Auto Manufacturers and High Speeds: Is a Fast Car a Defective Product

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INTRODUCTION

In 1975, more than 45,000 Americans lost their lives in traffic accidents.\(^1\) Another 1.8 million people suffered disabling injury.\(^2\) Automobiles consume over 100 billion gallons of precious fuel resources each year,\(^3\) and it is well known that car exhaust is a significant source of air pollution.\(^4\) It is therefore apparent that in many ways the automobile poses serious national problems. As will be seen, these varying problems share a common characteristic: each one becomes more pronounced with an increase in vehicle speed.\(^5\)

Without question, an innocent person whose injury is proximately caused by a speeding automobile should be able to recover damages from the driver. However, it is frequently overlooked that speeding could not have occurred but for the manufacturer's conscious decision to design a car capable of high speeds. It is the thesis of this article that such a manufacturer is equally culpable. When it designs a car with a capacity for excessive speed, it should therefore be liable for injuries proximately caused by the resulting speeding.

A cautionary note should be made. Throughout this article the term "excessive" is used to describe the speed capacity beyond which liability for an accident resulting from speeding would attach to the manufacturer. No attempt is made to determine the specific speed which should be considered "excessive." Once it is agreed that speed capacity beyond some point should give rise to manufacturer liability, the location of that point would presumably reflect existing maximum posted

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\(^{1}\) See Recht & Carraro, Lowest Death Rate Ever, TRAFFIC SAFETY, March, 1976, at 14, 15.

\(^{2}\) Id.


\(^{5}\) See discussions on Traffic Accidents and Fatalities, Energy Consumption, and Air Pollution infra.
speed limits, reasonable predictions as to future changes in those limits, safety data, energy consumption, and other relevant factors. Although the current maximum speed limit in the United States is fifty-five miles per hour,\(^6\) the assumption is made here that the point at which excessive speed should result in liability may be higher than that limit to provide leeway for future changes.

This article begins by exploring the question whether the courts should impose common law liability on the manufacturer of a car capable of excessive speed, in cases where a person driving the car at such a speed thereby causes injury to a third party. Subsequent sections of the article build on the substantive principles advanced in the common law discussion by suggesting two alternative ways in which manufacturer liability could be imposed: an act of Congress, and federal administrative regulation.

**IMPOSITION OF COMMON LAW LIABILITY BY THE COURTS**

Of all the legal theories advanced in products liability cases generally, negligence and strict liability carry special promise in attaching liability to the manufacturer of a speeding automobile.\(^7\) Under either theory of liability, the legal arguments and factual data will be shown to be sufficient to submit the case to the jury for a determination of liability.

**Negligence**

A manufacturer's liability in negligence requires a breach of duty proximately causing damage to the interests of another.\(^8\) At least since *Palsgraf v. Long Island R. Co.*,\(^9\) it has been evident that the elements of duty and proximate cause are closely related. *Palsgraf* illustrated that issues relevant to both elements are often resolved by reference to the foreseeability of

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a particular occurrence. The applicability of that relationship to the liability question analyzed in this article will be closely examined.

A. Duty and Proximate Cause: Must the Manufacturer Anticipate Speeding?

The nature of the duty a person owes to others is typically articulated in terms of the standard of care, the determination of that standard being a question of law. A manufacturer, in particular, has a duty to exercise reasonable care in designing his product. It is contended here that a car has been unreasonably designed when it is capable of being driven at an excessive speed.

To say the appropriate standard is that of reasonable care, however, does not fully define the duty. Two further problems arise. The first concerns the class of risks against which the manufacturer is expected to guard—more specifically, which uses must be anticipated. The second problem is whether the duty of reasonable care is owed to an innocent bystander.

The class of risks problem was the major stumbling block in Schemel v. General Motors Corp., apparently the only case in which the argument has been made that a car capable of excessive speed has been unreasonably designed. In that case a Chevrolet Impala driven at a speed of 115 miles per hour collided with the plaintiff's car, causing him personal injury. The plaintiff sued General Motors, the manufacturer of the speeding car, on the theory it had been negligent in designing a vehicle capable of such speed. The Seventh Circuit, applying Indiana law, upheld the trial court's dismissal of the claim, ruling that as a matter of law a manufacturer need not make his product safe for an unintended use.

The unintended use issue can be analyzed in terms of duty, abnormal use, or proximate cause. As the following discussion will show, the Schemel

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12. 384 F.2d 802 (7th Cir. 1967), cert. denied, 390 U.S. 945 (1968).
13. Id. at 803.
14. When federal jurisdiction is based on diversity of citizenship, the court must apply the substantive law of the state in which it is situated. Erie R.R. v. Tompkins, 304 U.S. 64 (1938).
15. 384 F.2d at 804-05.
decision does not significantly dampen the prospects for establishing the cause of action advocated in this article.

Definition of Duty. To reach its 1967 Schemel decision,\textsuperscript{16} the Seventh Circuit rejected the cause of action on the basis that no duty had been shown. The court relied on its 1966 decision in \textit{Evans v. General Motors Corp.},\textsuperscript{17} also based on Indiana law. In \textit{Evans}, the driver of a General Motors car had been killed in a collision with another vehicle. The decedent’s widow sued General Motors on a negligence theory, alleging the design of the car had failed to provide sufficient protection in the event of an accident. The \textit{Evans} court held that the manufacturer’s only duty in designing a product is to make it reasonably safe for its \textit{intended} uses,\textsuperscript{18} and that a collision is not an intended use.

In line with the overwhelming trend in the crashworthiness cases, however, a majority of jurisdictions have now rejected \textit{Evans} in favor of the rule of \textit{Larsen v. General Motors Corp.}\textsuperscript{18} In \textit{Larsen} the Eighth Circuit held the manufacturer has a duty to anticipate all reasonably \textit{foreseeable} uses of the car, regardless of whether such uses were intended. Because traffic accidents are foreseeable, the court recognized a duty to make the car “crashworthy,” that is, reasonably safe in the event of accident. Though many decisions deny manufacturer liability after finding that the danger posed by the alleged defect was not unreasonable,\textsuperscript{20} such holdings must be distinguished from the \textit{Evans} rule that the manufacturer has no duty to anticipate a collision. Not surprisingly, \textit{Evans} has been severely criticized

\textsuperscript{16} \textit{Id.} at 802.
\textsuperscript{17} 359 F.2d 822 (7th Cir.), \textit{cert. denied}, 385 U.S. 836 (1966); see 384 F.2d at 804.
by commentators.\textsuperscript{21}

To be sure, recent crashworthiness cases applying Indiana law have applied the unintended use analysis of \textit{Evans}.\textsuperscript{22} Nevertheless, several other post-\textit{Evans} developments suggest a gradual erosion of that doctrine. In \textit{Sills v. Massey-Ferguson},\textsuperscript{23} a federal case from the Northern District of Indiana, a lawn-mower being towed by a truck picked up a bolt from the ground, hurling it through the air and injuring an unrelated bystander. The federal district court was bound to apply Indiana law. If it had wished to follow \textit{Evans}, the court could have said that picking up bolts while being towed was an unintended use against which the lawnmower manufacturer need not guard. Instead, recovery was permitted. Arguably the decision indicates a judicial reticence to apply \textit{Evans} outside the narrow context of the crashworthiness issue.

In addition, the Seventh Circuit itself rejected \textit{Evans} when applying Illinois law in \textit{Nanda v. Ford Motor Co.}\textsuperscript{24} There the court held the automobile manufacturer liable for injuries sustained by an occupant when the defective positioning of the fuel tank caused a fire upon collision.

Moreover, a general climate of hostility may dissuade courts from extending \textit{Evans} beyond the issue of crashworthiness. For example, where the alleged defect is the capacity for excessive speed, rather than the failure to make the car crash-worthy, a court may be willing to distinguish \textit{Evans}. Such a distinction is quite possible. The failure to make a car crash-worthy merely increases the chance of injury in the event of an accident, while the capacity for excessive speed actually increases the chance of the accident occurring in the first place,\textsuperscript{25} an arguably higher level of foreseeability.\textsuperscript{26}

Finally, it was not until 1970 that Indiana first adopted the doctrine of strict liability.\textsuperscript{27} Arguably, the \textit{Evans} court, basing

\textsuperscript{21} See, e.g., 80 HARV. L. REV. 688 (1967); 4 HOUSTON L. REV. 311 (1966); 42 NOTRE DAME LAW. 111 (1966).
\textsuperscript{23} 296 F. Supp. 776 (N.D. Ind. 1969).
\textsuperscript{24} 509 F.2d 213 (7th Cir. 1974).
\textsuperscript{25} See notes 64-117 and accompanying text infra.
\textsuperscript{26} Speeding also increases the severity of those accidents that do occur. See notes 85-88 and accompanying text infra.
\textsuperscript{27} Cornette v. Searjeant Metal Products, Inc., 258 N.E.2d 652 (Ind. 1970). Liability was denied, however, on the ground that the plaintiff had assumed the risk. \textit{Id.} at 657. For discussion of the assumption of risk doctrine, see subsection entitled Assumption of the Risk: A Defense of the Manufacturer \textit{infra}.
its decision on negligence law, would not have reached the result it did if the case had been heard after strict liability had been adopted by Indiana. Such a possibility seems realistic, for the *Evans* opinion focused on what type of conduct should be required of the manufacturer. Because strict liability places less emphasis on the conduct of the defendant, such a consideration might have influenced the outcome in *Evans*.28

Thus the barrier created by *Evans* must be placed in its proper perspective. The *Evans* doctrine, denying recovery for unintended uses, does not apply at all in the majority of states. Further, given the vehement criticism with which the case has been received, as well as the general trend in the direction of *Larsen*, the likelihood of further desertion from the *Evans* camp seems great. Finally, even in those jurisdictions which elect to retain the *Evans* doctrine, the hostile reception may dissuade courts from expanding it beyond crashworthiness. In conclusion a manufacturer should be held to have a duty to anticipate excessive speeding.

*Abnormal Use.* The bar to liability which the court found in *Schemel* can also be analyzed in terms of abnormal use,29 a defense in a products liability action.30 However, abnormal use is not truly an affirmative defense; rather, it is a finding that the product did not contain a defect causing an injury.31 When an injury arises from an abnormal use in a negligence case, the action is barred because the defendant's conduct did not proximately cause the injury.32 Thus abnormal use is not an affirmative defense; normal use is a part of the plaintiff's case.33

Regardless of the label, it is now apparent that a use should be regarded as abnormal only if it is one which the defendant cannot have been expected to anticipate.34 Thus the basic test for abnormal use is whether the use was reasonably

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31. Noel, supra note 30, at 96.


34. See note 32 supra.
foreseeable rather than whether it was one for which the product was manufactured.\textsuperscript{35}

Speeding could hardly be viewed as unforeseeable. One author, in fact, has used speeding for the express purpose of illustrating how an unintended use might nevertheless be foreseeable, pointing out, "Automobiles will surely be driven, sometimes at high speed, and often where other vehicles and pedestrians are present."\textsuperscript{36} The extent to which drivers violate speed limits is great and is well documented.\textsuperscript{37}

Further, even the restrictive "intended use" test should result in liability when a manufacturer consciously builds a car capable of excessive speed. To apply that test, a legal definition of "intent" becomes necessary. By analogy to the law of intentional torts, one should be held to "intend" a particular consequence when he acts either for the purpose of bringing it about or with the knowledge to a substantial certainty that it will occur.\textsuperscript{38} The incidence of excessive speeding\textsuperscript{39} lends impetus to the argument that a manufacturer who builds a line of cars capable of excessive speed knows with substantial certainty that many of them will be driven at such speeds. Thus speeding should be deemed an intended use since the manufacturer knows with substantial certainty it will occur.

\textbf{Proximate Cause.} There is one final approach to analyzing the Schmemel rule that a manufacturer need not anticipate that its car will be driven at an excessive speed. The rule amounts to a holding that speeding constitutes an intervening act precluding a showing of proximate cause. If that was the intention of the Schmemel court, its holding was plainly erroneous.

Concededly, driving the car at an excessive speed amounts to a negligent intervening act. It is clear, however, that a negligent intervening act will not be a superseding act, relieving the defendant of liability, unless the act was not reasonably fore-

\textsuperscript{35} See the crashworthiness cases discussed in text accompanying notes 16-23 supra. See also Horn v. General Motors Corp., 17 Cal. 3d 359, 551 P.2d 398, 131 Cal. Rptr. 78 (1976); Phillips v. Ogle Aluminum Furniture, Inc., 106 Cal. App. 2d 650, 235 P.2d 857 (1951); Hardman v. Helene Curtis Indus., Inc., 48 Ill. App. 2d 42, 198 N.E.2d 681 (1964). One case denying liability because of abnormal use is Smith v. Hobart Manufacturing Co., 302 F.2d 570 (3d Cir. 1962). Even in Smith, liability was denied only after a finding that the misuse in question was an unanticipated misuse.

\textsuperscript{36} 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 28.6, at 1546 (1956).

\textsuperscript{37} See text accompanying notes 60-63 infra.

\textsuperscript{38} Garratt v. Dailey, 46 Wash. 2d 197, 279 P.2d 1091 (1955); see also W. PROSSER, LAW OF TORTS § 8, at 32 (4th ed. 1971); SALMOND, JURISPRUDENCE 337 (4th ed. 1913).

\textsuperscript{39} See text accompanying notes 60-63 infra.
seeable to the defendant.40 This rule applies in Indiana, where Schemel was decided; an independent force which was reasonably foreseeable does not break the chain of causation.41

Nor does the criminal nature of the intervening speeding preclude a finding of proximate cause. Many cases have imposed liability even when criminal conduct of a third party intervened between the allegedly negligent act of the defendant and the alleged injury to the plaintiff.42 In the words of one California court, "it is not the law that one has no duty to protect against foreseeable criminal acts."43

The Schemel court might very well have been disturbed by the prospect of holding a manufacturer liable in a situation where the third party speeder had arguably been even more culpable. The negligent act of speeding would of course provide a basis for imposing liability on the speeder. It does not follow, however, that it provides a basis for denying liability of the manufacturer.

Furthermore, California has adopted an equitable indemnity rule permitting apportionment of damages among joint tortfeasors in proportion to their comparative fault.44 This rule entitles the plaintiff to full recovery from the manufacturer while the manufacturer seeks indemnity from the speeding co-defendant. Therefore, any unfairness inherent in singling out the manufacturer is diminished.

A similar analysis can be applied to the situation in which the speeder is the plaintiff suing the manufacturer in negligence. While the negligent act of speeding would constitute contributory negligence on the part of the speeder, it should have no bearing in a claim by an innocent bystander plaintiff.45

Further, even if the speeding driver were to sue the manufacturer, and even if the controlling law is that of a comparative negligence state such as California, the jury will be able to apportion the blame between the speeder and the manufacturer on the basis of relative fault. 46

The foregoing analysis shows that the issue of product misuse can be analyzed alternatively in terms of duty, abnormal use, or proximate cause. Under any of these approaches, the bottom line is the same. The manufacturer should be required to anticipate all uses that are reasonably foreseeable. That the use is negligent may bar some claims to which the user is a party. Where a third party sues the manufacturer, however, the negligent use should not preclude a showing of foreseeability.

Thus foreseeable misuse 47 is within the class of risks to which the manufacturer's duty of reasonable care extends. Since duty hinges on foreseeability, the primary issue will be a question of fact for the jury. 48 Before the case can be submitted to the jury, it must be determined to whom the manufacturer's duty of reasonable care extends. Fortunately, on this the case law is well settled. In negligence, 49 the plaintiff is not barred from recovery merely because he is a bystander, rather than a user or consumer of the product. 50

This section has demonstrated that a manufacturer has a duty to exercise reasonable care in designing an automobile. That duty extends to all foreseeable risks, and to all parties foreseeably endangered by the product. The next inquiry is whether a manufacturer, by building a car capable of excessive speed, has breached that duty of reasonable care.

47. Similarly, the fact that the defendant lacked actual knowledge of a particular use does not preclude liability. Simpson Timber Co. v. Parks, 369 F.2d 324 (9th Cir. 1966), vacated and remanded, 388 U.S. 459 (1967), aff'd district court and remanding, 390 F.2d 353, cert. denied, 393 U.S. 858 (1968).
49. Although a bystander can clearly recover in negligence, the cases are split on whether the same is true of strict liability. See text accompanying notes 140-149 infra.
50. Reed & Barton Corp. v. Maas, 73 F.2d 359 (1st Cir. 1934); Sills v. Massey-Ferguson, 296 F. Supp. 776 (N.D. Ind. 1969); Pike v. Frank G. Hough Co., 2 Cal. 3d 465, 467 F.2d 229, 85 Cal. Rptr. 629 (1970); McLeod v. Linde Air Products Co., 318 Mo. 397, 1 S.W.2d 122 (1927); Hopper v. Charles Cooper & Co., 104 N.J.L. 93, 139 A. 19 (1927).
B. Breach of Duty: Is the Conduct Unreasonable?

Whether a manufacturer has failed to exercise reasonable care is a question of fact for the jury.\(^{51}\) It should be noted here that the court in \textit{Schemel} did not dispute this proposition. Nor did it dispute that the evidence had been sufficient to sustain a jury finding of unreasonable conduct.\(^{52}\) The \textit{Schemel} court's decision not to submit the case to the jury was based, rather, on the premise that no duty existed with respect to the risk of excessive speeding.

The classic test for determining whether conduct is unreasonable is that enunciated by Judge Learned Hand in \textit{United States v. Carroll Towing Co.}\(^{53}\) Under that test, reasonableness depends on whether the burden of taking needed precautions is outweighed by the likelihood and the gravity of injury.\(^{54}\) That balancing test provides a convenient framework for a jury resolution of the reasonableness question.

If there is a basis for a finding that the manufacturer's conduct is unreasonable, a jury verdict of manufacturer liability will stand. To assess the likelihood and gravity of injury, it is necessary to take a statistical look at the relationship between speed and automobile accidents and fatalities. That analysis, together with the subsequent discussion concerning the burden of taking precautions, will show there is easily sufficient evidence for a jury finding that designing a car capable of excessive speed is unreasonable.

Traffic Accidents and Fatalities. In designing a product, a manufacturer is required to consider the environment in which the product is to be used.\(^{55}\) The automobile, in particular, is designed for an environment in which there is a death every eleven minutes, and an injury every nineteen seconds.\(^{56}\) One


52. A similar observation is made by Judge Kiley, dissenting in \textit{Schemel}, 384 F.2d at 806.

53. 159 F.2d 169 (2d Cir. 1947).

54. \textit{Id.} at 173. Judge Hand expressed this test in algebraic terms. He represented the probability of harm by \(P\), the gravity of that harm by \(L\), and the burden of adequate precautions by \(B\). Applying a probability expectation theory, he concluded that liability should attach whenever \(B > PL\). \textit{Id.}


noted commentator has observed that one-fourth to one-third of all cars are involved at least once in an accident resulting in either injury or death. National Safety Council statistics show that through 1965, approximately 1.5 million people had been killed in automobile accidents; since 1965 the onslaught has continued unabated. It is clear, then, that accidents and fatalities are foreseeable consequences of operating an automobile on the highways.

Speeding is also foreseeable. The Commissioner of the California Highway Patrol reported in 1974 that seventy percent of the public violates legally posted speed limits, a figure apparently still rising. Nationwide statistics verify the high incidence of speeding. Although the national fifty-five mile per hour speed limit has done much to reduce highway speeds, substantial non-compliance is evident.

Until recently, the correlation between highway speeds and traffic safety had been difficult to determine because the variables often proved incapable of isolation. However, on January 2, 1974, Congress enacted temporary legislation imposing a nationwide maximum speed limit of fifty-five miles per hour. The legislation was made permanent a year later.

60. Gregory, Reprieve on Slaughter Alley, MOTOR TREND, Aug., 1974, at 96, 100-01 (quoting Commissioner Walter Pudinsky).
61. The California Highway Patrol reported in April, 1977, that 80% of state drivers violate posted limits. San Diego Evening Tribune, Apr. 15, 1977, at A-14, col. 1:
62. One study shows in tabular form the percentage of vehicles exceeding various speeds. See Highway Users Federation, Facts on Vital Issues—The 55 MPH Speed Limit 1, Table 1 (Nov. 1975); see also Ramifications of the 55 M.P.H. Speed Limit, INSTITUTE OF TRANSPORTATION ENGINEERS, COMM. 4M-2 BRIEFING BOOK 7 (Nov., 1976) [hereinafter cited as I.T.E. STUDY].
63. All the data cited in notes 60-62 supra were compiled from experience incurred after the 55 m.p.h. speed limit had gone into effect.
64. The statute was to expire when the President declared a fuel crisis no longer existed, or on June 30, 1975, whichever came first. Act of Jan. 2, 1974, Pub. L. No. 93-239, § 26, 87 Stat. 1047.
65. The legislation accomplished this result by indirect means. It prohibited the Transportation Secretary from approving any federal highway grant project in a state not setting a maximum 55 m.p.h. speed limit. Id. § 2(b). The purpose of the Act was not to enhance safety, but to conserve fuel. Id. § 2(a).
Studies on the fifty-five mile per hour speed limit have made it possible to quantify the effect of high speeds on traffic safety. Since the fifty-five mile per hour limit was imposed, actual driving speeds have dropped appreciably. One study found average speed reductions of five to ten miles per hour on most major roads. Another has shown that the fifty-five mile per hour speed limit has reduced from fourteen percent to one percent the number of vehicles exceeding seventy miles per hour on main rural roads. The general speed reductions are well documented.

During the same period in which vehicle speeds have dropped, highway accidents have also undergone drastic reductions. The number of reportable accidents on California state highways fell by approximately 7500, and injuries by 9000, in 1974. Reductions were felt for all types of accidents, including those involving pedestrians and bicyclists. Nationally, the number of highway injuries in 1974 fell by 190,000. Various state studies consistently showed analogous results.

Even more dramatic than the drop in injuries has been the remarkable decline in fatalities. Total highway fatalities na-
tionwide dropped from 55,000 in 1973 to 46,000 in 1974, the level at which they remained in 1975. California experienced a huge eighteen and one-half percent fatality reduction since imposition of the fifty-five mile per hour speed limit. That reduction represents a savings of over 900 lives. Other state studies reveal similar results.

That the drop in speeds coincides chronologically with a drop in both accidents and fatalities is itself some evidence of a causal connection between high speeds and traffic hazards. Other observable statistical phenomena reinforce such a correlation. In the first place, the roads on which the speed reductions were greatest were also the roads showing the greatest decline in accidents and fatalities. In Arizona, for example, almost the entire fatality reduction was experienced on roads where a speed limit greater than fifty-five miles per hour had previously been in effect. California reported that a disproportionate share of its reductions for all types of accidents—fatalities, injuries, reportable accidents, and property-damage-only accidents—was allocable to state highways where speed reductions were greatest. The United States Department of Transportation has determined that rural roads affected by the fifty-five mile per hour speed limit, while carry-

76. NHTSA Fact Book, supra note 69, at 18.
78. CHP Study, supra note 70, at 1.
79. Id.
81. Burrett, Moghrabi, & Matthias, supra note 80, Table 8, reprinted in I.T.E. Study, supra note 62, App. A.
82. The percentages by which 1974 state highway accidents fell short of the expected totals can be contrasted with the corresponding percentages for the state as a whole. In tabular form:

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<th>All State Roads</th>
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<tr>
<td>Property-Damage-Only</td>
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These statistics have been extracted from CHP Study, supra note 70, at 11, chart 4.
ing only 61.7 percent of the travel, nevertheless had 87.9 percent of the national fatality reduction of 1975 over 1973. The Institute of Transportation Engineers agrees that fatality reductions have been greatest on those roads for which the reduction in speeds has been greatest.  

Secondly, regardless of whether reduced speeds were responsible for a reduction in accidents, there is strong evidence they were responsible for a drop in fatalities. As the category of accident becomes progressively more serious, the percentage reduction becomes greater. In 1974, “fatal injuries decreased more than severe injuries, severe injuries more than other injury, and injury more than (property-damage only).” The National Safety Council, gathering data from motor vehicle authorities in eighteen states, found that the ratio of total accidents to total fatalities jumped from 46:1 during the first four months of 1973, to 52:1 during the same period in 1974. The Council has interpreted this phenomenon to mean that once an accident occurs, the probability of severe injury or death tends to increase with an increase in speed.

Notwithstanding such substantial evidence, it is fair to ask whether the accident and fatality reductions might have resulted from factors other than the drop in speed. Because the fifty-five mile per hour speed limit was triggered by the energy crisis, one obvious candidate for such a contributing factor has been reduced travel.

Vehicle miles dropped substantially in 1974, principally because the energy crisis “limited fuel availability, increased gas prices, and increased car pooling.” In California mileage decreased by five billion miles. Nationwide travel dropped

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83. NHTSA FACT BOOK, supra note 69, at 7.
84. I.T.E. STUDY, supra note 62, at 5-6.
85. See, e.g., id. at 6 (in 1974, total accidents were down 5%; total fatalities down 17%); see also CHP Study, supra note 70, at 11, chart 4 (on California state highways, in 1974, fatalities were down 29.6%, and injuries 21.5%; corresponding figures for all roads statewide were 19.1% and 9.0%).
90. CHP Study, supra note 70, at 12.
91. The mileage for the year had been expected to increase by 5 billion miles, on the basis of the continuing trend. Id. Thus the actual mileage was 11 billion lower than expected.
five percent during the first six months of 1974.92 The national reductions became gradually smaller as the year progressed, however, and by 1975, total vehicle miles traveled actually exceeded those for 1973.93 In 1976, a further slight increase was experienced.94 Thus the reduction in travel was short-lived.

More significantly, both accidents and fatalities decreased not only as absolute numbers, but also in proportion to vehicle miles traveled.95 In 1974, California’s actual fatality rate—the number of fatalities per 100,000,000 vehicle miles traveled—was only 1.84, compared with an expected rate of 2.41.96 The 1975 national fatality rate also dropped substantially from the 1973 level.97 Therefore only a small fraction of the accident and fatality reductions can reasonably be attributed to reduced travel.98

A second generally recognized cause of enhanced highway safety has been more uniform vehicle speeds. Studies show that when the incidence of substantial deviation from the mean speed increases, the number of accidents and fatalities also increases.99 In 1974 uniformity of speed improved significantly;100 this improvement was found to account for approximately eleven percent of the 1974 California fatality reduction.101

There is evidence that reduction of the speed limit played

92. I.T.E. Study, supra note 62, at 8. The travel decrease was 8.5% in February, but only 2.3% in June. Id.
93. NHTSA Fact Book, supra note 69, at 7; confirmed in letter from William F. Scott, NHTSA, to author (Apr. 11, 1977).
96. CHP Study, supra note 70, at 6, chart 1.
97. NHTSA Fact Book, supra note 69, at 7.
98. For a summary of the various conclusions experts have reached on this issue, see text accompanying notes 110-117 infra.
99. Council & Waller, How Will the Energy Crisis Affect Highway Safety?, TRAFFIC SAFETY, Apr. 1974, at 12, 39; CHP Study, supra note 70, at 15-22 (variation of 5-10 m.p.h. above the mean speed causes such a rapid increase in accident involvement rates that a logarithmic scale is needed to prepare a visual chart); D. Solomon, Accidents on Main Rural Highways Related to Speed, Driver, and Vehicle (U.S. Dept. of Commerce Bureau of Public Trends, July 1964), cited approvingly by Smith, Chief of Traffic Safety Research, Cal. Dept. of Transp., in Letters to the Editor, WESTERNITE, Jan., 1977, at 6.
100. CHP Study, supra note 70, at 20.
101. Increased uniformity accounted for 97 of the 911 lives saved in California in 1974. Id. at 1. For the nationwide effects of reduced variance in speeds, see I.T.E. Study, supra note 62, at 6.
a role in causing the reduction in speed variance. The California Highway Patrol has suggested three reasons for believing the lower speed limit was at least "influential" in producing the reduced variance. First, both the speed limit and the variation dropped substantially during the same time period. Second, when speed is reduced, the same percentage distribution results in a tighter distribution of absolute speeds. Third, it decreased the speed of drivers who had formerly traveled above fifty-five without affecting the speed of drivers who had formerly traveled at fifty-five or below. Thus, whatever portion of the safety improvement is due directly to improved uniformity of speeds can arguably be attributed indirectly to the reduction in speeds.

Other factors such as a reduction in occupancy per vehicle, a reduction in night driving, greater use of safety belts, proportionately less driving by young drivers whose accident rates are higher, yearlong daylight savings time, and better enforcement of drunk driving laws may have played a part in the fatality reduction experienced in 1974. According to National Safety Council statistics, however, the effects of these factors have been relatively minor.

The above statistics provide strong evidence of a correlation between high speeds and traffic accidents and deaths. The vast majority of expert opinion is now in accord. The National Safety Council has expressed the view that reduced

102. CHP Study, supra note 70, at 20-21.
103. An occupancy reduction in the midst of an energy crisis may at first seem surprising. Its cause, however, was a decrease in the proportion of traffic for recreational purposes, where the average number of occupants per vehicle is typically high. See What's Behind the Drop in Traffic Deaths?, TRAFFIC SAFETY, Nov., 1974, at 12, 14.
104. Id.
105. Id.
106. Id. See also INSURANCE INSTITUTE FOR HIGHWAY SAFETY, STATUS REPORT, Dec. 20, 1973, at 3 (predicting effects of energy crisis); Gregory, Reprieve on Slaughter Alley, MOTOR TREND, Aug., 1974, at 96, 97.
107. CHP Study, supra note 70, at 34.
108. In California, arrests for drunk driving were up 10% during the early months of 1974, and the number of drunk drivers involved in accidents was down 9%. Gregory, Reprieve on Slaughter Alley, MOTOR TREND, Aug., 1974, at 96, 100.
110. See, e.g., Council & Waller, How Will the Energy Crisis Affect Highway Safety?, TRAFFIC SAFETY, Apr., 1974, at 12, 12; Smith, Chief of Traffic Safety Research, Cal. Dept. of Transp., in Letters to the Editor, WESTERNITE, Jan., 1977, at 6; I.T.E. STUDY, supra note 62, at 5-6 (half the nationwide fatality reduction for the first 6 months of 1974 due to reduced and more uniform speeds), 9 (safety benefits of the 55 m.p.h. limit substantiated, limit should be retained); Burrett, Moghrabi, & Matthias, supra note 80; Agent, Herd, & Rizenbergs, supra note 69, at 70-81.
speeds not only reduce braking and reaction time, thereby helping to avoid accidents, but also reduce the severity of accidents that do occur, thereby eliminating a high number of fatalities. The Council has concluded that almost half of the 1974 fatality reduction was attributable to reduced speeds. The California Highway Patrol has estimated that the combined effect of reduced speeds and more uniform speeds caused fatalities on California highways to drop by over twenty-one percent in 1974. Similar views have been expressed repeatedly by other transportation authorities, and by political officials.

Fairness dictates acknowledgement that not all experts share a belief in the strong correlation between high speed and traffic fatalities. The principal dissenters seem to be the Utah Transportation Department and Motor Trend Magazine. It
will suffice to note that such opinions exist, and that they constitute a minority view.

The high probability is that cars will be driven at high speeds, and that these high speeds will frequently result in increased accidents and fatalities. The gravity of the human cost entailed in mass highway deaths is self-evident. The economic cost is also devastating. The National Safety Council figures show the annual economic cost of motor vehicle fatalities to be twenty billion dollars.¹¹⁸

The Burden of Taking Added Precautions. In Schemel, where the Seventh Circuit rejected high speed capacity as a design defect, the manufacturer had contended the capacity for high speed was a deliberate design "to provide 'reserve power' for passing and to reduce strain on the engine during periods of sustained operation."¹¹⁹ Certainly a jury could reasonably find that those purposes do not outweigh the enormous cost incurred as a result of the thousands of injuries and fatalities attributable each year to high speeds.

In addition, a jury might reasonably find that the need for reserve power and reduced engine strain could be met without creating the capacity for excessive speed. In Schemel, for example, the plaintiff had alleged that governors would provide a simple device for accomplishing such a result.¹²⁰ The requirement of expert opinions should be no obstacle to recovery since, as the dissent noted, "juries have been weighing the opinions of expert witnesses on all types of issues for years."¹²¹

Other Factors Concerning Breach of Duty. A manufacturer

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¹¹⁸ The results of the NSC study are reproduced in Recht & Carraro, Lowest Death Rate Ever, TRAFFIC SAFETY, Mar., 1976, at 14, 17. The $20 billion figure can be obtained by beginning with the cost of all accidents, $46 billion, and deducting the costs of public non-motor-vehicle ($4.7 billion), home ($5.6 billion), and work ($15.9 billion). Id.

¹¹⁹ 384 F.2d at 808 (Kiley, J., dissenting).

¹²⁰ Id. at 809.

¹²¹ Id. at 810.
will contend that building a car capable of speeding is merely following the custom of the automobile industry. At most, however, compliance with such a norm would constitute some evidence of reasonable conduct, and would not be conclusive. Therefore the plaintiff need not show deviation from industry custom to get his case before the jury. One final consideration affecting breach of duty is the effect of compliance with federal safety standards. The enabling statute for the National Highway Traffic Safety Administration expressly provides: "Compliance with any federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." Thus the mere fact that manufacturer has not violated federal safety standards does not guarantee non-liability, and at least one court has so held. Neither compliance with industry custom nor compliance with federal safety standards insulates the manufacturer from liability.

Summary of the Breach Issue. The evidence discussed in this section illustrates the foreseeability of speeding, as well as that of accidents and fatalities. Experience under the fifty-five mile per hour speed limit reinforces the correlation between reduced speeds and highway safety in several ways: The reduction in actual speeds coincides chronologically with the drop in both accidents and fatalities. The safety improvement has been greatest on roads where speed reductions have been greatest. The ratio of fatalities to accidents has dropped appreciably, reflecting a lesser severity of those accidents which do occur. The rate of fatalities and accidents per vehicle miles traveled has also fallen, indicating that the improvement cannot be attributed solely to the reduced travel brought on by the energy crisis. Finally, there is reason to believe that reduced speeds bring with them more uniform speeds, a known ingredient of highway safety. Not surprisingly, therefore, the weight of expert opinion is that high speeds are likely to produce a high incidence of both accidents and fatalities.

125. Id. § 1397(c).
126. Larsen v. General Motors Corp., 391 P.2d 495 (8th Cir. 1968).
The gravity of the human cost—the loss of life, the permanent injuries, and the trauma—is immeasurable. The economic cost of accidents and fatalities is also prodigious. The burden of taking precautions against high speeds would be relatively slight. The manufacturer need only refrain from designing engines with unnecessary horsepower, or, alternatively, install governors to control top speed. Such controls are a small price to pay when it is considered that the purpose of a car is not only to provide transportation, but also to provide safe transportation. Further, neither compliance with industry custom nor compliance with federal standards insulates the manufacturer from liability. It is concluded that the evidence is sufficient to warrant a jury finding of unreasonable conduct.

Strict Liability

In addition to a negligence action, the theory of strict liability should also afford a means of recovery. The starting point for a discussion of strict liability is section 402A of the Restatement Second of Torts. 402A imposes strict liability on anyone who sells “any product in a defective condition unreasonably dangerous to the user or consumer or to his property,” with other conditions not pertinent here. The rule applies even when the seller has exercised all reasonable care in preparing and selling the product.

Section 402A requires that a product have a defect and that it be unreasonably dangerous. The California Supreme Court in Cronin v. J.B.E. Olson Corp., continuing its progressive trend in products liability cases, rejected the requirement of unreasonable danger and held that a defect proximately causing injury is sufficient for liability. The Cronin holding accentuates the importance of defining defect. Although there is no universally accepted definition, Dean Wade suggests that a product should ordinarily be considered defective when “the manufacturer had not intended it to be in

127. Id. at 502.
129. Id. § 402A(2)(a).
130. 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972).
that condition." As he later notes, however, that definition makes no sense in a design defect case since the product has been manufactured as intended. The more logical test for design defect should therefore be whether the characteristic is unreasonably dangerous. Thus, in design defect cases, the terms "defective" and "unreasonably dangerous" should be treated as synonymous.

In defining "unreasonably dangerous," two distinct approaches have been suggested. The Restatement approach defines a product as unreasonably dangerous if it is "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." This definition focuses on the expectation of the consumer. Its application to the manufacturer of a car with high speed capacity would undoubtedly lead to a directed verdict for the defendant, for it would be difficult to argue that the ordinary consumer would not have expected a car to be capable of exceeding posted speed limits.

The other common approach is the multiple factor test offered by Dean Wade. Under this test, the question is whether a hypothetical manufacturer who knew of the danger would be acting unreasonably if he were to market the product. Multiple factors, similar to those used in a negligence action, are suggested as useful in determining the reasonableness.

Whatever the comparative merits of the two tests in cases where a user or consumer is injured, the Restatement's consumer expectation test makes little sense when applied to the

133. Wade, supra note 30, at 831; see also Blissenbach v. Yanko, 90 Ohio App. 557, 107 N.E.2d 409 (1951) (no defect found because product was as manufacturer had intended it to be).
134. Wade, supra note 30, at 832.
137. For an application of the multiple factor test, see Turner v. General Motors Corp., 514 S.W.2d 497 (Tex. Civ. App. 1974).
138. Wade, supra note 30, at 834.
139. Many courts and commentators have noted that in design defect cases, negligence and strict liability theories usually produce the same result. See, e.g., Balido v. Improved Mach., Inc., 29 Cal. App. 3d 633, 105 Cal. Rptr. 890 (1973); Engberg v. Ford Motor Co., 87 S.D. 196, 205 N.W.2d 104 (1973); W. PROSSER, LAW OF TORTS § 96, at 644-45 (4th ed. 1971); Wade, supra note 30, at 841.
plaintiff who is an unrelated bystander. To see why this is so, it is necessary to explore the more basic question of whether the bystander even has a cause of action against the manufacturer in strict liability.

Section 402A itself provides for strict liability when the plaintiff is a user or consumer of the product.140 Thus, in the early years of strict liability, the courts strained to classify injured plaintiffs as "users" of products.141 The Restatement's reference to users and consumers should not be taken as a negative pregnant implying bystanders cannot recover in strict liability, however, for the American Law Institute expressly declined to offer its view on that issue.142

Whether bystanders should be able to recover depends on the underlying theory felt to justify the imposition of strict liability. Dean Prosser has observed that if the theory is one of loss-spreading—the idea that the enterprise, by increasing its prices, should bear the cost of injuries stemming from its product—then there is no reason for selectively denying recovery to bystanders.143 However if the theory is that the plaintiff has relied on safety representations by the manufacturer, then the bystander, who has relied on nothing, should not be permitted to recover in strict liability.144

The first theory is the sounder approach. It was precisely to escape the contract law limitations of implied warranty that the California Supreme Court in Greenman v. Yuba Power Products, Inc.145 adopted a theory of strict liability. Two authors, suggesting that the implied warranty theory should be available without proof of reliance, have alternatively argued that if reliance is required, that of the purchaser should be sufficient since the injury would not have occurred but for the sale.146

Although the cases are still split on the issue of liability to

141. See, e.g., Lonzrick v. Republic Steel Corp., 6 Ohio St. 2d 227, 218 N.E.2d 185 (1966) (person injured by a falling roof was a "user" of the roof); Haut v. Kleene, 320 Ill. App. 273, 50 N.E.2d 855 (1943) (woman who contracted disease while cooking food for husband was a "user" of the food).
142. Id. Restatement (Second) Torts § 402A, Caveat 1; see also id., Comment l (1965).
144. Id. at 170.
bystanders," the overwhelming trend is to permit recovery. In
the leading case of Elmore v. American Motors Corp., a
defective car veered out of control, colliding with a vehicle
driven by the plaintiff. The California Supreme Court held
the injured bystander could recover in strict liability from the
manufacturer of the defective automobile. Many modern deci-
sions are in accord.149

In the remainder of the discussion on strict liability it will
be assumed the plaintiff was injured in a state permitting by-
stander recovery. It is evident that the same rationale which
justifies such a rule dictates that the consumer expectation test
be rejected as a means of determining such liability. That basic
rationale, expressed in Greenman, is that strict liability is an
action in tort, not in contract.150 If an injured bystander sues
the manufacturer in tort, the expectation of the consumer, who
is not a party to the claim, has no logical bearing. The multi-
ple factor test, by contrast, is an appropriate way to resolve the
liability issue, because it is the unreasonably dangerous nature
of the product which gives rise to liability for design defect.

The multiple factor test directly addresses the question
whether a particular characteristic of a product is unreasona-
bly dangerous. Dean Wade has described this inquiry as one of
balancing the risk entailed by the dangerous condition against
the social utility attained by marketing the product in that
fashion.151

The California Supreme Court has recently combined both
the Restatement test and the multiple factor test into the fol-
lowing formulation:

[A] product is defective in design 1) if the plaintiff dem-

osistrates that the product failed to perform as safely as an
ordinary consumer would expect when used in an intended
or reasonably foreseeable manner, or 2) if the plaintiff

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147. For a good compilation of cases in both directions, see Prosser, Products
iability in Perspective, 5 Gon. L. Rev. 157, 169 n.37 (1970). See also 41 Tenn. L.
149. E.g., Sills v. Massey-Ferguson, Inc., 296 F. Supp. 776 (N.D. Ind. 1969); Pike
v. Frank G. Hough Co., 2 Cal. 3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970); Lenhart
Mich. 85, 133 N.W.2d 129 (1965); Codling v. Paglia, 32 N.Y.2d 330, 298 N.E.2d 622,
345 N.Y.S.2d 461 (1973); Howes v. Hansen, 56 Wis. 2d 247, 201 N.W.2d 825 (1972).
Rptr. 697 (1963).
151. Wade, supra note 30, at 825, citing Keeton, Product Liability and the Mean-
proves that the product's design proximately caused his injury and the defendant fails to prove, in light of the relevant factors . . . that on balance the benefits of the challenged design outweigh the risk of danger inherent in such design.\textsuperscript{152}

Thus the California plaintiff can recover under either theory.

As applied here, the issue then is whether there is sufficient evidence to support a jury finding that the risks involved in designing a car capable of excessive speed outweigh any social utility realized. This is precisely the ultimate issue in the negligence claim, and the answer there has been shown to be in the affirmative.\textsuperscript{153} In conclusion, the strict liability claim, like the negligence claim, should withstand a motion to dismiss, depending on the nature of the auto manufacturer’s defenses.

**Assumption of the Risk: A Defense of the Manufacturer**

One affirmative defense which the manufacturer may seek to invoke is assumption of the risk.\textsuperscript{154} The theory of this defense is that the plaintiff has agreed in advance to waive the defendant’s duty toward him.\textsuperscript{155} Assumption of risk must be distinguished from contributory negligence. The former requires knowledge of the danger, and intelligent acquiescence; the latter requires unreasonable conduct.\textsuperscript{156} Jurisdictions which still recognize the assumption of risk defense with respect to negligence\textsuperscript{157} generally apply it to strict liability as well,\textsuperscript{158} a position

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\textsuperscript{153} See subsection entitled Negligence supra.

\textsuperscript{154} For other possible defenses, see notes 29-39 and accompanying text (abnormal use), 44-46 and accompanying text (contributory and comparative negligence) supra.

\textsuperscript{155} See W. Prosser, Law of Torts § 68, at 440 (4th ed. 1971); Noel, supra note 30, at 120.

\textsuperscript{156} Koshorek v. Pa. R.R. Co., 318 F.2d 364 (3d Cir. 1963); see also W. Prosser, Law of Torts § 68, at 441 (4th ed. 1971); Noel, supra note 30, at 106.


with which the Restatement and California are in accord. Assumption of the risk is a question of fact for the jury.

For the assumption of risk defense to apply, the plaintiff must "know, understand, and voluntarily incur the risk." In the negligence context the manufacturer would argue that the plaintiff had known and understood from common experience that many drivers operate their vehicles at excessive speeds, and that by entering the public highway the plaintiff had voluntarily incurred the risk of collision with such a driver. Indeed, there is a suggestion in the Schemel dissent that assumption of risk may have been a serious issue in that case.

The assumption of risk defense should not be successful in the automobile situation. First, as Dean Prosser points out, a plaintiff does not assume a risk when the defendant's conduct has left him no reasonable alternative. In several older cases, railroads had negligently failed to fence off portions of track, with the result that cattle grazing on nearby farmland had been killed by passing trains. The courts held the farmers could not be required to forego pasturing their cattle because of the railroad companies' omissions. Dean Prosser draws from those cases the general principle that "the plaintiff is not required to surrender a valuable legal right, such as the use of his own property as he sees fit, merely because the defendant's conduct has threatened him with harm if the right is exercised."

The same is true of the plaintiff who drives his car on the public highway. He should not be expected to forego the legal right to drive his car simply because the manufacturer's conduct in building a car capable of dangerous speeds has threatened the exercise of that right.

Second, the assumption of risk defense in this context is conceptually similar to that in any other case involving auto-
mobile accidents. If the court were to hold that mere entry onto the public highway constitutes an assumption of the risk of meeting speeding drivers, it is hard to conceive of any negligent highway-related act which could give rise to liability. The logical consequence would be that the plaintiff would be unable to recover from the speeding driver, even in an ordinary negligence suit. A plaintiff who has assumed the risk that cars capable of speeding will be placed on the road has certainly assumed the risk that such cars will actually be operated at those speeds. Assumption of risk is simply not a viable defense in the defective automobile case.

Advantages in Maintaining a Cause of Action in Both Negligence and Strict Liability

The availability of both the negligence and strict liability causes of action ultimately rests on reasonableness. In negligence the focus is on whether the manufacturer acted unreasonably in marketing the product. In strict liability the question ordinarily is whether the manufacturer, if he had known the product contains a particular characteristic, would have been acting unreasonably by marketing it anyway. In the present context the manufacturer does know that the car he produces is capable of excessive speed. When he has such knowledge, it is therefore not surprising that the two claims ultimately turn on the same basic issue. That being the case, it might be asked why there would be any advantage in maintaining both causes of action. Depending on the facts of the individual case, there are at least three ways in which the outcomes of the two claims might differ.

First, the strict liability claim can encounter difficulty when the plaintiff is an unrelated bystander. If injury to him was reasonably foreseeable, the fact he was not a user or consumer does not bar liability in negligence. In some jurisdictions, however, it may bar recovery in strict liability. Thus the negligence claim would withstand a motion to dismiss in some cases in which a strict liability claim would not.

Second, defenses to the two claims can vary. Contributory negligence, clearly at least a partial defense to negligence, is

167. See text accompanying notes 49-50 supra.
169. See, e.g., CAL. CIV. CODE § 1714 (West 1973). The word "partial" was inserted in the text because many states have adopted the doctrine of comparative
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not ordinarily a defense to strict liability.\footnote{70} For example, if the plaintiff's failure to wear a seat belt contributed to his injuries, a strict liability count might be necessary, depending on the jurisdiction.\footnote{71} In addition, since the advent of comparative negligence,\footnote{72} the issue has arisen whether negligence on the part of the plaintiff will reduce the recovery when the action is brought on a strict liability theory.\footnote{73} California has recently responded to this issue in the affirmative.\footnote{74}

Third, it is possible damages recoverable in strict liability may vary from those recoverable in negligence. The strict liability policy of spreading the losses when defective products cause injuries may militate toward allowing more liberal recovery. On the other hand, strict liability represents a lower degree of fault than negligence. Focusing on the defendant's conduct might therefore result in restricting the categories of available damages. At the present time, case law on damages recoverable in strict liability actions is still somewhat meager.\footnote{75}

\textit{Policy Considerations}

It has generally been recognized by highway specialists that there are three main elements of a traffic safety program:

negligence, under which the damages of a contributorily negligent plaintiff are reduced proportionately. See, e.g., Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).


\footnote{172} See note 169 supra.


\footnote{174} Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978).

\footnote{175} Among the leading cases are Sealy v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965), and Santor v. A. & M. Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965).
the driver, the vehicle, and the motoring environment.\textsuperscript{176} With the publication of Ralph Nader's 1965 exposé of automobile safety defects,\textsuperscript{177} the vehicle component increased sharply. Creating an incentive for manufacturers to prevent lawless speeding would seem to be the next logical step in the progression of improved safety standards for automobiles.

Liability for production of a car capable of excessive speed is no more intrusive, on either the manufacturer or the consumer, than many of the existing safety requirements. When compared with such standards as a seat belt system,\textsuperscript{178} in fact, it is arguably even less intrusive. Preventing a car from exceeding a particular speed, as long as that speed is at least as high as the maximum posted limit,\textsuperscript{179} does nothing more than prevent the driver from committing an act which is already criminally proscribed. In addition, the restriction would be far less paternalistic. While a seat belt generally protects no one but the user,\textsuperscript{180} a maximum speed standard would protect other innocent people.

Legitimate concern might arise about what will happen if the courts impose liability on manufacturers of excessively fast cars, for injuries which would not have occurred but for the speeding capacity. Most likely, there would initially be many large judgments entered against automobile manufacturers, and it is plausible to assume that those costs will be passed on to the consumer. Because the money paid out by the manufacturers represents payments which would have been at least partially borne by the speeding drivers and their insurance carriers, however, it can be assumed any increase generated in automobile prices will be offset nationwide by a corresponding


\textsuperscript{179} Schemel was decided in 1967, before imposition of the 55 m.p.h. speed limit. Even then, however, the highest legal speed was 70 m.p.h. in 44 states, 75 in 3, 80 in 1, and "reasonable and proper speeds" in 2. Schemel v. General Motors Corp., 384 F.2d 802, 805 n.2 (7th Cir. 1967) (Kiley, J., dissenting). The G.M. car was proceeding at 115 m.p.h. at the time of the accident. \textit{Id.} at 803.

\textsuperscript{180} It is recognized, of course, that even a requirement designed only to protect the user of a product can indirectly benefit others. Thus an injury resulting from failure to wear a seat belt can cause emotional and financial hardship to other members of the family, place an extra strain on the community's medical resources, and boost insurance rates for everyone.
decrease in insurance premiums. Thus the short-term effect on all parties is negligible: The consumer's total bill for his car and his insurance premium remain fairly constant; the manufacturer's additional costs are offset by the additional price of the car; and the insurance company's reduced claims permit a premium structure lower than it would otherwise have been.

The real benefit of imposing liability is long-term. The existing system has the advantage of allowing recovery from the deep pocket of the insurance company. This advantage will not be lost, for the manufacturer's deep pocket will partially replace that of the insurance company. The difference is that while both deep pockets have the desire to keep accidents to a minimum, only the manufacturer has the ability to do so. He can take action to prevent cars from speeding; the insurance company cannot. It will be to his advantage to stop designing cars capable of excessive speed, and it is thus likely he will do so. Therefore, in the long run there will no longer be the question of who is to bear the costs of excessive speeding; there will simply be no such costs for anyone to bear. Finally, recovery from the manufacturer might be the only recourse of the innocent bystander plaintiff. The driver of the speeding automobile might be judgment-proof except for an inadequate liability insurance policy. A products liability action based on defective design will be the only reasonable alternative for a plaintiff placed in such a position.

**CONGRESSIONAL REGULATION OF EXCESSIVE SPEED**

In addition to the policy considerations already discussed with respect to judicial imposition of common law liability, other factors become important when congressional action in this area is considered.

An automobile manufacturer provides a needed product when he markets a car. At the same time, however, he creates several adverse effects: the exposure of people to safety hazards, the consumption of critically scarce energy resources, and the pollution of the air. It is reasonable to require that one whose actions cause such adverse consequences submit to unin-

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181. The differences would not be exactly the same because the class of people paying insurance premiums does not coincide precisely with the class of automobile buyers.

One cost of high speed capacity is the law enforcement problem it creates. Although the fifty-five mile per hour speed limit has been highly popular, serious enforcement problems exist. The enormous increase in citations has to some extent diverted highway patrol units from other important functions, including the policing of county roads on which accident frequency is sometimes higher. Therefore one important cost reduction in limiting automotive speed capacity is that law enforcement officials will not have to spend as much of their time policing violations of speed limit laws.

In addition, public attention has recently focused on the acuteness of the fuel crisis confronting the United States. As of January, 1975, the United States was importing thirty-eight percent of its petroleum needs, contributing to a fiscal year 1974 trade deficit of five billion dollars. Reliance on foreign oil also makes American energy needs dependent on the whims of foreign governments' political policies. Most importantly, unnecessary consumption of fuel further reduces the world's finite resources. About fourteen percent of American energy consumption is traceable to its more than one hundred million registered motor vehicles. The problem posed by automotive fuel consumption is obviously enormous.

The fifty-five mile per hour speed limit was enacted by Congress for the express purpose of addressing this energy shortage. It was based on the assumption that there was a correlation between high speeds and fuel consumption. Prior to enactment of the fifty-five mile per hour limit, the Federal Highway

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183. See notes 194-195 infra.
187. Compare to the $5 billion trade surplus in the preceding year. Id.
188. Id. at 1; FED. ENERGY ADMIN., DON'T BE FUELISH. TIPS FOR THE MOTORIST 1.
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Administration had completed a comprehensive study of the effects of speed on mileage. Testing a wide variety of cars, it found that fuel consumption increased dramatically at speeds above fifty miles per hour, soaring almost out of sight above seventy miles per hour. The results of the fifty-five mile per hour limit bear out this assumption. The Institute of Transportation Engineers calculated that reduced speeds saved three billion gallons of gasoline in 1974. The California Highway Patrol estimated that if all Californians were to obey the speed limit for one month, almost twelve million gallons would be saved. The EPA and FEA, in a joint publication, claim that for every ten miles per hour above fifty, mileage decreases by ten to fifteen percent. Therefore, by building cars capable of reaching high speeds, manufacturers aggravate the already high rates of automobile fuel consumption.

EPA studies reveal that a reduction in the speed limit from sixty-five miles per hour to fifty-five miles per hour reduces emissions of nitrogen oxides by sixteen percent. At the same time, however, hydrocarbon and carbon monoxide emissions actually increased slightly. Thus, the effects of high speeds on air quality are mixed.

Congressional enactment of the fifty-five mile per hour speed limit has received wide official acclaim and overwhelming popular support, with the strongest agreement...
being that it has saved lives. It is feasible to expect that other lifesaving provisions would be welcomed with equal enthusiasm once the beneficial effects are felt.

Congress could set a maximum speed potential for cars manufactured after a specified date. Such a statute could be enacted either independently or as an amendment to the National Traffic and Motor Vehicle Safety Act of 1966. The purpose of the latter statute is “to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents.” Given the substantial correlation between reduced speeds and highway safety, regulating maximum speed potentials within the 1966 Act would be a natural way in which to fulfill that goal.

If Congress is unwilling to enact permanent legislation, it could enact temporary legislation, as was done with the fifty-five mile per hour speed limit, observe the results, and make the legislation permanent once it proves successful. Congress could make maximum speed potentials applicable to one or two new model years, observe the accident rates for the new cars, and then decide whether to make the legislation permanent.

**FEDERAL ADMINISTRATIVE REGULATION**

Pursuant to the National Traffic and Motor Vehicle Safety Act of 1966, the Secretary of Transportation is required to promulgate federal motor vehicle safety standards. The statute defines “motor vehicle safety” as protection of the public against “unreasonable risk of accidents occurring as a result of the design, construction, or performance of motor vehicles.”

200. See note 199 supra.
202. Id. § 1381.
203. See subsection entitled Traffic Accidents and Fatalities supra.
207. 15 U.S.C. § 1392(a) refers to the “Secretary.” The “Secretary,” in turn, is defined as the Secretary of Transportation. 15 U.S.C. § 1391 (1970). The National Highway Traffic Safety Administration can and should promulgate regulations imposing a maximum speed limit potential on new cars. It might additionally be argued that the Federal Energy Administration, or even the Environmental Protection Agency, could regulate in this manner, for high speeds also affect energy consumption and air pollution. See text accompanying notes 126-138 supra.
The standards actually set "shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms." In prescribing standards, the Secretary is required to consider "the extent to which such standards will contribute to carrying out the purposes" of the statute. The Secretary of Transportation has in turn delegated to the National Highway Traffic Safety Administrator the authority provided by the 1966 Act.

These statutory guidelines arguably authorize the Administrator to order manufacturers to limit the maximum speed of new cars to a specified level. As was detailed earlier, building cars capable of excessive speed exposes the public to an unreasonable risk of accidents, precisely the risk which the safety standards are statutorily intended to confront. Because limiting top speed is practicable, and because the order setting such a limitation could easily be stated in objective terms, there seems to be no barrier to an order limiting the maximum speed potential of new cars.

In fact, regulations have been adopted limiting indicated speed on new car speedometers to a maximum eighty-five miles per hour. The purpose of the regulation was stated in the notice of proposed rulemaking:

This proposed standard for reduced maximum speedometer indication has been initiated to help maintain these lower speeds at minimum costs.

Benefits are expected to be achieved by the proposed standard in several ways. First, whatever temptation present speedometers provide immature drivers to test the top speed of their vehicles will be diminished. Second, shifting the indication for 50 or 60 mph from the center of the speedometer dial nearer to the right end should suggest to drivers that these speeds are near the legal limit. Existing speedometers which indicate speeds of 120 mph or more

209. Id. § 1392(a).
210. Id. § 1392(f)(4).
213. See section entitled Imposition of Common Law Liability by the Courts supra, which shows that the burden of taking precautions to guard against excessive speeding would be slight in relation to the harm of not taking such precautions.
use more than half of the dial to indicate illegal and dan-
gerous speeds.

Finally, limiting the maximum indication to 85 mph will allow speedometer dials to be more precisely gradu-
ated and more readable in the range of speeds normally driven. The NHTSA regards 85 mph as an appropriate maximum indication, since a much higher figure would defeat the desired effect of the rule.217

Adoption of this rule indicates the agency’s awareness of the problem.

Finally, the extent to which maximum speed capacity standards will contribute to carrying out the purposes of the statute must be considered.218 Since the expressed legislative purpose was “to reduce traffic accidents and deaths and inju-
ries to persons resulting from traffic accidents,”219 and since a high correlation exists between reduced speeds and highway safety,220 an administrative order limiting top speed of new cars would contribute greatly toward the legislative purpose.

Such a regulation would be less intrusive than many exist-
ing safety standards, which impose such requirements as a windscreen washing system221 and detailed specifications as to impact protection for all occupants.222 Other existing regulations often do nothing more than protect the driver against his own willingness to risk harm to himself. Examples include the requirements of a seat belt warning system,223 and of a theft control key-locking system with a warning buzzer to be acti-
vated whenever the key is left in the ignition.224 Compared to these requirements, prohibiting a car from injuring others by traveling at an already lawless speed is a mild way in which to reduce accidents and fatalities.

CONCERNS ABOUT THE APPROPRIATE BRANCH OF GOVERNMENT TO ACT

The desirability of imposing liability for speeding injuries

217. Id.
219. Id. § 1381.
220. See section entitled Imposition of Common Law Liability by the Courts supra.
221. 49 C.F.R. § 571.104-S4.2 (1976).
222. The specifications for the impact protection system generally appear at id. § 571.201. Other specifications pertain to the head restraint system, id. § 571.202, and protection of the driver from the steering wheel, id. § 571.203.
223. Id. § 571.208.S7.3.
224. Id. § 571.114.S4.4.
on manufacturers of unnecessarily fast cars has been demonstrated. It has also been shown that such liability could alternatively be imposed by the courts, by Congress, or by the National Highway Traffic Safety Administration. Several considerations arise in determining which of the three alternatives would be best.

One clear concern is that the liability issue is so intimately related to basic policy that the decision should be made only by a legislative body. The court in Schemel seemed uneasy about making such an important decision, quoting approvingly the district court's opinion that the problem of devising safety standards is a legislative one.\(^{225}\)

The Schemel court's philosophy about the judicial role is understandable. Being popularly elected, Congress is probably the best authority for making what might be regarded as a value judgment on policy—whether the human and economic costs of traffic accidents outweigh whatever benefits powerful engines and the absence of governors are intended to confer. Yet the courts have always been called upon to make important policy decisions, and when the issue is one of finding simple negligence or even strict liability, the fact that the issue is an important one does not make assertion of judicial authority any less legitimate. It would seem that while policymaking can be most ideally effected by Congress, the courts too can properly act in this area.

In addition, a judicial decision for the defendant is every bit as much a policy decision as one for the plaintiff. When an injury occurs, someone must incur the cost. A decision by a court not to submit the case to the jury is in essence a judicial declaration that as between the injured bystander and the manufacturer, the former should bear the expense. Therefore the question is not whether a court should make a policy decision, but rather which of several policy alternatives it should select.

A second consideration is that of relative expertise. The administrative agency charged with traffic safety would obviously have the greatest technical expertise on this subject. However courts have always resolved issues of the reasonableness of conduct: when a subject is beyond the technical grasp of a lay trier of fact, expert witnesses provide the necessary information.

\(^{225}\) Schemel v. General Motors Corp., 384 F.2d 802, 805 (7th Cir. 1967).
One court, expressing reluctance to impose liability in design defect cases, noted the possibility of a third problem; inconsistent judgments. Two types of inconsistencies are possible. One is that some courts (and juries) might permit recovery, while others deny it. The second is that those courts permitting recovery might differ as to the maximum allowable speed potential consistent with reasonableness. In either case, the manufacturer could protect himself by complying with the most restrictive of the holdings.

A final concern involves the timing of decision making. On the one hand, there is a need to act promptly so that compensation will not be prevented and deterrent effect lost. On the other hand, it is desirable that the defendant manufacturer receive fair warning of the potential for liability. While a court can give prompt relief by acting directly on the parties before it, the first such cases may catch the manufacturer by surprise if the decisions are made retroactive. This result is not necessarily unfair. The manufacturer does have warning that an unreasonably dangerous design could culminate in liability. That he does not know in advance whether the jury would find his design unreasonable is no truer here than in any other design defect case, or, for that matter, in any ordinary negligence case.

By contrast, if Congress sets a maximum speed capacity, it could easily limit the legislation to cars manufactured in the future. Even as to those cars, the hearings and committee reports implicit in the legislative process, while prolonging the procedure, would give the automobile industry time to prepare for compliance. The same is true of an NHTSA regulation, for advance notice of 180 days to one year is required, absent good cause. In addition the protective rulemaking procedure of the Administrative Procedure Act has been made expressly applicable. Thus either legislative or administrative action would afford substantial protection to the manufacturer without impairing the need for swift relief.

227. The issue of whether and when judicial decisions can be made prospective only is beyond the scope of the paper. See K. Davis, Administrative Law—Cases—Text—Problems 549-63 (1973).
228. 15 U.S.C. § 1392(c) (1970). The 180-day requirement also applies to orders revoking regulations. Id. § 1392(e).
CONCLUSION

The costs of high automobile speeds include an increased number of highway deaths and disabling injuries, wasteful consumption of precious fuel resources, and added air pollution. Manufacturing cars capable of lawless speeds permits these harmful effects without serving any useful social function. It is difficult to understand why the law allows such a practice to continue.

Imposition of common law liability fits nicely into existing tort law. There is little doubt that an automobile travelling on public highways in excess of one hundred miles per hour poses a danger to others travelling at lawful speeds. Each moment of hesitation causes a heavy toll of death and injury. If the courts fail to apply common law sanctions, either the legislative or executive branch must act.

One might try to imagine what the popular and the judicial reactions would be if a new product were to contain a feature which caused these effects, and which conferred no offsetting "benefits" other than to render the product capable of being used in a criminally irresponsible manner. In such a case the reaction would undoubtedly be one of immediate and uniform condemnation. The time has come to apply the same standard to the manufacturer of motor vehicles.