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Through the Looking Glass Darkly: Cleveland v. Piper Aircraft and Second Collision Liability

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Through the Looking Glass Darkly: Cleveland v. Piper Aircraft and Second Collision Liability

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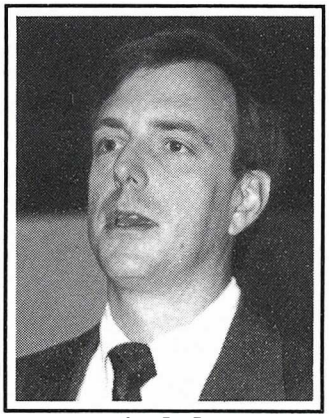
INTRODUCTION

"By the pricking of my thumbs,
Something wicked this way comes."[1]

There is a tendency these days during the Republican *fin de siecle* for the plaintiffs' bar to experience a distinct itching of the thumbs when slogging through product liability cases from the federal circuit courts. The Tenth Circuit in **Cleveland v. Piper Aircraft Corporation**[2], held that New Mexico law requires a fact finder to compare the negligence of a manufacturer for its failure to design or manufacture a crashworthy vehicle with the original tortfeasor's negligence in causing the accident to occur. This holding is in direct conflict with the analysis for the tort of crashworthiness articulated by the New Mexico Court of Appeals in **Duran v. General Motors Corporation**[3] and operates to undermine the fundamental social policies which formed the basis for the tort of crashworthiness. A thorough understanding of the Tenth Circuit's opinion, which is not binding on New Mexico state courts, and the reasons why the court misconstrued New Mexico



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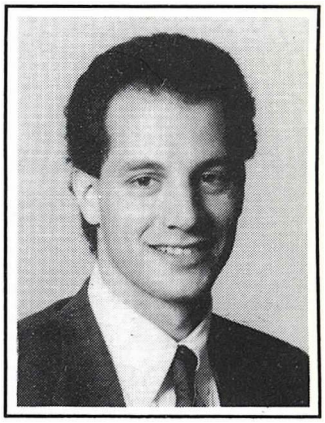
The New Mexico Court of Appeals Experiments With Satellite Offices

Will Murphy, J.D.

Will Murphy is currently clerking for Court of Appeals Judge Pamela Minzner and has recently been admitted to practice in New Mexico.

In 1990, the New Mexico legislature approved funding for a satellite office of the Court of Appeals in Albuquerque. The lease started on April 1, 1990, but Chief Judge Joseph Alarid of the New Mexico Court of Appeals insists that the court's Albuquerque satellite office did not open on April Fool's Day. "That was just the day that the money became available. The office opened on the second." The Albuquerque office is in the former State Bar Building, next to the UNM Law School. The court also has a satellite office in Las Cruces.



Will Murphy

As the Albuquerque office has no personnel from the clerk's office, filings must still be made in Santa Fe. The court tried to get funding so that it could begin accepting filings

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BACKGROUND ON CRASHWORTHINESS

The doctrine of "crashworthiness" or "second collision"[4] received its judicial baptism in the landmark case of **Larsen v. General Motors Corporation.**[5] The **Larsen** court concluded that a manufacturer owes a duty to design and manufacture a "crashworthy" vehicle because automobile accidents are a fact of life, and therefore entirely foreseeable.[6] **Larsen** stands for the essential proposition that a person who sustains injuries or whose injuries are enhanced by the breach of the manufacturer's duty to produce a crashworthy vehicle is entitled to recover for those injuries over and above what would have been sustained in the initial collision.

An automobile manufacturer owes a duty to design and manufacture a "crashworthy" vehicle because automobile accidents are a fact of life and therefore entirely forseeable.

New Mexico has followed the great majority of jurisdictions and adopted the doctrine of crashworthiness. In **Duran v. General Motors Corporation,**[7] the Court of Appeals held that design defects[8] which enhance injuries are actionable, even if the defect did not cause the initial collision. "The fact that the defect does not cause the initial collision or impact should make no difference *if it causes or enhances the ultimate injury."*[9]

There are two noteworthy points about the **Duran** opinion which are important for a full understanding of the **Cleveland** case. *First*, the Court of Appeals in **Duran** adopted a negligence standard for an injury-causing or injury-enhancing design defect.[10] The holding that a crashworthiness claim sounds in negligence rather than strict liability allowed the **Cleveland** court to conclude that New Mexico's regime of pure comparative negligence requires a comparison of the relative fault of the initial tortfeasors and the manufacturing tortfeasor. *Second*, the **Duran** court required that a plaintiff prove by specific evidence or testimony the extent of enhanced injury caused by the design defect.[11] The Court of Appeals adopted the three requirements for proof of proximate cause set out in **Huddell v. Levin.**[12] The plaintiff must prove that: (1) the defective design caused injuries over and above those which otherwise would have been sustained; (2) the specific degree or extent of the enhanced injury;[13] (3) what injuries, if any, would have resulted had the alternative, safer design been used.[14] In addition, plaintiff must offer some method of establishing the extent of enhanced injuries attributable to the design defect.[15]

The **Duran** court's requirement of specific proof that the design or production defect caused the injuries attributable to the second collision is significant for the purposes of understanding the flawed analysis in **Cleveland.** Because the **Duran** court so carefully crafted the requirements relating to proof of the second collision injury, a plaintiff *must* exclude the initial collision as a cause of the injuries. Proof of the second collision claim under New Mexico law necessarily excludes fault of the original tortfeasors in causing the second collision injuries since by definition, the second collision claim can *only* be established with specific evidence that the design or production defect caused the plaintiff's injuries or enhanced the injuries caused by the initial collision. Given this regime, the **Cleveland** court's conclusion that New Mexico law requires the comparison of fault between the initial and second collision tortfeasors constitutes a gross misreading of the **Duran** opinion.

CLEVELAND V. PIPER AIRCRAFT

The facts of **Cleveland** involved the crash of a Piper Super Cub at the Los Lunas airport. The Piper was pulling a glider, piloted by Robert Mudd, which was to be photographed for a commercial. The front seat of the Piper had been removed and a camera mounted to the base of the removed front seat to photograph the glider for the commercial. The pilot of the Piper would control the plane from the rear seat. The rear seats had seat-belts, but no shoulder harness.

Cleveland was the pilot of the Piper and employed as a glider tow pilot for High Valley Soaring. He and his employer had been involved in an ongoing dispute with the owner of the Los Lunas airport, John Wood. The dispute centered around the glider operations' compliance with FAA rules and regulations. In fact, Wood had closed the airport the day before the accident by blocking the runway with several parked vehicles. Two days before the accident Wood had stopped Cleveland from taking off at the airport by parking his van crosswise across the end of the runway. A court hearing on the dispute was scheduled the day of the accident.

Cleveland *proceeded to trial on two theories of design negligence: Negligence which proximately caused the initial collision and negligence which proximately caused the second collision.*

On the day of the accident, Wood again blocked the end of the runway with his van. The Piper, pulling the glider, collided with the van on take-off. Cleveland, who was piloting the plane, sustained serious brain injuries when his head struck the camera mounted in the front seat.

Cleveland sued Piper Aircraft. The case proceeded to trial on two theories of design negligence. *First*, inadequate visibility from the rear pilot's seat as a proximate cause of the *initial collision*; and *second*, the lack of a shoulder harness for the rear pilot's seat, the second collision theory. The jury apportioned fault among the parties under each of the two theories. Significantly, however, the jury found that 100% of Cleveland's injuries were attributable to the lack of shoulder

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harness. The special verdict form also indicated, however, that the design negligence as to inadequate forward visibility was a proximate cause of Cleveland's injuries and damages.[16]

The jury found that with regard to the lack of the shoulder harness Piper was 91.6 % at fault and Cleveland was 8.4% at fault. With regard to the rear seat visibility theory, the jury apportioned fault as follows: Piper — 41.7 %, Cleveland — 42.5%, Mudd — 15.8%, Wood — 0. The district court entered judgment against Piper based on the 41.7% finding, despite the jury's conclusion that *100%* of the injuries to Cleveland were caused by the lack of a shoulder harness.

The Tenth Circuit reversed the district court on the basis that the jury should have been permitted to compare the fault of the initial and second collision tortfeasors.[17] The court held that New Mexico law[18] required that "as to that portion of damages for which the original tortfeasors and the crashworthiness tortfeasors are concurrent tortfeasors, i.e., damages attributable to the enhanced injuries, only, the negligence of all of the tortfeasors, and of the Plaintiff, must be compared."[19] In other words, the Tenth Circuit interpreted the New Mexico law of crashworthiness and comparative negligence to require that the negligence of any party proximately causing any enhanced injury must be compared *including* any of the original tortfeasors that caused the accident in the first place.

***The Tenth Circuit's decision is fundamentally flawed and represents an unfortunate misreading of* Duran.**

Stated in this manner the opinion sounds so reasonable and would appear to comport with New Mexico's system of pure comparative fault. And yet, the decision is fundamentally flawed. The second collision tort by definition is limited to injuries caused by or enhanced by the product defect, that is *only* those injuries resulting from the second collision. The **Duran** court held, as indeed the Tenth Circuit recognized,[20] that the tort of crashworthiness as recognized in New Mexico assumes that the injury is divisible. It is a gross misreading of **Duran** to conclude, as did the Tenth Circuit, that the original tortfeasor's negligence in causing the accident may be compared against the manufacturer's design negligence. Why? Because such a result requires perforce the assumption that the initial injury is *indivisible*, that the first collision tortfeasor's negligence carries over to contribute to the second collision injuries. The unanswered conumdrum is how to compare the degree of an indivisible injury caused by the original tortfeaser's negligence with the second collision injuries caused by the crashworthiness tortfeaser's design negligence.[21]

Part of the difficulty in parsing the **Cleveland** opinion is that the court appears to give contradictory instructions to the district court on remand.[22] On the one hand, the court appears to hold that if the evidence is uncontroverted that no injuries would have occurred as a result of the first collision, then "no issue is presented for the jury to determine what injuries and damages were proximately caused by the negligence of the original tortfeasors."[23] So far so good. In the very next sentence, however, the court appears to hold that the jury must compare the relative fault of all parties and non-parties whose conduct proximately causes the enhanced injury, whether the party or non-party is an "original tortfeasor" or the design tortfeasor.[24]

The initial tortfeasor's negligence cannot be compared with the second collision tortfeasor's negligence.

The court's holding that initial and second collision tortfeasers' negligence must be compared is based on a faulty application of New Mexico law and is sure to create tremendous confusion for the jury. The opinion misconstrued New Mexico law in a number of respects. The court disregarded the express statement in **Duran** that, because the second collision tort is concerned only with the injuries proximately caused by the design defect, "the concurrent tortfeasor concept is not applicable."[25] Despite this clear statement, the Tenth Circuit found that "the logical extension of **Bartlett** to the case before this Court"[26] was to require straight comparison of fault. The logical fallacy here is that if the initial tortfeasor caused the additional injuries, then there is no injury enhanced by the design defect and the plaintiff has failed to prove an element of the second collision tort. It is for this reason that the **Duran** court properly recognized that in the context of crashworthiness the original and second collision tortfeasors' negligence cannot be concurrent and therefore logically should not be compared.

Duran was decided long after New Mexico's adoption of comparative fault and there is not the slightest indication in the decision that the initial collision tortfeasor's negligence should be compared to the crashworthiness tortfeasor's design negligence.[27] The reason for this omission is almost certainly because the **Duran** court focused on the divisibility of injury and the requirement that a plaintiff prove the design defect "causes or enhances the ultimate injury." **Duran**, 101 N.M. at 745.[28]

The Tenth Circuit also grounded its conclusion in a group of New Mexico cases that, taken as a whole, stand for the simple proposition that an initial tortfeasor may be liable for a successive act of negligence, if that successive act of negligence was foreseeable. *See* **Martinez v. First National Bank of Albuquerque**, 107 N.M. 268, 755 P.2d 606 (Ct. App. 1987); **Vaca v. Whitaker**, 86 N.M. 79, 519 P.2d 315 (Ct. App. 1974). Of course the design negligence that causes the second collision injury does *not* succeed the original collision; rather it antedates the accident-causing event and, as recognized by the **Duran** court, results in an injury separate and apart from the initial collision. Indeed, to allow comparison of an original tortfeasor's negligence in causing the accident with the manufacturer's design negligence based on **Martinez** or **Vaca** is tantmount to holding that the original tortfeasor should have

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foreseen the design failure which enhanced the injuries. This is a true perversion of the crashworthiness doctrine.

What is so confounding about the Tenth Circuit's analysis is its complete disregard for the public policies which underlie the tort of crashworthiness. A federal court making an "**Erie** guess" must consider the entire body of a state's law which, in the case of New Mexico, finds strong support for limiting the comparison of second collision fault to the manufacturer. The New Mexico Supreme Court has repeatedly held that it will interpret the laws of this state to keep the highways safe for the motoring public.[29] There is also the explicit recognition of the **Duran** court that the inevitability of automobile accidents gives rise to a manufacturer's duty to use "reasonable care in the design of its vehicle to avoid subjecting the user to an unreasonable risk of injury in the event of a collision."[30] The focus on the manufacturer for design responsibility is eminently practical because the manufacturer is the party best able to control the potential risks through the design of a reasonably safe vehicle. The **Cleveland** opinion, because it shifts the focus away from the manufacturer's responsibility for causing enhanced injuries, undermines the very purpose of the tort in the first place.

There is another compelling reason why the Tenth Circuit opinion should not be followed by New Mexico's courts. The approach set forth by the court shifts some portion of the risk of defective designs to parties other than the manufacturer. As Justice Traynor recognized long ago, the "purpose [of products liability]...is to insure that the costs of the injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves."[31]

WHAT IS TO BE DONE?

What to do about **Cleveland**?[32] Fortunately the court's "**Erie** guess" is not binding on state courts. Until such time as the New Mexico appellate courts address this issue the **Cleveland** opinion carries no precedential value in state court.

The case is binding in federal court, but with all due respect to *stare decisis*, plaintiffs should not be deterred from asking the federal district court to reexamine the issue in light of a more comprehensive analysis of New Mexico law. Allowing a comparision of fault between the original tortfeasor and the design tortfeasor for the *enhanced* injuries is in direct conflict with the entire theory underlying the crashworthiness doctrine and results in a distortion of the law as articulated by New Mexico's appellate courts. In addition, such a comparison is itself redundant of the requirements for a recovery in a crashworthiness case, that is a party can only recover for that part of the injuries which were enhanced by the design defect.

Plaintiffs must be prepared, however, to litigate a second collision case against all of the original tortfeasors and cannot afford to simply focus their case on the manufacturer.

END NOTES

1. Shakespeare, W., **Macbeth**, Act IV, Scene 1, The Complete Works of William Shakespeare 1016 (P. Alexander ed. 1951).

2. 890 F.2d 1540 (10th Cir. 1989).

3. 101 N.M. 742, 688 P.2d 779 (Ct. App. 1983).

4. The description "second collision" is sometimes applied to this theory of liability. It describes injuries or enhanced injury that occurred not as a result of the initial collision itself, but resulted subsequent to initial collision because of a design defect or manufacturing failure. At its simplest the "second collision" is the impact of the occupant of the occupant with some part of the vehicle, a crushed roof for example, which would not have occurred absent a design or manufacturing defect. The terms "second collision" and "crashworthiness" are used synonymously in this article. *See* **Miller v. Tood**, 551 N.E. 2d 1139, 1140 n. 1 (Ind. 1990) (containing a concise description of the theory).

5. 391 F.2d 495 (8th Cir. 1968).

6. The duty requires that a manufacturer "use reasonable care in the design of its vehicle to avoid subjecting the user to an unreasonable risk of injury in the event of a collision." **Larsen**, 391 F.2d at 502. The duty is founded upon the recognition that "[c]ollisions with or without fault of the user are clearly foreseeable by the manufacturer and are statistically inevitable." *Id.* More importantly, the duty expresses a fundamental policy determination that automobiles should provide not just transportation, but "*safe* transportation or as safe as is reasonably possible under the present state of the art." *Id.* (emphasis added).

7. 101 N.M. 742, 688 P.2d 779 (Ct. App. 1983) (emphasis added).

8. The **Cleveland** case included a product liability claim for negligent design as the causative factor in the initial collision. This claim was independent of the crashworthiness theory. The court's discussion of "design defect" which included both a negligent design as the cause of the accident and a negligent design crashworthiness theory is at times confusing. This article uses design or manufacturing defects only in reference to crashworthiness theories.

9. *Id.* at 745.

10. This result was by no means a foregone conclusion. Other courts have grounded the crashworthiness doctrine in strict products liability and breach of warranty theories. *See generally* Annot. "Liability of Manufacturer, Seller or Distributor of Motor Vehicle for Defect which Merely Enhances Injury from Accident Otherwise Caused" 42 A. L. R. 3d 560 (1972).

11. There was a split among the authorities whether plaintiff had to prove enhanced injury with specificity or, following the principles of the RESTATEMENT (SECOND) OF TORTS §§ 433, 433A, 433B, need not prove "the nature and extent of the enhanced injuries,but rather makes a submissible case by offering enough evidence of enhancement to present a jury issue [The "substantial factor" test]. [Under the substantial factor test] [d]efendants are deemed concurrent tortfeasors because their independent acts combine to cause a single injury. Under this theory, plaintiff has the burden of presenting sufficient evidence to prove to the jury that each defendant's act (the original tortfeasor and the manufacturer's defective product) was a substantial factor in producing plaintiff's injuries. Should plaintiff's injuries be indivisible, the defendants are held jointly and severally liable as concurrent tortfeasors for plaintiff's total damages." **Richardson v. Volkswagenwerk, A.G.**, 552 F. Supp. 73, 80 (W.D. Mo. 1982); **Mitchell v. Volkswagenwerk, A.G.**, 669 F.2d 1199 ()8th Cir. 1982); *see generally* Annot. "Products Liability: Sufficiency of Proof of Injuries Resulting from (Second Collision)" 9 A.L.R. 4th 494 (1981). As noted in the text, New Mexico did not follow this approach, but requires specific proof of enhanced injury.

12. 537 F.2d 726 (3rd Cir. 1976).

13. The **Huddell** court's proximate cause requirements for a crashworthiness case have been criticized for creating an impossible standard of proof. *See,*

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e.g., **McDowell v. Kawaski Motors Corp. USA**, 799 S.W.2d 854 (Mo. Ct. App. 1990).

14. This requirement is a corollary to the **Huddell** court's holding that in order to establish a defective design a plaintiff must offer proof of an alternative safer design practicable under the circumstances.The Tenth Circuit in **Cleveland** interpreted New Mexico law not to require that plaintiff offer proof of a benefit from an alternative design in order to establish design negligence. **Cleveland**, 890 F.2d at 1554. Rather, under New Mexico law, plaintiff must present evidence "from which a jury could conclude that the risk of injury would have been avoided by a reasonably prudent person in the position of the manufacturer." *Id.* at 1554.

15. There is authority that accident reconstructionists and/or biomechanical engineers without a medical degree can supply the necessary testimony to establish the degree and extent of enhanced injury. *See*, *e.g.* **Seese v. Volkswagenwerk, A.G.**, 648 F.2d 833 (3d Cir. 1981); **Bean v. Volkswagenwerk Aktiengesellschaft,** 440 N.E.2d 426 (Ill. Ct. App. 1982).

16. Obviously, there was some inconsistency in the jury's verdict, a point that the Tenth Circuit ultimately did not reach because of its conclusion that the jury should have been permitted to consider the original tortfeasor's negligence in determining the crashworthiness liability. **Cleveland**, 890 F.2d at 1546. In light of the court's ultimate holding, however, it must be assumed that the court could harmonize the verdict since the court's opinion invites precisely the type of inconsistency that occured in the **Cleveland** case.

17. The lengthy opinion was authored by Judge Russell from the Western District of Oklahoma sitting by designation.

18. The Tenth Circuit found no New Mexico law directly on point and so the court conducted its own analysis of New Mexico law to arrive at an "**Erie** guess." Where there is no authoritative pronouncement by a state's highest court, a federal court whose jurisdiction is based on diversity of citizenship must predict how the issue would be decided by the state's highest court if confronted with the same facts. **City of Aurora v. Bechtel Corporation**, 599 F.2d 382, 386 (10th Cir. 1979). The federal court, in making its prediction or "**Erie** guess," "may consider all resources including decisions of New Mexico, other states, federal decisions and the general weight and trend of authority." **Hartford v. Gibbons & Reed Co.**, 617 F.2d 567, 569 (10th Cir. 1980); **Rigby v. Beech Aircraft Co.**, 548 F.2d 288, 291 (10th Cir. 1977). "[D]icta or holding in analogous state court decisions, while not authoritative expression of the law [of the forum-state] are persuasive and entitled to consideration by this court." **City of Aurora v. Bechtel Corporation**, 599 F.2d at 386.

19. **Cleveland**, 890 F.2d at 1550-51.

20. **Cleveland**, 890 F.2d at 1546 ("[T]he concept of an 'indivisible injury' has no place in New Mexico's crashworthiness doctrine.").

21. Justice Jefferson's observation in dissent to the California Supreme Court's holding that a plaintiff's negligence in a strict products liability case is to be compared to the manufacturer's design negligence is appropriate here: "What the majority envisions as a fair apportionment of liability to be undertaken by the jury will constitute nothing more than an *unfair reduction* in the plaintiff's total damages suffered, resulting from a jury process that necessarily is predicated on speculation, conjecture and guesswork. **Daly v. General Motors Corporation**, 575 P.2d 1162, 1178,1180 (Cal. 1978) (Jefferson, J., concurring and dissenting) (emphasis in original).

New Mexico allows a jury to apportion fault between a plaintiff's negligence and a manufacturer's strict liability. **Marchese v. Warner Communications Inc.**, 100 N.M. 313, 316-17, 670 P.2d 113 (Ct. App. 1983). A second collision case is, however, totally different from the case where a plaintiff may have misused the product. The second collision theory assumes that there may have been misuse of the product, but that such misuse does not relieve the manufacturer from the duty of design care precisely because such misuse is foreseeable. *See* **Andrews v. Harley Davidson, Inc.**, 796 P.2d 1092, 1095 (Nev. 1990) ("Negligent driving of a vehicle is a foreseeable risk against which a manufacturer is required to take precaution."). The second collision tort fairly addresses product misuse by limiting recovery only to those damages caused by the design defect.

22. The other problem with the court's opinion is that its analysis simply does not track to the holding. The court recognizes that **Duran** clearly holds that crashworthiness and initial tortfeasors are not concurrent tortfeasors. The court also recognizes that New Mexico's standard of proof for a crashworthiness case eliminates the potentional for recovery under that theory where the injuries are indivisible. These two points should have ended the question insofar as the applicable New Mexico law was concerned. The court's opinion, however, reaches out to "read" New Mexico law as permitting a different and contrary result.

23. 890 F.2d at 1557.

24. *Id.* According to the court's analysis it should be unnecessary to compare the original tortfeasor's fault where the design defect caused all of the injury. The court, however, gives flatly contradictory instructions on this very point to the district court. In addition, the facts of **Cleveland** itself, where the jury *did* find that 100% of the injuries were caused by the absence of the rear shoulder harness, the design defect and the court's treatment of that fact, at least suggest that under **Cleveland** it may still be required to apportion fault between design and original tortfeasors even where the evidence shows that all of the injury was caused by the design tortfeasor.

25. **Duran**, 101 N.M. at 750. The Tenth Circuit's answer to what would appear to be the unequivocal statement in **Duran** was to undertake an *independent* analysis of **Huddell v. Levin**, to determine that the **Duran** court really did not intend its holding that the initial and second collision tortfeasors were not concurrent and therefore, implicitly, one would not compare their negligence for the enhanced injuries. Indeed, the Tenth Circuit's discussion of **Huddell** is demonstrably wrong because not only does that portion of the **Huddell** opinion suggest that one would *not* compare the fault of initial and second collision tortfeasors, but moreover, the **Huddell** court's discussion makes clear that the theoretical underpinnings of second collision cases are fundamentally in conflict with notions of concurrent fault. **Huddell**, 537 F.2d at 738-39 *quoted* in **Cleveland**, 890 F.2d at 1549.

26. **Cleveland**, 890 F.2d at 1550-51.

27. The Committee on Uniform Jury Instructions for Civil Cases comments to the products liability section of the New Mexico Uniform Jury Instructions which discusses **Duran** also makes no reference to the possibility that fault should be apportioned between the initial and second collision tortfeasors.

28. This result is in accord with conclusions reached in other jurisdictions. *See e.g.*, **Andrews v. Harley Davidson, Inc.**, 796 P.2d 1092 (Nev. 1990)("It is difficult to envision a situation in which a plaintiff's negligence would be relevant to the issue of whether a design defect relating to crashworthiness was the proximate cause of his injuries."); **Cota v. Harley Davidson**, 684 P.2d 888 (Ariz. Ct. App. 1984). Admittedly these cases arose in jurisdictions where the crashworthiness tort sounds in strict liability, but the results are consistent with the essential theory underlying second collision liability.

29. *See* **Miller v. New Mexico Department of Transportation**, 106 N.M. 253, 255, 741 P.2d 1374 (1987) ("The sole purpose of the waiver in Section 41-4-11 (A) is to ensure that highways are *made safe and kept safe for the traveling public.*"); **Fireman's Fund Ins. Co. v. Tucker**, 95 N.M. 56, 59, 618 P.2d 894 (Ct. App. 1980) ("[T]he New Mexico Legislature intended to protect the general public from injury by imposing liability upon governmental agencies when they fail to maintain safe public highways.").

30. **Duran**, 101 N.M. at 744.

31. **Greeman v. Yuba Power Products, Inc.**, 377 P.2d 897, 901 (Cal. 1963); **Stang v. Hertz Corporation**, 83 N.M. 730, 733, 497 P.2d 732 (1972) (recognizing that "[t]he basis of risk distribution was that the loss should be placed on those most able to bear it and they should distribute the risk of loss to users of the product in the form of higher prices").

32. On remand to the district court, Piper Aircraft raised the issue of federal preemption, another approach used by manufacturers to avoid their duties to the public. *See, e.g.*, **Kitts v. General Motors Corporation**, 875 F.2d 787 (10th Cir. 1989); **Wood v. General Motors**, 895 F.2d 395 (1st Cir. 1988). Judge Mechem rejected the defense, but made the necessary findings to permit Piper Aircraft to pursue an interlocutory appeal The case is now pending in the Tenth Circuit.