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Part I: Private Law - Torts

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PART I: PRIVATE LAW

TORTS

by

Page Keeton*

I. TRAFFIC

Standard of Care. The standard of care by which an actor is to be judged has never been regarded as a completely objective one. Certain subjective characteristics of an actor may be taken into account, including physical handicaps and the mental and moral limitations of the young. In dealing with the young all courts have recognized that there are two stages in a child's development as regards his responsibility for negligence. In the initial stage he is not regarded as being accountable for failing to perceive and guard against danger; in the second stage he is accountable, but the standard of care is one that is specially articulated for the young, and is usually expressed as the care of the reasonable person of like *age, intelligence, and experience*.¹ Following this second stage the child becomes accountable without respect to his age. Virtually all courts have imposed an adult standard of care prior to the age of twenty-one, the age of accountability for the making of contract.² In Texas the age of accountability as an adult has been placed at fourteen, and for this reason it was held that the same negligence per se standard applicable to adults should be applicable when a sixteen-year-old girl entrusted her father's car to a youthful companion who did not have a driver's license.³ The court observed that if there had been evidence showing mental deficiency or lack of discretion uncommon to children of her age, such evidence would have resulted in the continued application of a youthful standard. Since mental handicaps of adults are not generally considered, this would not seem to be sound, especially as regards the issue of negligence for the determination of liability, as distinguished from the issue of contributory negligence that bars recovery.⁴ Moreover, it is suggested that those who undertake to engage in an adult activity, such as driving cars, should have imposed upon them an objective standard of conduct without respect to any subjective attribute—physical, mental, or otherwise. All drivers, the young, the lame, the blind, and the inexperienced, should be required to operate automobiles in a manner that others on the highway are entitled to expect.⁵

Regarding the very young, the Supreme Court of Texas in *Yarborough v.*

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¹ RESTATEMENT (SECOND) OF TORTS § 283A (1965).

² See generally Schulman, *The Standard of Care Required of Children*, 37 YALE L.J. 618 (1927); Annot., 77 A.L.R.2d 917 (1961); Annot., 67 A.L.R.2d 570 (1959); Annot., 174 A.L.R. 1080 (1948); Annot., 107 A.L.R. 4 (1937).

³ *Barnes v. Zinda*, 464 S.W.2d 501 (Tex. Civ. App.—Waco 1971), *error ref. n.r.e.*

⁴ In the revised edition of the *Restatement of Torts* the American Law Institute approved a caveat to the following effect: "The Institute expresses no opinion as to whether insane persons are not required to conform for their own protection to the standard of conduct which society demands of sane persons." RESTATEMENT (SECOND) OF TORTS 507 (1965). See also Annot., 91 A.L.R.2d 392 (1932).

⁵ *Dellwo v. Pearson*, 259 Minn. 452, 107 N.W.2d 859 (1961).

*Berner*⁶ held that as a matter of law a child between four and five could not be found contributorily negligent. The court recognized that the common-law age of accountability of seven had been modified in Texas, but the opinion did for the first time clearly set forth an age for Texas below which a child is not accountable, either for negligence or contributory negligence purposes. The damaging event occurred at the Galveston beach when the plaintiff darted out in front of the defendant's car, which was being driven between the waterline and the plaintiff's parents' car about 100 feet from the waterline. In fixing an age below which a child cannot be negligent and above which he must be accountable as an adult, the courts must act somewhat arbitrarily, but the lines seem now to be reasonably drawn in Texas.

Inferential Rebuttals. While *Yarborough* is a significant decision because of the holding about the negligence of the young, it is far more important because of the holding eliminating the practice of separate submission of inferential rebuttal issues on unavoidable accident and sudden emergency. When there is evidence at the trial to indicate that some nonhuman agency, such as fog, snow, sleet, or the like, so contributed to the accident as to prevent it from being regarded as proximately caused by the negligence of anyone involved in the event, the trial judge has been required on request to submit the issue of unavoidable accident as a defensive theory.⁷ The court noted that when one of the parties to the event is incapable of negligence, such as a very young child, then the conduct of such a person can also raise the defensive theory.⁸ The court held however that the concepts of unavoidable accident and sudden emergency should not hereafter be submitted as separate issues. The only real purpose for such issues is to direct the jury's attention to factual theories rebutting either negligence or proximate cause, and this purpose, the court said, would "be better served by explanatory charges or definitions."⁹ The court went on to say: "We accordingly hold the better practice dictates that, upon retrial of this case, if the evidence presents these theories, the defendant *Berner* will be entitled to suitable explanatory charges or definitions which fairly present to the jury the fact that unavoidable accident or sudden emergency may be present."¹⁰

There is no difficulty about *how* to provide explanatory instructions related to sudden emergency. It would logically be done in connection with the definition of negligence because the existence or non-existence of an emergency at the time an actor was allegedly negligent tends to rebut the argument that he was negligent, even though the course of action taken was a mistake of judgment. However, there are some problems related to *what* to say in the explanatory instructions because of some uncertainties in the substantive law. In the first place, it is usually said that the actor whose judgment is being questioned

⁶ 467 S.W.2d 188 (Tex. 1971).

⁷ G. HODGES, SPECIAL ISSUE SUBMISSION IN TEXAS § 19 (1959). The issue as it has been submitted is as follows: "Do you find from a preponderance of the evidence that the occurrence in question was not the result of an unavoidable accident? 'Unavoidable accident' means an event not proximately caused by the negligence of any party to it." 1 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES § 3.03 (1969).

⁸ 467 S.W.2d at 191.

⁹ *Id.* at 192.

¹⁰ *Id.* at 193.

must not himself have been at fault in bringing about the emergency. This is seemingly unsound. Of course, negligent conduct in bringing about an emergency would generally be a proximate cause of a damaging event that was a consequence of action taken in response to the emergency. But it is logically immaterial to the issue of how an actor should be expected to respond in the emergency, and this can be of vital importance on the issue of discovered peril. In the second place, it may be that in Texas a litigant who is responsible for an emergency and thereby terrorizes the other litigant cannot successfully argue that the latter responded negligently in his terrorized condition. This distinction between "sudden emergency" and "imminent peril" was discussed in a decision made at the close of the year.¹¹

There would appear to be several differences between the two doctrines. When "imminent peril" applies, the litigant who is placed in such peril is not legally accountable. He is no longer held to a standard of ordinary care. However, the doctrine applies only when the perilous plight of the litigant was created by the negligence of the other litigant, so that if the "peril" or "emergency" was of innocent origin or was caused by a third person, then only "sudden emergency" is applicable.¹² The logic in this would seem to be that a litigant who is responsible for another being placed in peril should not be heard to argue that the other responded thereto improperly. The notion is that the greater fault lies with the litigant who creates the perilous situation. This imminent peril doctrine may indeed be available only to the plaintiff, for the court said: "A person is not legally accountable for imprudent conduct resulting in injury to himself when such conduct results from a *state of terror* reasonably springing from an imminent peril created by the negligent conduct of the defendant."¹³ So limited, the doctrine, like discovered peril, is one that is designed to obviate the rigors of the rule that contributory negligence is a complete bar to recovery.

Finally, in "imminent peril" it appears that a jury must find that the plaintiff was *terrorized* by the defendant's conduct.¹⁴ If this is an effort to distinguish between fear that is necessarily engendered when a sudden emergency arises requiring immediate action and terror, then this is an impractical, hair-splitting distinction. There is some justification for relieving a litigant of the burden of responding as an ordinary person would do when an emergency is produced by the other litigant, but there would seem to be no justification for trying to distinguish between terror and fear.

As to unavoidable accident, it is generally said that this rebuts either the existence of negligence on the part of anyone involved in the event, or the fact that any such negligence was the proximate cause of the damaging event. Therefore, it cuts across the usual definitions of both negligence and proximate cause. Moreover, unless abstractly given, it might be considered to be a charge on the weight of the evidence, and unless the explanatory instruction on "unavoidable accident" actually directs attention to some specific factual theory

¹¹ Del Bosque v. Heitmann Bering-Cortes Co., 474 S.W.2d 450 (Tex. 1971).

¹² Goolsbee v. Texas & N.O.R.R., 150 Tex. 528, 243 S.W.2d 386 (1951); International & G.N.R.R. v. Neff, 87 Tex. 303, 28 S.W. 283 (1894). See also Thode, *Imminent Peril and Emergency in Texas*, 40 TEXAS L. REV. 441 (1962).

¹³ 474 S.W.2d at 453 (emphasis added).

¹⁴ See Thode, *supra* note 12.

(such as fog) to explain an accident, it is rather confusing to give it. In addition, defining unavoidable accident without using the term "unavoidable accident" in issues that are submitted to the jury is a questionable practice. It would be better practice to omit any instruction on unavoidable accident. The trial attorneys are free to argue that a damaging event was unavoidable for reasons other than that it was brought about by some nonhuman agency.

Discovered Peril. The discovered peril doctrine is tolerable only because contributory negligence should not be a complete bar to recovery. This is not to say that a comparative negligence statute is the only alternative. When two or more negligent actors proximately cause injury to one of themselves, each could be required to contribute in proportion to the number of persons responsible for the injury. This is in effect the rule when joint tortfeasors are responsible for injuring a nonnegligent person. Until, however, something is done about the long-established rule that contributory negligence is a complete bar to recovery, a properly applied discovered peril doctrine that would permit the plaintiff to recover all of his damages, notwithstanding his contributory negligence, may be justified. At least it is commonly applied in one form or another. In Texas the rule has been for some time that the defendant must not only discover the plaintiff in a position of peril, but he must also *realize* that the plaintiff cannot or will probably not extricate himself.¹⁵ This requires a finding of a subjective state of mind similar to that required under the "no-duty," open-and-obvious-danger rule applicable to those encountering dangerous conditions and activities on land.¹⁶

It is feasible and practical to distinguish between an instance in which the defendant did not see the plaintiff because he was not keeping a proper lookout from a situation in which the defendant did see the plaintiff who was either helpless or oblivious to his peril. It is, however, much more questionable to distinguish between an instance in which the defendant did see but did not realize the plaintiff's peril (although he should have) from an instance in which the defendant did see and did realize the plaintiff's peril. If such a distinction is made, however, as it is in Texas, it would seem that the knowledge of facts which would cause a reasonable man to realize the plaintiff's peril would be a sufficient basis for a jury finding that the defendant realized the peril—regardless of what the defendant's testimony might be as to his state of mind. Therefore, evidence of the situation shortly before the damaging event that would have caused a reasonable man to realize that the plaintiff was in peril would be sufficient to justify a jury finding that the defendant did actually realize that peril. This, however, was not the result reached by the supreme court in two cases arising out of a collision at a railroad crossing.¹⁷ Two men, the driver and a passenger, were killed in an automobile that collided with a train. Two separate suits were filed, one for the death of the driver and the

¹⁵ *Texas & N.O. Ry. v. Hart*, 163 Tex. 450, 356 S.W.2d 901 (1962); *Ford v. Panhandle & S.F. Ry.*, 151 Tex. 538, 252 S.W.2d 561 (1952).

¹⁶ *Rabb v. Coleman*, 469 S.W.2d 384 (Tex. 1971). This case is commented upon at text accompanying notes 29-35 *infra*.

¹⁷ *Stanley v. Southern Pac. Co.*, 466 S.W.2d 548 (Tex. 1971); *Gentry v. Southern Pac. Co.*, 457 S.W.2d 889 (Tex. 1970).

other for the passenger. The cases were tried together, but separately appealed. The railroad crossing was protected by signs on the highway some distance from the crossing and by flashing lights operating at the crossing. The highway was practically perpendicular to the railroad tracks. The fireman of the train discovered the automobile when it was 2,000 or more feet from the crossing, and so all the evidence indicated awareness of the facts from that time on in regard to the issue of whether the driver of the car was not likely to stop. Since the passenger was not found to have been contributorily negligent, the only issue in the action for his wrongful death was whether the fireman or the engineer could be found to have been negligent, and this could be found if the fireman or engineer failed to take precautions after the fireman should have realized the plaintiff's peril. With one judge dissenting, the court held that the evidence was sufficient to support a finding of negligence.¹⁸ In the companion case, however, involving the action for the wrongful death of the driver, the court said the evidence was insufficient to justify a finding of the jury that the fireman discovered and realized the peril of plaintiff at a time when the accident could have been avoided.¹⁹ In fact, it was said: "We hold, as a matter of law, the plaintiff was not in a position of peril at that time."²⁰ If that sentence is accurate, then it would seem to follow that there could be no negligence because no one could be charged with negligence in failing to realize peril, if there was no peril.

II. IMMUNITIES

The assault on immunities—charitable, governmental, and family—has been proceeding apace for some years throughout the country. In general an immunity is a rule of nonliability based upon the notion that whereas plaintiff is deserving of recovery and would be able to do so under like circumstances against most persons and legal entities, there is an overriding social interest to be served in insulating a particular entity or person from most if not all types of tort actions.

Charitable Immunity. In a five-to-four decision, *Watkins v. Southcrest Baptist Church*,²¹ the Supreme Court of Texas warned that the doctrine of charitable immunity might be overruled the next time the matter was presented to it. This immunity, which was initially based largely on the fear that tort liability might impair the rendition of services currently needed and being performed by institutions and entities that were not organized for profit, has already been abrogated by most jurisdictions throughout the country by judicial decision.²² The decision by the court in *Howle v. Camp Amon Carter*²³

¹⁸ *Stanley v. Southern Pac. Co.*, 466 S.W.2d 548 (Tex. 1971).

¹⁹ *Gentry v. Southern Pac. Co.*, 457 S.W.2d 889 (Tex. 1970).

²⁰ *Id.* at 893.

²¹ 399 S.W.2d 530 (Tex. 1966).

²² In 1969 the Supreme Judicial Court of Massachusetts observed that "in the past on many occasions we have declined to renounce the defense of charitable immunity" It was further observed that this abstention was based on the opinion that any renunciation should preferably be accomplished by the legislature. Now it appears that only three or four states adhere to the doctrine. *Colby v. Carney Hosp.*, 254 N.E.2d 407, 408 (Mass. 1969).

²³ 470 S.W.2d 629 (Tex. 1971).

was not, therefore, any surprise either to the bench or to the bar. Unlike the complete immunity which the state and other political subdivisions enjoyed, a charitable institution's immunity was always qualified. It has been held liable for managerial negligence.²⁴ Now it is subject to vicarious liability under the same rules of respondeat superior applicable to corporations and other entities organized for profit. The plaintiff's injury occurred at a boys camp operated by the Y.M.C.A. of Fort Worth. Plaintiff alleged that his injuries were proximately caused by the negligence of camp employees in failing to supervise one of plaintiff's fellow campers in the casting of a fishing line. Plaintiff was struck in the eye by a sinker or hook attached to the fishing line. The trial court had granted summary judgment for the defendant, and this action was affirmed by the court of civil appeals. The case was remanded for trial by the supreme court. There was a dissenting opinion based largely on the idea that the legislature, having seen fit to enact legislation in the immunity area by waiving sovereign immunity only to a limited extent, should be left with the task of deciding what to do about the charitable immunity doctrine. Certain inconsistencies were noted about the consequences of the complete abrogation of charitable immunity and partial abrogation of governmental immunity. As the dissenting justice observed: "The sum of these inconsistencies is that the charitable institution, which performs no less a public service than its governmental counterpart, now faces unlimited exposure to a judgment of catastrophic proportions, while a public school or college remains rather well protected by legislation."²⁵

On the other hand, there are now numerous inconsistencies between the tort liability of private enterprise performing services similar to those of charitable enterprise, including the socially desirable services rendered by a boys camp. Moreover, in view of the nature of the legislative process, inaction does not necessarily mean that the legislature was opposed to complete abrogation in this area. Broadly speaking, it would seem that charitable enterprise should be treated more like private enterprise than governmental enterprise, if indeed governmental enterprise is to be treated differently from private enterprise. It may be that the proper and appropriate imposition of tort liability on the taxpayer because of allegedly improper action on the part of those engaged in the rendition of uniquely governmental functions is a problem of much greater complexity than that presented when the limited resources and less complicated actions of those rendering charitable services are involved. It is good, however, to be aware of the inconsistencies so that legislative reform of the Texas Tort Claims Act²⁶ can be furthered.

Parental Immunity. Until recently in most jurisdictions a parent was immune from tort liability to a minor child for personal harm.²⁷ There were other family immunities, including the immunity of one spouse from tort liability to the

²⁴ *Sullivan v. Sisters of St. Francis*, 374 S.W.2d 294 (Tex. Civ. App.—San Antonio 1963).

²⁵ 470 S.W.2d at 631 (Pope, J., dissenting).

²⁶ TEX. REV. CIV. STAT. ANN. art. 6252-19 (1970).

²⁷ See McCurdy, *Torts Between Persons in Domestic Relations*, 43 HARV. L. REV. 1030 (1930).

other spouse for personal harm and the immunity of a minor child from tort liability to the parent. The underlying policy reason for all family immunities was that of preservation of domestic harmony, the notion being that lawsuits would be a disruptive influence. Perhaps a sounder reason for parental immunity is the likelihood that in those cases in which the damaging event is of the unintentional variety the parent would be able to make a better judgment about how best to utilize the *family assets* that are available to the welfare of the members of the family than can a court. This is also the writer's view.

In *Felderhoff v. Felderhoff*²⁸ the supreme court handed down a decision of significance that alters materially the immunity of the parent from tort liability to a minor child. It may also have an impact on the other family immunities. Plaintiff was a fourteen-year-old child who was allegedly injured as a proximate result of the negligence of his father. It was alleged that the father was at the time engaged in the furtherance of a partnership enterprise, and that his son was an employee of the partnership. The partnership was engaged in a farming and ranching enterprise. On the occasion of the damaging event the plaintiff and his father had completed combining a field of milo and were cleaning up the combine. Through the alleged negligence of the father the plaintiff's arm was seriously injured. Suit was brought against the copartners, and the court assumed for the purposes of the opinion that the father would be jointly and severally liable for any debts of the partnership. Reversing and remanding the case, the court held that the partners, including the parent, would be personally liable in this situation. It was urged by the plaintiff that the general rule of parental immunity should be abrogated as some courts have done, but the court cited with approval decisions in Kentucky, Minnesota, and Wisconsin, which retained the immunity rule with respect to alleged acts of ordinary negligence involving "a reasonable exercise of parental authority or the exercise of ordinary parental discretion with respect to provisions for the care and necessities of the child,"²⁹ the fear being that tort liability in those areas could be disruptive of the "wide sphere of reasonable discretion which is necessary" and appropriate.³⁰ It would seem rather clear that the assets of a business enterprise—partnership, corporate, or otherwise—ought to be available for compensating other victims. But the court goes much further. All assets of the parent are available to compensate for injuries proximately resulting from negligence occurring in the course of business activities. Moreover, it is apparent that injuries may often occur when the negligent act was one that was neither related to business activities nor to the exercise of parental duties and responsibilities. It is likely that the immunity will be abrogated in this area as well as in the business area and that an immunity will be limited to the parental responsibility area. As with most distinctions, line-drawing will no doubt be difficult in particular situations. It should be said also that the court's holding was not based on the prevalence or presence of liability insurance. Since the presence of liability insurance that does not exclude coverage to members of the family eliminates all of the old reasons for parental immunity, the immunity to that

²⁸ 473 S.W.2d 928 (Tex. 1971).

²⁹ *Id.* at 933.

³⁰ *Id.* This is not to say that the existence of insurance might not induce the court to waive immunity.

extent arguably ought to be regarded as waived, notwithstanding, as in the automobile guest situation, the fact that there is the likelihood of collusion.

III. OCCUPIERS OF LAND

Open and Obvious Dangers. *Rabb v. Coleman*³¹ is another in a long line of cases³² to further illustrate both the theoretical and the practical difficulties of recognizing a general principle that one who voluntarily encounters a known and appreciated risk should not be entitled to recover for harm thereafter resulting from such risk. Plaintiff's husband died as a result of burns sustained in a flash explosion while his butane tank was being refilled. The tank was approximately ten feet from the back door of the deceased's home. While delivery was being made, the deceased was standing nearby observing the operations. During what had appeared to be routine procedure, the pop-off valve suddenly opened and began releasing butane gas with a loud noise. It appears that this valve was set to open when the pressure in the tank exceeded eighty pounds per square inch.

The jury found that the employee of the defendant put a mixture in the butane gas containing a greater amount of propane gas than a person of ordinary prudence would have done under the circumstances, and that such act was a proximate cause of the explosion. The jury also found that the deceased was not contributorily negligent. However, the jury further found in response to issues on the defense of *volenti non fit injuria* that: (1) prior to the explosion in question a perilous condition existed; (2) the deceased knew of the perilous condition; (3) the deceased realized that he was in a dangerous position due to such peril; and (4) the deceased voluntarily exposed himself to such dangers. The plaintiff argued that: (1) the finding about appreciation of danger was too general to serve as a bar to recovery; and (2) that the *volenti* defense was not applicable because the deceased was on his own land, and thus was where he chose to be as a matter of right, as distinguished from an invitee who goes on another's land rightfully only because he has permission from the occupier-defendant to do so.

The majority of the supreme court held against the plaintiff on both contentions. My comments on this case must be considered in the light of a conviction that I have previously expressed that even an invitee on the land of another should not be denied relief simply on the ground that a danger was open and obvious.³³ But, if one who is victimized by an obviously dangerous condition that he has encountered is to be denied relief in some situations, that denial of relief should be limited to the situation in which he had no right or privilege by law, independent of the defendant's willingness, to be present at

³¹ 469 S.W.2d 384 (Tex. 1971).

³² For two important cases see *Love Chem. Co. v. Greenwood*, 433 S.W.2d 695 (Tex. 1968); *Halepeska v. Callihan Interests, Inc.*, 371 S.W.2d 368 (Tex. 1963). This subject has been discussed in prior *Annual Surveys*: Keeton, *Torts, Annual Survey of Texas Law*, 24 Sw. L.J. 3, 5 (1970); Keeton, *Torts, Annual Survey of Texas Law*, 23 Sw. L.J. 1, 10 (1969); Keeton, *Torts, Annual Survey of Texas Law*, 22 Sw. L.J. 4, 8 (1968). See also Keeton, *Assumption of Risk and the Landowner*, 22 LA. L. REV. 108 (1961).

³³ Keeton, *Assumption of Risk and the Landowner*, 22 LA. L. REV. 108 (1961); Keeton, *Assumption of Risk and the Landowner*, 20 TEXAS L. REV. 562 (1942); Keeton, *Personal Injury Resulting from Open and Obvious Conditions*, 100 U. PA. L. REV. 629, 631 (1952).

the place where he was injured.³⁴ The "no-duty," open-and-obvious-danger rule has been so limited, and to so limit that rule but adopt at the same time a general defense with the only change being a change in the burden of proof and pleading is without a rational justification. For a defendant to require the plaintiff to give up a clear right or privilege unless he chooses to encounter a negligently created danger should always be regarded as a "coercive" willingness to encounter the danger. It is always involuntary. Moreover to submit to a jury the question of whether the plaintiff encountered a danger "voluntarily" without defining the term is questionable. However, the holding of the court is to the effect that the *volenti* defense is an affirmative defense to any negligence action in which the defendant is responsible for a dangerous condition or activity of which the plaintiff knows, appreciates the danger, and voluntarily encounters. Even so, it is clear that one who knowingly encounters danger to rescue another imperiled by the defendant's negligence will not be denied relief.³⁵ Perhaps it will be said that this is involuntary. But what makes it involuntary? The best reason is that the rescuer has a privilege by law without regard to plaintiff's wishes in the matter, and he should be able to recover so long as he *acts reasonably* to accomplish his objective. Those who burden the exercise of a privilege by negligently endangering those who exercise it should be liable in the absence of contributory negligence.

The majority also concluded that it was not necessary to have a more specific finding about appreciation of danger than that found, namely that the plaintiff knew of the perilous condition and realized that he was in a dangerous position. "To require further qualification of this peril would unreasonably diminish the utility of the *volenti* doctrine as a workable defense."³⁶ I would hope so. Four justices thought that the doctrine should require a showing and a finding of full knowledge and appreciation of the very specific danger "so that one against whom the doctrine is invoked may be said to have intelligently chosen to put himself in the way of the risk."³⁷ In the dissenting opinion it was pointed out that: (1) the deceased was unaware of the unsafe mixture; (2) the deceased might not have known and appreciated that an explosion might occur outside the tank; and (3) the deceased might have thought that the pop-off valve was performing its function of eliminating—not creating a danger.³⁸ While, if such a defense is to be recognized, it may be too much to require full appreciation of the danger, it would seem that the magnitude and nature of the danger ought to have been appreciated by the plaintiff to the extent it either was appreciated by defendant, or should have been in the exercise of ordinary care.³⁹ This could be the test given to the jury.

³⁴ In a leading article over 60 years ago Bohlen took this position. Bohlen, *Voluntary Assumption of Risk*, 20 HARV. L. REV. 14, 91 (1906), reprinted in F. BOHLEN, *STUDIES IN THE LAW OF TORTS* 441 (1926).

³⁵ See RESTATEMENT (SECOND) OF TORTS § 496E (1965).

³⁶ 469 S.W.2d at 388.

³⁷ *Id.* (dissenting opinion).

³⁸ *Id.*

³⁹ Keeton, *Assumption of Risk in Products Liability Cases*, 22 LA. L. REV. 122, 125 (1961): "The risk referred to in assumption of the risk is a risk that causes defendant's conduct to be characterized as infringing a legal standard. Where the basis of liability is negligence, that risk is determined from the point of view of the ordinarily prudent person

Occupier's Duty to Employees of Independent Contractors. In 1967 the Supreme Court of Texas in *Delhi-Taylor Oil Corp. v. Henry*⁴⁰ adopted the principle that an adequate warning to an independent contractor discharges as a matter of law the occupier's duty to employees of the independent contractor. The court in that case recognized that an issue of fact might sometimes exist as to the adequacy of the warning, but if the warning is such as to give full notice to the independent contractor of the dangers involved, the sole responsibility for preventing injuries thereafter is on the independent contractor whose liability would be governed by the Texas workmen's compensation laws. In commenting on *Delhi*, it was observed in 1968 that the court could have regarded the general contractor as having an unlimited duty of ordinary care and could have left the question for the jury to decide whether ordinary care required greater precaution than simply giving adequate warning to the independent contractor—subject only to the *Halepeska* limitation that the danger was one that was open and obvious to the victimized employee.⁴¹ The principle of *Delhi* was carried one step further by a majority of the court in *Pence Construction Corp. v. Watson*.⁴² The defendant, Pence Construction Corporation, was a general contractor and, therefore, in occupancy and control. It subcontracted the roof decking work for a one-story commercial building to the Greer Company, the employer of the plaintiff. One crew of the subcontractor covered a structural steel frame with galvanized metal sheets, but left some openings where vents were to be. On the following day another crew of the subcontractor came to the job to pour a layer of concrete mixture on top of the metal sheeting, and plaintiff was one of the members of this crew. He fell through one of the openings. It was plaintiff's contention that the general contractor should have barricaded or covered the opening. The trial court took the case from the jury. The court of civil appeals concluded that the knowledge of the employees of the subcontractor who installed the metal sheets was not the same as knowledge of the subcontractor, and that the danger was not so open and obvious as to charge the plaintiff with actual appreciation of it.⁴³ Therefore, there was an issue of fact on whether the general contractor was negligent either in failing to warn the subcontractor or reduce the danger. The supreme court unanimously reversed and affirmed the trial court judgment. Two justices justified this result on the established legal proposition that a dangerous condition can be so open and obvious that a person will be charged with knowledge of the condition and appreciation of the danger as a matter of law.⁴⁴ The majority reasoned that a general contractor would not be required to tell one crew or employee of a subcontractor what another crew or employee of that same contractor has done in the performance of the work for which a subcontractor is employed unless the danger was one that an employee would not recognize by examination of his work site.⁴⁵ This is a substantially broader proposition than

in the position of the defendant at some one or more times prior to the occurrence of the harm."

⁴⁰ 416 S.W.2d 390 (Tex. 1967).

⁴¹ Keeton, *Torts, Annual Survey of Texas Law*, 22 Sw. L.J. 4, 9 (1968).

⁴² 470 S.W.2d 637 (Tex. 1971).

⁴³ 462 S.W.2d 81 (Tex. Civ. App.—Houston [1st Dist.] 1970).

⁴⁴ 470 S.W.2d at 639 (concurring opinion).

⁴⁵ *Id.*

the one utilized by the concurring justices. Naturally, one who believes that the general contractor should be regarded as having a general and unrestricted duty of ordinary care would view his inaction in failing either to warn or reduce the magnitude of the danger as an issue of negligence, normally for the jury to pass upon. The fact that the danger is one that an examination would disclose is relevant on the issue, but in view of the evidence that such openings were usually or sometimes closed is not necessarily conclusive.

IV. RELEASES AND JOINT TORTFEASORS

In 1932 the Texas Supreme Court held that the unqualified release of one joint tortfeasor released the other, but the only justification offered was that for one injury there should be only one satisfaction. The court, therefore, equated the release of one tortfeasor with satisfaction.⁴⁶ Dissatisfaction with the viciousness of the release rule resulted in the development of various expedients to sidestep its effect. The most important has been the covenant not to sue, by which the injured party simply agreed not to enforce his cause of action against the tortfeasor with whom settlement was made.⁴⁷ From this development there followed the practice of specifically reserving in the settlement agreement the right to sue others, and the Texas courts regarded such an instrument as a covenant not to sue.⁴⁸ Thereafter parol evidence was allowed to show that the releasor did not intend the settlement in full satisfaction, but merely as an agreement not to sue the tortfeasor with whom settlement was made.⁴⁹

In *McMillen v. Klingensmith*⁵⁰ the supreme court adopted the rule that when an injured party settles with a party to a damaging event, he releases only the party or parties named in the document. As the court observes, this rule is fairer and easier and avoids the traps and complications of the older rule. Apparently, parol evidence will not be admissible to show that the injured party received the amount agreed upon as full satisfaction for all damages. In *McMillen* the plaintiff was injured in an automobile accident, and her injuries were allegedly thereafter aggravated by the negligent diagnosis and treatment of defendant doctors, which resulted in permanent damage to her larynx. The plaintiff had released the driver of the automobile, and then sued the physicians. Summary judgment was entered in behalf of the doctors, and this action of the trial court was affirmed in the court of civil appeals. In reversing and changing the law, the court makes it clear that an injured party will not be entitled to recover more than the amount for full satisfaction of his damages. The impact of the release, effective only with respect to the named original tortfeasor, on the extent of the liability of the successive tortfeasor, not being before the court, was not discussed. This is a rather complicated problem in the light of *Palestine*

⁴⁶ *Elston v. City of Panhandle*, 121 Tex. 553, 50 S.W.2d 1090 (1932).

⁴⁷ 4 A. CORWIN, CONTRACTS §§ 932-33 (1951); S. WILLISTON, CONTRACTS § 338A (rev. ed. 1936).

⁴⁸ *City of Coleman v. Kenley*, 168 S.W.2d 926 (Tex. Civ. App.—Eastland 1943), *error ref. w.o.m.*; *Cox v. Rio Grande Valley Tel. Co.*, 13 S.W.2d 918 (Tex. Civ. App.—San Antonio 1929), *error dismissed*.

⁴⁹ *Eckel v. First Nat'l Bank*, 165 S.W.2d 776 (Tex. Civ. App.—Fort Worth 1943), *error ref.*

⁵⁰ 467 S.W.2d 193 (Tex. 1971).

Contractors, Inc. v. Perkins.⁵¹ Perhaps that case should be reconsidered with the thought in mind that a defendant in a settlement negotiation is virtually always represented by competent counsel, and can protect himself against further responsibility by way of a contribution action by a simple provision in the settlement agreement requiring plaintiff to indemnify him if indeed he is called upon for contribution.

V. PRIVATE NUISANCE

Much has been written on the subject of private nuisance that I consider to be misleading and inaccurate. It has been said that liability for nuisance escaped the transition to fault principles which characterized most areas of tort law, and that it has remained an isolated island of liability without fault.⁵² Prosser, in commenting on *Turner v. Big Lake Oil Co.*,⁵³ a leading decision of the Supreme Court of Texas in which *Rylands v. Fletcher*⁵⁴ and all variations thereof were rejected as a basis for the imposition of strict liability on an oil company for damage resulting from the unintentional escape of salt water from a disposal pit, recites numerous examples of activities conducted by an occupier which were regarded as nuisances because of their location, and concludes therefrom that American courts, including those of Texas, have imposed strict liability under the guise of absolute nuisance.⁵⁵ Prosser has also stated that there is no more impenetrable jungle in the entire law than that which surrounds the word "nuisance."⁵⁶ If that be so, the notion that the courts, especially in Texas, have imposed strict liability in the guise of a nuisance has contributed to this impenetrable jungle. When the defendant engages in an activity that annoys and discomforts others in the vicinity of that activity, he is often held liable for the consequential harm thereby inflicted, even though the activity is socially desirable and even though utmost care is exercised. But the situation is virtually always one in which he knew that the necessary effect of his activity was to interfere with the use and enjoyment by another of his property. The interference was not accidental as in *Turner*; it was intentional. The issue is how much harm an enterpriser is justified in deliberately inflicting on another without paying for it. Not even the government is allowed to take or damage property intentionally without paying for it, and certainly the same should be true for private enterprise. The fact that the activity is socially desirable does not mean that the liability, if imposed, is without fault in the sense in which that term ought to be used. When the defendant engages in an activity with knowledge that this activity is interfering with the plaintiff in the use and enjoyment of his property, and the interference is substantial and unreasonable in extent, the defendant is liable, and the monetary recovery of the plaintiff is simply a cost of engaging in the kind of activity in which the defendant was engaged.⁵⁷ This should be so regardless of whether the conduct is committed in the air, on water,

⁵¹ 386 S.W.2d 764 (Tex. 1965).

⁵² 1 F. HARPER & F. JAMES, TORTS §§ 519-24 (1956).

⁵³ 128 Tex. 155, 96 S.W.2d 221 (1936), noted in 15 TEXAS L. REV. 355 (1937).

⁵⁴ L.R. 3 H.L. 330 (1868).

⁵⁵ Prosser, *Nuisance Without Fault*, 20 TEXAS L. REV. 399, 419-20 (1942).

⁵⁶ W. PROSSER, THE LAW OF TORTS 571 (4th ed. 1971).

⁵⁷ RESTATEMENT OF TORTS § 822 (1939).

on highways, or on private property. In *Wales Trucking Co. v. Stallcup*⁵⁸ plaintiffs, homeowners adjoining an unpaved highway, brought suit against the defendant trucking company for dust damage sustained by them as a result of the defendant's activity in hauling eight loads of pipe on the highway during a period of several months. In reversing the court of civil appeals, the supreme court said: "We do not, however, regard the facts in this case before us as warranting a holding of liability without fault, or nuisance without fault (there being no unlawful, malicious, or negligent conduct) where the activity is of a temporary nature and simply involves the lawful use of a public road to deliver pipe for a public water supply project."⁵⁹ My point is that if liability had been imposed it would not be liability without fault. It was undisputed that the dust from the operations was severe and like snow, and it is clear that the defendant knew that his activities were having a harmful effect on the plaintiff. The question is: How much of the value of the plaintiff's property shall the defendant be allowed to appropriate without paying for it? The answer is: not much. If the dust interfered substantially and unreasonably with the plaintiff, then the plaintiff should recover. Whether the interference in a given situation was substantial and unreasonable is normally a question for the jury. The issues were perhaps not quite correctly submitted, but perhaps well enough. The jury found that substantial amounts of dust were deposited on plaintiff's property, and that this was the result of the unreasonable and excessive use of the highway. I would construe the findings to mean that the plaintiff was interfered with substantially and unreasonably. The interference is unreasonable when a reasonable man would conclude that the activity should bear the burden of the harm that is an inevitable by-product of the activity.

⁵⁸ 474 S.W.2d 184 (Tex. 1971).

⁵⁹ *Id.* at 189.