

SUPREME COURT OF TEXAS

**General Motors Corporation and Lawrence Marshall Chevrolet
Oldsmobile, Inc. v. A.J. Sanchez, et al.**

General Motors Corporation and Lawrence Marshall Chevrolet Oldsmobile, Inc. v. A.J. Sanchez, 997 S.W.2d
584 (Tex. 1999) · No. No. 98-0442 · Decided July 1, 1999

SUMMARY

The Supreme Court of Texas addresses when comparative responsibility applies in a strict-products-liability case. It holds that a consumer has no duty to discover or guard against a product defect, but conduct beyond that mere failure may be compared under Texas's comparative responsibility statute. The court also concludes that the evidence was legally insufficient to support punitive damages and reverses and renders judgment reducing actual damages by the jury's comparative responsibility finding.

OPINION

GONZALES, J.

997 S.W.2d 584 (1999) GENERAL MOTORS CORPORATION and Lawrence Marshall Chevrolet Oldsmobile, Inc., Petitioners, v. A.J. SANCHEZ, et al., Respondents. No. 98-0442. Supreme Court of Texas. Argued January 12, 1999. Decided July 1, 1999. *586 Ruth G. Malinas, San Antonio, David M. Heibron, Leslie G. Landau, San Francisco, CA, for Petitioners. Rebecca E. Hamilton, Todd W. White, Rockwall, Guy H. Allison, Russell H. McMains, Robert J. Patterson, Corpus Christi, Stacy L. Keaton, Austin, for Respondents.

Justice GONZALES delivered the opinion for a unanimous Court. The principal question in this case is when does the doctrine of comparative responsibility apply in a products-liability case. Relying on its reading of our decision in *Keen v. Ashot Ashkelon, Ltd.*,^[1] the court of appeals held that the decedent's responsibility for the accident that resulted in his death should not be compared with the manufacturer's responsibility because *587 the decedent's actions merely amounted to the failure to discover or guard against a product defect.^[2] We conclude that: (1) comparative responsibility applies in strict liability if a plaintiff's negligence is something other than the mere failure to discover or guard against a product defect, and (2) there was evidence here the decedent was negligent apart from the mere failure to discover or guard against a product defect.

We also conclude that punitive damages may not be awarded in this case because the evidence is legally insufficient to support the finding of gross negligence. Therefore, we reverse the court of appeals' judgment and render judgment for the plaintiffs' actual damages, as reduced by the jury's

comparative responsibility finding. I Because there were no witnesses, relatively little is known first hand about the circumstances of the accident that is the basis of this litigation.

Lee Sanchez, Jr. left his home to feed a pen of heifers in March 1993. The ranch foreman found his lifeless body the next morning and immediately called Sanchez's father. Apparently, Sanchez's 1990 Chevy pickup had rolled backward with the driver's side door open pinning Sanchez to the open corral gate in the angle between the open door and the cab of the truck.

Sanchez suffered a broken right arm and damaged right knee where the gate crushed him against the door pillar, the vertical metal column to which the door is hinged. He bled to death from a deep laceration in his right upper arm.

The Sanchez family, his estate, and his wife sued General Motors Corporation and the dealership that sold the pickup for negligence, products liability, and gross negligence based on a defect in the truck's transmission and transmission-control linkage.

The plaintiffs presented circumstantial evidence to support the following theory of how the accident happened. Sanchez drove his truck into the corral and stopped to close the gate. He mis-shifted into what he thought was Park, but what was actually an intermediate, "perched" position between Park and Reverse where the transmission was in "hydraulic neutral."

Expert witnesses explained that hydraulic neutral exists at the intermediate positions between the denominated gears, Park, Reverse, Neutral, Drive, and Low, where no gear is actually engaged. Under this scenario, as Sanchez walked toward the gate, the gear shift slipped from the perched position of hydraulic neutral into Reverse and the truck started to roll backwards.

It caught Sanchez at or near the gate and slammed him up against it, trapping his right arm and knee. He was pinned between the gate and the door pillar by the pressure the truck exerted while idling in Reverse. Struggling to free himself, Sanchez severed an artery in his right arm and bled to death after 45 to 75 minutes.

In the trial court, G.M. offered alternative theories explaining the cause of the accident, all of which directed blame at Sanchez. It suggested that Sanchez left his truck in Reverse either accidentally or in a conscious attempt to prevent cattle from escaping the corral. Alternatively, G.M. suggested that Sanchez simply left the truck in Neutral and it rolled down the five degree slope toward the gate.

Finally, G.M. argued that even if the accident was caused by a mis-shift as alleged by the plaintiffs, the mis-shift was a result of operator error, and not a defect in design. The jury rejected G.M.'s theories and found that G.M. was negligent, the transmission was defectively designed, and G.M.'s warning was so inadequate as to constitute a marketing defect.

The jury also found that Sanchez was fifty percent responsible for the accident, but the trial court disregarded this finding. The trial court rendered judgment for actual and punitive damages of \$8.5 million for the plaintiffs. A panel of the court of appeals affirmed the trial court's judgment with one justice dissenting.[3] Sitting en banc, a 588 majority of the court of appeals adopted the panel's opinion and judgment.[4] Two justices joined the dissent, and one concurred in the judgment.[5] G.M. argues that there is no evidence to support liability for negligence or strict liability.

Alternatively, G.M. challenges the trial court's refusal to apply the comparative responsibility statute.[6] The plaintiffs respond that evidence supports both the negligence and strict liability findings, and that Sanchez's negligence was nothing more than a failure to discover or guard against a product defect.

Thus, they contend, comparative responsibility does not apply here as a defense to strict liability. Here, G.M. does not dispute that Sanchez's fatal injury was caused when he mis-shifted the truck's transmission into hydraulic neutral, which then migrated into Reverse.

The parties agree that all transmissions made today can mis-shift, that no design eliminates the possibility of a mis-shift, and that a mis-shifted car is dangerous. As G.M. puts it, a "[m]is-shift is just physics." G.M. contends that it has no liability, even if its product is defective, because the plaintiffs failed to present evidence of a safer alternative design.

We consider first the evidence of strict liability. We will sustain G.M.'s no evidence point only if there is no more than a scintilla of evidence to prove the existence of a product defect.[7] II A design defect renders a product unreasonably dangerous as designed, taking into consideration the utility of the product and the risk involved in its use.[8] A plaintiff must prove that there is a safer alternative design in order to recover under a design defect theory.[9] An alternative design must substantially reduce the risk of injury and be both economically and technologically feasible.[10] We first examine the evidence concerning the operation of the transmission in Sanchez's truck and then determine whether the plaintiffs have proven a safer alternative design.

A Most of the plaintiff's design evidence came in through the testimony of the plaintiffs' expert, Simon Tamny, who testified about the operation of the 700R4 transmission in Sanchez's truck. He opined that the G.M. transmission and transmission-control linkage presented a particular risk. All transmissions have an intermediate position between Reverse and Park.

It is impossible, under federal standardization guidelines, to design a gear shift without an intermediate position between Reverse and Park. However, Tamny testified that G.M.'s transmission has the added danger that internal forces tend to move the gear selector toward Reverse rather than Park when the driver inadvertently leaves the lever in this intermediate position.

Tamny explained how G.M. could alter the design to make the operation of the 700R4 safer. When a driver moves the gearshift of Sanchez's truck from one position to another, a system of rod linkage transmits the motion from the gearshift on the steering column to the manual lever of the transmission.

The manual lever is a semicircular part which is also known as the "rooster comb" because of the series of tooth-like peaks and dips along the perimeter *589 of the curve that are similar to the comb on a rooster's head.

As it turns, the rooster comb operates the manual valve, which directs hydraulic fluid around the transmission to engage and disengage gears. A stationary roller, held in place by a spring, moves along the peaks and dips of the rotating rooster comb when the gear shift lever on the steering column is moved from one gear to the next.

The dips of the rooster comb correspond to the gears, generally: Park, Reverse, Neutral, Drive, and Low. The purpose of the roller and rooster comb is to aid the driver to properly position the manual valve. When a gear position is reached, the roller snaps into the dip of the rooster comb, giving feedback to the driver that the gear has been properly selected.

As the gear shift is moved from Reverse to Park, the roller rides up the peak on the rooster comb, the manual valve begins to hydraulically disengage Reverse, and a mechanical rod attached to the rooster comb begins to push against the ratchet spring that engages a device called the parking pawl.

The parking pawl locks the transmission output shaft when the vehicle is in Park and prevents the wheels from turning. It is possible for the gear shift to be moved to a position between Reverse and Park, called hydraulic neutral by the parties.

In hydraulic neutral, the roller is perched at the peak between the two gears. At this point, Reverse is hydraulically disengaged, and the ratchet spring is forcing the parking pawl against the output shaft. The rooster comb has a designed predisposition to move toward a gear position, in this case either Park or Reverse.

However, the friction between the metal parts of the rod linkage between the rooster comb and the gearshift, as well as other forces, provide enough resistance that the roller will sometimes remained perched in this precarious position. Figuratively speaking, the roller is balanced on the head of a pin, as the peak on the rooster comb is.0030 of an inch wide.

Tamny performed an experiment in which he moved the gear selector of Sanchez's truck to this position six times. He disturbed the friction of the linkage four times by slapping the steering wheel; once by revving the engine, and once he took no action.

In each case, the gear shift slipped into Reverse. Tamny attributed the tendency to migrate toward Reverse in preference to Park to several factors within the transmission. First, the parking pawl is designed to contact the output shaft just before the roller reaches the peak when traveling from Reverse to Park. Three out of four times, the parking pawl hits the surface of the output shaft teeth and does not engage.

When this happens, the ratchet spring continues to compress, exerting force on the pawl and an equal force back in the other direction toward the rooster comb. The force exerted back against the rooster comb pushes it toward Reverse. Tamny testified that when the external friction is disturbed (such as by jarring the steering wheel), this force against the rooster comb is enough to tip the balance and begin a migration of the gear shift to Reverse.

Second, the .0030 inch peak is wide enough to allow the roller to perch. Third, the spring pushing the roller down into the dips on the rooster comb is weaker than the spring used in earlier transmission models. Fourth, the transmission "bleeds off" or disengages Reverse just before the roller reaches the peak, giving the driver the illusion that the transmission is in Park.

B Tamny offered a few alterations to G.M.'s design that he contended would reduce the risk of injury. First, he suggested moving (1) the peak between Park and Reverse from its current position 5.7° from Park to a position 7.5° from Park and (2) the "ratchet" point (where the parking pawl contacts the output shaft) nearer to Park, from 10.9° to 7.0°.

The effect of this change would be to ensure that the parking pawl did not begin to engage until after the roller had passed over the rooster comb peak. This way, even if the pawl failed to fully engage the output shaft, the *590 force exerted back against the rooster comb would be unable to push the roller back up over the peak to Reverse.

Second, he proposed sharpening the peak to .0010 of an inch to reduce the likelihood that the roller could perch. Third, he proposed using a stronger roller spring to increase the force pushing the rooster comb into a gear position, also reducing the likelihood that the roller would perch.

Finally, he suggested moving the "bleed-off" point from 9.6° from Park to 6.5° from Park. This would prevent the transmission from entering "hydraulic neutral" until after the roller passed over the peak. It would ensure that the driver would continue moving the gear shift lever toward Park without being fooled by the change in sound of the engine as the transmission disengaged Reverse.

The alteration would also ensure that, if the driver perched the rooster comb at the peak between Park and Reverse, the transmission would still be in Reverse. The vehicle's immediate reverse motion then would warn an exiting driver that the car was not fully in Park. Tamny admitted that his design change would not totally eliminate the possibility of leaving the gearshift in the intermediate position of hydraulic neutral.

However, according to Tamny, his design change would totally eliminate the possibility of slipping into Reverse from hydraulic neutral. Tamny described his design change as a "99% solution" to the mis-shift problem. While his design change would not eliminate the risk that the car might roll in hydraulic neutral, it would eliminate the most dangerous risk of migration to Reverse and powered movement without a driver.

C. G.M. does not challenge that Tamny's design was technically and economically feasible. Instead, G.M. argues that, as a matter of law, Tamny's design is inadequate to prove a substantial reduction in the risk of injury because: (1) the design was not proved safer by testing; (2) the design was not published and therefore not subjected to peer review; and (3) G.M.'s statistical evidence proved that other manufacturers, whose designs incorporated some of Tamny's suggestions, had the same accident rate as G.M.

These arguments however, go to the reliability and therefore the admissibility of expert evidence rather than the legal sufficiency of the evidence of a product defect.[11] We decided in *E.I. du Pont de Nemours & Co. v. Robinson* that the trial court is the evidentiary gatekeeper with the primary responsibility to screen out unreliable expert evidence.[12] Among the factors the trial court may consider in deciding reliability are: (1) whether the theory can be and has been tested, (2) whether the theory has been subjected to peer review, (3) the theory's potential rate of error, and (4) the theory's general acceptance in the relevant community.[13] Although G.M. argues that Tamny's theory was not tested or subjected to peer review, G.M. did not object to the reliability or admissibility of the scientific evidence of a safer alternative design at trial.

Instead, G.M. permitted the admission of Tamny's testimony and adopted the strategy of discrediting Tamny's theory on cross-examination and by its experts' testimony. We considered the Robinson factors in *Merrell Dow Pharmaceuticals, Inc. v. Havner*[14] to determine the reliability and competency of the expert's evidence. But in that case, the petitioners had properly objected to at least some of the evidence's scientific reliability throughout the proceedings in the *591 trial court.[15] Because the only evidence to prove causation was not competent, we sustained the legal sufficiency challenge.[16] To allow a Robinson challenge here, when G.M. did not object at all in the trial court to the reliability of the expert evidence, "would deny [the plaintiffs'] experts the opportunity to 'pass muster' in the first instance and usurp the trial court's discretion as 'gatekeeper.'"[17] G.M. argues that regardless of our resolution of the Robinson issues, the substance of Tamny's testimony does not amount to evidence of a safer alternative design.

G.M. contends that Tamny's testimony was based on "speculation and conjecture," citing *Schaefer v. Texas Employers' Insurance Association*[18] and *Burroughs Wellcome Co. v. Crye*.[19] We disagree. In *Schaefer*, an expert testified that in his opinion, Schaefer's disease resulted from his employment.

The expert based his opinion on his assumptions that Schaefer had contracted the avian form of a certain disease, that the pathogen causing the disease was present in bird droppings at Schaefer's workplace, and that Schaefer had contracted the disease from the bird droppings.[20] No evidence was introduced to show that Schaefer had the avian form of the disease.

No evidence was introduced to show that bird droppings at Schaefer's workplace were infected with the pathogen. Likewise, no evidence was introduced to show how Schaefer contracted the disease. Based on that record, we held that the expert's opinion was founded upon mere possibility, speculation, and surmise.[21] In Burroughs Wellcome Co., Crye suffered an injury to her foot that she attributed to frostbite from using the defendant's antiseptic spray.[22] Crye's expert assumed that her foot turned white after she applied the spray.

He attributed this symptom to frostbite in giving his opinion and stated that had the foot turned red, his diagnosis would be different.[23] At trial, the testimony indicated that Crye's foot turned red after application of the antiseptic spray.

We held that when the only facts in evidence contradict the assumption of the expert upon which his opinion is based, his opinion is "without probative value and cannot support a verdict or judgment." [24] Unlike Schaefer or Burroughs Wellcome Co., here there is more to the evidence than an expert's bald assertion that his design would be safer. Tamny described the current operation of the 700R4 transmission at length, and explained in some detail how his proposed design would make the transmission safer by eliminating the risk that the vehicle could move in a powered gear due to an inadvertent mis-shift.

"It will take you from a 90% solution to a 99% solution," he said. Tamny's testimony about the engineering principles underlying his proposed design support his conclusion that his design features would be safer than those in the 700R4. G.M. mis-characterizes Tamny's testimony by considering whether each individual feature of Tamny's design makes the design safer, instead of considering the design as a whole, and by considering the plaintiffs' testimony in light of its statistical evidence instead of considering the plaintiffs' evidence alone.

G.M. argues that none of the other manufacturers' designs incorporating different aspects of Tamny's design have proven safer than G.M.'s and that Tamny offered no testing evidence or engineering principles to show his design was safer. Without this evidence, G.M. concludes, Tamny's opinion is mere speculation. *592 However, the plaintiffs did not have to build and test an automobile transmission to prove a safer alternative design.

A design need only prove "capable of being developed." [25] The Restatement (Third) of Torts: Products Liability takes the position that "qualified expert testimony on the issue suffices, even though the expert has produced no prototype, if it reasonably supports the conclusion that a reasonable alternative design could have been practically adopted at the time of sale." [26]

Furthermore, assuming we could consider evidence contrary to the verdict,[27] no manufacturer has incorporated Tammy's design into an existing transmission.

For that reason alone, G.M.'s statistical evidence comparing the safety of different existing designs could not conclusively establish the safety of Tamny's design. The evidence supporting Tamny's conclusion that his design is safer raises a fact question that the jury resolved in favor of the plaintiffs.

We conclude that the plaintiffs have presented more than a scintilla of evidence that Tamny's alternative design substantially reduced the risk of injury. Having determined that the plaintiffs met their burden of proving some evidence of design defect, we need not consider G.M.'s challenge to the findings of a marketing defect or negligence.

We next consider whether to give effect to the jury's comparative responsibility findings. III The jury found that Sanchez was fifty percent responsible for his accident. G.M. argues that this finding should be applied to reduce its liability for damages whether in negligence or strict liability.

However, the plaintiffs argue that Sanchez's actions amounted to no more than a failure to discover or guard against a product defect and, because of our decision in *Keen v. Ashot Ashkelon, Ltd.*, [28] such negligence does not constitute a defense to strict liability.

To review the plaintiffs' claim, we must first consider the effect of the 1987 revisions to Chapter 33 of the Civil Practice and Remedies Code upon our decision in *Keen*. Before 1987, cases were submitted under the statutory comparative negligence system of Chapter 33 of the Texas Civil Practice and Remedies Code.[29] Comparative negligence explicitly governed only claims for negligence.

If strict liability was asserted against any defendant, comparative negligence did not apply.[30] Because *Keen* was filed before the effective date of the 1987 revisions to Chapter 33 and involved a claim based in strict liability, the statute did not apply.

Thus, in *Keen* the common law of *Duncan v. Cessna Aircraft Co.*[31] governed the effect of a claimant's negligence on a strict liability claim.[32] In *Duncan*, this Court adopted a comparative causation scheme in strict liability cases that allowed comparison of a plaintiff's conduct regardless of whether it should be characterized as assumption of the risk, misuse, or failure to mitigate or avoid damages.[33] It reaffirmed the rule in comment "n" to § 402A of the Restatement (Second) of Torts, that negligent failure to discover or guard against a product defect is not a defense.[34] *593 Relying on *Duncan*, the *Keen* majority held that a negligent failure to discover or guard against a product defect is not a defense against strict liability.[35] The Court characterized the plaintiff's conduct as a failure to discover or guard against a product defect, rather than an assumption of a known risk, thus implying that these were the only two choices.[36]

The Court therefore refused to apply the jury's comparative causation finding to reduce recoverable damages.

The scope of the Court's holding in *Keen* is difficult to assess when read in light of (1) the language in *Duncan* that seems to recognize the existence of a type of conduct that was more than a mere failure to discover or guard against a product defect and less than an assumption of the risk^[37] and (2) the unanswered criticism of the majority opinion in the dissenting opinions by Chief Justice Phillips and Justice Gonzalez.^[38] Both dissenting opinions fault the majority for considering only two types of plaintiff conduct: the failure to discover or guard against a product defect and assumption of the risk.^[39] Both dissents argued that the plaintiff in *Keen* was negligent without regard to any defect, and such negligence should be considered when apportioning responsibility.^[40] The *Keen* majority did not respond to this criticism, however.

Thus, after *Keen*, it was unclear whether a plaintiff's negligence other than a failure to discover or guard against a product defect should be submitted as part of a comparative responsibility inquiry. In 1987, the Legislature changed Chapter 33 from comparative negligence to comparative responsibility.

Under comparative responsibility, a court reduces a claimant's damages recovery by the "percentage of responsibility" attributed to him by the trier of fact.^[41] The new statute expressly included suits based on strict tort liability.^[42] It defined "Percentage of responsibility" as the percentage that a party "cause[d] or contribute[d] to cause in any way, whether by negligent act or omission,... [or] by other conduct or activity violative of the applicable legal standard" the harm for which damages are sought.^[43] Thus, as the emphasized language indicates, the new statute applies to a claimant's conduct that violated the duty to use ordinary care or some other applicable legal standard.

G.M. contends that the 1987 revisions of Chapter 33 effectively overrule *Keen*. It is not quite that simple. Implicit in this Court's holding in *Keen* was that a consumer has no duty to discover or guard against a product defect.^[44] The 1987 changes to Chapter 33, which apportion responsibility based on a breach of a legal duty or other applicable legal standard, do not impose a new duty on plaintiffs.

The statute merely says that if a claimant breaches an existing duty, then comparative responsibility shall apply. Accordingly, if a plaintiff's failure to discover or guard against a product defect breaches no duty, the statute does not apply.

Thus, *Keen*'s viability after the 1987 revisions depends on whether a plaintiff in a strict liability case has a duty to take steps to discover and guard against product defects. The *Duncan* Court refused to recognize such a failure as a defense, relying in part on comment n to section 402A of the Restatement (Second):^[45] *594 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.

On the other hand the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of 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.[46] We note that comment "n" was not carried forward in the Restatement (Third).[47] The position of Restatement (Third), section 17(a), is that a plaintiff's conduct should be considered to reduce a damages recovery if it fails to conform to applicable standards of care, similar to the Texas 1987 statutory scheme.

However, comment "d" to Restatement (Third) states: [W]hen the defendant claims that the plaintiff failed to discover a defect, there must be evidence that the plaintiff's conduct in failing to discover a defect did, in fact, fail to meet a standard of reasonable care.

In general, a plaintiff has no reason to expect that a new product contains a defect and would have little reason to be on guard to discover it.[48] We believe that a duty to discover defects, and to take precautions in constant anticipation that a product might have a defect, would defeat the purposes of strict liability.[49] Thus, we hold that a consumer has no duty to discover or guard against a product defect, but a consumer's conduct other than the mere failure to discover or guard against a product defect is subject to comparative responsibility.

Public policy favors reasonable conduct by consumers regardless of whether a product is defective. A consumer is not relieved of the responsibility to act reasonably nor may a consumer fail to take reasonable precautions regardless of a known or unknown product defect.

We therefore disapprove of Keen to the extent it suggests that the failure to discover or guard against a product defect is a broad category that includes all conduct except the assumption of a known risk. Because we conclude that a consumer has no duty to discover or guard against a product defect, we next determine whether the decedent's conduct in this case was merely the failure to discover or guard against a product defect or some other negligence unrelated to a product defect.

The truck's owner's manual describes safety measures designed to ensure that the truck would not move when parked: (1) set the parking brake; (2) place the truck completely in Park; (3) turn off the engine; (4) remove the key from the ignition; and (5) check that Park is fully engaged by pulling down on the gear shift. Sanchez's father testified that his son probably read the entire owner's manual.

The plaintiff's own experts agreed at trial that Sanchez failed to perform any of the safety measures described in the owner's manual and that performing any one of them would have prevented the accident. This evidence is sufficient to support the jury's negligence finding. Regardless of any danger of a mis-shift, a driver has a duty to take reasonable precautions to secure his vehicle before getting out of it.

The danger that it could roll, or move if the engine is running, exists independently of the possibility *595 of a mis-shift. For instance, the driver could inadvertently leave a vehicle in gear or a mechanical problem unrelated to a product defect could prevent Park from fully engaging. A moving vehicle without a driver is a hazard to public safety.

The state licenses drivers who have demonstrated the minimum knowledge and skill necessary to safely operate a motor vehicle.[50] Many, perhaps most, consumer products may be operated without a license, including lawn and garden equipment, household appliances, and powered hand tools. It follows then that, because of this licensing requirement, as well as other special duties imposed on drivers,[51] more is expected of an operator of a motor vehicle than of users of most other consumer products.

Thus, although we do not expect the average driver to have the engineering background to discover defects in their car's transmission, we do expect the reasonably prudent driver to take safety precautions to prevent a runaway car.[52] Sanchez had a responsibility to operate his truck in a safe manner.

The fact that the precautions demanded of a driver generally would have prevented this accident does not make Sanchez's negligence a mere failure to discover or guard against a mis-shift. We recognize that there may be some tension between how we apply the law to the facts of this case and the Keen majority's characterization of the plaintiff's conduct in that case.

As discussed previously, the Keen analysis was flawed from the outset because it recognized only two categories of plaintiff conduct: mere failure to discover or guard against a defect and assumption of the risk. All conduct that was not assumption of the risk was categorized as failure to discover or guard against a defect and thus no defense. Today, we hold that a plaintiff's conduct other than the mere failure to discover or guard against a product defect is subject to comparative responsibility.

Sanchez's actions amounted to conduct other than a mere failure to discover or guard against a product defect. We hold as a matter of law that such conduct must be scrutinized under the duty to use ordinary care or other applicable duty.

We conclude that there was legally sufficient evidence to support the jury's verdict that Sanchez breached the duty to use ordinary care and was fifty percent responsible for the accident. IV We next consider the punitive damages award.

The plaintiffs are entitled to punitive damages if they established all elements of gross negligence. Broadly speaking, gross negligence is the breach of duty involving an extreme degree of risk, considering the probability and magnitude of the potential harm to others (an objective element) when the actor has actual awareness of the risk involved but nevertheless proceeds in conscious indifference to the rights, safety, or welfare of others (a subjective element).[53] Evidence of gross negligence is legally sufficient if, considered as a whole in the light most favorable to the prevailing party, it rises to a level that would enable reasonable and fair-minded people to differ in their conclusions.[54] Some evidence of simple negligence is not evidence of gross negligence; conversely, some evidence of care does not defeat a gross negligence finding.[55] *596 Only G.M.'s own gross negligence, either by the corporation's own acts or omissions or by the agents' or employees' acts or omissions that are attributable to the corporation, will support punitive damages against it.[56] A court reviews all surrounding facts and circumstances to decide if a corporation itself is grossly negligent.[57] The inquiry "is determined by reasonable inferences the factfinder can draw from what the corporation did or failed to do and the facts existing at relevant times that contributed to a plaintiff's alleged damages." [58] A We first decide whether the evidence of the objective element, when considered as a whole, is legally sufficient.

We have said that an "extreme degree of risk" is a likelihood of serious injury.[59] G.M.'s experts agreed that a mis-shifted automobile is very dangerous. The only dispute is whether the evidence is legally sufficient to show the likelihood of serious injury.

We conclude the evidence is sufficient. The plaintiffs' expert, Tamny, knew of "about 500" mis-shift cases. In experiments, the transmission migrated into Reverse each time Tamny intentionally misshifted. G.M.'s experts admitted they had just testified in a similar case in California. G.M.'s statistical evidence tended to show that the possibility of serious injury was remote, but reasonable minds could differ about the degree of risk.

Thus the evidence supports the objective element. B The subjective element requires proof that the defendant knew about the danger, but its acts or omissions demonstrate that it did not care.[60] This element may be shown by direct or circumstantial evidence.[61] Much of the evidence the court of appeals discussed, including the bases for the expert opinions, was relevant to the issue of the degree of risk and G.M.'s knowledge of the danger, but did not show that G.M. was consciously indifferent.

Considered as a whole, the evidence here rises to the level that reasonable minds could differ over whether G.M. was actually aware of the mis-shift danger, but that does not establish conscious indifference. To show G.M.'s conscious indifference, the plaintiffs offered expert testimony from Juan Herrera, who characterized G.M.'s conduct as a "conscious decision," and Tamny, who said that G.M. "knew that people were getting hurt and they made the decision not to do anything about the design... or to warn properly."

Hererra's tautological statement sheds little light on the relevant issue, whether G.M. was consciously indifferent to a known serious risk. Moreover, Hererra gave his opinion in response to a hypothetical question about a manufacturer who gives no warning.

Here, G.M. gave a warning, which we will discuss presently. If an expert's opinion is based on facts that are materially different from the facts in evidence, then the opinion is not evidence.[62] As for Tamny's testimony, the fact that G.M. did not implement a new design is not evidence it was not working on the problem. G.M. presented evidence of engineering work over a period of years to modify and improve its transmissions.

An example is the 1989 patent application describing a design to alleviate the misshift problem. The 1989 design could not be implemented because federal standardization guidelines require the Park, Reverse, Neutral, Drive, Low shift pattern. *597 Moreover, there was no evidence that G.M. was aware of any other design with a better safety record than the 700R4 transmission.

While Tamny testified as to his own alternative design, there is no evidence of G.M.'s prior knowledge of it. We do not believe that G.M. can be consciously indifferent solely for failing to adopt a safer design it did not know existed. One of the main factors supporting punitive damages in many product defect cases is the fact that the manufacturer is aware of specific design changes that would have made the product safer.[63] In Grimshaw for instance, Ford deliberately chose to implement a more dangerous design because it believed that it would save more money than it would have to pay out in damages.[64] There is no such evidence in this case.[65] No evidence supports the inference that G.M. made a conscious choice to implement a more dangerous design in preference to a known safer one that would have substantially reduced the risk.

As for the warning, the court of appeals concluded that G.M.'s warning was so vague that it would allow an inference that G.M. consciously decided to downplay the mis-shift danger. But an inference must not be based on mere surmise or speculation.[66] G.M. warned: CAUTION: It can be dangerous to get out of your vehicle if... your shift lever is not fully in "P" (Park)....

Your vehicle can roll. If you have left the engine running, the vehicle can move suddenly. You or others could be injured. To be sure your vehicle won't move, even when you're parking on level ground, follow the steps below. 1. Hold the regular brake pedal down with your right foot and apply the parking brake all the way first.... 2.

To move the shift lever into "P" (Park), pull the lever toward you and move it up as far as it will go. 3. [applicable to four-wheel drive only] 4. If you don't have to leave the engine running, (briefly) Move the ignition key to "LOCK." Remove the key and take it with you. 5.

Before you leave the driver's seat, check that your vehicle is in park by trying to pull the shift lever out of "P" (Park)by pulling down on the shift lever without first pulling it toward you. If you

can do this, it means the shift lever wasn't fully locked into "P" (Park). Or, check that your vehicle is in park by pocketing the key. If you can remove the key, the vehicle is in "P" (Park).

While the warning here does not use the word "mis-shift," it does warn that a vehicle not "fully in Park" could "move suddenly" and could be dangerous. It is not necessary to know the specific engineering facts about hydraulic neutral to appreciate that a vehicle can be shifted into something less than full Park. G.M. could have explicitly warned its customers that the vehicle can migrate into a powered gear if not fully in Park, but no other manufacturer has such a warning, and it was undisputed that following any one of the precautions contained in the warning would have *598 prevented the accident.

The issue in gross negligence is not whether G.M. developed and used the best warning imaginable. We believe this warning, standing alone, does not provide a reasonable basis upon which to infer conscious indifference.

After reviewing the evidence in this case under the Moriel standard, we hold the evidence of conscious indifference is not legally sufficient to support the gross negligence finding. V In conclusion, we hold that (1) there is some evidence of a product defect; (2) comparative responsibility applies because there was evidence of negligence beyond the mere failure to discover or guard against a product defect; and (3) there is no evidence supporting the gross negligence finding.

Accordingly, we reverse the court of appeals judgment and render judgment that the plaintiffs recover their actual damages reduced by the jury's finding of fifty percent comparative responsibility. NOTES [1] 748 S.W.2d 91 (Tex.1988).

[2] 966 S.W.2d 545, 555. [3] 966 S.W.2d 545. [4] 974 S.W.2d 407. [5] Id. [6] See TEX. CIV. PRAC. & REM.CODE § 33.012. [7] See Juliette Fowler Homes, Inc. v. Welch Assocs., Inc., 793 S.W.2d 660, 666 n. 9 (Tex. 1990) (citing Robert W. Calvert, "No Evidence" and "Insufficient Evidence" Points of Error, 38 TEX. L. REV. 361, 362-363 (1960)).

[8] See American Tobacco Co., Inc. v. Grinnell, 951 S.W.2d 420, 432 (Tex.1997). [9] See Caterpillar, Inc. v. Shears, 911 S.W.2d 379, 384 (Tex.1995). [10] See TEX. CIV. PRAC. & REM.CODE § 82.005(b)(1) & (2). [11] See Maritime Overseas Corp. v. Ellis, 971 S.W.2d 402, 410-11 (Tex.1998).

[12] 923 S.W.2d 549, 556 (Tex.1995) (adopting the approach defined by the U.S. Supreme Court in Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 592-95, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)). [13] See Gammill v. Jack Williams Chevrolet, Inc., 972 S.W.2d 713, 720 (Tex.1998).

[14] 953 S.W.2d 706, 711-14 (Tex.1997). [15] See id. at 709. [16] See id. at 730. [17] Ellis, 971 S.W.2d at 411. [18] 612 S.W.2d 199, 202, 204-205 (Tex.1980). [19] 907 S.W.2d 497, 499-500

(Tex.1995). [20] See Schaefer, 612 S.W.2d at 204.

[21] See id. [22] See Burroughs, 907 S.W.2d at 498. [23] See id. at 499. [24] Id. [25] See Boatland of Houston, Inc. v. Bailey, 609 S.W.2d 743 (Tex.1980). [26] RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. f (1998).

[27] See Continental Coffee Prods. v. Cazarez, 937 S.W.2d 444, 450 (Tex.1996). [28] 748 S.W.2d at 92 (failure to discover or guard against a defect is no defense to a strict liability claim). [29] See TEX. CIV. PRAC. & REM.CODE § 33.001 et seq.

[30] See Duncan v. Cessna Aircraft Co., 665 S.W.2d 414, 423 (Tex.1984). [31] See id. [32] See Keen, 748 S.W.2d at 93. [33] See Duncan, 665 S.W.2d at 428. [34] See id. at 432; see also Dresser Indus., Inc. v. Lee, 880 S.W.2d 750, 755 (Tex.1993).

[35] See Keen, 748 S.W.2d at 93. [36] See id. at 92-93. [37] See Duncan, 665 S.W.2d at 422. [38] See Keen, 748 S.W.2d at 94 & 96. [39] See id. at 94 & 99. [40] See id. [41] See TEX. CIV. PRAC. & REM.CODE § 33.012(a).

[42] See id. § 33.003. [43] Id. § 33.011(4) (emphasis added). [44] See Keen, 748 S.W.2d at 92-93; see also Dresser Indus., 880 S.W.2d at 755. [45] See Duncan, 665 S.W.2d at 432. [46] See RESTATEMENT (SECOND) OF TORTS § 402A cmt. n (1964).

[47] See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 17 cmt. a (1998). [48] Id. cmt. d. [49] See Keen, 748 S.W.2d at 93 (consumers have a right to rely on product safety); see also Duncan, 665 S.W.2d at 432; William J. McNichols, The Relevance of the plaintiff's Misconduct in Strict Tort Products Liability, the Advent of Comparative Responsibility, and the Proposed Restatement (Third) of Torts, 47 OKLA L.REV.

201, 260 (1994). [50] See Tex. Trans. Code § 521.161. [51] See e.g. id. §§ 545.001-.423 (operation of a motor vehicle); 548.001 et seq. (compulsory car inspection); 601.051 & 601.072 (insurance required). [52] See e.g. id. § 545.404 (engine must be turned off, ignition locked, keys removed, and brake set).

[53] See Transportation Ins. Co. v. Moriel, 879 S.W.2d 10, 24-25 (Tex.1994) [54] See id. at 25. [55] See id. at 20-22. [56] See Mobil Oil Corp. v. Ellender, 968 S.W.2d 917, 921 (Tex.1998). [57] See id. at 922. [58] Id. [59] See id. at 921.

[60] See Wal-Mart Stores, Inc. v. Alexander, 868 S.W.2d 322, 326 (Tex.1993). [61] See Moriel, 879 S.W.2d at 23. [62] See Burroughs Wellcome Co., 907 S.W.2d at 499-500; Schaefer, 612 S.W.2d at 204-205. [63] See Dorsey v. Honda Motor Co., Ltd., 655 F.2d 650, 657 (5 th Cir.1981); Gillham v. Admiral Corp., 523 F.2d 102, 107-08 n. 3 (6 th Cir.1975); Grimshaw v. Ford Motor Co., 119 Cal. App.

3d 757, 813-14, 174 Cal. Rptr. 348 (Cal.Ct.App.1981); *Jardel Co., Inc. v. Hughes*, 523 A.2d 518, 530-31 (Del.1987); *Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727, 740 (Minn.1980); *Leichtamer v. American Motors Corp.*, 67 Ohio St. 2d 456, 424 N.E.2d 568, 580 (1981); *Wangen v. Ford Motor Co.*, 97 Wis. 2d 260, 294 N.W.2d 437, 462 (1980).

[64] See *Grimshaw*, 119 Cal.App.3d at 813-14, 174 Cal. Rptr. 348. [65] See supra page 591 (The only designs G.M. was aware of were other manufacturers' which, according to G.M.'s statistical expert, had the same accident rate as G.M.).

[66] See *Briones v. Levine's Dept. Store*, 446 S.W.2d 7, 10 (Tex.1969).