Golden Gate University Law Review

Volume 5 | Issue 1 Article 5

January 1974

Dreisenstock v. Volkswagenwerk, A.G.: Manufacturer Liability for Second Collision Design Defects

Leonard D. Weiler

Marlys J. Huez

DREISENSTOCK v. VOLKSWAGENWERK, A.G.: MANUFACTURER LIABILITY FOR SECOND COLLISION DESIGN DEFECTS

During the last decade, the question of a manufacturer's responsibility regarding safety in automobile design has received increasing public attention.[1] Congress, in 1966, enacted legislation setting up a federal regulatory agency to study problems of traffic safety and automobile design and to promulgate standards of construction and design intended to reduce accidents and resulting injuries.[2]

The issue of a manufacturer's duty to build safer automobiles has also generated a lively controversy in the courts. It has long been established that an automobile manufacturer has a duty to use reasonable care to build vehicles that are free from safety-related construction defects.[3] A duty of reasonable care in design has similarly been recognized. Until recently, however, most courts have been reticent to actually find against automobile manufacturers in negligent design cases, often on the basis that the plaintiff could not really know more about automobile design than the manufacturer.[4]

A current debate centers on whether an automobile, in order to satisfy the manufacturer's duty, must be "crashworthy". Proponents of the "crashworthy" standard argue that automobiles must be designed to prevent "second collision" injuries which result from collision with some part of the automobile's interior following the initial impact of an accident.[5]

1. R. NADER, UNSAFE AT ANY SPEED (1965).
2. THE NATIONAL TRAFFIC SAFETY AND MOTOR VEHICLE SAFETY ACT, 15 U.S.C. § 1381 (1966) [hereinafter cited as TRAFFIC SAFETY ACT].
3. MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).
4. *See e.g.*, Dillingham v. Chevrolet Motor Co., 17 F. Supp. 615 (N.D. Okla. 1936); *see generally* Katz, *Liability of Automobile Manufacturers for Unsafe Design of Passenger Cars*, 69 HARV. L. REV. 863 (1956); Nader and Page, *Automobile Design and the Judicial Process*, 55 CAL. L. REV. 645 (1967); Noll, *Negligence of Design or Directions for Use of a Product*, 71 YALE L.J. 816 (1962).
5. *See generally* W. PROSSER, LAW OF TORTS § 96, at 646 (4th ed. 1971); 10 WILLAMETTE L.J. 38 n.4 (1973).

I

Dreisenstock v. Volkswagenwerk, A.G.,[6] involved a "second collision" situation. Plaintiff Dreisenstock was injured as a passenger in a 1968 V.W. Microbus when the vehicle crashed into a telephone pole at 40 miles per hour. She did not contend that the manufacturer's negligence was a causative factor of the accident itself, but rather that her injuries were enhanced over and above what they otherwise would have been as a result of alleged negligent design of the vehicle. Dreisenstock contended that at forty miles per hour the integrity of the passenger compartment should not have been violated in a head-on crash. Defendant manufacturer, however, argued that as the accident was not caused by any defect in the vehicle it was not chargeable with any liability for plaintiff's injuries.

The significance of *Dreisenstock* lies in the court's analysis of crashworthiness on traditional tort principles—neither a rejection of the manufacturer's duty nor an application of absolute liability. The purpose of this comment is to review the conflicting lines of cases and analyze the *Dreisenstock* reconciliation of this conflict.

The leading case denying the existence of a duty to protect against second collision injuries is the 7th Circuit decision in *Evans v. General Motors Corporation.*[7] There, a divided court held that defendant General Motors was not liable for plaintiff's injuries where the alleged design defect—equipping the vehicle with an "x"-frame with no perimeter support instead of an allegedly safer frame design with side rail support—could not have functioned to avoid the collision. The court found that the manufacturer's only duty was to design and build a vehicle reasonably fit for the purpose for which it was made.

> A manufacturer is not under a duty to make his automobile accident-proof or fool-proof; nor must he render the vehicle "more" safe where the danger is obvious to all. . . . Perhaps it would be desirable to require manufacturers to construct automobiles in which it would be safe to collide, but that would be a

6. Dreisenstock v. Volkswagenwerk, A.G., 489 F.2d 1066 (4th Cir. 1974).
7. Evans v. Gen. Motors Corp., 359 F.2d 822 (7th Cir. 1966), *cert. denied* 385 U.S. 836 (1966); *for a compilation of cases following* Evans see Frericks v. Gen. Motors Corp., 20 Md. App. 518, 317 A.2d 494, 503 (1974); 10 WILLAMETTE L.J. 38, 39 n.6 (1973).

> legislative function, not an aspect of judicial interpretation of existing law.
>
> . . . . The intended purpose of an automobile does not include its participation in collisions with other objects, despite the manufacturer's ability to foresee the possibility that such collisions may occur. As defendant argues, the defendant also knows that its automobiles may be driven into bodies of water, but it is not suggested that defendent has a duty to equip them with pontoons.[8]

In *Larsen v. General Motors Corporation*,[9] the Eighth Circuit Court of Appeals grappled with issues similar to those in *Evans* but came to an opposite result. In *Larsen*, the plaintiff suffered severe injuries as the driver of a 1963 Chevrolet Corvair involved in a head-on collision. Plaintiff claimed that a design defect in the steering assembly had caused the entire assembly to be thrust back at the driver's head. The *Larsen* court agreed with *Evans* that a manufacturer's duty of design and construction is to produce a product that is "reasonably fit for its intended use and free of hidden defects."[10] The *Evans* interpretation of "intended use," however, was rejected as too narrow. Automobile accidents are clearly foreseeable by the manufacturers, the *Larsen* court reasoned; and although vehicles are not literally "intended" to collide with one another, the likelihood of such collisions is so great as to place them within the meaning of "intended use."

> The sole function of an automobile is not just to provide a means of transportation, it is to provide a means of safe transportation or as safe as is reasonably possible under the present state of the art.[11]

Whether a duty rests with the manufacturer to anticipate vehicle collisions and to take reasonable steps to minimize the resulting injuries, *i.e.* to build a crashworthy vehicle, is a question entirely distinct from the issue of whether the manufacturer, given such a duty, has acted reasonably or negligently in a particular fact situa-

8. 359 F.2d at 824-825.
9. Larsen v. Gen. Motors Corp., 395 F.2d 495 (8th Cir. 1966): *for a compilation of cases following* Larsen see Frericks v. Gen. Motors Corp., 20 Md. App. 518, 317 A.2d 494, 502 (1974); 10 WILLAMETTE L.J. 38, 39 n.6 (1973).
10. Larsen v. Gen. Motors Corp., 395 F.2d 495, 501 (8th Cir. 1966).
11. *Id.* at 502; *accord* Dyson v. Gen. Motors Corp., 298 F. Supp. 1064, 1073 (E.D. Pa. 1969).

tion.[12] In many decisions, this distinction is blurred. The confusion of these issues has hampered the courts in accurately assessing the areas of agreement and disagreement between the cases following *Larsen* and those following *Evans.*

As already noted, both the plaintiffs and the defendants can usually agree on the general proposition that a manufacturer has a duty to produce

> . . . a product that is reasonably fit for its intended use and free from hidden defects that could render it unsafe for such use.[13]

Courts differ, however, in their construction of the term "intended use." Variation in construction may reflect divergent views of the proper scope of the manufacturer's duty, or in some instances may have arisen from confusion of duty with liability. For example, in the recent case of *Frericks v. General Motors Corporation,*[14] the Maryland Court of Special Appeals erroneously stated that the "basic assumption" of *Larsen* was that "liability should be coextensive with foreseeability," an assumption the Maryland court rejected as "totally fallacious." The plaintiffs in *Dreisenstock*, citing *Larsen,* seemed to have made the same error, stressing the foreseeability of automobile collisions as the basis for imposition of liability on defendant manufacturer. The *Dreisenstock* court, however, correctly noted that foreseeability does not equal liability although it is an important factor to be considered. Since all accidents are to some extent foreseeable, an equation of liability with foreseeability would force upon the manufacturer an absolute obligation to build a crashproof car, a result *Larsen* specifically repudiated.[15]

The *Larsen* argument, again, is that, while strictly speaking an accident is not an intended use of a motor vehicle, it is such a predictable, commonplace occurrence that, under traditional negligence principles, the manufacturer should anticipate its likelihood and take reasonable precautions to guard against foreseeable injuries.[16]

---

12. *See generally* W. PROSSER, *supra* note 5, at 324.
13. Larsen v. Gen. Motors Corp., 395 F.2d 495, 501 (8th Cir. 1966).
14. Frericks v. Gen. Motors Corp., 20 Md. App. 518, 317 A.2d 495, 501 (1974); *see generally* Passwaters v. Gen. Motors Corp., 454 F.2d 1270, 1275-1276 n.5 (8th Cir. 1972).
15. 489 F.2d at 1070. *But see* Yetter v. Rajeski, 464 F. Supp. 105, 108 (D. N.J. 1973). *See generally* RESTATEMENT (SECOND) OF TORTS, § 289, comment b at 41 (1965); 2 F. HARPER and F. JAMES, TORTS § 28.6 (1956).
16. 395 F.2d at 502 n.4; *accord,* Grundmanis v. British Motor Corp., 308 F. Supp. 303 (E.D. Wis. 1970) (the court noted that "[b]etween 1/4 and 2/3 of all vehicles manufactured are at some time during their subsequent use involved in the tragedy of human injury and death."); Dyson v. Gen. Motors Corp., 298 F. Supp. 1064, 1072

Evans, recognizing that automobile accidents are foreseeable, nevertheless adhered to a limited conception of the manufacturer's duty.[17] The underlying reasoning in *Evans* must depend on factors other than "intended use" if we are to make sense of the argument. In the case of *Ford Motor Co. v. Zahn*,[18] cited in both *Larsen* and *Evans* in support of their respective interpretations of the intended use doctrine, plaintiff lost the sight of one eye when thrown against the jagged edge of a defectively designed ashtray. The accident occurred when the vehicle had to brake suddenly and unexpectedly. According to the *Evans* court, "The product . . . [was] unfit for its intended use and in that respect [was] the cause of the accidental injuries."[19] This "explanation" is unsatisfactory. Surely the sudden braking of the vehicle was as much the cause of the injuries as the jagged edge of the defective ashtray. How would the manufacturer's liability be any different if the vehicle was unable to stop in time and collided with another vehicle causing plaintiff to be thrown against the ashtray's jagged edge in the "second collision?"

II

The duty controversy is in reality an issue of public policy, and surely this is the case in *Evans*. The court does not address the issue squarely but does express its preference for a legislative rather than a judicial solution to the second collision problem. The underlying reasons for this determination are not disclosed in *Evans*, but the argument was most convincingly enunciated in *Yetter v. Rajeski*:

> [W]e think it unfair to the defendants to impose upon them such a retrospective duty. Any part of an automobile which causes injury to an occupant upon impact with that part can be said—after the fact—to have been capable of 'safer' design. Without legislatively imposed objective standards defining the design responsibility of automobile manufacturers, we think the imposition of the duty sought here by plaintiff to be unfair . . .[20]

Suggested advantages of a purely legislative approach include careful, impartial study of complex design problems, the promulgation

(E.D. Pa. 1969). *See generally* NADER, *supra* note 4; RESTATEMENT (SECOND) OF TORTS § 395, comment j at 330 (1965).

17. 359 F.2d at 825.
18. Ford Motor Co. v. Zahn, 265 F.2d 729 (8th Cir. 1959).
19. 359 F.2d at 825.
20. Yetter v. Rajeski, 364 F. Supp. 105, 108 (D. N.J. 1973).

of comprehensive and uniform standards, and even-handed administration of law.[21]

However, Congress has expressly denied any intention to supersede common tort liability,[22] and the standards so far enacted under the applicable federal act have NOT provided a truly comprehensive approach to the design problems.[23] Further, because the regulations are prospective only, they provide no aid to the victims of poor design unfortunate enough to have been injured prior to their effective date. It has also been suggested that the designation of a single government agency as the sole and ultimate arbiter of design standards ignores the political probability of undue influence on the agency by the regulated industry. And tort liability has the additional advantage of generality: whereas the specific standards promulgated by the legislature are minimums, not likely to be exceeded by the manufacturers, the threat of tort liability may encourage the manufacturers to build vehicles safer overall.

The *Evans* court was silent as to any other public policy consideration it may have relied upon in formulating its narrow conception of the manufacturer's duty. If it was the spectre of a duty to build "accident-proof" or "fool-proof" automobiles, such a duty was never imposed by *Larsen* or the cases following this line; nor have these cases suggested that manufacturers ought to be "insurers" of the ABSOLUTE safety of their cars. Nevertheless, the *Evans* school has consistently "confused crashproof with crashworthiness".[24] If the court's concern was for the economic impact the *Larsen* rule would have on the "basic industry in our economic complex," as sug-

---

21. *See generally* McClung v. Ford Motor Co., 333 F. Supp. 17, 20 (S.D. W. Va. 1973), *cert. denied*, 412 U.S. 940 (1973); Frericks v. Gen. Motors Corp., 20 Md. App. 518, 317 A.2d 494, 503 (1974); Hoenig and Weber, *Automobile Crashworthiness: An Untenable Doctrine*, 1971 INS. L.J. 583; NADER, *supra* note 4; 118 U. PA. L. REV. 299 (1969).

22. TRAFFIC SAFETY ACT, 15 U.S.C. § 1397(c) (1966): "Compliance with any Federal Motor Vehicle safety standard issued under this title does not exempt any person from any liability under common law. . ."; *see also id. at* § 1381, 1389, 1391 and 1392(d).

23. FEDERAL MOTOR VEHICLE SAFETY STANDARDS, 49 C.F.R. § 571; *see also* Badorek v. Gen. Motors Corp., 11 Cal. App. 3d 902, 924, 90 Cal. Rptr. 305 (1970); 118 U. PA. L. REV. 299 (1969).

24. Badorek v. Gen. Motors Corp., 11 Cal. App. 3d 902, 90 Cal. Rptr. 305 (1970).

> The rationale of *Evans* is difficult to follow: to manufacture an automobile which is accident proof is an obvious impossibility—to say so is to express a truism. To adopt that truism as the basis for a rule that, therefore, under the law of negligence, there is no duty to exercise care to design a 'safer' automobile is a non sequitor. It confuses crashproof with crashworthiness.

Id. at 919.

gested in *Frericks*, it was over-inflated as will shortly become evident.

The *Evans* line neglects the restrictions of "reasonableness" in the *Larsen* formulation. In the instant case, the *Dreisenstock* court demonstrated that the *Larsen* standard of the manufacturer's duty does not lead inexorably to a plaintiff victory. *Dreisenstock* properly concentrates on the issue of reasonable care:

> The key phrase in the statement of the *Larsen* rule is "unreasonable risk of injury in the event of a collision," not foreseeability of collision. The latter circumstance is assumed in collision cases under the *Larsen* principle; it is the element of "unreasonable risk" that is uncertain in such cases and on which the determination of liability will rest. . .[25]

By relying on a definition of "intended use" that restricts the scope of an automobile manufacturer's design responsibilities, courts following *Evans* foreclose as a matter of law a large number of plaintiffs from presenting their evidence in court. The broader duty espoused by the *Larsen* cases merely permits the court to reach the merits and apply the accepted negligence standard.[26] This involves a balancing of the likelihood and gravity of harm against the burden of effective precautions, according to *Dreisenstock*. A variety of factors including the purposes for which the vehicle was designed, the obviousness of the "defect," the price of the vehicle and the circumstances of the accident must be considered to determine liability. These considerations are a significant contribution by the *Dreisenstock* court to a reasoned, unambiguous approach to the problems of manufacturer liability.

After assuming that manufacturers have a duty to design reasonably safe automobiles, the court proceeds to analyze "reasonableness" by traditional tort principles of risk vs. utility.[27] *Evans* based its holding in large part on the leading case of *Campo v. Sco-*

25. 489 F.2d at 1071.
26. Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099 (1960):
> Where the action is against the manufacturer of the product, an honest estimate might well be that there is not one case in a hundred in which strict liability would result in recovery where negligence does not. *Id.* at 1114.

A number of courts, however, beginning with *Dyson* and *Badorek* have preferred the doctrine of strict liability to the *Larsen* negligence approach although the analysis in all these cases has been very similar.
27. 489 F.2d at 1071.

field,[28] which held as a matter of law that an "obvious" condition cannot be considered unreasonably dangerous. This latent-patent distinction is not seen in *Dreisenstock* as an escape-hatch for manufacturer's responsibilities but as a limitation on liability. Where the alleged design defect is an obvious danger to the user, the reasonableness of liability on the manufacturer is greatly reduced.[29] The rationale is analagous to the assumption of risk doctrine, albeit more flexible. In all but a few exceptional cases, the manufacturer would be unable to make out a prima facie case under the narrow confines of the assumption of risk defense.

The character of the particular vehicle is an element of utility to be weighed in the equation. *Dreisenstock* finds support for this proposition in the National Traffic and Motor Vehicle Safety Act of 1966, which provides that proposed safety standards must be "reasonable, practicable and appropriate for the particular type of motor vehicle."[30] The manufacturer is not expected to design and build a convertible which is as safe in a roll-over accident as a sedan with centerposts and full door frames. But the manufacturer ought to be held to a standard of providing a convertible which is as safe as it can reasonably be made to be, certainly "not appreciably less safe than other convertibles."[31] The style factor ought to cut the other way as well, so that where the alleged defect presents a clear RISK to the user or the public and has no appreciable UTILITY, it becomes reasonable to impose liability on the manufacturer.[32]

The price of the vehicle is another important factor for the *Dreisenstock* court in evaluating the vehicle's utility. A Volkswagen Beetle cannot be expected to protect its occupant as well as a Mercedes-Benz.[33] The availability and cost of an alternative design must be considered as well.[34]

---

28. Campo v. Scofield, 301 N.Y. 468, 95 N.E.2d 802 (1950).
29. *See, e.g.*, Schneider v. Chrysler Motors Corp., 401 F.2d 549 (8th Cir. 1968) (plaintiff held contributorily negligent resulting in eye injury when he walked into automobile vent in darkened garage).
30. 489 F.2d at 1072, *citing* 15 U.S.C. 1392(f)(3).
31. Dyson v. Gen. Motors Corp., 298 F. Supp. 1064, 1073 (E.D. Pa. 1969).
32. *See e.g.*, Passwater v. Gen. Motors Corp., 454 F.2d 1270 (8th Cir. 1972) (plaintiff, riding a Honda motorcycle, received lacerations on leg in collision with passing Buick Skylark equipped with stylistic metal fins protruding from rear wheel cover).
33. 489 F.2d at 1072; *see* Enders v. Volkswagenwerk, A.G., Commerce Clearing House Prod. Liab. Rep. § 5930 (Wis. 1968).
34. W. PROSSER, *supra* note 5, at 645. *But see* NADER, *supra* note 4, at 652; N.Y. Dep't of Motor Vehicles, FINAL REPORT OF THE FEASIBILITY STUDY OF THE N.Y. STATE SAFETY CAR PROGRAM XIX-XX (1966).

Finally, it is important to consider the actual circumstances of the particular accident.[35] The manufacturer may be expected to provide a roof that will not cave in during a low speed roll-over accident, for example, but would undoubtedly not have to guard against the consequences of the vehicle's plunging over a cliff.

Applying the foregoing considerations to the facts of the principle case, the *Dreisenstock* court made the reasonableness requirement of the *Larsen* rule quite clear. The court pointed out that defendant's vehicle was a "van-type multi-purpose vehicle" of special "type and particular design.' This design was required to "provide the owner with maximum amount of either cargo or passenger space in a vehicle inexpensively priced and of such dimensions as to make possible easy maneuverability." The engine was in the rear, and there was a reduction in the amount of space between the exact front of the vehicle and the driver's compartment. "All of this was readily discernible to anyone using the vehicle; in fact it was . . . the unique feature of the vehicle." Furthermore, the court pointed out, there was no evidence on the availability of practical alternative designs which would have been consistent with the special purposes of the vehicle.[36]

The contention of the plaintiff and the thrust of all her evidence was that the design of the Microbus did not provide the same protection nor conform to the design of "a standard American-made vehicle, which is a configuration with the passengers in the middle and the motor in the front." The court pointed out that under this proposed standard any rear engine automobile would be inherently dangerous and that it would impose a "straight-jacket on design" that was not contemplated by either the *Evans* or *Larsen* rules. The court also noted that the evidence that was presented for the plaintiff was not only inappropriate but was vague and unsubstantiated. Consequently, the court found the standard argued by the plaintiffs improper and held in favor of defendant manufacturer.[37]

Dreisenstock makes it clear that the burden of proof on the plaintiff, even under the *Larsen* rule, is considerable in these cases. The range of factors considered in determining the manufacturer's liability acts as an effective curb against the excesses feared by the *Evans* courts.

35. 489 F.2d at 1073.
36. *Id.* at 1073-1074.
37. *Id.* at 1074-1076.

Using the general negligence principles applied in *Dreisenstock* within the broadly defined scope of the *Larsen* duty would lead to generally similar results, as suggested previously, if applied in the context of some of the *Evans* cases.[38] For example, in *Willis v. Chrysler Corp.*,[39] plaintiff decedent was killed when his vehicle was involved in a head-on crash at a speed of 65-70 miles an hour. In a wrongful death action against the manufacturer, plaintiff alleged that the vehicle was uncrashworthy in that the force of the collision made decedent's vehicle "split in two," thus contributing to his death. The court felt it was necessary to resort to the *Evans* doctrine in order to conclude that defendant manufacturer "had no duty to design an automobile that could withstand [such] a high speed collision and maintain its structural integrity." But the same would be true under *Dreisenstock* which merely recognized that a product should not subject the user to an unreasonable risk of injury in the event of a collision.

Dreisenstock, it should be pointed out, does not expressly endorse the *Larsen* rule, but merely accepts it as "applicable" for the purposes of the particular decision.[40] Such a stance enabled the court to take a more objective look at the issues than a partisan position would have. The result—a separation of duty considerations from liability considerations—avoids much of the earlier confusion and permits reconciliation of cases which seemed in conflict.

The point of *Larsen* and the cases following that decision is simply that if the plaintiff's contentions are provable, he or she should have their opportunity in court and not be precluded, as in *Evans*, by a judicial determination that the manufacturer is never under a duty to build or design a safer car. The value of *Dreisenstock* in this regard is twofold in that it shows by example that *Larsen* does not create absolute liability for automobile manufacturers, while providing a general formula to aid in determining whether or not a particular manufacturer has breached his duty of reasonable care in a particular case.

Leonard D. Weiler
Marlys J. Huez

38. *Id.* at 1071 n.17.
39. Willis v. Chrysler Motors Corp., 264 F. Supp. 1010, 1012 (S.D. Tex. 1967); *see also* Schemel v. Gen. Motors Corp., 384 F.2d 802 (7th Cir. 1967), *cert. denied*, 390 U.S. 945 (1967) (plaintiff's theory that manufacturer of an ordinary automobile designed for speeds up to 115 miles per hour constituted negligence rejected by court).
40. 489 F.2d at 1069-1070.