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Contribution and Indemnity between Negligent and Strictly Liable Tortfeasors Lawyer's Forum - Settlements - New Perspectives.

James B. Sales

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CONTRIBUTION AND INDEMNITY BETWEEN NEGLIGENT AND STRICTLY LIABLE TORTFEASORS

JAMES B. SALES*

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I. HISTORICAL PERSPECTIVES

As early as 1799, courts began struggling with the problem of allocating the risk of an injured party's loss between multiple defendants who were either associated with or responsible for the damage sustained by the plaintiff.¹ Initially, recognition was accorded the right of an individual defendant, legally responsible to an injured party but not guilty of any fault or misconduct, to recoup the entire loss from the party whose fault or wrongful conduct precipitated the injury sustained by the plaintiff.² The

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1. *Merryweather v. Nixan*, 10 Eng. Rep. 1337 (K.B. 1799). See generally Reath, *Contribution Between Persons Jointly Charged with Negligence—Merryweather v. Nixan*, 12 HARV. L. REV. 176 (1898).

2. 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 (1977); Dube, *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 (1978); Comment, *Comparative Causation, Indemnity and the Allocation of Losses Between Joint Tortfeasors in Products Liability Cases*, 10 ST. MARY'S L.J. 587 (1979).

right of indemnity was succeeded in American jurisprudence by the evolution of the rules of contribution.³ Contribution contemplated that joint tortfeasors in *pari delicto* be required to share in the cost of the loss sustained by the plaintiff.⁴ Judicial development of these concepts of ascertaining and distributing losses sustained by injured parties, however, can only be described as inconsistent and uneven among the various jurisdictions.⁵

Most jurisdictions have adopted the concept of strict tort liability embodied in section 402A of the Restatement (Second) of Torts.⁶ With adoption of strict tort liability a struggle has emerged

3. The right of contribution among joint tortfeasors was established in 1917 by enactment of TEX. REV. CIV. STAT. ANN. art. 2212 (Vernon 1971). This provision provides that:

Any person against whom, . . . a judgment is rendered in any suit, . . . or based on tort, except in causes wherein the right of contribution or of indemnity, or of recovery, over, by and between the defendants is given by statute or exists under common law, shall upon payment of said judgment, have a right of action against his co-defendant or co-defendants and recover from each a sum equal to the proportion of all the defendants named in said judgment rendered to the whole amount of said judgment.

Id.

4. See, e.g., *Borg Warner Corp. v. White Motor Co.*, 344 F.2d 412, 415 (5th Cir. 1965) (applying Texas law); *Gulf, Colo. & S.F. Ry. v. Bliss*, 368 S.W.2d 594, 596-97 (Tex. 1963); *Strakos v. Gehring*, 360 S.W.2d 787, 796-97 (Tex. 1962); *Richards Mfg. Co. v. Aspromonte*, 557 S.W.2d 543, 552 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ).

5. Compare *Reese v. Chicago, B. & Q. R.R.*, 303 N.E.2d 382, 386 (Ill. 1973) (contribution between joint tortfeasors does not exist in Illinois) and *Dole v. Dow Chem. Co.*, 282 N.E.2d 288, 295, 331 N.Y.S.2d 382, 391-92 (1972) (loss allocated through comparative causation) and *Austin Rd. Co. v. Pope*, 147 Tex. 430, 434-35, 216 S.W.2d 563, 565 (1949) (right of contribution does not abrogate common law indemnity) and *Payne v. Bilco Co.*, 194 N.W.2d 641, 645-46 (Wis. 1972) (requirement of "special verdict" for contribution) with *Daly v. General Motors Corp.*, 575 P.2d 1162, 1170, 144 Cal. Rptr. 380, 388 (1978) (jurors possess ability to fairly apportion liability between multiple parties) and *B & B Auto Supply, Sand Pit, & Trucking Co. v. Central Freight Lines, Inc.*, 603 S.W.2d 814, 816-17 (Tex. 1980) (indemnity no longer applicable as between multiple negligent tortfeasors). See generally *Jensvold, A Modern Approach to Loss Allocation Among Tortfeasors in Products Liability Cases*, 58 MINN. L. REV. 723 (1974).

6. See *Bachner v. Pearson*, 479 P.2d 319, 325-26 (Alaska 1970); *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897, 900, 27 Cal. Rptr. 697, 700 (1963); *Hiigel v. General Motors Corp.*, 544 P.2d 983, 987-88 (Colo. 1976); *Stewart v. Budget Rent-A-Car*, 470 P.2d 240, 243 (Hawaii 1970); *Keener v. Dayton Elec. Mfg. Co.*, 445 S.W.2d 362, 365 (Mo. 1969); *Stang v. Hertz Corp.*, 497 P.2d 732, 735-36 (N.M. 1972); *Webb v. Zorn*, 220 A.2d 853, 854 (Pa. 1966); *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787, 790 (Tex. 1967). See generally R. HURSH & H. BAILEY, *AMERICAN LAW OF PRODUCTS LIABILITY* 2d § 4:41 (Supp. 1980). Thirty-four jurisdictions have adopted the law of strict tort liability, including: Alaska, Arizona, Arkansas, California, Colorado, District of Columbia, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota,

as the courts attempt to distinguish, integrate, and/or accommodate the concept of strict liability in tort with the more traditional doctrine of negligence and the application of contribution and indemnity between parties.⁷ Uncertainty exists whether the right of contribution and/or indemnity should apply to joint tortfeasors when one of the parties is adjudged liable based on negligent conduct, while another is adjudged liable on a strict tort liability theory. For instance, should a tortfeasor guilty of negligent conduct causing injury to a party be permitted to recoup indemnity from a co-defendant whose conduct is nonculpable, but who is likewise deemed liable for furnishing a defective product? Conversely, should a party strictly liable in tort be permitted contribution from a co-defendant tortfeasor who is neither a user of nor an innocent bystander with respect to the defective product, but who is guilty of independent acts of negligence?

The Texas courts have wrestled interminably with the legal obligation and responsibilities that exist between tortfeasors characterized by varying degrees of culpability.⁸ It is readily apparent, however, that improvement is essential if the system is to provide a fair allocation of the risk of loss among multiple parties contributing to an injury-producing event. This article endeavors to analyze the changes initiated in Texas law regarding the problems of contribution and indemnity between a negligent tortfeasor and a party deemed strictly liable in tort, and to suggest adoption of further rules to insure a fairer and more evenhanded apportionment of the risk of loss based on the fault precept underlying the entire tort reparation system.

Oregon, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Washington, and Wisconsin. *Id.* at 41.

7. Compare *State Farm Mut. Ins. Co. v. Factory Mut. Ins. Co.*, 526 P.2d 406, 407 (Ariz. App. 1974) (rejecting general right to contribution) and *Seaboard Coast Line R. Co. v. Smith*, 359 So. 2d 427, 428-29 (Fla. 1978) (refusing contribution from employer) and *Suvada v. White Motor Co.*, 210 N.E.2d 182, 188 (Ill. 1965) (refusing contribution in strict liability case) with *Edwards v. Sears, Roebuck & Co.*, 512 F.2d 276, 290 (5th Cir. 1976) (construing Mississippi law to allow contribution) and *Busch v. Busch Constr. Co.*, 262 N.W.2d 377, 394 (Minn. 1977) (allowing contribution) and *Northwestern Mut. Ins. Co. v. Stromme*, 479 P.2d 554, 557 (Wash. 1971) (allowing contribution in a strict liability case).

8. See, e.g., *Renfro Drug Co. v. Lewis*, 149 Tex. 507, 528-30, 235 S.W.2d 609, 623-24 (1951) (breach of duty); *Wheeler v. Glazer*, 137 Tex. 341, 345-46, 153 S.W.2d 449, 451 (1941) (different degrees of care); *San Antonio v. Smith*, 94 Tex. 266, 271-72, 59 S.W.1109, 1111 (1900) (vicarious liability). An excellent review of the basis for determining the applicability of indemnity is contained in *Strakos v. Gehring*, 360 S.W.2d 787, 796-97 (Tex. 1962).

II. CONTRIBUTION AND COMMON LAW INDEMNITY

As a necessary predicate for any analysis of the allocation of loss among multiple liable parties, it is essential to clearly understand the distinction between indemnity and contribution.⁹ Indemnity involves essentially an all-or-nothing proposition.¹⁰ This concept contemplates a total shifting of ultimate responsibility to the party legally responsible for the loss. The right of indemnification, as distinguished from contribution, depends not on legislative prerogative but rather on an evolution of the common-law concept of implied contract.¹¹ Contribution, unlike indemnity, is entirely a creature of statute, and implies that parties in *pari delicto* share the loss sustained by an injured party.¹²

Fundamentally, the common-law right of indemnity encompasses three factual situations.¹³ One concept of common-law indemnity involves different degrees of duty to the injured party.¹⁴ A

9. See generally W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 51, at 310 (4th ed. 1971); Davis, *Indemnity Between Negligent Tortfeasors: A Proposed Rationale*, 37 *IOWA L. REV.* 517 (1952); Hodges, *Contribution and Indemnity Among Tortfeasors*, 26 *TEXAS L. REV.* 150, 150-51 (1947); Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 *U. PA. L. REV.* 130 (1932).

10. Hodges, *Contribution and Indemnity Among Tortfeasors*, 26 *TEXAS L. REV.* 150, 151 (1947). Hodges characterizes indemnity as: "[T]he payment of all of plaintiff's damages by one tortfeasor to another tortfeasor who has paid it to the plaintiff." *Id.* at 151. Similarly, the Texas Supreme Court in *B & B Auto Supply, Sand Pit, & Trucking Co. v. Central Freight Lines, Inc.*, 603 S.W.2d 814 (Tex. 1980), defined common law indemnity to entitle one tortfeasor total reimbursement from another tortfeasor for damages paid to the plaintiff. *Id.* at 817.

11. As noted by the Texas Supreme Court in *Strakos v. Gehring*, 360 S.W.2d 787 (Tex. 1962), "[a]rticle 2212 has no application here if the situation is one where indemnity exists under the common law." *Id.* at 797; accord, *Renfro Drug Co. v. Lewis*, 149 Tex. 507, 525-30, 235 S.W.2d 609, 621-23 (1951) (common law right of indemnity); *Humble Oil & Ref. Co. v. Martin*, 148 Tex. 175, 185, 222 S.W.2d 995, 1002 (1949) (common law right of indemnity); *Wheeler v. Glazer*, 137 Tex. 341, 344-45, 153 S.W.2d 449, 451 (1941) (no right of contribution among joint tortfeasors at common law); see *Indemnity Ins. Co. v. Kootz-Wagner Elec. Co.*, 233 F.2d 380, 383 (7th Cir. 1956) (applying Indiana law); *Southern Pac. Co. v. Morrison Knudsen Co.*, 338 P.2d 665, 670-71 (Or. 1959).

12. See *General Motors Corp. v. Simmons*, 558 S.W.2d 855, 859 (Tex. 1977); *Austin Rd. Co. v. Pope*, 147 Tex. 430, 434-35, 216 S.W.2d 563, 565 (1949); Hodges, *Contribution and Indemnity Among Tortfeasors*, 26 *TEXAS L. REV.* 150, 151 (1947); Oldham & Maynard, *Indemnity and Contribution Between Strictly Liable and Negligent Defendants in Major Aircraft Litigation*, 43 *J. AIR L. & COM.* 245, 247 (1977); Shelton, *Comparative Causation: A Legislative Proposal for the Equitable Allocation of Loss Between Strictly Liable and Negligent Parties*, 20 *S. TEX. L.J.* 123, 124-25 (1979).

13. *Strakos v. Gehring*, 360 S.W.2d 787, 798 (Tex. 1962).

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

second concept of indemnity envisions the tortfeasor being deemed liable to the injured party vicariously by operation of law.¹⁵ The third concept contemplates a breach of duty that one tortfeasor owed not only to the injured party but also to the co-tortfeasor.¹⁶

At common law, the various degrees of duty owed by each tortfeasor is compared in apportioning loss. The degree of duty concept involves a tortfeasor who seeks to obtain indemnity from a co-tortfeasor because the indemnitee breached a duty to exercise an appropriate level or degree of care, while the indemnitor breached a duty to exercise a higher degree of care.¹⁷ As an example, a common carrier owes a high degree of care to its passengers, while a party who collides with a common carrier and injures the passenger merely owes a duty to exercise reasonable care.¹⁸ Under these circumstances, the party owing a duty to exercise reasonable care to the injured party has breached a duty not only to the injured passenger but also to the common carrier whose liability in turn to the injured passenger is based on a more stringent standard.¹⁹

A second basis for common-law indemnity involves the vicarious liability of the tortfeasor to the injured party by operation of law.²⁰

"[*Wheeler*] . . . involves the concept of 'different qualities' of negligence." *Strakos v. Gehring*, 360 S.W.2d 787, 798 (Tex. 1962).

15. See *Strakos v. Gehring*, 360 S.W.2d 787, 797-98 (Tex. 1962); *San Antonio v. Smith*, 94 Tex. 266, 271-72, 59 S.W. 1109, 1111 (1900). "[*Smith*] . . . gives indemnity to the tortfeasor who is only vicariously liable by operation of law." *Strakos v. Gehring*, 360 S.W.2d 787, 798 (Tex. 1962). See also *B & B Auto Supply, Sand Pit, & Trucking Co. v. Central Freight Lines, Inc.*, 603 S.W.2d 814, 816-17 (Tex. 1980).

16. See *Strakos v. Gehring*, 360 S.W.2d 787, 797-98 (Tex. 1962); *Austin Rd. Co. v. Pope*, 147 Tex. 430, 434-35, 216 S.W.2d 563, 565 (1949). "[*Austin Road Co.*] . . . involves a breach of duty as between tortfeasors." *Strakos v. Gehring*, 360 S.W.2d 787, 798 (Tex. 1962).

17. *Wheeler v. Glazer*, 137 Tex. 341, 343-45, 153 S.W.2d 449, 450-51 (1941); see *Knutson v. Morton Foods, Inc.*, 603 S.W.2d 805, 806 (Tex. 1980).

18. *Wheeler v. Glazer*, 137 Tex. 341, 343, 153 S.W.2d 449, 450-51 (1941). In *Wheeler*, an employee of Glazer drove a company owned truck into the path of a Dallas Railway Company street car, injuring Nona Wheeler, a passenger on the tram. Wheeler sued both Glazer and the street car company to recover damages for the injuries she sustained. The court held the street car company exercised ordinary care for the plaintiff's protection, but Glazer's negligence was of a different quality from that of the street car company. *Id.* at 343, 153 S.W.2d at 450-51; see *Huey v. Dykes*, 82 So. 481, 482 (Ala. 1919) (qualities of negligence as applied to a master and servant); *Gregg v. Wilmington*, 70 S.E. 1070, 1074 (N.C. 1911) (master and servant).

19. *Wheeler v. Glazer*, 137 Tex. 341, 344-45, 153 S.W.2d 449, 451 (1941).

20. *San Antonio v. Smith*, 94 Tex. 266, 271-72, 59 S.W. 1109, 1111 (1900); see *Coastal States Crude Gathering Co. v. Williams*, 476 S.W.2d 339, 350 (Tex. Civ. App. — Corpus

For example, an employee who negligently injures another creates liability not only for himself but also for his employer. Under principles of respondeat superior, both the employee and the employer are jointly and severally liable to the injured party. As between the employee and the employer, however, the culpable party is the employee who is obligated to indemnify his employer for the negligently caused injury.²¹

Perhaps the single most important test for evaluating the propriety of common-law indemnity has been the breach of duty that one tortfeasor owes to his co-tortfeasor.²² Texas courts have chosen to conceptualize the breach of duty test as an "imaginary lawsuit" in which the party seeking indemnity becomes a fictitious plaintiff in a hypothetical action against the other tortfeasor. In the landmark case of *Austin Road Co. v. Pope*,²³ plaintiff was injured when a truck operated by Pope backed into him, causing severe injury.²⁴ The general contractor, Austin Road Company, was responsible for providing signals to operators of the dump trucks during the course of backing.²⁵ The jury concluded the operator of the truck

Christi 1971, writ ref'd n.r.e.). In *Coastal States*, the court described the category of indemnity characterized in *Smith* as being based on "active versus passive" negligence. The active versus passive test originally contemplated a party who negligently created a dangerous condition, while another party was negligent in failing to recognize and remedy the condition. In such situation the plaintiff was consequently injured by the joint negligence of the tortfeasors. *Id.* at 350. See *Oats v. Dublin Nat'l Bank*, 127 Tex. 2, 10-11, 90 S.W.2d 824, 829 (1936) (active v. passive test utilized); *Valee v. Joiner*, 44 S.W.2d 983, 984 (Tex. Comm'n App. 1921, holding approved) (active v. passive test upheld). *But see* *Brown & Root, Inc. v. United States*, 198 F.2d 138, 140-41 (5th Cir. 1952) (court discussed disadvantage of the passive v. active test but did not find indemnity applied). The Texas Supreme Court, in *General Motors Corp. v. Simmons*, 558 S.W.2d 855 (Tex. 1977), rejected the active versus passive negligence test as unsound. *Id.* at 860.

21. *San Antonio v. Smith*, 94 Tex. 266, 271-72, 59 S.W. 1109, 1111 (1900); *Frantom v. Neal*, 426 S.W.2d 268, 272 (Tex. Civ. App.—Fort Worth 1968, writ ref'd n.r.e.); see *Knutson v. Morton Foods, Inc.*, 603 S.W.2d 805, 807 (Tex. 1980).

22. See *Hodges, Contribution and Indemnity Among Joint Tortfeasors*, 26 TEXAS L. REV. 150, 152-53 (1947). See generally *Shelton, Comparative Causation: A Legislative Proposal for the Equitable Allocation of Loss Between Strictly Liable and Negligent Parties*, 20 S. TEX. L.J. 123 (1979); Comment, *Comparative Causation, Indemnity and the Allocation of Losses Between Joint Tortfeasors in Products Liability Cases*, 10 ST. MARY'S L.J. 587 (1979). As noted by the Texas Supreme Court in *B & B Auto Supply v. Central Freight Lines, Inc.*, "the right to indemnity usually arises when one tortfeasor has breached a duty to a co-tortfeasor." *B & B Auto Supply, Sand Pit, & Trucking Co. v. Central Freight Lines, Inc.*, 603 S.W.2d 814, 816 (Tex. 1980).

23. 147 Tex. 430, 216 S.W.2d 563 (1949).

24. *Id.* at 432-33, 216 S.W.2d at 564.

25. *Id.* at 432-33, 216 S.W.2d at 564. Pope and other truckers were hauling materials to

was negligent in failing to maintain a proper lookout, and also determined the general contractor failed to provide appropriate signals to the truck operator during the back-up operation.²⁶ Although declaring both defendants to be in *pari delicto*, the Texas Supreme Court differentiated the case from one where one tortfeasor breaches a duty to both the injured party and the co-tortfeasor. Articulating the governing test, the supreme court stated:

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 wrong against a third person, is nevertheless entitled to recover against his co-tortfeasor.²⁷

If a tortfeasor, in the imaginary or theoretical position of a plaintiff would be entitled to assert a cause of action against the co-tortfeasor as a defendant, then common-law indemnity is appropriate.²⁸ The Texas courts have repeatedly reaffirmed the breach of duty test as the principal method for ascertaining the existence of a right to common-law indemnity.²⁹

a cement mixer operated by the Austin Road Company. This maneuver required Pope to back his truck the length of a city block while other manual laborers worked on both sides of the street. Although Austin Road Company endeavored to supervise the construction, they neglected to provide a watchman to aid the truckers. Subsequently, Pope backed over Jackson, a wheel barrow operator. Jackson sued Pope and Pope cross-claimed against Austin Road Company for failure to provide a watchman.

26. *Id.* at 434-35, 216 S.W.2d at 565-66.

27. *Id.* at 434-35, 216 S.W.2d at 565.

28. See *Foster v. Ford Motor Co.*, 616 F.2d 1304, 1308 (5th Cir. 1980). "Texas courts apply an 'imaginary lawsuit' test in deciding whether one tortfeasor is entitled to indemnity from another." *Id.* at 1308; accord, *Austin Rd. Co. v. Pope*, 147 Tex. 430, 434-35, 216 S.W.2d 563, 565 (1949); see, e.g., *Vergott v. Deseret Pharmaceutical Co.*, 463 F.2d 12, 16-17 (5th Cir. 1972) (applying *Austin Road Co.* "imaginary lawsuit" test); *Borg Warner Corp. v. White Motor Co.*, 344 F.2d 412, 415 (5th Cir. 1965) (citing *Austin Road Co.* as test); *General Motors Corp. v. Simmons*, 558 S.W.2d 855, 859 (Tex. 1977) (citing *Austin Road Co.* as test); *Air Shields, Inc. v. Spears*, 590 S.W.2d 574, 582 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.) (citing *Austin Road Co.* test); *Butler v. Henry*, 589 S.W.2d 190, 193 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.) (applying *Austin Road Co.* test); *Gammage v. Weinberg*, 355 S.W.2d 788, 791 (Tex. Civ. App.—Houston 1962, writ ref'd n.r.e.) (citing *Austin Road Co.* test).

29. See, e.g., *Harris v. Atchison, T. & S.F. R.R.*, 538 F.2d 682, 690 (5th Cir. 1976) (applying Texas law); *Gulf, Colo. & S.F. Ry. v. Bliss*, 368 S.W.2d 594, 596 (Tex. 1963); *Butler v. Henry*, 589 S.W.2d 190, 193 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.). But see *General Motors Corp. v. Simmons*, 558 S.W.2d 855, 859 (Tex. 1977) (citing breach of duty

Recently, however, this test for common-law indemnity has been drastically altered by the Texas Supreme Court. In cases involving multiple *negligent* tortfeasors under article 2212a, common-law indemnity no longer applies, while the right of common-law indemnity under article 2212 which governs multiple tort-feasors involving both negligence and strict tort liability remains an appropriate and recognized remedy.³⁰ In *B & B Supply, Sand Pit, & Trucking Co. v. Central Freight Lines, Inc.*,³¹ plaintiff was injured when a Central Freight truck jackknifed on some clay negligently deposited on the highway by B & B Supply. The jury apportioned 66⅔% of the negligence to Central Freight and 33⅓% to B & B Supply. The Texas Supreme Court noted article 2212a was designed to abolish the all or nothing concept that previously prevailed in negligence actions. The court announced, "[u]nder [article] 2212a, there is no longer any basis for requiring one tortfeasor to indemnify another when both have been found negligent. . . ."³²

Contribution, as distinguished from indemnity, did not exist at common law.³³ Prior to the advent of statutory authorization, a

test; noting it is not the sole factor). The long recognized right of common law indemnity in cases involving multiple *negligent* tortfeasors has recently been abrogated in *Balaban v. New Terminal Warehouse Corp.*, 23 Tex. Sup. Ct. J. 540, 541 (July 26, 1980). The supreme court affirmed the intermediate appellate court interpretation that article 2212a abolished the right of common law indemnity in cases involving multiple *negligent* tortfeasors. *Id.* at 541. Contemporaneously the Texas Supreme Court reversed the decision of the intermediate appellate court in *B & B Auto Supply Co. v. Central Freight Lines, Inc.*, which had held article 2212a did not affect common law indemnity in cases involving multiple *negligent* tortfeasors. *B & B Auto Supply, Sand Pit, & Trucking Co. v. Central Freight Lines, Inc.*, 603 S.W.2d 814, 817 (Tex. 1980).

30. Compare *Balaban v. New Terminal Warehouse Corp.*, 23 Tex. Sup. Ct. J. 540, 541 (July 26, 1980) (abolishing indemnity) and *B & B Auto Supply, Sand Pit, & Trucking Co. v. Central Freight Lines, Inc.*, 603 S.W.2d 814, 817 (Tex. 1980) (between multiple negligent tortfeasors the right of common law indemnity has now been abolished) with *General Motors Corp. v. Simmons*, 558 S.W.2d 855, 859 (Tex. 1977) (recognizing indemnity) and *Heil Co. v. Grant*, 534 S.W.2d 916 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.) (recognizing common law indemnity under article 2212 between negligent tortfeasor and strictly liable tortfeasor). It may be significant that the Texas Supreme Court in *B & B Auto Supply* declared that "[w]e express no opinion whether this holding would extend to a strict liability case or a case involving a combination of negligent and strictly liable tortfeasors." *B & B Auto Supply, Sand Pit, & Trucking Co. v. Central Freight Lines, Inc.*, 603 S.W.2d 814, 818 (Tex. 1980).

31. 603 S.W.2d 814 (Tex. 1980).

32. *Id.* at 817.

33. See generally *Hodges, Contribution and Indemnity Among Tortfeasors*, 26 TEXAS

tortfeasor was precluded from obtaining any contribution from a joint tortfeasor.³⁴ Each tortfeasor was deemed severally liable for loss sustained by the injured party and could not anticipate contribution from other tortfeasors to satisfy the judgment. Due to the obvious injustice, most jurisdictions have enacted a variety of contribution statutes to more equitably distribute and allocate the risk of loss among all parties contributing to the injury-producing event.³⁵

III. STRICT TORT LIABILITY AND THE PROBLEM OF CONTRIBUTION AND INDEMNITY

Strict tort liability, contrary to the traditional concepts of negligence, imposes liability on a product supplier based on the condition of the product and not on the conduct of the product supplier.³⁶ The conduct of the supplier is immaterial, and is not an issue in a cause of action between the injured party and the product supplier.³⁷

This distinction between negligence and strict tort liability was emphasized by the Texas Supreme Court in *Gonzales v. Caterpillar Tractor Co.*³⁸ Plaintiff was injured when he slipped and fell from the step of a Caterpillar tractor designed to operate as a front-end loader. The Texas Supreme Court ruled the degree of care or fault of a product supplier is not an element of an action instituted under strict tort liability. Rather, the condition of the product is determinative of liability under section 402A.³⁹ An ac-

L. REV. 150 (1947).

34. See *Wheeler v. Glazer*, 137 Tex. 341, 345, 153 S.W.2d 449, 451 (1941). The policy of the law favored leaving wrongdoers where it found them. *Id.* at 451.

35. At least thirty-eight jurisdictions allow contribution. See Comment, *Contribution and The Distribution of Loss Among Tortfeasors*, 25 AM. U.L. REV. 203, 207-08 (1975); Comment, *Comparative Contribution and Strict Tort Liability: A Proposed Reconciliation*, 13 CREIGHTON L. REV. 889, 890 (1980).

36. The "product supplier" includes any manufacturer, assembler, wholesaler, or distributor of a product or component part. Seller has been liberally interpreted to include within the ambit of its meaning any regular supplier of a product. See *Rourke v. Garza*, 530 S.W.2d 798-99 (Tex. 1975); *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787, 790 n.3 (Tex. 1967).

37. *E.g.*, *Boatland of Houston, Inc. v. Bailey*, 23 Tex Sup. Ct. J. 566, 570 (August 2, 1980); *Turner v. General Motors Corp.*, 584 S.W.2d 844, 852 (Tex. 1979); *Gonzales v. Caterpillar Tractor Co.*, 571 S.W.2d 867, 871 (Tex. 1978).

38. 571 S.W.2d 867 (Tex. 1978).

39. *Id.* at 870. In discussing the legal basis for strict tort liability as distinguished from

tion based on negligence evaluates conduct, whereas strict tort liability focuses on the product as manufactured.

Unlike an action predicated on negligence, the injured party may institute a cause of action against any party in the distributive chain of the product.⁴⁰ In instituting the suit against a defendant based on strict tort liability, however, it is essential that the injured party establish the product supplier was regularly engaged in introducing products into the stream of commerce.⁴¹

Prior to adoption of the doctrine of strict tort liability in Texas,⁴² it was well established that a negligent supplier of a defective product and a negligent third party who breached duties to the injured plaintiff were considered joint tortfeasors.⁴³ Under such circumstances, the doctrine of contribution, rather than common-law indemnity, controlled the liabilities of joint tortfeasors.⁴⁴

the traditional concept of negligence, the Texas Supreme Court stated:

The care taken by the supplier of a product in its preparation, manufacture or sale, is not a consideration in strict liability; this is, however, the ultimate question in a negligence action. Strict liability looks at the product itself and determines if it is defective. Negligence looks at the acts of the manufacturer and determines if it exercises ordinary care in design and production.

Id. at 870.

40. *Rourke v. Garza*, 530 S.W.2d 794, 800 (Tex. 1975); RESTATEMENT (SECOND) OF TORTS § 402A (1965). For a collection of cases, see generally J. SALES & J. PERDUE, *THE LAW OF STRICT TORT LIABILITY IN TEXAS* 97 (1977).

41. RESTATEMENT (SECOND) OF TORTS § 402A (1965). In instituting a suit against a party based on strict tort liability it is essential that the injured party establish that: (1) the product was in a defective condition when it left control of the supplier; (2) that it was unreasonably dangerous to the user; (3) the defect caused the injury; (4) the product reached the injured party without substantial change. *Id.* In *Armstrong Rubber Co. v. Urguidez*, 570 S.W.2d 374 (Tex. 1978), the court held that a product supplier who had not introduced a product into the stream of commerce but was merely using the product in a test program had not introduced the product into the stream of commerce to qualify as a seller under section 402A of the Restatement. *Id.* at 375. The introduction of the product into the channels of commerce for use by the public is a prerequisite for strict tort liability. See *Thate v. Texas Pac. Ry. Co.*, 595 S.W.2d 591, 598 (Tex. Civ. App.—Dallas 1980, no writ).

42. Texas formally adopted RESTATEMENT (SECOND) OF TORTS § 402A (1965) in 1967 in the companion cases of *Shamrock Fuel & Oil Sales, Inc. v. Tunks*, 416 S.W.2d 779, 785-86 (Tex. 1967) and *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787, 789 (Tex. 1967).

43. *E.g.*, *South Austin Drive-In Theater v. Thomison*, 421 S.W.2d 933, 948 (Tex. Civ. App.—Austin 1967, writ ref'd n.r.e.); *Petco Corp. v. Plummer*, 392 S.W.2d 163, 166 (Tex. Civ. App.—Dallas 1965, writ ref'd n.r.e.); *Union Iron & Metal Co. v. Gibson*, 374 S.W.2d 458, 461-62 (Tex. Civ. App.—Texarkana 1963, writ ref'd n.r.e.).

44. *South Austin Drive-In Theater v. Thomison*, 421 S.W.2d 933, 948-49 (Tex. Civ. App.—Austin 1967, writ ref'd n.r.e.); see *Hodges, Contribution and Indemnity Among Tortfeasors*, 26 TEXAS L. REV. 150, 151-52 (1947).

One of the initial cases to consider multiple tortfeasors in the context of a product related injury was *South Austin Drive-In Theatre v. Thomison*.⁴⁵ Plaintiff was injured when his leg was severed by the rotary blade of a riding power mower. The power mower was manufactured by Gilson Brothers Company, and was being operated by an employee of the South Austin Drive-In Theatre.⁴⁶ The jury found that Gilson Brothers failed to adequately guard the mower's chain and rear sprocket, but also found the employee/operator was negligent in failing to maintain a proper lookout.⁴⁷ The court refused to impose indemnity against the manufacturer of the mower and, instead, declared both parties to be in *pari delicto* and, therefore, subject to contribution.⁴⁸ The court specifically noted there was no breach of duty, as measured by the test articulated in *Austin Road Co.*. After applying the imaginary lawsuit test, the court observed that both defendants had breached a duty to the plaintiff, however, neither had breached any duty owed to the other.⁴⁹

Texas adopted the concept of strict tort liability, as embodied in section 402A of the Restatement (Second) of Torts, in 1967.⁵⁰ With the advent of strict tort liability in Texas, the courts ostensibly have continued to adhere to the basic rules of contribution and/or

45. 421 S.W.2d 933 (Tex. Civ. App.—Austin 1967, writ ref'd n.r.e.).

46. *Id.* at 936.

47. *Id.* at 936.

48. *Id.* at 948-49.

49. *Id.* at 948-49. The court specifically noted:

We believe this duty does not meet the test of *Austin Road Co. v. Pope*, We fail to see in this record a breach by Gilson Bros. of any duty owing by it to Joseph except the general duty owed Mike Thomison and all others lawfully in the vicinity of the power mower while it was being operated. It appears to us that both Joseph and Gilson Bros. owed a duty to exercise a care, one in the operation and the other in the design of the power mower for the safety of Mike Thomison and all others in the vicinity of the machine while it was being used as it was designed and intended to be used. Both Joseph and Gilson Bros. breached their duty and each was guilty of the same quality of negligence toward Mike. . . .

We believe that the negligence of Joseph, although constructive, but one upon which the injured party may recover, places Joseph in *pari delicto* with Gilson Bros. Since Joseph and Gilson Bros. were concurrent or joint tortfeasors, having no relation to one another, each of them owing the same duty to Mike Thomison, and involved in an accident in which the injury occurred without breach of duty to each other, no right of indemnity exists on behalf of either against the other.

Id. at 948-49.

50. *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787, 790 (Tex. 1967); see RESTATEMENT (SECOND) OF TORTS § 402A (1965).

indemnity formulated under article 2212 and in *South Austin Drive-In Theatre v. Thomison*.⁵¹ Although some jurisdictions have concluded that a party strictly liable in tort and a negligent tortfeasor are not joint tortfeasors, rendering the doctrine of contribution inapplicable,⁵² the Texas Supreme Court has determined that a product supplier, strictly liable in tort, is *not more culpable* than a negligent third party.⁵³ Third parties, therefore, in Texas, are considered joint tortfeasors for the purpose of contribution, but not under common-law indemnity.

In 1973, following adoption of strict tort liability in Texas, the legislature enacted article 2212a providing for comparative negligence.⁵⁴ The enactment of article 2212a neither overruled nor supplanted existing article 2212, which alluded to *tortfeasors* rather than *negligent parties*.⁵⁵ The courts construed article 2212a to be applicable only in negligence actions, consequently, the comparative aspects of this statutory provision have been declared inapplicable between a negligent defendant and a strictly liable defendant.⁵⁶

The landmark case confronting negligent and strictly liable in tort defendants was *General Motors Corp. v. Simmons*.⁵⁷ The plaintiff was struck by a large truck owned by Feld Trucking and operated by its employee. The employee ran a red traffic signal colliding with the side of plaintiff's vehicle.⁵⁸ The force of the impact caused the laminated glass in the driver's window to explode

51. 421 S.W.2d 933, 948-49 (Tex. Civ. App.—Austin 1967, writ ref'd n.r.e.); see *General Motors Corp. v. Simmons*, 558 S.W.2d 855, 862 (Tex. 1977); Edgar, *Products Liability in Texas*, 11 TEX. TECH L. REV. 23, 48-50 (1980); Comment, *Comparative Causation, Indemnity, and the Allocation of Losses Between Joint Tortfeasors in Products Liability Cases*, 10 ST. MARY'S L.J. 587, 590 (1979); 9 TEX. TECH L. REV. 701, 703-04 (1978).

52. See *Kinard v. Coats Co.*, 553 P.2d 835, 837-38 (Colo. 1976) (products liability does not rest upon negligence principles).

53. In *General Motors Corp. v. Simmons*, 558 S.W.2d 855 (Tex. 1977), the supreme court perceived, "no reason that a manufacturer found strictly liable under the lesser standards of proof of § 402A should be more culpable than the negligent manufacturer in *Thomison*." *Id.* at 861.

54. TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1980). The comparative negligence statute was adopted by the Texas Legislature in 1973.

55. See, e.g., *Foster v. Ford Motor Co.*, 616 F.2d 1304, 1308 (5th Cir. 1980) (applying Texas law); *General Motors Corp. v. Simmons*, 558 S.W.2d 855, 862 (Tex. 1977); *Lubbock Mfg. Co. v. Perez*, 591 S.W.2d 907, 923 (Tex. Civ. App.—Waco 1979, no writ).

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

57. 558 S.W.2d 855 (Tex. 1977).

58. *Id.* at 857.

resulting in injury to the plaintiff's eyes.⁵⁹ After entering into a "Mary Carter Agreement"⁶⁰ with Feld Trucking Company, the plaintiff instituted a strict tort liability action against the manufacturer of his vehicle.⁶¹ The plaintiff contended that under section 402A the laminated glass was a defective product that was unreasonably dangerous.⁶² The supreme court concluded Feld Trucking Company had confessed negligence in the "Mary Carter Agreement" and, therefore, was a tortfeasor in the accident.⁶³ Articles 2212 and 2212a were reviewed and analyzed, with the court concluding article 2212a to be inapplicable in allocating the risk of loss between a strictly liable defendant and a negligent defendant.⁶⁴ The court emphasized the inherent statutory weakness of article 2212a and suggested indirectly a solution to this type of situation. The *Simmons* court noted article 2212a, "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."⁶⁵ An additional suggestion was addressed to the legislature; that it investigate possible amendments to articles 2212 and 2212a to alleviate the incongruous problem created between an action involving only negligent tortfeasors and an action involving a negligent tortfeasor and a strictly liable tortfeasor.⁶⁶

59. *Id.* at 857.

60. *Id.* at 856-57. "Mary Carter Agreements" are named after *Booth v. Mary Carter Paint Co.*, 202 So. 2d 8, 11 (Fla. App. 1967). The first case to recognize such an arrangement arose when a settling defendant agreed to remain a party in the trial for the benefit of the plaintiff and retain a financial interest in the plaintiff's recovery. *Id.* at 11. Simply stated, a co-tortfeasor contractually agrees to aid the plaintiff in his suit against the remaining tortfeasor in consideration for recovering a portion of the plaintiff's judgment. *Id.* at 10-11. Jurisdictions have adopted divergent positions on the legitimacy of such a practice. Compare *Lume v. Stinnett*, 488 P.2d 347, 351-52 (Nev. 1971) (Mary Carter agreement against public policy) and *Trampe v. Wisconsin Tel. Co.*, 252 N.W. 675, 676-77 (Wis. 1934) (contractual settlement void) with *Hemet Dodge v. Dryder*, 534 P.2d 454, 460-61 (Ariz. 1975) (Mary Carter settlement is not void) and *Gatto v. Walgreen Drug Co.*, 337 N.E.2d 23, 28-29 (Ill. 1975) (Mary Carter agreement acceptable agreement).

61. *General Motors Corp. v. Simmons*, 558 S.W.2d 855, 859 (Tex. 1977).

62. *General Motors Corp. v. Simmons*, 545 S.W.2d 502, 506 (Tex. Civ. App.—Houston [1st Dist.], *rev'd*, 558 S.W.2d 855 (Tex. 1977).

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

64. *Id.* at 861-62.

65. *Id.* at 862.

66. Texas House Bill Number 1161, presented before the Texas Legislature in 1979, attempted to amend article 2212a of the Texas Revised Civil Statutes Annotated. It failed

A corollary issue raised in the *Simmons* case involved the contention by Feld Trucking Company that having settled with the plaintiff through the "Mary Carter Agreement" the manufacturer was obligated to indemnify the trucking company for the sums paid to the injured party.⁶⁷ Relying upon the earlier case of *South Austin Drive-In Theatre v. Thomison*,⁶⁸ the supreme court declared that a negligent tortfeasor cannot claim indemnity from a product supplier who is strictly liable in tort solely on the basis of a different type of duty owed the plaintiff.⁶⁹ The supreme court observed "no reason that a manufacturer found strictly liable under the lesser standard of proof of section 402A should be more culpable than the negligent manufacturer in *Thomison*."⁷⁰ In essence, the Texas Supreme Court rejected Feld Trucking Company's claim for indemnity based on the breach of duty test originally announced in *Austin Road Co. v. Pope*.⁷¹ Moreover, as noted under the facts in *Simmons*, Feld's position as a hypothetical plaintiff was predicated upon a claim against General Motors for the liability "incurred by the reason of Simmons' injuries."⁷² Since liability under section 402A is limited to property or physical damage caused by a defective product, the absence of a claim for other than economic loss foreclosed a finding of indemnification.⁷³

to pass, however, due to a lack of a quorum in the Senate.

67. General Motors Corp. v. Simmons, 558 S.W.2d 855, 860 (Tex. 1977).

68. 421 S.W.2d 933 (Tex. Civ. App.—Austin 1967, writ ref'd n.r.e.).

69. General Motors Corp. v. Simmons, 558 S.W.2d 855, 861 (Tex. 1977).

70. *Id.* at 861.

71. *Id.* at 861.

72. *Id.* at 860. The *Simmons* court stated:

When we view Feld as plaintiff in an imagined suit against General Motors, we have the Feld vehicle, driven by Johnston, run into the side of Simmons' car, causing the defective General Motors' glass to scatter into slivers inside Simmons' car. Feld's damage against General Motors would have to be the liability he incurred by reason of Simmons' injuries. Feld's action would not be for any physical damages Feld, Johnston or their property sustained; it would be only for the liability Simmons has said they incurred. . . . We ground our decision upon § 402A of the Restatement (Second) of Torts. . . . Section 402A in our decision . . . [has] limited the seller's liability to terms of the Restatement rule which is 'for physical harm thereby caused. . . .' Feld and Johnston made no claim that they suffered physical harm. To extend the duty to include liability to others would mean that in all causes the seller or manufacturer is subjected to indemnity without regard to the independent torts of others.

Id. at 860; accord, *Nobility Homes v. Shivers*, 557 S.W.2d 77, 78 (Tex. 1977).

73. General Motors Corp. v. Simmons, 558 S.W.2d 855, 860-61 (Tex. 1977).

The breach of duty test has apparently retained validity in the strict tort liability context. The Texas Supreme Court in *Simmons* not only acknowledged the breach of duty test in the determination of whether indemnity or contribution applied between co-tortfeasors, but added its imprimatur to this approach.⁷⁴ The court observed the negligent operator of the truck was never in the chain of ownership or possession of the alleged defective vehicle.⁷⁵ Unless a co-defendant is in the distributive chain, and actually subject to section 402A, the product supplier owes no duty to that party, unless that party has received personal injury or property damage as a result of the defective product.⁷⁶

In deciding *Simmons* the Texas Supreme Court considered the earlier case of *Heil Co. v. Grant*.⁷⁷ In *Heil*, the deceased was fatally injured while repairing a dump truck owned by his brother.⁷⁸ The bed of the truck had been raised by use of a hoist mechanism; while the deceased was working beneath the bed of the truck, the cable that controlled the hoist mechanism was inadvertently triggered, causing the bed to crush the deceased.⁷⁹ The manufacturer of the truck contended the owner was negligent in permitting the deceased to work underneath the raised bed of the vehicle and sought indemnity. The appellate court refused to sanction indemnity for the manufacturer and, in fact, concluded the owner-purchaser, even if negligent as to the deceased party, was entitled to obtain indemnity from the manufacturer because the defective design of the hoist mechanism constituted a breach of the product

74. *Id.* at 860.

75. *Id.* at 860; see *Foster v. Ford Motor Co.*, 616 F.2d 1304, 1314 (5th Cir. 1980) (applying Texas law). *Foster* acknowledges the *Simmons* rationale that a suit for indemnity must be based on injury to the person or property of the party seeking indemnity and must not be based on payment of a judgment. *Id.* at 1314-15; accord, *United Tractor Inc. v. Chrysler Corp.*, 563 S.W.2d 850, 851 (Tex. Civ. App.—El Paso 1978, no writ). Applying the *Simmons* rationale, the court in *United Tractor* held that even the purchaser of a defective product could not recover damages under strict liability if his only loss stemmed from liability to others. *Id.* at 851.

76. *General Motors Corp. v. Simmons*, 558 S.W.2d 855, 860 (Tex. 1977); *Heil Co. v. Grant*, 534 S.W.2d 916, 919 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.).

77. *Heil Co. v. Grant*, 534 S.W.2d 916, 919 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.).

78. *Id.* at 919. The plaintiffs alleged that the pullout cable for lowering the truck bed was defectively designed because it was easily triggered and was not accompanied by adequate warnings. *Id.* at 920.

79. See *id.* at 926.

supplier's duty both to the deceased and to the owner of the truck.⁸⁰

The decision in *Heil* does not appear to be in conflict with the earlier decision in *South Austin Drive-In*.⁸¹ In applying the breach of duty test in *South Austin Drive-In*, the court, in essence, determined that an independent act unconnected with the product constituted negligence of the co-tortfeasor.⁸² Both parties were deemed to be in *pari delicto*.

If the negligence of a joint tortfeasor does not independently cause the accident but rather, the negligence of the tortfeasor merely arises out of the use of a defective product supplied by a strictly liable manufacturer, then the negligent third party is entitled to common-law indemnity.⁸³ For example, if a manufacturer supplies scaffold boards that are defective for failure to incorporate safety cleats, and a co-defendant is adjudged negligent for failing to discover the absence of the cleats prior to use of the scaffolding by the plaintiff, then the act of the negligent defendant derives from the defective product and entitles the tortfeasor to recoup common-law indemnity from the manufacturer.⁸⁴

Conversely, if the acts of the negligent joint tortfeasor are independent of the product and do not arise from the product itself, then the negligent tortfeasor is in *pari delicto* and contribution applies. As an example, a manufacturer supplies a press that is defective for failure to include non-removable safety guards and a co-defendant is deemed negligent for removing the guards.⁸⁵ The negligent acts of the co-defendant are independent of and distinct from the condition of the product as supplied by the manufacturer, and the negligent tortfeasor is in *pari delicto* with the strictly

80. See *id.* at 926.

81. See *General Motors Corp. v. Simmons*, 558 S.W.2d 855, 860-61 (Tex. 1977). Compare *Heil Co. v. Grant*, 534 S.W.2d 916, 926-27 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.) with *South Austin Drive-In Theater v. Thomison*, 421 S.W.2d 933, 946-47 (Tex. Civ. App.—Austin 1967, writ ref'd n.r.e.).

82. See *General Motors Corp. v. Simmons*, 558 S.W.2d 855, 861 (Tex. 1977).

83. See *Air Shields, Inc. v. Spears*, 590 S.W.2d 574, 582 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.).

84. See *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 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.).

85. See *Ford Motor Co. v. Russell & Smith Ford Co.*, 474 S.W.2d 549, 557-58, 562 (Tex. Civ. App.—Houston [14th Dist.] 1971, no writ). See generally *Tromza v. Tecumseh Prod. Co.*, 378 F.2d 601, 606 (3d Cir. 1967).

liable manufacturer. Under these circumstances, contribution and not common-law indemnity applies.

Several recent decisions have further elaborated on the contribution and indemnity dichotomy between a negligent and strictly liable in tort defendant. In *Foster v. Ford Motor Co.*,⁸⁶ the plaintiff was injured while operating a tractor manufactured by one of the defendants. A bale of hay slid off a hayfork which had been attached to the tractor's front-end loader.⁸⁷ The hayfork itself was defective and unreasonably dangerous because it was incapable of preventing a load of hay from falling upon the tractor operator when the front-end loader was raised above a particular height.⁸⁸ The manufacturer of the tractor filed a third party action against the injured party's employer and the designer of the tractor's hayfork attachment.⁸⁹ The fifth circuit concluded the manufacturer of the tractor was not entitled to indemnity from either the injured party's employer or the designer of the hayfork since the third party defendants, though owing a duty to the plaintiff, violated no duty owed to the manufacturer.⁹⁰ The fifth circuit relied on the *Simmons* rationale in concluding that contribution and not common-law indemnity applied.⁹¹ After reviewing several earlier supreme court decisions, and in particular the *Simmons* decision, the fifth circuit stated:

Crew contends that had he been required to pay a judgment to Foster, he would have a right to indemnity against Ford, because Ford breached his duty under § 402A of the Restatement to sell Crew a nondefective tractor. On the basis of *General Motors v. Simmons, supra* 558 S.W.2d 855, we reject Crew's argument. . . .

Similarly, in an imaginary strict liability suit brought by Crew against Ford, the only item of damage would be the liability Crew incurred by reason of Foster's injury. Crew sustained no personal injury or property damage as a result of Ford's sale of the defective tractor. Since *Simmons* forecloses recovery under § 402A where the sole item of damage is liability to others, Crew's suit against Ford

86. 616 F.2d 1304 (5th Cir. 1980) (applying Texas law).

87. *Id.* at 1307.

88. *Id.* at 1310. Although the hayfork was designed to lift hay bales only three to four feet off the ground the court concluded it was reasonably foreseeable that the loader would be lifted above the operator's head. *Id.* at 1310.

89. *Id.* at 1307.

90. *Id.* at 1308.

91. *Id.* at 1313.

would fail.⁹²

The fifth circuit acknowledged that *South Austin Drive-In Theatre v. Thomison* was alleged to contradict *Heil Co. v. Grant*. In a footnote discussion of the cases, the court of appeals indicated the cases are clearly distinguishable and compatible. The court noted:

Further, the indemnitee's independent negligent conduct is the significant feature which distinguishes the *Thomison* case from the *Simmons* court's characterization of the *Heil* case.⁹³

It is readily apparent the determination of whether contribution or indemnity applies between a negligent tortfeasor and a strictly liable party is dependent on several factors.⁹⁴ First, the negligent tortfeasor must be seeking recoupment of damages either for personal injury or property damage caused by a defective product. Merely paying a judgment incurred because of negligence or seeking reimbursement for economic loss does not constitute a basis for common-law indemnity. Secondly, the negligence of the co-tortfeasor must be derivative of the defective product and must not constitute an independent act unrelated to the product. For example, a negligent act of a tortfeasor that would have caused the injury producing event in the absence of a defective product precludes the right of indemnity. Conversely, the negligence of a co-tortfeasor that would not have caused the injury-producing event but for the defective product satisfies the prerequisites for a right to common-law indemnity against the product supplier.

In the recent case of *Bell Helicopter v. Bradshaw*,⁹⁵ the plaintiffs, passengers in a helicopter manufactured by Bell and operated by Smith, were injured when the tail rotor of the helicopter failed due to a fatigue fracture.⁹⁶ The helicopter crashed seriously injuring the plaintiffs. The jury found the owner of the helicopter, Ingle, and the operator, Smith, were negligent, but also found that Bell Helicopter was strictly liable in tort for a defective product.⁹⁷ The court concluded the product supplier, under the breach of

92. *Id.* at 1313.

93. *Id.* at 1316.

94. See *Strakos v. Gehring*, 360 S.W.2d 787, 797-99 (Tex. 1962); Hodges, *Contribution and Indemnity Among Tortfeasors*, 26 TEXAS L. REV. 150, 150-53 (1947).

95. 594 S.W.2d 519 (Tex. Civ. App.—Corpus Christi 1979, writ granted).

96. *Id.* at 526.

97. *Id.* at 534-35.

duty test, owed a duty not only to the injured passengers, but also to the operator and the owner of the helicopter, notwithstanding that the operator and owner knew or should have known the helicopter tail rotor blade would fail if used beyond its specified useful life.⁹⁸ Concluding that neither the operator nor owner of the helicopter owed any duty to the product supplier, although they owed a duty to the passengers,⁹⁹ the court determined that both the operator and owner were entitled to full indemnity against Bell Helicopter Company utilizing the rationale announced in *Simmons*.¹⁰⁰ The court observed:

We think that such result may be shocking, particularly in light of the fact that it may be said that Smith and Ingle were far more culpable regarding plaintiff's injury than was Bell. The Supreme Court has, in *General Motors Corp. v. Simmons, supra*, urged the legislature to study the statutes in this area with an eye toward remedial legislation. We agree.¹⁰¹

The attitude of the appellate court reflects judicial discontent attributable primarily to the inapplicability of article 2212a to situations involving a tortfeasor strictly liable in tort vis-a-vis a tortfeasor adjudged to be negligent.¹⁰² Article 2212a represented a legislative effort to alleviate the all-or-nothing approach of its predecessor, article 2212.¹⁰³ There remains little justification for the courts to reject application of article 2212a to a strictly liable defendant simply because the article defines the tortfeasor's conduct in terms of negligence rather than the broader characterization of "tortfeasor."¹⁰⁴ It is also appropriate to observe that article 2212a, although utilizing the term "negligence" in reference to

98. *Id.* at 535.

99. *Id.* at 535.

100. *Id.* at 535.

101. *Id.* at 535.

102. *Id.* at 535. The Corpus Christi Court of Civil Appeals recognized the inequity particularly when the pilot/owner, in the opinion of the court, was the culprit most responsible for the accident and the product supplier only peripherally involved. Yet, the court felt constrained to grant the pilot/owner of the helicopter total indemnity against the product supplier. The court, echoing the refrain of the supreme court in *General Motors Corp. v. Simmons*, 558 S.W.2d 855, 863 (Tex. 1977), invited the legislature to review article 2212a toward making it applicable in a strict tort liability context.

103. TEX. REV. CIV. STAT. ANN. arts. 2212, 2212a (Vernon 1971 & Supp. 1980); see Keeton, *Torts, Annual Survey of Texas Law*, 28 Sw. L.J. 1, 8 (1974).

104. TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1980).

tortfeasors, does not expressly exclude the application of the statute to cases involving multiple parties in which one party is adjudged liable based on the doctrine of strict tort liability.¹⁰⁵ It is important to note that strict tort liability is an *ex delicto* doctrine. Although the concept differs in certain respects from traditional negligence, both doctrines represent a form of tort reparation to injured parties.¹⁰⁶

Either the legislature or the judiciary needs to adopt measures that will include the strictly liable tortfeasor within the ambit of comparative fault or allocation of loss as prescribed by article 2212a. Such an approach would neither be strained nor unique and, in fact, would undoubtedly further the intent of the legislature in the enactment of article 2212a to provide appropriate means to allocate the risks of loss.

In *General Motors Corp. v. Hebert*,¹⁰⁷ plaintiff instituted a suit based on strict tort liability for death allegedly attributable to a product defect.¹⁰⁸ The Texas Wrongful Death Statute,¹⁰⁹ which represents the sole basis for recovery of damages for wrongful death, specifically provides recovery for wrongful death "caused by the wrongful act, negligence, carelessness, unskillfulness or default of another."¹¹⁰ The court concluded it would be an anomaly to permit recovery of damages for personal injury under strict tort liability but deny recovery of damages for wrongful death caused by a defective product.¹¹¹ In view of the court's liberal construction of the Texas Wrongful Death Statute to encompass strict tort liability, it is difficult to understand the supreme court's reluctance in construing article 2212a, which more clearly defines the legislative objective to allocate the risks of loss, to include the strictly liable

105. *Id.*

106. *Id.*

107. 501 S.W.2d 950 (Tex. Civ. App.—Houston [1st Dist.] 1973, writ ref'd n.r.e.).

108. *Id.* at 951. The decedent's automobile while traveling at a speed between sixty and seventy miles per hour suddenly veered right, crossed the outside lane, struck the shoulder of the road, turned back towards the highway, and rolled over once fatally throwing the driver out of the car. Plaintiffs alleged defective steering design and manufacture. *Id.* at 951.

109. TEX. REV. CIV. STAT. ANN. art. 4671 (Vernon Supp. 1980).

110. *Id.* § 1.

111. *General Motors Corp. v. Hebert*, 501 S.W.2d 950, 959 (Tex. Civ. App.—Houston [1st Dist.] 1973, writ ref'd n.r.e.). "It would be unjust to interpret articles 4671 and 4672 as allowing, in products liability cases, a recovery for an injury but not for death." *Id.* at 959.

tortfeasor.¹¹²

It is urged that adoption of comparative fault in strict tort liability actions neither vitiates nor impairs the original goals and objectives of the strict tort liability doctrine. The injured party under strict tort liability continues to be relieved of the burden of establishing that the product supplier or any other person in the chain of distribution was negligent in the manufacture, design, distribution, or marketing of the product.¹¹³ Moreover, the injured party is relieved of the obligation to establish privity and is permitted a significantly less onerous burden of proof to establish liability. Regarding the damage award to the plaintiff, comparative fault merely provides that recovery will be reduced to the extent that the plaintiff's sub par conduct contributed to his loss.¹¹⁴ The cost of compensating injured users of defective products, although reduced proportionately, remains on the product supplier who must accept the imposition of liability as part of an enterprise liability to be spread among the consuming public.¹¹⁵ On the other hand, the injured party's sub par conduct should not be rewarded with a windfall, and to the extent the plaintiff's sub par conduct contributes to the injury-producing event and resulting loss, there exists no valid policy reason that this loss be borne initially by the product supplier and, ultimately, by innocent (product) consumers.¹¹⁶

The mechanism of comparative fault satisfies the equitable allo-

112. Compare TEX. REV. CIV. STAT. ANN. arts. 4671, 4672 (Vernon Supp. 1980) (wrongful death) with *id.* art. 2212a (comparative negligence).

113. *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787, 790-91 (Tex. 1967); RESTATEMENT (SECOND) OF TORTS § 402A (1965); see J. SALES & J. PERDUE, *THE LAW OF STRICT TORT LIABILITY IN TEXAS* 3-4 (1977), also printed in 14 HOUS. L. REV. 1 (1976-1977); Edgar, *Products Liability in Texas*, 11 TEX. TECH L. REV. 23, 25 (1980).

114. See, e.g., *Safeway Stores, Inc. v. Nest-Kart*, 579 P.2d 441, 442, 147 Cal. Rptr. 550, 551 (1978); *American Motorcycle Ass'n v. Superior Ct.*, 578 P.2d 899, 902, 146 Cal. Rptr. 182, 185 (1978); *Daly v. General Motors Corp.*, 575 P.2d 1162, 1165-73, 144 Cal. Rptr. 380, 383-91 (1978). *Daly* contains an excellent discussion of the merits of comparative fault or allocation of the risk of loss. *Id.* at 1165-73, 144 Cal. Rptr. at 383-91. See generally Sales, *Assumption of the Risk and Misuse in Strict Tort Liability — Prelude to Comparative Fault*, 11 TEX. TECH L. REV. 729 (1980). For a general discussion of comparative fault in a product liability context, see *id.* at 759-78.

115. See Wade, *Product Liability and Plaintiff's Fault — The Uniform Comparative Fault Act*, 29 MERCER L. REV. 373, 379 (1978).

116. *Id.* at 388. Dean Wade observes that, "if the plaintiff has contributed to his own injury by his culpable conduct, he ought not to be able to cast on the manufacturer (and ultimately on all other users of the product, through price setting) the cost of that culpable contribution to his injury." *Id.* at 388.

cation of loss according to the fault of all parties contributing to the injury-producing event while at the same time insuring even-handed fairness to the product supplier who is not totally responsible for the injury sustained by the plaintiff. It is rather axiomatic, and has been affirmed by most jurisdictions, that a product supplier was never meant to be metamorphosized into an insurer against product-related accidents by the adoption of section 402A of the Restatement (Second) of Torts.¹¹⁷

IV. THE EFFECT OF SETTLEMENT BY ONE OR MORE TORTFEASORS

In 1973, the Texas Legislature amended the law of contribution embodied in article 2212 to include the concept of comparative negligence.¹¹⁸ With ratification and enactment of the comparative negligence statute, article 2212a, Texas acknowledged the necessity of allocating the risk of loss between negligent tortfeasors and an injured party who contributed to his own injury.¹¹⁹ While article 2212a has benefited the injured party whose negligence is not greater than the negligence of other parties contributing to the injury,¹²⁰ the literal interpretation and limited application of this statutory provision only to "negligence" actions¹²¹ has rendered article 2212a more of a bane than a boon to the product supplier adjudged strictly liable in tort. Nowhere is this dilemma more glar-

117. Texas courts have been extremely careful in emphasizing that the concept of strict tort liability does not impose an insurer status on any product supplier. The concept of defect necessarily implies an underlying tort principle. See *Hagens v. Oliver Mach. Co.*, 576 F.2d 97, 104 (5th Cir. 1978) (applying Texas law); *Simien v. S.S. Kresge Co.*, 566 F.2d 551, 557 (5th Cir. 1978) (applying Texas law); *Armstrong Rubber Co. v. Urquidez*, 570 S.W.2d 374, 376 (Tex. 1978); *Henderson v. Ford Motor Co.*, 519 S.W.2d 87, 93 (Tex. 1974). See generally Keeton, *Products Liability — Liability Without Fault and the Requirement of Defect*, 41 TEXAS L. REV. 855 (1963); Wade, *Strict Tort Liability of Manufacturers*, 19 Sw. L.J. 5 (1965).

118. See TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1980).

119. See *id.*; Fisher, Nugent & Lewis, *Comparative Negligence: An Exercise in Applied Justice*, 5 ST. MARY'S L.J. 655, 655 (1974); Keeton, *Torts, Annual Survey of Texas Law*, 28 Sw. L.J. 1, 8 (1974).

120. TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1980). Texas, under article 2212a, follows a modified comparative negligence approach requiring the plaintiff to be adjudged less than 50% at fault. *Id.*; see Keeton, *Torts, Annual Survey of Texas Law*, 28 Sw. L.J. 1, 8-10 (1974); Sales, *Limitations on Recovery of Damages in Personal Injury Actions*, 18 S. TEX. L.J. 217, 267 (1977).

121. *General Motors Corp. v. Simmons*, 558 S.W.2d 855, 862 (Tex. 1977); see Edgar, *Products Liability in Texas*, 11 TEX. TECH L. REV. 23, 48 (1979); 9 TEX. TECH L. REV. 701, 703-04 (1978).

ingly apparent than in the settlement of product liability causes of action.¹²²

Under comparative negligence, an injured party whose negligence does not exceed the combined negligence of the defendants is authorized to recover a percentage of the total damages awarded by the jury.¹²³ The approach in negligence actions, requires that the claimant be less than 50% liable for his own injuries.¹²⁴ Moreover, if the injury producing event involves multiple defendants, each party's liability is limited to the percentage of negligence assessed against each in causing the accident and resulting injury.¹²⁵ When more than one tortfeasor is joined in the cause of action, the finder of fact actually performs two functions in allocating liability. Initially, the plaintiff and defendants are considered as two parties to determine whether the fault of the plaintiff exceeds the 50% maximum allowable under article 2212a.¹²⁶ The fact finder then apportions among the multiple defendants the percentage of negligence attributable to each in contributing to the accident and the resulting injury.¹²⁷

The comparative negligence statute specifically addresses settlement agreements between the plaintiff and joint tortfeasors.¹²⁸ The statute provides that if a tortfeasor settles with the plaintiff prior to suit, and the settling tortfeasor is subsequently determined to be negligent, the nonsettling defendants are entitled to deduct that sum from the total damages awarded by the jury represented by the percentage of negligence assessed against the settling tortfeasor.¹²⁹ In the absence of a determination that the settling party

122. See *Bristol-Meyers Co. v. Gonzales*, 561 S.W.2d 801, 805 (Tex. 1978); *General Motors Corp. v. Simmons*, 558 S.W.2d 855, 862 (Tex. 1977).

123. TEX. REV. CIV. STAT. ANN. art. 2212a, § 1 (Vernon Supp. 1980).

124. *Id.* § 1.

125. *Id.* § 2(b).

126. See Fisher, Nugent & Lewis, *Comparative Negligence: An Exercise in Applied Justice*, 5 ST. MARY'S L.J. 655, 657 (1974). See also *Wisconsin Natural Gas v. Ford, Bacon & Davis Constr.*, 291 N.W.2d 825, 832-33 (Wis. 1980). Under a similar contribution statute, Wisconsin requires that in cases involving multiple defendants the culpable conduct of the plaintiff is compared to the individual culpability of each defendant rather than the combined culpability of all defendants taken together. *Id.* at 832-33.

127. See Fisher, Nugent & Lewis, *Comparative Negligence: An Exercise in Applied Justice*, 5 ST. MARY'S L.J. 655, 657 (1974).

128. TEX. REV. CIV. STAT. ANN. art. 2212a, § 2(d)-(e) (Vernon Supp. 1980); see *Deal v. Madison*, 576 S.W.2d 409, 417 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.).

129. TEX. REV. CIV. STAT. ANN. art. 2212a, § 2(d) (Vernon Supp. 1980).

is a tortfeasor, and a percentage assessment of the negligence attributable to the settling tortfeasor, the nonsettling tortfeasors are entitled only to an offset of the actual amount paid in settlement. Depending on the likelihood that the settling party will be adjudged the major percentage of negligence, it appears appropriate that the nonsettling defendants implead the settling party to obtain a determination of the degree and percentage of fault attributable to each settling party.¹³⁰ It has been suggested, however, that a settling party should not be impleaded simply to determine whether the settling party is guilty of negligence.¹³¹ The argument has been advanced that impleading a settling tortfeasor represents an empty, and needless, formalism, since the settling tortfeasor is not a true party.¹³²

The Texas courts have rejected efforts to extend application of article 2212a to products liability actions involving parties adjudged liable based on strict tort liability.¹³³ By excluding application of article 2212a from causes of action involving parties adjudged liable based on strict tort liability and reverting to the original article 2212, the courts have limited the comparative fault doctrine only to "civil suits based on negligence."¹³⁴

In the landmark case of *General Motors Corp. v. Simmons*,¹³⁵ the Texas Supreme Court considered the application of article 2212a to a cause of action involving strictly liable tortfeasors.¹³⁶ The trial court determined the impleaded settling party was negligent and the jury determined the nonsettling product supplier was liable based on strict tort liability.¹³⁷ Concluding article 2212, and not article 2212a, governed the apportionment of liability, the

130. *Id.* § 2(g); see Sales, *Limitations on Recovery of Damages in Personal Injury Actions*, 18 S. TEX. L.J. 217, 269 (1977).

131. Keeton, *Torts, Annual Survey of Texas Law*, 28 Sw. L.J. 1, 14 (1974).

132. *Deal v. Madison*, 576 S.W.2d 409, 418 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.).

133. See *General Motors Corp. v. Simmons*, 558 S.W.2d 855, 862 (Tex. 1977); *Bell Helicopter Co. v. Bradshaw*, 594 S.W.2d 519, 535 (Tex. Civ. App.—Corpus Christi 1979, writ granted); Edgar, *Products Liability in Texas*, 11 TEX. TECH L. REV. 23, 48-50 (1979); Comment, *Comparative Causation, Indemnity, and the Allocation of Losses Between Joint Tortfeasors in Products Liability Cases*, 10 ST. MARY'S L.J. 587, 590 (1979); 9 TEX. TECH L. REV. 701, 703-04 (1978).

134. TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1980).

135. 558 S.W.2d 855 (Tex. 1977).

136. *Id.* at 862.

137. *Id.* at 858.

supreme court approved a literal interpretation of article 2212a, and declared its provisions were inapplicable under circumstances other than between *negligent* tortfeasors.¹³⁸

Application of article 2212 to settlements poses a unique problem for both the plaintiff and defendant in actions involving a party adjudicated to be strictly liable in tort. The non-settling defendant is obligated to obtain a judicial determination that the settling party is a tortfeasor for purposes of seeking contribution under article 2212, regardless of the degree of culpability of the parties. Meanwhile, the plaintiff is confronted with the unenviable prospect that in effectuating settlement with one or more potential tortfeasors, recovery against the nonsettling product supplier may be reduced pro rata. A plaintiff who settles with one potential tortfeasor reduces the verdict against the nonsettling tortfeasors on a pro rata basis.¹³⁹

The pro rata rule was articulated in *Palestine Contractors, Inc. v. Perkins*.¹⁴⁰ The plaintiff settled with one tortfeasor for the sum of \$1.00 and subsequently obtained a judgment against the nonsettling tortfeasor for \$26,500. The Texas Supreme Court concluded that the settlement with one of two tortfeasors reduced the verdict obtained by the plaintiff against the nonsettling tortfeasor by one-half or the sum of \$13,250.¹⁴¹ Application of the *Palestine Contractors* doctrine imposes a pro rata reduction based on the number of settling tortfeasors to all nonsettling tortfeasors rather than a percentage reduction.¹⁴² The rationale of *Palestine Contractors* under article 2212 has been extended to actions predicated on strict tort liability. In this context, when a party who settles with the plaintiff is later determined to be in *pari delicto* with a product supplier adjudicated to be strictly liable in tort, the settlement simply

138. *Id.* at 858.

139. *Palestine Contractors, Inc. v. Perkins*, 386 S.W.2d 764, 773-74 (Tex. 1964). In this case the Texas Supreme Court held if the plaintiff chooses to settle with one of several joint tortfeasors, then the plaintiff shall have his recovery from the remaining tortfeasors reduced on a pro rata basis. *Id.* at 773-74; see Note, *Settlement with One Joint Tortfeasor Bars Recovery Against Others of the Settling Tortfeasor's Proportionate Share of Damages*, 19 Sw. L.J. 650, 653-56 (1965); Comment, *Contribution Among Joint Tortfeasors*, 44 TEXAS L. REV. 326, 335-36 (1965).

140. 386 S.W.2d 764, 772 (Tex. 1964).

141. *Id.* at 772.

142. *Id.* at 775.

reduces the total judgment by one-half.¹⁴³

Implicit in an action seeking contribution against a settling party under article 2212 is the requirement of obtaining an adjudication that the settling party is, indeed, a tortfeasor.¹⁴⁴ This means the nonsettling defendant most likely needs to implead all settling parties into the lawsuit to determine whether the settling party was negligent.¹⁴⁵ In *Petco Corp. v. Plummer*,¹⁴⁶ plaintiff was injured by a gas explosion while attempting to activate the central heating system in his home.¹⁴⁷ The plaintiff sued the Petco Corporation, Lone Star Gas Company, L & L Electric Company, and Gene's Plumbing Company. Prior to trial, the plaintiff settled with the electric company for \$1,250, the plumbing company for \$1,750, and the gas company for \$75,000.¹⁴⁸ After the plaintiff dismissed the settling parties from the lawsuit, Petco Corporation filed a third-party action against the gas company seeking contribution or indemnity. The jury awarded the plaintiff \$165,959.¹⁴⁹ After crediting the judgment with \$3,000, which represented the sum previously paid by the electric company and the plumbing company, the trial court entered judgment against the nonsettling defendant, Petco Corporation, for one-half of the remaining amount or \$81,479.¹⁵⁰ The court of civil appeals affirmed the trial court judgment emphasizing that under the *Palestine Contractors* doctrine,

143. *Id.* at 772; see *Lubbock Mfg. Co. v. Perez*, 591 S.W.2d 907, 922-23 (Tex. Civ. App.—Waco 1979, no writ).

144. See, e.g., *General Motors Corp. v. Simmons*, 558 S.W.2d 855, 862 (Tex. 1977); *Palestine Contractors, Inc. v. Perkins*, 386 S.W.2d 764, 772 (Tex. 1964); *Lubbock Mfg. Co. v. Perez*, 591 S.W.2d 907, 922 (Tex. Civ. App.—Waco 1979, no writ). The failure to obtain an adjudication that the settling party is a tortfeasor is fatal to a pro rata reduction of the damage award. *Lynn v. Southwestern Elec. Power Co.*, 453 F. Supp. 599, 602 (E.D. Tex. 1978).

145. See *E. I. DuPont de Nemours & Co. v. McCain*, 414 F.2d 369, 375 (5th Cir. 1969) (applying Texas law); *Sweep v. Lear Jet Corp.*, 412 F.2d 457, 461 (5th Cir. 1969) (applying Texas law); *Leong v. Wright*, 478 S.W.2d 839, 845-46 (Tex. Civ. App.—Houston [14th Dist.] 1972, writ ref'd n.r.e.); *Connell v. Rosales*, 419 S.W.2d 673, 677 (Tex. Civ. App.—Texarkana 1967, no writ); *Petco Corp. v. Plummer*, 392 S.W.2d 163, 166-67 (Tex. Civ. App.—Dallas 1965, writ ref'd n.r.e.). But see *Deal v. Madison*, 576 S.W.2d 409, 415 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.) (same court that decided *Petco* declared under article 2212 the settling party need not be formally joined to adjudicate liability).

146. 392 S.W.2d 163 (Tex. Civ. App.—Dallas 1965, writ ref'd n.r.e.).

147. *Id.* at 164.

148. *Id.* at 165.

149. *Id.* at 165.

150. *Id.* at 165.

the award of damages is diminished only in proportion to the number of parties to the lawsuit adjudged to be tortfeasors.¹⁵¹

Failure to implead a settling party should not preclude the submission of issues to a jury to determine whether the settling party was negligent.¹⁵² Logically, the issues of the negligence of a settling party should be raised by defensive pleadings and submitted to the jury.¹⁵³ Nevertheless, sufficient uncertainty exists that cautious counsel undoubtedly will continue to implead the settling party to obtain an adjudication of negligence.¹⁵⁴

The adoption of article 2212a to allocate the risk of loss in negligence actions has not eliminated the necessity of obtaining an adjudication that the settling party is a tortfeasor. Even under article 2212a, the nonsettling defendant must elect either to take an offset in the amount paid by the settling party, or obtain an adjudication of the percentage of liability against the settling party. Unlike article 2212, a finding under article 2212a that the settling party is a tortfeasor reduces the verdict by the percentage of negligence ad-

151. *Id.* at 166.

152. Keeton, *Torts, Annual Survey of Texas Law*, 28 Sw. L.J. 1, 14 (1974).

153. In *Deal v. Madison*, 576 S.W.2d 409, 415 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.) the court stated:

Bringing in a third party against whom no relief can be granted in order to determine what relief should be granted as between the original parties is an empty formalism. Logically, the claim of proportionate reduction of damages can be raised by a defensive plea to the effect that a third person, whose negligence had proximately caused the damages, had made a settlement by which a proportionate part of the damages were discharged. Yet cautious defense counsel have not been content with this approach. Consequently, the extraordinary practice has persisted of filing third-party claims against parties who had settled, even though, under *Palestine Contractors*, no recovery could be awarded against them. These parties, because of their total freedom from further liability, have rarely played an active part in the litigation. Their presence has served only to present problems to trial judges with respect to rights to preemptory challenges and cross-examination of ostensibly adverse witnesses, and to confuse injuries with respect to the true interests of the parties before them, since these parties, though apparently in the position of defendants, often have made provisions in their settlement agreements which aligned their interests with the plaintiffs, as *Travelers* has done in the present case.

Id. at 415. *But see* *E. I. DuPont de Nemours & Co. v. McCain*, 414 F.2d 369, 375 (5th Cir. 1969). The fifth circuit interpreted *Palestine Contractors* and *Petco* to mandate impleading the settling party. The court stated the test for obtaining a pro rata reduction:

- (a) the settling tortfeasor must be party against whom indemnity or contribution is sought at the time of trial;
- (b) there must be a finding that the settling tortfeasor was negligent.

Id. at 375.

154. *Id.* at 416.

judged against the settling party.¹⁵⁵ Article 2212, presently governing products liability actions, reduces the award of damages pro rata based on the number of tortfeasors contributing to the accident and resulting injury.

V. THE CRASHWORTHINESS DOCTRINE AND THE PROBLEM OF CONTRIBUTION AND INDEMNITY

In the area of products liability, the novel and innovative theory of strict tort liability for crashworthiness or "second collision" has emerged.¹⁵⁶ Most jurisdictions considering the issue have held that a product supplier is obligated not only to design a product that does not cause or contribute to cause the original accident but also to design a product that will not aggravate or further enhance the injuries produced in an original accident.¹⁵⁷ To impose such requirements on the design of a product creates potentially novel problems in the area of contribution and indemnity.

It appears reasonably well established that an injured party seeking recovery against a product supplier on the basis of crashworthiness, as distinguished from a defective product that causes or contributes to cause an accident, is obligated to establish a divisible injury.¹⁵⁸ This means, as a predicate for recovery, the injured party must establish that but for the defective design of the product a certain portion of the injury sustained in the acci-

155. *Id.* at 422.

156. See *Maxey v. Freightliner Corp.*, 450 F. Supp. 955, 963 (N.D. Tex. 1978); *General Motors Corp. v. Turner*, 584 S.W.2d 844, 847-50 (Tex. 1979). See generally Digges, *The Impact of Liability for Enhanced Injury*, 5 U. BALT. L. REV. 1 (1975); Hoenig & Goetz, *A Rational Approach to "Crashworthy" Automobiles: The Need For Judicial Responsibility*, 6 SW. U.L. REV. 1 (1974); Katz, *Liability of Automobile Manufacturers for Unsafe Design of Passenger Cars*, 69 HARV. L. REV. 836 (1956); Sales, *Automobile Design Sufficiency and Enhanced Injury*, 38 INS. COUNSEL J. 388 (1971).

157. See *Higginbotham v. Ford Motor Co.*, 540 F.2d 762, 766 (5th Cir. 1976); *Huddel v. Levin*, 537 F.2d 726, 735 (3d Cir. 1976); *Polk v. Ford Motor Co.*, 529 F.2d 259, 266-67 (8th Cir. 1976); *Larson v. General Motors Corp.*, 391 F.2d 495, 501-02 (8th Cir. 1968); *Jeng v. Witters*, 452 F. Supp. 1349, 1355 (M.D. Pa. 1978), *aff'd*, 591 F.2d 1334 (3d Cir. 1979); *Stahl v. Ford Motor Co.*, 381 N.E.2d 1211, 1214 (Ill. App. 1978).

158. See *Higginbotham v. Ford Motor Co.*, 540 F.2d 762, 773 (5th Cir. 1976); *Huddell v. Levin*, 537 F.2d 726, 728 (3d Cir. 1976); *Polk v. Ford Motor Co.*, 529 F.2d 259, 264-65 (8th Cir. 1976); *Larsen v. General Motors Corp.*, 391 F.2d 495, 503-04 (8th Cir. 1968); *Yetter v. Rajeski*, 364 F. Supp. 105, 108 (D.C. N.J. 1973). *Contra*, *Smith v. Fiat-Roosevelt Motors, Inc.*, 556 F.2d 728, 729-30 (5th Cir. 1977). See generally Sales, *Limitations on Recovery of Damages in Personal Injury Actions*, 18 S. TEX. L.J. 217 (1977). For a general discussion of indivisible versus divisible injury, see *id.* at 261-65.

dent would not have occurred.¹⁵⁹ This requirement is fundamental to a crashworthiness case, and the failure of the plaintiff to sustain this burden of proof forecloses any liability against the products supplier.¹⁶⁰ For example, in *Texas & Pacific Railway Co. v. Van Zandt*,¹⁶¹ plaintiff allegedly suffered injuries when the train in which he was a passenger collided with a freight car standing on a siding.¹⁶² The evidence introduced at the trial raised a serious question regarding the injury suffered by the plaintiff.¹⁶³ The Texas Supreme Court stated that the plaintiff must submit a separate special issue when the occurrence of an injury is placed in issue. The court reasoned that an issue must be formulated which determines "whether there is any legal liability on a defendant to pay the money damages . . . when the evidence is conflicting, through the submission of separate issues."¹⁶⁴

This rationale possesses equal applicability in the crashworthiness context. The injured party has the burden of proving the alleged defective product was unreasonably dangerous and caused a specified amount of injury.¹⁶⁵ This principle parallels the well es-

159. *Huddell v. Levin*, 537 F.2d 726, 738 (3d Cir. 1976); *accord*, *Higginbotham v. Ford Motor Co.*, 540 F.2d 762, 767-68 (5th Cir. 1976); *Dreisonstok v. Volkswagenwerk, A.G.*, 489 F.2d 1066, 1069 (4th Cir. 1974); *Larsen v. General Motors Corp.*, 391 F.2d 495, 503 (8th Cir. 1968); *see* *Hoenig & Weiber, Automobile "Crashworthiness" An Untenable Doctrine*, 20 CLEV. ST. L. REV. 578, 579 (1971); *Sales, Limitations on Recovery of Damages in Personal Injury Actions*, 18 S. TEX. L.J. 217, 264 (1977). It seems clear the adequacy of design does not arise as a relevant issue unless and until the plaintiff establishes that "but for" the defective design and the failure to incorporate a different and safer design certain portions of the injuries sustained in the accident would not have occurred. *Huddell v. Levin*, 537 F.2d 726, 738 (3d Cir. 1976). Under earlier case law, however, some courts declared that a manufacturer is not liable for "second-collision" injuries. *See, e.g., Shumard v. General Motors Corp.*, 270 F. Supp. 311, 313 (S.D. Ohio 1967) (car ignited); *General Motors Corp. v. Howard*, 244 So. 2d 726, 728 (Miss. 1971) (steering); *Buchard v. Short*, 275 N.E.2d 632, 633-34 (Ohio 1971) (dashboard).

160. As noted by the fifth circuit in *Higginbotham v. Ford Motor Co.*, 540 F.2d 762 (5th Cir. 1976), "the fact that Ford is liable only for the injuries over and above those that would have occurred in a crashworthy car convinces us that a rational basis for apportionment exists." *Id.* at 774; *see* *Comment, Apportionment of Damages in The "Second Collision" Case*, 63 VA. L. REV. 475, 482 (1977). "[U]nder *Higginbotham*, apportionment is required because defendants are not joint tortfeasors." *Id.* at 482.

161. 317 S.W.2d 528 (Tex. 1958).

162. *Id.* at 529.

163. *Id.* at 529. The petitioner railway produced evidence indicating, "the jar from the collision was so slight that respondent could not have been thrown from his seat and could not have been injured." *Id.* at 529.

164. *Id.* at 530.

165. *Id.* at 530. The *Van Zandt* court stated:

established rule that a tortfeasor whose conduct merely aggravates an *existing* injury is liable only to the extent of the aggravation.¹⁶⁶ This means the plaintiff must establish a divisible injury by demonstrating the difference between the injury received as a result of the initial accident and any enhancement of the injury caused by the alleged defective design of the product. As a parallel example, when the plaintiff's original injury has been aggravated by the improper treatment of a physician, the plaintiff is entitled to recover from the original tortfeasor damages for all injuries, including those injuries which the malpractice aggravated or enhanced.¹⁶⁷ The physician, on the other hand, is only liable for the injuries enhanced by the malpractice.¹⁶⁸ The doctor and the original negli-

The burden was on respondent to prove that he had been injured. That question was therefore put in issue by petitioner's general denial. We are satisfied that it was also put in issue by petitioner's evidence, which need not be detailed. Inasmuch as no separate issue on the fact of injury was submitted, the judgment in respondent's favor may not stand unless the question was fairly and adequately submitted in Special Issue No. 5 quoted above.

Special Issue No. 5 is the conventional type of damage issue. Its purpose is not to establish liability. Its purpose is to fix the amount of money damages which will fairly compensate an injured party for his injuries and thus discharge the legal liability of a defendant. *Whether there is any legal liability on the part of a defendant to pay the money damages must be determined, when the evidence is conflicting, through the submission of separate issues.*

Id. at 530 (emphasis added). See also *Cowden Cab Co. v. Thomas*, 425 S.W.2d 886, 888 (Tex. Civ. App.—Fort Worth 1968, writ ref'd n.r.e.).

166. See *Sales, Limitations on Recovery of Damages in Personal Injury Actions*, 18 S. TEX. L.J. 217, 255 (1977). See generally J. SALES & J. PERDUE, *THE LAW OF STRICT TORT LIABILITY* 137-40 (1977), also printed in 14 HOUS. L. REV. 1, 137-40 (1977).

167. A negligent tortfeasor injures a plaintiff, who in turn is further injured by the negligence of the treating physician. The original tortfeasor is liable for all injuries caused by both his and the treating physician's negligence. *E.g.*, *Cannon v. Pearson*, 383 S.W.2d 565, 567 (Tex. 1964); *Potter v. Crump*, 555 S.W.2d 206, 209 (Tex. Civ. App.—Fort Worth 1977, writ ref'd n.r.e.); *Borden v. Sneed*, 291 S.W.2d 485, 488 (Tex. Civ. App.—Waco 1956, writ ref'd n.r.e.); accord, *Underwriters at Lloyds v. City of Lauderdale Lakes*, 382 So. 2d 702, 704 (Fla. 1980); *Borowski v. Von Solbrig*, 328 N.E.2d 301, 305 (Ill. 1975); *Stahlin v. Hochdoefer*, 235 S.W. 1060, 1062 (Mo. 1921); *Ruge v. Arden Hill Hosp.*, 371 N.Y.S.2d 354, 357 (Sup. Ct. 1975); *Thompson v. Fox*, 192 A. 107, 108-09 (Pa. 1937); *Greene v. Waters*, 49 N.W.2d 919, 921 (Wis. 1951).

168. The doctor can only be found liable for enhancement of the original injury. *E.g.*, *Gertz v. Campbell*, 302 N.E.2d 40, 43 (Ill. 1973); *Stahlin v. Hochdoefer*, 235 S.W. 1060, 1062 (Mo. 1921); *Radford-Shelton & Assoc. Dental Laboratory, Inc. v. St. Francis Hosp.*, 569 P.2d 506, 509 (Okla. App. 1977); *Sales, Limitations on Recovery of Damages in Personal Injury Actions*, 18 S. TEX. L.J. 217, 265 (1977); see *Underwriters at Lloyds v. City of Lauderdale Lakes*, 382 So. 2d 702, 704 (Fla. 1980); *Butzow v. Wausau Memorial Hosp.*, 187 N.W.2d 349, 352-53 (Wis. 1971).

gent party are not deemed joint tortfeasors.

Unless the defective product actually caused or contributed to the injury after the accident has occurred, there is no basis for obligating the product supplier to pay damages and impose the costs of those damages on innocent consumers of the product.¹⁶⁹ Basic fairness dictates that a supplier of a product that does not cause or contribute to cause an injury should not be held liable for those damages.

The distinction between an indivisible and a divisible injury assumes critical importance under the concept of crashworthiness. An indivisible injury is one which, by its nature, cannot be apportioned with any reasonable certainty to specific occurrences or to individual wrongdoers.¹⁷⁰ When apportionment of the injury is entirely arbitrary, speculative, and impractical, the injury is indivisible. When multiple joint tortfeasors each contribute to the injury-producing event and the resulting injury is indivisible in nature, each tortfeasor is jointly and severally liable for all the damage.¹⁷¹ The acts of tortfeasors causing separate and distinct damages,

169. Several jurisdictions consider the product supplier a joint tortfeasor and, therefore, subject to the identical rules of contribution and indemnity that apply in situations when the product causes or contributes to cause the original injury. See *Fox v. Ford Motor Co.*, 575 F.2d 774, 780 (10th Cir. 1978) (applying Wyoming law); *Caiazza v. Volkswagenwerk A.G.*, 468 F. Supp. 593, 602-03 (E.D. N.Y. 1979). The majority of jurisdictions, however, hold that the injured party must establish a divisible injury as a predicate to maintaining a cause of action against a product supplier for a defective product. See *Higginbotham v. Ford Motor Co.*, 540 F.2d 762, 773 (5th Cir. 1976); *Huddell v. Levin*, 537 F.2d 726, 735 (3d Cir. 1976); *Polk v. Ford Motor Co.*, 529 F.2d 259, 264-65 (8th Cir. 1976); *Larson v. General Motors Corp.*, 391 F.2d 495, 501-02 (8th Cir. 1968); *Jeng v. Witters*, 452 F. Supp. 1349, 1355 (M.D. Pa. 1978), *aff'd*, 591 F.2d 133 (3d Cir. 1979); *Stahl v. Ford Motor Co.*, 381 N.E.2d 1211, 1214 (Ill. App. 1978). In the comment, *Apportionment of Damages in The "Second Collision" Case*, the author is critical of *Huddell* and *Higginbotham*. The author notes, however, that in the interest of fairness, "the plaintiff should bear the burden of proving the defectiveness of the automobile design, the availability of safer alternatives and the aggravation of injuries because of the defective design. Any lighter burden on the plaintiff would transform the manufacturer into an insurer." Comment, *Apportionment of Damages in the "Second Collision" Case*, 63 VA. L. REV. 475, 486 (1977).

170. See *Arnst v. Estes*, 8 A.2d 201, 203-04 (Me. 1939); *Anderson v. Minneapolis St. P. & S.S.M. Ry.*, 179 N.W. 45, 48-49 (Minn. 1920); *Haverly v. State Line & S.R.R.*, 19 A. 1013, 1013 (Pa. 1890); *Landers v. East Tex. Salt Water Disposal Co.*, 151 Tex. 251, 256, 248 S.W.2d 731, 734 (1952); *Kirby Lumber Corp. v. Walter*, 277 S.W.2d 796, 799 (Tex. Civ. App.—Dallas 1954, writ ref'd n.r.e.); Sales, *Limitations on Recovery of Damages in Personal Injury Actions*, 18 S. TEX. L.J. 217, 256 (1977).

171. *Landers v. East Tex. Salt Water Disposal Co.*, 151 Tex. 251, 256, 248 S.W.2d 731, 734 (1952); *accord*, *Borel v. Fibreboard Products Corp.*, 493 F.2d 1076, 1095 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).

however, may *not* be characterized as imposing joint and several liability. This concept applies when the injuries are divisible. Divisible injuries are those injuries which are capable of apportionment as to wrongdoers and occurrence.¹⁷²

The landmark case involving the crashworthiness doctrine is *Larsen v. General Motors Corp.*¹⁷³ The plaintiff was injured when his vehicle collided head-on with another vehicle.¹⁷⁴ The plaintiff instituted suit against the manufacturer of the vehicle on the basis that the design location of the steering shaft directly behind the left front wheel was improper and produced more severe injuries in a head-on collision than would have occurred if the steering column had been placed in a safer location.¹⁷⁵ The eighth circuit court reversed a summary judgment for the product supplier holding the doctrine of crashworthiness applicable. In adopting crashworthiness the court stated that a manufacturer should be held liable *only* for the portion of damage or injury over and above the damage or injury resulting from the original accident.¹⁷⁶

In a recent well-reasoned opinion, the third circuit considered a case in which plaintiff's husband was fatally injured when the vehicle in which he was riding was struck from behind by another vehicle travelling at a high rate of speed.¹⁷⁷ As a result of the impact, the deceased was thrown backward causing his head to strike

172. *Landers v. East Tex. Salt Water Disposal Co.*, 151 Tex. 251, 256, 248 S.W.2d 731, 734 (1952). As stated by the Texas Supreme Court in *Landers*:

[W]here the tortious acts of two or more wrongdoers join to produce an indivisible injury; that is, injury from which its nature cannot be apportioned with reasonable certainty to the individual wrongdoers, all the wrongdoers will be held jointly and severally liable for the entire damage and the injured party may proceed to judgment against anyone separately or against all in one suit.

Id. at 256, 248 S.W.2d at 734.

173. 391 F.2d 495 (8th Cir. 1968).

174. *Id.* at 496-97.

175. *Id.* at 506.

176. *Id.* at 503. While adopting the concept of crashworthiness, the court further stated:

Any design defect not causing the accident would not subject the manufacturer to liability for the entire damage, but the manufacturer should be liable for that portion of the damage or injury caused by the defective design over and above the damage or injury that probably would have occurred as a result of the impact or collision absent the defective design.

Id. at 503. *Larsen* excludes the possibility of holding the manufacturer jointly and severally liable with the original tortfeasor for all of the damage. See Comment, *Apportionment of Damages in the "Second Collision" Case*, 63 VA. L. REV. 475, 478 (1977).

177. *Huddell v. Levin*, 537 F.2d 726, 731-32 (3d Cir. 1976).

the headrest of the vehicle.¹⁷⁸ He subsequently died as a result of a fractured skull.¹⁷⁹ Plaintiff contended that death was proximately caused by the defectively designed headrest and attempted to establish that a differently designed headrest would have prevented the initial injury from being fatal.¹⁸⁰ The third circuit defined plaintiff's burden of proof as being threefold: (1) in establishing that the design was defective, the plaintiff must offer proof of an alternative, safer design that would be practicable under the circumstances; (2) plaintiff must offer proof of what injuries, if any, would have resulted had the alternative, safer design, been used; and (3) as a corollary to the second aspect of proof, the plaintiff must offer some method of establishing the *extent* of enhanced injuries attributable to the defective design.¹⁸¹ The majority of the court concluded the plaintiff failed to establish a divisible injury that would impose upon the manufacturer a burden to design a different and safer headrest. The third circuit observed:

The crashworthy or second collision theory of liability is a relatively new theory, its contours are not wholly mapped, but one thing, at least, is clear: the automobile manufacturer is liable only for the enhanced injury attributable to the defective product. This being the essence of liability, we cannot agree that the burden of proof on that issue can properly be placed on the defendant manufacturer. . . .

[P]laintiff may not argue that the ultimate fact of death is divisible for purposes of establishing General Motors' liability and then assert that it is indivisible in order to deny to General Motors the opportunity of limiting damages.¹⁸²

In a recent decision plaintiffs were injured when a car door opened, permitting them to be ejected from their vehicle following

178. *Id.* at 732.

179. *Id.* at 732.

180. *Id.* at 735. The plaintiff alleged that the fatal headrest was designed like an airplane wing with an unyielding metal "v" shape pointed towards the back of the driver's head. In comparison plaintiff offered a headrest which would distribute impact over a larger area of the head. *Id.* at 735.

181. *Id.* at 737-38.

182. *Id.* at 738-39. As noted in the Comment, *Apportionment of Damages in the "Second Collision" Case*, 63 VA. L. REV. 475, 485 (1977), "Huddell thus reached a conclusion at which Higginbotham had only hinted: the plaintiff bears the burden of apportioning damages in a second collision case." *Id.* at 485.

an initial collision.¹⁸³ Relying on a earlier eighth circuit decision, the third circuit emphasized that the product supplier is liable only for those injuries that plaintiffs could establish were caused or enhanced by a defective condition of the product after the initial accident occurred.¹⁸⁴

Assuming that the plaintiff does establish a divisible injury in a crashworthiness context, the concept of contribution and indemnity is substantially altered. Traditionally, the original negligent tortfeasor causing the accident is responsible for all resultant injuries, including those injuries enhanced by the defective product. The product supplier, on the other hand, is liable only for that portion of the damages attributable to the design configuration of the product that enhanced the injury after the accident-producing event occurred.¹⁸⁵ Under these circumstances, the negligent tortfeasor would have no right of indemnity against the product supplier for *all* of the injury suffered by the injured party. Rather, the negligent tortfeasor would have a right of contribution against the product supplier only for that portion of the damages attributable to the defective design occurring after the accident-producing event.¹⁸⁶ Apportionment is essential because the original negligent tortfeasor and the product supplier are not joint tortfeasors under the concept of crashworthiness.¹⁸⁷

183. *Jeng v. Witters*, 452 F. Supp. 1349, 1355 (N.D. Pa. 1978), *aff'd*, 591 F.2d 1334 (3d Cir. 1979).

184. *Polk v. Ford Motor Co.*, 529 F.2d 259, 264-65 (8th Cir. 1976); *Jeng v. Witters*, 452 F. Supp. 1349, 1355 (N.D. Pa. 1978), *aff'd*, 591 F.2d 1334 (3d Cir. 1979).

185. *See Polk v. Ford Motor Co.*, 529 F.2d 259, 268 (8th Cir. 1976); *Schering v. Gieseche*, 589 S.W.2d 516, 519 (Tex. Civ. App.—Eastland 1979, writ *ref'd n.r.e.*); *cf. Ruge v. Ardes Hill Hosp.*, 371 N.Y.S. 354, 356 (Sup. Ct. 1975) (subsequent doctor's malpractice aggravates injury).

186. *Huddell v. Levin*, 537 F.2d 726, 735 (3d Cir. 1976); *Larsen v. General Motors Corp.*, 391 F.2d 495, 501-02 (8th Cir. 1968). *See also Fietzer v. Ford Motor Co.*, 383 F. Supp. 33, 37 (E.D. Wis. 1974), in which the court noted the corollary of this principle, that the subsequent tortfeasor possesses no similar right of recoupment because the successive tortfeasor's liability is limited solely to the enhancement of the original injury caused by the culpability of the subsequent tortfeasor. *Id.* at 37.

187. As noted by the eighth circuit in *Polk v. Ford Motor Co.*, 529 F.2d 259 (8th Cir. 1976), "Ford was not a joint tortfeasor in respect to any damages occurring prior to the fire; it is only the enhanced injuries for which Ford may be liable in this case." *Id.* at 268. *Accord*, *Higginbotham v. Ford Motor Co.*, 540 F.2d 762, 774 (5th Cir. 1976); *Huddell v. Levin*, 537 F.2d 726, 735 (3d Cir. 1976).

VI. COMPARATIVE CAUSATION OR COMPARATIVE FAULT AS A SUGGESTED SOLUTION

An emerging concept advanced by other jurisdictions to ameliorate the harshness of common law indemnity is comparative fault.¹⁸⁸ As practiced in its various forms the primary effect of comparative fault, or as some jurisdictions label it, comparative causation, is an assessment of liability based upon apportionment of culpability for contributing to the injury-producing event.¹⁸⁹ The increasing popularity of the concept's application is attributable to the numerous conceptual inconsistencies inherent in common law indemnity. Whereas indemnity is often mechanically applied in situations when the indemnitee possesses a technical but not an equitable right to restitution,¹⁹⁰ comparative fault authorizes contribution among multiple defendants regardless of their relative percentages of rectitude.¹⁹¹ Comparative fault or comparative causation further alleviates the necessity of applying the numerous confusing tests which have evolved to facilitate indemnification. Comparative fault judges liability not by the courts extrajudicial application of artificial tests, but rather by a jury deter-

188. *Safeway Stores, Inc. v. Nest-Kart*, 579 P.2d 411, 446-47, 146 Cal. Rptr. 550, 555-56 (Cal. App. 1978); *accord*, *Stueve v. American Honda Motor Co.*, 457 F. Supp. 740, 752 (D. Kan. 1978); *Sun Valley Airlines, Inc. v. Avco Lycomine Corp.*, 411 F. Supp. 598, 603 (D. Idaho 1967); *West v. Caterpillar Tractor Co.*, 336 So. 2d 80, 91-92 (Fla. 1976); *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 generally* Davis, *Comparative Negligence, Comparative Contribution, and Equal Protection in the Trial and Settlement of Multiple Defendant Product Cases*, 10 IND. L. REV. 831 (1977); Sales, *Assumption of the Risk and Misuse in Strict Tort Liability — Prelude to Comparative Fault*, 11 TEX. TECH L. REV. 729 (1980); Shelton, *Comparative Causation: A Legislative Proposal for the Equitable Allocation of Loss Between Strictly Liable and Negligent Parties*, 20 S. TEX. L.J. 123 (1979).

189. *See, e.g.*, *Daly v. General Motors Corp.*, 575 P.2d 1162, 1168-69, 144 Cal. Rptr. 380, 386-87 (1978); *Stevens v. Silver Mfg. Co.*, 374 N.E.2d 455, 457 (Ill. 1978); *Gus v. Nissan Corp.*, 204 N.W.2d 519, 522 (Wis. 1973).

190. *See, e.g.*, *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 363, 367 (Minn. 1977); *Bielski v. Schulze*, 114 N.W.2d 105, 109 (Wis. 1962). *See generally* C. HEFT & C. HEFT, *COMPARATIVE NEGLIGENCE MANUAL* §§ 4.200-.220 (1971); Keeton, *Torts, Annual Survey of Texas Law*, 32 SW. L.J. 1, 12 (1978).

191. *See* *Dole v. Dow Chem. Co.*, 282 N.E.2d 288, 295, 331 N.Y.S.2d 382, 391-92 (1972); Jensvold, *A Modern Approach to Loss Allocation Among Tortfeasors in Product Liability Cases*, 58 MINN. L. REV. 723, 736-38 (1974). *See generally* V. SCHWARTZ, *COMPARATIVE NEGLIGENCE* §§ 3.1-.5 (1974 & Supp. 1978).

mination of the degree that each party contributed to the harm.¹⁹²

The various jurisdictions that embrace comparative fault have chosen to follow one of three approaches when confronted with apportioning fault between a negligent and a strictly liable tortfeasor. Wisconsin, Minnesota, and Florida have determined strict liability to be a form of negligence per se within the contemplation of existing comparative negligence statutes.¹⁹³ As a second approach, some jurisdictions have judicially declared that by enacting comparative negligence statutes to eliminate the harsh "all or nothing" approach of contributory negligence, the legislatures did not intend to exclude strict liability from the operative ambit of such statutes.¹⁹⁴ The third approach has involved judicial formulation of comparative fault applicable in both strict tort and negligence liability cases.¹⁹⁵

The first approach, initiated by the Wisconsin Supreme Court's holding in *Dippel v. Sciano*,¹⁹⁶ characterizes strict tort liability as the equivalent of negligence per se and, therefore, extends the applicability of the state's comparative negligence act to include strict liability as another form of "negligence."¹⁹⁷ From its inception, Wisconsin courts have consistently applied comparative fault to strict tort liability actions.¹⁹⁸ In *Schuh v. Fox River Tractor Co.*,¹⁹⁹ plaintiff was injured while operating a crop blower.²⁰⁰ The

192. See, e.g., *Butaud v. Suburban Marine & Sporting Goods, Inc.*, 555 P.2d 42, 47 (Alaska 1976); *Daly v. General Motors Corp.*, 575 P.2d 1162, 1168-69, 144 Cal. Rptr. 380, 386-87 (1978); *Dole v. Dow Chem. Co.*, 282 N.E.2d 288, 291, 331 N.Y.S.2d 382, 386 (1972).

193. *West v. Caterpillar Tractor Co.*, 336 So. 2d 80, 90 (Fla. 1976); *Busch v. Busch Constr. Co.*, 262 N.W.2d 377, 393-95 (Minn. 1977); *Shuh v. Fox River Tractor Co.*, 218 N.W.2d 279, 287 (Wis. 1974).

194. See *Stueve v. American Honda Motors Co.*, 457 F. Supp. 740, 753 (D. Kan. 1978); *Sun Valley Airlines, Inc. v. Avco-Lycoming Corp.*, 411 F. Supp. 598, 603 (D. Idaho 1967); *Suter v. San Angelo Foundry & Mach. Co.*, 406 A.2d 140, 142 (N.J. 1979).

195. *Butaud v. Suburban Marine & Sporting Goods, Inc.*, 555 P.2d 42, 45 (Alaska 1976); *Daly v. General Motors Corp.*, 575 P.2d 1162, 1170, 144 Cal. Rptr. 380, 384 (1978).

196. 155 N.W.2d 55 (Wis. 1967).

197. *Id.* at 63; accord, *Powers v. Hunt-Wesson Foods, Inc.*, 219 N.W.2d 393, 395 (Wis. 1974); *Shuh v. Fox River Tractor Co.*, 218 N.W.2d 279, 287 (Wis. 1974).

198. See, e.g., *Decker v. Fox River Tractor Co.*, 324 F. Supp. 1089, 1091 (E.D. Wis. 1971). The court rejected the Pennsylvania law barring contributory negligence and concluded that under the Wisconsin comparative negligence view plaintiff's negligence will preclude recovery if it is as great or greater than the fault of the defendant. *Id.* at 1091; see *Austin v. Ford Motor Co.*, 273 N.W.2d 233, 237-38 (Wis. 1979); *Powers v. Hunt-Wesson Foods, Inc.*, 219 N.W.2d 393, 395 (Wis. 1974).

199. 218 N.W.2d 279 (Wis. 1974).

apparatus was designed to include a clutch lever to disengage the auger which fed silage to the blower, but did not deactivate the fan.²⁰¹ In attempting to repair another component of the mechanism the plaintiff used the lever provided; he failed, however, to disconnect the fan and suffered severe injury when his foot became entangled with its blades.²⁰² The manufacturer of the crop blower embossed on the equipment a clear warning not to stand near the area where the plaintiff sustained injury.²⁰³ The Wisconsin Supreme Court reversed a verdict for the plaintiff and rendered judgment for the manufacturer, holding that the comparative negligence of the plaintiff, as a matter of law, exceeded the product supplier's negligence per se.²⁰⁴

The second approach simply applies the jurisdiction's existing comparative negligence statute irrespective of whether the cause of action is premised on negligence or strict tort liability.²⁰⁵ Basically, these jurisdictions conclude that enactment of comparative negligence statutes does not evidence a legislative intent to exclude strict tort liability from the ambit of its application. For example, in *Stueve v. American Honda Motors Co.*,²⁰⁶ plaintiff's husband was fatally injured when a Honda motorcycle he was operating collided with an automobile. As a result of the impact, the motorcycle ignited and burned the deceased. The court, predicting the course of Kansas decisions, applied the Kansas comparative negligence statute to an action based both on negligence and strict tort liability.²⁰⁷ The court stressed that application of the existing compara-

200. *Id.* at 281.

201. *Id.* at 281.

202. *Id.* at 281. Plaintiff stood on the edge of the hopper of the crop blower and attempted to free the chain of an attached conveyor belt. He slipped from the edge into the revolving fan amputating his left leg. *Id.* at 281.

203. *Id.* at 281, 287. The plaintiff had operated the crop blower on previous occasions and the evidence established he knew, or should have known, the fan was still running when he pulled the clutch lever. *Id.* at 281. "The manufacturer saw fit to put a warning sign on the machine to warn of the danger of standing on it. . . ." *Id.* at 287.

204. *Id.* at 287.

205. *Stueve v. American Honda Motors Co.*, 457 F. Supp. 740, 751-52 (D. Kan. 1978); *Sun Valley Airlines, Inc. v. Avco-Lycoming Corp.*, 411 F. Supp. 598, 602-03 (D. Idaho 1976); *Suter v. San Angelo Foundry & Mach. Co.*, 406 A.2d 140, 147 (N.J. 1979); see *Kennedy v. City of Sawyer*, 608 P.2d 1379, 1386 (Kan. App. 1980). *Contra*, *Seay v. Chrysler Corp.*, 609 P.2d 1382, 1384 (Wash. 1980).

206. 457 F. Supp. 740 (D. Kan. 1978).

207. *Id.* at 755-56.

tive negligence statute to a section 402A cause of action harmonized the policies underlying enactment of a loss-allocation statute.²⁰⁸

Safeway Stores, Inc. v. Nest-Kart,²⁰⁹ a California decision, epitomizes the third approach to the application of comparative fault.²¹⁰ In jurisdictions adopting the California approach, the courts have reasoned that the introduction of a defective product into the marketplace is a violation of a duty and, therefore, manifests fault on the part of a products supplier.²¹¹ By characterizing strict liability as a form of culpable fault on the part of the products supplier, the semantical necessity for "negligence" between the parties no longer forecloses use of comparative fault as a form of contribution for the strictly liable tortfeasor.²¹²

In *Safeway Stores* plaintiff was injured in a Safeway supermarket when the shopping cart she was using collapsed, injuring her foot.²¹³ Plaintiff instituted suit based on negligence and strict liability against Safeway, owner of the cart; Nest-Kart, manufacturer of the cart; and a corporation that had in the past repaired some of Safeway's shopping carts.²¹⁴ The jury absolved both the plaintiff and the repair facility of responsibility for the accident, but returned a verdict against Safeway and Nest-Kart based on both

208. *Id.* at 758.

209. 579 P.2d 441, 146 Cal. Rptr. 550 (1978).

210. *Id.* at 445, 146 Cal. Rptr. at 554. See generally, Sales, *Assumption of the Risk and Misuse in Strict Liability—Prelude to Comparative Fault*, 11 TEX. TECH L. REV. 729 (1980); Comment, *Comparative Contribution and Strict Tort Liability: A Proposed Reconciliation*, 13 CREIGHTON L. REV. 889 (1980).

211. *Caterpillar Tractor Co. v. Beck*, 593 P.2d 871, 889 (Alaska 1979); *Safeway Stores, Inc. v. Nest-Kart*, 579 P.2d 441, 445, 146 Cal. Rptr. 550, 554 (1978).

212. See *Daly v. General Motors Corp.*, 575 P.2d 1162, 1168, 144 Cal. Rptr. 380, 386 (1978). "Fixed semantic consistency at this point is less important than the attainment of a just and equitable result. The interweaving of concept in terminology in this area suggests a judicial posture that is flexible rather than doctrinal." *Id.* at 1168, 144 Cal. Rptr. at 386; see Levine, *Strict Products Liability and Comparative Negligence: The Collision of Fault and No-Fault*, 14 SAN DIEGO L. REV. 337, 351 (1977). "Some [authorities] have suggested that products liability 'is not absolute but is based on the social fault of marketing defective products,' and therefore it is logical and consistent to consider plaintiff's fault in relation to the defendant's conduct." *Id.* at 351. See generally Brewster, *Comparative Negligence in Strict Liability Cases*, 42 J. AIR. L. COM. 197 (1976).

213. *Safeway Stores, Inc. v. Nest-Kart*, 579 P.2d 441, 442, 146 Cal. Rptr. 550, 551 (1978).

214. *Id.* at 442, 146 Cal. Rptr. at 551. The jury indicated that the liability of Safeway was for both negligence and strict liability, whereas Nest-Kart's liability rested solely in strict liability. *Id.* at 442, 146 Cal. Rptr. at 551.

negligence and strict liability.²¹⁵ The jury adjudged Safeway to be 80% at fault and Nest-Kart to be 20% at fault.²¹⁶ After judgment, Safeway urged contribution between the defendants on a pro rata fifty-fifty basis which was granted by the trial court.²¹⁷ In reversing the trial court, the California Supreme Court stated the difficulties in apportioning fault to a cause brought under strict liability are "more theoretical than practical"²¹⁸ and past experience had demonstrated that juries were competent in assessing percentage causation between a negligent and a strictly liable tortfeasor.²¹⁹

In contrast to those jurisdictions which have judicially applied comparative fault to strict liability are several states which have provided for comparative fault by statute.²²⁰ Arkansas' statute section 27-1763 includes a definition of comparative fault as "any act, omission, conduct, risk assumed, breach of warranty or breach of any legal duty which is the proximate cause of damages sustained by any party."²²¹ In conjunction, Arkansas' recently legislated products liability act provides that conduct by the consumer including abnormal use, unforeseeable alterations, improper mainte-

215. *Id.* at 442-43, 146 Cal. Rptr. at 551-52.

216. *Id.* at 443, 146 Cal. Rptr. at 552. "The trial court, while indicating that 'common sense' called for an apportionment of the judgment on a comparative fault basis ultimately concluded that such comparative apportionment was not permissible in light of the existing statutory contribution provisions." *Id.* at 443, 146 Cal. Rptr. at 552.

217. *Id.* at 446, 146 Cal. Rptr. at 555. Justice Tobriner in drafting the *Safeway Stores* opinion gives an excellent review of the progression of California case law in support of the decision. By reconciling the comparative negligence decision in *Li v. Yellow Cab Co.*, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975) with *American Motorcycle Assn. v. Superior Court*, 574 P.2d 763, 143 Cal. Rptr. 692 (1978), which applied apportionment of liability among multiple tortfeasors on a comparative fault basis, the court reasoned that apportionment between negligent and strictly liable tortfeasors was an unassailably logical and necessary extension of the earlier case law. *Id.* at 446, 146 Cal. Rptr. at 555.

218. See *Haney v. International Harvester Co.*, 201 N.W.2d 140, 146 (Minn. 1972); *Nobel v. Desco Shoe Corp.*, 343 N.Y.S.2d 134, 135 (App. Div. 1973); *Franklin v. Badger Ford Truck Sales, Inc.*, 207 N.W.2d 866, 871-73 (Wis. 1973); *Gies v. Nissan Corp.*, 204 N.W.2d 519, 526-27 (Wis. 1973). *But see West v. Caterpillar Tractor Co.*, 547 F.2d 885, 887 (5th Cir. 1977) (applying Florida law).

219. See ARK. STAT. ANN. §§ 27-1763 to -1765 (Supp. 1977); MICH. COMP. LAWS § 600.2949 (1970); MINN. STAT. ANN. § 604.01 (West Supp. 1978); NEB. REV. STAT. § 25-2252 (1975); N.Y. CIV. PRAC. § 1411 (McKinney Supp. 1979-80).

220. ARK. STAT. ANN. §§ 27-1763 to -1765 (Supp. 1977). Additionally, the following states have enacted statutes which are not limited only to actions in "negligence": ME. REV. STAT. ANN. tit. 14, § 156 (1980); MISS. CODE ANN. § 11-7-15 (1972); R.I. Gen. Laws § 10-6-2 (Supp. 1979).

221. 1979 ARK. ACTS 511, approved March 21, 1979.

nance or use beyond the product's anticipated utility could also be considered as factors in allocating fault.²²²

The Uniform Comparative Fault Act (UCFA) offers yet another approach to the application of comparative fault. The UCFA addresses the broad concept of comparative fault in various actions. Under this uniform act, fault is defined to include any acts or omissions that are negligent, as well as the defenses to a breach of warranty, unreasonable assumption of the risk, misuse of a product, and unreasonable failure to avoid injury.²²³ The Act closely parallels the form of judicial comparative fault articulated by the Supreme Courts of Alaska²²⁴ and California,²²⁵ by comparing the relative fault of the plaintiff and co-tortfeasors without regard to the theoretical underpinnings of the causes of action or defenses.

Texas courts have on at least one occasion approached comparative fault. In *General Motors v. Hopkins*,²²⁶ the Texas Supreme Court allocated fault between a strictly liable manufacturer of a defective carburetor and an injured plaintiff who altered the carburetor upon reinstallation in the pickup truck.²²⁷ Although not embracing the concept of comparative fault, the effect of the *Hopkins* decision was to establish a form for comparing the cause attributable to the defect with the fault attributable to the plaintiff's misuse.²²⁸ Subsequently, the Texas Supreme Court in *General Motors v. Simmons*²²⁹ noted the Texas 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."²³⁰ The court suggested the legislature consider amending the statute to elimi-

222. See Wade, *Product Liability and Plaintiff's Fault - The Uniform Comparative Fault Act*, 29 MERCER L. REV. 373, 374-78 (1978).

223. UNIFORM COMPARATIVE FAULT ACT § 1(a)-(b) (1977).

224. See *Caterpillar Tractor Co. v. Beck*, 593 P.2d 871, 890 (Alaska 1979).

225. See *Daly v. General Motors Corp.*, 575 P.2d 1162, 1170, 144 Cal. Rptr. 380, 388 (1978).

226. 548 S.W.2d 344 (Tex. 1977).

227. *Id.* at 346.

228. *Id.* at 351. "Reduction of the plaintiff's recovery should be ordered where the misuse is a concurring proximate cause of the damaging event." *Id.* at 351.

229. 558 S.W.2d 855 (Tex. 1977).

230. *Id.* at 862.

nate the perceived hiatus between article 2212 and article 2212a.²³¹

Recently, in *B & B Auto Supply, Sand Pit, and Trucking Co. v. Central Freight Lines, Inc.*,²³² Justice Spears indirectly alluded to the possible consideration of the application of comparative fault in Texas.²³³ In deference to *Simmons*, which refused to apply article 2212a to strict liability,²³⁴ the *B & B Auto Supply* decision clearly states the court "express[es] no opinion whether [application of 2212a] would extend to a strict liability case."²³⁵ More recently, however, in *Boatland of Houston, Inc. v. Bailey*,²³⁶ three concurring Justices express an urgent need to adopt comparative fault in Texas. Justice Pope, in his concurring opinion observed that, "[s]ooner or later, and the sooner the better, we must bring product liability cases within a manageable format. Simplicity, order and consistency can be advanced. . . by (1) The elimination of the misuse and voluntary assumption of the risk issues and by substituting in their place the more familiar issue about contributory negligence on the part of the plaintiff. . . ."²³⁷ The language utilized in these recent decision appears to signal an increasing momentum for an equitable and simple allocation of risk concept. The next logical step, therefore, would be the extension of article 2212a to all tort actions, including strict tort liability.

The adoption of comparative fault in Texas would provide a much needed degree of uniformity in allocating the risk of loss. This, in turn, would directly affect the present entanglements that cast such an ominous shadow over most settlement efforts. Currently, settlement between parties hinges upon whether the non-settling tortfeasor is negligent or strictly liable.²³⁸ If the cause of action is brought in negligence then the allocation of the risk of loss between settling and non-settling tortfeasors is expressly governed by sections (d) and (e) of article 2212a. If the liability of one

231. *Id.* at 862.

232. 603 S.W. 2d 814 (Tex. 1980).

233. *Id.* at 817.

234. *Id.* at 817.

235. *Id.* at 817.

236. 23 Tex. Sup. Ct. J. 566, 571 (August 2, 1980).

237. *Id.* at 571.

238. See Edgar, *Products Liability in Texas*, 11 TEX. TECH L. REV. 23, 48-49 (1980); Sales, *Limitations on Recovery of Damages in Personal Injury Actions*, 18 S. TEX. L.J. 217, 267-69 (1977); Comment, *Settlements in Multiple Tortfeasor Controversies — Texas Law*, 10 ST. MARY'S L.J. 75, 79-83 (1978).

or more of the tortfeasors is predicated on strict tort liability, however, negotiations are subordinate to article 2212 and the *Palestine Contractors* doctrine. The necessity of applying two totally dissimilar standards for settlement based solely upon the theory of liability favors form over substance. The court has emphasized that the law encourages settlement, but the contemporary effects of settlement in a case involving a strictly liable tortfeasor dissuade negotiations. A plaintiff confronted with the effect of article 2212 and *Palestine Contractors* is confronted with an undesirable dilemma.

It is ironic that almost all arguments that confronted proponents of comparative negligence are now resurrected as a barrier to adoption of comparative fault.²³⁹ Jurists who argue that comparative fault is arbitrary or "beyond the prowess of an American jury"²⁴⁰ ignore the success that has been achieved by comparative negligence. "What's good for the goose is good for the gander" is perhaps an appropriate syllogism for placing the entire problem in proper perspective. A tort system, whether strict or otherwise, must assume the appearance of fairness if its continued existence is contemplated.

VII. CONCLUSION

The current system in Texas for allocating loss between a negligent tortfeasor and a party strictly liable in tort is less than equitable. The Texas system fails to allocate the risk of loss other than on a pro rata basis. As a consequence, a party deemed to be strictly liable in tort assumes a disproportionate burden of the actual fault and resulting damages. Although these damages are absorbed by the supplier, ultimately innocent consumers pay the price of enterprise liability.

The present system is essentially an all-or-nothing system that

239. See *Daly v. General Motors Corp.*, 575 P.2d 1162, 1178, 144 Cal. Rptr., 380, 396 (1978) (Jefferson, J., concurring in part, dissenting in part); *Skinner v. Reed-Prentice Div. Package Mach. Co.*, 374 N.E.2d 437, 445 (Wis. 1977) (Ward, C.J., dissenting). See generally Henderson, *Expanding the Negligence Concept: Retreat From the Rule of Law*, 51 IND. L.J. 467 (1976); Levine, *Strict Products Liability and Comparative Negligence: The Collision of Fault and No-Fault*, 14 SAN DIEGO L. REV. 336 (1977); Comment, *Comparative Contribution and Strict Tort Liability: A Proposed Reconciliation*, 13 CREIGHTON L. REV. 889 (1980).

240. *Skinner v. Reed-Prentice Div. Package Mach. Co.*, 374 N.E.2d 437, 445 (Wis. 1977) (Ward, C.J., dissenting); see *General Motors Corp. v. Simmons*, 558 S.W.2d 855, 858 (Tex. 1977).

does not contemplate an apportionment or allocation of loss. A system for determining liability on the basis of comparative fault is essential. The Texas Supreme Court and intermediate appellate courts recognize the inherent unfairness of the current system and have invited the legislature to correct the condition.²⁴¹ It is suggested that, like California²⁴² and a number of other jurisdictions,²⁴³ the Texas courts possess the prerogative to implement judicial comparative fault or comparative causation.²⁴⁴ Only this system fairly allocates the risk of loss and insures that all parties contributing to an accident-producing event pay a proportionate share determined by their respective percentages of fault as assigned by the trier of the facts.²⁴⁵

241. See *General Motors Corp. v. Simmons*, 558 S.W.2d 855, 858 (Tex. 1977).

242. See *Daly v. General Motors Corp.*, 575 P.2d 1162, 1178, 144 Cal. Rptr. 380, 396 (1978); *Safeway Stores, Inc. v. Nest-Kart*, 579 P.2d 441, 446, 146 Cal. Rptr. 550, 555 (1978).

243. See *Stueve v. American Honda Motor Co.*, 457 F. Supp. 740, 760 (D. Kan. 1978); *Sun Valley Airlines, Inc. v. Avco-Lycoming Corp.*, 411 F. Supp. 598, 602-03 (D. Idaho 1967); *West v. Caterpillar Tractor Co.*, 336 So. 2d 80, 90 (Fla. 1976); *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).

244. The Texas Supreme Court has intimated that it may be reconsidering its earlier rejection of the comparative fault concept in *Simmons*. The concurring opinion of Justice Pope in *Boatland of Houston, Inc. v. Bailey*, 23 Tex. Sup. Ct. J. 566, 571 (August 2, 1980) and the language used by Justice Spears in *B & B Auto Supply, Sand Pit, & Trucking Co. v. Central Freight Lines, Inc.*, 603 S.W.2d 814, 816-17 (Tex. 1980), may portend further consideration of this concept.

245. Sales, *Assumption of the Risk and Misuse in Strict Tort Liability—Prelude to Comparative Fault*, 11 TEX. TECH L. REV. 729, 777-78 (1980); Wade, *Products Liability and Plaintiff's Fault: The Uniform Comparative Fault Act*, 29 MERCER L. REV. 373, 388 (1978). The legislative intent to apportion the risk of loss on a comparative negligence rather than aliquot basis by enactment of article 2212a is abundantly clear. See *B & B Auto Supply, Sand Pit, & Trucking Co. v. Central Freight Lines, Inc.*, 603 S.W.2d 814, 816 (Tex. 1980). There exists no persuasive reason for excluding application of comparative negligence simply because the basis of an asserted cause of action involves the concept of strict tort liability. *Id.* at 816.