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CRASHWORTHINESS AFTER SUMNER: PLAINTIFF'S "ENHANCED" BURDEN OF PROOF

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INTRODUCTION

It is generally recognized that a vehicle manufacturer may be liable for certain injuries sustained in an accident, even where the accident itself was not caused by any vehicle defect. The rationale supporting the manufacturer's liability in such cases is that a vehicle defect enhanced plaintiff's injury, making it greater than the injury he would have sustained in a collision without the alleged defect. In other words, the vehicle was not "crashworthy."

While all courts agree that a crashworthiness claim requires a showing of an "enhanced injury," much debate exists over the proof required to establish such an injury. Some courts require a plaintiff to show both the injuries that would have resulted without the defect and the enhanced injuries attributable to the defect. Other courts allow a plaintiff to show only that the defect was a substantial factor in causing the enhanced injury, a much lesser burden.

Prior to *Sumner v General Motors*, 212 Mich App 694 (1995), this issue had not been decided by the Michigan appellate courts. In *Sumner*, however, the Court of Appeals concluded that the higher standard of proof more accurately comported with the limited nature of a manufacturer's liability, and consequently adopted it. An analysis of the enhanced injury concept and the *Sumner* decision provides valuable guidance in shaping the defense to a crashworthiness claim.

WHAT IS AN "ENHANCED INJURY"

Enhanced injury was defined in the seminal case of *Larsen v General Motors*, 391 F2d 495, 503 (CA 8, 1968), as injuries "over and above the damage or injury that probably would have occurred" in the collision "absent the defective design."

Consequently, if the injuries sustained by a plaintiff in an accident probably would have been the same without the alleged defect, there is no enhanced injury. Conversely, an enhanced injury will exist if, in a non-defective vehicle, plaintiff probably would not have been injured, or the injuries would have been less severe.

To illustrate, assume plaintiff is involved in a frontal collision and strikes her head on the steering wheel when the shoulder restraint breaks, suffering a closed head injury. She also injured her ankle when her leg struck the instrument panel. Plaintiff proves that the shoulder restraint's failure caused her head to strike the steering wheel, and that without this defect, she would have only suffered several fracture ribs. Plaintiff can recover for the difference between the closed head injury and the rib fractures. Plaintiff cannot recover for the ankle injury, since she has not offered any proof that a defect enhanced that injury.¹

Determining whether an alleged defect caused an enhanced injury, then, requires an analysis of the actual injuries sustained in the collision involving the defective vehicle, and the hypothetical injuries that probably would have been sustained in the same collision, but with a non-defective vehicle, i.e. a vehicle with plaintiff's proposed alternative design. The difference between these injuries is the "enhanced injury."² This concept, though simply stated, has proved elusive in its application.

Much of the confusion surrounding "enhanced injury" cases stems from a misunderstanding of basic principles of physics. Numerous courts and commentators have defined enhanced injuries as the injuries suffered by a plaintiff in the "second" collision over and above those sustained during the "first" collision. It is incorrect, however, to speak of injuries sustained in the first collision. An analysis of a crash sequence will illustrate this point.

According to Newton's First Law of Motion, a body in motion remains in motion until acted upon by an outside, unbalanced force. Both the moving vehicle and its occupant are bodies subject to this law. The vehicle's collision with an object constitutes the first collision. The occupant, however, has not yet struck anything; he continues to move forward until acted upon by an outside, unbalanced force. It is then that the second collision occurs.³

The second collision, then, is the occupant's first collision, and is the injury-causing collision. No injuries flow from the first collision in the accident sequence, because only the vehicle has collided with something. All of the injuries, then, occur during the second collision, though not all are "enhanced injuries."

THE BURDEN OF PROOF IN ENHANCED INJURY CASES

Once the "enhanced injury" concept is understood, the burden of proof in crashworthiness claims can be analyzed. Despite the simplicity of the "enhanced injury" definition, courts have struggled to formulate the proof requirements in such cases. Two schools of thought have emerged.

Under the view adopted by the Third Circuit in *Huddell v Levin*, 537 F2d 726 (CA 3, 1976), in addition to proof of an alternative design, a plaintiff in a crashworthiness case must offer proof of what injuries, if any, would have resulted if the alternative design had been in place (the "unavoidable" injury), and a method of establishing the enhanced injuries that are thus attributable to the alleged defect. This view better accords

with the limited nature of a manufacturer's liability, because it requires proof of an "enhanced injury" before imposing liability on the manufacturer.

The other view, first espoused by the Tenth Circuit in *Fox v Ford Motor Co*, 575 F2d 774 (CA 10, 1978),⁴ and later adopted in *Mitchell v Volkswagen*, 669 F2d 1199 (CA 11, 1982), requires a plaintiff to show only that the defect was a substantial factor in causing enhanced injury; the defendant must then apportion the injuries, or risk being held liable for all of the injuries. Although this approach simplifies the plaintiff's burden of proof, it is difficult to reconcile with the rationale underlying the manufacturer's liability.⁵ Without showing what injuries would have resulted with a non-defective vehicle, any conclusion regarding "enhanced injuries" is speculative. With this background, the burden of proof in crashworthiness cases under Michigan law can now be analyzed.

MICHIGAN ADOPTS THE HEIGHTENED STANDARD OF PROOF

Although Michigan adopted the crashworthiness doctrine in 1975,⁶ the burden of proof issue was not addressed at the appellate level until the *Sumner* decision.⁷ The Court of Appeals in *Sumner* was clearly presented with this issue when plaintiff contended the trial court had erred in giving the following enhanced injury instruction:

Plaintiff must first prove the extent of injuries attributable [] to what the Plaintiff alleges to be the defect in the car. Specifically, Plaintiff has the burden to prove the amount of injuries which are in excess of those which can reasonably be expected and those which are attributable to the claimed defect. Any injuries not attributable to the claimed defect are not enhanced injuries. Plaintiff also has the burden to separately establish the extent of the injury that she would have sustained had there not been the claimed defect in the car. *Sumner, supra*, at 698.

The Court of Appeals concluded the instruction was appropriate.

Acknowledging the split of authority in the federal circuit courts, but recognizing that the gravamen of a crashworthiness claim is a showing of "enhanced injury," the panel unanimously concluded that the view expressed in *Huddell* was "the better-reasoned one . . . [because] logic dictates that the plaintiff claiming enhancement must prove the enhanced injuries beyond speculation and conjecture."⁸ In adopting *Huddell*, the Court mandated that a plaintiff offer proof of the injuries that would have resulted if the alternative design had been used, and a method of establishing the extent of the enhanced injuries proximately caused by the alleged defect.

Consequently, under *Sumner*, in addition to proving a defect in the vehicle and offering an alternative design, a plaintiff must offer evidence of both the "actual" injury and the "unavoidable" injury, with the difference being the "enhanced" injury. Without evidence of what injuries would have resulted from a non-defective vehicle (the "unavoidable" injuries), a plaintiff necessarily cannot establish the injuries resulting from the alleged defect (the "enhanced" injuries). If a plaintiff successfully establishes all of the above, the manufacturer is liable for the "enhanced injury."

What is clear from the above, though not yet understood by judges and practitioners alike, is that a plaintiff's burden of production necessarily requires the person offering opinion evidence about plaintiff's enhanced injuries to be thoroughly knowledgeable not only about plaintiff's medical records, but also about the injury mechanism, the alleged defects, and the proposed alternative design. Only after acquiring such knowledge can one properly opine about the unavoidable injury and the enhanced injury.

Moreover, the *Sumner* Court's reference to proof "beyond speculation and conjecture" should be construed as requiring expert testimony to meet this burden. It will be essential for plaintiff to retain a biomechanics or injury causation expert. Without such an expert, any attempt to show enhanced injuries will necessarily be speculative, contrary to *Sumner's* directive.

Assuming, however, that plaintiff has retained a biomechanics or injury causation expert, this expert may still be precluded from rendering opinions about enhanced injuries under MRE 702 if he lacks the "knowledge, skill, experience, training, or education" to formulate his opinions and conclusions. Plaintiff's biomechanics or injury causation expert must be thoroughly questioned concerning plaintiff's injuries, their causes, the defects alleged, the proposed alternative design, and the injuries that would have resulted with this design.⁹ An expert's lack of knowledge in any of these areas should prompt the filing of a motion to bar any injury causation testimony by the expert. An exhaustive examination of these areas will reveal problems of proof and provide ammunition for a successful dispositive motion.

CONCLUSION

Although a manufacturer may be liable for injuries sustained in an accident even when no vehicle defect caused the accident, it is well-settled that the manufacturer's liability extends only to the "enhanced injuries." The Michigan defense bar must be zealous in its efforts to defend crashworthiness claims, and put plaintiffs to their proofs. Defense counsel should move to bar an expert's testimony, or move for summary disposition premised on plaintiff's inability to prove a prima facie claim of enhanced injuries, when supported by the evidence. Should the case proceed to trial, defense counsel should request a special jury instruction on enhanced injury patterned after the instruction given in *Sumner, supra*. Finally, at the close of plaintiff's proofs, defense counsel must scrutinize the testimony given by plaintiff's experts, with an eye towards filing a directed verdict motion specifically delineating the deficiencies in such testimony.

Footnote

¹ See Wittner, *Crashworthiness Litigation: Principles and Proofs*, SAE 900371 (1990).

² See Levenstam & Lapp, *Plaintiff's Burden of Proving Enhanced Injury in Crashworthiness Cases: A Clash Worthy of Analysis*, 38 DePaul L. Rev. 55, 84 (1988):

The apportionment that is contemplated is not a division among the injuries that the plaintiff sustained, but rather the difference between the injuries actually incurred and the injuries that would have resulted in the collision in the absence of the alleged defect.

³ See Babcock, *Some Fundamentals of Automobile Enhanced Injury Litigation*, Practising Law Institute, No. 294, 1985.

⁴ The Tenth Circuit, however, later adopted the *Huddell* proof requirements in *Harvey v General Motors Corp*, 873 F2d 1343 (CA 10, 1989).

⁵ In *Fox*, a death case, the Court also mistakenly focused on the divisibility of the injury, concluding that since death was not a divisible injury, apportionment was neither appropriate nor possible. The focus, however, should not be on the divisibility or indivisibility of the injury, but rather, on whether there is an enhanced injury.

⁶ *Rutherford v Chrysler Motors*, 60 Mich App 392 (1975).

⁷ *Sumner v General Motors*, 212 Mich App 694 (1995). Plaintiff sustained injuries when her car was struck nearly head-on by another vehicle that had crossed the center line. There was testimony that some of the welds in plaintiff's vehicle were ineffective, causing buckling. Plaintiffs' experts testified that her injuries "were enhanced above and beyond those she would have received absent the defective welding."

⁸ *Id.*, at 700. The Court adopted the language in *Caiazzo v Volkswagenwerk A G*, 647 F2d 241 (CA 2, 1981)::

We realize that a plaintiff's burden of offering evidence of what injuries would have resulted absent the alleged defect will be heavy in some instances and perhaps impossible in others. Where it is impossible however, the plaintiff has merely failed to establish his prima facie case. . . [I]n those instances in which plaintiff cannot offer any evidence as to what would have occurred but for the alleged defect, the plaintiff has not established the fact of enhancement at all.

⁹ Sample questions include the following: QUESTIONS FOR PLAINTIFF'S BIOMECHANICS/INJURY-CAUSATION EXPERT

1. Are you familiar with the defects alleged by plaintiff? Describe.
2. Have you reviewed plaintiff's medical records regarding injuries sustained in the accident?
3. Describe specifically the injuries sustained by plaintiff in the accident.
4. Can you identify the cause of each injury? If so, describe. (If not, get him to admit this.)
5. Please identify each of plaintiff's injuries that was caused by the alleged defect.
6. Please identify each of plaintiff's injuries that was not caused by the alleged defect.
7. Are you familiar with plaintiff's proposed alternative design? If so, describe.
8. Please identify each injury plaintiff would have sustained with the alternative design.
9. Please identify each injury plaintiff would not have sustained with the alternative design.