criticism of the *Walton* and *Howard* decisions by commentators.[59]

Nevertheless, in *Pattillo v. Cessna Aircraft Corporation,*[60] the court refused to hold Cessna responsible for seat belts and seat anchors that broke during a collision and which caused the pilot, Pattillo, to be thrown against the instrument panel and out of the airplane to his death. Again, the initial cause of the accident predetermined the issue of the intended use of the seat belts, which may or may not have been a malfunctioning safety device.

Although *Walton* was decided under the guise of strict liability, the "initial cause" rule was easily transferred by the court to negligence in *Ford Motor Company v. Simpson,*[61] and to breach of expressed and implied warranty in the *Howard* and *Pattillo* decisions,[62] with no rationalization other than a strict adherence to the *Evans* and *Walton* dogma.

It is obvious that the strict liability rule promulgated in *State Stove* is a distant cousin to the outcome produced in *Walton* where the court saw fit to announce a "duty-breach" rule "growing out of the intended normal use for which the product was manufac-

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56. *Id.* at 729.

57. 376 F. Supp. 603 (N.D. Miss. 1974).

58. *Id.* at 607.

59. *Id.* (citing Maraist & Barksdale, *Mississippi Products Liability—A Critical Analysis*, 43 MISS. L. J. 139, 180 n. 200 (1972)).

60. 379 So. 2d 1225 (Miss. 1980). The court could have avoided second accident just by the determination that the crash was so severe that no distinct injuries could be found resulting from the seat belt failure.

61. 233 So. 2d 797 (Miss. 1970). The case involved the negligent placement of a heater in a truck.

62. In *Howard* the warranty issue was dismissed because the warranty on the truck did not state that the telescopic column "would telescope under any and all circumstances and conditions." 249 So. 2d at 729. In *Pattillo* it was stated that the implied warranty of fitness was to protect passengers in the event of a *survivable* crash, and the crash was not alleged to have been survivable. 379 So. 2d at 1225.

tured." [63] Although the court stated that this "duty-breach" was not synonymous with a finding of negligence, there can be little doubt that subsequent second accident decisions have interpreted *Walton* to mean that a defective product must cause the initial accident or the defendant must have had *actual* knowledge of the defect and its consequences,[64] or the defendant must have undertaken a *specific* responsibility to the plaintiff in relation to the product[65] to satisfy "duty-breach". This additional condition of a finding of "duty-breach" in respect to strict liability has led at least to one comment that the court may have eliminated strict liability in tort for products liability in this state.[66]

Negligence, Proximate Cause, and Foreseeability

In relation to a negligence action, *Walton* bears even less resemblance to the previous doctrine of the court. The second accident theory substitutes (or confuses) proximate cause of injury with the immediate cause of the accident,[67] moreover, in this state there may be two or more proximate causes of the injury even though there may be only one immediate cause of the accident. *Gulf Refining Company v. Brown,*[68] confirms the rule that:

> If a defendant is negligent and this negligence combines with that of another, or with any other independent intervening cause, he is liable, although his negligence was not the sole negligence, nor the sole proximate cause, and although his negligence without such other independent intervening cause would not have produced the injury.[69]

This rule of multiple proximate cause has been adhered to for decades,[70] and in conjunction with the rule it is also true that

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63. 229 So. 2d at 573.

64. *See* 229 So. 2d at 570 (the court expressed that it would not discuss whether Chrysler would be liable if knowledge of a defect were shown in evidence).

65. In *Howard,* it was determined that the manufacturer of a telescopic steering column did not guarantee that it would telescope during *side* impact collision. *See* 249 So. 2d at 729.

66. Maraist & Barksdale, *supra* note 59, at 151. This article included a discussion on the application of negligence concepts to strict liability.

67. Proximate cause is defined as "[t]hat which, in a natural or continuous sequence, unbroken by any efficient or intervening cause, produces the injury, and without which the result would not have occurred." BLACK'S LAW DICTIONARY 1391 (rev. 4th ed. 1968).

68. 196 Miss. 131, 16 So. 2d 765 (1944).

69. *Id.* at 148, 16 So. 2d at 769 (quoting Cumberland Tel. & Tel. Co. v. Woodham, 99 Miss. 318, 333, 54 So. 890, 891 (1910) (quoting Harrison v. Kansas City Elec. Co., 195 Mo. 606, 93 S.W.951, 956-57 (1906).

70. *See, e.g.,* Griffin v. Harkey, 215 So. 2d 866 (Miss. 1968); American Creosote Works of Louisiana v. Harp., 215 Miss. 5, 60 So. 2d 514 (1952); Planters Wholesale Grocery v. Kincade, 210 Miss. 712, 50 So. 2d 578 (1951).

one wrongdoer's acts cannot be joined with another's to *enlarge* the responsibility of one of them.[71]

As to foreseeability, *Walton* eliminates the concept that if subsequent negligence is foreseeable, that negligence is not independent and intervening, but is concurrent with the prior negligence.[72] Such a standard has heretofore, and presumably still in cases involving non-manufacturers, been essential to the court in determining a standard of fair play to impose liability on distinct wrong-doers. Thus, a truly independent and intervening cause of injury[73] can supersede an original culpable act, but when this negligence is foreseeable, the risk created by the first party must include the intervention of the forseeable negligence of others.

Environment in any decision not involving second accident is always taken into consideration when reviewing the standard of reasonable care "[which] may require the defendant to protect the plaintiff against 'that occasional negligence which is one of the ordinary incidents of human life, and therefore to be anticipated'."[74] Because automobile accidents must logically be anticipated,[75] *Walton* had to ignore the issue of foreseeability or face an embarrassing and overt incongruity, for in strict liability as well as negligence, foreseeability of harm is the touchstone of liability.[76] *Walton* does away with comparative negligence.

CONCLUSION

In the aftermath of *Walton,* it is difficult to determine which rules still operate the different theories of strict liability, negligence, and warranty as discussed above, unless it is conceded that manufacturers have been granted special immunity or a dispensation from liability by our court to the exclusion of protection for consumers. It is inconceivable that a defendant in this state can avoid liability for death caused by the explosion of a defective automobile gas tank following impact because the gas tank *did not cause the collision.*[77]

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71. Blizzard v. Fitzsimmons, 193 Miss. 484, 10 So. 2d 343 (1942).

72. Canton Broiler Farms, Inc. v. Warren, 214 So. 2d 671 (Miss. 1968).

73. This was defined as an independent and voluntary act of another which leads in unbroken sequence to the injury. Hoke v. W. L. Holcomb and Associates, 186 So. 2d 474, 477 (Miss. 1966).

74. 214 So. 2d at 677.

75. *See supra,* note 29.

76. State Stove Mfg. Co. v. Hodges, 189 So. 2d 113 (Miss. 1966), includes the foreseeability concept in strict liability but there is authority that the doctrine has no part in the concept of strict liability in tort. Howes v. Hansen, 56 Wis. 2d 247, 201 N.W.2d 825 (1972).

77. Hartford Accident and Indemnity Co. v. Mitchell Buick-Pontiac, 479 F. Supp. 345 (N.D. Miss. 1979).

Furthermore, all precedent and authority listed in the *Walton* rule has been totally eradicated, and it has become clear that products decisions, like all others, can only be properly determined by applying general principles governing tort law. The narrow view of *Walton* unrealistically denies a plaintiff access to the real culprit who caused the injury, and places the blame on society or the failure of the legislature to act to impose standards. But such a determination is in conflict with the policy decision adopted in *State Stove* to insure that the cost of injuries from defective products should be applied to the manufacturer who marketed the product and not to the innocent consumer.[78] The finding in *Walton* that the intended use of an automobile does not include accidents is untenable,[79] and the rule when extended to other types of products makes a farce of the term "intended use".

Perhaps the Mississippi court will review *Walton* with an awareness of the need for consumer protection[80] and impose liability on manufacturers for defective products. The erosion of the *Evans'* rule is not only unfair, but produces a special immunity for manufacturers contradictory to prior tort principles.

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78. 189 So. 2d at 120 (quoting Greenman v. Yuba Power Products, Inc., 59 Cal.2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962)).

79. Between one-fifth and two-thirds of all automobiles manufactured are involved in 50,000 fatalities and some two million disabling injuries yearly. Nader & Page, *Automobile Design and the Judicial Process*, 55 CALIF. L. REV. 645 (Aug. 1967).

80. In a recent decision the court upheld the doctrine in application to an accident involving a motorcycle safety helmet which burst on impact during an automobile-minibike collision. Affirming the trial court in a memorandum the court chose to remain silent in spite of the appellant's strong arguments that the *intended use* of the helmet was to provide protection for the wearer in the event of an accident. Odum v. Glover, 413 So.2d 722 (Miss. 1982) (memo only).