Torts—Comparative Negligence Statute's Provisions for Apportioning Damages Among Joint Tortfeastors Are Not Applicable When The Basis of Liability For One Is Strict Liability. *General Motors Corp. v. Simmons*, 558 S.W.2d 855 (Tex. 1977).

Hestle Johnston, an employee of Feld Truck Leasing Corporation, failed to stop at a traffic signal and drove Feld's truck into the left front door of Curtis Simmons' 1962 Chevrolet.[1] The impact bent the frame of the door on Simmons' car, and the laminated glass in the car window exploded into Simmons' eyes and blinded him.[2] Alleging that the glass was defective, Simmons sued General Motors Corporation in strict liability and negligence.[3] Simmons also joined Feld and Johnston, alleging negligence in Johnston's operation of the truck.[4] Feld and Johnston sought indemnity against General Motors;[5] General Motors asked for contribution from Feld and Johnston.[6] Prior to trial, Simmons settled with Feld and Johnston, but they remained in the case as named defendants.[7] The trial court rendered judgment on a jury verdict for one million dollars against General Motors in strict liability,[8] denying General Motors' request for contribution.[9] The court of civil appeals reformed the judgment because of Feld and Johnston's prior settlement[10] and rendered judgment for Simmons for one half million dollars.[11] The Texas Supreme Court affirmed that portion of the court of civil appeals' opinion,[12] concluding that the Texas comparative negligence statute, article 2212a, is not applicable to apportion damages between two tortfeasors where one is strictly liable and the other is negligent.[13] Instead, *Palestine Contracting, Inc. v. Perkins*[14] and article

1. General Motors Corp. v. Simmons, 558 S.W.2d 855 (Tex. 1977).
2. *Id.* at 857.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* General Motors Corp. was also found negligent by the jury. *Id.* at 859.
9. *Id.* at 859.
10. *Id.* at 859. Because Feld and Johnston confessed their liability to Simmons and stipulated that the manner in which they operated their truck was negligent, the court held as a matter of law that the defective glass was not the sole producing cause of Simmon's injuries and that Feld and Johnston were negligent. *Id.*
11. *Id.* at 856.
12. *Id.* at 861.
13. *Id.* at 862.
14. 386 S.W.2d 764 (Tex. 1964). If plaintiff settles with one joint tortfeasor, then plain-

2212 control in this situation[15] and require a reduction of the plaintiff's recovery by one half because of the prior settlement with the other defendants.[16]

In handling the problem of apportionment of plaintiff's damages between the two tortfeasors,[17] the court first recognized that the case arose prior to enactment of article 2212a.[18] Thus, the court prospectively defined the relationship between comparative negligence and strict liability for contribution purposes.[19] Examining the express language of article 2212[20] and article 2212a,[21] the court noted

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tiff may recover only one half of the jury verdict from the nonsettling tortfeasor. *Id.* at 767-68.

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

16. *Id.*

17. The court in *General Motors Corp. v. Simmons* rejected the plaintiff's claim that Feld should be indemnified by General Motors. Simmons argued on appeal that Heil Co. v. Grant, 534 S.W.2d 916 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.) should control. In *Heil Co. v. Grant* the user, consumer, and owner of a defective truck was impleaded by the manufacturer of the truck when the manufacturer was sued under section 402A. In *Heil Co. v. Grant* the manufacturer alleged that negligence by the truck owner caused the injury to the plaintiff. The court of appeals held that even if the owner was negligent toward the victim, the manufacturer breached its duty to both the victim and the owner. Thus, the owner was entitled to indemnification from the manufacturer. The Texas Supreme Court stated that even though the indemnification and contribution points were not reviewed by it on appeal, the case was correctly decided, if one assumed that the owner was not aware of the defects. The Texas Supreme Court distinguished *Heil Co. v. Grant* from Simmons: The party who requested indemnification in *Heil Co. v. Grant* was the owner and user of the defective product while Feld and Johnston were not the owners, users, or consumers of Simmons' 1962 Chevrolet. On the point of General Motor's indemnification of Feld and Johnston, the proper approach was to consider Feld and Johnston as plaintiffs in a suit against General Motors. Feld's cause of action against General Motors would have to be based on the liability to Simmons because that was his injury. The court refused to extend the manufacturer's liability under section 402A beyond physical injury to person or property. As a result, in a suit by Feld and Johnston against General Motors, Feld and Johnston would have no legally recognized injury resulting from General Motor's conduct.

In support of a second theory of indemnification, plaintiff contended that General Motors' duty to Simmons was of a higher order than the duty owed by Feld and Johnston to Simmons. The court rejected this argument. Where a plaintiff has a claim in strict liability against a manufacturer as a result of the negligence of a third party, the court refused to recognize any greater level of culpability or greater duty of a strictly liable defendant when compared to the negligent defendant. Consequently, the court denied indemnification between General Motors and Feld and Johnston. General Motors v. Simmons, 558 S.W.2d, 855, 861-62 (Tex. 1977).

18. *Id.* at 861.

19. *Id.* at 862.

20. TEX. REV. CIV. STAT. ANN. art. 2212 (1971).

> Any person against whom with one or more others, a judgment is rendered in any suit on an action arising out of, 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 the common law, shall, upon payment

that article 2212 is phrased in terms of torts generally, while the applicability of article 2212a is restricted to the specific tort of negli-

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of said judgment, have a right of action against his co-defendant or co-defendants and may recover from each a sum equal to the proportion of all of the defendants named in said judgment rendered to the whole amount of said judgment. If any of said persons co-defendant be insolvent, then recovery may be had in proportion as such defendant or defendants are not insolvent; and the right of recovery over against such insolvent defendant or defendants in judgment shall exist in favor of each defendant in judgment in proportion as he has been caused to pay by reason of such insolvency.

21. TEX. REV. CIV. STAT. ANN. art. 2212a (Supp. 1978).

Section 1. Contributory negligence shall not bar recovery in an action by any person or party or the legal representative of any person or party to recover damages for negligence resulting in death or injury to persons or property if such negligence is not greater than the negligence of the person or party or persons or parties against whom recovery is sought, but any damages allowed hall be diminished in proportion to the amount of negligence attributed to the person or party recovering.

Contribution among joint tortfeasors

Section 2. (a) In this section.

(1) "Claimant" means any party seeking relief, whether he is a plaintiff, counterclaimant, or cross-claimant.

(2) "Defendant" includes any party from whom a claimant seeks relief.

(b) In a case in which there is more than one defendant, and the claimant's negligence does not exceed the total negligence of all defendants, contribution to the damages awarded to the claimant shall be in proportion to the percentage of negligence attributable to each defendant.

(c) Each defendant is jointly and severally liable for the entire amount of the judgment awarded the claimant, except that a defendant whose negligence is less than that of the claimant is liable to the claimant only for that portion of the judgment which represents the percentage of negligence attributable to him.

(d) If an alleged joint tort-feasor pays an amount to a claimant in settlement, but is never joined as a party defendant, or having been joined, is dismissed or nonsuited after settlement with the claimant (for which reason the existence and amount of his negligence are not submitted to the jury), each defendant is entitled to deduct from the amount for which he is liable to the claimant a percentage of the amount of the settlement based on the relationship the defendant's own negligence bears to the total negligence of all defendants.

(e) If an alleged joint tort-feasor makes a settlement with a claimant but nevertheless is joined as a party defendant at the time of the submission of the case to the jury (so that the existence and amount of his negligence is found by the jury, the settlement is a complete release of the portion of the judgment attributable to the percentage of negligence found on the part of the joint tort-feasor.

(f) If the application of the rules contained in Subsections (a) through (e) of this section results in two claimants being liable to each other in damages, the claimant who is liable for the greater amount is entitled to a credit toward his liability in the amount of damages owed him by the other claimant.

(g) All claims for contribution between named defendants in the primary suit shall be determined in the primary suit, except that a named defendant may proceed against a person not a party to the primary suit who has not effected a settlement with the claimant.

(h) This section prevails over Article 2212, . . . to . . . the extent of any conflict.

gence.[22] Consequently, the court refused to apportion damages for contribution purposes under the comparative negligence statute.[23] The court affirmed the reduction of the judgment by one half, but recognized potential problems raised by article 2212a and *General Motors Corp. v. Hopkins,*[24] a recent supreme court case allowing damages to be allocated between a misusing plaintiff and a strictly liable defendant by comparing causation.[25] The court then invited legislative action to resolve the inequities created by the strict per capita contribution required by article 2212.[26]

In order to appreciate the legal significance of the decision in *General Motors Corp. v. Simmons,*[27] trends in three areas of law must be examined. Each of the three—negligence, contribution, and strict liability—has had a progressive parallel development into its present form.[28] The goal of this evolution in the three areas has been to produce a more equitable loss distribution among those involved in the loss-causing activity. As will be seen, *General Motors Corp. v. Simmons*[29] is indicative of the need for a comprehensive legislative enactment dealing with comparative allocations of loss in personal injury litigation in Texas.

Until recently, the problem of apportioning damages between plaintiffs and negligent defendants has been an all-or-nothing affair.[30] Defendant or defendants found negligent were responsible for the entire amount of the plaintiff's damages, unless the negligent defendant could successfully assert that plaintiff had contributed to his own injuries, in which case plaintiff would be denied any recovery at all.[31] The all-or-nothing apporach to recovery based on negligence has been modified by the Texas Legislature by the adoption of a comparative negligence statute.[32] This new statute, article 2212a, provides that contributory negligence shall not bar recovery of damages for negligence if the contributory negligence of the claimant is not greater than the sum total of the negligence of the

22. General Motors Corp. v. Simmons, 558 S.W.2d 855, 862 (Tex. 1977).
23. *Id.*
24. General Motors Corp. v. Hopkins, 548 S.W.2d 344 (Tex. 1977).
25. 558 S.W.2d 855, 862 (Tex. 1977).
26. *Id.* at 57.
27. 558 S.W.2d 855, 862 (Tex. 1977).
28. See text accompanying notes 35, 48, and 59.
29. 558 S.W.2d 855, 862 (Tex. 1977).
30. *See, e.g.,* Burgany v. Lawrence, 480 S.W.2d 38, 41-42 (Tex. Civ. App.—San Antonio, no writ).
31. *Id.*
32. TEX. REV. CIV. STAT. ANN. art. 2212a (Supp. 1978).

parties against whom recovery is sought.[33] However, plaintiff's recovery is reduced by the percentage of negligence attributable to him.[34] A claim based on negligence thus will not be barred completely by a mere showing of negligent conduct on the part of plaintiff.[35] Consequently, the effect of article 2212a as between plaintiff and defendant is to permit a more equitable allocation of losses where each party bears the share of the loss attributable to his wrongful conduct.

Contribution, which allocates losses among joint tortfeasors, has evolved in a manner much like the evolution of the allocation of loss in negligence. At common law joint tortfeasors generally had no right of contribution among themselves.[36] The policy of the law was to leave the wrongdoers where it found them; it did not allow the wrongdoer to base his right of recovery upon his own wrong.[37] Contribution was allowed only when the joint tortfeasors were not *in pari delicto*[38] as to each other.[39] Thus, at common law one tortfeasor against whom a judgment had been recovered could not compel others equally at fault to contribute their fair share.[40]

In order to relieve some of the harshness of the common law rule, the Texas Legislature adopted article 2212 to allow forced contribution among joint tortfeasors who are *in pari delicto* as to each other and thereby place the burden upon all solvent tortfeasors.[41] In effect, where two tortfeasors were equally at fault and a plaintiff sued and recovered a joint and several[42] judgment, the statute allowed the tortfeasor who had paid the entire judgment to force the other defendant to contribute one half of the judgment.[43] Because

33. *Id.*

34. *Id.*

35. *Id.*

36. Wheeler v. Glazer, 137 Tex. 341, 153 S.W.2d 449, 451 (1941).

37. *Id.*

38. Defendants are *in pari delicto* with each other if both are under a duty of ordinary care and both breech that duty. Austin Rd. Co. v. Rope, 147 Tex. 430, 216 S.W.2d 563, 566 (1949).

39. Wheeler v. Glazer, 137 Tex. 341, 153 S.W.2d 449, 452 (1941). (High degree of care opposed to ordinary care.) *See also* Renfro Drug Co. v. Lewis, 149 Tex. 507, 235 S.W.2d 609 (1951). (Breach of duty by the tortfeasor owed to another tortfeasor).

40. Wheeler v. Glazer, 137 Tex. 341, 153 S.W.2d 449, 451 (1941).

41. TEX. REV. CIV. STAT. ANN. art. 2212 (1971).

42. Where the actions of two or more persons concur in producing a single indivisible injury, then such persons are jointly and severally liable, although there was no common duty, common design or concerted action. Atchison v. Texas & P. Ry. Co., 143 Tex. 466, 186 S.W.2d 228, 231 (1945).

43. Palestine Contractors, Inc. v. Perkins, 386 S.W.2d 764, 767 (Tex. 1964).

one defendant may have been responsible for more than one half the damage, the law under article 2212 still remained somewhat harsh. If both tortfeasors breached a duty to the plaintiff and the conduct of each was a proximate cause of the damage to the plaintiff, defendants were considered *in pari delicto* and shared equally the burdens arising from their wrongful conduct.[44] In effect, regardless of the quantity of each tortfeasor's negligence, they were deemed as a matter of law guilty of the same degree of negligence; and, hence, they stood *in pari delicto.*[45]

Recognizing the inequities of article 2212, the legislature enacted article 2212a in 1973.[46] As a result of this recent enactment, negligent joint tortfeasors in Texas no longer share the burden of the judgment equally unless the factfinder expressly finds both tortfeasors to be equally negligent.[47] Contribution by each defendant to the damages awarded the claimant is in proportion to the percentage of negligence attributable to that defendant.[48] This statutory change was congruent with the development of comparative negligence in that joint tortfeasors bear the portion of the loss attributable to their wrongful conduct,[49] just as plaintiff's damages are diminished by his own negligent conduct.

Like negligence and contribution, the law governing allocation of losses resulting from defective products has undergone a significant evolution. Originally a person injured by a dangerous or defective product had to obtain relief through a cause of action based on warranty.[50] Frequently, the injured plaintiff was barred from recovery by a lack of privity with the manufacturer.[51] Strict liability in tort developed to allocate losses more equitably resulting from dangerous or defective products.[52] Initially, recovery in strict liability was all-or-nothing, similar to recovery for negligence.[53] If the manufacturer could successfully assert misuse of the product by the plain-

44. Austin Rd. Co. v. Pope, 147 Tex. 430, 216 S.W.2d 563, 566 (1949).
45. 216 S.W.2d at 566.
46. TEX. REV. CIV. STAT. ANN. art. 2212a, § 2(b) (Supp. 1978).
47. *Id.*
48. *Id.*
49. *Id.* § 2(g).
50. Cruz v. Ansul Chem. Co., 399 S.W.2d 944,946 (Tex. Civ. App.—Corpus Christi, 1966, writ ref'd n.r.e.).
51. *Id.* at 948.
52. McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787 (Tex. 1967).
53. *See* Shamrock Fuel & Oil Sales Co. v. Tunks, 416 S.W.2d 779 (Tex. 1967).
See also Henderson v. Ford Motor Co., 519 S.W.2d 87 (Tex. 1974).

tiff, then the plaintiff would be denied any recovery.[54] Following the trend to allocate losses more equitably, the Texas Supreme Court in *General Motors Corp. v. Hopkins*[55] recently abrogated the all-or-nothing approach in strict liability.[56] If the jury finds both that the product was unreasonably dangerous when the manufacturer placed it in the stream of commerce and that the product was the producing cause of the injury to the plaintiff, then the manufacturer may no longer interpose plaintiff's misuse of the product as an absolute defense.[57] Instead, if the plaintiff has misused the product in a way that the manufacturer could not have reasonably foreseen or expected in the normal and extended use of the product and if that misuse of the product is a proximate cause of the damage, then the damages recovered by the plaintiff will be limited to the percentage of the total injury caused by the product defect.[58] In effect, the court adopted a system of comparative causation to allocate the loss.[59] The court reasoned that there was no justification for requiring the manufacturer to bear the portion of the loss not caused by the defective product.[60]

In applying comparative causation, the court, in effect, required that the manufacturer would initially be held 100 percent liable for plaintiff's injuries.[61] However, the manufacturer could then reduce its liability by subtracting from that 100 percent that portion of plaintiff's injuries caused by plaintiff's misuse.[62] It is important to note that the manufacturer must prove that the misusing plaintiff should have reasonably foreseen as a consequence of the misuse that the injury would have occurred or there will be no partial reduction of its liability.[63]

While the recently enacted article 2212a expressly provides for contribution among negligent joint tortfeasors, it fails to provide for contribution when one or more joint tortfeasors are liable for torts other than negligence.[64] *General Motors Corp. v. Hopkins*[65] provides

54. Adam Dante Corp. v. Sharpe, 483 S.W.2d 452 (Tex. 1972).
55. 548 S.W.2d 344 (Tex. 1977).
56. *Id.* at 351.
57. *Id.* at 352.
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. TEX. REV. CIV. STAT. ANN. art. 2212a (Supp. 1978).
65. 548 S.W.2d 344 (Tex. 1977). The liability attaches to the manufacturer because he

for apportionment of damages between a plaintiff-misuser of a product and a strictly liable defendant-manufacturer but does not cover contribution in the same situation, nor does it provide for contribution where one tortfeasor is negligent and the other is strictly liable. The Texas Supreme Court faced the problem of apportioning damages between a strictly liable manufacturer and a negligent tortfeasor in *General Motors Corp. v. Simmons.*[66] The court, however, could not continue the equitable trend which has been previously established in negligence, contribution and strict liability of requiring each party to bear his fair share of the loss.

Despite the obvious equities that urged the court to allocate the loss in the Simmons case in a comparative manner, the court was faced with a statute unambiguous on its face that specified the manner of allocation of losses between joint tortfeasors.[67] Because article 2212a is specifically limited to the tort of negligence[68] and because article 2212a prevails over 2212 only to the extent of any conflict,[69] article 2212 controls contribution where one tortfeasor is strictly liable and the other is negligent.[70] The court could not allocate the losses between the tortfeasors because article 2212 clearly calls for a per capita division of the loss between the two defendants.[71] Not only is this mechanical allocation of the loss inequitable, but it is also an impediment to the orderly development of personal injury law in Texas.[72] Recognizing these problems, the court called for legislative action.[73]

In order to understand the court's invitation for legislative action, article 2212 need simply to be examined in a *Simmons*-type situation. But for the defective glass in the plaintiff's car, Feld and Johnston would very likely be liable for, at most, a couple of thousand dollars damage to the automobile and minor injuries to the plaintiff; instead, a one million dollar verdict resulted. Because of

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placed in the stream of commerce a defective product that causes an injury. The damaging event may not have been reasonably foreseeable at the time of manufacture or sale because the defect might not have been discoverable. The supplier would then be free of culpability, but public policy imposes upon him as a price of doing business, the duty to protect consumers from danger from his products or to pay for the injuries caused by the product. *Id.* at 351.

66. 558 S.W. 29 855, 862 (Tex. 1977).

67. *Id.* at 862.

68. TEX. REV. CIV. STAT. ANN. art. 2212a (Supp. 1978).

69. Id. 2212a, at § h.

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

71. TEX. REV. CIV. STAT. ANN. art 2212 (1971).

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

73. *Id.*

the ruling in *General Motors Corp. v. Simmons*[74] and article 2212, a defendant situated similarly to Feld and Johnston could see his liability soar from a few thousand dollars to a half million dollars because of the defective product marketed by the other defendant. Moreover, although the strictly liable defendant caused all but a couple of thousand dollars damage to the plaintiff, the strictly liable defendant has a reduction in liability from one million dollars to five hundred thousand. This patently inequitable result can be avoided only by the enactment of a statute allowing a percentage allocation of the plaintiff's recovery among the joint tortfeasors.

When considering a statute to allocate losses among joint tortfeasors, four broad, equitable policies should control. First, the plaintiff's recovery should not be reduced by the contribution among the tortfeasors. Second, no individual tortfeasor should have his liability increased as a result of the contribution. Third, the present method of allocating losses between plaintiff and defendant should not be compromised. Last, the method of contribution should be similar to the *Hopkins* principle—intially hold the strictly liable defendant 100 percent liable and then allow him contribution from the negligent defendant based on a percentage of causation. By adhering to these four principles, a contribution statute can be designed that will be logically consistent with present policies of tort law and will equitably allocate losses among joint tortfeasors.

A conceptual hurdle must be cleared before a contribution statute can fulfill these policies. Strict liability grew from warranty law[75] and liability is imposed as a matter of public policy, not because of fault.[76] In contrast, negligence is based on fault and liability is imposed because of some culpable conduct.[77] Because negligence is based on fault and strict liability is based on public policy, a comparison of the two raise theoretical difficulties.[78] However, it is possible both to surmount these theoretical difficulties and to apportion responsibility equitably for an injury. In fact, a close reading of *General Motors Corp. v. Hopkins*[79] will reveal that the supreme court has, for all practical purposes, mandated such apportionment

74. 558 S.W.2d 855 (Tex. 1977).

75. Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791 (1960).

76. *See* McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787 (Tex. 1967).

77. Koons v. Rook, 295 S.W. 592, 596 (Tex. Comm'n App. 1927, holding approved.).

78. *See* Feinberg, *The Applicability of a Comparative Negligence Defense in a Strict Products Liability Suit Based on Section 402A of the Restatement of Torts 2d (Can Oil and Water Mix?)*, 42 INS. COUNSEL J. 39 (1975).

79. 548 S.W.2d 344 (Tex. 1977).

under the guise of "comparative causation."[80] The court allowed the manufacturer, after failing to prove that the product was not defective and not the cause in fact of the plaintiff's injury to interpose an affirmative defense of misuse.[81] The specific elements essential to the affirmative defense of misuse indicate the true character of this apportionment. The manufacturer must prove that the consumer misused the product in an unforeseeable manner, that the misuse was a proximate cause of the injury, and that the consumer plaintiff should have reasonably anticipated as a consequence of the misuse that the injury would have occurred, and that the consumer plaintiff's misuse contributed to the cause in fact of the injury by a certain percentage.[81] The effect of this definition of misuse is that only *negligent* misuse of the product may be subtracted from the defendant's strict liability. Thus, by focusing only on the elements of negligence in arriving at the plaintiff's percentage "causation" the no-fault basis for strict products liability is left intact.

Because, effectively, juries are already required to compare negligence with strict liability, a simple two-step statute will suffice to determine percentage contribution between two tortfeasors, one strictly liable and one negligent. First, the losses should be allocated between the plaintiff and each defendant, as if each had been sued without the joinder of the other, according to presently applicable law. Plaintiffs and negligent defendants will have liability for the loss allocated according to article 2212a while *Hopkins* will continue to allocate losses between plaintiffs and strictly liable manufacturers. This will determine the maximum net recovery[83] to the plaintiff, which will be the greater of the amounts recoverable by the plaintiff if the suit had been brought separately. Second, after the net amount recoverable to the plaintiff is determined, there should be an allocation of this amount between the two tortfeasors by comparing causation of the two defendants in the following manner. The percentage causation between the negligent defendant and the strictly liable defendant is determined by a *Hopkins* type apportionment. For purposes of contribution, the sum of the defendant's percentage causation will equal 100 percent. This will be referred to as

80. *Id.* at 352.

81. Id. at 351.

82. *Id.*

83. The plaintiff will have his damages determined against each separate defendant. If plaintiff could recover X dollars from defendant one and Y dollars from defendant two, the greater of X or Y will be the plaintiff's maximum net recovery.

"defendant's causation." The strictly liable defendant should then be entitled to contribution from the negligent defendant in the amount determined by multiplying the negligent defendant's percentage of "defendant's causation" by the net amount that the plaintiff could have recovered against the negligent defendant separately.[84] Thus, the strictly liable defendant recovers from the negligent defendant the amount the negligent defendant would have been responsible for in a separate suit between the plaintiff and the negligent defendant, but this amount is adjusted to reflect the apportionment of "defendant's causation" between the negligent and the strictly liable defendant. In effect, the strictly liable defendant would be responsible for the remainder of the damage not caused by the negligent defendant; the negligent defendant is responsible for only the portion of the damages for which he would have been singularly responsible but for the defective product.

The mechanics can best be understood by examining four examples. For the purpose of these examples assume that the plaintiff has $100,000 damages. In the first example assume the plaintiff is found to be guilty of no misuse and no contributory negligence. In the second example assume that the plaintiff is found to be guilty of 10% contributory negligence but no misuse. In the third example assume that the plaintiff is found to be a 10% misuser. In the fourth

84. The justification for multiplying the negligent defendant's percentage causation by the net amount the plaintiff could have recovered seperately is two-fold. First, the policy in *Hopkins* was to allow the negligent misuser a reduction in liability based on his causation, while the strictly liable manufacturer was required to bear the remainder of the damages. Second, by using the separate liability the negligent defendant will not be required to bear more of the loss than he would have borne had the strictly liable defendant not been joined.

An example will be helpful. Suppose the jury finds the plaintiff to be 49% contributorily negligent but finds no misuse of the product. Assume the plaintiff has $100,000 damages. In separate suits against each individual defendant the plaintiff could recover $100,000 from the manufacturer or he could recover $51,000 from the negligent defendant. If the two defendants are joined, liability of negligent defendant should be a maximum of $51,000. But note that this $51,000 does not reflect any reduction in liability of the negligent defendant because of the defective product sold by the strictly liable defendant. The policy considerations of *Hopkins* suggest that the $51,000 should be reduced to reflect only the percentage of "defendants causation" attributable to the negligent defendant. Moreover, if the $51,000 were not used as a basis for liability for the negligent defendant, he might be required to bear a greater portion of the damages as a direct result of the joinder of the other defendant. If for contribution purposes, the jury found the negligent defendant "caused" 60%, the use of $100,000 as a basis would require the negligent defendant to be responsible for $60,000 in contribution. This is $9,000 more than than the negligent defendant's liability had the strictly liable defendant not been joined. Further, the strictly liable defendant would have reduction of $60,000 in his liability as a result of the joinder of the negligent defendant. This result is contrary to the spirit of *Hopkins* and the policy considerations of strict liability.

example assume the plaintiff is found to be guilty of 10% negligent misuse of the product and is found to be guilty of conduct other than misuse that amounts to 20% contributory negligence. Each of these examples emphasizes an important aspect of the proposed contribution statute.

In the first example, if the plaintiff is guilty of no misuse or contributory negligence, then his maximum net recovery is $100,000 against either defendant. If the negligent defendant is found to be responsible for 40% of the cause of the injury, and the strictly liable defendant is 60% responsible for the cause of the injury, the allocation should be $40,000 to the negligent defendant and $60,000 to the strictly liable defendant.

In the second example, we must first determine each defendant's separate maximum liability to plaintiff. If the plaintiff is found to be 10% contributorily negligent as against the negligent defendant, but guilty of no misuse, his maximum net recovery against the negligent defendant is 90% of the $100,000 or $90,000.[85] However, because no misuse was found, the plaintiff is entitled, to a maximum net recovery against the strictly liable manufacturer of $100,000. Once each defendant's separate liability is determined, then the loss should be allocated between the two tortfeasors on a basis of comparative causation. If, between the two defendants, the negligent defendant is 40% of the cause and the strictly liable defendant is 60% of the cause, the negligent defendant should be responsible for only 40% of the maximum net recovery that the plaintiff could have had against him: 40 percent of $90,000 ($36,000). The strictly liable defendant should be responsible for the remainder, or $64,000.

In the third example, if the plaintiff is found to have misused the product, the misuse has to be quantified for both the negligence and strict liability aspects of the case. Assuming that misuse is also negligence and that it can be compared with both negligence and strict liability, then no theoretical difficulties are encountered. First, each defendant's separate liability to the plaintiff must be determined. If against the negligent defendant, the plaintiff's misuse amounts to 10% contributory negligence, then the plaintiff's maximum net recovery against the negligent defendant will be $90,000. If the plaintiff's misuse is found to have caused 10% of the injury, the maximum net recovery against the strictly liable manu-

85. TEX. REV. CIV. STAT. ANN. art. 2212a, § 1 (Supp. 1978).

facturer will also be $90,000.[86] Now the second step in the statute should be completed by determining contribution between the two defendants based on modified comparative causation. As between defendants only, the negligent defendant caused 40% of the injury and the strictly liable defendant caused 60%, then the negligent defendant is responsible for 40% of the $90,000 or $36,000, and the strictly liable defendant is responsible for the rest ($54,000).

The fourth example has a plaintiff that is guilty of misuse and also guilty of other negligent conduct in addition to misuse. If the plaintiff is found, for negligence and strict liability purposes, to be a 10% misuser, and for negligence purposes 20% contributorily negligent apart from misuse, then a combination of the three prior examples occurs. The first step of the proposed statute required each defendant's liability to plaintiff be determined. Against the negligent defendant, the plaintiff is 30% (10% plus 20%) contributorily negligent and has a maximum recovery of $70,000. Against the strictly liable defendant, the plaintiff can recover a maximum of $90,000 (90% of $100,000). Next contribution is determined according to the second step in the statute. If, as between defendants, the negligent defendant is found to have caused 40% of the injury, then the negligent defendant is responsible for 40% of the $70,000 (his separate liability) or $28,000. The strictly liable defendant is responsible for the remainder or $62,000, for a total recovery to the plaintiff of $90,000.

Each of these four examples is logically consistent with the policies behind strict liability, article 2212a, and *General Motors Corp. v. Hopkins.*[87] The first example is logically consistent with *General Motors v. Hopkins*[88] in that each defendant is responsible for the portion of the damages caused by his actions.[89] The second example differs from the first in that the negligent defendant is responsible for only his separate liability reduced by his respective precentage causation while the strictly liable defendant is responsible for the remainder. This is logically consistent with article 2212a which allows a negligent defendant to reduce his liability by the percentage of contributory negligence found to be attributable to the plaintiff.[90] In a like manner, *General Motors v. Hopkins*[91] indi-

86. General Motors Corp. v. Hopkins, 548 S.W.2d 344, 352 (Tex. 1977).
87. 548 S.W.2d 344 (Tex. 1977).
88. 548 S.W.2d 344 (Tex. 1977).
89. *Id.* at 352.
90. TEX. REV. CIV. STAT. ANN. art. 2212a, § 1 (Supp. 1978).
91. 548 S.W.2d 344 (Tex. 1977).

cates that the percentage causation attributable to the negligent (misuser) party be used to reduce the strictly liable party's liability.[92] The policy behind strict liability combined with the rationale of *General Motors Corp. v. Hopkins*[93] provides the justification for requiring that the strictly liable defendant pay for slightly more than his comparative causation would dictate. Public policy dictates that a strictly liable defendant pay for all of the loss caused by his defective product regardless of the negligence of either party.[94] Moreover, the adoption of pure comparative causation[95] in *Hopkins* indicates that the strictly liable manufacturer is to pay for all the remaining damage caused by his defective product after the causation of others has been deducted.[96] Further, the result in *Hopkins* requires the misuser to bear only the portion of his damages ($90,000) which bears a direct relation to his causation (40%) and requires the strictly liable manufacturer to bear the balance of the loss.[97] It follows then that the strictly liable defendant should bear the remaining burden of the judgment after the negligent defendant pays for only the portion of the loss that he caused. Once misuse is equated with negligence, example three is identical to example one. Similarly, example four is just a variation of examples two and three, once misuse is equated to negligence. Thus, the proposed statute would be logically consistent with the policies of article 2212a and *General Motors Corp. v. Hopkins.*[98] Moreover, the statute would be in harmony with the recent equitable trends in negligence, contribution, and strict liability by requiring a defendant to bear only the portion of the injury attributable to his conduct.

Ed Huddleston

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92. *Id.* at 352.

93. 548 S.W.2d 344 (Tex. 1977).

94. *See* Turner v. General Motors Corp., 514 S.W.2d 497 (Tex. Civ. App.—Houston [14th Dist.] 1974, writ ref'd n.r.e.).

95. The comparative causation was pure in the sense that anything less than 100% causation by the plaintiff allows recovery of damages. General Motors Corp. v. Hopkins, 548 S.W.2d 344, 352 (Tex. 1977). *See also* Scarzafave, *An Analysis of Products Liability Defenses in the Aftermath of Hopkins*, 9 ST. MARY'S L.J. 261, 272 (1977).

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

97. *Id.*

98. 548 S.W.2d 344 (Tex. 1977).