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## Casenotes and Statute Notes

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**STRICT PRODUCTS LIABILITY — JUDICIAL ADOPTION OF PURE COMPARATIVE APPORTIONMENT OF LIABILITY —** In Products Liability Actions Based Other Than Upon Negligence, a Defendant May Obtain a Jury Allocation of the Plaintiff's Damages According to the Plaintiff's, Defendants', and Third Parties' Respective Percentages of Causation of Those Damages. *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414 (Tex. 1984).

On October 19, 1976, Benjamin Smithson, an instructor pilot for Air Plains West, Inc.,<sup>1</sup> was giving James Parker flying lessons<sup>2</sup> over eastern New Mexico.<sup>3</sup> Three miles southwest of Tepico, New Mexico, the Cessna 150 containing Smithson and Parker crashed into the ground at a speed of less than 60 miles per hour.<sup>4</sup> The force upon impact caused the legs of the Cessna aircraft's seats to break and threw Smithson and Parker against the forward part of the cockpit.<sup>5</sup> As a result of the crash, both men were killed.<sup>6</sup>

Carolyn Parker Duncan and her minor children filed suit in the United States District Court for the Northern District of Texas against Air Plains West, Inc., alleging that the negligence of Smithson and his employer, Air Plains West, Inc., proximately caused the death of James Parker.<sup>7</sup> In settlement for \$90,000, Mrs. Duncan and the children released from liability Air Plains West, Inc., Smithson's estate, and "any other corporations or persons whomsoever responsible therefor . . . ."<sup>8</sup>

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<sup>1</sup> *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414 (Tex. 1984).

<sup>2</sup> *Id.*

<sup>3</sup> *Duncan v. Cessna Aircraft Co.*, 632 S.W.2d 375, 378 (Tex. App.—Austin 1982), *rev'd*, 665 S.W.2d 414 (Tex. 1984).

<sup>4</sup> *Id.* at 378-79.

<sup>5</sup> *Id.* at 383.

<sup>6</sup> *Id.* at 378.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

Mrs. Duncan then filed a wrongful death action against Cessna Aircraft Company<sup>9</sup> in the Travis County District Court, alleging that the seats of the airplane, one of which was occupied by Parker at the time of the crash, were defectively designed or manufactured by Cessna.<sup>10</sup> Duncan further alleged that the defective seats failed in the crash, causing the death of Parker.<sup>11</sup> Cessna denied the defectiveness of the aircraft seats<sup>12</sup> and alleged that the settlement agreement and release executed by Duncan barred any claim by Duncan against Cessna.<sup>13</sup> Cessna counterclaimed that Smithson's negligence caused the crash and that it would be entitled to contribution from Smithson's estate for any damages required of it by virtue of Duncan's suit.<sup>14</sup> The jury found that the seats of the aircraft were defective in design and manufacture<sup>15</sup> and set damages for the death of Parker at one million dollars.<sup>16</sup> Upon motion for judgment *non obstante veredicto*<sup>17</sup> by Cessna on grounds that it was absolved of liability by the previously executed settlement and release of Air Plains West, Inc. and Smithson's estate, the court rendered a take nothing judgment against Mrs. Duncan.<sup>18</sup>

On appeal, the Austin Court of Appeals reversed the judgment of the trial court and remanded for a partial new trial.<sup>19</sup> The court, in stating an inability simply to render a judgment for Mrs. Duncan,<sup>20</sup> remanded the case so that Cessna might attempt to prove a right of contribution against Smithson's estate.<sup>21</sup> The court stated that if such a right could be

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Judgment *non obstante veredicto* is judgment notwithstanding the jury's verdict.

<sup>18</sup> *Duncan*, 632 S.W.2d at 378. Judgment *non obstante veredicto* was granted by the court following its favorable ruling upon Cessna's motion that New Mexico law applied to the extent that it differed from that of Texas. *Id.*

<sup>19</sup> *Duncan*, 632 S.W.2d at 390.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

proven, the trial court should render judgment for Mrs. Duncan and against Cessna for \$500,000.<sup>22</sup> The decision of the Court of Appeals was appealed to the Supreme Court of Texas on a writ of error.<sup>23</sup> *Held, reversed and rendered:* in products liability actions based other than upon negligence, a defendant may obtain a jury allocation of the plaintiff's damages according to the plaintiff's, defendants', and third parties' respective percentages of causation of those damages. *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414 (Tex. 1984).

## I. BACKGROUND: STRICT PRODUCTS LIABILITY

### A. *Cause of Action*

Until 1967, a Texas consumer's only avenue of redress for damages or injuries caused by a "defective" product was a derivative action under breach of warranty<sup>24</sup> or under ordinary negligence principles as to the conduct of the manufacturer.<sup>25</sup> But in 1967 the Supreme Court of Texas adopted Section 402A of the *Restatement (Second) of Torts*<sup>26</sup> as the law

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<sup>22</sup> *Id.*

<sup>23</sup> 26 Tex. Sup. Ct. J. 199 (1983).

<sup>24</sup> The breach of warranty (express and implied) cause of action still exists under the TEX. BUS. & COM. CODE ANN. §§ 2.313 - 2.318 (Vernon 1968). *See, e.g.*, *Garcia v. Texas Instruments Inc.*, 610 S.W.2d 456 (Tex. 1980); *Nobility Homes of Texas, Inc. v. Shivers*, 557 S.W.2d 77 (Tex. 1977).

<sup>25</sup> *See Boatland of Houston, Inc. v. Bailey*, 609 S.W.2d 743 (Tex. 1980).

<sup>26</sup> *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787 (Tex. 1967) (stating that strict liability under section 402A "should be held applicable to defective products which cause physical harm to persons"). *Shamrock Fuel & Oil Sales Co. v. Tunks*, 416 S.W.2d 779 (Tex. 1967) (holding section 402A applicable to a case involving the explosion of contaminated kerosene which was characterized as unreasonably dangerous). Section 402A of the RESTATEMENT (SECOND) OF TORTS provides:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and  
(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

RESTATEMENT (SECOND) OF TORTS § 402A (1965).

on strict products liability in Texas for a number of substantial policy reasons.<sup>27</sup> Under Section 402A, to establish a strict products liability cause of action against a manufacturer, distributor, or retailer, the plaintiff must show, first, that the defendant, as a "seller" of the product,<sup>28</sup> introduced it into the

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In Texas, prior to the *McKisson* and *Tunks* decisions, strict liability in tort applied only to contaminated foods. See, e.g., *Jacob E. Decker & Sons, Inc. v. Capps*, 139 Tex. 609, 622, 164 S.W.2d 828, 834 (1942) (establishing strict liability in cases of contaminated foods, the court stated that "the defendant, as the manufacturer and vendor of the [food] in question [is] liable to the plaintiffs, as consumers thereof, for the injuries caused to them [by reason of contamination], even though the defendant was not negligent in the processing thereof"). It should be noted that a section 402A cause of action supplements but does not supplant either the breach of warranty or negligence causes of action as alternative theories of recovery. See *supra* note 24 and accompanying text. See generally W. PROSSER, *LAW OF TORTS* § § 75-81, at 492-540 (4th ed. 1971); Wade, *Products Liability and Plaintiff's Fault — The Uniform Comparative Fault Act*, 29 *MERCER L. REV.* 373 (1978).

<sup>27</sup> See *Tunks*, 416 S.W.2d at 782-83; *McKisson*, 416 S.W.2d at 788-89. The adoption of strict products liability is the result of a number of public policy considerations. James B. Sales explains that

[a]doption of the doctrine of strict tort liability was designed to alleviate the more difficult burden of proof required for a claimant to establish a cause of action based on the traditional common law negligence doctrine. The rationale undergirding section 402A is multifaceted. In some jurisdictions adoption of the doctrine has been predicated on the deep pocket theory; that is, the product supplier, as part of an enterprise liability, is better able to absorb the cost of injuries than the consumer by a proportionate distribution of these costs to the purchasing public. Other jurisdictions rely on the theory implicit in the Restatement that the product supplier impliedly represents that the products introduced into the stream of commerce are safe for use. Some proponents of the doctrine disingenuously declare that the supplier is motivated to introduce only safe products into the stream of commerce by the ominous presence of strict tort liability. Irrespective of the rationale relied upon, section 402A has interjected a relatively novel concept of liability into the tort reparations systems. Although liability is judicially emphasized not to be absolute, the minimization of the degree of proof required by a claimant to establish a cause of action under the doctrine, coupled with constraints imposed on the product supplier's defenses, has effectuated a distinctly consumer oriented cause of action.

Sales, *Assumption of the Risk and Misuse in Strict Tort Liability—Prelude to Comparative Fault*, 11 *TEX. TECH L. REV.* 729, 730-31 (1980). See also W. KIMBLE & R. LESHER, *PRODUCTS LIABILITY* § 2 at 13 (1979).

<sup>28</sup> A plaintiff may bring suit against anyone who manufactures, distributes, or sells a defective product. See *Lubbock Manufacturing Co. v. International Harvester Co.*, 584 S.W.2d 908 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.) (holding chain of manufacturers liable in trucking accident); *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d

stream of commerce;<sup>29</sup> second, that the plaintiff was a "consumer" of the product;<sup>30</sup> third, that the product was unreasonably dangerous due to a defect<sup>31</sup> and that the defect existed at the time the product left the control of the defendant, not having undergone any significant alterations;<sup>32</sup>

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787 (Tex. 1967) (holding distributor liable for defectively manufactured hair wave product).

<sup>29</sup> The introduction of a product into the "stream of commerce," although loosely defined in the case law of strict products liability, includes the following transactions: selling the product, *see, e.g.*, *Jacob E. Decker & Sons, Inc. v. Capps*, 139 Tex. 609, 164 S.W.2d 828 (1942) (pre-section 402A case finding the manufacturer liable for the sale of adulterated sausage as introducing product into stream of commerce); *Griggs Canning Co. v. Josey*, 239 Tex. 623, 164 S.W.2d 835 (1942) (holding retailer of defective canned spinach liable under strict liability as introduced into stream of commerce); leasing the product, *see, e.g.*, *Rourke v. Garza*, 530 S.W.2d 794 (Tex. 1975) (holding lease of defective scaffolding as introducing it into the stream of commerce); and gratuitously giving away the product, *see, e.g.*, *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787 (Tex. 1967) (ruling that the giving away of a product with the expectation of potential future sales was an introduction into the stream of commerce).

The stream of commerce concept has limits, however. As stated by the court in *Armstrong Rubber Co. v. Urquidez*, 570 S.W.2d 374, 376 (Tex. 1978), "[t]he product must be released in some manner to the consuming public." *Id.* One limit is that products introduced to individuals for the purpose of industrial testing, as in *Urquidez* where a truck tire was used for testing purposes by an employee hired to test tires, have been held not to have entered the stream of commerce. *Id.*

In addition, the court in *Harville v. Anchor-Wate Co.*, 663 F.2d 598 (5th Cir. 1981) held that a machine not yet complete in its manufacture or testing had not entered the stream of commerce for purposes of strict products liability. *Id.*

<sup>30</sup> *See Jacob E. Decker & Sons, Inc. v. Capp*, 139 Tex. 609, 164 S.W.2d 828 (Tex. 1942) (holding plaintiff as a "consumer" of adulterated sausage when he purchased and served it); *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 878 (Tex. 1967) (holding plaintiff as a "consumer" of an unreasonably dangerous hair wave product by accepting and using it).

<sup>31</sup> As stated by the court in *Turner v. General Motors Corp.*, 584 S.W.2d 844 (Tex. 1979), "the concept of defect is central to a products liability action brought on a strict liability theory, whether the defect be in conscious design or in the manufacture of the product, or in the marketing of the product." *Id.* For a detailed analysis of the concept of defectiveness, see Keeton, *Product Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30 (1973). *See* RESTATEMENT (SECOND) OF TORTS, § 402A, *supra* note 26.

<sup>32</sup> For an explanation of the relationship of the "alteration" or "misuse" of a product after it has left the control of the distributor to the "defectiveness" of same, see *General Motors Corp. v. Hopkins*, 548 S.W.2d 344 (Tex. 1977). The *Hopkins* court explained:

[T]here are a variety of points upon which the unintended or reasonably unforeseeable use or alteration of a product may be relevant to the liability of the supplier of the product. The misuse may bear upon the issue [under section 402A] of whether the product was defective when it left the hands of the supplier or the misuse may bear on the issue of what caused the harm.

*Id.* at 349. *See infra* notes 44-55 for discussion of the alteration/misuse defense.

fourth, that the damaging event was the result of a foreseeable use;<sup>33</sup> and finally, that the defect was a producing cause of the plaintiff's injuries.<sup>34</sup>

## B. *Defenses*

The Texas courts have reluctantly approved the limited defenses to strict products liability of voluntary unreasonable assumption of risk and unforeseeable product misuse.<sup>35</sup> Although it rejected pure contributory negligence as a defense, the Texas Supreme Court held in *Henderson v. Ford Motor Co.*<sup>36</sup> that "the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger . . . is a defense . . ."<sup>37</sup> In *Henderson*, a piece of rubber gasket from the air filter housing of Mrs. Henderson's 1968 Lincoln Continental automobile jammed the carburetor in an open position at the moment the plaintiff accelerated to enter a freeway.<sup>38</sup> After leaving the freeway, and unable to slow the vehicle, Mrs. Henderson drove her car into a signal light pole in an attempt to avoid injuring third parties.<sup>39</sup> The plaintiff was seriously injured and sued the Ford Motor Company, maker of the automobile.<sup>40</sup> Mrs. Henderson obtained judgment at trial, but the judgment was reversed and remanded by the Court of Appeals on the basis

<sup>33</sup> See *General Motors Corp. v. Hopkins*, 548 S.W.2d 344 (Tex. 1977). See also discussion of misuse defense, *infra* text accompanying notes 44-55.

<sup>34</sup> See *Rourke v. Garza*, 530 S.W.2d 794 (Tex. 1976). "Producing cause" has been defined in approved jury instructions as "an efficient, exciting, or contributing cause, which, in a natural sequence, produced injuries or damages complained of, if any. There can be more than one producing cause." *Id.* at 798. See also *C.A. Hoover and Son v. O.M. Franklin Serum Co.*, 444 S.W.2d 597 (Tex. 1969).

<sup>35</sup> See generally FRUMER & FREIDMAN, *PRODUCTS LIABILITY* § 16A [5][f] (1983) (sections of a general treatise on products liability which deal with defenses); Sales, *supra* note 27 (examination of the development of assumption of risk and misuse defenses in strict products liability); Noel, *Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk*, 25 VAND. L. REV. 93 (1972) (an early examination of defenses to a section 402A cause of action).

<sup>36</sup> 519 S.W.2d 87 (Tex. 1974).

<sup>37</sup> *Id.* at 90 (quoting the RESTATEMENT (SECOND) OF TORTS, § 402A comment n (1965)).

<sup>38</sup> 519 S.W.2d at 88-89.

<sup>39</sup> *Id.* at 88.

<sup>40</sup> *Id.*

of her alleged assumption of the risk of driving her car into the light pole.<sup>41</sup> The Supreme Court of Texas ruled that the defense of assumption of risk remained as it had at common law — absolute.<sup>42</sup> The *Henderson* court, quoting the *Restatement*, stated that “[i]f the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, *he is barred from recovery.*”<sup>43</sup>

Further, in 1977 the defense of unforeseeable product misuse was adopted by the court in *General Motors Corp. v. Hopkins*.<sup>44</sup> In *Hopkins*, the plaintiff was badly hurt when he lost control of the speed of his pick-up truck after the carburetor locked in an open position, and the truck capsized.<sup>45</sup> The plaintiff brought suit against General Motors Corporation.<sup>46</sup> In turn, General Motors asserted the defense of misuse, alleging that Hopkins had altered the carburetor.<sup>47</sup> Although the jury returned findings that Hopkins had “misused” the carburetor and that such misuse was a producing cause of his accident, the court rendered judgment for the plaintiff.<sup>48</sup> The Houston Court of Civil Appeals and the Supreme Court of Texas affirmed.<sup>49</sup> In relieving the manufacturer of liability for injuries which are the result of unintended and unforeseeable uses or alterations of the product,<sup>50</sup> the Supreme Court of Texas held that a manufacturer should not be held liable

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<sup>41</sup> *Id.* See *Henderson v. Ford Motor Co.*, 500 S.W.2d 709 (Tex. Civ. App. — Beaumont 1973).

<sup>42</sup> *Henderson*, 519 S.W.2d at 90.

<sup>43</sup> *Id.* (quoting the RESTATEMENT (SECOND) OF TORTS, § 402A comment n (1965)) (emphasis added).

<sup>44</sup> 548 S.W.2d 344 (Tex. 1977).

<sup>45</sup> *Id.* at 346-47.

<sup>46</sup> *Id.* at 346.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* See *General Motors Corp. v. Hopkins*, 535 S.W.2d 880 (Tex. Civ. App. — Houston [1st Dist.] 1976).

<sup>50</sup> *Hopkins*, 548 S.W.2d at 349-52. As explained by Sales, *supra* note 27, at 753, the “misuse” in *Hopkins*, which consisted of the removal and replacement of the truck’s carburetor, actually amounted to an *alteration*. Section 402A provides an exclusion from a prima facie case of strict products liability when the product has undergone any significant alteration. *Id.* at 753. See also RESTATEMENT (SECOND) OF TORTS, § 402A (1965).

for "a use or handling so unusual that the average consumer could not reasonably expect the product to be designed and manufactured to withstand it — a use which the seller, therefore, need not anticipate and provide for."<sup>51</sup>

In *Hopkins* the court reasoned that

product liability was never intended to take the place of insurance, and we see no justification for making the supplier reimburse the plaintiff for that portion of his own damages as he caused by a use of the product which the supplier would not have foreseen — and which use the plaintiff should have foreseen would create or increase the attendant danger. Reduction of the plaintiff's recovery should be ordered where the misuse is a concurring *proximate* cause of the damaging event.<sup>52</sup>

Thus, under *Hopkins* a proportionate reduction in damages was pronounced as available when the "harm [was] reasonably foreseeable to the user . . . ."<sup>53</sup> The Supreme Court of Texas thereby established that where both a product defect and user misconduct combine to proximately cause the damaging event, the plaintiff's recovery is limited to that portion of his damages caused by the product defect;<sup>54</sup> the manufacturer's liability is thereby mitigated.<sup>55</sup>

### C. *Indemnity and Contribution*

Historically, however, the court's greatest means of adjusting the liabilities among tortfeasors has been through the grant of indemnity or contribution.<sup>56</sup> Indemnity mandates

<sup>51</sup> *Hopkins*, 548 S.W.2d at 349 (quoting the reasoning of the Oregon Supreme Court in *Findlay v. Copeland Lumber Co.*, 265 Or. 300, —, 508 P.2d 28, 31 (1973)).

<sup>52</sup> *Hopkins*, 548 S.W.2d at 351.

<sup>53</sup> *Id.* at 352.

<sup>54</sup> *Id.* The "comparison" as set forth in *Hopkins* was specifically excluded from the Texas comparative negligence scheme under TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1983). Instead of barring recovery where the plaintiff was found to have "caused" a greater proportion of the damaging event, the plaintiff may recover in all cases where the product defect was found to be a cause. *Id.*

<sup>55</sup> 548 S.W.2d 344 (Tex. 1977).

<sup>56</sup> See generally Hodges, *Contribution and Indemnity Among Tortfeasors*, 26 TEX. L. REV. 150 (1947). See also Sales, *Contribution and Indemnity Between Negligent and Strictly Liable Tortfeasors*, 12 ST. MARY'S L. J. 323 (1980).

the shift of a tort loss from one party to another;<sup>57</sup> that is, the right of a party to indemnity entitles him to shift the entire burden of responsibility to another who is legally responsible for the loss.<sup>58</sup> In contrast, contribution may be characterized as "the payment by each tortfeasor of his proportionate share of the plaintiff's damages to any other tortfeasor who has paid more than his proportionate part."<sup>59</sup>

At common law, the right of indemnity arose in three types of negligence or strict liability cases:<sup>60</sup> those where the defendants were not *in pari delicto*,<sup>61</sup> those where the party seeking indemnity was vicariously liable by operation of law,<sup>62</sup>

<sup>57</sup> See *General Motors Corp. v. Simmons*, 558 S.W.2d 855, 859 (Tex. 1977) (giving a general history of indemnity); *Strakos v. Gehring*, 360 S.W.2d 787 (Tex. 1962) (holding that entitlement to indemnification is dependent upon the nature of the case); *Renfro Drug Co. v. Lewis*, 149 Tex. 507, 235 S.W.2d 609 (1950) (enunciating a breach of duty test for indemnity); *Wheeler v. Glazer*, 137 Tex. 341, 153 S.W.2d 449 (1941) (holding that different qualities of negligence are required for right of indemnity).

<sup>58</sup> See *B & B Auto Supply, Sand Pit, and Trucking Co. v. Central Freight Lines, Inc.*, 603 S.W.2d 814, 816 (Tex. 1980) (explicating a doctrine of indemnity in the context of the application of article 2212a).

<sup>59</sup> *General Motors Corp. v. Simmons*, 558 S.W.2d 855, 859 (Tex. 1977) (crashworthiness case analyzing the history of indemnity and contribution). See generally *Hodges*, *supra* note 56.

<sup>60</sup> See *Hodges*, *supra* note 56; *Sales*, *supra* note 56.

<sup>61</sup> As the court explained in *Wheeler v. Glazer*, 137 Tex. 341, —, 153 S.W.2d 449, 451 (1941), when "the parties [were] shown not to have been equally guilty [or, not *in pari delicto*], the principal delinquent may [have been] held responsible to a co-delinquent for damage paid by reason of the offense in which both were concerned in different degrees as perpetrators." *Id.* (citing 10 TEX. JUR. § 554 (1937)).

Thus, as between co-tortfeasors, if one owed a markedly higher degree of care to the plaintiff or other parties than another, a successful action for indemnity could have been maintained by the less culpable tortfeasor. See *Strakos v. Gehring*, 360 S.W.2d 787 (Tex. 1962); *Renfro Drug Co. v. Lewis*, 149 Tex. 507, 235 S.W.2d 609 (1950); *Wheeler v. Glazer*, 137 Tex. 341, 153 S.W.2d 449 (1941).

<sup>62</sup> Appearing most often in the master-servant context, vicarious liability works to make the master constructively liable for the acts of the servant. See *South Austin Drive-In Theatre v. Thomison*, 421 S.W.2d 933 (Tex. Civ. App. — Austin 1967, writ *ref'd n.r.e.*).

The court in *San Antonio v. Smith*, 94 Tex. 266, 59 S.W. 1109 (1900), explained that [i]t is well settled that under some states of fact two parties may be liable to another for a tort, — the one by construction of law, on account of some omission of a duty of protection or care owed; and the other because he is the active perpetrator of the wrong, — and that in such cases the right of indemnity may exist in the one whose wrong was only a secondary one.

*Id.* at 1111.

Such a right of indemnity — still available to some extent—may not exist, however,

and those where one tortfeasor had breached a duty he owed to the party seeking indemnity.<sup>63</sup> The Supreme Court of Texas, however, removed most common law bases of indemnity among negligent tortfeasors in its 1980 decision in *B & B Auto Supply, Sand Pit, and Trucking Co. v. Central Freight Lines*.<sup>64</sup> In *B & B Auto Supply*, the plaintiff brought suit against a trucking company and a clay pit operator for damages sustained when a truck owned by Central Freight Lines jackknifed and collided with the plaintiff's vehicle.<sup>65</sup> The clay pit operator's liability was alleged because Central's truck skidded on dirt and debris left on the roadway by trucks loaded by the clay pit operator.<sup>66</sup> At trial the jury found that both B & B and Central were negligent and that such negligence proximately caused the collision.<sup>67</sup> The trial court rendered judgment upon the jury findings but granted Central complete indemnity against B & B because B & B had breached a duty it owed Central by leaving hazardous debris on the roadway.<sup>68</sup> The court of appeals affirmed.<sup>69</sup> The Supreme Court of Texas, in continuing its trend of erasing "all-or-nothing" doctrines from Texas law,<sup>70</sup> barred indemnity

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if the master is also liable for independent acts of negligence, such as negligent entrustment or negligent hiring. See *Estate of Arrington v. Fields*, 578 S.W.2d 173 (Tex. Civ. App. — Tyler 1979, writ ref'd n.r.e.); *Hines v. Nelson*, 547 S.W.2d 378 (Tex. Civ. App. — Tyler 1977, writ ref'd n.r.e.).

<sup>63</sup> At common law, a right of indemnity arose when "one of the tortfeasors had breached a duty he owed both to his co-tortfeasor and to the injured third person." *Austin Road Co. v. Pope*, 147 Tex. 430, 435, 216 S.W.2d 563, 565 (1949). Envisioned by Texas courts as an imaginary lawsuit, the breach of duty test for indemnity determined the shift of a loss by "consider[ing] the one seeking indemnity as though he were a plaintiff suing the other in tort, and then determin[ing] whether such a one as [the] plaintiff, though guilty of a wrong against a third person, is nevertheless entitled to recover against his co-tortfeasor." *Id.*

<sup>64</sup> 603 S.W.2d 814, 815-16 (Tex. 1980).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 816.

<sup>68</sup> *Id.* at 815-16. See note 63.

<sup>69</sup> *B & B Auto Supply*, 603 S.W.2d at 815-16. See *Central Freight Lines v. Pride*, 588 S.W.2d 832 (Tex. Civ. App. — Beaumont 1979).

<sup>70</sup> Among the all-or-nothing doctrines that the court had abolished were: the *no duty rule* in *Parker v. Highland Park, Inc.*, 565 S.W.2d 512 (Tex. 1978); the *rule of imminent peril* in *Davila v. Sanders*, 557 S.W.2d 770 (Tex. 1977); and the *rule of assumption of the risk* in *Farley v. MM Cattle Co.*, 529 S.W.2d 751 (Tex. 1975).

among negligent tortfeasors except in cases of purely vicarious liability or explicit contractual indemnity.<sup>71</sup> Relying upon article 2212a,<sup>72</sup> the court stated that “[u]nder art[icle] 2212a, there is no longer any basis for requiring one tortfeasor

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<sup>71</sup> *B & B Auto Supply, Sand Pit, and Trucking Co. v. Central Freight Lines, Inc.*, 603 S.W.2d 814, 817 (Tex. 1980). The court stated that it expressed no opinion as to whether its holding would extend to causes of action involving a mixture of negligent and strictly liable tortfeasors. *Id.*

<sup>72</sup> *Id.* See TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1983):

Section 2. (a) In this section:

(1) “Claimant” means any party seeking relief, whether he is a plaintiff, counterclaimant, or cross-claimant.

(2) “Defendant” includes any party from whom a claimant seeks relief.

(b) In a case in which there is more than one defendant, and the claimant’s negligence does not exceed the total negligence of all defendants, contribution to the damages awarded to the claimant shall be in proportion to the percentage of negligence attributable to each defendant.

(c) Each defendant is jointly and severally liable for the entire amount of the judgment awarded the claimant, except that a defendant whose negligence is less than that of the claimant is liable to the claimant only for that portion of the judgment which represents the percentage of negligence attributable to him.

(d) If an alleged joint tort-feasor pays an amount to a claimant in settlement, but is never joined as a party defendant, or having been joined, is dismissed or nonsuited after settlement with the claimant (for which reason the existence and amount of his negligence are not submitted to the jury), each defendant is entitled to deduct from the amount for which he is liable to the claimant a percentage of the amount of the settlement based on the relationship the defendant’s own negligence bears to the total negligence of all defendants.

(e) If an alleged joint tort-feasor makes a settlement with a claimant but nevertheless is joined as a party defendant at the time of the submission of the case to the jury (so that the existence and amount of his negligence are submitted to the jury) and his percentage of negligence is found by the jury, the settlement is a complete release of the portion of the judgment attributable to the percentage of negligence found on the part of that joint tort-feasor.

(f) If the application of the rules contained in Subsections (a) through (e) of this section results in two claimants being liable to each other in damages, the claimant who is liable for the greater amount is entitled to a credit toward his liability in the amount of damages owed him by the other claimant.

(g) All claims for contribution between named defendants in the primary suit shall be determined in the primary suit, except that a named defendant may proceed against a person not a party to the primary suit who has not effected a settlement with the claimant.

(h) This section prevails over Article 2212, Revised Civil Statutes of Texas, 1925, and all other laws to the extent of any conflict.

*Id.*

to indemnify another tortfeasor when both have been found negligent and assessed a percentage of fault by the jury."<sup>73</sup>

In causes of action involving both strict liability and negligence, however, the court's posture on indemnity has shifted away from that of the pure negligence case.<sup>74</sup> Presently, when a retailer attempts to obtain indemnity from a strictly liable manufacturer, his ability to recover rests upon the proof that he neither knew nor should have known of the defect or that the defect was not reasonably apparent.<sup>75</sup> In addition, the party seeking indemnity must not have been culpable of negligence which would of itself have caused the harm.<sup>76</sup>

The law of contribution in Texas, unlike that of indemnity, has its roots not in the common law but in statute.<sup>77</sup> To address contribution among negligent tortfeasors, the Texas legislature enacted article 2212a,<sup>78</sup> a codification of "modified" comparative negligence,<sup>79</sup> which mandates contribution from

<sup>73</sup> *B & B Auto Supply*, 603 S.W.2d at 817.

<sup>74</sup> See *General Motors Corp. v. Simmons*, 558 S.W.2d 855 (Tex. 1977). See also *Boatland of Houston, Inc. v. Bailey*, 609 S.W.2d 743 (Tex. 1980); *Bell Helicopter Co. v. Bradshaw*, 594 S.W.2d 519 (Tex. Civ. App. — Corpus Christi 1979, writ ref'd n.r.e.).

<sup>75</sup> *Simmons*, 558 S.W.2d at 861 (citing *Essex Wire Corp. v. Salt River Project*, 9 Ariz. App. 295, 451 P.2d 653 (1969); *Allied Mutual Casualty Corp. v. General Motors Corp.*, 279 F.2d 455 (10th Cir. 1960)).

<sup>76</sup> *Simmons*, 558 S.W.2d at 861 (citing *Essex Wire Corp.*, 451 P.2d 653; *Schuster v. Steedley*, 406 S.W.2d 387 (Ky. 1966); *Kenyon v. F.M.C. Corp.*, 286 Minn. 183, 176 N.W.2d 69 (1970)). The ability to recover against the manufacturer exists despite the ordinary exclusion of the right of indemnity for purely economic loss, as liability in tort may be characterized. *Id.* at 860-61.

Still, although the courts have been reluctant to grant indemnity for purely economic loss, reasoning that such indemnity amounted to "absolute liability," they have granted indemnity against the manufacturer in cases where the user or third party was negligent, as long as that negligence was not an independent cause of the harm, and the defect was not reasonably apparent. See *Air Shields, Inc. v. Spears*, 590 S.W.2d 574 (Tex. Civ. App. — Waco 1979, writ ref'd n.r.e.); *Heil Co. v. Grant*, 534 S.W.2d 916 (Tex. Civ. App. — Tyler 1976, writ ref'd n.r.e.).

<sup>77</sup> See TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1983), *supra* note 72.

<sup>78</sup> *Id.*

<sup>79</sup> "Modified" comparative negligence in Texas under article 2212a mandates that a plaintiff who is more negligent than the defendant or defendants combined (i.e. where the plaintiff is greater than 50% at fault) may not recover any damages; "pure" comparative negligence allows the plaintiff to recover his damages in proportion to fault without regard to the respective percentages of negligence among plaintiffs and defendants.

each defendant according to the percentage of fault attributable to him.<sup>80</sup> Article 2212a, in addition to apportioning liability among defendants, also takes into consideration the plaintiff's proportionate share of contributory negligence as determined by the jury;<sup>81</sup> the plaintiff recovers damages from the defendant as long as his portion of negligence is fifty percent or less of the total negligence.<sup>82</sup> Under article 2212a each defendant is jointly and severally liable for the entire amount of the judgment unless an individual defendant's negligence is less than that of the plaintiff, in which case that defendant is liable only for the portion of negligence attributable to him.<sup>83</sup>

Conversely, because the basis of liability in a cause of action in strict liability under section 402A dismisses as immaterial any negligence on the part of the distributor,<sup>84</sup> the law of contribution in such cases has evolved to emphasize the public policy concerns of strict liability<sup>85</sup> and has remained substantially unresponsive to the issues of fair apportionment of liability addressed by article 2212a in negligence causes of action.<sup>86</sup> Consequently, Texas courts have treated contribution in strict liability and mixed-strict liability/negligence causes of action under article 2212<sup>87</sup> rather than under article

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<sup>80</sup> See *Southern Pacific Transp. Co. v. Smith Material Corp.*, 616 F.2d 111, 113 (5th Cir. 1980) (interpreting Texas law as mandating contribution); *Deal v. Madison*, 576 S.W.2d 409, 416-17 (Tex. Civ. App. — Dallas 1978, writ ref'd n.r.e.) (elucidating the rationale behind article 2212a).

<sup>81</sup> See TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1983).

<sup>82</sup> See art. 2212a §2(b), *supra* note 72.

<sup>83</sup> See art. 2212a, §2(c), *supra* note 72.

<sup>84</sup> See *supra* note 26.

<sup>85</sup> See *supra* note 27.

<sup>86</sup> See *New Terminal Warehouse Corp. v. Wilson*, 589 S.W.2d 465 (Tex. Civ. App. — Houston [14th Dist.] 1979), *aff'd*, 605 S.W.2d 855 (Tex. 1980); *Deal v. Madison*, 576 S.W.2d 409 (Tex. Civ. App. — Dallas 1977, writ ref'd n.r.e.). See generally, Dorsaneo & Robertson, *Comparative Negligence in Texas*, 10 TEX. TECH. L. REV. 933 (1979).

<sup>87</sup> See TEX. REV. CIV. STAT. ANN. art. 2212 (Vernon 1971), which provides:

Any person against whom, with one or more others, a judgment is rendered in any suit on an action arising out of, or based on tort, except in causes wherein the right of contribution or of indemnity, or of recovery, over, by and between the defendants is given by statute or exists under the common law, shall, upon payment of said judgment, have a right of action against his co-defendant or co-defendants and may recover from each a sum equal to the proportion of all of the defendants named in

2212a.<sup>88</sup> Indeed, because article 2212a is couched in terms of negligence,<sup>89</sup> and article 2212 is applicable to "torts,"<sup>90</sup> the court in *General Motors Corp. v. Simmons*<sup>91</sup> refused to extend article 2212a to actions in strict liability.<sup>92</sup> In *Simmons*, the plaintiff sued alleging that in his collision with a third party, defective glass installed by General Motors had exploded causing permanent eye damage.<sup>93</sup> At the time of trial the plaintiff had already settled with the third party.<sup>94</sup> The jury returned a verdict for Simmons and against General Motors for one million dollars, and the trial court rendered judgment in this amount.<sup>95</sup> The court of civil appeals reformed the judgment against General Motors by granting contribution from the third party and rendered judgment to reflect the settlement for \$500,000.<sup>96</sup> In agreeing with the court of civil appeals, the Supreme Court of Texas ruled that the third

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said judgment. If any of said person co-defendant be insolvent, then recovery may be had in proportion as each defendant or defendants are not insolvent; and the right of recovery over against such insolvent defendant or defendants in judgment shall exist in favor of each defendant in judgment in proportion as he has been caused to pay by reason of such insolvency.

*Id.*

<sup>88</sup> TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1983), *supra* note 72.

<sup>89</sup> See article 2212a, *supra* note 72.

<sup>90</sup> See article 2212, *supra* note 87.

<sup>91</sup> 558 S.W.2d 855 (Tex. 1977).

<sup>92</sup> *Id.* at 862 (Tex. 1977). The court stated:

Article 2212a, which is not here applicable, apportions the damages among the several tortfeasors upon principles of comparative negligence. The article deals specifically with negligence, and it nowhere uses the other term "strict liability." See subsection 2(b), (c), (d), and (e), Art. 2212a. Article 2212, on the other hand, speaks out not about negligence, but about torts. Strict liability is a tort. As stated in Comment "n" of section 402A, "the basis of liability is purely one of tort." It follows, therefore, that this case is governed by article 2212 and is still controlled by *Palestine Contractors, Inc. v. Perkins*, 386 S.W.2d 764 (Tex. 1964), even though the comparative negligence statute, Article 2212a, has preempted the allocation of liability among negligent tortfeasors controlled by that statute.

*Id.*

<sup>93</sup> *Simmons*, 558 S.W.2d at 588.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* See *General Motors Corp. v. Simmons*, 545 S.W.2d 502 (Tex. Civ. App. — Houston [1st Dist] 1976).

party should contribute *pro rata* in mixed-strict liability/negligence causes of action, and noted that "[article 2212a] does not provide any mechanism for comparing the causative fault or percentage causation of a strictly liable manufacturer with the negligent conduct of a negligent co-defendant."<sup>97</sup> In dissatisfaction, the court called for legislative action to alleviate the tensions resulting from the inapplicability of article 2212a to strict liability causes of action.<sup>98</sup>

The Supreme Court of Texas has not been completely unwilling to move toward comparison of liability in strict products liability cases.<sup>99</sup> In *General Motors Corp. v. Hopkins*,<sup>100</sup> the court applied "pure" comparative causation<sup>101</sup> when the defendant demonstrated the plaintiff's unforeseeable misuse of the product.<sup>102</sup> The court held that if a manufacturer is strictly liable, but the plaintiff has misused the product, then comparative causation should apply.<sup>103</sup> The court in *Hopkins* established recovery by a plaintiff even if the percentage of

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<sup>97</sup> *Simmons*, 558 S.W.2d at 862. See also *Bell Helicopter Co. v. Bradshaw*, 594 S.W.2d 519 (Tex. Civ. App. — Corpus Christi 1979, writ ref'd n.r.e.).

<sup>98</sup> *Simmons*, 558 S.W.2d at 863.

<sup>99</sup> See *Hopkins*, 548 S.W.2d 344.

<sup>100</sup> 548 S.W.2d 344 (Tex. 1977).

<sup>101</sup> *Id.* at 351. The court stated that

[a]s indicated . . . contentions by the supplier relative to unforeseeable misuse of the product by the consumer usually bear upon the primary issues of defect and/or cause-in-fact of the damaging event. Where the supplier is unsuccessful in the contentions on those issues, he may interpose an affirmative defense and attempt to prove that the consumer plaintiff altered or misused the product in an unforeseen manner, that the misuse was a proximate cause of the damaging event, and that the misuse contributed to the cause of the event by a certain percent or fraction of the total contribution as between the product defect and the misuse.

*Id.*

<sup>102</sup> *Id.* at 352. See *supra* text accompanying notes 44-55.

<sup>103</sup> 548 S.W.2d at 352. The court stated:

If the product is found to have been unreasonably dangerous when the defendant placed it in the stream of commerce, and if that defect is found to have been a producing cause of the damaging event, and if the plaintiff has misused the product . . . , and if that misuse is a proximate cause of the damaging event, the trier of fact must then determine the respective percentages (totalling 100%) by which these two concurring causes contributed to bring about the event.

*Id.*

fault assigned to the misuse was greater than that assigned to the product's defect.<sup>104</sup> Thus, the actions of the court served to mitigate the harshness of the previously all-or-nothing misuse defense,<sup>105</sup> yet to allow the distributor to escape full liability when the plaintiff is partly at fault.<sup>106</sup>

#### D. National Trends

Concurrently with the Texas development toward a more responsive system of contribution,<sup>107</sup> a number of states have developed systems of comparative responsibility in strict liability causes of action. Each judicial application of comparison in some way addresses the conceptual "apples and oranges" of fault principles in strict liability.<sup>108</sup> As explored

<sup>104</sup> That is, the court established "pure" comparison of causation as opposed to article 2212a's "modified" comparison of negligence. See *supra* note 79.

<sup>105</sup> See *supra* text accompanying notes 44-55.

<sup>106</sup> *Hopkins*, 548 S.W.2d at 352.

<sup>107</sup> See *supra* text accompanying notes 77-106.

<sup>108</sup> Inherent in any judicial adoption of comparative allocation of loss in strict products liability actions is the conceptual and semantic incompatibility of strict liability without fault and fault-based comparisons. *Murray v. Fairbanks Morse*, 610 F.2d 149, 158 (3d Cir. 1979). See also *Lewis v. Timco, Inc.*, 716 F.2d 1425 (5th Cir. 1983) (en banc); *Pan-Alaska Fisheries v. Marine Constr. & Design Co.*, 565 F.2d 1129, 1139; *Butaud v. Suburban Marine & Sporting Goods*, 555 P.2d 42, 47 (Rabinowitz, J., concurring); *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978). The court in *Murray* posed the proper question as to the application of fault principles to strict liability actions, stating:

Comparative fault would seem to function smoothly in those negligence cases in which the defendant is at fault for violating a duty of care owed to the plaintiff by exposing him to an unreasonable risk of harm and the plaintiff is at fault for enhancing the danger by exposing himself to an unreasonable risk of harm. The jury is simply asked to compare the conduct of the parties. But in strict products liability actions, where the focus is on the product defect and not on the defendant's personal misconduct, can comparative fault principles be applied effectively?

610 F.2d at 158. Cf. *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978). Indeed, the primary difficulty arises when the concept to be compared is defined as "fault" and the attempt is made by a court to apply the term "fault" to the comparative apportionment phase of the jury charge. See *Duncan v. Cessna Aircraft Co.*, 26 Tex. Sup. Ct. J. 507, 515 n.9 (1983). While in tort theory the term "fault" may have no connotations of moral blameworthiness, it is inevitable that the popular usage connotations of fault, complete with notions of blameworthiness, would enter improperly into the jury's consideration of fact. See *Murray*, 610 F.2d at 158-59 (where the court quoted PROSSER, *supra* note 26, at 493, stating:

There is a broader sense in which "fault" means nothing more than a departure from a standard of conduct required of a man by society for

the protection of his neighbors; and if the departure is an innocent one, and the defendant cannot help it, it is nonetheless a departure, and a social wrong.

*Id.*) Such considerations of fault give rise to a propensity on the part of the jury to consider the conduct of the manufacturer and to take its focus off of the product itself. See *Murray*, 610 F.2d at 158-59. With a defective product, the substitution of fault for defect in a strict liability action draws the jury's product focus parallel to the conduct of the plaintiff and other parties. The court in *Murray*, 610 F.2d at 158-59, stated in quoting Aaron Twerski that "[i]n this imperfect world it is not an outrageous inference that a bad defect most probably stems from serious fault—even if the fault need not nor cannot be established." See Twerski, *From Defect to Cause to Comparative Fault—Rethinking Some Product Liability Concepts*, 60 MARQ. L. REV. 297, 331 (1977). Further, the *Murray* court stated that

[t]he substitution of the term fault for defect, however, would not appear to aid the trier of fact in apportioning damages between the defect and the conduct of the plaintiff. The key conceptual distinction between strict products liability theory and negligence is that the plaintiff need not prove faulty conduct on the part of the defendant in order to recover. The jury is not asked to determine if the defendant deviated from a standard of care in producing his product. There is no proven faulty conduct of the defendant to compare with the faulty conduct of the plaintiff in order to apportion the responsibility for an accident. Although we may term a defective product "faulty," it is qualitatively different from the plaintiff's conduct that contributes to his injury. A comparison of the two is therefore inappropriate. The characterization of both plaintiff's negligent conduct and the defect as faulty may provide a semantic bridge between negligence and strict liability theories, but it provides neither a conceptual nor pragmatic basis for apportioning the loss for a particular injury.

610 F.2d at 159.

By adopting section 402A, the Texas Supreme Court intended that the focus of attention be shifted from the conduct of the manufacturer to the quality of the product. See *McKisson*, 416 S.W.2d 787; and *Tunks*, 416 S.W.2d 779. Still, notions of fault are, in some sense, inherent in the defective product. See *Wade*, *supra* note 26, at 377 (where *Wade* stated that

[i]n the case of products liability, the fault inheres primarily in the nature of the product. The product is "bad" because it is not duly safe; it is determined to be defective and (in most jurisdictions) unreasonably dangerous . . . . It is not necessary to prove negligence in letting the thing get in the dangerous condition or in failing to discover and rectify it. Instead, simply maintaining the bad condition or placing the bad product on the market is enough for liability . . . . This is legal fault . . . .

*Id.*) But this argument minimizes "[t]he key conceptual distinction between strict products liability theory and negligence[,] in that the plaintiff need not prove faulty conduct on the part of the defendant to recover." *Murray*, 610 F.2d at 159. To ask a jury to compare and quantify the negligent or faulty conduct of a plaintiff with the "badness" of a product in which no faulty conduct has been proven on the part of the defendant is to invite jury confusion and inconsistent verdicts. *Id.*

Comparative causation, in the terms of the court in *Hopkins*, involves the comparison by the jury of the percentage of producing cause of the product defect as balanced against the proximate causes of the plaintiff and third parties, with a total between all

in the dissent in a California case,<sup>109</sup> courts that use comparative principles in strict liability actions may be mixing "negligence apples" with "liability-without-fault oranges."<sup>110</sup> That is, courts may be forcing comparison of incompatible princi-

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causes of one hundred percent. See discussion in *Hopkins*, 548 S.W.2d at 351. See also discussions *supra* text accompanying notes 44-55, 99-106. Such a shift to comparative causation is arguably more consistent with the theoretical and conceptual requirements of fairness in loss distribution in that no connotations of blameworthiness need enter into jury consideration. *Murray*, 610 F.2d at 159. Some courts, such as those in *Butaud*, 555 P.2d at 45 and *Daly*, 575 P.2d at 1168, have attempted to characterize the doctrinal difficulties as inconsequential. Indeed, as the California court in *Daly* stated, "Fixed semantic consistency at this point is less important than the attainment of a just and equitable result." 575 P.2d at 1168 (emphasis added). The court in *Daly* set forth a broad, general rule in the face of a relatively narrow set of facts. The court established few guidelines, with little precision for use by trial courts, stating:

The interweaving of concept and terminology in this area suggests a judicial posture that is flexible rather than doctrinaire.

We pause at this point to observe that where, as here, a consumer or user sues the manufacturer or designer alone, technically, neither fault nor conduct is really compared functionally. The conduct of one party in combination with the product of another, or perhaps the placing of a defective article in the stream of projected and anticipated use, may produce the ultimate injury. In such a case as in the situation before us, we think the term "equitable apportionment or allocation of loss" may be more descriptive than "comparative fault."

*Id.* While "semantic consistency" may not be the paramount concern in tort law, "semantic consistency" in comparative loss allocation, by distributing loss according to causation, leads to "judgment consistency" as well. *Murray*, 610 F.2d at 159. By a shift to causative contribution rather than to comparative fault the semantic difficulties are bridged and the practical difficulties overcome. *Id.* See also Twerski, *supra* this note; Wade, *supra* note 26. The court in *Murray* elaborated on the theory as follows:

In apportioning damages we are really asking how much the injury was caused by the defect in the product versus how much was caused by the plaintiff's own actions. . . . Thus, the underlying task in each case is to analyze and compare the causal conduct of each party regardless of its label [of negligence or strict liability].

610 F.2d at 159. Through causative contribution or comparative causation, the jury is not forced to make the *ad hoc* "apples and oranges" comparisons of plaintiff or third party fault and liability without fault. Cf. Powers, *The Persistence of Fault in Products Liability*, 61 TEX. L. REV. 777 (1983). But see Twerski, *supra* this note; Wade, *supra* note 26; Levine, *Strict Products Liability and Comparative Negligence: The Collision of Fault and No-Fault*, 14 SAN DIEGO L. REV. 327 (1977). Instead, the jury may avoid the distractions of irrelevant testimony going to the distributor's fault in distributing the product and concentrate on the fair and equitable distribution of damages as among parties. *Murray*, 610 F.2d at 159-61. See also Twerski, *supra* this note; Wade, *supra* note 26; Levine, *supra* this note; Powers, *supra* this note.

<sup>109</sup> *Daly v. General Motors Corp.*, 20 Cal. 3d at 757-64, 575 P.2d at 1181-86, 144 Cal. Rptr. at 399-404 (Mosk, J., dissenting).

<sup>110</sup> *Id.*

ples.<sup>111</sup> In an effort, however, to distribute more equitably the loss which may have resulted, at least in part, from the misconduct of the plaintiff, many courts have bridged the conceptual gap with a number of doctrinal devices.<sup>112</sup>

Some states without comparative negligence statutes have judicially adopted comparative responsibility in strict products liability actions as a natural progression from judicial adoption of section 402A strict liability and comparative neg-

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<sup>111</sup> 20 Cal. 3d at 763-64, 575 P.2d at 1185-86, 144 Cal. Rptr. at 403-04. The dissent carries the blending of apples and oranges by the majority to the absurd:

The majority devote considerable effort to rationalizing what has been described as a mixture of apples and oranges. Their point might be persuasive if there were some authority recognizing a defense of contributory products liability, for which they are now substituting comparative products liability. However, all research to discover such apples and oranges has been fruitless. The conclusion is inescapable that the majority, in avoiding approval of comparative negligence in name as a defense to products liability, are thereby originating a new defense that can only be described as comparative products liability. We may now anticipate similar defenses in the vast number of other tort actions. Can comparative libel, comparative slander of title, comparative wrongful litigation, comparative nuisance, comparative fraud, be far behind? By whatever name, negligence, theretofore just one subtopic in the elaborate spectrum of torts—which require six volumes and appendices of the Restatement Second of Torts to cover—now seems destined to envelop the entire tort field.

20 Cal. 3d at 760-61, 575 P.2d at 1184, 144 Cal. Rptr. at 402. *But see* Powers, *supra* note 108, at 803:

Comparing the fault of a plaintiff or negligent defendant with the “culpability” of a strictly liable defendant seems as impossible as a comparison of apples and oranges. Opponents of comparative allocation in products liability have argued that juries asked to make such a comparison will assign percentages to each party, but they will assign percentages to each party, but they will do so either arbitrarily or by making a *sub rosa* appraisal of the defendant’s fault. These responses would render comparative allocation of loss either arbitrary or incompatible with the nonfault basis of strict products liability. This argument is powerful as a pragmatic flag of caution, but it does not demonstrate an intrinsic incompatibility of comparative allocation and strict products liability. We routinely compare apples and oranges by using one of two methods. One method of comparison focuses on a shared feature, such as weight, volume, juice content, or calories. The other method refers to an overreaching value system, such as price or preference, which incorporates subordinate values that appear at first glance to be incommensurate. Similar methods could be used to compare fault with the “culpability” of a strict products liability defendant.

*Id.* (citations omitted).

<sup>112</sup> See *infra* notes 113-141 and accompanying text.

ligence.<sup>113</sup> Such was the case in *Daly v. General Motors Corp.*<sup>114</sup> In *Daly*, the decedent was driving an Opel automobile when it collided with, and spun off of, a metal divider fence.<sup>115</sup> The driver's-side door was thrown open, and the driver was forcibly ejected and killed.<sup>116</sup> The plaintiffs alleged that the decedent's fatal injuries were produced by his ejection from the car and that such ejection would not have occurred but for the activation on impact of a defective door latch.<sup>117</sup> As the court stated, "[Being] persuaded by logic, justice, and fundamental fairness, we conclude that a system of comparative fault should be . . . extended to actions founded on strict products liability."<sup>118</sup> The court in *Daly* went further to dismiss claims of conceptual inconsistency through the reasoning of the Supreme Court of Alaska.<sup>119</sup> The Alaskan court had reasoned that the difficulty in balancing fault principles with strict liability was "more apparent than real."<sup>120</sup> The *Daly* court summarized its position in light of that reasoning by stating that "[w]hile fully recognizing the theoretical and semantic distinction between the twin principles of strict products liability and traditional negligence, we think they can be blended or accommodated."<sup>121</sup>

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<sup>113</sup> See *Pan-Alaska Fisheries v. Marine Constr. & Design Co.*, 565 F.2d 1129 (9th Cir. 1977) (suit in admiralty adopting comparative fault applied as comparative causation); *Butaud v. Suburban Marine & Sporting Goods*, 555 P.2d 42 (Alaska 1976) (adopting comparative fault as comparative causation); *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978) (adopting comparison *characterized* as "equitable apportionment" or "allocation of loss," but *named* "comparative fault"); *West v. Caterpillar Tractor Co.*, 336 So. 2d 80 (Fla. 1976) (defining comparative apportionment in terms of "comparative negligence").

<sup>114</sup> 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978).

<sup>115</sup> *Daly*, 20 Cal. 3d at 730, 575 P.2d at 1164, 144 Cal. Rptr. at 382.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Daly*, 20 Cal. 3d at 742, 575 P.2d at 1172, 144 Cal. Rptr. at 390.

<sup>119</sup> *Id.* (citing *Butaud v. Suburban Marine & Sporting Goods*, 555 P.2d 42, 45 (Alaska 1976)).

<sup>120</sup> *Butaud*, 555 P.2d at 45.

<sup>121</sup> *Daly*, 20 Cal. 3d at 734, 575 P.2d at 1167, 144 Cal. Rptr. at 385. The court went further in its clarification of the theoretical and semantic problems to state that since "neither fault nor conduct is really compared functionally . . . we think the term 'equitable apportionment' or 'allocation of loss' may be more descriptive than 'comparative fault'." 20 Cal. 3d at 736, 575 P.2d at 1168, 144 Cal. Rptr. at 386.

In states that have comparative negligence statutes,<sup>122</sup> other means of theoretical reconciliation are utilized. One approach is to analogize strict liability to negligence *per se* as developed in the Wisconsin case of *Dippel v. Sciano*.<sup>123</sup> In that case, Donald Dippel sued to recover for injuries sustained when a tavern owner's coin-operated pool table collapsed upon his foot and crushed it.<sup>124</sup> Dippel alleged a warranty claim and a negligence claim against the tavern owner and the seller of the table.<sup>125</sup> The trial court sustained a demurrer against the plaintiffs because of lack of privity, but on appeal the Supreme Court of Wisconsin ruled first, that an action lay in strict products liability, and second, in dicta, that the state's comparative negligence statute applied to actions brought on a strict products theory.<sup>126</sup> As stated by the court in *Dippel*, "liability imposed [in an action under strict liability] is . . . akin to negligence *per se*."<sup>127</sup> The court continued, stating that as "[i]n all those cases where it is said that [in] the performance of the wrongful act . . . the defendant is guilty as a matter of law or that the act is negligent *per se*, the [strict products liability] case is one which admits of no question as to reasonable anticipation or foreseeability," and is, therefore, similar to a case of negligence *per se*.<sup>128</sup> Thus, the court reasoned, since Wisconsin allowed comparison of fault through its comparative negligence statute in cases of ordinary negligence *per se*,<sup>129</sup> when the "negligence *per se*" of strict liability is a producing cause<sup>130</sup> of a damaging event, it may also be compared to the contributory negligence of the

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<sup>122</sup> For a listing of states with comparative negligence statutes, see Brewster, *Comparative Negligence in Strict Liability Cases*, 42 J. AIR L. & COM. 107, 107 n.2 (1976). See also discussion of theoretical difficulties, *supra* notes 108-111 and accompanying text.

<sup>123</sup> 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

<sup>124</sup> 155 N.W.2d at 56.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 65.

<sup>127</sup> *Id.* at 64. "Negligence *per se*" is conduct which is negligent as a matter of law.

<sup>128</sup> *Dippel*, 155 N.W.2d at 64 (quoting *Osborne v. Montgomery*, 203 Wis. 223, 240, 234 N.W. 372, 378 (1931)).

<sup>129</sup> *Dippel*, 155 N.W.2d at 64. The *Dippel* court stated that "[c]omparison of the failure to exercise ordinary care and negligence *per se* is so common and widely approved in our jurisdiction as to need no citation." *Id.*

<sup>130</sup> See definition of producing cause, *supra* note 34.

plaintiff.<sup>131</sup>

The second approach to the application of statutory comparative fault to strict liability actions, as explained by the court in *Suter v. San Angelo Foundry & Machine Co.*,<sup>132</sup> is to treat "the term 'negligence' [as being] subsumed within the concept of tortious fault."<sup>133</sup> The Supreme Court of New Jersey reasoned that the concept of strict liability has within it an inherent notion of fault.<sup>134</sup> In *Suter*, a sheet metal worker brought suit on a strict products theory against the manufacturer of an industrial sheet metal rolling machine after his hand became caught in the device, causing injuries.<sup>135</sup> Upon jury findings that Suter himself was guilty of negligence, the trial court rendered judgment for one-half of his damages as assessed by the jury.<sup>136</sup> The New Jersey Superior Court, Appellate Division, modified the judgment and awarded the plaintiff the full amount of the jury assessment.<sup>137</sup> The Supreme Court of New Jersey affirmed, but added in dicta that the state's comparative negligence statute applied to strict liability actions.<sup>138</sup> The court stated that "[t]he manufacturer or supplier of a chattel has been charged with the duty of distributing a product which is fit, suitable and duly safe. Failure to comply with this standard constitutes fault."<sup>139</sup> Thus, since the notion of fault is common between

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<sup>131</sup> *Dippel*, 155 N.W.2d at 64. Minnesota has adopted the reasoning of the *Dippel* decision. See, e.g., *Busch v. Busch Constr., Inc.*, 262 N.W.2d 377, 393 (Minn. 1977) (holding that "our adoption of the Wisconsin comparative negligence statute presumed our adoption of . . . the Wisconsin rule that the comparative negligence statute applies in actions brought on a § 402A theory").

<sup>132</sup> 81 N.J. 150, 406 A.2d 140 (1979).

<sup>133</sup> *Id.* at 145.

<sup>134</sup> *Id.* at 146.

<sup>135</sup> *Id.* at 141.

<sup>136</sup> *Id.* at 142.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 147.

<sup>139</sup> *Id.* at 146. The court quoted W. PROSSER, *supra* note 26, § 75 at 493:

There is a broader sense in which "fault" means nothing more than a departure from a standard of conduct required of a man by society for the protection of his neighbors; and if the departure is an innocent one, and the defendant cannot help it, it is none the less a departure, and a social wrong. The distinction still remains between the man who has deviated from the standard, and the man who has not. The defendant

an action for strict liability and a defense of contributory negligence,<sup>140</sup> the application of the comparative negligence statute is deemed proper.<sup>141</sup>

Other courts have refused to apply their jurisdictions' comparative negligence statutes to actions in strict liability<sup>142</sup> but have nonetheless adopted some form of comparative responsibility.<sup>143</sup> Such was the result in the New Hampshire Supreme Court case of *Thibault v. Sears, Roebuck & Co.*<sup>144</sup> In *Thibault*, the plaintiff fell while using a lawn mower manufactured by the defendant, Sears,<sup>145</sup> and seriously injured himself when his foot slid under the housing and into the blades.<sup>146</sup> The plaintiff sued on a theory of strict products liability, alleging that the mower should have had a rear trailing guard to prevent such accidents.<sup>147</sup> At trial, the jury returned a verdict for the defendant, and the trial judge entered judgment.<sup>148</sup> On appeal, the Supreme Court of New Hampshire affirmed, but added in dicta that it "judicially recognize[d] the comparative concept in strict liability cases parallel to the legislature's recognition of it in the area of negligence."<sup>149</sup> In

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may not be to blame for being out of line with what society requires of him, but he is none the less out of line.

*Id.*

<sup>140</sup> 406 A.2d at 145-47.

<sup>141</sup> *Id.* A line of other cases has adopted similar reasoning. See e.g., *Sun Valley Airlines v. Avco-Lycoming Corp.*, 411 F. Supp. 598 (D. Idaho 1976) (the court holding that "the manufacturer is under a duty to produce a product which is free from unreasonably dangerous conditions. A violation of that duty constitutes blameworthiness or culpability or a sense of legal fault"); *Kennedy v. City of Sawyer*, 228 Kan. 439, 618 P.2d 788 (1980) ("liability for damages resulting from putting a dangerously defective product in commercial channels").

<sup>142</sup> See, e.g., *Stueve v. American Honda Motors*, 457 F. Supp. 740 (D. Kan. 1978); *Thibault v. Sears, Roebuck & Co.*, 118 N.H. 802, 395 A.2d 843 (1978) (discussed *infra* text accompanying notes 144-156); *Kirkland v. General Motors Corp.*, 521 P.2d 1353 (Okla. 1974). Cf. *General Motors Corp. v. Simmons*, 558 S.W.2d 855.

<sup>143</sup> See, e.g., *Stueve v. American Honda Motors*, 457 F. Supp. 740 (D. Kan. 1978); *Thibault v. Sears, Roebuck & Co.*, 118 N.H. 802, 395 A.2d 843 (1978); *Kirkland v. General Motors Corp.*, 521 P.2d 1353 (Okla. 1974). See also *Hopkins*, 548 S.W.2d 344 (Tex. 1977).

<sup>144</sup> 118 N.H. 802, 395 A.2d 843 (1978).

<sup>145</sup> 395 A.2d at 845.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 850.

reasoning that "the comparative negligence statute . . . does not apply to strict liability cases because it is confined by its terms to actions for negligence,"<sup>150</sup> the New Hampshire court joined with others in deciding not to tamper with a specific legislative enactment.<sup>151</sup> Nonetheless, it judicially adopted a system of comparative principles.<sup>152</sup> Still, those same courts have often mitigated their pronouncement of statutory inapplicability and adopted judicial comparative fault schemes.<sup>153</sup> These courts have reasoned that since the legislature enacted comparison in negligence cases, the next logical step was judicial adoption of comparative responsibility<sup>154</sup> — especially along lines of comparative causation<sup>155</sup> — in strict liability cases to achieve fair loss allocation and permit semantic continuity.<sup>156</sup>

Thus, it is clear that a number of states have moved, either judicially or statutorily, toward comparative responsibility in strict liability. It has been adopted in numerous jurisdictions precisely because it helps further the legitimate ends of accurate loss distribution and product safety. Equally important, comparative systems of loss allocation distribute to the plaintiff that which is his fault; in those states having adopted some form of comparative allocation, the manufacturer and

<sup>150</sup> *Id.* at 848.

<sup>151</sup> *Id.* See, e.g., *Simmons*, 558 S.W.2d 855; *Kirkland v. General Motors*, 521 P.2d 1353 (Okla. 1974).

<sup>152</sup> 395 A.2d at 850.

<sup>153</sup> See, e.g., *Murray*, 610 F.2d 149 (applying Virgin Islands' law, comparative negligence statute held inapplicable, but comparative causation allowed to promote fair loss allocation and to permit semantic continuity); *Stueve v. American Honda Motors*, 457 F. Supp. 740 (D. Kan. 1978) (applying Kansas law, common law of comparative fault without the application of the comparative negligence statute).

<sup>154</sup> *Murray*, 610 F.2d at 162. The court stated:

[This] leads us to conclude that a system of comparative fault may effectively operate in strict products liability cases and will result in a more equitable apportionment of the loss for product related injuries while furthering the valid policy goals behind the strict products liability action.

*Id.*

<sup>155</sup> *Id.* The analysis works as follows and is parallel to that described in *Hopkins*, 548 S.W.2d 344, for misuse cases: if fault on the part of the plaintiff is present in addition to misuse, the trier of fact shall reduce the damage award in proportion to the plaintiff's causal contribution to his own injury. *Id.* See also *supra* text accompanying notes 44-55.

<sup>156</sup> *Murray*, 610 F.2d at 162.

the purchasing public need no longer pay for the plaintiff's negligence. Such a pathway is neither inconsistent with the policies underlying the strict products liability cause of action, nor is it an improper means of loss allocation.<sup>157</sup>

## II. ANALYSIS OF *DUNCAN V. CESSNA AIRCRAFT COMPANY*

The Supreme Court of Texas in *Duncan v. Cessna Aircraft Co.*<sup>158</sup> addressed three separate issues.<sup>159</sup> The first issue of concern was whether the release executed by Mrs. Duncan in favor of Air Plains West, Inc. and the Smithson estate was to be governed by Texas or New Mexico law;<sup>160</sup> the court resolved the choice of law question by affirming the court of appeals' decision<sup>161</sup> and found that Texas had the most significant relationship to the case.<sup>162</sup> The second issue addressed by the court in *Duncan* was whether the release executed by Mrs. Duncan pursuant to her settlement with Air Plains West and the Smithson estate was effective to release Cessna on the basis of its generalized language.<sup>163</sup> The court resolved this issue by holding that "[a] tortfeasor can claim the protection of a release only if the release refers to him by name or with such descriptive particularity that his identity or his connection with the tortious event is not in doubt."<sup>164</sup>

But the third and most significant issue arose over whether Cessna was entitled to contribution from Smithson's estate because Smithson was contributorily negligent in his piloting of the airplane.<sup>165</sup> The court observed that the issue of contri-

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<sup>157</sup> *Id.*

<sup>158</sup> 665 S.W.2d 414 (Tex. 1984).

<sup>159</sup> *Id.* at 213-26.

<sup>160</sup> *Id.* at 214-15.

<sup>161</sup> *Id.* at 214. Significantly, the court affirmed the court of appeals *result* (that Texas law was applicable to the case), but on a different basis; overruling the court of appeals use of *lex loci* principles, the Supreme Court of Texas adopted the choice of law the "most significant relationship" choice of law methodology for subsequent contract cases as espoused for tort cases in *Gutierrez v. Collins*, 583 S.W.2d 312 (Tex. 1979). See RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6, 145 (1971).

<sup>162</sup> *Duncan*, 665 S.W.2d at 421 ("[T]he *lex loci* rules will no longer be used to resolve conflicts problems.").

<sup>163</sup> *Duncan*, 665 S.W.2d at 419-20.

<sup>164</sup> *Id.* at 420.

<sup>165</sup> *Id.* at 422.

bution spawned two secondary questions:

[First,] whether a plaintiff's contributory negligence is a defense in strict products liability actions when the negligence does not rise to the level of assumed risk or unforeseeable product misuse, but is more than a mere failure to discover a product defect; and [second,] whether comparative contribution among tortfeasors is possible when at least one is strictly liable.<sup>166</sup>

In response to the third issue's sub-questions the court extensively analyzed Texas and other state and federal law. After first discussing the adoption of section 402A as the law in Texas,<sup>167</sup> with its prohibition of contributory negligence as a defense under comment "n",<sup>168</sup> the court concluded under the reasoning of *Hopkins*<sup>169</sup> that "a manufacturer is not an insurer"<sup>170</sup> and is not to be held liable for that portion of damages caused by the misuse of the product user.<sup>171</sup> The court further articulated that under existing law, only two defenses to strict liability were available: "the absolute defense of assumption of the risk, and the comparative defense of unforeseeable product misuse."<sup>172</sup> Noting, however, that in a multi-theory products case such defenses spawn numerous procedural difficulties,<sup>173</sup> the court questioned the very theo-

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<sup>166</sup> *Id.*

<sup>167</sup> *Id.* See *McKisson*, 416 S.W.2d 787; *Tunks*, 416 S.W.2d 779.

<sup>168</sup> *Duncan*, 665 S.W.2d at 422. See RESTATEMENT (SECOND) OF TORTS, § 402A, comment n, which states:

Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in a product or guard against its existence. On the other hand the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability.

*Id.* See also, *Rourke v. Garza*, 530 S.W.2d 794, 800 (Tex. 1975); *Henderson v. Ford Motor Co.*, 519 S.W.2d 87, 91 (Tex. 1974) (stating: "Assumption of risk is the defense; contributory negligence or failure to act reasonably is not").

<sup>169</sup> *General Motors Corp. v. Hopkins*, 548 S.W.2d 344 (Tex. 1977).

<sup>170</sup> *Duncan*, 665 S.W.2d at 423 (citing *Hopkins*, 548 S.W.2d 344).

<sup>171</sup> *Duncan*, 665 S.W.2d at 423.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* The court stated:

In Texas, a plaintiff can predicate a product liability action on one or more of three theories of recovery: (1) strict liability under section 402A,

retical and practical justification of the defenses.<sup>174</sup> Stating that each defense is little more than an "extreme variant" of contributory negligence,<sup>175</sup> the court reiterated its concern over the state of Texas products liability law as expressed in *Simmons*<sup>176</sup> and other decisions.<sup>177</sup>

The *Duncan* court then recited the difficulties that Texas courts have encountered due to the inapplicability of article 2212a in the apportionment of joint liability among negligent and strictly liable tortfeasors.<sup>178</sup> The court explained that article 2212a provides for comparative contribution in negligence cases and that article 2212 provides for *pro rata* contribution in other tort actions.<sup>179</sup> The court stated, however, that no mechanism existed "to fairly and sensibly compare causation in [mixed causes of action]."<sup>180</sup> Repeating its admonition, as found in *Simmons*, that article 2212a is not applicable to cases in strict liability,<sup>181</sup> the court also reasserted its holding in *Simmons* that the legislature had not given Texas courts, through either article 2212 or article 2212a, a means for apportionment of causation among negligent and strictly-liable joint tortfeasors.<sup>182</sup>

In response to the difficulties it recognized, the court began

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(2) breach of warranty under the U.C.C., and (3) negligence. If either breach of warranty or negligence is alleged in addition to strict liability, the product supplier is entitled to submit three defensive issues, namely, contributory negligence, assumption of the risk, and misuse. In addition, he may also be entitled to submission of both a comparative negligence issue and a comparative causation (product misuse) issue.

*Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> 558 S.W.2d 855. See *supra* text accompanying notes 84-98.

<sup>177</sup> *Duncan*, 665 S.W.2d at 423-24 (citing *Boatland of Houston, Inc. v. Bailey*, 609 S.W.2d 743, 750-51 (Tex. 1980) (Pope, J. concurring); *Farley v. MM Cattle Co.*, 529 S.W.2d 751, 758 (Tex. 1975)).

<sup>178</sup> *Duncan*, 665 S.W.2d at 423-24. See TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1983), *supra* note 72.

<sup>179</sup> *Duncan*, 665 S.W.2d at 423 (citing *Simmons*, 558 S.W.2d 855). See TEX. REV. CIV. STAT. ANN. art. 2212 (Vernon 1972), *supra* note 87.

<sup>180</sup> *Duncan*, 665 S.W.2d at 424. See also *Simmons*, 558 S.W.2d 855; *Bell Helicopter v. Bradshaw*, 594 S.W.2d 519 (Tex. Civ. App. — Corpus Christi 1979, writ ref'd n.r.e.).

<sup>181</sup> *Duncan*, 665 S.W.2d at 424.

<sup>182</sup> *Id.* See *Simmons*, 558 S.W.2d at 855.

an analysis of alternatives.<sup>183</sup> Noting that numerous commentators have "strenuously urged the implementation of comparative fault, also referred to as comparative responsibility or comparative causation, as a means of distributing accident costs among negligent plaintiffs, negligent defendants, and strictly liable defendants,"<sup>184</sup> the court restated the unfairness of the all-or-nothing defenses to strict liability, and the unfairness and the virtual absolute liability that often inheres on the product supplier.<sup>185</sup> Additionally, the court asserted that the inefficiencies of the present liability allocation system virtually nullified equitable and rational risk distribution by overburdening the manufacturer/distributor.<sup>186</sup> Thus, the court stated, a shift to comparative responsibility was required to alleviate that burden in cases involving misconduct by the plaintiff or a third party.<sup>187</sup> The court concluded its theoretical analysis by stating that "applying principles of comparative apportionment to strict liability not only furthers the policy goals of section 402A but simplifies the submission of product cases."<sup>188</sup>

The Supreme Court of Texas then reviewed the various approaches to the adoption of comparative apportionment.<sup>189</sup> Focusing first upon the California Supreme Court's judicial adoption of comparative fault in *Daly*,<sup>190</sup> whereby that court supplemented California's rules on strict liability, the Texas court favorably recited California's policy decisions on comparative fault.<sup>191</sup> In addition, and for the same policy reasons, the court cited with some approval Wisconsin's

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<sup>183</sup> *Duncan*, 665 S.W.2d at 414-34.

<sup>184</sup> *Id.* at 424. The court favorably cited Edgar, *Products Liability in Texas*, 11 TEX. TECH. L. REV. 23, 44-50 (1979); Sales, *supra* note 56, at 363-65; *Special Project — Texas Tort Law in Transition*, 57 TEX. L. REV. 381, 491-95 (1979); Schwartz, *Strict Liability and Contributory Negligence*, 42 TENN. L. REV. 171, 178-81 (1974); Wade, *supra* note 26, at 376-81.

<sup>185</sup> *Duncan*, 665 S.W.2d at 414. See Sales, *supra* note 27, at 776-78.

<sup>186</sup> *Duncan*, 665 S.W.2d at 424-25.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 425.

<sup>189</sup> *Duncan*, 665 S.W.2d at 425.

<sup>190</sup> See *Daly*, 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380. See *supra* text accompanying notes 113-121.

<sup>191</sup> *Duncan*, 665 S.W.2d at 425.

adoption of the doctrine of strict liability as negligence *per se*.<sup>192</sup> Similarly, the court acknowledged the New Jersey Supreme Court's pronouncement that the placement of a defective product into the stream of commerce is a species of fault and therefore comparable with negligence.<sup>193</sup> The Texas court chose, however, the judicially adopted comparative apportionment system espoused by the New Hampshire Supreme Court.<sup>194</sup>

In citing *Thibault*<sup>195</sup> and reaffirming the notion that because article 2212a is couched in terms of "negligence" it has no applicability to strict liability actions in tort,<sup>196</sup> the court asserted the common law adoption of a comparative apportionment system.<sup>197</sup> Article 2212, the court said, does not foreclose such a judicial adoption and in fact provides for common law exceptions to the applicability of *pro rata* contribution.<sup>198</sup> Indeed, the court stressed that in 1917 when article 2212 was enacted, no identifiable body of strict products liability law existed.<sup>199</sup> Thus, it is unlikely that the statute was intended to control theretofore unforeseen theories.<sup>200</sup> The court concluded, therefore, that article 2212 and the court's reasoning in *Simmons* were insufficient barriers to judicial adoption of comparative apportionment.<sup>201</sup> Consequently, the court followed the *Thibault* court's lead and judicially adopted a comparative apportionment system.<sup>202</sup>

The Supreme Court of Texas in *Duncan*, however, labeled its system of loss allocation "comparative causation" rather

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<sup>192</sup> *Id.* See *Dippel*, 155 N.W.2d 55. See *supra* notes 122-131 and accompanying text.

<sup>193</sup> *Duncan*, 665 S.W.2d at 415. See *Suter v. San Angelo Foundry & Machine Co.*, 81 N.J. 150, 406 A.2d 140 (1979). See also *supra* text accompanying notes 133-141.

<sup>194</sup> *Duncan*, 665 S.W.2d at 416. See *Thibault*, 395 A.2d 843. See also *supra* text accompanying notes 144-156.

<sup>195</sup> *Thibault v. Sears, Roebuck & Co.*, 118 N.H. 802, 395 A.2d 843 (1978).

<sup>196</sup> *Duncan*, 665 S.W.2d 855. See also *Simmons*, 558 S.W.2d 855.

<sup>197</sup> *Duncan*, 665 S.W.2d at 427.

<sup>198</sup> *Id.* at 427. See also article 2212, *supra* note 87. The court held that to the extent that it is inconsistent with the rejection of article 2212 and applicable to strict products liability cases, *Simmons* is overruled. *Id.*

<sup>199</sup> *Duncan*, 665 S.W.2d at 427.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

than "comparative fault."<sup>203</sup> Basing its choice upon the more conceptually accurate expression of *causation* as the entity to be compared,<sup>204</sup> the court noted that "the defendant's 'fault,' in the traditional sense of culpability, is not at issue."<sup>205</sup> Thus, the court said, the trier of fact is not comparing the fault or conduct of the products defendant to that of the plaintiff or other defendants.<sup>206</sup> Rather, "[t]he trier of fact is to compare the harm caused by the defective product with the harm caused by the negligence of other defendants, any settling tortfeasors and the plaintiff."<sup>207</sup> The court noted that such a system was, in fact, consistent with its focus on causation in earlier cases,<sup>208</sup> and that

Plaintiffs will continue to be relieved of proving that the manufacturer or distributor was negligent in the production, design, or dissemination of the article in question. Defendant's liability for injuries caused by a defective product remains strict.<sup>209</sup>

Thus, the court said, in addition to establishing a new system

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<sup>203</sup> *Id.* at 427. *But see* *Duncan v. Cessna Aircraft Co.*, 26 Tex. Sup. Ct. J. 507, 515 (July 13, 1983) (opinion withdrawn) (where the court referred to that which was to be compared as "fault").

<sup>204</sup> *See supra* notes 108-111.

<sup>205</sup> *Duncan*, 665 S.W.2d at 427.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* The court suggested in a footnote special issues on comparative causation:

We suggest that the following general form, adapted to the specific allegations of each case, provides a general idea of the submission of the comparative apportionment issue in these cases:

If, in answer to Questions—, —, and —, you have found that more than one party's act(s) or product(s) contributed to cause the plaintiff's injuries, and only in that event, then answer the following question.

Find from a preponderance of the evidence the percentage of plaintiff's injuries caused by:

Product X	—
Defendant Y	—
Plaintiff Z	—
Total	100%

*Cf. Daly*, 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1980) (suggesting analogous special issues from maritime seaworthiness cases). 575 P.2d at 1170.

*Id.*

<sup>208</sup> *Id.* (citing *Signal Oil & Gas Co. v. Universal Oil Products*, 572 S.W.2d 320 (Tex. 1978), and *Hopkins*, 548 S.W.2d 344)).

<sup>209</sup> *Duncan*, 665 S.W.2d at 418 (citing *Daly*, 575 P.2d at 1168).

of loss allocation, the court preserved all of the policies supporting strict products liability.<sup>210</sup>

In addition, the court abolished the separate defenses of assumption of the risk and misuse, and overruled *Henderson* and *Hopkins* to the extent that they are inconsistent with *Duncan*.<sup>211</sup> The court subsumed the defenses within the notion of contributory negligence and drew all strict products liability cases not controlled by article 2212a within the *Duncan* holding.<sup>212</sup> The court's disposition of the defenses and the adoption of comparative causation, the court said, "is especially appropriate in crashworthiness cases where the product defect causes or enhances injuries but does not cause the accident."<sup>213</sup> The court explained that in cases where a combination of factors causes the injury and where the degree of harm is increased by the product defect, the new system permits jury allocation of loss according to responsibility for it.<sup>214</sup>

After adopting its system of comparative causation the court addressed two significant side issues:<sup>215</sup> first, the choice of pure comparison over modified comparison with the accompanying adoption of full joint and several liability,<sup>216</sup> and second, the effect of partial settlements.<sup>217</sup> In deciding to adopt a pure comparative scheme, the court recited "the relative inefficiency and reduced deterrent effect [(as to product

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<sup>210</sup> *Duncan*, 665 S.W.2d at 428.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 429. The court clarified, stating,

Article 2212a will, of course, continue to govern cases in which the plaintiff alleges only negligence or where the plaintiff fails to obtain findings of defect and producing cause, or breach of warranty, against a product supplier who has been joined with a negligent defendant.

*Id.*

<sup>213</sup> *Id.* at 428.

<sup>214</sup> *Id.* (citing *Stueve v. American Honda Motor*, 457 F. Supp. 740, 559-60 (D. Kan. 1978)); see also *Fietzer v. Ford Motor Co.*, 590 F.2d 215 (7th Cir. 1978) (comparing causation in automobile crashworthiness case); *Trust Corp. of Montana v. Piper Aircraft*, 506 F. Supp. 1093, 1098-99 (D. Mont. 1981) (comparing fault in airplane crashworthiness case); *Daly*, 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (comparing fault in automobile crashworthiness case).

<sup>215</sup> *Duncan*, 665 S.W.2d at 428-32.

<sup>216</sup> See *infra* notes 218-226 and accompanying text. See *supra* note 79.

<sup>217</sup> See *infra* notes 227-244 and accompanying text.

manufacturers)] of modified comparative apportionment.”<sup>218</sup> The court refused to engraft the “51-percent-bar” rule of article 2212a, wherein the plaintiff found to be 51 percent or greater at fault is barred from recovery.<sup>219</sup> The court explained that “[n]o sound reason exists for allowing a defendant to escape liability which the jury has allocated to him, irrespective of the responsibility allocated to the plaintiff.”<sup>220</sup> Thus, the court held that a plaintiff may recover any percentage of damages caused by the defendants regardless of the percentage of causation attributable to them.<sup>221</sup>

The court also held that each defendant found to be a cause of the plaintiff’s injuries under a strict products liability theory is to be held jointly and severally liable for the entire amount of damages the plaintiff is entitled to recover.<sup>222</sup> Further, however, each defendant is entitled to contribution from the other defendants for amounts paid in excess of his percentage share.<sup>223</sup> In so holding, the court expressly rejected the limitation on joint and several liability contained within article 2212a.<sup>224</sup> The adoption of full joint and several liability protects plaintiffs when one or more defendants is insolvent and ostensibly furthers the goal of loss allocation: the injured are to be adequately compensated.<sup>225</sup> The court justified such a policy on the theory that “the defendants’ conduct or products endangered another person, the plaintiff, while the plaintiff’s conduct only endangered himself.”<sup>226</sup>

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<sup>218</sup> *Duncan*, 665 S.W.2d at 418 (citing V. SCHWARTZ, *COMPARATIVE NEGLIGENCE* §§ 12.6, 12.7 at 207, 209; Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 494 (1953)).

<sup>219</sup> *Duncan*, 665 S.W.2d at 429. See also article 2212a, *supra* note 72.

<sup>220</sup> *Duncan*, 665 S.W.2d at 429 (citing *Murray*, 610 F.2d at 162).

<sup>221</sup> *Duncan*, 665 S.W.2d at 429.

<sup>222</sup> *Id.* “A liability is said to be joint and several when the creditor may sue one or more of the parties to such liability separately, or all of them together at his option.” BLACK’S LAW DICTIONARY 751 (rev. 5th ed. 1979). Several liability is that which is “separate and distinct from liability of another to the extent that an independent action may be brought without joinder of others.” BLACK’S LAW DICTIONARY 1232 (rev. 5th ed. 1979).

<sup>223</sup> *Duncan*, 665 S.W.2d at 429.

<sup>224</sup> *Id.* See also article 2212a § 2(c), *supra* note 72.

<sup>225</sup> *Duncan*, 665 S.W.2d at 429.

<sup>226</sup> *Id.* (citing *American Motorcycle Association v. Superior Court*, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978)). The court, in adopting full joint and several

## In response to the issue of the effects of partial settlements

liability, promotes the policy considerations behind strict products liability. See *supra* note 27. See also W. KIMBLE & R. LESHER, PRODUCTS LIABILITY § 2 at 13 (1979). In addition, the court adopts the position on joint and several liability held by the vast majority of jurisdictions that have considered the issue. See Petitioner's Motion to Reform Opinion, *Duncan v. Cessna Aircraft Co.*, 26 Tex. Sup. Ct. J. 507, at 10, 11 (hereinafter "Motion to Reform") (discussing the approaches taken in several states). State and Federal decisions on the law that were included were *Daly*, 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (stating "[The manufacturer's] exposure will be lessened only to the extent that the trier of fact finds that the victim's conduct contributed to his injury."); *Butaud v. Suburban Marine & Sporting Goods*, 555 P.2d 42, 46 (Alaska 1976) (stating: "The manufacturer is still accountable for all the harm from a defective product except that part caused by the consumer's own conduct."); *Pan-Alaska Fisheries, Inc. v. Marine Constr. & Design Co.*, 565 F.2d 1129, 1139 (9th Cir. 1977) (stating: "[T]he defendant is strictly liable for the harm caused from his defective product, except that the award of damages shall be reduced in proportion to the plaintiff's contribution to his own loss or injury.") See also *Murray*, 610 F.2d at 162; *Conkright v. Ballantyne of Omaha, Inc.*, 496 F. Supp. 147 (W.D. Mich. 1980) (maintaining joint and several liability); *American Motorcycle Association v. Superior Court*, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978) (stating: "joint and several liability does not logically conflict with a comparative negligence regime"); *Thibault v. Sears, Roebuck & Co.*, 118 N.H. 802, —, 395 A.2d 843, 850 (1978) (stating: "In multiple defendant cases, if recovery is allowed against more than one defendant, the jury shall apportion the loss in ratio to what each liable defendant caused or contributed to the loss or injury to the amount of causation or liability attributed to all defendants against whom recovery is allowed."). See in support of the majority view A. MURPHY, K. SANTAGATA & F. GRAD, *THE LAW OF PRODUCT LIABILITY, PROBLEMS AND POLICIES* 67-69 (1982); Motion to Reform, *supra* this note, at 1-12. Petitioner put forth an example:

An example of this court's holding in application to a typical crashworthiness situation will illustrate the harshness and unfairness of the retreat from joint and several liability which this court has erroneously embraced [in its opinion of July 13, 1983]. In a typical rear-end low speed accident involving a Ford Pinto that bursts into flame as a result of a gas tank rupture, the jury could likely find 10% fault on the plaintiff for stopping too quickly, 9% "fault" or "causation" on the part of the manufacturer of the defectively designed gas tank and 81% on the part of the defendant who rear-ended the plaintiff. The latter defendant may well have only a \$10,000.00 minimum limit insurance policy or be completely insolvent. Under this Court's opinion and holding of July 13, the manufacturer will be responsible for only 9% of the plaintiff's damages despite the fact that the plaintiff's own conduct contributed only 10% to his own loss.

*Id. Contra Greenwood v. McDonough Power Equipment*, 437 F. Supp. 707 (D. Kan. 1977) (interpreting Kansas statutory law); *Brown v. Keill*, 224 Kan. 195, 580 P.2d 867 (1978)). See BOWMAN, *Contribution, Joint Liability and Settlement Under Comparative Fault from the Defendant's Viewpoint*, SOUTHERN METHODIST UNIVERSITY PRODUCTS LIABILITY INSTITUTE § 12.01 (1983). Bowman stated:

In states where joint and several liability exists, manufacturers found to be responsible for only tiny shares of causal fault may find themselves paying plaintiff's full judgment in the event that co-defendants are judg-

on cases to be governed by *Duncan*, the court held that "in multiple defendant cases in which grounds of recovery other than negligence are established, the non-settling defendants' liability and the plaintiff's recovery shall be *reduced by the percent share* of causation assigned to the settling tortfeasor by the trier of fact."<sup>227</sup> Prior to the *Duncan* decision, in actions governed by article 2212, a defendant could proceed to trial seeking a *pro rata* or proportionate reduction<sup>228</sup> but advantageously elect<sup>229</sup> a *pro tanto* or dollar-for-dollar credit for any settlement accepted by the plaintiff from another defendant.<sup>230</sup> This ability of the defendant to adjust his liability based upon the jury findings was examined carefully by the court and rejected.<sup>231</sup>

The court addressed several reasons for its holding that a percentage credit is proper in lieu of either *pro rata* or *pro tanto* reduction.<sup>232</sup> First, the *pro rata* method arbitrarily reduces the defendant's liability by the number of settling tortfeasors di-

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ment-proof, immune or cannot be located. Thus, extreme unfairness obtains in holding a nearly faultless manufacturer responsible to pay all of the fault attributable to non-joined or judgment-proof co-defendants.

The opportunity to allocate fairly causal fault among co-defendants, encourages the joinder of numerous co-defendants any one of which may be held to be partly responsible. With a increased stable of co-defendants, the quantity of warfare is increased, and so are the verdicts.

*Id.*

<sup>227</sup> *Duncan*, 665 S.W.2d at 429. (emphasis added).

<sup>228</sup> *Id.* A *pro rata* credit, as defined and permitted by *Palestine Contractors v. Perkins*, 386 S.W.2d 764 (Tex. 1964), is a proportional credit. See BOWMAN, *supra* note 226, at § 12.02. The proportional set-off is referred to in other jurisdictions as "equitable indemnity." See also *Gomes v. Broadhurst*, 394 F.2d 465 (3d Cir. 1967); *Pierringer v. Hoyer*, 21 Wis. 2d 182, 124 N.W.2d 106 (1963); *Dole v. Dow Chemical Co.*, 30 N.Y. 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

<sup>229</sup> *Duncan*, 665 S.W.2d at 430. *Deal*, 576 S.W.2d at 416 (stating that "after the verdict had settled questions of fault and amount of damages, the court would apply whichever rule was [most advantageous to defendant]"). In ordinary negligence suits after the adoption of article 2212a, however, the election must be made *prior* to the submission of the case to the jury to avoid giving the defendant a "best-of-both-worlds" result). See *Cypress Creek v. Muller*, 640 S.W.2d 860 (Tex. 1982).

<sup>230</sup> *Duncan*, 665 S.W.2d at 430. A *pro tanto* credit for amounts paid in settlement is a "dollar-for-dollar" credit. See *Bradshaw v. Baylor University*, 126 Tex. 99, 84 S.W.2d 703 (1924).

<sup>231</sup> *Duncan*, 665 S.W.2d at 430-32.

<sup>232</sup> *Id.* at 430.

vided by the total number of tortfeasors;<sup>233</sup> thus, the *pro rata* credit places a risk of accepting an inadequate settlement upon the plaintiff.<sup>234</sup> The court dismissed the *pro rata* system as "crude headcounting" in light of the newly adopted system of comparative allocation.<sup>235</sup> Further, the court criticized any use of *pro tanto* reduction by a defendant because the dollar-for-dollar reduction in liability would be attributable to a settlement to which he is not a party.<sup>236</sup> The fluctuation in the defendant's liability, the court said, "cannot be reconciled with the policy of apportioning liability in relation to each party's responsibility . . . ."<sup>237</sup> Thus, the court adopted a system to reduce the liability of non-settling defendants by that percentage of causation allocated by the fact finder to the settling defendant.<sup>238</sup>

The adoption of a percent credit, the court said, necessitates the abrogation of the long-held rule that a plaintiff may recover but one satisfaction of his damages.<sup>239</sup> Indeed, a plaintiff *may* recover more than one satisfaction, but he stands the same chance that he might recover *less*.<sup>240</sup> As the court stated, "Plaintiffs bear the risk of poor settlements; logic and equity dictate that the benefit of good settlements should also be theirs."<sup>241</sup> The court reasoned that the settlement has no effect on any liability that may rest with a non-settling defendant.<sup>242</sup> Thus, there is no "unjust enrichment" argument if the plaintiff recovers more than one satisfaction of his damages because no one is harmed.<sup>243</sup> Accordingly, the court overruled the one recovery rule and replaced it with a percent credit rule.<sup>244</sup>

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<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> *Id.* at 430.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> *Id.* (citing *Bradshaw*, 126 Tex. 99, 84 S.W.2d 703).

<sup>240</sup> *Duncan*, 665 S.W.2d at 430.

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> *Id.* The same arguments were applied to the cases governed by article 2212a in *Cypress Creek*, 640 S.W.2d at 866-67.

<sup>244</sup> *Duncan*, 665 S.W.2d at 432.

In closing, the court reaffirmed the continuing viability of strict products liability under section 402A of the *Restatement (Second) of Torts* to ensure consumer protection.<sup>245</sup> Further, the court restated "the right of a retailer or other member of the marketing chain to receive indemnity from the manufacturer of the defective product when the retailer or other member of the marketing chain is merely a conduit for the defective product and is not independently culpable."<sup>246</sup> Thus, the court maintained the essential features of strict products liability that protect plaintiffs and individual defendants.<sup>247</sup>

Although it adopted a new system of comparative allocation of causation,<sup>248</sup> the court decided not to make the effect of its ruling applicable to the case at hand because of Cessna's failure to perfect a proper bill of exceptions as to apportionment of liability.<sup>249</sup> Consequently, Cessna received no relief from the new system of allocation, the decision was applied prospectively, and the entire issue was rendered as dicta.<sup>250</sup>

### III. CONCLUSION

The Supreme Court of Texas' decision in *Duncan v. Cessna Aircraft Co.*<sup>251</sup> brings the Texas system of strict products liability into line with the growing consensus of states.<sup>252</sup> By adopting comparative causation in strict products liability cases in which plaintiffs or third parties contribute to the harm along with the products defendant, the court has established a coherent and conceptually sound system of loss allocation.<sup>253</sup> The court's invocation of comparative contribution concepts into the law of strict liability maintains the policy that supports strict products liability,<sup>254</sup> yet eases the burden

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<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> *Id.* at 428.

<sup>249</sup> *Id.* at 432-33.

<sup>250</sup> *Id.*

<sup>251</sup> 665 S.W.2d 414 (Tex. 1984).

<sup>252</sup> See *supra* notes 107-157 and accompanying text.

<sup>253</sup> See *supra* notes 108-111 and accompanying text.

<sup>254</sup> See *supra* note 27 and accompanying text. See also *Duncan*, 665 S.W.2d at 428,

placed upon the manufacturer/distributor by reducing total awards of damages by the amount of causation attributable to the plaintiff and third parties.<sup>255</sup> Thus, absolute liability no longer grips the products defendant as the plaintiff is accountable for his share of the harm.<sup>256</sup>

And yet, as pointed out in the dissent by Chief Justice Pope of the Supreme Court of Texas, a significant inequity is done by the court. As stated by Pope, the rule in Texas tort law had consistently been that a change in the law should apply both to future cases and to those still in the judicial process.<sup>257</sup> But in *Duncan*, Cessna was denied the benefit of this rule. As the Chief Justice explained,

This case was pleaded and tried exclusively as a products liability case, and the majority says for the first time in Texas that it should have been tried with comparison of plaintiff's negligence and the defendant's product[s] liability fault. Somehow, Cessna, the one who successfully made that contention has lost its cause. It lost because it failed to do what it was prevented [by the trial court] from doing. Cessna's only mistake was that it was denied and could not use a trial method that never [before] existed in Texas.<sup>258</sup>

The result in *Duncan* gives rise to a conclusion by Pope: the majority opinion "accords an unequal treatment to plaintiffs and defendants."<sup>259</sup> Although Cessna proved its contentions, and the court adopted the change in the law, Cessna lost.<sup>260</sup> Only recently, the dissent pointed out, a plaintiff was allowed the advantage of a change in the law on appeal.<sup>261</sup> "The rule announced by this case is a simple one to state[.]" Pope explained. "Under [precedent], the plaintiff prevails if he wins

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where the court stated that "[p]laintiffs will continue to be relieved of proving that the manufacturer or distributor was negligent in the production, design, or dissemination of the article in question. Defendant's liability for injuries caused by a defective product remains strict." *Id.*

<sup>255</sup> *Duncan*, 665 S.W.2d at 437-38.

<sup>256</sup> *Id.*

<sup>257</sup> *Id.* (citing *Sanchez v. Schindler*, 651 S.W.2d 249, 254 (Tex. 1983)).

<sup>258</sup> *Duncan*, 665 S.W.2d at 437-38.

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> *Id.* (citing *Sanchez v. Schindler*, 651 S.W.2d 249, 254 (Tex. 1983)).

[on appeal]; under *Duncan*, the plaintiff prevails if he loses. The defendant loses both ways."<sup>262</sup>

Indeed, the cause of the products defendant in general has been similarly affected by the court's most recent decision in *Duncan*. The instant opinion analyzed in this Note is not the first handed down by the Supreme Court of Texas in this case.<sup>263</sup> Rather, it is in many regards a response to extensive briefing for rehearing on a variety of aspects of the first opinion by the plaintiff/petitioner and *amici curiae*.<sup>264</sup> The original opinion in *Duncan* purported to establish comparative *fault* in lieu of comparative *causation*,<sup>265</sup> and a system of joint and several liability in parallel with article 2212a,<sup>266</sup> but left unanswered a number of issues, including the issue of election and credit. The instant opinion adopts pure comparative causation, but interjects full joint and several liability<sup>267</sup> and abrogates the "one recovery rule" in favor of a percentage credit for settlements.<sup>268</sup> The implications of this aspect of the opinion in *Duncan* are potentially staggering to settlement prospects where there is at least one negligent but insolvent defendant. In such a case as that, through its grant of full joint and several liability, the court potentially places the full burden upon the products defendant. If a plaintiff should settle with an insolvent but negligent defendant, then that portion of causation of the plaintiff's damages is lost for the amount—however minimal—that might be available from an insolvent defendant. But if the negligent defendant is left in the suit and any fraction of liability may be placed upon the products defendant, then recovery against both may be had against the products defendant alone. In terms of pre-trial strategy, the plaintiff has no incentive to settle with the insolvent defendant or with the products defendant for less than the full amount of damages if there is a likelihood of

<sup>262</sup> *Id.*

<sup>263</sup> See 26 Tex. Sup. Ct. J. 507 (July 13, 1983).

<sup>264</sup> See, e.g., Motion to Reform, *supra* note 226.

<sup>265</sup> *Duncan*, 26 Tex. Sup. Ct. J. at 514-16.

<sup>266</sup> *Id.* See *supra* note 72 and accompanying text.

<sup>267</sup> *Duncan*, 665 S.W.2d at 428-29.

<sup>268</sup> *Id.* at 429. See also *supra* notes 227-244 and accompanying text.

recovery against the products defendant. As a trial strategy, the plaintiff need only prove a minimal amount of liability on the part of the products defendant and may focus upon proving a maximum amount upon the negligent defendant with the result that the products defendant becomes liable for the full award.<sup>269</sup> Thus, the products defendant's edge, apparently sharpened by comparative causation, is dulled by the other aspects of *Duncan*.

Nonetheless, the instant opinion is preferable to the original opinion for a variety of reasons. First, had the court maintained comparative fault, a conceptual cloud would have remained over the comparative allocative system. Instead, the court withdrew all notions of blameworthiness from the strict products liability loss allocation analysis through its adoption of a causative contribution system. Second, the court rendered in dicta the means of handling the multitude of practical problems that accompany the new system. Questions of joint and several liability,<sup>270</sup> of the affects of partial settlements,<sup>271</sup> and of when and how article 2212a will govern<sup>272</sup>

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<sup>269</sup> The difficulty with the present state of the law as espoused by the Supreme Court of Texas in *Duncan* may be seen in an example:

While traveling at night Driver runs out of gas and pulls his car to the side of the freeway. Driver attempts to turn on his emergency flashers, but the switch made by Manufacturer fails and the lights do not flash. Defendant, somewhat intoxicated, and covered by only the legal minimum of insurance, rams into the rear of Driver's automobile at 55 miles per hour, maiming Driver. Driver does not settle with any of the defendants. At trial, Driver is able to prove that the light switch was defective and that Defendant was negligent. The jury returns a finding that Driver caused 10 percent of his own harm, that the Manufacturer of the light switch caused one percent of the harm through manufacturing a defective light switch, and that the intoxicated Defendant caused 89 percent of the harm.

Had Driver settled with Defendant he would only have received that minimal amount of compensation in addition to the one percent of damages from the Manufacturer. Instead, by Driver's refusing to settle, Manufacturer absorbs 90 percent of the damages despite a jury finding that it caused only one percent.

While it may be argued that the risk of this type of scenario occurring will cause potentially strictly-liable defendants to settle more quickly, it is clear that much of the strictly-liable defendant's bargaining power is lost.

<sup>270</sup> *Duncan*, 665 S.W.2d at 429-30. See *supra* notes 227-244 and accompanying text.

<sup>271</sup> *Duncan*, 665 S.W.2d at 429-30. See *supra* notes 227-244 and accompanying text.

<sup>272</sup> *Duncan*, 665 S.W.2d at 429. See *supra* note 212 and accompanying text.

have been answered by the court. Further, the court explicitly reaffirmed the adoption of section 402A of the Restatement and the strict products liability cause of action.<sup>273</sup> The substance of the *Duncan* decision by the Supreme Court of Texas is, therefore, essentially an advancement in Texas law, with an overall, if somewhat limited, effect of greater fairness to both plaintiffs and defendants.

*David F. Brown*

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<sup>273</sup> *Duncan*, 665 S.W.2d at 432.

# **Current Literature**

