St. Mary's Law Journal

Volume 9 | Number 2 Article 4

6-1-2022

An Analysis of Products Liability Defenses in the Aftermath of Hopkins.

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AN ANALYSIS OF PRODUCTS LIABILITY DEFENSES IN THE AFTERMATH OF *HOPKINS*

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The law of products liability is an outgrowth of the technological revolution and the modern marketing practices of the twentieth century. It is a field characterized by dynamism as opposed to precedent. Although once predicated upon warranty and negligence, products liability is today in the throes of a transition from warranty and negligence law to strict liability.[1] Nowhere can this transition be more fully appreciated than in an analysis of the defenses applicable to the different theories of recovery.

Just as the field of products liability has undergone many stages in its development, so too have its defenses been continually modified. Most courts have recognized defenses for an action based on negligence which are different from those allowed in a strict liability action. Other courts have failed to draw this distinction.[2] Thus, in this transitory stage, products liability actions continue to yield inconsistent results. In an effort to resolve this conflict, the Supreme Court of Texas recently addressed the scope of one of the defenses, that of misuse, in *General Motors Corp. v. Hopkins*.[3] In order to

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1. Most products liability cases will be based upon negligence or strict liability because a warranty approach generally does not lend itself to a case based upon personal injury. *See* Hall v. Chrysler Corp., 526 F.2d 350, 352-53 (5th Cir. 1976)(plaintiff's recovery under strict liability, but assembler entitled to recover from supplier of parts under warranty theory); McKee v. Brunswick Corp., 354 F.2d 577, 583-84 (7th Cir. 1965)(recovery predicated on warranty, but court stated that plaintiff could also have recovered under strict liability); Keeton, *Product Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30, 36-37 (1973).

2. *Compare* Farley v. M M Cattle Co., 529 S.W.2d 751, 758 (Tex. 1975)(assumption of risk distinguished from contributory negligence), *and* Henderson v. Ford Motor Co., 519 S.W.2d 87, 90 (Tex. 1974)(assumption of risk distinguished from contributory negligence), *with* Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1108 (5th Cir. 1973)(contributory negligence equated with assumption of risk).

3. 548 S.W.2d 344 (Tex. 1977). The *Hopkins* decision involved the misuse and modification of a carburetor on an automobile manufactured by General Motors Corporation. The plaintiff had removed the General Motors carburetor and installed a carburetor made by another manufacturer. After having some difficulty with the new carburetor, the plaintiff later reinstalled the General Motors carburetor using a technique and parts not approved by General Motors. The jury found the original product to be defective and found the defect to be a producing cause of the injuries incurred. The jury also determined that the plaintiff had misused the carburetor and automobile and held that this misuse was, likewise, a producing cause. The trial court disregarded the jury findings relative to misuse and found in favor of

structure its innovative position on misuse,[4] the court addressed other related subjects clarifying the causation issue and questioning, in dictum, the viability of "state of the art" as a defense.[5] Although the *Hopkins* decision certainly did not complete the transition to strict liability, and in fact, may have raised more questions than it answered, it nevertheless established a definite framework against which the other products liability defenses can be evaluated. In so doing, *Hopkins* has lent some valuable insight into the evolving law of products liability. An examination of the applicable defenses, as they presently exist in the aftermath of *Hopkins,* will facilitate an understanding of the direction that products liability law should take in the future.

Some Considerations in Selection of Pleadings in Negligence or Strict Liability

When preparing a products liability case, the practitioner must be cognizant of the legal theories available. Although there are three approaches that may be utilized, in the majority of cases the practitioner will be concerned only with negligence and strict liability.[6] In theory, these approaches are separate and distinct; in practice, however, the distinctions are not as pronounced.[7] Some have attributed this discrepancy to the failure of the bench and bar to appreciate fully the role of strict liability in a products liability case.[8] Whatever the reason, the trial lawyer must recognize the distinctions in order

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the plaintiff. The court of civil appeals affirmed, holding that misuse which is only a concurrent cause of an accident does not, by law, limit the plaintiff's recovery. General Motors Corp. v. Hopkins, 535 S.W.2d 880 (Tex. Civ. App.—Houston [1st Dist.] 1976), *modified,* 548 S.W.2d 344 (Tex. 1977). The supreme court was thus faced with the question whether the plaintiff should recover all, part, or none of his damages. General Motors Corp. v. Hopkins, 548 S.W.2d 344, 349 (Tex. 1977).

4. The court created a pure comparative liability formula where unforeseeable misuse had been shown to be a proximate cause of the damages incurred. General Motors Corp. v. Hopkins, 548 S.W.2d 344, 352 (Tex. 1977).

5. *Id.* at 350-51. The court also discussed "defective design" as it relates to jury charges in a products liability case. *Id.* at 347 n.1.

6. Most products liability cases will be based upon negligence or strict liability because a warranty approach generally does not lend itself to a case based upon personal injury. *See* Keeton, *Product Liability and the Meaning of Defect,* 5 St. Mary's L.J. 30, 36-37 (1973).

7. *See* Signal Oil & Gas Co. v. Universal Oil Prods., 545 S.W.2d 907 (Tex. Civ. App.—Beaumont 1977, writ granted)(jury finding of proximate cause on negligence sufficient to support producing cause element in strict liability without submission of special issue on producing cause).

8. *See* Kronzer & Nichols, *"No Duty" and "Volenti Non Fit Injuria"—Are the Ghosts Really Laid?,* 2 Tex. Trial Law. F. 16 (1976).

to prosecute his suit competently under the present law.

Under the strict liability doctrine, liability is not based on the concept of fault. In the words of Dean Page Keeton, "[t]he plaintiff is no longer required to impugn the maker, but he is required to impugn the product."[9] In order to do this, the plaintiff must establish that the product in question was unreasonably dangerous as marketed by the manufacturer.[10] Strict liability has eliminated the necessity of demonstrating the existence of the manufacturer's negligence and, in so doing, has discarded the concept of foreseeability.[11] In spite of this more lenient burden of proof, the plaintiff's attorney may, nonetheless, opt to plead in negligence or both in negligence and in strict liability. He may thereby avoid a defense available under one of these theories but not the other.

The present state of the law creates a unique situation in which the conduct of the plaintiff, as opposed to that of the defendant, may often dictate the theory which the plaintiff's lawyer will utilize. For example, assumption of the risk is an absolute defense in strict liability[12] but no defense at all in negligence.[13] On the other hand, contributory negligence[14] is at least a partial defense in suits based upon negligence[15] but no defense at all in strict liability.[16] Thus, in cases in which the plaintiff arguably assumed the risk,[17] it would be

9. Keeton, *Product Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30, 33 (1973); *accord, e.g.*, Reyes v. Wyeth Laboratories, 498 F.2d 1264, 1272 (5th Cir.), *cert. denied*, 419 U.S. 1096 (1974); Rourke v. Garza, 530 S.W.2d 794, 798 (Tex. 1975); Crocker v. Winthrop Laboratories, 514 S.W.2d 429, 432 (Tex. 1974).

10. *E.g.*, Reyes v. Wyeth Laboratories, 498 F.2d 1264, 1272 (5th Cir.), *cert. denied*, 419 U.S. 1096 (1974); Helene Curtis Indus., Inc. v. Pruitt, 385 F.2d 841, 851 (5th Cir. 1967), *cert. denied*, 391 U.S. 913 (1968); General Motors Corp. v. Hopkins, 548 S.W.2d 344, 351 (Tex. 1977).

11. General Motors Corp. v. Hopkins, 548 S.W.2d 344, 351 (Tex. 1977); Rourke v. Garza, 530 S.W.2d 794, 798 (Tex. 1975). *But see* Crocker v. Winthrop Laboratories, 514 S.W.2d 429, 432-33 (Tex. 1974) (foreseeable abnormal reaction to drug); Davis v. Gibson Prods. Co., 505 S.W.2d 682, 691 (Tex. Civ. App.—San Antonio 1973, writ ref'd n.r.e.) (foreseeable bystanders).

12. *E.g.*, Henderson v. Ford Motor Co., 519 S.W.2d 87, 90 (Tex. 1974); Shamrock Fuel & Oil Sales Co. v. Tunks, 416 S.W.2d 779, 785 (Tex. 1967); Ethicon, Inc. v. Parten, 520 S.W.2d 527, 532 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ).

13. Farley v. M M Cattle Co., 529 S.W.2d 751, 758 (Tex. 1975).

14. Contributory negligence is used in the sense that the plaintiff's negligence was a concurring proximate cause of the injury rather than the sense that such negligence would completely bar recovery.

15. Farley v. M M Cattle Co., 529 S.W.2d 751, 758 (Tex. 1975); *see* TEX. REV. CIV. STAT. ANN. art. 2212a, § 1 (Supp. 1976-1977) (Comparative Negligence Statute).

16. *E.g.*, Rourke v. Garza, 530 S.W.2d 794, 800 (Tex. 1975); Henderson v. Ford Motor Co., 519 S.W.2d 87, 90 (Tex. 1974); Marshall v. Ranne, 511 S.W.2d 255, 259 (Tex. 1974).

17. Assumption of the risk exists where, (1) the plaintiff voluntarily exposed himself to

preferable to proceed in negligence so as to circumvent the absolute defense of assumption of the risk. In suits in which the facts indicate that the plaintiff was contributorily negligent, however, the plaintiff's lawyer should proceed in strict liability, so that comparative negligence would not reduce or bar recovery.[18]

There are other considerations that the practitioner may wish to consider in choosing a legal theory. One obvious consideration involves the amount of the jury verdict. Evidence designed to impugn the manufacturer tends to result in higher jury verdicts than evidence which merely establishes a defective product.[19] For this reason, a plaintiff, with a strong strict liability case and a weaker negligence case, may choose to proceed under both theories. In doing so, however, the practitioner must be aware that he will be required to refute the defensive issues applicable to both theories. This can be done through the use of limiting instructions and separate jury issues on strict liability and negligence.[20] In contrast, however, where a plaintiff's negligence case is stronger it still might be preferable to proceed under both theories because of the lesser burden of proof in strict liability.

CONTRIBUTORY NEGLIGENCE VERSUS ASSUMPTION OF THE RISK

Contributory Negligence—A Remnant of Negligence Law?

Until such time as the transition from negligence to strict liability is fully realized, contributory negligence will remain a viable de-

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the risk; (2) with knowledge and appreciation of the danger involved; (3) by a free and intelligent choice. Ethicon, Inc. v. Parten, 520 S.W.2d 527, 532 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ); *see* Henderson v. Ford Motor Co., 519 S.W.2d 87, 91 (Tex. 1974); Marshall v. Ranne, 511 S.W.2d 255, 260 (Tex. 1974).

18. An example of contributory negligence that would not amount to assumption of the risk could occur in a situation where a plaintiff negligently failed to discover the defect in a product, failed to guard against the possibility of its existence, or failed to use the degree of care which a prudent person would have used in handling the product. Henderson v. Ford Motor Co., 519 S.W.2d 87, 89 (Tex. 1974)(failure to discover defect in product); General Motors Corp. v. Hopkins, 535 S.W.2d 880, 888 (Tex. Civ. App.—Houston [1st Dist.] 1976), *modified on other grounds*, 548 S.W.2d 344 (Tex. 1977)(failure to use degree of care which prudent person would have used); *see* Helicoid Gage Div. v. Howell, 511 S.W.2d 573, 575-77 (Tex. Civ. App.—Houston [14th Dist.] 1974, writ ref'd n.r.e.)(failure to guard against possibility of existence of defect).

19. For example, in Gonzales v. Caterpillar Tractor Co. the jury rendered a verdict in excess of a quarter of a million dollars. Gonzales v. Caterpillar Tractor Co., Civ. No. 74-CI-9467, Dist. Ct. of Bexar County, 131st Judicial Dist. of Texas, May 12, 1976. Interviews with members of the jury in that case indicate that the jury found it easier to focus on the concept of fault. Interviews with jurors in other cases corroborate this finding.

20. *See* TEX. R. CIV. P. 273, 275, 277.

fense in products liability cases predicated upon negligence.[21] The contributory negligence of the plaintiff is to be measured objectively. Thus the plaintiff is contributorily negligent when his conduct does not conform to that of the reasonable and prudent man.[22] The *Restatement (Second) of Torts* defines contributory negligence as negligence that consists of a failure to discover the defect in the product or to guard against the possibility of the existence of the defect.[23] Thus, simple carelessness on the part of a plaintiff is sufficient to raise the defense of contributory negligence. The Texas Comparative Negligence Act,[24] effective September 1, 1973, governs the defense of contributory negligence in this state. Prior to the adoption of this statute, contributory negligence was a complete defense. Now, under the comparative negligence statute, the negligence of the plaintiff will be compared with that of the defendant, their respective damages assessed, and the liability apportioned.[25] Contributory negligence, under the statute, may nevertheless be a total defense if the negligence of the plaintiff was a proximate cause of more than fifty percent of his injury. Hence, at present, contributory, or more correctly, comparative negligence is at least a partial bar to recovery in a case predicated upon negligence.[26] Contributory negligence is not, however, a defense in a case predicated upon strict liability.[27] "The fact that a consumer does not use a defective product . . . with the same degree of care as a prudent person will not preclude his recovery under the theory of strict liability where the product was defective when supplied."[28] This is true even where the

21. *See* Farley v. M M Cattle Co., 529 S.W.2d 751, 758 (Tex. 1975); Shamrock Fuel & Oil Sales Co. v. Tunks, 406 S.W.2d 483, 489 (Tex. Civ. App.—Houston 1966), *aff'd*, 416 S.W.2d 779 (Tex. 1967).

22. Moody v. City of Galveston, 524 S.W.2d 583, 590 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.); W. PROSSER, LAW OF TORTS § 65, at 419 (4th ed. 1971).

23. RESTATEMENT (SECOND) OF TORTS, § 402A, Comment n at 356 (1965). *See also* Henderson v. Ford Motor Co., 519 S.W.2d 87 (Tex. 1974).

24. TEX. REV. CIV. STAT. ANN. art. 2212a (Supp. 1976-1977).

25. *See id.*

26. *See id.*

27. *E.g.*, Rourke v. Garza, 530 S.W.2d 794, 800 (Tex. 1975); Farley v. M M Cattle Co., 529 S.W.2d 751, 758 (Tex. 1975); Bituminous Cas. Corp. v. Black & Decker Mfg. Co., 518 S.W.2d 868, 875 (Tex. Civ. App.—Dallas 1974, writ ref'd n.r.e.); *see* Feinberg, *The Applicability of a Comparative Negligence Defense in a Strict Products Liability Suit Based on Section 402A of the Restatement of Torts 2d (Can Oil and Water Mix?)*, 42 INS. COUNSEL J. 39, 42 (1975); Sales and Perdue, *The Law of Strict Tort Liability in Texas*, 14 HOUS. L. REV. 1, 63-64 (1977).

28. General Motors Corp. v. Hopkins, 535 S.W.2d 880, 888 (Tex. Civ. App.—Houston [1st Dist.] 1976), *modified on other grounds*, 548 S.W.2d 344 (Tex. 1977).

improper conduct of the user follows a discovery of the defect.[29]

Sometimes both scholars and practitioners tend to overlook contributory negligence as a defense in products liability cases. It should be stressed, therefore, that so long as the negligence theory is recognized in products liability cases, the defense of contributory negligence will remain as critical as the other products liability defenses.[30]

Assumption of the Risk—A Defense to Strict Liability

Assumption of the risk is an absolute defense in a strict liability cause of action.[31] It is not, however, a defense to a cause of action based upon negligence.[32] Assumption of the risk presupposes that one voluntarily encounters a danger of which he has knowledge and appreciation.[33] Thus, these distinct elements must be proven in order for the defendant to assert the defense of assumption of the risk.

Knowledge and Appreciation of the Danger. As a general rule, one's knowledge and appreciation of a dangerous condition or defect are to be measured subjectively: They are to be determined by that particular person's actual conscious knowledge.[34] Hence, in the greater majority of cases "[w]hether an injured person actually knew of the danger is peculiarly within the province of the jury."[35] There are, however, certain situations in which the plaintiff may be charged with knowledge and appreciation as a matter of law.[36] These

29. Henderson v. Ford Motor Co., 519 S.W.2d 87, 89 (Tex. 1974).

30. *See* Farley v. M M Cattle Co., 529 S.W.2d 751, 758 (Tex. 1975); Shamrock Fuel & Oil Sales Co. v. Tunks, 406 S.W.2d 483, 489 (Tex. Civ. App.—Houston 1966), *aff'd*, 416 S.W.2d 779 (Tex. 1967); Kirby Lumber Corp. v. Murphy, 271 S.W.2d 672, 677-78 (Tex. Civ. App.—Beaumont 1954, no writ).

31. *E.g.*, General Motors Corp. v. Hopkins, 548 S.W.2d 344, 351 (Tex. 1977); Rourke v. Garza, 530 S.W.2d 794, 800 (Tex. 1975); Henderson v. Ford Motor Co., 519 S.W.2d 87, 90 (Tex. 1974); Ethicon, Inc. v. Parten, 520 S.W.2d 527, 532 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ). *See also* Polelle, *The Foreseeability Concept and Strict Products Liability: The Odd Couple in Tort Law*, 8 RUT.-CAM. L.J. 101, 129 (1976).

32. Farley v. M M Cattle Co., 529 S.W.2d 751, 758 (Tex. 1975).

33. *E.g.*, General Motors Corp. v. Hopkins, 548 S.W.2d 344, 351 (Tex. 1977); Rourke v. Garza, 530 S.W.2d 794, 800 (Tex. 1975); Henderson v. Ford Motor Co., 519 S.W.2d 87, 91 (Tex. 1974); *see* note 17 *supra*.

34. Massman-Johnson v. Gundolf, 484 S.W.2d 555, 557 (Tex. 1972); Heil Co. v. Grant, 534 S.W.2d 916, 920-21 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.); RESTATEMENT (SECOND) OF TORTS, § 496D, comment c at 575 (1965).

35. Heil Co. v. Grant, 534 S.W.2d 916, 921 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.); *accord*, Hillman-Kelley v. Pittman, 489 S.W.2d 689, 692 (Tex. Civ. App.—El Paso 1972, no writ).

36. *E.g.*, Farley v. M M Cattle Co., 549 S.W.2d 453, 458 (Tex. Civ. App.—Waco 1977,

situations constitute an exception to the general rule and are severely limited. The case of *Heil Co. v. Grant*[37] is one such example. In that case, the court held that an injured person may be charged objectively with knowledge of the danger where it was difficult or impossible to determine his state of mind.[38]

To date, the imposition of constructive knowledge has been limited to latent defects. The Texas Supreme Court held in *Henderson v. Ford Motor Co.*:[39] "No decision has been made by this court to rule the case where the defendant manufacturer should have anticipated that the dangerous design would cause physical harm . . . notwithstanding the plaintiff user's knowledge of the danger."[40] The *Henderson* court did, however, cite authority from other jurisdictions which have refused to implement a volenti defense where the circumstances indicated that the product was obviously dangerous.[41]

There are several policy considerations which discourage the application of the volenti defense in a case involving patent defects. First, the courts of this state have determined that assumption of the risk is a harsh defense that places a great burden on the plaintiff.[42] The extension of volenti to patent defects would allow an absolute bar to recovery irrespective of the extent to which the user's action contributed to the injury. A second and perhaps more important consideration is that the extension of volenti would defeat the fundamental purpose of the theory behind products liability: the creation of an incentive for manufacturers to produce safer prod-

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no writ); Heil Co. v. Grant, 534 S.W.2d 916, 921 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.).

37. 534 S.W.2d 916 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.).

38. *Id.* at 921. The *Heil* case involved a fatal injury.

39. 519 S.W.2d 87 (Tex. 1974).

40. *Id.* at 91. It has been suggested that Rourke v. Garza, 530 S.W.2d 794 (Tex. 1975), applied constructive knowledge and appreciation to a patent defect case. Sales & Perdue, *The Law of Strict Tort Liability in Texas*, 14 HOUS. L. REV. 1, 76 (1977). The court in *Rourke* was not, however, faced with a patent defect. The evidence did not establish that Rourke was aware of the defect, nor did the evidence establish that the defendant manufacturer should have appreciated that the dangerous design would cause physical harm. This is apparent by the jury's refusal to find the manufacturer guilty of negligence. The defect in *Rourke* was latent whether viewed from the user's or manufacturer's standpoint. Rourke v. Garza, 530 S.W.2d 794 (Tex. 1975).

41. Henderson v. Ford Motor Co., 519 S.W.2d 87, 91 (Tex. 1974).

42. *E.g.*, Rabb v. Coleman, 469 S.W.2d 384, 388 (Tex. 1971)(dissenting opinion); Ellis v. Moore, 401 S.W.2d 789, 794 (Tex. 1966); Azores v. Samson, 434 S.W.2d 401, 404 (Tex. Civ. App.—Dallas 1968, no writ).

ucts.[43] Thus, to allow a manufacturer to defend his suit on the basis of having marketed an obviously defective product would be to reject the very policy considerations that gave birth to the law of products liability. The manufacturer of an obviously defective product ought not escape because its product's defect was obvious. The law should discourage misdesign and misconstruction rather than encourage it in its obvious form.[44] Finally, the implementation of the open and obvious doctrine as a defense in products liability would create a hiatus in the law. In the past the position of almost every manufacturer has been that his product was not defective. Under the open and obvious doctrine, the manufacturer would have to elect whether to defend its product as being totally without defect, or prove that its product was so unsafe as to be obviously defective.[45] Because assumption of the risk is an affirmative defense, the burden would thus be on the manufacturer to develop evidence that his product was defective and that the danger was so open and obvious that the plaintiff ought to be charged with knowledge and appreciation as a matter of law. It is suggested that the dangers inherent in this type of defense are indeed open and obvious. The policy considerations thus overwhelmingly favor not expanding the application of the volenti defense.

Voluntary Encounter. The final element of assumption of the risk that the defendant must prove is that the plaintiff *voluntarily* encountered the risk or danger through exercise of a "free and intelligent choice."[46] Texas has departed from the Restatement position in that the reasonableness of the plaintiff's conduct in this state does not per se void the defense of assumption of the risk as the Restatement suggests.[47] Largely because there has been little case

43. Helene Curtis Indus., Inc. v. Pruitt, 385 F.2d 841, 849 (5th Cir. 1967), *cert. denied,* 391 U.S. 913 (1968); Hall v. E.I. DuPont de Nemours & Co., 345 F. Supp. 353, 360 (E.D.N.Y. 1972).

44. Micallef v. Miehle Co., 348 N.E.2d 571, 576-77, 364 N.Y.S.2d 115, 120-21 (1976); Bolm v. Triumph Corp., 305 N.E.2d 769, 773, 350 N.Y.S.2d 644, 650-51 (1973), *cited in* Henderson v. Ford Motor Co., 519 S.W.2d 87, 91 (Tex. 1974); Palmer v. Massey-Ferguson, Inc., 476 P.2d 713, 719 (Wash. Ct. App. 1970).

45. The alternative would be to argue at the outset that there was no defect and later attempt to convince the trier of the facts that the once non-existent defect had become open and obvious.

46. Henderson v. Ford Motor Co., 519 S.W.2d 87, 91 (Tex. 1974); *accord,* Messick v. General Motors Corp., 460 F.2d 485, 488 (5th Cir. 1972); Otto v. Bobo, 287 S.W.2d 274, 279 (Tex. Civ. App.—Amarillo 1956, writ ref'd n.r.e.).

47. Henderson v. Ford Motor Co., 519 S.W.2d 87, 91 (Tex. 1974).

law in this area, the scope of voluntariness has yet to be adequately defined. It has been established, however, that a free and intelligent choice means a free choice of alternatives, not a choice between two evils that are wrongfully imposed upon the user.[48] Further, the encounter with a risk would not be voluntary where the plaintiff is exercising a right or is responding to an emergency.[49]

The definition of voluntariness which the courts have adopted raises a bona fide question with respect to economic duress. If one is under an economic compulsion, it may be argued that he cannot truly exercise a "free and intelligent choice" in encountering the danger. Clearly, the old negligence cases indicate that economic compulsion will not excuse the plaintiff's action.[50] Nevertheless, those cases sound in negligence and are based on the duty of a landowner;[51] they do not address the policy considerations of products liability. Moreover, it has been held that there is a distinction in the duties owed by a landowner and the duties owed by a supplier of products: "[A] supplier of products . . . has a more stringent duty."[52] Bearing this in mind and considering that a manufacturer may not wrongfully impose upon a user a choice between two evils, it appears that a manufacturer may not force a user to choose between encountering a danger and losing his livelihood. At least two jurisdictions have so held.[53] In the words of the Illinois Court of Appeals, "[i]n situations where the nature of plaintiff's employment requires exposure to certain hazards, it would be a *non sequitur* of the policy considerations of strict tort liability to say that plaintiff has voluntarily . . . assumed such hazards by mere acceptance of his employment."[54] This would appear to be compatible with the holding of the Texas Supreme Court that the lessor of premises may not force the lessee into a "take it or leave it" position.[55] In the final analysis, it is difficult to imagine that the "free and intelli-

48. Marshall v. Ranne, 511 S.W.2d 255, 260 (Tex. 1974).

49. Harvey v. Seale, 362 S.W.2d 310, 313 (Tex. 1962).

50. McKee v. Patterson, 153 Tex. 517, 524-25, 271 S.W.2d 391, 396 (1954); Rittenberry v. McKee, 337 S.W.2d 197, 201-02 (Tex. Civ. App.—Dallas 1960, writ ref'd n.r.e.); Bonn v. Galveston, H. & S.A. Ry., 82 S.W.2d 808, 814 (Tex. Civ. App.—San Antonio 1964, no writ).

51. Cases cited note 50 *supra*.

52. Rourke v. Garza, 530 S.W.2d 794, 801 (Tex. 1975).

53. Scott v. Dreis & Krump Mfg. Co., 326 N.E.2d 74, 87 (Ill. App. Ct. 1975); *see* Codling v. Paglia, 345 N.Y.S.2d 461 (1973).

54. Scott v. Dreis & Krump Mfg. Co., 326 N.E.2d 74, 87 (Ill. App. Ct. 1975).

55. Harvey v. Seale, 362 S.W.2d 310, 313 (Tex. 1962); *cf.* Crowell v. Housing Auth., 495 S.W.2d 887, 888-89 (Tex. 1973).

gent" choice envisioned by the supreme court is one that allows the manufacturer to force the user to choose between two evils, especially when one of the choices is so grave as to cause the loss of employment.

STATE OF THE ART AS A DEFENSE IN TEXAS

Under the negligence theory of recovery, a product is evaluated in terms of the knowledge and practices reasonably available in the industry, known as the "state of the art." Professors Harper and James, in their treatise on the law of torts, have written that, "[a] person who undertakes to manufacture an instrumentality for use by others will be held to an expert's knowledge of the arts, materials, and processes relating to the product."[56] Nevertheless, liability will not ensue unless the negligence is a proximate cause of the injury alleged.[57] The liability of the manufacturer, therefore, is limited by what is reasonably foreseeable.[58] Hence, in negligence, the product is measured against what was reasonably foreseeable at the time of manufacture.[59]

In strict liability, however, the plaintiff need only establish that the defect in the product was a producing cause of the damage sustained.[60] Under the producing cause standard the concept of foreseeability has been eliminated. Thus, in strict liability actions, the Texas Supreme Court has determined that the defect should be measured at the time of trial.[61] In strict liability then, the manufacturer is held to a much higher standard. It is no defense to strict liability that the product was made in accordance with the best available practices in the industry at the time of production. In fact, the entire framework within which liability is measured has been greatly restructured. Along with the elimination of the concept of fault has come the minimization of the relevance of the practices and customs within a given industry. Strict liability looks to the

56. 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 28.4, at 1541 (1956).

57. General Motors Corp. v. Hopkins, 548 S.W.2d 344, 352 n.4 (Tex. 1977); *accord*, O.S. Stapley Co. v. Miller, 447 P.2d 248, 252 (Ariz. 1968); Stevens v. Silver Mfg. Co., 355 N.E.2d 145, 152 (Ill. App. Ct. 1976).

58. *See* General Motors Corp. v. Hopkins, 548 S.W.2d 344, 351-52 (Tex. 1977).

59. *Id.* at 349.

60. *Id.* at 351. There is at least an argument that failure to warn of an abnormal reaction to an otherwise safe drug may present an exception to this rule. The court in Crocker v. Winthrop Laboratories, 514 S.W.2d 429, 433 (Tex. 1974), held that the duty to warn an idiosyncratic user does not arise until the risk of harm to *a* user becomes foreseeable.

61. General Motors Corp. v. Hopkins, 548 S.W.2d 344, 351 (Tex. 1977).

product not the manufacturer. Therefore, the only relevant question centers upon whether the *product* is unreasonably dangerous at the time of trial. Clearly, "state of the art" at the time of production has no role in such a system.

MISUSE—THE NEW COMPARATIVE LIABILITY

Of all the products liability defenses, perhaps misuse has been the most nebulous. One of the primary problems was that of determining the scope of misuse. Some have suggested that misuse is little more than a guise for contributory negligence,[62] its purpose being to bar recovery to a user who negligently misuses a product. Additionally, there existed a general uncertainty with respect to the question of causation where misuse was a concurrent cause of the damages incurred. These issues were presented to the Texas Supreme Court in *General Motors Corp. v. Hopkins.*[63]

In addressing the scope of misuse in *Hopkins,* the supreme court determined that misuse is an abnormal use of a product: a use so abnormal that it can not be reasonably anticipated by the seller.[64] Hence, the court rejected misuse as a defense "where the product is dangerous for its foreseeable use and that danger is a producing cause of the injury of a bystander or a user who has not himself made some unforeseeable use of the product."[65] Thus, misuse is not a defense where the misuse could have been anticipated by the supplier, nor will misuse limit recovery in a situation in which the user could not foresee the consequences of his misuse.[66] The court stated that, "[i]t is essential that the supplier prove, as an element of this defense, that the consumer plaintiff should have reasonably anticipated as consequences of the misuse that the malfunction or injury, or some similar malfunction or injury, would occur."[67] In essence, to amount to misuse, the plaintiff's conduct must be a proximate cause of the malfunction or injury.[68]

62. Kronzer & Nichols, *"No Duty" and "Volenti Non Fit Injuria"—Are the Ghosts Really Laid?,* 2 TEX. TRIAL LAW. F. 16 (1976).

63. 548 S.W.2d 344 (Tex. 1977). For a discussion of the *Hopkins* decision see Scarzafava, *The Supreme Court of Texas Clarifies the Applicable Defenses in Products Liability,* 40 TEX. B.J. 733 (1977).

64. General Motors Corp. v. Hopkins, 548 S.W.2d 344, 349 (Tex. 1977).

65. *Id.* at 351.

66. *Id.* at 351, 352.

67. *Id.* at 351.

68. *Id.* at 351.

Finally, the *Hopkins* court addressed the viability of misuse where: (1) the misuse was unforeseeable by the supplier, (2) the user could have appreciated the consequences of his misuse, and (3) the misuse was a concurrent cause of the malfunction or injury sustained.[69] The court held that under these circumstances, the percentage of causation attributable to the plaintiff as a result of his misuse is to be compared with that percentage attributable to the defect in the product. After these proportions have been established, the court is to award the plaintiff the percentage of his damages caused by the defect in the product. As the supreme court noted, the result is a pure comparative liability rather than the modified comparative liability embodied in the Texas Comparative Negligence Statute.[70] The court justified its position in *Hopkins* with the assertion that "the supplier should not be required to pay for all of the damages suffered by a user who contributes to the cause of his harm by unforeseeable handling of the product."[71] In the final analysis, the defense of misuse has been greatly restricted. In cases where this defense remains applicable, it limits the plaintiff's recovery only to the extent that his misuse contributes to the cause of his harm.[72]

PERSPECTIVE—TOWARD A PURE COMPARATIVE LIABILITY?

In the aftermath of *Hopkins* there has been much speculation concerning the possibility of a general restructuring of products liability defenses. There can be little question that some mode of uniform system must be established, as products liability defenses in Texas are, at present, in a state of chaos. Assumption of the risk, as previously stated, is an absolute defense in actions predicated on strict liability, but no defense to products liability cases brought under the negligence theory. Misuse, also a strict liability defense, is, however, a partial defense in that area, with recovery limited by the extent to which the plaintiff contributed to the cause of the damaging event. Misuse has no application in cases predicated on negligence. Finally, comparative negligence is at least a partial defense in negligence suits, and may be a complete bar if the plaintiff's negligence caused more than fifty percent of his injury. This strange

69. *Id.* at 352.
70. *Id.* at 352.
71. *Id.* at 351.
72. *Id.* at 352.

interplay among the various defenses defies logical analysis. Recovery oftentimes will depend more upon the form of pleading, negligence or strict liability, rather than upon the merits of the case.[73] Even within strict liability itself, however, it is possible that a plaintiff, with a minimal contribution on his part, will be denied recovery absolutely because of assumption of the risk. At the same time, a more active contributor will recover where the defense is misuse.

Many scholars have contended that the answer to this anomaly is a pure comparative liability or pure comparative causation standard, which would be applied in all situations.[74] Such a development certainly would result in uniformity irrespective of the pleading or defense raised. In fact, pure comparative liability has already been successfully applied in some jurisdictions.[75]

The problem, however, may not be as easily resolved in Texas. Two of the defenses in Texas, assumption of the risk and misuse, are judicial in origin. Comparative negligence, on the other hand, is statutory. Thus, the adoption of pure comparative liability in this state must be accomplished, at least in part, by the legislature. Even should the Texas Supreme Court decide to apply this liability concept to assumption of the risk, legislative enactment would be necessary to change the standard established for comparative negligence.[76]

At present, products liability law is a conglomeration of negligence, strict liability, and to some extent warranty law. Before there can be any meaningful clarification of the applicable defenses, the transition to strict liability must be fully accomplished. Products liability cases should sound in strict liability only. Once this has been accomplished, the courts will be free to apply pure comparative liability to the assumption of the risk defense and thus achieve a long sought uniformity. Until such time, the practitioner must be ever cognizant of the idiosyncrasies in the law as they exist in the aftermath of *Hopkins*.

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73. *See* Keeton, *Product Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30, 36 (1973).

74. *E.g.*, Sales & Perdue, *The Law of Strict Tort Liability in Texas*, 14 HOUS. L. REV. 1, 66-70 (1977); Woods, *The New Kansas Comparative Negligence Act—An Idea Whose Time Has Come*, 14 WASH. L.J. 1, 24-26 (1975).

75. Butaud v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42, 43 (Alaska 1976); Li v. Yellow Cab Co., 532 P.2d 1226, 1242, 119 Cal. Rptr. 874 (1975); Hoffman v. Jones, 280 So. 2d 431, 438 (Fla. 1973).

76. In a negligence case the plaintiff's recovery would be totally barred where his negligence exceeded fifty percent. TEX. REV. CIV. STAT. ANN. art. 2212a (Supp. 1976-1977).