SMU | Dedman School of Law

SMU Law Review

Volume 32
Issue 1 *Annual Survey of Texas Law*

Article 1

1978

# Torts

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# PART I: PRIVATE LAW

## TORTS

*by*

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### I. PRODUCTS LIABILITY

Products liability law has become unnecessarily complex, primarily because recovery for a particular kind of loss may often be obtained under three separate theories: negligence in tort, strict liability in tort,[1] and strict liability for breach of warranty.[2] All three theories are concurrently available in Texas when a damaging event, produced by a defectively dangerous product, results in a claim for damages arising from physical harm to persons or property.[3] Although choice of theory would be of no practical importance if the liability and damage rules were equivalent under all three theories, the actual litigation process is confused because the extent of liability may vary, depending on the theory of the action. Consequently, a claimant must sometimes seek findings related to two or more theories in order to obtain maximum possible relief. For example, in Texas, voluntary assumption of the risk is not a defense to recovery on a theory of negligence;[4] it may, however, preclude recovery on a theory of strict liability in tort, and possibly on a theory of breach of warranty.[5] Similarly, contributory

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1. Rourke v. Garza, 530 S.W.2d 794, 798 (Tex. 1975); Davis v. Gibson Prods. Co., 505 S.W.2d 682, 688 (Tex. Civ. App.—San Antonio 1973), *writ ref'd n.r.e. per curiam*, 513 S.W.2d 4 (Tex. 1974); K & S Oil Well Serv., Inc. v. Cabot Corp., 491 S.W.2d 733, 735 (Tex. Civ. App.—Corpus Christi 1973, writ ref'd n.r.e.).

2. Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974). The court in *Borel* stated:

> Although we agree that a reference to 'breach of warranty' in a products liability charge may be unnecessarily confusing in some cases, since that is the language of contracts not torts, we are persuaded that no prejudice resulted to the defendant from its use in this case. . . . With respect to breach of implied warranty, the court specifically equated 'unfitness' or 'unmerchantability' with the 'unreasonably dangerous' standard of strict liability in tort. Viewing the charge as a whole, we think that the jury fully understood that liability could be imposed only if the product was unreasonably dangerous.

*Id.* at 1091. *See* Reyes v. Wyeth Laboratories, 498 F.2d 1264 (5th Cir.), *cert. denied*, 419 U.S. 1096 (1974); Monsanto Co. v. Thrasher, 463 S.W.2d 25 (Tex. Civ. App.—Amarillo 1970, writ dism'd).

3. *See* Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1087 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).

4. Farley v. M M Cattle Co., 529 S.W.2d 751 (Tex. 1975); Rosas v. Buddies Food Store, 518 S.W.2d 534 (Tex. 1975). *See* Keeton, *Torts, Annual Survey of Texas Law*, 30 Sw. L.J. 1, 2-6 (1976). *See also* 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).

5. The defense still exists in strict liability cases when the injured party voluntarily exposes himself to the risk posed by the defective product *with knowledge and appreciation* of the danger. Rourke v. Garza, 530 S.W.2d 794 (Tex. 1975); Henderson v. Ford Motor Co., 519 S.W.2d 87 (Tex. 1974); Heil Co. v. Grant, 534 S.W.2d 916 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.); Ethicon, Inc. v. Parten, 520 S.W.2d 527 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ). *See also* Keeton, *Torts, Annual Survey of Texas Law*, 30 Sw. L.J. 1, 5 (1976).

negligence is a defense that either bars or diminishes recovery on a negligence theory, depending on whether the jury finds the plaintiff's negligence to be greater than that of the defendant or defendants.[6] On the other hand, while contributory negligence is not a defense to recovery on a theory of strict liability in tort,[7] the Texas Supreme Court recently defined unforeseeable misuse as a defense that mitigates recovery, based on findings of comparative causation.[8] Thus, a claimant seeking maximum recovery should proceed on several theories since the hazards of litigation differ for each. The resulting complexity of litigation strongly suggests that development of a single theory of recovery for a particular kind of loss would promote a more efficient and just administration of products liability claims.

### A. *Types of Claimants and Losses*

The issues presented by the law of products liability may be clarified by categorizing such claims by class of claimant and type of loss suffered. Within this framework, several cases decided since the last *Annual Survey* have clarified the law regarding theories of recovery and their applicability to particular kinds of losses.[9]

#### 1. *Claimant as Bystander Whose Person or Property Is Injured as Result of Product Defect.*

Texas permits such a claimant to recover under both tort theories of negligence and strict liability.[10] Purchasers and users were the first to receive tort protection from dangerously defective products since strict liability in tort was an outgrowth of warranty liability.[11] Yet, unlike bystanders, consumers and users have had an opportunity to inspect for defects, and to limit their contacts to articles made by reputable manufacturers.[12] Subsequent extension of tort actions to bystanders for physical harm reflects a societal policy to hold manufacturers responsible through liability for accidents attributable to the "dangerousness" of their products.[13]

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6. For a discussion of various problems connected with comparative negligence and contribution see Keeton, *Torts, Annual Survey of Texas Law*, 28 SW. L.J. 1, 7-16 (1974).

7. Henderson v. Ford Motor Co., 519 S.W.2d 87 (Tex. 1974); Ethicon, Inc. v. Parten, 520 S.W.2d 527 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ); Bituminous Cas. Corp. v. Black & Decker Mfg. Co., 518 S.W.2d 868 (Tex. Civ. App.—Dallas 1974, writ ref'd n.r.e.).

8. General Motors Corp. v. Hopkins, 548 S.W.2d 344 (Tex. 1977). *See also* Magic Chef, Inc. v. Sibley, 546 S.W.2d 851 (Tex. Civ. App.—San Antonio 1977, writ ref'd n.r.e.).

9. Particular note should be given to Nobility Homes v. Shivers, 557 S.W.2d 77 (Tex. 1977), and Mid Continent Aircraft Corp. v. Curry County Spraying Serv., 553 S.W.2d 935 (Tex. Civ. App.—Amarillo 1977, no writ), which are discussed in categories 4 and 6 *infra*.

10. Darryl v. Ford Motor Co., 440 S.W.2d 630 (Tex. 1969).

11. *See* Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960). *See also* RESTATEMENT (SECOND) OF TORTS § 402A, comment m (1965).

12. *See* Elmore v. American Motors Corp., 70 Cal. 2d 578, 583, 451 P.2d 84, 89, 75 Cal. Rptr. 652, 657 (1969).

13. Traditional policy considerations underlying tort protection afford greater protection to bodily integrity than to economic interests. Whereas purely economic loss is suffered solely by the purchaser, physical injury to a person or property is part of a larger accident problem in society as a whole; thus, it deserves greater control through deterrent effect of risk allocation. For a general discussion of risk shifting to those producing dangerous products see Keeton, *Products Liability—Some Observations About Allocation of Risks*, 64 MICH. L. REV. 1329 (1966). *See also* Keeton, *Products Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30, 35 (1973).

2. *Claimant as Non-purchasing User Whose Person or Property Is Injured as Result of Product Defect.*[14]

As in the case of a bystander, recovery for a claimant in this category has been available only on the two tort theories of negligence and strict liability. Recovery under a warranty theory has traditionally been barred because the claimant is not a party to or a third-party beneficiary of any contract with anyone in the marketing chain.[15] This limitation lessens litigation complexity because only purchasers and third-party beneficiaries of the purchaser's contract may proceed on warranty-contract theories of recovery. Moreover, if the doctrine of third-party beneficiaries is applied realistically, its use should be narrowly limited. Because third persons and bystanders may recover in tort based on the product's defect as an alternative theory to seller's negligence, the Business and Commerce Code need not be amended to ensure adequate recovery to all kinds of users for damages attributable to physical harm.[16]

3. *Claimant as Purchaser or Member of Purchaser's Immediate Family Whose Person or Property Is Injured as Result of Product Defect.*

Like most other states, Texas permits such claimants to recover on all three theories of negligence in tort, strict liability in tort, and breach of warranty.[17]

The Business and Commerce Code currently allows recovery on a warranty theory for personal injury to purchasers or family members. The Code provisions, however, were drafted prior to the development of the theory of strict liability in tort. Thus, the appropriate provisions of the Business and Commerce Code should be amended to limit such damages to economic losses resulting from failure of the product to meet minimum requirements of quality and efficiency. While recovery for physical harm would remain available on tort theories, such an amendment would enable the supreme court to apply uniform rules for recovery to both outsiders and purchasers and members of purchasers' families. Since tort liability is imposed to protect consumers from physical harm, risk allocation should not differ according to the victim's status as purchaser or outsider.

14. *See* Dement v. Olin-Mathieson Chem. Corp., 282 F.2d 76 (5th Cir. 1960); O.M. Franklin Serum Co. v. C.A. Hoover & Son, 418 S.W.2d 482 (Tex. 1967); Ford Motor Co. v. Russell & Smith Ford Co., 474 S.W.2d 549 (Tex. Civ. App.—Houston [14th Dist.] 1971, no writ).

15. In Texas, however, section 2.318 of the Business and Commerce Code is expressly neutral and leaves the issue open to judicial resolution: "[T]his Chapter does not provide whether anyone other than a buyer may take advantage of an express or implied warranty of quality made to the buyer . . . ." TEX. BUS. & COMM. CODE ANN. § 2.318 (Vernon 1968).

16. Availability of tort theories to users and members of the user's family is consistent with tort policy to control risk imposition for personal injuries, including physical harm to users or to the property of users. *See* note 14 *supra* and accompanying text.

17. Crocker v. Winthrop Laboratories, 514 S.W.2d 429 (Tex. 1974) (drugs, strict tort theory); McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787 (Tex. 1967) (permanent wave preparation, strict tort theory). See the Business and Commerce Code provisions on recovery of consequential damages for an injury to a person or property, TEX. BUS. & COMM. CODE ANN. § 2.715 (Vernon 1968), and on the limitation of consequential damages for injury to the person in the case of consumer goods, *id.* § 2.719.

4. *Claimant as Purchaser (Both Commercial User and Consumer-Purchaser) Whose Intangible Economic Loss Is Caused by Product's Poor Quality or Failure to Fulfill Purchaser's Expectations.*

*Nobility Homes, Inc. v. Shivers*,[18] in which the plaintiff was a purchaser of a mobile home, falls within this category. The immediate seller had gone out of business and could not be located at the time the claim was filed; thus, the plaintiff sought recovery from the manufacturer alone. The trial court, sitting without a jury, found that the mobile home was defectively constructed and was unfit for the purposes for which it was sold. Damages of $8,750 were awarded as the difference between the reasonable market value of the mobile home at the time of purchase and the original contract price. The Beaumont court of civil appeals affirmed, and the judgments of both courts, against the manufacturer, were affirmed by the Supreme Court of Texas. Although recovery was based on a contract-warranty theory, the supreme court held that privity is no longer required to hold a manufacturer responsible for economic loss resulting from breach of an implied warranty of merchantability.[19]

Additionally, the plaintiff had successfully alleged the manufacturer's negligence in both design and construction of the mobile home. The supreme court affirmed the judgment for the plaintiff on the negligence theory,[20] noting that "consumers have other remedies for economic loss against persons with whom they are not in privity. One of these remedies is a cause in negligence."[21] Because only economic loss had resulted, however, the court's approval of an action in negligence ignores traditional policies underlying the imposition of tort liability, policies which allocate liability to the manufacturer as the better risk-bearer of harm resulting from risks that inhere in the use of his product.

5. *Claimant as Non-purchaser Whose Intangible Economic Loss Is Caused by Product's Poor Quality or Failure to Meet Purchaser's Objectives.*[22]

6. *Claimant as Purchaser of Product Damaged as Result of Its Own Defect.*

Such a claim was upheld by the Amarillo court of civil appeals in *Mid Continent Aircraft Corp. v. Curry County Spraying Service.*[23] The purchaser, an operator of a crop-spraying service, purchased a used airplane on an "as is" basis. Twenty-one days later, and after thirty hours of engine time, the engine failed in flight while the airplane was spraying a field. The pilot landed the aircraft on a rough country road, damaging the fuselage and wings. The court held that the plaintiff could recover on either a warranty

18. 557 S.W.2d 77 (Tex. 1977).
19. *Id.* at 81.
20. *Id.* at 83. The court was bound to uphold judgment on the negligence theory because the defendant did not challenge that ground on appeal. *Id. See also* State Farm Mut. Auto. Ins. Co. v. Cowley, 468 S.W.2d 353, 354 (Tex. 1971); City of Deer Park v. State, 154 Tex. 174, 187, 188, 275 S.W.2d 77, 84, 85 (1954).
21. 557 S.W.2d at 83.
22. *See* note 33 *infra* and accompanying text.
23. 553 S.W.2d 935 (Tex. Civ. App.—Amarillo 1977, writ granted).

theory or on the tort theories of negligence and strict liability. With regard to the "as is" sale agreement, however, the court ruled that such language excluded all liability under a contractual warranty. Nevertheless, it did not eliminate the strict liability for physical harm imposed by tort law.[24] The opinion in *Mid Continent* suggested, however, that parties to an "as is" contract can disclaim strict tort liability, for physical harm to the product itself, and perhaps liability on a negligence theory as well, by very clear and specific language in the agreement.[25]

A distinction should be made between the type of "dangerous condition" that causes damage only to the product itself and the type that is dangerous to other property or persons. A hazardous product that has harmed something or someone can be labeled as part of the accident problem; tort law seeks to protect against this type of harm through allocation of risk. In contrast, a damaging event that harms only the product should be treated as irrelevant to policy considerations directing liability placement in tort. Consequently, if a defect causes damage limited solely to the property, recovery should be available, if at all, on a contract-warranty theory.[26]

7. *Claimant as Purchaser Seeking Recovery from Supplier of Product's Defective Component Part Which Damaged Product.*

In this situation the component part is dangerous only because it has not functioned as intended and has resulted in deterioration or destruction of the product, or the building of which it was a part. It is not dangerous to people; its risk extends to tangible things to the extent that it is a component part of such things. Facts within this category were presented to the San Antonio court of civil appeals in *Hovenden v. Tenbush*.[27]

The plaintiff, a commercial enterpriser, had entered into an agreement with a building contractor for the construction of a commercial building. The plaintiff and his architect selected used Mexican brick for construction of the exterior walls. After the building was completed, the walls began shedding mortar. The court found the deterioration had occurred because the used brick was unsuited for its designated use. Even though the case concerned a commercial transaction and a commercial type of loss, the appellate court held that the seller was subject to liability on a tort theory.[28]

Arguably, the contract between the purchaser and the seller should govern liability of the seller. The mere fact that the brick was not suitable for its proposed use does not justify requiring the seller to guarantee that it would be suitable unless (1) the seller represented that it would be suitable[29] and (2)

24. *Id.* at 941.
25. *Id.*
26. *See* Long v. Jim Letts Oldsmobile, Inc., 135 Ga. App. 293, 217 S.E.2d 602 (1975) (engine overheated and was eventually ruined); *accord*, Long v. Grady Tractor Co., 140 Ga. App. 320, 231 S.E.2d 105 (1976) (while being moved, portable tobacco barn collapsed because of defect).
27. 529 S.W.2d 302 (Tex. Civ. App.—San Antonio 1975, no writ).
28. *Id.* at 305-06.
29. *See* Gorbett Bros. Steel Co. v. Anderson, Clayton & Co., 533 S.W.2d 413, 419 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ); Parks v. Glidden Co., 433 S.W.2d 445, 446 (Tex. Civ. App.—Texarkana 1968, writ ref'd n.r.e.); Cruz v. Ansul Chem. Co., 399 S.W.2d 944, 949 (Tex. Civ. App.—Corpus Christi 1966, writ ref'd n.r.e.); Craftsman Glass, Inc. v. Cathey, 351 S.W.2d 950, 952 (Tex. Civ. App.—Amarillo 1961, no writ).

the purchaser relied on the seller's judgment in the matter.[30] If these requirements were met, however, an implied warranty of fitness for the particular purpose would arise.[31]

The extension of strict tort liability to those who supply component parts is currently unsettled, even in cases limited to physical harm to persons. Judicial reluctance to permit strict tort liability is justified in the case of an assembler who incorporates into the ultimate product a part unsuited for its use, unless he relies on the component part seller to furnish an appropriate part.[32]

A claimant of the kind contemplated in the fourth and fifth categories set forth above will not be able to recover in Texas on a theory of strict tort liability because his claim is for an economic loss attributable to the inferior quality of the product, or its inability to meet the purchaser's expectations. Historically, the remedies of a disappointed purchaser have been (1) a contract action seeking damages for breach of an express or implied warranty of quality; (2) a tort action seeking damages for deceit or fraud; and (3) an action for rescission of the contract.[33] In *Nobility Homes* a central issue was whether privity of contract between the purchaser and the defendant manufacturer is an essential element of liability under a warranty theory. The fact that the court resolved that issue in favor of the claimant, however, does not mean that warranty theories of liability are no longer important.

Other important issues will also be affected by the holding in *Nobility Homes*. For example, the theory upon which recovery is sought will significantly affect: (1) the type of quality deficiency that will subject the seller to liability under the warranty provisions of the Business and Commerce Code; (2) the validity and effect of "as is" and "disclaimer" clauses; (3) the effect of an obvious defect on recovery; (4) the effect of failure to give prompt notification of a defect after it was discovered or should have been discovered in the exercise of ordinary care; (5) the ability of someone other than a purchaser to recover for economic loss suffered; (6) the appropriate conflict of laws rule to apply; and (7) the time when a cause of action arises and the applicable limitations period.

### B. *Privity of Contract, Economic Loss, and Recovery in Tort*

The opinion of the supreme court in *Nobility Homes* recognized the division of American courts on whether to extend strict liability in tort to

30. *See* Crocker v. Winthrop Laboratories, 514 S.W.2d 429, 433 (Tex. 1974); Brown v. Asgrow Seed Co., 379 S.W.2d 412, 414 (Tex. Civ. App.—San Antonio 1964, writ ref'd n.r.e.).

31. TEX. BUS. & COMM. CODE ANN. § 2.315 (Vernon 1968).

32. Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 437, 191 N.E.2d 81, 83, 240 N.Y.S.2d 592, 595 (1963) (court refused to hold maker of flawed component part strictly liable to ultimate purchaser when assembler could be sued). *But see* Clark v. Bendix Corp., 42 App. Div. 2d 727, 728, 345 N.Y.S.2d 662, 664 (1973) (intermediate New York appellate court allowed recovery against component part maker on both tort theory and breach of warranty theory). *See also* Suchomajcz v. Hummel Chem. Co., 524 F.2d 19 (3d Cir. 1975) (imposed liability on seller of component part only on theory of negligence where seller supplied chemicals to a fabricator of firecracker assembly kits sold in violation of federal law); Taylor v. Paul O. Abbe, Inc., 516 F.2d 145 (3d Cir. 1975) (strict liability for design defect of component part *not* available against its manufacturers). *Contra*, Rourke v. Garza, 530 S.W.2d 794 (Tex. 1975), *noted in* Keeton, *Torts, Annual Survey of Texas Law*, 30 Sw. L.J. 1, 6 (1976).

33. See Keeton, *Rights of Disappointed Purchasers*, 32 TEXAS L. REV. 1 (1953), for a discussion of the law in this area relating to an economic loss.

pure economic loss situations.[34] No doubt some of the courts that approved this extension of strict liability in tort did so in order to provide the purchaser with a cause of action against the manufacturer, thereby avoiding the contractual requirement of privity of contract for recovery. The supreme court, however, eliminated this particular requisite for recovery, even on a contract theory.[35] Such an approach appears to be sounder than extending strict liability in tort to recovery for pure economic loss. Nevertheless, substantial authority supports the position that privity of contract should be a prerequisite to recovery for those economic losses which are unaccompanied by physical harm to the person or his property.[36]

Where products do not have defects that endanger others, it can be argued that they can not be so poor in quality as to be unworthy of sale if the price is right. Therefore, the immediate contract between the retailer and the user-purchaser, as well as the contract between the manufacturer and its marketing purchaser, is of utmost importance with regard to whether the user-purchaser should be permitted to recover against the manufacturer. Notwithstanding the obvious difficulty in evaluating immediate contracts in cases when the retailer is unavailable, much can be said for disregarding marketing privity, especially when the user-purchaser is an ordinary consumer rather than a commercial purchaser. Although the supreme court in *Nobility Homes* assured consumers of additional remedies, including a cause of action in negligence,[37] that action has traditionally been unavailable. In the past the only tort action available to a disappointed purchaser was an action of deceit for fraud; the only contract action available in such situations was based on breach of warranty, which is also the single contract action for disappointed purchasers provided in the Uniform Commercial Code.[38]

34. 557 S.W.2d at 79. The two leading judicial opinions in this area are Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965), and Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965).

35. Privity of contract as an element required to recover for economic loss on a warranty theory was also abrogated by the Supreme Court of Alaska. Morrow v. New Moon Homes, Inc., 548 P.2d 279 (Alas. 1976). In *Morrow* the court said that "there is no satisfactory justification for a remedial scheme which extends the warranty action to a consumer suffering personal injuries or property damage but denies similar relief to the consumer 'fortunate' enough to suffer only direct economic loss." *Id.* at 291.

36. *See, e.g.*, Trans World Airlines, Inc. v. Curtiss-Wright Corp., 1 Misc. 2d 477, 148 N.Y.S.2d 284 (1955), *aff'd without opinion*, 2 App. Div. 2d 666, 153 N.Y.S.2d 546 (1956) (problem related to direct recovery by the ultimate purchaser against the manufacturer made apparent). The court stated that:

> If the ultimate user were allowed to sue the manufacturer in negligence merely because an article with latent defects turned out to be bad when used in 'regular service' without any accident occurring, there would be nothing left of the citadel of privity and not much scope for the law of warranty. There seems to me to be good reason for maintaining that, short of an accident, the citadel should be preserved. Manufacturers would be subject to indiscriminate lawsuits by persons having no contractual relations with them, persons who could thereby escape the limitations, if any, agreed upon in their contract of purchase. Damages for *inferior quality, per se*, should better be left to suits between vendors and purchasers since they depend on the terms of the bargain between them.

*Id.* at 290 (emphasis added). *See also* Price v. Gatlin, 241 Ore. 315, 405 P.2d 502 (1965) (jury found that tractor performed inadequately and plaintiff suffered economic loss, but plaintiff was denied recovery against wholesaler).

37. 557 S.W.2d at 83.

38. U.C.C. §§ 2-314, -315. The Texas Legislature enacted the 1965 Uniform Commercial Code as part of the Texas Business and Commerce Code to take effect on Sept. 1, 1967.

In dealing with a similar problem, the Supreme Court of Ohio reached a different result.[39] In a case involving an automobile that squeaked and rattled, the plaintiff alleged that the defendant negligently failed to inspect the automobile properly prior to delivery; he claimed that such negligence proximately caused him the loss of $1,500, the difference between the purchase price and the market value of the automobile. The court held that pecuniary loss of the benefit of the bargain was not recoverable on a negligence theory because the defendant's acts caused no damage to person or property.

Nevertheless, the position of the Texas Supreme Court finds support in the fact that the existing warranty provisions of the Uniform Commercial Code and the Deceptive Trade Practices Act are inadequate to give the ordinary consumer, as opposed to the commercial enterpriser, significant protection from inferior merchandise. In the absence of an express warranty, the Code, drafted over twenty years ago, provides only an implied warranty of merchantability[40] and an implied warranty of fitness for a particular purpose.[41] Thus, a defective product such as a mobile home may be worth no more than half its original purchase price and, at the same time, be merchantable or suitable for human habitation under the Code's warranty standards. The best solution to this problem, however, is not to open the door to a myriad of negligence suits seeking recovery from sellers in the marketing chain for purely economic loss. Rather, the Code sections on warranties should be amended.

### C. *Liability Disclaimers and Physical Harm to the Product Itself*

*Mid Continent Aircraft*[42] concerned the liability of a seller, in an "as is" sale, for the loss attributable to a defect in the aircraft that resulted in physical harm to the product itself. The law relating to the validity of contract clauses that attempt to relieve one contracting party of tort liability is clouded with a great deal of uncertainty.[43] Properly stated, the issue is to what extent a contracting party may be allowed to accept the risk of losses attributable to what would otherwise be the actionable and tortious conduct of the other. Generally speaking, a person can agree by contract to accept a risk of harm arising from the defendant's negligent or reckless conduct unless the agreement is held invalid as contrary to public policy.[44] That proposition, however, does not answer the policy question of whether the particular agreement should be regarded as illegal and unenforceable. Courts must consider as vitally important, any inequality of the bargaining position of the contracting parties as well as the effect that the enforcement of such an agreement would have in frustrating the policy considerations underlying the tort rules of liability. The comment to section 402A of the *Restatement (Second) of Torts* states:

39. Inglis v. American Motors Corp., 3 Ohio St. 2d 132, 209 N.E.2d 583, 588 (1965), (quoting Prosser, *Products Liability in General*, 36 CLEV. B.A.J. 149, 174-75 (1965)).
40. TEX. BUS. & COMM. CODE ANN. § 2.314 (Vernon 1968).
41. *Id.* § 2.315.
42. 553 S.W.2d 935 (Tex. Civ. App.—Amarillo 1977, no writ).
43. If a contract clause is considered unconscionable, the court may refuse to enforce it. *See* TEX. BUS. & COMM. CODE ANN. § 2.302 (Vernon 1968).
44. RESTATEMENT (SECOND) OF TORTS § 496B (1965).

> The consumer's cause of action does not depend upon the validity of his contract with the person from whom he acquires the product, and it is not affected by any disclaimer or other agreement, whether it be between the seller and his immediate buyer, or attached to and accompanying the product into the consumer's hands.[45]

Disclaimer clauses, however carefully worded, do not appear to alter the average consumer's ability to recover for personal injuries under either negligence or strict liability theories. The precise question discussed in *Mid Continent Aircraft*, however, was not the enforceability of a personal injury disclaimer but the validity of an agreement between enterprisers that purported to relieve the seller of tort liability for physical harm to the subject matter of the sale. The majority and the dissenting judge agreed that liability for damage to the property could be shifted by agreement, but differed on the issue of whether this type of loss could be recovered on a tort theory as well as on a contract theory.[46] The majority held that a contractual disclaimer does not eliminate the strict liability imposed by law.[47] The dissenting judge concluded that recovery was obtainable only on a contract theory.[48]

One difficulty with the majority view is that the line between a defect that results in economic loss and one that results in physical harm to the product itself is not always easy to draw. When the product itself is physically harmed, the principal reason for recognizing the existence of a tort theory for recovery is to invalidate a no-liability clause when the transaction is between a seller and an ordinary consumer. Consequently, if a defect in a mobile home causes a fire that destroys the mobile home, liability would obtain without regard to a disclaimer clause.[49] In *Jig the Third Corp. v. Puritan Marine Insurance Underwriters Corp.*[50] a shrimp boat sank in the Gulf of Mexico. The contract of sale contained a disclaimer clause but it was not broad enough to exclude liability for negligence. The majority held that tort theories were available and the disclaimer provision did not clearly exclude recovery on a negligence theory. As in *Mid Continent Aircraft*, the dissenting judge in *Jig the Third* took the position that recovery should be obtainable only on a contract theory.

## II. JOINT TORTFEASORS

During this survey period Texas courts addressed several important issues in dealing with the proper allocation of accident costs between two or more

45. *Id.* § 402A, comment m (1965). See also RESTATEMENT (SECOND) OF CONTRACTS § 337(3) (Tent. Draft No. 12, 1977), which states that "[a] term exempting a seller of a product from his special tort liability for physical harm to a user or consumer is unenforceable on grounds of public policy unless the term is fairly bargained for and is consistent with the policy underlying that liability." The exception is for the rare situation when a term of this kind is included in a contract between two merchants for the sale of an experimental product.

46. 553 S.W.2d at 941.

47. The court cited two of the leading cases concerning tort liability for harm to the product itself: Keystone Aeronautics Corp. v. R.J. Enstrom Corp., 499 F.2d 146 (3d Cir. 1974) (upheld recovery on a tort theory but recognized validity of clearly drafted disclaimer clauses); Sterner Aero AB v. Page Airmotive, Inc., 499 F.2d 709 (10th Cir. 1974) (strict liability in tort cannot be waived no matter how carefully disclaimer clause is drawn).

48. *Id.* at 943 (Robinson, J., dissenting).

49. Cloud v. Kit Mfg. Co., 563 P.2d 248 (Alas. 1977) (court held that recovery would be obtainable on theory of strict liability in tort).

50. 519 F.2d 171 (5th Cir. 1975).

legally responsible parties. In discussing these cases, the term joint tortfeasor will be used broadly to include a victim who was himself guilty of the tortious conduct that proximately caused the accident.

### A. *Unforeseeable Misuse as a Defense in Products Liability Cases*

In *General Motors Corp. v. Hopkins*,[51] a products liability case, the plaintiff's harm arose out of a single car accident in which the jury found (1) unforeseeable misuse of the car by the plaintiff[52] and (2) defective design of the car's carburetor.[53] The jury further found both the misuse and the design defect to be producing causes of the accident. The case, therefore, involved the proper allocation of the costs of an accident between victims and suppliers of products when the accident results from the combination of both product defect and unforeseeable misuse by the victim.[54] On appeal, the supreme court held that misuse of a product would be a defense if (1) the misuse was not reasonably foreseeable by the supplier of the defective product, and (2) if such misuse was a *proximate* cause and not simply a producing cause of the accident.[55] To constitute a proximate cause, harm from an event of the kind that occurred must be reasonably foreseeable. Therefore, a finding that the unforeseeable misuse was a producing cause is not sufficient to establish the defense since it must be a proximate cause. In effect the court is saying that (1) the misuse must be the kind that was unforeseeable by the supplier of the product, (2) the misuser must have been negligent, and (3) his negligence must have been a proximate cause of the event from which the injury arose. Even if successful, the defense does not bar plaintiff's recovery; it merely diminishes the amount of that recovery. The jury, in considering the totality of the harm incurred by the plaintiff, is to apportion causation to the respective parties—to the plaintiff for the misuse and to the defendant for the product defect.

Quantification of fault is theoretically possible since the quality of each party's fault in the case of a single and indivisible injury is almost always different. But to quantify causation between two or more parties is impossible when the conduct of each was a prerequisite to the resulting harm. Although recognizing this problem, the supreme court apparently held that the jury must apportion the damages in some fair and just manner. The difficulty of framing an appropriate question for the jury without knowing the conduct of the defendant that caused the accident is apparent. For example, should the questions to the jury be framed in a negligence theory or a strict liability theory; furthermore, for each theory the appropriate defenses must also be considered. The combinations and permutations of questions increase unnecessarily the complexity of the litigation process. The defenses to recovery on a theory of strict liability and negligence should be identical so as to avoid these complexities. The solution is a pro rata

51. 548 S.W.2d 344 (Tex. 1977), *noted in* 31 Sw. L.J. 940 (1977).
52. *Id.* at 348.
53. *Id.* at 347.
54. The particular conduct of Hopkins was an alteration of the carburetor. The jury found that this was not reasonably foreseeable by the defendant manufacturer. *Id.* at 348-49.
55. *Id.* at 351. *See also* Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

sharing of the costs of accidents among those legally responsible for such accidents, under both negligence and strict liability. Such a general principle would further the policy considerations behind rules that impose tort liability on those engaging in socially desirable activities without creating undue complexity.

### B. *Products Liability and Misconduct of Third Persons*

In *Hopkins* the court stated that misuse of a product, however abnormal or unforeseeable, that operated as a proximate cause of a damaging event does not bar recovery by a bystander against the seller of a defective product when the defect was a producing cause of the event.[56] In fixing limits to legal liability, it is not clear that any distinction should be drawn between suppliers of products and negligent users of products. This is not to suggest that the proximate cause rules established by the courts to fix liability limits on a negligence theory are unassailable. In most states, including Texas, reasons commonly given for concluding that the defendant's negligence was not a proximate cause include: (1) harm to the plaintiff was not reasonably foreseeable by the defendant; (2) harm from the kind or type of damaging event was not reasonably foreseeable by the defendant; and (3) another's conduct was a "new and independent intervening cause" or a "superseding cause."[57] The notion behind these rules has been that the plaintiff's injury was not sufficiently related to the defendant's faulty acts to justify holding him liable. Nearly all courts, execpt Texas',[58] have apparently adopted the requirement in products liability litigation that the defect in the product supplied be a proximate cause, accompanied by the same limitations listed above. Thus, a product defect would not be a proximate cause if (1) harm to the plaintiff was not reasonably foreseeable from a defect of the kind that was proven, (2) harm from the kind of damaging event that occurred was not reasonably foreseeable from a defect of the kind that was proven, or (3) another's conduct was "a new and independent cause" or "superseding cause." Since the supreme court decision in *Hoover v. Franklin Serum Co.*,[59] Texas law requires only that the defect be a producing cause.[60] It is not clear, however, that producing cause means only "but for" cause. Nevertheless, the *Hopkins* decision indicates that in Texas the supplier of a defective product is liable for all factual consequences.

In *General Motors Corp. v. Simmons*[61] defendant Johnson failed to stop at a traffic signal and drove his employer's truck into the left front door of the car driven by Simmons. The impact bent the frame of the door on Simmons' car and exploded the laminated glass in the car window into Simmons' eyes, blinding him. The jury found the glass to be defective and to be a producing

56. 548 S.W.2d at 351.
57. *See, e.g.*, Helene Curtis Indus., Inc. v. Pruitt, 385 F.2d 841 (5th Cir. 1967), *cert. denied*, 391 U.S. 913 (1968); Ford Motor Co. v. Mathis, 322 F.2d 267 (5th Cir. 1963).
58. *See, e.g.*, Ethicon, Inc. v. Parten, 520 S.W.2d 527 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ); 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.).
59. 444 S.W.2d 596 (Tex. 1969).
60. *See* Rourke v. Garza, 530 S.W.2d 794 (Tex. 1975).
61. 558 S.W.2d 855 (Tex. 1977).

cause of the accident. Prior to the trial, Simmons entered into a type of settlement commonly referred to as a "Mary Carter" agreement with Johnson and his employer, Feld, pursuant to which Simmons agreed (1) not to sue Johnson and Feld and (2) to pay Feld fifty percent of each dollar Simmons recovered against General Motors until Feld received $200,000. Feld and Johnson remained in the law suit as named defendants, but the existence of the settlement agreement or its nature was not disclosed to the jury. The jury was, however, informed that Simmons, Johnson, and Feld were allies against General Motors. The trial court rendered judgment on a jury verdict for one million dollars, and denied General Motors either contribution or indemnity. The court of civil appeals[62] held that as a matter of law Johnson's negligence was a proximate cause of all the direct consequences of the accident, including the harm resulting from the defective side window; consequently, General Motors was awarded contribution from Johnson and Feld. Additionally, Johnson and Feld were not entitled to indemnity, and, therefore, the judgment was reduced by one-half because the plaintiff had settled with one of two joint tortfeasors.[63]

On appeal, the supreme court held that the exclusion of the evidence as to the existence of the "Mary Carter" agreement was reversible error because the financial interest that Feld acquired in the outcome of the plaintiff's case against General Motors was a proper subject of cross-examination and proof. The supreme court did, however, agree with the court of civil appeals regarding the issues of contribution and indemnity between Feld and General Motors.

Indemnity, as distinguished from contribution, was a creation of the common law, adopted to prevent unjust enrichment. In regard to contribution, the common law generally made no attempt to work out equitable arrangements between wrongdoers.[64] Therefore, just as contributory negligence was a complete bar to recovery, so one joint tortfeasor who was held liable for the entire damage incurred by plaintiff could not recover contribution from the other tortfeasors.[65] With the emergence of judicially devised exceptions to the contributory negligence bar, such as the doctrines of discovered peril and last clear chance, indemnity rules were developed based on the notion that the parties were not in equal fault (*in pari delicto*).[66] One well recognized rule permits one who is vicariously liable for the

62. 545 S.W.2d 502 (Tex. Civ. App.—Houston [1st Dist.] 1976); *see* Palestine Contractors, Inc. v. Perkins, 386 S.W.2d 764 (Tex. 1964); Keeton, *Torts, Annual Survey of Texas Law*, 28 SW. L.J. 1 (1974).

63. 545 S.W.2d at 520. The opinion of the court of civil appeals also contains some interesting rulings regarding the concept of product defect. *Id.* at 515-16.

64. For a good discussion of the common law development see Davis, *Indemnity Between Negligent Tortfeasors: A Proposed Rationale*, 37 IOWA L. REV. 517 (1952); Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130 (1932).

65. *See* Reath, *Contribution Between Persons Jointly Charged for Negligence—Merryweather v. Nixan*, 12 HARV. L. REV. 176 (1898).

66. Kampmann v. Rothwell, 101 Tex. 535, 109 S.W. 1089 (1908); City of San Antonio v. Talerico, 98 Tex. 151, 81 S.W. 518 (1904); Gulf, C. & S.F. Ry. v. Galveston, H. & S.A. Ry., 83 Tex. 509, 18 S.W. 956 (1892). More recent Texas cases applying this rule include General Motors Corp. v. Simmons, 545 S.W.2d 502 (Tex. Civ. App.—Houston [1st Dist.] 1976), *aff'd*, 558 S.W.2d 855 (Tex. 1977); Heil Co. v. Grant, 534 S.W.2d 916 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.).

negligence of another to have indemnity against the negligent party.[67] Another rule commonly applied, although of questionable value, states that as between negligent tortfeasors, one found guilty of active negligence has the obligation to indemnify one guilty of mere passive negligence.[68] This rule, applicable only to negligent tortfeasors, was rejected by the Supreme Court of Texas in *Austin Road Co. v. Pope*.[69] That decision adopted instead a rule that if one co-tortfeasor breached a duty owed only to the plaintiff, but the other breached a duty owed both to his co-tortfeasor and to the plaintiff, the latter tortfeasor had the obligation of indemnifying the former.[70] Both the active-passive negligence rule and the Texas breach of duty rule were devised to deal with negligent tortfeasors and were created at a time when it was not considered appropriate to quantify fault of the parties to an accident.[71] Therefore some ideas founded purely on negligence theory cannot be satisfactorily transferred to situations involving a strictly liable tortfeasor and negligent tortfeasors. Consequently, where defendants are liable on differing tort theories, present indemnity rules between negligent tortfeasors should be abrogated in favor of an apportionment of damages based on *quantification* of fault; such an approach would parallel the current abolition of exceptions to the contributory negligence defense, such as last clear chance and discovered peril, under the new comparative negligence scheme. When two or more tortfeasors are at fault they should share the responsibility to some degree; no one should be entirely responsible.

The initial basis for a move in this direction was established by the holding in *Simmons* that the breach of duty rule does not apply to the manufacturer simply because it breached a warranty obligation or duty to the purchaser. Unless the supplier's conduct endangers the person or property of the defendant co-tortfeasor, as well as that of the plaintiff, the breach of duty rule apparently does not apply.

In virtually all cases, the simplest, fairest, and best way to apportion damages between a strictly liable defendant and a negligent defendant would be to divide them equally, even in cases in which the defectively dangerous product endangers the co-tortfeasor as well as the physically injured party. Accordingly, the supreme court held in *Simmons* that article 2212, the general contribution statute,[72] governs apportionment of damages in such cases. In so doing, the court rejected application of the contribution provisions of the comparative negligence statute, article 2212a,[73] and limited its

67. Orlove v. Philippine Air Lines, Inc., 257 F.2d 384 (2d Cir. 1958) (carrier); Waylander-Peterson Co. v. Great N. Ry., 201 F.2d 408 (8th Cir. 1953) (independent contractor); American S. Ins. Co. v. Dime Taxi Serv., Inc., 275 Ala. 51, 151 So. 2d 783 (1963) (servant); Lunderberg v. Bierman, 241 Minn. 349, 63 N.W.2d 355 (1954) (owner of automobile for driver's conduct).

68. *See, e.g.*, Chicago Great W. Ry. v. Casura, 234 F.2d 441 (8th Cir. 1956); Daly v. Bergstedt, 267 Minn. 244, 126 N.W.2d 242 (1964); Western Cas. & Sur. Co. v. Shell Oil Co., 413 S.W.2d 550 (Mo. App. 1967).

69. 147 Tex. 430, 216 S.W.2d 563 (1949). This position had previously been espoused by Gus M. Hodges in Hodges, *Contribution and Indemnity Among Tortfeasors*, 26 TEXAS L. REV. 150 (1947). *See also* Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130 (1932).

70. 147 Tex. at 433, 216 S.W.2d at 565.

71. *See* Hodges, *supra* note 69.

72. TEX. REV. CIV. STAT. ANN. art. 2212 (Vernon 1971). The provision embodies the equal-division rule of Palestine Contractors, Inc., v. Perkins, 386 S.W.2d 764 (Tex. 1964).

73. TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1978).

application to joint tortfeasors to those cases where all parties were negligent.[74] Indeed, it is difficult to interpret the comparative negligence statute to apply to any case except that in which the plaintiff was contributorily negligent and all the defendants were negligent. While such an interpretation renders the statute workable, it reaches improper results in many situations because the plaintiff can be denied all recovery if guilty of the greater negligence and because of the offset rule in the statute.

In *Simmons* the court concluded its opinion by predicting that "[a]rticle 2212a and the comparative causation advanced in *General Motors Corp. v. Hopkins* . . . portend problems which may retard the orderly trial of personal injury and property damage cases. This court respectfully invites further legislative study and amendments of Articles 2212a and 2212."[75] The court's assessment of the situation is correct, but it is doubtful that the matters can be resolved solely by the legislature. I would suggest: (1) abolition of the comparative negligence statute and the substitution of a principle of pro rata apportionment of damages between tortfeasors, including a negligent victim; (2) the adoption by the Texas Supreme Court and the legislature of the principle that contributory negligence never bars recovery but always requires an apportionment of damages between the plaintiff and the defendants on a pro rata basis, whether strictly liable or liable on a negligence theory; and (3) the abolition of voluntary assumption of the risk as a defense to strict liability.

74. 558 S.W.2d at 862-63. The court's construction of article 2212a's contribution provision was based on the provision's failure expressly to mention the term "strict liability." *Id.*

75. 558 S.W.2d at 862.