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Torts

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PART I: PRIVATE LAW

TORTS

by

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I. IMPUTED CONTRIBUTORY NEGLIGENCE

FREQUENTLY, one who was not negligent is injured by the actionable negligence of two or more other persons. Normally, the negligent parties would be joint tortfeasors and each would be liable to the victim for the entire damage suffered. All states have recognized, however, that situations exist where the negligence of one party should be imputed to a non-negligent party plaintiff because of some relationship between them.[1] Imputing negligence to a non-negligent plaintiff in effect makes him contributorily negligent. Since contributory negligence has until recently been a complete bar to recovery,[2] the plaintiff would then be required to look for relief only to the negligent party who was actually contributorily negligent.[3] For example, if a passenger is injured in a car accident caused by the negligence of his driver and that of another motorist, the passenger might be barred from suing the motorist and forced to sue his driver. The legal issue may be framed as follows: when is the relationship between the claimant and another such that negligence of the latter should be regarded as though it were the claimant's?

Under the *Restatement (Second) of Torts* a person's negligence, in general, is imputed to an innocent victim to bar him from recovery only if the relationship between the parties is such that the negligence of one party would have been imputed to a non-negligent party defendant.[4] In other words, contributory negligence is imputed to the plaintiff only when negligence would have been imputed to him had he been the defendant. This is commonly referred to as the both-ways doctrine; negligence is imputed for both purposes or for neither purpose. The acceptance of this doctrine presumes that rules relating to vicarious liability also apply to imputed contributory negligence. Thus limited, the imputed contributory negligence doctrine is of

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1. *See generally* W. PROSSER, LAW OF TORTS § 74 (4th ed. 1971); Gregory, *Vicarious Responsibility and Contributory Negligence*, 41 YALE L.J. 831 (1932); Comment, *Imputed Contributory Negligence*, 26 TENN. L. REV. 531 (1959).

2. Contributory negligence acted as a complete bar except when either the last clear chance or the discovered peril doctrine applied. Sisti v. Thompson, 149 Tex. 189, 229 S.W.2d 610 (1950). This rule prevailed in Texas until Sept. 1, 1973, which was the effective date of the Texas comparative negligence statute. *See* TEX. REV. CIV. STAT. ANN art. 2212a (Vernon Supp. 1976-77).

3. *See* Comment, *Imputed Contributory Negligence*, 13 TEXAS L. REV. 161 (1935).

4. *See* RESTATEMENT (SECOND) OF TORTS §§ 485, 486, 491 (1965) [hereinafter cited as RESTATEMENT (SECOND)]. The reporter states:

> The rule stated in this Section rejects, except as indicated by the reference to other Sections, the doctrine of 'imputed contributory negligence,' under which the plaintiff is barred from recovery against the defendant because the negligence of a third person, with whom the plaintiff stands in some relation, has contributed to the harm.

Id. § 485, comment a at 541. Sections 486 and 491 adopt the both-ways doctrine, the first relative to master and servant and the second to joint enterprisers.

importance primarily when a passenger is injured in a traffic accident attributable to the negligence of his driver and another vehicle's driver. In such a situation the relationship between the passenger and his driver may be either that of master and servant or of joint enterprisers.[5] In both situations the right of control which the passenger has over the driver has been regarded as the basis for justifying the imposition of vicarious liability on the passenger. It should be noted that Texas narrowly limits findings of joint enterprise to cases in which the parties were on a joint business trip or venture.[6]

The both-ways doctrine has the merit of simplicity, but the disadvantage of being simplistic. Typically, when the issue of vicarious liability is involved, the controversy is between two innocent persons: the plaintiff who has been injured by a negligent servant, and the defendant-master who is himself innocent. Moreover, the negligent agent is often insolvent and, therefore, unable to satisfy a judgment. Fairness and justice in dealing with accident losses justify the imposition of liability upon the non-negligent employer or other principal who is typically better able to bear such losses as a cost of doing business.[7]

Imputed contributory negligence issues, however, are usually involved in a suit by an innocent plaintiff against a negligent defendant. It is not a controversy between two non-negligent parties as is true when vicarious liability is at issue. Careful consideration of the justification for imposing vicarious liability upon a master will demonstrate that these reasons do not justify the imputation of a servant's contributory negligence to the plaintiff-master. Thus, that the rules regarding vicarious liability require a both-ways test with respect to imputed contributory negligence is a non sequitur. For example, one of the major reasons for the vicarious liability rule is to allow a plaintiff injured by a negligent, judgment-proof servant to obtain a judgment against a person with a "deep pocket," the master. This policy consideration is not met by imputing negligence to a faultless plaintiff who seeks a recovery for injuries he received; in this situation there is no need to create a solvent defendant. Minnesota has adopted this policy by discarding the both-ways rule, at least as to automobile negligence cases, and thus, virtually eliminating all vestiges of imputed contributory negligence in that state.[8] This result is commendable because seldom, if ever, is there any good reason for imputing the negligence of another to a blameless plaintiff in a suit against a negligent defendant.

This much has been said by way of support for the holding of the Texas Supreme Court in *Rollins Leasing Corp. v. Barkley*.[9] Prior to this decision the bailee's contributory negligence was imputed to his bailor to bar the bailor's recovery in a suit against a negligent third person for damages to the bailment

5. *See* Satterfield v. Satterfield, 448 S.W.2d 456 (Tex. 1969); Bonney v. San Antonio Transit Co., 160 Tex. 11, 325 S.W.2d 117 (1959).

6. *See* Shoemaker v. Estate of Whistler, 513 S.W.2d 10 (Tex. 1974). The court held that joint enterprises are limited to enterprises "having a business or pecuniary purpose." *Id.* at 17.

7. *See* W. PROSSER, *supra* note 1, §69; Seavey, *Speculations as to "Respondeat Superior,"* 1934 HARV. LEGAL ESSAYS 433.

8. *See* Weber v. Stokely-Van Camp, Inc., 274 Minn. 482, 144 N.W.2d 540 (1966). *See also* Greyhound Lines, Inc. v. Caster, 216 A.2d 689 (Del. 1966).

9. 531 S.W.2d 603 (Tex. 1975).

property. This doctrine was established in *T. & P. Ry. v. Tankersley*[10] which was decided in 1885. In that case the plaintiff-bailor's cotton was destroyed by fire as a consequence of the negligence of the bailee-warehouseman and the defendant-railroad. In a suit by the bailor against the railroad it was held that the negligence of the bailee-warehouseman would be imputed to the bailor to bar recovery. In effect, this holding required the bailor to seek recovery against the bailee with the bailee having no recourse against the railroad for contribution.

In *Barkley* a bailor rented a truck to plaintiff-bailee who had an accident with a negligent motorist. The bailor intervened in a personal injury action brought by the bailee against the motorist to recover the loss of his truck. Plaintiff-bailee was found to be contributorily negligent. Both the trial court and the court of civil appeals properly denied recovery to the bailor on the basis of past decisions imputing the negligence of the bailee to the bailor to bar recovery.[11]

Quoting from Professor Prosser and from Chief Justice Alexander's dissenting opinion in *Rose v. Baker*,[12] the Texas Supreme Court abolished the unique Texas rule imputing the negligence of the bailee to the bailor in this situation. The court held that in the absence of some kind of control relationship between the plaintiff and another who was negligent no contributory negligence may be imputed. Thus, there are no longer any rules in Texas for the imputation of contributory negligence separate from those that apply for the imposition of vicarious liability.[13]

II. OCCUPIERS OF LAND

The duty an occupier owes to a person injured on his land has historically been determined by the relationship between the occupier and the injured party.[14] Those who came onto the premises of another are commonly divided into three categories: trespassers, licensees, and invitees.[15] The courts in

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10. 63 Tex. 57 (1885).

11. In addition to *Tankersley*, other cases which have imputed the negligence of the bailee to the bailor are Rose v. Baker, 138 Tex. 554, 160 S.W.2d 515 (1942); Weir v. Petty, 355 S.W.2d 192 (Tex. Civ. App.—Amarillo 1962, writ ref'd); Langford Motor Co. v. McClung Constr. Co., 46 S.W.2d 388 (Tex. Civ. App.—Eastland 1932, writ ref'd).

12. 138 Tex. 554, 558, 160 S.W.2d 515, 517 (1942).

13. This decision leaves unaffected the rules pertaining to the rights of an injured spouse to recover from a third person for expenses and lost earnings as a consequence of an injury attributable to the negligence of the other spouse and the third person. Under our community property system the cause of action is jointly owned; negligence of the non-injured spouse therefore bars or diminishes recovery on the cause of action that is jointly owned. This is not, however, really a principle of imputed contributory negligence, and, therefore, is unaffected by *Barkley*.

14. *See* Rosas v. Buddie's Food Store, 518 S.W.2d 534 (Tex. 1975).

15. *See* Thacker v. J.C. Penney Co., 254 F.2d 672, 676 (5th Cir.), *cert. denied*, 358 U.S. 820 (1958); Arambula v. J.M. Dellinger, Inc., 415 S.W.2d 456 (Tex. Civ. App.—San Antonio 1967, writ ref'd n.r.e.). Courts have also held that the liability for injuries to children caused by natural conditions is governed by the usual rules relating to the three categories. *See* Gowen v. Willenborg, 366 S.W.2d 695 (Tex. Civ. App.—Houston 1963, writ ref'd n.r.e.). Yet it is clear that policy considerations dictate that children be treated differently and thus be classed separately. *See* W. PROSSER, *supra* note 1, § 59. An occupier only has a duty not to injure a trespasser by willful or wanton conduct, or through gross negligence. *See* Burton Constr. & Shipbldg. Co. v. Broussard, 273 S.W.2d 598 (Tex. 1955); Hopkins v. Texas Power & Light Co., 514 S.W.2d 143 (Tex. Civ. App.—Dallas 1974, no writ); Garner v. Harris County Houston Ship Channel Navigation Dist., 69 S.W.2d 425 (Tex. Civ. App.—Galveston 1934, no writ).

Texas and in the majority of states adhere to these commonlaw classifications and hold that mere negligence is an insufficient foundation upon which to impose liability upon the occupier. Notwithstanding, at least two states have abandoned the above classifications and instead have held that an occupier's duty is governed by ordinary negligence concepts.[16]

Although the liability of an occupier for injuries suffered by trespassers[17] and invitees[18] has remained substantially unchanged for many years, liability with respect to licensees has not been so stable. Some prior Texas decisions have implied that gross negligence or recklessness is always a prerequisite to recovery by a licensee. Hence, a finding of mere negligence would not be sufficient.[19] This is a much more restrictive view of an occupier's duty than that commonly adopted in most states, and certainly more restrictive than the duty prescribed by the *Restatement (Second) of Torts*.[20]

The *Restatement (Second)* imposes liability upon an occupier for injuries sustained by a licensee in two instances. First, any negligence pertaining to the way an activity is carried out on the premises subjects the occupier to liability.[21] Second, negligence in maintaining a dangerous condition known to the occupier or of which the occupier has reason to know, with some qualifications, will subject the occupier to liability.[22] It is insufficient to show merely that the occupier should, in the exercise of ordinary care, have known or had reason to know of the danger. Rather, to be held liable, the occupier must have known of or have had reason to know of the danger. Reason to know of the danger means that he had sufficient knowledge to put him on notice that the danger probably existed.[23] Some courts, however, always require actual knowledge of the danger.[24]

In addition to the exception with regard to the occupier's knowledge of the dangerous conditions, the *Restatement (Second)* and the majority of courts have accepted the idea that a licensee who has the same knowledge and appreciation of the danger as the occupier cannot recover.[25] Thus, if the danger was as obvious to the licensee as it was to the occupier, or if the occupier gave the kind of warning that provided the licensee with an awareness of the danger, there would be no liability.[26] This is a partial acceptance of

16. *See* Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968); Richard v. City of Honolulu, 51 Hawaii 134, 452 P.2d 445 (1969).

17. *See* State v. Tennison, 509 S.W.2d 560 (Tex. 1974).

18. An occupier has a duty to an invitee of reasonable care in maintaining the premises, discovering defects, and in making the premises safe or giving adequate warning. *See* Adam Dante Corp. v. Sharpe, 483 S.W.2d 452 (Tex. 1972); Stamford Oil Mill Co. v. Barnes, 103 Tex. 409, 128 S.W. 375 (1910); Safeway Stores, Inc. v. Leck, 543 S.W.2d 207 (Tex. Civ. App.—Waco 1976, no writ).

19. *See* Renfro Drug Co. v. Lewis, 149 Tex. 507, 235 S.W.2d 609 (1950); Carlisle v. Weingarten, Inc., 137 Tex. 220, 152 S.W.2d 1073 (1941). *See also* Keeton, *Torts, Annual Survey of Texas Law*, 24 SW. L.J. 237 (1970).

20. *See* RESTATEMENT (SECOND), *supra* note 3, §§ 341-342.

21. *Id.* § 341. *See* also W. PROSSER, *supra* note 1, § 60.

22. *See* RESTATEMENT (SECOND), *supra* note 3, § 342.

23. *Id.* §§ 342 and 339, comment g.

24. *See* State v. Tennison, 509 S.W.2d 560 (Tex. 1974).

25. *See* RESTATEMENT (SECOND), *supra* note 3, § 342; *See, e.g.*, Mississippi Power & Light Co. v. Griffin, 81 F.2d 292 (5th Cir. 1936); Kopp v. R.S. Noonan, Inc., 385 Pa. 460, 123 A.2d 429 (1956); State v. Tennison, 509 S.W.2d 560 (Tex. 1974).

26. An occupier owes no duty to an invitee who is aware of the danger. *See* Massman-Johnson v. Gundolf, 484 S.W.2d 555 (Tex. 1972).

the assumed risk doctrine, but it is a far cry from a general defense of assumed risk. This was discussed last year in the *Annual Survey of Texas Law* in commenting on *Farley v. M M Cattle Co.*,[27] and it was there said that "[m]ost courts hold that an occupier of land can satisfy any duty of care owed to a licensee by giving notice of dangers that would not likely be noticed by the casual observer."[28] One notion behind this rule is that even though a jury might be justified in finding that a reasonable person would have eliminated the danger and that the occupier was negligent and could be held liable to an invitee, such liability should not extend to one, such as a licensee, who was simply tolerated on the premises.

The Texas Supreme Court decision in *Lower Neches Valley Authority v. Murphy*[29] clarifies the Texas law concerning the duty owed to licensees by occupiers of land. In that case a fourteen-year-old boy, an adult as regards this problem, sustained injuries when he dived into a tank maintained by the river authority, a governmental agency, and struck his head on a mound of clay at the bottom of the canal. Even if the plaintiff was not the kind of intruder normally classified as a licensee upon the premises of an individual, he would nevertheless have been so regarded under the Texas Tort Claims Act.[30] The existence of mounds at the bottom of the tank was known to both the defendant-occupier and the plaintiff-licensee, but the precise location of the particular mounds was not known to either the defendant or the plaintiff. The contention was made that because the plaintiff did not know of the existence of a mound at the exact spot at which he dived, the occupier should be liable if found to be negligent. The trial court granted summary judgment for the defendant, but the court of civil appeals reversed. The Texas Supreme Court reversed the court of civil appeals and upheld the action of the trial court. The supreme court thus reached the result that would have been reached in most jurisdictions since the plaintiff had as much knowledge of the danger as did the occupier. The court did, however, recognize that an occupier would be liable to a licensee for injuries sustained as a result of the occupier's willful or wanton conduct, or his gross negligence.

III. DEFAMATION

Public defamatory communications by the mass media have historically been made at the risk of the enterprise and its publisher.[31] The law on this subject, however, has been drastically altered as a result of decisions holding that the first amendment requires toleration of some falsehood in order that more material speech may be protected.[32] Though significant attempts at

27. 529 S.W.2d 751 (Tex. 1975).
28. Keeton, *Torts, Annual Survey of Texas Law*, 30 SW. L.J. 2, 5 n.21 (1976).
29. 536 S.W.2d 561 (Tex. 1976).
30. "As to premise defects, the unit of government shall owe to any claimant only the duty owed by private persons to a licensee on private property, unless payment has been made by the claimant for the use of the premises." TEX. REV. CIV. STAT. ANN. art. 6252-19, § 18(b) (Vernon 1970).
31. *See* RESTATEMENT OF TORTS § 598, comment b at 259 (1938); Keeton, *Defamation and Freedom of the Press*, 54 TEXAS L. REV. 1221 (1976). For an analysis of the privileges of fair comment on public interest matters see W. PROSSER, *supra* note 1, at 776-96; Veeder, *Freedom of Public Discussion*, 23 HARV. L. REV. 413, 422-31 (1910).
32. Until 1964 the first amendment lay dormant as a defense to defamation. With the

defining defamation have been undertaken, the specific scope and consequences of the constitutional defense in defamation cases have not been determined.[33]

A. *The Fault Requirement*

As enunciated above, the limits of the first amendment's impact on the liability of media for defamatory publications are indefinite. Nevertheless, several fundamental propositions bear repeating:[34]

(1) The press and the electronic media have a constitutional privilege to publish false and defamatory matter including misstatements of defamatory fact about others.[35] The common-law rule subjecting the media to liability except when there was proof of truth of all injurious statements does not afford adequate protection to first amendment liberties;[36]

(2) The constitutional privilege enjoyed by the press and the broadcasting media requires a differentiation between private individuals on the one hand and public officials and public figures on the other;[37]

(3) Precise content has not as yet been given to the terms 'public officials' and 'public figures.'[38] The category of public officials, however, includes not only those who are commonly classified as public officers but also public employees who exercise any substantial govern-

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landmark decision of New York Times Co. v. Sullivan, 376 U.S. 254 (1964), new life was breathed into the controversy surrounding individual freedoms. The Court in *New York Times* held narrowly that under the Constitution colloquium had not been proven and that a qualified privilege, assertable in the absence of "actual malice," could be based on a reasonable, good-faith belief that the underlying facts of the defamation were true. (For the Court, "actual malice" is a phrase of art, dealing only with knowing-or-reckless falsity rather than with ill-will. For a distinction drawn between actual malice and common law malice see Cantrell v. Forest City Publishing Co., 419 U.S. 245 (1976).) The implication of *New York Times* was momentous: The closer a statement comes to criticism of the government (seditious libel), the more protection is afforded by the first amendment. The policy reason was persuasive: In order to encourage debate of public issues, and even of the performance of public officials, the press should be shielded from self-censorship.

For other cases instrumental in the evolution of the constitutional defense see Time, Inc. v. Firestone, 96 S. Ct. 958, 47 L. Ed. 2d 154 (1976); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971); Greenbelt Coop. Publishing Ass'n v. Bresler, 398 U.S. 6 (1970); St. Amant v. Thompson, 390 U.S. 727 (1968); Rosenblatt v. Baer, 383 U.S. 75 (1966).

33. *See generally* Keeton, *supra* note 31; Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, 54 TEXAS L. REV. 199 (1976).

34. The textual material which follows is taken from Keeton, *supra* note 31, at 1227-28 (original footnotes omitted).

35. A controversial issue exists as to whether the first amendment protection extends to defendants other than the media. Under the prevailing view, the privilege is limited to the media. Decisions involving defamation by non-media defendants have concentrated upon the common law truth privilege without adverting to *Gertz* or any other of the *New York Times* opinions. For a consideration of the conceivable justifications for expanding the actual-malice protection to statements made by citizens or for restricting it to the media see Robertson, *supra* note 33, at 215-20.

36. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964).

37. *See* Time, Inc. v. Firestone, 96 S. Ct. 958, 965, 47 L. Ed. 2d 154, 162 (1976); Gertz v. Robert Welch, Inc. 418 U.S. 323, 343 (1974).

38. In Herald-Post Publishing Co. v. Hervey, 282 S.W.2d 410, 413 (Tex. Civ. App.—El Paso 1955, writ ref'd n.r.e.), Texas early recognized a difference between public officials and private citizens: "We wish first to point out that publications about public officials are treated differently than publications about private individuals." *See also* Fitzjarrald v. Panhandle Publishing Co., 149 Tex. 87, 228 S.W.2d 499 (1950).

The federal distinction was slower in coming, but in Rosenblatt v. Baer, 383 U.S. 75 (1966), significant inroads were made with respect to the narrow seditious libel holding in *New York Times*. The extension of the public official rule, subject to the qualified privilege of fair comment in the absence of knowing-or-reckless falsity, to public figures occurred in Curtis Publishing Co. v. Butts, 388 U.S. 130, 164 (1967).

mental power.[39] The category of public figures is not definitionally applied to those who are simply famous or well known [*sic*], but rather to those who have achieved some prominence and, therefore, influence over others in the resolution of public questions;[40]

(4) The constitutional privilege requires that a public official or a public figure establish clearly and convincingly that the defamatory falsehood was published with knowledge of its falsity or with reckless disregard for the truth, if the defamatory matter relates to aspects of the person's life that stimulate a legitimate public interest;[41]

(5) The constitutional privilege requires that the private person, or the person who is neither a public official nor a private citizen, prove that defamatory matter was published either with knowledge of its falsity or without a reasonable basis for belief;[42]

(6) The Constitution does not permit recovery of presumed or punitive damages against the press or broadcasting media unless the plaintiff establishes clearly and convincingly that the media had knowledge of the falsity or acted in reckless disregard of the truth of the defamatory matter published.[43] As the Court has stated, 'In short, the private defamation plaintiff who establishes liability under a less demanding standard than that stated by *New York Times* may recover only such damages as are sufficient to compensate him for actual injury.'[44]

In their development of a new doctrinal structure for defamation, the states have had to cope with extant and malleable constitutional demands. The resultant framework is interstitial. First, the press and other mass media may no longer be held liable, irrespective of the truth or falsity of the published material, without proof of respective fault.[45] Secondly, the states, on behalf of the defamed plaintiff, are free to adopt as antecedents to recovery more stringent requirements than constitutional notions mandate.[46]

State courts, however, have not been inclined to formulate criteria more compelling than those announced in the federal opinions.[47] Instead, the trend of state court decisions is toward giving the defamed plaintiff as much

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39. Mr. Justice Brennan, writing for the majority in Rosenblatt v. Baer, 383 U.S. 75, 85 (1966), concluded "that the 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." *See also* Gertz v. Robert Welch, Inc., 418 U.S. 323 n.6 (1974); New York Times Co. v. Sullivan, 373 U.S. 254, 283 n.23 (1964).

40. *See* Time, Inc. v. Firestone, 96 S. Ct. 958, 47 L. Ed. 2d 154 (1976). In *Firestone* the wife of the wealthy industrialist, Russell Firestone, was not found to be a public figure, even though she had actively discussed at press conferences the events central to the divorce proceedings. As a consequence, proof of actual malice was not a prerequisite to her recovery against Time in a subsequent defamation action. *Id.* at 964-66, 47 L. Ed. 2d at 163. *But see* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), in which the Court adhered specifically to its evolved public-official, public-figure analysis and gave no hint of *Firestone*'s "public controversy" approach.

41. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974); New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964).

42. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 n.10 (1974). *See also* note 32 *supra*.

43. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 349-50 (1974).

44. *Id.* at 350.

45. *See* notes 32, 35-44 *supra* and accompanying text.

46. In this constitutional defense area the standards imposed by the Court have been minimums below which a plaintiff may not go in making his proof and still survive a directed verdict. For example, the plaintiff who seeks punitive damages must clearly and convincingly show that the media had knowledge of the falsity or acted in reckless disregard of the truth of the defamatory matter published. *See* note 43 *supra* and accompanying text.

47. *See, e.g.*, Cahill v. Hawaiian Paradise Park Corp., 56 Hawaii 522, 543 P.2d 1356 (1975); Troman v. Wood, 62 Ill. 2d 154, 340 N.E.2d 292 (1975); Gobin v. Globe Publishing Co., 216 Kan. 223, 531 P.2d 76 (1975). *Contra*, Walker v. Colorado Springs Sun, Inc., 538 P.2d 450 (Colo.), *cert.*

protection as possible against the mass media.[48] Conformity with this trend was demonstrated by the Texas Supreme Court in *Foster v. Laredo Newspaper, Inc.*[49] The defendant-newspaper published an allegedly libelous article suggesting the plaintiff was responsible for a certain flooding in the city.[50] Plaintiff, a private civil engineer who had been employed by the county on separate occasions for special projects, served as the elected Webb County surveyor. The court, in reversing the court of appeals, concluded after a bifurcated analysis, that a factual issue had been raised.[51] First, the supreme court ruled that, although the plaintiff was a "public official" in connection with his elective office, the *New York Times* requirement that actual malice be proved was not applicable to him as a public official because the statements made about him did not clearly relate to his official conduct as county surveyor.[52] Also preliminary to the court's final holding that plaintiff was a private individual and could recover damages under a theory of negligent defamation[53] was a determination that the county surveyor was not a "public figure." The court accomplished this by concluding as a matter of law that the evidence was insufficient to indicate that plaintiff had either thrust himself into the "vortex of the controversy" or had achieved pervasive fame or notoriety in the community.[54]

The precise holding of *Foster* represents only a restatement of the law as found in *Time, Inc. v. Firestone*.[55] The significance of *Foster* centers on its factual inferences: a county surveyor, even though elected, is not the kind of public official contemplated in *New York Times* or in *Gertz*. The plain import of this is that only those governmental officials and employees who exercise uniquely governmental functions, albeit minor in character, are burdened

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denied, 423 U.S. 1025 (1975). Chapadeau v. Utica Observer-Dispatch, Inc., 38 N.Y.2d 196, 341 N.E.2d 569, 379 N.Y.S.2d 61 (1976).

48. *See* authorities cited in note 47 *supra*.

49. 541 S.W.2d 809 (Tex. 1976).

50. In documenting the events giving rise to the litigation, the court wrote:

> On June 17, 1973 an article printed in the Laredo Times newspaper in connection with the flooding problem made the following references to Foster:
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> > The Rice development official said the flooded area in question was platted by Jack Foster, who doubles as a consultant engineer for Webb County. Foster has been handling numerous engineering jobs for the Commissioners Court on a consultant basis involving road improvements, some paving, park recreational work and drainage problems in Del Mar Hills.

Id. at 810-11.

51. *Id.* at 816-17.

52. *Id.* at 813-14.

53. *Id.* at 819. The standard of care owed to a private citizen, *i.e.*, an individual who is neither a public official nor a public figure, is a lesser measure: While a public personality must prove knowing or reckless falsity, the private individual need only demonstrate by a preponderance of the evidence that the defendant medium knew or *should have known* that the statement was false. *See* Time, Inc. v. Firestone, 96 S. Ct. 958, 47 L. Ed. 2d 154 (1976); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

54. 541 S.W.2d at 817. The two tests for determining public figure status were announced in Gertz v. Robert Welch, Inc., 418 U.S. 323, 352 (1974): "general fame or notoriety in the community," or having voluntarily "thrust himself into the vortex of [the] public issue." *But see* Time, Inc. v. Firestone, 96 S. Ct. 958, 965, 47 L. Ed. 2d 154, 163-64 (1976), in which the Court, per Mr. Justice Rehnquist, hinted that the phrase of art "public figure" will not be definitionally applied to those who are simply famous or notorious; rather, it will apply only to those who have achieved prominence in the resolution of public issues generally, or in the resolution of particular issues related to the subject matter of the publication.

55. 96 S. Ct. 958, 47 L. Ed. 2d 154 (1976).

with the actual malice requirement set forth in *New York Times*.[56]

The position taken by the supreme court was not, however, the inevitable consequence of the federal decisions.[57] Practical alternatives exist. A state supreme court could develop the state common law to accommodate defamatory statements which would not otherwise come within the categories of communications requiring proof by the plaintiff of actual malice. For example, an elected county surveyor, who meets neither the "public official" nor "public figure" criteria, may, nonetheless, be so adjudicated to have attained public-personality status as a matter of state law. The adoption by a state of a less exacting standard in order to invoke for the media's protection the public-official, public-figure actual malice burden may be considered more feasible or desirable than attempting to decide the hard questions that would sometimes be necessary if bare conformity to constitutional demands for freedom of the press were the measure. Moreover, states might settle upon a categorical rule that all elected officials, irrespective of their having taken the oath of office[58] or having control over the conduct of public affairs,[59] must prove actual malice in order to survive summary judgment for the defendant-medium. The effect of such a rule would be the elimination of the necessity for drawing difficult distinctions in at least the elected official classification, based on the exercise of a uniquely governmental function.[60]

B. *The Statute of Limitations*

Many of the rules and principles limiting the liability of those engaged in various socially desirable activities have been modified, eliminated, or altered in such a way as to shift more losses from those victimized by these activities to those engaged therein.[61] The extent to which courts will be allowed to go without causing serious social consequences and seeding constitutional conflict among the three governmental branches remains to be seen. One area of the law which has received the judiciary's recent attention is that of limitations.

The opportunity for judicial at-law enhancement of the rights of recovery lies not with the legislatively determined duration of the period during which an action may be brought, but with the fixing of the points at which the period

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56. *See* note 32 *supra*. Specifically unfortunate for Foster was the supreme court's having discounted any argument that the newspaper's defamatory statements imputed incompetence or dishonesty in relation to plaintiff's work as county surveyor. The inference to be drawn from this would seem to make plaintiff's qualifications for continuing in his official capacity a matter of public interest.

57. *See* note 46 *supra* and accompanying text, in which it was asserted that the series of federal cases dating from *New York Times* documents simply an amalgamation of minimum standards.

58. Texas cases which have indicated that the requirement of oath taking is a determinative factor in distinguishing between public officials and public employees include: Lightfoot v. Lane, 104 Tex. 447, 140 S.W. 89 (1911); Commissioners' Court v. Garrett, 236 S.W. 970 (Tex. Comm'n App. 1922, jdgmt adopted); Loard v. Como, 137 S.W.2d 880 (Tex. Civ. App.—Fort Worth 1940, writ ref'd).

59. *See* note 39 *supra*.

60. *See* Keeton, *supra* note 31, at 1235, where it was noted that simplification of the doctrinal structure of defamation in achieving the proper balance for adequately protecting both reputational interests and free speech might best be accomplished by requiring all elected public officials in Texas, regardless of the nature of the defamation, to prove actual malice in order to recover in a defamation action against a mass-media defendant.

61. *See* W. PROSSER, *supra* note 1, at 1-7.

begins to run or is tolled. The statute of limitations commonly begins to run when the cause of action accrues,[62] and it has normally been held that the cause of action accrues at the time harm results from the tortious act.[63] The two objectives of imposing limitations of time on the prosecution of causes of action are the avoidance of stale and often unmeritorious claims[64] and the provision for parties' repose.[65] For apparently equitable and notice reasons, courts have evinced a tendency toward abandoning the rule that would start limitations running from the time of harm in favor of some kind of discovery rule.[66] The practical effect of embracing such a rule is to toll the running of the applicable statute of limitation[67] for five to fifteen years after the tortious act was committed, making it costly and almost impossible through normal discovery procedures to gather the relevant evidence to the extent possible shortly after the incident occurred. But such an analysis misses the point; comparison of discovery ten or fifteen years down the road with that obtainable the day or month after the tortious act presumes that the injured party has recognized that a cause of action has accrued. It is precisely this injustice, the barring of a cause of action even before its existence is discerned, that the discovery rule is designed to circumvent. Any argument against the discovery rule should not focus upon prompt assimilation of relevant evidence; rather, the real insufficiency of the rule is that it leaves unresolved the issue concerning the legal moment that a cause of action becomes evident, or is imputed to be evident, to the potential plaintiff.

In *Kelley v. Rinkle*[68] suit was brought one year and thirteen days after defendant-doctor had turned over to a credit agency records of plaintiff's allegedly delinquent account.[69] Since the case had been appealed from a summary judgment, the fact that plaintiff had no actual notice of the report's existence until some five months after the doctor had filed it with the credit bureau[70] was presumed true. Dating from the time of actual notice, the litigation was commenced within the one-year limitations period. The Su-

62. *See* Martel v. Somers, 26 Tex. 551, 561 (1863); Beirne & Burnside v. Kelsey, 21 Tex. 190, 191 (1858). *See generally* 37 TEX. JUR. 2D *Limitation of Actions* § 56 (1962).

63. *See* authorities cited at note 62 *supra*.

64. When the act causing the damage to another is originally lawful, the cause of action does not accrue until the injury occurs. When the act is originally unlawful, however, the cause of action accrues at the time of the act. *See* Axcell v. Ortho Pharmaceutical Corp., 387 F. Supp. 364 (S.D. Tex. 1974); Tennessee Gas Transmission Co. v. Fromme, 153 Tex. 352, 269 S.W.2d 336 (1954).

65. *See, e.g.*, McAdams v. Dallas Ry. & Terminal Co., 149 Tex. 217, 229 S.W.2d 1012 (1950); Sherman v. Sipper, 137 Tex. 85, 152 S.W.2d 319 (1941).

66. *See, e.g.*, Boyd v. Knox, 273 S.W.2d 81 (Tex. Civ. App.—Fort Worth 1954, no writ); Lewis v. Hall, 271 S.W.2d 447 (Tex. Civ. App.—Fort Worth 1954, writ ref'd n.r.e.).

67. *See, e.g.*, Moonie v. Lynch, 256 Cal. App. 2d 361, 64 Cal. Rptr. 55 (1967) (negligence of accountant); Basque v. Yuk Lin Liau, 50 Hawaii 397, 441 P.2d 636 (1969) (negligence of neighboring landowners); Flanagan v. Mount Eden Gen. Hosp., 24 N.Y.2d 427, 248 N.E.2d 871, 301 N.Y.S.2d 23 (1969) (medical malpractice). *See generally* 37 TEX. JUR. 2D *Limitations of Actions* § 62 (1962).

68. 532 S.W.2d 947 (Tex. 1976), *noted in* 30 SW. L.J. 950 (1976).

69. TEX. REV. CIV. STAT. ANN. art. 5524, § 1 (Vernon 1958) provides: "There shall be commenced and prosecuted within one year after the cause of action shall have accrued, and not afterward, all actions or suits of the following description: 1. Actions for malicious prosecution or for injuries done to the character or reputation of another by libel or slander."

70. Plaintiff filed his complaint on March 26, 1974; the doctor had submitted to the Credit Bureau Services, Inc., on March 13, 1973, a "voluntary report" that plaintiff owed $277.00 on an account. Not until August 29, 1973, when he visited the credit bureau to learn the reasons for his recently poor credit rating, did plaintiff learn of the defendant's report. 532 S.W.2d at 947-48.

preme Court of Texas, expressly adopting the discovery rule, held that the period of limitations for causes of action for libel of one's credit reputation by the publication of a defamatory report to a credit agency begins to run when the person defamed learns of, or by reasonable diligence should have learned of, the existence of the credit report.[71]

Aside from the policy reasons outlined above, a partial influence upon the outcome was the position previously taken in some recent Texas medical malpractice cases which adopted the discovery rule.[72] The vitality of the judiciary's social policy-making was abbreviated, however, since the legislature at the last regular session abrogated the discovery rule for medical malpractice and substituted a flat two-year period from the time of injury.[73] A similar fate may await the application of the discovery rule in defamation cases. Furthermore, a study commission has recommended another solution for medical malpractice that could be utilized as a legislative solution in other tort areas.[74] The solution is to provide a relatively short period after discovery with a provision for barring recovery after a substantial period has lapsed, running from the date of injury. The specific recommendation is this: A claimant must bring the suit within one year from the date that the claimant discovered, or should have discovered, the injury; in no event, however, may the suit be brought more than three years after the injury occurred.[75]

IV. MEDICAL MALPRACTICE

Approximately eighty percent of the medical mishaps that produce malpractice claims occur in hospitals.[76] Under our existing fault-liability insurance system, physicians and hospitals are independently responsible for those mishaps that are produced through negligence. This hospital-physician dichotomy has created problems of accountability throughout hospitalization since no single person or entity is responsible for the total care of a patient. This is reflected in the large number of malpractice cases involving multiple defendants. The hospital is generally not liable for the negligence of the staff physicians.[77] Conversely, physicians are generally not liable for negligent care rendered by hospital personnel.[78]

Medical risk-control can be facilitated by making the health care institution solely responsible for the negligence of everyone, including physicians,

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71. *Id.* at 949.

72. *See* Hays v. Hall, 488 S.W.2d 412 (Tex. 1972) (cause of action for malpractice arising from negligence in vasectomy operation accrued at time of discovery of true facts concerning failure of operation, or on date it should have been discovered by exercise of ordinary care and diligence); Gaddis v. Smith, 417 S.W.2d 577 (Tex. 1967) (cause of action for malpractice based on negligence of surgeon in failing to remove surgical sponge from body of patient accrued at time patient discovered such sponge).

73. *See* TEX. INS. CODE ANN. art. 5.82, § 4 (Vernon Pamphlet Supp. 1975-76). *See also* Keeton, *supra* note 28, at 12.

74. *See* FINAL REPORT OF THE TEXAS MEDICAL PROFESSIONAL LIABILITY STUDY COMMISSION TO THE 65TH TEXAS LEGISLATURE (Dec. 1976).

75. *See id.* at 11.

76. *See* 1 NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS, CLOSED CLAIMS STUDY, NO. 2, at 10-12 (April 1976).

77. In Ferguson v. Gonyaw, 64 Mich. App. 685, 236 N.W.2d 543 (1975), the court held that a hospital could not be held liable solely on the basis of negligence of one of its staff surgeons.

78. In McEachern v. Glenview Hosp., Inc., 505 S.W.2d 386 (Tex. Civ. App.—Fort Worth 1974, no writ), it was held that the hospital alone could be found liable for failing to have an attendant with the patient in the emergency room.

engaged in health care services within the confines of the institution.[79] Given the questionable effectiveness of the individual efforts of physicians in reducing their risk, and the knowledge that most claims arise from hospital-based incidents, efforts to reduce the number of adverse medical events and the exposure to liability may be more effective if focused upon the medical institution rather than upon the individual.

This much has been said in support of a recent Texas Supreme Court holding which clarifies the law limiting the surgeon's liability and extending that of the hospital. In *Sparger v. Worley Hospital, Inc.*[80] plaintiff named as defendants the doctor who had performed the operation and the hospital at which the surgery had been conducted. This malpractice action was brought as a result of the failure to remove a sponge from the plaintiff's abdomen at the conclusion of the operation. The jury found that the nurses assisting the doctor were negligent, but no negligence was attributed to the doctor. Reversing the trial court, the court of civil appeals held the doctor was vicariously liable for the nurses' negligence.

On appeal to the supreme court the issue raised was the degree to which the physician was accountable for the negligence of the hospital nurses assisting him in the operating room. Theoretically, if the nurse is an employee of the physician, then liability can be imposed on the physician via respondeat superior. Typically, nurses are in the hospital's employ, not the doctor's. Notwithstanding, nurses may be the doctor's servants through two alternative theories:[81] Liability may be imposed on a doctor for the negligence of a nurse by either the borrowed-servant[82] or the captain-of-the-ship doctrine.[83]

Application of these theories in Texas was discussed in *Sparger*. The jury found that the nurses were not the borrowed servants of the surgeon; essentially, the jury determined that the nurses were not "subject to the *right* of the physician to direct or control the details of the particular work . . . ."[84] Under the borrowed-servant doctrine only the master-hospital is liable for the

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79. *See* FINAL REPORT OF THE TEXAS MEDICAL PROFESSIONAL LIABILITY STUDY COMMISSION TO THE 65TH LEGISLATURE 46-47 (Dec. 1976).

80. 20 Tex. Sup. Ct. J. 143 (Jan. 12, 1977). In addition to *Sparger*, the Texas Supreme Court decided Ramon v. Mani, 20 Tex. Sup. Ct. J. 149 (Jan. 12, 1977). Since the facts and holdings of the two cases are virtually identical, discussion in the text will be limited to *Sparger*.

81. *See* Comment, *Separation of Responsibility in the Operating Room: The Borrowed Servant, the Captain of the Ship, and the Scope of Surgeons' Vicarious Liability*, 49 NOTRE DAME LAW. 933 (1974).

82. Texas has for several years adhered to the principle that one employer's employee could become the borrowed servant of another. *See* J.A. Robinson Sons v. Wigart, 431 S.W.2d 327 (Tex. 1968); Producers Chem. Co. v. McKay, 366 S.W.2d 220 (Tex. 1963). The critical issue under the borrowed-servant analysis is whether the master (the surgeon) had the right to control another's servants (the nurses employed by the hospital). Special attention should be given to situations in which the employed person is independently engaged. *See* Leidy, *Salesmen as Independent Contractors*, 28 MICH. L. REV. 365, 378 (1930).

As to the specific facts in *Sparger*, the court rejected the argument that the doctor had the right of control necessary to subject him to liability as a matter of law under the borrowed-servant doctrine; rather, the issue of whether or not the nurses were the borrowed servants of the doctor was for the jury, and the jury had found for the surgeon. *See* 20 Tex. Sup. Ct. J. at 144.

83. The "captain of the ship" doctrine was initially propounded in McConnell v. Williams, 361 Pa. 355, 65 A.2d 243 (1959). Its utility in tort law is limited since even the court which created it refused to apply it for the purposes of imposing liability on the defendant surgeon. The analogy, however, is drawn from maritime law. The captain of the ship is said to be in total command and is charged with full responsibility for the care and efficiency of the vessel and for the crew's welfare. *See* Comment, *supra* note 81, at 935.

84. 20 Tex. Sup. Ct. J. at 144 (emphasis added).

negligence of the nurses. The court may, nevertheless, have concluded that the doctor was responsible under the captain-of-the-ship doctrine. The degree to which this theory extends liability is unclear. In its narrowest application it is co-extensive with the borrowed-servant doctrine or other master-servant principles.[85] Under its broadest interpretation the doctor would be liable for the negligence of those in his presence, just as a captain is responsible for those on his ship.

The Supreme Court of Texas apparently anticipated this expansive interpretation of the captain-of-the-ship doctrine. The court in *Sparger* rejected the suggestion that the "surgeon's mere presence in the operating room makes him liable as a matter of law for the negligence of other persons."[86] Moreover, the supreme court explicitly discounted the idea that the captain-of-the-ship doctrine should have a meaning separate from the borrowed-servant doctrine, which cuts across the entire law of master and servant. The mere fact that a surgeon is generally in control of the sequence of events in the operating room does not subject him to vicarious liability for the negligence of nurses, unless under all the other circumstances the commonly accepted rules applicable to the borrowed-servant doctrine dictate such a result.[87] From a policy standpoint the borrowed-servant doctrine was originally needed in the medical malpractice area since the law regarding charitable and governmental immunities was such as to provide the great majority of hospitals with an almost insurmountable defense.[88] As a result of these immunities the injured patient would not have had legal recourse against a solvent defendant unless the physician or surgeon were held responsible pursuant to the borrowed-servant doctrine. Today, however, both charitable and governmentally operated hospitals are subject to liability for the torts of employees.[89] The borrowed-servant doctrine should thus be abrogated in the medical malpractice area as regards the negligence of nurses at the hospital. Its abandonment would be in the interest of centralizing responsibility, obtaining better quality controls, and lessening the totality of insurance costs. The risk of liability resulting from the negligence of nurses ought not be included as part of the costs of both the doctor's insurance and that of the hospital. The single risk, that of nurses' negligence, should fall on one or the other.

The position taken by the supreme court in *Sparger* and *Ramon* constitutes a step in the right direction by casting the entire legal responsibility on the hospital for the negligence of the employed nurses so long as they are acting in furtherance of the hospital's business. Under the court's analysis, however, the issue of whether the borrowed-servant doctrine applies is a question of fact for the jury,[90] and is, thus, one that must be litigated at the request of either the injured patient or the hospital. To avoid this case-by-case factual

85. *See* Thomas v. Hutchinson, 442 Pa. 118, 275 A.2d 23 (1971); McConnell v. Williams, 361 Pa. 355, 65 A.2d 243 (1959).
86. 20 Tex. Sup. Ct. J. at 145.
87. *See* note 82 *supra*.
88. *See* W. PROSSER, *supra* note 1, at 975-77, 992-96.
89. *See* Howle v. Camp Amon Carter, 470 S.W.2d 629 (Tex. 1971). *But see* Childs v. Greenville Hosp. Auth., 479 S.W.2d 399 (Tex. Civ. App.—Texarkana 1972, writ ref'd n.r.e.). *See also* W. PROSSER, *supra* note 1, at 984, 996.
90. 20 Tex. Sup. Ct. J. at 144-45.

contest, the Texas Supreme Court should at its first opportunity re-examine the borrowed-servant doctrine with respect to its suitability for medical malpractice in light of the medical malpractice crisis and the destruction of the immunities that hospitals once enjoyed.