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THE TEXAS POLITICS OF TODAY'S PRODUCTS LIABILITY

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Politics, it is said, is the art of making the impossible possible, and here in the Lone Star State, "politics" in the field of products liability law is no exception. Texas, like other states, has been literally besieged by the well-recognized "politics" disease called "consumeritis," engendered in part by the almost universal distaste for the corporate establishment and by the widespread dissatisfaction with day-to-day politics of government. There has been a dynamic movement in the field of products liability because everyone is a consumer, and, therefore, everyone theoretically can suffer personal injury or property damage or economic loss from the use of the consumer product. It is good "politics" to be on the side of motherhood, against sin, and in the fight *for* the consumer! Underlying this "politics" disease of "consumeritis" are three basic "un-principles" (as in *Alice in Wonderland*) which infest and infect the practice of products liability law today:

(1) "Injury begets liability," *i.e.*, all is deductive reasoning;
(2) a trial judge is a mere conduit to insure that cases go to juries; and
(3) the only guideline is the Robin Hood syndrome or the "deep pocket" theory, *i.e.*, he who can afford to pay should pay willingly.

The first "un-principle" that deductive reasoning is always applicable to the products liability situation, *i.e.*, a given injury begets liability, is a cynical reminder that every injury, damage or loss is entitled to compensation, regardless of fault. I am reminded of the story of the little boy who at Christmas time found underneath his Christmas tree a bucket containing defecatory matter; whereupon he jumped with joy and shouted, "Daddy must have bought me a pony for Christmas!" Plaintiffs' lawyers are pleased to find a personal injury or substantial property damage or even economic loss, the more serious the better. These advocates make little, if any, inquiry as to the cause or the circumstances of the injury, damage or loss; they are not inter-

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ested in whether the potential defendant was at fault or in any way responsible. They do not want to be confused by the facts. They prefer simply to deduce from the injury that some product must be at fault and that somebody must have caused the client's injury, damage or loss. The result is a flood of lawsuits and the crowding of our court calendars beyond belief! Serve a summons first, and then challenge the court not to find liability against the consumer product. A good Texas example of plaintiff's *deductive* reasoning (which did NOT succeed) is found in *Muncy v. General Motors Corp.*[1] The plaintiff, a pedestrian, was injured after being *hit* by a "parked" Chevrolet automobile. According to the evidence, the owner of the automobile had removed the key from the ignition, left the ignition switch in the "on" position with the motor running, but had not set the brakes; an occupant of the car accidentally stepped on the accelerator causing the car to jumb the curb and run into the plaintiff. Suit was brought not against the tortfeasor but against the automobile manufacturer alleging negligence in design of the ignition switch, to wit: the key could be withdrawn while the motor was running. The tortious act of the occupant of the car was of no concern to the plaintiff nor to his attorney. Fortunately, the district court for Dallas County found "no bona fide cause of action" against the automobile manufacturer, and the Texas court of civil appeals affirmed.[2] But the injured pedestrian then filed in the federal court, and after a mistrial, succeeded in recovering $225,000. Defendant General Motors appealed, and the Court of Appeals for the Fifth Circuit reversed and remanded with instructions to enter a directed verdict for defendant, holding that the Texas courts had previously stated the "principles of determining liability," to wit, "[t]he fact of an accident does not prove nor create a presumption of negligence" and "[w]here . . . the accident may have resulted from one of several causes, for some of which the appealing defendant was not responsible, a verdict against such defendant is based upon speculation and conjecture and cannot stand."[3] Here injury did not beget liability, although plaintiff tried hard. The impossible was not made possible as plaintiff's deductive logic was repudiated.

On the lighter side is the Illinois case of *Holden v. Kayser Roth*

1. 357 S.W.2d 430 (Tex. Civ. App.—Dallas 1962, no writ).
2. *Id.*
3. General Motors Corp. v. Muncy, 367 F.2d 493 (5th Cir. 1963), *cert. denied,* 386 U.S. 1037 (1967).

Corp.[4] Here the female plaintiff purchased a bathing suit and then proceeded to claim damages for humiliation. She argued that when the bathing suit became wet she was exposed to view! The issue presented to the court—Was there a prima facie *showing* that the plaintiff was exposed to view? She testified that she wore the bathing suit for the first time at a "family night," and was told by her daughter that she (the daughter) could see through the bathing suit. The plaintiff recited her psychic injuries in these words: "Every time we are out in a group or gathering, or a picnic, or something, the subject is always brought up. (They say), 'Let's turn a hose on Evelyn,' or 'let's throw her in the water and see what kind of a bathing suit she has on.' " Plaintiff offered expert testimony, consisting of four photographs of a professional model wearing that bathing suit, three wet and one dry. But, the court, after observing the photographs, stated that they "completely fail to support plaintiff's contention." Indeed, there was no defect in the product. The defect may have been in the person. Defendant's counsel, as did the court, treated the case as one of little or no exposure!

The second "un-principle" involves weak-kneed trial judges who conceive their role as simple conduits "without filtration," so that every question and every bit of evidence is construed as "factual," and therefore goes to the jury. Weak-kneed judges refuse under any circumstance to entertain a motion to dismiss or a defendant's motion for summary judgment. Furthermore, there is no need to expedite a case until plaintiff has exhausted himself in (a) extensive and intensive (and generally immaterial) discovery procedures; (b) completely nonsensical interrogatories; and (c) amendment after amendment of the complaint. Weak-kneed trial judges sleep well and seldom encounter the nightmare of reversal by the appellate courts whose experience is similarly soporific. As mere conduits these weak-kneed judges are, at most, legal paraprofessionals deserving little further consideration.

The third "un-principle," the Robin Hood syndrome, can best be described in terms of paternalistic experimentation with another person's money. Too many courts look only to the size and the depth of the pocket of the defendant, contending that the "deepest pocket" must compensate the plaintiff for the pain and suffering, property damage or economic loss, attributed to the product, regardless of liability, or

4. 235 N.E.2d 426, 427 (Ill. Ct. App. 1968).

fault, or even an honorable reckoning of the amount of damages. *Rumsey v. Freeway Manor Minimax*[5] is a good example of a Texas court struggling to do its brand of social justice in accord with the Robin Hood syndrome by placing the financial responsibility upon the party best able to pay. The very tragedy of this case involving an infant elicited sympathy, but at the expense of the product manufacturer. The infant at home ingested some roach poison, the container of which was labeled in three places "Poison" and had a red skull and crossbones. In addition, the labeling contained the following:

> Give a tablespoon of salt in a glass of warm water and repeat until vomit fluid is clear. Have victim lie down and keep warm. Call a physician immediately! Warning: Cumulative Poison. Absorbed through the skin. Do not get in eyes, on skin or on clothing. Wash thoroughly after handling. Keep children and domestic animals away from baited areas and burn all pests killed.

The parents of the fatally poisoned child argued that the above labeling was inadequate because it did not state that there was no specific antidote for the poisoning. The Texas court of civil appeals agreed that the first aid instructions failed to warn there was nothing that could be done once the child ingested the poison. The court therefore castigated the product manufacturer for failing "to fully disclose the extent of the danger . . . and [failing] to disclose the measures that may be taken to avoid fatal consequences . . . ."[6] The court distinguished between first aid treatment, which the label recited, and a specific antidote to counteract the effects of the posion, which was not recited. The court reasoned: "If ingestion is discovered before absorption, first aid may suffice, but if not then an antidote is necessary. If there is no antidote, nothing can be done. It is to be foreseen that a child may get the poison, take some of it and such will not be known until absorption by the system . . . ."[7] The fact that the product manufacturer had complied with all federal and state statutes regarding the marketing and labeling of the insecticide was insufficient because, said the court, there is a common law duty to warn the user which transcends specific statutes. Even the infant's mother was found *not* guilty of negligence because it did not appear that "she knew or should have known there was no specific antidote."[8] (Apparently

5. 423 S.W.2d 387 (Tex. Civ. App.—Houston [1st Dist.] 1968, no writ).
6. *Id.* at 393.
7. *Id.* at 393.
8. *Id.* at 394.

she had no duty to protect her infant either!) Perhaps with tongue in cheek, the court concluded: "[E]ven though poison is known to the ordinary person to be inherently dangerous, there is a common law duty to warn of the full extent of the danger . . . ."[9] In other words, a reasonably prudent ordinary person (such as the infant's mother?), reading the label on the insecticide, might conclude that there was an antidote, and therefore she should not worry about the health of her child. But a "poison" is still a poison, *i.e.*, a substance that, being in the blood or acting chemically on the blood, either destroys life or impairs seriously the functions of one or more of the organs of the body. The Texas court of civil appeals, therefore found the "deepest pocket," and reasoned that the product manufacturer should have explained in its labeling what a poison is. Interestingly, even Professor Page Keeton agreed that "[n]othing was specifically said in the case about the necessity for a finding that an adequate warning would have prevented the injury."[10] Professor Keeton properly asked:

> Should causal relation be presumed as a matter of law? If not, should there be a rebuttable presumption? If not, should the issue be submitted to the jury without any evidence introduced bearing on the question? Or, finally, must the claimant introduce evidence of some kind to show a warning of the proper kind would have been heeded and would have prevented the harm?[11]

Perhaps it is a "melancholy season," to use the words of the late President Lyndon B. Johnson, in an address delivered on September 16, 1972 at the Scott & White Clinic in Temple, Texas:

> We no longer see the blooming flowers for we are searching for the litter. We no longer celebrate the many fresh triumphs of justice for we are lingering over the residue of yesterday's shortcomings. We no longer measure the miles we have come toward a more humane, civil and peaceful world for we are too busy calibrating the remaining inches of times we are trying to escape and leave behind.

And, may I add, we no longer address ourselves to fault as the basis for liability; we are content to dissipate the rule of reason in favor of compensating everyone for injury, damage, or loss allegedly attributed to a consumer product.

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9. *Id.* at 393.
10. Keeton, *Torts, Annual Survey of Texas Law,* 23 Sw. L.J. 1, 4 (1969).
11. *Id.* at 4.

The most popular vehicle for executing this paternalistic doctrine of the "deepest pocket," giving credence to this deductive reasoning that injury begets liability, and sanctioning the role of weak-kneed judges is the relatively new doctrine of strict liability in tort. The development of the strict liability in tort concept encompasses a relatively short 13-year period, perhaps initiated in New Jersey by *Henningsen v. Bloomfield Motors, Inc.*,[12] involving automobile liability. The doctrine was born out of an illegitimate marriage between tort and contract with the result that it soon spread its tentacles over every aspect of liability law. An automobile collision with resulting personal injuries formerly involved a suit against the tortfeasor, but today the culprit is not the other driver, but the automobile manufactuer who *must* have produced a defective vehicle. Indeed, why sue the real tortfeasor when there is a better target defendant, a large corporation. Perhaps the braking system of one vehicle was defective; perhaps the windshield wiper, the overall design of the car, or even the ashtray was at fault. Professor Page Keeton provided the rationale:

> Theories of strict liability for defective products have been based largely on the argument that the maker-enterpriser has the capacity, or at least normally has the capacity, to accept this kind of legal responsibility without hardship because of his ability to distribute as a cost of doing business the losses of the few to the many who purchase his products. The retailer's strict liability has been based on the notion that he is in a better position than the consumer to recover against the maker, whose liability should be primary and ultimate.[13]

But Mr. Justice Jefferson of the California superior court brushed aside that approach with these pragmatic words: "It was not until after the accident . . . that Mr. Drummond, upon reading and studying certain materials such as Ralph Nader's book 'Unsafe at Any Speed' and getting the opinion of others, formed an opinion and came to the conclusion that the automobile was dangerous and defective for the average driver. No such opinion resulted from his own experience of driving the car for four months."[14] Judge Osborn of the Kentucky Court of Appeals described the strict liability doctrine as "another step down the path of socializing losses . . . . The pseudo-legal jargon in

12. 161 A.2d 69 (N.J. 1960). Note that the New Jersey Supreme Court expressed second thoughts on the doctrine, as evidenced by its 1965 pronouncement that contributory negligence is a valid defense. Maiorino v. Weco Products Co., 214 A.2d 18 (N.J. 1965).

13. Keeton, *Torts, Annual Survey of Texas Law*, 23 SW. L.J. 1, 2 (1969).

14. Drummond v. General Motors Corp., CCH 1966 PRODUCTS LIAB. REP. ¶ 5611.

which the opinion is couched is so vaporous that to attempt to attack it with legal principles would be like fighting the ocean with a sieve. [W]e should clear the air and call the movement what it is—social engineering to socialize losses . . . ."[15]

Fortunately, the Texas variety of strict liability cases has been generally sensible and even pragmatic,[16] as perhaps is best illustrated by the *Helene Curtis Industries, Inc. v. Pruitt*,[17] *Proctor & Gamble Manufacturing Co. v. Langley*,[18] and *Barbee v. Rogers*[19] cases.[20] In *Pruitt*,

15. Post v. American Cleaning Equip. Corp., 437 S.W.2d 516, 523 (Ky. 1968) (dissenting opinion).

16. Texas decisions on the applicability of the strict liability in tort doctrine run the gamut. In *Texsun Feed Yards, Inc. v. Ralston Purina Co.*, 447 F.2d 660 (5th Cir. 1971), the court refused to apply the doctrine under Texas law to economic losses. Damages were sought because a particular cattle feed supplement had not increased the weight of cattle. Similarly, strict liability was not applicable against a hospital which did not manufacture nor distribute the product. Shivers v. Good Shepherd Hosp., 417 S.W.2d 104 (Tex. Civ. App.—Tyler 1968, writ ref'd n.r.e.). In Freitas v. Twin City Fisherman's Co-op. Ass'n, 452 S.W.2d 931 (Tex. Civ. App.—Corpus Christi 1970, writ ref'd n.r.e.) the defendant was deemed a nonseller, not in the business of selling tanks, ladders, and platforms, and therefore not strictly liable for the property damage. *Cf.* O.M. Franklin Serum Co. v. C.A. Hoover & Son, 410 S.W.2d 272 (Tex. Civ. App.—Amarillo), *aff'd*, 418 S.W.2d 482 (Tex. Sup. 1967). The doctrine of strict liability is not applicable to economic loss cases. Melody Home Mfg. Co. v. Morrison, 455 S.W.2d 825 (Tex. Civ. App.—Houston [1st Dist.] 1970), *aff'd*, 468 S.W.2d 505 (Tex. Sup. 1971).

On the other hand, strict liability is applicable to admiralty actions. *In re* Alamo Chem. Transp. Co., 320 F. Supp. 631 (S.D. Tex. 1970). In Pizza Inn, Inc. v. Tiffany, 454 S.W.2d 420 (Tex. Civ. App.—Waco 1970, no writ) the doctrine was applied to a personal injury action; it seemed that the pizza dough rolling machine, which had no safety device, caught the purchaser's fingers. Also, in Jacobs v. Technical Chem. Co., 472 S.W.2d 191 (Tex. Civ. App.—Houston [14th Dist.] 1971), *rev'd and remanded*, 480 S.W.2d 602 (Tex. Sup. 1972), the doctrine was deemed applicable to a personal injury situation: a can of freon (itself labelled as packed under pressure) allegedly exploded when the freon was used to charge an automobile air-conditioning unit. The alleged defect was the failure to warn. *See also* Pittsburg Coca-Cola Bottling Works v. Ponder, 443 S.W.2d 546 (Tex. Sup. 1969).

17. 385 F.2d 841 (5th Cir. 1967), *cert. denied*, 391 U.S. 913 (1968). The court favorably cited Freedman, *"Defect" in the Product: The Necessary Basis for Products Liability in Tort and in Warranty*, 33 TENN. L. REV. 323 (1966).

18. 422 S.W.2d 773 (Tex. Civ. App.—Dallas 1967, writ dism'd).

19. 425 S.W.2d 342 (Tex. Sup. 1968).

20. On the other hand, the Texas Supreme Court in Darryl v. Ford Motor Co., 440 S.W.2d 630, 633 (Tex. Sup. 1969), after first expressing "neither approval nor disapproval of the expansion of the [strict liability] rule to protect others," nevertheless extended the benefits of the strict liability doctrine under § 402A of the *Restatement (Second) of Torts* to nonusers and nonconsumers, to wit, innocent bystanders. Judge McGee simply expressed "the desire to minimize risks of personal injury and/or property damage." *Id.* at 633. He was of the opinion that "[a] manufacturer who places in commerce a product rendered dangerous to life or limb by reason of some defect is strictly liable in tort to one who sustains injury because of the defective condition." *Id.* at 633. It should be noted that in this case the Texas court of civil appeals had *reversed* the judgment for the plaintiffs because of lack of proof of "defect;" Chief Justice Denton had found the evidence "highly speculative and conjectural." Ford Motor Co. v. Darryl, 432 S.W.2d 569, 572 (Tex. Civ. App.—Amarillo 1968), *rev'd*,

the Court of Appeals for the Fifth Circuit reversed the judgment of the Texas federal district court and rendered judgment for the product manufacturers. The appellee was allegedly injured by an application to her hair (by a close friend) of a mixture of a professional bleach and hydrogen peroxide creme developer. The jury had found that the professional hair bleach mixture was "not suitable and reasonably fit for the purpose," and that such mixture, being "corrosive," was the proximate cause of the injuries. The defendant manufacturers argued, *inter alia*, that (a) the evidence was insufficient *as a matter of law* to establish a *defect* in the mixture of bleach and developer, and (b) appellee was not within the class of persons who could invoke a Texas rule of strict liability. Circuit Judge Thornberry, at the very outset of his 41-page opinion, agreed that "as a matter of law the jury could *not* have rationally inferred that the mixture was defective for its intended use,"[21] and furthermore that "[a]ppellee was without the scope of the duty which the doctrine of strict liability has imposed . . . ."[22] The court declared:

> The mere imposition of strict liability on cosmetics makers does not . . . mean that the maker is liable for any harm to anybody under any circumstances. . . . The maker is not an absolute insurer who is responsible for all physical hurts occurring in the course of using the product.[23]

The court delineated the requirement that the product be *defective* for its intended use, defining "defect" in terms of "unreasonably dangerous to the user or consumer," *i.e.*, "so dangerous that a reasonable man would not sell the product if he *knew* the risks involved."[24] Circuit Judge Thornberry found "NO DIRECT EVIDENCE OF AN *IDENTIFIABLE* DEFECT."[25] Furthermore, "[t]he evidence about

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440 S.W.2d 630 (Tex. Sup. 1969). *See also* Ryan v. Galveston Model Dairy, 473 S.W.2d 536, 538 (Tex. Civ. App.—Houston [14th Dist.] 1971, no writ): "We feel a finding of a defect in the product at the time of delivery by appellee would be based on pure speculation."

21. Helene Curtis Indus., Inc. v. Pruitt, 385 F.2d 841, 847 (5th Cir. 1967), *cert. denied*, 391 U.S. 913 (1968) (emphasis added).

22. *Id.* at 849.

23. *Id.* at 849. On the nature of the *allergic response*, Judge Thornberry ruled that "an allergic plaintiff cannot invoke strict liability," *citing* Merrill v. Beaute Vues Corp., 235 F.2d 893 (10th Cir. 1956), and concluded that appellee has *not* established "any rational basis for excluding the possibility of a hypersensitive reaction." *Id.* at 858.

24. *Id.* at 849, 850.

25. *Id.* at 851 (emphasis added). The court characterized the mixture of Helene Curtis New Blue Bleach and L'Oreal Creme Developer as an "illegal mixture," because it was contrary to the instructions accompanying both products of both manufacturers. Specifically, the labeling on the Helene Curtis product stated: "Do not mix Helene Curtis New Blue Bleach with anything except Helene Curtis Creme De-

the character of the mixture and its propensities for harm does not suggest a defect."[26]

The opinion also included an in-depth discussion of the social and economic aspects of the doctrine of strict liability,[27] concluding that

veloper (or a good grade of fresh 20 volume hydrogen peroxide)." The court regarded this representation as more than mere advertising puffery, for the court discussed the importance of proper and compatible viscosities when the bleach was mixed with an incompatible creme developer. Since the ingredients in the L'Oreal Creme Developer were admittedly a trade secret (and since this product was recommended only for use with L'Oreal products), the court reasoned that there could be additional ingredients in the L'Oreal Creme Developer which would not satisfy the viscosity requirement of the Helene Curtis bleach. Professional beauticians would obviously not have combined or mixed these two products, particularly in face of the clear-cut warnings, according to the court. Having found that the particular bleaches and creme developer "were never meant to be used together," the court concluded: "[t]he mixing of these products amounted to an abnormal handling or substantial alteration which, because it was unintended and unforeseen, excuses the makers from responsibility for any harm." *Id.* at 856. The court strengthened its conclusion by pointing out that "instructions accompanying cosmetics are an integral part of the warranty and are to be strictly followed." *Id.* at 856, *citing* E.I. Du Pont De Nemours & Co. v. Baridon, 73 F.2d 26 (8th Cir. 1934). Noting that a bleaching product "has the inherent danger of burning the scalp or hair if misapplied in any way," *i.e.*, contrary to the instructions accompanying the product, the court emphasized that the bleaching mixtures, which carried a "For Professional Use Only" label, were "intended to be used by a professional beautician," and were not over-the-counter products, and therefore appellee was *not* "the intended user." "A maker is liable only to those whom it can reasonably expect to use its product," and "a product cannot be deemed defective if proper application would eliminate the possible dangers." *Id.* at 857. The "professional" nature of the bleaching product was a very important criterion in the mind of the court, as evidenced by its comment that the professional beautician's conception of the professional application was "far different from the picture drawn by Mrs. Hendren of two friends reading the directions from only the Helene package and drinking iced tea as the solution was applied." *Id.* at 857. Specifically, the court cited these aspects of the professional bleaching application (which appellee had omitted): (1) constant survey of hair to detect burning; (2) strand testing every 5 minutes; (3) on virgin head, solution should have been removed and new application made before being applied next to scalp; and (4) cotton-packed about ears to prevent the mixture from touching ears. *Id.* at 857. (The "patch test," cited by the court, was, however, unnecessary, except for a virgin head.) These "additional safety precautions" were *expected* by the product manufacturer, who has "the right to expect that his product will be used in the normal and customary fashion," to wit, by professional users as professional products. The manufacturer "could only foresee that they would be applied by a trained beautician. Therefore, the directions had to be adequate only for the professional's use." *Id.* at 858.

26. *Id.* at 853. The court minimized both plaintiff's "medical evidence," and the testimony of plaintiff's expert witness (a beauty school teacher who disapproved of any and all *home* permanent treatments), and believed, "that in this instance a finding of a defect was unwarranted." *See also* Proctor & Gamble Mfg. Co. v. Langley, 422 S.W.2d 773, 778 (Tex. Civ. App.—Dallas 1967, writ dism'd) where the court was "convinced that the jury's finding as to unmerchantability and unfitness is so contrary to the great weight and preponderance of the credible testimony as to be manifestly wrong."

27. The court stated:

> Confining the makers' responsibility to harm incurred by use of the products in a beauty shop is not a revival of the doctrine of privity of contract. It is simply an

the imposition of strict liability herein "would be an undue impediment to business and an intolerable injustice."

Misuse of a product is a recognized defense to strict liability, as illustrated by *Proctor & Gamble Manufacturing Co. v. Langley.*[28] Here the Texas court of civil appeals reversed a $5,550 judgment for plaintiff and rendered judgment for the defendants. Plaintiff had purchased a home permanent wave kit, and upon applying the product to her hair allegedly sustained hair breakage. Action for breach of *implied* warranties against the product manufacturer, the wholesaler, and the retail vendor resulted in a Dallas County jury finding in favor of the plaintiff, although the jury had found that the plaintiff (a) "failed to make a 10 minute test curl to see if her hair could take a wave before applying the product;" (b) "after her hair felt sticky and gummy, she failed to use liquid neutralizer at once;" and (c) "she waved more hair after feeling strands of hair which were sticky and gummy."[29] The *aforesaid* acts were clearly contrary to the instructions accompanying the product, but the jury inexplicably did not regard her acts as "negligent." Chief Justice Dixon, who carefully examined the testimony of the plaintiff, concluded that she had indeed failed to

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attempt to confine the scope of liability to the zone of danger which could reasonably have been foreseen before these products were sold. Even the decisions which give the broadest definitions of the intended-use doctrine do not go as far as Appellee urges. The decisions have expanded the doctrine of intended use to include the environment in which the product is used and the incidental and attendant consequences that accompany normal use. The environment of the products in this case is a beauty shop. Their attendant use and incidental consequences do not include resale by the beauty shop, a mixture contrary to directions, and application by a novice. The risk created by this resale was neither the kind which the product was likely to create, nor inherent in proper use. Any other holding would twist the doctrine of foreseeability of harm into that degree of clairvoyance which hindsight alone can give. Moreover, were we to bridge the gap between the present decisions and the instant situation, we could no longer say that manufacturers are not absolute insurers for all physical harm which occurs during use of the product. The judicial doctrine of strict liability was not created to sanction such results.

Helene Curtis Indus., Inc. v. Pruitt, 385 F.2d 841, 863 (5th Cir. 1967) (citations omitted). The court also ruled that the res ipsa loquitur doctrine was *not* applicable, pointing out the plaintiff must first prove (a) the accident would not ordinarily have occurred without the presence of negligence; (b) the product was properly handled after it left the maker's possession; (c) the product was not substantially altered after leaving the maker's control; and (d) exclusion of these other causes by a preponderance of the evidence. *Id.* at 853. The court concluded that the alleged injuries could have been caused by (1) the method of application, or (2) an allergic condition, both of which factors "do *not* point an accusing finger at the manufacturer." *Id.* at 854 (emphasis added).

28. 422 S.W.2d 773 (Tex. Civ. App.—Dallas 1967, writ dism'd). *See also* McDevitt v. Standard Oil Co., 391 F.2d 364 (5th Cir. 1968).

29. Proctor & Gamble Mfg. Co. v. Langley, 422 S.W.2d 773, 774 (Tex. Civ. App.—Dallas 1967, writ dism'd).

follow and had violated the above instructions. Furthermore, "Mrs. Langley did not keep or save any of the hair waving products which she claims in this instance damaged her hair. She disposed of them by throwing them away without having an analysis of them made."[30] The court concluded "there was not and could not be any direct testimony that the particular products she purchased were in any way defective or harmful if properly used. Neither do the circumstances constitute evidence to that effect."[31] Accordingly, her MISUSE of the product "constitutes a defense to her cause of action."

In the *Barbee* case the Texas Supreme Court answered the following question in the negative: "[W]hether the doctrine of strict liability, which is tortious and not contractual, will be extended to the prescription, fitting, and sale of contact lenses under the circumstances here shown?"[32] The court found:

> [T]he rule of strict liability is inapplicable. Respondents and the licensed optometrists in their employ exercise skill and judgment in the examination, prescription and fitting process whereby it is sought to remedy visual abnormalities by the use of curved lenses or prisms. The failure here is not attributable to the product itself, i.e., the contact lenses, but to the professional and statutorily authorized act of "measuring the powers of vision" of Petitioner's eyes and "fitting lenses . . . to correct or remedy . . . [his] defect or abnormal condition of vision." This is not the act of one selling a "product in a defective condition unreasonably dangerous to the user" in the terms of the Torts Restatement. It is the act of one deemed in law to have the competence to remedy a visual defect by furnishing particularly prescribed contact lenses.[33]

The defenses to strict liability generally include such tortious defenses as contributory negligence and assumption of the risk, although the Texas Supreme Court handed down a confusing decision in which "contributory negligence" was held *not* to be a defense to an action

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30. *Id.* at 775.

31. *Id.* at 777.

32. Barbee v. Rogers, 425 S.W.2d 342, 344 (Tex. Sup. 1968).

> Apart, then, from Respondent's way of practicing optometry, the fact remains that the contact lenses sold to Petitioner were designed in the light of his particular physical requirements and to meet his particular needs. Presumably, and insofar as this record shows, they were not in existence when Petitioner sought the services of Respondents. They were not a finished product offered to the general public in regular channels of trade. The considerations supporting the rule of strict liability are not present.

Id. at 346.

33. *Id.* at 346.

based upon strict liability,[34] but "assumption of the risk" was a proper defense to an action based upon strict liability. The court noted that the trial jury had found that the minor plaintiff was contributorily negligent in directing his brother to pour kerosene adulterated with gasoline upon a smoldering stick which he had taken from an incinerator and placed in a toy truck. The court also was aware of the jury's determination that such contributory negligence was the proximate cause of the injuries sustained by the minor plaintiff as a result of the explosion which took place. Nevertheless, the Texas Supreme Court was obsessed with the issue as to whether or not the minor plaintiff knew and appreciated the extent of the dangers in the use that he made of adulterated kerosene and therefore held that the evidence did not disclose whether or not the minor plaintiff knew and appreciated the danger. Accordingly, it ruled that the minor plaintiff could not have assumed the risk, and thus his contributory negligence did not bar recovery. In essence, the Texas Supreme Court made a distinction without a difference.[35] It viewed "contributory negligence" as *not* a defense to strict liability in such terms as these: plaintiff's failure to discover the defect or the unsafe condition did not bar recovery; plain-

34. Shamrock Fuel & Oil Sales Co. v. Tunks, 416 S.W.2d 779 (Tex. Sup. 1967); *see* McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787 (Tex. Sup. 1967). Contributory negligence [*i.e.*, failure to discover the defect or guard against the possibility of its existence] was deemed *not* to be a valid defense to breach of implied warranty, which is "clearly grounded in tort." *Id.* at 790. The Texas Supreme Court then echoed what it decided in the *Tunks* case:

> Based upon such assumpion, we may conclude that the jury's finding upon the contributory negligence issue would bar a recovery based upon negligence. It does not, however, bar a recovery based upon strict liability which is not based upon negligence. Torts Restatement, § 402A, Comment (n).
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> . . . This species of contributory negligence is not a defense to strict liability.

Id. at 792.

35. In the April 27, 28, 1967 issues of the *New York Bar Journal*, my article entitled *Contributory Negligence and/or Assumption of the Risk: Tort Defenses to Breach of Warranty* [Or, How a Cigarette Manufacturer Had its Hands Tied!] criticized, in no uncertain terms, such a distinction without a difference. While it is true that the article dealt with tort defenses to breach of warranty, there can be little doubt that the strict liability doctrine is in reality an "implied warranty imposed by law," and if tort defenses are applicable to breach of warranty, such tort defenses are equally applicable to strict liability in tort. This article analyzed several facets as constituting valid defenses whether or not described as "contributory negligence" or "assumption of the risk:" (1) *Misuse of the product, i.e.*, product was used in a manner differing from that intended or different from that recommended; in Greeno v. Clark Equip. Co., 237 F. Supp. 427, 429 (N.D. Ind. 1965) it was held that "[m]isuse would include much conduct otherwise labeled contributory negligence and would constitute a defense" (under the doctrine of strict liability); (2) *Knowledge of the defect in the product, i.e.*, the plaintiff consumer should have discovered the patent or obvious defect in the product and not used the product, or having knowledge of the latent defect should not have used it; (3) *Deliberate exposure to known danger*; and (4) *Careless use of product.*

tiff's failure to guard against the possibility of a defect or unsafe condition did not bar recovery; plaintiff's failure to act as a reasonable, prudent person did not bar recovery; or plaintiff's failure to foresee that kerosene had a dangerously low flash point did not bar recovery. On the other hand, the court was willing to recognize "assumption of the risk" as a valid defense to strict liability in such terms as these: if plaintiff deliberately and unreasonably proceeded to encounter a known danger, recovery was barred; if plaintiff failed to exercise due care after learning of the danger, then recovery was barred; and if plaintiff voluntarily exposed himself to a known risk or danger, recovery was barred. Another illustration sharpens the issue: if a product user fails to read and follow the instructions accompanying a product and is injured thereby, the Texas court would deem this to be contributory negligence and hence *not* a defense to strict liability. On the other hand, if the same user read the instructions and voluntarily refuses to follow them and is so injured, the Texas court deems this to be an assumption of the risk and a valid defense for the product manufacturer. In other words, the Texas court has placed a premium upon ignorance, in the sense that if the user does *not* read the instructions and uses the product contrary thereto, she may recover; but if she reads the instructions and ignores them, she is deemed to have voluntarily exposed herself to a known risk and therefore her cause of action in strict liability is barred.[36] In *Ross v. Upright, Inc.*,[37] Judge Wisdom comments upon these 1967 decisions of the Texas Supreme Court[38] and cites favorably the 1968 Court of Appeals for the Fifth Circuit case, *McDevitt v. Standard Oil Co.*,[39] in which it was stated:

36. A California case, Hutchinson v. Revlon Corp., 65 Cal. Rptr. 81 (Dist. Ct. App. 1967), further illustrates how ridiculous this alleged distinction between contributory negligence and assumption of the risk really is. Here the plaintiff contracted a severe dermatitis under her breasts after using Revlon Hi and Dri underarm deodorant. According to the court, the plaintiff used the product beneath her "large pendulous breasts which rested against her body preventing evaporation of perspiration." *Id.* at 82. The evidence revealed that, although this underarm deodorant did not in its labelling specifically restrict its use to the underarm area, it was clear from plaintiff's testimony that she never read the label. *Id.* at 86. Nevertheless, the California court found a defect in the product, to wit, defendant's failure to warn a stupid plaintiff that underarm deodorants are *not* to be used under the breasts. Thus, a stupid plaintiff who did not read the label was *not* guilty of contributory negligence. Arguendo, if she had acted like a reasonable person, the court might have ruled that she assumed the risk by applying an underarm deodorant to the areas under her breasts, and thus was barred from recovery. The California court held that "[t]he very defect in a warning may lie in its failure to call attention to itself." *Id.* at 86.

37. 402 F.2d 943 (5th Cir. 1968).

38. *See* the discussion in notes 25 and 26 above.

39. 391 F.2d 364 (5th Cir. 1968); *cf.* Pizza Inn, Inc. v. Tiffany, 454 S.W.2d 420 (Tex. Civ. App.—Waco 1970, no writ).

> It is evident from these two decisions that the Supreme Court of Texas did *NOT* decide that contributory negligence is *never* a defense to a strict liability action, but limited its holding to the principle that one who is contributorily negligent in failing to discover a defect in a product is *NOT* barred from recovery. The question of whether that species of contributory negligence variously referred to as "misuse," "improper use," "voluntarily proceeding to encounter a known risk" or any other of the myriad synonyms used by various courts and writers constitutes *defensive* matter to such an action was expressly left open.[40]
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> . . . .
>
> [But] MISUSE does constitute a defense to a strict liability action in Texas . . . .[42]

In the *McDevitt* case the court had found that the injured plaintiff purchased tires of *improper* size for his station wagon, although the dealer and auto manufacturer had furnished him with instructions as to the proper size of the tires. Therefore, MISUSE of the product was clearly the proximate cause of the injuries, and the defense to strict liability was controlling.

The Texas "politics" of products liability can be summed up by the recognition that strict liability does not mean absolute liability, and the product manufacturer does have substantial defenses available to him. The question is whether Texas is prepared to hold the line against obfuscation of the legal concepts inherent in the rule of law and in favor of the predication that liability must be based upon fault. Hopefully "politics" in the Texas products liability situation will remain respectful of the rights (and the responsibilities) of others.

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40. McDevitt v. Standard Oil Co., 391 F.2d 364, 369 (5th Cir. 1968) (emphasis added).

41. *Id.* at 370 (emphasis added).