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I. PRODUCTS LIABILITY

A. Proof of Defectiveness

SUBSEQUENT Remedial Measures Under Texas Rule of Evidence 407.** The new Texas Rules of Evidence went into effect on September 1, 1983.1 Following prior Texas case law,2 rule 407(a) provides that evidence of a defendant's post-accident remedial measures is inadmissible to prove negligence or culpable conduct.3 Rule 407(a) explicitly provides, however, that it does not bar this evidence in products liability cases based on strict liability.4 Consequently, evidence of post-accident design changes is admissible to prove the existence of a design defect. In addition, rule 407(b) provides that evidence of recall letters from manufacturers to purchasers is admissible to prove defectiveness.5

While most courts have agreed that evidence of subsequent remedial measures is normally inadmissible to prove negligence,6 the use of evidence of subsequent design changes to prove defectiveness in strict prod-

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** I am especially grateful to Steven Goode for his help on this and the next section.
1. TEXAS RULES OF COURT 317 (West 1983).
3. TEX. R. EVID. 407 provides:
   (a) Subsequent remedial measures. When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent remedial measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent remedial measures when offered for another purpose, such as proving ownership, control or feasibility of precautionary measures, if controverted, or impeachment. Nothing in this rule shall preclude admissibility in products liability cases based on strict liability.
   (b) Notification of defect. A written notification by a manufacturer of any defect in a product produced by such manufacturer to purchasers thereof is admissible against the manufacturer on the issue of existence of the defect to the extent that it is relevant.
4. Id.
5. Id.
6. Texas's exclusion of evidence of subsequent remedial measures for the purpose of proving negligence is in accord with the overwhelming majority of other jurisdictions. See FED. R. EVID. 407; C. MCCORMICK, HANDBOOK ON THE LAW OF EVIDENCE § 275, at 666-67.
ucts liability cases has been a source of controversy. One argument for excluding evidence of subsequent remedial measures to prove negligence is that admitting such evidence would discourage defendants from taking desirable safety precautions. Some courts have reasoned that this rationale does not apply in strict product liability cases, however, since product manufacturers have an overwhelming, independent economic reason to improve their products despite the possible adverse evidentiary impact of the improvement.

A second argument for excluding evidence of subsequent remedial measures to prove negligence is that its probative value is outweighed by the danger of unfair prejudice and confusion. Juries may conclude...

(2d ed. 1972); 2 J. Wigmore, Evidence in Trials at Common Law § 283, at 185 (Chadbourn rev. ed. 1979). But see Me. R. Evid. 407.

Evidence of subsequent remedial measures is admissible, even in negligence cases, "when offered for another purpose, such as proving ownership, control or feasibility of precautionary or remedial measures." Tex. R. Evid. 407(a) (emphasis added).

Since rule 407(a) follows previous Texas practice in negligence cases, its effect in negligence cases is not discussed in detail in this survey.


9. See id. at 119-20, 528 P.2d at 1151-52, 117 Cal. Rptr. at 815-16 and cases cited supra note 5. This reasoning would apply whether the underlying theory of liability is negligence or strict liability. Conversely, manufacturers are arguably more aware of and influenced by legal rules than are other types of defendants. Consequently, admitting evidence of subsequent remedial measures might discourage product improvements more than some courts have presumed. I am indebted to Steven Goode for this point.

10. See Tex. R. Evid. 403. Evidence of subsequent remedial measures is clearly probative on both negligence and defectiveness issues. Although this evidence is not conclusive on the issue of negligence (since the risks may not have been foreseeable at the time of the original conduct), conclusiveness is not required for relevance. A decision to change conduct after an accident has some probative value on the issue of whether the original conduct imposed unreasonable risks.
the changes reflect an admission of fault.11 Also, evidence of subsequent remedial measures invites a defendant to offer collateral evidence suggesting reasons for the changes other than improved safety, thereby diffusing the focus of the trial. Moreover, evidence of a defendant's post-accident conduct may divert the jury from the issue of foreseeability. In a strict products liability case, however, collateral evidence concerning the defendant's motivation for a post-accident change may not be as diverting to the jury because foreseeability is normally not a factor in determining defectiveness.12

Courts that have declined to treat strict products liability cases differently from negligence cases for the purpose of admitting evidence of subsequent remedial measures have justly criticized these distinctions.13 Since rule 407 distinguishes between negligence and strict products liability, however, Texas courts will be required to understand the rationales for the distinction to apply the rule properly.

Rule 407 is potentially ambiguous in its treatment of products liability cases involving warning defects. The exemption within rule 407(a) applies only to cases based on strict liability. Since Texas courts seem to judge warning defects according only to risks that were knowable at the time the product was sold,14 cases involving warning defects might not be "based on strict liability." Due to the analytical similarity of warning defects and negligence, courts might treat them alike for the purpose of excluding evidence of post-accident modifications.15

If the distinction in rule 407 between negligence and strict products liability is based on the premise that product manufacturers are less likely than other defendants to be deterred from undertaking worthwhile safety precautions, warning defects should be treated like other types of product defects. According to this rationale the evidentiary rule is less likely to discourage product safety improvements regardless of the type of defect. If, however, the distinction in rule 407 is based on a premise that this evidence may cause unfair prejudice and confusion in proving negligence but not defectiveness, the appropriate treatment of warning defects is less clear. Warning defects might be treated like negligence, since in both cases evidence of subsequent remedial measures may confuse the jury concerning the issue of foreseeability, which is a factor in negligence and warning defects.

defect cases but not in design defect cases. Unlike many subsequent design modifications cases, however, modifications to product warnings are seldom motivated by reasons other than safety. Consequently, evidence of a post-accident warning change is less likely to create a collateral dispute concerning the defendant's motivation for making the change. After choosing between these conflicting rationales, Texas courts might treat warning defects either like negligence or strict liability for the purpose of applying rule 407(a).

Rule 407(b) provides that recall letters and other written notification of defect are admissible for the purpose of proving the existence of a defect. Ostensibly, this provision applies without regard to whether the plaintiff's case is based on negligence or strict products liability. If rule 407(b) were applicable only to strict liability actions, it would be superfluous, since recall letters are implicitly made admissible in strict products liability cases by the proviso to rule 407(a). Moreover, if the rationale for admitting recall letters is that they are so clearly motivated by the defendant's belief that its product is unsafe (and therefore the danger of collateral evidence concerning probative value is remote), the plaintiff's theory of recovery is irrelevant. If the rationale is that an evidentiary rule is less likely to deter a manufacturer than another defendant from taking post-accident remedial measures, the distinction between negligence and strict liability is again irrelevant. Consequently, the admissibility of recall letters under rule 407(b) should not depend on the plaintiff's theory of recovery.

Subsequent Remedial Measures Under Federal Rule of Evidence 407. The Fifth Circuit considered the admissibility of evidence of subsequent remedial measures in products liability cases in *Granada Steel Industries, Inc. v. Alabama Oxygen Co*. Federal Rule of Evidence 407, which is applicable

16. Instructions for product use, as opposed to direct warnings, might be modified for nonsafety reasons. By their nature, however, warnings are likely to be motivated only by safety concerns. See infra note 19 and accompanying text.

17. For cases suggesting that warning defects be treated like negligence rather than strict liability under rules similar to rule 407, see supra note 15.

18. This assumes that rule 407(b) is not merely redundant. But Me. R. Evid. 407(b) (the source of the Texas rule) explicitly provides that recall letters are admissible even though all evidence of subsequent remedial measures is admissible under the Maine rule. Since the recall letter provision in the Maine rule is redundant, the Texas provision may also be redundant.

19. This conclusion suggests that subsequent changes of warnings should also be admissible even if warning defects are governed essentially by negligence. Like recall letters, warning changes are unlikely to be motivated other than by a belief that the product is unsafe. The improbability that a manufacturer will be deterred from taking post-accident safety precautions applies to warning changes as well as to recall letters. The danger of distracting the jury from the issue of foreseeability is an issue in warning cases, but the admissibility of recall letters in negligence cases suggests that foreseeability has a limited role in the application of rule 407. Consequently, the mere fact that foreseeability may also govern warning defects does not require that rule 407 treat warning defects and negligence alike.

20. 695 F.2d 883 (5th Cir. 1983).
in federal courts even in diversity cases based on state substantive law, provides that evidence of subsequent remedial measures is not admissible to prove the defendant's negligence or culpable conduct. Unlike the Texas rule, the federal rule does not explicitly address strict products liability or recall letters. Following the majority of other circuit courts that have faced the issue, the Fifth Circuit held that the exclusion provision of rule 407 applies to strict products liability cases. The court recognized the reasoning of other courts that the policy encouraging voluntary repairs applies equally to product manufacturers and other defendants. The court relied principally, however, on a conclusion that evidence of subsequent design changes has little probative value, which is outweighed by a propensity to confuse and divert the jury.

The difference between the Texas rule and the Fifth Circuit's interpretation of the federal rule creates an incentive for forum shopping when evidence of subsequent remedial measures is likely to be important. Since defendants obviously will prefer the Fifth Circuit's interpretation of the federal rule, they have an incentive to remove diversity cases from Texas state courts to federal courts. A plaintiff, however, can prevent removal


22. When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving . . . feasibility of precautionary measures, if controverted . . . .


The Eighth Circuit excludes evidence of subsequent remedial measures in cases involving warning defects but not in cases involving design defects or manufacturing defects. Compare DeLuryea v. Winthrop Laboratories, 697 F.2d 222, 228-29 (8th Cir. 1983); with Unterburger v. Snow Co., 620 F.2d 599, 603 (8th Cir. 1980).

24. Since the Fifth Circuit held that evidence of subsequent remedial measures is inadmissible in both negligence cases and strict products liability cases, it will be unnecessary for the court to determine whether warning defects should be treated like negligence or strict liability. In either case, evidence of subsequent remedial measures would be excluded.


26. 695 F.2d at 887-88. The court recognized that evidence of subsequent remedial measures is admissible for the purpose of showing feasibility of precautionary measures. This requires, however, that feasibility be controverted by the defendant, which was not the case in Granada Steel. Since the plaintiff had not requested an admission on the issue of feasibility, the court was not required to decide whether a defendant's refusal to admit feasibility constitutes a per se controversy on the issue of feasibility. Id. at 888-89; see C. Wright & K. Graham, Federal Practice & Procedure § 5288, at 144 (1980).

by joining a local retailer or other defendant whose citizenship is not diverse.\textsuperscript{28}

\textit{Industry Custom.} In \textit{Carter v. Massey-Ferguson, Inc.}\textsuperscript{29} the Fifth Circuit held that evidence of product compliance with industry custom is admissible on the issue of design defect.\textsuperscript{30} Although Federal Rules of Evidence 401 and 402 govern the admissibility of relevant evidence in federal courts even in diversity cases,\textsuperscript{31} the court examined Texas substantive law to determine whether evidence of industry custom is relevant.\textsuperscript{32} Noting that the Texas Supreme Court has not decided the issue, the court made an \textit{Erie} guess that the Texas Supreme Court would hold that evidence of industry custom is admissible.\textsuperscript{33}

The court reasoned that evidence need only be probative and that it need not be dispositive to be relevant.\textsuperscript{34} Although the propriety of a manufacturer's conduct is not at issue in a design defect case, industry custom may indicate how an industry perceives the danger associated with the use of a product. Moreover, while the Texas Supreme Court has rejected the consumer expectation test in design defect cases in lieu of a risk-utility test, evidence of the consumer's expectation is relevant to the risk-utility analysis.\textsuperscript{35} Industry custom, in turn, is relevant to an ordinary consumer's expectations.\textsuperscript{36} The court recognized that industry custom differs from state-of-the-art evidence,\textsuperscript{37} but its holding may render the distinction meaningless since both types of evidence are now admissible.\textsuperscript{38}

\begin{itemize}
\item \textsuperscript{28} See American Fire & Casualty Co. v. Finn, 341 U.S. 6 (1951); Strawbridge v. Curtiss, 7 U.S. 267 (1806).
\item \textsuperscript{29} 716 F.2d 344 (5th Cir. 1983). The plaintiff was injured when a motorized log-moving "skidder" backed into him. The skidder was not equipped with a back-up alarm.
\item \textsuperscript{30} \textit{Id.} at 348. The court did not address the issue of whether a product's nonconformance with industry custom would be admissible, but it approvingly discussed Dean Keeton's argument that evidence of industry custom should be admissible on the issue of a design defect without distinguishing between conformance and nonconformance. \textit{Id.} at 348-49 (citing Keeton, \textit{Torts, Annual Survey of Texas Law}, 35 Sw. L.J. 1, 11 (1981)).
\item \textsuperscript{31} See C. WRIGHT, LAW OF FEDERAL COURTS \S 93, at 620-27 (4th ed. 1983).
\item \textsuperscript{32} 716 F.2d at 347.
\item \textsuperscript{33} \textit{Id.} at 348. Evidence of industry custom is admissible in Texas courts in negligence cases. See South Austin Drive-In Theater v. Thomison, 421 S.W.2d 933, 951 (Tex. Civ. App.—Austin 1967, writ ref'd n.r.e.).
\item \textsuperscript{34} 716 F.2d at 348.
\item \textsuperscript{35} \textit{Id.} at 348 (citing Turner v. General Motors Corp., 584 S.W.2d 844, 847 (Tex. 1979)).
\item \textsuperscript{36} 716 F.2d at 348 (citing Two Rivers Co. v. Curtiss Breeding Serv., 624 F.2d 1242, 1249 (5th Cir. 1980), \textit{cert. denied}, 450 U.S. 920 (1981)).
\item \textsuperscript{37} 716 F.2d at 347-48 (citing Boatland of Houston, Inc. v. Bailey, 609 S.W.2d 743, 748 (Tex. 1980)).
\item \textsuperscript{38} The Texas Supreme Court's distinction between state-of-the-art evidence and industry custom in Boatland of Houston, Inc. v. Bailey, 609 S.W.2d 743, 748 (Tex. 1980), might have been used to support a conclusion that, unlike state-of-the-art evidence, evidence of industry custom is not admissible.
\end{itemize}

A distinction that might remain between state-of-the-art evidence and industry custom evidence is that the former may actually define the standard of defectiveness whereas the latter may merely be evidentiary. In \textit{Bailey} the Texas Supreme Court held that state-of-the-art evidence is merely evidentiary, not conclusive. \textit{Id.} at 748-49. The level of the state of the art, however, was itself controverted in \textit{Bailey}. Conceivably, notwithstanding \textit{Bailey}, a stip-
B. Standard of Defectiveness

Unforeseeable Risks. No single issue has caused more difficulty in strict products liability cases than the role of foreseeability in defining defectiveness.39 In Carter v. Johns-Manville Sales Corp.40 the United States District Court for the Eastern District of Texas faced this issue again in a diversity case governed by Texas law. The plaintiff claimed that defendant’s asbestos insulation products were both defectively designed and were defective due to a failure to warn. The parties stipulated that the defendant neither knew nor should have foreseen the risks attending the use of its products.41 Thus, the court was faced squarely with the role of foreseeability under Texas law in defining both design defects and warning defects.

The court recognized that foreseeability has no role in Texas law in determining whether a product has a design defect since design defects are judged according to a product’s risks as they are known at the time of trial.42 Interpreting Texas law, however, the court held that a product is defective due to a failure to warn only if the product dangers were foreseeable to the manufacturer at the time the product was sold.43 This conclusion was undoubtedly a correct Erie guess concerning the role of foreseeability in Texas warning defect cases. Texas cases state that a product is defective if a manufacturer fails to warn of risks that were reasonably foreseeable when the product was sold.44 The Committee on Texas

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41. Id. at 1318.
42. Id. at 1319 (quoting from General Motors Corp. v. Hopkins, 548 S.W.2d 344, 351 (Tex. 1977)):

[The manufacturer's] liability is not rested upon what he knew or should have known when he manufactured or sold the product; it rests on his placing into the stream of commerce a product which is demonstrated at trial to have been dangerous. The damaging event may not have been reasonably foreseeable at the time of manufacture or sale because the dangerous factor of the product might not then have been even reasonably knowable. The supplier would thus be free of culpability, but a price of his doing business is to protect people from danger from his products—or to pay.

43. 557 F. Supp. at 1319.
Pattern Jury Charges has stated that a plaintiff must prove that a product's risks were foreseeable at the time it was sold in order to prevail in a warning defect case. Moreover, comment j to section 402A states that foreseeability is a factor in cases involving warning defects.

Notwithstanding this authority, the role of foreseeability in warnings cases is not free from doubt in Texas. The Texas Supreme Court has not squarely held that warnings are judged only according to risks that were known or foreseeable at the time of sale. In *Crocker v. Winthrop Laboratories* the court upheld a finding of liability under section 402B for an affirmative misrepresentation. In dictum, the court declined to hold manufacturers responsible under section 402A for failure to warn of unforeseeable risks, but it is unclear whether the court did so merely because it was unnecessary to resolve the issue to decide the case. In *Bristol-Myers Co. v. Gonzales* the court stated that a manufacturer is liable for failure to warn of reasonably foreseeable risks. Since the product's risks in that case were foreseeable, however, the court was not required to determine whether the manufacturer would have escaped liability had the risks not been foreseeable.

Moreover, both *Crocker* and *Gonzales* involved drugs, which some jurisdictions have suggested are special. The New Jersey courts have expressly distinguished between drugs and other products in determining whether warning defects are to be judged according to risks known at the time of trial or only according to risks that were reasonably foreseeable at the time the product was sold. Texas courts could plausibly make this same distinction. Nevertheless, the court in *Carter* made the appropriate *Erie* guess concerning Texas law given the available precedents.

After dismissing the warning defects claim, the *Carter* court considered the plaintiff's claim of a design defect. Under the Texas risk-utility test for design defects, the fact finder must compare a product's actual design with the reasonable alternative design.


46. RESTATEMENT (SECOND) OF TORTS § 402A comment j (1965).

47. 514 S.W.2d 429, 433 (Tex. 1974).


49. 561 S.W.2d 801, 804 (Tex. 1978).

50. None of the cases decided by the Texas Courts of Appeals has squarely held that a product defendant escapes liability in a warning defect case if the risks associated with the product were unforeseeable at the time the product was sold. See cases cited supra note 44.


53. *Carter* itself constitutes a clear holding that foreseeability is an element of defectiveness in warning defects cases since the failure to warn claim in *Carter* was actually dismissed on this ground.

54. See Turner v. General Motors Corp., 584 S.W.2d 844, 847 (Tex. 1979).
with feasible alternatives. A feasible alternative in *Carter* was to sell asbestos with an appropriate warning to reduce the risk of injury. The defendant in *Carter* argued that since asbestos is not defective when accompanied by an appropriate warning, it is not defective without a warning that was itself not required under Texas law because the risks of asbestos were unforeseeable at the time of sale. Since Texas law applies hindsight rather than foresight to design defects, however, the court held that the defendant could not escape liability for a design defect by arguing that the risks that a warning reduces were unforeseeable when the product was sold.

The court’s reasoning would permit a plaintiff to convert any warning defect into a design defect and thereby circumvent the Texas foreseeability requirement for warning defects. If the lack of a warning makes a product unreasonably dangerous under the risk-utility test, a comparison of the actual design with the same design accompanied by a warning will necessarily reveal a design defect under the risk-utility test. The same product feature, the absence of a warning, renders the product defective, regardless of whether a warning rubric or a design rubric is used. Permitting the defendant to escape liability because the risks were unforeseeable when a warning theory is used, but not when a design theory is used, seems anomalous.

The problem has its source in the distinction between noninformational features that make products safer and warnings that make them safer. Manufacturers cannot be expected to warn against unknowable risks, but neither can they be expected to account for unknowable risks during the design process. The issue in *Carter* could be avoided by treating warning defects and design defects similarly. Since Texas courts arguably distinguish between warning defects and design defects, however, they must determine whether the absence of a warning will be considered as a design feature, notwithstanding the fact that the risks were not foreseeable when the product was sold. If Texas courts follow the approach taken by the court in *Carter*, plaintiffs should plead warning defects alternatively as design defects, claiming that an alternative design that includes a warning would have been safer.

**Jury Instructions.** In *Fleishman v. Guadiano* the Texas Supreme Court
considered the appropriate jury instruction for a design defect. The plaintiff was injured when she slipped from a ladder, which she claimed had been defectively designed. The trial court instructed the jury on the definition of a design defect in accordance with Turner v. General Motors Corp. However, the trial court refused the plaintiff's request that the jury also be instructed to ignore the plaintiff's contributory negligence in determining whether the ladder was defective. The supreme court upheld the trial court's refusal of the plaintiff's requested instruction.

C. Comparative Causation in Products Liability Suits

Adoption of Comparative Causation. In Duncan v. Cessna Aircraft Co. the Texas Supreme Court adopted comparative causation in strict products liability cases. First, the court held that a plaintiff's negligence is a defense in a strict products liability action when the negligence is more than a mere failure to discover a product defect. Second, while the Texas comparative negligence statute does not directly apply to a strict products liability action, the court created a system of comparative causation to govern both the reduction of a plaintiff's recovery and contribution among joint tortfeasors in suits based on strict products liability.

Although the court had previously recognized the absolute defense of assumption of risk and the comparative defense of unforeseeable misuse in strict products liability cases, it had declined to recognize contributory negligence. In Duncan the court recognized the procedural complexity of this system in suits that involve both strict products liability and negligence. The court also noted that assumed risk and unforeseeable misuse are merely extreme variations of contributory negligence in that all three defenses focus, in varying degrees, on the reasonableness of a plaintiff's conduct. Consequently, the court recognized contributory negligence as

61. The suit was brought against the architect who designed the ladder, raising a potential problem concerning the applicability of strict tort liability to professional service providers. See Barbee v. Rogers, 425 S.W.2d 342, 346 (Tex. 1968) (no strict liability for optometry services). The court, however, did not address this issue.
62. 584 S.W.2d 844, 847 (Tex. 1979).
63. 651 S.W.2d at 731.
65. The court also addressed the effect of general releases. See infra text accompanying notes 226-29.
69. See, e.g., General Motors Corp. v. Hopkins, 548 S.W.2d 344, 351-52 (Tex. 1977) (defense of unforeseeable misuse created in lieu of comparative negligence); Rourke v. Garza, 530 S.W.2d 794, 800 (Tex. 1975) (no defense that plaintiff did not inspect for open and obvious defect); Henderson v. Ford Motor Co., 519 S.W.2d 87, 89-90 (Tex. 1974) (no defense that plaintiff was negligent after discovering defect).
71. 27 Tex. Sup. Ct. J. at 218 (citing Boatland of Houston, Inc. v. Bailey, 609 S.W.2d 743, 750-51 (Tex. 1980) (Pope, J., concurring); Farley v. M M Cattle Co., 529 S.W.2d 751, 758 (Tex. 1975)).
a defense that reduces recovery in strict products liability actions. In so doing, the court abolished assumption of risk and unforeseeable misuse as absolute defenses in strict liability actions.

Nothing in the rationale underlying strict products liability is incompatible with contributory negligence as a defense. The irrelevance of the defendant's fault is not necessarily inconsistent with the plaintiff's fault being an issue. Independent of our attitude toward manufacturers, we may want to encourage consumers to be safe. Moreover, it may be unfair to spread losses attributable to a plaintiff's fault among all the consumers of a product. The historical reluctance of courts to recognize contributory negligence as a defense in strict products liability actions has largely been due to a dissatisfaction with the harsh, all-or-nothing consequences of the defense. The advent of comparative principles has alleviated this problem.

The court also held that the reduction of a plaintiff's recovery and contribution among joint tortfeasors are governed by comparative causation. Although the Texas comparative negligence statute applies only to actions for negligence, the court created a similar, but not identical, system of comparative causation to govern strict products liability. This new system governs the entirety of any action "in which at least one defendant is found liable on a theory other than negligence."

The court's principal rationale for adopting comparative principles for strict liability was to avoid the procedural labyrinth caused by imposing divergent schemes on negligence and strict products liability actions, which commonly occur in the same lawsuit. The court also reasoned that an all-or-nothing approach to contribution is both unfair and inefficient because it fails to apportion accident costs relative to the parties' abilities to have prevented those costs. The court also relied on the fact that a growing number of other courts have adopted comparative fault in strict products liability actions. The court's comparative scheme involves allo-
cating a loss according to the parties' relative "causation" and is similar but not identical to comparative negligence under article 2212a. The jury allocates a percentage of causation to the plaintiff, to the products defendant and to other defendants, and the court structures an appropriate judgment.

Comparative causation creates problems for submitting a products liability case to the jury, since it combines two separate steps in allocating a loss among defendants. Aside from comparative principles, a defendant is appropriately held liable only for damages that it caused. Consider a driver who is injured in a collision with another negligent motorist in which (1) the original impact causes injuries to his back; (2) a defective steering wheel shatters in his hand; and (3) a doctor treating him for the injured hand negligently administers a drug that causes a rash. The negligent driver is a cause-in-fact of all the plaintiff's injuries under the "but for" test of causation. The steering wheel manufacturer, however, is a cause-in-fact only of the hand injury and the rash, whereas the doctor is a cause-in-fact only of the rash. The plaintiff, of course, is a cause-in-fact of all three injuries.

Since the back injury was caused only by the negligent driver, he alone (and the plaintiff if he was negligent) should be liable for it. Since the hand injury was caused by both the negligent driver and the steering wheel


An obstacle to adopting comparative principles in strict products liability has been a fear that comparing one party's fault with the culpability of a strict products liability defendant who has not been at fault is theoretically impossible. Just as we often compare seemingly incommensurate interests while making personal or social decisions, however, we can compare the strength of our judgments that various actors bear a loss even if the judgments concerning each actor are based on different underlying values. The court implicitly recognized this by concluding that the jury can compare various versions of fault, including negligence, selling a defective product, and breaching an implied or express warranty. The court's holding may also suggest that strict products liability is not that different from negligence. See Powers, supra note 74, at 802-05.

80. In its first opinion, which was subsequently replaced by a second opinion, the court adopted comparative "fault." 26 Tex. Sup. Ct. J. at 515-16. The court's second opinion, however, explicitly rejected comparative "fault" in favor of comparative "causation." 27 Tex. Sup. Ct. J. at 220.

81. The court suggested the following jury submission:

If, in answer to Questions —, —, and —, you have found that more than one party's act(s) or product(s) contributed to cause the plaintiff's injuries, and only in that event, then answer the following questions:

Find from a preponderance of the evidence the percentage of plaintiff's injuries caused by:

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manufacturer, the hand injury should be allocated between them (and the plaintiff when appropriate) according to the comparative allocation principles of Duncan. Since the rash was caused jointly by all three defendants, it should be allocated among all three of them (and the plaintiff when appropriate) according to the allocation principles of Duncan.

Using comparative causation to allocate the rash creates two problems. First, if comparative causation means cause-in-fact, the rash cannot be allocated, since each defendant (and the plaintiff) was a cause-in-fact of the entire rash. Second, if comparative causation refers to some other allocative principle, using the word "causation" will confuse the jury, since the allocation principle is different than the cause-in-fact principle that protects the doctor from liability for the back and hand injuries altogether. By using the term "causation," the court creates the risk that these separate allocative principles will be merged into one.

The court also considered four specific issues concerning the implementation of its comparative causation scheme. First, unlike comparative negligence under article 2212a, the scheme created in Duncan involves "pure," rather than "modified," comparative causation. Consequently, if the jury assigns fifty-one percent causation to the plaintiff, his injury is reduced by fifty-one percent rather than barred altogether. Second, each defendant is jointly and severally liable even if he is less responsible than the plaintiff. Under article 2212a, section 2(c), a negligent defendant is jointly and severally liable unless he is less negligent than the plaintiff, in which case he is liable only for his own percentage of fault. Third, partial settlement be-

82. "Proximate causation" has its own difficulties as a method of allocation since a different standard governs proximate causation in negligence than governs producing cause in strict products liability. See General Motors v. Hopkins, 548 S.W.2d 344, 351-52 nn.3-4 (Tex. 1977).

83. For the jury to accurately allocate damages, it must first decide who caused which portions of the injury. For example, the driver alone caused the back injury; the driver and the steering wheel manufacturer caused the hand injury; and the driver, steering wheel manufacturer, and doctor caused the rash. Then the jury must allocate percentages within each category. This should not be done in one submission, because the jury may want to allocate a high percentage of the rash to the doctor, but a high percentage of the hand injury to the steering wheel manufacturer.

84. Faith that the jury will separate these tasks in a single submission is naive. If damages due to the rash are $1000, damages due to the hand are $5000, and damages due to the back are $25,000, a single submission could easily lead the jury to allocate 10% to the doctor, 30% to the steering wheel manufacturer, and 60% to the negligent driver. The resulting judgment of $3100 against the doctor would not be supported by the evidence unless the court was willing to abandon the principle that defendants are liable only for damages they have in fact caused. Cases in which a jury cannot determine which defendant caused which portions of the harm present a different and more complicated issue. See, e.g., Loui v. Oakley, 50 Hawaii 260, 438 P.2d 393 (1968) (plaintiff injured same area of body in four separate automobile accidents over four years); Sindell v. Abbott Labs., 23 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (plaintiffs could not trace cancer-causing drug, which was prescribed by doctors generically rather than by brand name, to any one of several manufacturers who had mutually agreed to use the same drug formula), cert. denied, 449 U.S. 912 (1980).

85. Thus, an insolvent tortfeasor's share of the loss is allocated to the other defendants, regardless of the relative percentages allotted to the plaintiff and the other defendants. 27 Tex. Sup. Ct. J. at 222 & n.9.
tween the plaintiff and one defendant reduces the plaintiff's claim against
the other defendants by the percentage loss allocated by the jury to the
settling defendant. If the plaintiff makes an advantageous settlement, the
plaintiff may recover more than the entire amount of the damages,
notwithstanding the one-recovery rule of Bradshaw v. Baylor University. 86
Finally, the court held that the plaintiff's negligent failure to discover or
guard against a product defect is not a defense.

Each of these features conflicts with the treatment of a negligence case
under article 2212a. Since the court's principal rationale in Duncan was
the procedural nightmare of using conflicting schemes in different parts of
the same lawsuit, the court understandably concluded that its judicially
created scheme applies to all aspects of a lawsuit in which at least one
defendant is held strictly liable. 87 Consequently, negligent defendants are
no longer afforded the protection of article 2212a in cases in which a prod-
uct manufacturer is also held liable on a theory other than negligence.

The court's rationale for not applying article 2212a to strict products
liability claims is dubious. The court reasoned that article 2212a was in-
tended to exclude products liability claims, since it "refers only to negli-
gence actions, even though strict products liability had been judicially
adopted six years earlier." 88 Article 2212 does not control products liabil-
ity actions, the court reasoned, because it "was enacted in 1917, long
before any identifiable body of strict products liability law existed." 89 It
does seem clear, however, that when the legislature enacted article 2212a,
when it did understand the nature of strict products liability, it did not
envisage three different schemes.

Given the ambiguity regarding the legislature's intent to include strict
products liability in article 2212a, the procedural nightmare of having sep-
arate schemes govern different aspects of the same lawsuit could justify the
court's interpretation of article 2212a to include strict products liability.
But article 2212a at least represents a legislative judgment that if compara-
tive principles are used, they should be used in the method described by
the statute. This is especially true for the negligence actions that the court
now holds are no longer governed by article 2212a simply because they are
coupled with products liability claims. It is desirable to have one scheme
govern all aspects of a single lawsuit. The court may be convinced that
certain features of article 2212a are undesirable, but they should at least be
followed in negligence actions. If uniformity is desirable, uniform applica-

86. 126 Tex. 99, 84 S.W.2d 703 (Tex. Comm'n App. 1935, opinion adopted); see infra
text accompanying notes 91-104.
87. 27 Tex. Sup. Ct. J. at 222. Since a finding of strict liability is unknown until after
the verdict, presumably Duncan will control the submission of any action in which an issue
of one defendant's strict liability is submitted to the jury. The court held, however, that the
judgment would be controlled by art. 2212a if the jury refused to hold at least one defendant
strictly liable. Id. This may create difficulties, however, since the submission will have
asked the jury to compare causation, whereas art. 2212a requires a comparison of fault.
88. 27 Tex. Sup. Ct. J. at 220.
89. Id.
tion of article 2212a would be more harmonious with the legislative mandate.

The court's distinction between its scheme and article 2212a leaves numerous problems unresolved. For example, will the court follow the setoff provisions of article 2212a, section 2(f), or will it treat cases involving immune worker's compensation employers similar to their treatment under article 2212a? The implication of Duncan is that the court is writing on a clean slate.

**Settling Tortfeasors.** In *Thibodeaux v. Fibreboard Corp.*, the Fifth Circuit considered the treatment of settling tortfeasors in strict products liability actions. The plaintiff had settled with thirteen of fourteen joint tortfeasors who were all manufacturers of asbestos products. He then sued the fourteenth manufacturer for strict products liability, and the jury found that the plaintiff's damages were less than the total settlements. The defendant argued that under the Bradshaw one-recovery rule, the plaintiff should recover nothing because he had already received full compensation for his injury. The plaintiff argued that he should recover one-fourteenth of the jury's award by applying Palestine Contractors, which provides for proportionate reduction of a plaintiff's award against remaining, nonsettling joint tortfeasors.

*Thibodeaux* was decided before the Texas Supreme Court's decision in *Duncan v. Cessna Aircraft Co.*, so the Fifth Circuit assumed that article 2212 and Palestine Contractors, rather than comparative causation, governed an action for strict products liability. The court held that the Bradshaw one-recovery rule controlled, rather than the proportionate reduction rule of Palestine Contractors and, consequently, that the defendant was entitled to a take nothing judgment. The court reasoned that whenever Texas courts had considered a conflict between Bradshaw and another line of cases, they had inevitably followed Bradshaw. The court, therefore, made an *Erie* guess that Texas courts would follow Bradshaw rather than Palestine Contractors when the two approaches conflicted.

The court's reasoning overlooks *Cypress Creek Utility Service Co. v. Muller*, which held that a jury finding of a settling tortfeasor's percentage of negligence requires proportionate reduction under article 2212a, section 2(e), which takes precedence over the Bradshaw one-recovery rule.

90. See Varela v. American Petrofina Co., 658 S.W.2d 561 (Tex. 1983); infra text accompanying notes 148-61.
91. 706 F.2d 728 (5th Cir. 1983).
92. Id. at 729.
96. TEX. REV. CIV. STAT. ANN. art. 2212 (Vernon 1971); see General Motors Corp. v. Simmons, 558 S.W.2d 855, 862 (Tex. 1977).
97. 706 F.2d at 730-31.
98. 640 S.W.2d 860 (Tex. 1982).
99. Id. at 867. The *Thibodeaux* court merely cited *Cypress Creek* with a "but cf." sig-
Cypress Creek relied heavily on the legislative intent of article 2212a, which was not directly implicated in Thibodeaux. Moreover, the unfairness of permitting a defendant to choose proportionate reduction and then escape its consequences was not present in Thibodeaux, as it was in Cypress Creek. Nevertheless, Cypress Creek at least suggests that the Bradshaw one-recovery rule is not inviolate.

The conflict between Bradshaw and Palestine Contractors will not be an issue after the effective date of Duncan, since strict products liability will be governed by comparative causation rather than by article 2212 and Palestine Contractors. The supreme court in Duncan held that a plaintiff's recovery against remaining defendants is reduced by the percentage allocated to a settling defendant, not by the dollar amount of the settlement. Accordingly, Duncan explicitly overruled the Bradshaw one-recovery rule in products liability actions, just as Cypress Creek overruled it in negligence actions governed by article 2212a, section 2(e).

Comparative Fault in Admiralty. Although federal courts have long used comparative negligence in admiralty cases based on negligence, the use of comparative fault in suits by longshoremen based on strict products liability has been more problematical. In Lewis v. Timco, Inc. a Fifth Circuit panel considering a longshoreman's claim declined to follow other circuit courts that have applied comparative fault to strict products liability claims. Consequently, the defendant was not permitted to reduce the longshoreman's recovery by proving contributory negligence. The court granted a rehearing, however, and reversed the ruling of the panel. Noting the trend to adopt comparative fault in strict products liability cases, the court held that comparative fault is applicable to strict products liability claims by longshoremen in admiralty cases.

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100. 706 F.2d at 729. Compare Tex. Rev. Civ. Stat. Ann. art. 2212 (Vernon 1971); with id. art. 2212a, § 2(d), (e) (Vernon Supp. 1984). See Cypress Creek Util. Serv. Co. v. Muller, 640 S.W.2d 860, 864 (Tex. 1982). Of course, unfairness is not a factor when the plaintiff in a negligence action has selected proportionate reduction under art. 2212a, § 2(e) by requesting the appropriate jury issues. See Cypress Creek, 640 S.W.2d at 866.
102. See supra notes 64-90 and accompanying text.
104. Id.
106. 697 F.2d 1252 (5th Cir. 1983).
107. See cases cited supra note 79.
108. 716 F.2d 1425 (5th Cir. 1983) (en banc).
109. Id. at 1431; see cases cited supra note 79. This result is justifiable on the basis of fairly allocating a loss among the various parties. It also follows the trend in state and federal courts toward adopting comparative fault in strict products liability actions. The court reasoned that recognizing comparative negligence as a defense will help optimize investments in safety by both parties. 716 F.2d at 1432-33. The court argued that the rejection of comparative negligence results in an overcharge to the defendant and thereby creates an undue incentive for an inefficient increase in the defendant's expenditures for safety. Id. at 1032. This argument is incorrect. Defendants will tend to stop investing in safety at the point it becomes inefficient, even if they are liable for harm caused by a plaintiff's contribu-
D. Unusual Results

In Fitzgerald Marine Sales v. LeUnes the Fort Worth court of appeals considered a difficult problem concerning the treatment of unusual results caused by allegedly defective products. The plaintiff was injured when he was thrown from a motorboat. The steering wheel that he was holding broke as he left the boat, and he alleged that the steering wheel was defective because of voids in the plastic. The court characterized the alleged defect as a manufacturing flaw and held that the defendants were not liable even if the steering wheel was flawed. The court reasoned that strict liability does not arise simply upon a showing of a defect in the product; the plaintiff must also show that the product is rendered unreasonably dangerous as a result of the defect. This conclusion overlooks the fact that even under the risk-utility test, a flawed product is almost always unreasonably dangerous because flaws do not have any apparent utility.

The main thrust of the court’s reasoning, however, was that the plaintiff introduced no evidence showing that the steering wheel was defective for its intended purpose of steering the boat. This reasoning raises a number of difficult issues. First, the court may have been implicitly relying on the doctrine of misuse, but the test of misuse is foreseeability of use, not the manufacturer’s intent. Moreover, misuse does not bar a plaintiff’s recovery entirely, it merely reduces recovery.

Second, the court may have been relying on the fact that unusual accidents are so unlikely that they contribute very little to the risk side of the risk-utility test of defectiveness. This interpretation of Fitzgerald comports with the court’s conclusion that the plaintiff was not entitled to recover at all, rather than that the plaintiff’s recovery should merely be reduced, since the steering wheel was held to be not defective as a matter of law. This view, however, relies on the questionable premises that manufacturing defects are governed by the risk-utility test and that the utility of the flaw outweighs even the slightest risk of this type of unusual accident.

Another rationale for denying rather than merely reducing recovery might be that even if the steering wheel was flawed, the flaw was not a producing cause of the injury. Unusual results in negligence are analyzed under the rubric of proximate causation, and using producing cause to accomplish this task in products liability would be sensible. General Motors
Corp. v. Hopkins"117 precludes using foreseeability as the test of producing cause in strict products liability, but it need not preclude the use of other policies concerning the scope of liability.118 The scope of this survey does not extend to suggesting a comprehensive test. Fitzgerald may be significant because it raises a difficult issue concerning the appropriate treatment of unusual results caused by allegedly defective products. This issue lies at the intersection of defectiveness, misuse and producing cause, and will require careful attention.

E. Special Transactions

In G-W-L, Inc. v. Robichaux119 the Texas Supreme Court held that the implied warranty of habitability created in Humber v. Morton120 for the sale of a new house can be waived as long as the waiver is clear and free from doubt.121 The waiver need not comply with the waiver provisions of section 2.316 of the Commercial Code122 since article 2 does not apply to real estate transactions.123 The court also reasoned that building contracts are hybrid transactions involving both services and materials, and that such transactions are governed by article 2 only if their essence is the sale of materials. Since the building contract in Robichaux was essentially a service, article 2 did not apply.124

The court’s reasoning concerning the product-service distinction clouds the question of the applicability of strict tort liability to hybrid product-service transactions. Robichaux did not involve an action for strict products liability because strict products liability does not apply to real estate transactions, and because the plaintiff did not suffer personal injury or property damage other than to the house itself.125 Nevertheless, the court’s treatment of the product-service distinction in the context of article 2 may affect its treatment of the same distinction in strict products liability actions.

The “essence of the transaction” test is inconsistent with the court’s ear-

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117. 548 S.W.2d 344, 351 n.3 (Tex. 1977).
118. See Powers supra note 74, at 805-09.
119. 643 S.W.2d 392 (Tex. 1982).
120. 426 S.W.2d 554, 555 (Tex. 1968).
121. 643 S.W.2d at 393.
122. The supreme court reserved this issue in Watel v. Richman, 576 S.W.2d 779, 780 (Tex. 1978). The court disapproved of the holding in MacDonald v. Mobley, 555 S.W.2d 916, 919 (Tex. Civ. App.—Austin 1977, writ ref’d n.r.e.), that the provisions of § 2.316 are applicable to waivers of the implied warranty of habitability in real estate transactions. 643 S.W.2d at 394. See TEX. BUS. & COM. CODE ANN. § 2.316(b) (Vernon 1968) (Tex. UCC): “Subject to Subsection (c), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous . . . .”
123. 643 S.W.2d at 394; see TEX. BUS. & COM. CODE ANN. §§ 2.102, .105 (Vernon 1968) (Tex. UCC). Even though art. 2 is not applicable to real estate transactions, the court might have borrowed from its provisions to control waivers of the court-created implied warranty of habitability.
124. 643 S.W.2d at 394.
125. See Humber v. Morton, 426 S.W.2d 554 (Tex. 1968); Mid Continent Aircraft Corp. v. Curry County Spraying Serv., 572 S.W.2d 308, 312-13 (Tex. 1978).
lier treatment of the product-service distinction in strict products liability cases. In *Barbee v. Rogers* the court held that an optometrist’s failure to fit a contact lens properly was not governed by strict products liability. The court relied in part on the fact that the miscarriage was due to the service component of the hybrid transaction, suggesting that some parts of a product-service transaction may be governed by strict products liability while others are not. This reasoning runs counter to the essence of the transaction test, which entails that an entire transaction be within or outside the scope of strict products liability.

The court in *Robichaux* did not cite *Barbee* or a long line of appellate cases dealing with the product-service distinction. The court probably did not intend to upset this line of cases with its brief reference to the essence of the transaction test in *Robichaux*, especially in the context of article 2. Nevertheless, *Robichaux* may be a harbinger of the general application of the essence of the transaction test in cases involving the product-service distinction.

II. COMPARATIVE NEGLIGENCE

The Texas Supreme Court decided three cases involving comparative negligence under article 2212a. These cases may also be applicable in strict products liability actions if the courts borrow from article 2212a to define the new comparative causation scheme adopted in *Duncan*.

A. SETTLING TORSFEASORS

The treatment of settling tortfeasors under article 2212a has presented recurring problems. The Texas Supreme Court again faced the issue in an unusual situation in *Dabney v. Home Insurance Co.* During a two-car automobile race on a public highway, car 1 (insured by Home Insurance)

126. 425 S.W.2d 342, 346 (Tex. 1968).
127. *Id.*
130. Varela v. American Petrofina Co., 658 S.W.2d 561 (Tex. 1983); Arthur Bros., Inc. v. U.M.C., 647 S.W.2d 244 (Tex. 1982); Dabney v. Home Ins. Co., 643 S.W.2d 386 (Tex. 1982); *see* TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1984).
131. *See supra* notes 64-90 and accompanying text.
132. *See*, e.g., Cypress Creek Util. Serv. Co. v. Muller, 640 S.W.2d 860 (Tex. 1982); Clemtex Ltd. v. Dube, 578 S.W.2d 813 (Tex. Civ. App.—Beaumont 1979, writ ref’d n.r.e.); Deal v. Madison, 576 S.W.2d 409 (Tex. Civ. App.—Dallas 1978, writ ref’d n.r.e.).
133. 643 S.W.2d 386 (Tex. 1982).
went out of control, injuring its driver (who was not the owner) and passengers. The driver of car 2 was uninsured. Home Insurance settled with the passengers under the liability provision of the policy and settled with both the driver of car 1 and the passengers under the personal injury protection (PIP) provision of the policy. The driver of car 1 and the passengers then sued Home Insurance for the negligence of the driver of car 2 under the uninsured motorist provision of the policy. The jury found that each of the parties was negligent in the following percentages.\(^\text{134}\)

<table>
<thead>
<tr>
<th>Party</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Driver 1</td>
<td>50%</td>
</tr>
<tr>
<td>Passenger 1</td>
<td>10%</td>
</tr>
<tr>
<td>Passenger 2</td>
<td>5%</td>
</tr>
<tr>
<td>Passenger 3</td>
<td>5%</td>
</tr>
<tr>
<td>Driver 2</td>
<td>30%</td>
</tr>
</tbody>
</table>

The supreme court held that for the purpose of determining whether an individual plaintiff can recover under the Texas modified comparative negligence statute, the driver's negligence is not imputed to the passengers.\(^\text{135}\) It also held that payments made by Home Insurance under the PIP provision of the policy did not constitute set-off against its liability under the uninsured motorist provision of the policy.\(^\text{136}\) Moreover, the court held that payments made by Home Insurance under the liability provisions of the policy did not effect a dollar-for-dollar reduction of recovery under the uninsured motorist provision.\(^\text{137}\) Instead, since the negligence of each tortfeasor was submitted to the jury, Home Insurance was entitled to proportional reduction based on the percentage of negligence found against each party.\(^\text{138}\)

In the context of the suit against Home Insurance as representative of the uninsured driver of car 2, the driver of car 1 was merely a settling tortfeasor. Consequently, under article 2212a, section 2(e), the recovery against the driver of car 2 (and, therefore, Home Insurance under the uninsured motorist provision) should be reduced by the percentage of negligence attributed to driver 1, as long as the negligence of driver 1 was

\(^{134}\) Id. at 387.

\(^{135}\) Id. at 389; see Tex. Rev. Civ. Stat. Ann. art. 2212a, § 1 (Vernon Supp. 1984) (barring recovery by a plaintiff who is more than 50% negligent).

\(^{136}\) 643 S.W.2d at 389; see Westchester Fire Ins. Co. v. Tucker, 512 S.W.2d 679 (Tex. 1974). In Tucker the court relied on the fact that a set-off for PIP payments against uninsured motorist payments would have reduced the uninsured motorist payments below the statutory minimum. Id. at 685-86; see Tex. Ins. Code Ann. art. 5.06—1 (Vernon 1981). The court in Dabney did not rely on this rationale and simply stated that in Tucker "we held an insurer was not entitled to set off payments under medical payments coverage against claims made under uninsured motorist coverage." 643 S.W.2d at 389.

The result in Dabney may merely be an application of the collateral source rule. Since the uninsured driver would not have been able to reduce his liability by payments made under the victim's insurance policy, arguably neither should the insurer standing in the shoes of the uninsured motorist. Less clear, however, is whether the insurer could recoup its PIP payments through a subrogation clause for any proceeds the plaintiff receives from a tortfeasor, including proceeds from the insurer standing in the place of the tortfeasor under the uninsured motorist provision of the policy.

\(^{137}\) 643 S.W.2d at 389.

\(^{138}\) Id. (citing Cypress Creek Util. Serv. Co. v. Muller, 640 S.W.2d 860 (Tex. 1982)).
The passengers' recovery should also be reduced by their own negligence under article 2212a, section 1. This, in fact, appears to be the method used by the trial court to calculate the damages. Consequently, Dabney represents a straightforward application of article 2212a and Cypress Creek, albeit in a somewhat complex setting.

B. Venue for Contribution

In Arthur Brothers, Inc. v. U.M.C., Inc. the Texas Supreme Court held that article 2212a, section 2(g), which provides that "[a]ll claims for contribution between named defendants in the primary suit shall be determined in the primary suit," applies to third-party defendants whom the original defendants sued for contribution. Consequently, sustaining a plea of privilege by the third-party defendant to be sued in its home county was improper. If venue is proper for the primary suit, venue is also proper for the third-party action.

The new Texas venue statute perpetuates the holding in Arthur Brothers. In addition to eliminating the plea of privilege as a mechanism for challenging venue, the new statute explicitly provides that venue over third-party claims is proper if venue over the principal claim is appropriate. Consequently, in suits arising after the effective date of the new venue statute, the result in Arthur Brothers will occur independently of the language of article 2212a, section 2(g).

C. Negligence of a Workers' Compensation Employer

In Varela v. American Petrofina Co. the plaintiff was injured at work, allegedly as a result of his employer's negligence and the negligence of a third party. After collecting from his employer's workers' compensation insurer, the plaintiff sued the third party for negligence. The trial court

139. If the negligence of driver 1 had not been submitted to the jury, the recovery against driver 2 should have been reduced by the dollar amount of the settlements under art. 2212a, § 2(d).
140. 643 S.W.2d at 389-90.
141. The court also held that a passenger's knowledge that the driver was intoxicated coupled with a reasonable opportunity to leave does not constitute an absolute bar to recovery, but is merely a factor under comparative negligence. Id. at 388-89.
142. 647 S.W.2d 244 (Tex. 1982).
143. TEX. REV. CIV. STAT. ANN. art. 2212a, § 2(g) (Vernon Supp. 1984).
144. 647 S.W.2d at 245-46.
148. 658 S.W.2d 561 (Tex. 1983).
submitted jury issues concerning the negligence of the plaintiff, the employer and the third party. The jury found that the plaintiff was fifteen percent negligent, the employer was forty-two percent negligent, and the third party was forty-three percent negligent.\textsuperscript{149} The trial court then reduced the plaintiff's recovery by both his own negligence and the negligence of his employer, and the court of appeals affirmed.\textsuperscript{150} The Texas Supreme Court reversed, holding that the plaintiff's recovery against the negligent third party should not be reduced by the employer's percentage of negligence.\textsuperscript{151}

The court's reasoning was puzzling. Under the Texas Workers' Compensation Act, an injured worker cannot recover from his employer in an action for negligence, and a third-party tortfeasor who is liable to the worker cannot recover contribution from the employer.\textsuperscript{152} The court held that these provisions of the Act are exceptions to article 2212a, section 2(b), which provides that contribution to the damage award is proportional to the amount of negligence attributable to each party.\textsuperscript{153} This construction is reasonable since article 2212a, section 2(b), addresses the method of calculating contribution when it is available; it does not create a right of contribution when the Workers' Compensation statute expressly precludes one.

The negligent defendant in \textit{Varela}, however, was not attempting to obtain contribution from the employer. The issue was whether the plaintiff or the negligent defendant should bear the portion of negligence attributable to the employer. The defendant's theory was that the employer, who was immune under the Workers' Compensation Act, was similar to a settling joint tortfeasor. The employer's percentage of negligence, therefore, should proportionately reduce the plaintiff's recovery under article 2212a, section 2(e).\textsuperscript{154}

The court rejected this argument. First, it stated that since the plaintiff had no cause of action against his employer, the defendant had no claim for contribution from the employer, which, in turn, rendered article 2212a, section 2(e), inapplicable.\textsuperscript{155} This reasoning overlooks the fact that a non-settling tortfeasor does not have a claim of contribution against a normal

\textsuperscript{149} Id. at 561.
\textsuperscript{150} 644 S.W.2d 903 (Tex. App.—Beaumont 1983).
\textsuperscript{151} 658 S.W.2d at 562. The supreme court also decided a companion case on the same point. Teakell v. Perma Stone Co., 658 S.W.2d 563 (Tex. 1983). The trial court in \textit{Teakell} had refused to consider the employer's negligence, but the court of appeals reversed. 653 S.W.2d 483 (Tex. App.—Corpus Christi). The supreme court reversed the court of appeals on the basis of \textit{Varela}. 658 S.W.2d at 563.
\textsuperscript{152} TEX. REV. CIV. STAT. ANN. art. 8306, § 3 (Vernon 1967).
\textsuperscript{153} The court also reasoned that since the plaintiff has no common law right to recover for the employer's negligence, the other negligent defendant has no right of contribution against the employer. 658 S.W.2d at 562. This reasoning is superfluous since the Workers' Compensation Act explicitly provides that other defendants have no right of contribution against the employer. TEX. REV. CIV. STAT. ANN. art. 8306, § 3 (Vernon 1967).
\textsuperscript{154} If the percentage negligence of the employer was not submitted to the jury, the defendant's theory would, presumably, entail a reduction of the plaintiff's recovery according to art. 2212a, § 2(d).
\textsuperscript{155} 658 S.W.2d at 562.
settling tortfeasor, and yet section 2(e) clearly applies to such a case. The mere absence of a right of contribution does not preclude the application of section 2(e).

Second, the court concluded that the payment by the employer's insurer under the Workers' Compensation Act was not a settlement; therefore, section 2(e), and presumably section 2(d), did not apply. While a payment under the Workers' Compensation Act is not precisely a settlement, this conclusion does not resolve the issue. The problem is that two situations in which a plaintiff cannot recover from a negligent party are explicitly covered by article 2212a. Section 2(c) provides that the percentage of damages attributable to an insolvent defendant is borne by other defendants who are not less negligent than the plaintiff. Section 2(e) places a settling defendant's percentage of negligence on the plaintiff by reducing the plaintiff's recovery. Since article 2212a does not expressly deal with immune defendants, the court should have adopted the treatment that accords with the scheme the statute has established. A conclusion that section 2(e) does not precisely apply does not resolve the issue, because no provision of article 2212a applies precisely.

The court should have examined the purposes of article 2212a as shown by the treatment of insolvent and settling defendants, and thus resolved the problem of immune defendants in a way that reflects the purposes of the statute. This requires a determination of whether immune defendants are similar to settling defendants or insolvent defendants, given the statutory purpose for distinguishing between insolvent defendants and settling tortfeasors. Settling defendants differ from insolvent defendants because the plaintiff is benefited by the former, but is neither benefited by nor responsible for the latter. Consequently, a conclusion that the plaintiff should bear the percentage of negligence for settling defendants is reasonable. The problem of insolvent defendants, however, cannot be as easily resolved. Article 2212a, section 2(c) is a reasonable solution since it puts the percentage of negligence of an insolvent tortfeasor on either the plaintiff or the solvent defendant, depending on which of them is more culpable.

Given these purposes, a workers' compensation employer is more akin to a settling defendant than to an insolvent defendant. Immune employers differ from settling tortfeasors because the plaintiff normally can choose whether to settle, whereas a plaintiff cannot choose whether to settle with his employer under the Workers' Compensation Act. Nevertheless, like a settlement, a workers' compensation award benefits the plaintiff, and the other defendant is neither responsible for nor benefitted by it. Unlike a defendant's insolvency, an employer's immunity is granted only in ex-
change for a benefit to the plaintiff.\textsuperscript{159}

Even if immune employers are more analogous to insolvent tortfeasors than to settling tortfeasors, a remaining defendant should be treated at least as advantageously as in cases involving an insolvent defendant. Under section 2(c) a defendant is liable only for its own percentage of negligence if it is less negligent than the plaintiff, regardless of the insolvency of another defendant. \textit{Varela} does not necessarily rule out this possibility, since the remaining defendant was more negligent than the plaintiff, but the court's opinion does not suggest that immune employers will be treated like insolvent defendants under section 2(c). Moreover, in the companion case of \textit{Teakell v. Perma Stone Co.}\textsuperscript{160} the Texas Supreme Court affirmed the trial court's refusal to submit the employer's negligence to the jury. The result in \textit{Teakell} is inconsistent with treating an employer like an insolvent defendant.

A final problem with \textit{Varela} is that if the employer's negligence should not be submitted to the jury, as \textit{Teakell} holds, \textit{Varela} should have been remanded for a new trial, since the court did submit the employer's negligence to the jury. If the employer's negligence had not been submitted to the jury, the jury could have found higher percentages of negligence for both the plaintiff and the defendant. Since the defendant was liable for all the damages not attributable to the plaintiff, raising the plaintiff's percentage of negligence would reduce the defendant's liability. Thus, in \textit{Varela} the defendant was probably held liable for a higher percentage of the damages than it would have been had the employer's negligence not been submitted to the jury. Although the defendant requested that the employer's negligence be submitted to the jury, this request was for the purpose of reducing the plaintiff's award under article 2212a, section 2(e). The court's decision to place the employer's percentage of negligence, as found by the jury, on the defendant gave the plaintiff a higher percentage recovery than either the section 2(e) method or the \textit{Teakell} position would entail.

The legislature did not consider the treatment of an immune employer's negligence when it enacted article 2212a. Similar issues may arise concerning other forms of immunity. The court should resolve these issues in harmony with the situations that article 2212a does address. The opinion in \textit{Varela} fails to do this. It merely concludes that since article 2212a does not expressly address the situation, the plaintiff's position should prevail.\textsuperscript{161} Perhaps the legislature should expressly provide for the treatment of immune tortfeasors under article 2212a.

\textsuperscript{159} This analysis does not apply to all immunities. Governmental immunity, for example, does not create a specific benefit for the plaintiff in exchange for the immunity. Consequently, each type of immunity should be analyzed on its own merits.

\textsuperscript{160} 658 S.W.2d 563 (Tex. 1983).

\textsuperscript{161} \textit{Id.} at 563.
III. MEDICAL MALPRACTICE

A. Statute of Limitations

In 1975 the Texas Legislature enacted a special two-year statute of limitations in medical malpractice actions against health care providers carrying professional liability insurance. This two-year limitation applied to all persons regardless of legal disability except minors under the age of six years. Consequently, a minor could be time barred in a medical malpractice action after reaching the age of eight years. In 1977 the legislature enacted the Medical Liability and Insurance Improvement Act, which included minors under the age of twelve years within the exception, giving minors at least until their fourteenth birthday to file an action. Prior to the enactment of these statutes, the statute of limitations for medical malpractice claims was tolled under general Texas law for all tort actions until two years after a minor reached the age of majority.

In Sax v. Votteler the Texas Supreme Court held that the provision in the 1975 Act permitting a malpractice action to be barred after the plaintiff's eighth birthday violates the open courts provision of the Texas Constitution. Relying on Hanks v. City of Port Arthur, the court held that a statute that unreasonably abridges a right to obtain redress for personal injuries is void as a denial of due process under the open courts provision. The court went on to hold that “the right to bring a well-established common law cause of action cannot be effectively abrogated by the legislature absent a showing that the legislative basis for the statute outweighs the denial of the constitutionally-guaranteed right of redress.”

To demonstrate that a statute violates the open courts provision, a litigant must show that he has a cognizable common law cause of action and that the restriction on that cause of action is unreasonable when weighed against the purpose of the statute. The court recognized that the general purpose of the Act was to establish insurance rate standards that would


163. Id.


167. 648 S.W.2d 661 (Tex. 1983).

168. Tex. Const. art. I, § 13 provides: "All courts shall be open, and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law." The medical treatment in Sax occurred in 1976, before the effective date of the 1977 Act.

169. 121 Tex. 202, 210, 48 S.W.2d 944, 947 (1932). The court also relied on Lebohm v. City of Galveston, 154 Tex. 192, 197, 275 S.W.2d 951, 954 (1955), and Waites v. Sondock, 561 S.W.2d 772, 775 (Tex. 1977).

170. 648 S.W.2d at 665.

171. Id. at 665-66.

172. Id. at 666.
allow health care providers to obtain liability insurance. The court further recognized that the specific purpose of the limitation provision was to limit the insurer's period of potential liability. Nevertheless, the court concluded that barring a child's malpractice claim is arbitrary and unreasonable when weighed against this purpose. Relying upon parents, who might be unaware of the claim, negligent, or even minors themselves, to file a timely medical malpractice lawsuit would be unreasonable and unrealistic.\textsuperscript{173} Given the other interests of children we entrust to parents, the court's holding regarding the unreasonableness of entrusting parents with the responsibility of bringing a lawsuit is odd. The court's holding on this point, however, is clear.\textsuperscript{174}

The impact of \textit{Sax} on the current medical malpractice statute of limitations imposed by the 1977 Act is slightly ambiguous. The 1977 Act imposes a two-year limitation period to all persons except minors under the age of twelve years, rather than excepting only minors under the age of six years as provided by the 1975 Act.\textsuperscript{175} The court did not expressly conclude that this revised limitation period also violates the open courts provision of the Texas Constitution, but the court's reasoning is arguably as applicable to the new Act as to its predecessor. True, the new statute may not be as unreasonable, since it entrusts the claims of children to their parents for a shorter period of minority, but during this period the children, though older, are just as incapable of litigating on their own behalf.

\textbf{B. Sixty-Day Notice Under the Medical Liability and Insurance Improvement Act}

Section 4.01 of the Medical Liability and Insurance Improvement Act requires that a claimant give written notice of his medical malpractice claim to the health care provider at least sixty days before filing a lawsuit on that claim.\textsuperscript{176} In \textit{Schepps v. Presbyterian Hospital}\textsuperscript{177} the plaintiff filed a lawsuit without giving the required sixty-day notice. After the statute of limitations had run, the district court granted the defendant's motion for summary judgment on the ground that the notice provision had not been met.\textsuperscript{178} The Texas Supreme Court held that the notice provision of section 4.01 was mandatory rather than merely directory, but that dismissal was not the appropriate remedy.\textsuperscript{179} Rather, a district court should merely abate the action for sixty days to permit the parties to negotiate a settlement.\textsuperscript{180} The court reasoned that the purpose of the sixty-day notice re-

\textsuperscript{173} \textit{Id.} at 666-67.

\textsuperscript{174} The court also held that the parents' causes of action were barred, since the parents failed to file their claims within the statutory time period. \textit{Id.} at 667. Parents may recover medical costs and lost earning capacity of a minor child prior to the child's eighteenth birthday. \textit{Id.}


\textsuperscript{176} \textit{Id.} art. 4590i, § 4.01.

\textsuperscript{177} 652 S.W.2d 934 (Tex. 1983).

\textsuperscript{178} \textit{Id.} at 935.

\textsuperscript{179} \textit{Id.} at 938.

\textsuperscript{180} In \textit{Wilborn v. University Hosp.}, 642 S.W.2d 50, 52 (Tex. App.—Amarillo 1982, no
quirement is to encourage pre-litigation negotiations and that this can be accomplished by requiring an abatement of the action for sixty days.\textsuperscript{181}

Chief Justice Pope noted in his dissent, however, that a sixty-day abatement is not equivalent to pre-litigation notice.\textsuperscript{182} Professional embarrassment caused by a lawsuit may rigidify the parties and make settlement less likely, even during a sixty-day abatement period. Nevertheless, the statute’s purpose is not wholly frustrated by the majority’s position, despite the chief justice’s assertion to the contrary,\textsuperscript{183} since at least the burden of discovery can be delayed during a sixty-day abatement while settlement negotiations take place. Consequently, the majority’s reading of the statute is at last plausible, if not compelling. Moreover, the harsh remedy of dismissal for a procedural error should be reserved for situations in which the legislature has spoken clearly, or where dismissal is essential to effectuate a procedural scheme. Since one purpose of the Medical Liability and Insurance Improvement Act was to stabilize malpractice insurance rate structures, substantial compliance with the Act’s requirements may be enough, and a sixty-day abatement may sufficiently encourage substantial compliance. Although this conclusion is arguably empirically incorrect, it at least suggests that the majority’s interpretation may not eviscerate the sixty-day notice requirement.

\textbf{C. Expert Testimony Concerning Disclosure of Risks}

In medical malpractice cases, Texas common law requires a plaintiff to introduce expert medical testimony to prove what a reasonable doctor of the same school and of the same or similar community would have done under similar circumstances.\textsuperscript{184} Consequently, unlike other industries,\textsuperscript{185} doctors collectively set the standards against which their conduct is judged. Unlike some jurisdictions,\textsuperscript{186} Texas courts have not recognized an exception to the requirement of a medical standard for cases involving warnings and disclosure of risks.\textsuperscript{187} In \textit{Peterson v. Shields}\textsuperscript{188} the Texas Supreme

\textsuperscript{181} 652 S.W.2d at 938.
\textsuperscript{182} Id. at 938-39.
\textsuperscript{183} Id. at 939.
\textsuperscript{184} See Wilson v. Scott, 412 S.W.2d 299, 302 (Tex. 1967).
\textsuperscript{187} See Roark v. Allen, 633 S.W.2d 804, 809 (Tex. 1982); Wilson v. Scott, 412 S.W.2d 299, 302 (Tex. 1967); Hartfiel v. Owen, 618 S.W.2d 902, 904-05 (Tex. Civ. App.—El Paso 1981, writ ref’d n.r.e.).
\textsuperscript{188} 652 S.W.2d 929 (Tex. 1983).
Court held that section 6.02 of the Medical Liability and Insurance Improvement Act abrogates this common law requirement in malpractice cases involving warnings and disclosures of risk.\textsuperscript{189} Section 6.02 provides:

In a suit against a physician or health care provider involving a health care liability claim that is based on the failure of the physician or health care provider to disclose or adequately to disclose the risks and hazards involved in a medical care or surgical procedure rendered by the physician or health care provider, the only theory on which recovery may be obtained is that of negligence in failing to disclose the risks or hazards that could have influenced a reasonable person in making a decision to give or withhold consent.\textsuperscript{190}

The court concluded that this provision replaced the medical standard with a reasonable person standard for which expert testimony is not required.\textsuperscript{191}

If the legislature intended to change the requirement of expert testimony, section 6.02 is an odd way of doing it. The principal purpose of section 6.02 arguably is to preclude theories of liability other than negligence in failing to disclose risks, not to relax the requirement of expert testimony in proving negligence. Indeed, the overall purpose of the Act was to respond to spiraling medical malpractice insurance costs,\textsuperscript{192} which suggests that the legislature did not intend to relax the requirements for recovery.

The court also noted that the Act establishes the Texas Medical Disclosure Panel, which will ascertain in advance whether certain medical procedures require disclosure of risks.\textsuperscript{193} The panel's conclusion creates a rebuttable presumption that due care requires disclosure of specific risks. If a procedure has not been considered by the panel, physicians are under a duty otherwise imposed by law.\textsuperscript{194} Only in these cases does the question of expert testimony arise. Since these cases will become less common as the panel considers more procedures, the court's holding in \textit{Peterson} will likewise become less important.

The creation of the panel does not support the court's conclusion that expert testimony is unnecessary in warning cases not yet considered by the panel. Although the existence of the panel abrogates the need for expert medical testimony in cases in which the panel has considered the procedure, it does not provide that lay jurors should substitute their judgment for that of medical experts. The panel represents a centralized, structured attempt to determine the medical standard for warnings in advance. Its

\begin{footnotes}
\item[189] \textit{Id.} at 931.
\item[191] 652 S.W.2d at 931.
\item[193] Tex. Rev. Civ. Stat. Ann. art. 4590i, § 6.03 (Vernon Supp. 1984). Medical procedures are placed on one list if some disclosure is necessary and on another list if no disclosure is necessary. For procedures placed on the first list, the panel determines which risks need to be disclosed. \textit{Id.} § 6.04.
\item[194] \textit{Id.} § 6.07(b).
\end{footnotes}
existence undermines rather than supports a conclusion that juries should be permitted to second-guess established medical procedures in the context of a specific case.

The rationales for permitting doctors, but not other industries, to set their own standards might not apply as strongly to warning cases. Consequently, some jurisdictions have exempted warning cases from their normal common law rule that expert testimony is needed to establish a medical standard. It is unlikely, however, that the legislature intended such a change when it enacted the Medical Liability and Insurance Improvement Act.

D. Proximate Cause—Duty to Third Person

In Gooden v. Tips the plaintiff was injured in an automobile accident in which the driver of the other car was under the influence of a drug that had been prescribed by her physician. The plaintiff sued both the physician and the driver, alleging that the physician had negligently failed to warn his patient not to drive while under the influence of the drug. The Tyler court of appeals reversed summary judgment for the physician, holding that “under proper facts, a physician can owe a duty to use reasonable care to protect the driving public where the physician’s negligence in diagnosis or treatment of his patient contributes to plaintiff’s injuries.”

The court stated that the physician was under no duty to control the patient; at most, there was a duty to warn. The court’s duty analysis gives the appearance of imposing a duty where none previously existed. The doctor was clearly under a duty to use reasonable care to warn his patient of the risks associated with taking the drug, including the danger of driving under its influence. Had the patient sued the doctor for her injuries, there would have been no question about the existence of a duty. The issue in Gooden was whether liability for the physician’s breach of duty extended to third-party motorists foreseeably injured by the patient. This question presents a problem of proximate causation, involving an intervening human cause—the patient who drove while under the influence of the drug. Since the plaintiff alleged that the intervening human cause was foreseeable, a normal analysis of proximate causation would extend liability to the plaintiff’s injury.

The issues of duty and proximate causation are intertwined, since both deal with the extent of liability. Significantly, Gooden does not place the

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195. *See* The T.J. Hooper, 60 F.2d 737, 740 (2d Cir. 1932). For example, the need for doctors to be able to rely on preexisting rules of thumb in emergencies is not as acute in determining whether to warn a patient, and juries may be better equipped to balance the benefits and detriments of a warning than to evaluate the propriety of a diagnostic or surgical technique.


197. 651 S.W.2d 364 (Tex. App.—Tyler 1983, no writ).

198. *Id.* at 369.

199. *Id.* at 370.

physician under a previously unrecognized duty to warn, regardless of whether the issue is labeled as duty or proximate causation. *Gooden* merely extends liability to a foreseeable plaintiff in a situation in which the physician allegedly breached a duty he clearly had to his patient. The court's conclusion in *Gooden* is not especially novel; it merely reflects conventional notions of proximate causation.201

IV. W R O N G F U L D E A T H

In *Sanchez v. Schindler*202 the Texas Supreme Court overruled a long line of Texas cases203 holding that the Texas Wrongful Death Act204 limits recovery to pecuniary damages. The court held that a parent can recover damages for mental anguish and loss of companionship and society for the death of his or her child.205 The court first concluded that its earlier interpretation of the Wrongful Death Act, limiting recovery to pecuniary loss, was not controlling.206 Relying on its prior cases changing common law tort rules,207 the court concluded that it "has always endeavored to interpret the laws of Texas to avoid inequity."208 The fact that the legislature had recently refused to amend the Act to include emotional loss was not dispositive, since a "'legislature legislates by legislating . . . not by keeping silent.'"209

Chief Justice Pope argued in dissent that this approach ignores a settled principle of statutory construction previously recognized in *Cunningham v. Cunningham*210 that the legislature has adopted the judicial interpretation of a statute when it repeatedly reenacts the statute.211 The Chief Justice was concerned that the majority was overruling *Cunningham* as well as the court's earlier opinions concerning the Wrongful Death Act, and substituting its own wisdom for that of the legislature.212

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201. This outcome may explain why Justice Colley, concurring, stated simply that "a cause of action was alleged against [the physician] under existing common-law rules." 651 S.W.2d at 372.
202. 651 S.W.2d 249 (Tex. 1983).
203. See, e.g., J.A. Robinson Sons, Inc. v. Wigart, 431 S.W.2d 327, 334-35 (Tex. 1968) (recovery denied for sorrow, anguish, and grief from death of father and husband); Texas Jersey Oil Corp. v. Beck, 157 Tex. 541, 549-51, 305 S.W.2d 162, 168-69 (1957) (child recovers only pecuniary value of deceased mother's care); March v. Walker, 48 Tex. 372, 375 (1877) (children recover only pecuniary injury caused by father's death). The court expressly overruled 20 cases in rejecting the pecuniary loss limitation on damages for the loss of a child. 651 S.W.2d at 251 n.2.
205. 651 S.W.2d at 251.
206. Id. at 251-52.
208. 651 S.W.2d at 252.
209. Id. (quoting Wycko v. Gnodtke, 361 Mich. 331, 105 N.W.2d 118, 121-22 (1960)).
210. 120 Tex. 491, 40 S.W.2d 46 (1931).
211. 651 S.W.2d at 256 (quoting Cunningham v. Cunningham, 120 Tex. 491, 503, 40 S.W.2d 46, 51 (1931)).
212. 651 S.W.2d at 256-57.
After freeing itself from the Act’s earlier interpretation, the court rejected the pecuniary loss rule, since it is based on an antiquated concept that characterizes a child as an economic asset. The pecuniary loss rule rests on a more plausible ground, however, than that of a child being a mere economic asset. Expanded liability increases insurance premiums, and including a specific type of injury in damage awards effectively requires that we insure against it. Risks that are spread roughly homogeneously throughout society are plausible candidates to be suffered as risks, rather than insured against by inclusion in personal injury awards. Insuring against some risks but not others may be desirable. Since most people tend voluntarily to insure themselves against out-of-pocket pecuniary losses, but not against emotional loss, the distinction between pecuniary loss and emotional loss in determining recoverable damages may be valid. This does not mean that denial of emotional damages is desirable; it merely recognizes that the case favoring denial is more plausible than merely viewing children as economic assets.

The court also reasoned that a parent’s recovery for the loss of a child’s companionship is closely analogous to recovery for loss of consortium, for which either spouse can recover when the other spouse has been negligently injured. This analogy reveals some ambiguities in Sanchez. If the loss of companionship due to a child’s death is analogous to the loss of consortium for the negligent injury of a spouse, then the loss of consortium for a spouse’s death is an even closer analogy. Does this mean that the court will recognize mental anguish and loss of consortium under the Wrongful Death Act in cases involving the death of a spouse (or parent)? Justices Ray and Kilgarlin, in a concurring opinion, indicated that they would recognize such recovery.

Another ambiguity is whether damages for mental anguish without physical manifestations are now recoverable. The court was not required to resolve this issue in Sanchez because the plaintiff suffered physical injury from her mental anguish. The majority does not rely on this fact, however, and the concurring and dissenting opinions involving four justices expressly disagreed on the continuing validity of this requirement.

A third ambiguity in Sanchez is its effect on the requirement that a plaintiff must either have been in the zone of danger or have contemporaneously witnessed injury to a family member in order to recover for negli-
gently caused emotional distress. In *Sanchez* the court expressly dispensed with the zone of danger or contemporaneous viewing requirement, which might undermine these requirements in cases involving negligent injury short of death.

Each of these ambiguities concerns the impact of *Sanchez* in cases involving mental anguish caused by circumstances other than the death of a child. Cases involving the wrongful death of a child may be special, however, because in many cases involving a child’s death the defendant would escape liability altogether if damages for mental anguish were not recoverable. Cases involving injury to a child or death of a spouse or parent normally also involve substantial pecuniary damages. Consequently, *Sanchez* may be read narrowly to affect only cases involving the death of a child. Read more broadly, however, *Sanchez* may affect the rules governing recovery of mental anguish in other types of cases as well.

V. MISCELLANEOUS

A. Premises Liability

In *Corbin v. Safeway Stores, Inc.* the Texas Supreme Court held that an occupier of land may be held liable to a business invitee who is injured by a condition on the premises even though the occupier was neither actually nor constructively aware of the defect. In *Corbin* the plaintiff was injured when he slipped on a grape on the floor of defendant’s store. Corbin alleged that the defendant negligently displayed the grapes so as to impose a foreseeable, unreasonable risk that they would fall to the floor and cause injury. The court held that the defendant’s actual or constructive knowledge of the condition may be necessary for recovery in a slip and fall case when the alleged negligence is a failure to remedy the condition. When the alleged negligence is actually causing the condition, however, such knowledge is unnecessary. Language in earlier cases and in section 343 of the *Restatement (Second) of Torts*, referring to the


218. 651 S.W.2d at 254 n.6. Such a requirement in the Act would have been surprising, since prior to *Sanchez* the Act was thought not to permit recovery for mental anguish at all.

219. This would not have been the case in *Sanchez* itself, however, since the defendant was liable for substantial damages for the decedent’s medical care and pain and suffering under the survival statute. *Id.* at 250.

220. 648 S.W.2d 292 (Tex. 1983).

221. The plaintiff introduced evidence that Safeway normally placed mats on the floor under the grapes to prevent customers from slipping. No mats were present when the plaintiff slipped. The court held that Safeway was not automatically liable for failing to follow its normal procedure, but its normal procedure was evidence that Safeway foresaw the risk. *Id.* at 297-98.

222. *Id.* at 297.


defendant's knowledge of the defect, addressed the common situation in which the alleged negligence is a mere failure to remedy the defect. These authorities do not preclude recovery for other forms of negligence in which the defendant creates a foreseeable, unreasonable risk of injury to its business invitees.\(^{225}\)

**B. Release**

In *Duncan v. Cessna Aircraft Co.*\(^{226}\) the Texas Supreme Court held that the choice of law applicable to determining the effect of a release is governed by the “most significant contacts” approach embodied in the *Restatement (Second) of Conflict of Laws*, rather than by the law of the state where the contract is made.\(^{227}\) After concluding that Texas law governed the release in *Duncan*, the court went on to hold that the release of one joint tortfeasor does not release another joint tortfeasor unless the release specifically names the other tortfeasor.\(^{228}\) A general provision that releases “any other corporations or persons whomsoever responsible . . . whether named herein or not”\(^{229}\) is insufficient to release a tortfeasor not specifically named.

**C. Federal Decisions**

The Fifth Circuit decided two cases involving federal law that are significant for products liability practitioners in Texas. In *Wedgeworth v. Fibreboard Corp.*\(^{230}\) the court held that Johns-Manville’s codefendants are not entitled to a stay under the automatic stay provisions of the Bankruptcy Code\(^{231}\) as a result of the stay in the actions against Johns-Manville. In *Gulf South Insulation v. Consumer Product Safety Commission*\(^{232}\) the court vacated the Consumer Product Safety Commission’s ban on urea-formaldehyde foam insulation in residences and schools because the ban was not supported by substantial evidence.\(^{233}\)

\(^{225}\) 648 S.W.2d at 295 (citing Rosas v. Buddies Food Store, 518 S.W.2d 534, 536-37 (Tex. 1975)); Parker v. Highland Park, Inc., 565 S.W.2d 512, 521 (Tex. 1978).


\(^{227}\) *Id.* at 216; see *Restatement (Second) of Conflict of Laws* §§ 6, 145 (1971). In *Gutierrez v. Collins*, 583 S.W.2d 312, 318 (Tex. 1979), the court adopted the most significant contacts approach to choice of law for torts. *Duncan* suggests that all choice of law problems in Texas are now governed by the most significant contacts approach.


\(^{229}\) *Id.* at 213 (emphasis added by the court).

\(^{230}\) 706 F.2d 541 (5th Cir. 1983).


\(^{232}\) 701 F.2d 1137 (5th Cir. 1983).

\(^{233}\) *Id.* at 1149-50.