Volume 30
Issue 1 *Annual Survey of Texas Law*

Article 2

1976

Torts

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PART 1: PRIVATE LAW

TORTS

by

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I. VOLUNTARY ASSUMPTION OF THE RISK AND CONTRIBUTORY NEGLIGENCE

In recent years considerable attention has been given to the defenses of voluntary assumption of the risk and contributory negligence, primarily due to the considerable alterations which these defenses have undergone.[1] Much confusion has resulted from the fact that these two defenses are based upon entirely different considerations. Voluntary assumption of the risk, if recognized as a separate defense, is basically a consent doctrine, whereas the defense of contributory negligence is essentially a fault doctrine.[2] In the former the injured person is barred from recovery because of his "willingness to take a chance" under circumstances where an alternative course of action was available. In the latter the injured person's recovery is barred or diminished because his conduct was unreasonably dangerous. The Supreme Court of Texas has clarified this distinction in recent years,[3] thereby making it easier to deal with the fundamental policy questions relating to the type of conduct that should bar or diminish the plaintiff's recovery.

In last year's *Survey* considerable discussion was devoted to the subject of voluntary assumption of the risk.[4] At that time the defense was recognized by the Texas Supreme Court regardless of whether the plaintiff's theory of recovery was one of negligence or strict liability. In reporting on the cases in last year's *Survey*, my thesis was that with respect to recovery on a negligence theory the defense of voluntary assumption of risk should generally be inapplicable except where (a) prior to encountering the danger, the plaintiff and defendant entered into an express or implied in fact agreement that defendant would not be legally responsible, or (b) the relationship between the parties was such that defendant's duty of care was justifiably limited to advising the plaintiff of the risk that was willingly encountered.[5] My observations on assumed risk were concluded with the following statement: "It is hardly necessary for me to say, in view of the observations that

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1. Keeton, *Torts, Annual Survey of Texas Law*, 29 SW. L.J. 1-9 (1975); Keeton, *Torts, Annual Survey of Texas Law*, 28 SW. L.J. 1, 15 (1974); Keeton, *Torts, Annual Survey of Texas Law*, 26 SW. L.J. 1, 10-13 (1972); Keeton, *Torts, Annual Survey of Texas Law*, 24 SW. L.J. 1, 3-8 (1970).

2. Bohlen, *Voluntary Assumption of the Risk*, 20 HARV. L. REV. 14 (1906); Keeton, *Assumption of Risk and the Landowner*, 22 LA. L. REV. 108 (1961); Mansfield, *Informed Choice in the Law of Torts*, 22 LA. L. REV. 17 (1961).

3. Henderson v. Ford Motor Co., 519 S.W.2d 87 (Tex. 1974), *noted in* 29 SW. L.J. 644 (1975); Marshall v. Ranne, 511 S.W.2d 255 (Tex. 1974); Rabb v. Coleman, 469 S.W.2d 384 (Tex. 1971).

4. Keeton, *Torts, Annual Survey of Texas Law*, 29 SW. L.J. 1-9 (1975).

5. *Id.*

have been made above, that such defenses as are recognized in the products liability area should be based on some kind of fault."[6] This statement was made in criticizing the holding in *Henderson v. Ford Motor Co.*[7] that the voluntary assumption of the risk defense is available when the basis for recovery is strict liability.

In early 1975 the supreme court indicated that it was contemplating changing the law with respect to voluntary assumption of the risk in negligence actions. In *Rosas v. Buddies Food Store*[8] suit was brought against a grocery store for injuries sustained when plaintiff slipped on a wet floor in defendant's store. The trial court granted defendant's motion for summary judgment, and the court of civil appeals affirmed, holding, first, that there was no negligence as a matter of law since a wet floor was a normal consequence of a rainy day. Second, the court determined that there could be no breach of duty because the dangerous condition was, as a matter of law, open and obvious.[9]

The supreme court, in an opinion by Justice Steakley, remanded as to both holdings, stating:

> The writer, joined by Justices Daniel and Johnson would also declare that for this trial, and henceforth in the trial of all actions based on negligence, *volenti non fit injuria*—he who consents cannot receive an injury—or, as is generally known, voluntary assumption of risk will no longer be treated as an issue in actions based on negligence; but that the reasonableness of an actor's conduct in confronting a risk will be determined under principles of contributory negligence.[10]

The court noted that elusive and complex distinctions inherent in this defense were unduly complicating cases.[11] Attention was also directed to the recent adoption of comparative negligence.[12] The court reasoned that if fault is not a complete bar to recovery, then a plaintiff's willingness to encounter a danger should not defeat a claim for relief except in rare circumstances. Several other justices, while not disagreeing in principle, preferred to resolve the issue in a case that involved the defense.[13] Just such a case was accepted by the court later in the year.

In *Farley v. M M Cattle Co.*[14] the plaintiff was injured when the horse he was riding collided with a horse ridden by a co-worker while they were rounding up cattle for the defendant. At the conclusion of the plaintiff's

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6. *Id.* at 8.
7. 519 S.W.2d 87 (Tex. 1974).
8. 518 S.W.2d 534 (Tex. 1975).
9. 509 S.W.2d 451 (Tex. Civ. App.—Fort Worth 1974), *rev'd*, 518 S.W.2d 534 (Tex. 1975).
10. 518 S.W.2d at 538.
11. *See, e.g.*, Sifford v. Santa Rosa Medical Center, 524 S.W.2d 559 (Tex. Civ. App.—San Antonio 1975, no writ). As this case and other cases demonstrate, the recognition of this defense results in the creation of a number of critical issues. For example, when is a person to be charged with knowledge of a condition and the appreciation of the risk as a matter of law? What degree of the total danger must the person appreciate? When is the person's decision to encounter a danger to be regarded as involuntary?
12. TEX. REV. CIV. STAT. ANN. art. 2212a, § 1 (Supp. 1975-76).
13. Rosas v. Buddies Food Store, 518 S.W.2d 534, 540 (Tex. 1975).
14. 529 S.W.2d 751 (Tex. 1975).

evidence, the trial court entered judgment for the defendant. This directed verdict was upheld by the court of civil appeals. The supreme court ruled that the plaintiff's evidence was sufficient to raise fact issues as to the negligence of the defendant given the known danger of the horse. The defendant cattle company argued that the plaintiff had assumed this risk as a matter of law due to his appreciation of the unsuitability of the horse for the task at hand. For the reasons previously set forth in *Rosas*, the court rejected defendant's argument and abolished voluntary assumption of the risk as a general defense in an action predicated on negligence. In addition to the precise pronouncement set forth in the *Rosas* decision, the court added two qualifying statements: "Unaffected will be the current status of the defense in strict liability cases and cases in which there is a knowing and express oral or written consent to the dangerous activity or condition. The reasons expressed for abolishing the defense in negligence cases do not obtain as to these situations."[15]

Justice Reavley, dissenting on another ground, stated that in negligence cases he would regard *volenti* considerations as bearing upon the legal determination of duty.[16] This seems to indicate that, notwithstanding the abrogation of assumed risk as a general affirmative defense, there are occasions when the defendant can satisfy a duty of care owed to another by advising the latter of latent risks and dangers. Further, by abolishing voluntary assumption of the risk as a general defense to recovery on a negligence theory, the court has adopted the minority position which was rejected some fifteen years ago by the American Law Institute.[17] This dubious consent doctrine has lost some of its adherents in recent years,[18] and the assumption of risk defense is likely to be abrogated throughout the country over the next ten to fifteen years.

The court's exceptions to the general proposition that an injured person's willingness to take a reasonable chance will no longer constitute a complete bar to recovery are extremely important. First, the court stated that no change was intended in situations where "there is a knowing and express oral or written consent to the dangerous activity or condition."[19] This obviously means that an actual agreement to assume the risk will not necessarily be invalid. And although the court speaks of an express agreement, perhaps an implied-in-fact agreement will be treated in the same manner. Whether or not such an agreement is enforceable will depend upon the relationship between the parties, their respective bargaining positions, and perhaps other policy considerations.[20]

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15. *Id.* at 758.
16. *Id.* at 760 (Reavley, J., dissenting).
17. RESTATEMENT (SECOND) OF TORTS 71 (Tent. Draft No. 9, 1963); *see* Halepeska v. Callihan Interests, Inc., 371 S.W.2d 368, 378 (1963).
18. *See, e.g.*, Williamson v. Smith, 83 N.M. 336, 491 P.2d 1147 (1971); Siragusa v. Swedish Hosp., 60 Wash. 2d 310, 373 P.2d 767 (1962); McConville v. State Farm Mut. Auto Ins. Co., 15 Wis. 2d 374, 113 N.W.2d 14 (1962), and other cases cited in Rosas v. Buddies Food Store, 518 S.W.2d 534 (Tex. 1975).
19. 529 S.W.2d at 758.
20. *See* Keeton, *supra* note 4, at 2-3. *See also* 6A A. CORBIN, CONTRACTS § 1472 (1962); RESTATEMENT OF CONTRACTS §§ 574, 575 (1932).

Second, as previously noted, Justice Reavley in his brief opinion did not rule out altogether the importance of a plaintiff's willingness to take a chance as bearing upon the extent of a defendant's duty of care. This could conceivably result in shifting the burden of pleading and proof to the plaintiff, with the substantive policy position remaining the same as before. Thus, if the duty of care of an occupier of land was satisfied by notifying an invitee of dangers that were not open and obvious as a matter of law, then no real change would have been effected. A reasonable interpretation of the court's opinion would indicate, however, that only in exceptional circumstances should a defendant's duty be limited to giving notice of unappreciated dangers.[21]

Finally, the court asserted that the law with respect to the assumed risk defense in strict liability cases, or at least in products liability litigation, was unaffected. This being true, the proposition in *Henderson v. Ford Motor Co.*,[22] that voluntary assumption of the risk is a complete bar to recovery, remains intact when recovery based upon strict liability is sought against a manufacturer, seller, or lessor. The court's justification for this novel differentiation between negligence and strict liability is that the reasons expressed for abolishing the defense in negligence cases are simply inapplicable to strict liability actions.[23] However, the elusive and complex distinctions and issues pertaining to this defense are no different when the theory of recovery is strict liability. Further, the impetus for abolishing assumed risk in negligence cases was the legislature's enactment of the comparative negligence statute and the resulting abrogation of contributory negligence as a complete bar to recovery. The thought was that if contributory negligence were no longer a bar, then one's willingness voluntarily to take a reasonable chance in encountering an appreciated danger should not prevent recovery. Most courts, the Texas Supreme Court included, have of their own motion abrogated contributory negligence as a bar to recovery in products liability suits.[24] In fact, such conduct does not even diminish recovery. In light of this, it could be concluded that the court's fear of the greater scope of responsibility inherent in strict liability dictated the retention of at least some defenses.

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21. Most courts hold that an occupier of land can satisfy any duty of care owed to a licensee by giving notice of dangers that would not likely be noticed by the casual observer. This rule has not necessarily been altered. *See, e.g.*, Deacy v. McDonnell, 131 Conn. 101, 38 A.2d 181 (1944); John v. Reich-McJunkin Dairy Co., 281 Pa. 543, 127 A. 143 (1924); RESTATEMENT (SECOND) OF TORTS § 342 (1965) [hereinafter cited as RESTATEMENT (SECOND)].

22. 519 S.W.2d 87 (Tex. 1974).

23. 529 S.W.2d at 758.

24. Henderson v. Ford Motor Co., 519 S.W.2d 87 (Tex. 1974); *see* RESTATEMENT (SECOND) § 402A, comment *n* at 356, which provides:

> Since the liability with which this Section deals is not based upon the negligence of the seller, but is strict liability, the rule applied to strict liability cases (see § 524) applies. Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of 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.

A more justifiable defense to any theory of recovery, fault or non-fault, would seem to be the fault of the victim rather than his voluntary election to take a reasonable chance in encountering danger. Most courts have, for example, recognized as defenses both abnormal use, and voluntary and unreasonable use after knowledge of a dangerous defect.[25] These are two kinds of contributory negligence. Therefore, a rule that would diminish the recovery of a contributorily negligent plaintiff against a seller through the apportionment of blame between the seller and others legally responsible would not seem unreasonable at this juncture.

It is particularly unfortunate that the defendant should have a defense to recovery on a strict liability theory (contributory negligence under comparative negligence) which is unavailable on a negligence theory, and then, on the other hand, have a defense to recovery on a negligence theory (assumed risk) that is not available on a strict liability theory. Efficiency and justice dictate the development of an exclusive theory of recovery in order to avoid the now existing complicacy attendant in the submission to the jury of a case premised on three theories—negligence, warranty, and strict liability in tort.

II. PRODUCTS LIABILITY

In the area of products liability *Rourke v. Garza*[26] was perhaps the most significant decision during the survey period. In *Garza* the defendant, engaged in the business of leasing scaffolding materials, supplied as a bailor the necessary component parts for the erection of a scaffold. The materials, including the steel pipe frames, boards, and connecting pins, were delivered at the job site, and checked in by the contractor's superintendent. The superintendent signed a receipt which contained an indemnity provision on the reverse side, and the scaffold was subsequently erected by Har-Con, the contractor. Plaintiff, a pipefitter-welder and an employee of the contractor, was seriously injured in a fall through the center of the scaffolding which resulted when two of the boards "slipped on the inside." In response to questions submitted, the jury found that: (1) The failure to have cleat-type devices on the scaffold boards to prevent slippage rendered the scaffold boards defective in the sense that the boards were dangerous to an extent beyond that which would be contemplated by the ordinary user who leased it with the ordinary knowledge common to the community as to its characteristics; (2) the defendant could reasonably have anticipated that the boards might be placed upon the scaffold frame without the addition of cleat-type devices; (3) the defendant was not negligent in failing to provide cleat-type devices on the scaffolding boards; and (4) the failure to have the cleat-type devices on the board was a producing cause of the occurrence.

The court held that plaintiff himself was not chargeable with knowledge of the absence of the cleats and the danger involved in their absence; moreover,

25. Green v. Volkswagen of America, Inc., 485 F.2d 430 (6th Cir. 1973); Shields v. Morton Chem. Co., 95 Idaho 674, 518 P.2d 857 (1974); Lewis v. Stran Steel Corp., 57 Ill. 2d 94, 311 N.E.2d 128 (1974); Early-Gray, Inc. v. Walters, 294 So. 2d 181 (Miss. 1974).

26. 530 S.W.2d 794 (Tex. 1975).

the jury failed to find that plaintiff had knowledge of the absence of the cleats prior to the accident. Affirming a trial court judgment for the plaintiff, the supreme court in a six-to-three decision adopted several positions on issues relating to products liability that had not previously been settled. These positions will be dealt with separately, but before doing so, some general observations must be made concerning strict liability claims by employees against sellers and suppliers of products and equipment.

Strict liability notions were developed primarily because of a feeling that the negligence cause of action afforded inadequate protection for the general consumer.[27] Once adopted, the theory was extended so as to impose strict liability upon manufacturers and sellers of all kinds of products, and to provide a remedy for all persons likely to be injured, often without much justification for so doing.[28] While I do not have a solution, it is apparent that in many cases sellers and suppliers are being held responsible for harm to employees when the employer is far more to blame for the damaging event than the supplier.

Lessors. In *Garza* the court held that those engaged in the business of leasing products or equipment are subject to strict liability in the same way as are manufacturers and sellers of products.[29] This result is not particularly novel, as some courts have extended liability to large enterpriser-lessors of cars and trucks.[30] What is significant is that it was apparently argued in *Garza* that such a rule should not apply when the lessee is an industrial purchaser in a position to demand the safest equipment available. However, courts have not distinguished between sales to consumers generally and sales to industrial purchasers, even when the only risk is to employees covered by a no-fault compensation system.[31] This presents a rather anomalous situation, in that the employee is covered by two no-fault systems, the less adequate being the recovery available against the employer.

Perhaps there is little, if any, reason to differentiate between lessors and retailers. Under section 402A of the *Restatement (Second)* no differentiation is made between retailers and wholesalers on the one hand and manufacturers on the other.[32] The justification for this is questionable, in that while

27. Greenman v. Yuba Power Prods. Inc., 59 Cal. 2d 67, 377 P.2d 897, 27 Cal. Rptr. 697 (1963); Henningsen v. Bloomfield Motors Inc., 32 N.J. 358, 161 A.2d 69 (1960); *see* Keeton, *Products Liability—Liability Without Fault and the Requirement of a Defect*, 41 TEXAS L. REV. 855 (1963).

28. Lewis v. Stran Steel Corp., 57 Ill. 2d 94, 311 N.E.2d 128 (1974) (forklift machine injuring an employee); Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963) (airplane intended for airline use).

29. 530 S.W.2d at 800.

30. The two leading cases cited by the supreme court in *Garza* are: Cintrone v. Hertz Truck Leasing & Rental Serv., 45 N.J. 434, 212 A.2d 769 (1965); Stang v. Hertz Corp., 83 N.M. 730, 497 P.2d 732 (1972). *See also* McClaflin v. Bayshore Equip. Rental Co., 274 Cal. App. 2d 446, 79 Cal. Rptr. 337 (1969).

31. Stevens v. Kanematsu-Gosho Co., 494 F.2d 367 (1st Cir. 1974). Lewis v. Stran Steel Corp., 57 Ill. 2d 94, 311 N.E.2d 128 (1974); Reese v. Chicago, B & Q.R.R., 55 Ill. 2d 356, 303 N.E.2d 382 (1973).

32. Under § 402A strict liability applies to any seller if "the seller is engaged in the business of selling such a product." The comment states "that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, *and be treated as a cost of production* against which liability insurance can be obtained." RESTATEMENT (SECOND) § 402A, comment *c* at

this imposition of strict liability on lessors and retailers for defective products is not overly burdensome because of their ability to recover over against the manufacturer,[33] these concerns are generally less able to distribute the risk among the public at large. It was for this reason that privity of contract was eliminated as an impediment to recovery based on strict tort liability. Moreover, as long as negligence continues as a prerequisite to recovery against a retailer for harm resulting from a dangerous condition existing on the premises, little explanation can be given for subjecting the retailer to strict liability for harm resulting from a defect in a product, such as a bottle, if the defect cannot be found to have originated with the manufacturer of the bottle. If enterprise liability can be justified regarding product defects originating with the retailer or other supplier, then perhaps it is equally applicable to mishaps attributable to dangerous conditions.

Frequently, in connection with the sale and distribution of products, especially petroleum products, the seller will lease to the purchaser equipment with which to receive and store products. Notwithstanding *Garza*, it is likely to be held that strict liability does not apply to harm from defects in the leased equipment where the leasing is incidental to the sale of the products.[34] The justification for this distinction, though somewhat unpersuasive, is that such a leasing transaction is merely occasional in the conduct of the enterpriser's business, and, therefore, it would be both unfair and overly burdensome to subject him to a high standard of care.

Open and Obvious Danger. The courts are presently divided on the issue of whether a product can be regarded as defective and unreasonably dangerous when the danger stemming from the product's design is obvious to the casual observer.[35] Some courts have held that it is the duty of the ultimate purchaser, especially industrial or other sophisticated enterpriser-purchasers, to avoid the obvious dangers resulting from defectively designed products.[36] Often these purchasers can, after acquiring the products, adopt measures, make alterations, or install safety devices more economically than the manufacturer. However, this argument is generally inapplicable to consumer products, for it is likely that measures necessary to reduce the risk would

350. The italics are mine and are for the purpose of showing that it was assumed that retailers would be able to recover over against manufacturers. This could apply to defects attributable to the manufacturing process.

33. Tromza v. Tecumseh Prods. Co., 378 F.2d 601 (3d Cir. 1967); Hager v. Brewer Equip. Co., 17 N.C. App. 489, 195 S.E.2d 54 (1973).

34. *See* Freitas v. Twin City Fisherman's Coop. Ass'n, 452 S.W.2d 931 (Tex. Civ. App.—Corpus Christi 1970, writ ref'd n.r.e.); Keeton, *Torts, Annual Survey of Texas Law*, 25 Sw. L.J. 1, 3-4 (1971). *But see* Price v. Shell Oil Co., 2 Cal. 3d 245, 466 P.2d 722, 85 Cal. Rptr. 178 (1970).

35. Schemel v. General Motors Corp., 384 F.2d 802 (7th Cir. 1967) (no liability); Pike v. Hough Co., 2 Cal. 3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970) (liability); Wright v. Massey-Harris, Inc., 68 Ill. App. 2d 70, 215 N.E.2d 465 (1966) (liability); Balm v. Triumph Corp., 33 N.Y.2d 644, 305 N.E.2d 769, 350 N.Y.S.2d 644 (1973) (no liability); Campo v. Scofield, 301 N.Y. 468, 95 N.E.2d 802, 95 N.Y.S.2d 610 (1950) (no liability); Palmer v. Massey-Ferguson, Inc., 3 Wash. App. 508, 476 P.2d 713 (1970) (no liability).

36. Schemel v. General Motors Corp., 384 F.2d 802 (7th Cir. 1967); Balm v. Triumph Corp., 33 N.Y.2d 644, 305 N.E.2d 769, 350 N.Y.S.2d 644 (1973); Campo v. Scofield, 301 N.Y. 468, 95 N.E.2d 802, 95 N.Y.S.2d 610 (1950).

be unavailable. Moreover, most consumers fail to appreciate the so-called obvious dangers. Even so, some economists would argue that the best mechanism for resolving the issue of how safely products should be designed, particularly with reference to obvious dangers, is the market place.[37] This argument, for reasons already stated, is perhaps even more persuasive when the product is intended for industrial and commercial use.

The Texas Supreme Court has adopted the position that a product can be defective even though the risk or hazard is obvious. Under this view the obviousness of the hazard is simply a factor bearing upon the ultimate issue of whether the product is unreasonably dangerous.[38] This is the position I have consistently supported, particularly with respect to sales to the general consumer.[39]

The hazard in *Garza* was obvious to any casual observer, and the absence of cleats on the planks should have been noticed when delivery was accepted. Many courts, adopting a statement made in a comment to section 402A of the *Restatement (Second)*, have said that a product is defective if it is "dangerous to an extent beyond that which would be contemplated by the *ordinary consumer who purchases it*, with the ordinary knowledge common to the community as to its characteristics."[40] I have always construed this to mean that an obvious hazard could not be regarded as a defect, and have for this and other reasons rejected the "contemplation" test as invalid. In submitting the issue of defectiveness to the jury in *Garza*, the trial judge instructed that the boards were defective if they were more dangerous than would be "contemplated by the ordinary user who leases" them. The jury found that the boards were defective, possibly by construing the charge as referring to the boards after the scaffold was assembled. Additionally, the jury perhaps interpreted the term "user" as referring to Garza, the actual user, rather than the lessee. If so, this interpretation did not present the issue of defectiveness, but rather the issue of whether Garza assumed the risk by using the scaffold.[41] The court held that "the jury was justified in concluding that the risk of harm outweighed the utility of the cleatless scaffold boards and that they were therefore unreasonably dangerous."[42] The jury was not asked to weigh danger against utility, but was simply to consider whether the danger was greater than that which would be contem-

37. *See* Calabresi, *Transaction Costs, Resource Allocation and Liability Rules—A Comment*, 11 J. LAW & ECON. 67 (1968); Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960).

38. Rourke v. Garza, 530 S.W.2d 794, 800 (Tex. 1975).

39. Keeton, *Products Liability—Inadequacy of Information*, 48 TEXAS L. REV. 398, 400 (1970). It was there said:

> The obviousness of a danger is quite relevant to the issue whether the dangerous condition is unreasonably so—whether it subjects the user and others in the vicinity of use to an unreasonable risk of harm. It is relevant because the nature of the use of the product can be altered in light of its known dangers. It is also, of course, relevant to the issue whether the user was himself negligent in the way in which he used the product on the occasion of the accident. It should not, however, be conclusive on either issue.

40. RESTATEMENT (SECOND) § 402A, comment *i* at 352 (emphasis added).

41. Henderson v. Ford Motor Co., 519 S.W.2d 87 (Tex. 1974).

42. 530 S.W.2d at 799.

plated by the ordinary user. It therefore appears that the jury utilized a test different from that employed by the supreme court in affirming the decision.

Suppliers of Component Parts. The supreme court in *Garza* apparently held that a lessor who supplies component parts to an industrial lessee, knowing that the parts are to be assembled, will incur the same liability as a lessor who delivers an assembled product.[43] This is the most debatable aspect of the decision. Perhaps it can be said that the cleatless scaffold boards were unreasonably dangerous and that the supplier had a duty to furnish the cleats for the scaffold. However, it does not follow in all cases that one who sells or supplies component parts with the knowledge that they will be assembled in a manner that subjects users to an unreasonable risk should be expected to perceive the danger and guard against it. In such a transaction, the supplier should be under no duty to foresee improper assembly by the purchaser. In this regard the courts have concurred, as evidenced by their considerable reluctance to subject manufacturers of component parts to strict liability, even when the component part itself proves to be defective.[44] In *Garza*, however, the responsibility imposed extends far beyond defects in the component parts. First, it extends to a lessor rather than a manufacturer, and second, the liability extends to a danger that is obvious to the lessee. Justice Daniel, dissenting, asks the pertinent question, "What if Har-Con had specifically stated in its order that it wanted scaffold boards without cleats? Would Rourke Rental then be liable . . . under the doctrine of strict liability . . . ?"[45] Justice Daniel answered in the negative. It seems to me that strict liability should not be applied at all against a supplier; certainly, it should not be applied under the circumstances outlined by Justice Daniel.

Aside from industrial accidents, it would seem that the primary responsibility should be borne by the assembler rather than the manufacturer of the individual parts, for it is at the assembly stage that quality control can best be employed to correct defective design *with respect to the assembled product.* However, the limited recovery available to an employee against an employer is clearly insufficient to provide the impetus needed to obtain proper quality control in working conditions. Perhaps the *Garza* decision will generate such impetus.

Negligence and Strict Liability. In *Garza* the jury finding that the defendant

43. "Neither can we agree that Rourke Rental is not responsible for this accident because the scaffold was erected by Har-Con's employees . . . . Since the boards were expected to and did reach the user, Garza, without substantial change in condition, Rourke Rental may be held strictly liable." *Id.* at 801.

44. In Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 435, 191 N.E.2d 81, 83, 240 N.Y.S.2d 592, 595 (1963), the court refused "for the present at least" to hold the manufacturer of a component part strictly liable. However, in Clark v. Bendix Corp., 42 App. Div. 2d 727, 728, 345 N.Y.S.2d 662, 664 (1973), an intermediate appellate court reversed a trial court's dismissal of an action and remanded, stating that "if . . . the realities of the market place called for allowing a non-user to recover against the manufacturer of the completed product for breach of warranty, *a fortiori*, those realities should permit a *purchaser* and *user* to have similar recourse against the manufacturer of the specific component allegedly responsible for the accident." The American Law Institute purportedly expressed no opinion on the matter but in fact actually did. *See* RESTATEMENT (SECOND) § 402A, comment *q*.

45. 530 S.W.2d at 806 (Daniel, J., dissenting).

was not negligent raises the question of whether such finding can be reconciled with a finding of defect, assuming that the risk was one that was known to the supplier. Some courts have held that in order to resolve issues involving defective product design, it is necessary to balance danger against utility. This balancing approach has led to the conclusion that, except as to certain defenses and, perhaps, proximate cause, there is essentially no difference between negligence and strict liability as a basis for recovery.[46] This conclusion is fallacious. It is that danger which the defendant did or should have perceived which is balanced against utility in a negligence inquiry, whereas it is the *danger in fact* which should be balanced against utility to determine whether a product is defective.[47] It is true, however, that normally there is no difference between the theories of negligence and strict liability when the magnitude of the risk is actually perceived by the seller, except where courts have created obstacles to recovery on a negligence theory through the adoption of no-duty rules, proximate cause rules, and defenses that need not necessarily be carried over to the new strict liability compensation system. But as can be seen, this exception is expansive.

The rule that an occupier's duty of care to an employee is satisfied by warning the employer of a danger is, in effect, a no-duty rule, in that it often relieves the defendant of legal responsibility when a jury could reasonably find that the defendant was negligent in failing to take greater precautions.[48] This and other no-duty rules can be freely disregarded by courts in the imposition of strict liability.

If, in *Garza*, the jury was correct in finding no negligence, the conclusion that the boards were defective becomes difficult to rationalize. If, however, the supplier of the materials is to be treated as though he supplied the scaffold as constructed, it would seem that a finding of no negligence is consistent with a finding that the product was defective. This result follows because a reasonable supplier might not have perceived the magnitude of the danger, or because a reasonable person might not be expected to question the lessee's judgment regarding proper safety practices. In any event, the proper test to determine defectiveness of a product as marketed is whether a reasonable person would conclude that the danger, as it is proved to be at the trial, in fact outweighs its utility *when used as intended*, or perhaps, as it was likely to be used.

III. MEDICAL MALPRACTICE

As was predicted in the 1968 *Survey*, a variety of problems has accompanied the increase in professional malpractice litigation.[49] In particular, a

46. Chestnut v. Ford Motor Co., 445 F.2d 967, 968-69 (4th Cir. 1971); Dyson v. General Motors Corp., 298 F. Supp. 1064 (E.D. Pa. 1969). *See also* Wade, *The Continuing Development of Strict Liability in Tort*, 22 ARK. L. REV. 233, 234 (1968).

47. *See* Crocker v. Winthrop Laboratories, 514 S.W.2d 429 (Tex. 1974); Keeton, *Products Liability—Drugs and Cosmetics*, 25 VAND. L. REV. 131, 141 (1972).

48. *See* Delhi-Taylor Oil Corp. v. Henry, 416 S.W.2d 390 (Tex. 1967).

49. Keeton, *Torts, Annual Survey of Texas Law*, 23 SW. L.J. 1, 4 (1969).

serious dilemma has developed due to the high cost of, or in some instances, the unavailability of, liability insurance for doctors and hospitals. As a result, temporary measures were initiated during the last legislative session to reduce the inordinately high cost of medical malpractice insurance.[50] First, in order to provide sufficient time for protracted research by the newly created Study Commission,[51] insurance rates for providers of health care were brought under the control of the State Board of Insurance.[52] Next, a Joint Underwriting Association composed of all liability insurers was created to guarantee the availability of up to $300,000 in liability insurance to each purveyor of health care.[53] Finally, the statute of limitations applicable to medical malpractice actions was amended to reduce the risk borne by the insurers.[54]

The manner in which the statute of limitations was amended raises questions as to its constitutional validity. The new statute of limitations provides that "no claim against a person or hospital covered by a policy of professional liability insurance covering a person licensed to practice medicine or podiatry or certified to administer anesthesia in this state or a hospital licensed under the Texas Hospital Licensing Law . . . may be commenced unless the action is filed within two years of the breach [of contract] or tort complained of . . . ."[55] The new statute apparently abrogates the rule of *Gaddis v. Smith*, which involved a cause of action predicated upon a doctor's negligence in leaving a surgical sponge inside his patient. The Texas Supreme Court held that the statute of limitations began to run when the patient learned or should have learned of the presence of the foreign object, rather than from the time of the operation.[56] Although the "discovery rule" has had a substantial impact on insurance rates because of the prolongation of time within which a claim can be brought, it is patently unfair to deprive a person of a cause of action before he is able to discern its existence. On the other hand, considerable difficulty results when one attempts to reconstruct an incident that occurred ten years prior to the time a claim is filed, and perhaps this provides a reasonable basis for the statute. A further constitutional objection arises in light of the fact that the statute applies only to doctors and hospitals covered by liability insurance. A distinction between insureds and uninsureds for statute of limitations purposes could conceivably constitute invidious discrimination.

50. TEX. INS. CODE ANN. art. 21-49-3 (Supp. 1975-76).
51. Ch. 331, §§ 2, 3, [1975] Tex. Laws 867.
52. TEX. INS. CODE ANN. art. 5.82 (Supp. 1975-76).
53. *Id.* art. 21.49-3, § 3.
54. *Id.* art. 5.82, § 4.
55. *Id.*
56. 417 S.W.2d 577 (Tex. 1967); *see* Keeton, *Torts, Annual Survey of Texas Law*, 22 SW. L.J. 1, 8 (1968). *See also* Hays v. Hall, 488 S.W.2d 412 (Tex. 1972).