TORTS—A Manufacturer of Farm Machinery May Be Liable in Iowa for Enhanced Injuries, But How Is Any Comparative Fault of the Plaintiff to Be Attributed to the Enhanced Injuries?—*Hillrichs v. Avco Corp.*, 478 N.W.2d 70 (Iowa 1991).

I. INTRODUCTION

The doctrine of "enhanced injuries" originated in automobile accidents[1] in which manufacturers faced claims their vehicles were not crashworthy.[2] The doctrine has created difficulties for the courts in apportioning damages between injuries that would have occurred absent the manufacturer's design defect and injury enhancement attributable to the product defect.[3] Similarly, the doctrine has created difficulties for plaintiffs because the proof of injury enhancement often lacks precision.[4] Despite these difficulties, the doctrine is "widely recognized" as applicable to injuries suffered by car and truck occupants.[5]

The Iowa Supreme Court approved the enhanced injuries theory for accidents involving farm machinery in *Hillrichs v. Avco Corp.*[6] Although Iowa was not the first state to extend the enhanced injury doctrine to farm machinery,[7] *Hillrichs* broke new ground by applying this theory when the injured person was one hundred percent at fault for the accident and no collision or rollover occurred.[8]

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1. The enhanced injury doctrine may be traced back to an Eighth Circuit Court of Appeals decision in Larsen v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968), which involved the crashworthiness of the Corvair automobile. In *Larsen*, the court imposed a duty on all manufacturers "to use reasonable care in the design of [their] products to protect against an unreasonable risk of injury *or enhancement of injury* to a user of the product." *Id.* at 504 (emphasis added); *see also* Ford Motor Co. v. Zahn, 265 F.2d 729, 733-34 (8th Cir. 1959) (discussing the manufacturer's duty to exercise care in the design of automobiles given the foreseeability of injuries).

2. *See, e.g.*, Huddell v. Levin, 537 F.2d 726 (3d Cir. 1976).

3. *See id.* at 737-39.

4. *See, e.g.*, Hillrichs v. Avco Corp., 478 N.W.2d 70, 75 (Iowa 1991) ("The extent of the enhanced injury is certainly not fixed to any degree of definiteness."), *limited by* Reed v. Chrysler Corp., 494 N.W.2d 224, 230 (Iowa 1992) (holding "a plaintiff's comparative fault should not be . . . assessed" against the plaintiff "in a crashworthiness case unless it is shown to be a proximate cause of the *enhanced* injury"). Nevertheless, the jury is generally empowered to determine "a just and reasonable estimate" of the enhancement of a plaintiff's injuries. *Id.*

5. *Id.* at 74 (citing Tafoya v. Sears Roebuck & Co., 884 F.2d 1330, 1337-38 (10th Cir. 1989)). The theory of enhanced injuries is, however, not limited to motor vehicle manufacturers. *See infra* text accompanying notes 55-57.

6. Hillrichs v. Avco Corp., 478 N.W.2d 70 (Iowa 1991), *limited by* Reed v. Chrysler Corp., 449 N.W.2d 224 (Iowa 1992).

7. *See, e.g.*, Farrell v. John Deere Co., 443 N.W.2d 50, 54-55 (Wis. Ct. App. 1989).

8. *See* Hillrichs v. Avco Corp., 478 N.W.2d at 72. Courts apply the enhanced injury doctrine more readily in cases involving collisions or rollovers. *See, e.g.*, Roe v. Deere & Co., 855 F.2d 151 (3d Cir. 1988) (tractor rollover); Huddell v. Levin, 537 F.2d 726 (3d Cir. 1976) (automobile rear-end collision); Wernimont v. International Harvestor Corp., 309 N.W.2d 137

This Case Note discusses how farm machinery manufacturers may be liable for enhanced injuries in Iowa following *Hillrichs*. In particular, this Case Note considers the allocation of fault, apportionment of injuries, and use of jury instructions in enhanced injury cases.[9]

II. WHAT HAPPENED TO HILLRICHS?

A. *The Farming Accident*

Kenneth Hillrichs was severely injured on November 20, 1986, when he became entangled with his corn husking equipment.[10] His corn picker, a "New Idea Unisystem," was comprised of three parts: a power unit or tractor, a "stripper plate" attached to the front of the tractor that strips the ears of corn from the stalks, and a "husking bed" at the rear of the tractor that catches and husks the corn.[11] Twelve rollers, thirty-six inches long and two and seven-eighths inches in diameter, comprise the husking bed.[12] Six cast iron rollers are paired to six rubber rollers spinning in opposite directions.[13] The corn husks and stalks are pulled between the rollers and deposited below as the corn passes over the rollers.[14]

While Hillrichs was picking corn with an assistant, the husking bed became plugged with corn husks.[15] Hillrichs's assistant had left with a load of corn.[16] Hillrichs attempted to clear the plugged corn husking rollers with his hands with the power to the husking bed off, but he was not successful.[17]

Hillrichs then renewed power to the corn husking bed and again reached into the bed to unplug the husker.[18] Hillrichs's glove became entangled in the rapidly spinning rollers, which drew Hillrichs's hand into the ma-

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(Iowa Ct. App. 1981) (truck cab impact with bridge support beam), *limited by* Hillrichs v. Avco Corp., 478 N.W.2d 70 (Iowa 1991).

9. The issues discussed in this Case Note should be considered in light of subsequent decisions by the Iowa Supreme Court. In *Hillrichs*, the court remanded for retrial with instructions for the jury to assess Hillrichs's fault in causing the accident against both his initial injuries and his enhanced injuries. Hillrichs v. Avco Corp., 478 N.W.2d at 76. In a later case, the Iowa Supreme Court decided comparative fault principles should not be applied to the enhanced injuries, despite any fault of the plaintiff in causing the accident. Reed v. Chrysler Corp., 494 N.W.2d 224, 230 (Iowa 1992); *see infra* part V. Thus, the cause of the accident is not a factor that would reduce the plaintiff's recovery for enhanced injuries absent special circumstances. *See infra* text accompanying notes 57-61.

10. Hillrichs v. Avco Corp., 478 N.W.2d at 71.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 71-72.

18. *Id.* at 72.

chinery.[19] Hillrichs had to pull his hand backwards to keep it from being drawn farther into the machinery.[20] He was caught in the corn husking machine for approximately thirty minutes until his assistant returned to shut off power to the rollers.[21]

B. *The Enhanced Injuries*

Although Hillrichs could not free his hand, he was able to keep the rest of his arm out of the pinching rollers by pulling his hand backwards.[22] Hillrichs testified, however, the rollers burned "all the flesh from his fingers" in "several minutes."[23] Four fingers of Hillrichs's right hand were amputated and his right hand was permanently disfigured.[24] An orthopedic surgeon retained by Hillrichs testified the damage suffered by Hillrichs was directly proportional to the amount of time his hand was in the corn husking machine.[25] These facts made *Hillrichs* an attractive case for the application of the enhanced injury doctrine.

III. THE HILLRICHS'S COMPLAINT

The Hillrichses—Kenneth, Loretta, and their four minor children—sued Avco Corporation and Siouxland Implement Company.[26] Avco manufactured the New Idea Unisystem corn picker that injured Hillrichs.[27] Avco manufactured the tractor portion as well as the used corn picker and husking bed Hillrichs had purchased from another farmer; all three items were compatible.[28] Siouxland, the implement dealer, sold only the tractor, but also assisted in attaching Hillrichs's corn picker and husking bed to the tractor.[29]

The Hillrichs's complaint against Avco and Siouxland included counts against each for negligence, strict liability, and breach of implied warranties.[30] Avco asserted the defenses of comparative fault and "state of the art" in the corn picker design.[31] Siouxland sought immunity as a product wholesaler, retailer, distributor, or seller.[32]

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19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.* at 75.
24. *Id.* at 72.
25. *Id.* at 75.
26. *Id.* at 71.
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.* at 72.
31. *Id.* The state of the art defense was codified under Iowa Code § 668.12, which provides:

    668.12 Liability for products—state of the art defense.

IV. THE FIRST TRIAL AND APPEAL

A. *Plaintiff's Claims and the Jury Determination*

Hillrichs introduced evidence the husking bed was unreasonably dangerous because of its lack of a protective shield that would disconnect power to the bed when the shield was opened.[33] Hillrichs also demonstrated the husking bed was unreasonably dangerous because it lacked an emergency power cut-off switch for use when a person became entangled in the machin-

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> In any action brought pursuant to this chapter against an assembler, designer, supplier of specifications, distributor, manufacturer or seller for damages arising from an alleged defect in the design, testing, manufacturing, formulation, packaging, warning, or labeling of a product, a percentage of fault shall not be assigned to such persons if they plead and prove that the product conformed to the state of the art in existence at the time the product was designed, tested, manufactured, formulated, packaged, provided with a warning, or labeled. Nothing contained in this section shall diminish the duty of an assembler, designer, supplier of specifications, distributor, manufacturer or seller to warn concerning subsequently acquired knowledge of a defect or dangerous condition that would render the product unreasonably dangerous for its foreseeable use or diminish the liability for failure to so warn.

IOWA CODE § 668.12 (1989). The statute has remained unchanged. *See* IOWA CODE § 668.12 (1993).

32. Hillrichs v. Avco Corp., 478 N.W.2d at 72. Iowa Code § 613.18 stated:

> 613.18 Limitation on products liability of nonmanufacturers.
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> 1. A person who is not the assembler, designer, or manufacturer, and who wholesales, retails, distributes, or otherwise sells a product is:
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> a. Immune from any suit based upon strict liability in tort or breach of an implied warranty of merchantability which arises solely from an alleged defect in the original design or manufacture of the product.
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> b. Not liable for damages based upon strict liability in tort or breach of implied warranty of merchantability for the product upon proof that the manufacturer is subject to the jurisdiction of the courts of this state and has not been judicially declared insolvent.
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> 2. A person who is a retailer of a product and who assembles a product, such assembly having no causal relationship to the injury from which the claim arises, is not liable for damages based upon strict liability in tort or breach of implied warranty of merchantability which arises from an alleged defect in the original design or manufacture of the product upon proof that the manufacturer is subject to the jurisdiction of the courts of this state and has not been judicially declared insolvent.
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> 3. An action brought pursuant to this section, where the claimant certifies that the manufacturer of the product is not yet identifiable, tolls the statute of limitations against such manufacturer until such time as discovery in the case has identified the manufacturer.

IOWA CODE § 613.18 (1989). The statute has remained unchanged. *See* IOWA CODE § 613.18 (1993).

33. Hillrichs v. Avco Corp., 478 N.W.2d at 72.

ery.[34] The court instructed the jury on the "claims against Avco based on strict liability, breach of implied warranty, and alleged negligence" in the corn picker design and the failure to warn of its dangerous condition.[35] The only claim against Siouxland submitted to the jury was for the alleged failure to warn of the machinery's dangerous qualities.[36]

Notably, the trial court refused instructions offered by Hillrichs that would have asked the jury to separate the damages between Hillrichs's initial entanglement and any subsequent enhanced injuries due to the machine's lack of an emergency cut-off switch.[37] Without these instructions, the jury did not have an opportunity to consider Hillrichs's enhanced injury claim.[38] The jury first rendered an apportionment of seventy percent of fault for the accident to Hillrichs, twenty-five percent to Avco, and five percent to Siouxland.[39] At the same time, the jury answered "no" to the special interrogatory asking whether the fault of Avco and Siouxland was a proximate cause of the accident.[40] Because of this inconsistency, the court asked the jury to reconsider its verdict in light of the instructions.[41] The jury returned with an amended verdict finding Hillrichs one hundred percent at fault.[42]

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34. *Id.* Two engineering experts, testifying for Hillrichs, stated an emergency cut-off device was feasible, other dangerous types of farm machinery manufactured at the time contained these devices, and the cost of such a device "would be between twenty-five and fifty dollars." *Id.* at 75.

35. *Id.* at 72. The trial court refused to instruct the jury to hold Avco to the standard of an "expert in the field." *Id.* at 74. Instead, the court used the "generic" ordinary care instruction, which provides:

> 700.2 Ordinary Care—Common Law Negligence—Defined.
> "Negligence" means failure to use ordinary care. Ordinary care is the care which a reasonably careful person would use under similar circumstances. "Negligence" is doing something a reasonably careful person would not do under similar circumstances, or failing to do something a reasonably careful person would do under similar circumstances.

IOWA CIVIL JURY INSTRUCTION 700.2 (1991).

Surprisingly, the Iowa Supreme Court did not find this to be error. Instead, it believed Iowa Civil Jury Instruction 700.2 was sufficient in that it "describes a flexible duty that adjusts to both the status of the actor and the circumstances that the actor faces." Hillrichs v. Avco Corp., 478 N.W.2d at 74.

36. Hillrichs v. Avco Corp., 478 N.W.2d at 74. Arguably, the court implied the failure to warn claim against Siouxland should not have been submitted to the jury: "A mere furnisher of services is not liable for a dangerous condition that it neither created nor aggravated unless it somehow acts to mask the danger." *Id.* at 73 (citing Anderson v. Glynn Constr. Co., 421 N.W.2d 141, 143-44 (Iowa 1988)). The court reasoned Hillrichs could not complain about the exclusion of expert testimony regarding Siouxland's duty after Hillrichs was treated "more favorably than he was entitled to be under applicable law" because he was given the failure to warn instruction. *Id.*

37. *Id.* at 72.

38. *See id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

B. *Review of the Enhanced Injury Claim*

The Iowa Supreme Court found the trial court erred by refusing the offered instructions on enhanced injuries.[43] In the court's words, "Although the issue is close we conclude that plaintiff's enhanced injury claim should have been submitted to the jury."[44]

The court discussed the enhanced injury doctrine's origin, which has its roots in "second collision" or "crashworthiness" claims involving automobiles.[45] As the Iowa Supreme Court explained, the Iowa Court of Appeals previously recognized three criteria for a prima facie case of enhanced injuries: (1) proof of a safer design alternative, practicable under the circumstances, (2) proof of what injuries would have resulted if the alternative design had been used, and (3) proof of enhanced injuries attributable to the defective design.[46]

The earlier Iowa enhanced injury case, from which the supreme court borrowed this test, involved a motor vehicle accident and a claimed lack of crashworthiness.[47] The court in *Hillrichs* recognized, however, the enhanced injury doctrine has been applied by other courts to accidents involving a riding lawnmower,[48] a front-end loader,[49] and an agricultural tractor.[50] The

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43. *Id.* at 75. The court reviewed several other claimed errors. In particular, the district court refused to allow the jury to consider the liability of the implement dealer, Siouxland, under the theories of strict liability and breach of implied warranty of merchantability. *Id.* at 72-73. The Iowa Supreme Court observed these theories "are only visited upon" sellers in Iowa. *Id.* at 73 n.1 (citing RESTATEMENT (SECOND) OF TORTS § 402A (1964); IOWA CODE § 554.2314 (1989); Van Wyk v. Norden Labs., 345 N.W.2d 81, 84 (Iowa 1984); State Farm Mut. Auto. Ins. Co. v. Anderson-Weber, Inc., 110 N.W.2d 449, 456 (Iowa 1961)). Because Siouxland only sold the tractor, which was not claimed to be defective and for which no breach of warranty was asserted, the court held the trial court was correct in refusing to allow the strict liability and breach of implied warranty claims to go to the jury. *Id.* at 73.

See *supra* note 35 for a discussion of the court's response to plaintiff's contention on appeal that the manufacturer, Avco, should have been held to the standard of an expert in the field.

44. Hillrichs v. Avco Corp., 478 N.W.2d at 75. The court's reference to the issue as "close" arguably relates to Hillrichs's proof of enhanced injuries. Avco argued on appeal that "Hillrichs did not offer sufficient evidence of enhancement to have such a claim submitted to the jury." *Id.* Although the extent of enhancement was uncertain, the court did not believe the uncertainty was "so great as to preclude the jury from quantifying the enhanced loss within a reasonable margin of error." *Id.*

45. *Id.* at 74 (citing Larsen v. General Motors Corp., 391 F.2d 495, 502 (8th Cir. 1968)).

46. *Id.* at 75 (citing Wernimont v. International Harvestor Corp., 309 N.W.2d 137, 140-41 (Iowa Ct. App. 1981); Huddell v. Levin, 537 F.2d 726, 737-38 (3d Cir. 1976)).

47. Wernimont v. International Harvestor Corp., 309 N.W.2d 137, 141-42 (Iowa Ct. App. 1981) (discussing the crashworthiness of a truck cab and the vehicle's lack of a collapsible steering wheel), *limited by* Hillrichs v. Avco Corp., 478 N.W.2d 70 (Iowa 1991).

48. Hillrichs v. Avco Corp., 478 N.W.2d at 74 (citing Tafoya v. Sears Roebuck & Co., 884 F.2d 1330, 1337-38 (10th Cir. 1989) (discussing a rollover accident that occurred on a riding lawnmower not equipped with a "dead man's" switch)).

49. *Id.* (citing Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co., 652 F.2d 1165 (3d Cir. 1981)). The *Pennsylvania Glass Sand Corp.* case involved a claim for property damage to a front-end loader for quarry use. Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co., 652

court also noted a Wisconsin court applied the doctrine when a man became entangled in corn husking equipment.[51]

The *Hillrichs* court reasoned "well-established" principles of Iowa law "permit recovery of damages for injuries caused by the [tortious] conduct of another."[52] Such recovery, the court concluded, extends "to all injury or degree of injury that would have been prevented through the tortfeasor's exercise of the proper standard of care."[53] This raises the issue of how the jury is to be instructed regarding the apportionment of fault between the plaintiff and defendant as well as between the initial injuries and enhanced injuries.

V. HOW IS FAULT APPORTIONED FOR ENHANCED INJURIES?

A. *As Remanded by the Iowa Supreme Court in* Hillrichs

Hillrichs argued any fault potentially attributable to him for the initial entanglement should not be assigned to him for the enhanced injuries.[54] The court disagreed, holding, "The fault of the plaintiff, if any, in becoming entangled in the machinery would be a proximate cause of the enhanced injury as well as the initial injury."[55] The court ordered that "the jury should be so instructed" on retrial of the negligence claim against Avco on remand.[56] The trial court on remand was therefore left to determine what jury instructions would fulfill this objective.

A difficulty arises from the supreme court's reasoning that Hillrichs's fault in becoming entangled is also a proximate cause of the enhanced injuries. Clearly the entanglement proximately caused the enhanced injuries, but the court offered no justification why Hillrichs's fault in becoming

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F.2d at 1165. The plaintiff incurred damages of $170,000 following a fire that originated in the loader's hydraulic lines. *Id.* at 1166. The tractor was not equipped with a fire suppression system, which allegedly would have contained the fire. *Id.* at 1167. The *Pennsylvania Glass Sand Corp.* holding extends the enhanced injury doctrine's application to property losses. *See generally id.*

50. Hillrichs v. Avco Corp., 478 N.W.2d at 74 (citing Roe v. Deere & Co., 855 F.2d 151, 152 (3d Cir. 1988) (discussing a rollover accident on a farm tractor not equipped with a rollbar or seatbelt)).

51. *Id.* (citing Farrell v. John Deere Co., 443 N.W.2d 50 (Wis. Ct. App. 1989)).

52. *Id.* at 75.

53. *Id.*

54. *Id.* at 76.

55. *Id.*

56. *Id.* Only the negligence claim against Avco was to be retried. *Id.* The court reasoned that applying the enhanced injury doctrine to the facts of *Hillrichs* "will make the strict liability claim depend on virtually the same elements of proof as are required to establish the negligence claim." *Id.* at 75-76. In this regard the court took notice of "the growing number of courts and commentators" who have suggested the proof of a design defect claim is essentially the same whether it is couched in negligence or strict liability terms. *Id.* at 76 n.2 (citing Keith Miller, *Design Defect Litigation in Iowa: The Myths of Strict Liability*, 40 DRAKE L. REV. 465 (1991) and other authorities).

entangled should have been applied to reduce any recovery for the enhanced injuries. Although Hillrichs may have fully caused the initial accident, his conduct was not necessarily the sole cause of his enhanced injuries. The fact Hillrichs caused his own entanglement should not result in the same percentage of fault being applied to the enhanced injury as the initial injury because the manufacturer's design defect regarding the lack of a cut-off switch is an element of fault only in the enhanced injury claim—a separate injury. Logically, the causation element does not give rise to the same degree of fault for both injuries.

After deciding *Hillrichs*, the Iowa Supreme Court reconsidered the issue of attributing a plaintiff's fault for causing an accident to the enhanced injury claim in an automobile crashworthiness case.[57] The court then held the plaintiff's fault in causing the initial accident should not reduce recovery for the enhanced injury claim.[58] The court reasoned the enhanced injury doctrine "presupposes accidents precipitated for myriad reasons."[59] Further, the court held the doctrine does not require that the product's defect was in any way a cause of the initial accident; the defect need only increase the damages.[60] Thus, "any participation by the plaintiff in bringing the accident about is quite beside the point."[61] The question still remains: How is the jury to be instructed on the apportionment of fault and injuries in enhanced injury claims?

B. *An Example of Apportionment from Wisconsin*

The case of *Farrell v. John Deere Co.*[62] provides an example of how a Wisconsin court instructed the jury to consider the relative fault of the plaintiff and defendants in an enhanced injury situation. *Farrell* involved an accident similar to that of Hillrichs: The plaintiff in *Farrell* became entangled in corn husking equipment and claimed the manufacturer failed to include an interlock device on the covers to the corn husking bed, and failed to include an emergency power cut-off switch.[63] The accident resulted in the amputation of the plaintiff's arms and legs.[64]

The Wisconsin trial court applied a "two-tiered" approach, which was approved by the Wisconsin Supreme Court.[65] The two-tiered approach separated the *Farrell* accident into its component parts of entanglement and

57. Reed v. Chrysler Corp., 494 N.W.2d 224 (Iowa 1992).
58. *Id.* at 230.
59. *Id.*
60. *Id.*
61. *Id.*
62. Farrell v. John Deere Co., 443 N.W.2d 50 (Wis. Ct. App. 1989).
63. *Id.* at 53.
64. *Id.*
65. *Id.* at 53, 66.

enhancement.[66] Although the defendant argued the *Farrell* injury was legally inseparable into two different tortious events,[67] the jury was asked:

> Was John Deere negligent in failing to take steps in the design of the Model 300 Cornhusker to provide a means to stop the machine in an emergency so as to reduce the extent and severity of injuries in the event of entanglement in the husking rolls? [Answer: *Yes*]
>
> . . . .
>
> Was the John Deere Model 300 Cornhusker so defective in its design, in that it lacked a means to stop the machine in an emergency so as to reduce the extent and severity of injuries in the event of entanglement in the husking rolls, as to be unreasonably dangerous to users? [Answer: *Yes*]
>
> . . . .
>
> Was the defective and unreasonably dangerous design of the John Deere Model 300 Cornhusker a cause of any enhanced or increased injury to Gordon Farrell? [Answer: *Yes*]
>
> . . . .
>
> Assuming Gordon Farrell's total injuries and damages to be 100%, what percentage of those injuries and damages do you find:
> (a) to be caused by the entanglement in the husking rolls of the cornhusker? [Answer: *35%*]
> (b) to be enhanced or increased due to the lack of a means to reduce the extent or severity of injury from entanglement in the husking rolls? [Answer: *65%*][68]

Thus, in *Farrell*, the jury was asked to segregate on the basis of causation the portion of damages attributable to the initial injury from that attributable to enhanced injuries. The jury did not further consider, however, the allocation of responsibility for the accident's cause and the enhanced injuries' cause as between Farrell and John Deere. Once the jury in *Farrell* determined John Deere contributed to an enhanced injury, the enhanced injury was not reduced by the percentage of fault of Farrell in causing the initial injury, or by any separate percentage of fault on his part in contributing to the enhanced injury.[69] This is true despite the fact Farrell was found to be legally at fault for the initial entanglement.[70] The Wisconsin

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66. *Id.* at 53.

67. *Id.* at 55. John Deere argued *Farrell* "did not involve a subsequent impact [as in a second collision or crashworthiness case,] or a separate tortious event." *Id.*

68. *Id.* at 57 (brackets, ellipses, and italics in original).

69. As summarized by the court, "Judgment . . . was entered against Deere for $966,469.65, plus interest, representing 65% of the total damages after additur. (The 65% figure was utilized because the jury had determined that this percentage of the damages and injuries was attributable to Deere's failure to provide the emergency shut-off device.)" *Id.* at 54 (parentheses in original).

70. *Id.* at 53 (reviewing the trial court's finding that Farrell was 70% contributorily negligent).

appellate court approved the use of these instructions "because only Deere was alleged to have enhanced the injuries through its failure to provide an emergency shut-off device."[71]

C. *How the* Hillrichs *Jury Was Instructed on Remand*

Unlike Hillrichs's first trial, the court asked the jury at the second trial to apportion fault for the enhanced injury claim separately from the plaintiff's fault for the initial entanglement.[72] The court instructed the jury, "Hillrichs was solely at fault for his initial entanglement with the cornpicker and is not entitled to any damages sustained as a result of that initial entanglement."[73] On the other hand, the enhanced injuries were those that resulted "from the inability of the plaintiff Kenneth Hillrichs to shut off the cornpicker mechanism after he had caused his hand to become caught."[74] The comparative fault instructions for the enhanced injury claim were:

> Instruction No. 13
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> Damages may be the fault of more than one person. In comparing fault, you should consider all of the surrounding circumstances as shown by the evidence, together with the conduct of the Plaintiff Kenneth Hillrichs, and Defendant AVCO Corporation, and the extent of the causal relation between their conduct and the enhanced injury claimed. You should then determine what percentage, if any, each person's fault contributed to the damages, if any, caused by the enhanced injury claimed.[75]
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> Instruction No. 17
>
> Defendant claims that the plaintiff Kenneth Hillrichs was at fault in the following particular:
>
> 1. Negligence.
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> . . . .
>
> The defendant must prove both of the following propositions:
>
> 1. The Plaintiff Kenneth Hillrichs was at fault.
>
> 2. The Plaintiff's fault was a proximate cause of Plaintiff's damages.
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> If the Defendant has failed to prove either of these propositions, the Defendant has not proven its defense of comparative fault. If the Defendant has proven both of these propositions, then you will assign a

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71. *Id.* at 57. "There was no evidence that Farrell or the other defendants in any way contributed to the design defect that enhanced Farrell's injuries." *Id.*

72. Instructions to the Jury, Hillrichs v. Avco Corp., No. 25981 (Iowa Dist. Ct. for Plymouth County Sept. 28, 1992).

73. Instruction No. 14, Hillrichs v. Avco Corp., No. 25981 (Iowa Dist. Ct. for Plymouth County Sept. 28, 1992).

74. Instruction No. 15, Hillrichs v. Avco Corp., No. 25981 (Iowa Dist. Ct. for Plymouth County Sept. 28, 1992).

75. Instruction No. 13, Hillrichs v. Avco Corp., No. 25981 (Iowa Dist. Ct. for Plymouth County Sept. 28, 1992).

> percentage of fault against the Plaintiff Kenneth Hillrichs and include the Plaintiff's fault in the total percentage of fault found by you in answering the special verdicts.[76]

Instruction Number 13 correctly asked the jury to apportion fault for the enhanced injuries. Instruction Number 17 must be read in conjunction with Instruction Number 13, and limited to fault for the enhanced injuries, although this limitation is not expressed in the instruction.[77] The jury rendered a multi-million dollar verdict and allocated twenty percent of fault for the enhanced injuries to Hillrichs.[78] The result indicates the jury properly allocated a separate percentage of fault to Hillrichs for the enhanced injuries, apart from his complete fault for the initial entanglement.

VI. CONCLUSION

In *Hillrichs*, the Iowa Supreme Court correctly ruled that an accident victim's fault in causing the initial injury is also a proximate cause of the enhanced injury. The victim should not be charged with any comparative fault for the enhanced injuries, however, unless the victim somehow participated in making the product more dangerous, or unless the victim aggravated the enhanced injuries. The victim might be responsible for making the product more dangerous by performing alterations, such as removing shields, or defeating safety interlocks. The victim might contribute to the enhanced injuries by failing to take advantage of an available means of escape, or by unreasonably attempting a perilous escape. The victim's participation in the enhanced injuries should be the subject of a special interrogatory to the jury, apart from an inquiry into the injured person's fault for causing the initial accident. This special interrogatory would be appropriate only in situations in which evidence has been introduced implicating the victim in the injury enhancement. The victim's fault for causing the accident itself should not operate to reduce any award for enhanced injuries. The jury should be instructed to disregard any fault of the plaintiff in causing the accident itself on the enhanced injury portion of the claim.

Terrence P. Sheehan

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76. Instruction No. 17, Hillrichs v. Avco Corp., No. 25981 (Iowa Dist. Ct. for Plymouth County Sept. 28, 1992).

77. Compare the instruction regarding assumption of the risk, which provided, "Defendant must prove . . . Kenneth Hillrichs' fault was a proximate cause *of his enhanced damages*. . . . Concerning this defense, the fault of the Plaintiff must be a proximate cause of the enhanced injury or damage, but it need not be the sole proximate cause." Instruction No. 18, Hillrichs v. Avco Corp., No. 25981 (Iowa Dist. Ct. for Plymouth County Sept. 28, 1992) (emphasis added).

78. Telephone conversation with Brett I. Anderson, an attorney for the Hillrichses (Jan. 16, 1993).