SMU | Dedman School of Law

SMU Law Review

Volume 31 | Issue 4 Article 10

January 1977

General Motors Corp. v. Hopkins: The Misuse Defense When Design Defect and Plaintiff Misuse Concur to Cause Injury

Cynthia H. Morriss

General Motors Corp. v. Hopkins: The Misuse Defense When Design Defect and Plaintiff Misuse Concur to Cause Injury

Robert Hopkins sued General Motors Corporation, the manufacturer of his pickup truck, and Bud Moore Chevrolet, the dealer, under strict liability in tort for personal injuries he suffered while a passenger in his truck. Hopkins claimed that the driver lost control of the truck due to a defective carburetor and that the design defect was a producing cause of Hopkins' injuries. General Motors asserted that Hopkins' alterations to the carburetor constituted misuse, heretofore a complete defense to a strict liability charge. The jury found that the carburetor was defectively designed, that Hopkins' changes constituted misuse of the product, and that both factors were producing causes of the accident. The trial court, disregarding the jury's findings of misuse, entered judgment for the plaintiff. The court of civil appeals found evidence to support the jury's conclusions, but affirmed the judgment on the grounds that misuse which is only a concurring cause of an accident does not relieve a manufacturer from strict liability.[1] General Motors appealed to the Texas Supreme Court. *Held, affirmed*: If a defective product is a producing cause of the damaging event and the plaintiff's misuse is a proximate cause of the accident, the plaintiff's recovery is limited to that portion of the damages attributable to the product's defect. *General Motors Corp. v. Hopkins*, 548 S.W.2d 344 (Tex. 1977).

I. STRICT PRODUCTS LIABILITY IN TEXAS

In 1967 the Texas Supreme Court adopted section 402A of the *Restatement (Second) of Torts*,[2] thereby introducing into Texas law the concept of strict products liability in tort.[3] The court based its decision on the policy considerations of risk spreading and justifiable consumer expectations. These policy considerations, however, were not viewed by the court as precluding the assertion of defenses to the new type of liability.[4]

A plaintiff's recovery under strict liability depends first on his showing that the product was defective when it left the hands of the manufacturer,[5] and secondly, that it was unreasonably dangerous.[6] Under Texas law a

1. 535 S.W.2d 880 (Tex. Civ. App.—Houston [1st Dist.] 1976).
2. RESTATEMENT (SECOND) OF TORTS § 402A (1965).
3. McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787 (Tex. 1967).
4. *Id.* at 790. *See also* Shamrock Fuel & Oil Sales Co. v. Tunks, 416 S.W.2d 779 (Tex. 1967).
5. Texas courts have accepted various methods of tracing the defect to the manufacturer. *See, e.g.*, Pittsburg Coca-Cola Bottling Works v. Ponder, 443 S.W.2d 546 (Tex. 1969) (evidence that product not mishandled after leaving manufacturer's control); Darryl v. Ford Motor Co., 440 S.W.2d 630 (Tex. 1969) (circumstantial evidence that defect in automobile existed at time of sale); Ford Motor Co. v. Ted Arendale Ford Sales, Inc., 447 S.W.2d 774 (Tex. Civ. App.—Fort Worth 1969, no writ) (plaintiff had complained about symptoms of auto's defect several times prior to accident).
6. RESTATEMENT (SECOND) OF TORTS § 402A, Comment i (1965) provides: "The article sold must be 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." In cases involving a design defect, courts applying Texas law have treated the

defect may result from a malfunction in a normally safe manufacturing process,[7] a defective product design,[8] or a failure to warn of a product's dangerous propensity.[9] If the plaintiff lacks evidence of a specific defect, circumstantial evidence of the product's malfunction may establish its defective nature.[10] A causal link must also be established between the alleged defect and the injury. An early trend of Texas cases required varying degrees of proof of causation, depending on the type of defect.[11] A later trend of cases recognized that because the same policy considerations applied to all product defects, the same proof of causation should be required regardless of the type of defect;[12] consequently, the courts dropped the distinction. The plaintiff now must show only that the defective product was a producing cause, rather than the sole cause, of his injuries.[13]

A significant problem in products liability has been the determination of when a plaintiff's conduct will defeat his recovery.[14] Three categories of defenses have emerged: (a) contributory negligence; (b) unreasonable assumption of risk; and (c) abnormal use, or misuse.[15] Texas courts have adopted the position espoused by the *Restatement*[16] that the plaintiff's negligence in failing to discover the defect or to guard against the defect's existence should not bar his recovery.[17] Texas courts have also accepted the

---

dangerous nature of the product as the defect. *See* Reyes v. Wyeth Laboratories, Inc., 498 F.2d 1264 (5th Cir. 1974) ("defective condition" and "unreasonably dangerous" essentially synonymous); Messick v. General Motors Corp., 460 F.2d 485 (5th Cir. 1972); Rourke v. Garza, 530 S.W.2d 794 (Tex. 1975). *But see* Metal Window Prod. Co. v. Magnusen, 485 S.W.2d 355 (Tex. Civ. App.—Houston [14th Dist.] 1972, no writ). *See generally* Keeton, *Products Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30 (1973); Sales & Perdue, *The Law of Strict Tort Liability in Texas*, 14 HOUS. L. REV. 1, 27-30 (1977).

7. *See, e.g.*, Crump v. Clark Equip. Co., 481 F.2d 667 (5th Cir. 1973); C.A. Hoover & Son v. O.M. Franklin Serum Co., 444 S.W.2d 596 (Tex. 1969).

8. *See, e.g.*, Rourke v. Garza, 530 S.W.2d 794 (Tex. 1975); Helicoid Gage Div. of Am. Chain & Cable Co. v. Howell, 511 S.W.2d 573 (Tex. Civ. App.—Houston [14th Dist.] 1974, writ ref'd n.r.e.); Pizza Inn, Inc. v. Tiffany, 454 S.W.2d 420 (Tex. Civ. App.—Waco 1970, no writ).

9. Reyes v. Wyeth Laboratories, Inc., 498 F.2d 1264 (5th Cir. 1974); Borel v. Fibreboard Paper Prod. Corp., 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974); Bituminous Cas. Corp. v. Black & Decker Mfg. Co., 518 S.W.2d 868 (Tex. Civ. App.—Dallas 1974, writ ref'd n.r.e.).

10. *See, e.g.*, Franks v. National Dairy Prod. Corp., 414 F.2d 682 (5th Cir. 1969); C.A. Hoover & Son v. O.M. Franklin Serum Co., 444 S.W.2d 596 (Tex. 1969); Ford Motor Co. v. Bland, 517 S.W.2d 641 (Tex. Civ. App.—Waco 1974, writ ref'd n.r.e.).

11. *See, e.g.*, C.A. Hoover & Son v. O.M. Franklin Serum Co., 444 S.W.2d 596 (Tex. 1969); Hebert v. Loveless, 474 S.W.2d 732 (Tex. Civ. App.—Beaumont 1971, writ ref'd n.r.e.). The Texas Supreme Court recently endorsed the use of circumstantial evidence in proving causation. Birmingham v. Gulf Oil Corp., 516 S.W.2d 914 (Tex. 1974) (involving collapse of crane on offshore drilling platform).

12. *See, e.g.*, Rourke v. Garza, 530 S.W.2d 794 (Tex. 1975); Pizza Inn, Inc. v. Tiffany, 454 S.W.2d 420 (Tex. Civ. App.—Waco 1970, no writ).

13. *See, e.g.*, Rourke v. Garza, 530 S.W.2d 794 (Tex. 1975); Helicoid Gage Div. of Am. Chain & Cable Co. v. Howell, 511 S.W.2d 573 (Tex. Civ. App.—Houston [14th Dist.] 1974, writ ref'd n.r.e.). There may be more than one producing cause. *See, e.g.*, Ford Motor Co. v. Russell & Smith Ford Co., 474 S.W.2d 549 (Tex. Civ. App.—Houston [14th Dist.] 1971, no writ).

14. *See generally* Noel, *Defective Products: Abnormal Use, Contributory Negligence and Assumption of Risk*, 25 VAND. L. REV. 93 (1972); Sales & Perdue, *supra* note 6, at 63-70.

15. W. PROSSER, TORTS, § 102 (4th ed. 1971).

16. RESTATEMENT (SECOND) OF TORTS § 402A, Comment n (1965).

17. The Supreme Court eliminated the defense of contributory negligence in Shamrock Fuel & Oil, Inc. v. Tunks, 416 S.W.2d 779 (Tex. 1967). The court went even further in Henderson v. Ford Motor Co., 519 S.W.2d 87 (Tex. 1974), and allowed a plaintiff to recover when she negligently drove into a light pole after discovering that her car had faulty brakes. Her negligence was a proximate cause of her injuries, but the court concluded that in light of the defect, Mrs. Henderson had no realistic alternatives.

Restatement's definition of assumption of risk,[18] and retained it as a defense to strict liability.[19]

Misuse, the third defense,[20] has also presented significant problems, in part because of its interrelationship with the other two defenses.[21] Manufacturers have not ordinarily been expected to guard against unforeseeable uses of the product, and proof that such misuse caused the plaintiff's injury has traditionally foreclosed any recovery.[22] Actions which courts have recognized as misuse include violation of instructions and warnings,[23] misapplication of or improper mixing of products,[24] and substantial alterations of the product by the consumer.[25]

To invoke the defense of misuse prior to *Hopkins* the defendant had to show that the plaintiff's use of the product was not reasonably foreseeable by the manufacturer and was a use which the consumer could not reasonably think proper.[26] Once proven, such misuse would totally bar recovery even if it were merely a producing cause of the accident.[27] Texas courts had not yet focused on the situation in which the product defect and a plaintiff's misuse coincided to cause an injury.

II. GENERAL MOTORS CORP. V. HOPKINS

In *General Motors Corp. v. Hopkins* the Texas Supreme Court considered three issues. The court first considered the propriety of the lower court's finding that Hopkins' truck was defectively designed.[28] Secondly, the court

18. "If 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." RESTATEMENT (SECOND) OF TORTS § 402A, Comment n (1965). There are four elements to the assumption of risk defense: (a) knowledge of the dangerous condition; (b) knowledge of the danger; (c) appreciation of the nature or extent of the danger; and (d) voluntary exposure to the danger. J&W Corp. v. Ball, 414 S.W.2d 143 (Tex. 1967); Halepeska v. Callihan Interests, Inc., 371 S.W.2d 368 (Tex. 1963).

19. Adam Dante Corp. v. Sharpe, 483 S.W.2d 452 (Tex. 1972). The language of Comment n has been criticized for its vagueness. Twerski, *Old Wine in a New Flask—Restructuring Assumption of Risk in the Products Liability Era*, 60 IOWA L. REV. 1, 3 (1974). The difficulty of applying the assumption of risk defense is compounded by the fact that until recently, Texas courts have applied it only to contractual cases, while applying volenti non fit injuria to other products liability cases. *See generally* Greenhill, *Assumption of Risk*, 16 BAYLOR L. REV. 111 (1964); Keeton, *Assumption of Products Risks*, 19 SW. L.J. 61 (1965). *Sharpe* abolished this distinction.

20. *See generally* Noel, *supra* note 14, and cases cited therein.

21. In Jacobs v. Technical Chem. Co., 472 S.W.2d 191 (Tex. Civ. App.—Houston [1st Dist.] 1971), *rev'd on other grounds*, 480 S.W.2d 602 (Tex. 1972), misuse was said to be close to contributory negligence. In other cases it has seemed more similar to assumption of the risk. *See, e.g.*, Procter & Gamble Mfg. Co. v. Langley, 422 S.W.2d 773 (Tex. Civ. App.—Dallas 1967, writ dism'd).

22. *See generally* Noel, *supra* note 14, and cases cited therein.

23. *See, e.g.*, McDevitt v. Standard Oil Co., 391 F.2d 364 (5th Cir. 1968); Procter & Gamble Mfg. Co. v. Langley, 422 S.W.2d 772 (Tex. Civ. App.—Dallas 1967, writ dism'd).

24. *See, e.g.*, Helene Curtis Indus., Inc. v. Pruitt, 385 F.2d 841 (5th Cir. 1967), *cert. denied*, 391 U.S. 913 (1968).

25. *See, e.g.*, Darryl v. Ford Motor Co., 440 S.W.2d 630 (Tex. 1969). *See generally* Annot., 41 A.L.R.3d 1251 (1972).

26. *See, e.g.*, Heil Co. v. Grant, 534 S.W.2d 916 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.) (not sufficient for the defendant to show only abnormal use); Bituminous Cas. Corp. v. Black & Decker Mfg. Co., 518 S.W.2d 868 (Tex. Civ. App.—Tyler 1974, writ ref'd n.r.e.) (misuse defense further limited if adequate warning would have prevented abnormal use).

27. *See, e.g.*, Kudelka v. American Hoist & Derrick Co., 541 F.2d 651 (7th Cir. 1976); Hales v. Green Colonial, Inc., 490 F.2d 1015 (8th Cir. 1974); McDevitt v. Standard Oil Co., 391 F.2d 364 (5th Cir. 1968).

28. 548 S.W.2d 344, 346-47 (Tex. 1977).

reviewed the question of whether Hopkins' alterations constituted misuse.[29] Finally, and most importantly, the court considered narrowing the scope of the misuse defense in Texas products liability cases.[30]

The court summarily disposed of the defective design issue, finding ample evidence to support the jury's conclusion that a defect did, in fact, exist.[31] The court also concluded that the evidence was sufficient to support the jury's finding that Hopkins' alterations to the carburetor constituted misuse of the vehicle and that such misuse was a producing cause.[32] The court, therefore, found that the product's defect and the plaintiff's misuse had concurred to cause the accident.[33]

The supreme court acknowledged that this was a case of first impression.[34] Citing numerous cases involving the misuse defense,[35] the court observed that heretofore defendants had traditionally asserted misuse to disprove product defect or to prove that the plaintiff's misuse, not the defect, caused the plaintiff's injury.[36] The court in *Hopkins*, however, found no guiding authority either in the case law or the *Restatement*[37] for the situation in which a defective product and misuse concur to cause the plaintiff's injury.[38]

Confronted with this novel situation, the court formulated two rules. First, it announced that misuse is not a defense to an action brought by an innocent bystander when a product is dangerous for its foreseeable uses,[39] thus extending well-settled policy considerations which allow recovery by innocent parties.[40]

The court was, however, unwilling to eliminate the defense of misuse when the plaintiff himself misused the product and should have foreseen that his actions would create or increase the attendant danger.[41] Thus, in

29. *Id.* at 348-49.
30. *Id.* at 349-52.
31. The jury had been instructed that: "defective design meant a carburetor so designed . . . that it would create an 'unreasonable risk of harm.' " *Id.* at 347 n.1. It had been instructed that the term "unreasonable risk of harm" as applied to product design meant a product so dangerous that a prudent manufacturer aware of its risk would not market it, and the product would not meet the ordinary consumer's reasonable expectations of safety. The supreme court found ample evidence to support the jury's finding that the truck's lockout pin could jam the carburetor's secondary valves open, allowing large amounts of fuel to rush into the engine. Two witnesses had testified that a similar malfunction had occurred a few weeks prior to the accident. Evidence of this malfunction, which occurred before Hopkins' alterations, bolstered his claims, but perhaps the most conclusive proof of defect was evidence indicating General Motors' knowledge of the design problem as early as 1968. *Id.* at 347.
32. *Id.* at 349.
33. *Id.*
34. *Id.* at 351.
35. *Id.* at 349-50. Most cases cited by the court were from other states.
36. *Id.* at 351.
37. RESTATEMENT (SECOND) OF TORTS § 402A, Comment h (1965) provides: "A product is not in a defective condition when it is safe for normal handling and consumption. If the injury results from abnormal handling . . . or from abnormal preparation for use . . . , the seller is not liable."
38. 548 S.W.2d at 351.
39. *Id. See generally* Comment, *Misuse as a Bar to Bystander Recovery Under Strict Products Liability*, 10 HOUS. L. REV. 1106 (1973).
40. The first case in which the Texas Supreme Court allowed bystanders to recover under strict products liability was Darryl v. Ford Motor Co., 440 S.W.2d 630 (Tex. 1969). *See generally* Noel, *Defective Products: Extension of Strict Liability to Bystanders*, 38 TENN. L. REV. 1 (1970).
41. 548 S.W.2d at 351.

formulating its second rule of law, the court increased the defendant's burden while at the same time moving toward a comparative fault system for products liability. Reasoning that the policy basis for strict liability was not culpability, but risk-spreading and protection of the public,[42] the court held that the defect need only be a producing cause of the injury for the manufacturer to be liable.[43] The court, however, recognized that a manufacturer should not be an insurer; he should not be required to pay for all damages suffered by a user who contributes to his own harm by misusing the product.[44] Therefore, the extent of the defendant's liability should vary in proportion to the degree to which the defect contributed to the injury.

For the defendant to be totally relieved of liability, he must meet a heavy burden of proof; the defendant must show either that the product was not defective, or that the misuse rather than the defect was the sole cause of injury. If the defendant is unable to sustain this burden, he may assert the affirmative defense of misuse.[45] In order to do so, he must prove that the misuse was a proximate cause[46] of the damaging event, and the percentage of the injury's cause attributable to the misuse.[47] As an essential element of proximate cause, the defendant must prove that the plaintiff should reasonably have anticipated that the specific malfunction or injury, or a similar one, would occur as a result of the misuse.[48] This aspect of the court's opinion significantly alters Texas law. Prior to *Hopkins* a manufacturer had to show that the plaintiff's misuse was unforeseeable to the manufacturer, whereas now he must also show that the plaintiff should reasonably have foreseen the type of damaging event or injury which resulted from the plaintiff's misuse.[49] The plaintiff's misuse will not limit his recovery, however, if the specific type of malfunction or damaging event was not reasonably foreseeable.[50]

---

42. *Id.*; *accord*, Shamrock Fuel & Oil Sales, Inc. v. Tunks, 416 S.W.2d 779 (Tex. 1967).

43. 548 S.W.2d at 351; *accord*, Helicoid Gage Div. of Am. Chain & Cable Co. v. Howell, 511 S.W.2d 573 (Tex. Civ. App.—Houston [14th Dist.] 1974, writ ref'd n.r.e.); Pizza Inn, Inc. v. Tiffany, 454 S.W.2d 420 (Tex. Civ. App.—Waco 1970, no writ).

44. 548 S.W.2d at 351; *accord*, Martinez v. Dixie Carriers, 529 F.2d 457 (5th Cir. 1976); Ross v. Up-Right, Inc., 402 F.2d 946 (5th Cir. 1968).

45. 548 S.W.2d at 351. The trial court defined "misuse" as "use of a vehicle in which it is mishandled in a way that the manufacturer could not reasonably have foreseen or expected in the normal and intended use of the vehicle." *Id.* at 348 n.2. Whether the manufacturer, knowing of the defect, should have foreseen that the plaintiff would alter the carburetor remains an open question, since the supreme court seemed to assume that Hopkins' misuse was unforeseeable. *See generally* Schwartz, *Strict Liability and Comparative Negligence*, 42 TENN. L. REV. 171 (1974).

46. 548 S.W.2d at 351-52. The court defined "proximate cause" as "that cause, which in its natural and continuous sequence, produces a result that would not have occurred but for such cause, and which said result ought reasonably to have been foreseen or anticipated in light of the attending circumstances." *Id.* at 352 n.4 (quoting Dallas Ry. & Terminal Co. v. Black, 152 Tex. 343, 345, 257 S.W.2d 416, 422 (1953)). The court defined "producing cause" as:

> an efficient, exciting or contributory cause, which in a natural and continuous sequence caused in whole or in part the occurrence of injuries, if any, in question, and but for such cause the occurrence or injuries would not have occurred. There can be more than one producing cause, but there may be only one 'sole producing cause' of any occurrence.

548 S.W.2d at 351.

47. 548 S.W.2d at 352.

48. *Id.*

49. *Id.* at 351-52. The court offers no justification for this shift in position.

50. *Id.*

If the defendant can surmount each of the above hurdles, the trier of fact must then determine the respective percentages by which the concurring causes contributed to the accident.[51] The plaintiff's recovery will be limited to that portion of his damages attributable to the product defect. Although acknowledging that General Motors might have pleaded its defense differently had it anticipated such a change in the law,[52] the court found no error in the trial court's judgment and, therefore, refused to remand.[53]

In this obscure opinion, the supreme court narrowed the misuse defense, making it more difficult for the defendant to prove. The court also seemed to be moving toward a comparative fault system of products liability in the area of design defect, and under that system misuse is no longer a complete defense.[54] Nonetheless, the court expressly stated that its ruling should not be confused with the Texas modified comparative negligence scheme.[55]

The decision raises far more questions than it answers and creates potential problems both in and out of the courtroom. For example, the opinion does not clearly state whether it applies only in cases of design defect or in all product liability cases. The trier of fact may encounter difficulty not only in differentiating between, but also in comparing, the proximate cause and producing cause.[56] Calculation of percentages of cause, particularly when multiple parties are involved, could prove an almost impossible task for even the most sophisticated jury.[57]

---

51. *Id.* at 352. Following *Hopkins*, the plaintiff may recover some of his loss even if his misuse is 99% the cause of his injuries. Under the Texas comparative negligence system a plaintiff may not recover if his negligence is greater than the defendant's. TEX. REV. CIV. STAT. ANN. art. 2212a, § 1 (Vernon Supp. 1976-77).

52. 548 S.W.2d at 352. General Motors failed to plead misuse as a proximate cause or to seek a finding on the percentage of cause attributable to misuse.

53. *Id.*; *see* Halespeska v. Callihan Interests, Inc., 371 S.W.2d 368 (Tex. 1963).

54. Several states have applied some form of comparative fault system to products liability. For example, the Wisconsin Supreme Court, in Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55, 64-65 (1967), reasoned that strict liability was equivalent to negligence per se; thus, negligence defenses and the state's modified comparative negligence statute should apply. In Hagenbuch v. Snap-On Tools Corp., 339 F. Supp. 676 (D.N.H. 1972), a federal court applying New Hampshire law found that since the state's comparative negligence statute replaced a statute on contributory negligence, which had been a defense to strict liability, the new statute should also be a defense to products liability. A federal court in Idaho interpreted that state's comparative negligence statute in Sun Valley Airlines, Inc. v. Avco-Lycoming Corp., 411 F. Supp. 598 (D. Idaho 1976). The court reasoned that strict liability, founded on the concept of loss-spreading, merely imposed a higher standard of care than negligence. Because the comparative negligence statute was not specifically limited to cases of ordinary negligence, the statute should apply to all legal causes of the plaintiff's injury, including strict liability defects and misuse. The court then applied comparative cause. Finally, in Butaud v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42 (Alas. 1976), the Supreme Court of Alaska adopted the judicial doctrine of comparative negligence for use in products liability cases involving assumption of the risk and misuse. The court in *Hopkins* does not openly adopt any of the above approaches, but the ruling most nearly resembles the Idaho decision discussed above. *See* Kinard v. Coats Co., 553 P.2d 835 (Colo. App. 1976), in which the court refused to apply comparative negligence to products liability for policy reasons. *See generally* Sales & Perdue, *The Law of Strict Liability in Texas*, 14 HOUS. L. REV. 1 (1977); Schwartz, *supra* note 45.

55. 548 S.W.2d at 352. The Texas comparative negligence statute allows a plaintiff who is injured as a result of another's negligence to recover if the plaintiff's negligence is not greater than that of the defendant. Damages are measured in proportion to each party's negligence. TEX. REV. CIV. STAT. ANN. art. 2212a, § 1 (Vernon Supp. 1976-77).

56. *But see* Butaud v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42 (Alas. 1976), in which the court rejected arguments that strict products liability is incompatible with comparative negligence.

57. Juries would probably find it easier to compare fault than to compare causes.

The court's failure to follow the course of several other states[58] which have openly acknowledged the appropriateness of applying an existing comparative negligence system to products liability is curious. By requiring the defendant to prove proximate cause and foreseeable injury, the court apparently adopts comparative negligence in products liability, yet it carefully sidesteps the issue by referring to comparative causes.[59] Perhaps this choice of terminology can be explained by the court's natural fear of assuming a legislative role. By adopting "comparative cause" rather than "comparative negligence," the court could avoid the modified statutory system and retain a pure comparative system more favorable to a plaintiff's recovery.[60] The ruling also differs from comparative negligence by approving jury instructions which would require a defendant to convince the jury that the plaintiff, before misusing the product, should reasonably have foreseen the particular type of malfunction or injury which occurred. As a practical matter, while juries may find that a plaintiff should have foreseen some injury resulting from his misuse, it seems unlikely that juries will find the particular accident or injury foreseeable. Despite what the courts have often said, the effect of this decision may render the manufacturer an insurer.[61] While strong public policies support recovery in products liability cases, such policies should not undermine cautious, although imperfect, product development.[62]

III. CONCLUSION

After adopting section 402A of the *Restatement (Second) of Torts*, the Texas Supreme Court struggled to clarify the instances in which a plaintiff's actions bar his recovery. Prior to *Hopkins* courts had not squarely confronted a situation where a design defect and the plaintiff's misuse of the product coincided to cause the plaintiff's injuries. In *Hopkins* the supreme court announced that if the manufacturer of a defectively designed product could prove that the plaintiff's unforeseeable misuse was a proximate cause of the injury, the plaintiff's recovery would be reduced by that percentage of cause attributable to his misuse. Although the court reached the proper conclusion under the specific facts of *Hopkins*, the perplexing opinion fails to disclose

58. *See* note 54 *supra* and accompanying text.

59. 548 S.W.2d at 352. In Sun Valley Airlines, Inc. v. Avco-Lycoming Corp., 411 F. Supp. 598 (D. Idaho 1976), a federal district court justified the use of comparative cause in products liability because if misuse had been an absolute defense, a plaintiff whose misuse was 1% the cause of his accident would be unable to recover. The court's holding in *Hopkins* suggests similar policy considerations, although the court never explains its reasoning or cites *Sun Valley Airlines*.

60. If the court had adopted comparative negligence, their choice of a "pure" rather than a "modified" system would have conflicted with the legislative policy set forth in the comparative negligence statute. TEX. REV. CIV. STAT. ANN. art. 2212a, § 1 (Vernon Supp. 1976-77).

61. Courts applying Texas law have often insisted that manufacturers should not be insurers. Martinez v. Dixie Carriers, 529 F.2d 457 (5th Cir. 1976); Reyes v. Wyeth Laboratories, Inc., 498 F.2d 1264 (5th Cir. 1974). Nevertheless, the practical effect of this decision is to make misuse very difficult to prove in cases where the product is also defective. The only remaining defense in products liability is assumption of the risk, which is also difficult to prove. *See* notes 18-19 *supra*. As a result of the *Hopkins* decision, manufacturers may pay large judgments when previously they would have been immune because of the misuse defense. They may begin to scrutinize more closely their legal exposure before marketing new products.

62. *See generally* Hoenig, *Products Liability Problems and Proposed Reforms*, 1977 INS. L.J. 213.