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PART I: PRIVATE LAW

TORTS

by

Page Keeton*

I. PRODUCTS LIABILITY

Intangible Commercial Losses. While some courts have apparently applied strict tort liability concepts to claims for intangible commercial losses resulting from alleged defects and conditions that prevent products from being as effective as contemplated,¹ the better view, it seems, is to regard all such claims as coming within the purview of the Uniform Commercial Code, as passed by the Texas legislature.² Jurisprudentially, it is difficult to understand how the Code can be ignored in dealing with such claims. Those who drafted the Code doubtless contemplated that the obligations imposed by law for commercial losses, without respect to fault, were exclusively contained in the Code. Therefore, if additional obligations are to be imposed, it should be done by the legislature. At common law the terms of the contract, and not tort law, controlled the nature of the obligations between seller, buyer, and third parties for these business losses and others arising from the fact that a product simply would not do what it was supposed to do. The question of whether or not a risk of loss for physical harm should be allocated to the seller rather than the buyer is an utterly different problem.

It is for the above reasons that I believe *Melody Home Manufacturing Co. v. Morrison*³ represents a start in the right direction. The action was for damages caused by alleged defects in a house trailer. The allegations were that the trailer leaked, the floor buckled, and all the faucets leaked; for these and other reasons, it was contended that the trailer was worthless. The court held that the better reasoned cases⁴ did not extend the doctrine of strict liability in tort, as applied in several Texas cases when physical harm was caused,⁵ to claims for intangible economic losses resulting from unfitness or inefficacy of products. Principles related to the law of sales should be applicable. This means that there are two basic warranties to be concerned with—the warranty of merchantability under section 2-314⁶ and the warranty of fitness for a particular purpose under

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¹ See, e.g., *Santor v. A. & M. Karagheurian, Inc.*, 44 N.J. 52, 207 A.2d 305 (1965).

² TEX. BUS. & COMM. CODE ANN. §§ 1.101-9.507 (1968).

³ 455 S.W.2d 825 (Tex. Civ. App.—Houston 1970).

⁴ *Seely v. White Motor Co.*, 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965); *Suvada v. White Motor Co.*, 32 Ill. 2d 612, 210 N.E.2d 182 (1965); *Ford Motor Co. v. Lonon*, 217 Tenn. 400, 398 S.W.2d 240 (1966).

⁵ *Darryl v. Ford Motor Co.*, 440 S.W.2d 630 (Tex. 1969); *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787 (Tex. 1967).

⁶ TEX. BUS. & COMM. CODE ANN. § 2.314 (1968).

section 2-315.⁷ I am not here concerned about what result should be adopted with respect to a variety of problems, but I am pleading for the adoption of the practice of looking to the Uniform Commercial Code for the adjudication of claims of this nature. In this manner ambiguity and uncertainty can be avoided. If the Code needs revision, then let it be revised. But issues related to claims based on the inferiority of products are utterly different from claims based on the dangerousness of products. While the rules for recovery should be the same in most instances, there are good reasons for distinguishing. The court in *Melody* stated that privity of contract should be required. While I do not believe that marketing privity should be required, I do think the question of whether third parties who are not parties to the contract should recover for consequential losses arising from inferior products or products that do not work as contemplated should be governed by the law of contracts.⁸

Design Defects. Much uncertainty exists in the law with respect to a claim arising from physical harm suffered by the user, and those in the vicinity of use, from a product that was made exactly as it was intended to be made. When the product is found to be defective, in the sense that it is different from what it was intended to be because of some miscarriage in the manufacturing process, the law is now clear. The maker is strictly accountable.⁹ But when the claim is based on the ground that all products similar to the one in question involve an inherent risk such as that which resulted in harm to the plaintiff, the ambit of responsibility remains quite unclear. As the law now stands the notion that there is strict liability in such a case is largely a myth. This is primarily because most courts have seen fit to hold that a maker shall not be liable for harm resulting from a risk or danger arising from the use of products until such a risk or danger becomes scientifically knowable.¹⁰ The problem is most frequently presented with respect to drugs and cosmetics—products intended for intimate bodily use. It is a well-known fact that almost any drug or cosmetic will inevitably harm some people, even when utmost care is exercised by all concerned—maker, distributor, doctor, and patient or other user.

A few courts, in dealing with cosmetics, have held that an allergic victim can recover on proof that he is a member of an appreciable class of persons who are allergic to some ingredient in the product, provided such was a known scientific fact.¹¹ This is what was called an "abreaction"

⁷ *Id.* § 2.315.

⁸ The Uniform Commercial Code is neutral as regards the necessity for marketing privity. The issue of whether or not third parties and non-users can recover for harm resulting from defective products is questioned by § 2.318 entitled "Third Party Beneficiaries of Warranties Expressed or Implied." In Texas, the legislature concluded to say that they were neutral on the question as to when third parties could recover, leaving the law on this subject to be developed by the courts. TEX. BUS. & COMM. CODE ANN. § 2.318 (1968).

⁹ See, e.g., *Seely v. White Motor Co.*, 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).

¹⁰ See, e.g., *Darryl v. Ford Motor Co.*, 440 S.W.2d 630 (Tex. 1969); Keeton, *Torts*, *Annual Survey of Texas Law*, 24 Sw. L.J. 3, 8 (1970).

¹¹ See, e.g., *Esborg v. Bailey Drug Co.*, 61 Wash. 2d 347, 378 P.2d 298 (1963).

in *Cudmore v. Richardson-Merrill, Inc.*¹² This must be a term known only in Texas, and it has not contributed to the solution of problems in this area. It is the only drug case of which I am aware applying this special and peculiar terminology. In nearly all the cosmetic cases on this subject, the maker had not attempted to give adequate warning to users, and so the precise question was whether or not liability should be imposed on the maker for marketing a product known to involve a risk of harm to an appreciable number of persons without taking adequate measures to give any warning.¹³ So perhaps *Cudmore* stands for the same proposition as to drugs; namely, that the maker is subject to liability if he fails to warn the user about a risk when it is known, or should be known in the exercise of ordinary care, that an appreciable number are allergic. Is this anything more than saying that it is negligence as a matter of law to market a drug or a cosmetic without taking adequate steps to give notice to users?

These problems were involved in *Alberto-Culver Co. v. Morgan*.¹⁴ There, the court stated that appellant owed no duty to Mrs. Morgan to warn her of the dangerous effects of using New Dawn (a hair dye), because there was no evidence that she belonged to an appreciable class of potential users of New Dawn who are allergic to it. I do not believe that the issue of liability should be regarded as conclusively determined even if it can be established that an appreciable number will be affected. Nor do I believe that the maker should be conclusively relieved of liability simply because the plaintiff has failed to establish an appreciable number. If strict liability is applicable at all to design conditions, then the maker has a duty to market the product in such a way as to avoid subjecting users to an unreasonable risk of harm, whether or not he realized it or should have realized it. I submit that the question in every case should be whether or not a reasonable man, having such knowledge as exists at the time of trial regarding the risks and utility of a particular product, would market the same, and, if so, would he have taken greater precautions in the light of what was known at the trial regarding the risks. Thus, a slight risk of harm to a very small segment could be enough to condemn the product simply because of the availability of substitutes with different ingredients involving less risk.

Lessors. Frequently in connection with the sale and distribution of products, especially petroleum products, the seller will lease to the purchaser equipment to receive and store the products. Thus, in *Freitas v. Twin City Fisherman's Cooperative Association*¹⁵ the court was faced with a number of questions relating to an accident which resulted in injury to a third person on the leased property, a Gulf Oil Co. tank used for the storage of diesel fuel. The tank and its ladder were leased to a cooperative associ-

¹² 398 S.W.2d 640, 642 (Tex. Civ. App.—Dallas 1965), *error ref. n.r.e.*

¹³ See, e.g., *Merrill v. Beaute Vires Corp.*, 235 F.2d 893 (10th Cir. 1956); *Howard v. Avon Prods., Inc.*, 395 P.2d 1007 (Colo. 1964).

¹⁴ 444 S.W.2d 770 (Tex. Civ. App.—Beaumont 1969), *error ref. n.r.e.*

¹⁵ 452 S.W.2d 931 (Tex. Civ. App.—Corpus Christi 1970).

ation furnishing a variety of services to shrimpers. The court held that the doctrine of strict liability did not apply to the lessor, Gulf, since it was not in the business of leasing equipment, leasing being merely incidental to the sale of products. This means that any defect in the gasoline sold will result in the application of strict liability, whereas any defect in the equipment used to supply the gasoline will not. The court distinguished *Frietas* from the situation of one engaged in leasing cars and trucks, as was the case in *Cintrone v. Hertz Truck Leasing & Rental Service*.¹⁶ However, the holding in *Frietas* is in conflict with a recent California case. In *Price v. Shell Oil Co.*¹⁷ plaintiff sustained injuries as a result of falling from a ladder attached to a gasoline truck used to fuel airplanes. The defendant owner had leased the truck to plaintiff's employer, the airline. In applying strict liability, the California court rejected the notion that *Cintrone* did not apply. There was evidence to show that the defendant made ten or more similar arrangements. However, as in *Frietas*, the lease arrangement was nonetheless incidental to the sale of petroleum products.

II. MEDICAL MALPRACTICE

I observed last year that there can be little justification for a trial court to direct a verdict after all the evidence has been admitted.¹⁸ Rather, the case should be submitted to the jury, and if the jury finds an issue of fact in a way that the trial judge or the appellate court feels is unsupported under the evidence, a retrial will not be required. This is one of the two questions involved in *Lenger v. Physician's General Hospital, Inc.*¹⁹ In that case a colon resection was performed on a patient, and the two ends of the colon were sutured together following the operation. Thereafter, they came completely apart. Gas and fecal material entered the abdominal cavity and serious complications followed. There was proof of hospital negligence causally related to the plaintiff's eating solid food contrary to medical instructions. An expert witness gave several possible causes of the opening in the meso-colon, including: (1) failure of the stitches to hold; (2) tension on the suture lines; and (3) the solid food that was eaten. While the opinion does not mention the point, it seems clear from other cases involving sutures²⁰ that one reason stitches may not hold is because of professional negligence of the doctor, which can occur when the stitches are too tight or too far apart, or there is negligence in moving patients. Anyone who has witnessed patients being moved can understand that the latter can be true. The court in *Lenger* concluded that because the expert witness stated that "It's just as reasonable one thing could have caused it as another,"²¹ there was insufficient evidence to submit the question to the jury. The fact is that the witness was not per-

¹⁶ 45 N.J. 434, 212 A.2d 769 (1965).

¹⁷ 466 P.2d 722, 85 Cal. Rptr. 178 (1970).

¹⁸ Keeton, *supra* note 10, at 11.

¹⁹ 455 S.W.2d 703 (Tex. 1970).

²⁰ See, e.g., *Wiggins v. Piver*, 276 N.C. 134, 171 S.E.2d 393 (1970).

²¹ 455 S.W.2d at 707.

mitted to testify to the jury at the trial, and it is not clear what the precise testimony would have been following direct and cross examination. In the medical malpractice area, where evidence is so difficult to obtain, I would be inclined to agree with the view that when there is evidence of a probable cause as to negligence, the jury should be allowed to determine whether it was the cause, *i.e.*, whether it is more probable than not that it was the cause. Moreover, if negligence of someone in treating the patient was more likely than not the cause, then both the hospital and the doctor should be held responsible unless evidence is produced by one of them to identify the particular cause.²³

III. OCCUPIERS OF LAND

Licenses. I have purposely directed attention in each of the annual *Surveys on Torts* to any case that involves the distinction between a licensee and an invitee and the differences between the occupier's duty of care to each. As stated last year,²³ the law of Texas as to the exact nature of the duty of care of a licensee has not been clearly articulated. The Texas supreme court has clarified, through *Halepeska v. Callihan Interests, Inc.*,²⁴ the open-and-obvious-danger concept insofar as invitees are concerned. But the position of the licensee with respect to injuries from dangerous conditions encountered without actual awareness of the danger has yet to be clarified. Two additional cases reported this year illustrate the uncertainties.

In *Olsban Demolishing Co. v. Burleson*²⁵ the court, citing a Tennessee case,²⁶ labeled any kind of hidden, dangerous condition a trap, and observed by way of dictum that the occupier would be liable. While the court concluded that the plaintiff in the case should be regarded as an invitee rather than a licensee, it was favorably disposed to the hidden danger rule. If such a rule were adopted, then the troublesome distinction between licensees and invitees could be abolished. On the other hand, in *St. Clergy v. Northcutt*²⁷ the same court concluded that a social guest could not recover for harm suffered when she fell after slipping on a throw rug on a waxed floor, because there was no genuine issue of fact as to gross negligence. It is true that these two cases are substantially different, since one involved a latent dangerous condition and the other involved a condition, the danger of which could be regarded as just as obvious to the user as to the occupier. As noted last year,²⁸ the distinctions between licensees and invitees have been abolished in California and Hawaii, and I submit they should be abolished everywhere. If a person enters upon

²³ See *Ybarra v. Spangard*, 25 Cal. 2d 486, 154 P.2d 687 (1944). See also *Dement v. Olin-Mathieson Chem. Corp.*, 282 F.2d 76 (5th Cir. 1960), for a similar problem involving *res ipsa loquitur*.

²⁴ Keeton, *supra* note 10, at 6.

²⁵ 371 S.W.2d 368 (Tex. 1963).

²⁶ 452 S.W.2d 742 (Tex. Civ. App.—Beaumont 1970).

²⁷ *Walker v. Williams*, 215 Tenn. 195, 384 S.W.2d 447 (1964).

²⁸ 448 S.W.2d 847 (Tex. Civ. App.—Beaumont 1969).

²⁹ Keeton, *supra* note 10, at 7.

business property rightfully, then he is without fault, regardless of whether he is there for his own convenience or for that of the occupier, and there is no justification for relieving the occupier of the responsibility of exercising ordinary care with reference to all such persons.

Liability of Occupier for Misconduct of Third Persons. Generally speaking, a person is under no duty to protect another from the misconduct of third persons. However, it is quite clear that a common carrier, an innkeeper, or an operator of a theatre or other place of amusement or entertainment is under a duty to take such precautions as a reasonable man would take to prevent harm to patrons from the misconduct of others on the premises.²⁹ I think one reason for the reluctance of the courts to create duties of affirmative action has to do with causation. When a person fails to do something that he ought to have done in order to prevent harm, the causal question is whether the action that he should have taken would have prevented harm. The issue is not what did happen, but what would have happened if proper action had been taken. Even when it is clear what such action should have been, and often several different measures could have been taken, any one of which would have satisfied due care requirements, no one can say what effect the action would have had in the given situation. This was the problem in *East Texas Theatres, Inc. v. Rutledge*.³⁰ In that case a theatre patron was hit with a bottle thrown from the balcony. The supreme court accepted the jury's finding that there was negligence in failing to take action to control a rowdy crowd, but it concluded that there was a complete lack of proof that the bottle would not have been thrown even if such action had been taken. If the evidence in the record must show that proper precautions would have more likely than not prevented the occurrence, this result is sound. But I think the real question here is whether an enterpriser who negligently allows people to misconduct themselves should be held accountable for all that happens, or whether patrons who attend in the expectation of receiving proper care should be required to bear the loss because of an inability to prove a causal relationship. I admit to some uncertainty, but there is good reason to argue that if failure to take precautions substantially increased the likelihood of the event, or something similar occurring, then the enterpriser should be held liable. Perhaps the affinity of causal likelihood between defendant's conduct and plaintiff's injury should not be the same for all kinds of problems. There are different policy considerations.³¹

Slip-and-Fall Cases. The hazards of litigating slip-and-fall situations are well illustrated in three cases decided during the course of the year. One involved a customer who fell when the heel of her shoe got caught

²⁹ See *Connolly v. Nicollet Hotel*, 254 Minn. 373, 95 N.W.2d 657 (1959); *Marek v. Southern Enterprises, Inc.*, 128 Tex. 377, 99 S.W.2d 594 (1936).

³⁰ 453 S.W.2d 466 (Tex. 1970).

³¹ See the excellent article by Malone, *Ruminations on Cause-in-Fact*, 9 STAN. L. REV. 60 (1956).

in a small rug. The plaintiff was denied recovery by the supreme court, with two judges dissenting, on the ground that there was no evidence to justify a finding that the condition was unreasonably dangerous.³² A second case involved a fall in a supermarket on Icee, a flavored, carbonated ice product. The court of civil appeals correctly reversed a trial court judgment for the defendant and rendered for plaintiff, since there was a finding of negligence of the defendant and a further finding that plaintiff did not see the slippery floor, however obvious it should have been to a person who was looking where he was going.³³ The third involved a fall by a seventy-nine-year-old woman as she slipped from one level to another in the Harris County domed stadium. The court of civil appeals, with one judge dissenting, concluded that recovery should be allowed, since the jury found that the depth of the step created more than an ordinary risk of harm to the plaintiff.³⁴ In all three cases, there was much discussion about the open-and-obvious-danger concept. The litigation in this area has confirmed a conviction that I have had for some time—these cases should be tried as simple issues of negligence and contributory negligence or pursuant to an objective test of whether or not the danger of the condition would be appreciated by one who was looking where he was going.

IV. TRAFFIC

Proximate Cause. It would aid thinking about proximate cause if everyone would recognize something that cannot be denied: there is no such thing as negligence in the air. Negligence is unreasonably dangerous conduct. It is by definition conduct which a reasonable man would not have committed because of the magnitude of the harm that was reasonably foreseeable from such conduct. The failure of trial courts to refer in their definition of negligence to the fact that negligence is conduct from which harm is reasonably foreseeable, contributes to much of the confusion about this subject. Even though an actor has been found to have been negligent, there are at least three reasons why, under the substantive law, such negligence may not be a proximate cause. First, it may not be a cause at all. The damaging event may be something that would have occurred even if defendant had not been negligent. Secondly, the damaging event that resulted from the negligence may have been so different in kind from that which the defendant was negligent in failing to guard against, that he should be treated as if he were not at fault. The law is, right or wrong, that a negligent defendant is not liable unless harm from an event of the same general kind was foreseeable.³⁵ Finally, even though

³² Seideneck v. Bayreuther Associates, 451 S.W.2d 752 (Tex. 1970).

³³ Goodson v. Southland Corp., 454 S.W.2d 823 (Tex. Civ. App.—El Paso 1970), *error ref. n.r.e.*

³⁴ Houston Sports Ass'n, Inc. v. Russell, 450 S.W.2d 741 (Tex. Civ. App.—Houston 1970), *error ref. n.r.e.*

³⁵ Carey v. Pure Distrib. Corp., 133 Tex. 31, 124 S.W.2d 847 (1939); Missouri, Kan. & Tex. Ry. v. McLain, 131 Tex. 484, 105 S.W.2d 206 (1939), *on rehearing*, 133 Tex. 484, 126 S.W.2d 474 (1939).

both of the other requirements are met, under the substantive law, with which I do not agree, a negligent defendant may be excused even though the plaintiff was injured in the kind of event that was foreseeable, because the conduct of someone else may be regarded as a new and independent cause.³⁶ This really means that because someone else may be regarded as so much more to blame for the damaging event than the particular defendant, the latter ought not to be held responsible.

In *Clark v. Waggoner*³⁷ the defendant's automobile collided with the rear of the plaintiff's automobile. The jury found that the defendant had failed to keep a proper lookout because he had looked away to locate house numbers prior to the collision. The jury then found that such negligence was not a proximate cause. The car that was rear-ended stopped rather suddenly in response to a signal from a workman who was aiding the maneuvering of a telephone pole over the street ahead. The trial court rendered judgment against the defendant notwithstanding the finding on proximate cause. The court of civil appeals reversed and rendered judgment for the defendant on the theory that foreseeability was not shown as a matter of law,³⁸ and the supreme court, with four judges dissenting, reinstated the trial court's judgment. Those who dissented said: "[I]t was for the jury to say whether, under all the circumstances, a person of ordinary prudence in respondent's position should have foreseen that a momentary glance to the side would probably result in injuries or damage to himself or others."³⁹ I submit that a momentary glance to the side could not be negligence unless harm from such conduct was reasonably foreseeable, and this was precisely the way that it was likely to happen. The need for keeping a lookout is because something might happen in front requiring one to stop. I can understand how the jury might have reached their result. In the light of the conduct of those working in the street, and in the light of the charge to the jury on new and independent causes, they could well have believed that harm coming about in this precise way was not foreseeable or that the conduct of the workmen was the sole proximate cause for the occurrence. However, since this was the same general kind of accident that one would anticipate occurring from failure to keep a lookout, *i.e.*, a collision resulting from inability to stop in time, it seems to me that the trial court's judgment was sound. Either the ruling should be that there was no negligence as a matter of law, or there should be liability.

Gross Negligence. The definition of gross negligence by the supreme court in *Harbin v. Seale*⁴⁰ has been needed for some time. While both negligence and gross negligence must necessarily be defined in somewhat vague terms, there have been too many statements such as the following:

³⁶ *McAfee v. Travis Gas Corp.*, 137 Tex. 314, 153 S.W.2d 442 (1941); *Paris & Great N. Ry. v. Stafford*, 53 S.W.2d 1019 (Tex. Comm'n App. 1932), *judgment adopted*.

³⁷ 452 S.W.2d 437 (Tex. 1970).

³⁸ 446 S.W.2d 737 (Tex. Civ. App.—Amarillo 1969).

³⁹ 452 S.W.2d at 440.

⁴⁰ 14 Tex. Sup. Ct. J. 128 (1970).

excessive speed alone cannot constitute gross negligence; a single dangerous act not involving a persistent course of conduct cannot constitute gross negligence.⁴¹ There are two main characteristics of gross negligence: conduct that constitutes a gross deviation from the standard of care of a reasonable man; and a conscious realization by the actor of the dangerousness of his conduct. The combination of the two elements constitute cussedness, and, for cussedness, anyone ought to be held liable, criminally and tortiously, under almost all circumstances. The supreme court makes it clear that excessively high speed that causes so much death and destruction on the highway can be gross negligence.

V. LIBEL AND SLANDER

Fair, true, and impartial accounts of most public meetings are qualifiedly privileged by statute.⁴² The case of *Denton Publishing Co. v. Boyd*⁴³ is an illustration of how easy it is for a reporter to get outside the area of the privilege and subject himself and his employer to liability. In *Boyd* the occasion for the newspaper report was a city council meeting. One subject at the meeting was a request from a group of citizens involving the subject of more paving of streets in a particular area of the city. In making the report, the following statement was made: "The developer of the area, D. B. Boyd, declared bankruptcy and didn't pave a total of 901 running feet of streets in the area."⁴⁴ It was not disputed that the statement was false, but the evidence was in conflict as to whether the statement was made at the meeting or whether this was background information.⁴⁵ The court held that the failure to submit issues to resolve two questions of fact relating to the privilege constituted a waiver of the affirmative defense. The two issues were: (1) whether the ordinary reader would have interpreted the statement as being made at the meeting; and (2) whether the statement was or was not made at the meeting. It could reasonably be argued that this being a privileged occasion, the burden of proof should be on the plaintiff to show that the statement was one that was not made at the meeting and that the privilege had been abused by reporting on matters not discussed at the meeting. As the court stated, it is clear that if the statement had been made at the meeting, the plaintiff could not recover without proof that the statement was actuated by malice. As a matter of fact, I would predict that the Supreme Court of the United States will hold reports of public meetings to be absolutely

⁴¹ See *Rogers v. Blake*, 150 Tex. 373, 240 S.W.2d 1001 (1951); *Bowman v. Puckett*, 144 Tex. 125, 188 S.W.2d 571 (1945); *Rowan v. Allen*, 134 Tex. 215, 134 S.W.2d 1022 (1940).

⁴² TEX. REV. CIV. STAT. ANN. art. 5432 (1958).

⁴³ 448 S.W.2d 145 (Tex. Civ. App.—Fort Worth 1969), *error granted*.

⁴⁴ *Id.* at 146.

⁴⁵ It was conceded on oral argument that the plaintiff was not a public figure. I must say that the trend of the decisions by the United States Supreme Court is such as to cause me to believe that he was. A contractor whose conduct or financial condition is reasonably related to the creation of a public issue under discussion and debate becomes, I suspect, a public figure with respect to the particular matter at issue. This is an interesting question that will have to be resolved. It could arise quite frequently in connection with background information related to issues discussed at public meetings.

privileged. The law of libel is being rewritten, and very little of what has been the law will remain so after the constitutional guarantee of free speech in relation to libel has been fully articulated by the Supreme Court of the United States.

In *El Paso Times, Inc. v. Trexler*⁴⁶ the basis for a libel suit against the defendant newspaper was the publication of a "letter to the editor" about a professor at the University of Texas at El Paso who had led an anti-Vietnam war demonstration that aroused a considerable amount of interest in the area. The letter, among other things, stated: "After reading Dr. Trexler's remarks on the welfare state's being the ideal situation, I've come to an EXTREME conclusion. Throw the bum out! There was a time when rats paid the penalty for treason against our Republic. Today they teach history in high schools and colleges, or are seated in the United States Senate."⁴⁷ Prior to *New York Times Co. v. Sullivan*,⁴⁸ the courts in Texas and in a majority of jurisdictions held that a misstatement of fact about a public figure to the general public was actionable without respect to proof of fault.⁴⁹ On the other hand, the courts had always recognized a qualified privilege to comment on matters of public interest, including the conduct of writers, professors, etc.⁵⁰ This latter privilege, described as a privilege of fair comment, required that the courts attempt to distinguish between expressions of opinion and misstatements of fact,⁵¹ a distinction that resulted in a great deal of litigation. Moreover, the privilege of fair comment was qualified in the sense that proof of malice would subject the publisher to liability.⁵² Malice could be established presumably by showing the existence of an improper motive *or* by showing that the opinion was not honestly entertained by the publisher.⁵³ When the Supreme Court interpreted the first amendment to give a qualified privilege to publish defamatory misstatements of fact about public figures, it required, as a basis for recovery, proof of malice in the sense of knowledge of the falsity of the imputation or with reckless disregard for the truth.⁵⁴ The existence of bad motive became immaterial. Such a result seems to me to require a further change in the law. It would seem that a derogatory opinion, no matter how unreasonable, can no longer serve as a basis for recovery. The privilege of fair comment is, I suggest, an absolute privilege, because if a misstatement of fact is not actionable without proof of dishonesty, then the same test should be applied to the circularization of an opinion. This means that the writer of a letter could

⁴⁶ 447 S.W.2d 403 (Tex. 1969).

⁴⁷ *Id.* at 404.

⁴⁸ 376 U.S. 254 (1964).

⁴⁹ See, e.g., *Arizona Publishing Co. v. Harris*, 20 Ariz. 446, 181 P. 373 (1919); *Bell Publishing Co. v. Garrett Eng'r Co.*, 141 Tex. 51, 170 S.W.2d 197 (1943).

⁵⁰ See, e.g., *Emde v. San Joaquin County Cent. Labor Council*, 23 Cal. 2d 146, 143 P.2d 20 (1943); *Moore v. Leverett*, 52 S.W.2d 252 (Tex. Comm'n App. 1932), *holding approved*.

⁵¹ See, e.g., *Warren v. Pulitzer Publishing Co.*, 376 Mo. 184, 78 S.W.2d 404 (1934).

⁵² See, e.g., *Kulesza v. Chicago Daily News, Inc.*, 311 Ill. App. 117, 35 N.E.2d 517 (1941); *Moore v. Leverett*, 52 S.W.2d 252 (Tex. Comm'n App. 1932), *holding approved*.

⁵³ See, e.g., *Cohalan v. New York World-Telegram Corp.*, 172 Misc. 1061, 16 N.Y.S.2d 706 (1939).

⁵⁴ 376 U.S. at 279-80.

not be subject to liability because of ill will, or hatred, or for some other improper motive, but only for dishonesty. If the writer has an absolute privilege, then the newspaper clearly has a privilege to print his opinion. Conceivably, a court might hold that if plaintiff could prove that the defendant expressed an opinion which he did not entertain, his statement would be actionable. However, this does not mean that the newspaper would be liable. I predict the Supreme Court will hold that the privilege to comment is an absolute one. Thus, I agree with the result in *El Paso Times v. Trexler*, which was for the defendant. The court's holding was that the evidence "does not show actual malice as defined in the *New York Times* case."⁵⁵ My reason would be the same reason that the employee of the newspaper gave for printing the letter. He said that he would not have published the letter if he thought it accused the plaintiff of treason in the technical, legal sense. He considered it as expressing an extreme conclusion and an opinion of the letter-writer, and not a statement of fact. The trial court in *El Paso Times* submitted the question of malice to the jury and defined malice to mean publishing "with a desire or intent to injure a person through a deliberate falsehood or with actual knowledge of its probable falsity."⁵⁶ If there had been a publication of a misstatement of fact, I am inclined to disagree with plaintiff's counsel that this places a greater burden on plaintiff than is required by *New York Times*. In fact, it may be too favorable to the plaintiff, depending on what is meant by "probable falsity." I think an honest belief in the existence of the fact asserted will prevent it from being said that the defendant was reckless. So, a person acts maliciously within the meaning of *New York Times* if he publishes dishonestly, *i.e.*, with knowledge of the falsity or without an honest belief in its truth. A person could honestly believe that another was a murderer even though he realized that there was an appreciable chance that he was mistaken.

VI. RECAPTURE OF PERSONAL PROPERTY

It is the general rule that one entitled to possession of personal property cannot use force against another to take possession of such property unless the latter's possession was acquired unlawfully, *i.e.*, tortiously or criminally.⁵⁷ On the other hand, one entitled to possession is generally entitled to trespass on the land of another to recapture property that is being wrongfully withheld, especially after a request has been made to surrender possession.⁵⁸ In *North Side State Bank v. Hunter*⁵⁹ the court was presented with a claim for damages by the owner and mortgagor of an automobile against the mortgagee when an attempt at repossession culminated in a fight. The mortgage contract contained the usual stipulation

⁵⁵ 447 S.W.2d at 406.

⁵⁶ *Id.* at 405.

⁵⁷ See, *e.g.*, *Lamb v. Woodry*, 154 Ore. 30, 58 P.2d 1257 (1936); *Kirby v. Foster*, 17 R.I. 437, 22 A. 1111 (1891); RESTATEMENT (SECOND) OF TORTS § 101 (1965).

⁵⁸ RESTATEMENT (SECOND) OF TORTS § 198 (1965).

⁵⁹ 452 S.W.2d 34 (Tex. Civ. App.—Houston 1970), *error ref. n.r.e.*

giving the mortgagee the right to enter the owner's premises to reclaim. This provision is valid, but only to the extent that this can be done without the use of force against the person. Any provision in a contract authorizing the use of force against another is illegal and contrary to public policy. In such a situation, the law is that the mortgagor cannot use force against the intruder to prevent the recapture, and the intruder cannot use force against the mortgagor to effect the recapture. The first person, therefore, to use force against the other is the aggressor, and the other would then have a privilege of self-defense. It appears from such facts as were reported in the opinion in *Hunter* that force was first used by the mortgagor to prevent the taking of the car by confronting the agents of the mortgagee with a gun. This was unprivileged and an actionable assault, if not a battery. The important question, not clearly answered, is whether the mortgagee or his agents should have withdrawn, if they could, or whether they could stand ground and resist the force with such means as reasonably appeared to be necessary. Arguably, the use of any unnecessary force to effect withdrawal is to be regarded as the use of force to repossess rather than the use of force in defense. These questions could not be answered by the court of civil appeals in the light of the fact that appropriate issues at the trial were not submitted. The case was remanded, but without any instructions as to how the case should be submitted. It was submitted on a negligence theory and in such a global manner as to fail to identify for the jury the questions to which the substantive law requires answers.