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PERSONAL TORTS

Frank L. Branson*

I. NEGLIGENCE

A. Duty

IN the past year, Texas courts decided several notable cases in the area of liability resulting from intoxication. In *Joseph E. Seagram & Sons, Inc. v. McGuire*,¹ the Texas supreme court dealt with the issue of duty on the part of manufacturers and distributors of alcoholic beverages.² The three plaintiffs, all of whom suffered from alcoholism, sued under a theory of the defendants' failure to warn of potential alcoholism resulting from prolonged and excessive consumption of alcohol, at least prior to enactment of the Alcohol Beverage Labeling Act⁴ in 1988. They alleged that the defendants' advertisements portrayed drinking as a safe activity, and further alleged that if the defendants had properly warned of the symptoms of alcoholism, the plaintiffs would have sought medical help for their addiction. The plaintiffs brought claims of negligence, 402A product liability, breaches of implied warranty of merchantability and fitness, DTPA violations, and conspiracy. The court, citing the comments to section 402A of the Restatement Second of Torts, noted that sellers do not have a duty to warn of generally known and recognized dangers.⁵ Because the dangers of developing alcoholism were within the realm of what the court termed common knowledge, the court held that there was no duty to warn of that particular danger.⁶ However, since the supreme court narrowed its holding to the limited facts and circumstances present,⁷ it is unclear how other courts will interpret this case in the future.

The San Antonio court of appeals, sitting en banc, heard another significant case, *Beard v. Graff*.⁸ In *Beard* the court purported to create social host

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1. 814 S.W.2d 385 (Tex. 1991).

2. *Id.* at 385.

3. The manufacturers and wholesalers named in the suit were Seagram, Hiram Walker, Inc., Private Cellar Co., d/b/a/ Medley Distilling Co., Brown-Forman Corp., d/b/a/ B-F Spirits Ltd., Tarrant Distributors, Inc. and Lone Star Co. The manufacturers' trade association, Distilled Spirits Council of the United States, Inc., was also a defendant in the suit. *Id.* at 386.

4. 27 U.S.C.A. §§ 213-129a (1992).

5. 814 S.W.2d at 487 (citing RESTATEMENT (SECOND) OF TORTS § 402A comment j (1965)).

6. 814 S.W.2d at 388.

7. *Id.*

8. 801 S.W.2d 158 (Tex. App.—San Antonio 1990, writ granted).

liability for an intoxicated guest's conduct.⁹ Following an automobile accident allegedly caused by the intoxication of a motor vehicle driver, Houston Moos. Beard and his mother sued the two couples who had served the driver alcoholic beverages, asserting a negligence claim in serving a guest whom the host knew to be intoxicated and knew would be operating a motor vehicle in such an intoxicated state. Following the trial court's dismissal for failure to state a cause of action, the court of appeals reversed, despite finding no precedential authority in Texas on a social host's duty to innocent third parties.

Distinguishing this case from others addressing an alcoholic beverage licensee's duty to third parties¹⁰ and a social host's duty to the intoxicated guest himself,¹¹ the court imposed liability under these circumstances because of its concern that the "public . . . requires greater protection by available remedy than the drunken driver himself."¹² In imposing such a duty, the court followed the minority rule and expressly declined to defer the issue to the legislature.¹³ The elements of the cause of action delineated by the court were: (1) injury to a third party; (2) exclusive control of the alcohol supply by the host; and (3) knowingly serving a guest with knowledge that the guest was intoxicated and would later be driving in that condition.¹⁴

A series of dissents followed. One lengthy dissent compared the status of social host liability in other states to that in Texas, presented the three traditional reasons for rejecting such liability, and found the *Walker v. Children's Services Inc.*¹⁵ case dispositive on the issue.¹⁶ Specifically, the dissent stated that in *Walker*, the court, after noting an absence of legislative policy regarding social host liability, refused to provide a remedy for social guests who injure themselves or others.¹⁷ Alternatively, the dissent argued it was a question best left to the legislature,¹⁸ a proposition with which the second dissent agreed.¹⁹ Another dissent stressed that the supreme court had implicitly rejected the duty by denying writ in the *Walker* case.²⁰ Such divergent views compelled the legislature to address the issue, resulting in legislation which arguably precluded social host liability for serving alcoholic beverages.²¹ The final word on social host liability, however, has yet to be spoken, pending the supreme court's review of the *Beard* case and case law interpreting the new statute.

The final case on alcohol liability considered in this Survey involved an

9. *Id.*

10. *El Chico Corp. v. Poole*, 732 S.W.2d 306, 308 (Tex. 1987).

11. *Walker v. Children's Servs., Inc.*, 751 S.W.2d 717, 718 (Tex. App.—Amarillo 1988, writ denied).

12. 801 S.W.2d at 160.

13. *Id.* at 161.

14. *Id.* at 164.

15. 751 S.W.2d 717, 718 (Tex. App.—Amarillo 1988, writ denied).

16. *Id.* at 165-66. (Butts, J. dissenting).

17. 801 S.W.2d at 167.

18. *Id.* at 167. (Butts, J., dissenting).

19. *Id.* at 171-72. (Peeples, J., dissenting).

20. *Id.* at 173. (Biery, J., dissenting).

21. TEX. ALCO. BEV. CODE ANN. §§ 2.01-.03 (Vernon Supp. 1992).

employer's duty to prevent an intoxicated employee from harming himself. *Spruiell v. Schlumberger Ltd.*²² arose out of injuries suffered by an intoxicated employee who left a company picnic driven by another intoxicated employee. The employee, Spruiell, alleged liability on the part of his employer as an alcohol vendor rather than as a social host, based on the four dollar admission to the picnic where beer was served at no additional cost. Contrary to Schlumberger's contention, the court found no requirement of a liquor license to impose liability but rather, liability could be imposed based on "the conduct of selling alcoholic beverages to individuals who are intoxicated."²³ The court also addressed the issue of whether the employer acted negligently in compelling Spruiell to leave the picnic intoxicated.²⁴ Noting that in *Otis Engineering Corp. v. Clark*²⁵ the court imposed a duty on an employer to prevent harm to others when the employer exercises control over an incapacitated employee. The *Spruiell* court relied on *El Chico Corp. v. Poole*²⁶ and *Pastor v. Champs Restaurant, Inc.*²⁷ to extend this duty to prevention of harm to the employee himself, leaving the question of his contributory negligence to the jury.²⁸

The case of *Connell v. Payne*²⁹ established the duty owed by one participant in a contact sport to another participant. In *Connell* a polo player, Connell, sued a fellow polo player for injuries suffered during a match when Payne struck Connell in the eye with a mallet. After the jury declined to impose liability, the injured polo player appealed based on the standard applied by the trial court.³⁰ The trial court's holding was based on an intentional or reckless standard, while Connell asserted that negligence was the proper standard.³¹ Agreeing with other states, this first impression case compared participation in a contact sport with the now-abolished defense of assumption of the risk, and affirmed the trial court's standard of reckless or intentional conduct.³²

II. PROFESSIONAL NEGLIGENCE

The question of how the Texas Deceptive Trade Practices Act³³ (DTPA) applies to hospitals arose in *Eoff v. Peterson Foundation*.³⁴ The Eoffs alleged a breach of an implied warranty to provide good and workmanlike emer-

22. 809 S.W.2d 935 (Tex. App.—Texarkana 1991, no writ).

23. *Id.* at 938-39.

24. *Id.* at 939.

25. 668 S.W.2d 307 (Tex. 1983).

26. 732 S.W.2d 306, 308 (Tex. 1987).

27. 750 S.W.2d 335, 337 (Tex. App.—Houston [14th Dist.] 1988, no writ). *Pastor* simply followed *El Chico* in imposing a duty not to serve a customer it knew or should have known was intoxicated on an alcoholic beverage dealer on behalf of the general public, including its intoxicated customers. *Id.*

28. 809 S.W.2d at 940.

29. 814 S.W.2d 486, 488-89 (Tex. App.—Dallas 1991, writ denied).

30. *Id.* at 488.

31. *Id.*

32. *Id.* at 488-89.

33. TEX. BUS. & COM. CODE ANN. § 17.41 (Vernon 1987 & Supp. 1991).

34. 811 S.W.2d 187, 189 (Tex. App.—San Antonio 1991, no writ).

gency room services and to provide these services in a professional manner. After distinguishing the case from an implied warranty imposed in repairing goods,³⁵ supplying products,³⁶ the sale of pharmaceutical drugs,³⁷ and provision of a broad range of other services,³⁸ the court noted those services were all in conjunction with tangible goods or property.³⁹ The court took *Dennis v. Allison*⁴⁰ one step further to unequivocally state that there is no implied warranty in a hospital's rendition of medical care, and hence no cause of action under the DTPA.⁴¹

The patient in *Knight v. Department of Army*⁴² attempted an informed consent cause of action to redress his infection with the HIV virus through a blood transfusion. Knight underwent five coronary artery bypass grafts to prevent the onset of a heart attack, during which he received contaminated blood. The infection occurred before detection of the virus was possible, but Knight asserted he should have been informed of the risk of transmission through transfusions and available alternatives. While the court found that failure to disclose such risks could have influenced a reasonable person's consent decision, they concluded that a reasonable person, deciding between a remote though deadly virus and necessary cardiac surgery, nonetheless would have consented to the surgery.⁴³

III. PRODUCT LIABILITY

The unsettled and controversial issue of the preemptive effect of the Federal Cigarette Labeling and Advertising Act⁴⁴ was the central issue in *Carlisle v. Philip Morris, Incorp.*⁴⁵ The Fifth Circuit concisely summarized other jurisdictions' conclusions⁴⁶ and discussed the Texas supreme court's presumption against preemption.⁴⁷ Identifying six factors, the court concluded no clear, unambiguous congressional intent to preempt common law tort claims in passage of the Act.⁴⁸ In doing so, the court may have opened

35. *Melody Home Mfg. Co. v. Barnes*, 741 S.W.2d 349, 351 (Tex. 1987) (unworkmanlike repairs made to mobile home).

36. *Thomas v. St. Joseph Hosp.*, 618 S.W.2d 791, 793 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.) (supplying harmful product by way of defective hospital gown).

37. *Providence Hosp. v. Truly*, 611 S.W.2d 127, 129 (Tex. Civ. App.—Waco 1980, writ dismissed w.o.j.) (sale of contaminated drug to patient).

38. *Archibald v. Act III Arabians*, 755 S.W.2d 84, 85 (Tex. 1988) (horse training included among services).

39. 811 S.W.2d at 196.

40. 698 S.W.2d 94, 96 (Tex. 1985) (no need to impose strict liability on the provision of medical treatment).

41. 811 S.W.2d at 196.

42. 757 F. Supp. 790, 791 (W.D. Tex. 1991).

43. *Id.* at 794.

44. 15 U.S.C. § 1331-41 (1988 & Supp. 1990).

45. 805 S.W.2d 498, 500 (Tex. App.—Austin 1991, no writ).

46. *Id.* at 502-05.

47. *Id.* at 507-09.

48. *Id.* at 509. The six factors were: (1) whether congressional goals would be frustrated by allowing such state common law tort claims; (2) whether the primary goal (here said to be informing the public of the hazards of smoking) would be enhanced by allowing such claims; (3) whether plaintiffs were preempted; (4) whether Congress expressly preempted common law tort claims; (5) any indication of Congressional intent to preempt in legislative history;

the door for state common law tort claims against cigarette manufacturers such as failure to warn, design defects, manufacturing defects, misrepresentation, and conspiracy unless or until Congress ascertains a need for tort immunity for the tobacco industry.⁴⁹

In a recent asbestos case, *Fibreboard Corp. v. Pool*,⁵⁰ the recurring issue of admissibility of Sumner Simpson papers occupied the court. The actual Sumner Simpson papers consist of about 6,000 documents given by officers of two asbestos manufacturers to the Editor of *Asbestos Magazine* indicating knowledge of the hazards of asbestos as early as the 1930s.⁵¹ Although neither of the manufacturers were parties to the instant suit, the selected seven letters held to be relevant were admissible to show that such risks were scientifically discoverable by others in the industry and that the manufacturers were held to a duty of keeping abreast of such knowledge and discoveries.⁵² In doing so, the court took time to clarify the Texas supreme court's holding in *Gaulding v. Celotex Corp.*,⁵³ explaining that *Gaulding* was not intended to affect any change on the standard applied to manufacturers, but rather they are still held to the knowledge and skill of an expert.⁵⁴ In a secondary issue, the court allowed autopsy photographs over objections of irrelevancy and unfair prejudice based on the gruesome nature of the photos because they pertained to the disputed issue of causation of death.⁵⁵

IV. IMMUNITIES

Although the Texas Tort Claims Act⁵⁶ provides certain entities with immunity from a wide range of claims, circumstances may arise in which the court finds such immunity from suit does not apply or that it has been waived. In *City of Waco v. Hester*⁵⁷ an inmate sued for being homosexually raped in the city jail. The court said central to the immunity issue was whether the claim arose out of an intentional tort, or a failure to provide police protection, in which case the city would be immune.⁵⁸ If, on the other hand, the claim arose from the negligence of a city employee, government immunity was not applicable.⁵⁹ Refusing to follow state appellate decisions,⁶⁰ the court concluded the legislature intended such immunity to apply to intentional torts by government employees only, not to negligence of those employees which happened to result in an intentional tort committed

and (6) any indication of Congressional intent to preempt in other statutes such as the Comprehensive Smokeless Tobacco Health Education Act of 1986. *Id.* at 509.

49. *Id.* at 517.

50. 813 S.W.2d 658, 666 (Tex. App.—Texarkana 1991, no writ).

51. *Id.* at 668.

52. *Id.* at 668-69.

53. 772 S.W.2d 66, 67 (Tex. 1989).

54. 813 S.W.2d at 668; see *Borel v. Fibreboard Paper Prod. Corp.*, 493 F.2d 1076, 1088 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).

55. 813 S.W.2d at 671-73.

56. TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.-.009 (Vernon 1986 & Supp. 1992).

57. 805 S.W.2d 807 (Tex. App.—Waco 1990, no writ).

58. *Id.* at 809.

59. *Id.*

60. *Id.* at 811.

by a third party.⁶¹ Thus, the court concluded Hester's case was not barred by the intentional tort immunity, but rather was a negligence claim (resulting in an intentional tort), allowable under the Act.⁶² As to immunity relating to the provision of police protection, the court ruled that the claim arose out of negligent implementation of formulated policy, rather than negligent formulation of the city's policies, making the police-protection immunity inapplicable.⁶³

The Austin court of appeals in *Texas Department of Mental Health & Mental Retardation v. Petty*⁶⁴ also found a waiver of governmental immunity. In this case, however, the waiver stemmed from the condition or use of tangible property.⁶⁵ The patient's negligence claims relating to her involuntary confinement were allowed primarily on the basis of treatment plans, mental status exams, evaluations, diagnoses, staff reports, progress notes, and the patient's I.Q. and achievement tests, all of which the court deemed tangible personal property, thereby waiving the state hospital's immunity.⁶⁶ The court noted "the cryptic language of § 101.021" and the resulting "conflicting opinions . . . regarding what constitutes tangible property."⁶⁷ The court also explained that under *Salcedo v. El Paso Hospital District*⁶⁸ the Texas supreme court meant that such property need not proximately cause the injury, but only need be involved or included in any negligent act or omission by the employee which proximately causes the injury.⁶⁹

In contrast, the Fort Worth court of appeals in *Ozolins v. North Lake Community College*⁷⁰ held the college immune from liability in the drowning of a student who fell from the school's sailboat. Claiming the sailboat constituted a motor vehicle because it had a motor and was used to transport people as provided by the statutory definition of a motor vehicle,⁷¹ the plaintiff contended the death claim fell under the exception to immunity for deaths arising from the operation or use of a motor-driven vehicle or equipment.⁷² The court flatly rejected the contention that any vehicle with a motor was a motor vehicle, focusing instead on definitions specifying "land

61. *Id.* at 812; see *Delaney v. University of Houston*, 792 S.W.2d 733, 735 (Tex. App.—Houston [14th Dist] 1990, writ granted) (immunity applies to intentional torts of third parties in student's claim resulting from rape by unknown assailant), *Trevathan v. State*, 750 S.W.2d 500, 502 (Tex. App.—Houston [1st Dist.] 1987, writ denied) (immunity from park visitor's claim resulting from attack by assailant in state park).

62. 805 S.W.2d at 812.

63. *Id.* at 812-13.

64. 817 S.W.2d 707, 713 (Tex. App.—Austin 1991, n.w.h.).

65. *Id.* at 711-12. Specifically, the Texas Tort Claims Act waives immunity for: "personal injury and death so caused by a condition or use of tangible personal or real property if the government unit would, were it a private person, be liable to the claimant according to Texas law." TEX. CIV. PRAC. & REM. CODE ANN. § 101.021(2) (Vernon 1986).

66. 817 S.W.2d at 713.

67. *Id.* at 713.

68. 659 S.W.2d 30, 33 (Tex. 1983).

69. 817 S.W.2d at 714.

70. 805 S.W.2d 714, 615 (Tex. App.—Fort Worth 1991, no writ).

71. TEX. CIV. STAT. ANN. art. 6675a-1 (Vernon 1977).

72. See TEX. CIV. PRAC. & REM. CODE ANN. § 101,021(1)(A) (Vernon 1986).

vehicles",⁷³ the requirement of two or more wheels,⁷⁴ and prior case law.⁷⁵ This determination seems to conflict with the recent case of *Elliott v. State*,⁷⁶ where the court summarily declared that the same rule that allows governmental liability for police officers' negligent operation of their police cars should also apply to Parks & Wildlife officers in the operation of their motorboats, which fell under the category of motor-driven equipment.⁷⁷ However, this issue was not raised by the plaintiff, so the conclusion will likely fade away as dicta.

V. DAMAGES

A. *Mental Anguish*

The Texas supreme court previously held that a person can recover damages for mental suffering for the willful invasion of the right to privacy.⁷⁸ A lower court in *Boyles v. Kerr*⁷⁹ addressed the issue of whether a negligent invasion of privacy is compensable. In *Boyles* a man secretly videotaped sexual relations with his girlfriend and played the tape to others. The plaintiff alleged that she was entitled to damages for the intentional, as well as the negligent invasion of her privacy. The jury found that the defendant's negligence proximately caused her mental anguish.⁸⁰ On appeal, the defendant argued that the cause of action upon which the case was based did not exist. Upholding the jury's finding, the Texarkana court of appeals concluded that the precise motives of the defendant were generally not important in the determination of a cause of action for invasion of privacy.⁸¹ Thus, the right to compensation for a recognized tortious injury did not depend on whether it was inflicted for the purpose of harming another or negligently inflicted with the probability of harm.⁸²

In *Robinson v. Chiarello*⁸³ an aunt and uncle sued a physician and hospital under theories of mental anguish and bystander recovery following the death of their nephew. Affirming the trial court's grant of summary judgment, the Fort Worth court of appeals held that a physician's failure in diagnosis was not sufficient to bring it within the guidelines of bystander recovery set out by the Texas supreme court in *Freeman v. City of Pasadena*.⁸⁴ A contemporaneous perception of the event is required by the

73. 805 S.W.2d at 615 (citing TEX. REV. CIV. STAT. ANN. art. 6675a-6e, § 1 (Vernon 1977); art. 5069-7.01(a) (Vernon 1987), and art. 6701d-11, § 1(2) (Vernon Supp. 1991)).

74. 805 S.W.2d at 615 (citing TEX. REV. CIV. STAT. ANN. art. 4413(36), § 1.03(1)(A), (B) (Vernon Supp. 1991)).

75. 805 S.W.2d at 616 (citing *Lloyds v. Burtner*, 436 S.W.2d 611, 613-14 (Tex. Civ. app.—Fort Worth 1968, writ ref'd n.r.e.) and *Williams v. State*, 725 S.W.2d 258, 260-61 (Tex. Crim. App. 1987)).

76. 818 S.W.2d 71, 74 (Tex. App.—San Antonio 1991, n.w.h.).

77. *Id.* at 74.

78. *Billings v. Atkinson*, 489 S.W.2d 858, 860 (Tex. 1973).

79. 806 S.W.2d 255, 258 (Tex. App.—Texarkana 1991, writ granted).

80. *Id.* at 259.

81. *Id.*

82. *Id.*

83. 806 S.W.2d 304, 305-06 (Tex. App.—Fort Worth 1991, writ denied).

84. *Id.* at 309 (citing *Freeman v. City of Pasadena*, 744 S.W.2d 923 (Tex. 1988)). The

guidelines.⁸⁵ In its decision not to extend bystander injury to a guardian of a misdiagnosed child, the court noted that the appellants' suffering occurred over an extended period of time and bystanders could not perceive a failure of diagnosis.⁸⁶

B. Exemplary Damages

The court discussed the issue allowing a post-verdict trial amendment to increase the requested exemplary damages to the amount actually awarded in *Harvey v. Stanley*.⁸⁷ In *Harvey* a wrongful death suit resulted in the jury doubling the amount of exemplary damages that plaintiffs sought as special damages.⁸⁸ Relying on a recent Texas supreme court decision,⁸⁹ the court reasoned that the language of Texas Rule of Civil Procedure 63⁹⁰ requires the trial court to grant leave for a party to file an amendment if the court finds no element of surprise or prejudice.⁹¹ The burden is on the party opposing the amendment to show that the increased damages resulted in surprise.⁹² Since the amended pleading changed only the amount of damages and did not reshape the cause of action, the court allowed the post-verdict trial amendment.⁹³

While it is accepted in Texas that minors are severally liable for their own torts,⁹⁴ the question of whether a minor was capable of the willful and malicious conduct necessary to support an award for exemplary damages was a question of first impression. In *Williams v. Lavender*⁹⁵ a child's parents sued the parents of a fourteen-year-old for damages arising from an assault. The trial court granted the defendants' motion for judgment notwithstanding the verdict as to exemplary damages awarded by the jury because the fourteen-year-old was incapable of malicious intent as a matter of law.⁹⁶ Reversing the trial court, the Fort Worth court of appeals held that minors are capable of malicious conduct because the Family Code⁹⁷ states that parents are liable for any property damage arising from the willful and malicious conduct of a minor.⁹⁸ The court conceded that while the statute is designed

Texas supreme court employed the guidelines from the California supreme court in *Dillon v. Legg*, 441 P.2d 912, 920 (1968).

85. 806 S.W.2d at 310.

86. *Id.*

87. 803 S.W.2d 721, 727 (Tex. App.—Fort Worth 1990, no writ).

88. *Id.* at 727.

89. *Greenhalgh v. Serv. Lloyds*, 787 S.W.2d 938, 939 (Tex. 1990). In *Greenhalgh*, the defendants contended that any post-trial amendment would be prejudicial because of reliance on the amount requested in the plaintiffs' pleadings in preparing for trial and in deciding whether to settle the cause.

90. TEX. R. CIV. P. 63.

91. 803 S.W.2d at 729.

92. *Id.*

93. *Id.*

94. *Brown v. Dellinger*, 355 S.W.2d 742, 746 (Tex. Civ. App.—Texarkana 1962, writ ref'd n.r.e.).

95. 797 S.W.2d 410, 412 (Tex. App.—Fort Worth 1990, no writ).

96. *Id.* at 412.

97. TEX. FAM. CODE ANN. § 33.01 (Vernon 1986).

98. 797 S.W.2d at 412.

to compensate a property owner for the willful destruction of their property, it also recognized that minors possessed the capability of willful and malicious conduct necessary to support a civil award for exemplary damages.⁹⁹

Several cases reported during this Survey period addressed issues of excessive and cumulative punitive damage awards. For example, in *Owens v. Watson*¹⁰⁰ the court of appeals held that exemplary damages must be reasonably proportioned to actual damages.¹⁰¹ However, the court, relying on factors set out by the Texas supreme court in *Alamo National Bank v. Kraus*, pointed out that no set rule or ratio existed for the determination of reasonableness.¹⁰² Therefore, the determination must be made on a case-by-case basis.¹⁰³ *Fibreboard Corporation v. Pool*¹⁰⁴ considered multiple impositions of punitive damage awards in asbestos litigation.¹⁰⁵ The Texarkana court of appeals held that it found no constitutional or due process violation and had no power to determine broad policy considerations, reasoning that such decisions were better left to the supreme court or legislatures.¹⁰⁶

VI. STATUTES OF LIMITATION

Two cases decided in this Survey period dealt with interpretation of the Medical Liability and Insurance Improvement Act.¹⁰⁷ The primary issue in *Roberts v. Southwest Texas Methodist Hospital*¹⁰⁸ was whether notice to one defendant in a medical malpractice case, pursuant to the Medical Liability Act, tolled the statute of limitation to only that party or to all potential parties. The two Texas cases that previously addressed this issue arrived at different conclusions.¹⁰⁹ In *Roberts* the plaintiff gave notice of her health care liability claim to the physician within two years of her surgery, tolling the statute of limitations for 75 days. Suit was then filed against the hospital more than two years after the surgery, but within the 75-day extension. The hospital contended that notice must be given to each physician or health care provider as required by the Medical Liability Act.¹¹⁰ In response to the statute of limitations defense, the plaintiff relied upon another provision of

99. *Id.*

100. 806 S.W.2d 871, 875 (Tex. App.—Corpus Christi 1991, writ denied).

101. *Id.* at 875.

102. *Id.* (citing *Alamo National Bank v. Krause*, 616 S.W.2d 908, 910 (Tex. 1981)). The factors include: "1) the nature of the wrong; 2) the character of the conduct; 3) the degree of culpability of the wrongdoer; 4) the situation and sensitivities of the parties involved; and 5) the extent of which the conduct offends a public sense of justice and propriety". 806 S.W.2d at 875.

103. 806 S.W.2d at 875.

104. 813 S.W.2d 658, 687 (Tex. app.—Texarkana 1991, no writ). For further discussion of this opinion, see *supra* notes 50-55 and accompanying text.

105. *Id.* at 687.

106. *Id.*

107. TEX. REV. CIV. STAT. ANN. art. 4590i (Vernon Supp. 1992).

108. 811 S.W.2d 141, 143 (Tex. App.—San Antonio 1991, writ denied).

109. *Maddox v. Halipoto*, 742 S.W.2d 59, 61 (Tex. App.—Houston [14th Dist.] 1987, no writ), held notice to one party only tolls the statute of limitations as to that party, while *Rhodes v. McCarron*, 763 S.W.2d 518, 522 (Tex. App.—Amarillo 1988, writ denied), concluded that notice to one party tolls the statute as to all potential health care providers.

110. TEX. REV. CIV. STAT. ANN. art. 45908, § 4.01(a) (Vernon Supp. 1992).

the Medical Liability Act¹¹¹ which states that notice to one defendant tolls the statute of limitations for all health care providers, whether known or unknown. Consequently, the San Antonio court of appeals agreed.¹¹² While the court felt the statute probably should not be tolled for a known defendant such as the hospital, it considered both provisions of the Act and chose not to ignore the statute's plain language.¹¹³

The court in *Shidaker v. Winsett*¹¹⁴ held that the applicable statute of limitations for a health care liability claim resulting in death was that specified by the Medical Liability Act¹¹⁵ and not the wrongful death limitation statute.¹¹⁶ The suit arose out of the alleged negligent diagnosis and treatment by a physician which resulted in the death of Shidaker. Under the Medical Liability Act, a claim must be commenced within 2 years of the tort or the date the medical treatment was completed,¹¹⁷ while the wrongful death limitation accrues upon the death of the injured person.¹¹⁸ The court concluded that Shidaker's claims, which alleged misdiagnosis and mistreatment, were health care liability claims covered by the Medical Liability Act even though they resulted in death.¹¹⁹ The court further held that the Medical Liability Act provision did not violate the Open Courts provision of the Texas Constitution¹²⁰ since Shidaker's survivors were aware of the alleged malpractice and his death occurred four months before the limitation period expired.¹²¹

111. *Id.* § 4.01(c).

112. *Roberts v. Southwest Tex. Methodist Hosp.*, 811 S.W.2d at 144.

113. *Id.*

114. 805 S.W.2d 941, 942 (Tex. App.—Amarillo 1991, no writ).

115. TEX. REV. CIV. STAT. ANN. art. 4590i, § 10.01 (Vernon Supp. 1992).

116. TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(b) (Vernon 1986).

117. TEX. REV. CIV. STAT. ANN. art. 4590i, § 10.01 (Vernon Supp. 1992).

118. TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(b) (Vernon 1986).

119. *Shidaker v. Winsett*, 805 S.W.2d at 943 (Tex. App.—Amarillo 1991, no writ).

120. TEX. CONST. art. I, § 13.

121. 805 S.W.2d at 944.