1980

Torts

Page Keeton

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Recommended Citation
Page Keeton, Torts, 34 Sw L.J. 1 (1980)
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PART I: PRIVATE LAW

TORTS

by

Page Keeton*

I. PRODUCTS LIABILITY

A. Current Unrest

It is now generally accepted that one engaged in the business of supply-
ing products of a particular kind for use by others is subject to liability in
tort, notwithstanding lack of negligence, when the product supplied is in a
defectively dangerous condition.¹ This principle has brought a change in
tort law that has often been regarded as revolutionary.² The magnitude of
the effect of the elimination of proof of negligence as a basis for recovery,
however, depends primarily on the nature of the strict liability system that
has been substituted for the prior negligence system as well as the changes
that subsequently have occurred in the negligence system.

Prior to 1960, there were at least three obstacles to recovery by a plaintiff
suing under a negligence theory apart from the necessity of proving that
some kind or character of negligence by the defendant was a cause of a
damaging event out of which a claimant's injury arose. These obstacles
were (1) limitations on the duty of care, such as the rule that there was no
duty to guard against obvious design hazards;³ (2) legal or proximate cause
rules fixing limits to legal liability,⁴ and (3) defenses such as contributory

¹ See Keeton, Product Liability and the Meaning of Defect, 5 St. Mary's L.J. 30, 33-
34 (1973); Keeton, Products Liability—Inadequacy of Information, 48 Texas L. Rev. 398,

² See Birnbaum, Legislative Reform or Retreat? A Response to the Product Liability
Crisis, 14 Forum 251, 251-52 (1978); Wysocki, Litigation Load, Wall St. J., June 3, 1976, at
1, col. 6.

³ Camp v. Scofield, 301 N.Y. 468, 95 N.E.2d 802 (1950), overruled, Micallef v. Michle
Co., 39 N.Y.2d 376, 348 N.E.2d 571 (1976), was the classic products liability case on obvious
dangers. Plaintiff's hands were caught and injured in the revolving steel rollers of an onion
topping machine manufactured by the defendant. The notion that there is no duty to guard
against obvious design hazards has been one of the most firmly entrenched doctrines of
products liability law. See Ward v. Hobart Mfg. Co., 450 F.2d 1176, 1186-87 (5th Cir. 1971);
Jamieson v. Woodward & Lothrop, 247 F.2d 23, 28 (D.C. Cir.), cert. denied, 355 U.S. 855,
(1957); Restatement (Second) of Torts § 388 (1965).

⁴ See Gordon v. Niagra Mach. & Tool Works, 574 F.2d 1182, 1191 (5th Cir. 1978)
(employer-employee relationship relevant in determining intervening and superseding
causes). See also Restatement (Second) of Torts § 447 (1965) on intervening acts as
superseding causes.
negligence and voluntary assumption of the risk.\textsuperscript{5}

The substitution of a product defect theory for a negligence theory as an alternative basis for recovery would not have been so drastic in itself, except for the fact that in most states, and clearly in Texas, the courts chose to alter or eliminate most of the above enumerated substantive limitations to liability under a negligence theory: (1) the "no-duty" rules, (2) the proximate cause rules, and (3) the available defenses. Thus, with the introduction of a product defect theory of recovery, it became necessary to develop an entirely new set of rules and principles for establishing limits to liability. In developing the strict liability system, three major changes were implemented: (1) the "no-duty" rules were eliminated for the most part;\textsuperscript{6} (2) contributory negligence was abrogated as a defense and the narrow defense of unforeseeable misuse was substituted therefor;\textsuperscript{7} and (3) in Texas, at least, it was held that a defect need only be a producing cause rather than a proximate cause of the damaging event in which the claimant is injured.\textsuperscript{8}

Contemporaneous with the development of a strict liability system, courts made substantial changes to the negligence theory of recovery by altering and modifying the limitations to liability, both as to users of products as well as to suppliers. Thus, most courts have held that a manufacturer has a duty to take such precautions as a reasonable person would take to eliminate obvious design hazards, so that recovery is now obtainable on a negligence or fault theory as well as a theory of product defect or strict liability.\textsuperscript{9} Likewise, contributory negligence has been eliminated as a complete bar to recovery.\textsuperscript{10} With these changes, much of the original justi-
fication for the development of a complete new structure for strict liability has been removed.

There still exists uncertainty and confusion as to recovery against a supplier on a theory of strict liability, either in tort or for breach of a warranty. Three substantive issues have perhaps been the source of most of this uncertainty and confusion: (1) the meaning of defect in the design area; (2) the kind of conduct on the part of a victim, user or otherwise, that constitutes a defense that bars or diminishes recovery; and (3) the kind of conduct, if any, on the part of a third party, that constitutes a "new and independent cause" or a "superseding cause," thereby breaking the chain of legal causation.

Personal injury litigation has been notably affected by all of these developments in tort law in two fundamental ways. First, the ultimate resolution of personal injury claims, by out-of-court settlements or through litigation, has become an involved, tortuous, and difficult undertaking in a large percentage of occurrences. Secondly, the liability for the personal injuries and deaths of those engaged in our private enterprise system by way of delivering necessary and desirable goods and services has been materially expanded, possibly leading to a variety of adverse side effects related to the availability and cost of insurance, business failures, product development, and costs of goods and services to the ultimate consumer.

Presently, three factors are causing complexity in the products liability area. In the first place, it often can reasonably be argued that there are multiple parties tortiously responsible under existing rules of substantive

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13. There is considerable doubt as to whether the doctrine of new and independent cause or superseding cause will be recognized in Texas. In Hopkins, 548 S.W.2d at 344, the Texas Supreme Court indicated that misconduct of a third party, however unforeseeable, is not a cause that prevents a product defect from being a producing cause if it is a "but-for" cause. Id. at 351 n.3. In most states, the same type of intervening misconduct that constitutes a superseding cause in a negligence theory also does so in a theory of strict liability. See Eshbach v. W.T. Grant's & Co., 481 F.2d 940, 942-43 (3d Cir. 1973); Winnett v. Winnett, 57 Ill. 2d 7, 310 N.E.2d 1, 4 (1974). There are, however, views such as that expressed in Comment, Substantial Change: Alteration of a Product as a Bar to a Manufacturer's Strict Liability, 80 DICK. L. REV. 245, 264 (1974), to the effect that intervening conduct bringing about a change of a product should not bar recovery when the original design was a "but-for" cause of the accident. According to the Comment, the only change that should bar recovery is an alteration that is the sole cause of the harm. Id.

14. The Federal Interagency Task Force on Product Liability in its final report indicated that the impact of product liability claims on suppliers generally had been felt in four areas: (a) availability and cost of insurance; (b) business failures; (c) impact on product development; and (d) increased costs in product liability prevention. U.S. DEP'T OF COMMERCE, INTERAGENCY TASK FORCE ON PRODUCT LIABILITY FINAL REPORT V-48 (1977).
law for a particular damaging event. This multiple liability is in part due
to the growing complexity of our industrialized and technological society
and in part to changes in the substantive law. The second complicating
factor is that those tortfeasors involved in a damaging event as suppliers
may be subject to liability on any one of three alternative theories: negligence; strict liability in tort; or breach of warranty. Finally, the defenses
and other limitations on liability are different for each theory, making it
difficult to submit some cases to the jury in a way that can be understood
by them.

All of these developments, coupled with an increase in the average
award or payment in product liability cases, have brought forth the charge
that a crisis exists in products liability law similar to that which allegedly
existed several years ago as a consequence of the large volume of medical
malpractice claims. A nationwide counterattack to the above judicial de-
velopments has been launched in the halls of most state legislative
branches, as well as in the Congress of the United States. An unsuccessful
attack was made in the last regular session of the Texas legislature, but
there is a strong likelihood that a renewal of some proposals will be made
in the next session.

Shortly after a special session in 1977, the Texas Speaker of the House of
Representatives created an Interim Study Committee, which developed
some recommendations for rather drastic changes in the substantive law as
to the tort liability of those who make and sell products. Three of the
most important recommendations were (1) the elimination of design de-

15. Like most states, Texas permits claimants who are purchasers or members of the
family of purchasers to recover for personal injuries or death under theories of negligence,
strict liability, or breach of warranty. See Crocker v. Winthrop Laboratories, Div. of Ster-
ling Drug, Inc., 514 S.W.2d 429 (Tex. 1974) (drugs, strict liability tort theory); McKisson v.
Sales Affiliates, Inc., 416 S.W.2d 787 (Tex. 1967) (permanent wave preparation, strict liabil-
ity tort theory). See also TEX. BUS. & COM. CODE ANN. § 2.715 (Vernon 1968) (recov-
yery of consequential damages for an injury to person or property); id. § 2.719 (limitation of con-
sequential damages for injury to the person in the case of consumer goods).

16. For differences in result depending upon the theory of recovery, see Signal Oil &
Gas Co. v. Universal Oil Prods., 572 S.W.2d 320 (Tex. 1978), commented on in Keeton,
Torts, Annual Survey of Texas Law, 33 Sw. L.J. 1, 23 (1979); General Motors Corp. v. Hop-
kins, 548 S.W.2d 344 (Tex. 1977), discussed in Note, General Motors Corp. v. Hopkins: The
Misuse Defense When Design Defect and Plaintiff Misuse Concur to Cause Injury, 31 Sw. L.J.
940 (1977); Rourke v. Garza, 530 S.W.2d 794 (Tex. 1975), commented on in Keeton, Torts,
Annual Survey of Texas Law, 30 Sw. L.J. 2, 6-11 (1976); Henderson v. Ford Motor Co., 519
S.W.2d 87 (Tex. 1974), commented on in Keeton, Torts, Annual Survey of Texas Law, 29 Sw.
L.J. 2, 7-8 (1975).

17. See note 2 supra. Manufacturers and insurers united in an effort to effect legislative
solutions and went to the White House. The result: creation in 1976 of a Federal Inter-
agency Task Force on Product Liability, working under the Department of Commerce.

18. Numerous legislative proposals for reform have been considered by state legisla-
tures throughout the country, and some legislative changes have been made. See IND. CODE
ANN. §§ 34-4-20A-1 to -8 (Burns Supp. 1979); KY. REV. STAT. §§ 411.300-.350 (Supp. 1978);
MINN. STAT. ANN. § 604.03(1) (West Supp. 1980); NEB. REV. STAT. §§ 25-224, -702, -21,180
to -21,182 (Supp. 1978); OR. REV. STAT. §§ 30.900-915 (1977); UTAH CODE ANN. §§ 78-15-1
to -6 (1977).

19. See TEX. HOUSE OF REPRESENTATIVES, 65TH LEGISLATURE, REPORT OF THE JOINT
COMMITTEE STUDY ON PRODUCT LIABILITY (1978).
fects from the scope of strict liability; (2) the establishment of the doctrine of comparative fault in strict liability cases by defining "defect" in a product to be "fault"; and (3) the adoption of a statute of repose that would prevent any claim from being brought against a supplier after a specified period of time, running from the date of the sale of the product.  

A number of bills were introduced in both the house and the senate, but most of the recommendations were incorporated in an omnibus package bill in the house. This effort at reform was not successful, but no doubt further efforts will be made in the next regular session. Legislative reform attempts in Texas to date have not adequately balanced all of the interests in such a way as to produce a final result that would be in the public interest. Rather, there has been an overreaction to a complex problem.

B. Design Hazards and the Meaning of Defect

As indicated above, one of the substantive issues that has produced a vast amount of confusion and difference of opinion in the products liability area relates to the identification of the kind of design hazard in a product that will be regarded as justifying the conclusion that the product was defectively dangerous. A product can be defective as marketed if there exists (1) a flaw in the product, (2) a failure adequately to warn or to use proper means to warn about a design hazard, or (3) a defective design as such.

A flaw in a product is an abnormality or an unintended condition of the product—such as the bubble in a tire that causes an explosion—which, to be defectively dangerous or "unreasonably dangerous," must be a flaw that makes the product more dangerous than it would have been if it had been as intended. If this flaw occurs in the manufacturing process, it is normally referred to as a construction defect. Thus, the term "flaw" is easy to define, and no liability necessarily accompanies the determination that a flaw exists.

When a claim is based on the ground that a specific flaw or a flaw of some kind was a cause of a damaging event, the important issue is whether the nature and quality of the evidence is sufficient to justify the twin findings that a "dangerous flaw" existed at the time of sale by the defendant and that such flaw was a producing cause of the damaging event out of which the claimant's injury arose. It is quite clear that negligence, either

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20. Id.
23. For two recent cases discussing the important difference between a "flaw" in a product and a "design" hazard, see Barker v. Lull Eng'r Co., 20 Cal. 3d 413, 573 P.2d 443 (1978) and Cepeda v. Cumberland Eng'r Co., 76 N.J. 152, 386 A.2d 816 (1978).
in the creation of or the failure to discover the flaw, is not a prerequisite to recovery.25

When the defect alleged is that of failure or inadequacy of warnings, the claimant in most states must prove that the defendant supplier knew or should have known of the existence of a hazard and failed to take adequate precautions to inform reasonably foreseeable users of the hazard and how to avoid it.26 While an inadequate warning is referred to as a kind of defect that subjects the seller to recovery on a theory of strict liability,27 this characterization has resulted in much confusion since in most states, recovery for a defect of this kind requires proof of negligence.28 Liability is strict only in the sense that recovery under a product defect theory involves the defenses and limitations to liability applicable to strict liability rather than to negligence liability.

Finally, as to the meaning of defect in relation to design hazards, much confusion and perplexity has resulted from the fact that courts have utilized a number of different ways to formulate a standard or test by which a design can be evaluated from the standpoint of its dangerousness. The latest formulation was enunciated by the Texas Supreme Court in the second and final opinion in Turner v. General Motors Corp.29 In Turner a motorist was injured when the roof of his car collapsed when the car rolled


An insulation worker, no less than any other product user, has a right to decide whether to expose himself to the risk. Furthermore, in cases such as the instant case, the manufacturer is held to the knowledge and skill of an expert. This is relevant in determining (1) whether the manufacturer knew or should have known the danger, and (2) whether the manufacturer was negligent in failing to communicate this superior knowledge to the user or consumer of its product.

Id. at 1089 (citation omitted).


29. 584 S.W.2d 844 (Tex. 1979). The supreme court initially handed down an opinion on March 21, 1979. Turner v. General Motors Corp., 22 Tex. Sup. Ct. J. 272 (March 21, 1979). Attention was directed in last year’s Annual Survey article to this first opinion by way of an addendum to some comments on the subject. Keeton, Torts, Annual Survey of Texas Law, 33 SW. L.J. 1, 15 (1979). This opinion was later withdrawn and replaced with the present opinion. 584 S.W.2d at 845.
over, placing the crashworthiness of the vehicle in issue. At trial the jury answered the following issue in the affirmative:

**Special Issue No. 1**

Do you find from a preponderance of the evidence that at the time the automobile in question was manufactured by General Motors the roof structure was defectively designed?

By the term "defectively designed" as used in this issue is meant a design that is unreasonably dangerous.

"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.\(^{30}\)

Thus, a consumer contemplation test was used by the trial court to determine defective design. This test is frequently approved in judicial opinions throughout the country.\(^{31}\) Sometimes it is utilized as the only measure of when a design hazard is to be regarded as unreasonably dangerous.\(^{32}\) It has also been approved as one of two ways by which to evaluate a design from the standpoint of dangerousness.\(^{33}\) For reasons set forth in last year's *Annual Survey* article on torts,\(^{34}\) I have not approved of the use of the test, either as an alternative basis or as the sole basis for determining whether or not a design makes a product "unreasonably dangerous." If the task of evaluating designs is to be undertaken, it has been my position for quite some time that there should be a balancing of danger against utility.\(^{35}\) Some commentators take the position that the design choices of product manufacturers should not be evaluated because of the difficulties in taking account of the various factors that are involved and quantifying the weight to be given to these factors.\(^{36}\) The problem of weighing danger against

\(^{30}\) 584 S.W.2d at 846.


\(^{33}\) *See* Barker v. Lull Eng., Co., 573 P.2d 443, 445-56 (Cal. 1978); Henderson v. Ford Motor Co., 519 S.W.2d at 92.

\(^{34}\) *Keeton*, supra note 29, at 9-10. The consumer contemplation test is inappropriate as a test for identifying a defectively dangerous design hazard for several reasons: (1) the mere fact a product has a risk not contemplated by the seller, purchaser, or other user should not result automatically in a finding that the product as formulated is defective; (2) the mere fact that a product is not more dangerous than is contemplated does not, standing alone, require a finding that it is a defective product; and (3) the standard is vague and impractical. *Id.*

\(^{35}\) *See* 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 outweighed the benefits of the way the product was so designed and marketed.

*Id.* (footnote omitted).

\(^{36}\) *See* Henderson, *Judicial Review of Manufacturers' Conscious Design Choices: The
utility and giving consideration to the factors related to these two matters, however, is something that the courts and juries often do, consciously or not, in passing upon negligence questions.37 When it is said that negligence is the failure to exercise the care of the ordinary person, the court is asking the jury to decide whether the community sense of justice and morality justifies the risk created by the defendant through his conduct, in light of (a) benefits flowing from the conduct and (b) alternative ways of obtaining the same benefits with less danger, albeit with perhaps some additional burden.38

The consumer contemplation test as given by the trial court in Turner has been utilized repeatedly by trial judges in Texas with the apparent approval of the supreme court.39 Therefore, the supreme court upheld the judgment of the trial court, but stated that in the future the test will not contain "either the element of the ordinary consumer or of the prudent manufacturer."40 As a substitute for the issue submitted by the trial court, the supreme court set forth an issue that it considered to be appropriate:

Special Issue No. 1

Do you find from a preponderance of the evidence that at the time the [product] in question was manufactured by [the manufacturer] the [product] was defectively designed?

By the term "defectively designed" as used in this issue is meant a product that is unreasonably dangerous as designed, taking into consideration the utility of the product and the risk involved in its use.

Answer: "We do" or "We do not."41

Last year in the Annual Survey article on torts, I proposed the following

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37. Judge Learned Hand, in United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947), said in discussing the negligence of a custodian of a barge that broke loose from its moorings while the custodian was absent:

Since there are occasions when every vessel will break from her moorings, and since, if she does, she becomes a menace to those about her; the owner's duty, as in other similar situations, to provide against resulting injuries is a function of three variables: (1) The probability that she will break away; (2) the gravity of the resulting injury if she does; (3) the burden of adequate precautions. Id. at 173. See Osborne v. Montgomery, 203 Wis. 223, 234 N.W. 372 (1931), in which the court stated:

One driving a car in a thickly populated district, on a rainy day, slowly and in the most careful manner, may do injury to the person of another by throwing muddy or infected water upon that person. Society does not hold the actor responsible because the benefit of allowing people to travel under such circumstances so far outweighs the probable injury to bystanders that such conduct is not disapproved. Circumstances may require the driver of a fire truck to take his truck through a thickly populated district at a high rate of speed

Id. at 376.


40. 584 S.W.2d at 847.

41. Id. at 847 n.1.
test, slightly revised to provide for a general submission when a product allegedly has been designed improperly in more than one way:

By the term "defectively designed" as used in this issue is meant a product that is unreasonably dangerous as designed.

A product is unreasonably dangerous as designed if 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 of the product as designed is affected by such matters as the degree of likelihood of injury producing events from misuse and unintended uses as well as from intended and proper uses, the seriousness of the harm that is likely to result when such events do occur, and the obvious nature of the danger and therefore the extent to which harm can be avoided by proper use. The utility or usefulness of a product as designed is affected by such matters as the importance of the need that is served by the product, the practicability or feasibility, both from a scientific and economic standpoint, by serving that need with a safer design, and the availability of other products, if any, to serve the same needs and wants about as well with greater safety]. 42

That part of the proposed charge in brackets is so designated because of some doubt whether to include such material on the relevant factors in the charge to the jury. 43

Several propositions can be drawn from the supreme court’s final opinion in Turner. Some of these are:

(1) The requirement that a defect render the product “unreasonably dangerous” reflects a realization that products have both utility and danger. Therefore, a balancing of a product’s danger against its utility is required in the evaluation of product designs. 44

(2) “Unreasonably dangerous” is a term that needs some explanation. The jury is to be advised that in answering this question, it is to consider a product’s utility and its danger. 45

(3) In its original opinion, the court was disinclined to give any charge to the jury about “unreasonably dangerous,” because of the difficulty of trying to charge on the various factors without confusing them and being counterproductive. 46 In the final opinion, the court decided to approve a balancing charge. The court, however, has disapproved of any attempt to charge the jury on the different factors and considerations that are relevant in measuring the magnitude of the danger and the utility of the conduct, 47 such as I have suggested in the bracketed part of the proposed charge set

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42. See Keeton, supra note 29, at 13 (emphasis added).
43. The Texas Supreme Court does not require a balancing of enumerated factors in jury submissions. See 584 S.W.2d at 848-49.
44. See id. at 847.
45. Id. In the first opinion that was withdrawn, the court stated that no definition of “unreasonably dangerous” should be given to the jury. See 22 Tex. Sup. Ct. J. at 273.
47. See 584 S.W.2d at 848-49.
forth above. The opinion of the court of civil appeals in Turner, as stated in last year's Annual Survey article, illustrates some of the dangers. I remain convinced, however, that a "pattern instruction" on the factors could be developed that would not be misleading or erroneous and would contribute to the jury's understanding. If not, then perhaps since this issue is too complex for a jury to utilize, it should be treated as an issue of law for the court.

(4) In deciding when a design is defective, no distinction should be made between design hazards that cause accidents and those that merely aggravate injuries received in accidents caused in other ways.

(5) Both parts of the bifurcated test for submission of the issue of design defect to the jury, as set forth in Henderson v. Ford Motor Co., whatever its meaning, will no longer be applicable. The test in Henderson states that a product is unreasonably dangerous if: (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 such an extent that it would not meet the reasonable expectations of the ordinary consumer as to its safety. According to the supreme court in Turner, the notion underlying the prudent manufacturer test was that the additional perspective of the prudent manufacturer is to the advantage and for the benefit of the plaintiff since it could apply to obvious dangers and to situations where the consumer had no definite expectations. There should be no difference, in theory, between a reasonable seller approach and a reasonable consumer approach to the question of whether a product is unreasonably dangerous. The ultimate question is whether the mythical reasonable person would conclude that the danger outweighs the utility. This was quite clearly perceived by the Oregon Supreme Court, and this is apparently the conclu-

49. See note 42 supra and accompanying text.
50. See Azzarello v. Black Bros. Co., 480 Pa. 547, 391 A.2d 1020 (1978), in which the court stated:
   While a lay finder of fact is obviously competent in resolving a dispute as to the condition of a product, an entirely different question is presented where a decision as to whether that condition justifies placing liability upon the supplier must be made. . . . Should an ill-conceived design which exposes the user to the risk of harm entitle one injured to recover? . . . When does the utility of a product outweigh the unavoidable danger it may pose? These are questions of law and their resolution depends upon social policy.
51. Id. at 1025-26 (citation omitted).
52. 519 S.W.2d 87 (Tex. 1974).
53. Id. at 92.
54. See 584 S.W.2d at 850.
55. Id. at 851.
   [We feel that the two standards [a seller-oriented standard and a user-oriented standard] are the same because a seller acting reasonably would be selling the same product which a reasonable consumer believes he is purchasing.
sion that has now been reached by the Texas Supreme Court. All that is being asked of the jury is to do what it has been asked to do over and over again on the negligence issue—weigh danger against utility, but with one fundamental difference as pointed out below.

(6) The elimination from the charge to the jury of all reference to the considerations and factors that normally are relevant in ascertaining the magnitude of the danger of a product as designed and the utility of the product as so designed does not mean that the court and the jury are not to be influenced by such factors. Indeed, there is no way to balance danger against utility without doing so. Such factors are important in determining the kinds of evidence that will be admissible, the sufficiency of the evidence needed to justify a finding of defect, and the nature of the arguments that can be made to the jury.57

(7) In a concurring opinion in Turner, two justices dissented from the views of the majority in discarding the consumer-contemplation test as used by the trial judge and approved in the commentary to section 402A of the Restatement (Second) of Torts.58 Three ideas are expressed in this concurring opinion. The first is that a product should be regarded as unreasonably dangerous in any case where it is more dangerous in some respect than would be contemplated, regardless of its beneficial characteristics, and even if the risk or hazard was not susceptible to discovery by the manufacturer.59 Secondly, instructing the jury to consider such evidentiary factors as danger and utility compels the jury to decide the issue of defect solely on the basis of the fault or nonfault of the manufacturer.60 Finally, the majority opinion does not state if its new form of submission would be applicable to alleged defects in products other than those attributable to the way a product is designed.61

The resolution of the issue as framed by the majority in Turner could be construed to require a finding of negligence. Since it is the defendant's product and not the defendant's conduct that is being evaluated, however, there is a substantial and quite significant difference. Under a negligence theory, the plaintiff must impugn the conduct of the defendant. To do so, the plaintiff must prove that the defendant did or in the exercise of reasonable care ought to have perceived the danger of a risk or hazard relative to the way a product is designed.62 Under a theory of strict liability, however, when only the product must be impugned, it is the magnitude of the

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57. See 584 S.W.2d at 847.
58. Id. at 853.
59. Id. at 854.
60. Id.
61. Id.
62. See W. Prosser, Handbook of the Law of Torts 145 (4th ed. 1971), in which it is stated: "[N]egligence is a matter of risk—that is to say, of recognizable danger of injury. . . . Against this probability, and gravity of the risk, must be balanced in every case the utility of the type of conduct in question." Id. at 173.
danger in fact as proved at the trial that is important to consider, and not whether that danger could or should have been appreciated. This is an important distinction; it can be especially important on the admissibility of certain kinds of evidence, such as evidence of accident history after a product was designed or evidence of a change in design attributable to increased knowledge of the dangerous characteristics of a particular design.\(^6\) It is my assumption that the majority opinion is referring to the danger in fact of the product as designed, and not the foreseeable danger of the product as so designed.

As regards "flaws" in the manufacture of products, it would seem that a product is defectively dangerous per se if the flaw makes the product more dangerous than the product would have been as intended. Thus, a decomposed mouse in a soft drink bottle makes the beverage defectively dangerous, and a bubble in a tire makes the tire defectively dangerous.\(^6\) The only questions for the jury are those related to causation and the existence of the flaw at the time the defendant surrendered possession. In order to establish a marketing defect, however, there must be proof that the supplier knew or should have known of the hazard and breached a duty of ordinary care to adequately warn.\(^6\) It is a negligence issue in the guise of strict liability.

C. State of the Art

"State of the art" is a term that has been used in products liability litigation pertaining to design hazards to mean quite different things. There are at least four different and distinguishable usages. It is often used, especially by defense counsel, to refer to the customary practices in an industry, and therefore in products liability litigation to the customary way of designing a product.\(^6\) It is frequently used to mean that which is feasible, as distinguished from that which is customary, \textit{i.e.}, that which is reasonably capable of being done, technically and economically, to reduce a risk or hazard.\(^6\) It is also used at times to mean that which is possible within


\(^6\) See note 23 \textit{supra} and accompanying text.

\(^6\) See note 26 \textit{supra} and accompanying text.


the technology available to the manufacturer. Finally, it is frequently used to mean the technological capability of an industry, or the technological and economic feasibility of an industry to discover a risk or hazard that exists in a product. It is of utmost importance to distinguish between these usages when dealing with the substantive effect of compliance with the state of the art on issues related to the existence of a defect or a defense, and on the admissibility of evidence of the state of the art as to such issues. The failure to do so has brought about much confusion.

Under the test for design defects proposed earlier, a product is defectively designed and unreasonably dangerous if the danger in fact outweighs the utility. That being so, it is irrelevant that the defendant in the exercise of utmost care by way of utilizing the technological knowledge and capabilities of an industry could not discover a hazard that caused the harmful effects of such product to outweigh its utility. There is a conflict on the issue of whether scientific lack of knowledge of a risk or hazard should be a defense, but if it is, then the judges that concurred in Turner are nearly correct in arguing that there is little difference between strict liability pursuant to a balancing test and negligence. The only difference would be a change in the burden of proof.

There are three primary reasons for concluding that the danger in fact of a product as designed can outweigh a product’s utility. These reasons are that: (1) the harmful consequences from a product’s use exceed the benefits; (2) although the harmful consequence from a product’s use does not exceed the benefits, alternative products are available, such as a cosmetic made from entirely different material, that will provide similar benefits with less harmful consequences; or (3) there was or is now a way of designing the product with less harmful consequences.

The third argument for the position that a product is defective as designed is that although the danger does not outweigh the benefits, the danger was further reducible by an alternative design. This contention involves all of the first three usages of the term “state of the art” set forth above. It is difficult to find any support for the position that an unavoidably unsafe characteristic of a product at the time it was manufactured can nevertheless make a product defective as designed simply because under the state of the art at the time of trial it could have been designed more

68. See 1 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 6.05(15), at 104.38 (1978).
70. See note 67 supra. See also Crocker v. Winthrop Laboratories, Div. of Sterling Drug, Inc., 514 S.W.2d 429 (Tex. 1974), in which the Texas Supreme Court said that “some products, though manufactured as designed and intended, are so dangerous in fact that the manufacturer should be liable for resulting harm though he did not and could not have known of the danger at the time of marketing.” Id. at 432.
71. See notes 66-69 supra and accompanying text.
A maker's design of a product is to be evaluated from the standpoint of how safely a design engineer, charged with the danger that a product is found to have at the time of trial, could be reasonably expected to design the product at the time of its manufacture. Therefore, the state of the art in all of the first three senses is relevant—custom, feasibility, and possibility. If it was not technologically possible to design a safer product, then if the danger did not outweigh the product's benefits, the product would not be defective as a matter of law. Obviously, evidence of technological impossibility is admissible, and such evidence would be conclusive if there was no evidence to support a contrary position. If a safer product was technologically possible, evidence would still be admissible to indicate lack of economic feasibility. Evidence of custom would also be admissible as some indication of lack of feasibility, although quite obviously this would not be conclusive.

In Bailey v. Boatland of Houston, Inc. the court of civil appeals was confronted with the relevance of the failure to utilize a particular device to minimize harm when the device was allegedly unavailable for commercial use. The state of the art in the first three senses, therefore, was in issue. The claimants were the widow and two adult children of Samuel Bailey, who was killed in a boating accident. The deceased was thrown from the boat while the engine was running. The plaintiffs asserted that the boat was defectively designed in not having a "kill switch" that would automatically stop the engine in the event the operator was thrown from the boat. The trial court, over the plaintiffs' objection admitted evidence indicating the unavailability of kill switches to the manufacturer at the time of the manufacture and sale of the boat. A switch had been invented at about the time the boat was sold, but was not commercially available when the boat was manufactured. The inventor testified, however, that the concept of kill switches was not new and that the National Outboard Association had used various types of switches for thirty years on racing boats. The court of appeals held, with one judge dissenting, that such evidence was relevant only to the issue of the care exercised by the defendant in the manufacturing process; such care is not a defense to strict liability in tort.

The Bailey decision was released at approximately the same time as the second opinion of the supreme court in Turner, but the court of civil appeals correctly assumed that Henderson was still applicable to the meaning of a design defect, Bailey having been tried before the final decision in Turner was released. In deciding Bailey the court utilized a consumer-contemplation test and stated that the "expectation of the ordinary consumer should be based on experience with the product itself, not the expert tech-

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73. See Bruce v. Martin-Marietta Corp., 544 F.2d 442, 446-47 (10th Cir. 1976).
75. Id. at 810 (citing Gonzales v. Caterpillar Tractor Co., 571 S.W.2d 867 (Tex. 1978)).
76. See notes 38-40 supra and accompanying text. The court in Turner overruled Henderson to the extent that in the trial of strict liability cases involving design defects, the issue and the accompanying instructions would henceforth not include the element of the ordinary consumer. 584 S.W.2d at 847.
nological knowledge of the manufacturers within the industry." This is, of course, a reasonable position if that test is applied literally and the necessity for balancing danger and utility is rejected. The court, however, also relied on section 402A of the Restatement (Second) of Torts and cases involving the inability of a supplier, under the existing state of the art, to discover a flaw in a product. Reliance on section 402A and on these cases is misplaced. Section 402A states that the seller of a defective and unreasonably dangerous product is subject to liability even though all proper care has been exercised in the preparation or sale of his product. This does not, however, indicate when a product is defective. A product is defective when it leaves the seller's hands in a condition not contemplated by the ultimate consumer, and such product will be unreasonably dangerous to him. If the risk of harm to the consumer outweighs the utility of the product, the seller also will not be relieved of liability because he has exercised the utmost care. The comments to section 402A, however, point out that some products are, in the present state of human knowledge, incapable of being made safe for their ordinary and intended use. If products at the time of their design are unavoidably unsafe in this sense, then there is no seller's liability if such products are properly prepared and are accompanied by proper directions and warning. In Turner there was substantial evidence of industry practice introduced by General Motors at trial. The majority in Turner alluded to this evidence and indicated that this evidence is relevant on the issue of product defect as well as on the issue of supplier negligence. If the state of the art in the sense of custom is admissible to show that it is neither feasible nor practical to provide a safer design, then, clearly, evidence that this manufacturer, who neither made switches nor any component parts of the boats assembled, was unable to obtain the kill switch on the market was admissible to prove that the product was not defective.

II. INDEMNITY AND CONTRIBUTION

As stated at the outset of this Survey article, the proliferation of products, because of advances in technology and changes in the substantive law expanding the tort liability of those engaged in a variety of socially desirable activities, has increased the instances where multiple parties to an event are held tortiously liable. This has produced new issues related to the proper allocation of the costs of an accident between joint tortfeasors and between those injured as a consequence of contributory negligence. The common law rule that contributory negligence was a complete bar to

77. 585 S.W.2d at 808.
78. See, e.g., Cunningham v. MacNeal Memorial Hosp., 42 Ill. 2d 443, 266 N.E.2d 897 (1970) (impure blood).
80. See RESTATEMENT (SECOND) OF TORTS § 402A, Comment g (1965).
81. Id. Comment a.
82. Id. Comment k.
83. Turner v. General Motors Corp., 584 S.W.2d at 852-53.
recovery, except when the doctrines of last clear chance and discovered peril were applicable, was never defensible. The abandonment of contributory negligence for the principle of comparative fault, however, has added to the complexity of this allocation problem.

Early in Anglo-American law the rule developed that there would be no contribution or indemnity between joint tortfeasors. This was a necessary consequence of the principle that the law should not attempt to work out equitable arrangements between wrongdoers. The majority of courts, however, to alleviate the hardship of that early doctrine, developed rules of indemnity. The right to recover was provided as a remedy when the parties were clearly not equally at fault. Courts developed a bewildering number of theories, often criticized as unworkable and unsatisfactory, to decide when this "all" rule of recovery would apply. Indemnity means that a tortfeasor, who has been unjustly enriched at the expense of another tortfeasor, is obligated to indemnify the other tortfeasor. One easily administered rule was that a tortfeasor who was vicariously liable for the tort of another had a right of indemnity against the actual wrongdoer. Some effort was also made to provide for indemnity between tortfeasors when all were negligent. The Texas rule has been that where there are two or more tortfeasors, either or all of whom are liable to an injured third person, but one of whom has breached a duty owed both to his joint tortfeasor and to the injured third person, the tortfeasor who is blameless as to his cotortfeasor will be allowed indemnity.

Contribution between joint tortfeasors, or the right to recover part of the amount a tortfeasor paid to an injured party in settlement or as the result of a judgment, has been provided for, either by statute or judicial decision, in all but two or three states. In Texas, contribution is currently available between tortfeasors, some or all of whom are strictly liable, on a pro

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87. See Hodges, Contribution and Indemnity Among Tortfeasors, 26 Texas L. Rev. 150, 157-63 (1947).
88. Id. at 154-55.
89. Austin Road Co. v. Pope, 147 Tex. 447, 216 S.W.2d 563, 565 (1949); Hodges, supra note 87, at 162.
A comparative fault statute was introduced in the last session of the Texas Legislature that would have defined a defect in a product to be "fault." \(^9\) Contributory negligence would have become a defense that diminished recovery from the supplier of a defective product, just as it does against the negligent user. \(^9\) This proposal would have simplified some of the contribution problems. It was included, however, in a bill that dealt with other controversial products liability measures, and the bill failed to pass.

Three cases of interest in this area were recently decided. They are Lubbock Manufacturing Co. v. International Harvester Co., \(^9\) Central Freight Lines v. Pride, \(^9\) and New Terminal Warehouse Corp. v. Wilson. \(^9\)

In Lubbock Manufacturing a tank-trailer combination manufactured by Lubbock, carrying butane and propane, overturned and exploded. Fifty people were injured or killed. Suit was brought, in which it was alleged that the accident was caused by two distinct defects: a design defect in the tank and a defect in the "fifth-wheel," a device that connected the tank to the trailer. The alleged tortfeasors included Fontaine, the manufacturer of the "fifth-wheel," International, the reseller of the "fifth-wheel," and Lubbock, the manufacturer of the tank.

Pursuant to a plea of privilege, all suits and claims as to International were transferred to Dallas County. Both Fontaine and Lubbock were also initially named as defendants, but the plaintiffs subsequently entered into a "Mary Carter" settlement agreement with Fontaine. \(^9\) Fontaine was made a party to the law suit, however, for the purpose of ascertaining its liability. Several plaintiffs entered into a covenant not to sue with Lubbock after the suit was filed. In these cases, judgments were entered against Lubbock for the amounts specified in the settlement agreements. The remaining plaintiffs did not settle and pursued their claims at trial.

The jury found that both the tank and the "fifth-wheel" were defective and that each defect was a producing cause of the accident. Both Lubbock

\(^9\) 1. TEX. REV. CIV. STAT. ANN. art. 2212 (Vernon 1971).
\(^9\) 2. Id. art. 2212a, § 2 (Vernon Supp. 1980). See also General Motors Corp. v. Simmons, 558 S.W.2d 855 (Tex. 1977), Keeton, Torts, Annual Survey of Texas Law, 32 Sw. L.J. 1, 11 (1978).
\(^9\) 4. Id. at 471.
\(^9\) 8. Agreements with a settling defendant who remains a party at the trial and retains a financial stake in the plaintiff's recovery have been called "Mary Carter" agreements since the 1967 Florida decision Booth v. Mary Carter Paint Co., 202 So. 2d 8 (Fla. Dist. Ct. App. 1967). See Comment, Mary Carter Agreements: Unfair and Unnecessary, 32 Sw. L.J. 799 (1978). The effect of "Mary Carter" agreements in Texas is discussed in General Motors Corp. v. Simmons, 558 S.W.2d 855, 858 (Tex. 1977). The Texas Supreme Court held that the exclusion of evidence as to the existence of this type of agreement is reversible error. 558 S.W.2d at 858-59. A Mary Carter settlement will apparently have the same effect in extinguishing a pro-rata part of the plaintiff's cause of action as in the ordinary settlement.
and Fontaine, therefore, were held strictly liable in tort to the plaintiffs. Lubbock thereafter filed a third party claim in the district court of Dallas County for contribution against International, the reseller of the “fifth-wheel,” and International was granted summary judgment.

On appeal the court denied Lubbock’s right of contribution from International because the settlement, and the judgment of the court entered pursuant to the settlement agreement with Lubbock, did not extinguish any cause of action the plaintiffs had against the nonsettling defendant. A settling tortfeasor cannot obtain contribution from a nonsettling tortfeasor unless the settlement extinguishes the injured party’s cause of action against all others. At least one court of civil appeals has held that a voluntary settlement will not satisfy the prerequisite for contribution under the contribution statute because the statute by its terms only authorizes contribution when a tortfeasor has satisfied a judgment that has been rendered against him. The rendition of an agreed judgment pursuant to a settlement agreement, however, only satisfies the prerequisite for a judgment. The order of a trial court to pay an agreed amount in settlement is not a sufficient basis for contribution when the plaintiff has retained his claim against the nonsettling tortfeasor. In Texas, the settlement in such a case only extinguishes a pro rata part of the plaintiff’s cause of action.

The Lubbock Manufacturing court also held that Lubbock was entitled to contribution from the reseller of the “fifth wheel,” International, as to those plaintiffs who refused to settle with Lubbock and obtained a judgment and satisfaction for their entire damages. According to the court, a reseller or a retailer of a defective product is subject to a claim for contribution by a third party tortfeasor, even after the manufacturer has been released from liability, thereby eliminating any recovery over by way of indemnity. Most courts, however, will and should hold that a reseller or a retailer who is a mere conduit of the defective product, absent any independent act of negligence or conduct that adds to the danger of a defective condition of the product, has a right of indemnity over against the manufacturer. While policy reasons may justify the reseller’s strict liability to the injured party, the risk of ultimate loss should be on the manufacturer of the product. Retailers and resellers must depend on the manufacturer for information about the dangers that inhere in the products they sell. This is, in fact, recognized in the law of implied warranties, where it is not unusual for liability to move transactionally through the chain of distribution to the manufacturer, who ultimately pays for the

99. 584 S.W.2d at 910.
101. TEX. REV. CIV. STAT. ANN. art. 2212 (Vernon 1971).
103. 584 S.W.2d at 912-13.
breach of warranty. A settlement was made in this case, therefore, with a manufacturer who should have an obligation to indemnify the reseller. If this is the case, the plaintiffs settled with a tortfeasor who had the obligation to indemnify another. Under these circumstances the indemnitee is released. The court finally held that Lubbock's claim for contribution was not collaterally estopped, because Texas law requires that the parties be the same or in privity with one another, and International was not a party or in privity with a party to the action in the original suit.

In Central Freight Lines v. Pride the plaintiff was injured when his automobile collided with a Central Freight Lines truck-trailer. The collision occurred when the truck-trailer jack-knifed, crossed over to the wrong side of a two-lane highway, and crushed the plaintiff's car. B & B Company operated a dirt pit alongside the highway near the collision site. Trucks coming from B & B's pit deposited large chunks of dirt and clay on the highway. Despite efforts by B & B to clean up this material on the roadway, considerable amounts remained on the highway, rendering it very slick. Plaintiff sought judgement against B & B and Central jointly. Each defendant filed third-party claims for contribution and indemnity against the other. The jury found both Central and B & B guilty of negligence, apportioning two-thirds fault to Central and one-third fault to B & B. The plaintiff was found free of contributory negligence. The trial court granted Central complete indemnity against B & B and denied B & B any relief as to the truck operators. Both defendants appealed. The court of civil appeals concluded that B & B, in causing mud and dirt to be on the highway, breached a duty of ordinary care both to the injured motorist and to Central. B & B's conduct exposed Central's trucks and the plaintiff motorist to an unreasonable risk of harm. The court concluded, therefore, that B & B breached its duty to Central, but that Central breached no duty to B & B, especially because B & B had no property on or near the place of the accident likely to be damaged by the negligent driving of Central's vehicle.

B & B argued that this test for indemnity no longer makes sense under a comparative negligence system for allocating the costs of accidents between tortfeasors. The Texas comparative negligence statute makes no provision for indemnity, as an exception to the rule of contribution, when all joint tortfeasors are negligent and therefore subject to liability. Indemnity rules have always been based on the notion that one of two or more tortfeasors should be regarded as primarily responsible when there is a gross disparity in the culpability of the parties or when a party was only

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106. The courts are not in accord on this point, and the fact situation is often determinative. A settlement with an employee, for example, should not release an employer because the rule that permits an employer to obtain indemnity against an employee is questionable. The enterprise should bear the cost of employee negligence. See Annot., 20 A.L.R.2d 1044 (1951).
107. 584 S.W.2d at 913.
vicariously liable. Under a comparative negligence system, any disparity in the fault of the negligent parties is considered in the apportionment of negligence between or among the parties. A proper result and a proper interpretation of the Texas comparative negligence statute is that indemnity has been eliminated. The court of civil appeals in *New Terminal Warehouse Corp. v. Wilson*, in fact, implies this result. Thus, the decisions in *Wilson* and *Pride* conflict and the resolution of this issue is left to the supreme court.

In *Wilson* the plaintiff's husband was struck and killed by a truck unloading grain on a dock. The jury found the plaintiff's husband 10% negligent, the defendant warehouse corporation 50% negligent, and the trucker 40% negligent. According to the court, the warehouse corporation breached a duty to the trucker defendant as well as to the plaintiff. The trucker, however, did not breach a duty to the warehouse corporation. The court, nevertheless, rejected the claim made by the trucker for indemnity, stating that there was no longer any rational reason for the application of an indemnity rule between negligent tortfeasors. I subscribe to this proposition and agree that the nonapplicability of indemnity to such a situation is supported by the absence of any provision in the comparative negligence statute providing for indemnity.

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110. 589 S.W.2d 465 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ).
111. *Id.* at 469-70.
112. *Id.* at 469.
113. *Id.* at 469-70.