The Enhanced Injury Doctrine: How the Theory of Liability is Addressed in a Comparative Fault World

By Charles E. Reynolds and Shane T. Costello

IN CERTAIN motor vehicle accidents, there may be several potentially negligent actors, as well as several contributing causes to the injury of the plaintiff. The plaintiff himself may have been negligent, and this negligence could have contributed to causing some aspect of the injury. In addition, there are accidents in which an individual and discrete defect in the vehicle may have caused or enhanced the injury. One problem that courts have encountered in such cases is whether to isolate the action against the motor vehicle manufacturer for this individual defect and the injury alleged to be caused by the defect, or to allow a jury to hear all of the evidence regarding how the accident happened in the first place.

This article discusses the application of the doctrine of comparative fault to the well-established enhanced injury doctrine. It analyzes and compares the fundamental principles and reasoning behind both the enhanced injury and comparative fault doctrines. This article also reviews case law from jurisdictions that have addressed this issue, finding that the vast majority of courts have held that comparative fault applies in enhanced injury cases. The article concludes that the enhanced injury theory of liability continues to be viable, even when incorporated within the comparative fault doctrine.

Charles Reynolds is a member of IADC and a partner with Butler Pappas Weihmuller Katz & Craig in Tampa, Florida. His practice focuses on defense litigation involving products liability, premises liability, toxic torts and medical malpractice. He is past chair of IADC's Construction Law Committee and a present member of the Products Liability Committee.

Shane Costello is an associate with Butler Pappas Weihmuller Katz & Craig with a defense practice dedicated to personal injury, products liability and premises liability.

I. Theory of Enhanced Injury

Under the "enhanced injury," doctrine, also sometimes called the "crashworthiness" or "second collision" doctrine, a manufacturer or seller of a product may be liable under strict liability, negligence, or breach of warranty principles for injuries sustained in an accident where a defect in the product either aggravated or caused

additional injury to the plaintiff, even though the defective product did not cause the initial harm. Under the theory, the manufacturer is not held liable for injuries arising out of the initial collision, but is instead liable for enhanced injuries over and above the injuries caused by the initial collision—in other words, those injuries that probably would not have occurred due to the initial collision in the absence of a defective design.

While the terms "enhanced injury," "crashworthiness," and "second collision" are often used interchangeably, the term "enhanced injury" perhaps best captures the theory of liability. "Crashworthiness" relates to the protection that a vehicle provides to its occupants against injuries arising from accident. The term "second collision" refers to, for example, the impact between the occupant and the interior of the vehicle, or the ejection of the occupant from the vehicle, while the first or initial collision is the vehicle's impact with another object. The majority of "enhanced injury" cases involve motor vehicle accidents.

The "enhanced injury" doctrine was first established by the decision of the Eighth Circuit Court of Appeals in *Larsen v. General Motors*.[1] Prior to this seminal decision, courts rejected the notion that a product manufacturer could be held liable for a defective product where another's negligence was the cause of the underlying accident.[2] The rationale was that manufacturers could only be held liable for the intended use of the product, and collisions were not an intended use.

The *Larsen* court reasoned that automobile collisions are clearly foreseeable and statistically inevitable, and therefore car manufacturers have the duty to design vehicles to avoid subjecting the user to an unreasonable risk of injury in the event of a collision.[3] Therefore, the *Larsen* court established liability on the automobile manufacturer when an injury was caused or enhanced by a design or manufacturing defect and was reasonably foreseeable and reasonably could have been avoided.[4] *Larsen* was subsequently widely approved and adopted.

II. Comparative Fault

The enhanced injury doctrine was established and developed largely under the then-existing tort systems of joint and several liability and contributory negligence. However, many jurisdictions have since developed a comparative fault system applicable to negligence and products liability cases, either completely abolishing joint and several liability or specifically limiting it to particular situations. Under a system of comparative fault, each party, including the plaintiff, is apportioned that percentage of plaintiff's damages which were proximately caused by that party's negligence.

The courts have since been confronted with the question of how best to apply the principles of comparative fault to enhanced injury cases. The principal question presented is whether

[1] 391 F.2d 495 (8th Cir. 1968).

[2] Evans v. Gen. Motors Corp., 359 F.2d 822 (7th Cir.1966), overruled by Huff v. White Motor Corp., 565 F.2d 104, 110 (7th Cir.1977).

[3] *Larsen*, 391 F.2d at 502.

[4] *Id.* at 503.

evidence of the comparative fault of the plaintiff and other negligent parties in causing the "initial collision" may be presented to the jury to apportion plaintiff's damages with respect to both the "initial collision" and "second collision" due to design defect. The key to answering this question lies in proximate cause analysis, which plays an extremely significant role in both comparative fault and the enhanced injury doctrine.

III. The Shaky and Shrinking Minority

Stated generally, the minority view holds that it is impermissible in enhanced injury cases to allow the fact finder to compare the fault or negligence of the plaintiff and other potentially liable parties and nonparties in causing the accident with the fault or negligence of the manufacturer in designing or manufacturing a motor vehicle. The cause of the initial impact and injury is treated as entirely separate and distinct from the cause of the second impact and injury (the "enhanced injury"). This results in the conclusion that the causative factors are not joint tortfeasors.[5]

Under this view, the comparative negligence of the plaintiff and other third party tortfeasors in causing the accident is deemed irrelevant and inadmissible. The plaintiff only must show that there existed a product defect and that the defect caused an enhanced injury. This allows plaintiffs to prevent juries from hearing evidence concerning the cause of the initial crash, such as the intoxication or negligence of the plaintiff or a third party tortfeasor. The rationale is that, since the crashworthiness doctrine proceeds from the belief that a vehicle manufacturer has a duty to minimize the injurious effect of a crash no matter how the crash is caused, any participation by persons in bringing about the accident is irrelevant.

In *D'Amario v. Ford Motor Company*,[6] a minor under the influence of alcohol drove his car into a tree and the vehicle subsequently caught fire, resulting in the plaintiff passenger burning to death.[7] The plaintiff claimed enhanced injuries due to the fire being caused by a defective fuel system in the vehicle.[8] The Florida Supreme Court held that comparative negligence would not ordinarily apply in enhanced injury cases, ruling that the tortfeasor who caused the crash was not a joint tortfeasor with the manufacturer and could not be on the verdict form.[9] The court distinguished between fault in causing the accident and

[5] *See, e.g.*, Robert C. Reichert, *Limitations on Manufacturer Liability in Second Collision Actions*, 43 MONT. L. REV. 109, 117–118 (1982) (stressing that accident-causing fault must be distinguished from injury-enhancing fault; otherwise manufacturers of a defective product will be shielded from liability in every second injury case, a result contrary to the holding in *Larsen* and contrary to the purpose for which the crashworthiness doctrine was first recognized).

[6] 806 So.2d 424, 426 (Fla. 2001).

[7] *D'Amario*, 806 So. 2d at 427.

[8] *Id.* at 428.

[9] *Id.* at 426. In so holding, the Court held that *Fabre v. Marin*, 623 So.2d 1182 (Fla. 1993), did not apply in crashworthiness cases. *Fabre* held that all joint tortfeasors may be placed on a verdict form so that fault could be apportioned among all persons (parties or non-parties) who may have contributed to an accident.

fault in causing the enhanced injuries as a result of the product defect, reasoning that the manufacturer was only being held liable for injuries sustained from the fire, or "second collision," and not for injuries sustained as a result of the impact with the tree, or "first collision."[10]

The court was aware of the potential for successive tortfeasors being held liable for damages caused by the initial tortfeasor, but was of the opinion that this issue was sufficiently addressed by the crashworthiness doctrine's legal rationale limiting a manufacturer's liability only to those damages caused by the defect.[11] The court held that the defendant manufacturer would be entitled to a jury instruction that no claim was being made for damages arising out of the initial accident and that the manufacturer should be held liable only for the damages caused by the initial collision.[12] Such an instruction, in the court's opinion, would ensure each defendant was held responsible for the damages it proximately caused, and would avoid juror confusion related to the retrying of the cause of the underlying action in the crashworthiness case.[13]

In a footnote,[14] the court recognized that under certain circumstances damages would not be capable of apportionment between the initial and secondary collision, in which case the jury would be able to apportion all the damages to the defendant in accordance with *Gross v. Lyons*.[15] *Gross* provides that when the tortious conduct of more than one defendant contributes to one indivisible injury, the entire amount of damage resulting from all contributing causes is the total amount of damages recoverable by the plaintiff.[16]

In support of its reasoning and conclusion, the *D'Amario* court cited authority from various jurisdictions, including *Reed v. Chrysler Corp*.,[17] *Cota v. Harley Davidson*,[18] *Jimenez v. Chrysler Corp*.,[19] *Andrews v. Harley Davidson*,[20] and *Green v. General Motors*.[21]

In *Reed*, the Supreme Court of Iowa addressed the question of the admissibility of the intoxication of the vehicle driver and the plaintiff passenger in a one-vehicle accident.[22] The court held that the evidence was inadmissible, holding that comparative fault should not be assessed in a crashworthiness case unless it is shown to be a proximate cause of the enhanced injury.[23] The rationale in *Reed* was that the fault of the plaintiff in causing the accident was irrelevant because the theory of an enhanced injury presupposes the occurrence of an accident and focuses solely on the enhancement of

[10] *Id*. at 436-437.
[11] *Id*. at 439-440 (citing Jimenez v. Chrysler Corp., 74 F. Supp.2d 548 (D. S.C.1999), *reversed in part and vacated*, 269 F.3d 439 (4th Cir. 2001)).
[12] *Id*. at 440.
[13] *Id*.
[14] *Id*. at 440, n. 16.
[15] 763 So.2d 276 (Fla. 2000).
[16] *Gross*, 763 So.2d at 280.
[17] 494 N.W.2d 224 (Iowa 1992).
[18] 141 Ariz. 7, 684 P.2d 888, 895–986 (Ariz. Ct. App. 1984).
[19] 74 F. Supp.2d 548 (D. S.C.1999), *reversed in part and vacated*, 269 F.3d 439 (4th Cir. 2001).
[20] 106 Nev. 533, 796 P.2d 1092, 1095 (Nev. 1990).
[21] 310 N.J. Super. 507, 709 A.2d 205, 212–213 (N.J. Sup. Ct. App. Div. 1998).
[22] *Reed*, 494 N.W.2d at 229–230.
[23] *Id*. at 230.

the resulting injuries.[24] Because *Reed* involved negligence of the driver of the vehicle as well as the plaintiff, the holding applied to apportionment among defendants and to apportionment between the plaintiff and the manufacturer.[25]

However, in *Jahn*, the Supreme Court of Iowa revisited the question of whether comparative fault applied in enhanced injury cases. The court focused on the proximate cause issue, finding that it was foreseeable to an initial tortfeasor that equipment in a vehicle may malfunction and cause further injuries.[26] The court also relied on its interpretation of the Iowa comparative fault statute, which provided that "[i]n determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party and the extent of the casual relation between the conduct and the damages claimed." The court concluded that by this language the legislature directed that causal relation between the conduct of the product manufacturer and the resulting damages were elements to be considered in assigning a percentage of liability in enhanced injury cases.[27] The *Jahn* court additionally recognized that there may be cases where the fact finder finds divisible injury, in which case the product manufacturer would only be liable for the amount of divisible injury subject to comparative fault principles.[28]

In *Cota*, the plaintiff motorcyclist was intoxicated and was burned when one of the motorcycle's gasoline tanks ruptured during a collision.[29] He sued the manufacturer under the enhanced injury theory, claiming the motorcycle was defective in its design.[30] The court held that evidence of the plaintiff's intoxication was properly excluded as irrelevant, because the manufacturer was only liable for the enhancement of damages, and the real purpose for wanting the evidence introduced was to inflame the jury against the plaintiff.[31]

However, *Cota* was decided before the legislative adoption of comparative fault in Arizona. In *Zuern v. Ford Motor Co*.,[32] the court overruled *Cota*, specifically based upon the application of the comparative fault statute to enhanced injury cases.[33] The court interpreted the statute to require comparison of all types of fault.[34] This process involved the determination of proximate causation and also the determination and apportionment of the relative degrees of fault of all parties and nonparties.[35]

In *Andrews*, the Nevada Supreme Court held that the comparative negligence of the plaintiff was not admissible in enhanced injury cases.[36] However, one aspect of the rationale for this holding was that enhanced injury cases fell within the realm of strict liability, and that comparative negligence was not a defense in such cases under Nevada law.[37]

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[24] *Id*.
[25] *See* Jahn v. Hyundai Motor Co., 773 N.W.2d 550, 559 (Iowa 2009).
[26] *Id*. at 559-560.
[27] *Id*. at 560.
[28] *Id*.
[29] *Cota*, 684 P.2d at 889.
[30] *Id*.
[31] *Id*. at 895-896.
[32] 937 P.2d 676 (Ariz. Ct. App. 1996).
[33] *See Zuern*, 937 P.2d at 680.
[34] *Id*. at 681.
[35] *Id*.
[36] 796 P.2d at 1095 (Nev. 1990).
[37] *Id*.

In *Green v. General Motors Corp*., the court pointed out that it was in the minority on the issue and that this was due to New Jersey's rules of limited comparative fault.[38] Specifically, the court noted that if New Jersey abrogated its quasi-assumption of risk rule in favor of a pure form of comparative negligence, then the result might be different.[39]

Ten years after the *D'Amario* decision, the Florida Legislature has amended the comparative fault statute to expressly provide that a jury must apportion damages amongst all persons or entities contributing to an accident in products liability cases in which the plaintiff alleges an additional or enhanced injury,[40] expressly overruling *D'Amario*.[41]

Therefore, several courts which refused to apply comparative fault to enhanced injury cases in legal systems of pure comparative negligence have since been expressly overruled. In addition, several of the other aforementioned decisions are distinguishable based on the fact that they were made in legal systems which did not apply pure comparative negligence.

IV. The Great and Growing Majority

The majority view holds that the principle of concurrent causation applies to cases involving enhanced injuries and, as a result, the principles of comparative fault apply. Concurrent causes are two or more separate and distinct causes that operate contemporaneously to produce a single injury or damage. Thus, under the majority view, a plaintiff may still recover against a manufacturer for the enhanced injury caused by the product defect, but evidence is permitted as to the cause of the initial impact and injuries in addition to the defect and enhanced injuries, and the jury is tasked with apportioning fault to each responsible party for the damages proximately caused by that party. It can therefore be said that the enhanced injury doctrine, under the majority view, is incorporated into the comparative fault doctrine.

In *Montag by Montag v. Honda Motor Co*., the plaintiff stopped her vehicle on the railroad tracks and was hit by a train.[42] The impact caused her door to open, which automatically caused her seatbelt to retract, and she was subsequently ejected from the vehicle.[43] The plaintiff admitted her negligence in driving in front of the train, but argued that the initial accident and her own negligence were irrelevant to the cause of action for damages for enhanced injuries

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[38] 709 A.2d at 224, n.23.

[39] *Id.*

[40] FLA. STAT. § 768.81(3)(b) (2011).

[41] Note 1A to §768.81 states, "Section 2, ch. 2011-215, provides that '[t]he Legislature intends that this act be applied retroactively and overrule D'Amario v. Ford Motor Co., 806 So. 2d 424 (Fla. 2001), which adopted what the Florida Supreme Court acknowledged to be a minority view. That minority view fails to apportion fault for damages consistent with Florida's statutory comparative fault system, codified in s. 768.81, Florida Statutes, and leads to inequitable and unfair results, regardless of the damages sought in the litigation. The Legislature finds that, in a products liability action as defined in this act, fault should be apportioned among all responsible persons.'"

[42] 75 F.3d 1414, 1415 (10th Cir. 1996).

[43] *Id.*

due to the defective design of the seatbelt.[44]

The Tenth Circuit addressed the application of the Colorado comparative fault statute, which provided that the fault of the person suffering the harm and the fault of all other parties of the action shall be compared in a products liability action.[45] The court broadly construed the term "fault," stating that it was a general term encompassing a broad range of behavior, including negligence.[46] It held that the jury could compare the fault of the plaintiff in determining damages from the second collision.[47] The court reasoned that, in making a determination regarding "enhanced injury," the jury was comparing which of the plaintiff's injuries were caused by the first collision versus the second collision, and thus the jury was essentially "already comparing the plaintiff's and the defendant's behavior in order to determine causation."[48] Hence, requiring the jury to make a similar determination regarding damages was deemed consistent with Colorado's comparative fault statute.[49]

In *Meekins v. Ford Motor Co*.,[50] the plaintiff was involved in an intersectional collision, and there was a dispute as to whether the plaintiff stopped at the stop sign.[51] The plaintiff argued that he would not have been injured but for a defective airbag which crushed his fingers upon inflating.[52] Defendant car manufacturer denied the air bag caused the injuries and alleged that the injuries were caused when the steering wheel spun as a result of the collision.[53]

Regarding the application of the enhanced injury doctrine and comparative negligence, the court remarked, "One must be careful to resist the temptation to view this issue in an isolated, over simplified way."[54] While some cases might have clearly distinguishable injuries as a result of the initial collision compared to injuries from the defect, most cases are not clear cut and involve "several acts of negligence, all of which might be proximate causes of the plaintiff's injuries."[55] The *Meekins* court held that the comparative negligence statute applied in enhanced injury cases and that the negligence of the plaintiff was a defense.[56] In addition, while the specific issue was not before the court, the court in *dicta* stated that the negligence of all parties whose conduct proximately caused the injuries could be considered by the jury.[57]

Within the past two years, the state supreme courts of Utah and Indiana have addressed the application of comparative fault in enhanced injury cases. In *Egbert v. Nissan Motor Co.*,[58] the Egberts were involved in an accident while trying to avoid another vehicle.[59] The car rolled and the front passenger window shattered,

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[44] *Id*.
[45] *Id*. at 1419 (citing COL. REV. STAT. § 13-21-406).
[46] *Id*.
[47] *Id*.
[48] *Id*.
[49] *Id*.
[50] 699 A.2d 339 (Del. Super. Ct. 1997).
[51] *Id*. at 340.
[52] *Id*.
[53] *Id*.
[54] *Id*.
[55] *Id*.
[56] *Id*. at 346.
[57] *Id*.
[58] 228 P.3d 737 (Utah 2010).
[59] *Id*. at 738.

causing Mrs. Egbert, who was eight months pregnant at the time, to be ejected through the window.[60] She suffered serious injuries and had an emergency C-section, and her child was born with a serious brain injury.[61] The Egberts alleged, under the enhanced injury theory, that the passenger window was defectively designed because it was made with tempered glass as opposed to laminated glass, and had the window been designed properly the accident would not have caused such serious injuries to Mrs. Egbert or the brain injury to the child.[62]

Pointing to the Utah legislature's abolition of joint and several liability in favor of a comparative fault scheme, the court explained, "Utah's statute contains an explicit legislative intent and declaration that fault, in all its broadly defined forms, is always apportionable. Thus, even when a plaintiff suffers what is generally thought to be an indivisible injury, our statute calls for apportionment."[63]

The court held that a defendant product seller is liable only for the enhanced injury as determined by a fact-finder's apportionment under the comparative fault statute, and that, under this rule of apportionment, when there is evidence of a defect and evidence that the defect is a factor in enhancing the injury, the jury must apportion fault between the defendant original tortfeasor and the defendant product seller.[64]

In *Green v. Ford Motor Co.*,[65] answering a certified question from the United States District Court, the Indiana Supreme Court ruled that, in a crashworthiness case alleging enhanced injuries under the Indiana Products Liability Act, the finder of fact must apportion fault to the person suffering physical harm when that alleged fault is a proximate cause of the harm for which damages are being sought.[66]

The underlying federal lawsuit asserted that the defendant was negligent in the design of the 1999 Ford Explorer vehicle's restraint system.[67] The plaintiff drove the vehicle off the road and it struck a guardrail, rolled down an embankment, and came to rest upside down in a ditch.[68] The plaintiff alleged that his injuries were substantially enhanced because of the alleged defects in the vehicle's restraint system.[69]

The court addressed the minority view's theory that any negligence in causing the "first collision" is irrelevant to determining liability for the "second collision," and found that this theory failed to address two considerations which lead to a contrary conclusion.[70] First, the court pointed out that most of the early crashworthiness decisions arose under common law or statutory product liability law that imposed strict liability for which a plaintiff's contributory negligence was not available as a defense, making it irrelevant in those cases to

[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.* at 746.
[64] *Id.*

[65] 942 N.E.2d 791 (Ind. 2011).
[66] *Id.* at 796.
[67] *Id.* at 793.
[68] *Id.*
[69] *Id.*
[70] *Id.* at 794.

consider a plaintiff's contributory negligence.[71]

Second, and more importantly, the court noted that the Indiana Product Liability Act expressly required liability to be determined in accordance with the principles of the comparative fault statute.[72] The court examined the Indiana Product Liability Act and the Comparative Fault Act, finding that the legislature had employed expansive language to describe the breadth of causative conduct that may be considered in determining and allocating fault.[73] The court concluded that it was the function of the fact finder to consider and evaluate the conduct of all relevant actors who are alleged to have caused or contributed to cause the harm, determine whether such conduct satisfies the requirement of proximate cause, allocate as comparative fault only such fault that it finds to have been a proximate cause of the claimed injuries, and, if the fault of more than one actor is found to have been a proximate cause of the claimed injuries, the fact finder may consider the relative degree of proximate causation attributable to each of the responsible actors.[74]

Courts in many other jurisdictions[75] have reached the same conclusion that the principles of comparative fault apply to enhanced injury cases.[76]

V. The Right Result?

As demonstrated by the foregoing case analysis, most courts addressing the enhanced injury doctrine within a system

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[71] *Id*.
[72] *Id*.
[73] *Id*. at 793.
[74] *Id*. at 795-796.
[75] Hinkamp v. American Motors Corp., 735 F. Supp. 176 (E.D. N.C. 1989), *judgment aff'd without opinion*, 900 F.2d 252 (4th Cir. 1990) (applying North Carolina law); Huffman v. Caterpillar Tractor Co., 645 F. Supp. 909 (D. Colo. 1986), *decision aff'd*, 908 F.2d 1470 (10th Cir. 1990), *reh'g denied*, (June 12, 1990); General Motors Corp. v. Farnsworth, 965 P.2d 1209 (Alaska 1998); Keltner v. Ford Motor Co., 748 F.2d 1265 (8th Cir. 1984) (applying Arkansas law); Doupnik v. General Motors Corp., 225 Cal.App.3d 849 (Cal. Ct. App. 1990); Day v. General Motors Corp., 345 N.W.2d 349 (N.D. 1984); Whitehead v. Toyota Motor Corp., 897 S.W.2d 684 (Tenn. 1995); Payne v. Ford Motor Co., 223 Wis. 2d 265, 588 N.W.2d 927 (Wis. Ct. App. 1998), *review denied* (Wis. 1999); Norwest Bank New Mexico, N.A. v. Chrysler Corp., 127 N.M. 397, 981 P.2d 1215 (N.M. Ct. App. 1999), *cert. denied* (May 25, 1999); Dannenfelser v. DaimlerChrysler Corp., 370 F. Supp.2d 1091 (D. Haw. 2005) (applying Hawaii law); McNeil v. Nissan Motor Co., Ltd., 365 F. Supp.2d 206 (D.N.H. 2005) (applying New Hampshire law); Estate of Hunter v. Gen. Motors Corp., 729 So.2d 1264, 1273–1275 (Miss.1999); Harsh v. Petroll, 584 Pa. 606, 887 A.2d 209, 218 (Pa. 2005); Duncan v. Cessna Aircraft Co., 665 S.W.2d 414, 428 (Tex.1984); Zuern v. Ford Motor Co., 937 P.2d 676 (Ariz. Ct. App. 1997) (discussed *supra*); Jahn v. Hyundai Motor Co., 773 N.W.2d 550, 559 (Iowa 2009) (discussed *supra*).
[76] Regarding the application of comparative fault, the Restatement (Third) section 17(b) indicates that comparative fault principles should apply among multiple defendants. The official comments to section 17, however, address only the issue of apportionment of the fault of the plaintiff, but do not discuss the issue of applying comparative fault principles among defendants. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 17, reporter's note to cmt. a, at 259–260.

of comparative fault have held that the comparative negligence of the plaintiff and other parties applies. Based upon a purely legal analysis, the majority approach is arguably the correct approach. The key to the issue is the principle of proximate cause, which is the focus of both the enhanced injury doctrine and the comparative fault doctrine. The majority viewpoint recognizes that enhanced injury cases can involve several proximate causes and that the best way to address this is through the universal application of comparative fault.

Comparative fault systems in place in many states broadly define the term fault and envision a scheme in which the fact finder is able to hear evidence regarding all potential proximate causes of injury and apportion responsibility accordingly. The jury under this system may still consider the evidence and find that the entire injury was caused by the defect, or that a specific injury would not have been caused but for the defect. Thus, the majority viewpoint properly brings the enhanced injury theory of liability within the system of comparative fault.

In contrast, many of the decisions advocating the minority position were from states which retain some aspects of joint and several liability. For legal systems with pure comparative fault, there are two major criticisms of the minority position's approach of not applying comparative fault in enhanced injury cases.

The first is that this approach ignores well-established principles of proximate cause—that the injury would not have occurred but for the negligent conduct, and that the injury was a natural and probable consequence of that conduct which should have been foreseen. Generally, in enhanced injury cases, the defect would not have manifested itself but for the negligence of the person causing the initial injury. There are also usually several acts of negligence (i.e. negligence of the plaintiff or third parties), all of which may be proximate causes of the injuries the plaintiff sustained, whether they are limited to those sustained in the initial collision or enhanced by a defective product in a subsequent collision. Further, in many enhanced injury cases, the injuries suffered are not sufficiently separate and distinct to be able to differentiate between or among them. The minority viewpoint relies on the presumption that the "first collision" and "second collision" are completely unrelated and severable, which is oftentimes not the case in motor vehicle accidents.[77]

From an application and policy perspective, proponents of the minority viewpoint express the concern that allowing the jury to hear facts relating to the initial cause of the accident will cause confusion among jurors in assessing the negligence of multiple parties and determining the extent to which a person's negligence caused injury. This concern is misplaced. Jurors have historically been assigned a civic responsibility of seeking the truth and applying law to the relevant facts. Moreover, the minority approach prevents jurors from hearing all the material facts related to the cause of the accident, which

[77] *See* Charles T. Wells, Douglass B. Lampe and Larry M. Roth, D'Amario v. Ford*: Time to Expressly State the Decision Is No Longer Viable*, 85 FLA. BAR. J. 10 (2011).

itself creates juror confusion, as jurors do not have any knowledge regarding how the accident occurred.

Another argument often presented in association with the minority viewpoint suggests that hearing evidence regarding the cause of the initial accident may prejudice jurors, resulting in defense-oriented verdicts, for example, in situations in which the plaintiff is intoxicated and speeding. These concerns seem to be anticipated by Rule 403 of the Rules of Evidence, which addresses the balancing of prejudice and relevance. In some cases, where it can be shown that there is an enhanced injury which is clearly distinguishable from the cause of the initial crash and where there is a plaintiff whose actions in causing the crash were particularly loathsome, it may be appropriate for the judge to limit evidence related to the cause of the initial crash under this Rule.

The majority viewpoint balances the competing public policy concerns of holding manufacturers responsible for placing defective products on the market and encouraging those who use the product to do so in a responsible manner. In enhanced injury cases, this public policy concern is often related to negligent or reckless driving by the plaintiff. The majority perspective also appropriately addresses the responsibility of a negligent third party driver. Manufacturers are still held responsible, but liability is fairly and equitably divided amongst all responsible persons.

VI. Conclusion

The enhanced injury doctrine lives on, but has been incorporated within the broader umbrella of the comparative fault system in those states which apply comparative fault. Essentially, a claim for enhanced injury is nothing more than a claim for an injury that was actually and proximately caused by a defective product, which is the portion of the total damages for which the manufacturer is potentially liable under the product liability component of the action. Comparative fault appropriately addresses the issue of proximate cause and the apportionment of damages for which each party is responsible.