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Comparative Causation, Indemnity, and the Allocation of Losses between Joint Tortfeasors in Products Liability Cases.

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COMPARATIVE CAUSATION, INDEMNITY, AND THE ALLOCATION OF LOSSES BETWEEN JOINT TORTFEASORS IN PRODUCTS LIABILITY CASES

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The allocation of liability between defendants held jointly responsible for a plaintiff's injury has long been a subject of voluminous commentary and a source of confusion for courts and legislatures.[1] In recent years, this confusion has intensified with the increasing emphasis on strict liability as a ground for recovery in products liability cases. Loss distribution systems derived from common law indemnity theories and originally developed for use in negligence actions are poorly suited for use in strict liability cases and frequently yield a disproportionate allocation of losses.[2] In several jurisdictions, the search for an equitable method of allocating damages between defendants, applicable to both strict liability and negligence, has resulted simply in the modification of existing systems. In a few states, however, the emergence of strict products liability has served as the impetus for the creation of a new system of loss distribution based entirely on "comparative causation."[3]

The Texas Supreme Court recently acknowledged the uncertainty that exists in the Texas law of contribution and indemnity when one defendant has been found negligent and another found strictly liable.[4] An analysis of the present Texas system illustrates that the respective rights and liabilities of defendants in products liability cases are not readily ascertainable, and emphasizes the need for a major revision of the Texas system of loss allocation.

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1. For comprehensive historical treatments of contribution and indemnity see Hodges, *Contribution and Indemnity Among Tortfeasors*, 26 TEXAS L. REV. 150 (1947); Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130 (1932).

2. *See generally* Jensvold, *A Modern Approach to Loss Allocation Among Tortfeasors in Products Liability Cases*, 58 MINN. L. REV. 723 (1974); Phillips, *Contribution and Indemnity in Products Liability*, 42 TENN. L. REV. 85 (1974).

3. *See* American Motorcycle Ass'n v. Superior Ct., 578 P.2d 899, 901, 146 Cal. Rptr. 182, 184 (1978); Dole v. Dow Chem. Co., 282 N.E.2d 288, 295, 331 N.Y.S.2d 382, 391-92 (1972); General Motors Corp. v. Hopkins, 548 S.W.2d 344, 351-52 (Tex. 1977). *See generally* Davis, *Comparative Negligence, Comparative Contribution, and Equal Protection in the Trial and Settlement of Multiple Defendant Product Cases*, 10 IND. L. REV. 831 (1976); Jensvold, *A Modern Approach to Loss Allocaton Among Tortfeasors in Products Liability Cases*, 58 MINN. L. REV. 723, 736-39 (1974).

4. General Motors Corp. v. Simmons, 558 S.W.2d 855, 862 (Tex. 1977).

CONTRIBUTION AND INDEMNITY

General Background

At common law, contribution between joint tortfeasors[5] was denied to the tortfeasor who had discharged the claim of the injured party.[6] Underlying this rule was the policy of the law to leave wrongdoers where it finds them, and to not allow one to base a right of recovery on his own wrong.[7] Even at common law, however, a principal without personal fault, held liable solely on the basis of respondeat superior, was entitled to indemnity from his agent, the party actually at fault.[8] Gradually courts overcame the common law disdain for contribution between wrongdoers and recognized the injustice in a rule that allowed the entire loss, for which two defendants were equally responsible, to fall on a single defendant.[9] The common law doctrine has been abrogated by statute or judicial decision in most jurisdictions.[10]

For a full understanding of the allocation of losses between joint tortfeasors it is necessary that the terms "contribution" and "indemnity" be properly differentiated. The terms are frequently confused and many cases exist in which indemnity has been awarded in the name of contribution.[11]

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5. The term "joint tortfeasors" encompasses "all cases where there is joint liability for a tort, whether the acts of those jointly liable were concerted, merely concurrent, or even successive in point of time." Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130, 132 n.9 (1932). *See generally* J. DOOLEY, MODERN TORT LAW § 26.02, at 539 (1977); 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 10.1, at 692-97 (1956).

6. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 50, at 305 (4th ed. 1971); *see* Washington Gas Light Co. v. Landsden, 172 U.S. 534, 552 (1899); Oats v. Dublin Nat'l Bank, 127 Tex. 2, 11, 90 S.W.2d 824, 829 (1936); Longworth v. Stevens, 145 S.W. 257, 262 (Tex. Civ. App.—San Antonio 1912, writ ref'd). This rule is ordinarily said to be derived from the decision in Merryweather v. Nixan, 101 Eng. Rep. 1337 (K.B. 1799). W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 50, at 305 (4th ed. 1971).

7. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 50, at 305 (4th ed. 1971); Maynard & Oldham, *Indemnity and Contribution Between Strictly Liable and Negligent Defendants in Major Aircraft Litigation*, 43 J. AIR L. & COM. 245, 253 (1977).

8. Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130, 146-48 (1932). *See generally* Steffen, *The Employer's "Indemnity" Action*, 25 U. CHI. L. REV. 465 (1958). A party was also entitled to full reimbursement at common law when held responsible solely by operation of law due to the acts of an independent contractor, business partner, or on the basis of a non-delegable duty. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 51, at 311 (4th ed. 1971).

9. *See* Austin Road Co. v. Pope, 147 Tex. 430, 436, 216 S.W.2d 563, 565 (1949); Wheeler v. Glazer, 137 Tex. 341, 345-46, 153 S.W.2d 449, 451 (1941).

10. Licenberg v. Issen, 318 So. 2d 386, 390 (Fla. 1975). A majority of the states, the District of Columbia and the Virgin Islands have rejected the common law view and allow contribution among tortfeasors. *See id.* at 390 n.1; Allen, *Joint Tortfeasors—A Case For Unlimited Contribution*, 43 MISS. L.J. 50, 55 (1972).

11. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 51, at 310 (4th ed. 1971). *See also* Penn Tanker Co. v. United States, 310 F. Supp. 613, 614 (S.D. Tex. 1970) (awarding contribution in name of fifty percent indemnity).

In indemnity, the entire loss is shifted from the tortfeasor who has been compelled to pay, to another who should rightfully bear it.[12] Contribution signifies the payment by each tortfeasor of an equal or proportionate share of the loss.[13] In addition to this distinction of total as opposed to partial reimbursement, indemnity is said to be based upon an express or implied contract while contribution is not based on contract but on equitable principles.[14]

Texas was one of the first states to create a statutory exception to the common law rule prohibiting contribution between joint tortfeasors, and presently has two distinct contribution statutes.[15] Designed to relieve the harshness of the common law rule against contribution, these statutes are applicable only when no right of common law indemnity exists.[16] Grounds for indemnity generally do not exist when joint tortfeasors are in pari delicto, or equally at fault, with regard to the plaintiff's injury.[17] Joint tortfeasors will generally be held not to be in pari delicto when there is an absence of concerted action, when the injury is caused by a breach of a duty owed by one tortfeasor to the other, or when one tortfeasor has ac-

12. *E.g.*, General Motors Corp. v. Simmons, 558 S.W.2d 855, 859 (Tex. 1977); Strakos v. Gehring, 360 S.W.2d 787, 797-98 (Tex. 1962); Austin Road Co. v. Pope, 147 Tex. 430, 435, 216 S.W.2d 563, 565 (1949). *See also* RESTATEMENT OF RESTITUTION § 76 (1937); RESTATEMENT (SECOND) OF TORTS § 886B, at 7 (Tent. Draft No. 18, 1972).

13. General Motors Corp. v. Simmons, 558 S.W.2d 855, 859 (Tex. 1977); Gulf, C. & S.F. Ry. v. Galveston, H. & S.A. Ry., 83 Tex. 509, 517, 18 S.W. 956, 959 (1892); *accord,* Herrero v. Atkinson, 38 Cal. Rptr. 490, 492 (Ct. App. 1964); White v. Johnson, 137 N.W.2d 674, 677 (Minn. 1965); Radford-Shelton v. St. Francis Hosp., 569 P.2d 506, 511 (Okla. Ct. App. 1976).

14. Symons v. Mueller Co., 526 F.2d 13, 16 (10th Cir. 1975); Stuart v. Hertz Corp., 351 So. 2d 703, 706 (Fla. 1977); *see* Brown & Root v. United States, 92 F. Supp. 257, 261 (S.D. Tex. 1950) (describing indemnity as derived from theory of unjust enrichment), *aff'd,* 198 F.2d 138 (5th Cir. 1952).

15. *See* TEX. REV. CIV. STAT. ANN. art. 2212 (Vernon 1971) (contribution between tortfeasors); *id.* art. 2212a (Vernon Supp. 1978-1979) (comparative negligence: contribution among joint tortfeasors). The primary difference between the two statutes with regard to loss distribution between tortfeasors is that article 2212 allocates loss on a pro rata basis while article 2212a operates on a modified comparative fault basis. *Compare* TEX. REV. CIV. STAT. ANN. art. 2212 (Vernon 1971) *with id.* art. 2212a (Vernon Supp. 1978-1979).

16. General Motors Corp. v. Simmons, 558 S.W.2d 855, 861-62 (Tex. 1977) (article 2212a); Renfro Drug Co. v. Lewis, 149 Tex. 507, 529, 235 S.W.2d 609, 622-23 (1950) (article 2212). Article 2212 expressly provides that it is applicable only in the absence of grounds for common law indemnity. *See* TEX. REV. CIV. STAT. ANN. art. 2212 (Vernon 1971). Article 2212a has no such provision but judicial treatment indicates that it will be subject to the same qualification. *See* General Motors Corp. v. Simmons, 558 S.W.2d 855, 861-62 (Tex. 1977).

17. *See, e.g.*, Renfro Drug Co. v. Lewis, 149 Tex. 507, 529, 235 S.W. 2d 609, 623 (1950); Heil Co. v. Grant, 534 S.W.2d 916, 927 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.); Palestine Contractors v. Perkins, 375 S.W.2d 751, 755 (Tex. Civ. App.—Houston 1964), *rev'd on other grounds,* 386 S.W.2d 764 (Tex. 1964); Hodges, *Contribution and Indemnity Among Tortfeasors,* 26 TEXAS L. REV. 150, 153 (1947).

tively participated in causing the injury and the other's liability arises merely from acts of omission.[18]

Texas Contribution Statutes

Although Texas has two contribution statutes, only one is applicable when one or more defendants is found strictly liable.[19] The Texas Comparative Negligence Statute[20] speaks only of "negligence."[21] The contribution statute, which allocates loss according to the number of tortfeasors,[22] is expressly applicable to all torts and is the proper statute for use in strict products liability situations.[23]

The Texas Comparative Negligence Statute could easily be adapted, by the addition of the words "strict liability," to cases in which one or more defendants are found strictly liable.[24] The Texas Supreme Court has expressed concern over the feasibility of applying comparative negligence principles when one party has been found negligent and another strictly liable.[25] Several jurisdictions, however, have successfully adapted the comparative system of distributing losses between joint tortfeasors to all prod-

18. Wheeler v. Glazer, 137 Tex. 341, 345-46, 153 S.W.2d 449, 451 (1941).

19. *See* General Motors Corp. v. Simmons, 558 S.W.2d 855, 862 (Tex. 1977).

20. TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1978-1979). Under the Texas system of modified comparative negligence, a claimant may recover if he is found to be not more than fifty percent at fault and his culpability is not greater than that of the other defendants. *Id. See generally* Fisher, Nugent & Lewis, *Comparative Negligence: An Exercise in Applied Justice*, 5 ST. MARY'S L.J. 655 (1974); Comment, *Comparative Negligence in Texas*, 11 HOUS. L. REV. 101 (1973).

21. *See* TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1978-1979). *See generally* General Motors Corp. v. Simmons, 558 S.W.2d 855, 862 (Tex. 1977).

22. TEX. REV. CIV. STAT. ANN. art. 2212 (Vernon 1971).

23. General Motors Corp. v. Simmons, 558 S.W.2d 855, 862 (Tex. 1977). *See also* Keeton, *Torts, Annual Survey of Texas Law*, 32 SW. L.J. 1, 13-14 (1978).

24. Several jurisdictions have dispensed with the necessity of amending statutes by applying their comparative negligence statutes to products liability litigation despite language apparently limiting the statutes to negligence actions. *See* Sun Valley Airlines, Inc. v. Avco-Lycoming Corp., 411 F. Supp. 598, 602-03 (D. Idaho 1976) (applying Idaho law); Hagenbuch v. Snap-On Tools Corp., 339 F. Supp. 676, 681-83 (D.N.H. 1972) (applying New Hampshire law); Dippel v. Sciano, 155 N.W.2d 55, 64 (Wis. 1967).

25. In General Motors Corp. v. Simmons, 558 S.W.2d 855, 862 (Tex. 1977), the court stated that the comparative negligence statute "does not provide any mechanism for comparing the causative fault or percentage causation of a strictly liable manufacturer with the negligent conduct of a negligent co-defendant." In the jurisdictions applying comparative negligence to strict liability this argument has been regarded as being without substance. *See* Butaud v. Suburban Marine & Sporting Goods, 555 P.2d 42, 45 (Alaska 1976) (problem more apparent than real); Daly v. General Motors Corp., 575 P.2d 1162, 1170, 144 Cal. Rptr. 380, 388 (1978) (jurors fully capable of comparing negligence with strict liability). The Alaska Supreme Court also noted that comparative negligence has been applied without serious difficulties in admiralty cases arising under the doctrine of seaworthiness, which is a form of strict liability. *See* Butuad v. Suburban Marine & Sporting Goods, 555 P.2d 42, 45 (Alaska 1978). *See generally* 36 LA. L. REV. 288 (1975).

ucts liability cases.[26] When strict liability is integrated into comparative negligence, the trier of facts is vested with the responsibility of allocating damages between negligent and strictly liable defendants.[27] In order to effectively compare the fault of a strictly liable tortfeasor with that of a negligent tortfeasor, some courts have treated strict liability as negligence per se.[28] The majority of jurisdictions applying comparative negligence to situations involving strictly liable tortfeasors, however, do not label strict liability as negligence per se,[29] but instead reason that a violation of a duty owed, regardless of its characterization as strict liability or negligence, constitutes culpable conduct and is capable of apportionment by the fact finder.[30]

26. Edwards v. Sears, Roebuck & Co., 512 F.2d 276, 290 (5th Cir. 1975) (applying Mississippi law); Sun Valley Airlines, Inc. v. Avco-Lycoming Corp., 411 F. Supp. 598, 602-03 (D. Idaho 1976) (applying Idaho law); Hagenbuch v. Snap-On Tools Corp., 339 F. Supp. 676, 681-83 (D. N.H. 1972) (applying New Hampshire law); Butaud v. Suburban Marine & Sporting Goods, 555 P.2d 42, 43 (Alaska 1976); Daly v. General Motors Corp., 575 P.2d 1162, 1164, 144 Cal. Rptr. 380, 382 (1978); West v. Caterpillar Tractor Co., 336 So. 2d 80, 89-90 (Fla. 1976); Busch v. Busch Const. Co., 262 N.W.2d 377, 394 (Minn. 1977); Dippel v. Sciano, 155 N.W.2d 55, 64 (Wis. 1967). Other courts have specifically rejected the application of comparative negligence to products liability. Melia v. Ford Motor Co., 534 F.2d 795, 802 (8th Cir. 1976) (applying Nebraska law); Kinard v. Coats Co., 553 P.2d 835, 837 (Colo. Ct. App. 1976). *See generally* Jensvold, *A Modern Approach to Loss Allocation Among Tortfeasors in Products Liability Cases*, 58 MINN. L. REV. 723 (1974); Twerski, *The Use and Abuse of Comparative Negligence in Products Liability*, 10 IND. L. REV. 797 (1977); Note, *Products Liability, Comparative Negligence, and the Allocation of Damages Among Multiple Defendants*, 50 S. CAL. L. REV. 73 (1976). Even in jurisdictions allocating on a pro rata basis several courts have denied a strictly liable defendant a right to contribution from a negligent codefendant. *See* Fenton v. McCory Corp., 47 F.R.D. 260, 262 (W.D. Pa. 1969) (contribution right exists only between negligent tortfeasors); Texaco, Inc. v. McGrew Lumber Co., 254 N.E.2d 584, 588 (Ill. App. Ct. 1969) (public policy demands shifting burden to manufacturer even to extent of ignoring codefendant's negligence). *Contra,* Chamberlain v. Carborundum Co., 485 F.2d 31, 34 (3d Cir. 1973); Walters v. HIAB Hydraulics, Inc., 356 F. Supp. 1000, 1003 (M.D. Pa. 1973).

27. Butuad v. Suburban Marine & Sporting Goods, 555 P.2d 42, 45 (Alaska 1976); Daly v. General Motors Corp., 575 P.2d 1162, 1170, 144 Cal. Rptr. 380, 388 (1978). Criticism of the application of comparative negligence to strict liability focuses on the lack of an exact mechanism for an equitable allocation of damages between negligent and strictly liable defendants. *See* General Motors Corp. v. Simmons, 558 S.W.2d 855, 862 (Tex. 1977). No jurisdiction has as yet developed a system more precise than one that merely vests the fact finder with responsibility for allocation. This problem could be remedied, to a great extent, by an appellate court requirement that juries and trial judges clearly state the factual bases of the apportionment. *See* V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 17.1, at 110 (Supp. 1978).

28. *See* West v. Caterpillar Tractor Co., 336 So. 2d 80, 90 (Fla. 1976); Dippel v. Sciano, 155 N.W.2d 55, 64 (Wis. 1967).

29. *See* V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 12.6, at 205 (1974) (criticizing negligence per se theory as an attempt to force strict liability into negligence terminology).

30. Sun Valley Airlines, Inc. v. Avco-Lycoming Corp., 411 F. Supp. 598, 602 (D. Idaho 1976); *accord,* Butuad v. Suburban Marine & Sporting Goods, 555 P.2d 42, 45 (Alaska 1976); Daly v. General Motors Corp., 575 P.2d 1162, 1170, 144 Cal. Rptr. 380, 388 (1978).

COMPARATIVE CAUSATION

An emerging concept in the allocation of losses between joint tortfeasors involves the abandonment of common law indemnity principles and the assessment of liability solely on the basis of actual responsibility for the plaintiff's injury.[31] This doctrine may be distinguished from most comparative negligence statutes in that a defendant has a right of contribution from codefendants for the portion of the judgment paid in excess of actual culpability even if his own culpability is equal to or greater than the culpability of his codefendants.[32] Although this system has received diverse labels[33] in the few jurisdictions in which it is used, several basic theories underlie its development.[34] The concept primarily evolved from dissatisfaction with the all-or-nothing characteristics of common law indemnity.[35]

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31. At least four states by judicial action have adopted comparative causation as a method of allocating liability. *See* American Motorcycle Ass'n v. Superior Ct., 578 P.2d 899, 901, 146 Cal. Rptr. 182, 184 (1978); Tolbert v. Gerber Indus., Inc., 255 N.W.2d 362, 367 (Minn. 1977); Dole v. Dow Chem Co., 282 N.E.2d 288, 295, 331 N.Y.S.2d 382, 391-92 (1972); Bielski v. Schulze, 114 N.W.2d 105, 107 (Wis. 1962). Those jurisdictions which have included optional subsection 2(4) in their adoption of the 1939 version of the Uniform Contribution Among Tortfeasors Act also employ this method of distributing losses. *See* ARK. STAT. ANN. § 34-1002(4) (1962); DEL. CODE tit. 10, § 6302(d) (1975); HAWAII REV. STAT. § 663-12 (1955); S.D. COMPILED LAWS ANN. § 15-8-15 (1967). Optional subsection 2(4) provides "[w]hen there is such a disproportion of fault among joint tortfeasors as to render inequitable an equal distribution among them of the common liability by contribution, the relative degrees of fault of the joint tortfeasors shall be considered in determining their pro rata shares." UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 2(4) (revised 1955). The 1955 version of the Act omitted subsection 2(4) and determined liability on a pro rata basis without considering relative degrees of fault. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 2. There is also language in several state court decisions that indicates this doctrine would be adopted under the proper circumstances. *See* Robinson v. International Harvester Co., 358 N.E.2d 317, 322-23 (Ill. App. Ct. 1976); Ruvolo v. United States Steel Corp., 354 A.2d 685, 690 (N.J. Super. Ct. Law Div. 1976); Wenatchee Wenoka Growers Ass'n v. Krack Corp., 576 P.2d 388, 392 (Wash. 1978).

32. *See generally* V. SCHWARTZ, COMPARATIVE NEGLIGENCE §§ 3.1-3.5 (1974) (Supp. 1978).

33. Butaud v. Suburban Marine & Sporting Goods, 555 P.2d 42, 47 (Alaska 1978) (Rabinowitz, J., concurring) (comparative causation); American Motorcycle Ass'n v. Superior Ct., 578 P.2d 899, 902, 146 Cal. Rptr. 182, 185 (1978) (equitable indemnity); Dole v. Dow Chem. Co., 282 N.E.2d 288, 291, 331 N.Y.S.2d 382, 386 (1972) (partial indemnification). *See also* Jensvold, *A Modern Approach to Loss Allocation Among Tortfeasors in Products Liability Cases*, 58 MINN. L. REV. 723, 739 (1974) (comparative responsibility).

34. *See* 3 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY *Indemnity* § 44.02[2], at 15-13 (1978); Davis, *Comparative Negligence, Comparative Contribution, and Equal Protection in the Trial and Settlement of Multiple Defendant Product Cases*, 10 IND. L. REV. 831, 831-32 n.4 (1977); Comment, *Relative Contribution Among Tortfeasors: Time for Judicial Change of the Washington Rule?*, 11 GONZ. L. REV. 179, 183-84 (1975); Comment, *Comparative Fault and Strict Products Liability: Are They Compatible?*, 5 PEPPERDINE L. REV. 501, 514-16 (1978).

35. *See, e.g.*, American Motorcycle Ass'n v. Superior Ct., 578 P.2d 899, 902, 146 Cal. Rptr. 182, 185 (1978); Ruvolo v. United States Steel Corp., 354 A.2d 685, 690 (N.J. Super. Ct. Law Div. 1976); Dole v. Dow Chem. Co., 282 N.E.2d 288, 291, 331 N.Y.S.2d 382, 386

Frequently, one tortfeasor may have a technical right of indemnity as against another. The entire loss is thereby shifted to and imposed upon one party and the other is completely relieved of responsibility, without regard for the fact that in a given situation, the actual proportion of causal responsibility for the plaintiff's injury may not be 100 to zero percent.[36] In addition, the numerous tests for common law indemnity have frequently been criticized as resting on artificial distinctions and as "lacking the objective criteria desirable for predictability in the law."[37] Thus, concluding that the all-or-nothing concept of indemnity does not produce an equitable allocation of loss, a few courts have used a doctrine that permits a joint tortfeasor to obtain "partial indemnity" from other joint tortfeasors on a comparative fault basis without regard to the presence or absence of grounds for common law indemnity.[38] Under this theory, in one sense, indemnity does remain in effect. Rather than being determined by the technical criteria of the numerous common law indemnity tests, full reimbursement occurs when one defendant with zero responsibility is entitled to shift 100 percent of the judgment to a party who is found 100 percent responsible.[39]

Recovery based on the respective parties' comparative causation is not

(1972). Criticism of the drastic aspects of implied indemnity frequently compares them to the inequitable effects a plaintiff's contributory negligence has on his cause of action in jurisdictions still recognizing such conduct as defense to liability. *See* American Motorcycle Ass'n v. Superior Ct., 578 P.2d 899, 907, 146 Cal. Rptr. 182, 190 (1978); Tolbert v. Gerber Indus., Inc., 255 N.W.2d 362, 367 (Minn. 1977); Keeton, *Torts, Annual Survey of Texas Law*, 32 SW. L. J. 1, 13 (1978); Note, *Products Liability, Comparative Negligence, and the Allocation of Damages Among Multiple Defendants*, 50 S. CAL. L. REV. 73 (1976).

36. *See* American Motorcycle Ass'n v. Superior Ct., 578 P.2d 899, 902, 146 Cal. Rptr. 182, 185 (1978); Tolbert v. Gerber Indus., Inc., 255 N.W.2d 362, 367 (Minn. 1977); Bielski v. Schulze, 114 N.W.2d 105, 109 (Wis. 1962). *See generally* Goldenberg & Nicholas, *Comparative Liability Among Joint Tortfeasors: the Aftermath of Li v. Yellow Cab Co.*, 8 U.W.L.A. L. REV. 23, 34 (1976); Jensvold, *A Modern Approach to Loss Allocation Among Tortfeasors in Products Liability Cases*, 58 MINN. L. REV. 723, 736-39 (1974); Phillips, *Contribution and Indemnity in Products Liability*, 42 TENN. L. REV. 85, 121 (1974).

37. Atchinson, T. & S.F. Ry. v. Franco, 73 Cal. Rptr. 660, 664 (Ct. App. 1968); *accord*, Tolbert v. Gerber Indus., Inc., 255 N.W.2d 362, 367 (Minn. 1977) (describing indemnity as blunt instrument in allocating responsibility for damages); Dole v. Dow Chem. Co., 282 N.E.2d 288, 293, 331 N.Y.S.2d 382, 388 (1972) (stating indemnity doctrine evolved in unnatural surroundings of inflexible common law rules). *See generally* Davis, *Indemnity Between Negligent Tortfeasors: A Proposed Rationale*, 37 IOWA L. REV. 517, 539-44 (1952); Jensvold, *A Modern Approach to Loss Allocation Among Tortfeasors in Products Liability Cases*, 58 MINN. L. REV. 723, 736-38 (1974); Comment, *The Allocation of Loss Among Joint Tortfeasors*, 41 S. CAL. L. REV. 728, 737-43 (1968).

38. *See, e.g.*, American Motorcycle Ass'n v. Superior Ct., 578 P.2d 899, 901, 146 Cal. Rptr. 182, 185 (1978); Dole v. Dow Chem. Co., 282 N.E.2d 288, 295, 331 N.Y.S.2d 382, 391-92 (1972); Bielski v. Schulze, 114 N.W.2d 105, 107 (Wis. 1962). *See also* UNIFORM COMPARATIVE FAULT ACT § 2.

39. *See* Langsford v. Chrysler Motors Corp., 513 F.2d 1121, 1127 (2d Cir. 1975) (applying New York law) (auto dealer whose fault was minimal indemnified by manufacturer who was 100 percent responsible); 3 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY *Indemnity* § 44.02[4], at 15-43 (1978).

totally foreign to Texas law. In *General Motors Corp. v. Hopkins*[40] the Texas Supreme Court used the doctrine of comparative causation to determine the recovery of an injured plaintiff who unforeseeably misused[41] a defective product.[42] The court did not base its holding on the comparative negligence statute but rather on a form of pure comparative causation under which the plaintiff's recovery was diminished by the percentage of responsibility for his own injury as determined by the trier of facts.[43]

COMMON LAW INDEMNITY

In a wide variety of situations courts will consider it proper to shift the entire burden of loss from one tortfeasor to another. Attempting to encompass all possible circumstances, different jurisdictions employ a myriad of tests for common law indemnity.[44] Under the active-passive test one whose liability is predicated on nonfeasance is entitled to full reimbursement from one who actively caused the injury.[45] Although this test is regarded as unsound by Texas courts,[46] it serves as the primary criteria for determining products liability indemnity in several jurisdictions.[47] The primary-secondary test is used in several states and awards indemnity to a tortfeasor who was under only a secondary duty when another was primarily

40. 548 S.W.2d 344 (Tex. 1977).

41. Unforeseeable misuse will bar or reduce a plaintiff's recovery in a strict liability action. *Id.* at 351; *accord,* Daly v. General Motors Corp., 575 P.2d 1162, 1166, 144 Cal. Rptr. 380, 384 (1978); Kirkland v. General Motors Corp., 521 P.2d 1353, 1366 (Okla. 1974); RESTATEMENT (SECOND) OF TORTS § 402A, Comments g, h (1965). *See generally* Noel, *Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk,* 25 VAND. L. REV. 93, 95-105 (1972).

42. General Motors Corp. v. Hopkins, 548 S.W.2d 344, 352 (Tex. 1977). *See generally* Blanton, *The Nature of Damages in Personal Injury Actions as Viewed by a Trial Judge,* 18 S. TEX. L.J. 157, 161 (1977); 14 HOUS. L. REV. 1115 (1977).

43. General Motors Corp. v. Hopkins, 548 S.W.2d 344, 352 (Tex. 1977).

44. *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 51, at 311-12 (4th ed. 1971); Maynard & Oldham, *Indemnity and Contribution Between Strictly Liable and Negligent Defendants in Major Aircraft Litigation,* 43 J. AIR L. & COM. 245, 253 (1977).

45. Oats v. Dublin Nat'l Bank, 127 Tex. 2, 11, 90 S.W.2d 824, 829 (1936). The active-passive rule is generally applied in situations in which one tortfeasor has created the danger and another has merely failed to discover or remedy the situation. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 51, at 312 (4th ed. 1971). *See generally* 1 J. DOOLEY, MODERN TORT LAW § 26.07, at 547-48 (1977).

46. General Motors Corp. v. Simmons, 558 S.W.2d 855, 860 (Tex. 1977). There appears to be a growing dissatisfaction with the active-passive test and it has been expressly rejected in several states. *See, e.g.,* Stanfield v. Medalist Indus., 309 N.E.2d 104, 108 (Ill. App. Ct. 1974); Tolbert v. Gerber Indus., 255 N.W.2d 362, 367 (Minn. 1977); Pachowitz v. Milwaukee & Suburban Transport Corp., 202 N.W.2d 268, 272 (Wis. 1972).

47. *See, e.g.,* Symons v. Mueller Co., 526 F.2d 13, 19 (10th Cir. 1975) (applying Kansas law); Hart Properties, Inc. v. Eastern Elevator Serv. Corp., 357 So. 2d 257, 262 (Fla. Dist. Ct. App. 1978); Smith Radio Communications, Inc. v. Challenger Equip., 527 P.2d 711, 713 (Or. 1974).

responsible.[48] It also has been said that indemnity will only be permitted when there exists a great difference in the gravity of the fault between tortfeasors, or when there is a gross disparity in the nature of the duties owed by the wrongdoer to the injured party.[49]

In *General Motors Corp. v. Simmons*[50] the Texas Supreme Court acknowledged that there were several approaches to indemnification, but because of the variety of duties and situations it was impossible to state a single, all-inclusive test.[51] Texas courts use four theories which vary in the ease of their application and the equity of their results.[52] First, as a general rule, indemnity will lie in favor of a tortfeasor who is only vicariously liable.[53] A second test, derived from the Texas Supreme Court's decision in *Wheeler v. Glazer*,[54] determines the existence of grounds for common law indemnity on the basis of the difference in the nature of duties owed by the joint tortfeasors to the aggrieved party.[55] The third test turns upon the existence of a breach of duty between tortfeasors.[56] When an injury, forming the basis for a judgment against joint tortfeasors, results from a viola-

48. *See, e.g.*, Atchinson, T. & S. F. Ry. v. Franco, 73 Cal. Rptr. 660, 665 (Ct. App. 1968); Keefer v. Al Johnson Const. Co., 193 N.W.2d 305, 311 (Minn. 1971); Hendricks v. Leslie Fay, Inc., 159 S.E.2d 362, 365 (N.C. 1968).

49. *See, e.g.*, Slattery v. Marra Bros., Inc., 186 F.2d 134, 138 (2d Cir. 1951), *cert. denied*, 341 U.S. 915 (1952); Rollins v. State, 92 Cal. Rptr. 251, 254 (Ct. App. 1971); Russell v. Community Hosp. Ass'n, 428 P.2d 783, 788 (Kan. 1967).

50. 558 S.W.2d 855 (Tex. 1977).

51. *Id.* at 859-60.

52. *See id.* at 859-62.

53. *See* Oats v. Dublin Nat'l Bank, 127 Tex. 2, 10-11, 90 S.W.2d 824, 829 (1936) (agent received full reimbursement when subjected to liability by principal); City of San Antonio v. Talerico, 98 Tex. 151, 155, 81 S.W. 518, 520 (1904) (municipality, held strictly liable for failure to keep highways in safe condition, indemnified by person creating dangerous condition); South Austin Drive-In Theatre v. Thomison, 421 S.W.2d 933, 948 (Tex. Civ. App.—Austin 1967, writ ref'd n.r.e.) (employer entitled to shift loss to employee actually responsible for plaintiff's injury); Westheimer Transfer & Storage Co. v. Houston Bldg. Co., 198 S.W.2d 465, 467 (Tex. Civ. App.—Galveston 1946, writ ref'd n.r.e.) (defendant liable solely on basis of nondelegable duty indemnified by negligent independent contractor); RESTATEMENT (SECOND) OF AGENCY § 219 (1958); RESTATEMENT OF RESTITUTION §§ 87, 95-96 (1937). *See generally* 2 G. PALMER, LAW OF RESTITUTION § 10.6(c), at 412-14 (1978); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 51, at 311 (4th ed. 1971); Hodges, *Contribution and Indemnity Among Tortfeasors*, 26 TEXAS L. REV. 150, 153-55 (1947).

54. 137 Tex. 341, 153 S.W.2d 449 (1941).

55. *Id.* at 345-46, 153 S.W.2d at 451-52 (carrier, held liable to injured passenger for failure to exercise high degree of care, indemnified by negligent driver who breached duty of ordinary care to injured party); *accord*, Brown & Root, Inc. v. United States, 92 F. Supp. 257, 263 (S.D. Tex. 1950) (leaving open culvert with flimsy barricade and no lights more culpable than driving at excessive speed), *aff'd*, 198 F.2d 138 (5th Cir. 1952); Panhandle Gravel Co., Inc. v. Wilson, 248 S.W.2d 779, 783 (Tex. Civ. App.—Amarillo 1952, writ ref'd n.r.e.) (speeding by driver of improperly loaded truck more culpable than improper loading by gravel company); Kimbriel Produce Co. v. Mayo, 180 S.W.2d 504, 507 (Tex. Civ. App.—San Antonio 1944, writ ref'd w.o.m.) (applying test to bus-truck collision and finding parties to be in pari delicto).

56. *See* Renfro Drug Co. v. Lewis, 149 Tex. 507, 529, 235 S.W.2d 609, 623 (1950).

tion of a duty which one of the tortfeasors owed the other, the latter, at common law, is entitled to indemnity from the other.[57]

The test that determines the existence of grounds for indemnity on the basis of vicarious liability is still employed by Texas courts.[58] The remaining two tests, however, have merged into and serve as the foundation for the fourth and primary test for common law indemnity in Texas.[59] Used in products liability to the exclusion of the other three methods,[60] this test was first stated in *Austin Road Co. v. Pope*:[61]

> In order to determine whether the loss should be shifted from one tortfeasor to another the proper approach is to consider the one seeking indemnity as though he were a plaintiff suing the other in tort, and then determine whether such a one as plaintiff, though guilty of a wrong against a third person, is nevertheless entitled to recovery against his co-tortfeasor.[62]

The rationale for this rule is that in most indemnity cases one tortfeasor has breached a duty he owed to both his cotortfeasor and the injured plaintiff. Although both are liable to the plaintiff, as between tortfeasors the blameless should be allowed indemnity.[63]

Proper use of this test is illustrated by *Austin Road Co. v. Evans*.[64] In this case two motorists sued a road company and a third motorist for damages arising from rear end collisions that resulted when the road company negligently created a dense dust cloud. Both the third motorist, by following too closely, and the road company, by creating the dust cloud, breached duties to the plaintiffs.[65] While the creation of the road hazard was also a breach of duty to the third motorist,[66] the negligent driving by the third motorist did not constitute a breach of duty to the road com-

57. *Id.* at 529, 235 S.W.2d at 623; *accord*, Tobin & Rooney Plastering Co. v. Giles, 418 S.W.2d 598, 600 (Tex. Civ. App.—Texarkana 1967, no writ); Gammage v. Weinberg, 355 S.W.2d 788, 791 (Tex. Civ. App.—Houston 1962, writ ref'd n.r.e.).

58. *See* South Austin Drive-In Theatre v. Thomison, 421 S.W.2d 933, 948 (Tex. Civ. App.—Austin 1967, writ ref'd n.r.e.).

59. *See generally* General Motors Corp. v. Simmons, 558 S.W.2d 855, 859-61 (Tex. 1977); Comment, *Contribution and Indemnity: Does the Right Exist Among Joint Tortfeasors When One is Liable on a Theory of Strict Liability?*, 18 S. TEX. L.J. 572, 574-76 (1977).

60. *See, e.g.*, General Motors Corp. v. Simmons, 558 S.W.2d 855, 860-61 (Tex. 1977); United Tractor, Inc. v. Chrysler Corp., 563 S.W.2d 850, 851 (Tex. Civ. App.—El Paso 1978, no writ); Heil Co. v. Grant, 534 S.W.2d 916, 926-27 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.).

61. 147 Tex. 430, 216 S.W.2d 563 (1949). *See also* Hodges, *Contribution and Indemnity Among Tortfeasors*, 26 TEXAS L. REV. 150, 162 (1947).

62. Austin Road Co. v. Pope, 147 Tex. 430, 435, 216 S.W.2d 563, 565 (1949).

63. General Motors Corp. v. Simmons, 558 S.W.2d 855, 859 (Tex. 1977); Austin Road Co. v. Evans, 499 S.W.2d 194, 200 (Tex. Civ. App.—Fort Worth 1973, writ ref'd n.r.e.); Hodges, *Contribution and Indemnity Among Tortfeasors*, 26 TEXAS L. REV. 150, 162 (1947).

64. 499 S.W.2d 194, 200 (Tex. Civ. App.—Fort Worth 1973, writ ref'd n.r.e.).

65. *See id.* at 197.

66. *Id.* at 200.

pany.[67] Therefore, the negligent motorist and the road company were not in pari delicto and the motorist was entitled to have ultimate liability imposed on her cotortfeasor.[68]

The relative duty, Texas test undoubtedly furnished a more predictable and exact system than the active-passive or primary-secondary tests.[69] Its application when relative duties are clear-cut also avoids the procedural complexities of methods that allocate losses on the basis of comparative fault.[70] Unfortunately certain equitable considerations are sacrificed in the achievement of consistent holdings. As the emphasis of this Texas test is on the relative duties between tortfeasors,[71] it thereby overlooks the primary purpose of indemnity, namely the fair allocation of losses.[72] The attainment of this equitable goal is more likely if the attention of the court is focused on each party's actual responsibility for the plaintiff's injury rather than on an attempt to discern the existence and breach of duties between joint tortfeasors.[73]

Amply illustrating the inherent unfairness of the Texas system are products liability cases in which a seller, who has negligently contributed to an injury to a consumer, is entitled to full indemnification from a manufacturer who breached a duty to the seller by supplying a defective product.[74] Although the seller was partially responsible for the injury, when he

67. *Id.* at 200.

68. *Id.* at 200.

69. *See* Davis, *Indemnity Between Negligent Tortfeasors: A Proposed Rationale*, 37 IOWA L. REV. 517, 545 (1952). Both the active-passive and primary-secondary tests have been criticized for promulgating inconsistent decisions. *See generally* Michael & Appel, *Contribution and Indemnity Among Joint Tortfeasors in Illinois: A Need for Reform*, 7 LOY. CHI. L.J. 591, 595-97 (1976); Comment, *The Allocation of Loss Among Joint Tortfeasors*, 41 S. CAL. L. REV. 728, 738-39 (1968); Note, *Products Liability, Comparative Negligence, and the Allocation of Damages Among Multiple Defendants*, 50 S. CAL. L. REV. 73, 82 (1976).

70. *See* American Motorcycle Ass'n v. Superior Ct., 578 P.2d 899, 909, 146 Cal. Rptr. 182, 192 (1978); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 52, at 313-14 (4th ed. 1971); Jensvold, *A Modern Approach to Loss Allocation Among Tortfeasors in Products Liability Cases*, 58 MINN. L. REV. 723, 736-38 (1974).

71. *See, e.g.*, General Motors Corp. v. Simmons, 558 S.W.2d 855, 860-61 (Tex. 1977); Gulf, C. & S.F. Ry. v. Bliss, 368 S.W.2d 594, 596 (Tex. 1963); Strakos v. Gehring, 360 S.W.2d 787, 797-98 (Tex. 1962). *See also* Comment, *Contribution and Indemnity: Does the Right Exist Among Joint Tortfeasors When One is Liable on a Theory of Strict Liability?*, 18 S. TEX. L.J. 572, 576 (1977).

72. *See* 3A L. FRUMER & M. FREIDMAN, PRODUCTS LIABILITY *Indemnity* § 44.04 [2], at 15-19 (1978); Allen, *Joint Tortfeasors—A Case for Unlimited Contribution*, 43 MISS. L.J. 50, 55 (1972); Bohlen, *Contribution and Indemnity Between Tortfeasors*, 21 CORN. L. Q. 552, 554 (1936). *See also* RESTATEMENT (SECOND) OF TORTS § 886B (Tent. Draft No. 18, 1972).

73. *See* Davis, *Indemnity Between Negligent Tortfeasors: A Proposed Rationale*, 37 IOWA L. REV. 517, 546 (1952); Comment, *The Allocation of Loss Among Joint Tortfeasors*, 41 S. CAL. L. REV. 728, 737-43 (1968). "Regardless of the terminology used, the crucial question is whether it would be fair to require a party, because of greater fault, to compensate another who has been subjected to liability." 1 J. DOOLEY, MODERN TORT LAW § 26.07, at 549 (1977).

74. *See* Richard Mfg. Co. v. Aspromonte, 557 S.W.2d 543, 552 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ).

breached no duty to the manufacturer he incurred no liability.[75] Under a rule which allocates losses on the basis of comparative causation, the presence or absence of duties between tortfeasors would never be an issue and liability would be apportioned on the basis of actual responsibility for the plaintiff's injury.[76]

ILLUSTRATIVE PRODUCTS LIABILITY SITUATIONS

Employer/Purchaser v. Manufacturer

In most instances this situation involves a defective product purchased from a manufacturer and an injury to an invitee or employee of the purchaser that was received while using the product in a foreseeable manner.[77] The purchaser's liability to the injured party is generally predicated on the purchaser's failure to inspect, or on a nondelegable duty to provide reasonably safe tools or a reasonably safe place to work. Texas cases in this area have allowed indemnity to a purchaser unless his intervening acts of negligence bar recovery against the manufacturer.[78] Employers held liable for the death of, or injuries suffered by an employee have been entitled to indemnity from the manufacturer when they unknowingly supplied a workshop with defective wiring,[79] a railroad car with a defective handbrake,[80] or an elevator with a defective gear.[81] Underlying these holdings is

75. *Id.* at 552. *See also* Note, *Products Liability, Comparative Negligence, and the Allocation of Damages Among Multiple Defendants*, 50 S. CAL. L. REV. 73, 91 (1976).

76. *See* Dole v. Dow Chem. Co., 282 N.E.2d 288, 291, 331 N.Y.S.2d 382, 386 (1972) (manufacturer entitled to contribution from negligent employer despite lack of duty running from employer to manufacturer). *See also* Note, *Products Liability, Comparative Negligence, and the Allocation of Damages Among Multiple Defendants*, 50 S. CAL. L. REV. 73, 92 (1976).

77. 3A L. FRUMER & M. FREIDMAN, PRODUCTS LIABILITY *Indemnity* § 44.02 [3][a], at 15-20 to 15-23 (1977).

78. *See, e.g.*, Missouri Pac. R.R. v. Southern Pac. Co., 430 S.W.2d 900, 906 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ ref'd n.r.e.), *cert. denied*, 394 U.S. 1013 (1969); South Austin Drive-In Theatre v. Thomison, 421 S.W.2d 933, 949 (Tex. Civ. App.—Austin 1967, writ ref'd n.r.e.); Galveston, H. & S.A. Ry. v. Pigott, 116 S.W. 841, 847 (Tex. Civ. App.—1909, writ ref'd). Results in other jurisdictions are in accord with Texas decisions regardless of the test applied. *See, e.g.*, Simpson Timber Co. v. Parks, 390 F.2d 353, 357 (9th Cir.) (active-passive test) (shipowner indemnified by manufacturer when longshoreman hurt by defective packaging of doors), *cert. denied*, 393 U.S. 858 (1968); Great Am. Ins. Co. v. "Quick-Way" Truck Shovel Co., 204 F. Supp. 847, 853 (D. Colo. 1962) (primary-secondary test) (wrong type bolts for crane in need of repair supplied by manufacturer who indemnified purchaser), *aff'd*, 314 F.2d 702 (10th Cir. 1963); Burns v. Pennsylvania Rubber & Supply Co., 189 N.E.2d 645, 649 (Ohio Ct. App. 1961) (primary-secondary test) (seller of hydraulic lift required to indemnify service station owner for employee's judgment against owner).

79. Galveston, H. & S.A. Ry. v. Pigott, 116 S.W. 841, 847 (Tex. Civ. App.—1909, writ ref'd).

80. Missouri Pac. R.R. v. Southern Pac. Co., 430 S.W.2d 900, 906 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ ref'd n.r.e.), *cert. denied*, 394 U.S. 1013 (1969). *See also* Pullman Co. v. Norton, 91 S.W. 841, 843 (Tex. Civ. App.—1905, writ ref'd) (sleeping car company supplying defective car indemnified railway company for liability to injured passenger); RESTATEMENT OF RESTITUTION § 93c (1937).

the premise that while the employer breached a duty to his employee, the manufacturer breached a duty to both the injured party and to the employer/purchaser to whom he supplied the defective item.[82]

In this illustrative situation and those that follow, it must be emphasized that the failure of a purchaser to inspect or test a product does not constitute a breach of duty to the manufacturer.[83] Some jurisdictions have modified the duty to inspect, but in Texas a purchaser's right to indemnity is not affected by his failure to inspect.[84] Despite the normal rule allowing indemnity, intervening acts of negligence can act as a bar to recovery against the manufacturer.[85] Older cases refused indemnity in such instances on the ground that awareness of the defect or aggravation thereof changed a purchaser's status from a passive to an active tortfeasor.[86]

Manufacturer v. Employer/Purchaser

With the advent of workers' compensation laws, the effect of an employer's negligent actions on his liability to a manufacturer or his right to indemnity from a manufacturer has become unclear. Since workers' compensation laws confer immunity on employers from employee tort action for work-related injuries, employers are not jointly liable with the manufacturer of a defective product for an injury to an employee partially caused by an employer's negligence.[87] The vast majority of jurisdictions bar

81. Otis Elevator Co. v. Cameron, 205 S.W. 852, 858 (Tex. Civ. App.—Dallas 1918, writ ref'd). *See also* Otis Elevator Co. v. Wood, 436 S.W.2d 324, 327 (Tex. 1968) (indemnity principles not discussed but elevator purchaser absolved of liability).

82. *See* Missouri Pac. R.R. v. Southern Pac. Co., 430 S.W.2d 900, 906 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ ref'd n.r.e.), *cert. denied*, 394 U.S. 1013 (1969).

83. Champion Mobile Homes v. Rasmussen, 553 S.W.2d 237, 244 (Tex. Civ. App.—Tyler 1977, writ ref'd n.r.e.). *But see* Galveston, H. & S.A. Ry. v. Nass, 94 Tex. 255, 257, 59 S.W. 870, 871 (1900) (employer/purchaser negligently inspecting railroad car not entitled to indemnity as held contributorily negligent).

84. Otis Elevator Co. v. Cameron, 205 S.W. 852, 856 (Tex. Civ. App.—Dallas 1918, writ ref'd) (employer indemnified by manufacturer despite failure to inspect and discover structural defect); *accord*, Roberts v. Richland Mfg. Co., 260 F. Supp. 274, 277 (W.D. Mich. 1966) (no duty to discover latent defects); Great Am. Ins. Co. v. "Quick-Way" Truck Shovel Co., 204 F. Supp. 847, 851 (D. Colo. 1962) (failure to discover faulty bolts did not bar indemnity), *aff'd*, 314 F.2d 702 (10th Cir. 1963). *See also* RESTATEMENT OF RESTITUTION § 93, Comment a (1937).

85. *See* 3A L. FRUMER & M. FREIDMAN, PRODUCTS LIABILITY *Indemnity* § 44.04, at 15-54 to 15-55 (1977). *See generally* Scarzafava, *An Analysis of Products Liability Defenses in the Aftermath of Hopkins*, 9 ST. MARY'S L.J. 261 (1977).

86. *See* Galveston, H. & S.A. Ry. v. Nass, 95 Tex. 255, 257, 59 S.W. 870, 871 (1900) (employer's failure to inspect constituted active negligence). Jurisdictions still employing the active-passive test also refuse indemnity on the grounds that the employer's negligence has been transformed from passive to active. *See* Oregon Farm Bureau Ins. Co. v. E.L. Caldwell & Sons, Inc., 306 F. Supp. 835, 839 (D. Ore. 1969) (employer who was aware of defect and who permitted employee to use product actively negligent); Goldstein v. Compudyne Corp., 45 F.R.D. 467, 469 (S.D.N.Y. 1968) (employer's continued use of machine despite known defect was active negligence).

87. *See* TEX. REV. CIV. STAT. ANN. art. 8307, § 6a (Vernon 1967). *See generally* 2A A.

a third party's claim for indemnification when based upon the employer's liability to the employee.[88]

Courts that allocate loss on the basis of the joint tortfeasors' relative duties refuse manufacturers' indemnity claims regardless of an employer's actual responsibility for an injury.[89] Indemnification is denied because no duty is owed to the manufacturer by the employer to exercise due care with respect to the manufacturer's product.[90] Although this method of allocation allows negligent employers to escape liability, Texas courts would probably follow the majority rule and refuse indemnity since the Texas indemnity test centers on the existence of duties rather than on actual culpability.

Jurisdictions apportioning loss strictly on the basis of comparative causation hold an employer liable to the extent that his conduct contributed to the employee's injury.[91] As the injured employee's total recovery is not affected by a complete or partial shifting of the burden from the manufacturer to the employer, equitable considerations would seem to require the allocation of loss on a comparative causation basis.[92]

Retailer v. Manufacturer

Sales of food or drugs in violation of a statute may create a cause of action for a consumer regardless of the retailer's fault.[93] In *Griggs Canning*

LARSON, WORKMEN'S COMPENSATION § 76.00, at 14-287 to 14-407 (1976).

88. Maynard & Oldham, *Indemnity and Contribution Between Strictly Liable and Negligent Defendants in Major Aircraft Litigation*, 43 J. AIR L. & COM. 245, 256 (1977).

89. *See* Blaw-Knox Food & Chem. Equip. Corp. v. Holmes, 348 So. 2d 604, 608 (Fla. Dist. Ct. App. 1977) (fact that employer secondarily negligent in fall of employee into vat of cooking oil immaterial to manufacturer's indemnity claim); William H. Field Co. v. Nuroco Woodwork, Inc., 348 A.2d 716, 718 (N.H. 1975) (employer's negligence in allowing employee to use band saw without guard had no bearing on manufacturer's indemnity claim).

90. William H. Field Co. v. Nuroco Woodwork, Inc., 348 A.2d 716, 718 (N.H. 1975); Arcell v. Ashland Chem. Co., 378 A.2d 53, 63-64 (N.J. Super. Ct. Law Div. 1977); Olch v. Pacific Press & Shear Co., 573 P.2d 1355, 1358 (Wash. Ct. App. 1978). *See also* Larson, *Workmen's Compensation: Third Party's Action Over Against Employer*, 65 N.W.U. L. REV. 351, 419 (1970). Some courts hold that the relationship between a manufacturer and an employer/purchaser is a sufficient basis for a claim for indemnity. *See* Harn v. Standard Eng'r Co., 416 F. Supp. 1168, 1170 (D.S.D. 1976); United States Fidelity & Guar. Co. v. Kaiser Gypsum Co., 539 P.2d 1065, 1073 (Or. 1975). *See generally* Comment, *Another Look at Strict Liability: The Effect on Contribution Among Tortfeasors*, 79 DICK. L. REV. 125, 132 (1974); Note, *Contribution Among Joint Tortfeasors When One Tortfeasor Enjoys a Special Defense Against Action by the Injured Party*, 51 CORN. L.Q. 407 (1967).

91. *See* Skinner v. Reed-Prentice Div. Package Mach. Co., 374 N.E.2d 437, 443 (Ill. 1977); Dole v. Dow Chem. Co., 282 N.E.2d 288, 292, 331 N.Y.S.2d 382, 387 (1972).

92. Skinner v. Reed-Prentice Div. Package Mach. Co., 374 N.E.2d 437, 442 (Ill. 1977); Dole v. Dow Chem. Co., 282 N.E.2d 288, 292, 331 N.Y.S.2d 382, 387 (1972). *See also* 2A A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 76.44 (1976).

93. *See* Texas Food, Drug and Cosmetic Act, TEX. REV. CIV. STAT. ANN. art. 4476-5 (Vernon 1976). Section 402A was originally proposed to cover food and drugs only. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 830 (1973).

Co. v. Josey[94] a grocery store owner who was held strictly liable for breach of the implied warranty of fitness for human consumption was entitled to full reimbursement from the processor.[95] Again, the Texas rationale for such holdings is that although the retailer is strictly liable to the injured consumer, the retailer is without fault to the food supplier, who in turn has breached a duty to both the injured consumer and the retailer.[96]

In most instances in which a retailer has been held strictly liable for injuries to the ultimate consumer caused by a defective product manufactured by another, the retailer was entitled to indemnity from the manufacturer when he neither knew of nor contributed to the dangerous defect.[97] Thus, in a retailer's action arising out of a consumer's suit against the manufacturer and retailer of a mobile home for injuries suffered in a fire caused by a latent defect in the electrical system, the retailer had no obligation to the manufacturer to repair latent defects and received indemnity.[98]

For a retailer to recover in an indemnity action against a manufacturer it is essential to the retailer's cause of action that the evidence affirmatively prove that the product was in a defective condition when it left the hands of the manufacturer.[99] If the evidence neither circumstantially nor

94. 139 Tex. 623, 164 S.W.2d 835 (1942).

95. *Id.* at 634, 164 S.W.2d at 840; *accord,* Cushing v. Rodman, 82 F.2d 864, 867 (D.C. Cir. 1936); Newmark v. Gimbel's, Inc., 258 A.2d 697, 705 (N.J. 1969) (seller of caustic permanent wave solution has cause of action against manufacturer); Di Gregorio v. Champlain Valley Fruit Co., 255 A.2d 183, 185 (Vt. 1969) (failure to discover thermometer in banana did not bar retailer's indemnification by supplier). *But cf.* Eisenbach v. Gimbel Bros., Inc., 24 N.E.2d 131, 133 (N.Y. 1939) (restauranteur not entitled to indemnity from seller of bad pork when cooked insufficiently).

96. *See generally* Austin Road Co. v. Pope, 147 Tex. 430, 435, 216 S.W.2d 563, 565 (1949). Another court employed similar reasoning, holding that a supplier of inedible food breached a duty to both the restauranteur and to the customer. Hughes Provision Co. v. La Mear Poultry & Egg Co., 242 S.W.2d 285, 289 (Mo. Ct. App. 1951).

97. General Motors Corp. v. Simmons, 558 S.W.2d 855, 860 (Tex. 1977); *accord,* Jennings v. United States, 374 F.2d 983, 987 n.7 (4th Cir. 1967) (applying Maryland law); Allison Steel Mfg. Co. v. Superior Ct., 511 P.2d 198, 203 (Ariz. Ct. App. 1973); Good v. A.B. Chance Co., 565 P.2d 217, 227 (Colo. Ct. App. 1977); RESTATEMENT (SECOND) OF TORTS § 886B(2), Comment g at 9-10 (Tent. Draft No. 18, 1972). *See generally* 3A L. FRUMER & M. FREIDMAN, PRODUCTS LIABILITY *Indemnity* § 44.04[4], at 15-54 to 15-55 (1977); Davis, *Indemnity Between Negligent Tortfeasors: A Proposed Rationale,* 37 IOWA L.J. 517, 526-27 (1952). Underlying the imposition of ultimate liability on the manufacturer is the theory that losses "should be borne by those who have created the risk and reaped the profit by placing the product in the stream of commerce." Suvada v. White Motor Co., 210 N.E.2d 182, 186 (Ill. 1965).

98. Champion Mobile Homes v. Rasmussen, 553 S.W.2d 237, 243-44 (Tex. Civ. App.—Tyler 1977, writ ref'd n.r.e.). *See generally* Valore, *Product Liability for a Defective House,* 18 CLEV.-MAR. L. REV. 319 (1969). Joint liability predicated solely on the failure of a packager to include a proper warning will also warrant indemnification of a retailer. *See* Jacobs v. Technical Chem. Co., 472 S.W.2d 191, 200 (Tex. Civ. App.—Houston [14th Dist.] 1971) (exploding can of refrigerant), *rev'd on other grounds,* 480 S.W.2d 602 (Tex. 1972).

99. *Compare* Coca Cola Bottling Co. v. Hobart, 423 S.W.2d 118, 125 (Tex. Civ.

directly establishes the existence of a defect in the product at the time of sale, the retailer will remain the sole party liable to the injured consumer.[100]

A frequent source of litigation in this area emanates from an injury to a purchaser caused by a defective automobile with the dealer and manufacturer joined as defendants.[101] When the dealer merely serves as an innocent conduit for a defective machine, he will experience little difficulty in shifting the entire loss to the manufacturer.[102] If an automobile manufacturer, however, sells a dealer a vehicle with defectively designed parts and the dealer knowingly aggravates and contributes to the condition, severely enhancing the danger, the parties will be considered to be in pari delicto and a claim for indemnity will be denied.[103] Underlying this denial of indemnity is the reasoning that the manufacturer breached its duty to the dealer by supplying a defective automobile but the dealer's installation with actual knowledge of the danger and the probable consequences constituted a similar breach of duty to the manufacturer.[104]

The scarcity of Texas cases dealing with this aspect of indemnity law makes it somewhat uncertain at what point a dealer's contribution will be sufficient to constitute a breach of duty to the automobile manufacturer.[105] The failure to discover a latent mechanical or structural defect will not incur liability.[106] A dealer will be considered to have breached a duty to a

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App.—Houston [14th Dist.] 1967, writ ref'd n.r.e.) (no indemnity when retailer failed to trace defect back to bottler) *with* Honea v. Coca Cola Bottling Co., 143 Tex. 272, 277, 183 S.W.2d 968, 970 (1944) (recovery allowed when consumer sufficiently traced defect in bottle back to manufacturer). *See also* Herbert v. Loveless, 474 S.W.2d 732, 739 (Tex. Civ. App.—Beaumont 1971, writ ref'd n.r.e.) (no indemnity where restauranteur failed to establish ice was impure when delivered by ice manufacturer).

100. *See* Coca Cola Bottling Co. v. Hobart, 423 S.W.2d 118, 124 (Tex. Civ. App.—Houston [14th Dist.] 1967, writ ref'd n.r.e.). The injured consumer's cause of action is also predicated on proving that the product was in a defective condition when purchased by the consumer. *See* McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787, 792 (Tex. 1967); RESTATEMENT (SECOND) OF TORTS § 402A, Comment g (1965).

101. *See generally* Sales & Purdue, *The Law of Strict Liability in Texas*, 14 HOUS. L. REV. 1, 100 (1977).

102. Ford Motor Co. v. Russell & Smith Ford Co., 474 S.W.2d 549, 559 (Tex. Civ. App.—Houston [14th Dist.] 1971, no writ) (dicta); *accord*, Langford v. Chrysler Motors Corp., 373 F. Supp. 1251, 1255 (E.D.N.Y. 1974) (using comparative fault test), *aff'd*, 513 F.2d 1121 (2d Cir. 1975).

103. Ford Motor Co. v. Russell & Smith Ford Co., 474 S.W.2d 549, 560 (Tex. Civ. App.—Houston [14th Dist.] 1971, no writ). In *Russell & Smith* the court's determination that Russell & Smith had knowingly aggravated the defect was based on a finding that although vans equipped with air conditioners had chronic overheating problems, the dealership continued to install that equipment. *Id.* at 557.

104. *Id.* at 562-63.

105. *See generally* Comment, *The Automobile Manufacturer as Guarantor of His Product*, 11 GONZ. L. REV. 221, 239-40 (1975); Comment, *Are There Implied Warranties on Used Cars in California?*, 9 U.S.F. L. REV. 539, 540-43 (1975).

106. Williams v. General Motors Corp., 501 S.W.2d 930, 931 (Tex. Civ. App.—Houston [1st Dist.] 1973, writ ref'd n.r.e.) (dealer's indemnity award against manufacturer affirmed

manufacturer, however, when he has actual knowledge of a dangerous defect regardless whether that knowledge was acquired independently or directly from the manufacturer.[107]

The California Supreme Court in its adoption of equitable indemnity[108] singled out the automobile manufacturer-dealer situation as indicative of the inequitable results achieved by the application of rigid standards for common law indemnity.[109] In *Ford Motor Co. v. Poeschl, Inc.* Ford had sent a recall notice to one of its dealers who failed to recall the defective car and, as a result, a consumer suffered a severe injury. Although the dealer's omission was a major factor in the consumer's injury, the court of appeals reluctantly charged Ford with total liability because loss allocation in California was governed by several inflexible indemnity tests.[110] Under the newly announced California system of equitable indemnity, however, that case would be decided on a comparative causation basis and the inequitable result of permitting the dealer to escape all liability would be avoided.[111]

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despite dealer's failure to discover design defects); *accord,* Williams v. Ford Motor Co., 494 S.W.2d 678, 681 (Mo. Ct. App. 1973); Nationwide Mut. Ins. Co. v. Weeks-Allen Motor Co., 198 S.E.2d 88, 91 (N.C. Ct. App. 1973). *But cf.* Volkswagen of America, Inc. v. Licht, 544 S.W.2d 442, 446 (Tex. Civ. App.—El Paso 1976, no writ) (retailer not entitled to indemnity when consumer's cause of action based on consumer protection statute). *See also* Champion Mobile Homes v. Rasmussen, 553 S.W.2d 237, 243 (Tex. Civ. App.—Tyler 1977, writ ref'd n.r.e.) (no duty to discover latent defects in mobile home).

107. *See* Ford Motor Co. v. Russell & Smith Ford Co., 474 S.W.2d 549, 559-60 (Tex. Civ. App.—Houston [14th Dist.] 1971, no writ). In jurisdictions using active-passive or primary-secondary tests as opposed to the Texas concept of relative duties between joint tortfeasors, dealers incur liability if they are aware of or aggravate the defect. *See* Duckworth v. Ford Motor Co., 320 F.2d 130, 132-33 (3d Cir. 1963) (manufacturer entitled to contribution from dealer who negligently failed to repair steering assembly); Chapman v. General Motors Corp., 242 F. Supp. 94, 95 (E.D. Pa. 1965) (dealer liable to manufacturer for contribution or indemnity if his carelessness was factor in collision).

108. American Motorcycle Ass'n v. Superior Ct., 578 P.2d 899, 901-02, 146 Cal. Rptr. 182, 184-85 (1978).

109. *Id.* at 910, 146 Cal. Rptr. at 193. *See generally* Note, *Products Liability, Comparative Negligence, and the Allocation of Damages Among Multiple Defendants,* 50 S. CAL. L. REV. 73, 93 (1976).

110. Ford Motor Co. v. Poeschl, Inc., 98 Cal. Rptr. 702-705 (Ct. App. 1971). *See also* Williams v. Steuart Motor Co., 494 F.2d 1074, 1084 (D.C. Cir. 1974) (despite violation of agreement to inspect all new cars, dealer entitled to indemnity from manufacturer as negligence was merely passive).

111. American Motorcycle Ass'n v. Superior Ct., 578 P.2d 899, 910-11, 146 Cal. Rptr. 182, 193-94 (1978). The California Supreme Court emphasized that the drastic characteristics of implied indemnity are incompatible with the equitable allocation of losses stating:

> The all-or-nothing aspect of the doctrine has precluded courts from reaching a just solution in the great majority of cases in which equity and fairness call for an apportionment of loss between the wrongdoers in proportion to their relative culpability, rather than the imposition of the entire loss upon one or the other tortfeasor.

Id. at 910, 146 Cal. Rptr. at 194.

Just distribution of liability may also be obtained in an automobile manufacturer/dealer

Manufacturer v. Retailer

When a manufacturer sells a retailer a defective product that injures the ultimate buyer, the manufacturer is held strictly liable and thus has no ground for an indemnity claim and receives contribution only when he has been the victim of a significant breach of duty by the retailer.[112] Strict liability is a vehicle of social policy as it looks to the protection of the public,[113] and courts will not allow it to be undermined by attempts to shift the risks of a defective product to an innocent retailer.[114]

Two civil appeals cases and a Fifth Circuit case provide guidelines for the rights and liabilities involved in indemnity claims between manufacturers and retailers. In *Richard Manufacturing Co. v. Aspromonte*[115] the plaintiff brought an action against the manufacturer, Richards, and the seller, Sears Roebuck & Co., for eye and face injuries sustained when the battery of another car exploded during an attempt to jump-start the plaintiff's car.[116] Both Sears and Richards were found guilty of negligence in failing to give adequate warnings and cautionary instructions regarding the use of jumper cables.[117] Richards contended that since it manufactured cables to Sears' specifications, Sears breached a duty owed to Richards to specify that appropriate warnings be placed on the battery cables.[118] Refusing Richards' claim for indemnity the court of civil appeals stated that Sears owed no such duty and further held that as Richards had breached its duty to Sears by furnishing a defective product, Sears was entitled to

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context when allocation is based upon a comparative fault statute. *See* Burks Motors, Inc. v. International Harvester Co., 466 S.W.2d 907, 908 (Ark. 1971) (dealer found ten percent negligent received ninety percent contribution from manufacturer). *See generally* Phillips, *Contribution and Indemnity in Products Liability*, 42 TENN. L. REV. 85, 104-07 (1974).

112. *See* Frisch v. International Harvester Co., 338 N.E.2d 90, 102 (Ill. App. Ct. 1975) (indemnity allowed when distributor's negligent failure to warn viewed merely as continuation of defect); *cf.* Barth v. B.F. Goodrich Tire Co., 92 Cal. Rptr. 809, 814 (Ct. App. 1971) (tire dealer liable to manufacturer for indemnity when he failed to advise consumer of dangers of over-inflation).

113. RESTATEMENT (SECOND) OF TORTS § 402A, Comment c (1965) states in pertinent part: "[P]ublic policy demands that the burden of accidental injuries caused by products . . . be placed upon those who market them . . . and that the consumer of such products is entitled to the maximum of protection . . . ." *Accord*, K & S Oil Well Serv., Inc. v. Cabot Corp. 491 S.W.2d 733, 735 (Tex. Civ. App.—Corpus Christi 1973, writ ref'd n.r.e.) (products liability based on public policy considerations).

114 *See* Bexiga v. Havir Mfg. Corp., 290 A.2d 281, 285 (N.J. 1972). When a retailer is under a statutory or contractual obligation to equip the product with safety devices he may incur liability for contribution if he fails to fulfill that obligation. *See* Chamberlain v. Carborundum Co., 485 F.2d 31, 34 (3d Cir. 1973) (applying Pennsylvania law) (manufacturer of defective grinding wheel and employer who failed to install guard required by law in pari delicto).

115. 557 S.W.2d 543 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ).

116. *Id.* at 550.

117. *Id.* at 551.

118. *Id.* at 551.

full indemnification.[119]

In *Bristol-Meyers v. Gonzales*[120] the plaintiff sought recovery against a drug manufacturer for drug induced deafness. The manufacturer, Bristol-Meyers, was found strictly liable to the patient for failure to provide adequate information on the use of the drug and the prescribing and treating physician was determined to be negligent for administering the drug in excessive dosages and for failing to halt treatment when symptoms indicated an adverse reaction.[121] The jury also found that Bristol-Meyers had failed to give the doctor adequate warnings and that the doctor reasonably relied on the inadequate instructions.[122] The manufacturer sought indemnity or contribution from the physician who had settled with the plaintiff prior to trial.[123] In response, the physician sought indemnity or contribution from the manufacturer.[124] Upholding Bristol-Meyers' right of contribution, the court of civil appeals stated that the manufacturer had breached a duty only to the user of the drug and not to the prescribing physician.[125] The court reasoned that the sole duty owed by a drug manufacturer to a physician is to communicate the danger of using a given medication[126] and

119. *Id.* at 552. In Borg Warner Corp. v. White Motor Co., 344 F.2d 412, 415 (5th Cir. 1965) (applying Texas law), the failure to provide proper specifications was a major factor in holding the defendants equally responsible. The court in Richards Manufacturing Co. v. Aspromonte, 557 S.W.2d 543, 552 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ), distinguished its holding from the result in *Borg Warner* by pointing out that there was no jury finding that the retailer's failure in *Aspromonte* to provide proper specifications was a proximate cause of the injury.

120. 548 S.W.2d 416, 421 (Tex. Civ. App.—Corpus Christi 1976), *rev'd on other grounds*, 561 S.W.2d 801 (Tex. 1978).

121. *Id.* at 423, 427.

122. *Id.* at 421.

123. *Id.* at 421. When the nonsettling tortfeasor establishes a right to contribution, the judgment will be reduced according to the applicable contribution statute. If the nonsettling tortfeasor is entitled to indemnity, the law is unclear whether the court may place that burden on the settlor, limit the plaintiff's recovery to the settlement or deny the nonsettling defendant any claim to indemnity. *See generally* Comment, *Settlements in Multiple Tortfeasor Controversies—Texas Law*, 10 ST. MARY'S L.J. 75, 79-87 (1978).

124. Bristol-Meyers v. Gonzales, 548 S.W.2d 416, 421 (Tex. Civ. App.—Corpus Christi 1976), *rev'd on other grounds*, 561 S.W.2d 801 (Tex. 1978).

125. *Id.* at 428.

126. *Id.* at 428. In some states, a drug manufacturer's duty to the prescribing physician is greater than merely warning of a drug's potential danger. Hoffman v. Sterling Drug, Inc., 485 F.2d 132, 142 (3d Cir. 1973) (applying Pennsylvania law). In *Hoffman* the facts were remarkably similar to those in *Bristol-Meyers v. Gonzales*. Evidence disclosed that the prescribing physician was aware of the dangerous side effects of the drug, but did not know of the debilitating effects of prolonged use of the drug. The court held that the drug manufacturer had breached a duty to the physician. Hoffman v. Sterling Drug, Inc., 485 F.2d 132, 142 (3d Cir. 1973). The Texas Supreme Court did not address contribution and indemnity in *Bristol-Meyers*. *See* Bristol-Meyers Co. v. Gonzales, 561 S.W.2d 801, 805 (Tex. 1978). *See generally* Gravis v. Parke-Davis & Co., 502 S.W.2d 863, 868-70 (Tex. Civ. App.—Corpus

as neither tortfeasor had breached a duty to the other, the parties were in pari delicto and the pro rata contribution statute determined the allocation of liability.[127]

The Fifth Circuit in *Vergott v. Deseret Pharamaceutical Co.*[128] faced the problem of applying Texas law to the allocation of loss between a needle manufacturer, a packager and distributor of the needle, and a hospital for injuries sustained when a defective needle caused a catheter to break off in a patient's vein.[129] Noting a jury finding that the needle was not fit for its intended use and that this was the proximate cause of the injuries, the court stated that the manufacturer had thereby breached a duty to the distributor, the hospital, and the patient.[130] The manufacturer's claim for indemnity was refused as the distributor and the hospital had not breached any duty to the manufacturer, and would have been entitled to indemnification at common law had judgment been rendered against them.[131]

As is clearly evident in *Vergott*, application of Texas indemnity principles achieves equitable results when duties and responsibilities are clear-cut.[132] It could hardly be argued under any theory of loss allocation that an innocent retailer held strictly liable to a consumer should be required to indemnify the producer of a dangerous instrumentality.[133] Unfortunately, when the relative duties become more complex and each tortfeasor has contributed in some manner to the plaintiff's injury, application of the Texas indemnity doctrine becomes difficult and frequently results in a disproportionate allocation of the loss.[134] In both *Richards Manufacturing Co.* and *Bristol-Meyers*, the conduct of each of the joined defendants was determined to be a proximate cause of the ultimate user's injury.[135] In

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Christi 1973, writ ref'd n.r.e.) (discussing duty owed by drug manufacturer to doctor); Comment, *The Diminishing Role of Negligence in Manufacturer's Liability for Unavoidably Unsafe Drugs and Cosmetics*, 9 ST. MARY'S L.J. 102, 106-07 (1977).

127. Bristol-Meyers Co. v. Gonzales, 548 S.W.2d 416, 428 (Tex. Civ. App.—Corpus Christi 1976), *rev'd on other grounds*, 561 S.W.2d 801 (Tex. 1978).

128. 463 F.2d 12 (5th Cir. 1972).

129. Under Texas law, hospital suppliers and hospitals are not subject to strict liability under § 402A as they are not sellers engaged in the business of selling a product. Vergott v. Deseret Pharmaceutical Co., 463 F.2d 12, 16 (5th Cir. 1972). Any indemnity action by a manufacturer would have to be predicated on negligent conduct injuring both the plaintiff and the manufacturer. *See id.* at 16. *See also* Shivers v. Good Shepherd Hosp., Inc., 427 S.W.2d 104, 107 (Tex. Civ. App.—Tyler 1968, writ ref'd n.r.e.) (applying strict tort liability to distributors of medical products).

130. Vergott v. Deseret Pharamaceutical Co., 463 F.2d 12, 16 (5th Cir. 1972).

131. *See id.* at 16.

132. *See id.* at 16. *But see* Davis, *Indemnity Between Negligent Tortfeasors: A Proposed Rationale*, 37 IOWA L.J. 517, 545 (1952) (concluding that Texas' indemnity formula has not brought any certainty to Texas law).

133. See notes 78, 96-97, 106 *supra* and accompanying text.

134. *See* Comment, *The Allocation of Loss Among Joint Tortfeasors*, 41 S. CAL. L. REV. 728, 739-41 (1968).

135. Bristol-Meyers Co. v. Gonzales, 548 S.W.2d 416, 427, 427 (Tex. Civ. App.—Corpus Christi 1976), *rev'd on other grounds*, 561 S.W.2d 801 (Tex. 1978); Richards Mfg. Co. v.

Richards Manufacturing Co. a retailer completely escaped liability for an injury caused in part by its failure to include proper warnings.[136] This result contrasts sharply with the holding in *Bristol-Meyers* in which the manufacturer was able to show a right to contribution and the physician was denied indemnity despite having acted in a reasonable manner by justifiably relying on the manufacturer's defective instructions.[137]

As liability in each case was determined by the presence or absence of a duty between the tortfeasors, the allocation of liability had no relation to each party's role in the causation of the injury to the plaintiff.[138] This result contrasts sharply with the equitable nature of the comparative causation system. Under that system even though a retailer who was adjudged slightly negligent may have a technical right to common law indemnification, he will still incur liability in direct proportion to his responsibility for the injury to the consumer.[139]

Manufacturer v. Manufacturer

The bulk of the cases in this area involve a claim by a manufacturer/assembler seeking indemnity from the manufacturer of a defective component part. The manufacturer/assembler who integrated a defective component into his product is held strictly liable for the introduction of a dangerous instrumentality into the stream of commerce.[140] Only when the evidence clearly establishes that the unsuitable part was the sole cause of the injury will the assembler receive indemnity.[141] Since the social purpose

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Aspromonte, 557 S.W.2d 543, 546-47 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ).

136. Richards Mfg. Co. v. Aspromonte, 557 S.W.2d 543, 552 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ).

137. *See* Bristol-Meyers v. Gonzales, 548 S.W.2d 416, 427, 428 (Tex. Civ. App.—Corpus Christi 1976), *rev'd on other grounds*, 561 S.W.2d 801 (Tex. 1978).

138. The assessment of liability without any real relation to culpability also occurs when the imprecise distinctions of the active-passive test are used. *See* Bjorklund v. Hantz, 208 N.W.2d 722, 723 (Minn. 1973) (thirty percent negligent retailer awarded indemnity from manufacturer forty-five percent negligent). When Minnesota adopted a comparative fault system of loss distribution *Bjorklund* was overruled as its reasoning allowed tortfeasors to escape liability. *See* Tolbert v. Gerber Indus., Inc., 255 N.W.2d 362, 367-68 (Minn. 1977).

139. Bielski v. Schulze, 114 N.W.2d 105 (Wis. 1962) was the first case to assess liability by determining the percentage of causal negligence contributing to the injury.

> It is difficult to justify, either on a layman's sense of justice or on a natural justice, why a joint tortfeasor who is 5% causally negligent should only recover 50% of the amount he paid to the plaintiff from a co-tortfeasor who is 95% causally negligent, and conversely why the defendant who is found 5% causally negligent should be required to pay 50% of the loss by way of reimbursement to the co-tortfeasor who is 95% negligent.

Id. at 109.

140. Watz v. Zapata Off-Shore Co., 431 F.2d 100, 115 (5th Cir. 1970) (applying Texas law); Ford Motor Co. v. Mathis, 322 F.2d 267, 273 (5th Cir. 1963) (applying Texas law). *See also* RESTATEMENT (SECOND) OF TORTS § 402A, Comment q (1965).

141. *See, e.g.*, Westric Battery Co. v. Standard Elec. Co., 522 F.2d 986, 990 (10th Cir.

of strict liability is to assure that the one actually responsible for placing a dangerous product on the market is held liable, public policy is not contravened by the shifting of the loss from the innocent manufacturer/assembler to the component manufacturer.[142] Thus, if the liability of a manufacturer/assembler is predicated solely on the failure to inspect and discover a malfunction in the component, the partmaker will suffer the entire judgment.[143] The failure to discover a defect in a component as a defense to indemnity liability has been extended in one jurisdiction in which it was held that a manufacturer/assembler who negligently tested a part and failed to uncover the malfunction was entitled to receive indemnity from the producer of the part.[144]

Problems with proof of proximate causation are particularly difficult when a component has been fully integrated into a product. As a result, the manufacturer/assembler and the component manufacturer will usually be deemed to be in pari delicto and indemnity will rarely be awarded.[145] In an instance in which a manufacturer/assembler failed to provide proper specifications and to determine the suitability of a clutch in a truck, and the clutch plate manufacturer failed to inspect it or to determine its suitability, the parties were held to be in pari delicto and the contribution statute established loss allocation.[146] Similar results were reached when a component producer was held strictly liable and the manufacturer/assembler was aware of the danger but failed to warn users.[147] The Texas rationale for these holdings is that each party was guilty of wrongful

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1975); B.K. Sweeney Co. v. McQuay-Norris Mfg. Co., 489 P.2d 356, 358 (Colo. Ct. App. 1971); City of Franklin v. Badger Food Truck Sales, Inc., 207 N.W.2d 866, 870-72 (Wis. 1973).

142. *See* Liberty Mut. Ins. Co. v. Williams Mach. & Tool Co., 338 N.E.2d 857, 861 (Ill. 1975) (liability should be traced back to originally responsible party). *See also* 3A L. FRUMER & M. FREIDMAN, PRODUCTS LIABILITY *Indemnity* § 44.02 [3][e], at 15-35 (1977); Michael & Appel, *Contribution and Indemnity Among Joint Tortfeasors in Illinois: A Need for Reform*, 7 LOY. CHI. L.J. 591, 602 (1976).

143. *See, e.g.*, Hales v. Green Colonial, Inc., 402 F. Supp. 738, 741 (W.D. Mo. 1975); Continental Cas. Co. v. Westinghouse Elec. Corp., 327 F. Supp. 723, 726 (E.D. Mich. 1970); Liberty Mut. Ins. Co. v. Williams Mach. & Tool Co., 338 N.E.2d 857, 860 (Ill. 1975); RESTATEMENT OF RESTITUTION § 93(1) (1937). *But see* Symons v. Mueller Co., 526 F.2d 13, 17 (10th Cir. 1975) (manufacturer/assembler who negligently failed to notice defective valve indemnified partmaker); Reefer Queen Co. v. Marine Const. & Design Co., 440 P.2d 453, 457 (Wash. 1968) (manufacturer/assembler who should have been aware of unsuitability of component liable for indemnity).

144. Tromza v. Tecumseh Prods. Co., 378 F.2d 601, 606 (3d Cir. 1967).

145. *See* Penn. v. Inferno Mfg. Corp., 199 So. 2d 210, 235 (La. Ct. of App. 1967) (gauge manufacturer in pari delicto with glass supplier); Schroeder v. Fageol Motors, Inc., 544 P.2d 20, 25 (Wash. 1975) (dealer who negligently repaired not entitled to indemnity from maker of defective piston rod cap).

146. Borg Warner Corp. v. White Motor, Co., 344 F.2d 412, 415 (5th Cir. 1965) (applying Texas law).

147. Trahan v. Crosby-Laughlin, 460 F.2d 266, 267 (5th Cir. 1972) (applying Texas law). *See also* United Tractor Inc. v. Chrysler Corp., 563 S.W.2d 850, 851 (Tex. Civ. App.—El Paso 1978, no writ) (both aware of defective condition).

conduct that concurred in the injury to the plaintiff and since that same conduct was a breach of each tortfeasor's duty to the other, no basis for indemnity existed as neither party was blameless with respect to the other.[148]

Although there is very little Texas law concerning loss distribution between a component manufacturer and a manufacturer/assembler, it is clear that this area will be plagued by the same problems with the strained concepts of duty and inequitable results that affected common law indemnity when applied to retailers and employer/purchasers.[149] Due to the difficulties with proof of proximate cause when a component is completely integrated into the manufacturer's product, the relative duties and liabilities are blurred even further when considered in the context of the Texas test for indemnity.

Other Situations

Frequently, a purchaser who does not fall in the class of employer, retailer, or manufacturer will injure another through the operation of a defective instrumentality. When the owner of an automobile injures another due to a mechanical defect in the vehicle and is held liable on the basis of a nondelegable duty, the owner will generally be reimbursed by the manufacturer.[150] Operation of the car with knowledge of the mechanical malfunction, however, will usually place the parties in pari delicto and bar claims for indemnity.[151]

Recent Texas authority indicates that a manufacturer's right to recover against a concurrently negligent consumer will also be determined by the existence and breach of respective duties. In *Heil Co. v. Grant*[152] the widow and children of the decedent, who was killed when the bed of his brother's dump truck descended as he was working under it, instituted a strict liability action against the manufacturer for defective design and for failure to warn of the hazard.[153] Alleging that the decedent's brother was negligent in allowing him to work beneath the raised bed without a brace,

148. Borg Warner Corp. v. White Motor Co., 344 F.2d 412, 415 (5th Cir. 1965). *See also* General Motors Corp. v. Simmons, 558 S.W.2d 855, 859 (Tex. 1977).

149. See notes 71-76, 89-91, 132-37 *supra* and accompanying text.

150. *See* Allied Mut. Cas. Corp. v. General Motors Corp., 279 F.2d 455, 458-59 (10th Cir. 1960) (applying Missouri law); Suvada v. White Motor Co., 210 N.E.2d 182, 188-89 (Ill. 1965); Ford v. Flaherty, 294 N.E.2d 437, 439-40 (Mass. App. Ct. 1972); RESTATEMENT OF RESTITUTION § 93(1), Comment a, Illustration 2 (1937).

151. *See* Schneider v. Swaney Motor Car Co., 136 N.W.2d 338, 342 (Iowa 1965); Lenhart v. Owens, 507 P.2d 318, 323 (Kan. 1973). *But see* Bill Loeper Ford v. Hites, 121 Cal. Rptr. 131, 136 (Ct. App. 1975) (strictly liable dealer not entitled to recovery over against negligent driver). A substantial alteration of the vehicle may also bar any recovery by the owner against the manufacturer. *See* Douglas Equip., Inc. v. Mack Trucks, Inc., 471 F.2d 222, 225 (7th Cir. 1972) (recovery disallowed when exploding truck air reservoir tank had been significantly changed by employer of injured employee).

152. 534 S.W.2d 916 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.).

153. *Id.* at 919-20.

the manufacturer sought contribution or indemnity by impleading the brother. The Tyler Court of Civil Appeals applied the Texas indemnity test[154] and refused the manufacturer's claim.[155] Instead, the brother as a consumer was held entitled to indemnity from the manufacturer as Heil had breached its duty to furnish a truck without dangerous defects.[156] Even if the brother's negligence had been established, such a finding would likely have been found irrelevant to any claim by the manufacturer as his duty ran to the decedent, not to the manufacturer.[157]

A strictly liable defendant's right to indemnity from a negligent joint tortfeasor was further analyzed in *General Motors Corp. v. Simmons.*[158] Examining the criteria used by other states, the Texas Supreme Court stated that ignorance of a latent defect not reasonably discoverable, actual knowledge of a defect, or independent harm caused by a cotortfeasor's conduct were factors influencing indemnity awards.[159] *Simmons* represented an attempt by the Texas Supreme Court to clarify the duties and responsibilities of joint tortfeasors in indemnity and contribution actions founded on strict liability.[160] *Simmons* recognized, however, that the proper method for insuring equitable distribution of losses in products liability cases in Texas was uncertain, and asked for legislative assistance in remedying the problem.[161]

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154. See text accompanying notes 61-62 *supra*.

155. Heil Co. v. Grant, 534 S.W.2d 916, 926 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.).

156. *Id.* at 926-27. *See also* Comment, *Contribution and Indemnity: Does the Right Exist Among Joint Tortfeasors When One Is Liable on a Theory of Strict Liability*, 18 S. TEX. L.J. 572, 578 (1977).

157. Heil Co. v. Grant, 534 S.W.2d 916, 927 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.) (on motion for rehearing); *accord*, William H. Field Co. v. Nuroco Woodwork, Inc., 348 A.2d 716, 718 (N.H. 1975); Olch v. Pacific Press & Shear Co., 573 P.2d 1355, 1358 (Wash. Ct. App. 1978). A party's status as a purchaser from a particular manufacturer does not create a duty to the manufacturer beyond that owed as a member of the general public. *See* Heil Co. v. Grant, 534 S.W.2d 916, 926-27 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.); Petco Corp. v. Plummer, 392 S.W.2d 163, 165 (Tex. Civ. App.—Dallas 1965, writ ref'd n.r.e.).

158. 558 S.W.2d 855 (Tex. 1977).

159. *Id.* at 860-61. *Simmons* also clarified two other unsettled areas. It emphasized that liability, direct or derivative, under § 402A extends only to physical injury to person or property and not to economic loss. *Id.* at 860. *See generally* Note, *Economic Loss in Products Liability Jurisprudence*, 66 COLUM. L. REV. 917 (1966); *see also* Nobility Homes v. Shivers, 557 S.W.2d 77, 80 (Tex. 1977). In addition *Simmons* stressed that the general duty owed by a manufacturer to a user will not be extended to all parties coming into contact with the product to justify indemnity to a cotortfeasor under all circumstances. General Motors Corp. v. Simmons, 558 S.W.2d 855, 859 (Tex. 1977); *accord*, South Austin Drive-In Theatre v. Thomison, 421 S.W.2d 933, 949 (Tex. Civ. App.—Austin 1967, writ ref'd n.r.e.).

160. *See* General Motors Corp. v. Simmons, 558 S.W.2d 855, 859-62 (Tex. 1977). *See generally* Keeton, *Torts, Annual Survey of Texas Law*, 32 SW. L.J. 1, 11-14 (1978).

161. General Motors Corp. v. Simmons, 558 S.W.2d 855, 862-63 (Tex. 1977).

CONCLUSION

There is little doubt that the present Texas system for the allocation of losses between joint tortfeasors in a strict liability action frequently results in the assessment of liability disproportionate to actual fault.[162] The value of an indemnity test that is based entirely upon the duties between tortfeasors and ignores actual responsibility for the injury is highly questionable.[163] The inadequacy of the system is especially evident when the rigidly structured, all-or-nothing Texas test is contrasted with loss distribution systems that no longer use the common law indemnity concept and determine liability on the basis of comparative causation.[164] The Texas Supreme Court has invited legislative clarification of the rights and remedies between negligent and strictly liable tortfeasors. In the interest of common sense and justice, the Texas Legislature should discard the artificial concepts of common law indemnity and institute a system of loss distribution that assesses liability entirely on the basis of actual culpability.

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162. See text accompanying notes 73-76, 87-90, 130-34 *supra*.

163. *See* Keeton, *Torts, Annual Survey of Texas Law*, 32 Sw. L.J. 1, 13 (1978) (ideas founded on negligence theory not satisfactorily transferred to strict liability situations). *See also* Skinner v. Reed-Prentice Div. Package Mach. Co., 374 N.E.2d 437, 439 (Ill. 1978) (ordinary negligence and indemnity theories not adaptable to strict liability).

164. *See, e.g.*, American Motorcycle Ass'n v. Superior Ct., 578 P.2d 899, 901, 146 Cal. Rptr. 182, 184 (1978); Dole v. Dow Chem. Co., 282 N.E.2d 288, 295, 331 N.Y.S.2d 382, 391-92 (1972); Bielski v. Schulze, 114 N.W.2d 105, 107 (Wis. 1962).