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Whatever Happened to 1845 - The Missing Decisions of the Texas Supreme Court

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Whatever Happened to 1845? The Missing Decisions Of the Texas Supreme Court

By Jim Paulsen, Briefing Attorney, Texas Supreme Court
And James Hambleton, Director, State Law Library

Have you ever noticed a gap in the publication of Texas Supreme Court decisions? Both the Harvard "Blue Book" and the University of Texas "Green Book" inform readers that opinions of the court from 1840 to 1844 (the Republic period) can be found in *Dallam's Decisions*, while decisions from 1846 on (statehood) are available in *Texas Reports* or the *Southwestern Reporter*. That's all very clear, but whatever happened to 1845? This article will supply half an answer to this question; perhaps some reader can provide the other half.

At the outset, a little historical background is in order. The Texas Supreme Court in 1845 operated in a much different way than it does today. There were seven judges in all, with John Hemphill presiding as chief justice. Six of the judges — John B. Jones, William J. Jones, William E. Jones, R.E.B. Baylor (*the Judge Baylor*, of Baylor University), R.T. Wheeler and M.P. Norton — served double duty as district judges.

For most of the year, these district judges heard cases in the counties of their respective districts. Then, for about three weeks, they would meet with Chief Justice Hemphill as a supreme court to hear appeals, with the judge who sat at trial not par-

ticipating in the decision.

Unfortunately, the court had no official reporter to publish the decisions. Until 1845, Texas attorneys simply learned about Texas Supreme Court cases from newspaper accounts or by word of mouth. Then James Wilmer Dallam, an enterprising young lawyer from Matagorda, stepped in.

In the spring of 1845, Dallam traveled to Philadelphia to oversee the publication of a digest of Republic statutes. He included at the end of this volume the opinions of the Supreme Court for the terms up to that point (1840-44). Since later reprints followed the original pagination, the first reported Texas case appears as "Dallam 357."

Although *Dallam's Decisions* is often bound with a red and gold "Texas Reports" on its spine (and is sometimes listed as "Volume 0") it does not enjoy the "official" status of the real *Texas Reports*. The *Texas Reports* were authorized by the first state Legislature in 1846, but Volume 1 was not printed until 1848. The delay, according to the first reporters, James Webb and Thomas H. Duval, was caused by considerations of state pride that led them to reject faster and cheaper printing by Yankees in favor of authentic Texas ink.

The Supreme Court of the Republic of Texas was scheduled to meet in December of 1845. Yet, amid all the confusion surrounding imminent statehood, there was some uncertainty about even this fact. The *Telegraph and Texas Register*, a Houston newspaper, reported: "Several of our contemporaries have expressed the opinion that little or no business would be transacted by the Supreme Court owing to the expiration of the term of service of the chief justice and one of the associate judges previous to the meeting of the court. This however is an error; the term of service of the chief justice and the senior judge does not expire until the 25th of January [1846]."

Some people also hoped that the Supreme Court of the Republic would not meet. Royal T. Wheeler wrote to a fellow attorney, Oran M. Roberts (later a chief justice), in November 1845: "I suspect that Ch. J. has at length concocted some learned opinions with which he is pregnant and which he is desirous to promulgate before the expiration of the Republic. ... The bar south and west entertain a very moderate respect for Judge Hemphill and are extremely averse to see him retained upon the bench." The irony of this letter is that not only was Justice

Hemphill retained as the first chief justice of the state, but Royal T. Wheeler became one of the first associate justices.

With this historical foundation laid, three questions arise. The first, and simplest: Are there any 1845 opinions? The answer is "Yes." The Supreme Court of the Republic of Texas met in December of 1845, had a perfectly ordinary session, wrote more than 30 opinions, and adjourned on Jan. 5, 1846, to reconvene in the fall as the Supreme Court of the State of Texas.

That was the easy question. The second one is harder. Why weren't the opinions printed? Any number of possible reasons come to mind. Perhaps they were not considered authoritative once Texas statehood was declared, although decisions of the Republic have often since been quoted. Perhaps they were just forgotten, although William Alexander's *Texas Digest* in 1854 carefully includes some of the manuscript decisions of 1845 among the state and Republic decisions digested. Paschal's 1875 *Digest of Decisions* also pirated some of Alexander's notes, but references to 1845 cases seem to die out thereafter.

The most likely reason the decisions were never printed is much more mundane. With no authorization or funding for an official reporter before 1845, and with the official *Texas Reports* authorized in 1846, there was probably just no profit to be made from printing this one relatively small batch of opinions, to fill the gap between *Dallam's Decisions* and Volume 1 of the *Texas Reports*. After enough years, most people probably just forgot that the decisions ever existed. Whatever the reason, it is undisputed that these opinions never made it into print.

The last question is the hardest: Where are the 1845 decisions today?

It appears that opinions at this time were initially written in longhand by the judges or their clerks, then copied by the court clerk into a bound opinion book. This book is preserved in the State Archives, and does contain the full text, sometimes faint and faded, of 16 opinions.

Court minutes, though, show that more than 30 opinions were actually written. The opinion book contains the beginning of the seventeenth case, but trails off in mid-sentence, with a hundred or so blank pages left in the book. The opinions were evidently preserved somewhere, because Alexander was able to digest them some 10 years later. Perhaps the original opinions remained somewhere in the appellate record or other Supreme Court documents. In 1975, though, virtually all case files of the Republic period were illegally removed and presumably sold to autograph collectors and antiquarians.

As we said at the beginning, this article provides only half an answer to the question of what happened to the missing year of the Texas Supreme Court. Efforts are underway to arrange publication of all available opinions as a Texas Sesquicentennial project. If any reader has an idea or suggestion as to where the remaining opinions might be found, information would be gratefully received by James Hambleton, Director, State Law Library, Box 12367, Capitol Station, Austin 78711. Naturally, any confidences will be respected. A list of the missing opinions follows:

- No. 144. *William M. Cook v. Edward Hall*. From Harris County, opinion by Judge Wheeler.
- No. 354. *Jose Antonio de la Garza v. John Twohig*. From Bexar County, opinion by Judge John B. Jones.
- No. 331. *Thomas Duggan v. James Cole*. From Travis County, opinion by Judge John B. Jones.
- No. 305. *Samuel M. Frost v. Ann L. Frost*. From Harris County, opinion by Judge Baylor.
- No. 261. *Jesse Holderman v. Russell B. Craft*. From Bastrop County, opinion by Judge William E. Jones.
- No. ????. *Thomas M. League v. Samuel Whiting*. From Harris County, opinion by Judge William E. Jones.
- No. 190. *N.H. Monger v. James B.*

Allen and Elizabeth Allen. From Austin County, opinion by Judge Norton.

No. 255. *Heirs of Naham Nixon v. Republic of Texas*. From Colorado County, opinion by Chief Justice Hemphill.

No. 245. *Hugh Nunn v. Republic of Texas*. From Liberty County, opinion by Judge John B. Jones.

No. 341. *Republic of Texas v. William Gammell*. From Bastrop County, opinion by Judge William E. Jones.

No. 135. *Republic of Texas v. David S. Harbert*. From Bastrop County, opinion by Chief Justice Hemphill.

No. 370. *E.A. Rhoades v. J.A. Wheeler*. From Victoria County, opinion by Judge Baylor.

No. 347. *Sinks, Vail & Co. v. Republic of Texas*. From Bastrop County, opinion by Chief Justice Hemphill.

No. 187. *Townsend & Haywood v. Whiting*. From Harris County, writer of opinion unknown.

No. 369. *Samuel M. Wingate v. Republic of Texas*. Opinion by Judge William E. Jones, county of origin unknown.

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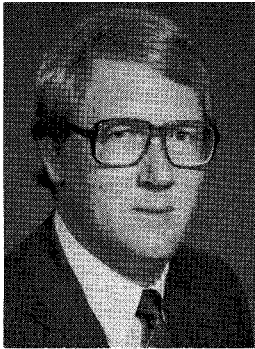
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David Seidler

More Than A Snooze

Worried clients, anxious clients, lots of clients (at any and all hours of the day and night), partners, adjusters, deposition reports, memos, juries (who obviously do not hear closing arguments as well as they should), briefs, deadlines ... your blood pressure is boiling ... no apparent relief in sight ... and the dog days of summer are just beginning.

Boy, if your law practice is anything like mine, the last few months have been anything but relaxing.

Gotta lower that diastolic, systolic ... NOW ... gotta relax. Exercise? Aerobics? Isometrics? Lamaze? (just focus on that framed law degree and systematically breathe deeply) Golf? (Naw, that is worse than the office —

how could I leave that ball in the sand trap three times in a row?) Tennis? (Nope — no one should ever double fault the set away).

All these activities occasionally relax a bone-tired lawyer — but more often, they don't.

I have discovered one daily activity that rarely fails to relax: HAMMOCKING!

The indians in South America started it all. When Columbus dropped anchor in the Bahamas in 1492, he found the locals sleeping in hanging beds woven from strips made from the bark of the hammack tree. The indians called their beds "hamacas." The idea was taken back to Spain, and soon, the French, the British and the Spanish sailors used these contraptions to relax and sleep while on long voyages.

In the early 1880's, hammocks in the United States were still a novelty. Most were narrow and demanded great athletic ability to stay on board. Thanks to wider versions, hammocks became popular in the 1800's and have remained so.

Swaying vigorously, one can mentally cope with worries left over from the office. It might take four or nine, but in no more than 11½ minutes the vigorous swaying subsides and while lying perfectly still, floating in a pristine, relaxing silence, the worries disappear.

For those of you not mechanically inclined, I offer these tips to sling your hammock:

INDOORS: Take care to drill into wood studs or beams (nothing breaks a relaxing snooze like a collapsed hammock).

OUTDOORS: Trees (or if you live in Amarillo, Lubbock, Midland/Odessa or almost anywhere else in West Texas, 10-foot 4x4 posts make great substitutes; use guy-wires for strength) and porch columns are perfect.

Adjust the hammock so it drapes deeply (no more than two feet off the ground). For safety's sake, keep the area under the hammock clear and test the hammock for strength.

Now, after a full day of doing all the things that lawyers have to do, lie back in your full-length silent rocking chair and read, watch television, talk to your kids, chat with your wife, snooze or just day-dream — Relax.

Your family, your partners, your clients and even you will hardly recognize the rejuvenated, relaxed lawyer who shows up at the dinner table each evening and behind the desk each morning.

A handwritten signature in cursive script that reads "David".

Loss of Consortium and Contributory Negligence: What's the Rule?

By Greg Thompson and Kurt Chacon

Claims for loss of consortium are being advanced at an ever increasing pace since the 1978 Texas Supreme Court decision in *Whittlesey v. Miller*.¹ By this decision the court recognized a cause of action in Texas for loss of consortium and disapproved any previous holdings to the contrary.² In recognizing a cause of action for loss of consortium, the court brought Texas into the majority of states which have recognized that doctrine.³ However, the recognition of a cause of action for consortium has raised the attendant problem of whether or not to reduce or exclude such an award based upon any negligence on the part of the injured spouse. This article focuses on the approach that other jurisdictions have adopted as well as that approach which Texas should adopt.

With the advent of *Duncan v. Cessna*,⁴ and the application of pure comparative causation to strict liability, this problem will be occurring with increasing frequency. Consortium has been defined to include the mutual right of the husband and wife to that affection, solace, comfort, companionship, society, assistance, and sexual relations necessary to a successful marriage.⁵ The definition primarily consists of the intangible elements of a marriage. Whenever any of these elements have been substantially interfered with, a cause of action for loss of consortium accrues. Whether or not a loss of consortium award should be reduced or excluded on the basis of the injured spouse's negligence depends upon the very nature of the consortium cause of action. If the cause of action for loss of consortium derives from the cause of action of the injured spouse, it follows that any consortium award be reduced by the contributory negligence attributed to the injured spouse. If, however, the consortium action is considered separate and independent from the injured spouse's cause of action, then any contributory negligence of the injured spouse has no effect on the consortium recovery.

In addressing the independent/derivative dichotomy, the Supreme Court in *Whittlesey* stated:

Finally, while the deprived spouse's suit for loss of consortium is considered to be derivative of the impaired spouse's negligence action to the extent that the tortfeasor's liability to the impaired spouse must be established, the consortium action is, nevertheless, independent and apart from that of the impaired spouse's negligence action.⁶

The court's holding is ambiguous with respect to the actual independence of the cause of action.⁷ One interpretation is that the Supreme Court held once liability is established with respect to the injured spouse, then the consortium action is independent from the impaired spouse's negligence action. Another reasonable interpretation is that the negligent actor is liable to the impaired spouse only to the extent he is liable to the injured spouse.

Although this fact situation has not been squarely confronted by the Texas courts, the ambiguous language was discussed in *Reed Tool Company v. Copelin*.⁸ In *Copelin*, the primary issue was whether a wife's cause of action for loss of consortium against her injured husband's employer was barred by the Texas Workers' Compensation act. The *Copelin* Court in reviewing *Whittlesey* determined that a consortium cause of action was derivative of the injured spouse's cause of action. In so holding the court stated:

We therefore hold that Judy Copelin's suit is derivative and that a defense that tends to constrict or exclude the tortfeasor's liability to the injured husband will have the same effect on the wife's consortium action.⁹

The court went on to hold that negligent impairment of consortium would be barred but that intentional impairment would not be. Although *Copelin* dealt with the Workers' Compensation Act's effect on a consortium award, the Supreme Court issued a sweeping pronouncement seeming to apply the rationale to any defense that may "constrict or exclude the tortfeasor's liability." The defense of contributory or comparative negligence could be subsumed in that category. Therefore, although there are no Texas cases on point, a broad reading of *Copelin* might suggest that if the injured spouse is found to be contributorily negligent, that finding will serve to reduce or bar the recovery for loss of consortium.

Such a broad reading of *Copelin*, however, would be misplaced. Such an interpretation greatly overstates *Whittlesey's* holding and unreasonably limits an impaired spouse's cause of action for their independent injury. Although the Texas Supreme Court in *Whittlesey* held that the cause of action for loss of consortium is derivative to the extent liability to the injured spouse is established, that determination did not preordain that any defense that limits or excludes liability to the injured spouse would do likewise to the impaired spouse. Neither the *Whittlesey* nor the *Copelin* court defined what it meant by the term "derivative cause of action."

Black's Law Dictionary defines "derivative" as coming from another; that which has not its origin in itself, but owes its existence to something foregoing.¹⁰ As to the definition of a derivative action, Black's states that they are actions based upon the primary right of a corporation, asserted by a stockholder because of a corporation's failure to act upon the primary right.¹¹

Loss of consortium is not derivative in the same manner. To be sure, the impaired spouse's action is dependent upon the injury to the other spouse; however, unlike a shareholder derivative suit, the impaired spouse actually suffers an original injury. The impaired spouse has a separate right that can be enforced in a separate action. It is the injury rather than the claim that is derivative. Since this is so, the rights of the impaired spouse should not be contingent upon the rights of the disabled spouse.¹²

The doctrine of imputed negligence among husband and wife has been abolished in Texas. In *Graham v. Franco*¹³ and *Southwestern Bell Telephone Co. v. Thomas*,¹⁴ the court held that a husband's contributory negligence could not be imputed to bar his wife's separate property recovery for her personal injuries. In doing this, Texas thrust itself in the majority of states by finding that applying the concept of imputed contributory negligence would frustrate the theoretical underpinnings of Texas tort law. It has the effect of freeing from liability a party at fault even though the injured party is totally blameless.¹⁵

The dicta in *Copelin*, which some might read to indicate that it would reduce or exclude a consortium award based upon the negligence of an injured spouse, resurrects the doctrine of imputed negligence in another form.¹⁶ The case law and commentator's criticism of imputed negligence is equally valid when pertaining to the problem of reducing consortium awards based on contributory negligence of the injured spouse. To do so is to penalize a totally innocent plaintiff in favor of a negligent tortfeasor.

The *Copelin* court distinguishes in a footnote *Graham v. Southwestern Bell* by stating that the cause of action at issue there was not derivative as was the cause of action for loss of consortium.¹⁷ The court did not address the underlying policy reasons for doing away with the doc-

trine of imputed negligence. The court failed to realize those policy reasons applied equally to a loss of consortium case as to a separate spousal injury case. As stated previously, although the injury may be derivative, the claim is independent. As such the loss of consortium award should not be reduced or excluded on the basis of the injured spouse's negligence.

Other jurisdictions have recognized this distinction and allowed the impaired spouse a full recovery of all damages from the defendant. In *Feltch v. General Rental Co.*,¹⁸ the Massachusetts Supreme Court was presented the question of whether or not the impaired spouse's recovery for loss of consortium should be reduced by the injured spouse's comparative negligence. The court began its inquiry by examining the historical basis for the derivative action theory, as the theory views husband and wife as a single unit. Prior Massachusetts cases had rejected the derivative rule and adopted the independent cause of action theory in loss of consortium action.¹⁹ The analysis is predicted on the "...nature of the claims, not the source of the injury..."²⁰

After reaffirming adherence to the independent theory, the court then turned to the comparative negligence statute to determine the application of the theory to the facts. The court stated:

... the statute does not indicate that her recovery (impaired spouse) should be reduced by the degree of her husband's negligence ... Any change in the legislative policy as expressed in the statute is for the legislature ... (parenthetical added).²¹

The court felt a contrary rule would simply impute negligence from one family member to another.

The last issue decided in *Feltch* was the propriety of the defendant's cross-action for contribution against the husband for the amount of the husband's comparative negligence as it pertained to the impaired wife's claim. The court summarily rejected this approach, as it would sanction imputed negligence in another form, and has the effect of reducing the impaired spouse's claim due to the injured spouse's negligence.²²

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The first Circuit Court of Appeals decided a similar question in *Macon v. Seaward Construction Co.*,²³ applying New Hampshire law. While acknowledging that jurisdictions previously deciding this issue reduced or limited the impaired spouse's negligence, the court concluded New Hampshire law viewed loss of consortium as an independent cause of action. The court then stated that the comparative negligence statute of New Hampshire did not insure that a tortfeasor would never be required to pay a greater proportion of his damages than his percentage of comparative fault.²⁴ The statute provided that a plaintiff's recovery be reduced only by the degree of negligence attributable to the plaintiff, and in the instant case, the impaired spouse was not at fault. The court was bound by the wording of the New Hampshire comparative fault statute not unlike the *Felch v. General Rental Co.* court. The significant difference between the two opinions is the *Macon* court did not offer any real analysis of the nature of the consortium action and did not reach the result with much assurance interpreting New Hampshire law.²⁵

In *Lantis v. Condon*,²⁶ the California First Court of Appeals faced the question whether or not to limit an impaired spouse's recovery by the percentage of comparative negligence of the injured spouse. The court first established that the defense of imputed contributory negligence was abolished by statute. The court rejected the distinction that this statute was intended to operate only when the contributory negligence of the injured spouse was a complete bar to recovery. The court found no significance in the argument that the impaired spouse's claim would not be barred but rather limited by the injured spouse's negligence.²⁷

Having dismissed the imputed negligence argument, the court then decided the issue of whether the loss of

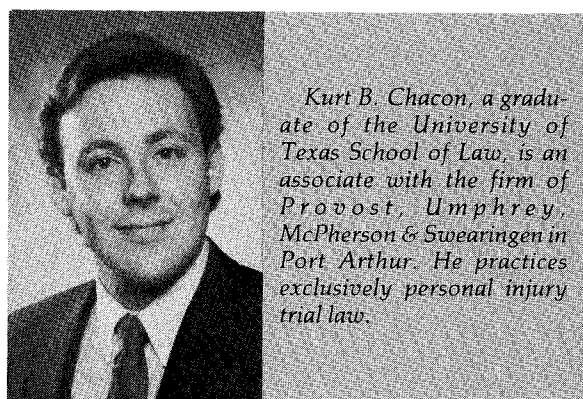
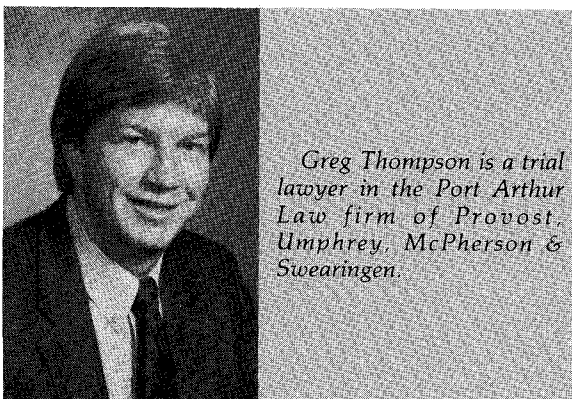
consortium was a derivative or independent cause of action. The court acknowledged *Nelson v. Busby*²⁸ and *White v. Lunder*²⁹ as the leading cases supporting the derivative theory and offered the following analysis:

The basis for the theory appears to be that the wife's cause of action is so inextricably linked to the marital relation that there is in reality only one cognizable injury. Another way of explaining ... this is to picture the cause of action as being in the nature as an assignment from the injured spouse to his partner. We find this description neither persuasive nor logical ...³⁰

The court held that the loss of consortium action is separate and distinct and is comprised of the spouse's own "physical, psychological and emotional pain and anguish" resulting from the injury to the other spouse as it affects the "love, affection, companionship, comfort and sexual relations concomitant with normal married life."³¹

The defendant presented the argument that the loss of consortium action was akin to a wrongful death action where comparative negligence is a limitation on recovery, and the court rejected this theory on the basis of the express wording of the California wrongful death statute providing for such a defense.³² The court also considered how the California comparative negligence statute affected the issues raised in the case. The California statute speaks only in terms of the negligence of the plaintiff and defendant, and embodies the principals that (1) one whose negligence causes harm to another should be liable, and (2) one whose negligence contributes to his/her own injury should not cast the burden of liability upon another. The impaired spouse is, as a rule, an innocent third party, and allowing any party to escape liability for the spouse's injuries is simply imputed negligence, a doctrine rejected by the California law.³³

The court discussed the possibility that this system might allow the injured spouse to indirectly profit from his/her own negligence, but the Legislature had spoken on that issue as well. By abolishing imputed negligence as a defense, the Legislature chose to allow a contributorily negligent spouse to indirectly profit in this situation as opposed to allowing a negligent defendant to escape liability for injuries to a plaintiff who was totally free from fault — whether under contributory or comparative negligence.³⁴ The court briefly discussed the



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possibility of a counterclaim by the defendant against the injured spouse for contribution, but passed no judgment on this policy.

There are several cases often cited as contra authority. In *Maidman v. Stagg*,³⁵ the question raised on appeal was whether or not the negligence of the injured spouse proportionately reduced the impaired spouse's recovery for loss of consortium. The New York court held that the claim was derivative and that any recovery by the impaired spouse shall be reduced by any percentage of negligence of the injured spouse,³⁶ based on previous New York decisions holding loss of consortium a derivative action arising from the injured spouse's action for injuries.

In discussing case law contrary to the decision announced in the opinion, the court stated that in none of these decisions:

... did the courts suggest that their rejection of the majority rule was mandated by the adoption of comparative negligence. Rather, those courts relied on a scholarly criticism of the rule, which was written before the widespread adoption of comparative negligence ...³⁷

Thus, the court implies that criticism of the derivative concept was based on fairness — that is, an innocent spouse should not be totally barred from recovery. This rationale does not address the underlying nature of the claim and, further, does not address the real effect this doctrine has on the innocent spouse.

A similar result was reached in *Eggert v. Working*.³⁸ The Alaska Supreme Court held a reduction of the impaired spouse recovery proper under Alaska law.³⁹ Alaska previously adopted by way of judicial decision a comparative negligence system.⁴⁰ The court noted that prior to the adoption of comparative negligence, contributory negligence of the injured spouse barred any consortium recovery by the impaired spouse, and further stated:

... it seems entirely logical to apply the partial defense of comparative negligence to such a claim ...⁴¹

The court in *Eggert* relied on the rationale of comparative negligence, that is, each tortfeasor should bear their respective portion of fault. While the court admitted this result was not technically achieved,⁴² it harmonized this inconsistency by pointing out that the plaintiff/spouses "... were in effect, if not in law, a single economic unit ..."⁴³ This may or may not be true in every case, and the economic unit analysis does not address the fundamental question of the impaired spouse's innocence or the independent nature of the claim.

The Supreme Court of Wisconsin faced a similar yet unique situation in *White v. Lunder*,⁴⁴ with the jury apportioning fault between both spouses and the defendant.⁴⁵ The impaired spouse sued for medical expenses incurred on behalf of the injured spouse and for loss of consortium. The court discussed prior Wisconsin law and concluded that the cause of action for loss of consortium was derivative.⁴⁶ The court admitted that deeming the action derivative for the purposes of applying the Wisconsin comparative negligence statute⁴⁷ "... might not be entirely logical ... but ... does little violence to the prior expressions of this court ..."⁴⁸ The court felt it was

unjust to allow the defendant to escape liability when he was more negligent than any other party, but felt it equally unjust to allow the husband (impaired spouse) a recovery disregarding his causal negligence or that of his wife (injured spouse).⁴⁹ The court allowed a recovery by the husband for loss of consortium and medical expenses for the proportion of negligence attributable to the defendant,⁵⁰ based on the comparative negligence statute allowing recovery so long as the negligence of the person seeking recovery was not greater than that from whom recovery is sought.⁵¹

This holding is inconsistent with the derivative action theory. Under the facts of the case, the combined negligence of the spouses was greater than that of the defendant, but the defendant was not able to avail himself of the comparative negligence defense. This opinion is better explained on the basis of the finding of negligence of the impaired spouse and the court's reluctance to allow the impaired/negligent spouse a full recovery. The opinion does not focus on the nature of the claim or the problem of imputed negligence.

Another often cited case was decided by the Arkansas Supreme Court in *Nelson v. Busby*.⁵² Arkansas had previously adopted comparative negligence and the court faced the issue of whether or not to reduce the impaired spouse's recovery by the negligence of the injured spouse. The court held, without discussion, that



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Arkansas law had already established a consortium action as derivative. The court concluded that, due to this derivative nature, the impaired spouse has no better standing than rested in the injured spouse.⁵³ This case provides no discussion of any rationale or theory as to why the consortium action is derivative. While this case is properly cited for the conclusion it reaches, one can hardly say the opinion is well-reasoned. It does not discuss the merits of the problem as it applies to an innocent plaintiff in the scheme of comparative negligence.

Conclusion

These cases reflect obvious differences in analyzing the problem of the innocent spouse's claim for loss of consortium in the scheme of contributory negligence. The rationale offered in support of these holdings are equally varied. The solutions to this problem, however, can be narrowed to three: (1) allowing a reduction of the tortfeasor's liability proportionate to the percentage of negligence attributable to the injured spouse, (2) allowing the impaired spouse a full and total recovery from the

tortfeasor, ignoring any negligence of the injured spouse, and (3) allowing a full recovery by the impaired spouse from the tortfeasor but also allowing a counterclaim by the tortfeasor for contribution from the injured spouse.⁵⁴

The third solution allowing a claim for contribution against the negligent spouse is the most technically correct. However, courts considering this procedure found this a sanction of imputed negligence in another form and in Texas would be barred by the doctrine of interspousal tort immunity.⁵⁵

We prefer a full and total recovery by the impaired spouse, disregarding any negligence of the injured spouse. The derivative action rationale relied upon to reduce the impaired spouse's recovery does not address the nature of the claim but rather the source of the injury. It is, at best, a method of preventing unjust enrichment of the negligent/injured spouse,⁵⁶ a doctrine rejected by Texas courts.⁵⁷ Further, at least as to all non-pecuniary losses, these recoveries would be the separate property of the impaired spouse.⁵⁸ The fact that the tortfeasor may bear a disproportionate share of liability carries little weight. Texas law in no way guarantees this fate will not befall the defendant/tortfeasor.⁵⁹ Texas courts should adopt the sounder reasoning that the impaired spouse's claim for loss of consortium is completely independent of the injured spouse's claim for damages and protect the innocent spouse's recovery from any reduction or limitation.

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1. 572 S.W.2d 665 (Tex. 1978).

2. *Id.*

3. *Id.* at 668. See also *Loss of Consortium: A Derivative Injury Giving Rise to a Separate Cause of Action*, 50 Fordham L. Rev. 1344, 1350 (1982).

4. 26 *Tex. Sup. Ct. J.* 507 (July 16, 1983).

5. *Whittlesey* at 666.

6. *Id.* at 667.

7. As was stated in *Whittlesey*, it is probably theoretically more precise to refer to loss of consortium as an element of damages rather than a cause of action. However, as a practicality, it has come to be referred to as a cause of action.

8. 610 S.W.2d 736 (Tex. 1980). *Copelin II* was recently decided by the Texas Supreme Court. See *Reed Tool Company v. Copelin*, 28 *Tex. Sup. Ct. J.* 349 (April 10, 1985). The court held that an employer who intentionally fails to maintain a safe work environment does not constitute an "intentional injury" that would allow Mrs. Copelin to sue her husband's employer.

9. *Id.* at 738-739.

10. *Black's Law Dictionary*, p. 399, 5th edition, 1979.

11. *Id.*

12. See Footnote 3.
13. 488 S.W.2d 390 (Tex. 1972).
14. 554 S.W.2d 672 (Tex. 1977).
15. W. Prosser, *Handbook of the Law of Torts*, §74, Note 1, at 488.
16. See 50 Fordham L. Rev. 1344 (1980).
17. *Copelin*.
18. 421 N.E.2d 67 (Mass. 1981).
19. *Id.* at 71.
20. *Id.* at 71.
21. *Id.* at 71.
22. *Id.* at 71-72.
23. 555 F.2d 1 (1st Cir. 1977).
24. *Id.* at 2. See also *Varela v. Petrofina*, 658 S.W.2d 561, Tex.1983) and *Duncan v. Cessna*, 665 S.W.2d 414 (Tex.1983).
25. *Id.* at 2.
26. 95 Cal.App. 3d 153 (1979).
27. *Id.* at 156.
28. 437 S.W.2d 799 (Ark.1969) discussed *infra*.
29. 225 N.W.2d 442 (Wisconsin 1975), discussed *infra*.
30. *Lantis v. Condon*, 95 Cal.App. 3d 153, 156 (1979).
31. *Id.* at 157.
32. *Id.* at 158. Since the statute provided that the defenses against deceased are viable as against the wrongful death claimants, the courts found this analogy unpersuasive.
33. *Id.* at 159.
34. *Id.* at 160.
35. 441 N.Y.S.2d 711 (AppDiv 1981).
36. *Id.* at 713.
37. *Id.* at 715.
38. 599 P.2d 1389 (Alaska 1979).
39. *Id.* at 1390.
40. *Kaatz v. State*, 540 P.2d 1307 (Alaska 1975).
41. 599 P.2d 1389, 1390.
42. *Id.* at 1391. The injured spouse is not liable to the impaired spouse.
43. *Id.* at 1391.
44. 225 N.W.2d 442 (Wisconsin 1975).
45. *Id.* at 1390. The jury apportioned fault as follows: defendant 37 percent; injured spouse 30 percent; impaired spouse 33 percent.
46. *Id.* at 449. Wisconsin law was unclear at that time on this issue.
47. Sec. 895.045 Wisc. Stats.-1971 provides, in pertinent part, "Contributory negligence ... shall not bar recovery ... if such negligence is not greater than the negligence against whom recovery is sought..." This is sometimes referred to as a "not greater than" statute.
48. 225 N.W.2d 442, 449.
49. *Id.* at 449.
50. *Id.* at 449.
51. *Id.* at 449. A workable construction, consistent with the statute, that will allow recovery in derivative actions where the causal negligence of the person against whom recovery is sought is greater than either the husband or wife can be accomplished by reducing the entire award for both medical expenses and loss of consortium by the percentage of negligence attributed to the injured spouse (here Rosemary White's 30 percent); and further reducing the entire award by the percentage of causal negligence attributable to the claiming spouse (here Lloyd White's 33 percent). By this method the person who was found to have been causally negligent in greatest degree cannot escape all liability but his liability is decreased by an amount proportionate to the two other tortfeasors.
52. 437 S.W.2d 799 (Ark.1969).
53. *Id.* at 803.
54. See *Maidman v. Stagg*, Fn. 18.
55. Contribution exists only if the plaintiff would have a right of action against the person from whom contribution is sought. *Paradissis v. Royal Indemnity Co.*, 507 S.W.2d 526 (Tex.1974).
56. See Footnotes 13, 14.
57. See Footnote 14.
58. *Graham v. Franco*, 488 S.W.2d 390.
59. See Footnote 24.

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—Woodrow Wilson

1985-86 Officers Lead TYLA

"Attorneys should want to participate in Texas Young Lawyers Association and State Bar activities," according to David Seidler, 1985-86 president of TYLA.

Seidler, who assumed the TYLA presidency at the annual State Bar Convention in Dallas, points out that most TYLA projects are geared to the public and that through these

projects, attorneys are able to serve the clients they represent.

"The TYLA is an influential organization," says Seidler. "Its projects are organized efforts by attorneys to do something for the public."

Seidler hopes that during his year as president of TYLA, more attorneys will become involved in the State Bar.

"State Bar services are available to all attorneys," says Seidler. "All the work is done at the local level and I would like to see more attorneys active at that level."

Seidler is a partner in the Aransas Pass law firm of Ellis, Andrews, & Lawrence, Inc.

He earned his B.A. at the University of New Mexico in 1973 and his J.D. from Texas Tech University

School of Law in 1976. He was president of Delta Theta Phi legal fraternity.

Seidler has served on the TYLA Board of Directors, and as TYLA vice president and president-elect. He served as president of the San Patricio County Bar association in 1983. He is also a member of the San Patricio County Bar Association in Association, Nueces County Bar Association, and Young Lawyers Association.

He was listed in Outstanding Young Men in America in 1982.

Seidler and his wife, Karen, have two sons, Bradley David and Matthew Kennedy.

Working with Seidler this year will be Robert "Doc" Watson, who was elected chairman of the board;

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David and Karen Seidler

James Nelson, vice president; William "Bill" Ford, secretary; and J. Keaton Grubbs, treasurer.

Watson, a partner in the Waco law firm of Sheehy, Lovelace & Mayfield, P.C., is board certified in commercial and residential real estate law.

He earned his B.A. from Baylor University and his J.D. from Baylor Law School.

As a TYLA director, Watson has chaired the Local Affiliates, Bylaws Revision and Award of Achievement Committees. He has served on numerous other TYLA committees.

Watson is past president of the Waco-McLennan County Young Lawyers Association. He was selected Outstanding Young Lawyer of Waco-McLennan County in 1983.

Watson and his wife, Kay, have two daughters, Allison and Melissa, and a son, Ryan.

James Nelson is a partner in the Odessa law firm of Shafer, Gilliland, Davis, McCollum & Ashley.

He attended Texas Christian University and the University of Texas at Arlington. He earned his J.D. from Texas Tech School of Law in 1976.

He was appointed TYLA director in 1983 and co-chaired the Newsletter Committee in 1984-85. He also chaired the Law Day Committee and served on the State Bar Activities Planning Committee.

Nelson was elected to the Board of Trustees of the Ector County Independent School District.

He and his wife, Karen, have three sons, Kyle, Jeff, and Cliff.

William "Bill" Ford is an associate in the San Antonio firm of Groce, Locke & Hebdon. He works primarily in the areas of family law and civil litigation.

Ford earned his B.A. from Baylor University and his J.D. from South Texas College of Law.

As a TYLA director, Ford co-chaired the TYLA Moot Court Committee and Marketing Committee. He is a member of the San Antonio Young Lawyers Association and has served as director, treasurer and chairman of several committees.

Ford and his wife, Deborah, have two children, Meredith and Garrett.

J. Keaton Grubbs is a partner in the Wichita Falls law firm of Gibson & Hotchkiss.

Grubbs earned an M.B.A. in management from Texas Tech University and a J.D. from Texas Tech

School of Law.

As a TYLA director, Grubbs chaired several committees. He will serve as president of the Wichita County Bar Association during 1985-86.

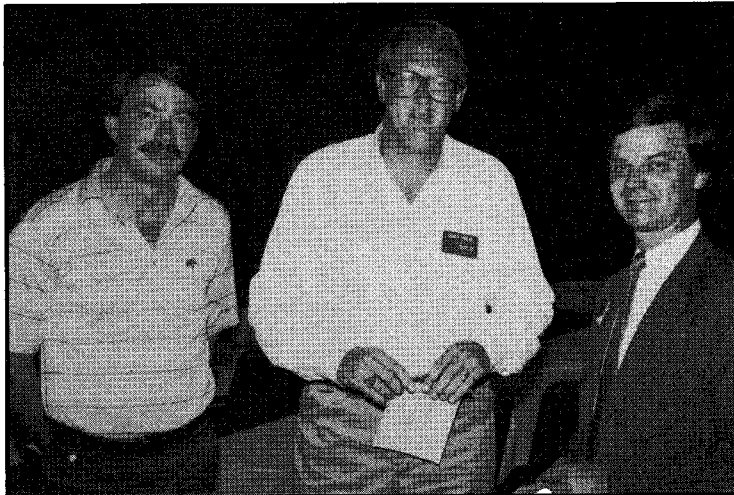
He is a member of the Texas Bankers Association and Texas Trial Lawyers Association.

Grubbs and his wife, Debbie, have three children, John III, Ginger, and Jana.

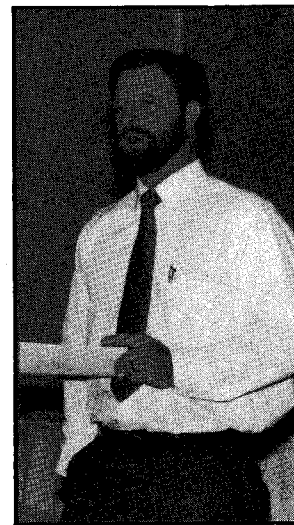
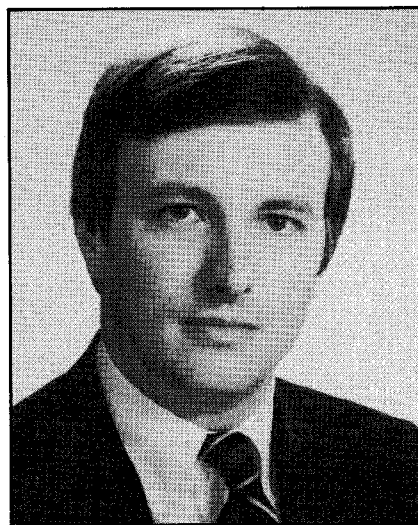
Kenneth C. Raney, Jr. will serve as president-elect of TYLA. Raney, a private practitioner in Dallas, has served as director, secretary, and vice president of TYLA.

He earned a bachelor's degree in journalism from the University of Texas in 1974 and his J.D. from South Texas College of Law in 1977.

He and his wife, Carolyn, have two children, Katherine Claire, and Kenneth C. Raney, III.



TYLA OFFICERS: 1985-86 officers elected to lead TYLA include (above) Jim Nelson, vice president; David Seidler, president; and Robert A. Watson, chairman of the board. William Ford (left) serves as TYLA secretary. President-elect is Kenneth C. Raney, Jr., (below, left) and J. Keaton Grubbs (below, right) serves as treasurer. All attorneys 36 years of age or younger or in their first three years of practice are members of the Texas Young Lawyers Association.



Local Winners Nominated For Outstanding Young Lawyer Of Texas Award

Each year, TYLA presents an award to the outstanding young lawyer of Texas for exemplified professional proficiency, service to the profession and to the community. Local affiliates present awards at the local level and nominate their winner for the statewide award. The following local winners were nominated for the award:

Taylor S. Boone San Antonio

The San Antonio Young Lawyers Association awarded Taylor S. Boone the Outstanding Young Lawyer Award.

Boone is an associate with Oppenheimer, Rosenberg, Kelleher & Wheatley, Inc. and a Certified Public Accountant.

He serves on the board of directors for the Alamo Chapter of the American Diabetes Association. Boone chairs the United Way Allocations Committee is a member of the advisory council of Boysville and a trustee of the Laurel Heights United Methodist Church. He is on the board of the Chamber Opera and St. Mary's University Law Alumni Association.

Boone served as chairman of the committee for cooperation with attorneys for the San Antonio Chapter of the Society of C.P.A.'s.

Linda L. Addison Houston

Linda L. Addison, a first generation American who is a trial partner in the firm of Fulbright & Jaworski, was selected as the Outstanding Young Lawyer by the Houston Young Lawyers Association.

Addison is the chairman of the Houston Bar Association Continuing Legal Education Committee and received the President's Award for Outstanding Service in 1981-82. She served on the TYLA Board of Directors during 1981-83 and headed the Federal Practice Committee Written Materials and the Long Range Planning Committee.

Addison is a Fellow of the Texas Bar Foundation. She is active in civic organizations including Books for Texans and serves on the board of advisors for the Mission Task Force of the Centennial Presidents Associates for the University of Texas.

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Craig T. Enoch Dallas

Craig T. Enoch, judge of the 101st District Court in Dallas, is the Dallas selection for Outstanding Young Lawyer.

Enoch was appointed to the bench by Gov. William Clements in 1981 and was then elected to the position. During 1977-81, he was a partner in the firm of Moseley, Jones, Allen & Fuquay.

Enoch serves on the TYLA Judicial Administration Subcommittee. He served as a director of the Dallas Bar Association and is a member of the Commercial Law League of America.

Enoch is a member of the Kiwanis Club, Canterbury House, Boy Scouts of America, Association of Children with Learning Disabilities and the Southern Methodist University Alumni Association.

Henry Cuellar Laredo

Henry Cuellar, a partner in the firm of Zaffirini, Cuellar & Castillo was selected by the Laredo Bar Association as Outstanding Young Lawyer.

Cuellar is an adjunct professor of International Commercial Law in the Masters Program for International Trade at Laredo State University and a part-time instructor at Laredo Junior College.

He is a licensed U.S. Customhouse broker. Cuellar is active in the Laredo Legal Aid Society, Inc., Laredo Volunteer Lawyers Program, Inc., the United Way, International Good Neighbor Council, Kiwanis Club and Stop Child Abuse and Neglect.

Rodney S. (Rod) Goble Waco/McLennan County

Rodney S. (Ron) Goble was selected Outstanding Young Lawyer by the Waco/McLennan County Young Lawyers Association.

Goble, a partner in Estes & Goble, is a certified criminal lawyer. He is a member of the Texas Criminal Defense Lawyers Association.

Goble serves on the board of directors of the Waco/McLennan County Young Lawyers Association. He is on the H.O.T. Council of Governors of the Alcohol Advisory Committee.

Goble is a member of the Baylor-Waco Foundation, United Way, Masonic Lodge, and Northwest Waco Rotary Club. In 1976, he received the Jaycees Outstanding Young Man in America Award.

James C. Gordon Abilene

James C. Gordon, a partner in the firm of McMahon, Smart, Surovik, Suttle, Buhrmann & Cobb, was selected

Outstanding Young Lawyer by the Abilene Young Lawyers Association.

Gordon has served as chairman of the Public Service to Abilene State School Committee of the Abilene Young Lawyers Association. He also serves on the TYLA Texas Law for the Texas Law and Clergy Committee.

He is a member of the Volunteer Council of the Abilene State School, Abilene Civil Service Commission, Citizen Energy Council, Taylor County Child Protective Service Board, Abilene Jaycees and Episcopal Church of the Heavenly Rest.

Richard Harrison Grayson County

Richard Harrison, a partner in the firm of Henderson, Bryant & Wolfe, is the Outstanding Young Lawyer of Grayson County.

Harrison is board certified in civil trial law and personal injury litigation. He has served as TYLA director, president of the Grayson County Bar Association and the North Texas Bar Association. He was named the 1983 Outstanding Young Citizen of Sherman and is active in the Sherman Jaycees, Sherman Community Players, Legal Exploring Post and the Boy Scouts of America.

Harrison also offers pre-law internships to undergraduate students at his law firm. He headed a committee to select a police chief for the City of Sherman.



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Todd A. Hunter Nueces County

Todd A. Hunter, an associate and member of the litigation section of Kleberg, Dyer, Redford & Weil, was selected Outstanding Young Lawyer by the Nueces County Bar Association.

Hunter, board certified in civil trial law, has served as president and treasurer of the Nueces County Young Lawyers Association. He is vice president of the Nueces County Bar Association and a faculty member of the National Institute of Trial Advocacy of the American Bar Association.

Hunter is a member of the board of directors of the Corpus Christi Chamber of Commerce, Corpus Christi Issues Council, United Way, Rotary Club, YWCA Fundraising Board and is chairman of the Task Force on Government/Charter Revision for Corpus Christi.

William M. Schur Fort Worth

William M. Schur, a partner in Wynn, Brown, Mack, Renfro & Thompson, was selected by the Tarrant County Young Lawyers Association to receive the Outstanding Young Lawyer Award.

Schur serves as vice chairman and executive committee member on the A.B.A. Committee on Adoption, as a

member of the State Bar of Texas District 7 Committee on Admissions, and Court Costs, Efficiency and Delay Committee. Schur is a member of the Tarrant County Bar Association, Family Law Bar Association, Association of Trial Lawyers of America and Texas Trial Lawyers Association.

He is active in the Mental Health Association of Tarrant County, Child Custody Center, Trinity Mental Health, Celtic Soccer Club and the Special Committee of the Juvenile Board of the Domestic Relations Office of Tarrant County.

Bert W. Pluyman Austin

Bert W. Pluyman, a member in the firm of Pluyman & Bayer, was selected Outstanding Young Lawyer by the Austin Young Lawyers Association.

Pluyman is a Fellow of the Texas Bar Foundation, a former director of TYLA, associate director of the Texas Trial Lawyers Association, past president of the Austin Young Lawyers Association and ex-officio director of the Travis County Bar Association.

Pluyman is listed as the youngest civil trial lawyer in the country of the 730 listed in the Best Lawyers in America.

He is active in the Travis County Association for the Blind, Austin Lawyers Care, Lions Club and is a Labor Grievance Arbitrator.

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Local Affiliate Nominations: Liberty Bell Award

The Liberty Bell Award is presented annually to an outstanding lay person who has made the most selfless contribution to his or her community which strengthens the effectiveness of the American system of justice. The following nominees were given the Liberty Bell Award at the local level and recommended by the local affiliate for the statewide award.

Eugene F. Jud Waco/McLennan County

Eugene F. (Gene) Jud was recognized by the Waco McLennan County Young Lawyers Association for his work with Caritas of Waco. He was presented the Liberty Bell Award by the Association.

Eight years ago, Jud left retirement to rebuild and lead Caritas of Waco, a local charitable organization dedicated to pulling together local churches, businesses and individuals to care for the needs of the poor in Central Texas.

Jud is executive director of Caritas of Waco and has kept the administrative costs of the program to less than five percent of the Caritas budget. Jud feels the community must step forward to take care of its own.

He has served on numerous committees of civic organizations including the Red Cross, Waco Youth Commission, United Fund, Waco Council for Social Welfare, ACTION Committee and the Waco Conference of Christians and Jews.

In their application for the state-wide Liberty Bell award the Waco/McLennan County Young Lawyers commented that Jud has "helped develop the potential of the individual, and the participation of the handicapped and less privileged. He has taken unpopular stands on behalf of black civil rights, but always in a quiet manner that simply encouraged participation in our democratic form of government."

H. Ross Perot Dallas

H. Ross Perot, chairman of the board of Dallas-based Electronic Data Systems Corp. and member of the board of directors of General Motors Corp. in Detroit, was presented the Liberty Bell Award by the Dallas Association of Young Lawyers.

Most recently, Perot is recognized for his efforts in heading up the Select Committee on Public Education. As a result of the committee's recommendations, the Texas Legislature passed a public education reform bill during a special session in 1984.

In 1981, Perot was appointed chairman of a committee to make Texas the least desirable state for illegal drugs. Five bills toward this end were passed by the Texas Legislature.

Perot was awarded the Defense Medal of Distinguished Public Service in 1979 for his efforts to change the treatment of U.S. Prisoners of War in Vietnam.

In their application to TYLA, the DAYL recognized Perot for "the time and money he has spent to promote and strengthen our American system of law and government."

Benjamin F. Kelly Tom Green County

Benjamin F. Kelly is the Liberty Bell Award winner from Tom Green County. Kelly was given the award because he has "furthered the cause of liberty and justice for all citizens of San Angelo as much as any resident in Tom Green County."

Kelly is the executive director of the Boys Club of San Angelo.

He was the first black athlete to play football at an all white college, San Angelo State. Kelly played professional football with the San Francisco 49er's and the New York Giants before returning to San Angelo as director of the West Side Boys Club in 1967.

In his positions with the Boys Club, Kelly emphasizes building the mind as well as the body. He has also been involved in educating and counseling youth about the dangers of drug abuse.

The mayor of San Angelo proclaimed Dec. 2, 1983 as "Ben Kelly Appreciation Day."

Brad Jackson Laredo

Brad Jackson, assistant vice president of the Union National Bank, was presented the Liberty Bell Award by the Laredo Young Lawyers Association.

Jackson has served on the board of directors of the Laredo Chamber of Commerce for 12 years and is currently vice president of the Laredo International Fair and Exposition and secretary-treasurer of the Washington's Birthday Celebration Association. He is past president of the Laredo Jaycees, Laredo Noon Lions Club and the South Texas Funeral Directors Association.

Jackson is a block leader for the United Way and was presented a Gold Award for his efforts. He serves as a peer counselor for a drug and alcohol abuse program.

H.C. (Clair) Brillhart, Jr. Northeast Panhandle

H.C. (Clair) Brillhart, Jr., a rancher, was selected for the Liberty Bell Award by the Northeast Panhandle Bar Association.

Brill and his wife were selected Citizen Couple of the Year in 1967. In 1985, he received the Bobby Githens Memorial Award.

Brillhart is a community leader who is active in the Kiwanis Club, Perryton Industrial Foundation, Ochiltree General Hospital Board of Directors, Ochiltree Chamber of Commerce and First United Methodist Church. He is president of the Ochiltree Development Corporation and is on the board of directors of Interstate Savings and Loan.

Kenneth McKinney Houston

Kenneth McKinney, a retired certified public accountant in Houston, was awarded the Liberty Bell Award by the Houston Young Lawyers Association for his work in fostering respect for law enforcement officers.

McKinney authored and produced two audio-visual presentations called "The Law is Ours" and "Just a Cop." The audio-visuals are shown to schools and local organizations. The presentations were produced in cooperation with the Kiwanis Club of Houston to reinforce, encourage and educate the public on its dependence on the law, its agencies and agents.

McKinney received distinguished service awards from the Galveston Junior Chamber of Commerce and was named the Outstanding Senior Citizen of Galveston in 1965. In 1981, he was nominated for the Freedom Foundation Award for his work in fostering respect for law enforcement officers.

Raul Jimenez, Sr. San Antonio

Raul Jimenez, Sr., president and chairman of the board of the Jimenez Food Products, Inc., was selected for the Liberty Bell Award by the San Antonio Young Lawyers Association.

The Jimenez Annual Thanksgiving Dinner, Inc. is a non-profit organization that has fed about 50,000 senior citizens since the program began in Fort Worth in 1974. The San Antonio program began in 1980.

Jimenez is active in working to improve the community. He has worked for adult education schools and advanced parent/child education programs.

In 1984, the Jimenez family cooperated with the City of San Antonio, United San Antonio, World Class Wrestling, and the San Antonio and the Mexican Chambers of Commerce to coordinate the Thanksgiving Dinner.

Jimenez was awarded the City of San Antonio Citation Award in 1984.

Fred Lee Hughes Abilene

The Abilene Young Lawyers Association presented Fred Lee Hughes, vice-chairman of InterFirst Bank of Abilene, the Liberty Bell Award.

In 1982, Hughes was selected as the second most influential citizen in Abilene in an *Abilene Reporter News* poll.

He served on the Abilene City Council and as mayor of the city. As mayor, Hughes emphasized the importance of law and the constitution with activities such as Law Day, Constitution Week, Respect the Law Week and Crime Prevention Week. Hughes is also recognized for his belief in the youth of the city.

He has served as liaison between the city of Abilene and Dyess Air Force Base, on the board of Citizens for Better Government, the Hendricks Home Development Council and has participated in various other civic activities.

Liberty and Justice for All: TYLA Law Day Activities, 1985

By Kathryn Snapka

TYLA affiliates throughout the state participated in Law Day activities based upon the 1985 theme for Law Day, "Liberty and Justice for All." Emphasis as always was on increasing public awareness of law and the legal profession, however there were several outstanding examples of an intense focus for this year's activities on disseminating information to students in public schools.

Throughout the state, young lawyers spoke in junior high and high school civic classes and answered questions regarding law and the legal profession. In Houston, there was an essay contest based on the 1985 Law Day theme. In Nueces County, several mock trials involving young lawyers and the students were held in high schools throughout the city. To give the students a close-up look at courtroom procedures, young lawyer associations in several cities conducted courthouse tours.

This year, as in years past, young lawyers in cooperation with bar associations, sponsored the popular "Call-

A-Lawyer" and "Ask-A-Lawyer" programs. These programs offer the public an opportunity to ask general questions of law that can be answered over local radio or television stations. In some cities, young lawyers manned booths in shopping centers to answer questions that individuals might have but would not normally turn to a lawyer for assistance.

And of course, for lawyers, numerous luncheons, banquets and gatherings were sponsored by local young lawyer associations for speeches and award presentations.

Perhaps the most interesting facet of this Law Day, is that at the time of this writing programs at schools all over the state, mock trials and requests for speeches by young lawyers are still being received. This may be the greatest measure of the success of the Law Day program: genuine interest in the law, the legal profession and how it affects all of us not only on May 1 but all year.

TYLA Awards of Achievement

Each year, the Texas Young Lawyers Association recognizes local affiliates for their individual projects and comprehensive programs. The local projects are then entered in the ABA competition. Local affiliates receiving recognition from TYLA this year included:

Comprehensive:

Large City:

- First — Austin
- Second — Dallas
- Third — Houston
- Fourth — Fort Worth

Small City:

- First — Waco/McLennan County
- Second — Abilene
- Third — Nueces County
- Fourth — Jefferson County

Single Project Awards:

Large City:

- First: San Antonio — Bexar County Community Service Restitution Project, a probation program for first offenders to do community work.
- Second: Austin — Dispute Mediation Center of Travis County.
- Third: Houston — "A Day in Court," an opportunity for high school students to view an actual trial and tour a jail.
- Fourth: Dallas — Mock trial training videotape for high school students.
- Fifth: Fort Worth — Federal Civil Practice and Procedure Seminar and videotape.

Small City:

- First: Waco/McLennan County — "Hear ye ... Hear ye, Order in the Court," a court clinic for participants in high school mock trial competitions.
- Second: Abilene — "Point of Law," videotapes showing attorneys answering questions from "You and the Law" for use on television.
- Third: Nueces County — Television "Public Service Announcements" for Pro Bono services offered by attorneys.

By Terri LeClercq

JARGON 2: Just When You Thought it Was Safe ...

Just when you thought you were sensitive to the '80's — women's rights, gay rights, and other minority rights — you now read that you should concentrate on the demands of consumer English. Judging from the mail after my first column on jargon (April 1985, *Texas Bar Journal*), many attorneys do not understand what the fuss is all about. Many do not see how to avoid jargon.

"And what, pray tell, should I use instead of the words on your April hit list?" wrote a Dallas attorney.

I have this image of a harried attorney, proud of his research and product, reading the "hit list" he would have retitled "These Are a Few of my Favorite Things." To help answer his question about alternatives, I will list some of the words (in italics) on the "hit list" that can be eliminated entirely:

the *aforesaid* plaintiff

enclosed *herein* (and *herewith*)

null and void

it is *hereby* ordered

said defendant

Juicy Fruit, *hereinafter* the seller (and *hereinafter cited as*)

save and except

witnesseth (a pause between identification in a contract and the details — adds nothing and can be deleted)

deem and consider

covenant and agreement

give, devise, and bequeath (*bequeath* may now govern real property as well as personal)

in truth and in fact (*Truth* is distinguished from fiction or error, and the purpose of the court will be to prove these statements, so the *fact* will determine the actual occurrence anyway.)

be it remembered and know all men by these presents

whereas to introduce recitals ("Whereas, no one reads this part anyway...")

in lieu, in place, instead of, and in substitution for have *and hold* (old common law for conveyance)

last will and testament (A will now relates to both real and personal property, unlike early English law which separated them. Many attorneys express serious discomfort changing the names of legal documents, so I doubt this redundancy will ever die.)

annual and set aside (imbalance of phraseology. "Annul" is one option of setting aside, and would mean the same thing without the unnecessary words. However, to set aside can mean a variety of things: to "reverse, vacate, cancel, annul, or review." So if you are describing the action of a court, you might qualify how the court set aside the ruling by adding, for example, that the court set aside the opinion for review. Another option might be that an appellate court will set aside its decision by reversing it, or cancelling it.)

Dr. Terri LeClercq is a lecturer on writing in the English Department at the University of Texas at Austin and has taught for two years in the Legal Writing Program at the University of Texas School of Law. She is writing a text on legal writing for law students.



Other jargon words from the "hit list" have simple or more modern substitutes. None of the words below is "incorrect," but the cumulative effect of these words in a document, designed for either a client or another attorney, cloys as unnecessary baggage.

- aforesaid (above)
- forthwith (immediately)
- heretofore (before, up to this time)
- thenceforth (thereafter, after that)
- to wit (namely, that is to say)
- behoove (to be advantageous, or to be proper)
- henceforth (from now on)
- whence (from where, or from what place)

A second group of words from the "hit list" may not be synonymous, but they need to be reconsidered. The coupled words below are not parallel or equal, in spite of the conjunction that signals they will be. For example, *fraud and deceit* is frequently written as a phrase, joined by the conjunction "and." But fraud is a cause of action that contains the element of deceit, along with other elements (the purpose of inducing another to part with a valuable thing or legal right). If you have committed fraud, you have deceived; that is a conditional relationship rather than a conjunctive one. The combined phrase is repetitious. Fraud is merely one aspect of deceit.

While an element of fraud, deceit is also an element of other causes of action. Deceit is also deceptive misrepresentation that does not lead to any cause of action. Parents lying to their children about Santa Claus deceive them, but they are not guilty of breaking any law. If you have *defrauded* someone, you have necessarily deceived her. But if you have *deceived* someone, you have not necessarily defrauded her. The phrase is used incorrectly if the two words are joined by a conjunction that indicates that the words are equals. If they are related at all, one (deceit) is a subordinate rather than an equal.

Another coupled phrase, *acknowledge and confess*, contains an internal redundancy. To acknowledge is defined as "to own, avow, or admit; to confess; to recognize one's acts and assume responsibility." So the definition contains "confess." Acknowledge is the larger entity, and confession is one of the aspects of it. They are not parallel and equal.

Due and payable has the same problem; both mean that justice or the law requires something owing, payable. In this case, though, *payable* may signify an obligation to pay at once, so it subsumes *due* within this phrase and becomes redundant. Play it safe and drop one of the terms.

I suspect that consumer English is here to stay. After the initial development of other social reforms of this decade and the natural reactions against them, an equilibrium has developed with far more respect for other people's interests. Consumer English is a response to the years that people have felt powerless against, and unnecessarily ignorant of, legalese in documents that control their lives. Texas attorneys who want to keep their clients should write — and edit — with their clients' interests in mind; waiting for the Texas Legislature or bar associations to edit consumer documents is like waiting for Godot. If your professional judgment is that a contract or will must be couched in careful language required by courts, then the least that a conscientious attorney can do for clients — the ones who pay the bills — is to provide an accompanying summary that the clients can understand.

Last week an attorney shared his favorite office anecdote. He had written to a client using clean, clear prose. Later, the client called back and chewed him out, saying he did not expect to receive a letter written by the office secretary. When the attorney insisted that he had done the actual writing, the client grumbled, "Well, it sure didn't sound like a lawyer."

If you consider the years of indoctrination that led to that accusation, you will accept that no one person can change the public's perception of legal writing. But each of you can make a conscious effort, while dictating or filling in forms, to balance your need for speed with your client's need to understand what you have said. And change will occur.

We are only halfway through the '80's....

WATCH OUT: prescribe/proscribe

You *prescribe* when you are giving a remedy or decree. The opposite is true of *proscribe*, when you forbid or prohibit. The more frequent use of *prescribe* is with medicine. *Proscriptive* is used to reflect a judgment, where someone is mandating that someone else must do something.