Products Liability in Texas and a Proposal to Require Privity within the Implied Warranty of Merchantability

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PRODUCTS LIABILITY IN TEXAS AND A PROPOSAL TO REQUIRE PRIVITY WITHIN THE IMPLIED WARRANTY OF MERCHANTABILITY

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PRODUCTS liability law in Texas currently offers three major theories of recovery to a plaintiff who suffers injury to person or property caused by a defective product. Negligence, strict liability in tort, and breach of an implied warranty of merchantability are concurrently available, such that a plaintiff may pursue all three theories in a single lawsuit. A plaintiff is often well advised to plead all three causes of action since, though conceptually similar in many respects, each theory bases liability on different factual elements and the ultimate resolution of the factual issues by the finder of fact cannot be predicted prior to trial. Thus, an injured party can improve his chances of prevailing at trial by pleading and proving all three causes of action for a single injury.

Multiple theory products liability litigation, however, creates jury confusion as the jury charge is often unintelligible and the standard of a defendant's responsibility often incomprehensible. This confusion leads to inconsistent results in derogation of the rights of both plaintiffs and defendants. Several commentators have proposed forms of a uniform doctrine of products liability to promote a more efficient and just disposition of products liability lawsuits. This Comment discusses the present status

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5. Note, Products Liability in New York: Section 2-318 of the U.C.C.—The Amendment Without a Cause, 50 Fordham L. Rev. 61, 64 (1981); see also Dickerson, Was Prosser's Folly Also Traynor's? or Should the Judge's Monument Be Moved to a Firmer Site?, 2 Hofstra L. Rev. 469, 481-83 (1974) (discussing doctrinal confusion in products liability).
6. See Keeton, supra note 1, at 2; Final Report, supra note 4, at 37; see also Keeton, Products Liability—Inadequacy of Information, 48 Tex. L. Rev. 398, 408 (1970) (arguing that strict tort liability dispenses with the need for alternate theories of negligence and implied warranty); Shanker, A Reexamination of Prosser's Products Liability Crossword Game: The Strict or Stricter Liability of Commercial Code Sales Warranty, 29 Case W. Res. L. Rev. 550, 551 (1979) (arguing that implied warranty makes strict liability unnecessary); Note, supra note 5, at 103 (recommending that strict tort liability remain applicable and the statutory implied warranty of merchantability be eliminated).
of these three theories in Texas law and recommends changes in order to simplify products litigation without sacrificing substantial rights of the litigants.  

I. PRODUCTS LIABILITY CAUSES OF ACTION

A. Negligence

As early as 1912 Texas courts recognized a cause of action in negligence by an injured consumer against a remote manufacturer whose want of care in the manufacture of a product rendered it dangerous to human health. The absence of any requirement of privity of contract between the manufacturer and the injured consumer set this decision apart from prior Texas law. Four years later Judge Cardozo wrote the opinion in *MacPherson v. Buick Motor Co.*, the landmark decision that established the duty a manufacturer owed to an ultimate purchaser for injuries caused by a product that is dangerous to life and limb because of negligent manufacture. Texas courts have adopted the *Restatement* version of the *MacPherson* decision, which proposes a reasonable care standard for evaluating a manufacturer's negligence. Although the courts impose the legal duty of reasonable care on remote manufacturers, to recover on a negligence theory an injured party must also prove that the manufacturer's

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11. 111 N.E. at 1053 (citing Thomas v. Winchester, 6 N.Y. 397 (1852)).
12. Gonzales v. Caterpillar Tractor Co., 571 S.W.2d 867, 871-72 (Tex. 1978); Otis Elevator Co. v. Wood, 436 S.W.2d 324, 327 (Tex. 1968). The *Restatement* states the rule generally adopted following *MacPherson* in section 395:

Negligent Manufacture of Chattel Dangerous Unless Carefully Made

A manufacturer who fails to exercise reasonable care in the manufacture of a chattel which, unless carefully made, he should recognize as involving an unreasonable risk of causing physical harm to those who use it for a purpose for which the manufacturer should expect it to be used and to those whom he should expect to be endangered by its probable use, is subject to liability for physical harm caused to them by its lawful use in a manner and for a purpose for which it is supplied.

*RESTATEMENT (SECOND) OF TORTS* § 395 (1965).

A special application of section 395 is stated in section 398:

Chattel Made Under Dangerous Plan or Design

A manufacturer of a chattel made under a plan or design which makes it dangerous for the uses for which it is manufactured is subject to liability to others whom he should expect to use the chattel or to be endangered by its probable use for physical harm caused by his failure to exercise reasonable care in the adoption of a safe plan or design.

*RESTATEMENT (SECOND) OF TORTS* § 398 (1965); see also id. comment a (special application of § 395).
breach of the legal duty proximately caused the injury and that the injured party is one to whom the duty is owed.\textsuperscript{13} A negligence claim, therefore, remains a viable cause of action against a remote manufacturer,\textsuperscript{14} or even a lessor,\textsuperscript{15} even though this theory of recovery has been used less frequently since the development of forms of strict liability.\textsuperscript{16}

\textbf{B. Strict Liability in Tort for Unreasonably Dangerous Products}

Recognizing a strong public policy against the sale of food unfit for human consumption, the Texas Supreme Court in 1942 decided \textit{Jacob E. Decker & Sons v. Capps},\textsuperscript{17} allowing a cause of action by an ultimate consumer against a nonnegligent manufacturer of contaminated food.\textsuperscript{18} The court based its decision on a warranty implied by law rather than negligence or the usual implied contractual warranty.\textsuperscript{19} This new implied warranty sounded in tort in the nature of deceit, but did not require any knowledge by the manufacturer of the food contamination.\textsuperscript{20} This cause of action did not displace a negligence claim that might arise from the same facts,\textsuperscript{21} but allowed an injured plaintiff an independent basis for recovery without the difficult task of proving a manufacturer's negligence.\textsuperscript{22}

The \textit{Decker} decision aligned Texas law with a growing number of other jurisdictions that had adopted a form of strict liability for food sellers\textsuperscript{23} in response to a national concern with the pervasiveness of adulterated and unsafe foodstuffs.\textsuperscript{24} While the courts generally agreed that retail food sellers assumed a special civil responsibility to the consuming public,\textsuperscript{25} the attempts to justify this responsibility yielded a wide variety of ingenious legal rationales.\textsuperscript{26} The implied warranty explanation chosen by the Texas Supreme Court originated in thirteenth century England and appeared in

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\item \textsuperscript{13} Herring v. Hathcock, 643 S.W.2d 235, 237 (Tex. App.—El Paso 1982, no writ).
\item \textsuperscript{14} See Gonzales v. Caterpillar Tractor Co., 571 S.W.2d 867, 871-72 (Tex. 1978); Nobility Homes of Texas, Inc. v. Shivers, 557 S.W.2d 77, 80-81 (Tex. 1977); Otis Elevator Co. v. Wood, 436 S.W.2d 324, 328 (Tex. 1969); South Austin Drive-In Theater v. Thomison, 421 S.W.2d 933, 949 (Tex. Civ. App.—Austin 1967, writ ref’d n.r.e.); Starr v. Koppers Co., 398 S.W.2d 827, 830 (Tex. Civ. App.—San Antonio 1965, writ ref’d n.r.e.).
\item \textsuperscript{15} See Sims v. Southland Corp., 503 S.W.2d 660 (Tex. Civ. App.—Tyler 1973, writ ref’d n.r.e.).
\item \textsuperscript{16} W. Prosser, \textit{The Law of Torts} 644 (4th ed. 1971).
\item \textsuperscript{17} 139 Tex. 609, 164 S.W.2d 828 (1942).
\item \textsuperscript{18} Id. at 622, 164 S.W.2d at 834.
\item \textsuperscript{19} Id. at 618-19, 164 S.W.2d at 832-33.
\item \textsuperscript{20} Id. at 617, 164 S.W.2d at 831; see also Prosser, \textit{The Assault upon the Citadel (Strict Liability to the Consumer)}, 69 Yale L.J. 1099, 1126 (1960) (history of action for breach of warranty); Titus, \textit{Restatement (Second) of Torts Section 402A and the Uniform Commercial Code}, 22 Stan. L. Rev. 713, 728-51 (1970) (history of strict tort liability developing from implied warranty).
\item \textsuperscript{21} 139 Tex. at 620, 164 S.W.2d at 833.
\item \textsuperscript{22} Id. at 621, 164 S.W.2d at 834.
\item \textsuperscript{23} See Prosser, \textit{supra} note 20, at 1106-08 (listing case law in 14 jurisdictions that allow a nonprivity consumer to recover for personal injuries caused by contaminated food).
\item \textsuperscript{24} Id. at 1104-10.
\item \textsuperscript{25} R. Dickerson, \textit{Products Liability and the Food Consumer} 26 (1951).
\item \textsuperscript{26} Prosser, \textit{supra} note 20, at 1124 & n.153.
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American decisions in the early nineteenth century.\textsuperscript{27} Although these early instances of implied warranty involved strict liability of a food seller as did \textit{Decker}, the implied warranty in those early cases originally extended only to the immediate purchaser.\textsuperscript{28} Use of a warranty theory derived from contractual settings to justify strict tort liability to a consumer invited confusion because courts had to decide whether tort or contract concepts applied.\textsuperscript{29}

The \textit{Decker} court considered the confusion experienced by the courts and concluded that it was due to a failure to note the difference in the usage of the term "warranty."\textsuperscript{30} The court then contributed to the confusion by describing its new warranty as an "implied warranty imposed by operation of law as a matter of public policy,"\textsuperscript{31} a "warranty of purity,"\textsuperscript{32} an "implied warranty of wholesomeness,"\textsuperscript{33} and a "warranty of suitability."\textsuperscript{34} The form of strict liability imprecisely described by the warranty terminology generally remained restricted to foodstuffs for a quarter of a century.\textsuperscript{35}

In 1967 the Texas Supreme Court, in the companion cases of \textit{McKisson v. Sales Affiliates, Inc.}\textsuperscript{36} and \textit{Shamrock Fuel & Oil Sales Co. v. Tunks},\textsuperscript{37} extended strict tort liability to manufacturers of all products by adopting section 402A of the \textit{Restatement (Second) of Torts}.\textsuperscript{38} Section 402A imposes liability on a manufacturer of a product that is sold in an unreasonably
dangerous condition if the defective condition causes injury to person or property and the product reaches the consumer or user without substantial change. The court recognized that section 402A stated the law in Texas as developed under the implied warranty in tort theory and acknowledged the logic of applying the Decker rule to all defective products causing personal injury.

Subsequent strict liability opinions by the court did not mention the implied warranty in tort terminology, but described the cause of action as simply strict liability in tort, a description that emphasizes the departure from contractual warranty principles. Setting the uncertain status of Decker, the court in Nobility Homes of Texas, Inc. v. Shivers stated that section 402A and the Uniform Commercial Code had replaced the Decker implied warranty in tort as a means of establishing a manufacturer's liability in Texas.

After the introduction of section 402A the Texas courts began broadening the scope of strict liability. The supreme court confirmed the applicability of section 402A to damages for injury to a claimant's property, other than the product itself, in O.M. Franklin Serum Co. v. C.A. Hoover & Son. The court later applied section 402A protection beyond consumers or users by including bystanders. In extending liability beyond manufacturers, the court in Pittsburg Coca-Cola Bottling Works v. Ponder held that bottlers were sellers within the meaning of section 402A. Courts of appeals' decisions further extended liability to retailers for injuries sustained by shoppers who had not yet purchased a product and to a city in

(2) The rule stated in Subsection (1) applies although
(a) the seller has exercised all possible care in the preparation and sale of his product, and
(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Id.
its role as a municipal corporation selling water.\textsuperscript{51} Restaurants\textsuperscript{52} and sellers of used products\textsuperscript{53} were also subject to liability. The supreme court determined that introducing a product into commerce by lease rather than by sale was sufficient to impose liability.\textsuperscript{54} The court refused, however, to impose strict liability for inadequate services.\textsuperscript{55}

In \textit{Mid Continent Aircraft Corp. v. Curry County Spraying Service, Inc.}\textsuperscript{56} the court limited the scope of section 402A somewhat by disallowing recovery when the plaintiff alleged only economic loss to the product itself.\textsuperscript{57} The court thus followed strong dictum expressed in \textit{Nobility Homes of Texas, Inc. v. Shivers},\textsuperscript{58} which involved economic loss to a product that was not unreasonably dangerous. In the companion case of \textit{Signal Oil & Gas Co. v. Universal Oil Products}\textsuperscript{59} the court stated that this economic loss was recoverable if the claimant also suffered injury to his property other than the product itself.\textsuperscript{60}

As the doctrine of strict tort liability developed in Texas, the courts refined the critical elements of "defective condition" and "unreasonably dangerous," terms that were used synonymously,\textsuperscript{61} until three distinct categories emerged. Design defects comprise the first type of product defect. The supreme court defined a defectively designed product in \textit{Turner v. play). But see Moore v. Weingarten, Inc., 523 S.W.2d 445, 449 (Tex. Civ. App.—Beaumont 1975, writ ref'd n.r.e.) (no strict liability for slip and fall on grape on store floor since grape not defective).

\textsuperscript{51} Moody v. City of Galveston, 524 S.W.2d 583, 588 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.).

\textsuperscript{52} Hebert v. Loveless, 474 S.W.2d 732, 737 (Tex. Civ. App.—Beaumont 1971, writ ref'd n.r.e.) (restaurant escaped liability, however, due to insufficient evidence of ice contamination); see also \textit{Restatement (Second) of Torts} § 402A comment f (1965) (rule applies to manufacturer, wholesaler, retail dealer, or distributor, and operator of a restaurant).


\textsuperscript{54} Rourke v. Garza, 530 S.W.2d 794, 800 (Tex. 1975). Relying on Rourke, the Fifth Circuit extended strict liability to a manufacturer of ammunition that followed government designs with government-supplied materials on a cost-plus contract with the government. Challoner v. Day & Zimmerman, Inc., 512 F.2d 77, 84 (5th Cir.), \textit{vacated on other grounds}, 423 U.S. 3 (1975).


\textsuperscript{56} 572 S.W.2d 308 (Tex. 1978).


\textsuperscript{58} 557 S.W.2d 77, 80 (Tex. 1977).

\textsuperscript{59} 572 S.W.2d 320 (Tex. 1978).

\textsuperscript{60} \textit{Id.} at 325. But see Keeton, \textit{supra} note 1, at 7-9 (criticizing recovery of economic loss in strict tort liability lawsuit).

\textsuperscript{61} Blackwell Burner Co. v. Cerda, 644 S.W.2d 512, 515 (Tex. App.—San Antonio 1982, writ ref'd n.r.e.). But see \textit{Restatement (Second) of Torts} § 402A comment i (1965) (liability should be imposed only when the defective condition makes the product unreasonably dangerous).
General Motors Corp. as a product unreasonably dangerous as designed when the utility of the product is weighed against the risk associated with its use. The court expressly substituted this definition of design defect for a previous definition that used an ordinary consumer’s expectation or a prudent manufacturer standard. The defect need only be a producing cause of the injury, not a proximate cause. Thus the danger need not be reasonably foreseeable or even knowable at the time of manufacture if the danger is demonstrable at trial.

When a manufacturing defect, the second type of defect, is at issue the applicable test for defining defectiveness seems to be the ordinary consumer test. Under this test a product is defective if it exposes its user to an unreasonable risk of harm and is dangerous to a greater degree than an ordinary user would contemplate. At least one court of appeals has held, however, that the risk versus utility test used in design defect cases applies as well in manufacturing defect cases. Manufacturing defect cases also resemble design defect cases in that a producing cause, rather than a proximate cause, is required.

Marketing defects in the form of inadequate warnings or instructions are

62. 584 S.W.2d 844 (Tex. 1979).
63. Id. at 847; see also 3 Texas Pattern Jury Charges PJC 71.02 (1982) (drawing instruction directly from Turner). But see Birnbaum, Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence, 33 Vand. L. Rev. 593, 643-49 (1980). Birnbaum notes that strict liability seems to apply fairly and efficiently in manufacturing defect cases, but is very critical of its use instead of a negligence standard in design defect cases. Id. at 645. The risk-utility test for an unreasonably dangerous product in a design defect case is merely a detailed version of a negligence calculus. Id. at 649. Unlike the negligence standard, however, the risk-utility test does not distinguish between vigilant, safety-conscious manufacturers and lax, careless manufacturers. Id. at 645. Thus the risk-utility test might provide less incentive to manufacturers to design safer products than a negligence standard would. Id.
64. 584 S.W.2d at 847; see also General Motors Corp. v. Hopkins, 548 S.W.2d 344, 347 n.1 (Tex. 1977) (product would not meet reasonable expectations of ordinary consumer).
65. The definition of proximate cause is: “an efficient, exciting, or contributing cause, which, in a natural sequence, produced the occurrence. There can be more than one producing cause.” 3 Texas Pattern Jury Charges PJC 70.01 (1982).
66. General Motors Corp. v. Hopkins, 548 S.W.2d 344, 351 (Tex. 1977). The definition of proximate cause given to a jury may provide:
   ‘PROXIMATE CAUSE’ means that cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred; and in order to be a proximate cause, the act or omission complained of must be such that a person using ordinary care would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event.
1 Texas Pattern Jury Charges PJC 2.02 (1969).
68. See 3 Texas Pattern Jury Charges PJC 71.01 & comment at 216 (1982); see also Special Project, Texas Tort Law in Transition, 57 Tex. L. Rev. 381, 470-71 (1979) (tracing case law development of consumer expectation test).
69. Two Rivers Co. v. Curtiss Breeding Serv., 624 F.2d 1242, 1248-49 (5th Cir. 1980); V. Mueller & Co. v. Corley, 570 S.W.2d 140, 145 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ ref'd n.r.e.); Restatement (Second) of Torts § 402A comments g, i (1965).
70. See Thiele v. Chick, 631 S.W.2d 526, 531 (Tex. App.—Houston [1st Dist.] 1982, writ ref'd n.r.e.).
the third type of defect within strict tort liability. Unlike the other defect types, an element of foreseeability of danger is present in determining when a manufacturer is under a duty to warn. The Texas Supreme Court in *Technical Chemical Co. v. Jacobs* defined a product as unreasonably dangerous when an ordinary manufacturer would not have marketed the product without warning of the dangers involved in using the product and providing instructions on how to avoid those dangers. Only those dangers that are reasonably foreseeable at the time of marketing the product are within the duty to warn. Once a risk is found to be foreseeable, however, liability will depend on a finding of producing cause, rather than involve another foreseeability issue within proximate causation. To be adequate, warnings or instructions must be given with sufficient intensity to cause a reasonable user to take precautions in proportion to the danger and must be reasonably calculated to reach the ultimate user.

C. Breach of Implied Warranty of Merchantability

On July 1, 1966, the Uniform Commercial Code (UCC) first became effective in Texas. The following year the UCC was reenacted within the Texas Business and Commerce Code, becoming effective on September 1, 1967. Section 2.314 provides a statutory cause of action for breach of

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74. 480 S.W.2d 602 (Tex. 1972).
75. *Id.* at 605.
77. *Blackwell Burner Co. v. Cerda*, 644 S.W.2d 512, 516 (Tex. App.—San Antonio 1982, writ ref'd n.r.e.) (pear burner found to be defective for lack of warning about danger from foreseeable misuse, but defect held not a producing cause of plaintiff's injury since he was already aware of danger).
82. *TEX. BUS. & COM. CODE ANN. § 2.314* (Tex. UCC) (Vernon 1968). The implied warranty of merchantability is set forth as follows:

(a) Unless excluded or modified (Section 2.316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.

(b) Goods to be merchantable must be at least such as
an implied warranty of merchantability, which has been termed the most important warranty in the UCC.83 The law implies the warranty of merchantability in the sale of goods by a merchant who regularly deals in goods of that kind and obligates those sellers to provide goods fit to be used for their ordinary purposes.84 Merchantability, however, is measured against a trade or industry standard,85 which, along with the requirement that recoverable damages be proximately caused by the breach,86 gives the implied warranty of merchantability a negligence flavor.87 Despite these similarities to a negligence cause of action, an implied warranty of merchantability action is considered a form of strict liability.88

The Texas Legislature expressly left to the courts the question of a privity requirement for application of the implied warranty.89 The legislature thus took a neutral position on the privity question,90 although the proposed UCC would have extended warranty protection for personal injury to any natural person in the family or household of a buyer.91 Manufacturers had expressed concern about the proposed extension of warranty protection to some nonprivity plaintiffs, which created a potential impediment to adoption of the UCC.92 The legislature recognized, however, that en-

(1) pass without objection in the trade under the contract description; and
(2) in the case of fungible goods, are of fair average quality within the description; and
(3) are fit for the ordinary purposes for which such goods are used; and
(4) run, within the variations permitted by the agreement of even kind, quality and quantity involved; and
(5) are adequately contained, packaged, and labeled as the agreement may require; and
(6) conform to the promises or affirmations of fact made on the container or label if any.

Id.
83. J. WHITE & R. SUMMERS, supra note 57, at 343.
84. See TEX. BUS. & COM. CODE ANN. § 2.314 (Tex. UCC) (Vernon 1968).
85. See generally J. WHITE & R. SUMMERS, supra note 57, §§ 9-7 (discussing definition of merchantability).
86. Signal Oil & Gas Co. v. Universal Oil Prods., 572 S.W.2d 320, 328 (Tex. 1978); TEX. BUS. & COM. CODE ANN. §§ 2.715(b)(2), 2.314 comment 13, 2.715 comment 5 (Tex. UCC) (Vernon 1968); 3 TEXAS PATTERN JURY CHARGES PJC 71.01 (1982).
87. J. WHITE & R. SUMMERS, supra note 57, at 343.
88. Id.
89. TEX. BUS. & COM. CODE ANN. § 2.318 (Tex. UCC) (Vernon 1968). Section 2.318 states:
This chapter does not provide whether anyone other than a buyer may take advantage of an express or implied warranty of quality made to the buyer or whether the buyer or anyone entitled to take advantage of a warranty made to the buyer may sue a third party other than the immediate seller for deficiencies in the quality of the goods. These matters are left to the courts for their determination.

Id.
91. TEXAS LEGISLATIVE COUNCIL, ANALYSES OF ARTICLE 2 OF THE UNIFORM COMMERCIAL CODE: SALES 105 (1953) [hereinafter cited as LEGISLATIVE COUNCIL].
actment of the UCC without the nonprivity extension would leave unaffected a nonprivity plaintiff's common law rights under the Decker implied warranty in tort. The UCC implied warranty of merchantability, therefore, merely clarified the law developed by Texas courts, which had imposed an implied warranty of merchantability only when a buyer and a seller were in privity of contract.

Due to the expressed neutrality of the enacted UCC, the Texas courts of appeals disagreed on the privity question. The supreme court addressed the issue in Nobility Homes of Texas, Inc. v. Shivers and held that a buyer need not be in privity with a remote seller to recover for economic loss under the implied warranty of merchantability. The court recognized that economic losses should be remedied under contract law and personal injuries should be remedied under tort law. The UCC, however, expressly allows consequential damages for personal injuries caused by a breach of warranty. Accordingly, in Garcia v. Texas Instruments, Inc., the supreme court allowed a recovery for personal injuries under the implied warranty. The Garcia court extended the Nobility decision to nonpurchasers, eliminating any requirement of privity in an implied warranty claim.

Implied warranty protection is not unlimited in scope, however. When a buyer knows that he is buying a used product, a number of courts have held that an implied warranty of merchantability does not accompany the

93. M. Ruud, supra note 90.
96. 557 S.W.2d 77 (Tex. 1977).
97. Id. at 81.
98. Id. at 82; see Comment, The Vexing Problem of Purely Economic Loss in Products Liability: An Injury in Search of a Remedy, 4 SETON HALL L. REV. 145, 175 (1972).
100. 610 S.W.2d 456 (Tex. 1980).
101. Id. at 465.
102. Id.
product. The implied warranty has not been applied to rental agreements or service contracts since article 2 of the UCC applies only to sales.

II. DEFENSES

A. Plaintiff's Conduct

Prior to the adoption of comparative negligence in Texas, a plaintiff's contributory negligence absolutely barred his recovery in an action against a negligent defendant. Article 2212a, the Texas comparative negligence statute, allows a plaintiff to recover in an action unless his negligence is a greater proximate cause of his injury than the combined negligence of all parties whom he has sued. Thus, a plaintiff cannot recover that part of his damages attributable to his own negligence. The assumption of the risk defense, which completely defeated the cause of action of a plaintiff who voluntarily and unreasonably encountered a known danger, remained a viable defense in negligence actions until the Texas Supreme Court abolished it in Farley v. M M Cattle Co.

Assumption of the risk nevertheless remained a defense in strict tort liability actions. The contributory negligence of a plaintiff in failing to discover a product defect or guard against the possibility of a defect was
not, however, a defense. When the supreme court first adopted section 402A, the court cited authority to support the proposition that a plaintiff's conduct could be categorized as either a failure to discover and guard against the defect or as a voluntary and unreasonable encounter with a known danger. This proposition failed entirely to recognize that a plaintiff's negligent conduct could at times be the major cause of his injury and an undiscovered defect could only incidentally increase the severity of that injury.

Texas courts fashioned an awkward "unforeseeable misuse" defense to address the cases in which the plaintiff is not aware of the product risk. This defense depended on a defendant's showing that a plaintiff's use of the product was not reasonably foreseeable and that the plaintiff should have reasonably anticipated the harm that resulted from the misuse. Unlike assumption of the risk, misuse was administered as a comparative defense when a product defect was also a contributing cause of a claimant's injury. Instead of following the lead of the comparative negligence statute that denied recovery to a plaintiff whose conduct contributed more to his injury than did the product defect, however, the supreme court in General Motors Corp. v. Hopkins created a "pure" comparative causation system. Hopkins allowed a plaintiff to recover that portion of his damages caused in fact by the product defect, even though misuse proximately caused a greater percentage of the damages. The assumed risk and misuse defenses received much criticism, but remained in use while the court's attention turned to adopting comparative apportionment in implied warranty actions.


113. McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787, 790 (Tex. 1967); Shamrock Fuel & Oil Sales Co. v. Tunks, 416 S.W.2d 779, 782-84 (Tex. 1967); see RESTATEMENT (SECOND) OF TORTS § 402A comment n (1965).

114. RESTATEMENT (SECOND) OF TORTS § 402A (1965); see supra notes 38-40 and accompanying text.


118. Id. at 352.


120. 548 S.W.2d 344 (Tex. 1977).

121. Id. at 352.

122. Id.

In *Signal Oil & Gas Co. v. Universal Oil Products*\(^{124}\) the Texas Supreme Court established a contributory negligence defense to a breach of implied warranty of merchantability claim.\(^{125}\) Prior to *Signal* only a plaintiff who had discovered a product defect or who reasonably should have discovered the defect was barred from recovery, since such discovery broke the chain of proximate causation from the seller.\(^{126}\) As in *Hopkins*, the court in *Signal* did not feel constrained by the legislature's expressed policy to allow a plaintiff in a negligence action to recover only when his negligence was not more than the defendants' negligence.\(^{127}\) Consequently, a plaintiff in an implied warranty action could recover that portion of his damages proximately caused by the product defect regardless of the extent to which his own negligence was a concurring proximate cause.\(^{128}\)

The inherent confusion of litigating the four defenses of misuse, assumed risk, modified comparative negligence, and pure comparative negligence in a single defective product lawsuit prompted the supreme court to abolish the misuse and assumed risk defenses in *Duncan v. Cessna Aircraft Co.*\(^{129}\) For strict tort liability cases the court adopted a scheme of pure comparative causation to apportion damages when a plaintiff's negligence has contributed to his injury.\(^{130}\) Thus, a plaintiff's misconduct as a proximate cause of his injury will reduce his recovery whether he brings an action in negligence, implied warranty of merchantability, or strict liability in tort.\(^{131}\)

When the product defect is due either to breach of implied warranty, to the unreasonably dangerous nature of the product, or to negligence, the finder of fact will compare the harm caused by the defective product or negligence of each defendant with the negligence of the plaintiff.\(^{132}\) The percentages of the plaintiff's injury caused by each party will total 100%, but a plaintiff's recovery will, in all cases, be reduced in proportion to the percentage of his injuries caused by his own negligence.\(^{133}\) Unlike cases involving only negligence, a plaintiff whose own negligence caused more than fifty percent of his injury may still recover the remainder of his damages so long as at least one of the defendants is found partially liable on a theory other than negligence.\(^{134}\) In addition, a defendant who is liable for any part of a plaintiff's injury will be jointly and severally liable for the entire part of the plaintiff's injury caused by all the defendants, if one of the defendants is liable on a theory other than negligence.\(^{135}\)

\(^{124}\) 572 S.W.2d 320 (Tex. 1978).
\(^{125}\) Id. at 329.
\(^{126}\) Id. at 327-28; TEX. BUS. & COM. CODE ANN. §§ 2.314 comment 13, 2.715 comment 5 (Tex. UCC) (Vernon 1968).
\(^{127}\) 572 S.W.2d at 329; TEX. REV. CIV. STAT. ANN. art. 2212a, § 1 (Vernon Supp. 1984).
\(^{128}\) 572 S.W.2d at 329.
\(^{129}\) 665 S.W.2d 414, 428 (Tex. 1984).
\(^{130}\) Id. at 427-28.
\(^{131}\) Id. at 429.
\(^{132}\) Id. at 428.
\(^{133}\) Id. at 428.
\(^{134}\) Id.
\(^{135}\) Id.
B. Disclaimers of Liability

A party may agree to exempt a seller from liability for future negligence unless such exemption is contrary to public policy.\(^{136}\) Such a disclaimer is void between parties who have substantially unequal bargaining power, even if they are in privity.\(^{137}\) As a result, a disclaimer of liability for negligence may be unenforceable against a nonprivity buyer or user uninvolved in the bargain. In a strict tort liability action, moreover, the drafters of section 402A intended to immunize strict liability from the effects of all contractual disclaimers, even between a seller and an immediate buyer.\(^{138}\) The Texas Supreme Court in *Mid Continent Aircraft Corp. v. Curry County Spraying Service, Inc.*\(^{139}\) intimated, nevertheless, that the intent of the parties to a contract to allocate risk through a disclaimer should not be nullified by applying strict liability in frustration of the contract.\(^{140}\) This rationale, however, has little application to a typical consumer purchase in which the parties have not bargained for a reallocation of risk. The court of appeals decision in *McMillen Feeds, Inc. v. Harlow*\(^{141}\) denied any effect to a contractual disclaimer in a strict liability case under the old implied warranty in tort theory.\(^{142}\) This approach would therefore seem applicable to current strict tort liability cases brought by a consumer under section 402A.

The UCC expressly allows exclusion of the implied warranty of merchantability, provided that the exclusion is worded in terms of merchantability or an “as is” sale and a written exclusion is conspicuous.\(^{143}\) A court is likely to hold a disclaimer of liability for personal injury caused by a defect in consumer goods to be unconscionable and unenforceable, however.\(^{144}\) The supreme court made clear in *Mid Continent* that an “as is” disclaimer is enforceable against the immediate commercial buyer when the buyer suffered only economic loss.\(^{145}\) The effect between

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\(^{136}\) Allright, Inc. v. Elledge, 515 S.W.2d 266, 267 (Tex. 1974); Crowell v. Housing Auth., 495 S.W.2d 887, 889 (Tex. 1973). The court, however, will strictly construe provisions purporting to exempt a person from the exercise of ordinary care. Langford v. Nevin, 117 Tex. 130, 133, 298 S.W. 536, 537 (1927).

\(^{137}\) Crowell v. Housing Auth., 495 S.W.2d 887, 889 (Tex. 1973) (low-income tenant recovering for wrongful death from public housing authority).

\(^{138}\) *RESTATEMENT* (SECOND) OF TORTS § 402A comment m (1965).

\(^{139}\) 572 S.W.2d 308 (Tex. 1978).

\(^{140}\) *Id.* at 312.

\(^{141}\) 405 S.W.2d 123 (Tex. Civ. App.—Austin 1966, writ ref’d n.r.e.).

\(^{142}\) *Id.* at 137-38. Under the old warranty theory the defendant was liable for food contamination even though it was not negligent. Jacob E. Decker & Sons v. Capps, 139 Tex. 609, 164 S.W.2d 828 (1942).


\(^{144}\) *TEX. BUS. & COM. CODE ANN.* § 2.719(c) (Tex. UCC) (Vernon 1968) (limitation of remedy for personal injury prima facie unconscionable).

\(^{145}\) 572 S.W.2d at 313. The court did not address the issue of whether the used nature of the defective aircraft would prevent imposition of an implied warranty of merchantability. *See supra* note 103 and accompanying text. The court also did not address
commercial parties of disclaimers of liability for property damage and personal injury otherwise recoverable under section 402A remains undetermined, but at least property damage disclaimers are enforceable under the Mid Continent rationale.\textsuperscript{146} In cases of nonprivity buyers a disclaimer that is never brought to the attention of the buyer may be unenforceable,\textsuperscript{147} though clearly a buyer may not recover for breach of implied warranty from a remote manufacturer if an intermediate retailer communicated a proper disclaimer to the buyer.\textsuperscript{148}

C. Statutes of Limitations

In Texas the two-year statute of limitations governs actions for injury to person or property\textsuperscript{149} and is controlling in actions for negligence\textsuperscript{150} and strict liability in tort.\textsuperscript{151} While the limitation period begins at the time of the injury to person or property in a strict liability action,\textsuperscript{152} Texas case law does not clearly require the same result in a negligence action. One court of appeals held, in a case in which the plaintiff only alleged loss of the defective product itself, that the limitation period begins when the buyer takes possession of the product.\textsuperscript{153} In a similar situation in which a product was leased and installed on the plaintiff's business premises by the lessor, a court held that the limitation period began at the time of a fire caused by the faulty product or improper installation, not at the time of installation.\textsuperscript{154}

The UCC contains a special four-year statute of limitations\textsuperscript{155} that is

\textsuperscript{146} Comment, Contractual Disclaimers of Strict Tort Liability in Oregon, 18 WILAMETTE L.J. 631, 657 (1982); see also RESTATEMENT (SECOND) OF CONTRACTS § 195 (1981) (would allow exemption of seller's strict tort liability for injury to person or property if disclaimer is fairly bargained for and not in violation of public policy).

\textsuperscript{147} Willoughby v. Ciba-Geigy Corp., 601 S.W.2d 385, 388 (Tex. Civ. App.—Beaumont 1979) (warrant) (seller applied herbicide on plaintiff's property; disclaimer on herbicide container ineffective against plaintiff who had never seen container).


\textsuperscript{149} TEX. REV. CIV. STAT. ANN. art. 5526 (Vernon Supp. 1984).

\textsuperscript{150} Atkins v. Crosland, 417 S.W.2d 150, 152-53 (Tex. 1967).

\textsuperscript{151} Cleveland v. Square-D Co., 613 S.W.2d 790, 792 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ).

\textsuperscript{152} A line of federal court decisions has extended the discovery rule applicable in some medical malpractice and fraudulent concealment cases to apply to strict tort liability cases. Thus the limitation period in a strict tort liability action begins when the injury is or should have been discovered. Fusco v. Johns-Manville Prods. Corp., 643 F.2d 1181, 1183 (5th Cir. 1981) (injury from exposure to asbestos fibers); Roman v. A.H. Robins Co., 518 F.2d 970, 971 (5th Cir. 1975) (drug injury; application of discovery rule not essential to court's decision); Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1102 (5th Cir. 1973) (asbestosis); Thrift v. Tenneco Chems., Inc., 381 F. Supp. 543, 546 (N.D. Tex. 1974) (drug injury).

\textsuperscript{153} Metal Structures Corp. v. Plains Textiles, Inc., 470 S.W.2d 93, 98-99 (Tex. Civ. App.—Amarillo 1971, writ ref'd n.r.e.).

\textsuperscript{154} Sims v. Southland Corp., 503 S.W.2d 660, 663 (Tex. Civ. App.—Tyler 1973, writ ref'd n.r.e.).

\textsuperscript{155} TEX. BUS. & COM. CODE ANN. § 2.725 (Tex. UCC) (Vernon 1968).
consistent with the four-year limitations statute applicable to non-UCC contract actions. 156 The Texas Supreme Court in Garcia v. Texas Instruments, Inc., 157 held that the UCC limitation period, rather than the two-year statute of limitations, governs actions for personal injury caused by a breach of the implied warranty of merchantability. 158 In so holding the court deemed irrelevant the traditional distinctions between tort and contract. 159

The Garcia court did not address the issue of time of accrual of a personal injury cause of action under the UCC warranty provisions. 160 The court recited the period of time between the nonpurchaser’s injury and the filing of the lawsuit as controlling, yet mistakenly referred to the time of injury as the time of sale. 161 If the court’s holding is interpreted as not allowing a seller his repose four years from the sale, a potentially unlimited exposure to lawsuits by nonpurchasers could result. 162

Except for explicit warranties of future performance, the UCC plainly states that a cause of action for breach of warranty accrues when the tender of delivery is made, despite the claimant’s lack of knowledge of the breach. 163 A Texas federal district court applied pre-UCC case law in place of explicit statutory wording and held that the cause of action accrues at the time of injury, not at the time of sale. 164 Other jurisdictions with identical statutes have criticized this decision. 165 The federal court decision is particularly questionable since the Texas legislature was made aware prior to enactment of the UCC that the UCC limitation provision would abrogate the common law discovery rule. 166 The Fifth Circuit and a Texas court of appeals have therefore expressed the better interpretation by holding that the UCC limitation period begins at tender of delivery. 167

157. 610 S.W.2d 456 (Tex. 1980).
158. Id. at 462.
159. Id. at 463. Bus see Nobility Homes of Texas, Inc. v. Shivers, 557 S.W.2d 77, 82 (Tex. 1977) (recognizing that contract law should control recovery of economic losses, tort law should control personal injury recovery).
161. 610 S.W.2d at 465.
166. Legislative Council, supra note 91, at 276.
167. Timberlane v. A.H. Robbins Co., 727 F.2d 1363, 1367 (5th Cir. 1984) (personal injury claim barred under Texas law); Garvie v. Duo-Fast, 711 F.2d 47, 48-49 (5th Cir. 1983) (applying Texas law to bar personal injury claim); Clark v. DeLaval Separator Corp., 639 F.2d 1320, 1324-25 (5th Cir. 1981) (applying Texas law to economic loss recovery, distinguishing the pre-UCC case law relied upon in Morton); Southerland v. Northeast Datsun, Inc., 659 S.W.2d 889, 892 (Tex. App.—El Paso 1983, no writ) (personal injury). The plaintiff in Clark argued that an implied warranty was within the future performance exception of...
D. Notice of Injury

A plaintiff is not required to give notice of his injury to the seller when a lawsuit is tried on a negligence or strict liability theory.\textsuperscript{168} The UCC, however, appears to bar recovery by any party asserting a claim for breach of implied warranty if the party did not give notice of the breach to the seller within a reasonable time.\textsuperscript{169} An official comment to the UCC notice provision explains that the notice requirement applies to claimants other than the immediate buyer who sue under an implied warranty, and these claimants are held to use good faith in notifying the seller once they know of the legal situation.\textsuperscript{170} Nevertheless, one court of appeals disregarded the official comment to the notice provision and held that a nonprivity purchaser was not required to give any notice to either the immediate seller or the remote manufacturer when only the manufacturer was sued.\textsuperscript{171}

III. Differences and Similarities: Are They Justified?

The current state of products liability law in Texas contains marked differences between causes of action for negligence, strict tort liability, and breach of an implied warranty of merchantability. Solid legal reasoning has supported the development of each theory of recovery.\textsuperscript{172} Applying all

\textsuperscript{168} McLain v. Hodge, 474 S.W.2d 772, 774 (Tex. Civ. App.—Waco 1971, writ ref'd n.r.e.); RESTATEMENT (SECOND) OF TORTS § 402A comment m (1965).

\textsuperscript{169} Id. at 1325. This literal interpretation of the statute has been accepted in other jurisdictions also. See, e.g., General Motors Corp. v. Tate, 516 S.W.2d 602, 605-06 (Ark. 1974) (UCC limitation period held to begin at tender of delivery in personal injury lawsuit under implied warranty); Johnson v. Hoeksema Tractor, Inc., 420 A.2d 154, 156-58 (Del. 1980) (implied warranty lawsuit filed two years after personal injury but five years after purchase of allegedly defective tractor barred by UCC § 2-725); Wilson v. Massey-Ferguson, Inc., 21 Ill. App. 3d 867, 315 N.E.2d 580, 584 (Ill. App. Ct. 1974) (implied warranty cause of action barred by unambiguous language of § 2.725 running from time of delivery).

\textsuperscript{170} Id. comment 5; see Southwest Lincoln-Mercury, Inc. v. Ross, 580 S.W.2d 2, 4-5 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ); Import Motors, Inc. v. Matthews, 557 S.W.2d 807, 809 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.); Melody Home Mfg. Co. v. Morrison, 502 S.W.2d 196, 202-03 (Tex. Civ. App.—Houston [1st Dist.] 1973, writ ref'd n.r.e.).

\textsuperscript{171} Vintage Homes, Inc. v. Coldiron, 585 S.W.2d 886, 888-89 (Tex. Civ. App.—El Paso 1979, no writ) (buyer had complained to retailer, however, and manufacturer sent repairman to attempt some repairs).

\textsuperscript{172} Several commentators, however, have analyzed the complex economic and jurisprudential issues of strict liability. See Calabresi, Optimal Deterrence and Accidents, 84 YALE L.J. 656 (1975); Calabresi & Hirschoff, Toward a Test for Strict Liability in Torts, 81 YALE L.J. 1055 (1972); Epstein, Products Liability: The Search for the Middle Ground, 56 N.C.L. REV. 643 (1978); Hoenig, Product Designs and Strict Tort Liability: Is There a Better Approach?, 8 SW. U.L. REV. 109 (1976); Montgomery & Owen, Reflections on the Theory and Administration of Strict Tort Liability for Defective Products, 27 S.C.L. REV. 803 (1976); Plant, Strict Liability of Manufacturers for Injuries Caused by Defects in Products—An Opposing View, 24 TENN. L. REV. 938 (1957); Posner, Strict Liability: A Comment, 2 J. LEG. STUD. 205 (1973); Sachs, Negligence or Strict Liability: Is There Really a Difference in Law or Eco-
three theories to a single products liability case, however, has led to inconsistent and confused results. Moreover, the uncertainty of products liability law is prompted by courts' improvisations of new legal rules that foster needless litigation, adding to the social costs of a strained and overworked legal system. Before proposing a system to simplify Texas products liability law, however, the three major products liability causes of action should be scrutinized to determine where they are redundant and where they are justifiably different.

A. Parties Potentially Liable

Determining whether a defendant is a seller of an allegedly defective product plays a different role in each of the three major products liability theories. Negligence liability is broader than strict liability and liability for breach of warranty, since it alone extends to parties responsible for a defective product that has not entered the stream of commerce. When a defendant introduces a defective product into the stream of commerce by sale, negligence liability is again broader than strict liability and warranty liability, which apply only to sellers who regularly sell the product in a business context. When a defendant introduces a defective product into the stream of commerce by a nonsale transaction such as a lease, negligence liability, as well as strict liability, applies, but warranty liability does not.

The broad scope of negligence liability for defective products stems from the definition of negligence. In Texas negligence is defined as a failure to do what an ordinarily prudent person would have done in similar circumstances or doing what an ordinarily prudent person would not have done in similar circumstances. With this focus on a party's conduct, negligence in a products liability context involves product defectiveness only to the extent that the defectiveness serves as the instrumentality between a manufacturer's negligent act or omission and a claimant's injury.


173. Note, supra note 5, at 64.


175. Wood v. Kane Boiler Works, Inc., 238 S.W.2d 172, 181 (Tex. 1951) (independent contractor, hired to inspect pipe during manufacture and injured when defective pipe burst, recovered under negligence theory).

176. The implied warranty of merchantability applies only to merchant sellers. TEX. BUS. & COM. CODE ANN. § 2.314(a) (Tex. UCC) (Vernon 1968).


178. See supra note 54 and accompanying text.

179. See supra notes 103-04 and accompanying text.

As with product defectiveness, the form of a transaction that exposes a claimant to a defective product is largely irrelevant in a negligence analysis. Negligence liability therefore justifiably extends to nonsale transactions. 8

Sound policy also supports the application of strict tort liability in nonsale transactions. Strict tort liability is based in part on the policy that the seller of a product must assume a special responsibility to meet the public expectations of reasonably safe products in the marketplace. 8

Another reason for imposing strict tort liability is to ensure that the costs of accidental injuries caused by unreasonably dangerous products are borne by the sellers of the products, who can best spread the loss through liability insurance and cost increases to the consumer. 8

Consumers expect safe products from lessors no less than from sellers, and a business can obtain insurance and increase price whether the business involves leases or sales. 8

The policies of strict tort liability, therefore, justify application of this liability to nonsellers who are in the business of introducing products into the stream of commerce. 8

Although application of an implied warranty of merchantability in Texas to sales transactions only has generated little controversy, some jurisdictions expanded this implied warranty beyond the express wording of article 2 of the UCC to apply to nonsale transactions. 8

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82. RESTATEMENT (SECOND) OF TORTS § 402A comment c (1965).
83. Id.
84. Rourke v. Garza, 530 S.W.2d 794, 800 (Tex. 1975).
86. See supra notes 103-04 and accompanying text.
87. TEX. BUS. & COM. CODE ANN. § 2.314 (Tex. UCC) (Vernon 1968) (warranty of merchantability implied in a contract for “sale” of goods). “A ‘sale’ consists in the passing of title from the seller to the buyer for a price.” Id. § 2.106.
88. See, e.g., Quality Acceptance Corp. v. Million & Albers, Inc., 367 F. Supp. 771 (D. Wyo. 1973) (implied warranty held especially applicable to lease agreement for machinery with option to purchase); KLPR TV, Inc. v. Visual Elec. Corp., 327 F. Supp. 315 (W.D. Ark. 1971) (lease of broadcasting equipment), aff’d in part, rev’d in part, 465 F.2d 1382 (8th Cir. 1972); Bachner v. Pearson, 479 P.2d 319 (Alaska 1970) (lease of aircraft did not preclude implied warranty recovery, lessee’s recovery allowed on strict tort liability grounds); Redfern Meats, Inc. v. Hertz Corp., 134 Ga. App. 381, 215 S.E.2d 10 (1975) (lease of refrigerated trailer); Cintrone v. Hertz Truck Leasing & Rental Service, 45 N.J. 434, 212 A.2d 769 (1965) (truck lease); see also Fender v. Colonial Stores, Inc., 138 Ga. App. 31, 225 S.E.2d 691 (1976) (exploding bottle injuring shopper before purchase; contract for sale need not be executed for attachment of implied warranty); Giant Food, Inc. v. Washington Coca-Cola Bottling Co., 273 Md. 592, 332 A.2d 1 (1975) (exploding bottle injuring shopper before purchase); Gillespie v. Great Atl. & Pac. Tea Co., 14 N.C. App. 1, 187 S.E.2d 441 (1972) (exploding bottle injured shopper before purchase). See generally Note, Implied Warranty Protects Self-Service Shopper Even Before She Pays Retailer For Goods, 28 MERCER L. REV. 751, 759 (1977) (implied warranties may arise before purchase is made). See also J. WHITE & R. SUMMERS, supra note 57, at 344, wherein the authors were willing to concede that a manufacturer should be liable under an implied warranty to a shopper injured before a product had actually been purchased, but they were less certain that an implied warranty should extend to other nonbuying parties. “So bending the warranty law may be unnecessary where the consumer would have strict tort and negligence theories to rely on and where such a distortion may have untoward effects in other circumstances.” Id.
transaction involves an apparent lease with an option to purchase that effects a sale despite the rental format, the extension of warranty liability seems justified. One court, however, seized upon wording in a UCC comment that would leave undisturbed any case law on nonsale warranties and implied a warranty in a genuine truck lease. Another court interpreted the comment differently and held that the UCC did not bar extension of common law strict liability to an aircraft lessor. A possible explanation of this UCC comment is that express warranties in nonsale transactions are not barred by the UCC, since the comment accompanies the section providing for express warranties. Although logically a lessee of a defective product would seem to be entitled to recover damages just as is a purchaser of the same product, the Texas Legislature has not so provided. Until the legislature expressly creates an implied warranty remedy in the nonsale context, therefore, the courts should not impose any further common law liability other than that provided by the theories of negligence and strict tort liability.

Even as applied to sales transactions, the liability theories diverge on the issue of liability for defects in used products. Negligence liability recognizes no distinction between new and used products since the liability stems from the seller's negligent conduct. While attaching negligence liability in a used product sales context is justified under present Texas law, the policies of strict tort liability are strained in their application to sellers of used products. Unlike the consumer expectations attending the purchase of a new product, a buyer generally neither expects as much from nor pays as much for a product that he knows is used. Moreover, without the distribution chain of a new product that ideally leads to a "deep pocket" manufacturer, the seller of used products will not be able to pass on the liability for defects created during use of the product by the original or subsequent consumers. The court that extended strict tort liability to


190. The comment provides:

Although this section is limited in its scope and direct purpose to warranties made by the seller to the buyer as part of a contract for sale, the warranty sections of this Article are not designed in any way to disturb those lines of case law growth which have recognized that warranties need not be confined . . . to sales contracts. . . . They may arise in other appropriate circumstances such as in the case of bailments for hire.

TEX. BUS. & COM. CODE ANN. § 2.313 comment 2 (Tex. UCC) (Vernon 1968) (section deals with express warranties).

191. Cintron v. Hertz Truck Leasing & Rental Serv., 45 N.J. 434, 212 A.2d 769, 775-79 (1965). The court noted, however, that in this personal injury action strict tort liability would have been a more appropriate remedy, perhaps suggesting that the court allowed the warranty claim only to give the plaintiff a chance to amend his pleadings on remand. Id.


193. See supra notes 180-81 and accompanying text.


195. Id.
a used brick seller did not discuss these policies.196 Other jurisdictions have considered the issue in more depth and have rejected the extension of strict tort liability to used product sellers.197 Texas courts should also refuse to apply strict tort liability to sellers of used products.198

Despite the liability imposed on sellers of used products under the theories of negligence and strict tort liability, the Texas courts have not extended liability under an implied warranty of merchantability to sellers of used products.199 The drafters of the UCC commented that the contract description of secondhand goods should determine the seller's obligation.200 When a seller describes a product as used, Texas courts have properly refused to imply a warranty of merchantability.201 The supreme court missed an opportunity to comment on this issue in Mid Continent Aircraft Corp. v. Curry County Spraying Service.202 The court denied warranty liability for a defective, used aircraft because of a valid disclaimer, but failed to discuss whether an implied warranty of merchantability would have otherwise applied.203 Other jurisdictions have implied a warranty in the sale of a used product in situations in which the buyer relied on the judgment of the seller.204 Such situations properly give rise to a warranty of fitness for a particular purpose under the UCC,205 regardless of the used nature of a product.206 Since the warranty of fitness for a particular purpose provides a remedy, the Texas courts should continue to refuse to apply an implied warranty of merchantability to used product sales and thereby avoid adding to the already confused state of products liability law.

198. See generally Sales & Perdue, supra note 35, at 102-05 (recommending that courts consider consumer reliance before imposing strict tort liability on used product dealers and stating that imposition of strict tort liability when a defect is within the reasonable expectation of a consumer is contrary to the policies of strict tort liability).
199. See supra note 103 and accompanying text.
200. TEX. Bus. & COM. CODE ANN. § 2.314 comment 3 (Tex. UCC) (Vernon 1968) (stating that seller's obligation should be "appropriate" for the contract description of the used goods).
201. See supra note 79 and accompanying text.
202. 572 S.W.2d 308 (Tex. 1978).
203. Id. at 313.
205. TEX. Bus. & COM. CODE ANN. § 2.315 (Tex. UCC) (Vernon 1968). This warranty of fitness for a particular purpose might have applied in Mid Continent were it not for a valid disclaimer. See 572 S.W.2d at 313. Further discussion of the implied warranty of fitness for a particular purpose is beyond the scope of this Comment.
206. See generally 3 S. WILLISTON, A TREATISE ON THE LAW OF SALES § 19-9 (4th ed. 1974) (stating that implied warranty of fitness for a particular purpose applies to sale of used as well as new goods).
All three products liability theories apply to sales by merchants of new products. A merchant is defined in the UCC as a person who deals in goods of the kind alleged to be defective. Only sellers who are merchants are potentially liable for a breach of an implied warranty of merchantability. Strict tort liability, which applies to sellers engaged in the business of selling a product alleged to be defective, is coextensive with the UCC for this class of potentially liable parties. Neither strict tort liability nor implied warranty apply to an isolated or occasional sale. The extension of two forms of liability based on the defective nature of a product to the same class of merchant sellers, plus the availability of negligence liability based on a defendant’s conduct, is justifiable when different classes of plaintiffs may exercise the different legal theories. But when the same class of plaintiffs may obtain a remedy under all three theories of recovery against the same class of merchant sellers, the redundancy and confusion in products liability law becomes particularly pronounced.

B. Parties Who May Recover

A party with an injury caused by the defective nature of a product may seek a recovery in Texas under the theories of negligence, strict tort liability, and implied warranty of merchantability without regard to privity. Although the foreseeability requirement within the proximate causation standard of negligence and implied warranty theoretically reduces the class of potential plaintiffs relative to the producing cause standard of strict tort liability, the Texas courts have allowed recovery to injured bystanders under all three theories without difficulty. While privity is not required for recovery in tort, absence of privity often bars recovery in contract. Recovery by nonprivity plaintiffs under an implied warranty of merchantability therefore appears contrary to the otherwise contractual nature of the UCC.

207. Merchant means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

TEX. BUS. & COM. CODE ANN. § 2.104(a) (Tex. UCC) (Vernon 1968).

208. TEX. BUS. & COM. CODE ANN. § 2.314(a) (Tex. UCC) (Vernon 1968); 3 R. ANDERSON supra note 104, § 2-314:52.


210. TEX. BUS. & COM. CODE ANN. § 2.314 comment 3 (Tex. UCC) (Vernon 1968); RESTATEMENT (SECOND) OF TORTS § 402A comment f (1965).

211. See supra notes 13 & 66 and accompanying text.

212. See supra notes 66 & 86 and accompanying text.

213. See supra notes 66, 71 & 77 and accompanying text.


The law of sales governs the economic relations between buyers and sellers of goods, and strict tort liability controls the separate problem of physical injuries. Only plaintiffs in privity with a seller should recover damages for inferior quality of a product since these damages depend on the terms of the bargain between buyer and seller. The UCC provisions allowing recovery for property damage and personal injury as consequential damages do not contradict the privity-only nature of sales law, but instead provide a simple vehicle for a buyer in privity to recover for both economic and physical injury in a single cause of action, rather than in separate contract and tort actions.

Recovery for physical injury under the UCC is a remnant of a more tort-flavored implied warranty proposed in the second draft of the Revised Uniform Sales Act, an ancestor of the sales chapter in the Texas UCC. The Sales Act draft would have extended warranty protection for injury to person or property to any legitimate user of a defective product, whereas the proposed Texas UCC would have protected only persons in the family or household of the buyer, and only for personal injury. The Texas legislature failed to enact either proposal. The implied warranty of merchantability, as enacted in Texas, merely codified case law that had implied a warranty of merchantability only between parties in privity of contract, leaving the development of nonprivity implied warranty in tort to the courts.

The Texas Supreme Court's first decision on the privity question was *Nobility Homes of Texas, Inc. v. Shivers.* The issue of liability of a remote manufacturer arose because an intermediate retailer had gone out of business and was not a party to the suit. The buyer claimed that defects in workmanship and materials reduced the market value of a mobile home to less than its purchase price, and the trial court found a difference of $8,750 between market value and purchase price. Strict tort liability could not apply since the mobile home was not unreasonably dangerous

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1. See *Seely v. White Motor Co.*, 63 Cal. 2d 9, 403 P.2d 145, 149, 45 Cal. Rptr. 17, 21 (1965); *see Prosser, supra* note 20, at 1134.


4. *See supra* note 94 and accompanying text.

5. *See supra* note 89 and accompanying text.
and did not cause injury to the plaintiff's person or other property. The supreme court, however, allowed the nonprivity buyer to recover his economic loss under an implied warranty of merchantability.

The court reasoned that since a nonprivity claimant could recover for personal injury caused by an unreasonably dangerous product by the application of strict tort liability, then for fairness and consistency a nonprivity claimant should also recover for economic loss due to the defective but not dangerous nature of a product under the implied warranty of merchantability. The court envisioned a claimant losing his entire life savings due to the reduced value of a defective product and postulated that this economic loss could be as disastrous as physical injury.

The court's stated rationale for extending implied warranty protection to nonprivity buyers, however, is not convincing. Public policy justifies elimination of a privity requirement in support of strict tort liability's primary purpose of protecting the public from dangerous products. Even though a damage award for loss of a leg or a life may equal an award for economic loss when expressed in dollars and cents, this pecuniary value is no more than a compromise to the fact that human suffering and death cannot truly be quantified. Strict tort liability therefore protects the public from dangerous products that cause either minor or major personal injuries, but does not offer a remedy for even huge economic losses.

Yet strict liability does not protect a plaintiff personally injured by a product not unreasonably dangerous, even if this plaintiff is in privity with the seller of the product. While professing to forge a remedy consistent with strict tort liability, the Nobility court's reasoning oversteps the policies of strict tort liability. This reasoning would allow a recovery for injury caused by a product not unreasonably dangerous, first when the product causes physical injury and then when the product causes purely economic injury. While professing an intent to keep contract law and tort law separate, the court misapplied tort policy to an historically contractual remedy in Texas in its eager "assault upon the citadel of privity."

The Nobility court decided that limiting a buyer to a cause of action against his immediate seller would encourage manufacturers to sell to consumers through low-capital collapsible corporations. As authority for this proposition the court cited to an admittedly exaggerated hypothetical

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227. Id. at 79-80.
228. Id. at 81.
229. Id.
230. Id.
231. See Darryl v. Ford Motor Co., 440 S.W.2d 630, 633 (Tex. 1969); Keeton, Torts, Annual Survey of Texas Law, 32 Sw. L.J. 1, 18 (1981); Sales, supra note 123, at 773.
232. See Note, supra note 5, at 98 (freedom from death and suffering should be the primary concern in products liability law).
233. 557 S.W.2d at 82.
235. 557 S.W.2d at 81-82. A collapsible corporation, in this non-tax context, is one that ceases to exist when all of the goods in its inventory are sold. See id.; Roberts, The Case of the Unwary Home Buyer: The Housing Merchant Did It, 52 CORNELL L. REV. 835, 835-36 (1967).
in a law review article. Although the hypothetical concerned real estate development corporations that dissolved after the last house of a development was sold, low-capital retail outlets with a nonrenewable stock of goods are also conceivable. Even if the court's fears of fly-by-night retailers of consumer goods is well-founded, this reasoning does not explain saddling a remote manufacturer with the responsibilities of the retailer to sell a product at a price commensurate with its value. A UCC comment states that the selling price of a product provides an excellent indication of the degree of quality a merchant is obligated to furnish. This comment is in accordance with the measure of damages for breach of warranty under the UCC, which is the difference between the value of the product as received and the value of the product as warranted. Thus if a manufacturer sells a product of inferior quality to a wholesaler for $100, its actual value, the wholesaler has suffered no loss, and the manufacturer is liable for no damages. But if a consumer eventually buys the product from a hard-bargaining retailer for $1000, when its retail value is only $200, the consumer has suffered a substantial loss, yet the manufacturer should not be liable for damages. Regardless of whether the retailer, and any other intermediate dealers, are solvent by the time the consumer brings suit, the Nobility holding would allow the consumer to recover the difference between his purchase price and the actual retail value directly from the manufacturer. This imposition of liability on the manufacturer for a consumer's bad bargain with a retailer demonstrates that the court in Nobility embraced the deep-pocket theory.

Once the Nobility decision allowed remote consumers to recover any excess price paid for a defective product under an implied warranty of merchantability, the supreme court found it easy to extend this implied warranty to protect nonpurchasers from personal injury in Garcia v. Texas Instruments, Inc. The plaintiff in Garcia suffered acid burns when he fell while carrying glass containers of sulfuric acid, which the plaintiff's employer had purchased from the defendant. The court could have based

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236. "[I]t may be better to launch this enterprise with a short, and somewhat exaggerated scenario." Roberts, supra note 235, at 835.
237. TEX. BUS. & COM. CODE ANN. § 2.314 comment 7 (Tex. UCC) (Vernon 1968).
238. Id. § 2.714(b).
239. In Nobility no showing was made of the retailer's insolvency; he was not a party to the suit because he could not be found. Nobility Homes of Texas, Inc. v. Shivers, 539 S.W.2d 190, 191 (Tex. Civ. App.—Beaumont 1976), aff'd, 557 S.W.2d 77 (Tex. 1977).
240. 539 S.W.2d at 195 (Keith, J., dissenting).
241. Id. at 196 (Keith, J., dissenting). One of the justifications proposed by Dean Prosser in support of strict liability in tort was that liability of the manufacturer directly to the consumer would eliminate a multiplicity of suits for indemnity involving dealers intermediate to the manufacturer and consumer. Prosser, supra note 20, at 1123-24. This justification fails to recognize that the same series of lawsuits can occur in reverse order due to contractual indemnity agreements when a manufacturer is initially liable to a consumer. Additionally, a manufacturer initially held liable for a consumer's economic loss for breach of warranty would appear to have a cause of action in equity via subrogation against any intermediate dealers who contributed to the disparity between the consumer's cost and the actual value of the warranted product.
242. 610 S.W.2d 456 (Tex. 1980).
this plaintiff's recovery on his employment relationship with the buyer, who was in privity with the defendant. This limited nonpurchaser exception would generally follow the proposed Texas UCC provision that would have allowed a recovery for personal injury to household guests of the immediate buyer.243 Instead the court held that privity was not a requirement in an action for breach of an implied warranty of merchantability.244

In completely eliminating privity as a bar to recovery under an implied warranty of merchantability, the court again confused contract law and tort law and justified its holding with the rationale that supported extension of strict tort liability protection to bystanders.245 This extension of strict tort liability was based on a product's unreasonably dangerous nature.246 Since a nonprivity plaintiff suffering personal injury may bring a cause of action in strict tort liability or negligence, the court's only reason for giving a nonprivity plaintiff another route to recovery was that the legislature had delegated the privity question to the courts.247 The court's holding thus neatly sidestepped the long established two-year statute of limitations for personal injuries,248 which barred the plaintiff's otherwise possible negligence and strict tort liability claims, and applied the four-year UCC limitations period.249

While the UCC clearly allows recovery for personal injury,250 it does not mandate extension of an implied warranty cause of action to bystanders. Negligence and strict tort actions adequately protect a nonprivity claimant who deserves compensation for personal injuries. An additional cause of action coextensive with strict tort liability251 merely confuses the litigation of defective product cases and provides the unjustified bonus of a four-year limitation period.252

243. See supra text accompanying note 91; see generally, 3 R. Anderson, supra note 104, at 2-314:118 (discussing recovery by employees of a buyer under implied warranty).
244. 610 S.W.2d at 465.
245. Id. The court cited as authority Darryl v. Ford Motor Co., 440 S.W.2d 630, 633 (Tex. 1969), which had extended strict tort liability to protect bystanders. See supra note 47 and accompanying text.
246. The Garcia court stated: "A manufacturer who places in commerce a product rendered dangerous to life or limb by reason of some defect is strictly liable in tort to one who sustains injury because of the defective condition." 610 S.W.2d at 465 (quoting Darryl, 440 S.W.2d at 633). The court also quoted from the dissenting opinion of Colvin v. FMC Corp., 43 Or. App. 709, 604 P.2d 157 (1979), which postulated a warranty of safety imposed by the UCC analogous to strict tort liability. Id. at 162 (Thornton, J., and Lee, J., dissenting); see also Keeton, supra note 231, at 18 (Strict tort liability developed principally to guard against dangerousness of product).
247. 610 S.W.2d at 465. See supra note 89 and accompanying text.
251. Keeton, supra note 231, at 18.
C. Defenses

With the recent adoption of comparative causation in *Duncan v. Cessna Aircraft Co.*,253 a plaintiff's negligent conduct reduces his recovery whether he sues under a theory of negligence, strict tort liability, or implied warranty of merchantability.254 This commonality eliminates one of the conceptual and practical difficulties in Texas products liability law, yet differences between the defenses to the three major products liability theories still exist. The differences in applicable defenses in turn reflect some fundamental differences in the justifiable scope of the three products liability causes of action.

Disclaimers of liability are effective in Texas under proper circumstances regardless of whether a plaintiff brings a products liability action in negligence, strict tort liability, or implied warranty of merchantability.255 While Texas appellate courts have not addressed all disclaimer issues, the same considerations of public policy influence disclaimer enforcement decisions under all of the three major products liability theories.256 Absent fraud or illegality in a transaction, the most significant policy ground for denying enforcement to a disclaimer of liability appears to be substantially unequal bargaining power.257 The supreme court expressly invalidated a negligence disclaimer on the ground of unequal bargaining power,258 but other decisions at least imply that the same ground would serve to invalidate disclaimers of strict tort or implied warranty liability.

The Texas Supreme Court in *Mid Continent Aircraft Corp. v. Curry County Spraying Service, Inc.*259 stated that the rights and remedies provided by the UCC should not be nullified by application of strict tort liability in derogation of a contractual allocation of liability.260 Although the case involved only economic loss which the court held was not recoverable under strict liability in any event,261 the court's statement implies that a disclaimer of strict liability for any type of damages would be enforceable against a commercial buyer.

Other jurisdictions have held that such disclaimers are enforceable between commercial parties of equal bargaining strength.262 These decisions

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253. 665 S.W.2d 414 (Tex. 1984).
254. *See supra* notes 129-35 and accompanying text.
255. *See supra* notes 136-48 and accompanying text.
256. *See Crowell v. Housing Auth., 495 S.W.2d 887, 889 (Tex. 1973); Wade v. Austin, 524 S.W.2d 79, 86 (Tex. Civ. App.—Texarkana 1975, no writ).*
257. *Crowell v. Housing Auth., 495 S.W.2d 887, 889 (Tex. 1973); Wade v. Austin, 524 S.W.2d 79, 86 (Tex. Civ. App.—Texarkana 1975, no writ).*
258. *Id.* at 312.
259. 572 S.W.2d 308 (Tex. 1978).
260. *Id.* at 312.
261. *Id.* at 313.
suggest that the courts would enforce disclaimers of strict tort liability for injury to a buyer's property other than the defective product itself against a capable commercial buyer, but not enforce these disclaimers against consumers or other buyers with little bargaining power.

Although the UCC appears to support enforceability of a broader range of disclaimers of liability than does the common law of negligence and strict tort liability, a UCC provision denying effect to unconscionable contract clauses reflects the same public policy as the common law. This unconscionability provision does not expressly apply to disclaimers of implied warranties, but commentators have convincingly argued that this provision bars enforcement of unconscionable disclaimers of implied warranties just as it bars enforcement of any other unconscionable contract clauses. The UCC appears to rule all disclaimers of personal injury unconscionable, but does not specifically address other criteria for determining unconscionability. Because unconscionability is not otherwise defined in the UCC, courts must look to the common law of contracts, which considers the lack of a buyer's bargaining power as an important element on the issue of unconscionability.

Since a buyer's bargaining power plays a part in the determination of enforceability of a disclaimer of liability regardless of which theory of recovery a claimant presents, the issue of enforceability of a disclaimer can

95, 47 Cal. Rptr. 518, 523 (1965) (clear negligence disclaimer enforceable between freely negotiating parties); see generally McNichols, Who Says That Strict Tort Disclaimers Can Never Be Effective? The Courts Cannot Agree, 28 Okla. L. Rev. 494, 528-29 (1975) (strict tort liability primarily designed for consumer protection, so knowledgeable corporations should be able to disclaim the liability freely).


265. See Shanker, supra note 6, at 565.


268. See Wade v. Austin, 524 S.W.2d 79, 86 (Tex. Civ. App.—Texarkana 1975, no writ) (looking at entire context of agreement, alternatives available at time of contract formation, nonbargaining ability of plaintiff, or illegal, oppressive or unreasonable nature of the contract to determine unconscionability).
only logically arise when a claimant has participated in a bargaining transaction. Disclaimers arise, therefore, only in a contractual setting and, if enforceable, bar a claimant from recovering under any of the three products liability theories. In a contractual setting when a buyer alleges a defect in a product, the seller’s express disclaimer of any express or implied representations of the quality of the product should be examined under the statutory disclaimer and unconscionability provisions of the UCC. Since the UCC provides for an effective disclaimer other than by express disclaimer, as by a buyer’s course of dealing269 or a buyer’s refusal to inspect and failure to discover patent defects,270 the issue of disclaimer will almost always arise when a buyer alleges a product defect. The UCC should control the resolution of disclaimer issues in a buyer’s products liability suit, but should not necessarily control the other liability issues of the case. Accordingly, when a claimant is in privity of contract with the defendant seller of a defective product, the theories of negligence or strict tort liability should not be applied to impose liability on the seller in contravention of a disclaimer of liability for product defectiveness made in accordance with the disclaimer and unconscionability provisions of the UCC.271

When a party injured by a defective product did not buy or lease the product, the issue of disclaimer should not arise at all. Since such a bystander or user has participated in no bargaining transaction, public policy should deny enforcement of any remote disclaimers due to this ultimate example of a claimant’s lack of bargaining power. To avoid the anomalous result of allowing a bystander to recover under an implied warranty from the manufacturer of a defective product while denying the immediate purchaser a recovery due to a valid disclaimer, nonpurchasing bystanders and users should have a right to only the tort remedies of negligence and strict liability. Similarly, buyers suing a remote manufacturer should bring a cause of action in negligence or strict tort liability, rather than implied warranty, because of the lack of privity with the manufacturer. These tort actions against the remote seller would supplement the same buyer’s cause of action for breach of an implied warranty of merchantability against his immediate seller and should be subject to any disclaimers for which the buyer has bargained.

Just as enforcement of a disclaimer of liability should occur only when the disclaimer is the product of contractual dealings, the special four-year UCC statute of limitations should apply only to a cause of action arising from contractual dealings.272 A four-year limitation period, which is applicable in Texas by a general statute of limitations to non-UCC causes of action founded in contract,273 may reflect the drafter’s oversight in not spe-

269. TEX. BUS. & COM. CODE ANN. § 2.316(c)(3) (Tex. UCC) (Vernon 1968) (providing also for disclaimer by course of performance or usage of trade).
270. See id. § 2.316(c)(2).
272. See supra notes 155-67 and accompanying text.
specifically considering the applicability of the UCC to personal injuries, which would otherwise give rise to a cause of action in tort with a two-year limitation period. 274 The available legislative history shows that the Texas Legislature recognized that the UCC limitation period would change the prior statutory period for suits on oral contracts, 275 and that the initiation of the UCC period at tender of delivery would abrogate the prior common law discovery rule. 276 The legislature did not mention, however, the change to the two-year tort limitations period. Assuming the drafters had considered the issue, the UCC four-year period may reflect an intent that only those injuries founded in classical contract circumstances would be controlled by the UCC limitation period. Since privity is generally a requirement in a contract action, the four-year provision could be applied only to those personal injury suits in which a plaintiff and defendant are in privity of contract. At least one jurisdiction has construed the UCC in this manner. 277 The explicit wording of the UCC limitation provision that it applies to actions for breach of sales contracts and that the period begins to run at tender of delivery for implied warranty actions 278 supports this result. These limitation provisions can be a benchmark only for parties involved in the sale and delivery of a product and therefore in privity with the purchaser. 279

Like the UCC limitation provisions, the UCC requirement that a seller be given reasonable notice of breach of an implied warranty 280 is strained in its application to parties not in privity of contract. When a bystander or remote buyer is entitled to a cause of action for breach of an implied warranty of merchantability, other jurisdictions have concluded that the UCC obligates the plaintiff to give reasonable notice of the breach to the defendant seller, regardless of absence of privity, at least when the plaintiff suffers only economic loss. 281 The single Texas court of appeals ruling on the

274. See J. White & R. Summers, supra note 57, at 416.
275. Legislative Council, supra note 91, at 274; M. Ruud, supra note 90.
276. Legislative Council, supra note 91, at 276.
277. Eg., Plouffe v. Goodyear Tire & Rubber Co., 373 A.2d 492, 495 (R.I. 1977). The Rhode Island UCC allows recovery under implied warranty for personal injury to a nonprivity plaintiff. The Rhode Island courts have held, however, that recovery by a nonprivity plaintiff is governed by a general two-year tort statute of limitation because the UCC four-year period is not applied in nonprivity cases. Id.
280. See supra notes 168-71 and accompanying text.
issue, which did not require notice to a remote seller.\(^{282}\) contradicts the legislative intent expressed in the official comment that accompanies the UCC notice provision.\(^{283}\) The court's holding, however, is largely due to the wording of the notice provision.\(^{284}\) While the official comment imposes the notice requirement on nonpurchaser claimants, the statutory section mentions only the buyer's duty of notice.\(^{285}\) This inconsistency again indicates that the drafters designed the notice provision, and the cause of action for breach of implied warranty of merchantability to which it applies, for use between parties in privity. Limiting the availability of an implied warranty of merchantability cause of action to parties in privity of contract with a defendant seller would restore rationality to the UCC notice provisions, as well as the disclaimer and limitation period provisions.

The confusion in Texas products liability law currently appears to stem largely from the extension of liability for breach of an implied warranty of merchantability to sellers not in privity of contract with a injured plaintiff. This extension allows a plaintiff injured by a defective product to sue a remote seller, if he sold the product when it was new, under three theories of liability. Allowing a nonprivity plaintiff to bring a third cause of action needlessly complicates products liability litigation and gives some plaintiffs an unjustified escape route around the two-year statute of limitations imposed on negligence and strict tort liability causes of action. The implied warranty action against a remote seller also allows a plaintiff to recover the economic loss he suffers in a bad bargain from a party who played no part in that bargain.\(^{286}\)

Even strict tort liability, which bases the imposition of liability for a nonprivity plaintiff's damages on a policy of encouraging the manufacture of safe products, does not allow a recovery for economic loss when the only damage caused by an unreasonably dangerous product is to the product itself. Since the public policy underlying strict tort liability does not allow recovery for economic loss to an unreasonably dangerous product, then no other policy but a thinly disguised policy of finding a deep pocket explains a nonprivity plaintiff's ability to recover under an implied warranty for economic loss to a product that is not even dangerous.

The implied warranty of merchantability historically has been available

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283. The comment states that "under this Article various beneficiaries are given rights for injuries sustained by them because of the seller's breach of warranty . . . ; but even a beneficiary can be properly held to the use of good faith in notifying, once he has become aware of the legal situation." Tex. Bus. & Com. Code Ann. § 2.607 comment 5 (Tex. UCC) (Vernon 1968).
284. Id. § 2.607(c)(1) ("the buyer" must notify).
285. Id.
286. See supra notes 235-41 and accompanying text.
only to a plaintiff in privity with a defendant seller. The UCC provisions for disclaimer, limitation period, and notice all reflect the contractual nature of the implied warranty cause of action and are all ill-suited in their application to parties not in privity of contract with a defendant seller. A measure of rationality and simplicity should be returned to products liability law. The implied warranty of merchantability should obligate a seller only to his immediate buyer and not to any plaintiffs that are not in privity with the seller.

IV. PROPOSAL FOR LEGISLATIVE AMENDMENT

Both the Texas Supreme Court and the Texas Legislature have the power to impose privity of contract as a requirement for recovery under the UCC implied warranty of merchantability theory. The supreme court, however, must adhere to the case-by-case method of judicial review and await a proper case for resolution of the privity issue. A change of such broad scope seems best left to the Texas Legislature.

The legislatures of a majority of states addressing the privity issue have enacted a UCC provision similar to that originally proposed, but not enacted, in Texas. In those states, therefore, only the buyer and foreseeable users are covered by implied warranty protection.
able users of a defective product who are natural persons in the buyer's family or in the buyer's household as guests may recover under an implied warranty of merchantability cause of action. The extension of implied warranty protection to even this limited class of nonprivity claimants, however, creates several new factual issues to be resolved before a claimant is entitled to a recovery. The multiple issues of whether a claimant is a member of a buyer's family or a guest of the buyer's household and a foreseeable user would often require a determination by the finder of fact. Thus a plaintiff could often litigate a breach of warranty claim to a jury verdict only to be denied recovery for lack of a favorable finding on his relationship to the buyer. Litigating the warranty theory with the negligence and strict tort liability theories would cause the needless confusion that courts and commentators have sought to avoid.

Since negligence and strict tort liability causes of action offer a remedy to a buyer's family members and household guests, only the buyer himself should be allowed a recovery under an implied warranty of merchantability. This no-exceptions privity of contract requirement would accord with the contractual history of the implied warranty of merchantability cause of action in Texas.290 The UCC provisions on disclaimer, limitation period, and notice would again be applied, as designed, only to immediate buyers, who may bargain for allocation of risk of a product defect, who are aware of the tender of delivery that starts the limitation period, and who know the identity of the seller to whom notice of injury is owed.

Privity of contract as a requirement for recovery also should reduce litigation confusion since it presents a clearer factual issue than the limited nonprivity requirement. Fewer plaintiffs would be uncertain of a verdict

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290. See supra note 94 and accompanying text.
on a privity issue than, for example, on a "foreseeable user" issue. Thus fewer plaintiffs would be enticed to litigate an implied warranty theory to an unfavorable verdict and would instead focus on the traditional nonprivity theories of negligence and strict tort liability. The clearer factual issue of privity should also allow more unmeritorious implied warranty claims to be dismissed at the trial court level by summary judgment. Requiring privity for a breach of an implied warranty claim should serve to simplify products liability litigation and to allow more efficient and consistent resolution of a nonprivity plaintiff's valid negligence and strict tort liability claims.

Requiring privity in an implied warranty of merchantability cause of action would necessitate amendment to section 2.318 of the UCC. To establish a privity requirement within the implied warranty of merchantability, as well as the more directly contractual express warranty and implied warranty of fitness for a particular purpose, section 2.318 could be amended to provide:

Third Party Beneficiaries of Warranties of Quality and Need for Privity of Contract
No one other than a buyer may take advantage of an express or implied warranty of quality made to that buyer, and the buyer may not sue a third party other than the immediate seller for breach of an express or implied warranty. Notwithstanding this section, a seller may contractually agree to extend an express warranty to persons other than the immediate buyer.

This proposed legislative amendment would accomplish little if the courts were left free to award damages to a nonprivity plaintiff for the reduced value of a defective product under strict tort liability. Texas strict tort liability law currently allows recovery of this reduced value when a defective product also causes injury to person or property. The Texas legislature should therefore codify the common law of strict tort liability by enacting a statutory equivalent to section 402A of the Restatement and limiting recoverable damages to those for injury to person or property. Legislatures in other states have already enacted versions of section 402A that could serve as models for a Texas strict tort liability statute. This statutory form of strict tort liability would provide a measure of reliability

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291. See supra text accompanying note 60.
292. Restatement (Second) of Torts § 402A (1965).
to Texas products liability law and reduce wasteful litigation spawned by the uncertainty of the scope of judicially adopted strict tort liability.

V. CONCLUSION

Products liability law in Texas currently provides three major avenues to recovery for injury caused by a product defect to a party not in privity of contract with the merchant seller of the product. Concurrent litigation of three separate causes of action for the same injury is difficult, costly, and unnecessary to ensure a deserving plaintiff a remedy. Legislative action building on the statutory framework of the UCC could simplify products litigation by the enactment of a comprehensive statute defining the respective roles of the breach of implied warranty of merchantability and strict liability in tort.

Limiting the cause of action for breach of an implied warranty of merchantability to only those parties in privity of contract with a defendant seller of a defective product would simplify the litigation of products liability claims by consumers against remote manufacturers. These non-privity consumer lawsuits would not be encumbered by inappropriate disclaimer, limitation period, and notice provisions of the UCC that are best suited to controversies between the parties to a contract of sale. The right of a nonprivity plaintiff to a remedy for the injury to his person or property would be fulfilled in the causes of action for negligence and strict tort liability.

Statutory enactment of a form of strict tort liability would further ensure that the distinctions between tort law and contract law are preserved. Damages recoverable under a strict tort liability statute could be limited to those for the traditional tortious injury to person or property. Recovery for the loss of value of a defective product would be available only to parties who are in privity with a seller and who have the opportunity to bargain for a price consistent with a product's quality.

Legislative amendment of the UCC to require privity of contract in an implied warranty of merchantability cause of action and a statutory enactment of strict tort liability limiting recovery to damages for physical injury should alleviate the confusion engendered by multiple theory products liability litigation in Texas. These proposed changes generally comport with existing Texas law, but eliminate alternate causes of action that are substantially duplicative. These proposals would simplify products liability law while preserving for a party injured by a defective product the right to a judicial remedy.