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Torts

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I. PRODUCTS LIABILITY

A. Theories of Recovery and Kinds of Losses

Last year's Annual Survey Article on Torts suggested that some of the complexity in products liability law in Texas and other states is unnecessary in order to allocate the costs of losses between those who buy, use, and are otherwise adversely affected by products, and those who make and sell such products. Much of the complexity can be eliminated by adopting, through court decision and legislation, a single theory of recovery for each particular kind of loss as opposed to permitting the plaintiff to rely on two or three theories for the same loss. Since the Uniform Commercial Code as adopted in Texas specifically provides for recovery on a warranty theory for all losses proximately caused by a breach of warranty, the single theory of recovery can only be accomplished by eliminating recovery against a seller on a tort theory. Such a solution, however, is utterly unreasonable when applied to personal injuries produced by dangerously defective products. Two decisions by the Texas Supreme Court, Mid Continent Aircraft Corp. v. Curry County Spraying Service, Inc. and Signal Oil & Gas Co. v. Universal Oil Products, can help in identifying a single theory of recovery for a particular kind of loss. While these two cases do not settle the law, they do constitute a substantial step toward resolving the problem.

In Mid Continent the plaintiff, an operator of a crop-spraying service, purchased a used airplane from the defendant on an "as is" basis. Twenty-
one days later, and after thirty hours of engine time, the engine failed in flight while the pilot was spraying a field. The pilot landed the aircraft on a rough country road, damaging the fuselage and wings. Recovery appeared to depend upon whether the defendant could disclaim strict liability in tort and contract warranty with an "as is" disclaimer. The majority, however, did not reach the disclaimer of strict liability in tort issue, stating that since the loss was an "economic loss to the purchased product itself," the basis of recovery would be limited to a UCC warranty theory. This conforms to the suggestion made in last year's survey. Admittedly, there is substantial diversity of opinion on this point throughout the country. For example, in the dissenting opinion in Mid Continent Justice Pope perceptively observed that the single-theory approach to recovery espoused in last year's Annual Survey Article would have been better accepted if a reason had been given in support of its conclusion, especially in view of the fact that the defect in the airplane was the kind that could have endangered other things and people as well as the product itself.

In Signal an action was brought by Signal Oil and Gas Company to recover damages to a reactor-charged heater, to the refinery surrounding the heater, and to other nearby property, which resulted from an explosion and fire caused by an alleged defect or defects in the heater. The primary defendants were Procon, the contractor who constructed an isomax unit and hydrogen plant into which the heater was installed, and Alcorn, the manufacturer of the heater who sold the heater directly to Procon. Arguably, a strict liability action against Procon should not have been available because Procon constructed the isomax unit and hydrogen plant at Signal's plant in Houston, thus possibly qualifying as an independent contractor. An independent contractor who constructs a building on land owned by the contractor's employer is normally not regarded as a seller of a product, but is regarded as a provider of a service and is not subject to strict liability in tort. On the other hand, in Texas and other states one who sells homes on property he owns and develops is subject to either strict liability in tort or breach of an implied warranty of habitability in the sale of such homes in much the same way as a manufacturer of goods. The technical distinction between an independent contractor who builds a house on land

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7. The Amarillo court of civil appeals held that an "as is" disclaimer did not absolve a seller of strict tort liability. 553 S.W.2d 935 (Tex. Civ. App.—Amarillo 1977), rev'd on other grounds, 572 S.W.2d 308 (Tex. 1978); see Keeton, supra note 1, at 8-9.
8. 572 S.W.2d at 312.
9. Id. at 313.
10. See note 6 supra.
11. 572 S.W.2d at 316-17 (Pope, J., dissenting).
owned by his employer and one who sells homes on property he owns and develops may not justify a distinction in liability for losses due to defective conditions arising from the construction process or the products installed in the building. In any event, the majority in Signal seemed to rely on the fact that under the contract title did not pass from Procon until construction was completed. As a result, Procon was regarded as a seller of the isomax unit and the hydrogen plant. The other defendant, Alcorn, was also a seller, but only of the heater, a component part of the refinery that was to be constructed. In other words, the suit was against both an assembler-contractor and a component part manufacturer for physical harm to the component itself, to the assembled product, and to other property. The jury found total property damage to be approximately $378,000, whereas the cost of the defective heater itself was only about $196,000. The majority regarded the physical damage to the refinery as damage to property other than the product itself, the heater, and concluded that the existence of such collateral property damage, in addition to the damage to the product itself, authorized recovery for such damages on a strict tort theory as well as on a warranty theory. The majority stated: "To the extent that the product itself has become part of the accident risk or the tort by causing collateral property damage, it is properly considered as part of the property damages, rather than as economic loss."

In summary, the following propositions can be derived from the majority opinion: (1) the heater was the defective product; (2) the collateral damage to the refinery, of which the heater was a component part, was caused by the defective heater; and (3) when property other than the defective product itself suffers physical harm, all of the damages resulting from the accident are recoverable on a strict tort liability theory as well as on a warranty theory.

The contrast in issues in the majority and dissenting opinions in Signal and Mid Continent provide a useful basis for a second attempt to propose the adoption of a single theory of recovery for a particular kind of loss resulting from a defective product. Such a theory is valuable for two reasons. First, it would simplify this complex area of tort law. Secondly, there are a variety of issues that ought not to and often cannot be answered in the same way with respect to all kinds of losses. Four of the most important of these issues are: (1) the condition of a product that will serve as a basis for finding that the product is defective or unfit; (2) the class of persons, if any, other than the purchaser who can recover for a particular kind of loss; (3) the validity of an agreement by the purchaser and the seller to alter the obligations that would otherwise be imposed on the seller

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14. 572 S.W.2d at 331. "Procon functioned as the assembler of the component parts into a final completed product, the isomax unit and hydrogen plant. Procon maintained title in such product until it was sold to Signal by a bill of sale." Id.
15. Id.
16. Id. at 325 n.7.
17. Id. at 325.
18. Id.
by including in the contract (a) disclaimers of warranties, (b) limitations on remedies, or (c) limitations on the duration of a warranty; and (4) defenses and other roadblocks to recovery attributable to the conduct of the purchaser, the user of the defective product, the user of a different product, or the victim. The rules relating to the dual remedies of rescission and damages when intangible economic losses are suffered as a consequence of a breach of warranty are set forth in some detail in the UCC.\(^{19}\) It is quite clear that the economic and policy considerations reflected in the Code's allocation of risks between buyers and sellers of goods are not the same as the considerations related to the resolution of personal injury claims. The legislative resolution of economic loss allocation in the Code should not be circumvented. The notion that the legislature has not provided the exclusive remedy cannot be rationally justified, either constitutionally or as a matter of interpretation.

For present purposes, defective product losses can be categorized into four areas. These areas are personal injuries, intangible economic losses attributable neither to personal injuries nor to physical damage to the product itself or other property, physical damage to property other than the defective product itself, and physical damage to the defective product itself.\(^{20}\)

**Personal Injuries.** The development of strict liability in tort for defective products was inspired by the astronomical costs of treating persons injured or killed by defective products. In 1960 the decision in *Henningsen v. Bloomfield Motors, Inc.*\(^{21}\) first developed the premise that costs arising from dangerously defective products should be borne by those in the business of making and selling such products. Generally, this enterprise liability has been justified on three grounds: (1) the seller is in a position to avoid the costs of accidents by the institution of safer practices and procedures;\(^{22}\) (2) proof of negligence or fault in the design or manufacture of a defective product is difficult to achieve;\(^{23}\) and (3) typically, the maker or other seller-defendant is in a position to escape such costs by shifting them to the consuming public as a cost of doing business.\(^{24}\) Moreover, in an action to recover damages as resulting from a dangerously defective prod-

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20. In last year's *Survey* Article seven categories were listed. Keeton, *supra* note 1, at 2-6. The list was unnecessarily complex, however, and, on further reflection, I believe only these four categories are needed for clear analysis.


TORTS

Product, answers to important issues such as standing to recover, availability of defenses, and validity of disclaimers cannot be properly resolved in the context of commercial law rules. This notion is probably true even as to personal injuries of the purchaser himself, although historically, a party to a contract could agree to a disclaimer of tort liability that would otherwise be imposed in many situations. Such contractual disclaimer of tort liability, however, probably should not be tolerated in the products liability area. In any event the problem should be dealt with in the context of a set of rules quite unlike those applicable in some instances to the commercial law of sales. In fact, the Joint Committee on the Study of Products Liability of the Texas House of Representatives, in a preliminary report, recommended legislation that would remove any recovery for damages due to physical harm to the person or property other than the defective product itself from coverage by the Business and Commercial Code. Only legislative action can limit recovery for personal injury losses to a single theory based upon tort.

Intangible Economic Losses. The appropriate theory of recovery for intangible economic losses was discussed in last year's Annual Survey. In the 1977 case of Nobility Homes, Inc. v. Shivers the Texas Supreme Court held that intangible economic losses resulting from defective products are recoverable only under a breach of warranty action under the UCC. Notwithstanding some authority to the contrary, this seems to be the generally accepted position in most jurisdictions. Legislation such as the UCC, the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act of 1974, and the Texas Deceptive Trade Practices Act demonstrates a legislative attempt to provide the exclusive remedy for economic losses. These legislative enactments ought to be the controlling remedy for economic losses. The creation of a judicial tort theory, either negligence or strict liability, to correct what is conceived to be an inadequate or improper legislative action, is not the appropriate solution.

Physical Harm to Property Other than the Defective Product Itself. Courts have begun to distinguish between a claim for damages resulting from physical harm to property and a claim for damages resulting from personal

25. See ReSTATEMENT (SECOND) OF TORTS § 496B (1965) and comments following. See also Keystone Aeronautics Corp. v. R.J. Enstrom Corp., 499 F.2d 146 (3d Cir. 1974) (clearly drawn disclaimer of tort liability will be upheld if parties are both enterprisers).
27. Keeton, supra note 1, at 6-8.
28. 557 S.W.2d 77 (Tex. 1977).
29. Id. at 80.
injuries. Prior to the development of strict liability in tort, it was clear that a seller of a defective product was subject to two theories of liability: a negligence theory for physical harm both to property of strangers to the contract and to property of the purchaser other than the product itself, and a warranty theory for damage to other property of the purchaser as consequential damages. Noting these two avenues of recovery, one justice stated in *Brown v. Western Farmers Association* that if he were writing on a clean slate, he would limit the application of strict liability in tort to injuries to the person, because it was the "human carnage caused by defectively dangerous products" that brought about strict liability in tort. The Nebraska Supreme Court restricted strict liability to personal injuries in *Hawkins Construction Co. v. Matthews Co.* As one justice observed in that case, the owner of tangible personal property usually protects himself against most accidental losses through first party insurance, as no doubt the plaintiffs did in *Mid Continent* and in *Signal.* Thus, there is very little social utility in transferring accident costs from one insurance company to another insurance company, thereby adding litigation fees to the total costs of insurance. It seems clear that the admonitory function of tort law in this area can be adequately served by limiting the plaintiff's theory of recovery to strict liability for personal injuries and to negligence liability for property damages.

First party insurance coverage of the type contemplated by the Nebraska justice, however, would often not extend to all kinds of accidents caused by the defective product. Even assuming broad insurance coverage, the amount of coverage may be for less than the full value of the damaged or destroyed product. A tort theory based on either negligence or strict liability is necessary to allow recovery by strangers to the contract, and in such cases the property damage recovery would often only be incidental to the primary recovery of damages for personal injuries. Consequently, strangers to the contract should not be required to prove negligence as a basis for recovery for property damage, but only to prove a product defect.

It would at first appear reasonable to require that economic losses of the

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34. Spence v. Three Rivers Builders & Masonry Supply, Inc., 353 Mich. 120, 90 N.W.2d 873 (1958) (cinder blocks caused damage to a cottage built of such blocks); Ebers v. General Chem. Co., 310 Mich. 261, 17 N.W.2d 176 (1945) (damage to fruit trees caused by an emulsion used to kill borers).
35. So long as consequential damages proximately result from a breach of warranty, recovery is available under § 2-715(b) (2) of the UCC.
37. 521 P.2d at 544.
39. 209 N.W.2d at 658 (Clinton, J., concurring).
40. *Id.* at 658-59. *See also* Wulff v. Sprouse, 262 Ore. 293, 498 P.2d 766 (1972) (insurance company joined with a homeowner in bringing suit for damages to home and contents caused by defective electric blanket).
buyer attributable to any kind of property damage be recoverable pursuant to sales or commercial law. A buyer that agrees to some kind of a disclaimer or "as is" transaction, however, does not ordinarily contemplate how costs should be allocated if an accident results from a dangerous condition of the product that physically harms something other than the product itself. As stated earlier, a Texas legislative committee has recommended excluding from the kinds of consequential damages recoverable under the UCC any physical harm to property other than damages to the defective product itself.41

**Physical Damage to the Defective Product Itself.** It has occasionally been held that if a dangerously defective product causes an accident, then any loss resulting from that accident, including damage to the product itself, should be recoverable on a theory of strict liability in tort.42 Justice Pope argued for such a theory in his dissent in *Mid Continent*43 and in his concurrence in *Signal*.44 Although this is a reasonable position, the risk of harm to the product itself due to the condition of the product is something that should be left to the parties to negotiate, especially if the parties are sophisticated. Quite correctly, however, a distinction is currently made in the law between consumer and nonconsumer transactions. The Magnuson-Moss Warranty Act substantially restricts freedom of contract in consumer transactions.45 Nevertheless, the law of sales should control whether a buyer may recover for any defect in the purchased product that results in depreciation in the value of that product. The policy considerations justifying the imposition of strict liability, irrespective of the contract, on those who sell dangerously defective products can be adequately fostered by imposing liability for personal injuries and other property damage.

Other reasons support the position that the law of sales and not the law of torts ought to control damage to the product itself. When damage is limited to the product itself, it may be difficult to determine whether the damage is attributable to a so-called accident. Distinguishing "accidental" damage to the product from mere economic loss is difficult in many cases, such as a defect in a component of a television set that burns out the tubes, or an electrical connection to the engine of a refrigerator that destroys the engine. If the theory of recovery is made to depend on the existence of an accident, liability for this kind of loss would be based upon an irrelevant issue, that is, whether the damage was due to a sudden calamitous event.46

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44. *Signal Oil & Gas Co. v. Universal Oil Prods.*, 572 S.W.2d 320, 331-33 (Tex. 1978) (Pope, J., concurring).
46. For an example of a court making such a finding, see Cloud v. Kit Mfg. Co., 563 P.2d 248, 251 (Alas. 1977).
In any event the "accident" distinction is questionable since tort liability for personal injuries for defective products does not depend on the happening of such an event. It can, however, be imposed for an occupational disease or other disease to persons or animals that is contracted as a consequence of a protracted use of drugs and other chemical products.\(^\text{47}\)

It is possible to distinguish defectively dangerous products from nondangerous, inferior products. If, however, a dangerous defect is discovered before an accident occurs and is repaired by the purchaser, the right to recover for that loss should depend upon the available contractual remedies, including warranties, just as recovery would be limited to the contract when the buyer must repair a product that is unsuitable for some reason unrelated to a risk of physical harm to person or property.\(^\text{48}\)

In *Mid Continent* an airplane was sold to the plaintiff on an "as is" basis. Consequently, if any part or component of the assembled airplane, albeit made by another, was defective, the defect could be said to have caused harm to the product itself. It is not difficult to identify what the defendant sold, and what the bargain was between the sophisticated parties. If the plaintiff did not have the airplane insured against loss, then it was a valid business decision to be a self-insurer. Denial of recovery because of the disclaimer of warranty is not unfair in such a case.

In *Signal* the court seemed to hold that if the product caused an accident that harmed property other than the defective product itself, then all property damages would be recoverable on a strict tort theory as well as a warranty theory. In so holding reliance was placed on an ambiguous comment by the author in last year's *Survey* Article.\(^\text{49}\) But the court's statement in *Signal* and the author's comment last year are ambiguous and unclear in more than one respect. Arguably, the theory upon which a recovery is available for a loss should depend entirely on the type of loss, and not on whether some other type of loss was also suffered. I would agree with the proposition in the dissenting opinion in *Mid Continent*: the theory of recovery for damage to the airplane should not depend upon whether physical injury to a person or damage to other property also resulted from the airplane crash.\(^\text{50}\) Thus, if a defectively dangerous car

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\(^{48}\) See Trans World Airlines, Inc. v. Curtiss-Wright Corp., 1 Misc. 2d 477, 148 N.Y.S.2d 284 (1955), aff'd mem., 2 App. Div. 2d 666, 153 N.Y.S.2d 546 (1956), in which a purchaser who spent considerable sums repairing allegedly dangerously defective airplane engines was denied recovery from the manufacturer because of lack of privity. In discussing the effects of a contrary result, the court stated:

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.

148 N.Y.S.2d at 290 (emphasis added).

\(^{49}\) See note 6 supra.

\(^{50}\) 572 S.W.2d 308, 317 (Pope, J., dissenting).
causes a collision that destroys itself and another car, recovery for damages to the nondefective car would be based on a tort theory, while damages to the defective car would be based on a warranty theory.

In *Signal* the contractor, Procon, sold the refinery. The other defendant, Alcorn, sold the heater, the component part. For the reasons just outlined, the seller of an assembled product should not be liable for harm to the product itself except on a warranty contract theory. But what about the liability of the seller of the component part? Arguably again, one who sells a product that is not to be used "as is" but as a component part of a product to be assembled by the purchaser, ought not to be subject to liability on any different theory than that on which the assembler is held liable. This is because the ultimate purchaser who incurred a loss purchased the assembled product, and the harm is, therefore, harm to the defective product itself. Hence, under this analysis harm to the refinery is harm to the product itself.

B. The Seller's Liability for Physical Injury and the Meaning of Defect

No issue has produced more diversity of opinion and outright misunderstanding as the meaning of defect when that term is used in relation to design hazards. Section 402A of the *Restatement (Second) of Torts* provides that one who sells a product "in a defective condition unreasonably dangerous . . . is subject to liability for physical harm thereby caused."51 This simply means that the defect must subject users or others to an unreasonable risk of physical harm. The commentary goes on to say that to be unreasonably dangerous "[t]he 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."52

One of the difficulties with the law of products liability is that many advocates and courts have accepted section 402A and the commentary—much of the latter of which is inconsistent with the law as it has developed—as the black letter law. In fact, when the comments were written, most of the issues had not even been raised. Only subsequent litigation and the adversary system could adequately raise these issues.

The test as set forth in the comments to section 402A reflects the commercial law origins of strict liability and is therefore inappropriate as a test for identifying a defectively dangerous design hazard. This is true for several reasons. First, the mere fact that a drug or some other product has a risk or hazard related to its use that neither the seller nor the purchaser or other user contemplated should not ipso facto result in a finding that the product as formulated is defective. It could be that the drug is of great benefit to modern science and the harmful side effects minimal compared

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52. *Id.*, Comment i.
with the benefits.\textsuperscript{53}

Secondly, the mere fact that a product is not more dangerous than would be contemplated does not of itself require a finding that it was a nondefective product. Such a requirement would mean that a plaintiff would never be able to recover for harm resulting from an obvious hazard.\textsuperscript{54} Moreover, industry practices would control how safely products should be designed since that is all that consumers would expect.\textsuperscript{55}

Thirdly, the standard found in section 402A and its commentary is vague and impractical. It has often been applied when the ordinary purchaser would not have considered certain performance characteristics of the product. For example, the ordinary automobile purchaser may not consider the possibility of the car catching fire after a collision, or the possibility of a side window of a car shattering and injuring the passengers.\textsuperscript{56}

Regardless of these criticisms, the section 402A test or a facsimile thereof has been used frequently by trial judges in Texas in total disregard of what the Texas Supreme Court suggested in \textit{Henderson v. Ford Motor Co.}\textsuperscript{57} According to \textit{Henderson}, a product is defectively designed if the product is unreasonably dangerous. A product is unreasonably dangerous if either: (1) it is so likely to be harmful to persons or property that a reasonable, prudent manufacturer who had actual knowledge of its harmful character would not place it on the market, or (2) it is dangerous to an extent that it "would not meet the reasonable expectations of the ordinary consumer as to its safety."\textsuperscript{58}

This approach seems to employ a bifurcated test similar to one adopted by the California Supreme Court in \textit{Barker v. Tull Engineering Co.}\textsuperscript{59} It is clear from a reading of \textit{Henderson} that both tests involve a weighing of risks against utility, one from the viewpoint of a seller knowing the dangers, and the other from the viewpoint of a consumer knowing the dangers. In reality, the tests are one and the same because the "reasonable person" will arrive at the same conclusion as to whether the danger is or is not unreasonable when cast in the role of either a seller or a buyer.


\textsuperscript{55} This would make defects harder to prove than negligence since, in negligence cases, custom is not controlling. See W. Prosser, \textit{supra} note 12, \S\ 33, at 166-68.

\textsuperscript{56} \textit{Cf.} General Motors Corp. v. Simmons, 558 S.W.2d 855 (Tex. 1977) (shattered window case not applying test for defect).

\textsuperscript{57} 519 S.W.2d 87 (Tex. 1974).

\textsuperscript{58} \textit{Id.} at 92 (emphasis added).

\textsuperscript{59} 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978). Using the \textit{Barker} test, a product is defectively designed in a particular way if the plaintiff proves \textit{either} that it "failed to perform as safely as the ordinary consumer would expect when used in an intended or reasonably foreseeable manner," or that the design in some particular respect proximately caused injury and the defendant \textit{fails to prove}, "in the light of relevant factors, that, on balance, the benefits of the challenged design outweigh the risk of danger inherent in such design." \textit{Id.} at 426-27, 573 P.2d at 452, 143 Cal. Rptr. at 234.
The Supreme Court of Oregon recognized this similarity in *Phillips v. Kimwood Machine Co.* The product in that case was a sanding machine that had no protective guards. As a result, it was alleged to be defective since it “could not be operated in the manner and for the purpose for which it was manufactured and sold without throwing back towards the operator panels of materials being sanded.” The court considered whether a seller-oriented standard or a user-oriented standard would be more appropriate, and concluded that the two standards would be the same because a reasonable seller would be selling the same product that a reasonable buyer would believe that he was entitled to have. This of course makes sense only if we presume knowledge of the danger on the part of both the seller and the consumer, leaving the issue of product defect to turn on the reasonableness of exposing users and others to such danger.

Three cases were decided during the survey period that seem to confirm the existence of a single test, two by the Texas Supreme Court and one by the Beaumont court of civil appeals in which the Texas Supreme Court has granted writ. In *Miller v. Bock Laundry Machine Co.* the eleven-year-old plaintiff had his left arm severed at the shoulder when it was caught in a centrifugal extractor clothes dryer that was being used at a laundromat. The extractor was equipped with a safety device to prevent the lid from opening while the basket was still spinning. After eighteen years of use the dryer lid safety device failed to work. The expert evidence indicated that the failure occurred because one of the rubber pads on which the operating mechanism rested had deteriorated. The instruction manual indicated that this should be expected. The court relied heavily on expert testimony clearly indicating that when the dryer was built an economically feasible design existed that would have eliminated this danger altogether, without relying on users for proper maintenance. In concluding that the evidence in the record justified a jury finding of defect, the court set forth the *Henderson* bifurcated test.

In *Gonzales v. Caterpillar Tractor Co.* the plaintiff sued the manufacturer of a Traxcavator, a tractor-type machine designed to operate primarily as a front-end loading machine in muddy conditions in which wheeled vehicles would not be suitable. A step mounted on the side of the Traxcavator was used to enter and leave the vehicle's cabin. The plaintiff suffered injuries when he fell from the step, which he claimed was defectively designed. The trial court submitted the issue of defective design of the step...
in terms of the section 402A "ordinary user's contemplation" test, and the jury found for the plaintiff. The court of civil appeals held that there was no evidence to support the finding, citing with approval an article by Professor James A. Henderson. The article takes the position that the conscious design choices of product manufacturers should not be evaluated by courts and juries, contending that in the area of design defect courts are incapable of deciding the complicated polycentric issues involved in the weighing of many relevant factors. The court of civil appeals observed that both the section 402A charge to the jury and the supreme court bifurcated test for design defect are inexplicably being transformed into a balancing test that weighs the risk of harm against the utility of the product. This is an understandable and reasonable criticism. The court further stated:

Without equating voluntary assumption of the risk with strict liability, some matters usually associated with that defense become of primary importance in disposing of the threshold question of the manufacturer's liability. Any minimal danger presented by reason of the design of the step was open, obvious, and objectively chargeable to the Plaintiff.

The supreme court reversed, holding that the obvious nature of the danger did not alter the fact that it was technically and economically feasible to design a safer system. Although the supreme court did not specifically address the issues raised by the court of civil appeals, the supreme court opinion indicates that the ordinary purchaser or user contemplation test involves balancing risk against utility just as a seller-oriented test does, and that such a balancing test is the only way to determine whether a design hazard makes the product defective.

Before discussing General Motors Corp. v. Turner, the third case decided during the survey period that addresses the test for determining a design defect, it might be advantageous to propose a possible jury charge on the issue of defective design that would seem to conform to the results of cases recently decided by the supreme court. It is as follows:

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69. 562 S.W.2d at 580.
72. 562 S.W.2d at 578. See also, Wade, Strict Tort Liability of Manufacturers, 19 SW. L.J. 5, 17 (1965), in which the author lists factors that should be considered in balancing the utility of the product against the magnitude of the risk.
73. 562 S.W.2d at 579.
74. 571 S.W.2d 867 (Tex. 1978).
75. 567 S.W.2d 812 (Tex. Civ. App.—Beaumont 1978, writ granted). The supreme court has granted a writ of error in Turner and oral arguments have already been heard. It is hoped that the ambiguities discussed herein will be resolved.
A product is defective as designed in a particular aspect if the product as so designed is unreasonably dangerous.

The product is unreasonably dangerous as so designed if—even though at the time of sale ordinary care was exercised in providing warnings and instructions about any danger that was known or should have been known in the exercise of ordinary care—a reasonable person would conclude that the magnitude of the danger in fact, as it is proved to be at the trial, from intended and reasonably foreseeable uses, outweighs its utility or usefulness.

[The magnitude of the danger as so designed is affected by such matters as the degree of likelihood of injury producing accidents from misuse and unintended uses as well as from intended and proper uses, the seriousness of the harm that is likely to result when an accident does occur, and the obvious nature of the danger and therefore the avoidability of some or all of the harm by proper use.]

The utility or usefulness of the product as so designed is affected by such matters as the importance of the need that is served by the product, the technical and economic feasibility or practicability of serving that need with a safer design, and the availability of other products, if any, serving that need about as well with greater safety.

This is simply an elaboration of a test previously proposed and seemingly approved in the dissenting opinion in Henderson. The proposed charge dispenses with language about either consumers or sellers, and it directly states that the test requires a balancing of danger against utility. In the design area litigants should be required to put into issue the problem of weighing danger against usefulness in deciding when the threatened danger exposes persons or property to an unreasonable risk of harm. This does not mean, however, that it is irrelevant that a product fails to conform to usual expectations. If the product fails to conform to usual consumer expectations, perhaps the manufacturer should not have the burden of coming forward with evidence to justify this failure; otherwise the inference can be drawn that the danger outweighs the benefits.

Some reservation must be expressed as to the usefulness of the danger and utility definitions, which appear in brackets in the proposed charge. Even after discussions with leading advocates, I remain uncertain as to whether an attempt to instruct the jury on the various factors related to danger and utility will be on the whole helpful or merely confusing. Such an instruction could also be considered a comment on the weight of the evidence, but that is a technical argument with which I am not in sympathy.

76. Keeton, Product Liability and the Meaning of Defect, 5 ST. MARY'S L.J. 30, 37-38 (1973), in which the author states: A product is defective if it is unreasonably dangerous as marketed. It is unreasonably dangerous if a reasonable person would conclude that the magnitude of the scientifically perceivable danger as it is proved to be at the time of trial outweighs the benefits of the way the product was so designed and marketed.

77. Henderson v. Ford Motor Co., 519 S.W.2d 87 (Tex. 1974), stating: “Dean Keeton's definition of what constitutes an unreasonably dangerous product fits the instant case precisely.” Id. at 97 (Johnson, J., dissenting) (citing Keeton, supra note 76, at 37-38).

78. TEX. R. CIV. P. 277.
thy if such a charge would be helpful to the jury and fairly presents the interests to be weighed.

In General Motors Corp. v. Turner a motorist was injured when the roof of his car collapsed in a rollover, placing the crashworthiness of the vehicle in issue. Pursuant to the trial judge's charge, which used the section 402A consumer contemplation test, the jury found that the car was defective as designed. The defendant appealed, claiming that the trial court's charge to the jury was error because it failed to employ a balancing test in instructing the jury on the definition of "unreasonably dangerous." The court of civil appeals agreed. The opinion stated that under the supreme court's rulings in Henderson and General Motors Corp. v. Hopkins a balancing test is not required as part of the instructions to the jury when the defect is the producing cause of the accident, but is required when the defect merely aggravates the injuries.

The court's opinion indicates that the jury should be instructed to balance the following factors to determine whether a design for crashworthiness is defective:

1. The utility of the product to the user and to the public as a whole weighed against the gravity and likelihood of injury from its use;
2. The availability of a substitute product which would meet the same need and not be unsafe or unreasonably expensive;
3. The manufacturer's ability to eliminate the unsafe character of the product without seriously impairing its usefulness or significantly increasing its costs;
4. The user's anticipated awareness of the dangers inherent in the product and their avoidability because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.

This approach has several flaws. In the first place, I can perceive no reason for distinguishing between design hazards that cause accidents and those that merely aggravate injuries received in accidents caused in other ways. Moreover, item (1), when properly stated, should be the whole test and not simply a factor. The question is whether the danger outweighs the utility of the product, and that judgment is to be made by the jury, except when there could be no reasonable difference of opinion as to whether a reasonable person would conclude that the danger in fact outweighs the utility.

The Turner opinion illustrates the danger in charging the jury on all the

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80. Id. at 815 n.2. The court instructed the jury that "'unreasonably dangerous' means 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." Id.
81. See notes 57-58 supra and accompanying text for a discussion of Henderson.
82. 548 S.W.2d 344 (Tex. 1977). In Hopkins the court approved the alternative test used in Henderson. Id. at 347 n.1. See notes 57-58 supra and accompanying text for a discussion of the test employed in Henderson.
83. 567 S.W.2d at 816.
84. Id.
85. Id. at 818 (footnote omitted).
considerations that are relevant in any given case. It may be better to allow advocates the freedom to illuminate the danger-utility test through the particular facts at hand rather than attempt a stereotyped list of factors to be used in all cases. A carefully worded explanation, however, such as the one set out in the suggested charge, would contribute to the jury's understanding of the problem.

Addendum

On March 21, 1979, the supreme court affirmed the decision of the court of civil appeals in Turner by way of remanding the case to the trial court. In doing so, however, disapproval was expressed of much of what was said in the opinion of the court of civil appeals. The court concludes that:

1. By the term “defectively designed” is meant a design that is “unreasonably dangerous”;

2. Unreasonably dangerous is a concept that necessarily implies a balancing of the danger in fact of a design against its utility. This therefore becomes important on the kinds of evidence that will be admissible, on the sufficiency of the evidence to justify a finding of defect, and on the nature of the arguments that can be made to the jury;

3. The bifurcated test for submission of the issue of design defect to the jury as set forth in Henderson will no longer be applicable;

4. A definition of “unreasonably dangerous” will no longer be required [or permitted] in the submission of a case to the jury. The jury is not to be instructed even about the necessity for weighing danger against utility;

5. In deciding when a design is defective no distinction is to be made between design hazards that cause accidents and those that merely aggravate injuries received in accidents caused in other ways.

II. Occupiers of Land

In the 1975 case of Farley v. M M Cattle Co. the Texas Supreme Court abolished voluntary assumption of the risk as a defense against claims seeking recovery on a theory of negligence. The court, however, did not rule out altogether the notion that a person may sometime be entitled only to information about a certain danger inherent in a course of action he is about to undertake. If the person is informed of the risks involved, his insistence on proceeding constitutes a bar to recovery; the defendant is not guilty of any breach of duty to such a person. The court in Farley, in other words, did not abolish the rule that a defendant can defend an action by

87. 529 S.W.2d 751 (Tex. 1975).
88. This holding was forecast in Rosas v. Buddies Food Store, 518 S.W.2d 534 (Tex. 1975), in which an invitee slipped and fell on a wet floor in the defendant's store.
89. The court stated that its decision would not affect the use of the voluntary assumption of risk defense "in strict liability cases in which there is a knowing and express oral or written consent to the dangerous activity or condition." 529 S.W.2d at 758.
proving that he gave the plaintiff adequate warning of risks or hazards not otherwise appreciated by the plaintiff. Still, the abolition of voluntary assumption of risk as a defense demonstrates the court's inclination to find that, normally, a victim's willingness to encounter a danger resulting from the negligence of the defendant should not have any effect on recovery.

Hence, it was predictable that the same considerations that led to the abolition of the assumed risk defense would also lead to the abolition of any rule that allowed an occupier of land to give an invitee no more than an adequate warning when the danger was not otherwise obvious. In *Parker v. Highland Park, Inc.* the supreme court held that the no-duty rule is no longer available when injuries to invitees result from obvious dangers on defendant's land. In *Parker* the plaintiff was the guest of an apartment complex occupant and was injured when descending a darkened stairway. The suit was against the owner-lesser of the complex who was in occupancy and control of the stairway. As the court noted, the award of damages could have been based on a narrow ruling that the plaintiff as a guest of the tenant had a right to come on the premises without having the permission of the defendant-owner of the complex. Instead, the court chose to adopt the broad rule that thereafter all premises cases involving injuries to invitees would be tried on the issues of defendant's negligence and plaintiff's contributory negligence. Consequently, the obviousness of the dangerous condition that results in an accident is a factor that has a bearing on both defendant's negligence and plaintiff's contributory negligence. Consequently, the obviousness of the dangerous condition that results in an accident is a factor that has a bearing on both defendant's negligence and plaintiff's contributory negligence, since an accident resulting from an obvious danger is one that normally can be avoided. It shall not be conclusive, however, that either the defendant exercised ordinary care in the protection of others or that the plaintiff failed to exercise reasonable care in his own behalf.

The opinion emphasized that the case did not involve the liability of an occupier to either a licensee or a trespasser. As to the duty owed to a licensee, the supreme court in 1976 in *Lower Neches Valley Authority v. Murphy* held that a defendant-occupier would not be liable if the danger was as obvious to the licensee as it was to the occupier, or if the occupier warned the licensee so as to make him aware of the danger. Thus, a defendant's duty of care to some persons under certain circumstances may, notwithstanding *Parker*, be satisfied as a matter of law by warning of dangers not otherwise appreciated. The recognition of such a proposition, however, is a far cry from a general defense of voluntary assumption of the risk.

90. Rosas v. Buddies Food Store, 518 S.W.2d 534 (Tex 1975) (invitee slips and falls on wet floor).
91. 565 S.W.2d 512 (Tex. 1978).
92. "Voluntary assumption of risk included and is inseparable from no-duty." *Id.* at 518.
93. *Id.* at 513.
94. 536 S.W.2d 561 (Tex. 1976).
In 1967 the supreme court in *Delhi-Taylor Oil Corp. v. Henry*95 adopted the principle that an adequate warning to an independent contractor discharges the occupier's duty to employees of that contractor. An employee of an independent contractor is a special kind of an invitee, and it is doubtful whether the opinion of the supreme court in *Parker* abolished the Delhi-Taylor "no-duty" rule. Even so, the issue seems to be one that is worth reopening in the light of *Parker*.

III. TORT LAW AND THE MARITAL RELATION

A. The Right of Consortium

When a tortfeasor causes physical harm to one person, the injury will often adversely affect another. Such indirect or consequential damage to third persons who are associated, by contract or otherwise, with the injured person, will sometimes give rise to a separate cause of action. The classes of persons permitted to recover for losses suffered as a consequence of physical harm to another have generally been limited to spouses,96 parents of minor children,97 and employers of servants.98 At early common law, a husband was entitled to the domestic services of his wife and her earnings outside the home, and he had a corresponding duty of support.99 Accordingly, when the defendant physically injured or incapacitated the wife, the husband had a cause of action for loss of services.100 This right of recovery gradually developed into a "right of consortium," which allowed a husband to recover intangible losses commonly referred to as loss of society, companionship, and sexual relations.101 The wife had no similar right.102 As the recognition of equal rights for women increased, so did the pressure for either recognition of a right of consortium for the wife when the husband was seriously injured103 or denial of the husband's right of consortium.104 The entire subject was recently reviewed by the Supreme Court of California in *Rodriguez v. Bethlehem Steel Corp.*105

Under the Texas community property system, when a spouse is injured, recovery is allowed by the husband or wife on behalf of the community by

95. 416 S.W.2d 390 (Tex. 1967).
96. *See* W. PROSSER, *supra* note 12, § 125, at 888-91.
97. *Id.*
98. *Id.* § 129, 938-42.
101. Deshotel v. Atchison, T. & S.F. Ry., 50 Cal. 2d 664, 328 P.2d 449 (1958), in which consortium was defined as "the noneconomic aspects of the marriage relation, including conjugal society, comfort, affection and companionship." 328 P.2d at 449.
105. 12 Cal. 3d 382, 525 P.2d 669, 115 Cal. Rptr. 765 (1974) (either spouse may bring an action for loss of consortium caused by negligent or intentional injury to other spouse by third party).
resorting to a loss of services theory rather than a loss of consortium. The recognition of the right to recover under a loss of services theory undoubtedly delayed the supreme court's consideration of whether a right of consortium exists for the recovery of damage to emotional interests only.

In Wittlesey v. Miller the supreme court recognized that either spouse has an independent cause of action for loss of consortium as a result of physical harm caused to the other spouse by the defendant's negligence. By this ruling, the supreme court has accepted the notion that loss of consortium damages are recoverable for sentimental losses, including loss of society, companionship, and sexual relations. The court further held in Wittlesey that the deprived spouse's consortium action is derivative of the impaired spouse's cause of action in the sense that liability to the impaired spouse must first be established. Moreover, one could assume that the deprived spouse's recovery would be diminished by the impaired spouse's contributory negligence under comparative negligence rules. Loss of consortium is, however, a separate and independent cause of action and a release by the impaired spouse of his cause of action does not extinguish the cause of action of the deprived spouse.

B. Interspousal Immunity

Practically all family immunities have been based on the notion that allowing one family member to sue another for damages caused by alleged tortious conduct would only disrupt the peace and harmony that would otherwise exist if the family was left to resolve its disputes. Further, it was thought that the policy of allocating most, if not all, of the family savings to a single member of the family would be questionable. In recent years, however, most courts have perceived that such arguments are not persuasive when claims are based on intentional misconduct. Family unity is usually shattered beyond repair by conduct intended to cause serious bodily injury or death, and the danger of doing injustice to other members of the household may be outweighed by other considerations. Moreover, it may not be feasible to distinguish between cases on the basis of the seriousness of the harm intended.

106. See McKnight, Matrimonial Property, Annual Survey of Texas Law, 26 Sw. L.J. 31, 40 n.149 (1972).
107. 572 S.W.2d 665 (Tex. 1978).
108. Id. at 667. Loss of services remains a valid cause of action brought by the impaired spouse on behalf of the community.
109. Id. at 667.
110. See TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1978-79) (damages allowed shall be diminished in proportion to the amount of negligence attributed to the person or party recovering).
111. 572 S.W.2d at 669.
The Texas Supreme Court, in *Bounds v. Caudle*\(^{113}\) abolished interspousal immunity for intentional torts. The case was a wrongful death action that obviously justified a waiver of interspousal immunity. The claimants were minor children whose mother was killed intentionally by their stepfather. Surely, children who suffer a pecuniary loss of great magnitude from the unjustified killing of a parent should not be deprived of a cause of action because another parent committed the wrongful act.

Perhaps no family immunity ought to survive the legal destruction of the relationship giving rise to the immunity in the first place.\(^{114}\) Thus, if divorce follows tortious misconduct, a lawsuit will not disrupt the peace and harmony of the relationship since it no longer exists. This is not to say that outright abrogation of family immunities is desirable.\(^{115}\) A careful reading of the New York court of appeals decision in *Holodook v. Spencer*\(^{116}\) demonstrates the wisdom of retaining some limitations on the tort liability of a parent to a minor child for injuries resulting from negligence in custodial care. The limited waiver of immunity rule enunciated by the Texas Supreme Court in *Felderhoff v. Felderhoff*\(^{117}\) recognizes the need for such limitations. In *Felderhoff* the court held the parent liable to the child for negligence while engaging in furtherance of a business enterprise, but retained the immunity rule "with respect to alleged acts of ordinary negligence which involve a reasonable exercise of parental authority or . . . parental discretion."\(^{118}\)

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113. 560 S.W.2d 925 (Tex. 1978).
114. Cf. Mahnke v. Moore, 197 Md. 61, 77 A.2d 923 (1951) (one spouse may sue the other for an intentional tort committed during a legal separation); Goode v. Martinis, 58 Wash. 2d 229, 361 P.2d 941 (1961) (divorced wife may maintain action against former husband based on tort committed while parties were legally separated, but before divorce decree was final). But see Burns v. Burns, 111 Ariz. 178, 526 P.2d 717 (1974) (divorced spouse may not sue former spouse for negligent tort committed during marriage; leaves open the question of intentional torts).
115. But see Coffindaffer v. Coffindaffer, 244 S.E.2d 338 (W. Va. 1978) (interspousal immunity totally abolished in West Virginia).
117. 473 S.W.2d 928 (Tex. 1971).
118. Id. at 933.