The subject of what may best be described in a general way as informed choice in the law of torts has become one of the most complex and difficult problems in the entire field of personal injury law. The landmark article was written by Bohlen in 1906,¹ and while many cases have been decided since that date involving informed choice in one or another of its numerous manifestations, it justifiably has been said that the resulting deposit of cogent general thought is remarkably slight.² That segment of the general subject involving the tort liability of an actor for unintentionally caused harm involves the greatest amount of litigation and complexity.

A brief statement about consent and intentional invasions will suffice for present purposes. Consent, actual or apparent, to conduct committed with the intention of bringing about an offensive or harmful contact bars recovery of the consenting party, subject to some exceptions not here relevant.³ In this setting consent bars recovery because the conduct of the actor was committed in response to a manifestation of willingness on the part of the person upon whom the contact was inflicted. There is very little similarity between this consent doctrine and the defense to unintentionally inflicted harmful contacts which is labeled voluntary assumption of the risk.

There are three fundamentally different situations regarding the subject of informed choice and harm unintentionally inflicted. The first is when the plaintiff and the defendant enter into a bargain or other consensual transaction and concomitantly enter into either an express or implied understanding that the defendant will not be legally responsible for harm resulting from a particular risk or hazard already in existence, known or unknown, or even for negligence that may occur in the future with respect to the subject matter of the agreement. The defendant in such a case extracts an agreement from the plaintiff that in exchange for the latter's use of the former's premises, goods or services, he will not be legally responsible for harm resulting from risks or hazards attributable to his negligence. The issue is the en-

¹ Bohlen, Voluntary Assumption of Risk, 20 Harv. L. Rev. 14 (1906).
³ In such a case consent destroys the wrongfulness of the conduct and it is a part of the plaintiff's prima facie case to negative consent. If the conduct is wrongful, it is not wrongful to the plaintiff. See O'Brien v. Cunard S.S. Co., 154 Mass. 272, 28 N.E. 266 (1891); Kirschbaum v. Lowrey, 174 Minn. 107, 218 N.W. 461 (1928).
forceability of such a bargain and the extent to which a defendant should be permitted by contract to escape a duty of care that would otherwise have existed. The inequality of the bargaining positions of the parties and the elimination of the incentive to exercise care in the prevention of accidents that result from the enforcement of such agreements are considerations that are relevant in determining the enforceability of such a promise.4

In the second type of situation the plaintiff, aware of a risk created by the negligence of the defendant, reasonably chooses to encounter it by doing something that he did not have a privilege or right to do at the time without the actual or apparent consent of the defendant. The plaintiff may have become aware of the risk either by notice given to him by the defendant or by his own discovery of the risk. The position taken in the Restatement of Torts is that the plaintiff cannot recover unless he encounters the risk involuntarily.5 Moreover, plaintiff's willingness to encounter the risk is regarded as voluntary even though the circumstances are such that no reasonable person would have acted otherwise. The fact that plaintiff is acting under compulsion of the circumstances is immaterial.6 Thus, in McKee v. Patterson7 it was held that the economic compulsion under which workmen operate does not prevent the application of the defense unless abolished by legislation. The defense was applied in that case, and in subsequent cases, to deny recovery to employees of independent contractors who were injured by exposing themselves to obvious dangers on the premises of an occupier of land.8 For all practical purposes this means that a business guest or invitee who enters the premises of an enterpriser voluntarily assumes the risk of hazards of which he was aware.9 Similarly, the passenger who accepts a ride with an automobile driver assumes the risk of any known incompetency such as intoxication.10

4. See 6A A. Corbin, Corbin on Contracts § 1472 (1962). Those engaged in the performance of public services may not bargain against liability for negligence. Those not so engaged are often allowed to do so but there is much conflict even in the cases in which public service is not involved. The contracts used by manufacturers usually contain provisions attempting to limit liability for defects, but the tendency today is to regard these portions of the contracts as unenforceable. The Restatement of Contracts which was adopted in 1932 is now out-of-date. Under the old Restatement sections a bargain for the exemption from liability for the consequences of ordinary negligence is not illegal except when "(a) the parties are employer and employee and the bargain relates to negligent injury of the employee in the course of the employment, or (b) one of the parties is charged with a duty of public service, and the bargain relates to negligence in the performance of any part of its duty to the public, for which it has received or been promised compensation." Restatement of Contracts §§ 574, 575 (1932). See also Keeton, Assumption of Risk and the Landowner, 22 La. L. Rev. 108 (1961).

5. Restatement (Second) of Torts § 496C (1965) [hereinafter cited as Restatement].

6. "The plaintiff's acceptance of the risk is to be regarded as voluntary even though he is acting under the compulsion of circumstances, not created by the tortious conduct of the defendant, which have left him no reasonable alternative." Restatement § 496E, comment b at 576.

7. 271 S.W.2d 391 (Tex. 1954).


10. Schiller v. Rice, 151 Tex. 116, 246 S.W.2d 607 (1952); Hunter v. Carter, 476
The term “voluntary” as used in this second situation is misleading because, however compelling the circumstances may be, there is no involuntary action unless, independent of the negligence creating the hazard, the defendant coerced the plaintiff into encountering the hazard. No good reason has yet been given for depriving all persons who enter into any kind of consensual relationship of a recovery simply because of a reluctant willingness to encounter a risk or hazard attributable to the negligence of others. No doubt there are some relationships, such as that of occupier of land and licensee, where the duty of care of one party to the other can be regarded as being satisfied by advising of any risk not likely to be discovered. In that event, actual discovery of the risk ought to be just as effective to bar recovery as when notice is given. It can of course be said that if the defendant had been present when plaintiff encountered the danger—and often he is, such as when a passenger chooses to ride with a person who has been drinking—he could have conditioned his assent to the plaintiff’s conduct on the understanding that defendant would not be legally responsible. But this conditional acceptance cannot be fairly inferred with respect to the vast majority of situations to which this defense has been applied. While in Texas and a majority of jurisdictions the courts have adopted the position taken in the *Restatement of Torts*, there are a growing number of jurisdictions that have rejected voluntary assumption of risk as a general defense available whenever the theory of recovery is negligence.11

In the third type of situation, the plaintiff, aware of a risk created by the negligence of the defendant, chooses reasonably to encounter it, as is true in the second type of situation, but the plaintiff in encountering the risk or hazard is in the exercise of a right or privilege of which the defendant has no right to deprive him. Thus, the defendant’s negligence puts the plaintiff in the dilemma of foregoing a right or privilege to act unless plaintiff elects to encounter the hazard that the defendant negligently created. Even those who accept the rationale of the second situation, that plaintiff’s election to encounter a risk should always bar recovery, are likely to conclude that plaintiff acts involuntarily in this third situation. A defendant who by his own wrong has compelled the plaintiff to choose between two such evils may not be permitted to say that plaintiff has voluntarily encountered the danger. It is my position that the defense should never be applied in this third situation, and as long as plaintiff acted reasonably, i.e., non-negligently, complete recovery should be allowed. In Texas, as in most jurisdictions, an analysis based on reasonableness is followed in rescue cases, for a rescuer’s recovery is neither barred nor diminished unless he acts negligently in encountering danger.12 The fact that it would have been quite reasonable for him not

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11. See the list of authorities collected in Marshall v. Ranne, 511 S.W.2d 255, 259 n.1 (Tex. 1974).
to risk his life or limb to effect a rescue has not been considered and of course should not be.

In Rabb v. Coleman the Supreme Court of Texas held that even in this third situation plaintiff could be barred of recovery for having voluntarily assumed the risk, although he acted reasonably and non-negligently in doing so. In that case, plaintiff's husband died as a result of burns sustained in a flash explosion attributable to the negligence of the defendant when the plaintiff's butane tank was being refilled. During a routine procedure, the pop-off valve suddenly opened and began releasing butane gas with a loud noise. The plaintiff remained nearby and was injured by the explosion. The argument was made that the defense ought not to be applicable because the plaintiff was on his own land and in the exercise of a privilege of which the defendant had no right to deprive him, but the court concluded that the assumption of risk defense was applicable to any negligence case and plaintiff could be found to have voluntarily exposed himself to the danger.

It must be admitted that the holding in Rabb can be regarded as supported by the Restatement of Torts. It is there said that "plaintiff's acceptance of a risk is not voluntary if the defendant's tortious conduct has left him no reasonable alternative course of conduct in order to (a) avert harm to himself or another, or (b) exercise or protect a right or privilege of which the defendant has no right to deprive him." This results in a curious kind of defense. It is one that involves a consideration of the same factors that are relevant on the issue of contributory negligence, but the question to be decided is quite different. Apparently, in this third situation the burden is on the defendant to show that the plaintiff had a reasonable alternative in order to exercise the privilege for, if he did, then the risk was voluntarily assumed even though plaintiff was in the exercise of a privilege. Admittedly, this is difficult to comprehend, and it would seem to be especially difficult to explain to a jury the difference between voluntary exposure to risk and unreasonable exposure to risk. In Rabb, plaintiff had no alternative to the exercise of the privilege to be at the precise place on his land where he stood when the explosion occurred. However, as a reasonable course of action, the plaintiff could have moved further away from the risk of an explosion, but that would have been to give up the privilege. So I suppose the court meant to say that if a course of action is open that is reasonable, even though it means the surrendering of a privilege, the plaintiff must take it or be barred of recovery. Arguably, however, those who are injured do not know the law, and if they act reasonably in the exercise of a privilege their recovery should not be barred simply because they were exposing themselves to harm.

At the beginning of the chapter on voluntary assumption of the risk in the Restatement of Torts it is made clear that the defense is applicable only when

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13. 469 S.W.2d 384 (Tex. 1971). This case was noted and commented on in the 1971 Annual Survey. See Keeton, Torts, Annual Survey of Texas Law, 26 Sw. L.J. 3, 10 (1972).
14. Restatement § 496E(2).
15. Id. comment d, where it is said: "As to either defense, the factors to be considered in determining the existence of a reasonable and adequate alternative are much the same."
the theory of recovery against the defendant is that of negligence or reckless-
ness. The Supreme Court of Texas decided two cases during the year
where the theory of recovery against the defendant was strict liability. In
Marshall v. Ranne17 the plaintiff brought suit against the defendant, the
owner of a hog, for harm resulting from an attack by the hog. The attack
on the plaintiff was made as the plaintiff was in the exercise of the rightful
use of his property. The court recognized that this was a proper situation
for the application of strict liability, following what is perhaps the majority
rule and the position of the Restatement of Torts. The plaintiff's counsel
apparently chose to take the position that, even if the assumed risk doctrine
was applicable, the plaintiff encountered the danger involuntarily. The court
accepted the argument. Quoting the Restatement of Torts section that was
meant to be applicable only when negligence is the basis for recovery, the
court said: "The dilemma which defendant forced upon plaintiff was that
of facing the danger or surrendering his rights with respect to his own real
property, and that was not, as a matter of law the voluntary choice to which
the law entitled him."18 The court also cited with approval Harvey
v. Seale,19 in which it was held that a choice facing a nine-year-old child to
cease playing on a porch which her parents held by a lease or to risk stepping
in a hole in the porch was not a voluntary choice.

These statements standing alone would support my position that the
assumed risk defense is never applicable to that situation where the plaintiff
encounters a danger in the exercise of a right or privilege. But, alas, it was
not to be. Faced with Rabb, the court continued to approve its holding that,
in Rabb, plaintiff had a reasonable alternative to encountering the danger
that the plaintiff did not have in Ranne. There can be no disagreement with
this distinction in the cases because in Rabb the plaintiff's conduct was
arguably such as to compel the conclusion that he was negligent.

Products Liability and Defenses. In Ranne, as heretofore observed, there
were two arguments for denying the applicability of the defense: the first
being that the risk was encountered in the exercise of a privilege and the
second being that the theory of recovery was that of strict liability. As to
the latter, the view commonly taken has been that when the defendant is
engaged in the kind of activity or enterprise that involves risks or hazards
as to which there should be strict liability, then the broad general defenses
of contributory negligence and voluntary assumption of the risk are not avail-

16. This Chapter deals with the plaintiff's voluntary assumption of the risk as
   a defense to an action brought by him against a defendant whose conduct
   would otherwise subject him to liability to the plaintiff. It is concerned
   only with the plaintiff's assumption of the risk arising from the defend-
   ant's negligent or reckless conduct. As to the plaintiff's consent to accept
   harm or a risk arising from the defendant's intentional conduct, see § 892.
   As to assumption of a risk where the action is founded upon the strict lia-
   bility of the defendant, see §§ 515 and 524.

17. 511 S.W.2d 255 (Tex. 1974).
18. ld. at 260.
19. 362 S.W.2d 310 (Tex. 1962).
The applicability of the doctrine to a products liability case was discussed by the Supreme Court of Texas in *Henderson v. Ford Motor Co.* On April 15, 1969, plaintiff was driving a 1968 automobile on a freeway when she realized that the speed of the car was not responsive to her control. It was proved at the trial that the accident was caused by a piece of rubber in the carburetor that was holding open the gas feed. Plaintiff's first impression was that the problem was with the brakes. She drove the car from the freeway at the first exit and onto a side road, continuing her efforts to stop. She determined that the accelerator pedal was not depressed. She pumped the brake and pushed with both feet on the brake pedal, but the car did not slow down. Seeing a busy intersection ahead, and recognizing the danger to others, she drove onto a median strip in the center of the street, and finally crashed into a large signal light pole. There was some reason to argue that plaintiff acted negligently after the emergency arose, and so this defensive theory was presented to the court. There were also issues related to whether or not the automobile was sold by the manufacturer in a defective and unreasonably dangerous condition. The court, in a five-to-four decision, concluded that there was no evidence to support a jury finding that the automobile was defectively designed. I shall not express an opinion on this holding except to say that I consider the general problem of the sufficiency of the evidence to establish a defect as being perhaps the most important and difficult problem that litigants face in the products liability area. Moreover, it is hardly justifiable to attempt a choice between competing positions without reading the record. In *Henderson* the more important substantive issue related to the general subject of defenses to strict liability of manufacturers and sellers of all kinds of products.

As the court suggests in *Henderson*, some courts have recognized assumed risk and contributory negligence as defenses to strict liability in the same way as these defenses are recognized when the theory of recovery is negligence. Perhaps the majority of the courts have chosen to create a different set of defenses altogether from those that were created in early common law in an atmosphere of rugged individualism. Two defenses have commonly been recognized. These are (a) abnormal use or unforeseeable misuse, and (b) unreasonable use after discovery of the defect and appreciation of danger.

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20. See Restatement § 402A, comment n at 356, which provides:

Since the liability with which this Section deals is not based upon the negligence of the seller, but is strict liability, the rule applied to strict liability cases (see § 524) applies. Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. On the other hand the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability.

21. 519 S.W.2d 87 (Tex. 1974).

from the defect. Both are special kinds of fault or contributory negligence defenses. The result is that fault of a special kind is a complete bar to recovery. I suggest that this whole subject could bear re-examination in the light of the adoption of comparative negligence when the theory of recovery is negligence. Perhaps the quality of negligence and not the kinds of negligence should be the yardstick for recovery. But how can the fault of the plaintiff be compared with the defect when negligence of the defendant is not a prerequisite to recovery? It probably could not be, but damages could be equally divided between the responsible parties.

In *Henderson* the court decided the case in favor of the defendant because of the insufficiency of the evidence to establish a defect, so everything the court said about defenses could be regarded as dictum. But what the court said is obviously important. The position of the court as to defenses to strict liability of makers and other sellers of products seems to be as follows:

1. Contributory negligence in a general sense is not a defense;
2. Nothing is said about whether or not improper or abnormal use is a defense, so this remains an open question;
3. Negligence after actual discovery of a defect is not a defense; I know of no other case adopting such a sweeping proposition;
4. Voluntary assumption of the risk is a defense just as it is when the theory of recovery is negligence;
5. Since plaintiff did not actually realize that there was any alternative course of action open to her, she could not be regarded as voluntarily encountering the danger. So even if evidence justified the finding that she was negligent in failing to appreciate alternative courses of action open to her, she could not be regarded as voluntarily encountering the danger.

The observations of the court are important not so much because of the final position taken on the effect of alleged negligent conduct in an emergency created by a defect in the defendant's product, but rather because of the impact of these observations in the more frequently recurring situation when plaintiff, with time to deliberate, takes a reasonable chance in using a known defective product when there was a reasonable alternative course of action open to him. It is hardly necessary for me to say, in view of the observations that have been made above, that such defenses as are recognized in the products liability area should be based on some kind of fault.


24. In Texas, in a negligence case, a litigant who is responsible for an emergency and thereby endangers the other litigant cannot successfully argue that the latter responded negligently in the emergency. See Del Bosque v. Heitmann Bering-Cortes Co., 474 S.W.2d 450 (Tex. 1971); Goolsbee v. Texas & N.O.R.R., 150 Tex. 528, 243 S.W.2d 386 (1951); Keeton, *Torts, Annual Survey of Texas Law*, 26 Sw. L.J. 3, 5 (1972); Thode, *Imminent Peril and Emergency in Texas*, 40 Texas L. Rev. 441 (1962). If this emergency or imminent peril doctrine is applicable as regards a negligence case, then if contributory negligence normally bars recovery in a products liability case it would not seem to do so in this situation.
II. THE DUTY TO ANTICIPATE AND MITIGATE DAMAGES

Either a defendant or a victim may engage in conduct antedating a damaging event that aggravates or enhances the harm arising out of the event although such conduct was not a factual cause of the event itself. As regards a defendant, the issue is generally whether or not he should be subject to liability for causing the harm, or at least some of the harm, when the event was proximately caused by the negligence of another who would normally be liable for the entire harm. With respect to the victim, the issue is whether or not recovery should be barred or diminished.

Traffic accidents supply the most frequent examples. For instance, the enormous increase in litigation with reference to the liability of manufacturers of all kinds of products have resulted in claims, many of which have been substantiated, being made against manufacturers of automobiles on the ground that a defect in design greatly increased the extent of the harm. This issue as to the liability of manufacturers for alleged defective designs that do not cause accidents but only enhance the harm arising out of accidents is of considerable importance. Often most of the harm in a traffic accident is a consequence of an alleged design defect of this kind. There are two fairly definite lines of conflicting authorities. The reason commonly given for denying any recovery against the manufacturer is that the intended purpose of a car does not include its participation in collisions. It is then said that strict liability applies only if the product is not reasonably fit for its intended purpose, and as to liability on a theory of negligence, it is said that there is no duty to guard against harm from unintended uses of products. Neither proposition passes muster. Fitness of a product for its intended purpose ought not to be the test for ascertaining the scope of a manufacturer's liability for physical harm. Even if it were, most automobiles when used as intended are involved in collisions at one time or another.

There are, however, several things that can be said about this problem that taken together may reasonably be regarded as supporting the position of non-liability that some courts have taken. Generally the damaging event is one that was proximately caused by the negligence of another who is liable for the entire harm so that injured persons are not usually without a remedy, albeit in many instances such may be unsatisfactory. Sometimes, perhaps, the misconduct of the person causing the event could reasonably be regarded as the sole proximate cause. Furthermore, the imposition of liability for failing to minimize the harm can present two difficult causation questions: the first being whether or not any harm would have been prevented by appropriate action, and if the answer is yes, the second being how much of the total harm would have been prevented. In addition, the process involved in determining whether or not a product is defective requires a balancing of danger against benefits and burdens of greater precautions and this is a much

27. The leading case espousing the position of liability is Larsen v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968) (applying Michigan law).
more difficult process as regards the crash-worthiness issue than is the case with alleged crash prevention defects. Finally, Congress and the various state legislatures, with the aid of administrative agencies, are legislating with respect to the crashworthiness of vehicles on a general basis, and arguably liability should be imposed only if there has been a failure to comply with a safety standard so enacted.

Notwithstanding these practical difficulties with the allowance of recovery, the fountain of justice should not be boarded up simply because some may drown in its salutary waters. The courts have split about evenly on this subject. Turner v. General Motors Corp., a case of first impression in Texas, involved a plaintiff who was injured when the hardtop sedan that he was driving overturned and the car landed on its top. The right front portion of the roof collapsed and came into contact with his head. This contact paralyzed plaintiff's hands and legs. It was the structural integrity of the roof that was put in issue with evidence from a design engineer indicating that it would have been feasible for the roof to have been equipped with a roll bar that would have made the top more crashworthy. Relying heavily on a case decided by the United States Court of Appeals for the Fourth Circuit, Dreisonstok v. Volkswagenwerk, A. G., the court held that a manufacturer may be regarded as designing a motor vehicle defectively if the magnitude of the risk or danger of enhancement of injuries from the condition proves to outweigh the benefits.

In Turner the defendant cited—as well it should have—the case of Kerby v. Abilene Christian College in support of the position that the manufacturer ought not to have a duty to guard against enhancement of harm from damaging events caused by another. That presents the problem of whether or not the victim in an accident should have his recovery diminished by virtue of conduct committed antedating the event that enhanced his harm. If the defendant has a duty to anticipate events and guard against enhancement of injuries, does not the plaintiff have a similar duty so long as contributory negligence bars or diminishes recovery?

In Kerby the plaintiff fell through an open sliding door of a truck that he was driving and the truck toppled on him. The jury found that he was negligent in driving with the door open and this was responsible for thirty-five percent of his damages. The trial court entered judgment for plaintiff by reducing the amount of damages suffered in the accident by thirty-five percent. The

28. This expression is not original but is taken from a dissenting opinion by Justice Musmanno in Bosley v. Andrews, 393 Pa. 161, 142 A.2d 263 (1958), involving injury from fright without impact. A trespassing bull caused fright and this caused a heart attack and the justice observed that he would "dissent... until the cows come home." 142 A.2d at 267, 280.

29. See Annot., supra note 25.

30. 514 S.W.2d 497 (Tex. Civ. App.—Houston [14th Dist.] 1974, writ ref'd n.r.e.).

31. 489 F.2d 1066 (4th Cir. 1974) (decided under Virginia law). In this case the alleged defect in design was that there was insufficient "crash space" between the front and the driver's compartment of the microbus so that there was much greater risk of harm from head-on collisions than would be true of most automobiles. The case was dealt with as a negligence case although it was observed that it makes little or no real difference whether liability is asserted on a negligence theory or strict liability theory as to designs. The court found that the microbus was not defective as a matter of law.

32. 503 S.W.2d 526 (Tex. 1973).
supreme court drew the sound distinction between negligence that contributes to an accident and negligence contributing to the damages sustained. The negligence that contributes to an accident will normally be a proximate cause of the entire harm, whereas negligence contributing only to enhancement of the harm is a proximate cause of only part of the harm. The supreme court reversed and rendered for the plaintiff and for the entire damages suffered in the accident. In the course of the opinion, the court referred to the seat belt cases and concluded that even those courts which had intimated that a reduction in the damages for failure to use a seat belt would be appropriate denied reduction on the ground that the "[d]efendant failed to raise the fact issue." It then concluded as follows: "The experts in the instant case confessed an inability to determine what injuries would have been suffered had the door been closed. Even if there were proof that the particular injury suffered would not have been suffered had Kerby avoided being thrown from his truck, it would not support the jury's findings of percentage contribution."  

Following the Kerby decision, King Son Wong v. Carnation Co. reached an appellate court. Plaintiffs, husband and wife, suffered injuries when a truck collided with their car. The collision was proximately caused by the negligence of the defendant truck driver. The jury also found that plaintiffs were negligent in failing to wear available seat belts, and that the failure caused fifty percent of the husband's injuries and seventy percent of the wife's. The court of civil appeals construed the supreme court decision in Kerby to mean that "the concept of mitigation of damages has no application to a plaintiff's actions which antedate the defendant's negligence," and the court further held that there is no duty to mitigate damages by wearing available seat belts. The supreme court in a per curiam opinion refusing an application for writ of error approved the result but indicated that the Kerby opinion had been misconstrued. It appears that whereas the supreme court in Kerby did express some doubt about the seat belt defense, the holding in that case was based upon a failure of proof of the kind that was deemed to be necessary. In any event, the court in King Son Wong has now held that "persons whose negligence did not contribute to an automobile accident should not have damages awarded to them reduced or mitigated because of their failure to wear available seat belts." However, this case should be narrowly construed to be applicable only to failure to use seat belts. It is not a holding that an injured person never has a duty to guard against aggravation of injuries, as for example when a rider of a motorcycle fails to wear a helmet that is obviously needed as a safety device.

Refusing to mitigate damages in any case for failure to wear seat belts is hard to justify on the ground that difficult questions of causation will often be involved. Statistics have been gathered that clearly indicate that the seat...
belt is a valid safety device with sixty percent decrease in all types of injuries when seat belts are used, and situations will arise when it is reasonably clear that the failure to use seat belts did cause death or serious injuries when only minor injury would otherwise have occurred. Courts have not, in situations involving successive accidents, denied all recovery against a defendant who negligently caused the second accident on the highway immediately following another simply because of the impossibility of ascertaining how much of plaintiff's total harm suffered was attributable to the second tortfeasor's negligence. It is enough that it is known that the harm was enhanced and the jury should be allowed to guess, if necessary, to what extent. Likewise, if plaintiff proves that the design of a car probably aggravated the injuries, the mere fact that the proof does not show with any degree of certainty the extent to which this was so is immaterial. It would probably be better not to ask the jury to be specific as to percentages but rather to ask them to approximate how much of the total damages is attributable to the conduct that enhanced the harm.

Perhaps a reasonable explanation for the seat belt result is that the failure to wear seat belts is not, as a matter of law, negligence. Justice Holmes was of the view that the negligence concept is a featureless generality that often leads to inconsistent results in like situations. Therefore, it was his position that in the course of time the courts should develop a body of rules as to recurring situations, just as the legislature and administrative agencies do, that would give the same predictable answer in like situations.

In Kerby it appears from the nature of the accident that some of the harm suffered would not have been suffered but for the open door. The fact that no one could know what the precise percentage of the totality of the harm was caused by the open door is no reason for not trusting the jury to do justice. As to accidents occurring on and after Sept. 1, 1973, comparative negligence rules would apply and it would be necessary to get the jury to quantify the negligence of plaintiff and the defendant with respect to harm attributable to the contributory negligence. Let us suppose jury findings as follows: (1) Plaintiff suffered $200,000 in an accident proximately caused by defendant's negligence alone; (2) jury finds that contributory negligence of plaintiff in leaving a door open proximately caused $100,000 of the damages; and (3) jury finds further that as to the $100,000, defendant was seventy-five percent negligent in causing the accident and plaintiff was twenty-five percent negligent in leaving the door open. Under those findings, even if contributory

40. For an example of Justice Holmes' thinking in this regard, see Baltimore & Ohio R.R. v. Goodman, 275 U.S. 66 (1927).
41. Examples are: It is negligence as a matter of law for one to drive so fast that he cannot stop within the distance that can be seen ahead, Lavson v. Town of Fond Du Lac, 141 Wis. 52, 123 N.W. 629 (1909); one who is blind is negligent to venture out without a dog or some kind of device to compensate for his handicap, Smith v. Sneller, 345 Pa. 68, 26 A.2d 452 (1942); and inadvertence is negligence in the absence of distracting circumstances, Reynolds v. Los Angeles Gas & Elec. Co., 162 Cal. 327, 122 P. 962 (1912).
negligence that enhances harm constitutes a defense, the recovery would be $175,000.

III. **Res Ipsa Loquitur**

Two cases were decided by the supreme court that will be most helpful in revealing some of the difficulties related to the application of the doctrine of *res ipsa loquitur* and in providing guidance as to the method to be used in submitting the negligence issue to the jury when the doctrine is found to be applicable. These two cases are *Birmingham v. Gulf Oil Corp.* and *Mobil Chemical Co. v. Bell.* Both involved damaging events that victimized employees of an independent contractor who had been employed by the defendants.

The so-called doctrine of *res ipsa loquitur* was a creation of the English court in *Byrne v. Boadle,* decided in 1863, for the purpose of relieving the plaintiff of the necessity for showing specific negligent conduct of the defendant that proximately caused the damaging event in which the injury or death that was the basis for the action occurred. There may be more than one reason for relieving a plaintiff of the normal burden of proof. Notions of fairness may justify shifting the primary responsibility for explaining how a damaging event occurred to the defendant or defendants if they are in a much better position to know and explain, but this has seldom been utilized. Most courts regard the doctrine simply as a Latin label given to the recognition of the justifiability of permitting plaintiff to prove that a defendant’s negligence was a cause of the damaging event by *circumstantial evidence.* The use of a Latin label to describe a rather simple notion such as this may not have contributed to clarity of thought about it. It should be noted, however, that plaintiff is not simply being allowed to prove a particular fact by proof of another fact or facts from which the first fact can be inferred. Plaintiff has been permitted to make out virtually his entire prima facie case simply by showing a set of circumstances and a kind of occurrence from which negligence and causation, at least factual causation, can be inferred. This is an approval of a kind of circumstantial evidence that is special in its nature. Thus the task of deciding when this doctrine or some other kind of broad circumstantial evidence rule will be allowed is a more difficult one than is present when it is asserted that there is circumstantial evidence of a particular fact.

In *Bell* the court of civil appeals held that for *res ipso loquitur* to be applicable, plaintiff had to establish three elements: (1) The character of the damaging event was of the kind that would not ordinarily occur without negligence; (2) the instrumentality or instrumentalities that were involved in the damaging event were under the control of the defendant; and (3) it was more likely than not that the damaging event was caused by defendant's neg-

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42. 516 S.W.2d 914 (Tex. 1974).
43. 517 S.W.2d 245 (Tex. 1974).
45. See Prosser § 39.
ligence. The supreme court reduced this to the first two requirements and most courts employ this practice. The satisfaction of the second requirement, as that requirement ought to be understood, constitutes satisfaction of the third requirement and accordingly both need not be utilized in the statement of the requirements. The main point is that it is not enough to show that negligence probably caused the damaging event. Rather, it is necessary to show that the defendant's negligence probably caused the damaging event. The finger of suspicion must be pointed at a particular defendant and not simply one or the other of two or more defendants. The "control" requirement has been a source of some confusion and I doubt that the use of the term to describe the fact that a particular defendant must be identified as the more likely negligent party has been helpful. As the supreme court suggests in Birmingham, it is not control at the time of the damaging event that is always important, but rather it is control when the probable negligence occurred. A better statement of the second requirement would seem to be that after an inventory of possible causes has been made, either from common knowledge or from expert evidence, it must appear that it is more likely than not that the cause was attributable to negligence of the defendant.

There is a growing body of the law which would permit a plaintiff to join two or more parties as defendants and prove that harm resulted from a kind of damaging event that does not ordinarily occur without negligence and that the negligence of one or the other of the defendants caused the event. A leading case on this approach, albeit limited to a narrow situation, is Dement v. Olin-Mathieson Chemical Corp., in which harm resulted from a premature explosion of dynamite, the component parts of which were made by different manufacturers. The parts were assembled at the site. Here the event itself destroyed any possible evidence as to the cause for the explosion and yet the court said that the jury should be permitted to infer that one or the other of the components was defective. The troublesome feature about the case is that the event standing alone without direct evidence as to an identifiable defect would seem to indicate that user negligence was just as likely, if not more so, to have caused the event as was product defect.

There is one issue of considerable importance that has not really been thoughtfully considered: When will the plaintiff be permitted to put the finger of suspicion on a defendant by introducing evidence of the kind of accident that does not ordinarily occur without negligence and then additional evidence of care to disprove the negligence of others, including himself? It

47. 517 S.W.2d at 251.
48. Prosser believed that "[i]t would be far better, and much confusion would be avoided, if the idea of 'control' were discarded altogether, and we were to say merely that the apparent cause of the accident must be such that the defendant would be responsible for any negligence connected with it." PROSSER § 39, at 221.
51. 282 F.2d 76 (5th Cir. 1960).
is evident that plaintiffs who were injured in automobile collisions will not be allowed to prove negligence of one of the drivers by disproving the negligence of others. Yet plaintiffs have been permitted to get to the jury against bottlers by showing an explosion and establishing that the bottle was carefully handled by the plaintiff and others in the marketing chain. There may be relevant differences between bottle explosions and automobile collisions that justify the different treatments. There are two instrumentalities involved in the automobile collision and, therefore, under the control test plaintiff could not utilize the doctrine because neither driver was ever in control of more than one. As regards a bottle explosion, or the premature explosion of dynamite, there is only one instrumentality, the bottle in one instance and the dynamite in the other, and control of that instrumentality simply changed from one person to another person. But what difference should this make? The reliability or unreliability of the evidence that is utilized as a basis for supporting an inference of negligence against one of the defendants is about the same. Perhaps there is a significant difference. It may be that bottle explosions are more often than not attributable to the negligence of the bottler: i.e., after an inventory of possible causes are ascertained, it would appear that the more likely causes are attributable to negligence of the bottler. Yet even if it is reasonable to conclude that ordinarily bottle explosions are attributable to the negligence of the bottler and therefore negligence of the bottler can be inferred from that event standing alone, perhaps plaintiff should be required to introduce as much direct evidence as is practical to establish his own care and that of others before an inference of negligence against the bottler is to be indulged.

In both Birmingham and Bell it was proved that the damaging event was caused by a malfunctioning of an instrumentality that was involved in the damaging event. Virtually all damaging events occur in the course of the use of something, and if there is no direct evidence as to an identifiable defect of the things being used, the finger of suspicion is usually, but not always, on users of those things rather than on the things. But even in these situations, when evidence of an identifiable defect as a cause for the malfunctioning is introduced, that tends to eliminate mismanagement at the time of the accident as a causal element. Therefore, the problem is who or what caused the defect.

In Birmingham v. Gulf Oil Corp.52 the operator of a crane was killed when the crane fell. The crane was owned by the defendant, Gulf Oil Corporation, and had been in use for ten years. The crane had during this period been affixed to a pedestal sitting on a drilling platform in the Gulf of Mexico. Expert testimony established that the cause of the accident was the failure of the bolts that held the crane to the pedestal. So there was a great deal more than simply evidence of a damaging event; there was evidence of a failure in the equipment that was being used. The deceased was an employee of an independent contractor, a drilling company, and the crane had been supplied to the Gulf Oil Corporation pursuant to a contract with the drilling

52. 516 S.W.2d 914 (Tex. 1974).
company to rework some oil wells. It had been in use by the operator and the drilling company for four months and at the time of the accident the reworking of the wells had been completed and the crane was being used to load drilling company equipment from the platform into a boat. The failure of the bolts was in turn attributable to metal fatigue. The trial court directed a verdict for all of the defendants who were made parties to the suit, including Gulf, and the court of civil appeals affirmed. The supreme court first handed down an opinion affirming the courts below, but on motion for rehearing the court, in a divided decision, held that the evidence justified the application of the res ipsa loquitur doctrine against Gulf and remanded the case for a new trial. There was evidence at the trial of specific grounds of negligence, including negligence in failing to ascertain if the crane was properly bolted to the pedestal and failure to make reasonable inspections periodically over the ten-year period that Gulf had used the crane. The evidence indicated that the metal fatigue could have occurred after the crane was supplied to the drilling company or, if the condition was dangerously defective prior to that time, reasonable inspection might or might not have disclosed it. There was evidence of specific negligent conduct of Gulf that could have been the cause, so that the primary problem was causation and not negligence.

In the first place, this is not a case where inferences from circumstantial evidence must be made to find negligence. Moreover, it is not a case of a damaging event standing alone, such as an airplane crash or a single car accident without any evidence as to a cause. It was established that metal fatigue, a defect in the thing that was being used, was the cause.

Thus, it is possible to assert the following: (1) A defective condition with respect to the equipment caused the damaging event. Therefore this is not the kind of case where there is no known mechanical or scientific cause for an event. This points to the fact that Gulf, the supplier, could have caused the dangerous condition through negligence. (2) There was evidence produced justifying a finding that Gulf, the supplier, was negligent. This adds to the probabilities that Gulf caused the dangerous condition. (3) There was no evidence of operator negligence.

When the cause of a damaging event that is not likely to occur in the absence of negligence is proven to be a defective condition of equipment that is being used, and a supplier was negligent because of the risk or hazard of creating or not discovering the defect at or prior to the time the product was supplied, and there is no evidence to justify a finding of another's negligence with respect to the defective condition, is that not enough evidence to justify an inference that the negligence of the supplier did cause the defect that caused the damaging event? It is perhaps debatable, and it appears that those who dissented would answer that it is not.

Two noteworthy statements are made in the majority opinion with respect to the control requirement for the application of the doctrine. It was said that Gulf was in control at the time of the accident because Gulf was in control of the bolts. But it seems rather doubtful whether Gulf had the kind of
control that carried with it any duty of care after it supplied the crane to the driller. However, more importantly, as the court indicated later, the control that was important was the control at the time the negligence causing the condition occurred. With this I agree. This simply means that the probable negligence must be identified as that of the defendant and control is not a useful term to use in deciding whether or not the plaintiff has adequately carried the burden of placing the finger of suspicion on the defendant.

In Bell, just as in Birmingham, the damaging event was attributable to a malfunctioning in the equipment that was being used, but in Birmingham the court concluded that the supplier could justifiably be found to be negligent, while in Bell it was the user of the equipment against whom the res ipsa loquitur doctrine was applied. Bell involved the construction of a portion of a chemical plant for the defendant by an independent contractor and possession was delivered after the equipment was tested, with some of the testing being done under the supervision of the defendant as well as the contractor. A pressure relief mechanism included to protect the system from pressure surges failed to function, and acetic acid under high pressure spurted out a quarter inch pipe and into the atmosphere causing respiratory harm to employees of the independent contractor. This system had worked perfectly, but some maintenance work was done by the defendant and it was subsequent to this that the failure occurred.

In Bell the court reaffirmed the well-settled position in Texas that the res ipsa loquitur doctrine does not create a presumption compelling the drawing of an inference of negligence in the absence of rebuttal evidence. Rather, when it can reasonably be found under some of the evidence that the requirements for the doctrine are met, the jury will be permitted to infer negligence as a cause of the occurrence. This is the majority rule, although there is respectable authority that would require the court to draw the inference of negligence once the requirements are found to be satisfied. It would seem that theoretically at least neither position is always sound and that a compelled inference of negligence should be indulged when there is no evidence in the record to justify a finding other than that the requirements are satisfied, and there was no rebuttal testimony to indicate that the situation was other than normal. However, this should also be the result in the same type of case when there is rebuttal testimony that is so weak that it does not justify any reasonable conclusion other than that negligence of the defendant was a cause.

54. See Burr v. Sherwin Williams Co., 42 Cal. 2d 682, 268 P.2d 1041, 1046 (1954), where the court said, "It is our conclusion that in all res ipsa loquitur situations the defendant must present evidence sufficient to meet or balance the inference of negligence, and that the jurors should be instructed that, if the defendant fails to do so, they should find for the plaintiff." See also Coca-Cola Bottling Co. v. Mattice, 219 Ark. 428, 243 S.W.2d 15 (1951); Ten Ten Chestnut St. Corp. v. Quaker State Coca-Cola Bottling Co., 186 Pa. Super. 585, 142 A.2d 306 (1958).
55. Prosser's position was that "the procedural effect of a res ipa case is a matter of the strength of the inference to be drawn, which will vary with the circumstances of the case." Prosser § 40, at 230.
The trial court in *Bell* submitted a general issue of negligent maintenance of the chemical plant by the defendant without any explanatory instructions about the *res ipsa loquitur* doctrine. The court of civil appeals concluded that this was reversible error, holding that separate issues should have been submitted for the purpose of ascertaining if the requirements for the application of the doctrine were found to be satisfied.\(^5\)\(^6\) This question has always haunted me, and it would seem to be theoretically sound, especially in the absence of rebuttal testimony. But if rebuttal testimony is offered, then a third issue on whether or not in the particular case defendant was negligent would be required, in most, if not in all cases. The supreme court held that the better practice, at least in the great majority of cases, would be to submit only the ultimate negligence issue and the court added: “We therefore conclude that the method of submitting *res ipsa loquitur* cases formulated by the court of civil appeals is not a required or even a proper method of submission.”\(^5\)\(^7\) The court also suggested that an explanatory instruction about proof of negligence by proving the satisfaction of the requirements for the *res ipsa loquitur* doctrine would often be helpful and is permissible.\(^5\)\(^8\)

Finally, the court commented on the situation where the plaintiff pleads both *res ipsa loquitur* and specific acts of negligence and then at the trial introduces evidence sufficient to justify a finding of negligence on both bases. This course of action will continue to be permitted but the court disapproves the practice heretofore followed of submitting negligence to the jury both on specific grounds and on a general issue of negligence. Such a practice constitutes a double submission of the same issues and is erroneous although the error may not be a reversible one. The proper method is to submit a general issue of negligence embracing the entire range of possible negligent acts.\(^5\)\(^9\)

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56. Mobil Chem. Co. v. Bell, 502 S.W.2d 564, 567 (Tex. Civ. App.—Beaumont 1973). The court said, “We have found no Texas cases which decide who makes the determination of the essentials of *res ipsa.* We know of no reason why these elements should not be made by the finder of facts.”

57. 517 S.W.2d at 253.

58. The suggested instruction was as follows:
You are instructed that you may infer negligence by a party but are not compelled to do so, if you find that the character of the accident is such that it would ordinarily not happen in the absence of negligence and if you find that the instrumentality causing the accident was under the management and control of the party at the time the negligence, if any, causing the accident probably occurred.

*Id.* at 256.

59. *Id.* at 256-57.