5.40E CRASHWORTHINESS — SPECIAL ISSUES (Approved 5/01)

NOTE TO JUDGE

In *Poliseno v. General Motors*, 328 *N.J. Super.* 41 (App. Div. 2000), *certif. denied*, 165 *N.J.* 138 (2000), and *Green v. General Motors*, 310 *N.J. Super.* 507, *certif. denied*, 156 *N.J.* 381 (1998), the Appellate Division has defined the parameters of a specialized type of products liability claim known as a crashworthiness claim and has also established a different burden of proof that shifts the burden of apportionment of damages in such claims to the defendant. In addition, the *Poliseno* court found that failure to provide specific factual tailoring of jury instructions in such cases was reversible error.[1] The design issues and causation issues in crashworthy engineering design cases are extremely complex, varied and fact sensitive. However, to assist trial judges and practitioners the Model Charge uses typical crashworthy design theories as illustrative examples.

Crashworthiness is defined as the ability of a motor vehicle to protect its passengers from enhanced injuries after a collision. Crashworthiness has also been defined as the protection a motor vehicle gives its passengers against personal injury or death from a motor vehicle accident. If injuries from a "second collision" of some part of the car intruding into the occupant's compartment space or the occupant being propelled outside of a safe survival space were avoidable, or could

[1] *Poliseno v. General Motors*, 328 *N.J. Super* at 62-63 (". . . in complex cases of this nature, the jury should be instructed on legal principles in the context of the particular facts of the case and the parties' contentions, rather than on abstract principles of law").

have been reduced or lessened by a reasonable alternative design, then the motor vehicle would not be crashworthy. Strict liability is imposed on a manufacturer for injuries sustained in an accident involving a design or manufacturing defect that enhanced the injuries the occupants suffer although the defect did not cause the accident. Enhanced injury refers to the degree by which a defect, which I have already defined for you, aggravates collision injuries beyond those that would have been sustained because of the impact or collision absent the defect. A manufacturer or designer's liability is premised upon their legal duty to design and manufacture a reasonably crashworthy vehicle.

Since accidents or collisions, no matter who was at fault or who caused the accident, are a foreseeable part of use of vehicles, reasonably designed, properly functioning safety devices or designs *[here the court and counsel should fill in examples appropriate to the case such as seat belts, air bags, collapsible steering columns, interior padding, an exterior safety cage or a wider wheel base, et cetera]* may be required to make a vehicle crashworthy.

The plaintiff maintains that: *[here insert defect claims such as, e.g., three point rather than lap belt only seat belts; seat belts with pre-tensioning devices or dual retractors or locking latch plates; padded interior pillars and/or dash; a re-*

enforced strengthened roof less susceptible to crush (the general defect in Green v. General Motors); a wider wheel base to allow greater stability] were reasonably safer alternative designs that should have been used in this vehicle to make it crashworthy.[2]

The defendant maintains that the design and manufacture of its *[here insert the defendant's design element claim, e.g., seat belt, interior pillars, door frame, roof, steering column and/or wheel base, et cetera]* were reasonably safe and that plaintiff's proposed alternative design was not feasible or practical and/or would not have improved the crashworthiness of the vehicle.[3]

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[2] In addition to separate delineation of distinct defect claims in the charge to satisfy *Poliseno*, separate jury interrogatories on each defect claim have been strongly recommended by the Supreme Court. *Kassick v. Milwaukee Electric Tool Corp.*, 120 *N.J.* 130, 134-135 (1990). In *Ponzo v. Pelle*, 166 *N.J.* 481 (2001), the Supreme Court reaffirmed the need for separate jury interrogatories where there are separate liability or damage claims.

[3] The following excerpt from a jury charge which was used in the trial of a seat belt crashworthy claim is a good example of how a crashworthy charge can incorporate the distinct defect allegations of the parties.

> Plaintiff claims that the seat belt should have contained the following alternative designs. And let's see. Plaintiff claims that the seat belt should have contained any of the following alternative designs, any of the following. One is that there should have been no comfort feature or window shade device at all. Another one was that it should have contained a pre-tensioner or a mechanical device that would have eliminated slack in the seat belt. And another one is that there should have been a change in the seat belt geometry.
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> Defendant, on the other hand, claims that the seat belt should not have contained the reasonable safer designs claimed by the plaintiff for a number of reasons. They say the benefits of the comfort feature outweigh any disadvantages and, therefore, a system with the comfort feature, it's just not defective, also that a pre-

You must determine whether the vehicle as designed was or was not crashworthy based on the principles of reasonable, safer alternative designs that I have already given you. If you find that there were reasonable, safer alternative designs that should have been, but were not used in this vehicle that would have improved the protection it gave its occupants against personal injury or death from a foreseeable motor vehicle accident, then you will have found this vehicle uncrashworthy. On the other hand, if you find that there were not reasonable, alternative designs that would have improved the ability of this vehicle to protect its occupants in case of a collision, then you will have found in favor of the defendant car manufacturer or designer on the issue of crashworthiness.

You must remember in deciding this issue that your focus must not be on who or what caused the accident. Instead, to evaluate the design issue properly you must focus your deliberations on how and why the occupants of the vehicle suffered enhanced injury or death in the collision and whether reasonable

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tensioner would not be capable of removing twelve or thirteen inches of webbing from the shoulder belt, that it promotes possible submarining by an occupant under the lap belt, and that there is no field accident data showing that pre-tensioners are providing a benefit in real world accidents.

They also claim that no feasible or practical mechanical comfort feature design exists that could remove webbing from the shoulder belt upon sensing a crash and, finally, that the lap belt anchor point was properly located to provide good restraint to all size occupants, and that a motorized system would have provided no better restraint, but would have been more complicated and less reliable.

alternative safety devices would have lessened or decreased the likelihood of injury or death after a collision.[4]

CAUSATION AND APPORTIONMENT

If you decide that the defendant's vehicle was not reasonably crashworthy, then you must decide the extent of the passengers' or occupants' enhanced injuries. If under all of the circumstances here *[here insert specific circumstances such as a rollover of the vehicle or an offset frontal collision, or rear or side impact, et*

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[4] In affirming two trial courts' decisions to expressly exclude considerations of plaintiff's conduct from the initial design or manufacturing defect issues, the *Green* and *Poliseno* courts both pointed out that once plaintiff's conduct or misconduct is found foreseeable, it becomes irrelevant on defect issues and is unavailable as a comparative negligence defense to strict liability crashworthy claims. *See Green*, 310 *N.J Super.* at 518-521 (since the plaintiff driver's excessive speed of 45-75 MPH in a 25 mph zone still did not exceed the foreseeable closing speeds for crashworthy design parameters, the jury was properly instructed to exclude it from their crashworthy design decision) and *Poliseno*, 328 *N.J. Super.* at 57-58. The same two courts, however, recognized that the negligent or non-negligent circumstances of the first collision, sometimes make issues of plaintiff's speed or other conduct relevant to the apportionment defense that it was the first impact that caused some or all of the occupants' injury either before the second collision defect occurred or independently of the second collision defect. *Green*, 310 *N.J. Super.* at 522.; *Poliseno*, 328 *N.J. Super.* at 59-60.

Therefore, as the *Poliseno* court explicitly recognized, a limiting instruction such as Model Civil Charge 5.40I, subsection G (2), which also incorporates the specifics of the case, is required to guide the jury as to when and how they may consider the plaintiff's conduct. *Poliseno*, 328 *N.J. Super.* at 61-62. The *Poliseno* court went on to emphasize that the jury must be instructed that only causative fault by the plaintiff that preceded his second collision injuries could be considered by them in apportioning injury as part of proximate causation. *Id.* Thus in that case, the jury should have been instructed that if they found that the plaintiff's speed or loss of control caused some of his injuries before the defective door weld broke (as part of the first collision) and then greater injuries were suffered as part of a second collision due to a door weld defect, then and only then would there be an apportionment issue for them to decide in which plaintiff's speed or loss would be relevant. *Poliseno*, 328 *N.J. Super.* at 57, 61-62.

cetera] you find that the occupants would have suffered lesser injuries with a reasonably safer alternative design, then the car manufacturer/designer is liable for the occupants' increased injuries. On the other hand, if you find that the occupants would have suffered the same or greater injuries even with reasonably safer alternative designs, then the vehicle's safety defect or lack of crashworthiness caused no enhanced injuries and defendants are not liable.

If you find that the plaintiff has proven there were reasonably safer alternative designs required to make this vehicle crashworthy, then you must determine whether the plaintiff also proved that those designs would have lessened the occupant's ultimate crash injury to some extent. If you find the plaintiff met that burden, you will find in favor of the plaintiff because the plaintiff need not have quantified or put a percentage on the extent to which the design or manufacturing defects added to all of the plaintiff's final injuries.

If the defendant vehicle manufacturer/designer claims that all or part of the injuries would have occurred anyway, then the defendant, and not the occupant of the vehicle, has the burden of proving what part/percentage of the plaintiff occupant's injuries would have occurred even if reasonable alternative safer designs had been supplied in their vehicle. If the defendant can prove that an apportionment can be

reasonably made, separating those injuries the occupant would have suffered anyway, even in a crashworthy vehicle, from those enhanced injuries the plaintiff occupant suffered due to the absence of reasonably safer designs, then the defendant's liability would be limited only to that portion/percentage of the injuries the defendant proves is related to the plaintiff's increased or enhanced harm. On the other hand, if you find that the defendant car manufacturer/designer has not met its burden of proving that plaintiff's injuries can be reasonably apportioned, then the defendant would be responsible for all of the occupant's harm or injury.[5]

[5] The following jury questions should be asked in a crashworthy case either at Model Civil Charge 5.40B subsection 5, for a manufacturing defect or at Model Civil Charge 5.40D-3 subsection 4 (d), for a design defect:

1) Has the plaintiff proved that the manufacturing/design defect was a proximate cause, *i.e.*, a substantial factor, in increasing plaintiff's harm or injury beyond that which would have resulted if there had not been a defect?

If the manufacturer has sought a credit and has presented evidence that would permit apportionment, the following question together with an ultimate outcome charge and percent apportionment verdict sheet should also be given to the jury.

2) If plaintiff has proved that his/her injuries were worsened or increased to some extent by uncrashworthy manufacture/design, has the defendant met its burden of proving that plaintiff's total injuries (death/paralysis, etc.) are capable of being reasonably apportioned on a percentage basis as to injuries the occupant of the vehicle would have suffered from the first collision in the absence of a crashworthy defect versus those he/she suffered here as the result of a second collision crashworthy defect?