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Negligent Inspection: Texas Expressly Adopts the Restatement (Second) of Torts Section 324A in *Seay v. Travelers Indemnity Co.*

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NEGLIGENT INSPECTION: TEXAS
EXPRESSLY ADOPTS THE
RESTATEMENT (SECOND) OF TORTS
SECTION 324A IN *SEAY V.*
TRAVELERS INDEMNITY CO.

IN October 1979 Jack Seay and another maintenance employee were working on a boiler at Gaston Episcopal Hospital (Gaston) when a safety relief valve on an adjacent boiler suddenly discharged scalding steam onto Seay. He died shortly thereafter from the resulting injuries. Seay's widow and children brought suit against Travelers Indemnity Company (Travelers),¹ alleging that Travelers had negligently inspected the boiler and that this negligent inspection had proximately caused Seay's death.

The Texas Boiler Inspection Act (TBIA) regulates the type of boilers used at Gaston.² Under the TBIA authorized inspectors must periodically inspect steam boilers. The inspectors are either state employees or state commissioned employees of insurance companies or inspection agencies.³ If the inspectors determine that a boiler is safe, the Commissioner of the Texas Department of Labor Standards issues a certificate permitting lawful operation of the boiler.⁴ The commissioner may authorize the repair, shut-down, or condemnation of a boiler that the inspectors determine is unsafe.⁵ TBIA's purpose is to protect lives and property from unsafe boilers.⁶

Travelers, the insurer of Gaston's boilers, had for several years sent employees to perform the statutory inspections at Gaston. Travelers' inspectors had reported favorably on the boilers' conditions. As a result, the commissioner had issued the required certificates of operation. The inspectors, however, had failed to report that the relief valves on some of the boilers did not discharge to the outside of the building. This valve setup allegedly violated

1. The plaintiff also sued Gaston and the engineers, architects, consultants, and general contractor who designed and constructed the boiler and boiler room. *Seay v. Hall*, 663 S.W.2d 468 (Tex. App.—Dallas 1983), *aff'd in part, rev'd in part*, 677 S.W.2d 19 (Tex. 1984).

2. TEX. REV. CIV. STAT. ANN. art. 5221c (Vernon 1987).

3. *Id.* § 10. See Quinn, *Bungled Inspections: A Polemic Against Insurer Liability [With Special Reference to Boilers]*, 4 TEX. INS. L. REP. 17, 26 (1986), for a description of the procedures followed in boiler inspections, and the interaction between the state, the inspectors, and the insureds. Steam heating boilers must be inspected biennially: externally, and internally where construction permits. TBIA §§ 1(24), 4(2).

4. TBIA § 4.

5. *Id.*

6. *Brownstone Park Ltd. v. Southern Union Gas Co.*, 537 S.W.2d 270, 274 (Tex. Civ. App.—Austin 1976, writ ref'd n.r.e.).

the safety standards that the TBIA references.⁷

The plaintiffs contended that under common law and section 324A of the Restatement (Second) of Torts⁸ Travelers owed a duty to Seay to use reasonable care in the statutory inspection because Travelers had undertaken to inspect the boilers. The trial court granted Travelers' motion for summary judgment. The Dallas court of appeals decided in favor of the plaintiffs. *Held, reversed and remanded*: An insurer owes a duty under section 324A to the employee of its insured when the insurer performs a statutorily required inspection in the absence of an expert third-party contractor.⁹ *Seay v. Travelers Indemnity Co.*, 730 S.W.2d 774 (Tex. App.—Dallas 1987, no writ).

I. HISTORY BEHIND "UNDERTAKING" LIABILITY IN TEXAS

A. Background

Under common law rules an occupier of real property must keep his premises in a reasonably safe condition for his invitees.¹⁰ This duty requires the occupier to inspect and to discover dangerous conditions.¹¹ Similarly, an employer has a nondelegable duty to furnish his employees with a reasonably safe place to work and reasonably safe machinery.¹²

A mere bystander, however, has no duty to protect others from danger.¹³ This rule applies even if the bystander is aware of the potential danger.¹⁴ In *Buchanan v. Rose*¹⁵ the Texas Supreme Court held that the defendant had no duty to warn others after defendant's truck driver drove over a weak

7. The TBIA adopts the standards that the American Society of Mechanical Engineers promulgates. TBIA § 1(4), (9), (39), (40).

8. The RESTATEMENT (SECOND) OF TORTS § 324A (1965) provides:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if

(a) his failure to exercise reasonable care increases the risk of such harm, or
 (b) he has undertaken to perform a duty owed by the other to the third person, or
 (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Id. [hereinafter section 324A].

9. The court presented its resolution of the issue in this manner in order to avoid a conflict with *Brownstone Park Ltd. v. Southern Union Gas Co.*, 537 S.W.2d 270 (Tex. Civ. App.—Austin 1976, writ ref'd n.r.e.). In *Brownstone* the Austin court of civil appeals held that an inspecting insurer owed no duty to the owner of the boiler or to the third party who had contracted to maintain the boiler. See *infra* notes 55-56 and accompanying text.

10. *Abalos v. Oil Dev. Co.*, 544 S.W.2d 627, 635 (Tex. 1976).

11. *Id.* The court stated: "[The occupier's] duty is to protect his invitees from dangers of which he . . . knows, or (because of his duty to inspect) of which he *should* know in the exercise of ordinary care." *Id.* (emphasis in original).

12. *Burk Royalty Co. v. Walls*, 616 S.W.2d 911, 923-24 (Tex. 1981); *Fort Worth Elevators Co. v. Russell*, 123 Tex. 128, 135-36, 70 S.W.2d 397, 401 (1934). The Texas Supreme Court overruled *Fort Worth Elevators* in part in *Wright v. Gifford-Hill & Co.*, 725 S.W.2d 712, 714 (Tex. 1987) (addresses proof of actual damages in worker's compensation context).

13. *Abalos*, 544 S.W.2d at 633.

14. *Buchanan v. Rose*, 138 Tex. 390, 391, 159 S.W.2d 109, 110-11 (1942).

15. *Id.*

bridge and crushed part of it.¹⁶ The question is, at what point does a non-occupier of premises, such as an inspector, become more than a mere bystander, thus owing a duty to others on the premises.

Texas courts have used three sources of law to answer this question. Early decisions relied on case law to find a duty in the undertaker when an undertaking must be performed carefully to prevent physical danger.¹⁷ Control over the dangerous situation is an important factor in finding a duty in this line of cases.¹⁸ Since 1976, Texas courts have also used the Restatement (Second) of Torts, section 323, to determine whether a nonoccupier owes a duty to others.¹⁹ Under section 323 a duty arises when one undertakes to render a service necessary for protecting people or property and (a) the undertaker increases the risk of harm or (b) the injury occurs because of reliance on the undertaking.²⁰ The *Seay* decision adds a third source of law, section 324A, for courts to use in deciding the duty issue.²¹ Section 324A is similar to section 323, but section 324A extends the duty to third persons injured by a negligently performed service.²² A duty under section 324A arises when the undertaking is necessary to protect a third person or his property and the undertaker increases the risk of harm, or the undertaker performs a duty the recipient of service owed the third person, or the third person's reliance on the undertaking creates harm.²³

*Fox v. Dallas Hotel Co.*²⁴ illustrates a nonoccupier's duty to use care to protect others from danger. Fox was a night watchman for A. Harris & Co., which leased part of a building owned by Adolphus Busch. Busch also owned most of the stock in the defendant, Dallas Hotel Co. For consideration and to serve its own interests, the defendant hotel had put engineers in charge and control of the elevators in the Busch building. Fox was using one of the elevators in the course of his duties when it suddenly stopped between floors. When Fox tried to discover the problem with the elevator, it lurched down and crushed his legs. He died of the resulting injuries, and his widow sued the hotel for damages. The jury found that the hotel had negligently allowed the elevator to become dangerous.²⁵

The Texas Supreme Court held that it could not excuse the hotel's negligence for lack of contractual privity between Fox and the hotel.²⁶ The hotel had agreed by contract to perform what might have been one of A. Harris & Co.'s nondelegable duties to Harris's employee, Fox. The contract did not

16. *Id.*

17. See *infra* notes 28-29 and accompanying text.

18. See *infra* note 29 and accompanying text.

19. See *infra* notes 32, 34 and accompanying text.

20. RESTATEMENT (SECOND) OF TORTS § 323 (1965) [hereinafter section 323]. For the text of section 323, see *infra* note 34.

21. *Seay v. Travelers Indemnity Co.*, 730 S.W.2d 774 (Tex. App.—Dallas 1987, no writ).

22. See *supra* note 8.

23. *Id.*

24. 111 Tex. 461, 240 S.W. 517 (1922). The Texas Supreme Court overruled *Fox* in part in *Burk Royalty Co. v. Walls*, 616 S.W.2d 911, 925 (Tex. 1981) (addresses separate submission of each issue).

25. *Fox*, 111 Tex. at 469, 240 S.W. at 518.

26. *Id.* at 473, 240 S.W. at 521.

directly create the duty to Fox; instead, the hotel's assumption of control as per the contract imposed the duty indirectly.²⁷ *Fox* provides the rule that an implicit duty to use reasonable care in an undertaking arises if the undertaking involves the prevention of personal injuries.²⁸

Under the rule of *Fox* the duty to keep premises safe spreads from an occupier to an undertaker when the undertaker exercises control over something that might cause personal injury.²⁹ In a recent case the Texas Supreme Court extended this logic considerably when it held an employer who exercised control over a drunk employee liable for the damages the employee caused while he was driving home from work.³⁰ When a defendant performs an undertaking off-premises, courts will impose a duty even if the undertaker does not control the situation. In the off-premises scenario, whoever set up the condition is responsible for ensuring the safety of that condition.³¹

B. *The Use of Section 323*

The Texas Supreme Court used section 323 for the first time in *Colonial Savings Association v. Taylor*.³² The court cited *Fox* to illustrate that Texas has long recognized the proposition that a duty to use reasonable care not to injure the person or property of another arises when one voluntarily undertakes an affirmative action for the benefit of that other person.³³ The court

27. The court stated: "Having brought under its control a mechanical appliance . . . known to be attended by grave risks, defendant . . . was under the specific, legal duty to exercise ordinary care to protect those for whose use the appliance was provided . . ." *Id.*, 240 S.W. at 520-21.

28. *Id.*, 240 S.W. at 520. Specifically, the court declared: "The duty is grounded on the obligation to exercise ordinary care in an undertaking which cannot otherwise be carried on without endangering the lives and limbs of others." *Id.*

29. For cases applying *Fox*, see *Smith v. Henger*, 148 Tex. 456, 463, 226 S.W.2d 425, 430 (1950) (contractual terms and evidence of actual control over premises created duty in general contractor to use reasonable care to furnish safe workplace for all employees on job); *Brewer v. Otis Elevator Co.*, 422 S.W.2d 766, 769 (Tex. Civ. App.—Houston [1st Dist.] 1967, writ ref'd n.r.e.) (since elevator service contract provided that Otis would make repairs according to Otis's judgment, and not that of premises' owners, Otis assumed joint control over elevator insofar as necessary to perform contract; Otis owed no duty regarding light fixtures because service contract expressly excluded responsibility for light); *S.H. Kress & Co. v. Selph*, 250 S.W.2d 883, 893 (Tex. Civ. App.—Beaumont 1952, writ ref'd n.r.e.) (existence of duty depended upon whether Howe had required control of premises).

30. *Otis Eng'g Corp. v. Clark*, 668 S.W.2d 307, 311 (Tex. 1983) (when employer exercises control over drunk employee, employer assumes duty of ordinary care to prevent the employee from causing unreasonable risk of harm to others). The *Otis* dissent criticized the majority decision because Otis did not create the dangerous situation; under the *Buchanan* rule, *supra* notes 15-16 and accompanying text, Otis should be vindicated. *Otis*, 668 S.W.2d at 313 (McGee, J., dissenting).

31. *Osuna v. Southern Pac. R.R.*, 641 S.W.2d 229, 230 (Tex. 1982) (although statute did not require flashing signal, once railroad undertook to place signal at crossing to warn motorists, railroad assumed duty to keep signal in working order); *Bolin v. Tenneco Oil Co.*, 373 S.W.2d 350, 355 (Tex. Civ. App.—Corpus Christi 1963, writ ref'd n.r.e.) (when oil company voluntarily made temporary repairs to public road, it created duty to make road safe to foreseeable automobile traffic).

32. 544 S.W.2d 116, 119-20 (Tex. 1976).

33. *Id.* at 119. The court stated: "[O]ne who voluntarily undertakes an affirmative course of action for the benefit of another has a duty to exercise reasonable care that the other's

then quoted section 323 as the expression of the historical rule and applied section 323 to the case.³⁴ Section 323 differs from the historical rule, however, as section 323 does not require that the undertaking be for the benefit of another.³⁵ In addition to an undertaking, section 323 requires a showing that the failure to use reasonable care in the undertaking increased the risk of harm,³⁶ or that the injured party suffered harm because he relied on the undertaking.³⁷

In *Colonial Savings* a fire destroyed Taylor's uninsured house. The mortgagee of the property, Colonial Savings Association (Colonial Savings), had written a letter to Taylor stating that Colonial Savings had obtained insurance for the property. Taylor owned two buildings on the property, but the insurance policy covered only one of the buildings. The court held that the letter sufficiently supported the jury's finding that Colonial Savings had undertaken to provide fire insurance coverage for both houses.³⁸ The court held that Taylor could not recover under section 323(a), however, because Colonial Savings' failure to obtain insurance did not increase the risk of fire to the house.³⁹ The court remanded the case for the trial court to determine whether Taylor relied on Colonial Savings' undertaking to obtain insurance pursuant to section 323(b).⁴⁰ The court held that Colonial Savings could not be held liable for Taylor's loss unless Taylor forbore from obtaining his own insurance in reliance upon Colonial Savings' undertaking to obtain it for him.⁴¹

According to the court, Colonial Savings undertook to provide insurance coverage for Taylor when it informed him by letter that it had done so.⁴² Other Texas cases are not as clear, however, in defining an undertaking.⁴³

person or property will not be injured thereby." *Id.* How the requirement arose that the undertaker render services "for the benefit of another" is uncertain. In *Fox* a duty arose when the defendant undertook to render a service "to promote its own interests." *Fox v. Dallas Hotel Co.*, 111 Tex. 461, 473, 240 S.W. 517, 520 (1922).

34. *Colonial*, 544 S.W.2d at 119-20. The RESTATEMENT (SECOND) OF TORTS § 323 (1965) provides:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

- (a) his failure to exercise such care increases the risk of such harm, or
- (b) the harm is suffered because of the other's reliance upon the undertaking.

35. *See supra* notes 28, 34.

36. RESTATEMENT (SECOND) OF TORTS § 323(a) (1965).

37. *Id.* § 323(b). The principle underlying the decision in *Fox* limited liability instead to situations in which the undertaker or any agent for whom he is responsible sets in motion any force that causes the injury. *Fox v. Dallas Hotel Co.*, 111 Tex. 461, 473-74, 240 S.W.2d 517, 521 (1922).

38. *Colonial Sav. Ass'n v. Taylor*, 544 S.W.2d 116, 120 (Tex. 1976).

39. *Id.*

40. *Id.* at 121; *see supra* note 34.

41. *Colonial*, 544 S.W.2d at 120.

42. *Id.*

43. Instead of specifically examining what constitutes an undertaking, Texas courts have skirted the issue. *See, e.g.*, *Diaz v. Southwest Wheel, Inc.*, 736 S.W.2d 770, 772-73 (Tex. App.—Corpus Christi 1987, no writ) (judgment for defendant because defendant had not in-

"Undertake" has two distinct possible meanings.⁴⁴ An undertaking may be a promise that expressly or implicitly sets forth the terms of the undertaking.⁴⁵ In such situations, the undertaker and the one to whom the undertaker renders service may limit the duties flowing from the undertaking.⁴⁶ The other sense of the term is to "enter upon," "set about," or "attempt."⁴⁷ In this looser sense, an individual undertakes to do something when he begins doing it, and the scope of the undertaking includes whatever the undertaker actually does regardless of what he claims he is attempting to do. The distinction is important because when the undertaker has agreed to do something for his own benefit, the act may also provide some incidental service to another to whom the undertaker does not intend to be liable.⁴⁸

C. *Inspection as an Undertaking*

In the context of negligent inspection, interpretation of sections 323 and 324A is subject to widely divergent views.⁴⁹ One commentator has noted that courts generally do not hold private insurance inspectors as having undertaken to render a service for the benefit of the insured by the mere performance of risk-analysis inspection.⁵⁰ Most insurance companies that inspect try to limit the scope of their undertaking by disclaiming that they are looking for safety hazards.⁵¹ Generally, liability disclaimers constitute ineffective shields against intentional and reckless conduct because such disclaimers try to waive a preexisting duty.⁵² Under sections 323 or 324A, however, a disclaimer merely prevents a duty from arising if an agreement

created risk of harm and plaintiff had not relied on defendant's actions); *Southern Pac. Transp. Co. v. Luna*, 707 S.W.2d 113, 118, 121-22 (Tex. App.—Corpus Christi 1985) (implying that railroad undertook service by agreeing with state to install crossing guards, but finding no duty under section 323 because no evidence supported theories of reliance or of increased risk), *rev'd on other grounds*, 724 S.W.2d 383 (Tex. 1987); *Brownsville Medical Center v. Garcia*, 704 S.W.2d 68, 76 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.) (implying that defendant hospital had undertaken to render services to plaintiff's decedent when it started medical treatment); *Peterson v. Mut. Sav. Inst.*, 646 S.W.2d 327, 329 (Tex. App.—Austin 1983, no writ) (judgment for mortgagee because homeowner failed to show that mortgagee had pursued undertaking for homeowner's benefit); *Central Freight Lines v. Pride*, 588 S.W.2d 832, 835 (Tex. Civ. App.—Beaumont 1979) (defendant testified that it had undertaken to clean mud off of highway and that truckers had no responsibility for cleaning, but court decided case under historical rule stated in *Colonial*, 544 S.W.2d at 119, rather than under section 323), *rev'd on other grounds sub nom. B&B Auto Supply, Sand Pit & Trucking Co. v. Central Freight Lines, Inc.*, 603 S.W.2d 814 (Tex. 1980).

44. See *Quinn*, *supra* note 3, at 17, 23, 24.

45. *Id.* at 24.

46. *Id.* at 23.

47. *Id.* at 24.

48. *Id.*

49. See Comment, *An Insurer's Liability to Third Parties for Negligent Inspection*, 66 KY. L.J. 910, 913-18 (1978) (judicial application of § 324A to negligent inspection ranges from literal acceptance to constructive rejection); *Quinn*, *supra* note 3, at 19, 22, 23 (courts differ regarding inspection disclaimers effect on insurer liability for negligent inspection).

50. See Comment, *Municipal Tort Liability for Erroneous Issuance of Building Permits: A National Survey*, 58 WASH. L. REV. 537, 556 (1983) (citing *Smith v. Allendale Mut. Ins.*, 410 Mich. 685, 303 N.W.2d 702, 711 (1981) and authorities cited therein).

51. *Quinn*, *supra* note 3, at 19.

52. RESTATEMENT (SECOND) OF CONTRACTS § 195 comment a (1973).

defines the undertaking.⁵³ Thus, some courts have honored inspection disclaimers.⁵⁴

A Texas court dealt with the issue of negligent inspection in *Brownstone Park Ltd. v. Southern Union Gas Co.*⁵⁵ The defendant gas company agreed in a contract with the plaintiff apartment complex owner that the gas company would bear sole responsibility for servicing and maintaining the complex's heating plant. Brownstone's owner sued the gas company for damages caused by a boiler explosion, alleging that the gas company was negligent. The gas company joined Brownstone's insurance carrier, Hartford, for the insurer's negligent inspection of the boiler. The appellate court refused to overturn the jury's finding that Hartford was not negligent because the court could find no ground for a duty on Hartford to either Brownstone or the gas company.⁵⁶

The Texas Supreme Court recently decided that the city of Denton was not liable for negligent inspection by its employee in *City of Denton v. Van Page*.⁵⁷ An explosion injured Van Page when he entered a storage building to investigate strange noises. An arsonist had attempted to burn the storage building on three prior occasions. Each time the Denton fire department had extinguished the fire. The fire marshall had investigated the scene and reported his conclusion that someone had used kerosene to set the fire. Van Page's theory argued that the city, through the fire marshall, negligently investigated the arson because the city failed to discover and remove the gasoline in the building, or because it failed to warn Van Page of the dangerous condition of the building.⁵⁸ The court held the city of Denton not liable for the building's unsafe condition "because it neither owned, occupied, nor controlled the premises, nor did it create the dangerous condition."⁵⁹ The majority remained silent on the possible duty that could arise as to a private person who undertakes to inspect under section 324A.

Van Page represents the first case in which a supreme court justice has addressed section 324A. Justice Kilgarlin wrote a concurring opinion in which he cited *Colonial Savings*, and went on to apply section 324A to the

53. See *supra* notes 44-46 and accompanying text.

54. See *Taylor v. Jim Walter Corp.*, 731 F.2d 266, 267 (5th Cir. 1984); *Trosclair v. Bechtel Corp.*, 653 F.2d 162, 165 (5th Cir. 1981); *Hill v. United States Fidelity & Guar. Co.*, 428 F.2d 112, 120 (5th Cir. 1970); *Hartford Steam Boiler Inspection & Ins. v. Cooper*, 341 So. 2d 665, 667 (Miss. 1977).

55. 537 S.W.2d 270, 274 (Tex. Civ. App.—Austin 1976, writ ref'd n.r.e.).

56. *Id.* Clearly, the gas company owed a duty of ordinary care under the *Fox* rule because it assumed responsibility for maintaining the boiler. See *supra* note 27. The appellate court decided *Brownstone* before the Texas Supreme Court adopted § 323, which added the element of reliance that was absent from the *Fox* rule. See *supra* note 37 and accompanying text. Arguably, if the court had decided the case after the adoption of § 323, the court might have found that Hartford owed a duty to Brownstone, rather than concluding that "any duty he owed was to the state, not to Southern Union Gas." *Brownstone*, 537 S.W.2d at 274.

57. 701 S.W.2d 831 (Tex. 1986).

58. Under the Texas Tort Claims Act, TEX. CIV. PRAC. & REM. CODE Ann. §§ 101.001-.109 (Vernon 1986) state and local governmental units in Texas waive immunity from tort liability in cases in which a private entity would be liable.

59. *City of Denton*, 701 S.W.2d at 835.

facts of *Van Page*.⁶⁰ In Kilgarlin's view the fire marshal undertook to perform an inspection of the storage building merely by inspecting it.⁶¹ He concurred with the result because the plaintiff failed to prove the existence of any of the other three elements required to charge the city with a duty of ordinary care under section 324A.⁶²

Section 324A maintains an uncertain foothold in Texas law. The Supreme Court ignored it in deciding a negligent inspection case, despite express application in the concurring opinion. Two appellate courts have mentioned section 324A as a possible avenue of relief without expressly stating whether section 324A is the law in Texas or finding a duty thereunder.⁶³ The Fifth Circuit, applying Texas law, however, has held that Texas would recognize a duty under section 324A in a negligent inspection case.⁶⁴

Section 324A appears similar to section 323, but it extends the duty to use reasonable care in an undertaking to protect third parties other than those for whom the undertaker renders the services.⁶⁵ The absence of privity between parties, such as between an undertaker and a third party under section 324A, will not defeat the existence of a duty in tort under Texas law.⁶⁶

60. *Id.* (Kilgarlin, J., concurring). Justice Ray joined Justice Kilgarlin's opinion.

61. *Id.* (Kilgarlin, J., concurring). Justice Kilgarlin added: "[T]he city did not agree with Melton [Van Page's landlord] to inspect the storage shed . . ." *Id.* Justice Kilgarlin thus used the term undertaking in the looser sense. See *supra* notes 47-48.

62. *City of Denton*, 701 S.W.2d at 836-37 (Kilgarlin, J., concurring). According to Justice Kilgarlin, the plaintiff failed to prove that the defendant increased the risk or undertook a duty that Melton owed Van Page, or that the plaintiff relied on the marshal's inspection. *Id.*

63. *Bernard Johnson, Inc. v. Continental Constructors, Inc.*, 630 S.W.2d 365, 375 (Tex. App.—Austin 1982, writ ref'd n.r.e.); *Roberson v. McCarthy*, 620 S.W.2d 912, 914 (Tex. Civ. App.—Corpus Christi 1981, writ ref'd n.r.e.). The *Johnson* court noted that one may incur a duty of care by embarking upon an undertaking and cited §§ 323 and 324A, but concluded that "it would be pure conjecture" to decide that the "appellee intended to plead such a cause of action." *Bernard Johnson*, 630 S.W.2d at 378. The plaintiff in *Roberson* contended that a fact issue existed that would give rise to a legal duty under § 324A on the part of the defendants toward her deceased husband. The court held that no liability could arise under the plaintiff's theory because the defendants did not fall within any of the categories defined in § 324A and that defendants were mere bystanders who owed no duty according to the rule of *Buchanan v. Rose*, 138 Tex. 390, 159 S.W.2d 109 (1942). *Roberson*, 620 S.W.2d at 914.

64. *Johnson v. Abbe Eng'g Co.*, 749 F.2d 1131, 1132 n.1 (5th Cir. 1984). The court stated:

While the Texas Supreme Court has never expressly adopted the language used in § 324A, it has addressed and followed the policy of the Good Samaritan Doctrine. [The court cited *Colonial*.] Following the predictive course required of us in diversity cases, we hold that the Texas courts would impose on parent corporations those duties expressed in § 324A.

Id.

65. "The rule stated in this section parallels the one stated in § 323, as to the liability of the actor to the one to whom he has undertaken to render services. This Section deals with the liability to third persons." Section 324A comment a. Section 323 and § 324A differ in two respects. First, the duty in § 323 is to use care to perform this undertaking; in § 324A the duty is to use care to protect the undertaking. Second, § 324A(b) adds an avenue for relief not found in § 323; specifically, § 324A creates a duty when one undertakes to perform a duty owed by the other to a third person. See *supra* notes 8, 34.

66. *Darryl v. Ford Motor Co.*, 440 S.W.2d 630, 633 (Tex. 1969) (manufacturer owed duty to innocent bystander); *Strakos v. Gehring*, 360 S.W.2d 787, 796 (Tex. 1962) (subcontractor owed duty to passing motorist); *Blue Bell, Inc. v. Peat, Marwick, Mitchell & Co.*, 715 S.W.2d 408, 411 (Tex. App.—Dallas 1986, writ ref'd n.r.e.) (accountant's duty to third parties); *Shatterproof Glass Corp. v. James*, 466 S.W.2d 873, 880 (Tex. Civ. App.—Fort Worth 1971, writ

When the Texas Supreme Court decided *Colonial Savings*, it cited *Fox* to support the proposition that Texas has long recognized the concept of duty delineated in section 323.⁶⁷ *Fox* involved a third person to whom the undertaker owed a duty.⁶⁸ Thus, the Texas Supreme Court will likely adopt section 324A when it directly confronts the issue.

II. *SEAY V. TRAVELERS INDEMNITY CO.*

Seay is an important case for several reasons.⁶⁹ It represents the first Texas case to expressly adopt section 324A as Texas law. The court analyzed what constitutes an undertaking, concluding that when a law designed to promote safety requires inspections, the one who performs the inspection undertakes to render services to the owner of the item that the inspector investigates.⁷⁰ Furthermore, the logic that the court used implicitly rejects the validity of inspection liability limitations.⁷¹ This case will cause alarm across the nation in insurance company boardrooms.⁷²

A. *Adoption of Section 324A*

In *Seay* the court held that the rule stated in section 324A is the law in Texas.⁷³ While the court recognized that Texas had not explicitly adopted section 324A, it pointed out that the Texas Supreme Court in *Fox* had adopted the principle underlying section 324A.⁷⁴ The court stated that section 323 mirrors section 324A except that section 324A deals with liability

ref'd n.r.e.) (duty to third party despite absence of privity) (citing RESTATEMENT (SECOND) OF TORTS § 552 (1967)); *Continental Fruit Express v. Leas*, 110 S.W. 129, 133 (Tex. Civ. App.—1908, writ ref'd) (car company owed duty to railroad employee).

67. *Colonial Sav. Ass'n v. Taylor*, 544 S.W.2d 116, 119 (Tex. 1976).

68. In *Fox* the court found that the defendant had agreed by contract to perform what might have been one of Fox's employer's nondelegable duties to Fox. *Fox v. Dallas Hotel Co.*, 111 Tex. 461, 468-69, 240 S.W. 517, 518 (1922). The case fits neatly into § 324A(b), the only avenue of duty in § 324A not found in § 323. See *supra* note 65 and accompanying text.

69. In November 1987 the Texas Supreme Court held that service providers impliedly warrant that repairs or modifications of existing tangible goods or property will be performed in a good and workmanlike manner, that this implied warranty on such services may not be waived or disclaimed, and that a breach of this implied warranty on such services is actionable under the Deceptive Trade Practices Act. *Melody Home Mfg. Co. v. Barnes*, 741 S.W.2d 349, 354-56 (1987). The *Melody Home* case will impact service providers' liability tremendously, but the opinion probably is limited to nonprofessional services in contractual settings. *Seay v. Travelers Indemnity Co.*, 730 S.W.2d 774 (Tex. App.—Dallas 1987, no writ), appears to be more important in the context of gratuitous undertakings, such as inspections.

70. *Seay*, 730 S.W.2d at 778-79. "Travelers . . . was undertaking to render services to Gaston." *Id.* at 779.

71. See *id.* at 778-79.

72. Quinn points out that many states have boiler inspection laws that provide for inspection by boiler insurers. Quinn, *supra* note 3, at 21. If these other states follow the precedent of *Seay*, boiler insurers may face liability despite the use of inspection disclaimers. Quinn puts forth a strong argument that public policy and practical considerations weigh against liability for negligent inspection in the boiler context. *Id.* at 17. If boiler accident cases proceed beyond the summary judgment stage through the plaintiff's use of § 324A, settlement is more likely.

73. *Seay*, 730 S.W.2d at 777.

74. *Id.* at 776; see *supra* notes 24-28 and accompanying text.

to a third party.⁷⁵ The courts declared that since absence of privity does not defeat a duty in tort under Texas law, the Texas Supreme Court's adoption of section 323 necessarily implies the validity of section 324A.⁷⁶

Justice Devany concurred in the court's judgment, but was unwilling to adopt all of section 324A.⁷⁷ In his view Travelers may have assumed a duty to use reasonable care when it caused the Commissioner of the Texas Department of Labor Standards to issue the certificate pursuant to the TBIA.⁷⁸ Under Justice Devany's approach the TBIA provides the statutory standard for negligence per se.⁷⁹ Justice Devany agreed that the court should reverse the summary judgment because issues of fact remained regarding the breach of duty and proximate cause.⁸⁰

B. Application of Section 324A

Before the court could reach the application of section 324A to the facts in *Seay*, it had to contend with two prior cases holding that an inspecting insurer owed no duty to an injured third party.⁸¹ The court held that the decision in *Brownstone Park Ltd. v. Southern Union Gas Co.*⁸² did not control in *Seay* because the discussion regarding the relationship between the insured and insurer in *Brownstone* was merely dictum.⁸³ Moreover, the facts necessary for a section 324A analysis were missing in *Brownstone*.⁸⁴ Without explanation the court declined to follow *Philadelphia Manufacturers Mutual Insurance Co. v. Gulf Forge Co.*⁸⁵ *Gulf Forge* has little precedential value because it incorrectly states that Texas law requires that an undertaking be for the sole benefit of the one for whom an undertaker renders a

75. 730 S.W.2d at 776; see *supra* note 65.

76. 730 S.W.2d at 776-77; see *supra* note 68.

77. 730 S.W.2d at 782 (Devany, J., concurring).

78. *Id.* at 781 (Devany, J., concurring). Travelers' authorized inspector reported the findings of the inspection to the commissioner, who then issued the certificate for lawful operation of the boiler.

79. *Id.* at 781-82 (Devany, J., concurring). Justice Devany's concurrence is unclear at this point. Perhaps Justice Devany found that the duty arose under the rules cited in *Bennett v. Span Indus., Inc.*, 628 S.W.2d 470, 473-74 (Tex. App.—Texarkana 1981, writ ref'd n.r.e.), from which Justice Devany quoted. This approach appears unlikely, however, because the rules cited in *Bennett* involve creation of and knowledge of a danger. See *id.* at 473. Travelers neither created nor knew of the improper valve setup.

80. *Seay*, 730 S.W.2d at 782 (Devany, J., concurring). According to Justice Devany, the issue was whether Travelers had failed to follow proper inspection standards. *Id.*

81. *Philadelphia Mfrs. Mut. Ins. Co. v. Gulf Forge Co.*, 555 F. Supp. 519, 526 (S.D. Tex. 1982); *Brownstone Park, Ltd. v. Southern Union Gas Co.*, 537 S.W.2d 270, 273 (Tex. Civ. App.—Austin 1976, writ ref'd n.r.e.).

82. For a discussion of *Brownstone*, see *supra* notes 55-56 and accompanying text.

83. *Seay*, 730 S.W.2d at 777. The *Seay* court stated that in *Brownstone* Southern Union raised the point of error against Hartford; thus, any comments on the relationship between Hartford and Brownstone are dicta, according to State *ex rel.* Childress v. School Trustees, 150 Tex. 238, 247, 239 S.W.2d 777, 782 (1951). *Seay*, 730 S.W.2d at 777.

84. *Seay*, 730 S.W.2d at 777. The *Seay* court found nothing in the *Brownstone* opinion that indicated that Hartford's actions had increased the risk of harm, that Hartford had undertaken to perform a duty that Southern Union owed Brownstone, or that Southern Union had relied on the safety inspection performed by Hartford. *Id.*

85. 555 F. Supp. 59 (S.D. Tex. 1982); see *Seay*, 730 S.W.2d at 777.

service before a duty can arise under section 323.⁸⁶ The importance of *Seay* lies in the rationale that the court used to support its holding. According to the court, when a law designed to promote safety requires inspections, the one who performs the inspection undertakes to render services to the owner of the item that the inspector investigates.⁸⁷

After disposing of these precedents, the court applied section 324A to the facts in *Seay*. Section 324A contains four elements.⁸⁸ The plaintiff must first prove the undertaking element by showing that the defendant undertook to render services necessary for the protection of another.⁸⁹ The plaintiff must also prove one of the remaining three elements: an increase in the risk,⁹⁰ the assumption of another's duty to third persons,⁹¹ or reliance.⁹²

The first element necessary to establish liability under section 324A required a showing that Travelers undertook to render services to Gaston.⁹³ Travelers contended that the objectives of the inspections were to evaluate the boilers as an insurable risk, a service to Travelers itself, and to determine whether the boilers complied with the standards of the TBIA, a service to the state. The court pointed to the printed inspection forms,⁹⁴ Travelers' manual for its authorized inspectors,⁹⁵ and the inspector's deposition, in which the inspector stated that Travelers had made safety-related recommendations to the hospital management.⁹⁶ In the court's view, these facts

86. *Gulf Forge*, 555 F. Supp. at 526 (citing *Colonial Sav. Ass'n v. Taylor*, 544 S.W.2d 116 (Tex. 1976)). The *Colonial* court never implied such a rule; to the contrary, it based its decision on the precedent in *Fox*, in which the undertaker rendered a service to promote its own interest. *Colonial*, 544 S.W.2d at 119; see Quinn, *supra* note 3, at 21.

87. *Seay*, 730 S.W.2d at 779. "[W]hen performing inspections pursuant to the [TBIA], Travelers was performing acts which directly promoted the interests of Gaston in the safety of its boilers and thereby was undertaking to render services to Gaston." *Id.* Thus the authorized inspector conducts the service not only for the state, but also for the recipient of the inspection.

88. See *supra* note 8.

89. Section 324A.

90. Section 324A(a).

91. Section 324A(b).

92. Section 324A(c).

93. Less burdensome ways to find that someone owed *Seay* a duty under § 324A also exist. For example, an allegation that Travelers was rendering a service to the state as an authorized inspector would fulfill the undertaking requirement without examining Travelers' relationship with Gaston. As an authorized inspector, Travelers would realize that the inspection was necessary for the protection of a third party, specifically anyone coming near the inspected boilers. Possibly the reason that the court designated Gaston as "another" for whom the undertaker renders the service was to tie in the "by the other" in § 324A(b) whose duty to the third person the inspector has undertaken to perform. Assuming Travelers was rendering a service to the state, however, this approach would leave open the reliance route of § 324A(c). Under this reasoning, the harm exists because the commissioner relied on the negligent report and then issued a certificate, leaving a dangerous boiler unchecked. One could also argue that the state owes a statutory duty to employees who work near boilers to ensure they are inspected. "The Commissioner shall cause boilers subject to the provisions of this Act to be inspected . . ." TBIA § 4 (emphasis added).

94. The forms stated that "[i]nspections and recommendations made by The Travelers, are advisory and designed to assist insureds in the establishment and maintenance of their own safety activities." *Seay*, 730 S.W.2d at 778 (emphasis in original).

95. The manual stated that "Code violations must be brought to the attention of the insured when they are discovered. . . ." *Id.* (emphasis omitted).

96. *Id.* at 778-79.

indicated that one purpose of the inspections was to increase the safety of the boilers for those who worked near them, regardless of Travelers' motive for performing the inspections.⁹⁷

In addressing the existence of an undertaking the court had to deal with Travelers' liability disclaimer. Travelers contended that the policy insuring Gaston's boilers disclaimed any undertaking to determine that the boilers were safe. The court held the disclaimer could not allow the defendant to avoid liability because the division of the company that had inspected the boilers was legally distinct and separate from the division that had issued the policy.⁹⁸ The court used the term undertaking in the looser sense, so that the undertaker stood responsible for everything he did rather than what he agreed to undertake.⁹⁹ Thus, even if the division of Travelers that had inspected the boilers had issued the disclaimer, the disclaimer probably would not have had any legal effect.

Even after Travelers failed to disprove that it undertook to render services, the court would have affirmed the summary judgment if an issue of fact existed as to the three remaining elements in section 324A. Neither side argued that there was any fact issue as to the second element. Travelers failed to disprove that it had a duty under the third or fourth element.¹⁰⁰

A duty under the third element arises when the undertaker has undertaken to perform a duty owed by the other to the third person.¹⁰¹ Gaston possessed a common law duty to provide a safe workplace for its employees. Moreover, a statute designed to promote the safety of boilers required the inspection of Gaston's boilers. On this basis, the court implied that Gaston had a duty to its employees to procure a statutory inspection as part of its duty to provide a safe workplace.¹⁰² Travelers failed to disprove that when it performed the statutory inspection, it undertook Gaston's duty to Seay to have the boilers inspected.¹⁰³

Travelers argued that it had no power to enforce compliance with the TBIA.¹⁰⁴ If Travelers had no control over boiler safety, no duty could arise under the rule of *Fox v. Dallas Hotel Co.*¹⁰⁵ A long line of Texas cases re-

97. *Id.*

98. *Seay*, 730 S.W.2d at 779. To support the statement that a court will not disregard the legally distinct status of two corporations even though they share common shareholders, the court cited *Mortgage & Trust, Inc. v. Bonner & Co.*, 572 S.W.2d 344, 348 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.), and *Wright Hydraulics, Inc. v. Womack Mach. Supply Co.*, 482 S.W.2d 34, 36 (Tex. Civ. App.—Fort Worth 1972, no writ). *Seay*, 730 S.W.2d at 779.

99. *See Seay*, 730 S.W.2d at 780; *supra* notes 44-48 and accompanying text. This view is in accord with Justice Kilgarlin's concurring opinion in *City of Denton v. Van Page*, 701 S.W.2d 831, 836 (Tex. 1986) (Kilgarlin, J., concurring). *See supra* note 61.

100. *Seay*, 730 S.W.2d at 780-81. For a description of these elements, see *supra* notes 90-92 and accompanying text.

101. *See supra* note 91 and accompanying text.

102. The court did not explicitly state this point, but the implication seems logical. "[T]he evidence fails to disprove that Travelers was performing a duty of care owed by Gaston to its employees" *Seay*, 730 S.W.2d at 780.

103. *Id.*

104. *Id.* Only the commissioner has the power to order repairs or shut down of the boiler. *See supra* note 5 and accompanying text.

105. *See supra* notes 29-31 and accompanying text.

quires control over at least part of the premises to create a duty on premises not possessed by one who renders services.¹⁰⁶ The court noted that one would expect a report from an inspector indicating that the safety valves on a boiler were dangerous to trigger the enforcement procedures in the TBIA.¹⁰⁷ Without holding that indirect control appeared sufficient to support a duty, the court found the evidence insufficient to prove that Travelers had no power at all to affect boiler safety.¹⁰⁸

Travelers also failed to disprove the fourth element: that Gaston had relied on Travelers' inspection pursuant to section 324A(c). Travelers contended that Gaston could not have relied on the safety inspections because Gaston possessed its own boiler safety program,¹⁰⁹ presumably to show that Gaston did not satisfy the forbearance standard set out in *Colonial Savings Association v. Taylor*.¹¹⁰ The administrator of Gaston stated that he relied on Travelers' inspection of the boilers, and that if the inspector had informed him of a risk to Gaston employees, he would have complied with any suggested modifications.¹¹¹ The court held this testimony sufficient to preclude a no-reliance ruling.¹¹²

III. CONCLUSION

A major shortcoming of the opinion in *Seay* is the court's failure to discuss whether its decision comports with public policy. When a novel cause of action is before the court, the court should consider public policy factors.¹¹³ The no-duty decisions in negligent inspection cases commonly support the result with public policy considerations.¹¹⁴ The Texas Legislature has indicated that public policy is against inspector liability, as legislation expressly immunizes workers' compensation insurance carriers from negligent inspection suits.¹¹⁵ The opinion in *Seay* would have appeared much stronger if the court had examined the public policy issue, regardless of which way that analysis came out.

The holding in *Seay v. Travelers Indemnity Co.* places a heavy burden on inspectors, but the court's decision makes sense from a logical viewpoint.

106. See *supra* note 29 and accompanying text.

107. *Seay*, 730 S.W.2d at 780.

108. *Id.*

109. *Id.*

110. *Colonial*, 544 S.W.2d at 116; see also *supra* text accompanying note 41 (no liability under § 323(b) unless Taylor refrained from obtaining insurance in reliance on the bank's letter).

111. Compare the definition of reliance *supra* in notes 37-41 and accompanying text with the standard used in *Seay*, 730 S.W.2d at 780. One court has determined that the reliance must be justifiable in order to trigger a duty of ordinary care. *Raymer v. United States*, 660 F.2d 1136, 1143 (6th Cir. 1981) (applying Kentucky law), *cert. denied*, 456 U.S. 944 (1982).

112. *Seay*, 730 S.W.2d at 780.

113. In *Otis Eng'g Corp. v. Clark*, 668 S.W.2d 307 (Tex. 1983) the court stated that if the parties present a novel issue, then "factors which should be considered in determining whether the law should impose a duty are the risk, foreseeability, and likelihood of injury weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury and consequences of placing that burden on the [defendant]." *Id.* at 309.

114. Comment, *supra* note 50, at 556.

115. TEX. REV. CIV. STAT. ANN. art. 8306, § 3 (Vernon 1967).

The Texas Legislature enacted the TBIA to help protect lives and property by improving boiler safety. The commissioner enforces the TBIA through information he receives from expert inspectors. The TBIA would become less effective if the inspectors failed to perform the inspections with reasonable care. The court used liability under section 324A as a method of promoting the legislative directive of improving boiler safety. If inspecting insurers are held liable to injured employees for the negligence of their inspectors, boiler insurance premiums will increase, either to cover the increased risk exposure, or to defray the cost of higher inspection standards. In the end, boiler owners will bear the cost of boiler safety through higher insurance premiums. Until the legislature determines that affordability of insurance outweighs the need to compensate preventable injury, the courts should further boiler safety through inspector liability.¹¹⁶ The same argument would apply to any statute that requires inspections as a gratuitous undertaking.

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116. The legislature is already concerned about the cost of liability insurance. In a bill passed this summer the legislature found that a serious liability crisis in Texas is adversely affecting the price and availability of liability insurance and the economic development and growth of Texas. Tex. S.B. 5, 70th Leg. (1987). The bill did not specifically list boiler owners among those persons being adversely affected by the insurance crisis, but the *Seay* decision could easily create a crisis in boiler insurance. The legislature could avoid such problems by enacting a statute similar to that which immunizes workers' compensation insurance carriers from negligent inspection suits. See *supra* note 115 and accompanying text.