Torts—Strict Liability—To Bar Plaintiff's Recovery in Strict Liability, Conduct After the Discovery of a Defect Must Amount Only to a Voluntary Encounter of the Risk. *Henderson v. Ford Motor Co.*, 519 S.W.2d 87 (Tex. 1974).

On April 15, 1969, Irene Henderson was driving her 1968 Lincoln Continental in Houston, Texas. While attempting to enter a freeway, Mrs. Henderson found that her car was accelerating without pressure on the gas pedal. When application of the brakes failed to slow the car, Mrs. Henderson drove onto an esplanade in the center of the road. She ultimately crashed into a large light pole and was severely injured. Mrs. Henderson claimed that the air filter housing of the car had been manufactured defectively and brought suit based on strict liability in tort against the manufacturer of the car and the retail dealer who sold her the car. She contended that as a result of the defectively manufactured air filter housing, a stray piece of the housing had lodged in the carburetor and held the gas feed open. She obtained a judgment in her favor in the trial court. The court of civil appeals reversed the trial court's judgment.[1] It reasoned that Mrs. Henderson's failure to exercise ordinary care by continuing to use the car after discovery of the defect barred her recovery. Reversing the court of civil appeals, the Texas Supreme Court held that contributory negligence after the discovery of a defect is not a defense to strict liability in tort.[2] The court, however, held that conduct by a plaintiff amounting to a voluntary encounter of the risk would bar recovery on a tort action based on strict liability.[3]

The supreme court, having previously ruled that contributory negligence prior to the discovery of the defect is not a defense in a strict liability in tort action, was required in *Henderson v. Ford Motor Co.*[4] to determine whether contributory negligence after the discovery of a defect is a valid defense. The court refused to recognize the defense. It based its holding on *Marshall v. Ranne*,[5] in which the court held that contributory negligence after the discovery of the vicious propensities of a domestic animal is not a defense in a suit based on strict liability for damages caused by the vicious

1. Henderson v. Ford Motor Co., 500 S.W.2d 709 (Tex. Civ. App.—Beaumont 1973).
2. Henderson v. Ford Motor Co., 519 S.W.2d 87 (Tex. 1974).
3. *Id.*
4. *Id.*
5. 511 S.W.2d 255 (Tex. 1974).

animal.[6] The *Henderson* court reasoned that the same rule should apply regardless of whether the risk encountered is a dangerous animal or a defective product.[7]

The court then considered whether assumption of the risk, or *volenti non fit injuria,* is a proper defense in a strict liability action. The court, although recognizing the *Restatement (Second) of Torts* view as the majority interpretation of the defense of assumption of risk in strict liability, declined to accept that view.[8] The *Restatement (Second) of Torts* states that one who voluntarily and unreasonably proceeds to encounter a known danger is barred from recovery under strict liability in tort.[9] The *Henderson* court did not agree that assumption of the risk includes the element of reasonableness. In the view of the court, the assumption of the risk defense requires only a voluntary encounter with a known and appreciated risk; *i.e.,* a "free and intelligent" choice to encounter the risk.[10] The court applied this definition of the defense to the facts in *Henderson* and found that there was no evidence to indicate that Mrs. Henderson made a free and intelligent choice to continue to drive her car after discovering the danger. Because Mrs. Henderson did not encounter the risk voluntarily, the defense of assumption of the risk was inapplicable.[11]

The doctrine of strict liability in tort has undergone an expansive development in Texas and now extends to protect persons from risks created by any type of defective product.[12] Despite the seemingly all-inclusive character of the doctrine's protection, several defenses have been recognized in various jurisdictions to an action in strict liability. A plaintiff may be barred from recovery because of misuse of the product,[13] contributory negligence, or assumption of the risk.[14]

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6. *Id.*

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

8. *Id.*

9. RESTATEMENT (SECOND) OF TORTS § 402A, comment *n* (1965).

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

11. *Id.* at 92. The court, however, found there was insufficient evidence that the car was designed defectively and held for the defendants. *Id.* at 94.

12. For an outline of the development of strict liability in tort in Texas, see Pittsburg Coca-Cola Bottling Works v. Ponder, 443 S.W.2d 546 (Tex. 1969).

13. A manufacturer is not liable for injuries resulting from the abnormal and unintended use of his product if the use was not reasonably foreseeable. To recover in an action based on strict liability in tort a plaintiff must prove that he was using the product for its intended purpose or for a purpose reasonably foreseeable to the manufacturer. *See* 1 R. HURSH & H. BAILEY, AMERICAN LAW OF PRODUCTS LIABILITY § 4:40 (2d ed. 1974).

14. *See* Epstein, *Products Liability: Defenses Based on Plaintiff's Conduct,* 1968 UTAH L. REV. 267.

The question of the availability of contributory negligence as a defense may depend on whether the plaintiff's negligence occurs before or after his discovery of the defect. Regarding contributory negligence before discovery, a minority of jurisdictions hold that failing to discover or foresee dangers that the ordinary prudent person would have discovered or foreseen will constitute a defense in an action based on strict liability.[15] The majority view, however, is that contributory negligence that consists of merely failing to discover the defect in the product or to guard against the possibility of its existence is not a defense.[16] *Williams v. Brown Manufacturing Co.*[17] is representative of the majority view. The *Williams* court stated that losses should be borne by manufacturers, distributors, or retailers rather than by a "less than careful plaintiff."[18] Thus, the *Williams* court found that it could not permit a defense based on simple negligence to bar the plaintiff's strict liability recovery. According to the court, there must be a "greater degree of culpability" on the plaintiff's part to preclude his recovery in an action not founded on the defendant's negligence.[19] This is also the *Restatement* view,[20] which has been applied by courts holding that a plaintiff will not be barred from recovery when he fails merely to inspect for possible defects,[21] or to otherwise search or guard against the possibility of a defective product.[22]

The Texas Supreme Court adopted the majority view with respect to contributory negligence in *Shamrock Fuel & Oil Sales Co. v. Tunks.*[23] In *Shamrock* a minor plaintiff's conduct in directing his brother to pour kerosene on a glowing stick, thereby causing an explosion, was not a bar to the plaintiff's recovery based on the

15. Stephan v. Sears, Roebuck & Co., 110 N.H. 248, 266 A.2d 855 (1970); Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

16. *See, e.g.*, Bachner v. Pearson, 479 P.2d 319 (Alas. 1970); DeFelice v. Ford Motor Co., 28 Conn. Supp. 164, 255 A.2d 636 (1969); Williams v. Ford Motor Co., 454 S.W.2d 611 (Mo. App. 1970); Shamrock Fuel & Oil Sales Co. v. Tunks, 416 S.W.2d 779 (Tex. 1967). For an extensive list of cases, see 2 L. FRUMER & M. FREIDMAN, PRODUCTS LIABILITY § 16A [5][f], at 3-353 to -357 (1974). 032

17. 45 Ill. 2d 418, 261 N.E.2d 305 (1970).

18. *Id.* at ____, 261 N.E.2d at 309.

19. *Id.*

20. Comment *n* of § 402A states in part, "Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence." RESTATEMENT (SECOND) OF TORTS § 402A, comment *n* (1965).

21. Ettin v. Ava Truck Leasing, Inc., 53 N.J. 463, 251 A.2d 278 (1969).

22. General Elec. Co. v. Bush, 498 P.2d 366 (Nev. 1972).

23. 416 S.W.2d 779 (Tex. 1967).

defective kerosene.[24] The *Shamrock* court accepted the *Restatement* view and held that contributory negligence prior to discovery of the defect would not bar a plaintiff from recovery.[25] The holding was based on the fact that the injured user-consumer in using the product relied on the integrity of the manufacturer and vendor and on their representations of the product's safety. The court reasoned that the class of plaintiffs who justifiably could rely on the representations and could recover based on that reliance for injuries caused by the defective product should not be restricted to only reasonably prudent users and consumers.[26] Although the court held that recovery based upon representations of product safety should be allowed in spite of negligence on the part of the plaintiff prior to discovery of the defect, it left open the question of whether contributory negligence after the discovery of the defect would be a defense.

The plaintiff's conduct after discovery of the defect may give rise to a defense, depending upon the jurisdiction in which the suit is brought[27] and whether the conduct is considered contributory negligence or assumption of the risk.[28] In the majority of jurisdictions[29] that form of conduct which consists of voluntarily and unreasonably proceeding to encounter a known danger[30] has been established firmly as a defense in actions based on strict liability in tort.

Many of the analytical problems in the area of defenses to strict liability are caused by the conceptual similarities between contributory negligence after the discovery of the defect and assumption of the risk. With regard to assumption of the risk, comment *n* to section 402A of the *Restatement* states that conduct that consists of voluntarily and unreasonably proceeding to encounter a known danger is a defense to strict liability in tort.[31] If the *Restatement* and

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24. *Id.*

25. *Id.* at 785.

26. *Id.* at 786.

27. *See* note 16 *supra* and accompanying text.

28. *But cf.* Buttrick v. Arthur Lessard & Sons, Inc., 110 N.H. 36, 260 A.2d 111 (1969).

29. *See, e.g.*, Bachner v. Pearson, 479 P.2d 319 (Alas. 1970); Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 261 N.E.2d 305 (1970). For an extensive list of cases, see 1 R. HURSH & H. BAILEY, AMERICAN LAW OF PRODUCTS LIABILITY § 4:36, at 740-41 (2d ed. 1974).

30. Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 261 N.E.2d 305 (1970).

31. Comment *n* of § 402A states in part that

> . . . the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name assumption of risk, is a defense under this Section as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.

majority view of assumption of the risk is compared to contributory negligence, it is apparent that both are measured to some degree by the same standard. Contributory negligence is conduct of the plaintiff that falls below the standard of conduct expected of the ordinary prudent man under the same or similar circumstances; thus, the conduct is measured by an objective test.[32] Assumption of the risk is conduct that involves voluntarily and unreasonably encountering a known risk.[33] The question of whether the encounter was reasonable is answered by applying the reasonably prudent man standard—an objective standard. Thus, the defenses of contributory negligence and assumption of the risk overlap and are similar in that they are both either wholly or partially dependent upon the objective element of reasonableness.

Although traditionally the term "assumption of the risk" has been used by courts to describe several different defenses,[34] the majority of courts presently apply the term to conduct that consists of voluntarily and unreasonably encountering a known danger.[35] Therefore, as applicable to strict liability in tort, assumption of the risk is the continued use of the product by the plaintiff after discovery of the defect when that continuation amounts to unreasonable conduct.

In Texas, however, the assumption of the risk defense involves no element of reasonableness.[36] The defense traditionally has been known in Texas as *volenti non fit injuria* (one who consents may not be injured).[37] For *volenti* to be applicable as a defense, four elements must be present. The plaintiff must have knowledge of facts constituting a dangerous condition or activity and know that the condition or activity is dangerous.[38] Also the plaintiff must appreciate the nature or extent of the danger and voluntarily expose himself to the

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RESTATEMENT (SECOND) OF TORTS § 402A, comment *n* (1965).

32. *See* W. PROSSER, THE LAW OF TORTS § 65, at 416-17 (4th ed. 1971).

33. RESTATEMENT (SECOND) OF TORTS § 402A, comment *n* (1965).

34. *See, e.g.*, W. PROSSER, THE LAW OF TORTS § 68, at 440-41 (4th ed. 1971); R. Keeton, *Assumption of Risk in Products Liability Cases*, 22 LA. L. REV. 122 (1961).

35. *See* note 29 *supra* and accompanying text.

36. *See* Wood v. Kane Boiler Works, 150 Tex. 191, 196, 238 S.W.2d 172, 175 (1951).

37. Traditionally, courts have applied the term assumption of the risk in employer-employee cases or only in cases of contractual relationships and have applied *volenti* to other situations. *Id.* The two terms now are used interchangeably, as is evident in the *Henderson* case. *See also* R. Keeton, *Assumption of Products Risks*, 19 Sw. L. J. 61 (1965), in which the author notes that no distinction should be made in the terms.

38. J. & W. Corp. v. Ball, 414 S.W.2d 143, 146 (Tex. 1967).

danger.[39] This form of assumption of the risk is measured by a subjective test based on the plaintiff's actual knowledge and appreciation of the danger.[40] Therefore, the element of reasonableness that is present in contributory negligence and the majority view of assumption of the risk is absent in *volenti*. This form of assumption of the risk is the form of the defense that was adopted by the *Henderson* court.[41]

The Fifth Circuit Court of Appeals, in cases prior to *Henderson*, predicted that the Texas Supreme Court would not accept the *volenti* view of assumption of the risk as a defense in strict liability, but instead would accept the majority and *Restatement* view that includes the element of reasonableness.[42] In *Messick v. General Motors Corp.*[43] the Fifth Circuit upheld an instruction by the trial court that the plaintiff would not be barred from recovery for voluntarily exposing himself to a known and appreciated danger, if under the same or similar circumstances, an ordinary prudent man would have encountered the same risk. In choosing the *Restatement* view, rather than the *volenti* view, as the proper form of the assumption of the risk defense, the Fifth Circuit noted that reasonableness must be considered regardless of which view is adopted.[44] The *Messick* court claimed that the objective element of reasonableness would enter into the case in one of two ways; either as an express instruction on a reasonably prudent man standard or in the jury's consideration of the voluntariness of the continued use.[45]

Despite the reasoning of the Fifth Circuit, the *Henderson* court stated that assumption of the risk in Texas requires only a voluntary encounter with the risk, *i.e.*, a free and intelligent choice by the plaintiff to encounter the risk.[46] Reasonableness would play no part in the defense, except as it reflects on voluntariness.[47]

Unreasonable conduct by a plaintiff prior to the discovery of the defect will not bar him from recovery in the majority of jurisdictions;[48] the plaintiff is protected and the loss falls on the

39. *Id.*
40. Halepeska v. Callihan Interests, Inc., 371 S.W.2d 368, 379 (Tex. 1963).
41. Henderson v. Ford Motor Co., 519 S.W.2d 87 (Tex. 1974).
42. Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076 (5th Cir. 1973); Messick v. General Motors Corp., 460 F.2d 485 (5th Cir. 1972).
43. 460 F.2d 485 (5th Cir. 1972).
44. *Id.* at 491-92.
45. *Id.*
46. Henderson v. Ford Motor Co., 519 S.W.2d 87 (Tex. 1974).
47. *Id.*
48. *See* note 29 *supra* and accompanying text.

manufacturer-seller defendant. Yet if the unreasonable conduct occurs after the discovery of the defect, the plaintiff will no longer be protected. In these situations the plaintiff has the best opportunity to protect himself by discontinuing the use of the defective product. If by his unreasonable conduct, the plaintiff continues to use the defective product and sustains injuries, the burden of the loss equitably should remain upon him.

Difficulty arises when the plaintiff's conduct in continuing to use the product after discovering the defect is reasonable. In the majority of jurisdictions the loss would be borne by the defendant.[49] Unless the standard of the plaintiff's conduct falls below the reasonably prudent man standard, he will be protected from injuries sustained as a result of a defective product. This, unfortunately, would not be the result in Texas. The *Henderson* court states that the inquiry into the plaintiff's conduct is limited to whether the plaintiff voluntarily exposed himself to the risk with knowledge and appreciation of the danger.[50] The fact that the plaintiff's conduct in assuming the risk may have been reasonable is not considered. Thus, if the subjective elements of *volenti* are present, the plaintiff will be barred from recovery even though his conduct may have been reasonable under the circumstances. This is a harsh reward for reasonable behavior.[51]

The reasonableness of conduct after discovery of the risk, not the voluntariness of the conduct, should be the critical factor in determining whether the plaintiff is barred from recovery. Perhaps the best solution would be to abolish the term "assumption of the risk" and merely determine whether the plaintiff acted as a reasonable person by encountering the known and appreciated risk.[52] By

49. *Id.*

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

51. Notice, however, that in *Henderson* the application of the *volenti* type defense favored the plaintiff. The jury found that the plaintiff was negligent after the discovery of the defect. If the majority view had been applied, the plaintiff may have been barred from recovery. Yet, by application of the *volenti* defense, the unreasonable conduct of the plaintiff was irrelevant.

52. Other states have abolished or limited the use of assumption of the risk. *See, e.g.*, Leavitt v. Gillaspie, 443 P.2d 61 (Alas. 1968); Parker v. Redden, 421 S.W.2d 586 (Ky. Ct. App. 1967); Felgner v. Anderson, 375 Mich. 23, 133 N.W.2d 136 (1965); Bolduc v. Crain, 104 N.H. 163, 181 A.2d 641 (1962); McGrath v. American Cyanamid, 41 N.J. 271, 196 A.2d 238 (1963); Williamson v. Smith, 83 N.M. 336, 491 P.2d 1147 (1971); Ritter v. Beals, 350 P.2d 1080 (Ore. 1961); Siragusa v. Swedish Hosp., 373 P.2d 767 (Wash. 1962). *See generally* Edgar, *Voluntary Assumption of Risk in Texas Revisited—A Plea for Its Abolition*, 26 Sw. L. J. 849 (1972).

allowing the jury to apply the objective reasonableness standard to the plaintiff's conduct, the harsh result of the *volenti* defense could be avoided. The *Henderson* court claims that the harsh results of *volenti* will be avoided by findings that the plaintiff's conduct in continuing the use of a defective product was not voluntary.[53] This approach, however, shrouds the real issue. The important question is whether the plaintiff's choice in continuing to use the defective product was a reasonable one. By phrasing the question to the jury in terms of reasonableness, rather than voluntariness, an element of justification, absent in *volenti*, comes into play. The plaintiff's conduct in continuing to use the product may be voluntary only as a result of the exigency of the circumstances, yet justified as the conduct of a reasonably prudent man under similar circumstances.[54] The Fifth Circuit in *Messick* points out that when applying the assumption of the risk defense, a subjective standard should be applied only to the plaintiff's knowledge and appreciation of the danger.[55] The element of voluntariness, however, "requires a finding of both subjective voluntary action, vis-a-vis the action of an automaton, . . . and an objective finding of unreasonableness."[56] Determining reasonableness, rather than voluntariness of conduct, allows a plaintiff to justify his voluntary continued use of a defective product by showing that the conduct was reasonable. In this way reasonably prudent plaintiffs will not be barred from recovery by subjective findings of voluntariness.

The purpose of strict liability in tort is to "insure that the cost of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves."[57] Plaintiffs who reasonably continue the use of defective products also must be protected. In adopting the version of the defense of assumption of the risk that entirely excludes the element of reasonableness, the *Henderson* court unreasonably has limited that protection.

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

54. Messick v. General Motors Corp., 460 F.2d 485, 494 (5th Cir. 1972).

55. *Id.* at 492.

56. *Id.*

57. Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, ____, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1962).