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PERSONAL TORTS

by

Frank L. Branson*

THIS Article summarizes and analyzes recent Texas case law concerning personal torts. Developments in negligence, premises liability, professional negligence, products liability, personal injury damages, contribution and indemnity immunities, and intentional torts will be discussed.

I. NEGLIGENCE

A. Duty

The logical starting point in any discussion of the law of negligence is the concept of duty.¹ During the Survey period Texas courts decided a number of cases interpreting this evolving concept. Building on *El Chico Corp. v. Poole*² and *Joleemo, Inc. v. Evans*,³ several courts of appeals dealt with the duties owed by those serving alcoholic beverages. *Pastor v. Champs Restaurant, Inc.*⁴ was a wrongful death action filed on behalf of a cocktail waitress killed in a one-car accident. Christine Ann Pastor Fail was a waitress at a Houston area restaurant. One evening after work, Mrs. Fail remained as a patron at the bar for approximately four hours. During that time, she consumed copious amounts of alcohol. When Mrs. Fail left the bar others noted her stumbling to her automobile. The fatal accident occurred a short distance from the restaurant, and an autopsy revealed that she died with a blood alcohol content of approximately 0.17.

In resisting the *Dram Shop* case, the restaurant filed a motion⁵ for summary judgment, alleging that it owed no duty to patrons who are injured as a result of voluntary intoxication.⁶ The trial court granted the motion for summary judgment. The court of appeals overturned the summary judgment, holding that alcoholic beverage licensees owe a duty not to serve alcoholic beverages to patrons when the licensees know or should know of the patron's

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1. Kilgarlin & Sterba-Boatwright, *The Recent Evolution of Duty in Texas*, 28 S. TEX. L.J. 241, 245 (1986); see *Edwards Transfer Co. v. Brown*, 764 S.W.2d 220 (Tex. 1988) (Kilgarlin, J., dissenting).

2. 732 S.W.2d 306 (Tex. 1987).

3. *Id.*

4. 750 S.W.2d 335 (Tex. App.—Houston [14th Dist.] 1988, no writ).

5. *Id.* at 337.

6. *Id.*

intoxication.⁷ Analyzing the supreme court's decision in *El Chico*,⁸ the court reasoned that the duty not to serve intoxicants extends to patrons as well as the public at large.⁹ After recognizing one potential difficulty with this new duty,¹⁰ the court stated that the tavern owner may be entitled to a jury issue inquiring about the patron's contributory negligence.¹¹

*Chapa v. Club Corp. of America*¹² considered the duty that bar owners owe to minor patrons. Julian Chapa, a 15-year old employee of the Lost Creek Country Club, received serious injuries in an automobile accident in which he was involved after drinking beer for several hours. Chapa sought to impose liability on the country club for its violation of a statute making it a crime to provide alcohol to minors.¹³ In reviewing the statute in question, the appellate court found that Julian was in the class of persons for whom the legislation sought to protect. The country club sought to avoid the application of the negligence per se doctrine by arguing that it had no actual notice that Julian was below the age of 19.¹⁴ The court did not decide whether actual notice of minority must be demonstrated before a duty arises; instead the court found that the country club did not conclusively prove its ignorance of Julian's true age.¹⁵

Another opinion, *Walker v. Children Services, Inc.*,¹⁶ held that social hosts have no duty to refrain from serving alcohol to obviously intoxicated adults.¹⁷ In *Walker* an employee driving a company van began drinking while on duty. At the conclusion of his route, the employee, Mr. Walker, returned the van and proceeded home in his own automobile. A one-car accident left Walker seriously injured, and investigators found that he had a blood alcohol level of .27. Walker and his wife sued his employer on two theories of liability. The first theory, based on *Otis Engineering Corp. v. Clark*,¹⁸ claimed that Walker's employer, after exercising control over him, owed Walker a duty because of his drunkenness. The second theory argued for an expansion of *El Chico* to include social host liability. The court of

7. *Id.*

8. 732 S.W.2d 306 (Tex. 1987). *El Chico Corp. v. Poole*, 730 S.W.2d 955 (Tex. App.—Houston [14th Dist.] 1986), *aff'd*, 732 S.W.2d 306 (Tex. 1987) and *Joleemo, Inc. v. Evans*, 714 S.W.2d 394 (Tex. App.—Corpus Christi 1986), *aff'd*, 732 S.W.2d 306 (Tex. 1987) were consolidated on appeal.

9. 750 S.W.2d at 337.

10. *Id.*

11. *Id.* at 338.

12. 737 S.W.2d 427 (Tex. App.—Austin 1987, no writ).

13. TEX. ALCO. BEV. CODE ANN. § 106.06 (1978). The statute reads: "[A] person commits an offense if he purchases an alcoholic beverage for or gives or knowingly makes available an alcoholic beverage to a minor." See also TEX. ALCO. BEV. CODE ANN. § 106.01 (Vernon Supp. 1989) (defining a minor as one younger than 21 years of age).

14. At the time of the offense, for purposes of § 106.06, see *supra* note 13, the age of minority was 19. Act of May 7, 1981, ch. 107, §§ 8-9, 1981 Tex. Gen. Laws 257 (amended 1986). The Texas Legislature changed the legal drinking age to 21 to become effective September 1, 1986. TEX. ALCO. BEV. CODE ANN. §§ 106.01, 106.03 (Vernon Supp. 1989).

15. 737 S.W.2d at 430.

16. 751 S.W.2d 717 (Tex. App.—Amarillo 1988, writ denied).

17. *Id.* at 719.

18. 668 S.W.2d 307 (Tex. 1983).

appeals rejected both theories.¹⁹ First, *Otis Engineering* required that the employer only take measures to prevent the employee from causing an unreasonable risk of harm to *others*.²⁰ The court concluded that no duty to protect the drunk employee from his or her own actions exists.²¹

Turning to Walker's second theory of liability, the court declined to extend *El Chico* to social host situations. Initially surveying other states' approaches, the court noted that the majority of jurisdictions do not hold social hosts liable for injuries caused by intoxicated guests.²² Independent of other states' laws, however, the court reasoned that social hosts should not be liable because they are not subject to regulation by the Alcoholic Beverage Commission.²³ Social hosts lack the specialized knowledge, experience, and dispersment controls that commercial alcohol providers possess.²⁴ The opinion invited the legislature to review the social host liability question and develop the necessary duty.²⁵

Several other cases dealt with the duties that arise from control over independent contractors. In *Wilson v. Goodyear Tire & Rubber Co.*²⁶ and *Ponder v. Morrison-Knudsen Co.*²⁷ the courts reiterated that control over subcontractors gives rise to a duty to monitor their work.²⁸ In *Ponder* a defendant who retained the right to supervise and control the manner and details of other entities' work owed a duty to exercise such supervision with reasonable care.²⁹ Relying on *Redinger v. Living, Inc.*,³⁰ a United States district court focused not on the degree of control actually exercised, but on the right to exercise such control over subcontractors.³¹ Conversely, *Wilson* stressed that a general contractor owes no duty to third parties when the general contractor lacks the right to control the subcontractor's actions.³²

*Beans v. Entex, Inc.*³³ held that a gas supplier has no independent duty to inspect and maintain gas heaters that it does not own or control.³⁴ *Beans* was a wrongful death suit against a gas company and the manufacturer of a space heater. In affirming the summary judgment rendered in favor of the gas company, the court of appeals found that since Entex simply supplied natural gas, and neither owed nor controlled the defective gas heater, the utility company owed no duty to inspect or adjust the appliance.³⁵

19. 751 S.W.2d at 719-20.

20. 668 S.W.2d at 311.

21. 751 S.W.2d at 719.

22. *Id.* at 720.

23. *Id.*

24. *Id.*

25. *Id.*

26. 753 S.W.2d 442 (Tex. App.—Texarkana 1988, writ denied).

27. 685 F. Supp. 1359 (E.D. Tex. 1988).

28. *Wilson*, 753 S.W.2d at 446; *Ponder*, 685 F. Supp. at 1362-63.

29. 685 F. Supp. at 1362.

30. 689 S.W.2d 415, 418 (Tex. 1985).

31. 685 F. Supp. at 1362.

32. 753 S.W.2d at 447.

33. 744 S.W.2d 323 (Tex. App.—Houston [1st Dist.] 1988, writ denied).

34. *Id.* at 325.

35. *Id.*

*Diaz v. Southwest Wheel, Inc.*³⁶ is an assumed duty case. The case considers the duty owed by one who voluntarily undertakes an affirmative course of action for the benefit of another. In *Diaz* a worker was injured when attempting to install a tire mounted on a multi-piece wheel. Southwest Wheel neither manufactured nor sold the defective wheel to the defendant; instead, the plaintiff premised liability on Southwest Wheel's failure to adequately disseminate warning and instructional information regarding multi-piece rims. While recognizing that one who assumes a task or undertakes a duty must perform that duty in a non-negligent fashion,³⁷ the court of appeals rejected liability in this case.³⁸ First, Southwest Wheel's alleged negligence did not increase the risk of rim separation or otherwise make the accident more likely to happen.³⁹ Furthermore, no proof existed that the plaintiff's employer relied on Southwest Wheel to warn of the dangers associated with a multi-piece rim.⁴⁰ No recovery exists for the negligent performance of an assumed duty unless the negligence increased the risk of harm, or the harm was suffered because the injured party relied on the third party's actions.⁴¹

B. Negligent Entrustment/Hiring

In *Schneider v. Esperanza Transmission Co.*⁴² the Texas Supreme Court appears to have made subtle changes in the law of negligent entrustment. *Schneider* was a double entrustment situation that arose when Esperanza Transmission (Esperanza) provided a pickup truck for the business and personal use of its employee, Mr. Havelka. Esperanza promulgated a company policy permitting employees to drive company vehicles, and on one occasion Havelka drove the company truck to a tavern where he became intoxicated. Havelka and his drinking companion, Schroeder, then took Esperanza's truck to a dance hall where they consumed even more liquor. As the pair prepared to leave the second bar, Havelka asked Schroeder to drive the truck home. With Schroeder at the wheel, the vehicle smashed into the rear end of a vehicle in which Barry Schneider was a passenger. Schneider was seriously injured and brought suit against Esperanza for negligently entrusting its vehicle to Havelka.

The Texas Supreme Court affirmed the court of appeals's take-nothing judgment on the grounds that no proximate cause existed between Esperanza's initial entrustment and the subsequent accident.⁴³ The element of proximate cause that the court focused upon was the defendant's ability to foresee that a second entrustment would occur.⁴⁴ This was a somewhat dif-

36. 736 S.W.2d 770 (Tex. App.—Corpus Christi 1987, writ denied).

37. *Id.* at 773.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. 744 S.W.2d 595 (Tex. 1987).

43. *Id.* at 597.

44. *Id.* at 596.

ferent formulation of proximate cause since prior cases had not emphasized the foreseeability element in negligent entrustment cases. For example, in *Mundy v. Pirie-Slaughter Motor Co.*⁴⁵ the Texas Supreme Court required claimants to show the causal connection between the owner's negligence in lending out the automobile and the subsequent injuries to the third person.⁴⁶ *Mundy* listed six factors necessary to establish a case of negligent entrustment, but omitted foreseeability.⁴⁷ Regardless of this changed focus in negligent entrustment, *Schneider* is not a radical departure and does not require that the exact chain of events leading to the accident be foreseen.⁴⁸

Another negligent entrustment case, *Drooker v. Saeilo Motors*,⁴⁹ discussed proof of negligent entrustment.⁵⁰ The underlying lawsuit in *Drooker* arose when several employees involved in an accident were on their way to dinner (intending to return to work after their meal) in a car belonging to a company manager. In response to a suit for damages, the employer filed a motion for summary judgment stating that the company did not know that its employee would be driving the car at the time of the accident and further swearing that the employee had never been in an accident or received a traffic ticket. The court of appeals held that the evidence did not prove as a matter of law that the employer was not negligent in entrusting the vehicle to the driver.⁵¹ The employer's ignorance of the entrustment on the occasion in question did not absolve the company from liability since the employee was generally allowed to drive his manager's car.⁵² Further, proof that the employee had no prior accidents or tickets did not conclusively establish that he was a competent and safe driver.⁵³

C. Vicarious Liability

Negligent hiring and the doctrine of *respondeat superior* were the topics of *Dieter v. Baker Service Tools*.⁵⁴ *Dieter* arose from an assault allegedly committed by two Baker Service Tools (Baker) employees. The assault did not occur at work and the defendant predicated its motion for summary judg-

45. 146 Tex. 314, 206 S.W.2d 587 (1948).

46. *Id.* at 321-22, 206 S.W.2d at 591.

47. *Id.* at 321-22, 206 S.W.2d at 591. The *Mundy* court explained:

The facts which the plaintiff must establish . . . to show liability are . . . , (1) that defendant's agents permitted [the driver] to drive one of its automobiles; (2) that at such time [the driver] did not have a driver's license; (3) that defendant's agents actually knew that he did not have such license; or if they did not have such knowledge, (4) that defendant's agents were in fact negligent in permitting [the driver] to drive the automobile without ascertaining whether he had a driver's license; (5) that [the driver] while in possession under such permission drove the automobile negligently; and (6) that such negligence on [the driver's] part caused the collision and the injuries and damage to the plaintiff.

Id.

48. 744 S.W.2d at 596.

49. 756 S.W.2d 394 (Tex. App.—Houston [1st Dist.] 1988, writ denied).

50. *Id.* at 399.

51. *Id.*

52. *Id.*

53. *Id.*

54. 739 S.W.2d 405 (Tex. App.—Corpus Christi 1987, writ denied).

ment on the fact that the two men who beat Dieter were acting outside the scope of their employment.⁵⁵ The doctrine of *respondeat superior* imposes liability on employers only when the employee's actions are within the scope of their authority and in furtherance of the employer's business.⁵⁶ Typically, assaults upon third parties are held to be outside of an employee's authority.⁵⁷ In *Dieter* since the action did not take place at work and was not related to Baker's business, the summary judgment evidence showed that the assault was one Baker did not authorize and could not have foreseen.⁵⁸ Therefore, the court did not impose liability under the theory of *respondeat superior*.⁵⁹ The court also rejected the alternate theory of negligent hiring.⁶⁰ Since the assault was unrelated to the employment, no nexus between the hiring decision and the assault existed.⁶¹ Because they were unable to find any Texas cases on point, the court of appeals analyzed out-of-state precedent and concluded that negligence in hiring the employee must be the proximate cause of the injuries.⁶² To hold otherwise would make an employer automatically liable for any tort committed by an employee.

D. *Res Ipsa Loquitur*

Texas courts decided two very different cases involving the doctrine of *res ipsa loquitur* during the Survey period. The doctrine of *res ipsa loquitur* relieves a plaintiff of proving negligence on the basis that (1) the instrumentality involved was within the defendant's exclusive control, and (2) the occurrence is of the type that does not usually happen without negligence.⁶³ *Wal-Mart Stores, Inc. v. Lerma*,⁶⁴ a suit involving a small child injured in a department store, discussed the first element. Amanda Lerma had wandered away from her mother while shopping at a Wal-Mart and was playing on a store fixture when it toppled over onto her. In seeking recovery for Amanda's injuries, the plaintiffs relied on the doctrine of *res ipsa loquitur* to establish Wal-Mart's negligence. Previous courts had applied the doctrine to cases involving injuries caused by store fixtures, but typically restricted its use to those situations where the fixtures were entirely within the defendants' control.⁶⁵ In this case, however, because Amanda was swinging on the rack when it fell over, the instrumentality of harm was not entirely under the

55. *Id.* at 407.

56. *See* *Leadon v. Kimbrough Brothers Lumber Co.*, 484 S.W.2d 567, 569 (Tex. 1972) (negligent act in question need not be expressly authorized by employer so long as it is in furtherance of employer's business and within scope of employee's authority); *Robertson Tank Lines v. Van Cleave*, 468 S.W.2d 354, 357 (Tex. 1971) (servant's acts must be within scope of his general authority and servant must be furthering master's business in order to impose liability on master).

57. *Texas & Pac. Ry. v. Hagenloh*, 247 S.W.2d 236, 239 (Tex. 1952).

58. 739 S.W.2d at 407.

59. *Id.*

60. *Id.* at 409.

61. *Id.* at 408.

62. *Id.*

63. *Porterfield v. Bringegar*, 719 S.W.2d 558, 559 (Tex. 1986).

64. 749 S.W.2d 572 (Tex. App.—Corpus Christi 1988, no writ).

65. *Id.* at 574.

store's control and therefore the doctrine was inapplicable.⁶⁶

*City of Fort Worth v. Holland*⁶⁷ involved roof damage to a residence which occurred when a Fort Worth water main broke. The plaintiff relied on the doctrine of *res ipsa loquitur* in order to avoid the need to show a specific act of negligence on the city's part. While the parties did not dispute evidence that the water main was within the city's exclusive control, the testimony was insufficient to demonstrate that the water main would not break in the absence of negligence. Evidence did not show that the water main corroded because of negligence or a deviation from the accepted standards of maintenance of the underground pipes. Further, no evidence linked the change in pumping pressure or direction with the break. Since the plaintiff failed to present sufficient evidence to prove that the accident would not have occurred in the absence of the city's negligence, the court of appeals refused to allow the plaintiff to rely on *res ipsa loquitur* to avoid the burden of proving negligence by direct evidence.⁶⁸

E. Premises Liability

In *Davis v. Esperado Mining Co.*⁶⁹ a court of appeals held that any duty to make premises safe for third-parties is dependent upon ownership, possession, or control of the property.⁷⁰ In *Davis* the court held that the owner of a sub-surface estate did not owe any responsibility to make the surface estate safe for third parties.⁷¹ Since the royalty owner had no right to possession or control of the surface estate and did not create the dangerous conditions giving rise to the accident, he owed no duty to third parties.⁷² Similarly, the court in *La Fleur v. Astro Dome-Astro Hall Stadium Corp.*⁷³ refused to impose a requirement upon the owner-operators of the Astro Dome that they prevent criminal activities occurring on property outside of their possession, ownership, or control.⁷⁴ Karen Le Fleur, a television news photographer, brought suit against the owner-operators of the Astro Dome for injuries she received during an assault which occurred on property located across the street from the stadium. The court upheld the Astro Dome's summary judgment and held that a party is not required to prevent criminal activities from occurring on premises over which the party had no control.⁷⁵

*S&A Beverage Co. v. DeRouen*⁷⁶ concerned a tavern owner's liability for a sexual assault that occurred on the premises. Rachel DeRouen was a customer at a Beaumont restaurant when an intoxicated patron sexually assaulted her. After a jury trial, the jury found that the restaurant's decision

66. *Id.*

67. 748 S.W.2d 112 (Tex. App.—Fort Worth 1988, writ denied).

68. 748 S.W.2d at 115-16.

69. 750 S.W.2d 887 (Tex. App.—Houston [14th Dist.] 1988 no writ).

70. *Id.* at 888.

71. *Id.*

72. *Id.*

73. 751 S.W.2d 563 (Tex. App.—Houston [1st Dist.] 1988, no writ).

74. *Id.* at 565.

75. *Id.*

76. 753 S.W.2d 507 (Tex. App.—Beaumont 1988, writ denied).

not to refuse service to the obviously intoxicated criminal was a proximate cause of the damage.⁷⁷ Further, the court of appeals held that the criminal assault was not a superseding cause of the damages.⁷⁸ The court reasoned that the tavern owner could have foreseen that continued service to an intoxicated person might lead to violence.⁷⁹ Relying on *Nixon v. Mr. Property Management Co.*,⁸⁰ the court emphasized that criminal conduct is a superseding cause only when it is unforeseeable.⁸¹ The court required no jury instruction on "new and independent cause" because that risk was created by the defendant's negligent actions.⁸²

Two other cases involving criminal activities on the premises are worth comparing. In *Blaustein v. Gilbert-Dallas Co., Inc.*⁸³ the Eastland Court of Appeals reversed a summary judgment in favor of an apartment owner who claimed to have no responsibility to provide security for tenants.⁸⁴ The summary judgment proof showed that the tenant had asked her apartment manager to change the locks on her door before she moved into the apartment. The manager declined to do so, explaining that only he and the maintenance man had keys. Additionally, the apartment lease contained a provision allowing the tenant to request such a lock change. Reasoning that the request and lease created a duty for the apartment owners, the court found fact issues as to whether the leasing company knew or should have known that criminals had access to Ms. Blaustein's apartment.⁸⁵ In comparison, in *Baley v. W/W Interest, Inc.*⁸⁶ a Houston Court of Appeals declined to reverse a take-nothing judgment in a wrongful death case filed against the owners and lessee of a Houston night club.⁸⁷ The plaintiffs alleged that the night club was negligent in not having adequate lighting or a uniformed security guard on the premises where a murder occurred. In finding evidence to support the jury's verdict, the court noted that the murderer had apparently followed the victim into the night club following a previous incident.⁸⁸ No evidence showed the murderer to be inappropriately dressed, intoxicated, or in any way noticeable. Absent evidence conclusively establishing that the bar owners or employees knew or should have known that the intruder was armed, the court upheld the jury's verdict.⁸⁹

77. *Id.* at 509.

78. *Id.* at 511.

79. *Id.*

80. 690 S.W.2d 546, 550 (Tex. 1985). Although criminal conduct of a third party is usually a superseding cause relieving a negligent actor from liability, a tortfeasor's negligence will not be excused where the criminal conduct is a result of such negligence. *Id.*

81. 753 S.W.2d at 511.

82. *Id.*

83. 749 S.W.2d 633 (Tex. App.—Eastland 1988, no writ).

84. *Id.* at 635.

85. *Id.*

86. 754 S.W.2d 313 (Tex. App.—Houston [14th Dist.] 1988, writ denied).

87. *Id.* at 318.

88. *Id.* at 317.

89. *Id.* at 318. The case is also notable for its dubious holding that jurors who perform independent investigations of the scene and read newspaper articles to each other concerning the incident are not guilty of jury misconduct. *Id.*

*Naumann v. Windsor Gypsum, Inc.*⁹⁰ involved the alleged defective layout of the entrance of a plant abutting a state highway. Ronald and Laura Naumann were injured when their automobile collided with a tractor-trailer that had just been loaded with sheet rock at the Windsor Gypsum plant in South Texas. The collision occurred when the truck driver attempted to turn right across both lanes of the state highway. The trial court granted Windsor Gypsum's motion for summary judgment on the grounds that the operator of the tractor-trailer was an independent contractor over which the defendant had no control and that the defendant had no duty to control traffic on a highway adjacent to its property.⁹¹ In upholding the summary judgment the court of appeals did not directly address these contentions, but relied on the fact that the truck driver was an independent contractor.⁹² The court said that Windsor Gypsum did not owe a duty to see that the independent contractors performed their work in a safe manner and was not required to anticipate that truck drivers would block the highway when leaving the plant.⁹³ The court of appeals cast Windsor Gypsum as a third party who could not foresee the independent contractor's actions.⁹⁴ The court noted that Windsor Gypsum did nothing to increase the hazards or expose the plaintiffs to danger.⁹⁵

Two other cases, *Prudential Insurance Co. of America v. Henson*⁹⁶ and *Physicians and Surgeons General Hospital v. Koblizek*⁹⁷ involved the method of submitting jury issues in premises cases. *Henson* involved a slip and fall accident that occurred near a shopping center. In submitting the case to the jury, the plaintiff incorporated the *Corbin v. Safeway Stores, Inc.*⁹⁸ and *Hernandez v. Kroger Co.*⁹⁹ elements of recovery into the instructions and definitions. Construing the new rules of civil procedure,¹⁰⁰ the court approved the broad-form submission.¹⁰¹ *Koblizek*, on the other hand, required that the

90. 749 S.W.2d 189 (Tex. App.—San Antonio 1988, writ denied).

91. *Id.* at 190.

92. *Id.* at 191.

93. *Id.*

94. *Id.*

95. *Id.* at 192.

96. 753 S.W.2d 415 (Tex. App.—Eastland 1988, no writ).

97. 752 S.W.2d 657 (Tex. App.—Corpus Christi 1988, no writ). In *Corbin v. Safeway Stores, Inc.*, 648 S.W.2d 292, 295 (Tex. 1983), and *Koblizek*, the court established the essential elements of a slip-and-fall case. As an invitee, a plaintiff must prove: 1) the possessor had actual or constructive knowledge of some condition on the premises; 2) the condition posed an unreasonable risk of harm to invitees; 3) the possessor failed to exercise reasonable care to reduce or eliminate the risk; and 4) the possessor's failure to use such care proximately caused the injuries. *Koblizek*, 752 S.W.2d at 659.

98. 648 S.W.2d at 295.

99. 711 S.W.2d 34, (Tex. 1986).

100. TEX. R. CIV. P. 277: "In all jury cases the court shall, *whenever feasible*, submit the cause upon broad-form questions. The court shall submit such instructions and definitions as shall be proper to enable the jury to render a verdict." *Id.* (Emphasis added).

101. 753 S.W.2d at 417. The court is almost certainly wrong in its statement that broad-form issues are not mandatory. Texas Rule of Civil Procedure 277 now informs members of the bar and bench that trial courts "shall, whenever feasible, submit the cause upon broad-form questions." While some argument may exist that it is infeasible to submit broad-form questions in premises liability cases, there is no question but that they are required when possi-

Corbin and *Hernandez* elements be submitted as granulated issues.¹⁰² Relying on the Texas pattern jury charge,¹⁰³ the court rejected a general charge based upon negligence principles.¹⁰⁴

Finally, the court in *Dominguez v. Garcia*¹⁰⁵ restated well-known principles that social guests are licensees within the context of determining the duties owed by premises occupiers.¹⁰⁶ The case arose when a ten-year old boy went to his friend's birthday party. While at the party, the boy fell on a stump in the yard and seriously injured his leg. In upholding the summary judgment rendered in favor of the homeowner, the court of appeals held that social guests are licensees within the premises liability framework.¹⁰⁷ As such, premises owners/occupiers owe their social guests only the duty not to injure the guest by willful, wanton, or gross negligence.¹⁰⁸ The host does not owe a duty to warn licensees of dangers, or to make conditions on the premises reasonably safe.¹⁰⁹

II. PROFESSIONAL NEGLIGENCE

A. Medical Negligence — Standard of Care

Several summary judgment cases decided during the Survey period illustrated the need to prove the standard of care in medical negligence cases. *Wales v. Williford*¹¹⁰ is a case in which a defendant physician defeated the plaintiff's case through the use of affidavits from physicians who were from the defendant's school of training and familiar with local standards of practice. Dr. Williford established that he had not violated the applicable standards of care in the case.¹¹¹ *Pinckley v. Gallegos*¹¹² and *Nicholson v. Naficy*¹¹³ are other examples of cases where summary judgment was proper in light of proof that there had been no violation of the standard of care.¹¹⁴ The holdings in these cases are somewhat limited because they involve fact-specific questions resolved in summary judgment proceedings. Nevertheless, these cases are instructive and demonstrate Texas courts' adherence to the basic elements in proving a medical negligence case.¹¹⁵

ble. Kilgarlin, Quesada & Russell, *Practicing Law in the "New Age": The 1988 Amendments to the Texas Rules of Civil Procedure*, 19 TEX. TECH L. REV. 881, 913 (1988).

102. 752 S.W.2d at 660.

103. 3 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES § 61.02 (1982).

104. 752 S.W.2d at 660.

105. 746 S.W.2d 865 (Tex. App.—San Antonio 1988, writ denied).

106. *Id.* at 867.

107. *Id.*

108. *Id.*

109. *Id.*

110. 745 S.W.2d 455 (Tex. App.—Beaumont 1988, writ denied).

111. *Id.* at 459.

112. 740 S.W.2d 529 (Tex. App.—San Antonio 1987, writ denied).

113. 747 S.W.2d 3 (Tex. App.—Houston [1st Dist.] 1987, no writ).

114. *Pinckley*, 740 S.W.2d at 530; *Nicholson*, 747 S.W.2d at 5.

115. In order to recover on a medical negligence case, a plaintiff must prove: (1) a provider-patient relationship; (2) the appropriate standard of care under the circumstances; (3) a breach of the appropriate standard of care; and (4) proximate cause between the deviation from the standard of care and the injuries suffered. Perdue, *The Law of Texas Medical Malpractice*, 22 HOUS. L. REV. 1, 47 (1985).

In *Williams v. Good Health Plus, Inc.*¹¹⁶ the San Antonio Court of Appeals made it clear that corporations cannot practice medicine.¹¹⁷ In *Good Health* the plaintiff filed suit against a Health Maintenance Organization for injuries to her thumb. The corporation filed for summary judgment on the grounds that they were incapable of practicing medicine in the state of Texas. The court agreed, and held that Health Maintenance Organizations are not liable for the torts of their physicians employed as independent contractors.¹¹⁸ The court further held that under the evidence presented in the case, no liability could exist on the theory that the corporation held itself out as practicing medicine.¹¹⁹ In reaching this conclusion the court noted that the plaintiffs specifically dealt with a group of independent contractors and physicians when receiving the medical care.¹²⁰

B. Proximate Cause

In *Duff v. Yelin*¹²¹ the Texas Supreme Court held that expert testimony must establish proximate cause between the health care provider's negligence and the patient's injuries.¹²² In *Duff* medical testimony showed two possible causes of the patient's injuries, but no indication as to which of the events actually caused the harm. Because the plaintiff failed to show that the two possibilities were the result of negligence, the court upheld judgment in favor of the physician.¹²³

In *Stripling v. McKinley*¹²⁴ the court addressed the necessity of proving that a physician's failure to adequately disclose the risks of surgery proximately caused injuries.¹²⁵ The court held that the patient must show that an adequate disclosure of the risks would have caused the patient to forego the treatment that eventually produced the injuries.¹²⁶ The plaintiff contended that section 6.02 of the Medical Liability and Insurance Improvement Act¹²⁷ removed the proximate cause requirement in a failure to disclose case.¹²⁸ However, the court interpreted section 6.02 as requiring proof of proximate cause.¹²⁹

116. 743 S.W.2d 373 (Tex. App.—San Antonio 1988, no writ).

117. *Id.* at 378.

118. *Id.*

119. *Id.*

120. *Id.*

121. 751 S.W.2d 175 (Tex. 1988).

122. *Id.* at 177.

123. *Id.* A three-judge dissent argued for recovery because testimony showed that the injuries probably occurred while the patient was under anesthesia. *Id.* at 178 (Mauzy, J., dissenting). The hospital personnel thus had complete control and custody of the plaintiff when the injuries probably occurred. *Id.*

124. 746 S.W.2d 502 (Tex. App.—Dallas 1988, writ granted).

125. *Id.* at 505-06.

126. *Id.*

127. TEX. REV. CIV. STAT. ANN. art. 4590i, § 6.02 (Vernon Supp. 1989).

128. 746 S.W.2d at 505.

129. *Id.* at 505-06. The Texas Supreme Court granted application for writ of error on this precise point and the cause was submitted on November 30, 1988.

C. Statute of Limitations

In *Kimball v. Brothers*¹³⁰ the supreme court construed the statute of limitations in medical negligence cases.¹³¹ The Medical Liability and Insurance Improvement Act establishes three events that trigger the running of the statute of limitations: (1) the occurrence of the breach or the tort; (2) the date on which the health care treatment that is the subject of the claim is completed; or (3) the date on which the hospitalization for such claim is made is completed.¹³² *Kimball* arose when the anesthesiologist, Dr. Brothers, experienced difficulty intubating the patient prior to surgery. The prolonged intubation allegedly caused respiratory failure and cardiac insufficiency. Since the cause of action arose from a specific identifiable event, the court found that the statute began to run on the day of the attempted intubation, and not from the date the hospitalization was completed.¹³³ The court rejected arguments that the third provision of the statute permitted the limitations period to run from the date the patient's hospitalization upon which the claim was made ended.¹³⁴ The express language of the statute limited its application to claims based on the hospitalization itself, as opposed to specific acts of negligence committed by a doctor.¹³⁵ A Dallas Court of Appeals case, *Shook v. Herman*,¹³⁶ attempted to clarify the *Kimball* holding in a case arising from alleged negligent performance of eye surgery and negligent follow-up care. In a rather confusing case, the court appeared to hold that the statute of limitations on specific acts of negligence begins to run immediately, even when they were committed in the course of an ongoing misdiagnosis and mistreatment.¹³⁷

In *Helman v. Mateo*¹³⁸ a Houston Court of Appeals reaffirmed that the discovery rule has been abolished in medical negligence cases.¹³⁹ The discovery rule is a common-law doctrine which holds that a statute of limitations tolls until an injured party discovers, or in the exercise of reasonable diligence should have discovered, the existence of a tort.¹⁴⁰ The courts are in general agreement that the legislature abolished the discovery rule in med-

130. 741 S.W.2d 370 (Tex. 1987).

131. *Id.* at 372. The applicable statute of limitations is as follows:

Notwithstanding any other law, no health care liability claim may be commenced unless the action is filed within two years from the occurrence of the breach or tort or from the date the medical or health care treatment that is the subject of the claim or the hospitalization for which the claim is made is completed; provided that minors under the age of 12 years shall have until their 14th birthday in which to file, or have filed on their behalf, the claim. Except as herein provided, this subchapter applies to all persons regardless of minority or other legal disability.

TEX. REV. CIV. STAT. ANN. art. 4590i, § 10.01 (Vernon Supp. 1989).

132. TEX. REV. CIV. STAT. ANN. art. 4590i, § 10.01 (Vernon Supp. 1989).

133. 741 S.W.2d at 372.

134. *Id.*

135. *Id.*

136. 759 S.W.2d 743 (Tex. App.—Dallas 1988, writ requested).

137. *Id.* at 746.

138. 751 S.W.2d 623 (Tex. App.—Houston [1st Dist.] 1988, writ denied).

139. *Id.* at 625.

140. *Gaddis v. Smith*, 417 S.W.2d 577, 580 (Tex. 1967).

ical negligence cases in an attempt to alleviate a perceived medical malpractice insurance crisis.¹⁴¹ *Hellman* reaffirms this analysis and upholds the constitutionality of the statute of limitations so long as it does not extinguish a cause of action before the plaintiff has a reasonable opportunity to discover the wrong and bring suit.¹⁴² This modified discovery rule¹⁴³ holds that as long as a plaintiff can discover the wrong and bring suit within the two-year period, the limitation period runs from the date of the tort or last date of treatment, and not from the date of discovery.¹⁴⁴ *Hellman* makes it clear that a plaintiff relying on the modified discovery rule in response to a motion for summary judgment must raise fact issues concerning the exception.¹⁴⁵ A good example of this is found in *DeLuna v. Rizkallah*¹⁴⁶ where the plaintiffs equivocally argued that they did not have a reasonable opportunity to discover the wrongdoing within the two-year statute of limitations. Relying upon *Neagle v. Nelson*¹⁴⁷ the court in *Deluna* stressed that the limitations section of the Medical Malpractice Improvement Act is unconstitutional when applied to deny plaintiffs the right to sue before they had a reasonable opportunity to discover the negligence.¹⁴⁸ Because the plaintiffs in *Deluna* properly raised fact issues concerning their ability to discover the physician's tort, summary judgment on the statute of limitations was improper.¹⁴⁹

Another exception to the absolute statute of limitations in medical negligence cases is the doctrine of fraudulent concealment. Based on *Borderlon v. Peck*¹⁵⁰ the fraudulent concealment doctrine estops a health care provider from relying on a defense of limitations when the provider fraudulently conceals the plaintiff's cause of action.¹⁵¹ *Evans v. Conlee*¹⁵² is an example of this doctrine. The *Evans* court held that fact issues existed concerning the estoppel effect of the physician continually assuring a patient that a breast deformity would resolve itself.¹⁵³ Because of the fiduciary nature of the doctor-patient relationship, the physician had an affirmative duty to inform his patient of a possible cause of action for negligence.¹⁵⁴

In another fraudulent concealment case, *Lopez v. Hink*,¹⁵⁵ the plaintiff argued that the defendant physician could not rely on the statute of limitations as a defense due to his fraudulent concealment of information that he

141. *Morrison v. Chan*, 699 S.W.2d 205, 208 (Tex. 1985).

142. 751 S.W.2d at 625; see *Morrison*, 699 S.W.2d at 207.

143. The phrase "modified discovery rule" originates with *Tsai v. Wells*, 725 S.W.2d 271, 273 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.) and *Del Rio v. Jinkins*, 730 S.W.2d 125, 127 (Tex. App.—Corpus Christi 1987, writ ref'd n.r.e.). See Branson, *Personal Torts, Annual Survey of Texas Law*, 42 Sw. L.J. 139, 161-62 (1988).

144. 751 S.W.2d at 625.

145. *Id.* at 626.

146. 754 S.W.2d 366 (Tex. App.—Houston [1st Dist.] 1988, writ denied).

147. 685 S.W.2d 11 (Tex. 1985).

148. 754 S.W.2d at 368.

149. *Id.*

150. 661 S.W.2d 907 (Tex. 1983).

151. *Id.* at 908.

152. 741 S.W.2d 504 (Tex. App.—Corpus Christi 1987, no writ).

153. *Id.* at 508.

154. *Id.* at 509.

155. 757 S.W.2d 449 (Tex. App.—Houston [14th Dist.] 1988, no writ).

was required to disclose to the plaintiff.¹⁵⁶ The plaintiff alleged that the defendant failed to inform her that a growth removed by the defendant was benign. The court of appeals affirmed the trial court's grant of the defendant's motion for summary judgment by holding the plaintiff's statement in an affidavit that the defendant never informed her that the growth was benign was insufficient summary judgment proof.¹⁵⁷

*Lenhard v. Butler*¹⁵⁸ also involved construction of the Medical Liability and Insurance Improvement Act. *Lenhard* was a suit by a client against a psychologist on the grounds that he intentionally or negligently gained complete emotional control over her and used his influence to have sexual relations with her. Application of the Act was in question because suit was filed within two years of the date of the last session with the psychologist, but more than two years after the date of the last sexual liaison between the parties. Under the continuing treatment provision of the statute, the plaintiff argued that her lawsuit was timely filed because it was within two years of the date of the last treatment. In rejecting this argument, the court of appeals held that a psychologist is not a health care provider within the meaning of the statute.¹⁵⁹ The Medical Liability and Insurance Improvement Act defines health care providers to include only those duly licensed or chartered by the state to provide health care.¹⁶⁰ Since psychologists are not contained within the list of persons so designated, the continuing treatment exception does not apply, and the patient had only two years to bring her suit against her former therapist.¹⁶¹ *Maddux v. Halipoto*¹⁶² involved the notice provisions of the Medical Liability and Insurance Improvement Act,¹⁶³ and stands for the proposition that a notice of claim letter must be sent to each physician or health care provider against whom a claim is to be made.¹⁶⁴

D. Limitations On Damages

In *Lucas v. United States*¹⁶⁵ the Texas Supreme Court declared unconsti-

156. *Id.* at 449-50.

157. *Id.* at 451.

158. 745 S.W.2d 101 (Tex. App.—Fort Worth 1988, writ denied).

159. *Id.* at 106.

160. The statute states that:

Health care provider means any person, partnership, professional association, corporation, facility, or institution duly licensed or chartered by the State of Texas to provide health care as a registered nurse, hospital, dentist, podiatrist, pharmacist, or nursing home, or an officer, employee, or agent thereof acting in the course and scope of his employment.

TEX. REV. CIV. STAT. ANN. art. 4590i, § 1.03(a)(3) (Vernon Supp. 1989).

161. 745 S.W.2d at 106.

162. 742 S.W.2d 59 (Tex. App.—Houston [14th Dist.] 1987, no writ).

163. The basic notice requirement of the Act is as follows:

Any person or his authorized agent asserting a health care liability claim shall give written notice of such claim by certified mail, return receipt requested, to each physician or health care provider against whom such claim is being made at least 60 days before the filing of a suit in any court of this state based upon a health care liability claim.

TEX. REV. CIV. STAT. ANN. art. 4590i, § 4.01(a) (Vernon Supp. 1989).

164. 742 S.W.2d at 61.

165. 757 S.W.2d 687 (Tex. 1988).

tutional the provisions of the Medical Liability and Insurance Improvement Act¹⁶⁶ placing caps on medical malpractice damages.¹⁶⁷ In *Lucas* the parents of a one-year old child who suffered permanent paralysis in his legs after an injection brought an action against a West Texas army medical center. In a bench trial the court rendered a \$2.9 million judgment in favor of the family, including \$848,000 for medical expenses, \$600,000 in lost earning capacity, and \$1.5 million for pain and suffering.¹⁶⁸ The trial judge refused to reduce the judgment as required by the Medical Liability and Insurance Improvement Act.¹⁶⁹ The act placed a ceiling on non-medical damages in medical negligence cases and contained a mechanism to adjust the ceiling upward in response to rises in the Consumer Price Index.¹⁷⁰ On appeal the Fifth Circuit held that the statute did not violate the due process or equal protection clauses of the United States Constitution.¹⁷¹ The Fifth Circuit certified a question to the Texas Supreme Court to determine whether the statute's limitations on medical negligence damages violated the open courts provision of the Texas Constitution,¹⁷² and whether such limitations applied to the liability of each defendant or to the damages recovered by each claimant.¹⁷³

The supreme court held that the statutory damage caps violated the open courts provision, which guarantees access to the courts to redress injuries caused by another's negligence.¹⁷⁴ Under the open courts provision, courts cannot uphold statutory limits on recognized common law causes of action if the court finds such limits unreasonable or arbitrary when balanced against the purpose and basis of the statute.¹⁷⁵ Utilizing this balancing approach, the court found the caps on medical malpractice damages both unreasonable and arbitrary.¹⁷⁶ The court found the statute arbitrary due to the fact that it failed to provide the injured child with any adequate alternative to obtain redress for his injuries.¹⁷⁷ The court also found that the legislative purpose

166. TEX. REV. CIV. STAT. ANN. art. 4590i, §§ 11.01-11.05 (Vernon Supp. 1989).

167. 757 S.W.2d at 692.

168. 807 F.2d 414, 416 (5th Cir. 1986), *question certified to Texas Supreme Court*, 811 F.2d 270, 271 (5th Cir. 1987).

169. 757 S.W.2d at 688; *see* TEX. CIV. STAT. ANN. art. 4590i, §§ 11.02-.03 (Vernon Supp. 1989).

170. *Id.* TEX. REV. CIV. STAT. ANN. art. 4590i, §§ 11.01, 11.04 (Vernon Supp. 1989).

171. 807 F.2d at 416.

172. TEX. CONST. art. I, § 13 (1876, amended 1984).

173. 811 F.2d at 270. This was the first question certified under such a procedure. 757 S.W.2d at 687; *see* TEX. CONST. art V, § 3-c(b) (1985); TEX. R. APP. P. 114.

174. 757 S.W.2d at 687; *see* TEX. CONST. art. I, § 13 (1876, amended 1984).

175. *Sax v. Votteler*, 648 S.W.2d 661, 666 (Tex. 1983). A litigant challenging a statute on grounds that it violates the open courts provision must prove that: (1) he had an established common law cause of action, and (2) the restrictions upon that cause of action are unreasonable in light of the litigant's right to redress balanced against the purpose of the challenged legislation. *Id.*

176. 757 S.W.2d at 690-92.

177. *Id.* The court noted that in two jurisdictions where courts have upheld damage caps, the statutes also contained alternative remedies for injured victims. This fact strongly influenced the decisions to uphold the caps. *See Johnson v. St. Vincent Hosp., Inc.*, 273 Ind. 274, 404 N.E.2d 585, 598-601 (1980); *Sibley v. Board of Supervisors*, 462 So. 2d 149, 154-58 (La. 1985). In Texas the legislature failed to adopt alternative remedies. 757 S.W.2d at 691.

behind the statute rendered it unreasonable.¹⁷⁸ The court characterized the statute as a speculative experiment to determine whether the statutory caps would have the effect of lowering liability insurance rates.¹⁷⁹ While the court paid deference to the noble statutory goals, it refused to burden severely injured victims with the cost of alleviating the liability insurance crisis in the health care industry.¹⁸⁰

E. Professional Negligence — Accountants

*Greenstein, Logan & Co. v. Burgess Marketing, Inc.*¹⁸¹ dealt with a professional malpractice action filed against a group of accountants. In *Greenstein* an accounting firm attempted to use a client's misconduct as a contributory negligence defense. The court of appeals rejected this defense.¹⁸² Relying on a Nebraska Supreme Court case¹⁸³ and a Seventh Circuit case,¹⁸⁴ the court established a rule that an accountant can only use a client's contributory negligence as a defense in an accounting malpractice case when the client has contributed to the accountant's failure to properly audit and carry out his duties.¹⁸⁵ The court suggested that to hold otherwise would shield accountants from liability for their negligence merely because their clients also engaged in negligent conduct.¹⁸⁶

III. PRODUCT LIABILITY

A. Duty

Several cases decided during the Survey period dealt with the duties owed by liquor manufacturers and distributors.¹⁸⁷ In *Malek v. Miller Brewing Co.*¹⁸⁸ the court held that a brewer owed no duty to warn consumers concerning the dangers of driving after consuming beer.¹⁸⁹ The court first noted that strict liability doctrine specifically excludes alcoholic beverages from the class of unreasonably dangerous products.¹⁹⁰ The court held that due to the general public awareness of the dangers of drunk driving, the law imposes no

178. 757 S.W.2d at 691.

179. *Id.*

180. *Id.* at 692 (citing *Carson v. Mauer*, 120 N.H. 925, 424 A.2d 825, 837 (1980)).

181. 744 S.W.2d 170 (Tex. App.—Waco 1987, writ denied).

182. *Id.* at 190.

183. *Lincoln Grain, Inc. v. Coopers & Lybrand*, 216 Neb. 433, 345 N.W.2d 300, 306-309 (Neb. 1984).

184. *Cenco, Inc. v. Seidman & Seidman*, 686 F.2d 449, 456 (7th Cir. 1982), *cert. denied*, 459 U.S. 880 (1982).

185. 744 S.W.2d at 190.

186. *Id.*

187. See *infra* notes 188-197 and accompanying text. See *Malek v. Miller Brewing Co.*, 749 S.W.2d 521, 524 (Tex. App.—Houston [1st Dist.] 1988, writ denied); *Brune v. Brown Forman Corp.*, 758 S.W.2d 827, 829 (Tex. App.—Texarkana 1988, no writ); *Morris v. Adolph Coors Co.*, 735 S.W.2d 578, 583 (Tex. App.—Fort Worth 1987, writ ref'd n.r.e.).

188. 749 S.W.2d 521 (Tex. App.—Houston [1st Dist.] 1988, writ denied).

189. *Id.* at 524.

190. *Id.* at 522. The court noted that RESTATEMENT (SECOND) OF TORTS § 402a, comment (i) (1965) imposes liability only if the product is "dangerous to an extent beyond that which would be contemplated by the ordinary consumer. . . [g]lood whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to

duty upon brewers to warn consumers of the dangers involved in drinking and driving.¹⁹¹ In a similar case, *Morris v. Adolph Coors Co.*,¹⁹² the court of appeals held that a brewer had no duty to warn of the dangers of drunk driving.¹⁹³ The court based its decision on the presumption that the ordinary consumer with ordinary knowledge common to the community knows or should know the hazards of driving while intoxicated.¹⁹⁴

*Brune v. Brown Forman Corp.*¹⁹⁵ presents an interesting contrast to the *Malek* and *Morris* cases. In *Brune* the court reversed a summary judgment granted in favor of a liquor manufacturer on the grounds that fact issues existed concerning the safety of excessive Tequila consumption.¹⁹⁶ This case dealt with the manufacturer's duty to warn consumers concerning the risks of alcohol poisoning. While the average layman should possess an awareness of the hazards of drunk driving, other dangers associated with alcohol use, such as acute alcohol poisoning, may impose a duty upon an alcohol manufacturer to give adequate warnings.¹⁹⁷

B. Stream of Commerce

*O'Neal v. Sherck Equipment Co.*¹⁹⁸ reaffirmed the rule that strict products liability attaches to every party in the business of supplying products who places such products into the stream of commerce.¹⁹⁹ In *O'Neal* an employee brought suit for injuries he received as a result of an unreasonably dangerous backhoe. The court of appeals noted that strict products liability extends to any party introducing defective products into the stream of commerce.²⁰⁰ Relying on *Rourke v. Garza*²⁰¹ the court held that strict liability can apply to lessors that make defective products available to the public.²⁰² In another case, *Graziadei v. D.D.R. Machine Co.*,²⁰³ the court makes it clear that the plaintiff must obtain a jury finding on issues concerning a defendant's actions in placing a product into the stream of commerce.²⁰⁴

alcoholics. . . ." *Id.* at 522. (quoting RESTATEMENT (SECOND) OF TORTS § 402a, comment (i) (1965)).

191. *Id.* at 523-24.

192. 735 S.W.2d 578 (Tex. App.—Fort Worth 1987, writ ref'd n.r.e.).

193. *Id.* at 583.

194. *Id.*

195. 758 S.W.2d 827 (Tex. App.—Corpus Christi 1988, writ granted).

196. *Id.* at 831.

197. *Id.* at 829.

198. 751 S.W.2d 559 (Tex. App.—Texarkana 1988, no writ).

199. *Id.* at 561; see *Rourke v. Garza*, 530 S.W.2d 794, 800 (Tex. 1975) (party in business of introducing products into stream of commerce subjected to strict liability whether such products are leased or sold).

200. 751 S.W.2d at 561.

201. 530 S.W.2d 794, 800 (Tex. 1975).

202. 751 S.W.2d at 561. The court went on to hold the leasing company liable for defects in the product even though the defects did not exist at the time the product was manufactured. *Id.* at 562.

203. 740 S.W.2d 52 (Tex. App.—Dallas 1987, writ denied).

204. *Id.* at 56.

C. Market Share Liability

In *Gaulding v. Celotex Corp.*²⁰⁵ a court of appeals held that plaintiffs cannot impose collective or market share liability against a group of manufacturers, one of which may have manufactured the defective product.²⁰⁶ In *Celotex* the plaintiffs stipulated that they could not determine which of the defendants actually manufactured an injury causing asbestos board.²⁰⁷ The plaintiff urged the court to adopt the rule in a few other jurisdictions that allows a plaintiff, unable to precisely identify the party causing his injury, to bring a collective action against a group of potential tortfeasors in the same industry.²⁰⁸ The court of appeals affirmed a summary judgment in favor of the defendants on the grounds that Texas does not recognize alternative liability, collective liability, marketing share liability, enterprise liability, or concert of action in products liability cases.²⁰⁹ Noting that the asbestos board had been purchased secondhand more than thirty years prior to the commencement of the suit, the court relied upon an Oklahoma Supreme Court decision²¹⁰ in declining to impose collective liability against a group of defendants, only one of which could have possibly caused the injury.²¹¹

D. Defenses

In *Keen v. Ashot Ashkelon, Ltd.*²¹² the supreme court held that a manufacturer could not use a plaintiff's negligent act of placing himself too close to a defective trailer as a defense to reduce the amount of the damage award against the manufacturer.²¹³ Daryl Keen, a hostler driver, parked his vehicle too close to a leaning trailer.²¹⁴ The trailer toppled over onto him causing serious injuries. The trailer manufacturer argued that Keen's contributory negligence of voluntarily placing himself in a danger zone created by the defective trailer should have reduced the damage award. The supreme court rejected this approach holding that Keen's negligence consisted of a failure to guard against a product defect.²¹⁵ The court found that since Keen had no knowledge of the particular defect causing the accident, his failure to guard against a product defect could not be used as a bar to his

205. 748 S.W.2d 627 (Tex. App.—Eastland 1988, writ granted).

206. *Id.* at 628-29.

207. *Id.* at 627.

208. See *Hall v. E.I. Dupont de Nemours & Co.* 345 F. Supp. 353, 376-78 (E.D.N.Y. 1972); *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 612-13, 607 P.2d 924, 937-38, 163 Cal. Rptr. 132, 145-46 (1980), *cert. denied*, 449 U.S. 912 (1980); *Abel v. Eli Lilly & Co.*, 418 Mich. 311, 343 N.W.2d 164, 174 (1984); *Bichler v. Eli Lilly & Co.*, 55 N.Y.2d 571, 584-85, 436 N.E.2d 182, 188, 450 N.Y.S.2d 776, 782-83 (1982). The courts in these cases recognized the market share or enterprise liability theory.

209. 748 S.W.2d at 628.

210. *Case v. Fiberboard Corp.*, 743 P.2d 1062, 1064-1067 (Okla. 1987).

211. 748 S.W.2d at 628.

212. 748 S.W.2d 91 (Tex. 1988).

213. *Id.* at 93.

214. A hostler is a motorized vehicle used to pull a loaded trailer from one area in the yard to another. *Id.* at 91.

215. *Id.* at 93.

recovery.²¹⁶

In *Ahlschlager v. Remington Arms Co.*²¹⁷ the court held that the manufacturer of a rifle was entitled to a jury instruction on a sole proximate cause defense to a product liability action.²¹⁸ Michael Ahlschlager suffered a leg wound when a companion's rifle fired unexpectedly on a hunting trip. The parties disputed over competing theories regarding the cause of the accident. The rifle manufacturer alleged that the companion inadvertently fired the gun, believing it to be unloaded. The trial court gave a jury instruction on the defendant's theory that the companion's negligence was the sole cause of the incident. In affirming the propriety of the instruction, the court of appeals held that the rifle manufacturer had presented evidence showing that the third party solely caused the accident.²¹⁹ That evidence entitled the manufacturer to have the jury consider such a defense.²²⁰

In *Hurley v. Lederle Laboratories Division of American Cyanamid Co.*²²¹ the court dealt with the issue of federal preemption.²²² The plaintiff sought to recover for an infant's severe neurological injuries allegedly caused by an adverse reaction to a DPT vaccine. The trial court granted a partial summary judgment in favor of the defendant on the grounds that federal labeling requirements preempted state common law actions against vaccine manufacturers based on inadequate warnings.²²³ In overturning the summary judgment, the Fifth Circuit held that the Federal Food, Drug and Cosmetic Act²²⁴ and the Public Health Service Act²²⁵ did not preempt state law claims based on a breach of the duty to warn of a product's dangers.²²⁶ The court found that none of the relevant federal statutes explicitly preempted Texas tort law.²²⁷ The court also rejected implicit preemption because FDA regulations did not prevent states from implementing common law duties regarding warnings of products risks.²²⁸ The court further considered and dismissed arguments that public health service vaccination programs implic-

216. *Id.* at 93; see *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 432 (Tex. 1984) ("negligent failure to discover or guard against a product defect is not a defense [in a products liability action]"). Chief Justice Phillips dissented on the grounds that Keen's conduct amounted to more than "a mere failure to discover or guard against a product defect." 748 S.W.2d at 94. Moreover, Phillips would adopt a system of pure comparative causation allowing the trier of fact to consider all negligent conduct when apportioning responsibility. *Id.* at 96. In a separate dissent, Justice Gonzalez would have upheld the court of appeals ruling that the jury's finding of contributory negligence should have reduced the damage award. *Id.*

217. 750 S.W.2d 832 (Tex. App.—Houston [14th Dist.] 1988, writ denied).

218. *Id.* at 835-36.

219. *Id.*

220. *Id.*

221. 863 F.2d 1173 (5th Cir. 1988).

222. *Id.* at 1176-80.

223. *Hurley v. Lederle Laboratories Div. of Am. Cyanamid Co.*, 651 F. Supp. 993, 998-1001, 1007-08 (E.D. Tex. 1988), *rev'd*, 863 F.2d 1173 (5th Cir. 1988). For a discussion of the district court opinion, see Branson, *Personal Torts, Annual Survey of Texas Law*, 42 Sw. L.J. 139, 147 (1988).

224. 21 U.S.C. §§ 301-392 (1982 & Supp. IV 1986).

225. 42 U.S.C. §§ 201-300 (1982 & Supp. III 1985).

226. 863 F.2d at 1176.

227. *Id.* at 1176-77.

228. *Id.*

itly supplanted state product liability law and found evidence that Congress did not intend to preempt state tort law in this area.²²⁹

Another Fifth Circuit case, *McGonigal v. Gearhart Industries, Inc.*,²³⁰ involved injuries sustained by Army personnel when a grenade prematurely exploded. Two sergeants, Lane McGonigal and Mark Thompson, suffered severe injuries when a hand grenade exploded unexpectedly during training. The service-men filed suit against the company that assembled the grenade on the theory that the organization failed to adequately inspect the grenade fuses before providing them to the military. The assembler sought to escape liability on the grounds that it had immunity as a government contractor. Relying on a recent United States Supreme Court case, *Boyle v. United Technologies Corp.*,²³¹ the contractor claimed that it had no responsibility for the loss due to the fact that it adhered to the requirements of the military contract. The court distinguished *Boyle* and held that the immunity for design defects outlined in *Boyle* does not extend to cases arising from the mismanufacture of military equipment.²³² Since the plaintiffs based their theory of liability in the case on the contractor's failure to meet government manufacturing specifications, the defendants could not use the defense of government contractor immunity.²³³

IV. DAMAGES

A. Mental Anguish

*Freeman v. City of Pasadena*²³⁴ arose from an automobile accident in which four Pasadena youths sustained serious injuries when their car ran into a drainage ditch. The jury awarded damages to the stepfather of two of the boys injured in the accident, including compensation for mental anguish suffered as a result of his visit to the scene. The evidence showed that Mr. Freeman did not witness the accident and that he learned of it only when an unidentified person rang his doorbell and told him about the catastrophe. When he went to the scene, Mr. Freeman saw the emergency vehicles and the crushed automobile and viewed one of his stepsons covered in blood lying on a stretcher. In upholding the court of appeals take-nothing judgment, the supreme court held as a matter of law that Mr. Freeman had no cause of action for emotional harm suffered as a result of visiting the accident scene.²³⁵ Relying on the California Supreme Court case of *Dillon v. Legg*,²³⁶ the court explicitly adopted the *Dillon* three-prong test that plain-

229. *Id.* at 1177. The court considered the recent National Childhood Vaccine Injury Act, 42 U.S.C. § 300aa -33 (Supp. IV 1986) as evidence that Congress did not intend to preempt state law with respect to the products liability of vaccine manufacturers.

230. 851 F.2d 774 (5th Cir. 1988).

231. 108 S. Ct. 2510, 2518, 101 L. Ed. 2d 442, 458 (1988).

232. 851 F.2d at 777; see *Bynum v. FMC Corp.*, 770 F.2d 556, 573 n.21, 574 (5th Cir. 1985) (governmental immunity for defense contractors not applicable when injuries caused by manufacturing defects).

233. 851 S.W.2d at 777.

234. 744 S.W.2d 923 (Tex. 1988).

235. *Id.*

236. 68 Cal. 2d 728, 441 P.2d 912, 919-20, 69 Cal. Rptr. 72, 79-81 (1968).

tiffs must meet in order to recover mental anguish damages as a bystander.²³⁷ Since the stepfather did not actually witness the accident or experience shock by unwittingly coming onto the accident scene, the court considered his emotional shock not reasonably foreseeable.²³⁸ In his concurring opinion Justice Ray explained that the supreme court affirmed the court of appeal's decision on the bystander theory and did not endorse the appellate court's theory that step-parents could not recover for mental anguish damages suffered as bystanders because of a missing blood relationship.²³⁹

In another bystander case, *National County Mutual Fire Insurance Co. v. Howard*,²⁴⁰ the court considered the question of whether a wife can recover damages for mental anguish when she is not involved in an accident and does not meet the *Freeman* test requirements for bystander mental anguish recoveries. In *Howard* a dump truck driver smashed into Arthur Riley's vehicle from behind. The dump truck demolished the smaller vehicle and pinned Mr. Riley within the wreckage. A witness to the accident informed Riley's wife that her husband had been in an accident and brought her to the scene of the collision. Mr. Riley remained pinned in the vehicle until after his wife arrived and she spoke to him while he was still trapped in the wreckage. In reversing the award for mental anguish damages, the court of appeals held that Mrs. Riley could not recover such damages because she had not contemporaneously perceived the tragedy.²⁴¹

Two Fifth Circuit cases, *Snyder v. Whittaker Corp.*²⁴² and *In re Air Crash at Dallas/Fort Worth Airport*,²⁴³ dealt with other facets of Texas mental anguish recoveries. In *Snyder* the court found sufficient evidence to support a jury's award for pain and suffering experienced by the doomed members of a Texas shrimp boat.²⁴⁴ The jury awarded damages to the families of two members of a capsized shrimp boat for the mental anguish and suffering experienced by the shrimpers during their ordeal. The court upheld the jury award based on testimony from one witness who saw figures clinging to the ruptured hull and other evidence indicating that weather conditions would have permitted a man to survive from eight to twenty hours in the water on the night of the accident.²⁴⁵ The court found it reasonable for the jury to infer that the two men struggled in the water for several hours after their

237. 744 S.W.2d at 923. The relevant portion of the *Dillon* test reads as follows:
In determining . . . whether defendant should reasonably foresee the injury to plaintiff . . . the court's will take into account such factors as the following: (1) Whether plaintiff was located near the scene of the accident . . . (2) Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident . . . (3) Whether plaintiff and the victim were closely related . . .

Dillon, 68 Cal. 2d at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80.

238. 744 S.W.2d at 924.

239. *Id.*

240. 749 S.W.2d 618 (Tex. App.—Fort Worth 1988, writ denied).

241. *Id.* at 622.

242. 839 F.2d 1085 (5th Cir. 1988).

243. 856 F.2d 28 (5th Cir. 1988).

244. 839 F.2d at 1092-93.

245. *Id.*

boat capsized.²⁴⁶ Analogizing the facts of this case to jury awards for mental anguish injuries for relatively short pre-impact suffering in plane crashes, the court approved the jury's verdict.²⁴⁷

In a more complicated case, *In Re Air Crash at Dallas/Fort Worth Airport*,²⁴⁸ the Fifth Circuit attempted to predict whether Texas courts would allow minor children to recover damages for mental anguish, loss of society, and loss of familial relationship because of their mother's severe brain damage.²⁴⁹ Linda McGee Ford suffered severe and permanent brain damage as a result of the 1985 air disaster at Dallas/Fort Worth International Airport. Her two minor children brought suit for lost parental support, care, and maintenance, as well as for mental anguish and emotional trauma.²⁵⁰ The trial court granted Delta Airline's motion for summary judgment on the grounds that Texas law did not provide a cause of action for such injuries when the parent does not die in an accident. In upholding the summary judgment, the Fifth Circuit made an "Erie guess"²⁵¹ that the Texas Supreme Court would not allow recovery for such damages.²⁵² While the court recognized that the Texas Supreme Court had recently expanded the remedies available for injured parties, the court held that under Texas law minor children of living parents do not have a cause of action for loss of society, diminished family relationships, or mental anguish.²⁵³

*Trailways, Inc. v. Mendoza*²⁵⁴ dealt with the loss of future earnings capacity. Juan Mendoza suffered a loss of earning capacity because of injuries arising out of a bus wreck. The court upheld a jury verdict awarding damages for his lost future earning capacity despite the fact that Mr. Mendoza made more money after the accident than he did before his injuries.²⁵⁵ The court pointed out that an increased present income does not prohibit recovery for the lost ability to earn more in the future.²⁵⁶

In *Lopez v. City Towing Associates, Inc.*²⁵⁷ the court made it clear that the estate of a decedent killed by another's negligence has no cause of action for lost future earnings.²⁵⁸ Under the Texas Survival Statute,²⁵⁹ a claimant's cause of action survives to his or her estate, and the legal representative and heirs may prosecute such an action.²⁶⁰ While the estate may recover all of a

246. *Id.*

247. *Id.*

248. 856 F.2d 28 (5th Cir. 1988).

249. *Id.* at 29.

250. *Id.*

251. See *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 64 (1938).

252. 856 F.2d at 31.

253. *Id.* One should note that the case did not discuss bystander recovery since the children did not witness the accident. For a comprehensive summary of Texas wrongful death and survival action damages in another case arising from the crash of Delta Flight 191, see *Larsen v. Delta Airlines, Inc.*, 692 F. Supp. 714, 718-20 (S.D. Tex. 1988).

254. 745 S.W.2d 63 (Tex. App.—San Antonio 1987, no writ).

255. *Id.* at 69.

256. *Id.*

257. 754 S.W.2d 254 (Tex. App.—San Antonio 1988, writ denied).

258. *Id.* at 260.

259. TEX. CIV. PRAC. & REM. CODE ANN. § 71.021 (Vernon 1985).

260. *Id.*

decedent's losses incurred prior to death,²⁶¹ the cause of action that survives does not include the right to recover for lost future earnings.²⁶² While the *Lopez* court correctly noted that an estate cannot recover lost future earnings, the beneficiaries may recover wrongful death damages for loss of inheritance.²⁶³

B. Exemplary/Punitive Damages

In Texas punitive or exemplary damage awards serve the purpose of punishing grossly negligent defendants and deterring similar conduct in the future.²⁶⁴ Several cases during the Survey period developed this area of the law. *Birchfield v. Texarkana Memorial Hospital*²⁶⁵ reaffirmed that plaintiffs can use evidence of a defendant's subjective knowledge to prove gross negligence.²⁶⁶ In *Birchfield* the plaintiff offered testimony showing that the hospital involved knew that its practices could cause blindness in new born infants due to excessive administration of oxygen. The court held admissible evidence that a doctor's prediction at a hospital meeting that the hospital would have a problem with blindness in new born infants unless the hospital took steps to improve pediatric facilities.²⁶⁷ The court also held admissible into evidence other cases of oxygen-related blindness at the hospital to show the hospital's conscious indifference to the hazards created by its conduct.²⁶⁸

Birchfield gains added significance when coupled with *Lunsford v. Morris*.²⁶⁹ In *Lunsford* the Texas Supreme Court allowed pre-trial discovery of a defendant's net worth in a gross negligence case.²⁷⁰ *Lunsford* overruled a one hundred year old precedent prohibiting discovery and admission of evidence concerning a defendant's net worth.²⁷¹ The court held that in cases involving punitive or exemplary damage claims parties may discover and offer evidence of a defendant's net worth.²⁷² The court's rationale stemmed from the relevance of a defendant's financial resources to the issue of adequate punishment and deterrence.²⁷³ Such reasoning fit neatly into the *Birchfield* framework allowing evidence of a defendant's financial condition in order to show its ability to take proper remedial actions.²⁷⁴

A court of appeals opinion also had a bearing on exemplary damages.

261. See *Bedgood v. Madalin*, 600 S.W.2d 773, 773 (Tex. 1980).

262. See *Yowell v. Piper Aircraft Corp.*, 703 S.W.2d 630, 632 (Tex. 1986).

263. 754 S.W.2d at 260.

264. *Hofer v. Lavender*, 679 S.W.2d 470, 474 (Tex. 1984).

265. 747 S.W.2d 361 (Tex. 1987).

266. *Id.* at 365; see *Williams v. Steves Indus., Inc.*, 699 S.W.2d 570, 573 (Tex. 1985).

267. 747 S.W.2d at 365.

268. *Id.*

269. 746 S.W.2d 471 (Tex. 1988).

270. *Id.* at 473.

271. *Id.* at 471-72. In *Young v. Kuhn*, 71 Tex. 645, 651-53, 9 S.W. 860, 862-63 (1888), the Texas Supreme Court held inadmissible any evidence offered to show the financial resources of a defendant in a tort action.

272. 746 S.W.2d at 473.

273. *Id.* at 472.

274. 747 S.W.2d at 366.

*Fort Worth Cab & Baggage Co. v. Salinas*²⁷⁵ held that the standard of review for examining exemplary damages awards requires courts to consider a number of factors including the nature and character of the wrongful conduct, the degree of fault on the part of the defendant, the circumstances surrounding the incident and the sensitivity of the injured party, and the offensiveness of the conduct to the public's sense of justice.²⁷⁶ The opinion did not create a new approach for reviewing gross negligence damages, but reaffirmed the standard used in such damage awards.

C. Pre-Judgment Interest

In 1985, the Texas Supreme Court permitted for the first time the recovery of pre-judgment interest on personal injury damages.²⁷⁷ Quite understandably both courts and litigants have struggled with the application of this new element of recovery. *Federal Pacific Electric Co. v. Woodend*²⁷⁸ demonstrates this difficulty. Since the *Cavnar* opinion recognized that pre-judgment interest as an element of a plaintiff's damages in personal injury suits applied to all cases still in the judicial process, a number of litigants remain eligible for its application.²⁷⁹ As stressed in previous supreme court cases, however, this retroactive grant of pre-judgment interest did not excuse plaintiff's from the requirement that they plead this element of damages.²⁸⁰ *Woodend* exemplifies this line of cases and suggests that court's typically construe a general pleading asking for interest as a request for post-judgment interest.²⁸¹ Court's especially favor this construction when the plaintiff asks that interest be compounded annually (the method used for calculating interest on the judgment) as opposed to asking that interest be compounded daily (the pre-judgment calculation).²⁸² Absent pleading or post-verdict trial amendments, parties cannot recover pre-judgment interest.²⁸³

Two Texas Supreme Court cases dealt with pre-judgment interest in the workers' compensation context. *Jones v. Liberty Mutual Insurance Co.*²⁸⁴ held that a workers' compensation insurance carrier cannot recover pre-judgment interest under the portions of the Workers Compensation Act²⁸⁵ allowing a recovery from third parties.²⁸⁶ The court held that the act explic-

275. 735 S.W.2d 303 (Tex. App.—Fort Worth 1987, no writ).

276. *Id.* at 306 (citing *Tatum v. Preston Carter Co.*, 702 S.W.2d 186, 188 (Tex. 1986) and *Alamo Nat'l Bank v. Kraus*, 616 S.W.2d 908, 910 (Tex. 1981)).

277. *Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d 549 (Tex. 1985), *holding limited in Steves Sash & Door Co. v. Ceco Corp.*, 751 S.W.2d 473, 476 (Tex. 1988).

278. 735 S.W.2d 887 (Tex. App.—Fort Worth 1987, no writ).

279. 696 S.W.2d at 555.

280. *See Vidor Walgreen Pharmacy v. Fisher*, 728 S.W.2d 353, 353 (Tex. 1987) (prejudgment interest disallowed due to plaintiff's failure to plead it as element of damages); *Benavides v. Isles Constr. Co.*, 726 S.W.2d 23, 25 (Tex. 1987) (recognizing rule that parties must specifically plead prejudgment interest).

281. 735 S.W.2d at 896.

282. *Id.*; 696 S.W.2d at 554.

283. 735 S.W.2d at 896.

284. 745 S.W.2d 901 (Tex. 1988).

285. TEX. REV. CIV. STAT. ANN. art. 8307, § 6(a) (Vernon Supp. 1989).

286. 745 S.W.2d at 903.

itly limited compensation carriers' recovery to past compensation, medical benefits, and attorneys fees.²⁸⁷ Since the act does not specifically allow for recovery of pre-judgment interest, the court could not uphold such an award.²⁸⁸ In *Moseley v. State Department of Highways and Public Transportation*²⁸⁹ the court underscored this point and prohibited a self-insured state agency from recovering pre-judgment interest in an identical subrogation situation.²⁹⁰

V. CONTRIBUTION AND INDEMNITY

A. Contribution

*International Proteins Corp. v. Ralston-Purina Co.*²⁹¹ dealt with a joint tortfeasor who settled and took an assignment of the plaintiff's cause of action and then sought contribution from a non-settling defendant. Barkley Feed & Seed sued International Proteins Corporation (IPC) and Ralston-Purina Company (Purina) for damages arising from Barkley's purchase of contaminated feed. Before trial, Purina entered into a settlement with Barkley that included an assignment to Purina of any damages that Barkley might recover from a third party. On appeal, Purina argued that it was entitled to contribution amounting to thirty percent of the damages on the basis of the jury's finding IPC thirty percent responsible for Barkley's injuries. Relying on the rule recently announced in *Beech Aircraft Co. v. Jinkins*,²⁹² the court held that the mere assignment of a plaintiff's cause of action to a settling defendant does not entitle the settling defendant to seek contribution from non-settling defendants.²⁹³ While the general rule allows parties to assign causes of action, the court found that public policy prohibited joint tortfeasors from purchasing a plaintiff's cause of action.²⁹⁴ The court held that Purina could only settle its proportionate share of liability and could not seek contribution by means of taking an assignment of Barkley's right to recover from IPC.²⁹⁵

In *State Department of Highways & Public Transportation v. Pruitt*²⁹⁶ the Tyler court of appeals concluded that settling defendants must remain in the primary lawsuit in order for non-settling defendants to have their contribu-

287. *Id.*

288. *Id.* at 902.

289. 748 S.W.2d 226 (Tex. 1988).

290. *Id.*

291. 744 S.W.2d 932 (Tex. 1988).

292. 739 S.W.2d 19 (Tex. 1987). In *Beech Aircraft* the defendants in a products liability action arising from an air crash settled with one of the co-plaintiffs and obtained an assignment of that plaintiff's contribution claim against the other plaintiff. The court held that a settling co-defendant cannot preserve contribution rights by means of taking an assignment from a plaintiff. *Id.* at 22.

293. 744 S.W.2d at 934.

294. *Id.*

295. *Id.*; see *Beech Aircraft Corp. v. Jinkins*, 739 S.W.2d 19, 22 (Tex. 1987). For an example of a similar application of the *Jinkins* rule, see *Texas Distributions, Inc. v. Texas College*, 747 S.W.2d 371 (Tex. 1987).

296. 752 S.W.2d 598 (Tex. App.—Tyler 1988, no writ).

tion claims determined.²⁹⁷ The dispute in this case arose when the City of Timpson, one of the defendants, settled with the plaintiff. The State of Texas, another defendant, filed a cross-action against the city. The trial court denied the state the opportunity to have the issue of the city's negligence submitted to the jury. The court of appeals found reversible error in the trial court's refusal to submit instructions to the jury concerning the city's negligence for the purpose of comparative causation.²⁹⁸

B. Indemnity

*B-F-W Construction Co. v. Garza*²⁹⁹ concerns the express negligence doctrine adopted by the Texas Supreme Court in *Ethyl Corp. v. Daniel Construction Co.*³⁰⁰ Under *Ethyl* parties seeking indemnification for their own negligence must expressly and specifically state that intent within the indemnity contract.³⁰¹ The document under consideration in *B-F-W Construction* provided that the subcontractor would indemnify the general contractor in all circumstances. The court of appeals found that such language was unambiguous and that it met the *Ethyl* test.³⁰²

*Kirby Forest Industries, Inc. v. Dobbs*³⁰³ involved another unambiguous indemnity contract in which the court reiterated the *Ethyl* rule.³⁰⁴ The court further held that defendants must plead and prove the affirmative defenses of concurrent or contributory negligence to an indemnity contract.³⁰⁵ The indemnitor in *Kirby* failed to meet this burden by filing only a general denial.³⁰⁶

VI. IMMUNITY

A. Texas Tort Claims Act

Two court of appeals cases dealt with the state's liability for unsafe highway conditions. In *State Department of Highways & Public Transportation v. Bacon*³⁰⁷ the court held that the state's failure to warn of known hazardous road conditions can subject it to liability.³⁰⁸ The suit arose when Janice Bacon, her mother, and her husband sustained serious injuries in a head-on collision caused by ice on the road. The jury found no negligence on the part of the driver and also found that none of the plaintiffs had actual knowledge of the ice covering the bridge where the accident occurred. The jury found

297. *Id.* at 600.

298. *Id.* at 602.

299. 748 S.W.2d 611 (Tex. App.—Fort Worth 1988, no writ).

300. 725 S.W.2d 705, 708 (Tex. 1987).

301. *Id.*; see Branson *Personal Torts, Annual Survey of Texas Law*, 42 Sw. L.J. 139, 158-59 (1988).

302. 748 S.W.2d at 613.

303. 743 S.W.2d 348 (Tex. App.—Beaumont 1987, writ denied).

304. *Id.* at 354.

305. *Id.*

306. *Id.*

307. 754 S.W.2d 279 (Tex. App.—Texarkana 1988, writ denied).

308. *Id.* at 281.

that the State Highway Department had actual knowledge of the icy condition of the bridge and breached its duty of care to the plaintiffs by failing to warn the public of the dangerous condition. The court analogized the duty owed by the state to motorists on state highways to the duty owed to licensees by owners of private property.³⁰⁹ When premises owners have actual knowledge of a dangerous condition and a licensee does not, the premises owner must either warn of the condition or take reasonable steps to eliminate or alleviate the condition.³¹⁰ Since the evidence supported the jury's findings that the vehicle drivers lacked knowledge of the icy conditions present on the bridge, the court upheld jury's verdict.³¹¹

In *Shives v. State*³¹² the El Paso court of appeals held that the state could not be liable for the defective design of a highway intersection.³¹³ The court first noted that the suit involved an intersection that had been constructed fourteen years prior to the effective date of the provisions of the Texas Tort Claims Act³¹⁴ that waive immunity for certain governmental activities.³¹⁵ Since the waiver only applied to acts and omissions occurring after January 1, 1970, the court held that the waiver did not apply in this case.³¹⁶ The court further held that since the plaintiff based his claims on the state's negligence in installing stop signs and stop bars on the roadway, the statutory exemptions for discretionary traffic control decisions prohibited the suit.³¹⁷ Under the statutory provisions in effect at the time of the collision, plaintiffs could not sue the government for its failure to perform actions not required by law.³¹⁸ In addition, specific grants of immunity covered the state's failure to initially place traffic signs, signals, and devices properly, and such omissions did not give rise to a cause of action against the state.³¹⁹

In *Bourne v. Nueces County Hospital District*³²⁰ the court considered the question of the state's liability for discharging a mental patient from institutional care. The case involved the wrongful deaths of a father and daughter when a family member recently released from a mental hospital set fire to their house. The plaintiffs based their theory of liability on the premise that the county hospital district had used tangible property, in this case its psychiatric ward, by discharging the patient.³²¹ The court rejected this approach noting that the true allegations concerned the hospital district's non-

309. *Id.*

310. *Id.*

311. *Id.* at 281-82.

312. 743 S.W.2d 714 (Tex. App.—El Paso 1987, writ denied).

313. *Id.* at 716.

314. TEX. REV. CIV. STAT. ANN. art. 6252-19, § 14 (repealed 1985), *recodified at* TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.021-.028 (Vernon 1986 & Supp. 1988).

315. *Id.*

316. 743 S.W.2d at 716.

317. *Id.* at 717. TEX. REV. CIV. STAT. ANN. art. 6252-19, § 14(12) (repealed 1985), *recodified at* TEX. CIV. PRAC. & REM. CODE ANN. § 101.060 (Vernon 1986).

318. 743 S.W.2d at 716; TEX. REV. CIV. STAT. ANN. art. 6252-19, § 14(7) (repealed 1985), *recodified at* TEX. CIV. PRAC. & REM. CODE ANN. § 101.056 (Vernon 1986).

319. 743 S.W.2d at 716; TEX. REV. CIV. STAT. ANN. art. 6252-19, § 14(12) (repealed 1985), *recodified at* TEX. CIV. PRAC. & REM. CODE ANN. § 101.060 (Vernon 1986).

320. 749 S.W.2d 630 (Tex. App.—Corpus Christi 1988, writ denied).

321. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.021 (Vernon 1986 & Supp. 1989)

use of its mental facilities.³²² The gravamen of the complaint was that the state did not confine the schizophrenic family member in the hospital district's building; as such, the complaint alleged a non-use, which did not give rise to a cause of action under the Texas Tort Claims Act.³²³

On a separate issue, the court in *Bourne* held that the emergency room records compiled in the case did not satisfy the statutory notice provisions required in a suit against the government.³²⁴ The plaintiff argued that the emergency room records of injuries arising from the fire constituted actual notice of the pending claim. The court disagreed reasoning that the governmental unit must have notice of their potential culpability as well as the plaintiff's intent to file a claim.³²⁵

Two cases decided during the Survey period involved school bus accidents. In *Mount Pleasant I.S.D. v. Estate of Lindburg*³²⁶ a school bus driver dropped seven year old Misty Lindburg off at a rural bus stop. After waiting a sufficient amount of time to allow the child to cross the highway, the driver drove on when he child did not cross. Several minutes later a pickup truck struck the child as she attempted to cross the highway. The court barred the claim on sovereign immunity grounds and held that claim did not fall within the sovereign immunity exception for injuries caused by the operation or use of a motor vehicle.³²⁷ The court's based its holding on the fact that the bus itself was not involved in the accident.³²⁸

The *Lindburg* court also addressed the issue of whether to subject school bus operators to the high degree of care imposed on common carriers.³²⁹ The court refused to impose the common carrier standard of care on school bus operators.³³⁰ The court reasoned that school districts are not in the business of transporting passengers for hire and the court further rejected the policy reasons advanced for increasing the standard of care owed to school bus riders.³³¹

In *Hitchcock v. Garvin*³³² the Dallas court of appeals held that a school bus driver's failure to activate the flashing warning lights while at bus stops falls within the waiver of governmental immunity under the Texas Tort Claims

("A governmental unit in the state is liable for . . . (2) personal injury and death so caused by a condition or use of tangible personal or real property . . .") (emphasis added).

322. 749 S.W.2d at 632.

323. *Id.*; TEX. CIV. PRAC. & REM. CODE ANN. § 101.021 (Vernon 1986).

324. 749 S.W.2d at 632. TEX. CIV. PRAC. & REM. CODE ANN. § 101.101(c) (Vernon 1986) provides that: "The notice requirements . . . do not apply if the governmental unit has actual notice that death has occurred, that the claimant has received some injury, or that the claimant's property has been damaged."

325. 749 S.W.2d at 633.

326. 32 Tex. Sup. Ct. J. 210 (Feb. 18, 1989).

327. *Id.* at 212; see TEX. CIV. PRAC. & REM. CODE ANN. § 101.021 (Vernon 1986) (providing that sovereign immunity does not apply if the injury is caused by the "operation or use of a motor-driven vehicle.")

328. 32 Tex. Sup. Ct. J. at 212.

329. *Id.*

330. *Id.*

331. *Id.*

332. 738 S.W.2d 34 (Tex. App. - Dallas 1987, no writ).

Act.³³³ The proof in the case created fact issues concerning the bus driver's failure to properly activate the flashers on the bus to warn oncoming motorists. The school district's bus program required the use of such flashing lights and the court held that the failure to comply concerned the operation or use of the motor-driven school bus.³³⁴

B. Governmental Immunity

*Russell v. Texas Department of Human Resources*³³⁵ involved governmental immunity in a case brought by a set of parents and grandparents against the Department of Human Resources for the negligent investigation of a sexual abuse case. Claiming that the Department of Human Resources negligently investigated the possible sexual abuse of a child, the targets of the investigation filed suit for damages. The court of appeals upheld the trial court's summary judgment in favor of the defendant characterizing the state investigator's actions as quasi-judicial.³³⁶ The court held that state employees acting in a quasi-judicial capacity enjoy governmental immunity regardless of how negligent, insensitive, or misguided their actions if they act in good faith and within the scope of their authority.³³⁷

In *Davis v. City of San Antonio*³³⁸ the court discussed the appropriate procedural steps necessary to raise a claim of governmental immunity.³³⁹ Davis sued the City of San Antonio for malicious prosecution and violations of his civil rights. Although the case arose from the city's discretionary actions, the city did not raise the defense of sovereign immunity until it filed its motion for judgment notwithstanding the verdict. In reversing the court of appeals, the supreme court held that the city did not timely assert the defense.³⁴⁰ The Texas Rules of Civil Procedure clearly require litigants to raise all affirmative defenses, including defenses of immunity.³⁴¹ The city's decision to raise the defense of immunity after the case had been tried constituted a waiver of any possible affirmative defense.³⁴²

333. *Id.* at 37. TEX. CIV. PRAC. & REM. CODE ANN. § 101.021 (Vernon 1986), allows recovery for personal injury and death arising from the operation and use of a motor-driven vehicle.

334. 738 S.W.2d at 37.

335. 746 S.W.2d 510 (Tex. App.—Texarkana 1988, writ denied).

336. *Id.* at 513.

337. *Id.* The court also decided that allegations that the state used tangible personal property, including telephones, computers, and report forms, did not give rise to a cause of action under TEX. CIV. PRAC. & REM. CODE ANN. § 101.021 (Vernon 1986). 746 S.W.2d at 513.

338. 752 S.W.2d 518 (Tex. 1988).

339. *Id.* at 519-20.

340. *Id.*

341. *Id.*; see TEX. R. CIV. P. 94.

342. 752 S.W.2d at 519.

