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## Personal Torts

Frank L. Branson

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# PERSONAL TORTS

*Frank L. Branson\**

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\* B.A., Texas Christian University; J.D., L.L.M., Southern Methodist University; Law Offices of Frank L. Branson, P.C., Dallas, Texas. The writer wishes to acknowledge the assistance of William B. Curtis, attorney, and Eleanor Starkey, law clerk, both of The Law Offices of Frank L. Branson, P.C.

## I. NEGLIGENCE

## A. DUTY AND BREACH

Traditional notions of duty and breach as a basis of negligence actions have not changed. Continuing the case-by-case refinements, Texas courts have addressed both issues dozens of times in 1997. Some of the more poignant fact scenarios follow.

In *Smith v. Merritt*,<sup>1</sup> a passenger was injured in an automobile accident. The passenger sued the social hosts of a party at which the nineteen-year-old driver consumed alcoholic beverages, claiming that the hosts were negligent and negligent per se in providing alcohol to the driver. Reasoning that the liability to third parties should rest with the drinker rather than the social host, the Texas Supreme Court held that the social hosts had no common law duty to the passenger to refrain from providing alcohol to the driver.<sup>2</sup>

In *Thornhill v. Ronnie's I-45 Truck Stop, Inc.*,<sup>3</sup> the owner of a hotel defaulted on loans he had borrowed to build the hotel, and rather than repossess the property, the lender requested that the owner stay on the property to operate the hotel for him. The hotel later caught fire and two guests died. Finding that the relationship between the lender and the hotel owner was not simply a debtor/lender relationship because the lender exercised control over the management and operation of the hotel, the appellate court concluded that the lender was the possessor of the hotel and owed a duty of care to keep the premises in a safe condition.<sup>4</sup>

In *Limon v. Gonzaba*,<sup>5</sup> a woman who was shot by her husband brought an action against a drug and alcohol abuse counselor at the clinic where her husband had been counseled, claiming that the counselor breached his duty to warn her of the risk her husband posed to her. Applying the *Tarasoff/Thompson* doctrine,<sup>6</sup> the Texas Supreme Court held that a health care provider has a duty to warn an identifiable victim if it is reasonably foreseeable that the patient will injure or kill that person.<sup>7</sup> In this case, the risk that the husband would harm his wife was not reasonably foreseeable, and therefore, the counselor owed no duty to warn the wife.<sup>8</sup>

*Scott Fetzer Co. v. Read*<sup>9</sup> involved the issue of an employer's liability for the acts of an independent contractor. Kirby hired independent distributors to market vacuum cleaners, who were then required to recruit door-to-door salespeople. The distributors were not required to conduct background checks on prospective salespeople. In *Fetzer*, the plaintiff

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1. 940 S.W.2d 602 (Tex. 1997).

2. *See id.* at 608.

3. 944 S.W.2d 780 (Tex. App.—Beaumont 1997, writ dismissed by agr.).

4. *See id.* at 789.

5. 940 S.W.2d 236 (Tex. App.—San Antonio 1997, writ denied).

6. *See Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334 (1976).

7. *See Limon*, 940 S.W.2d at 240.

8. *See id.* at 241.

9. 945 S.W.2d 854 (Tex. App.—Austin 1997, writ granted).

was sexually assaulted in her home by a Kirby salesperson who had a history of acting in a sexually inappropriate manner. Plaintiff sued the salesperson, the distributor, and Kirby. Kirby argued that it breached no duty to plaintiff, asserting that it was not responsible for the acts of an independent contractor. The court of appeals disagreed and found that Kirby did have a duty to take reasonable precautions to deter its distributors from hiring persons with histories of crime, violence, or sexually deviant behavior.<sup>10</sup>

### B. CAUSATION

As with duty and breach, the concept of causation has not changed, but it is often discussed. In *Pena v. Van*,<sup>11</sup> two teenage girls were brutally assaulted, raped, and murdered by a gang. The underage members of the gang had been sold alcohol by Van. The trial court held that the assaults and murders were not proximately caused by the sale of alcohol and granted the defendants a summary judgment. Discussing the elements of proximate cause (both cause in fact and foreseeability), the appellate court reversed the summary judgment, finding that the defendant did not produce any summary judgment evidence to show that the assaults were unforeseeable.<sup>12</sup> The court recognized that causation is usually a factual issue best left to the jury and remanded the case for trial.<sup>13</sup>

In *Nash v. Perry*,<sup>14</sup> the Nashes claimed that their children were molested at a day care facility and sued the defendants for common law negligence for failure to intervene or report the abuse and negligence per se under the Texas Family Code sections regarding the reporting of abuse. The appellate court held that the defendants were bystanders and had no common law duty to intervene.<sup>15</sup> The Family Code did, however, establish a minimum threshold for defendants' conduct,<sup>16</sup> and the case was remanded to allow the plaintiffs to attempt to prove a violation of that standard of care as the cause of their injuries.<sup>17</sup>

### C. NEGLIGENT HIRING

The obligations of a potential employer were evaluated in several different contexts during 1997. In *Guidry v. National Freight, Inc.*,<sup>18</sup> a truck driver hired by the defendant denied any prior criminal record. Without checking with prior employers, conducting a background search, or con-

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10. See *id.* at 859. See the further discussion of duty and breach in the context of Liquor Liability in *infra* Section II (F), and the issues related to the duty to warn of the addictive nature of tobacco in *American Tobacco Co. v. Grinnell*, 951 S.W.2d 420 (Tex. 1997), in *infra* Section III (C).

11. 960 S.W.2d 101 (Tex. App.—Houston [1st Dist.] 1997, pet. filed).

12. See *id.* at 104.

13. See *id.* at 105.

14. 944 S.W.2d 728 (Tex. App.—Austin 1997, writ granted).

15. See *id.* at 729.

16. See TEX. FAM. CODE ANN. § 261.101(a) (Vernon 1996).

17. See *Nash*, 944 S.W.2d at 729-30.

18. 944 S.W.2d 807 (Tex. App.—Austin 1997, no writ).

firming the driver's claims, the defendant hired the driver for long haul trips. During an unscheduled stop at an off-route location, the driver sexually assaulted Guidry. Finding that the assault on Guidry was not foreseeable, as she was not within the group of people with whom the driver should have had contact, the Austin Court of Appeals affirmed a summary judgment for the employer.<sup>19</sup> Although the employer might have been negligent in hiring the driver, it owed no duty to Guidry.<sup>20</sup>

Recall, also, the discussion of the *Fetzer* case in Section I(A) of this Article.<sup>21</sup> A customer assaulted by a Kirby salesman sued the company and its distributor for negligently hiring the salesman and allowing him to perform in-home demonstrations, in light of his history of sexual crimes and misconduct under prior employers. Recognizing that Kirby and the distributor owed a duty to avoid putting their customers in such a dangerous position, the Austin Court of Appeals upheld a jury's verdict against Kirby and the distributor for negligent hiring because Kirby failed to perform a reasonable investigation of the salesman before hiring him.<sup>22</sup>

In *St. Luke's Episcopal Hospital v. Agbor*,<sup>23</sup> a negligent credentialing case, the plaintiffs sued the defendant hospital, claiming that the obstetrician who injured their child during delivery should not have been given privileges to practice medicine at the hospital. The Texas Supreme Court held that the Texas Medical Practice Act<sup>24</sup> governed the action.<sup>25</sup> This Act protects peer review committees, which make decisions such as granting privileges to doctors, from civil liability, unless malice on the part of the committee can be shown.<sup>26</sup> Finding that the hospital's credentialing process fell within that protection, a summary judgment was affirmed due to a lack of evidence of malice by the hospital in granting privileges to the obstetrician.<sup>27</sup>

#### D. NEGLIGENCE PER SE

Application of traffic regulations in civil litigation became the crux of several appellate discussions this past year.

In *Knighten v. Louisiana Pacific Corp.*,<sup>28</sup> Knighten stopped for traffic ahead of her and was struck twice from behind by the two defendants. During trial, plaintiff requested an amendment to her petition to add a negligence per se allegation, which was refused by the trial court. Holding that negligence per se is not an independent cause of action, the Beaumont Court of Appeals reversed and remanded because the trial

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19. *See id.* at 808, 811.

20. *See id.* at 811.

21. *See supra* notes 9-10 and accompanying text.

22. *See Fetzer*, 945 S.W.2d at 859.

23. 952 S.W.2d 503 (Tex. 1997).

24. *See* TEX. REV. CIV. STAT. ANN. art. 4495b (Vernon Supp. 1998).

25. *See Agbor*, 952 S.W.2d at 504, 506.

26. *See* TEX. REV. CIV. STAT. ANN. art. 4495b.

27. *See Agbor*, 952 S.W.2d at 509.

28. 946 S.W.2d 638 (Tex. App.—Beaumont 1997, writ requested).

amendment would not have asserted a "new cause of action," but merely an additional facet of the negligence suit already being tried.<sup>29</sup>

In *Waring v. Wommack*,<sup>30</sup> Waring was riding his bicycle when he was struck by a motorist making a left turn. Waring requested a negligence per se instruction, which was refused. The Austin Court of Appeals held that the duties owed by the motorist were those of a reasonable driver and that there was no absolute duty to avoid turning left into Waring.<sup>31</sup> Accordingly, Waring was not entitled to an instruction that a violation of traffic laws by the motorist could constitute negligence per se.<sup>32</sup>

## E. PROFESSIONAL NEGLIGENCE

### 1. Medical Malpractice

The field of professional negligence was often addressed by Texas courts and the Legislature during this Survey period. Amendments to article 4590i were confined largely to procedural issues such as filing expert reports or bonds.<sup>33</sup> Case law, however, revisited traditional areas of interest.

In *Eckmann v. Des Rosiers*,<sup>34</sup> Eckmann filed suit against her doctor, claiming malpractice for lack of informed consent, among other things. Attached to the defendant doctor's motion for summary judgment was a form disclosure of the risks of Eckmann's surgery. This form was outdated and did not list all known risks, as compiled by the Texas Medical Disclosure panel.<sup>35</sup> However, a second form used by the hospital did comply with the requirements, and therefore, summary judgment was affirmed.<sup>36</sup>

In *Tajchman v. Giller*,<sup>37</sup> Tajchman suffered from epilepsy and was considering the removal of a portion of her brain to correct the seizures. The defendant doctors placed a probe in her brain to analyze the brain's internal functions. During the surgery, a vein was severed and the bleeding caused a type of stroke. The plaintiff sued, claiming a lack of informed consent. Although the severing of the vein was not disclosed as a possible risk or hazard, the consequences (a stroke) were disclosed, and thus, a summary judgment for the defendants was affirmed.<sup>38</sup>

In *Sampson v. Baptist Memorial Hospital System*,<sup>39</sup> Sampson was suffering from an insect bite and was taken to a local emergency room for

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29. See *id.* at 640-41.

30. 945 S.W.2d 889 (Tex. App.—Austin 1997, no writ).

31. See *id.* at 892.

32. See *id.*

33. See TEX. REV. CIV. STAT. ANN. art. 4590i, Subchapter M, § 13.01 (Vernon Supp. 1998).

34. 940 S.W.2d 394 (Tex. App.—Austin 1997, no writ).

35. See TEX. REV. CIV. STAT. ANN. art. 4590i, Subchapter F, § 6.04 (Vernon Supp. 1988).

36. See *Eckmann*, 940 S.W.2d at 396, 399.

37. 938 S.W.2d 95 (Tex. App.—Dallas 1996, writ denied).

38. See *id.* at 99.

39. 940 S.W.2d 128 (Tex. App.—San Antonio 1996, writ granted).

treatment. The emergency doctor administered some pain medication and an antihistamine, then discharged Sampson. Fourteen hours later, Sampson went into septic shock and was admitted to the intensive care unit of a different hospital. In a medical malpractice case against the first hospital, Sampson claimed that the hospital was vicariously liable for the negligence of the independent contractor physicians staffing the emergency room. Discussing both “agency by estoppel” and “apparent agency” theories, the San Antonio Court of Appeals followed Texas precedent and the near unanimous findings of other states in imposing vicarious liability on the hospital.<sup>40</sup> The court went on to discuss sound public policies confirming the need for vicarious liability to protect the patients of hospitals.<sup>41</sup>

In *Parkway Hospital, Inc. v. Lee*,<sup>42</sup> Lisa Lee was given pitocin to accelerate the delivery of her son. Lee claimed that improper administration of the drug caused her uterus to rupture, necessitated a hysterectomy to save her life, and caused severe cerebral palsy to her son. Defendants argued that Lee was not entitled to damages for injury to the family relationship. The court recognized that such injuries were significant and worthy of compensation and affirmed the jury’s \$16,000,000 verdict.<sup>43</sup>

## 2. Medical Malpractice Statute of Limitations

During this Survey period, a great number of medical negligence cases revolved around the timely filing of suit, the discovery of injuries, and the discovery of causation.

In *Diaz v. Westphal*,<sup>44</sup> the plaintiff suffered from Hodgkins disease. His medical doctor treated him with drugs for more than seven years. In 1987, at the end of that period, the plaintiff began suffering from urinary tract bleeding. He was treated by another doctor who advised reconstructive surgery in April, 1991, necessitated by the prolonged drug regimen administered by the first doctor. While in preparation for surgery, Westphal was diagnosed with bladder cancer. He died in April, 1992, and his wife brought suit against the first doctor in May, 1993. The defendant was granted a summary judgment on the basis of the two-year statute of limitations of article 4590i.<sup>45</sup> The Texas Supreme Court affirmed, holding that the Open Courts provision of the Texas Constitution does not toll the statute of limitations for wrongful death actions, which are created by statute rather than common law, as is required to invoke Open Courts relief.<sup>46</sup>

In *Husain v. Khatib*,<sup>47</sup> Khatib sought the medical care of the defend-

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40. *See id.* at 131-32.

41. *See id.* at 134-35.

42. 946 S.W.2d 580 (Tex. App.—Houston [14th Dist.] 1997, writ denied).

43. *See id.* at 590.

44. 941 S.W.2d 96 (Tex. 1997).

45. *See id.* at 97; TEX. REV. CIV. STAT. ANN. art. 4590i (Vernon Supp. 1998).

46. *See Diaz*, 941 S.W.2d at 101; TEX. CONST. art. I, § 13.

47. 41 Tex. Sup. Ct. J. 547, 1998 WL 107926 (March 13, 1998).

ants for a breast exam. Although a mammogram showed anomalies, Khatib was told that she did not have cancer. More than two years later, Khatib was diagnosed with cancer and was told that the first mammogram was not properly read or followed up. Khatib hired an attorney eight months later, and notice letters were immediately sent. After eighteen months of investigation, a suit was filed. The Texas Supreme Court rendered judgment in favor of the defendant, measuring limitations from the last date of treatment by the defendant.<sup>48</sup> The allegations of negligence revolved around a failure to properly diagnose cancer, which could only have occurred during the last treatment; since suit was filed more than two years after that treatment, plaintiff's claims were barred.<sup>49</sup>

In *Streetman v. Nguyen*,<sup>50</sup> Streetman was diagnosed with cancer in October, 1993. He hired an attorney in late 1994. The attorney received an expert's report in January, 1995, indicating that an X-ray taken in March, 1992, was misread and was a cause of Streetman's extensive cancer. Streetman died in May, 1995, and thereafter, his survivors filed a wrongful death lawsuit. Finding that the statutory action for wrongful death did not satisfy the elements necessary for an Open Courts tolling of the statute of limitations, the court affirmed the summary judgment for the defendants.<sup>51</sup>

The court of appeals grappled with the issue of whether the absolute two-year statute of limitations set out in article 4590i applies to negligence claims brought against a professional association in *Campbell v. MacGregor Medical Association*.<sup>52</sup> Finding that it does, the court determined that a professional association falls within the definition of "health care provider" in article 4590i.<sup>53</sup> The court then recognized that the article 4590i statute of limitations bars a negligence claim when the injury was known within two years of its occurrence, even though the standard care was not discovered until later.<sup>54</sup>

In *Terry v. Abito*,<sup>55</sup> plaintiff's shoulder was dislocated during a therapy session with physical therapists. Plaintiff sent timely notice of his intent to assert a health care liability claim against the therapists and filed his lawsuit two years and six days after the injury. The trial court granted summary judgment in favor of defendants based on the two-year statute of limitations. Plaintiff appealed the summary judgment, contending that the statute of limitations was tolled, and thus, the notice letters added seventy-five days to the two year limitations period. Contrary to the *Campbell* opinion,<sup>56</sup> the court of appeals reasoned that article 4590i does

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48. *See id.* at \*2

49. *See id.*

50. 943 S.W.2d 168 (Tex. App.—San Antonio 1997, writ denied).

51. *See id.* at 171-72.

52. No. 01-94-01277-CV (Tex. App.—Houston [1st Dist.] Apr. 24, 1997, writ requested) (not designated for publication), 1997 Tex. App. LEXIS 2215.

53. *See id.* at \*5.

54. *See id.*

55. 961 S.W.2d 528 (Tex. App.—Houston [1st Dist.] 1997, no pet. h.).

56. *See supra* notes 52-54 and accompanying text.



not apply to physical therapists; plaintiff's claim instead fell under the two-year statute of limitations applicable to claims of general negligence.<sup>57</sup>

### 3. *Legal Malpractice*

In *Delp v. Douglas*,<sup>58</sup> the Delps brought a legal malpractice suit against the attorneys who had represented the Delps in a business dispute. Mr. Delp later filed personal bankruptcy, and his "asset," the malpractice claim, was purchased by the insurance carrier for the defendant attorneys. Shortly after the purchase, the carrier (as the plaintiff) entered into an agreed dismissal of the claim against the attorneys. The Delps argued that the legal malpractice claim could not be assigned in Texas. The court of appeals agreed and set aside the dismissal because the "plaintiff" carrier did not have the necessary privity to the malpractice and the attorneys.<sup>59</sup>

In the complicated web of the estate distribution for an oil and gas mogul in Houston, the law firm of Vinson & Elkins was accused of malpractice, *inter alia*, in *Vinson & Elkins v. Moran*.<sup>60</sup> Two of the beneficiaries were assigned the claims of the remaining beneficiaries and filed suit against Vinson & Elkins. In appealing the \$35,000,000 verdict, Vinson & Elkins argued that the plaintiffs could not take an assignment of a legal malpractice claim. The court of appeals agreed, holding that public policy prohibits the assignment of legal malpractice claims.<sup>61</sup>

*Arce v. Burrow*<sup>62</sup> concerned a series of explosions at a chemical plant in Pasadena, Texas, that killed twenty-three people and injured hundreds more. A number of those people were represented by the Umphrey, Burrow firm. Their claims were settled for varying amounts and were dismissed by agreement. Later, the plaintiffs accused the firm of negotiating the claims for an aggregate amount, then dividing that amount among the various plaintiffs. The plaintiffs filed a legal malpractice claim that was dismissed summarily for lack of evidence of damages because the court of appeals held that the amounts received were fair, and therefore, the plaintiffs suffered no monetary damages.<sup>63</sup> Plaintiffs appealed, arguing that a forfeiture of the attorneys' fees was warranted, even without individual monetary damages. Finding that a breach of the fiduciary duty owed to a client might justify a fee forfeiture (even without actual damages), the court of appeals held that whether to forfeit a fee is best left to the jury in a legal malpractice claim; however, the amount of for-

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57. See *Terry*, 961 S.W.2d at 531; TEX. CIV. PRAC. & REM. CODE ANN. § 16.003 (Vernon 1986 & Supp. 1998).

58. 948 S.W.2d 483 (Tex. App.—Fort Worth 1997, writ granted).

59. See *id.* at 486, 491.

60. 946 S.W.2d 381 (Tex. App.—Houston [14th Dist.] 1997, writ dism'd by agr.).

61. See *id.* at 392-93.

62. 958 S.W.2d 239 (Tex. App.—Houston [14th Dist.] 1997, pet. filed).

63. See *id.* at 244.

feiture is to be decided by the court.<sup>64</sup>

## II. ADDITIONAL TORTS

Outside of negligence actions, Texas appellate courts were presented with many opportunities to write on less traditional torts during the Survey period.

### A. DEFAMATION AND FALSE LIGHT

In *Rogers v. Cassidy*,<sup>65</sup> a city attorney brought a defamation action against a private citizen who had written a letter to the editor that alleged improprieties committed by the city attorney in connection with city elections. The court applied *New York Times v. Sullivan*,<sup>66</sup> in holding that a public official must show actual malice in order to recover damages for defamation, and found that the defendant never doubted the veracity of his allegations and did not act with malice.<sup>67</sup>

An individual committed suicide after a newspaper published a report listing his name and the fact that he had been arrested for indecent exposure in *Hogan v. Hearst Corp.*<sup>68</sup> His family sued the newspaper and the author. The court of appeals held that publication of information obtained from otherwise publicly available police reports was not public disclosure of private facts.<sup>69</sup>

### B. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

In *C.M. v. Tomball Regional Hospital*,<sup>70</sup> a minor was raped, and her mother took her to the hospital twenty-three hours later to be examined. The head nurse interviewed the minor in a public waiting room, implied doubt that the minor had actually been raped, and refused to prepare a "rape kit" on the minor. The plaintiff and her mother brought a claim for intentional infliction of emotional distress against the nurse. The court of appeals affirmed the trial court's judgment in favor of the defendants, noting that the plaintiff's evidence did not rise to the necessary level of emotional distress.<sup>71</sup>

In *Johnson v. Standard Fruit & Vegetable Co.*,<sup>72</sup> Johnson was participating in a march along Highway 59 in Houston when a Standard Fruit truck crashed into the procession. Although Johnson was not physically injured by the wreck, he brought a claim for negligent infliction of physical injuries (exacerbation of his Vietnam post-traumatic stress syndrome) and

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64. See *id.* at 245.

65. 946 S.W.2d 439 (Tex. App.—Corpus Christi 1997, no writ).

66. 376 U.S. 254 (1964).

67. See *Rogers*, 946 S.W.2d at 444-46.

68. 945 S.W.2d 246 (Tex. App.—San Antonio 1997, no writ).

69. See *id.* at 250-51.

70. 961 S.W.2d 236 (Tex. App.—Houston [1st Dist.] 1997, no writ).

71. See *id.* at 245.

72. No. 01-95-01239-CV (Tex. App.—Houston [1st Dist.] Aug. 29, 1997, pet. granted) (not designated for publication), 1997 Tex. App. LEXIS 4757.

intentional infliction of emotional distress. Following a lengthy discussion of emotional distress damages and from which torts they are recoverable,<sup>73</sup> the appellate court held that no special relationship exists between a driver and the general public; therefore, the Standard Fruit driver committed no negligence against Johnson.<sup>74</sup> However, recognizing that the conduct of the driver could be interpreted as intentional or reckless infliction of emotional distress, the court reversed the defendant's summary judgment.<sup>75</sup>

### C. PREMISES LIABILITY

The courts visited novel areas of contractor responsibility and resurrected aged theories of attractive nuisance in 1997 premises cases.

In *Clayton W. Williams, Jr., Inc. v. Olivo*,<sup>76</sup> a drilling crew-member employed by an independent contractor was injured. He and his wife sued the general contractor and its on-site representative for negligence. The trial court rendered judgment in favor of the plaintiffs, and the court of appeals affirmed. The Texas Supreme Court reversed, holding that the plaintiffs failed to establish the elements of premises-defect liability against the on-site representative and failed to prove respondeat superior liability against the general contractor for the negligence of the employer.<sup>77</sup>

An intoxicated boy was killed while climbing an electrical tower in *Texas Utilities Electric Co. v. Timmons*.<sup>78</sup> His mother sued the electric company under the attractive nuisance doctrine, claiming that the tower was such a nuisance. Summary judgment was granted in favor of the electric company and was affirmed at the appellate level.<sup>79</sup> The appellate court held that recovery under the attractive nuisance doctrine was precluded because the boy was of sufficient age and experience to know of the dangers of being near high-voltage lines.<sup>80</sup>

In *Wal-Mart Stores v. Gonzalez*,<sup>81</sup> plaintiff was shopping at Wal-Mart when she slipped and fell on macaroni salad that had been spilled on the floor. She was awarded damages of \$100,000. Wal-Mart appealed, arguing that there was insufficient evidence that it had actual or constructive knowledge of the dangerous condition of the macaroni. The court of appeals affirmed the trial court's judgment in light of evidence demonstrating Wal-Mart's constructive knowledge of the spilled macaroni.<sup>82</sup>

In *Silva v. Spohn Health System Corp.*,<sup>83</sup> an employee of the defendant

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73. See *Boyles v. Kerr*, 855 S.W.2d 593 (Tex. 1993).

74. See *Johnson*, 1997 Tex. App. LEXIS at \*6.

75. See *id.* at \*7.

76. 952 S.W.2d 523 (Tex. 1997).

77. See *id.* at 530.

78. 947 S.W.2d 191 (Tex. 1997).

79. See *id.* at 192.

80. See *id.* at 194.

81. 954 S.W.2d 777 (Tex. App.—San Antonio 1997, pet. filed).

82. See *id.* at 779.

83. 951 S.W.2d 91 (Tex. App.—Corpus Christi 1997, writ denied).

hospital was stabbed as she was entering her car to go home. At the time she was stabbed, she was standing on the curb adjoining the street and the defendant's property. Summary judgment was granted in favor of the defendant upon the trial court's finding that the defendant did not owe plaintiff a duty when she was on the curb. The court of appeals reversed and held that the defendant was required to protect plaintiff from reasonably foreseeable criminal acts on or adjacent to the defendant's property.<sup>84</sup>

Plaintiff was raped when another tenant from her apartment complex entered her apartment through a sliding glass door in *Cain v. Timberwalk Apartments Partners, Inc.*<sup>85</sup> Plaintiff sued the landlord and management company, and a jury found in favor of the defendants. The court of appeals reversed, holding that the negligence instruction submitted to the jury did not reflect the rule that a landowner or apartment manager has a duty to use ordinary care to protect against unreasonable and foreseeable risks of harm by a third party.<sup>86</sup>

#### D. PRODUCT LIABILITY

Texas courts wrote detailed and thorough opinions in the field of product liability ranging from automobiles to asbestosis in 1997.

In *Sipes v. General Motors Corp.*,<sup>87</sup> Sipes was injured in an automobile accident and sued the automobile's manufacturer, claiming that the failure of the airbag to deploy was the result of a defective product. The trial court granted a summary judgment for the defendant based on the defendant's argument that the collision was a side-impact collision, which should not deploy the driver's front airbag. The appellate court noted the conflicting evidence of the direction of force and held that such a conflict was a fact issue best left to a jury; accordingly, the court reversed.<sup>88</sup> Further, in a well-reasoned discussion of the various theories in an automobile product liability action, the court held that the other sources of summary judgment evidence offered by the plaintiffs raised necessary fact issues regarding defective marketing and design, supporting a reversal.<sup>89</sup>

In *Rodriguez v. Hyundai Motor Co.*,<sup>90</sup> plaintiff was a passenger in a Hyundai that was involved in a rollover accident. She sued the driver and the manufacturer on various theories of negligence and product liability. The appellate court reversed a jury's take-nothing verdict, holding that the evidence presented at trial required a jury question on a breach of the implied warranty of merchantability.<sup>91</sup> Further, the court noted that the same proof offered (roof crush and crash-worthiness) could support theo-

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84. *See id.* at 95-96.

85. 942 S.W.2d 697 (Tex. App.—Houston [14th Dist.] 1997, writ granted).

86. *See id.* at 703.

87. 946 S.W.2d 143 (Tex. App.—Texarkana 1997, no writ).

88. *See id.* at 152.

89. *See id.* at 156-60.

90. 944 S.W.2d 757 (Tex. App.—Corpus Christi 1997, writ granted).

91. *See id.* at 771.

ries of both product liability and implied warranty, and both questions should be submitted to a jury since the evidence had been admitted.<sup>92</sup>

In *Owens-Corning Fiberglas Corp. v. Martin*,<sup>93</sup> plaintiffs successfully tried an action against Owens-Corning, alleging various product liability theories and that asbestos exposure caused a number of different injuries. Defendant appealed, claiming that the trial court erred by consolidating eighteen different plaintiffs for a single trial. In discussing Rule 174 and the criteria supporting the consolidation (common issues of law and fact among the cases), the court of appeals affirmed the jury's verdict.<sup>94</sup> Further, consistency in the verdicts among the plaintiffs did not support the defendant's claim of prejudice.<sup>95</sup>

#### E. MALICIOUS PROSECUTION

Efforts to turn the dismissal of criminal charges into successful civil litigation were occasionally addressed by Texas appellate courts during the Survey period.

One such case is *Lang v. City of Nacogdoches*.<sup>96</sup> Vira Lang was ninety-one years old, and living in Nacogdoches. Her son William was entrusted with her finances, to which her son Ben objected. Ben would occasionally visit, and these visits upset his mother. Vira then gave William a power of attorney to prosecute trespassers. William instructed Ben to cease the upsetting visits; Ben ignored the instruction, and William called the police and filed criminal trespass charges against Ben. After the charges were dropped, Ben sued William and all of the county officials involved in his fourteen hour incarceration, alleging malicious prosecution and intentional infliction of emotional distress. The court of appeals affirmed the summary judgment for most of the defendants, holding that the conduct of William was not outrageous, nor was the suit timely filed.<sup>97</sup>

In *Digby v. Texas Bank*,<sup>98</sup> Digby used life insurance policies as collateral for a loan from Texas Bank. During repayment, Digby borrowed from the insurance policies to repay the loan, allegedly with the knowledge and consent of a vice-president of Texas Bank. When Digby later defaulted, Texas Bank attempted to liquidate the collateral and allegedly learned for the first time of Digby's actions. Texas Bank filed with the FDIC a Report of Apparent Crime regarding Digby's actions. Digby was later acquitted by a jury. In a detailed discussion of the elements of malicious prosecution, the court of appeals recognized evidence of each element and reversed the summary judgment for Texas Bank.<sup>99</sup>

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92. *See id.* at 771-72.

93. 942 S.W.2d 712 (Tex. App.—Dallas 1997, no writ).

94. *See id.* at 716-20.

95. *See id.* at 720.

96. 942 S.W.2d 752 (Tex. App.—Tyler 1997, writ denied).

97. *See id.* at 758-60.

98. 943 S.W.2d 914 (Tex. App.—El Paso 1997, writ denied).

99. *See id.* at 918-25.

## F. LIQUOR LIABILITY

Responsibility for the sale and provision of alcohol remained a hotly contested area of tort law, revolving around the interpretation of Texas Alcoholic Beverage Code sections 106.01 and 106.06(a)<sup>100</sup> and common law duties and obligations.

In *Estate of Catlin v. GMC*,<sup>101</sup> a woman was killed after being struck by a car driven by an employee who had become intoxicated at a fish fry held on the defendant employer's property. The woman's estate sued the defendant and its employees, and the trial court granted the defendants a summary judgment. Plaintiffs appealed and claimed that because defendant adopted a policy regarding the consumption of alcohol on its premises, and thereafter failed to follow the policy, a legal duty was created. The court of appeals concluded that the mere creation of an internal policy regarding alcohol consumption does not create a duty per se; such a duty would have been created only if the defendant had actual knowledge of the employee's intoxication and then performed an affirmative act of control over the employee's actions.<sup>102</sup>

In *Kovar v. Krampitz*,<sup>103</sup> an eighteen-year-old boy was killed in a car accident after consuming alcohol at a party hosted by the defendants. The parents of the deceased argued that the defendants owed both common law and statutory duties to avoid making alcohol available to their son and to exercise reasonable care to ensure their son's safety after he became drunk. There was no evidence that the defendants provided the alcohol consumed by the deceased. Affirming the trial court's judgment, the court of appeals held that the defendants owed no common law duty as hosts to the deceased and did not violate any statutory duty created in the Texas Alcoholic Beverage Code.<sup>104</sup>

In *Gonzalez v. South Dallas Club*,<sup>105</sup> Gonzalez and her friends were involved in an altercation at defendant's bar. Defendant's employees intervened and allowed Gonzalez to leave the bar through a back door to avoid an additional altercation outside. About a mile from the bar, the groups clashed again, and Gonzalez was injured. Gonzalez sued the bar, alleging violations of the Dram Shop Act<sup>106</sup> and negligent security. Because the defendant had no control over the premises where the injury occurred, nor the parties causing the injuries, summary judgment was affirmed because the defendant had no duty to prevent the criminal conduct of third parties off of the defendant's premises.<sup>107</sup>

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100. TEX. ALCO. BEV. CODE ANN. §§ 106.01, 106.06(a) (Vernon 1995).

101. 936 S.W.2d 447 (Tex. App.—Houston [14th Dist.] 1997, no writ).

102. *See id.* at 451.

103. 941 S.W.2d 249 (Tex. App.—Houston [14th] 1996, no writ).

104. *See id.* at 252-54; TEX. ALCO. BEV. CODE ANN. §§ 106.01, 106.06(a).

105. 951 S.W.2d 72 (Tex. App.—Corpus Christi, 1997, no writ).

106. *See* TEX. ALCO. BEV. CODE ANN. § 2 (Vernon 1995).

107. *See Gonzalez*, 951 S.W.2d at 75-76.

### G. SPOILIATION OF EVIDENCE

Recognizing a cause of action for general negligence in the keeping of medical records, one Texas appellate court detailed both the public policies and the sister-state authority to support such an action in *Ortega v. Trevino*.<sup>108</sup>

Linda Ortega was injured during her birth. In a medical negligence action against the obstetrician, all of Ortega's medical records were lost or destroyed by the obstetrician. A separate suit was filed against the obstetrician, alleging that he had a duty to preserve and maintain her medical records. The loss of the records presented an insurmountable hardship with regard to the medical negligence action for which the obstetrician should be held responsible. The court of appeals recognized the procedural remedies available to a party in the face of spoliation of evidence, specifically the presumption that the evidence would have favored the opposite party.<sup>109</sup> The court further acknowledged that several other states have recognized an action exclusively for the spoliation of key evidence where the defendant had an obligation to preserve the evidence.<sup>110</sup> In light of the trend towards recognizing interference with prospective contracts in Texas, and the supporting authority from other states that have directly addressed the issue, the Corpus Christi Court of Appeals remanded the case for a jury's resolution of whether the destruction violated a duty owed by the obstetrician to his patient to not lose or destroy medical records.<sup>111</sup>

### III. DEFENSES

Very few new defenses were raised by appellate courts, and the traditional theories underwent little change during the Survey period. Although some legislative changes might be considered defense-oriented,<sup>112</sup> the practical impact on litigation will not be known for several years.

#### A. GOVERNMENTAL/OFFICIAL IMMUNITY

Plaintiffs were struck by a police car during a high speed police chase in *Wadewitz v. Montgomery*.<sup>113</sup> The trial court denied the defendant officer's and the defendant city's motion for summary judgment, and the court of appeals affirmed on an interlocutory appeal. The issue before the Texas Supreme Court was whether the police officer responding to an emergency call conclusively established that he acted in good faith enti-

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108. 938 S.W.2d 219 (Tex. App.—Corpus Christi 1997, writ granted).

109. *See id.* at 220-21.

110. *See id.* at 221-22.

111. *See id.* at 223.

112. *See, e.g.*, the forum non conveniens in TEX. CIV. PRAC. & REM. CODE ANN. § 71.051 (Vernon 1997 & Supp. 1998) and the limitations of landowners liability in TEX. CIV. PRAC. & REM. CODE ANN. § 75 (Vernon 1997 & Supp. 1998).

113. 951 S.W.2d 464 (Tex. 1997).

tling him to the official immunity defense. The Court applied the *City of Lancaster v. Chambers*<sup>114</sup> test in which good faith depends on how a reasonably prudent officer could have assessed both the need to which an officer responds and the risks of the officer's course of action, based on the officer's perception at the time of the accident. The Texas Supreme Court found that neither the city nor the officer provided conclusive evidence of the officer's good faith under the *Chambers* standard and affirmed the denial of summary judgment.<sup>115</sup>

In *City of Pharr v. Ruiz*,<sup>116</sup> Officer Castillo and three other patrol cars were in pursuit of a suspicious-looking vehicle when Castillo careened into the Ruiz's car. Ruiz sued the city, alleging that the officers breached their duty to drive with due regard and, pursuant to the Texas Tort Claims Act,<sup>117</sup> failed to act in good faith by balancing the need to apprehend the suspect with the risk of harm to the public. The trial court denied the defendants' motion for summary judgment, finding that a fact issue existed regarding whether the actions of the officers were discretionary and performed in good faith. The court of appeals determined that the officers' acts were discretionary, but upheld the denial of summary judgment because plaintiffs successfully rebutted defendants' good faith claim.<sup>118</sup>

Teresa, a sixth grader, reported to her teacher that she had been threatened by one of her classmates in *Downing v. Brown*.<sup>119</sup> The teacher held Teresa and her classmate after class one day to resolve their differences. The teacher believed that the problem was solved even though Teresa later wrote her a note about her fear of the other girl. A few days later, the girl attacked Teresa after school and Teresa's mother sued the school district and the teacher for Teresa's injuries. Summary judgment was granted in favor of the defendants. The Texas Supreme Court reviewed the case and determined that the teacher enjoyed qualified immunity from personal liability for her actions in maintaining classroom discipline.<sup>120</sup>

In *Texas Department of Criminal Justice v. Watt*,<sup>121</sup> a prison inmate allegedly spit on an officer and was ordered to be placed in a "management cell". The inmate violently struggled for some time as guards tried to restrain him and place him in the cell. He died as a result of the struggle. The inmate's mother filed suit against the Texas Department of Criminal Justice (TDCJ), and the trial court denied TDCJ's motion for summary judgment. On appeal, the court applied the *Chambers* official immunity

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114. 883 S.W.2d 650, 653 (Tex. 1994).

115. See *Wadewitz*, 951 S.W.2d at 467.

116. 944 S.W.2d 709 (Tex. App.—Corpus Christi 1997, no writ).

117. See TEX. CIV. PRAC. & REM. CODE ANN. § 101 (Vernon 1997 & Supp. 1998).

118. See *Ruiz*, 944 S.W.2d at 715-16.

119. 935 S.W.2d 112 (Tex. 1996).

120. See *id.* at 113.

121. 949 S.W.2d 561 (Tex. App.—Waco 1997, no writ).



test<sup>122</sup> and held that a reasonably prudent officer in the same or similar circumstances would have believed that the force used to place Watt in the cell was necessary.<sup>123</sup> The court of appeals, therefore, reversed and rendered summary judgment in favor of TDCJ.<sup>124</sup>

## B. TEXAS TORT CLAIMS ACT

Efforts to bring direct actions against the State pursuant to the limited waivers of immunity embodied in the Texas Tort Claims Act were slightly modified by the Legislature in 1997,<sup>125</sup> mostly in areas of procedure rather than substance. Appellate courts are now addressing the 1995 changes to the Texas Tort Claims Act, but again, the changes have had little effect on substantive issues.

### 1. Premises or Special Defect

In *Sipes v. Texas Department of Transportation*,<sup>126</sup> Jamie Sipes was struck by a car when she tried to walk to a store located across the highway. The median at the crossover was covered with tall grass and weeds that obstructed her view. Sipes sued the Department of Transportation (DOT) under a premises liability claim based on the Texas Tort Claims Act, arguing that the weeds were a special defect. Summary judgment was entered in favor of DOT and affirmed by the court of appeals.<sup>127</sup> The court of appeals held that the vegetation was not a special defect or a public nuisance, as required to pierce the State's sovereign immunity.<sup>128</sup>

### 2. Condition or Use of Property

In *Texas Department of Mental Health and Mental Retardation v. McClain*,<sup>129</sup> Leta McClain, a mental patient at Austin State Hospital, died as a result of being physically assaulted by Pugh, another resident, with either a metal rod removed from a hospital locker or a metal foot pedal removed from his wheelchair. Pugh had a long criminal record and was involuntarily admitted to the hospital because he was thought to be a danger to himself and others. McClain's family sued the hospital, alleging that hospital employees were negligent in allowing Pugh, whose dangerous propensities were known, to have access to either the rod or the pedal. The trial court denied the defendant's motion for summary judgment, and the court of appeals agreed, holding that the hospital's actions involved the use of tangible property as required by the Texas Tort Claims Act.<sup>130</sup>

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122. See *supra* note 114 and accompanying text.

123. See *Watt*, 949 S.W.2d at 566.

124. See *id.* at 567.

125. See TEX. CIV. PRAC. & REM. CODE ANN. § 101 (Vernon 1997 & Supp. 1998).

126. 949 S.W.2d 516 (Tex. App.—Texarkana 1997, writ denied).

127. See *id.* at 518, 522.

128. See *id.* at 521.

129. 947 S.W.2d 694 (Tex. App.—Austin 1997, writ requested).

130. See *id.* at 698.

## C. FEDERAL PREEMPTION OF TORT CLAIMS

With federal legislation becoming more pervasive, the defense of preemption is becoming more common. Last year saw a variety of different federal statutes working their way into Texas civil litigation.

One example is *American Tobacco Co., Inc. v. Grinnell*.<sup>131</sup> In 1952, Grinnell started smoking cigarettes. Thirty-three years later, he was diagnosed with lung cancer. He filed suit against the manufacturer of the cigarettes and died before the suit reached trial. His family continued the suit, pursuing theories of product liability, negligence, misrepresentation, and breach of warranty. Through a series of motions, the trial court granted the defendants' summary judgment on all of plaintiff's claims. Finding that the dangers associated with smoking were "common knowledge" from 1952 forward (contrary to the assertions of the defendant and the tobacco industry, even in sworn testimony before Congress), the Texas Supreme Court affirmed the summary judgment against the defective design theories.<sup>132</sup> However, holding that the addictive nature of tobacco was not common knowledge, the Court remanded the failure to warn and marketing defects actions to the trial court.<sup>133</sup> Since Congress enacted federal legislation related to appropriate warnings in 1969,<sup>134</sup> any claims related to warning and marketing defects after 1969 were preempted by federal law.<sup>135</sup>

In *Holguin v. Ysleta Del Sur Pueblo*,<sup>136</sup> Sifuentes was drinking at the Tigua Indian Reservation Casino and was served alcohol past the point at which she became obviously intoxicated. She left the casino and was involved in a head-on collision off of the reservation's land. Her estate sued the Indian tribe that owned and operated the casino, alleging violations of the Dram Shop Act,<sup>137</sup> and other negligent activities. The tribe argued that it was immune from personal injury suits as a federally recognized Indian Reservation.<sup>138</sup> The court of appeals recognized that no state has allowed a private plaintiff to sue a tribe for personal injuries.<sup>139</sup> Even though the Dram Shop Act was created pursuant to the state's police powers (which preempt the tribal immunity in the criminal context), attempting to collect money damages by an injured individual did not qualify under the limited waiver of the tribe's immunity.<sup>140</sup> Accordingly, the tribe's summary judgment was affirmed.<sup>141</sup>

In *Trevino v. Atchison, Topeka & Santa Fe Railway Co.*,<sup>142</sup> Trevino and

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131. 951 S.W.2d 420 (Tex. 1997).

132. *See id.* at 428-29.

133. *See id.*

134. *See* 15 U.S.C. §§ 1331-1340 (1998).

135. *See Grinnell*, 951 S.W.2d at 438-40.

136. 954 S.W.2d 843 (Tex. App.—El Paso 1997, pet. filed).

137. *See* TEX. ALCO. BEV. CODE ANN. § 2 (Vernon 1995).

138. *See* 25 U.S.C. § 1300(g) (1983 & Supp. 1997).

139. *See Holguin*, 954 S.W.2d at 847.

140. *See id.* at 854.

141. *See id.*

142. 958 S.W.2d 204 (Tex. App.—Houston [14th Dist.] 1997, pet. filed).

two of her children were killed in an auto-train collision. Suit was filed against the railroad, alleging negligent failure to warn regarding the crossing. The defendant obtained a summary judgment, arguing that federal law governed the railroad's duties. Finding that no federal regulations governed the railroad's duties to warn of the dangers at the particular crossing where the accident occurred, the court of appeals reversed.<sup>143</sup> Although federal law governs warnings required at federally-funded railroad crossings, the crossing at issue was not specifically covered under the railway crossing regulations.<sup>144</sup>

#### D. STATUTE OF LIMITATIONS

The selection of the cause of action will govern the appropriate statute of limitations for the plaintiff. Actions sounding in fraud, or governed by specific statutes, were recently addressed by Texas courts in the context of personal tort litigation.

In *Shannon v. Law-Yone*,<sup>145</sup> plaintiff was admitted to Brookhaven Psychiatric Pavilion as a voluntary inpatient for treatment and expressed a desire to end treatment and leave the facility but was discouraged by his doctor and others. Plaintiff later sued his doctor, other doctors, and the psychiatric hospital, asserting numerous claims including fraud and negligence. Defendants argued that the suit should be governed by the two-year statute of limitations because it involved personal injury claims, rather than the four-year statute of limitations allowed in cases involving fraud. The trial court granted the defendants a summary judgment. The court of appeals reversed, holding that "[t]he mere fact that [plaintiff] seeks damages more often associated with personal injury claims, i.e., emotional and mental anguish, is not determinative of which statute of limitation applies"; since plaintiff's claims sounded in fraud, the four-year statute governed.<sup>146</sup>

In *Reames v. Hawthorne-Seving, Inc.*,<sup>147</sup> plaintiff was injured on a conveyor belt in 1993. The belt was installed at the plant in 1982. The trial court granted summary judgment in favor of defendants based on a statute of repose requiring that certain suits against one who constructs an improvement to real property be brought within ten years after the construction of the improvement. The court of appeals held that the conveyor was an improvement to the property and that, because plaintiffs filed suit more than ten years after the conveyor's installation, their claim was barred by statute.<sup>148</sup>

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143. *See id.* at 207.

144. *See id.* at 206; 49 U.S.C. §§ 20101-20153 (1997).

145. 950 S.W.2d 429 (Tex. App.—Fort Worth 1997, writ denied).

146. *Id.* at 437.

147. 949 S.W.2d 758 (Tex. App.—Dallas 1997, writ denied).

148. *See id.* at 762, 764; TEX. CIV. PRAC. & REM. CODE ANN. § 16.009 (Vernon 1986). For a more detailed analysis of the statute of limitations in medical malpractice actions, see *supra* Section I (E)(2).

## E. VICARIOUS LIABILITY

Efforts to impute the responsibility of one tortfeasor to a different party were discussed in the context of construction sites and auto accidents in this Survey period. Although changes were made to joint tortfeasors' liability in chapter 33 of the Civil Practice & Remedies Code in 1995,<sup>149</sup> those changes have not yet worked their way into the appellate level.

In *Good v. Dow Chemical Co.*,<sup>150</sup> Good was a pipefitter working for a company building a hydrocarbon plant for Dow Chemical. While working on the project, Good was injured and sued the owner of the project, Dow Chemical. Holding that Good's employer was the contractor, and not Dow Chemical, the appellate court affirmed a summary judgment regarding allegations of an unsafe workplace because the control of Good's activities fell to his employer.<sup>151</sup> Further, Dow Chemical did not retain sufficient control over the project to be responsible as a landowner.<sup>152</sup>

## IV. IMPORTANT ISSUES

## A. DAMAGES

During the Survey period, jury damage awards remained largely unburdened by appellate review, provided an appropriate threshold of evidence was present in the record.

1. *Mental Anguish*

Shirley Trevino gave birth to a stillborn baby while under the medical supervision of Edinburg General Hospital in *Edinburg Hospital Authority v. Trevino*.<sup>153</sup> Both Trevino and her husband sued the hospital and judgment was entered in their favor. One of the elements of damages sought by the plaintiffs was mental anguish. Trevino offered evidence of her preparations in expectation of the arrival of her baby, the pain she experienced upon losing the baby, and the deterioration of her marriage that resulted. The Texas Supreme Court held that the evidence presented related to the grief that Trevino felt over the loss of the baby as a separate individual, and not as a part of her body.<sup>154</sup> Noting that under *Krishnan v. Sepulveda*,<sup>155</sup> a woman must provide evidence of mental anguish damages resulting from negligent treatment that causes the loss of a baby as part of the woman's body, the Court remanded her damage claim to the

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149. See TEX. CIV. PRAC. & REM. CODE ANN. § 33 (Vernon 1997).

150. 945 S.W.2d 877 (Tex. App.—Houston [1st Dist.] 1997, no writ).

151. See *id.* at 880.

152. See *id.* at 880-82. See also the discussion of vicarious liability of hospitals for the malpractice of emergency room doctors in *supra* Section I (E)(1).

153. 941 S.W.2d 76 (Tex. 1997).

154. See *id.* at 79.

155. 916 S.W.2d 478 (Tex. 1995).

trial court for a new trial.<sup>156</sup>

## 2. Punitive Damages

The codifications of exemplary damage elements in chapter 41 of the Civil Practice & Remedies Code<sup>157</sup> became effective on September 1, 1995, but have not yet had an impact at the appellate level. Instead, the *Moriel* decision<sup>158</sup> is still having the greatest impact on Texas jurisprudence regarding punitive damages.

After establishing an insurance company's gross negligence, the Texas Supreme Court has recognized that economic ruin caused by the insurance company's bad faith may support an award of punitive damages.<sup>159</sup> A plaintiff must satisfy the gross negligence standard created by *Transportation Insurance Co. v. Moriel*,<sup>160</sup> which requires proof that the insurance company was actually aware that its actions involved an extreme risk of harm, such as financial ruin, and was nevertheless consciously indifferent to the insured's rights or welfare.<sup>161</sup> Evidence of that extreme degree of risk in the form of economic harm will satisfy the evidentiary threshold to support a jury's damage award.<sup>162</sup>

### B. WRONGFUL DEATH BENEFICIARIES

Inattention to detail proved costly for one set of wrongful death defendants in 1997. In *Avila v. St. Luke's Lutheran Hospital*,<sup>163</sup> Jimenez died while under the medical care of the defendants. His adult children filed wrongful death and survival actions against the defendants later that same year. The case was settled and a final take-nothing judgment was entered. Later, Jimenez's minor daughter filed a second wrongful death suit against many of the same defendants. The defendants sought summary judgment on the basis of collateral estoppel, arguing that the same issues had been resolved between the same parties in a prior proceeding. Because the prior suit, the release, and the final judgment were all related specifically to the adult children and did not purport to represent all wrongful death beneficiaries, the court held that the minor child was not a party.<sup>164</sup> Further, the issues of liability were not actually litigated in the agreed settlement and final judgment.<sup>165</sup> Accordingly, the summary judgment for the defendants was reversed and the minor child's action remanded for trial.<sup>166</sup>

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156. See *Trevino*, 941 S.W.2d at 79; see also *Parkway Hospital*, 941 S.W.2d at 590; *supra* notes 42-43 and accompanying text.

157. TEX. CIV. PRAC. & REM. CODE ANN. § 41 (Vernon 1997 & Supp. 1998).

158. See *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10 (Tex. 1994).

159. See *Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48 (Tex. 1997).

160. 879 S.W.2d 10 (Tex. 1994).

161. See *id.* at 19-20.

162. See *Universal Life*, 950 S.W.2d at 57.

163. 948 S.W.2d 841 (Tex. App.—San Antonio 1997, writ denied).

164. See *id.* at 855.

165. See *id.*

166. See *id.*

## C. INSURANCE

An insurance company's obligations of defense and indemnification were often litigated during the past year, with the insurance company usually seeking a declaratory judgment to resolve its contractual duties. Although the law related to the issues did not change in 1997, many creative new efforts to invoke coverage were presented to the appellate courts.

In *Trinity Universal Insurance Co. v. Cowan*,<sup>167</sup> Mr. Gage was a photo lab clerk who made extra prints of some revealing photos of Ms. Cowan and distributed them to his friends. Discovering this, Ms. Cowan sued Mr. Gage, who requested both a defense to the suit and indemnification for any judgment from his homeowner's insurance policy. The insurance company ultimately denied coverage, claiming that Ms. Cowan's suit did not involve a "bodily injury" as defined by the policy and that Mr. Gage's conduct was not an "accident." The Texas Supreme Court agreed with both assertions.<sup>168</sup> The Court held that without physical manifestations, Ms. Cowan's damage claims were for humiliation and embarrassment only and were not a bodily injury; further, Mr. Gage's intentional tort was not an accident as defined by the policy.<sup>169</sup>

In *Grain Dealers Mutual Insurance Co. v. McKee*,<sup>170</sup> McKee's eleven-year-old daughter was injured as a passenger in a one-car accident. McKee sought a declaratory judgment against his business insurance policy, pursuing underinsured benefits for his daughter. The Texas Supreme Court rendered judgment for the insurer, holding that the business auto policy would not provide coverage to family members of business employees.<sup>171</sup> Although McKee was the president and sole shareholder of the business, he was not the policyholder—the business was. Since the business had no "family members," the Court held that McKee's daughter was not entitled to underinsured benefits.<sup>172</sup>

Griffin was injured by gunshots fired from a vehicle driven by Royal in *Farmers Texas County Mutual Insurance Co. v. Griffin*.<sup>173</sup> Griffin sued Royal and others for his injuries. Seeking both defense and indemnity, Royal notified his auto insurance carrier. The carrier provided a defense in the suit (subject to a reservation of the carrier's right to refuse indemnification) and filed an action for a declaration that it had no obligations to Royal. Finding the allegations in the personal injury suit to be intentional torts, the Texas Supreme Court held that the gunshots constituted intentional conduct and an exception to the carrier's duty to defend and indemnify.<sup>174</sup>

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167. 945 S.W.2d 819 (Tex. 1997).

168. *See id.* at 820.

169. *See id.* at 827.

170. 943 S.W.2d 455 (Tex. 1997).

171. *See id.* at 456.

172. *See id.* at 457.

173. 955 S.W.2d 81 (Tex. 1997).

174. *See id.* at 83.

In *Wessinger v. Fire Insurance Exchange*,<sup>175</sup> Wessinger got drunk and inexplicably punched Morrison several times in the face, causing injuries that included permanent vision loss. Wessinger, in the lawsuit filed by Morrison, sought coverage for his actions under his homeowner's policy, arguing that his intoxication meant that his actions (which he did not remember) were not intentional but were merely an accidental result of the intoxication. In this declaratory judgment action by the homeowner's carrier, the court of appeals held that voluntary intoxication does not destroy the intentional nature of the conduct; since the conduct was not "accidental" as covered by the policy, the insurer was not required to indemnify Wessinger for the resulting damages.<sup>176</sup>

#### D. WORKERS' COMPENSATION

Since the reform of the Workers' Compensation system, very few cases have been litigated in the trial courts, and even fewer have been appealed; 1997 was no exception.

In *Trico Technologies Corp. v. Montiel*,<sup>177</sup> Montiel was injured on the job, filed a claim for benefits under Trico's workers' compensation insurance policy, and was later discharged by Trico. After Montiel died, his wife sued Trico, alleging that Trico wrongfully discharged Montiel in retaliation for filing a workers' compensation claim. During pre-trial discovery, Trico learned that although Montiel stated on his application that he did not have an alcohol problem, he was a diagnosed alcoholic. The trial court found for Trico, but the court of appeals reversed. The Texas Supreme Court affirmed the court of appeals' decision, holding that the after-acquired evidence doctrine (evidence discovered after a hire that would have prevented the initial hiring) has been adopted as a limitation on an employee's recovery for a retaliatory discharge claim under the Workers' Compensation Act.<sup>178</sup> Under the after-acquired evidence doctrine, therefore, an "employee is only entitled to back pay from the date of the unlawful discharge to the date that the employer discovered evidence of the employee's misconduct."<sup>179</sup>

In *Simplex Electric Corp. v. Holcomb*,<sup>180</sup> Holcomb, a Simplex employee, was injured at work. He filed a claim for workers' compensation benefits with the Texas Workers' Compensation Commission, which then notified Simplex. Simplex gave its insurance carrier notice of the claim, and the carrier had sixty days in which to contest the compensability of Holcomb's injury. The carrier never formally contested compensability, and Simplex sought to invoke its right to contest compensability even though its carrier accepted liability for the payment of benefits. The

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175. 949 S.W.2d 834 (Tex. App.—Dallas 1997, no writ).

176. *See id.* at 840-41.

177. 949 S.W.2d 308 (Tex. 1997).

178. *See id.* at 310.

179. *Id.* at 312.

180. 949 S.W.2d 446 (Tex. App.—Austin 1997, writ denied).

Commission determined that Simplex lacked standing to challenge compensability because its carrier missed the statutory deadline. The district court affirmed the decision, as did the court of appeals.<sup>181</sup> The appellate court reasoned that the carrier's inadvertent failure to contest the compensability of the claim by the sixty-day statutory deadline did not give the employer standing to contest the employee's claim.<sup>182</sup>

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181. *See id.* at 447.

182. *See id.* at 448.



