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Angelini: Recovery of Consequential Damages in Breach of Implied Warranty A

power to protect the testator's intent. The present state of affairs does a great disservice to those testators who desire not only independence in the settlement of their estates, but also competence in its administration.

David V. Jones

PRODUCT LIABILITY—Implied Warranty—Recovery of Consequential Damages in Breach of Implied Warranty Action Disallowed to Extent Buyer's Negligence Was Concurring Proximate Cause

Signal Oil & Gas Co. v. Universal Oil Products,
572 S.W.2d 320 (Tex. 1978).

Signal Oil and Gas Company entered into negotiations with Universal Oil Products and its subsidiary Procon, Inc., for the licensing and construction of an isomax process unit and hydrogen plant for use at Signal's refinery. Procon contracted with Alcorn Combustion Company for the purchase of a reactor charge heater, a component part of the isomax unit. The isomax unit was constructed at the Signal refinery and three months after the unit began operation, it exploded causing a fire which resulted in damage to Signal's plant. Signal alleged that the explosion was caused by the defective design of the reactor charge heater in that the type of bolts used failed to meet the necessary specifications. The defect had been discovered almost two months prior to the explosion, and Signal had been warned of the hazard, but had disregarded the warning.

Signal sued Universal Oil Products, Procon, and Alcorn in strict liability, negligence, and breach of implied warranty. Signal was denied recovery under strict liability because the jury failed to find that the defective condition was a producing cause of the accident. The jury found Signal contributorily negligent; therefore, Signal was denied any relief on the basis of negligence or implied warranty. Signal appealed and the Beaumont Court of Civil Appeals affirmed, holding that Signal's contributory negligence in failing to heed the warning that the unit was defective precluded Signal's recovery on the theory of breach of implied warranty.[1] On appeal to the Texas Supreme Court, Signal alleged that contributory negligence was not a defense in breach of implied warranty actions. Held—*Affirmed in part, reversed and remanded in part.* In an action based on breach of implied warranty, the buyer may not recover consequential

1. Signal Oil & Gas Co. v. Universal Oil Prods., 545 S.W.2d 907, 911 (Tex. Civ. App.—Beaumont 1977), *aff'd in part, rev'd and remanded in part,* 572 S.W.2d 320 (Tex. 1978). Since the accident occured prior to the effective date of article 2212a, Signal's contributory negligence barred its recovery on the theory of negligence. *See* TEX. REV. CIV. STAT. ANN. art. 2212a, § 1 (Vernon Supp. 1978-1979) (comparative negligence statute).

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damages to the extent his own negligence or fault was a concurring proximate cause.[2]

Product liability actions are premised on the liability of a seller for injuries or damages to a buyer caused by the seller's product.[3] This liability is founded on the reasoning that one who puts goods on the market should bear the responsibility for injuries or damages caused by the goods.[4] An action for damages caused by a defective product can be brought on any of three theories:[5] strict liability, negligence, and breach of implied warranty.[6]

Originally, warranty actions sounded in tort[7] because the theory of warranty historically was based on the public policy of protecting human life and safety.[8] Eventually buyers brought these actions based on contract, and warranty became recognized as a term of the sales contract.[9] Early warranty cases involved only express representations regarding goods sold, but in later cases increasing responsibility placed on the seller by the public resulted in the development of implied warranties.[10] Because the historical development of warranties resulted in a dual nature of both tort and contract, confusion exists whether contributory negligence applies as a defense in these actions.[11]

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2. Signal Oil & Gas Co. v. Universal Oil Prods., 572 S.W.2d 320, 329 (Tex. 1978).

3. *See* 1 R. HURSH & H. BAILEY, AMERICAN LAW OF PRODUCTS LIABILITY 2D § 1:1, at 3-4 (1974); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 96, at 641 (4th ed. 1971).

4. *See, e.g.*, Liberty Mut. Ins. Co. v. Hercules Powder Co., 224 F.2d 293, 295 (3d Cir. 1955); Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 900, 27 Cal. Rptr. 697, 700 (1963); MacPherson v. Buick Motor Co., 111 N.E. 1050, 1052 (N.Y. 1916).

5. *See* 1 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 3, at 1-27 to 1-30 (1978); 1 R. HURSH & H. BAILEY, AMERICAN LAW OF PRODUCTS LIABILITY 2D § 1:3, at 8-10 (1974).

6. *See* Rhoads v. Service Mach. Co., 329 F. Supp. 367, 371 (E.D. Ark. 1971) (negligence action); Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 900, 27 Cal. Rptr. 697, 700 (1963)(action in strict liability); Tidlund v. Seven Up Bottling Co., 316 P.2d 656, 657 (Cal. Dist. Ct. App. 1957)(breach of warranty action). *See generally* 1 R. HURSH & H. BAILEY, AMERICAN LAW OF PRODUCTS LIABILITY 2D § 1:2, at 7 (1974); W. PROSSER, HANDBOOK OF THE LAW OF TORTS §§ 96-98, at 641-58 (4th ed. 1971).

7. *See, e.g.*, Rasmus v. A.O. Smith Corp., 158 F. Supp. 70, 78-81 (N.D. Iowa 1958); Ciociola v. Delaware Coca-Cola Bottling Co., 172 A.2d 252, 256 (Del. 1961); Rogers v. Toni Home Permanent Co., 147 N.E.2d 612, 614-15 (Ohio 1958). *See generally* 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 16.03 [1], at 3A-51 (1978); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 95, at 634 (4th ed. 1971).

8. *See* Rogers v. Toni Home Permanent Co., 147 N.E.2d 612, 614 (Ohio 1958); Jacob E. Decker & Sons v. Capp, 139 Tex. 609, 612, 164 S.W.2d 828, 829 (1942).

9. *See* Rasmus v. A.O. Smith Corp., 158 F. Supp. 70, 78 (N.D. Iowa 1958); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 95, at 634-35 (4th ed. 1971). The Texarkana Court of Civil Appeals stated that an implied warranty is, by its nature, a contractual agreement and is collateral to the sales contract. *See* Darr Equip. Co. v. Owens, 408 S.W.2d 566, 569 (Tex. Civ. App. — Texarkana 1966, no writ).

10. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 95, at 636 (4th ed. 1971).

11. *See* Pritchard v. Liggett & Myers Tobacco Co., 350 F.2d 479, 484 (3d Cir. 1965), *cert. denied*, 382 U.S. 987 (1966); Barefield v. La Salle Coca-Cola Bottling Co., 120 N.W.2d 786, 788 (Mich. 1963).

Some states have allowed contributory negligence as a defense in breach of implied warranty actions.[12] A Minnesota case, for example, held that contributory negligence was a defense because breach of implied warranty had its origins in tort law.[13] Other jurisdictions have refused to recognize contributory negligence as a defense.[14] In *Bahlman v. Hudson Motor Car Co.*[15] a Michigan court refused to allow contributory negligence as a defense because the plaintiff's negligence was foreseeable.[16] A few jurisdictions, instead of allowing contributory negligence as a defense, have denied recovery on the ground that the alleged breach of warranty did not proximately cause the injury.[17] In *Rasmus v. A.O. Smith Corp.*[18] a United States district court applied Iowa law in holding that proximate cause, not negligence, was at issue in warranty actions.[19] No clear majority view on the issue exists,[20] and disagreements are evident even within jurisdictions.[21]

The defense of contributory negligence in products liability cases has been formulated into legislation in at least one state.[22] In New York, the products liability statute allows damages to be diminished by the percentage of fault attributable to the plaintiff, regardless of the legal theory

12. *See* Pepsi Cola Bottling Co. v. Superior Burner Serv. Co., 427 P.2d 833, 836 (Alaska 1967); Coleman v. American Universal, 264 So. 2d 451, 454 (Fla. Dist. Ct. App. 1972); Gardner v. Coca Cola Bottling Co., 127 N.W.2d 557, 562 (Minn. 1964); Ettin v. Ava Truck Leasing, Inc., 242 A.2d 663, 666-67 (N.J. 1968).

13. Gardner v. Coca Cola Bottling Co., 127 N.W.2d 557, 562 (Minn. 1964).

14. *See* Dagley v. Armstrong Rubber Co., 344 F.2d 245, 250 (7th Cir. 1965); Kassouf v. Lee Bros., Inc., 26 Cal. Rptr. 276, 278 (Dist. Ct. App. 1962); Hensley v. Sherman Car Wash Equip. Co., 520 P.2d 146, 148 (Colo. Ct. App. 1974); Dillon v. General Motors Corp., 315 A.2d 732, 736 (Del. 1973); Henderson v. Cominco Am. Inc., 518 P.2d 873, 877-78 (Idaho 1974).

15. 288 N.W. 309 (Mich. 1939).

16. *Id.* at 312.

17. *See, e.g.*, Dallison v. Sears, Roebuck & Co., 313 F.2d 343, 346 (10th Cir. 1962); Rasmus v. A.O. Smith Corp., 158 F. Supp. 70, 95 (N.D. Iowa 1958); Missouri Bag Co. v. Chemical Delinting Co., 58 So. 2d 71, 77 (Miss. 1952). *See generally* Annot., 4 A.L.R.3d 501, 504-505 (1965).

18. 158 F. Supp. 70 (N.D. Iowa 1958).

19. *Id.* at 95. The Uniform Commercial Code allows a plaintiff to recover for injuries proximately caused by a breach of warranty, but does not deal directly with the issue of contributory negligence. If an injury is caused solely by the buyer's actions, the breach of warranty would not be the proximate cause of the injury, and the buyer could not recover. The Code does not, however, absolutely preclude recovery if the buyer is negligent or at fault. *See* U.C.C. §§ 2-314 to 317, -715; 1 R. HURSH & H. BAILEY, AMERICAN LAW OF PRODUCTS LIABILITY 2d § 3:83, at 629 (1974); Comment, *Sales—The Defense of Contributory Negligence in Warranty Actions*, 22 S.C. L. REV. 444, 449 (1970).

20. *See* Annot., 4 A.L.R.3d 501, 501-10 (1965).

21. *See* Williams v. Ford Motor Co., 454 S.W.2d 611, 619 (Mo. Ct. App. 1970)(contributory negligence not a defense); Bullock v. Benjamin Moore & Co., 392 S.W.2d 10, 13 (Mo. Ct. App. 1965)(contributory negligence apparently a defense). *See generally* 1 R. HURSH & H. BAILEY, AMERICAN LAW OF PRODUCTS LIABILITY 2D § 3:81, at 621 (1974).

22. *See* N.Y. CIV. PRAC. LAW § 1411 (McKinney 1976). *See generally* 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 16.01 [3], at 3A-36 to 37 (1978).

upon which the action is based.[23] Thus, damages in all New York products liability cases, including those based on breach of implied warranty, are relatively proportioned between the plaintiff and defendant.[24]

In addition to the problem arising from confusion between tort and contract law in breach of warranty actions, a problem results from the overlapping of the various defenses.[25] The defenses of contributory negligence and assumption of risk are often confused.[26] Although the cases are in disagreement regarding available defenses to breach of implied warranty, it has been suggested that the inconsistency is largely a matter of language.[27] When the plaintiff's contributory negligence is a mere failure to discover a defect or to guard against its existence, courts have held that the plaintiff is not barred from recovery.[28] If, however, the plaintiff's contributory negligence overlaps with assumption of risk in that the plaintiff discovers the defect and continues to use the product with knowledge of the danger, the plaintiff is barred from recovery.[29]

A recent trend in product liability cases indicates a rejection of absolutely allowing or denying the use of traditional defenses such as contributory negligence and assumption of risk.[30] The trend is based on the unfair-

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23. *See* N.Y. Civ. Prac. Law § 1411 (McKinney 1976).

24. *See id.* Similar to the New York statute is the Uniform Comparative Fault Act which was recently passed by the National Conference of Commissioners on Uniform State Laws. Under the Act the plaintiff's recovery can be diminished if he is partially at fault in causing the injury. The Act applies to all forms of misconduct by the plaintiff and to all products liability theories, including breach of warranty. *See* 2 L. Frumer & M. Friedman, Products Liability § 16.01 [3], at 3A-36 to 3A-37 (1978); Wade, *Products Liability and Plaintiff's Fault—The Uniform Comparative Fault Act,* 29 Mercer L. Rev. 373, 382 (1977).

25. *See* Buttrick v. Arthur Lessard & Sons, Inc., 260 A.2d 111, 114 (N.H. 1969); Cintrone v. Hertz Truck Leasing & Rental Serv., 212 A.2d 769, 782 (N.J. 1965); Dippel v. Sciano, 155 N.W.2d 55, 64 (Wis. 1967). *See generally* 2 L. Frumer & M. Friedman, Products Liability § 16.01 [3], at 3A-34 (1978); Restatement (Second) of Torts § 402A, Comment n (1965).

26. *See* Buttrick v. Arthur Lessard & Sons, Inc. 260 A.2d 111, 114 (N.H. 1969); Cintrone v. Hertz Truck Leasing & Rental Serv., 212 A.2d 769, 782 (N.J. 1965). *See generally* 2 L. Frumer & M. Friedman, Products Liability § 16.01 [3], at 3A-34 (1978); Restatement (Second) of Torts § 402A, Comment n (1965).

27. *See* Buttrick v. Arthur Lessard & Sons, Inc., 260 A.2d 111, 114 (N.H. 1969); Cintrone v. Hertz Truck Leasing & Rental Serv., 212 A.2d 769, 782 (N.J. 1965). *See generally* Prosser, *The Fall of the Citadel,* 50 Minn. L. Rev. 791, 839 (1966); Annot., 4 A.L.R.3d 501, 504-05 (1965).

28. *See* Barefield v. LaSalle Coca Cola Bottling Co., 120 N.W.2d 786, 788 (Mich. 1963); Gardner v. Coca-Cola Bottling Co., 127 N.W.2d 557, 562 (Minn. 1964): Cintrone v. Hertz Truck Leasing & Rental Serv., 212 A.2d 769, 782 (N.J. 1965). *See generally* Prosser, *The Fall of the Citadel,* 50 Minn. L. Rev. 791, 838-39 (1966).

29. *See* Prichard v. Liggett & Myers Tobacco Co., 350 F.2d 479, 485 (3d Cir. 1965), *cert. denied,* 382 U.S. 987 (1966); Brown v. Chapman, 304 F.2d 149, 153 (9th Cir. 1962); Crane v. Sears Roebuck & Co., 32 Cal. Rptr. 754. 757 (Dist. Ct. App. 1963); Brockett v. Harrell Bros., 143 S.E.2d 897, 902 (Va. 1965). *See generally* Prosser, *The Fall of the Citadel,* 50 Minn. L. Rev. 791, 838 (1966); Annot., 4 A.L.R.3d 501, 502-11 (1965).

30. *See* West v. Caterpillar Tractor Co., 547 F.2d 885, 887 (5th Cir. 1977); Edwards v. Sears, Roebuck & Co., 512 F.2d 276, 290 (5th Cir. 1975); Sun Valley Airlines, Inc. v. Avco-

ness of holding the seller totally liable or denying the plaintiff any recovery when both are partially at fault.[31] The jurisdictions which have rejected these standard defenses have simply extended the application of their comparative negligence statutes or court-made rules to product liability cases.[32] Some courts have equated strict liability with negligence per se in order to apply their comparative negligence statutes.[33] One jurisdiction has held that since the contributory negligence statute had applied to strict liability actions, the newly enacted comparative negligence statute must also be applied to such actions.[34] Those states which have judicially adopted the doctrine of comparative negligence have expanded the doctrine to hold the same principles applicable to product liability actions.[35]

The law in Texas has been similarly unsettled in regard to the buyer's

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Lycoming Corp., 411 F. Supp. 598, 603 (D. Idaho 1976); Hagenbuch v. Snap-On Tools Corp., 339 F. Supp. 676, 683 (D.N.H. 1972); Butaud v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42, 45-46 (Alaska 1976); Dippel v. Sciano, 155 N.W. 2d 55, 64-65 (Wis. 1967). *But see* Kinard v. Coats, 553 P.2d 835, 837 (Colo. Ct. App. 1976). *See generally* Kroll, *Comparative Fault: A New Generation in Products Liability,* 1977 INS. L. J. 492, 492; Levine, *Buyer's Conduct as Affecting the Extent of Manufacturer's Liability in Warranty,* 52 MINN. L. REV. 627, 647 (1968); Vargo, *The Defenses to Strict Liability in Tort: A New Vocabulary With an Old Meaning,* 29 MERCER L. REV. 447, 460 (1977); Wright, *Hoelter-Skelter: Product Defect and Plaintiff Negligence —A Connecticut Commentary on Confusion,* 10 CONN. L. REV. 90, 119-120 (1977). Contributory negligence refers to a plaintiff's conduct that is below the standard required to protect himself whereas assumption of risk is a plaintiff's voluntary action in the face of a known risk. The two defenses often overlap. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS §§ 65, 68, at 417, 440-41 (4th ed. 1971).

31. *See* Sun Valley Airlines, Inc. v. Avco-Lycoming Corp., 411 F. Supp. 598, 603-04 (D. Idaho 1976); Butaud v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42, 46 (Alaska (1976).

32. *See* West v. Caterpillar Tractor Co., 547 F.2d 885, 887 (5th Cir. 1977) (judicially made doctrine of comparative negligence applicable to all product liability actions); Edwards v. Sears, Roebuck & Co., 512 F.2d 276, 290 (5th Cir. 1975)(Mississippi's pure comparative negligence statute applicable to strict liability actions); Sun Valey Airlines, Inc. v. Avco-Lycoming Corp., 411 F. Supp. 598, 603 (D. Idaho 1976)(Idaho's comparative negligence statute applicable to strict liability actions); Hagenbuch v. Snap-On Tools Corp., 339 F. Supp. 676, 683 (D.N.H. 1972)(New Hampshire's comparative negligence statute applicable to strict liability actions); Butaud v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42, 45-46 (Alaska 1976)(judicially adopted doctrine of comparative negligence applicable to all product liability actions); Dippel v. Sciano, 155 N.W. 2d 55, 64-65 (Wis. 1967)(Wisconsin's comparative negligence statute applicable to all product liability cases concerning personal injuries). Comparative negligence is a doctrine in which damages are apportioned between plaintiff and defendant based upon the percentage of fault attributable to each. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 67, at 434 (4th ed. 1971). A federal district court applying Hawaii law employed comparative negligence principles although Hawaii had not adopted the doctrine of comparative negligence either by statute or judicial decision. *See* Brown v. Chapman, 198 F. Supp. 78, 86 (D. Hawaii 1961), *aff'd,* 304 F.2d 149 (9th Cir. 1962).

33. *See* Sun Valley Airlines, Inc. v. Avco-Lycoming Corp., 411 F. Supp. 598, 603-04 (D. Idaho 1976); Dippel v. Sciano, 155 N.W.2d 55, 64-65 (Wis. 1967).

34. *See* Hagenbuch v. Snap-On Tools Corp., 339 F. Supp. 676, 683 (D.N.H. 1972).

35. *See* West v. Caterpillar Tractor Co., 547 F.2d 885, 887 (5th Cir. 1977); Butaud v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42, 45-46 (Alaska 1976).

conduct in breach of implied warranty actions.[36] Before adoption of the Uniform Commercial Code, implied warranties were imposed upon a seller as a matter of law,[37] but the applicability of contributory negligence in such actions had never been dealt with squarely.[38] Several Texas cases, however, have considered the various defenses, including contributory negligence, in strict liability actions.[39] Prior to the Texas Supreme Court decision in *General Motors Corp. v. Hopkins,*[40] the general rule in Texas was that contributory negligence consisting of a failure to discover a defect was not a defense to recovery in strict liability actions.[41] The use of a product with an appreciation of the risk involved, however, was a defense in strict liability actions.[42] Additionally, unforeseeable misuse of the product was recognized as a defense in such actions.[43] Texas courts impliedly extended these rules to actions for breach of implied warranty by failing to make a clear distinction between cases involving strict liability and those involving breach of implied warranty.[44]

36. *See* Texsun Feed Yards, Inc. v. Ralston Purina Co., 447 F.2d 660, 670-72 (5th Cir. 1971)(applying Texas law); Olsen v. Royal Metals Corp., 392 F.2d 116, 118 (5th Cir. 1968)(applying Texas law); McDevitt v. Standard Oil Co., 391 F.2d 364, 369 (5th Cir. 1968)(applying Texas law); Shamrock Fuel & Oil Sales Co. v. Tunks, 416 S.W.2d 779, 782-83 (Tex. 1967).

37. *See* Jacob E. Decker & Sons, Inc. v. Capps, 139 Tex. 609, 612, 164 S.W.2d 828, 829 (1942)(implied warranty neither tort nor contract, but based on public policy).

38. *See* Texsun Feed Yards, Inc. v. Ralston Purina Co., 447 F.2d 660, 669-70 (5th Cir. 1971); Olsen v. Royal Metals Corp., 392 F.2d 116, 118 (5th Cir. 1968); Shamrock Fuel & Oil Sales Co. v. Tunks, 416 S.W.2d 779, 781 (Tex. 1967).

39. *See, e.g.*, McDevitt v. Standard Oil Co., 391 F.2d 364, 369 (5th Cir. 1968)(applying Texas law)(contributory negligence in failing to discover a defect not a defense); Rourke v. Garza, 530 S.W.2d 794, 800 (Tex. 1975)(contributory negligence or failure to act reasonably not a defense); Henderson v. Ford Motor Co., 519 S.W.2d 87, 89 (Tex. 1975)(negligent failure to discover a defect or to foresee danger not a defense); Shamrock Fuel & Oil Sales Co. v. Tunks, 416 S.W.2d 779, 785 (Tex. 1967)(failure to discover defect or to guard against its existence not a defense).

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

41. *See, e.g.*, Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1099 (5th Cir. 1973)(applying Texas law), *cert. denied,* 419 U.S. 869 (1974); Olsen v. Royal Metals Corp., 392 F.2d 116, 118 (5th Cir. 1968)(applying Texas law); General Motors Corp. v. Hopkins, 548 S.W.2d 344, 350 (Tex. 1977); Henderson v. Ford Motor Co., 519 S.W.2d 87, 90-91 (Tex. 1974).

42. *See, e.g.*, Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1098 (5th Cir. 1973)(applying Texas law), *cert. denied,* 419 U.S. 869 (1974); Olsen v. Royal Metals Corp., 392 F.2d 116, 118 (5th Cir. 1968)(applying Texas law); Rourke v. Garza, 530 S.W.2d 794, 800 (Tex. 1975); Henderson v. Ford Motor Co., 519 S.W.2d 87, 90-91 (Tex. 1974).

43. *See* Doss v. Apache Powder Co., 430 F.2d 1317, 1322 (5th Cir. 1970)(applying Texas law); Helene Curtis Indus., Inc. v. Pruitt, 385 F.2d 841, 856 (5th Cir. 1967)(applying Texas law), *cert. denied,* 391 U.S. 913 (1968); Procter & Gamble Mfg. Co. v. Langley, 422 S.W.2d 773, 780 (Tex. Civ. App.—Dallas 1967, writ dism'd).

44. *See, e.g.*, Texsun Feed Yards, Inc. v. Ralston Purina Co., 447 F.2d 660, 670-72 (5th Cir. 1971)(indicating no Texas cases have distinguished between strict liability in tort and breach of implied warranty in contract); Olsen v. Royal Metals Corp., 391 F.2d 116, 118 (5th Cir. 1968)(implied warranty action citing RESTATEMENT (SECOND) OF TORTS § 402A); Sham-

The Texas view of products liability cases has been changed somewhat by the recent Texas Supreme Court decisions of *General Motors Corp. v. Hopkins*[45] and *Nobility Homes, Inc. v. Shivers.*[46] In *Hopkins,* a strict liability case involving misuse of a product, the court recognized the theory of comparative causation.[47] The supreme court recognized that the cause of an injury could be the result of both the manufacturer's fault and the injured plaintiff's fault in strict liability cases.[48] The court held that in situations involving concurring proximate cause, the trier of fact must determine the relative percentages of fault and apportion damages accordingly.[49] *Nobility Homes* made a further alteration in Texas product liability law.[50] The supreme court noted that since Texas has adopted both section 402A of the *Restatement (Second) of Torts* and the Uniform Commercial Code, consumers need no longer rely only on public policy for protection.[51] Consequently, the supreme court held that actions for breach of implied warranty should be governed by the Texas Business and Commerce Code rather than by tort law.[52] *Nobility Homes* indicated, therefore, that warranty actions should be kept distinct from other product liability actions.[53]

Signal Oil & Gas Co. v. Universal Oil Products[54] is the first Texas case dealing with the issue of contributory negligence in a breach of implied warranty action.[55] In *Signal* the Texas Supreme Court recognized the implied warranty as a contractual issue under the Texas Business and Commerce Code,[56] rather than a tort action. The Code allows recovery for damages proximately resulting from a breach of warranty, but proximate cause is to be considered in view of whether the buyer's use of the goods was reasonable.[57] Thus, recovery of consequential damages under an im-

rock Fuel & Oil Sales Co. v. Tunks, 416 S.W.2d 779, 781 (Tex. 1967)(warranty referred to as strict liability in tort).

45. 548 S.W.2d 344 (Tex. 1977).

46. 557 S.W.2d 77 (Tex. 1977).

47. *See* General Motors Corp. v. Hopkins, 548 S.W.2d 344, 351 (Tex. 1977); Twerski, *The Many Faces of Misuse: An Inquiry Into the Emerging Doctrine of Comparative Causation,* 29 MERCER L. REV. 403, 433-34 (1978).

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

49. *Id.* at 351.

50. *See* Nobility Homes, Inc. v. Shivers, 557 S.W.2d 77, 78 (Tex. 1977).

51. *See id.* at 78; TEX. BUS. & COM. CODE ANN. §§ 1.109-9.507 (Tex. UCC)(Vernon 1968); RESTATEMENT (SECOND) OF TORTS § 402A (1965).

52. *See* Nobility Homes, Inc., v. Shivers, 557 S.W.2d 77, 78 (Tex. 1977); TEX. BUS. & COM. CODE ANN. §§ 1.109-9.507 (Tex. UCC)(Vernon 1968).

53. *See* Nobility Homes, Inc. v. Shivers, 557 S.W.2d 77, 78 (Tex. 1977).

54. 572 S.W.2d 320 (Tex. 1978).

55. *Id.* at 327.

56. *Id.* at 327. The concurring opinion, however, expresses the view that *Signal* should be decided on a strict liability theory. *Id.* at 331-33 (Pope, J., concurring opinion).

57. Signal Oil & Gas Co. v. Universal Oil Prods., 572 S.W.2d 320, 327-28 (Tex. 1978); *see* TEX. BUS. & COM. CODE ANN. §§ 2.714-715 (Tex. UCC) (Vernon 1968).

plied warranty cause of action may be affected by the buyer's conduct.[58] Since the Code does not state that the buyer's conduct will be a total bar to recovery, the court concluded that the buyer's fault is important in determining proximate cause.[59] Recognizing that the seller's defective product and the buyer's actions can concur in proximately causing the injury, the court applied the rule of concurrent proximate causation to the contractual theory of implied warranty.[60] Therefore, the court held that in an action for breach of implied warranty, liability is to be apportioned between the seller and the buyer according to their respective percentages of causation.[61]

With the decisions in *Hopkins* and *Signal*, Texas has followed the trend taken by several jurisdictions toward expanding the use of the standard defenses in product liability cases.[62] The approach taken by the Texas Supreme Court, however, differs somewhat from those jurisdictions that simply have applied their comparative negligence statutes and judicial rules to product liability actions.[63] In *Hopkins* and *Signal*, the supreme court stated that the allocation of damages in product liability actions based on strict liabilty and breach of warranty are not to be confused with the allocation of damages in actions brought under the Texas modified comparative negligence statute.[64] In these product liability cases the Texas

58. Signal Oil & Gas Co. v. Universal Oil Prods., 572 S.W.2d 320, 328 (Tex. 1978).

59. *Id.* at 328; *see* TEX. BUS. & COM. CODE ANN. § 2.715, Comment 5 (Tex. UCC)(Vernon 1968).

60. *See* Signal Oil & Gas Co. v. Universal Oil Prods., 572 S.W.2d 320, 329 (Tex. 1978)(no reference made to fact that *Hopkins* concerned misuse of product and *Signal* contributory negligence); General Motors Corp. v. Hopkins, 548 S.W.2d 344, 349-352 (Tex. 1977).

61. *See* Signal Oil & Gas Co. v. Universal Oil Prods., 572 S.W.2d 320, 329 (Tex. 1978)(to be distinguished from Texas comparative negligence statute which applies in negligence actions and bars recovery to plaintiff who is more than fifty per cent negligent).

62. *See* West v. Caterpillar Tractor Co., 547 F.2d 885, 887 (5th Cir. 1977); Edwards v. Sears, Roebuck & Co., 512 F.2d 276, 290 (5th Cir. 1975); Sun Valley Airlines, Inc. v. Avco-Lycoming Corp., 411 F. Supp. 598, 603 (D. Idaho 1976); Hagenbuch v. Snap-On Tools Corp., 339 F. Supp. 676, 683 (D.N.H. 1972); Butaud v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42, 45-46 (Alaska 1976); Dippel v. Sciano, 155 N.W.2d 55, 64-65 (Wis. 1967). *See generally* Kroll, *Comparative Fault: A New Generation in Products Liability*, 1977 INS. L.J. 492, 492; Levine, *Buyer's Conduct as Affecting the Extent of Manufacturer's Liability in Warranty*, 52 MINN. L. REV. 627, 645 (1968); Vargo, *The Defenses to Strict Liability in Tort: A New Vocabulary With an Old Meaning*, 29 MERCER L. REV. 447, 460 (1978); Wright, *Hoelter-Skelter: Product Defect and Plaintiff Negligence—A Connecticut Commentary on Confusion*, 10 CONN. L. REV. 90, 119-120 (1977).

63. *Compare* Signal Oil & Gas Co. v. Universal Oil Prods., 572 S.W.2d 320,329 (Tex. 1978) *and* General Motors Corp. v. Hopkins, 548 S.W.2d 344, 352 (Tex. 1977) *with* Edwards v. Sears, Roebuck & Co., 512 F.2d 276, 290 (5th Cir. 1975) *and* Sun Valley Airlines, Inc. v. Avco-Lycoming Corp., 411 F. Supp. 598, 603 (D. Idaho 1976) *and* Hagenbuch v. Snap-On Tools Corp., 339 F. Supp. 676, 683 (D.N.H. 1972) *and* Dippel v. Sciano, 155 N.W.2d 55, 64-65 (Wis. 1967).

64. *See* Signal Oil & Gas Co. v. Universal Oil Prods., 572 S.W.2d 320, 329 (Tex. 1978); General Motors Corp. v. Hopkins, 548 S.W.2d 344, 352 (Tex. 1977); TEX. REV. CIV. STAT. ANN. art. 2212a, § 1 (Vernon Supp. 1978-1979).

court has adopted a theory of pure comparative causation rather than modified comparative negligence.[65] The Texas modified comparative negligence statute refers only to negligence actions;[66] therefore, the Texas Supreme Court has applied that statute only to negligence actions.[67]

The Texas modified comparative negligence statute bars recovery to any plaintiff who is more than fifty per cent at fault in causing his own injury.[68] The comparative causation theory used in *Hopkins* and *Signal* completely bars recovery to a plaintiff only when he is totally responsible for his injury.[69] By adopting this theory of concurring proximate cause, the Texas Supreme Court has preserved the policy reasoning behind product liability cases by holding the seller responsible for placing a defective product in the stream of commerce if the defect was a cause of the injury.[70] The theory of concurring proximate cause also embraces the more equitable view that the seller should be relieved of part of the liability if the plaintiff partly caused the injury.[71]

65. *See* Signal Oil & Gas Co. v. Universal Oil Prods., 572 S.W.2d 320, 329 (Tex. 1978); General Motors Corp. v. Hopkins, 548 S.W.2d 344, 352 (Tex. 1977). *See generally* Twerski, *The Many Faces of Misuse: An Inquiry Into the Emerging Doctrine of Comparative Causation*, 29 MERCER L. REV. 403, 404 (1978).

66. *See* TEX. REV. CIV. STAT. ANN. art. 2212a, § 1 (Vernon Supp. 1978-1979). A possible problem presented by the non-applicability of the comparative negligence statute to actions in strict liability and breach of warranty is in regard to contribution among codefendants. The comparative negligence statute requires codefendants to pay damages in proportion to their percentages of negligence. The contribution statute, however, which applies to all torts actions not covered by the comparative negligence statute, holds codefendants liable for equal amounts regardless of the percentages of fault. Use of the contribution statute would conflict with the pure comparative fault doctrine set forth in *Hopkins* and *Signal*. *See generally* Signal Oil & Gas Co. v. Universal Oil Prods., 572 S.W.2d 320, 329 (Tex. 1978); General Motors Corp. v. Hopkins, 548 S.W.2d 344, 352 (Tex. 1977); TEX. REV. CIV. STAT. ANN. art. 2212 (Vernon 1971), art. 2212a, § 2 (Vernon Supp. 1978-1979).

67. *See* General Motors Corp. v. Simmons, 558 S.W.2d 855, 862-63 (Tex. 1977). *See generally*, Twerski, *The Many Faces of Misuse: An Inquiry Into the Emerging Doctrine of Comparative Causation*, 29 MERCER L. REV. 403, 433-34 (1978).

68. *See* TEX. REV. CIV. STAT. ANN. art. 2212a, § 1 (Vernon Supp. 1978-1979). Unlike the Texas modified comparative negligence doctrine, the pure comparative negligence doctrine applied in some jurisdictions allows the plaintiff to recover in proportion to the defendant's negligence regardless of the plaintiff's percentage of negligence. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 67, at 436-47 (4th ed. 1971).

69. *See* Signal Oil & Gas Co. v. Universal Oil Prods., 572 S.W.2d 320, 329 (Tex. 1978); General Motors Corp. v. Hopkins, 548 S.W.2d 344, 352 (Tex. 1977).

70. *See* Liberty Mut. Ins. Co. v. Hercules Powder Co., 224 F.2d 293, 295 (3d Cir. 1955); Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 900, 27 Cal. Rptr. 697, 700 (1963); MacPherson v. Buick Motor Co., 111 N.E. 1050, 1052 (N.Y. 1916).

71. *See* Edwards v. Sears, Roebuck & Co., 512 F.2d 276, 290 (5th Cir. 1975); Sun Valley Airlines, Inc. v. Avco-Lycoming Corp., 411 F. Supp. 598, 603-04 (D. Idaho 1976); Butaud v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42, 46 (Alaska 1976). *See generally* Kroll, *Comparative Fault: A New Generation in Products Liability*, 1977 INS. L.J. 492, 510; Levine, *Buyer's Conduct as Affecting the Extent of Manufacturer's Liability in Warranty*, 52 MINN. L. REV. 627, 652 (1968); Twerski, *Comparative Causation*, 29 MERCER L. REV. 373, 391 (1978); Vargo, *The Defenses to Strict Liability in Tort: A New Vocabulary With an Old Meaning*,

Although the *Signal* and *Hopkins* decisions will produce equitable results in many cases, the decisions result in an inconsistency in the area of product liability law. *Hopkins* applied the theory of comparative causation to strict liability actions, and *Signal* extends the theory to warranty actions.[72] Product liability cases brought on a negligence cause of action will still be governed by the Texas modified comparative negligence statute.[73] A plaintiff's recovery, therefore, may depend upon whether he brings his product liability case on a theory of strict liability, breach of warranty, or negligence.[74] If the plaintiff proceeds on a negligence theory, his recovery will be completely barred if he is more than fifty percent at fault.[75] A successful suit in strict liability or breach of warranty, however, will result in some recovery, unless the plaintiff is totally at fault.[76] Such inconsistency in product liability actions results in a failure to carry out the policy of holding a seller responsible for placing defective goods in the stream of commerce.[77]

In *Hopkins* the plaintiff's misuse of the product prevented full recovery, and in *Signal* the plaintiff's contributory negligence in failing to heed a warning prevented complete recovery.[78] Neither case expressly held that the theory of comparative causation will be applied in all cases in which the plaintiff is at fault.[79] The overlapping of the various defenses such as contributory negligence, assumption of risk, and misuse of the product is still a problem as long as the rules of each defense are different.[80] Since

29 MERCER L. REV. 447, 463-64 (1978); Comment, *Sales—The Defense of Contributory Negligence in Warranty Actions*, 22 S.C. L. REV. 444, 452-53 (1970).

72. *See* Signal Oil & Gas Co. v. Universal Oil Prods., 572 S.W.2d 320, 329 (Tex. 1978); General Motors Corp. v. Hopkins, 548 S.W.2d 344, 352 (Tex. 1977).

73. *See* General Motors Corp. v. Simmons, 558 S.W.2d 855, 862-63 (Tex. 1977). *See generally* Scarzafava, *An Analysis of Products Liability Defenses in the Aftermath of Hopkins*, 9 ST. MARY'S L.J. 261, 272-73 (1977).

74. *See* West v. Caterpillar Tractor Co., 547 F.2d 885, 887 (5th Cir. 1977); Butuad v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42, 46 (Alaska 1976). *See generally* Scarzafava, *An Analysis of Products Liability Defenses in the Aftermath of Hopkins*, 9 ST. MARY'S L.J. 261, 272-73 (1977).

75. *See* TEX. REV. CIV. STAT. ANN. art. 2212a, § 1 (Vernon Supp. 1978-1979).

76. *See* Signal Oil & Gas Co. v. Universal Oil Prods., 572 S.W.2d 320, 328-29 (Tex. 1978); General Motors Corp. v. Hopkins, 548 S.W.2d 344, 352 (Tex. 1977).

77. *See* Butaud v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42, 46 (Alaska 1976)(anomalous to have results in product liability cases dependent upon whether plaintiff sues in negligence, strict liability, or breach of warranty).

78. *See* Signal Oil & Gas Co. v. Universal Oil Prods., 572 S.W.2d 320, 328-29 (Tex. 1978); General Motors Corp. v. Hopkins, 548 S.W.2d 344, 352 (Tex. 1977).

79. *See* Signal Oil & Gas Co. v. Universal Oil Prods., 572 S.W.2d 320, 328-29 (Tex. 1978); General Motors Corp. v. Hopkins, 548 S.W.2d 344, 352 (Tex. 1977). *See generally* 31 Sw. L.J. 940, 945 (1977).

80. *See* Buttrick v. Arthur Lessard & Sons, Inc., 260 A.2d 111, 114 (N.H. 1969); Cintrone v. Hertz Truck Leasing & Rental Serv., 212 A.2d 769, 782 (N.J. 1965); Dippel v. Sciano, 155 N.W.2d 55, 64 (Wis. 1967). *See generally* 2 L. FRUMER & M. FRIDMAN, PRODUCTS LIABILITY § 16.01 [3] (1978); RESTATEMENT (SECOND) OF TORTS § 402A, Comment n (1965). Assumption

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the court in *Signal* applied the same rule of concurrent proximate cause as in *Hopkins* without making the distinction in the type of plaintiff fault involved, the court indicated a possible trend toward applying comparative causation to all plaintiff misconduct.[81] This rule has been recognized as the better view by some legal authorities because the theory of comparative causation results in more equitable judgments.[82]

Texas has adopted a fair method of dealing with plaintiff fault in some product liability cases. By recognizing that both seller and buyer can be partly responsible for an injury, the policy reasons behind product liability actions are preserved. Some basic issues, however, are still unanswered. The law of product liability could be made more uniform by reconciling the inconsistencies between the three areas of product liability. Additionally, the question of comparative liability and its application to the various defenses must be settled. A statute similar to the New York statute allowing the diminution of damages to the plaintiff regardless of the classification of his misuse or the theory sued upon would provide uniformity.[83] Such legislation would lead to a fair and consistent treatment of the consumer and the manufacturer in all product liability actions.

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of risk is a complete defense in strict liability causes of action. *See* 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 16A [5][f], at 3B-210 (1978).

81. *See* Signal Oil & Gas Co. v. Universal Oil Prods., 572 S.W.2d 320, 328-29 (Tex. 1978); General Motors Corp. v. Hopkins, 548 S.W.2d 344, 352 (Tex. 1977). *See generally* 14 HOUS. L. REV. 1115, 1125 (1977). The court in *Signal* does not make any distinction between the misuse of product in the *Hopkins* case and the contributory negligence in the instant case. *See* Signal Oil & Gas Co. v. Universal Oil Prods., 572 S.W.2d 320, 329 (Tex. 1978); General Motors Corp. v. Hopkins, 548 S.W.2d 344, 352 (Tex. 1977).

82. *See generally* Wade, *A Conspectus of Manufacturers' Liability for Products*, 10 IND. L. REV. 755, 760-61 (1978); Wade, *Products Liability and Plaintiff's Fault—The Uniform Comparative Fault Act*, 29 MERCER L. REV. 373, 382 (1978); Wright, *Hoelter-Skelter: Product Defect and Plaintiff Negligence—A Connecticut Commentary on Confusion*, 10 CONN. L. REV. 90, 119-120 (1977). The Uniform Comparative Fault Act drafted by the National Conference of Commissioners on Uniform State Laws supports the view that all plaintiff fault should be considered under the comparative liability theory. *See* Wade, *Products Liability and Plaintiff's Fault—The Uniform Comparative Fault Act*, 29 MERCER L. REV. 373, 382 (1978).

83. *See* N.Y. CIV. PRAC. LAW § 1411 (McKinney 1976).