No Duty at Any Speed?: Determining the Responsibility of the Automobile Manufacturer in Speed-Related Accidents

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NO DUTY AT ANY SPEED?: DETERMINING THE RESPONSIBILITY OF THE AUTOMOBILE MANUFACTURER IN SPEED-RELATED ACCIDENTS

As the automobile enters its second century of existence, it is appropriate to examine an automobile industry paradox: while the national speed limit has been established at 55 miles per hour, manufacturers continue to design automobiles that achieve speeds upwards of 100 miles per hour. In response to the devastating number of deaths and injuries caused by automobile accidents, courts and legislatures have expanded the responsibility of the manufacturer for the safety of the automobile. Congress has required that manufacturers make automobiles crashworthy. Courts have held automobile manufacturers

2. 23 U.S.C. § 154 (1982) provides that the Secretary of Transportation shall not approve federal aid for any state highway project in any state with a maximum speed limit on any highway in excess of 55 miles per hour. Each state is required to certify to the Secretary before January first of each year that it is enforcing all speed limits in accordance with § 154. 23 U.S.C. § 141 (1982).
   Each state must submit data to the Secretary in order to support its compliance with the maximum speed limit. If the data shows that the percentage of motor vehicles exceeding 55 miles per hour is greater than 50%, the state's federal aid highway funds will be reduced by up to 10% of the amount to be apportioned for the following fiscal year. 23 U.S.C. § 154(f) (1982).
3. For example, an analysis of the Mazda RX-7 included a discussion about the steering capabilities of the RX-7 at 112 miles per hour. Yamaguchi, Mazda RX-7 Technical Analysis, ROAD & TRACK, Nov. 1985, at 47, 47. The BMW 325i has a top speed of 135 miles per hour. Frere, Letter From Europe, New 3-Series BMWs, ROAD & TRACK, Nov. 1985, at 119, 120. The SAAB 900s claims a top speed of 105 miles per hour. Girdler, SAAB 900S 2-Door, ROAD & TRACK, Nov. 1985, at 144, 145.
   The total economic cost of motor vehicle accidents in the United States in 1982 was 60.2 billion dollars. Id.
5. See § 103 of the National Traffic & Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381-98 (1982). Performance requirements have been established for the protection of vehicle occupants in crashes. The standards are applicable to passenger cars, multipurpose passenger
liable for manufacturing and design defects which cause automobile accidents (first collisions). Manufacturers have also been held liable for defects which do not actually cause accidents, but which increase the injuries sustained by passengers in accidents resulting from other vehicles, trucks, and buses. The stated purpose of the standards are to reduce the number of deaths of vehicle occupants, and the severity of injuries, by specifying vehicle crashworthiness requirements in terms of forces and accelerations measured on anthropomorphic dummies in test crashes, and by specifying equipment requirements for active and passive restraint systems.


6. RESTATEMENT (SECOND) OF TORTS § 402A (1965) states:
   (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
      (a) the seller is engaged in the business of selling such a product, and
      (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
   (2) The rule stated in Subsection (1) applies although
      (a) the seller has exercised all possible care in the preparation and sale of his product, and
      (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

The product is considered to be defective if, at the time it leaves the seller's hands, it is "in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him." Id., comment g.

A product may be defective because of a manufacturing flaw. See, e.g., Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944) (defective soda bottle broke in waitress's hand). The allegedly defective product can be compared with properly manufactured items in the same product line in order to determine if the product was, in fact, defective.

A product may also be defective because of its design. See, e.g., Dawson v. Chrysler Corp., 630 F.2d 950 (3d Cir. 1980) (holding manufacturer liable for defective design of automobile door which failed to withstand a side impact), cert. denied, 450 U.S. 959 (1981). Unlike manufacturing defects, design defects cannot be determined by comparing a particular product with other products in the same line. An alleged design defect presupposes that all products within a line share the same defect. In such cases, comparison of products within the same line would be meaningless.

Courts have focused on a risk-utility analysis as a means of determining whether or not a product is defectively designed. See, e.g., Dawson v. Chrysler Corp., 630 F.2d 950 (3d Cir. 1980), cert. denied, 450 U.S. 959 (1981); Dreisonstok v. Volkswagenwerk A.G., 489 F.2d 1066 (4th Cir. 1974); Barker v. Lull Eng'g Co., 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978); Wilson v. Piper Aircraft Corp., 282 Or. 61, 577 P.2d 1322 (1978). This author takes the position that the speed capabilities of an automobile raise design questions which should be analyzed by using a risk-utility approach once the court determines that the manufacturer owes a duty to the plaintiff. See infra text accompanying notes 94-97.

causes (second collisions). The law of products liability has evolved to the point where automobile manufacturers must foresee a certain amount of misuse of their products: for example, drivers may have to swerve in order to avoid danger. Furthermore, it is expected that drivers will exceed the speed limit on occasion. Since manufacturers are required to anticipate that drivers will behave negligently, they have a duty to design automobiles that will withstand colli-

8. These injuries are referred to as second collision injuries, because they are caused by the impact of the passenger's body on the interior compartment of the vehicle. Automobile manufacturers are now required to design cars that are "crashworthy," see supra note 5, so as to minimize second collision injuries; they must provide a safe environment in which to have a collision, since accidents are recognized as an everyday fact of life within the ambit of foreseeability to the manufacturer. For a general discussion of crashworthiness and second collisions, see Rheingold, The Expanding Liability of the Product Supplier: A Primer, 2 Hofstra L. Rev. 521 (1974); Norman & Horgan, Crashworthiness: The Enhanced Injury Case, 20 Trial 84 (March 1984). But see Hoenig & Werber, Automobile "Crashworthiness": An Untenable Doctrine, 1971 Ins. L.J. 583.

For cases involving second collision injuries, see Huff v. White Motor Corp., 565 F.2d 104 (7th Cir. 1977), where a manufacturer was held liable for enhanced injuries resulting from faulty design of the fuel system. Although it did not cause the original collision, the defect caused the vehicle to burst into flames, killing the driver; Larsen v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968), where an automobile manufacturer was held liable for a defectively designed steering mechanism which was thrust into plaintiff's head after the impact of a head-on collision. The court in Larsen stated:

While all risks cannot be eliminated nor can a crash-proof vehicle be designed under the present state of the art, there are many common-sense factors in design, which are or should be well known to the manufacturer that will minimize or lessen the injurious effects of a collision.

Id. at 503; Ford Motor Co. v. Zahn, 265 F.2d 729 (8th Cir. 1959), where an automobile manufacturer was held liable for injuries sustained by plaintiff when driver rapidly applied the brakes. Plaintiff's head hit the dashboard and came in contact with the jagged edge of a defective ashtray.

9. See, e.g., Culpepper v. Volkswagen of Am., 33 Cal. App. 3d 510, 109 Cal. Rptr. 110 (1973), which held an automobile manufacturer liable for designing an automobile which overturned when plaintiff's driver turned the wheel sharply at a speed of 42 miles per hour in order to avoid an accident. The court reasoned that a driver may be required to turn the wheel sharply for a variety of reasons and thus did not consider whether or not the driver had been negligent in failing to check for traffic before moving into the right lane. The court stated that "situations of peril do arise daily requiring heroic turning maneuvers," which the automobile should be designed to withstand. Id. at 518, 109 Cal. Rptr. at 115.

10. See, e.g., LeBouef v. Goodyear Tire & Rubber Co., 623 F.2d 985 (5th Cir. 1980), stating that while speeding is illegal, "[i]t would be blinking [at] reality . . . to hold that Ford could not reasonably have expected purchasers of any automobile, . . . to transgress our nation's speeding laws periodically." Id. at 989, n.4 (emphasis added).

11. The duty concept is not easily defined. Before a determination can be made that a party was negligent towards an injured party, it must first be determined that the party owed a duty to the injured party. Various policy concerns will influence the decision that a duty was owed. Professor Green states:

The determination of the issue of duty and whether it includes the particular risk imposed on the victim ultimately rests on broad policies which underlie the law.
sions and prevent or minimize second collision impact.

While automobile manufacturers are required to foresee the negligence of drivers, thus far they have not been held accountable for injuries caused by the speed capabilities of their products. Auto-

These policies may be characterized generally as morality, the economic good of the group, practical administration of the law, justice as between the parties, and other considerations relative to the environment out of which the case arose.

Green, Duties, Risks, Causation Doctrines, 41 TEX. L. REV. 42, 45 (1962).

The policy issues implicated in a determination of duty are readily apparent in the area of social host liability. In Kelly v. Gwinnell, 96 N.J. 538, 476 A.2d 1219 (1984), the Supreme Court of New Jersey held that a social host who provides intoxicating liquor to a guest, knowing that the guest is intoxicated and will soon drive, is jointly and severally liable (together with the intoxicated guest) to a party injured as a result of the guest’s drunk driving. The court first determined that the host had not behaved reasonably: he provided his guest with liquor knowing that the guest was intoxicated and would have to drive in order to get home. The court then examined the question of whether or not it was realistic to impose a duty on a social host to victims of his guest’s drunken driving. Id. at 544, 476 A.2d at 1222.

The court recognized that the imposition of a duty required a balancing of public policy and fairness issues. It found that judicial imposition of this duty was consistent with a legislative goal of reducing drunk driving. The financial burden the duty would place on the host (a burden which the host would not be able to pass on to guests as would a facility licensed to serve alcohol to its customers) was outweighed by the interest in compensating the innocent victims of drunk driving. The court’s concern about the chilling effect the imposition of this duty would have on private socializing, as well as the concern that the host should not be responsible for the intervening recklessness of the drunk driver, was similarly outweighed by its conclusion that “society . . . must change its habits and do whatever is required . . . in order to stop the senseless loss inflicted by drunken drivers.” Id. at 558-59, 476 A.2d at 1229. Contra Edgar v. Kajet, 84 Misc. 2d 100, 375 N.Y.S.2d 548 (Sup. Ct. 1975), aff’d, 55 A.D.2d 597, 389 N.Y.S.2d 631 (1976) (refusing to impose a duty on social hosts because of the difficult policies implicated and a belief that the legislature did not intend to enact a law making the provision of alcohol at social events actionable). See also Tarasoff v. Regents of the University of California, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976) (holding a therapist liable to the foreseeable victim of a patient the therapist knows is violent, despite the chilling effect such a duty will have on the confidentiality of the patient-therapist relationship); Kelley v. R.G. Indus., Inc., 304 Md. 124, 497 A.2d 1143 (1985) (holding a manufacturer of small, easily concealed “Saturday Night Special” handguns liable to innocent persons who suffer gunshot injuries from the criminal use of their products, because the manufacturer (or seller) knows or ought to know that he is making (or selling) a product principally to be used in criminal activity).

Once it is determined that one party owes a duty of reasonable care towards an injured party, what is reasonable in a particular case is determined by a risk-utility analysis. Green, supra this note, at 45. Risk-utility analysis was expressed by Judge Learned Hand in United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947), as a function of three variables: 1) the probability of harm occurring, 2) the gravity of the injury that would result if the harm did occur, and 3) the burden of adequate precautions to guard against the harm occurring. Id. at 173. If the product of the first two factors exceeds the burden of adequate precautions, the failure to take those precautions constitutes negligence. Posner, A Theory of Negligence, 1 J. LEGAL STUD. 29, 32 (1972). For an alternative expression of the reasonableness standard, see Terry, Negligence, 29 HARV. L. REV. 40, 42-43 (1915) (negligence depends on an evaluation of five factors).
mobile manufacturers, perhaps recognizing their apparent insulation from liability, have continued to market their products aggressively with an emphasis on speed and power.\textsuperscript{12}

This Note discusses the limited case law addressing the question of manufacturer liability for injuries caused by excessive speeding, and criticizes the use of single-factor duty tests\textsuperscript{13} which have prevented plaintiffs from litigating their claims. The author recommends that courts use a multi-factor test\textsuperscript{14} in determining whether a manufacturer owes a duty to those injured in accidents involving excessive speeds.

\section*{I. Schemel v. General Motors Corp.\textsuperscript{15}}

The only case to consider a cause of action against an automobile manufacturer for designing an automobile capable of attaining excessive speeds exculpated the manufacturer from liability. The case, however, was predicated on faulty reasoning no longer applicable in modern products liability law.

\textsuperscript{12} For example, a current television advertisement contains the following language: At 110 miles per hour engineers find the new HONDA ACCORD LXI Hatchback to be quiet and comfortable. And at that speed you could find it to be twice as quiet and comfortable.

A VOLVO advertisement in a recent issue of Motor Trend reads:

Yes. It will fly. If you don't believe it, strap yourself into the cockpit of a VOLVO 740 Turbo and take off.

This flying machine will rocket you from a standing start to legal speed in 6.7 seconds . . . So check into your VOLVO dealers and log some time in the intercooled 740 Turbo.

No pilot's license required.

\textit{Motor Trend}, Nov. 1985, at 121.

Similar advertisements were criticized in 1963 by Professor O'Connell, who argued that advertising and sales techniques play a large role in creating public tastes. O'Connell, \textit{Taming the Auto}, 58 Nw. U.L. Rev. 299, 358-59 (1963). Consumers desire powerful cars as an outlet for aggression. Automobile manufacturers cultivate this desire by portraying their cars as symbols of speed and strength. \textit{Id.} at 362. Even the names given to cars suggest speed, power, and daring (e.g., Electra, Firebird, Thunderbird, Cougar, Cobra, Jaguar). \textit{Id.} at 361. One conclusion to be drawn from Professor O'Connell's analysis is that consumers will expect the automobile to be safe at the speeds it is depicted as capable of achieving, and that consumers will be encouraged to drive at excessively high speeds. For an analysis of the role of consumer expectations in determining whether a product is defective, see infra note 24.

\textsuperscript{13} The two single-factor duty tests referred to in this Note are the patent danger rule and the intended purpose doctrine. \textit{See infra} notes 56-85 and accompanying text.

\textsuperscript{14} \textit{See infra} notes 94-97 and accompanying text.

A. Trial Court

In Schemel, the plaintiff brought an action against General Motors (GM) to recover for personal injuries sustained when his car was struck from the rear by a GM Chevrolet Impala. The Impala was being driven at a speed of approximately 115 miles per hour when it struck plaintiff's car.16

Plaintiff claimed that GM had a duty to the public to refrain from (1) manufacturing and selling cars capable of attaining speeds in excess of 100 miles per hour, and (2) advertising its products in such a way as to encourage irresponsible and reckless drivers to drive at excessive speeds.17

GM moved to dismiss plaintiff's action for failure to state a claim upon which relief could be granted.18 The United States District Court for the Southern District of Indiana granted GM's motion and dismissed plaintiff's action, relying heavily on Evans v. General Motors Corp.,19 a case decided by the same court and affirmed by the United States Court of Appeals for the Seventh Circuit. The Evans case stood for the proposition that a plaintiff could only recover for injuries sustained while the product was being used for its intended purpose.20

The Evans court relied on the patent danger rule for the proposition that the automobile manufacturer had no duty to render the vehicle more safe, since the danger of unintended uses was obvious. The patent danger rule has since been rejected. See infra notes 60-80 and accompanying text. The court also stated that any decision to require automobile manufacturers to construct automobiles in which it would be safe to collide would have to be a legislative decision. 359 F.2d at 824.

The court's reasoning is flawed in several respects. While the court placed primary emphasis on the patent danger rule, it did not articulate those dangers which it found to be obvious to the decedent, or to any reasonable driver. Whether the average driver is even aware of the type of frame his car is built upon is open to question. It is highly doubtful that the dangers of a X-shaped frame, not even visible to the consumer, can be considered open and obvious when compared with products considered in other cases relying on the patent danger rule. See, e.g., Jamieson v. Woodward & Lothrop, 247 F.2d 23 (D.C. Cir.) (en banc), cert. denied, 355 U.S. 855 (1957) (manufacturer of an elastic exercise rope not liable to plaintiff

16. Id. at 135.
17. Id.
18. Id.
20. Id. at 824-25. In Evans, the driver of a car designed by defendant GM was killed in a collision. While plaintiff did not claim that the design of the car caused the accident, she alleged that an alternative design would have provided additional protection to the driver in the event of a collision. The court acknowledged that the injury occurred in a manner foreseeable to the manufacturer, yet dismissed plaintiff's action, holding that the manufacturer had no duty to make the automobile safer as long as it was already safe for its intended purpose. Id.
Based upon the *Evans* holding, the *Schemel* court concluded that defendant had no duty to restrict the speed of its vehicles. While speeding was foreseeable to the manufacturer, speeding was illegal per se in the absence of a justifiable excuse. The court refused to impose a duty upon defendant to make it impossible for its products to be used in an unlawful manner. The court went on to state that any changes in automobile design safety would have to be embodied in a uniform national standard established by the legislature, and not hammered out on a case-by-case basis by the judiciary.

Furthermore, since GM's advertisements were truthful, the

who sustained severe eye injuries, since it was obvious that if the rope was stretched and then quickly released it would snap back); Myers v. Montgomery Ward & Co., 253 Md. 282, 252 A.2d 855 (1969) (manufacturer of a rotary blade power lawnmower not liable for injuries sustained when plaintiff fell and his foot slipped under the mower while it was running; it was obvious that if a person using the mower fell, there was no safety guard to prevent a leg or arm from slipping under the machine); Blissenbach v. Yanko, 90 Ohio App. 557, 107 N.E.2d 409 (1951) (manufacturer of a steam vaporizer not liable for severe burns sustained by a child since it was obvious that if the vaporizer was tilted or upset while operating, someone could be scalded).

The intended purpose doctrine is similarly flawed. The *Evans* court concluded that the manufacturer could foresee collisions, yet required only that the product be made reasonably safe for intended purposes. The court distinguished Ford Motor Co. v. *Zahn*, 265 F.2d 729 (8th Cir. 1959), which held an automobile manufacturer liable for injuries sustained by plaintiff when the driver rapidly applied the brakes. Plaintiff hit his head on the dashboard and injured his eye on the jagged edge of a defectively manufactured ashtray. The *Zahn* court held that the manufacturer had a duty to foresee such events as collisions, or sudden application of the brakes, which would pitch a passenger forward. The manufacturer was responsible for eliminating a jagged edged ashtray which would increase the severity of injury to a passenger in such an event. The *Evans* court found that the manufacturer in *Zahn* was liable because the ashtray was unfit for its intended purpose. *Evans*, 359 F.2d at 825. The fitness of the ashtray to hold ashes, however, was not at issue in *Zahn*. The *Evans* court clearly overlooked the fact that *Zahn* held automobile manufacturers to a duty of foreseeing collisions, and constructing their products so as to minimize injuries to a passenger in the event of such a collision.


23. *Id.* The court referred to the lengthy public hearings held in the United States Senate in March and April of 1966 which examined the question of automobile safety. The National Traffic and Motor Vehicle Safety Act of 1966, P.L. No. 89-563, 80 Stat. 718, was enacted as a result of the hearings, and the *Schemel* court noted that the Act did not impose a maximum automobile speed capacity with respect to automobile designs. The court believed
court refused to consider the possibility of any adverse effect of defendant's advertising on the driving habits of its consumers. 24

that Congress would have enacted a national speed standard for the highly centralized automobile industry should Congress have deemed it necessary, 261 F. Supp. at 136.

24. The court reasoned that a manufacturer had the right to advertise its products truthfully, and that any adverse effect of truthful advertisements on the consumer were far too speculative to support a legal cause of action. Id.

This reasoning is inconsistent with Restatement (Second) of Torts § 402A (1965). Comment i to § 402A states that “[t]he article sold must be 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.” Id., comment i (emphasis added). See supra note 6.

In Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972), the California Supreme Court discussed the impact of California's adoption of § 402A. It concluded that a product was defective if a plaintiff proved that the product contained a defect which proximately caused his injuries. The court found that the “unreasonably dangerous” qualification was added to § 402A simply to protect manufacturers of inherently dangerous products, such as drugs, alcohol, and automobiles, from responsibility for all the harm that such products cause. Id. at 132, 501 P.2d at 1161, 104 Cal. Rptr. at 441.

Six years later in Barker v. Lull Eng'g Co., 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978), the California Supreme Court re-examined Cronin and other decisions which had grappled with the definition of defect. The court deviated from Cronin and read § 402A as defining defect, in part, by the consumer's expectations of the product. Barker announced a two prong test of defect. A product is defective in design either:

(1) If the product has failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or
(2) If . . . the benefits of the challenged design do not outweigh the risk of danger inherent in such design.

Id. at 418, 573 P.2d at 446, 143 Cal. Rptr. at 228 (emphasis added). The second prong of the Barker test is a traditional statement of risk-utility balancing. See supra note 11. The first prong is a formulation of the consumer expectation test.

The consumer expectation test attained status as an independent test of defective design in Leichtamer v. American Motors Corp., 67 Ohio St. 2d 456, 424 N.E.2d 568 (1981). In Leichtamer, the plaintiffs were severely injured in an offroad jeep accident when the jeep “pitched over” (the motion which would result if a skewer was run from side to side through the center of a plastic model of the jeep and then rotated so that both the front and rear bumpers moved in circles about each other). Id. at 459, 424 N.E.2d at 572. The jeep had been designed with a roll bar provided solely as protection against a side roll and not as protection against a pitch-over.

Plaintiffs claimed that the advertised use of the vehicle involved a great risk of forward pitch-overs. Id. at 459, 424 N.E.2d at 572. They faulted defendant’s advertising campaign, which stressed the jeep's ability to conquer steep hills, and challenged potential jeep owners to “discover the rough, exciting world of mountains, forest, [and] rugged terrain.” Id. at 459, 424 N.E.2d at 572. Plaintiffs testified that they had seen these ads and believed that the roll bar would protect them in the event that the vehicle landed upside down. Id. at 460, 424 N.E.2d at 573. They did not claim that the lack of protection in the event of a pitch-over caused the accident, but that it enhanced the injuries they sustained.

The court held that “[a] product will be found unreasonably dangerous if it is dangerous to an extent beyond the expectations of an ordinary consumer when used in an intended or reasonably foreseeable manner.” Id. at 467, 424 N.E.2d at 577.

For a complete discussion of the development of products liability law in California and a
B. Appellate Court

1. Majority.—Plaintiff in Schemel appealed the decision to the United States Court of Appeals for the Seventh Circuit. On appeal, plaintiff relied on section 398 of the Restatement of Torts, Second, claiming that any automobile capable of being driven at speeds in excess of 110 miles per hour was dangerous for the uses for which it was manufactured.

The court rejected plaintiff's theory and concluded that defendant's product was not being used in a lawful manner when it hit plaintiff's car. Since defendant's automobile was not dangerous when used in a lawful manner, (i.e. when driven at legal speeds), defendant could not be held liable for plaintiff's injuries.


25. 384 F.2d 802 (7th Cir. 1967), cert. denied, 390 U.S. 945 (1968).
26. Id. at 804. Section 398 provides:
A manufacturer of a chattel made under a plan or design which makes it dangerous for the uses for which it is manufactured is subject to liability to others whom he should expect to use the chattel or to be endangered by its probable use for physical harm caused by his failure to exercise reasonable care in the adoption of a safe plan or design.

RESTATEMENT (SECOND) OF TORTS § 398 (1965).

27. 384 F.2d at 804-05. The court cited § 395 of the RESTATEMENT (SECOND) OF TORTS as support for this analysis:
A manufacturer who fails to exercise reasonable care in the manufacture of a chattel which, unless carefully made, he should recognize as involving an unreasonable risk of causing physical harm to those who use it for a purpose for which the manufacturer should expect it to be used and to those whom he should expect to be endangered by its probable use, is subject to liability for physical harm caused to them by its lawful use in a manner and for a purpose for which it is supplied.

RESTATEMENT (SECOND) OF TORTS § 395 (1965) (emphasis supplied by court). The court's reliance on § 395 as support for its statement that the automobile was safe “for the purpose for which it was supplied,” 384 F.2d at 805, confuses § 395 with the Evans intended purpose doctrine, supra note 20. Section 395 does not state that the manufacturer will only be held liable when the product causes injury to someone using the product as the manufacturer intended. Comment k to § 395, entitled Foreseeable uses and risks, states that the manufacturer may reasonably anticipate other uses than what the manufacturer primarily intended. RESTATEMENT (SECOND) OF TORTS § 395 Comment k (1965). A chair manufacturer, for example, may expect that the chair will be used as a step ladder.
The court also based its rejection of plaintiff's action on the patent danger rule announced in *Campo v. Scofield.* The *Schemel* court reasoned that a manufacturer is not an insurer of its product and is therefore "not bound to anticipate and guard against grossly careless misuse of its product by reckless drivers." While the manufacturer has a duty to avoid risks created by dangers that are latent or concealed, the manufacturer owes no duty to avoid any risk created by patent, or open and obvious dangers. Since the dangers of speeding are obvious, the court refused to hold defendant liable. Implicit in the court's holding was the determination that the driver of the car which hit plaintiff's car was the only party from whom plaintiff could recover, since the driver had operated the car at unlawful speeds.

The court reiterated the district court's statement that Congress, rather than the court, should dictate any changes in automobile design standards. It concluded its opinion by stating that GM had no duty to conceal the reserve power of its automobile in advertisements in order to avoid possible misuse of the power by a "wantonly negligent driver."

2. Dissent.—Judge Kiley, disagreeing with the majority, would have allowed plaintiff to proceed with his cause of action against GM. He attacked the majority's reasoning on several grounds.

   a. Reliance on *Evans.*—Judge Kiley criticized the majority's reliance on the statement made in *Evans* that the nature and ex-

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The court's reliance on § 395 indicates that it did not consider the ability of a manufacturer of high speed automobiles, who truthfully advertises the high speed capabilities of his automobiles, to anticipate that the cars would be driven at high speeds and might cause injuries.

28. 301 N.Y. 468, 95 N.E.2d 802 (1950). The patent danger rule dictates that the manufacturer not be held liable for any injuries caused by a design-related hazard that is, or should be, obvious to a reasonable product user. The manufacturer can therefore be held liable only for injuries caused by hidden or latent dangers in the product's design. *Id.* at 475, 95 N.E.2d at 806. For a complete discussion of the patent danger rule, the criticisms and eventual rejection of the rule, see infra text accompanying notes 60-80.

29. 384 F.2d at 805 (emphasis added).

30. *Id.*

31. Prior to the appeal, plaintiff had already collected damages from the insurer of Michael N. Bigham (the driver of the car manufactured by defendant) in exchange for a covenant not to sue. *Id.* at 803.

32. *Id.* at 805 (emphasis added).

33. 359 F.2d 822.
tent of defendant’s duty presented a question of law for the court.34 He maintained that GM had the same duty as any member of society, that of acting with reasonable care.35 Reasonable care on the part of an automobile manufacturer must reflect the widespread knowledge of the ever-increasing number and severity of automobile accidents.36 Therefore, Judge Kiley reasoned, GM should be charged with the duty of reasonably foreseeing that a high speed automobile would be driven at the speeds it was advertised as capable of attaining.37

The dissent further objected to the majority’s extension of the Evans’ intended purpose doctrine38 to the facts of Schemel.39 The facts in the two cases were distinguishable, according to Judge Kiley, because the unlawful use of the automobile’s speed capacity in Schemel was not unintended within the meaning of Evans. If the intended purpose of the product was defined in Evans by the subjective intent of the manufacturer, GM’s allegedly “unduly enticing advertising”40 was evidence of GM’s subjective intent to encourage drivers to utilize the high speed capabilities of GM’s cars. In addition, the dissent cited the statement in GM’s brief that the speed capacity was deliberately planned to provide reserve power for passing and to reduce engine strain41 as further evidence of GM’s subjective intent to have its cars driven at unlawful speeds. Judge Kiley questioned the logic of concluding that high speed driving was unintended by GM, when GM had promoted the lawless speed capacity of its cars.42

Alternatively, if the intended purpose doctrine was defined by an objective standard (i.e. the “normal” use of the product),43 Judge Kiley maintained that unlawful use may not be unintended or abnormal use. He again cited GM’s brief for its reference to the “common

34. 384 F.2d at 806 (Kiley, J., dissenting).
35. Id. See Green, supra note 11, at 45.
36. 384 F.2d at 806. Judge Kiley noted that automobiles are used in an environment in which a traffic death occurs every 11 minutes and an injury every 19 seconds (citing 16 De Paul L. Rev. 261, 264 (1966)), and in which there are reckless and irresponsible drivers. He reasoned that this environment must be considered in any meaningful application of the “reasonableness” standard. Id.
37. Id.
38. See supra note 20.
39. 384 F.2d at 807.
40. Id. at 808 (Kiley, J., dissenting).
41. Id.
42. Id. at 810.
43. Id. at 808.
knowledge" that an automobile can be driven too fast. This common knowledge, coupled with impressive statistics regarding the number of injuries and deaths resulting from excessive speeds, led Judge Kiley to conclude that the manufacturer must anticipate the abuse of the speed capacity of its automobiles. The manufacturer must not use as a shield from liability the clearly erroneous notion that drivers will not drive faster than the legal speed limit.

b. The Patent Danger Rule.—The dissent observed that the majority incorrectly relied on the patent danger rule. While not criticizing the rule itself, the dissent found it inapposite because the risk of another driver traveling at unlawful speeds could not be classified as open and obvious. Judge Kiley would have defined the problem as one of assumption of risk: since even extraordinary care on plaintiff's part could not have avoided his being hit by the car manufactured by defendant, the only question was whether plaintiff's conduct (riding as a passenger) was inherently unreasonable given the risks created by drivers traveling at excessive speeds. Like the question of the reasonableness of GM's conduct, the assumption of risk question should also be decided by the jury.

c. Deferral to the Legislature.—Judge Kiley disagreed with the majority's belief that any changes in automobile safety standards should be made by Congress. He reasoned that Congress' purpose in enacting the National Traffic and Motor Vehicle Safety Act of 1966 was not to create causes of action or to compensate victims,

44. Id.
45. Id. Judge Kiley listed the following statistics:
10% of all fatal accidents involve a car traveling over 70 miles per hour.
13% of all fatal accidents in rural areas involve a car traveling over 70 miles per hour.
33.3% of all fatal accidents involve excess speed.
20.6% of all injury causing accidents involve excess speed.

Id., n.11 (citing National Safety Council, Accident Facts 46, 48, 53 (1966 ed.)). "Excess Speed" was the leading factor in urban and rural fatal accidents, and in rural injury-causing accidents at the time. Id.

46. 384 F.2d at 808 (Kiley, J., dissenting); MacDonald, The 55 M.P.H. Speed Limit No Longer Makes Sense, N.Y. Times, Feb. 1, 1986, at 27, col. 5 (a study commissioned by Congress revealed that more than half the drivers in two-thirds of the states drive at speeds in excess of the 55 mile per hour limit).

47. 384 F.2d at 809 (Kiley, J., dissenting).
48. Id. The Restatement (Second) of Torts § 496A (1965) states: "A plaintiff who voluntarily assumes a risk of harm arising from the negligent or reckless conduct of the defendant cannot recover for such harm." For a discussion of the defense of assumption of risk in the product liability area, see Keeton, Assumption Of Products Risks, 19 Sw. L.J. 61 (1965).

49. 384 F.2d at 809 (Kiley, J., dissenting).
but to authorize the Secretary of Transportation to establish motor
vehicle safety standards. 51

The dissent stated that courts would still be called upon to de-
cide liability for violations of the established standards, as well as to
supplement the Act's purpose of reducing accidents and the injuries
and deaths which resulted. 52 Since violations of the Act's standards
resulted only in small monetary penalties, 53 Judge Kiley maintained
that the possibility of suits resulting in large awards to injured plain-
tiffs would more effectively encourage automobile manufacturers
to upgrade the safety of their products. 54

II. ANALYSIS OF SCHEMEL

The Schemel decision dictated that automobile manufacturers
had no duty, as a matter of law, 55 to foresee that an individual would
drive an automobile at the speeds it was capable of attaining, or to
prevent the injuries sure to result from high speed driving. The court
did not assign to the jury the difficult task of determining the reason-
ableness of GM's conduct in designing a car capable of excessive and
unlawful speeds. It did not examine the factors which would be con-

51. Id. § 1381 declares the Congressional purpose as follows:
   Congress hereby declares that the purpose of this chapter is to reduce traffic acci-
   dents and deaths and injuries to persons resulting from traffic accidents. Therefore,
   Congress determines that it is necessary to establish motor vehicle safety standards
   for motor vehicles and equipment in interstate commerce; to undertake and support
   necessary safety research and development; and to expand the national driver
   register.

52. The authorization of the Secretary of Transportation is set out in § 1392(a):
   The Secretary shall establish by order appropriate Federal motor vehicle safety
   standards. Each such Federal motor vehicle safety standard shall be practicable,
   shall meet the need for motor vehicle safety, and shall be stated in objective terms.

53. 384 F.2d at 810 (Kiley, J., dissenting).

54. The District Court for the Southern District of Indiana sustained defendant's motion
to dismiss plaintiff's action for failure to state a claim upon which relief could be granted. See
supra text accompanying notes 18-19. The decision was affirmed by the Court of Appeals for
the Seventh Circuit. See supra text accompanying note 27.
sidered in a risk-utility analysis of a defendant's conduct. Instead the court mechanically applied two single-factor, or "no-duty,"\textsuperscript{56} tests in order to determine whether GM owed a duty to the plaintiff.

The first no-duty rule relied upon in \textit{Schemel} was the intended purpose doctrine.\textsuperscript{57} Its use in \textit{Schemel} illustrated the court's reluctance to extend the duty of the automobile manufacturer beyond traditional and judicially manageable limits. The court read plaintiff's allegations as suggesting the imposition of a duty on the manufacturer to design "an automobile incapable of causing injury . . . through foreseeable misuse for a purpose for which the automobile was never supplied."\textsuperscript{58} While the court conceded that gross speeding was foreseeable to the manufacturer,\textsuperscript{59} speeding was not an intended use of the automobile. Therefore, the manufacturer was not responsible for any resulting injuries.

The second no-duty rule used by the \textit{Schemel} court was the patent danger rule.\textsuperscript{60} As illustrated in \textit{Campo v. Scofield},\textsuperscript{61} the patent danger rule states that a manufacturer is not liable for any design-related hazard that is or should be obvious to a reasonable product user.\textsuperscript{62} Therefore, the manufacturer can only be held liable for hidden or latent dangers in the product's design.\textsuperscript{63}

The \textit{Schemel} court found that the dangers of excessive and unlawful speed were so obvious to the driver of an automobile that the automobile manufacturer should not be responsible for any injuries or deaths caused by such gross speeding.\textsuperscript{64} Despite its conclusion

\textsuperscript{56} Single-factor, or "no-duty," analysis is a method of avoiding the difficult task of determining, through risk-utility analysis, whether or not a manufacturer owed a duty to the particular plaintiff. No-duty rules permit the court, and not the jury, to establish standards for conduct by holding that a defendant owed no duty to the plaintiff as a matter of law. See J. HENDERSON & A. TWERSKI, \textit{PRODUCTS LIABILITY: PROBLEMS \& PROCESS} 519-20 (1985) (temporary edition).

One commentator stated that a court's conclusion that defendant owed no duty to plaintiff may result because of institutional limitations preventing courts from fairly litigating design defect cases. The no-duty conclusion may also result from the recognition that alternative decisionmaking bodies may exist for determining the appropriate level of product safety. Twerski, \textit{Seizing The Middle Ground Between Rules \& Standards in Design Defect Litigation: Advancing Directed Verdict Practice In The Law Of Torts}, \textit{57 N.Y.U. L. Rev.} 521, 551 (1982).

\textsuperscript{57} See supra text accompanying note 20.

\textsuperscript{58} 384 F.2d at 805.

\textsuperscript{59} \textit{Id}.

\textsuperscript{60} See supra note 28.

\textsuperscript{61} 301 N.Y. 468, 95 N.E.2d 802 (1950).

\textsuperscript{62} \textit{Id}. at 472, 95 N.E.2d at 804.

\textsuperscript{63} \textit{Id}.

\textsuperscript{64} 384 F.2d at 805.
that speeding was foreseeable to the manufacturer, the *Schemel* court strictly adhered to the patent danger no-duty rule.  

Both the intended purpose doctrine and the patent danger no-duty rules set forth in *Schemel* received a great deal of criticism. The dissatisfaction with the intended purpose doctrine led one court to re-examine the duty of an automobile manufacturer toward drivers. In *Larsen v. General Motors Corp.*, the Court of Appeals for the Eighth Circuit granted relief to a plaintiff who was injured in a second collision impact. The plaintiff came in contact with the defectively designed steering assembly. The court examined the accepted principle that a manufacturer’s duty of design and construction extends to producing a product reasonably fit for its intended use. It concluded, however, that the realities of automobile travel dictated an expansion of the interpretation of intended use: automobiles are intended for use on the roads and highways, and that use carries with it the probability and potential of injury-producing impacts. The court concluded that the manufacturer must consider the environment in which a product is used. Therefore, the court imposed a duty on the automobile manufacturer to use reasonable care in designing the vehicle so that users would not be subjected to an unreasonable risk of foreseeable injury in the event of a collision.

The widespread acceptance of *Larsen* accelerated a growing trend toward expanding the manufacturer’s responsibility for the design of its products. *Larsen* was eventually adopted by the Seventh Circuit in *Huff v. White Motor Corp.*, where the court of appeals

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65. Id.
66. 391 F.2d 495 (8th Cir. 1968).
67. Id. at 496-97.
68. Id. at 502-03.
69. Id. at 502. The court cited Spruill v. Boyle-Midway Inc., 308 F.2d 79 (4th Cir. 1962) (manufacturers of furniture polish have a duty to anticipate that bottle might be left within reach of children). See also Filler v. Rayex Corp., 435 F.2d 336 (7th Cir. 1970) (manufacturer of sunglasses has a duty to foresee that glasses would be worn by persons playing baseball, especially since glasses had been advertised as being worn by baseball players).
70. 391 F.2d at 503.
72. 565 F.2d 104 (7th Cir. 1977).
expressly rejected the narrow intended purpose doctrine it had announced eleven years earlier in Schemel. To the extent that it relied on the intended purpose doctrine, Schemel was overruled in Huff.\textsuperscript{7}\textsuperscript{7}\textsuperscript{7}

The patent danger rule has also received extensive criticism.\textsuperscript{7}\textsuperscript{4}\textsuperscript{4}

In Micallef v. Miehle Co.,\textsuperscript{7}\textsuperscript{6}\textsuperscript{6} the New York Court of Appeals overruled Campo and rejected the patent danger rule because of the inequity of absolving a manufacturer of liability simply because the dangers of his product were obvious.\textsuperscript{7}\textsuperscript{8}\textsuperscript{8} The court instead held that a manufacturer has a duty to avoid any unreasonable risk of harm, not only to the product user, but also to anyone likely to be exposed to the harm resulting from the product's intended, or unintended but reasonably foreseeable, use.\textsuperscript{7}\textsuperscript{7}\textsuperscript{7}

While that portion of the Schemel decision which is based on the patent danger rule has never been expressly overruled, widespread rejection of the patent danger rule\textsuperscript{7}\textsuperscript{8}\textsuperscript{8} has significantly diminished the value of the Schemel decision in determining what duty, if any, the automobile manufacturer owes to victims of accidents in-

\begin{itemize}
  \item 73. \textit{Id.} at 106, n.1.
  \item 74. Pike v. Frank G. Hough Co., 2 Cal.3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970) (obviousness of the danger should be viewed as an element of a manufacturer's defense, and not as a determination that the manufacturer owed no duty to the injured party); 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 28.5, at 1543 (1956) (obviousness of the harm is only one of a number of factors which should be considered in a risk-utility analysis); Marschall, An Obvious Wrong Does Not Make a Right: Manufacturers' Liability for Patently Dangerous Products, 48 N.Y.U. L. Rev. 1065 (1973) (patent danger rule does not ensure fairness between the parties, therefore manufacturers of patently dangerous products should be absolutely liable to injured consumers); Twerski, Old Wine in a New Flask—Restructuring Assumption of Risk in the Products Liability Era, 60 IOWA L. Rev. 1 (1974) (elimination of patent danger rule would not create unlimited liability for manufacturers).
  \item 75. 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976).
  \item 76. \textit{Id.} at 385, 348 N.E.2d at 577, 384 N.Y.S.2d at 121.
  \item 77. \textit{Id.}

\end{itemize}
volving gross speeding.

Under present design defect law, the use of the patent danger rule\(^7\) and the intended purpose doctrine\(^8\) as single factor duty tests has diminished, while the use of risk-utility analysis in establishing product defects has increased.\(^9\) Risk-utility analysis, which is usually a jury function,\(^2\) determines the negligence of a manufacturer by weighing the probability of harm resulting from the use of the product, and the gravity of harm, against the burden of adequate precautions to avoid the harm. If the probability of harm, when multiplied by the gravity of harm, exceeds the burden to the manufacturer and to society of providing adequate precautions against the harm, the product is deemed defective.\(^3\)

While the patent danger rule and the intended purpose doctrine have been rejected as single factor tests, elements of both have been incorporated into modern products liability law. The patency of the danger of a product is relevant in determining the probability of harm occurring.\(^4\) The more obvious the danger, the less probable the occurrence of harm. Likewise, the use for which a product is intended is considered in a proximate cause analysis.\(^5\)

The increased use of risk-utility analysis has aided plaintiffs who seek to establish that a defendant’s behavior or product failed to meet societal standards. Design defect claims have survived defendants’ motions for dismissal and have reached the jury for consideration.\(^6\)

79. See supra note 28.
80. See supra text accompanying notes 57-70.
83. For a discussion of risk-utility analysis, see supra note 11.
84. 2 F. Harper & F. James, supra note 74, § 28.5, at 1543; Noel, Manufacturer’s Negligence of Design or Directions For Use of a Product, 71 Yale L.J. 816, 836-41 (1962); Twerski, supra note 56, at 569.
85. A manufacturer must design the product to be safe for intended as well as reasonably foreseeable unintended uses. Micallef v. Miehle Co., 39 N.Y.2d at 385-86, 348 N.E.2d at 577, 384 N.Y.S.2d at 121. If the product is used in a manner clearly not foreseeable to the manufacturer and injury results, however, a court may not allow the case to proceed to the jury since the plaintiff’s abnormal use of the product, rather than the product’s design, was the proximate cause of the harm. Noel, supra note 84, at 856-62. See infra note 110.
86. For an exhaustive list of cases adopting risk-utility in design defect cases, see Twerski, supra note 56, at 522 n.1. See also Neider v. Chrysler Corp., 361 F. Supp. 320 (E.D. Pa. 1973), aff’d 491 F.2d 750 (3d Cir. 1974), which presented a fact situation similar to that in Schemel. Plaintiffs claimed that the automobile manufactured by defendant was not safe at the 120 mile per hour speed it was capable of attaining. While the district court opinion did not discuss the speed issue, but instead focused on evidentiary questions, the significance of the...
There are problems, however, attendant to the use of risk-utility analysis in design defect litigation. In *Dawson v. Chrysler Corp.*, the Court of Appeals for the Third Circuit affirmed a jury verdict that an automobile manufactured by defendant was not reasonably fit to withstand a collision. In its conclusion, however, the court expressed discomfort with the unhindered practice of submitting design defect claims to the jury, because of the lack of uniformity or consistency which would result. While the jury in *Dawson* found Chrysler liable for not producing a rigid enough vehicular frame, another jury in another case might find a manufacturer liable for producing a frame that was too rigid. The result would be to allow individual juries to establish national automobile safety standards and to impose conflicting requirements on automobile manufacturers.

In *Slatkavitz v. General Motors Corp.*, the District Court of Massachusetts indicated that risk-utility analysis would yield inconsistent verdicts as applied to cases challenging automobile speed capabilities. *Slatkavitz* involved a negligence claim against GM for designing and manufacturing a vehicle capable of attaining excessive and unlawful speeds. The court recognized defendant's duty to design a product fit for intended and foreseeably unintended uses, but indicated that the issue of automobile speed capacity eluded risk-utility analysis: "Speed and acceleration are relative terms, always operating in changing contexts, and it divorces social policy from practical reality to measure a manufacturer's reasonableness by speed capacity alone."

### III. Judicial Screening of Speed Cases: Multi-Factor Duty Analysis

The growth of products liability law has resulted in the increased use of risk-utility analysis in determining whether a design is

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88. *Id.* at 962-63.
89. *Id.* at 962.
90. *Id.*
92. *Id.* at 385.
93. *Id.*
The problems identified in Dawson and Slatkavitz, however, indicate that the unhindered use of risk-utility analysis in every case may yield unwarranted plaintiff’s verdicts. In response to this problem, several commentators have proposed the use of a judicial screening process by which judges could selectively determine, as a matter of law, whether or not a design defect issue should proceed to the jury. Rather than utilizing one

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94. See supra note 6.
95. See also Kelley v. R.G. Indus. Inc., 304 Md. 124, 497 A.2d 1143 (1985) (suggesting that the risk-utility analysis is only applicable when something “goes wrong” with a product; in cases where the product functioned exactly as intended, i.e. the firing of a handgun which caused injury to another person, a different standard must be used).
96. Professor Wade advocates the consideration and weighing of seven factors in determining whether a product is unreasonably dangerous, or not duly safe:
   1) The usefulness and desirability of the product—its utility to the user and to the public as a whole.
   2) The safety aspects of the product—the likelihood that it will cause injury, and the probable seriousness of the injury.
   3) The availability of a substitute product which would meet the same need and not be as unsafe.
   4) The manufacturer’s ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.
   5) The user’s ability to avoid danger by the exercise of care in the use of the product.
   6) The user’s anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.
   7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.
Wade, supra note 82, at 837-38.
Professor Twerski criticizes the Wade factors as overly simplistic, and advocates the use of an alternative, ten-factor test to determine whether or not the defendant owed a duty to plaintiff:
   1) Polycentricity: Aspects of the product design may be related in such a way that any design change would substantially affect the cost, utility, safety, or esthetics of the product.
   2) Close risk-utility proof: The task of weighing and balancing the product’s potential for harm against its utility may be difficult or impossible.
   3) State of the art: The alternative design may not be practically feasible in light of the state of the art.
   4) Tenuous causation: The case for causation-in-fact may be tenuous.
   5) Shifting duty: Independent and responsible decisionmakers may have played a significant role in assessing and utilizing the allegedly hazardous product.
   6) Consumer choice: Consumers may have the option to purchase a similar product without the alleged safety hazard.
   7) Obviousness of danger: The hazard may be open and obvious to the ordinary consumer.
   8) Cost: An alternative design could substantially raise the cost of the product to the consumer.
single factor in determining whether or not a duty is owed, the decision to allow the issue of defendant's reasonableness to proceed to the jury would result from consideration of a number of relevant factors. Such a multi-factor duty analysis would enable a court to balance important policy questions with the issues presented by a particular defect claim.

The process may lead the court to the conclusion that the defendant owed no duty to the plaintiff. In such a case, the court would direct a verdict for the defendant. Alternatively, the court might conclude that the defendant did in fact owe a duty to the plaintiff. Accordingly, the issue of defect would then proceed to the jury for a risk-utility analysis. In either event, the court will have screened those cases likely to yield unwarranted results.

The analysis of the speed cases should include examination of at least the four following factors:97

1) The obviousness of the harm likely to result from gross speeding;
2) The ability of the consumer to choose an automobile capable of achieving slower speeds;
3) Whether society has shifted the duty of the automobile manufacturer to the consumer; and
4) Whether the design of an automobile is so multifaceted as to make judicial analysis impossible.

While one individual factor may strongly suggest that a verdict be directed for the manufacturer, or that the case proceed to the jury for a risk-utility analysis, the ultimate decision results from a consideration and balancing of all the relevant factors.

97. The speeding case does not necessarily implicate all of the factors in any one multi-factor scheme. Accordingly, the four factors selected are those common to several of the schemes listed and those most relevant to the analysis of the automobile manufacturer's duty to persons injured as a result of gross speeding.
A. Obviousness of the Danger of Speeding

While the patent danger rule is no longer a workable single-factor no-duty rule, the obviousness to the automobile driver of the risks of gross speeding is relevant in a determination of the manufacturer's duty.

It may be obvious to the average driver, as a matter of common sense, that gross speeding is dangerous. The importance of driving within the 55 mile per hour speed limit has also been underscored by various media campaigns. If the danger of gross speeding is obvious to the driver, the result may be a decrease in the probability of accidents occurring because of this misuse of the automobile. Several commentators suggest that the reduced probability of harm, when balanced with other relevant factors, may lead to the conclusion that the product was not defective. If the automobile was honestly marketed, and its dangers were open and obvious, the only method of preventing the dangerous use of the automobile would be a form of paternal supervision which is not within the court's role to provide.

One problem presented by the speed cases is the effect of automobile advertisements which not only fail to warn consumers of the dangers of speeding, but actually assure drivers that their cars are

98. See supra text accompanying notes 74-81.
100. For example, the State of California in 1985 formed a task force to increase awareness of the 55 mile per hour speed limit. From June to August of that year, the State used a $50,000 federal grant to fund a public awareness campaign which included a television commercial and signs on billboards. Featured in the campaign was a picture of a personal check accompanied by the slogan “55—Can you afford not to?”. Telephone interview with Mark Lunn, Sergeant in charge of Public Affairs for the Los Angeles County Highway Patrol (Aug. 11, 1986).

The State of New Jersey has concentrated its efforts in the area of enforcement rather than awareness. Although media campaigns have been used in the past, which included such slogans as “55 Saves Lives” and “55—a Law We Can Live With,” the State has elected to use a $509,000 federal grant to expand its patrol force in an effort to curtail speeding. Telephone interview with William Taylor, Manager of the New Jersey Office of Highway Safety (Aug. 11, 1986).

101. Fischer, supra note 96, at 359 (listing consumer's knowledge of a risk and ability to control the danger as two of 13 factors); Montgomery & Owen, supra note 96, at 818 (the ability of the consumer to recognize the risks of the condition of the product as one of four relevant factors); Twerski, supra note 56, at 567-73 (obviousness of the danger is one of 10 relevant factors); Wade, supra note 82, at 837 (listing as one of seven factors, the user's awareness "of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product").
102. Twerski, supra note 56, at 573.
comfortable at 110 miles per hour. While information highlighting the obviousness of the danger of speeding may reduce the probability of harm, the effect may be cancelled out by contemporaneous information luring the consumer to the very feature which makes the automobile dangerous. Advertisements casting the speed capabilities of the automobile in a favorable light may actually increase, rather than decrease, the probability of harm. If so, the court may be more likely to find that the manufacturer owes a duty to the plaintiff to anticipate and guard against the danger of gross speeding.

B. Consumer Choice

The ability of the consumer to choose from a broad range of products varying in price and quality may influence the court’s willingness to find that a manufacturer owed a duty to an injured plaintiff. Since safety is one element of a product’s design which would affect the price of the product, a consumer’s conscious decision to pay less and receive less product safety, when considered along with the other factors, may suggest that the consumer, rather than the manufacturer, has the duty to avoid or minimize the harm caused by that product.

Consumers have little choice with regard to the speed capabilities of automobiles. In what may be perceived as an effort to curtail speeding, speedometers have been modified in some automobiles to indicate maximum speeds of 85, rather than 120 miles per hour.

103. See supra note 12.
104. For a multi-factor analysis which includes consumer choice, see Twerski, supra note 56, at 566-67; Wade, supra note 82, at 837 (“the availability of a substitute product which would meet the same need and not be as unsafe” listed as a factor).
106. A spokesman for the Ford Motor Company’s Office of General Counsel indicated that the oil crisis of the mid-1970’s prompted a proposal in Congress to require automobile manufacturers to equip cars with 85 mile per hour maximum speedometers. Technical problems prohibited this practice, however, since a speedometer will not be accurate unless the design is symmetrical around a desired point. If this desired point is 55 miles per hour, the easiest, and technically most reliable speedometer has a maximum of 110 miles per hour.

The spokesman stated that many Ford models do have 85 mile per hour maximum speedometers, a change that was prompted by a Ford management decision. The indicator needles on these speedometers, however, do go beyond 85 miles per hour if the cars are driven in excess of this speed. This is done so that the driver will have a visual indication of how fast he is actually traveling.

Certain newer Ford automobiles are equipped with digital speedometers. These are not limited to 85 mile per hour gauges since the inability to register speeds above 85 miles per hour would mean that the driver would have no visual indication of any kind on the digital readout if he did exceed 85 mile per hour.

The Ford spokesman concluded that the 85 mile per hour speedometers were not accom-
Nonetheless, the consumer still has no choice but to purchase a car panied by any adjustment in automobile speed capabilities, and merely affected a change in the speedometer's display. Telephone interview with spokesman for Ford Motor Company, Office of General Counsel, Detroit, Mich. (Aug. 12, 1986).

In contrast, a spokesman for AC Sparkplug, a division of General Motors, stated that the 85 mile per hour speedometers were mandated by federal law. He stated that approximately 90% of all new General Motors vehicles are equipped with these speedometers, and the remaining percentage of automobiles are high performance models, such as the TransAm and the Corvette, for which exceptions have been granted. Telephone interview with spokesman for AC Sparkplug, Division of General Motors, Detroit, Mich. (Aug. 12, 1986).

In fact, the National Highway Traffic Safety Administration (the agency) had created a safety standard, effective September 1, 1979, which required automobile manufacturers to highlight the numeral "55", and to indicate a maximum speed of 85 miles per hour on all speedometers. 49 C.F.R. § 571.127 (1979) (rescinded). The agency believed that this standard would reduce "the temptation for immature drivers to test the upper speeds of their vehicles on public roads." 46 Fed. Reg. 51,788 (1981). In addition, the highlighted "55" on the speedometer was intended to "help drivers maintain the lower speeds mandated by the nationwide 55 mile per hour speed limit." Id.

In February and March of 1981, however, the agency reviewed the standard and determined that it would not yield significant safety benefits, and would place unnecessary financial burdens on automobile manufacturers. The agency stated that the standard was unnecessary since, prior to the effective date of the standard, several automobile manufacturers had voluntarily lowered the maximum speed indication on their speedometers to 85 or 100 miles per hour because of "liability concerns." Id. at 51,799.

Furthermore, the agency stated that automobile manufacturers' decreasing emphasis on high performance cars made it unlikely that manufacturers would raise the maximum speed indication if the federal standard was revoked. Id. Finally, there was no firm evidence to suggest that the highlighted "55" was having any positive effect on speed reduction. The agency conceded that "many drivers frequently drive 5 to 10 miles per hour above any posted highway speed limit, including the 55 mile per hour speed limit," and concluded that "[a] highlighted '55' on a speedometer scale adds little to the information provided to the driver by a roadside speed limit sign." Id.

Accordingly, the standard was revoked on February 18, 1982, effective March 25, 1982. 47 Fed. Reg. 7250 (1982). In revoking the standard, the agency encouraged experimentation by manufacturers to improve automobile safety, subject to review by the agency. Id. It also stated that all automobile manufacturers which had commented on the proposal to rescind the standard indicated that they would voluntarily continue to provide some of the features formerly required by the standard. American Motors, Chrysler, Ford, General Motors, Mack, Renault, Subaru, and Volvo White Truck Corporation said they would maintain a maximum scale of 85 miles per hour or less. Honda said it would modify its speedometers to show the maximum capabilities of its vehicles. . . American Motors, Ford, Mack, Renault, Subaru, and Volvo White said they would also continue to highlight the '55' miles per hour position on the speedometer scales. Honda said it would drop the highlighting.

Id. at 7251.

The agency concluded by recommending an early effective date for revocation of the standard since "it will avoid the unnecessary expenditure by manufacturers on requirements that have no significant safety benefits." Id. at 7253.

Consequently, any changes in speedometer indicators to reflect lower maximum speeds are the result of manufacturer discretion.
capable of speeds far in excess of the 55 mile per hour legal limit. This lack of choice in the market might increase the court’s willingness to determine that the automobile manufacturer owes a duty to plaintiff with respect to harm caused by excessive speed.

The difficulty with imposing liability on the manufacturer, however, is that society has expressed its enthusiastic approval of high speed automobiles. Advertisements emphasizing speed and power are presumably targeted at a receptive audience of drivers who frequently exceed the speed limit. Accordingly, courts may be unwilling to deter automobile manufacturers from designing high speed automobiles with which society finds favor.

107. See MacDonald, supra note 46, at 27, col. 5 (“New cars are safer not only because they’re in better condition but also because they’re designed for the higher speeds drivers plainly prefer.”).

108. Of 4,895,000 vehicles clocked in 1982, the average speed traveled was 59 miles per hour. Seventy-three percent of the automobiles exceeded 55 miles per hour, 40% exceeded 60 miles per hour, and 14% exceeded 65 miles per hour. U.S. Bureau of the Census, Statistical Abstract of the United States: 1985, at 601 (105th ed. 1984) (No. 1046 Motor Vehicle Travel, By Type of Vehicle & Speed: 1970 to 1982). See supra note 46.

Current information illustrates substantial disregard of the 55 mile per hour limit. Despite an awareness campaign in California in 1985, a spokesman indicated that the number of instances of speeding has not been reduced. See supra note 100.

Similarly, a New Jersey official stated that 39-40% of those who drive in New Jersey exceed the speed limit. Approximately 300,000 summonses are issued each year in that state for speeding. Id.

While studies indicate that the 55 mile per hour limit has saved between 2,000 and 4,000 lives each year, and that 70% of Americans are in favor of retaining the 55 mile per hour limit, a growing faction has expressed interest in abolishing the national 55 mile per hour speed limit. Darlin, Does 55 MPH Speed Limit Save Lives? More Drivers Are Doubtful, Wall St. J., Apr. 28, 1986, § 2, at 27, col. 6.

Support for the law is lowest in the western states and highest among those who drive the least. Martz, Does Speed Kill?, Newsweek, July 21, 1986, at 14. Enforcement of the 55 mile per hour limit is necessarily selective, and penalties vary widely. Some states impose fines of up to $100 for driving at 65 miles per hour with a penalty toward loss of license and notification to insurers. Other states, particularly those with flat terrain and wide open spaces, fine drivers as little as five dollars for an offense referred to as “wasting motor fuel.” Id.

Opponents of the 55 mile per hour limit maintain that there is no correlation between the speed limit and the declining national highway death rate. Instead, they attribute the reduced death rate to seat belt and child restraint laws, campaigns against drunk driving, improved automobile and highway design, and advanced medical technology. Id. at 15.

All of the states “complain that trying to enforce the speed law hampers their efforts to deal with more pressing problems, such as drunken driving.” Id. at 17. However, they are compelled to devote resources to enforcement of the speed law in order to secure federal funding. See supra note 2. Despite recent efforts by some states to challenge the law, the Administration has demonstrated reluctance to reconsider this controversial issue. For a complete discussion of the pros and cons surrounding the 55 mile per hour limit, see Martz, supra this note.
Several commentators suggest that courts should consider whether the user, and not the manufacturer, should have the responsibility of avoiding the particular harm. This position may also be expressed in terms of proximate cause: since the driver of an automobile knows the particular uses to which he puts the vehicle and can control those uses, his misuse (speeding), not the capability of the automobile to achieve excessive speeds, is the proximate cause of any harm.

If this argument suggests that an automobile user who drives at 120 miles per hour is an intervening/superseding cause, thereby eliminating any liability on the part of the manufacturer, it is legally unsound. Conduct of the user cannot break the line of causation if such conduct was foreseeable to the manufacturer. Speeding is not only foreseeable to the automobile manufacturer but, arguably, is also encouraged by the manufacturer via advertisements.

A preferable interpretation of the argument, and one which courts should consider, is that society may have shifted the duty to

109. Fischer, supra note 96, at 359 (the ability of the consumer to "minimize the risk through careful use of the product"); Montgomery & Owen, supra note 96, at 818 ("the respective abilities of the manufacturer and the consumer to (a) recognize the risks of the condition, (b) reduce such risks, and (c) absorb or insure against such risks—the allocation of risk awareness and control between the manufacturer and the consumer"); Wade, supra note 82, at 837 ("the user's ability to avoid danger by the exercise of care in the use of the product.").

110. Proximate cause, referred to as "legal cause" in RESTATEMENT (SECOND) OF TORTS § 431 (1965), is a concept used in "setting the limits beyond which the courts will not look in the attempt to trace the connection between a given cause and a given effect." Atlantic Coast Line R. Co. v. Daniels, 8 Ga. App. 775, 778, 70 S.E. 203, 205 (1911). If the causal link between defendant's conduct and plaintiff's injury is too attenuated, the court will not grant relief to the plaintiff. While the concept is not easily defined, it has been the subject of numerous articles. See generally L. Green, The Rationale of Proximate Cause (1927); R. Keeton, Legal Cause in the Law of Torts (1963); Beale, The Proximate Consequences of an Act, 33 HARV. L. REV. 633 (1920); Campbell, Duty, Fault and Legal Cause, 1938 Wisc. L. REV. 402; Goodhart, The Unforeseeable Consequences of a Negligent Act, 39 YALE L.J. 449 (1930). For an exhaustive list of articles discussing proximate, or legal cause, see W. Prosser & W. Keeton, The Law of Torts, § 41, at 263, n.1. (5th ed. 1984).

111. An intervening/superseding cause is an act which takes place after the negligent act of defendant, and is a separate factor said to cause the harm to plaintiff. See generally W. Prosser & W. Keeton, supra note 110, § 44 at 301-19.

112. For a recent and dramatic illustration of this doctrine, see Kelley v. R.G. Indus., Inc., 304 Md. 124, 156, 497 A.2d 1143, 1159 (1985) (holding that criminal use of a "Saturday Night Special" handgun is clearly foreseeable to the manufacturer who, therefore, is liable to the victim of criminal use of the gun).

113. See supra text accompanying notes 40-46.

114. Id. See also supra note 12.
avoid or minimize the danger of speeding from the manufacturer to the user.\footnote{115} Since the driver is more familiar with his own driving habits and with driving conditions at any given time, he has the responsibility to exercise discretion with regard to the car’s speed. The possibility of a shifting duty must be examined, along with the other factors, in order to determine the manufacturer’s duty to those injured in speed-related accidents.

D. Polycentricity

Commentators have suggested that certain design defect cases are polycentric\footnote{116} because they present multi-faceted problems in which each point for decision is related to all the others in such a way that consideration of one issue without consideration of all the others is impossible.\footnote{117} Professor Henderson explains the polycentricity problem with reference to a spider web. “If one strand [of the web] is pulled, a complex pattern of readjustments will occur throughout the entire web. If another strand is pulled, the relationships among all the strands will again be readjusted.”\footnote{118} In the usual design defect case, the plaintiff must propose a safer alternative to the design of the product which allegedly injured him.\footnote{119} With a polycentered problem, however, alternative designs...
are impossible. Any suggested change in the design which would have avoided the particular harm suffered by plaintiff will necessitate other alterations which may cause more severe harm to other product users.

Because of the interrelation of the factors which combine to form a particular product design, any change in the design may require managerial, rather than judicial, decisionmaking. In such cases, it is argued that the court should defer to an alternative managerial decisionmaking body.²

_Self v. General Motors Corp.,₃⁴ provides a meaningful illustration of polycentricity. In that case, plaintiff's car was stopped on the shoulder of a freeway. A car traveling at speeds of 65-85 miles per hour crashed into the left rear of the plaintiff's car. Upon impact, the fuel tank, located by the left rear fender of plaintiff's car, ruptured and the car caught fire. The plaintiff claimed that the car was defective with regard to the location of the fuel tank.₃⁵

The court noted its frustration in evaluating the design of a complex product, since the parties had such divergent orientations. The plaintiff argued that this particular accident could have been minimized had the defendants placed the fuel tank in a different location in the vehicle.³² The defendants, on the other hand, contended that the damage suffered by the plaintiff's vehicle was so extensive that the location of the fuel tank did not bring about plaintiff's injuries. Regardless of the location of the tank, they argued that plaintiff's vehicle would have exploded as a result of the high-speed impact.³⁴ Defendants also indicated that the car which hit plaintiff's car was equipped with a fuel tank located in the position plaintiffs advocated as a safe alternative, yet it also ruptured and caught fire in the collision.³⁵ The court noted that the courtroom was a poor arena for the redesign of an automobile, since the suit would invariably emphasize one single aspect of the design while ignoring all other relevant aspects.³⁶

Despite the dissent's urging that the jury not be asked to grapple with the difficulties inherent in designing a complicated prod-

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120. Henderson, _supra_ note 116, at 1538.
122. _Id._ at 5, 116 Cal. Rptr. at 577.
123. _Id._ at 6, 116 Cal. Rptr. at 578.
124. _Id._ at 9, 116 Cal. Rptr. at 580.
125. _Id._
126. _Id._ at 7-8, 116 Cal. Rptr. at 579.
uct, the majority supported the trial court's decision to allow the issue of the defendant's reasonableness in locating the fuel tank in the left rear of the automobile to go to the jury.

A criticism of the Self court's decision to allow the case to proceed to the jury centers not on the jury's inability to understand complex design information, but on the many factors involved in the design which make it impossible to examine in any logical sequence. If each proposed alteration in design affects another aspect which, in turn, has an impact on yet another aspect of the design, the jury, and possibly the court, cannot address the particular problem in anything but an arbitrary fashion.

As in the Self decision, courts in speed cases are not deciding whether the product conformed to the manufacturer's own established standards. Rather, they are determining whether the design of the entire product line was reasonable.

The determination of whether the speed capabilities of automobiles should be limited requires the use of some standard for evaluation. The problem, however, is that no such standard exists. Moreover, the question of how fast an automobile should be equipped to travel raises many interrelated issues. For example:

1) Speed is a relative concept. What is considered speeding on an urban street may be perfectly reasonable on an open road in a rural area. Furthermore, a speed which is reasonable on a clear day when driving conditions are optimal may be dangerously

127. *Id.* at 15, 116 Cal. Rptr. at 584-85 (Compton, A.J., concurring and dissenting).
129. When courts measure the allegedly defective product against a standard preestablished by the manufacturer, the flaw in the product is referred to as a manufacturing or production defect. *See supra* note 6.
130. For a discussion of design defects, see *supra* note 6.
131. Professor Henderson states that standard setting is implicit in the courts' attempted application of a general reasonableness standard in a design defect case. Henderson, *supra* note 116, at 1533:

> Passing judgment upon the acceptability or reasonableness of any product . . . implies a relatively particularized normative standard against which the product . . . may be measured. If the courts are to render such judgments, they must either accept and apply particularized standards developed elsewhere or develop standards by themselves.

*Id.* Henderson further states that while courts are well-suited to the task of applying existing product standards, they cannot and should not establish such standards in the course of applying a reasonableness standard. *Id.* at 1534. For further discussion on the need for standards, see 2 F. Harper & F. James, *supra* note 74, at 880-83; W. Prosser, *Law of Torts*, 206-07 (4th ed. 1971).
fast at night, or during inclement weather. 102

2) The speed of the automobile bears some relation to fuel economy. A design change with respect to the automobile’s maximum speed would require technological changes, and may also have an impact on fuel consumption.

3) A judicial decision that an automobile manufacturer is liable for designing a car capable of excess speeds would dictate a change in design in the entire industry. Manufacturers, fearful of liability, would alter the speed capabilities of their automobiles, and those manufacturers who market their automobiles with an emphasis on speed capabilities may lose their competitive position in the marketplace.

4) Society approves of high speed automobiles. 103 A speed-related design change would affect the appeal of the automobile, and may influence buying patterns.

A court, rather than rendering a case nonjusticiable, should consider the polycentricity problem in connection with the other factors relevant to the speed cases. 104 The complexity of the polycentric issues may explain the near absence of litigation of speed cases, and may indicate that the problem is better suited to legislative analysis. 105

IV. CONCLUSION

The analysis undertaken in this Note demonstrates the difficulties involved in determining the automobile manufacturer’s responsi-


133. See supra notes 107-08 and accompanying text.

134. Twerski, supra note 56, at 553, stating:

Courts should assess the “polycentricity quotient” based on the facts of each case. A court may, at one extreme, disregard polycentricity and, at the other, direct a verdict for defendant because of it. In the more commonly encountered middle range, a court should accord polycentricity whatever weight it believes the factor deserves in considering it together with the other duty factors.

135. Deferral to the legislature will not be effective, however, if the legislature takes no action. Since the adoption in 1975 of the 55 mile per hour national speed limit, see supra note 2, the Secretary of Transportation has not promulgated any regulation of automobile speed capabilities. This has resulted in insulation from liability for automobile manufacturers who continue to design and advertise automobiles capable of excessive speeds. See supra text accompanying note 12.

Professor Henderson urges that when a court responds to polycentered problems it impugns the integrity of the adjudicative process. Henderson, supra note 116, at 1539. If the court finds, however, that the problems will not be satisfactorily addressed by an alternative decision-making body such as the legislature, it may be more inclined to decide a polycentered problem. See Twerski, supra note 56, at 551.
bility to a party injured in an accident caused by excessive speeding. Courts have deferred to the legislature on the problem. While the 55 mile per hour speed limit remains in effect, automobile manufacturers are not restricted with regard to the speed capabilities of their products.

The increase in advertisements emphasizing automobile speed and power is likely to lead to cases presenting fact situations similar to Schemel. When such cases do arise, courts must take an active role. While the ultimate decision may follow Schemel and free the manufacturer of any threat of liability, the method used in reaching the decision is as important as the result. Unlike mechanical application of single-factor tests, the multi-factor approach suggested in this Note may provide courts with the framework necessary to reach decisions likely to have far-reaching effects in the automobile industry.

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