Personal Torts

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I. PRODUCTS LIABILITY

A. Defectiveness

JURY Instructions for Design Defects. Few issues in the law of products liability have caused Texas courts more difficulty than the definition of a design defect and the appropriate instruction to convey this definition to the jury. After several attempts at resolving these issues, the Texas Supreme Court settled on a standard jury instruction in 1979 in Turner v. General Motors Corp.: "By the term 'defectively designed' as used in this issue is meant a product that is unreasonably dangerous as designed, taking into consideration the utility of the product and the risk involved in its use." The court expressly rejected a more detailed instruction directing the jury to consider several specific factors in determining whether a product's design is defective.

Turner did not lay the issue to rest, however. In 1983, in Fleishman v. Guadiano, the Texas Supreme Court held that the trial court did not err by refusing to give a supplemental instruction directing the jury to ignore the plaintiff's contributory negligence when determining whether the product was defectively designed. This year, in Acord v. General Motors Corp., the supreme court held that the trial court committed reversible error by instructing the jury in addition to the standard Turner instruction that a manufacturer is not an insurer of his product and is not required to design an accident-proof product. The court recognized that the additional instruc-

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2. 584 S.W.2d 844 (Tex. 1979).
3. Id. at 847 n.1.
4. Id. at 848.
5. 651 S.W.2d 730 (Tex. 1983).
6. Id. at 731.
7. 669 S.W.2d 111 (Tex. 1984).
8. Id. at 113, 116.
tion correctly reflected Texas law and had been approved by two courts of appeals. Nevertheless, the court disapproved of the supplemental instruction as an inappropriate comment on the evidence by the trial judge.

Following closely on the heels of Fleishman, Acord will likely cause trial courts to be reluctant to depart from the precise wording of the instruction that was approved in Turner. Had the supreme court merely disapproved prospectively the specific instruction the trial court gave in Acord, trial courts would have learned of the impropriety of the instruction without being chilled from adapting their instructions to special situations in the future. By reversing the judgment the supreme court has sent a very different message to trial courts around the state.

The mere fact that the specific instruction in Acord was consistent with legal doctrine does not necessarily mean that the instruction should have been approved. One objective of Turner was to approve an instruction that reflects a balance between simplicity and accuracy in order to inform the jury without confusing it. If jurors were instructed fully about the law of design defects, they would be hopelessly confused. Nevertheless, the fact that the supplemental instruction was at least accurate might have led the court merely to disapprove it only prospectively.

One potential improvement in the Turner instruction concerns its provisions that the jury balance the risk and utility of the product in question. The appropriate test would require the jury to balance the risk and utility of the design feature that caused the injury instead of the product as a whole. For example, Ford Pintos were defectively designed not because the overall risks of Pintos outweighed their overall benefits, but because the risks of the gas tank's design outweighed the utility of that design. Under the Turner instruction as it is now worded, admitting evidence of safer alternative designs makes no sense. A comparison of the overall risks and utility of a product unduly favors the defendant.

Warning Defects: “No Duty” Doctrine. In Dixon v. Van Waters & Rogers the Fort Worth court of appeals held that the trial court correctly instructed the jury that a manufacturer has no duty to warn users who have actual knowledge of a product's dangerous characteristics and risks. Furthermore, the court held that Parker v. Highland Park, Inc., which abolished the “no duty” doctrine in negligence, does not apply to strict tort liability. The court's reasoning was somewhat elliptical but relied on the fact that the

9. Id. at 116.
11. 669 S.W.2d at 116.
12. 584 S.W.2d at 848-49.
14. 674 S.W.2d 479 (Tex. App.—Fort Worth 1984, writ ref'd n.r.e.).
15. Id. at 482.
16. 565 S.W.2d 512 (Tex. 1978).
17. 674 S.W.2d at 483.
assumption of risk defense has not been abolished in strict liability cases. 18 Implicit in the court's reasoning was that when Parker abolished the "no duty" doctrine in negligence, Farley v. M M Cattle Co. 19 had already abolished assumption of risk as an independent defense in negligence cases. 20 Since assumption of risk had not been abolished in strict tort liability, the "no duty" doctrine remained valid.

The Dixon court did not include any discussion of Duncan v. Cessna Aircraft Co., 21 in which the supreme court recognized contributory negligence as a comparative defense in strict tort liability. 22 In Duncan the court also held that assumption of risk is subsumed into contributory negligence, suggesting that it is no longer a defense independent of contributory negligence. 23 Consequently, assumption of risk no longer supports the adoption of a "no duty" doctrine in strict tort liability. Duncan should have the same effect on the "no duty" doctrine in strict liability that Farley had on the "no duty" doctrine in negligence. 24

After Duncan the plaintiff's knowledge of a product's risks should reduce the plaintiff's recovery under comparative causation rather than bar recovery under a "no duty" component of the requirement of defectiveness. 25 Elimination of the "no duty" component does not mean, however, that user knowledge of a product's risks is irrelevant to the question of defectiveness. If a product's risks are obvious or well known in the community, a failure to warn might not render the product defective. A knife is not defective because it does not carry a warning that it might cut the user. 26 If a product is defective for failure to warn general users about risks, however, an individual user's actual knowledge of the risks should implicate contributory negligence and comparative causation, not defectiveness under a "no duty" doctrine.

Aside from the issue of defectiveness, an individual user's knowledge of a product's risks may also affect the issue of causation. If a user is already aware of a product's risks, the manufacturer could argue that a warning would have no effect. Consequently, the absence of a warning, although a

18. Id.; see General Motors Corp. v. Hopkins, 548 S.W.2d 344, 351 (Tex. 1977); Shamrock Fuel and Oil Sales Co. v. Tunks, 416 S.W.2d 779, 783-84 (Tex. 1967).
19. 529 S.W.2d 751 (Tex. 1975).
20. Id. at 758.
21. 665 S.W.2d 414 (Tex. 1984); see infra text accompanying notes 45-104.
22. 665 S.W.2d at 429.
23. Id. at 423-24; see infra note 55 and accompanying text.
24. Duncan applies to all cases tried after July 13, 1983, the date of the first Duncan opinion. 665 S.W.2d at 434. The court in Dixon did not indicate when the trial occurred, but it implicitly assumed that Duncan did not control the case.
25. Id. at 429.
26. A manufacturer might be required to warn about generally known risks as a reminder in appropriate circumstances. Even if a product's risks are not generally known, a product might not be defective if the manufacturer failed to warn about risks that the relevant group of users would normally know. E.g., Blackwell Burner Co. v. Cedra, 644 S.W.2d 512, 516 (Tex. App.—San Antonio 1982, writ ref'd n.r.e.) (failure to warn would not be producing cause if user knew of dangers); Pearson v. Hevi-Duty Elec., 618 S.W.2d 784, 787 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.) (cannot evaluate warning adequacy apart from knowledge of expected users).
product defect, would not be a cause-in-fact of the injury under the "but for" test. While a presumption exists in warnings cases that a user would have read and heeded a warning, the presumption might not be applicable when the user actually knew about the risks even without a warning. This argument should be couched as an issue of causation, not as an issue of defectiveness under the "no duty" doctrine.

B. Unusual Accidents

Unusual results caused by a defendant's negligent conduct are analyzed under the doctrines of duty and proximate causation. An injury that is sufficiently unforeseeable is beyond the scope of liability, either because it is beyond the scope of the defendant's duty or because it is beyond the scope of proximate causation. Texas courts have not developed a similar doctrine in strict tort liability. In General Motors Corp. v. Hopkins the Texas Supreme Court held that in strict tort liability a plaintiff must prove only that the defect was a producing cause of his injuries, not that it was a proximate cause. Unlike proximate causation, producing causation does not depend on a finding that the injury was foreseeable.

Without the doctrines of duty and proximate causation, Texas courts have not developed a systematic approach to unusual accidents in strict tort liability. Courts might rely on three separate doctrines. First, a court could rely on the concept of defectiveness, finding that an accident is so unusual that the risk of its occurrence is too small to render the product defective under the risk-utility test. Also under the rubric of defectiveness, a court might conclude that an accident occurred under circumstances that the product was not designed to encounter and hold that the product was not defective for its normal use. Reliance on the concept of defectiveness has two difficulties: it does not resolve cases in which the risk-utility test does not apply, and it does not resolve cases in which a product is defective for one type of risk but in which another type of injury occurs. Nevertheless, in some cases the unusual nature of an accident may bear on the issue of defectiveness under the risk-utility test.


28. E.g., Rosas v. Buddies Food Store, 518 S.W.2d 534, 537 (Tex. 1975) (finding that wet floor just inside grocery store created no danger absolved store owner liability).

29. E.g., McClure v. Allied Stores of Texas, Inc., 608 S.W.2d 901, 904 (Tex. 1980) (evidence sufficient to sustain jury finding that security guard proximately caused plaintiff's injuries during pursuit of shoplifter).

30. 548 S.W.2d 344 (Tex. 1977).

31. Id. at 351.

32. See Turner, 584 S.W.2d at 847-48; supra note 3 and accompanying text.

33. See Fitzgerald Marine Sales v. LeUnes, 659 S.W.2d 917, 919 (Tex. App.—Fort Worth 1983, writ dism'd).

34. This problem is particularly evident in cases of manufacturing laws. See 3 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES PJC 71.01 (1982).
Second, a court could rely on the doctrine of misuse, concluding that the unusual circumstances under which the accident occurred were not within the product's normal use. This approach also creates difficulties, because foreseeability of a product's use rather than the manufacturer's intent is the normal test of misuse. A plaintiff may have used a product in a foreseeable way but nevertheless be involved in an unusual accident. If the court required the accident to be foreseeable, it would both stretch the normal meaning of misuse and violate the edict of Hopkins by incorporating the equivalent of a proximate cause standard into strict tort liability. Moreover, after Duncan v. Cessna Aircraft Co. the doctrine of misuse has been subsumed into the defense of contributory negligence. Contributory negligence may help in cases in which the plaintiff fails to use reasonable care, but unusual accidents can occur without the plaintiff failing to use reasonable care.

Third, a court could rely on the doctrine of producing causation. While producing causation cannot include foreseeability and remain consistent with Hopkins, foreseeability might be used to reflect other criteria to determine whether a specific injury should be compensable in strict tort liability. The backbone of proximate causation in negligence is foreseeability because it is a key ingredient in determining whether a defendant's conduct is negligent in the first place. Except in cases involving warnings defects, foreseeability does not define defectiveness and therefore should not define producing causation. But other factors that underlie the definition of defectiveness could be used to determine whether an accident is so unrelated to the product's defect that the policies underlying strict tort liability do not support recovery.

Some precedents concerning proximate causation in negligence reflect factors other than foreseeability. For example, a conclusion that rescuers are within the scope of proximate causation reflects an approving attitude toward rescuers as much as it does a judgment about the foreseeability of rescuers as intervening human causes. To rely on precedents concerning proximate causation in negligence to help define producing causation in strict tort liability would not be inconsistent with Hopkins to the extent that those precedents rely on factors other than foreseeability.

Some consistent doctrine is clearly required in strict tort liability to resolve cases involving unusual accidents caused by defective products. An automobile manufacturer is not liable for a defective battery if a consumer, after leaving his car at the dealer to have the battery repaired, decides to browse in a book store next door and is injured when some books fall on.

35. Hopkins, 548 S.W.2d at 349.
36. See, e.g., Fitzgerald Marine Sales v. LeUnes, 659 S.W.2d 917 (Tex. App.—Fort Worth 1983, writ dism'd) (plaintiff using boat steering wheel as brace; when steering wheel broke, plaintiff thrown from boat).
37. Hopkins, 548 S.W.2d at 351.
38. 665 S.W.2d 414 (Tex. 1984).
39. Hopkins, 548 S.W.2d at 351; see infra text accompanying notes 45-79.
40. Hopkins, 548 S.W.2d at 351.
him. The defective battery is a "but for" cause of the injury, and the consumer neither was contributorily negligent nor misused the automobile—
even if misuse were still an independent defense. Producing cause seems to be the best place to make a judgment about the scope of liability, keeping in mind that it differs from proximate cause in negligence.

In *Colvin v. Red Steel Co.* the plaintiff sustained an injury when he fell at a construction site. The plaintiff had grabbed a metal beam to support himself, but because the beam was shorter, and therefore lighter, than the specifications required, it could not support him. The court declared that to recover under strict tort liability the plaintiff must prove that at the time the beam left the manufacturer it was unfit for its intended or reasonably foreseeable use. The court held that the defendant could not have reasonably foreseen such a use, implicitly holding that the product was not defective.

The court's reliance on the absence of defectiveness raises problems. If the divergence between the beam's actual length and its specified length had caused a weakness in the building's structure, surely the court would have held that the beam had a manufacturing flaw and was, therefore, defective. A better rationale for a finding of no liability would have been to focus on the unusual nature of the accident: even if the beam was defective, the accident was too unrelated to the reasons for calling it defective. This rationale invokes the concept of producing causation.

**C. Comparative Causation: Consumer Conduct Defenses and Contribution**

In *Duncan v. Cessna Aircraft Co.* the Texas Supreme Court adopted comparative causation in strict tort liability cases. The court held that a plaintiff's negligence is a defense in a strict tort liability action when such negligence is more than a mere failure to discover or guard against a product defect. The court also held that while the Texas comparative negligence

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41. 682 S.W.2d 243 (Tex. 1984).
42. Id. at 246.
43. Id.
44. The court's reliance on a product's foreseeable use raises issues concerning the continuing vitality of the defense of product misuse. This issue, and *Colvin's* effect on it, is treated in more detail in the discussion of *Duncan*, infra text accompanying notes 97-104.
45. 665 S.W.2d 414 (Tex. 1984). The Supreme Court issued an earlier opinion in *Duncan* on July 13, 1983. The Supreme Court withdrew that opinion and substituted the current opinion on February 15, 1984. Although *Duncan II* was not decided during the period covered by the 1984 Survey, I included a brief commentary on it, primarily because *Duncan I* had been decided during the 1984 survey period. See Powers, *Torts—Personal, Annual Survey of Texas Law*, 38 Sw. L.J. 1, 10 (1984). I have amplified that commentary here in order to present a complete picture of the current survey period.
46. 665 S.W.2d at 427-28. The court also addressed the effect of a general release. See Powers, supra note 45, at 33.
47. 665 S.W.2d at 432.
statute\textsuperscript{48} does not directly apply to strict tort liability, a common law system of comparative causation governs both the reduction of a plaintiff's recovery and contribution among joint tortfeasors in suits based on strict tort liability.\textsuperscript{49}

Although the court had previously recognized the absolute defense of assumption of risk and the comparative defense of unforeseeable misuse in strict tort liability, it had declined to recognize contributory negligence as a defense.\textsuperscript{50} The \textit{Duncan} court, noting the procedural complexities of these three defenses in suits involving both strict tort liability and negligence,\textsuperscript{51} stated that assumed risk and unforeseeable misuse constitute extreme variations of contributory negligence.\textsuperscript{52} All three defenses focus in varying degrees on the reasonableness of a plaintiff's conduct.\textsuperscript{53} Consequently, the court recognized contributory negligence as a defense in strict tort liability actions that reduces the plaintiff's recovery.\textsuperscript{54} The court abolished assumption of risk and unforeseeable misuse as independent defenses, subsuming them into the comparative defense of contributory negligence.\textsuperscript{55} The \textit{Duncan} court also subsumed into the comparative defense of contributory negligence the doctrines of avoidable consequences and mitigation of damages.\textsuperscript{56}

The court adopted a scheme of comparative causation to govern the re-

\textsuperscript{48} TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1985).
\textsuperscript{49} 665 S.W.2d at 427-28.
\textsuperscript{50} See e.g., General Motors Corp. v. Hopkins, 548 S.W.2d 344, 351-52 (Tex. 1977) (defense of unforeseeable misuse created in lieu of comparative negligence); Rourke v. Garza, 530 S.W.2d 794, 800 (Tex. 1975) (no defense that plaintiff did not inspect for open and obvious defect); Henderson v. Ford Motor Co., 519 S.W.2d 87, 89-90 (Tex. 1974) (no defense that plaintiff was negligent after discovering defect).
\textsuperscript{51} 665 S.W.2d at 423; see Pope & Lowerre, \textit{The State of the Special Verdict—1979}, 11 ST. MARY'S L.J. 1, 47-48 (1979) (noting procedural complexities in Texas comparative negligence statute, art. 2212a).
\textsuperscript{52} 665 S.W.2d at 428.
\textsuperscript{53} Id. (citing Boatland of Houston, Inc. v. Bailey, 609 S.W.2d 743, 750-51 (Tex. 1980) (Pope, J., concurring); Farley v. M M Cattle Co., 529 S.W.2d 751, 758 (Tex. 1975)).
\textsuperscript{54} 665 S.W.2d at 428.
\textsuperscript{55} Id. The court overruled General Motors Corp. v. Hopkins, 548 S.W.2d 344 (Tex. 1977), and Henderson v. Ford Motor Co., 519 S.W.2d 87 (Tex. 1974), to the extent that they conflict with \textit{Duncan}. 665 S.W.2d at 428.
\textsuperscript{56} 665 S.W.2d at 428; see Carnation Co. v. Wong, 516 S.W.2d 116, 117 (Tex. 1974); Kerby v. Abilene Christian College, 503 S.W.2d 526, 528 (Tex. 1973); Moulton v. Alamo Ambulance Serv., 414 S.W.2d 444, 448 (Tex. 1967).

duction of a plaintiff's recovery and contribution among joint tortfeasors.\textsuperscript{57} Although the Texas comparative negligence statute applies only to actions for negligence, the court created a similar system of comparative causation to govern strict tort liability. The court's comparative scheme involves allocating a loss according to the parties' relative causation and is similar but not identical to comparative negligence under article 2212a.\textsuperscript{58} The jury allocates a percentage of causation to the plaintiff, to the products defendant, and to other defendants, and the court structures an appropriate judgment.\textsuperscript{59} This new system governs the entirety of any action "in which at least one defendant is found liable on a theory other than negligence."\textsuperscript{60}

The court's primary rationale for adopting comparative principles for strict tort liability was to avoid the procedural labyrinth created by imposing divergent schemes on negligence and strict tort liability actions, which commonly occur in the same lawsuit.\textsuperscript{61} The court also reasoned that an all-or-nothing approach to contribution was both unfair and inefficient because it failed to apportion accident costs relative to the parties' abilities to prevent those costs.\textsuperscript{62} The court also noted that a growing number of other courts have adopted comparative fault in strict tort liability actions.\textsuperscript{63}

\textsuperscript{57} 665 S.W.2d at 429.
\textsuperscript{58} In its first opinion, which was subsequently replaced by a second opinion, the court adopted comparative fault. 26 Tex. Sup. Ct. J. at 515-16. The court's second opinion, however, explicitly rejected comparative fault in favor of comparative causation. 665 S.W.2d at 427.
\textsuperscript{59} The court suggested the following jury submission:
If, in answer to Questions______,and____, you have found that more than one party's act(s) or product(s) contributed to cause the plaintiff's injuries, and only in that event, then answer the following question.

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

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<th>Product</th>
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<tr>
<td>Product X</td>
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<td>Defendant Y</td>
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<td>Plaintiff Z</td>
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<td>Total</td>
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665 S.W.2d at 427 n.8.
\textsuperscript{60} Id. at 429.
\textsuperscript{61} Id. at 425.
\textsuperscript{62} Id. at 424-25. The unfairness of an all-or-nothing approach is understandable. Its inefficiency, however, is debatable. Efficiency depends on the incentives facing actors when they engage in an activity. The aggregate likelihood of liability governs these incentives, which may reflect proportionate ability to reduce accidents even if individual cases are governed by an all-or-nothing or pro rata approach. A total rejection of contributory negligence is theoretically inefficient because it removes the consumer's pecuniary interest in safety, but contributory negligence as an all-or-nothing defense is not necessarily inefficient. Indeed, comparative negligence is theoretically inefficient. Fairness is a more powerful argument than allocative efficiency for comparative principles in individual cases.
Although the system of comparative causation adopted in *Duncan* is similar to comparative negligence, it differs from comparative negligence in several important respects. These differences may create problems for courts submitting a case involving both negligence and strict tort liability to the jury. *Duncan* applies to all defendants, whether negligent or strictly liable, in a case in which the jury finds at least one defendant liable under strict tort liability or breach of warranty. If the jury does not find at least one defendant liable under a theory other than negligence, article 2212a, the Texas comparative negligence statute, continues to be applicable. Since the jury verdict will not be known at the time the case is submitted to the jury, trial courts will face a difficult problem determining the appropriate method for submitting the case to the jury.

The first difference between *Duncan* and article 2212a is that under *Duncan* the jury must compare causation rather than negligence or fault, as is appropriate under article 2212a. The trial judge might instruct the jury that in allocating percentages for the various parties, it should compare causation if it finds at least one defendant liable under strict tort liability or breach of warranty, but otherwise that it should compare negligence. This approach seems unduly complicated, however. Since jurors are not likely to distinguish greatly between causation and fault, a preferable approach would be to instruct the jury to compare causation and let the comparison stand, even if it turns out that article 2212a rather than *Duncan* applies.

Even if this problem involving the jury instruction is resolved, a scheme based on comparative causation is likely to create other problems because it combines two separate steps in allocating a loss among defendants. Aside from comparative principles, a defendant is appropriately held liable only for damages that he causes. Consider a driver who is injured in a collision with another negligent motorist in which (1) the original impact causes injuries to his back; (2) a defective steering wheel shatters in his hand; and (3) a doctor treating him for the injured hand negligently administers a drug that causes a rash. The negligent driver is a cause-in-fact of all the plaintiff's injuries under the "but for" test of causation. The steering wheel manufacturer, however, is a cause-in-fact only of the hand injury and the rash, whereas the

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An obstacle to adopting comparative principles in strict tort liability has been a fear that comparing one party's fault with the culpability of a strict tort liability defendant who has not been at fault is theoretically impossible. Just as we often compare seemingly incommensurate interests while making personal or social decisions, however, we can compare the culpability of various defendants if the judgments concerning each actor are based on different underlying values. The *Duncan* court implicitly recognized this by concluding that the jury can compare various versions of fault, including negligence, selling a defective product, and breaching an implied or express warranty. 665 S.W.2d at 427. The court's holding may also suggest that strict tort liability is not that different from negligence. See Powers, *supra* note 56, at 802-05.

64. 665 S.W.2d at 429.
66. 665 S.W.2d at 427.
doctor is a cause-in-fact only of the rash. The plaintiff, of course, is a cause-
in-fact of all three injuries. Since only the negligent driver caused the back
injury, he alone should be liable for it. Since the negligent driver and the
steering wheel manufacturer caused the hand injury, the hand injury should
be allocated between them, and the plaintiff when appropriate, according to
the comparative allocation principles of Duncan. The rash, caused jointly by
all three defendants, should be allocated among all of them according to the
allocation principles of Duncan.

Using comparative causation to allocate the rash creates two problems. First, if comparative causation means cause-in-fact, the rash cannot be allo-
cated because each defendant was a cause-in-fact of the entire rash. Second, if comparative causation refers to some other allocative principle, using
the word “causation” is likely to confuse the jury, since the allocation prin-
ciple differs from the cause-in-fact principle that protects the doctor from lia-

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

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

69. Faith that the jury will separate these tasks in a single submission is naive. If damages
due to the rash are $1000, damages due to the hand are $5000, and damages due to the back
are $25,000, a single submission could easily lead the jury to allocate 10% to the doctor, 30%
to the steering wheel manufacturer, and 60% to the negligent driver. The evidence would not
support the resulting judgment of $3100 against the doctor, unless the court was willing to
abandon the principle that defendants are liable only for damages they have in fact caused.

70. 665 S.W.2d at 429.
than the plaintiff.\textsuperscript{71} Under article 2212a, section 2(c), a negligent defendant is jointly and severally liable unless he is less negligent than the plaintiff, in which case he is liable only for his own percentage of fault.\textsuperscript{72} Since the trial court can wait for the verdict to determine whether \textit{Duncan} or article 2212a applies and then structure the judgment, this difference does not create problems for submitting a case to the jury.

Fourth, under \textit{Duncan} a partial settlement between the plaintiff and one defendant reduces the plaintiff's claim against the other defendants by the percentage loss the jury allocated to the settling defendant.\textsuperscript{73} If the plaintiff makes an advantageous settlement, the plaintiff may recover more than the entire amount of the damages, notwithstanding the one-recovery rule of \textit{Bradshaw v. Baylor University}.\textsuperscript{74} Unlike article 2212a, section 2(d),\textsuperscript{75} under \textit{Duncan} no dollar-for-dollar credit will be given if the settling tortfeasor's percentage causation is not submitted to the jury. Again, on this issue the trial court can wait for the verdict and structure the judgment according to \textit{Duncan} or article 2212a, depending on which is applicable.

A fifth and more problematic distinction is that different conduct by the plaintiff constitutes contributory negligence under \textit{Duncan} than under article 2212a. On one hand, a mere negligent failure to discover or guard against a product defect does not count as contributory negligence under \textit{Duncan}\textsuperscript{76} but presumably does count under article 2212a.\textsuperscript{77} On the other hand, \textit{Duncan} explicitly stated that a plaintiff's failure to mitigate damages and the doctrine of avoidable consequences, which might not be a part of a percentage finding of contributory negligence under article 2212a, are subsumed into contributory negligence.\textsuperscript{78} These differences in what constitutes

\textsuperscript{71} Thus, an insolvent tortfeasor's share of the loss is allocated to the other defendants under \textit{Duncan}, regardless of the relative percentages allotted to the plaintiff and the other defendants. \textit{Id.}

\textsuperscript{72} \textsc{Tex. Rev. Civ. Stat. Ann.} art. 2212a, § 2(c) (Vernon Supp. 1985). Section 2(c) provides that:

\begin{quote}
Each defendant is jointly and severally liable for the entire amount of the judgment awarded the claimant, except that a defendant whose negligence is less than that of the claimant is liable to the claimant only for that portion of the judgment which represents the percentage of negligence attributable to him.
\end{quote}

\textsuperscript{73} 665 S.W.2d at 429.

\textsuperscript{74} 126 Tex. 99, 104, 84 S.W.2d 703, 705 (Tex. Comm'n App. 1935, opinion adopted), overruled by \textit{Duncan v. Cessna Aircraft Co.}, 665 S.W.2d 414, 432 (Tex. 1984).

\textsuperscript{75} \textsc{Tex. Rev. Civ. Stat. Ann.} art. 2212a, § 2(d) (Vernon Supp. 1985). Section 2(d) provides that:

\begin{quote}
If an alleged joint tort-feasor pays an amount to a claimant in settlement, but is never joined as a party defendant, or having been joined, is dismissed or non-sued after settlement with the claimant (for which reason the existence and amount of his negligence are not submitted to the jury), each defendant is entitled to deduct from the amount for which he is liable to the claimant a percentage of the amount of the settlement based on the relationship the defendant's own negligence bears to the total negligence of all defendants.
\end{quote}

\textit{Id.}

\textsuperscript{76} 665 S.W.2d at 432.


\textsuperscript{78} 665 S.W.2d at 423; see supra text accompanying note 56. Mitigation of damages refers to plaintiff's conduct after an accident that proximately caused some of his injuries, such as failure to heed his doctor's advice. Avoidable consequences refers to plaintiff's conduct before
contributory negligence will create problems when submitting a case to the jury because the trial court must determine prior to the submission—and, therefore, prior to learning whether Duncan or article 2212a governs the case—whether to include these various forms of contributory negligence.

One solution might be to ask the jury to allocate percentages to each type of plaintiff conduct and then have the trial court ignore the irrelevant types when structuring the judgment. This method, however, may give the jury too many opportunities to allocate percentages to the plaintiff. To mitigate this problem the jury could be asked to assign one aggregate percentage for the plaintiff, and then state which portions of that aggregate were due to the separate types of plaintiff conduct. In either case the trial court could structure the judgment, using only the relevant percentages. Under both methods the relevant total may not add up to 100%, but the trial court could allocate liability according to the ratios of the percentages that turn out to be relevant.

Other issues remain unresolved after Duncan. For example, Duncan left unclear whether the set-off provision of article 2212a, section 2(f), also applies to cases governed by Duncan. Some Texas courts have held that, in negligence cases, set-off is automatic and required by Texas Rules of Civil Procedure 301 and 302. Although this conclusion may itself be dubious, it would seem to apply to cases governed by Duncan, since it is independent of the language in article 2212a, section 2(f).

Whether the conduct of non-settling persons who have not been made parties to the lawsuit should be submitted to the jury for a percentage finding also remains uncertain after Duncan. In Varela v. American Petrofina Co., the Texas Supreme Court held that under article 2212a the negligence of the plaintiff's employer should not be submitted to the jury to reduce the plaintiff's recovery from other tortfeasors. Arguably, Varela does not apply to an accident, such as failing to wear seat belts, which was not a proximate cause of the accident but was a proximate cause of some of his injuries. Before adoption of comparative negligence, avoidable consequences had no effect on the plaintiff's recovery. Mitigation of damages was not a form of contributory negligence that would bar the plaintiff's recovery altogether, but the defendant was entitled to an instruction that the jury should reduce the plaintiff's damages by the amount of injury the failure to mitigate damages caused. After the adoption of comparative negligence in article 2212a, the status of these doctrines is unclear. Possibly they are still not part of the percentage finding of contributory negligence. See Carnation Co. v. Wong, 516 S.W.2d 116, 117 (Tex. 1974); Kerby v. Abilene Christian College, 503 S.W.2d 526, 528 (Tex. 1973); Moulton v. Alamo Ambulance Serv., 414 S.W.2d 444, 447-48 (Tex. 1967); Whitman v. Campbell, 618 S.W.2d 935, 937-38 (Tex. Civ. App.—Beaumont 1981, no writ); Armellini Express Lines of Florida, Inc. v. Ansley, 605 S.W.2d 297, 304, 309 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.); 3 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES PJC 80.17 (1982).

82. 658 S.W.2d 561 (Tex. 1983); see Powers, supra note 45, at 21-24 (discussing holding and impact of Varela).
83. 658 S.W.2d at 561-62.
cases governed by *Duncan*, because *Varela* relied heavily on the language of article 2212a. In *Caterpillar Tractor Co. v. Boyett* the court stated in dictum that, after *Duncan*, the negligence of non-settling non-parties should be submitted to the jury. Nevertheless, the supreme court declining to follow *Varela* in a case governed by *Duncan* would be surprising.

A related issue seemingly resolved after *Duncan* is whether a settling tortfeasor must be made a party to the litigation in order to have his percentage of negligence submitted to the jury. In *Acord v. General Motors Corp.* the Texas Supreme Court held that in a products liability case a settling defendant's negligence should be submitted to the jury even if he had not been made a party. This holding will likely apply to cases governed by article 2212a as well.

The issues *Duncan* creates concerning submitting a hybrid negligence-strict liability case to the jury result from the divergence between the system adopted in *Duncan* and the system embodied in article 2212a. These issues will not be fully resolved until one system governs both negligence and strict liability. In addition to the issues that *Duncan* raises concerning the mechanics of jury submission and the operation of its comparative scheme, *Duncan* raises some questions about the substantive contours of assumption of the risk and unforeseeable misuse as defenses in strict liability cases. In *Farley v. M M Cattle Co.* the Texas Supreme Court required that in negligence cases a risk be unreasonable to trigger the defense of assumption of a risk. Before its decision in *Farley*, the Texas Supreme Court in *Henderson v. Ford Motor Co.* had declined to adopt the unreasonable risk requirement for assumption of risk in strict tort liability. In *Duncan* the court suggested that the defendant must now prove that a risk is unreasonable in order to trigger assumption of risk as a defense in a strict tort liability. Since

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84. 674 S.W.2d 782 (Tex. App.—Corpus Christi 1984, no writ).
85. Id. at 789.
86. 669 S.W.2d 111 (Tex. 1984).
87. Id. at 117.
89. 529 S.W.2d 751 (Tex. 1975).
90. Id. at 758; accord RESTATEMENT (SECOND) OF TORTS § 402A comment n (1977); see also *Parker v. Highlands Park, Inc.*, 565 S.W.2d 512, 517 (Tex. 1978) (abolishing "no duty" doctrine); *Rosas v. Buddies Food Stores*, 518 S.W.2d 534, 537-39 (Tex. 1975) (abolishing doctrine of *volenti non fit injuria*).
91. 519 S.W.2d 87 (Tex. 1974).
92. Id. at 91. "[A] plaintiff may have elected from some alternatives to face the danger without being barred from subsequent recovery, but it does not mean that a fact issue of reasonableness is always an element of the defense." *Id*.
93. 665 S.W.2d at 423. The *Duncan* court explained:
assumption of risk now apparently depends on the unreasonableness of the risk, the doctrine has been subsumed into contributory negligence. 94

One possible exception to the conflation of assumption of risk and contributory negligence may be the plaintiff's mere failure to discover the product defect. This type of contributory negligence is not a defense in strict tort liability under Duncan, 95 but the plaintiff’s actual knowledge of a defect would presumably still trigger the defense of assumption of risk. In such a case it would be important to determine whether assumption of risk applies only to unreasonable risks, as now seems to be the requirement after Duncan. If assumption of risk continues to have independent vitality in this situation, it would presumably only reduce the plaintiff's recovery under comparative causation rather than bar recovery altogether. 96

In General Motors Corp. v. Hopkins 97 the Texas Supreme Court held that unforeseeable product misuse 98 that proximately causes 99 a plaintiff's injury reduces his recovery according to a scheme of comparative causation. 100 In Duncan the court seemed to abandon unforeseeable product misuse as an independent defense by subsuming it into contributory negligence, 101 but the court did not focus on the specific problem of unforeseeable uses as distinguished from unreasonable uses. 102 This problem was implicitly addressed in Colvin v. Red Steel Co. 103 The Colvin court held that a plaintiff must prove "that the product was not fit for its intended or reasonably foreseeable use at the time it left the manufacturer" 104 in order to recover under strict tort liability. Without expressly analyzing the defense of product misuse, the

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If there was any qualitative difference between contributory negligence, on the one hand, and assumed risk and misuse, on the other, this procedural complexity might be justified. Assumed risk and unforeseeable misuse, however, are nothing more than extreme variants of contributory negligence. To varying degrees, all three defenses focus on the reasonableness of a plaintiff's conduct.

Id. (citations omitted).

94. Id. at 428; see supra text accompanying note 56.
95. See supra note 76 and accompanying text.
96. 665 S.W.2d at 429.
97. 548 S.W.2d 344 (Tex. 1977); see also McDevitt v. Standard Oil Co., 391 F.2d 364, 370 (5th Cir. 1968) (misuse does not constitute defense to strict liability suit in Texas); Rourke v. Garza, 530 S.W.2d 794, 799 (Tex. 1975) (strict liability does not apply in cases of misuse); Heil Co. v. Grant, 534 S.W.2d 916, 923 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.) (supplier not liable for injuries resulting from misuse); Proctor & Gamble Mfg. Co. v. Langley, 422 S.W.2d 773, 780 (Tex. Civ. App.—Dallas 1967, writ dism'd) (manufacturer not liable for knowing violation of printed warning on product).
98. The Hopkins court stated: "Misuse in this application has been defined by the Oregon Supreme Court as 'a use or handling so unusual that the average consumer could not reasonably expect the product to be designed and manufactured to withstand it—a use which the seller, therefore, need not anticipate and provide for.' " 548 S.W.2d at 349 (citing Findlay v. Copeland Lumber Co., 265 Or. 300, 509 P.2d 28, 31 (1973)).
99. While a plaintiff must prove only that a product defect was a "producing cause" of his injuries, the defendant must prove that a product misuse was a "proximate cause" of the plaintiff's injuries. See supra note 67.
100. 548 S.W.2d at 352.
101. 665 S.W.2d at 423; see supra text accompanying note 55.
102. In Hopkins product misuse depended upon the unforeseeability of the use. 548 S.W.2d at 351.
103. 682 S.W.2d 243 (Tex. 1984).
104. Id. at 246.
court seems to have converted unforeseeable use, which was the comparative defense of misuse in *Hopkins* and was subsumed into contributory negligence in *Duncan*, into an element of defectiveness. In light of these conflicting formulations the role of unforeseeable product uses in strict tort liability remains unclear.

**D. Special Transactions: Sales-Service Distinction**

Several Texas cases address the applicability of strict tort liability or implied warranty of merchantability to service transactions and to hybrid sales-service transactions. The cases do not, however, develop a comprehensive analysis of the product-service distinction other than to conclude that pure services are governed by neither strict tort liability nor an implied warranty of merchantability. In *Gray v. Enserch, Inc.* the Fort Worth court of appeals, adding to this line of cases, held that strict tort liability did not govern a gas explosion in the plaintiff's home caused by the defendant's failure to repair a leak in a gas main. The court concluded that the defendant had not delivered a defective product, but the court did not suggest a comprehensive test to determine what constitutes a product and what does not.

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105. See G-W-L, Inc. v. Robichaux, 643 S.W.2d 392, 394 (Tex. 1982) (construction and sale of house not governed by U.C.C.); Barbee v. Rogers, 425 S.W.2d 342, 346 (Tex. 1968) (optometrist not strictly liable for improperly fitted contact lenses); Navaux v. Park Place Hosp., 656 S.W.2d 923, 926 (Tex. App.—Beaumont 1983, writ ref'd n.r.e.) (radiation therapy administered by hospital not governed by strict tort liability); Navarro County Elec. Coop. v. Prince, 640 S.W.2d 398, 399 (Tex. App.—Waco 1982, no writ) (implied warranty of merchantability not applicable to transmission of electricity); Thomas v. Saint Joseph Hosp., 618 S.W.2d 791, 796 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.) (hospital may be held strictly liable to patient supplied with flammable gown); Providence Hosp. v. Truly, 611 S.W.2d 127, 131-33 (Tex. Civ. App.—Waco 1980, writ dism'd) (hospital liable under implied warranty of merchantability for contaminated drug); Langford v. Kraft, 551 S.W.2d 392, 396 (Tex. Civ. App.—Beaumont 1977) (stating in dictum that strict liability is not applicable to services), aff'd, 565 S.W.2d 223 (Tex. 1978); Moody v. City of Galveston, 524 S.W.2d 583, 588-89 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.) (contaminated water supply governed by strict liability); Ethicon v. Parten, 520 S.W.2d 527, 534 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ) (doctor not strictly liable for defective needle used during operation); Erwin v. Guadalupe Valley Elec. Coop., 505 S.W.2d 353, 355 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.) (strict liability inapplicable to transmission of electricity); City of Denton v. Gray, 501 S.W.2d 151, 153-54 (Tex. Civ. App.—Fort Worth 1973, writ ref'd n.r.e.) (strict liability not applicable to flooding caused by supplier of water); Shivers v. Good Shepherd Hosp., Inc., 427 S.W.2d 104, 107 (Tex. Civ. App.—Tyler 1968, writ ref'd n.r.e.) (hospital not liable under warranty theory or strict tort liability for contaminated drug); see also Vergott v. Deseret Pharmaceutical Co., 463 F.2d 12, 16 (5th Cir. 1972) (hospital not strictly liable for injuries caused by defective needle); Texsun Feed Yards, Inc. v. Ralston Purina Co., 447 F.2d 660, 666 (5th Cir. 1971) (feed supplement seller not strictly liable for defect that is not unreasonably dangerous).


107. 665 S.W.2d 601 (Tex. App.—Fort Worth 1984, writ ref'd n.r.e.).

108. *Id.* at 605. The court also held that the defendant was not liable under common law strict liability based on an abnormally dangerous activity. *Id.* at 606.

109. The Texas Supreme Court will have an opportunity to clarify the law in this area because it has granted an application for writ of error in Dennis v. Allison, 678 S.W.2d 511
II. Wrongful Death

A. Jurisdiction of Statutory Probate Courts over Wrongful Death and Survival Claims

In Seay v. Hall, the Texas Supreme Court held that statutory probate courts do not have jurisdiction over a survival claim or a wrongful death claim brought on behalf of a decedent's estate or his dependents. The court reasoned that neither action primarily concerned estates or the settlement of estates under section 5A(b) of the Probate Code, which established jurisdiction of the probate court. Moreover, because neither action is for a liquidated claim, neither constitutes a claim by an estate under section 5A(b).
Tort claims against an estate present a different issue that might be resolved in favor of jurisdiction in the probate court. In *Adams v. Calloway*\(^{115}\) the Corpus Christi court of appeals held that a tort action against an estate does fall within the jurisdiction of the statutory probate court.\(^{116}\) The court of appeals, however, decided *Adams* before the *Seay* decision. Although *Seay* does not directly address actions against estates, it does cast doubt on the court's reasoning in *Adams*.

The *Adams* court relied on a Texas Supreme Court holding that an action for conversion brought by the executor of an estate falls within the jurisdiction of the probate court.\(^{117}\) A claim for conversion may be liquidated, however; in *Seay* the supreme court held that a personal injury claim does not qualify as a claim under section 5A(b) of the Probate Code precisely because it is not liquidated.\(^{118}\) The *Adams* court reasoned that if tort claims brought on behalf of or by the estate can be considered incident to the estate, then other tort claims against the estate can also be considered as incident to the estate under the section 5A(b) definition.\(^{119}\) In this regard the *Adams* court relied heavily on the court of appeals' opinion in *Seay*.\(^{120}\) Of course, the supreme court's reversal of the court of appeals' decision in *Seay* renders this reasoning invalid.

### B. Non-Pecuniary Damages for Wrongful Death

In *Sanchez v. Schindler*\(^{121}\) the Texas Supreme Court held that parents can recover for mental anguish and loss of consortium for the wrongful death of a minor child.\(^{122}\) This year the interpretation of *Sanchez* spawned a great deal of litigation in the courts of appeals. The first issue involves the precise elements of recoverable damages. In three cases courts of appeals held that loss of consortium and mental anguish are separate and recoverable elements of damage.\(^{123}\) The Houston court of appeals held, however, that a separate award to a parent for medical expenses and lost earnings due to mental anguish was inappropriate.\(^{124}\) This holding was surprising because actual, out-of-pocket losses seem to be a worthier reason for recovery than the intangible elements of mental anguish and loss of consortium.

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\(^{115}\) *English v. Cobb*, 593 S.W.2d 674, 675-76 (Tex. 1979) (conversion claim held to be within county court's probate jurisdiction).

\(^{116}\) *662 S.W.2d 423* (Tex. App.—Corpus Christi 1983, no writ).

\(^{117}\) *Id.* at 426-27.

\(^{118}\) *Id.* at 426 (*citing English v. Cobb*, 593 S.W.2d 674 (Tex. 1979)).

\(^{119}\) *677 S.W.2d at 23.*

\(^{120}\) *662 S.W.2d at 426 (citing Seay v. Hall, 663 S.W.2d 468 (Tex. App.—Dallas 1983), rev’d, 677 S.W.2d 19 (Tex. 1984)).

\(^{121}\) *663 S.W.2d 468, 472* (Tex. App.—Dallas 1983), rev’d, 677 S.W.2d 19 (Tex. 1984).

\(^{122}\) *651 S.W.2d 249* (Tex. 1983).


\(^{124}\) *Gulf States Util. Co. v. Reed*, 659 S.W.2d 849, 852-53 (Tex. App.—Houston [14th Dist.] 1983, writ ref’d n.r.e.).
The second issue raised by Sanchez concerns the application of the Sanchez ruling to cases involving the death of parents and adult children. Courts of appeals held that one spouse can recover for loss of consortium and mental anguish caused by the wrongful death of the other spouse,\textsuperscript{125} and that a parent can recover for loss of consortium and mental anguish caused by the wrongful death of an adult child.\textsuperscript{126} Furthermore, the Houston court of appeals held in Cavnar v. Quality Control Parking, Inc.\textsuperscript{127} that children can recover for loss of consortium and mental anguish caused by the wrongful death of a parent.\textsuperscript{128} The Fort Worth court of appeals, however, denied recovery for loss of consortium under the Wrongful Death Act to the spouses and children of passengers who were killed in an airplane crash.\textsuperscript{129}

Plausible arguments can be made that Sanchez should be applied only to the death of minor children and that the decision should cover a broader range of family members, including parents and spouses. The Sanchez court itself reasoned that a parent’s recovery for the loss of a child’s companionship is closely analogous to a spouse’s recovery for loss of consortium when the other spouse has been negligently injured.\textsuperscript{130} If the loss of companionship caused by a child’s death is analogous to loss of consortium caused by a spouse’s injury, then loss of companionship caused by a spouse’s death, if not a parent’s death, is an even closer analogy. Justices Ray and Kilgarlin stated in Sanchez that they would expand recovery to cover the death of a spouse.\textsuperscript{131}

Courts arguably should not read Sanchez to authorize recovery for loss of consortium and mental anguish in cases not involving the death of a child. Expanded liability rules tend to increase insurance premiums, and the inclusion of a specific type of injury in damage awards effectively requires that we insure against it. Risks that are evenly spread throughout society might plausibly be taken as risks rather than be included in personal injury awards and thereby be included in a judicially imposed insurance scheme. Insuring against some risks but not others may be desirable. Since most people voluntarily tend to insure against out-of-pocket pecuniary losses, but not against emotional loss, a court might validly distinguish pecuniary loss and emotional loss in determining recoverable damages.

\begin{itemize}
\item \textsuperscript{125} Monsanto Co. v. Johnson, 675 S.W.2d 305, 312 (Tex. App.—Houston [1st Dist.] 1984, no writ); see Missouri Pac. R.R. v. Dawson, 662 S.W.2d 740, 742-43 (Tex. App.—Corpus Christi 1983, writ ref’d n.r.e.).
\item \textsuperscript{127} 678 S.W.2d 548 (Tex. App.—Houston [14th Dist.] 1984, writ granted) (court stating in dictum that every class of beneficiary under Wrongful Death Act can recover damages for loss of consortium and mental anguish).
\item \textsuperscript{128} Id. at 553.
\item \textsuperscript{129} Piper Aircraft Corp. v. Yowell, 674 S.W.2d 447, 462 (Tex. App.—Fort Worth 1984, writ granted). The court also held that loss of inheritance is a special damage that must be specially pleaded and proved. Whether loss of inheritance should be awarded depends upon the circumstances of the specific case. Id. at 454.
\item \textsuperscript{130} 651 S.W.2d at 252; see Whittlesey v. Miller, 572 S.W.2d 665, 668 (Tex. 1978).
\item \textsuperscript{131} 651 S.W.2d at 258.
\end{itemize}
Cases involving a child's death are special, however, because the defendant would often escape liability altogether if damages for mental anguish were not recoverable.\textsuperscript{132} In cases involving the death of a spouse or parent the defendant is normally liable for substantial pecuniary damages even if loss of consortium and mental anguish are not recoverable. Consequently, to award nonpecuniary damages in cases involving the death of a child would be reasonable, notwithstanding a general rejection of nonpecuniary damages under the Wrongful Death Act.\textsuperscript{133}

III. MEDICAL MALPRACTICE

A. Limitation on Damages

Section 11.02 of the Texas Medical Liability and Insurance Improvement Act of 1977 imposes a $500,000 limitation on the civil liability of a physician or other health care provider.\textsuperscript{134} In Baptist Hospital of Southeast Texas, Inc. v. Baber\textsuperscript{135} the Beaumont court of appeals held that this limitation, as applied to hospitals, is unconstitutional as a violation of the equal protection clause.\textsuperscript{136} The court reasoned that, while the United States Supreme Court has not expressly required that statutes that disadvantage a specific group also give that group a quid pro quo benefit, many other courts have relied on this factor when analyzing statutes under the equal protection clause.\textsuperscript{137} Since the court could ascertain no such quid pro quo for persons injured by hospitals, it held that the statute violated the equal protection clause.\textsuperscript{138}

B. Statute of Limitations

In 1975 the Texas Legislature enacted a special two-year statute of limitations for medical malpractice claims against health care providers who carry professional liability insurance.\textsuperscript{139} The 1975 legislation was replaced in 1977 by the Medical Liability and Insurance Improvement Act,\textsuperscript{140} which applies to all health care providers, regardless of whether they are covered by pro-

\textsuperscript{132} This result would not have been the case in Sanchez because the defendant was liable for substantial damages under the survival statute for the decedent's medical care and pain and suffering. 651 S.W.2d at 250.

\textsuperscript{133} TEX. REV. CIV. STAT. ANN. art. 4671 (Vernon 1952). This issue is likely to be resolved soon because the Texas Supreme Court granted an application for writ of error in Cavnar v. Quality Control Parking, Inc., 678 S.W.2d 548 (Tex. App.—Houston [14th Dist.] 1984, writ granted).

\textsuperscript{134} TEX. REV. CIV. STAT. ANN. art. 4590(i), § 11.02 (Vernon Supp. 1984).

\textsuperscript{135} 672 S.W.2d 296 (Tex. App.—Beaumont 1984, writ granted).

\textsuperscript{136} Id. at 298.


\textsuperscript{138} 672 S.W.2d at 298. The court did not consider potentially lower hospital rates.


\textsuperscript{140} TEX. REV. CIV. STAT. ANN. art. 4590(i), § 10.01 (Vernon Supp. 1984).
professional liability insurance. The 1977 legislation is codified in article 4590(i), section 10.01, of the Texas Revised Civil Statutes, and provides:

Notwithstanding any other law, no health care liability claim may be commenced unless the action is filed within two years from the occurrence of the breach or tort or from the date the medical or health care treatment that is the subject of the claim or the hospitalization for which the claim is made is completed . . . .\textsuperscript{141}

Both statutes purport to abrogate the "discovery rule," under which a statute of limitations does not begin to run until the plaintiff knows, or by exercising reasonable care should know, about the injury. Consequently, both statutes attempt to bar actions that a reasonably diligent plaintiff could not have discovered.\textsuperscript{142}

In \textit{Nelson v. Krusen}\textsuperscript{143} the Texas Supreme Court held that, insofar as it abrogated the discovery rule, the 1975 version of the statute of limitations violated the open courts provision of the Texas Constitution.\textsuperscript{144} \textit{Nelson} did not directly address the 1977 version of the statute of limitations because the conduct in \textit{Nelson} occurred before the effective date of the 1977 legislation, but the court's reasoning seems also to apply to the current statute.\textsuperscript{145}

In \textit{Borderlon v. Peck}\textsuperscript{146} the Texas Supreme Court held that while article 4590(i), section 10.01, purports to abrogate the discovery rule, it does not abolish fraudulent concealment as an equitable estoppel to the defense of limitations.\textsuperscript{147} Of course, if the Texas Supreme Court follows \textit{Nelson v. Krusen} and strikes down the abrogation of the discovery rule in article 4590(i), section 10.01, the decision in \textit{Borderlon} is inconsequential. The supreme court in \textit{Borderlon} was not required to decide whether article 4590(i), section 10.01, was constitutional.\textsuperscript{148}

\textsuperscript{141.} \textit{Id.}


\textsuperscript{143.} \textit{678 S.W.2d 918 (Tex. 1984).}

\textsuperscript{144.} \textit{Id.} at 921; \textit{see Tex. Const.} art 1, § 13 (every person has a right to a remedy by due course of law for an injury to him, his lands, his goods, or his reputation).

\textsuperscript{145.} In \textit{Neagle v. Nelson}, 658 S.W.2d 258, 261 (Tex. App.—Corpus Christi 1983), rev'd, 28 Tex. Sup. Ct. J. 215 (Jan. 30, 1985) the Corpus Christi court of appeals upheld article 4590(i), section 10.01, against attacks based on the open courts provision of the Texas Constitution and the equal protection and due process clauses of the Texas and United States Constitutions. \textit{Neagle} was decided before \textit{Krusen} and Judge (now Justice) Gonzales dissented. The Texas Supreme Court reversed the \textit{Neagle} decision and applied \textit{Krusen} to article 4590(i), section 10.01.

\textsuperscript{146.} In \textit{Morrison v. Chan}, 668 S.W.2d 483, 485 (Tex App.—Fort Worth 1984, writ ref'd n.r.e.), and \textit{Phillips v. Sharpstown Gen. Hosp.}, 664 S.W.2d 162, 168 (Tex. App.—Houston [1st Dist.] 1983, no writ), both decided before \textit{Krusen}, the courts upheld article 4590(i), section 10.01, against various constitutional attacks.

\textsuperscript{147.} \textit{Id.} at 908-09.

\textsuperscript{148.} In \textit{Stephens v. James}, 673 S.W.2d 299, 301-02 (Tex. App.—Dallas 1984, writ ref'd n.r.e.), the Dallas court of appeals held that although article 5.82 of the Insurance Code was intended to abrogate the discovery rule and not the fraudulent concealment doctrine, the statute begins to run from the date that the plaintiff is made aware of facts that would cause a
Three other cases addressed technical issues concerning calculation of the two-year statute of limitations. In *Atha v. Polsky*\(^1\) the Austin court of appeals held that the two-year limitation period of the repealed 1975 legislation\(^2\) was not tolled for the entire time a patient maintained a medical relationship with the doctor if that relationship was not associated with the treatment out of which the claim arose.\(^3\) In *Hill v. Milani*\(^4\) the Austin court of appeals held that the temporary absence tolling provision that normally tolls a statute of limitations when a defendant is absent from the state is not applicable to the two-year statute of limitations in article 4590(i), section 10.01.\(^5\) Arguably, if *Nelson v. Krusen* is applied to article 4590(i), section 10.01, to restore the discovery rule, the temporary absence tolling provision will be as applicable to article 4590(i), section 10.01, as it is to any other statute of limitations. Article 4590(i), section 10.01, is special only because of its absolute nature. This feature would no longer be present if its abrogation of the discovery rule were ruled unconstitutional. Conversely, a defendant might argue that *Hill* was based on statutory construction and that the meaning of article 4590(i), section 10.01, would not be changed by a holding that one of its features is unconstitutional. In *Valdez v. Texas Children's Hospital*\(^6\) the Houston court of appeals held that article 4590(i), section 10.01, does not abrogate the provision that tolls the statute of limitations for one year following the death of the person in whose favor the action could be brought.\(^7\)

C. Wrongful Life

In *Nelson v. Krusen*\(^8\) the Texas Supreme Court declined to recognize a cause of action for wrongful life.\(^9\) The plaintiff was born with Duchenne Muscular Dystrophy and his parents claimed that he would not have been born if the physician had informed them of the child's illness before birth. The physician was not responsible for the defect itself. The child sued to recover general damages attributed to the pain and suffering of muscular dystrophy and special damages for the added medical expenses necessary to treat his impaired condition.\(^10\) The court refused to recognize such cause of action because it would have implicated philosophical and moral positions

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149. 667 S.W.2d 307 (Tex. App.—Austin 1984, no writ).
150. TEX. INS. CODE ANN. art. 5.82, § 4 (Vernon 1975) (repealed).
151. 677 S.W.2d at 308-11.
153. 678 S.W.2d at 204-05; see TEX. REV. CIV. STAT. ANN. art. 5537 (Vernon 1958).
154. 673 S.W.2d 342 (Tex. App.—Houston [1st Dist.] 1984, no writ).
155. Id. at 344; see TEX. REV. CIV. STAT. ANN. art. 5538 (Vernon 1958). The court also held that the child's death, under article 5538, did not toll a cause of action by the decedent's mother in her own capacity. 673 S.W.2d at 345.
156. 678 S.W.2d 918 (Tex. 1984).
157. Id. at 924-25.
158. Id. at 924.
that the court was unwilling to countenance. If the court had recognized such a cause of action a normal measure of damages would have required the court to conclude that the child was worse off alive with the defect than he would have been if he were dead.

An action for wrongful life should be carefully distinguished from two other types of actions: (1) an action by a child against a defendant who has caused a defect and not merely the birth of the child, and (2) an action by the parents for their damages caused by the birth of the child. The Texas Supreme Court’s rejection of the child’s claim for wrongful life does not affect either of the other two types of claims. Indeed, the supreme court, after striking down article 4590(i), section 10.01, to the extent that it abrogated the discovery rule, remanded for trial the mother’s claim for damages that the trial court had held was barred by the two-year statute of limitations in article 4590(i).

IV. Negligence

A. Scope of Liability

In Otis Engineering Corp. v. Clark the defendant’s employee, who had a long history of drinking on the job, became intoxicated at work. His supervisor took him to his car in the company parking lot and sent him home. While driving home the employee caused an accident in which the plaintiff, who was driving another car, was killed. The plaintiff sued Otis, alleging that it had acted negligently when it affirmatively placed an intoxicated employee on the streets. The trial court granted summary judgment for Otis on the ground that Otis owed no duty of care to the plaintiff, with whom it had no relationship. The Texarkana court of appeals reversed, and the Texas Supreme Court affirmed the court of appeals.

The defendant argued that its negligence, if any, was mere nonfeasance and that it had no affirmative duty to protect motorists from its employee’s intoxication. The supreme court expressly rejected the argument that the case was one of mere nonfeasance because Otis had affirmatively taken the employee to his car and sent him home. The court also stated that if a duty was to be imposed on Otis, the duty would not be based merely upon knowledge of the employee’s intoxication but also would be based on additional factors. The court remanded the case for trial to determine whether Otis had in fact failed to exercise reasonable care, concluding that the standard of duty that we now adopt for this and all other cases currently in the judicial process, is: when, because of an employee’s incapacity, an employer exercises control over the employee, the em-

159. Id. at 925.
160. Id. at 922-25.
161. 668 S.W.2d 307 (Tex. 1983).
162. 633 S.W.2d 538, 542 (Tex. App.—Texarkana), aff’d, 668 S.W.2d 307 (Tex. 1983).
163. 668 S.W.2d at 311.
164. Id. at 309-10.
165. Id. at 309.
ployer has a duty to take such action as a reasonably prudent employer under the same or similar circumstances would take to prevent the employee from causing an unreasonable risk of harm to others.166

This duty applies to all cases in the judicial process on November 30, 1983.

The court saw its decision as expanding existing liability rules by creating a new duty in a narrow situation in which a duty did not previously exist.167 In this regard, the case affects and was affected by the current debate about drunk driving and dram shop liability, although the court was careful to state that Otis was not itself a dram shop case.168 The court might have written a very different opinion by simply stating the hornbook law that action begets a duty to act with reasonable care and that foreseeability defines the scope of liability. Under this view the holding would not have changed the law but would have merely applied existing law to a novel situation.169

The difference between these two approaches exemplifies a deep difference in approaches to tort law. One approach starts with a simple rule that actors have a duty to use reasonable care and that they are liable to foreseeable plaintiffs for foreseeable injuries. Under this approach common cases might be reduced to rules, such as the rule that rescuers are normally within the scope of foreseeable risks.170 Moreover, countervailing policy considerations, such as those underlying the rights of property owners, might support special no-duty or limited-duty rules in certain circumstances. These special rules, however, would be exceptions to a general rule of liability for negligent actors who cause foreseeable injuries.

Another approach starts with a background rule that no liability exists in a specific situation unless the courts have expressly created a special duty to cover it. The court's reasoning in Otis reflects this approach. Thus, while Otis expands liability in an area of great current concern, its reasoning is inherently hostile to liability in novel situations even if the defendant failed to use reasonable care.171

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166. Id. at 311.
167. The prospective nature of the ruling, id., and the court's discussion of the need to "change concepts of duty as changing social conditions occur," id. at 310, makes this point clear.
168. Id. at 309.
169. The supreme court took the same approach last year in Corbin v. Safeway Stores, Inc., 648 S.W.2d 292, 295 (Tex. 1983). In Otis the court characterized Corbin as a change in the concept of duty in premises cases, 668 S.W.2d at 310, whereas Corbin could have been explained as a simple application of hornbook notions of duty and proximate causation. See Powers, supra note 45, at 32-33.
170. See Kelley v. Alexander, 392 S.W.2d 790, 792 (Tex. Civ. App.—San Antonio 1965, writ dism'd); Reddick v. Longacre, 228 S.W.2d 264, 269 (Tex. Civ. App.—Fort Worth 1950, writ ref'd n.r.e.).
171. In Appelbaum v. Nemon, 678 S.W.2d 533 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.), the Houston court of appeals held that a day care center has a duty to render emergency aid to children in its custody. Id. at 535-36. This duty requires only that the day care center render whatever initial care that it knows how to administer and take reasonable steps to place the injured person in the hands of a competent doctor. Id. at 536. The day care center does not have a duty to instruct employees in procedures for medical emergencies or
B. Damages

Punitive Damages. In *Doubleday & Co. v. Rogers*, a suit for defamation, the Texas Supreme Court reiterated its long-standing rule that punitive damages are not recoverable in the absence of actual damages. In *Hofer v. Lavender*, the Texas Supreme Court held that while parents are not within the class that the Texas Constitution entitles to recover exemplary damages in wrongful death actions, they are entitled, either as representatives or heirs of an estate, to recover exemplary damages in an action brought under the survival statute. The court also held that the trial court may award exemplary damages against the estate of a deceased tortfeasor.

Prejudgment Interest. Several courts of appeals reaffirmed the long-standing rule that personal injury tort judgments should not include an award for prejudgment interest. On appeal, the supreme court in *Bauer v. King* did not decide if pre-judgment interest should be allowed in this type of case because the plaintiff did not plead for it. In *Cavnar v. Quality Control Park-*

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conduct drills. *Id.* at 537. The duty to render aid, therefore, does not arise until after the emergency has occurred. *Id.* at 536.

In *Brownlee v. Holiday Lincoln-Mercury, Inc.*, 675 S.W.2d 817 (Tex. App.—Fort Worth 1984, no writ), the Fort Worth court of appeals held that an insured driver has a duty to a person he injures—who is a third-party beneficiary of the insurance contract—not to create a policy defense by failing to notify the insurer of the claim. *Id.* at 819. A breach of this duty gives the injured third party a cause of action against the insured. *Id.*

172. The Fifth Circuit decided two cases involving punitive damages under Texas law. In *Bridges v. Phillips Petroleum Co.*, 733 F.2d 1153, 1155-56 (5th Cir. 1984), the court held that the Texas Workers' Compensation Act, which provides for exemplary damages for surviving spouses and children but not for parents and siblings, *TEX. REV. CIV. STAT. ANN.* art. 8306(5) (Vernon 1967), does not violate the equal protection clauses of the United States and Texas Constitutions. 733 F.2d at 1155-56. In *Martin v. Texaco, Inc.*, 726 F.2d 207 (5th Cir. 1984), the court held that courts may instruct jurors with examples of ratios of actual damages to exemplary damages that have been approved by the Texas Supreme Court. *Id.* at 213-14. The court also held that informing the jury that the Workers' Compensation Act would preclude the plaintiff from receiving actual damages from her deceased husband's employer is not error. *Id.* at 215-16.

173. 674 S.W.2d 751 (Tex. 1984).
174. *Id.* at 756.
175. 679 S.W.2d 470 (Tex. 1984).
176. *Id.* at 476; see *TEX. CONST.* art. 16, § 26 (recovery of exemplary damages in wrongful death cases is not limited to surviving husband, widow, or heirs of decedent's body, but extends to whomever the beneficiaries of decedent's estate may be).
177. 679 S.W.2d at 476; see *TEX. REV. CIV. STAT. ANN.* art. 5525 (Vernon 1958) (because of the survival statute, the death of an injured party does not bar recovery of exemplary damages, by the estate, legal representatives, or heirs).
178. 679 S.W.2d at 475-76.
ing, Inc.\textsuperscript{181} the Texas Supreme Court granted an application for writ of error on this issue.

**Emotional Harm to Bystanders.** Three courts of appeals addressed issues concerning bystander recovery for mental pain and anguish from witnessing a wrongful death or negligently caused injury of a family member. In *Baptist Hospital of Southeast Texas, Inc. v. Baber*\textsuperscript{182} the Beaumont court of appeals followed the suggestion of the concurring justices in *Sanchez v. Schindler*\textsuperscript{183} and held that a plaintiff is not required to prove physical manifestations of emotional harm to recover damages for emotional trauma.\textsuperscript{184} The Corpus Christi court of appeals held, in *Genzer v. City of Mission,*\textsuperscript{185} that grandparents who witness an injury to their grandchild are among the category of family members who can recover as bystanders for their own emotional trauma even though they were not themselves within the zone of danger.\textsuperscript{186} In *Dawson v. Garcia*\textsuperscript{187} the Dallas court of appeals held that a bystander's recovery for emotional trauma derives from the physical victim's cause of action against the tortfeasor. Thus, the bystander cannot recover damages when the physical victim's contributory negligence exceeds fifty percent.\textsuperscript{188}

**C. Contribution**\textsuperscript{189}

In *Bonniwell v. Beech Aircraft Corp.*\textsuperscript{190} the Texas Supreme Court held that a settling defendant has neither a right of contribution nor a right of indemnity against other tortfeasors.\textsuperscript{191} Nevertheless, *Duncan v. Cessna Aircraft*
Co. 192 recognized the nonstatutory right of an innocent retailer in the chain of distribution to indemnity at common law against a product manufacturer.193 Similarly, in B & B Auto Supply, Sand Pit, and Trucking Co. v. Central Freight Lines 194 the Texas Supreme Court held that in negligence cases a vicariously liable defendant is entitled to a non-statutory right of indemnity against the actual tortfeasor.195 Other than these narrow exceptions, however, contribution and indemnity are governed solely by articles 2212 and 2212a or by the system of contribution adopted in Duncan.196 Since these sources do not extend a right of contribution to a settling tortfeasor, no such right exists.

Two courts have read Bonniwell narrowly. Beaumont Coca-Cola Bottling Co. v. Cain 197 and Iowa Manufacturing Co. v. Weisman Equipment Co. 198 held that if a settling tortfeasor has reduced the settlement to a judgment, Bonniwell does not apply and contribution might be available.199

D. Vicarious Liability 200

Two Texas courts of appeals addressed issues concerning vicarious liability. In Langley v. National Lead Co. 201 the El Paso court of appeals held that the employer could be held vicariously liable for an injury to the employee’s wife caused by the employee’s negligence during the course of his employment.202 Thus, although the employee was immune from liability to his wife under the doctrine of interspousal immunity for nonintentional torts, the employer could not avail itself of its employee’s spousal immunity.203

In Hunsucker v. Omega Industries 204 the Dallas court of appeals held that a rebuttable presumption arises that the driver of a vehicle is an employee in the scope of employment once the plaintiff proves that the employer owns the vehicle.205 The court declined to follow contrary holdings of other

192. 665 S.W.2d 414 (Tex. 1984).
193. Id. at 432. A retailer who is independently culpable does not have a right of indemnity against the manufacturer, but does have a right of contribution.
194. 603 S.W.2d 814 (Tex. 1980).
195. Id. at 816-17.
196. 663 S.W.2d at 819; see supra text accompanying notes 45-79.
198. 667 S.W.2d 209, 214 (Tex. App.—Austin 1983, writ dism’d).
199. In Young v. Kilroy Oil Co., 673 S.W.2d 236, 245 (Tex. App.—Houston [1st Dist.] 1984, writ ref’d n.r.e.), the Houston court of appeals held that under maritime law a contractor that agreed to furnish a crew and indemnify the employer from all liabilities accepted responsibility for the joint negligence of the contractor and employer even though the agreement excluded any liability caused by the sole negligence of the leaseholder.
200. In Lucas v. Everman Corp., 27 Tex. Sup. Ct. J. 491, 492 (July 11, 1984), the Texas Supreme Court applied the alter ego doctrine to determine whether a parent corporation was liable for the negligence and defective product of its subsidiary. The case does not develop new law, but it provides a good example of an application of the alter ego doctrine.
201. 666 S.W.2d 343 (Tex. App.—El Paso 1984, no writ).
202. Id. at 345.
203. Id.
204. 659 S.W.2d 692 (Tex. App.—Dallas 1983, no writ).
205. Id. at 695-97.
Three cases this year addressed governmental immunity and section 3 of the Texas Tort Claims Act. In *Salcedo v. El Paso Hospital District* the plaintiff's decedent died of a heart attack after receiving an electrocardiogram test by a doctor employed by the defendant. The plaintiff, alleging that the test was conducted negligently, sued the hospital district. The supreme court held that the plaintiff stated a cause of action within the waiver of governmental immunity under section 3 of the Texas Tort Claims Act because the injury was caused by "some use of tangible property, real or personal, under circumstances where such unit of government, if a private person, would be liable to the claimant in accordance with the law of [Texas]." The hospital district argued that the waiver provisions of the Texas Tort Claims Act required the plaintiff to show a defective condition in the property. The court, however, held that section 3 waives immunity in situations in which property is wrongfully used even though the property is not itself defective. The court recognized that the legislature had known of the ambiguity in section 3 since the court's decision in *Lowe v. Texas Tech University* but had failed to resolve it. Moreover, the court noted that section 13 of the Texas Tort Claims Act provided for liberal interpretation of its provisions to achieve its intended purposes.

The Austin court of appeals applied *Salcedo* in *Smith v. University of Texas*. The plaintiff was injured during a track meet when he was hit by a shot. The court held that the defendant's failure to supervise the use of the shot put area brought the case within the requirements of section 3 of the

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206. See Moreland v. Hawley Indep. School Dist., 163 S.W.2d 892, 895 (Tex. Civ. App.—Eastland 1942, no writ); Longhorn Drilling Corp. v. Adilla, 138 S.W.2d 164, 166-67 (Tex. Civ. App.—Eastland 1940, writ ref'd) (both holding that it would be impermissible to allow a presumption of employment of the driver and his scope of employment to arise simply from proof that the vehicle was owned by the defendant).

207. TEX. REV. CIV. STAT. ANN. art. 6262-19, § 3 (Vernon 1970) provides that:

[Each unit of government in the state shall be liable for money damages for personal injuries or death when proximately caused by the negligence or wrongful act or omission of any officer or employee acting within the scope of his employment or office arising from the operation or use of a motor-driven vehicle and motor-driven equipment, other than motor-driven equipment used in connection with the operation of flood gates or water release equipment by river authorities created under the laws of this state, under circumstances where such officer or employee would be personally liable to the claimant in accordance with the law of this state, or death or personal injuries so caused from some condition or some use of tangible property, real or personal, under circumstances where such unit of government, if a private person, would be liable to the claimant in accordance with the law of this state.]

208. 659 S.W.2d 30 (Tex. 1983).

209. Id. at 32-33; see TEX. REV. CIV. STAT. ANN. art. 6252—19, § 3 (Vernon 1970).

210. 659 S.W.2d at 31-32.

211. 540 S.W.2d 297, 302 (Tex. 1976).

212. 659 S.W.2d at 32.


214. 664 S.W.2d 180 (Tex. App.—Austin 1984, writ ref'd n.r.e.).
Texas Tort Claims Act because the case involved a personal injury caused by the negligent use of tangible property.215

In *Trinity River Authority v. Williams*216 the plaintiffs were injured in a boating accident on the Trinity River. They claimed that the Trinity River Authority and the City of Houston negligently released water into the river without providing boaters with a warning about dangerous back currents. The court held that the City of Houston co-operated the flood gates and that the city was negligent.217 The City of Houston was not protected by governmental immunity because supplying water to citizens is a proprietary function.218 The court also held that the operation of the flood gates by the Trinity River Authority fell within the waiver of governmental immunity of section 3 of the Texas Tort Claims Act.219 Section 3 of the Act provides for a waiver of governmental immunity for damages arising from the negligent operation or use of a motor-driven vehicle or motor-driven equipment.220 Furthermore, the express exception to this waiver for motor-driven equipment used in the operation of flood gates or water release equipment by river authorities was not applicable.221 The court reasoned that the plaintiffs failed to allege that the operation of water release equipment was negligently performed.222 Rather, they based their claim on the failure to warn of dangerous back currents and the failure to maintain a barrier cable across the river.223 If this exception to the waiver of governmental immunity in section 3 of the Texas Tort Claims Act is inapplicable, the reason is unclear why the waiver of governmental immunity is itself applicable since the waiver is also predicated upon the use of motor-driven equipment. Nevertheless, the court held that the river authority was not protected by governmental immunity.224

**F. Causation**

In *Morgan v. Compugraphic Corp.*225 the plaintiff obtained a default judgment for injuries caused by chemical fumes emitted by a typesetting machine in the defendant's office. At a damages estimate hearing pursuant to Texas

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217. 659 S.W.2d at 719.
219. 659 S.W.2d at 723.
221. 659 S.W.2d at 723.
222. *Id.*.
223. *Id.*
224. *Id.* The Texas Supreme Court upheld the court of appeals' decision concerning governmental immunity, but reversed the court's finding of no contributory negligence. 28 Tex. Sup. Ct. J. at 265.
225. 675 S.W.2d 729 (Tex. 1984).
Rule of Civil Procedure 243\textsuperscript{226} the defendant argued that the plaintiff was required to prove that the fumes caused her injuries. The plaintiff responded that the causal connection between the fumes and her injuries was a matter of causation; thus, the default judgment already had proven causation conclusively when it established liability. The court agreed with the defendant by distinguishing between two aspects of causation.\textsuperscript{227} First, the plaintiff must establish a causal link between the defendant’s conduct or product and the event that causes injury, in this case the emission of chemical fumes.\textsuperscript{228} This link falls under the category of causation. Either proximate causation or producing causation, depending upon whether the case is based on negligence or strict tort liability, defines the causal nexus.\textsuperscript{229} The link between the event sued upon and the harm to the plaintiff, however, is an element of damages.\textsuperscript{230} Consequently, the plaintiff must present evidence of this second causal relationship at a damage hearing.\textsuperscript{231}

The court’s distinction seems dubious. The mere emission of fumes does not create a cause of action if the fumes have not injured the plaintiff. Consequently, showing that the fumes caused some form of injury is a necessary element of liability. The default judgment should conclusively establish this element. While the extent or measure of the plaintiff’s damages might be distinguished from causation, the link between the defendant’s conduct or product and some form of injury is a necessary element of liability. Within the context of Morgan the court’s distinction may be innocuous. The plaintiff was merely required to prove a causal link between the fumes and her injury. More significantly, Morgan suggests that the proximate cause standard, including the element of foreseeability, does not apply to the causal link between the fumes and the plaintiff’s injury. For example, a negligently maintained piece of office equipment could foreseeably emit fumes but not cause injury. The fumes might simply smell bad. The distinction in Morgan renders the unforseeability of the injury irrelevant because the proximate causation standard, including the element of foreseeability, would apply only to the causal link between the machine and the emission of fumes. Courts will probably limit Morgan to its specific facts in the context of the rule 243 requirement of proving damages after a default judgment.

G. Unavoidable Accident

In Lemos v. Montez\textsuperscript{232} the Texas Supreme Court held that the trial court erred by adding to the correct definition of unavoidable accident the additional instruction that the mere occurrence of a motor vehicle collision is not

\textsuperscript{226} TEX. R. Civ. P. 243 (a damages estimate hearing is allowed when the cause of action is unliquidated or is not proved by written instrument).
\textsuperscript{227} 675 S.W.2d at 731.
\textsuperscript{228} Id.
\textsuperscript{229} Id.; see supra text accompanying notes 30 & 31.
\textsuperscript{230} 675 S.W.2d at 731.
\textsuperscript{231} Id; see TEX. R. Civ. P. 243.
\textsuperscript{232} 680 S.W.2d 798 (Tex. 1984).
evidence of negligence. The court also held that, in the special issue asking the jury which party's negligence was the proximate cause of the accident, the trial court erred in giving "neither" as one of the possible alternative answers. This form of submission, the court held, was equivalent to an issue on unavoidable accident that should not have been submitted, both because it is an inferential rebuttal issue and because the evidence did not raise the possibility of unavoidable accident. Moreover, when unavoidable accident is an issue, the correct submission is to include the correct definition of unavoidable accident and then ask:

Whose negligence, if any, do you find from a preponderance of the evidence proximately caused the collision made the basis of this suit?

   ANSWER: Plaintiff (Yes —) (No —).
   Defendant (Yes —) (No —).

To include opinions of "both" or "neither" is error.

233. Id. at 801.
234. Id. at 800.
235. Id.
236. See id.