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PART I: PRIVATE LAW

TORTS

by

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I. PRODUCTS LIABILITY

Causation. When plaintiff seeks to recover in any kind of situation on a theory of negligence, and the ground of negligence is that the defendant failed to do something that he ought to have done, a causal question is whether the action that he should have taken would have prevented the harm. The issue is not what did happen but rather what would have happened if proper action had been taken.[1] It was this principle of law that induced the following observation which this writer made some time ago:

> There is a fundamental difference in the factual causation issue between negligence in the sale of a defective product per se and negligence in failing to give adequate warnings or instructions about the dangers of a good product. As to the former, proof by the plaintiff that harm flowed from a condition or ingredient that made the product unreasonably dangerous would establish causal connection in fact. As to the latter, the aspect of the defendant's conduct that made the sale of the product unreasonably dangerous must be found to have contributed to the plaintiff's injury . . . . There has as yet been no indication that causation issues will be resolved in any different manner under a strict liability theory from the way such issues have been resolved when recovery has been sought on a negligence theory.[2]

The question whether causation will be treated any differently under strict liability than under negligence theory has now been answered by the Supreme Court of Texas in *Technical Chemical Co. v. Jacobs.*[3] The plaintiff in that case suffered injury when a can of freon coolant exploded after he had mistakenly connected it to the high pressure side of his car's air conditioner rather than to the low pressure side. The jury found that the product was unreasonably dangerous because the manufacturer failed to warn of this hazard. Since, however, there was some evidence that the plaintiff never looked at the can, the jury found that the absence of the warning did not cause the accident, and the trial court entered judgment for the defendant. This judgment was reversed by the court of civil appeals.[4] The court of civil appeals took the position that, despite what the rule as to negligence might be, when strict liability is involved, if harm resulted from the risk or hazard about which the manufacturer failed adequately to warn, the manufacturer would be liable. Alternatively, the court held that in the event causation was not established as a

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[1] East Texas Theatres, Inc. v. Rutledge, 453 S.W.2d 466 (Tex. 1970); Keeton, *Torts, Annual Survey of Texas Law*, 25 SW. L.J. 1, 6 (1971).

[2] Keeton, *Products Liability—Inadequacy of Information*, 48 TEXAS L. REV. 398, 413 (1970).

[3] 480 S.W.2d 602 (Tex. 1972).

[4] Jacobs v. Technical Chem. Co., 472 S.W.2d 191 (Tex. Civ. App.—Houston [14th Dist.] 1971).

matter of law, on the theory that an adequate warning would not have been heeded, then the jury finding should be regarded as against the great weight and preponderance of the evidence. The supreme court held that it was necessary for the plaintiff to prove that the existence of a warning would have prevented the injury and remanded the case for retrial pursuant to the alternative holding of the court of civil appeals. But in so holding, the court recognized the difficult problem of proof and indicated that the plaintiff ought to have the benefit of a presumption.[5] With such a presumption available, the plaintiff would not in most instances be denied a recovery as a matter of law. Another solution would be to place the burden of persuasion that the warning would not have been successful on the defendant who failed to give adequate warning. This is perhaps just another way of saying that the affinity of causal likelihood between the aspect of the defendant's conduct that subjects the defendant to liability and plaintiff's harm should not necessarily be the same for all kinds of problems.[6] In the situation of a failure to warn, the plaintiff should recover if there is a substantial likelihood, based on the evidence, that the warning would have been effective. If this principle were adopted and the jury were so instructed, there would be no necessity for talking about presumptions or changing the burden of persuasion. Clearly, as the supreme court indicated, situations will occur when it would seem to be ridiculous to hold the manufacturer liable. More and more warnings are required to be given as a consequence of public regulation, and this is as it should be. It would seem reasonably clear that if the only basis for recovery against the defendant is the fact that he did not take adequate precautions to warn users, a user who had knowledge of that about which the manufacturer was supposed to warn him should not recover. Warnings are often required out of an abundance of caution in order to prevent the occasional uninformed user from being subjected to a risk of which the vast majority of users would be aware, as for example, the warning about the dangers of cigarette smoking.

The Meaning of Defect in Design. While the language of strict liability in tort or breach of warranty is often used in describing the liability of a manufacturer for harm resulting from the way products are designed, no court has ever imposed liability on the manufacturer of a product simply because the product, when properly used, involved a substantial and serious risk of harm to the user. Many highly useful products have inherent dangers from proper and reasonably foreseeable uses.

The courts have used two theories of recovery in cases involving defective designs. The theories are implied warranty and strict liability in tort. It is submitted that the time is long overdue for the submission of a case to the jury on one theory of recovery. Sometimes, lack of efficiency in the administration of personal injury litigation is due to the ambiguities of the substantive law rather than deficiencies in court organization and procedure. In com-

[5] The court cited a note making this suggestion. *See* Note, *Plaintiff Need Not Establish Causal Link Between Failure To Warn and Injury*, 50 TEXAS L. REV. 577 (1972).

[6] Keeton, *supra* note 1; Malone, *Ruminations on Cause-in-Fact*, 9 STAN. L. REV. 60 (1956).

menting on *Melody Home Manufacturing Co. v. Morrison*[7] two years ago, this writer suggested that the Uniform Commercial Code, as passed in Texas,[8] should be used to decide when to shift intangible economic losses resulting from inferior or poor quality products.[9] When dealing with problems related to physical harm arising out of damaging events produced by the dangerous characteristics of products, the Code should be ignored because it is not helpful and was not intended to be exclusive. The Code does authorize recovery for physical harm as consequential damages from a breach of warranty when such damage proximately results from a breach of warranty.[10] Since anything can be done under the phrase, "proximately results," it is jurisprudentially sound to ignore the Code and proceed to the development of a compensation system, independent of the Code, for dealing with losses from physically harmful events that are attributable in part to dangerous products. So, the only theory that should be recognized is the tort theory.

There have been three main tests used by the courts to identify a defect, and two of the three can be attributed largely to the fact that many courts used warranty theories initially in arriving at strict liability. The three tests are:

(1) A product is defective if it is not reasonably fit for its intended [ordinary] [or reasonably foreseeable] purposes. Two terms have been bracketed because the courts have differed about the precise language used. The Code uses "ordinary purposes."[11] This test of defect adequately describes the problem to the jury when the claim is for intangible economic losses resulting from a lack of efficacy of the product to serve its purposes. Its usage, however, merely serves to confuse and confound the jury when the issue is how dangerous should the product be, and the claim is for damages attributable to a physically harmful damaging event produced by the product.

(2) A product is defective if it is dangerous to an extent beyond that which would be reasonably contemplated by intended [and reasonably foreseeable] purchasers.[12] This does speak to the issue—the dangerousness of the product. But the ordinary consumer cannot be said to have expectations regarding the safety of many features of the complicated products that are purchased, such as the risk of fire from the way gasoline tanks are designed. This test is an unclear way of saying something else—the third test.

(3) A product is defective if it is unreasonably dangerous as marketed. It is unreasonably dangerous if a reasonable person would conclude that the magnitude of the scientifically perceivable danger, as it is proved to be at the time of the trial, outweighs the benefits of the way the product was designed. Under the heading of benefits one would include anything that gives utility

[7] 455 S.W.2d 825 (Tex. Civ. App.—Houston [1st Dist.] 1970). On remand the district court overruled defendant's plea of privilege and the court of appeals affirmed. 468 S.W.2d 505 (Tex. Civ. App.—Houston [1st Dist.] 1971).

[8] TEX. BUS. & COMM. CODE ANN. § 2.314 (1968).

[9] Keeton, *supra* note 1, at 1-2.

[10] TEX. BUS. & COMM. CODE ANN. § 2.715 (1968).

[11] *Id.* § 2.314. The statement is as follows: "Goods to be merchantable must be at least such as . . . (3) are fit for the ordinary purposes for which such goods are used."

[12] RESTATEMENT OF TORTS § 402A, comment *i* at 352 (1965): "The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."

of some kind to the product; also one would include the feasibility and additional cost of making a safer product. There is no way of evaluating the utility of a product from the standpoint of its dangerous characteristics without weighing risks against benefits.[13]

This much has been said to lead up to and express satisfaction with the reasoning and holding of the court in *Metal Window Products Co. v. Magnusen.*[14] In that case, judgment was rendered for the plaintiff in the trial court on both negligence and strict liability theories. The product was a sliding glass door installed in an apartment. The door constituted the rear entrance to the apartment and was the same type used in other apartments of the building. The plaintiff attended a cookout at the apartment and had gone back and forth through the door several times when it was open. The last time she started through, however, the door had been closed and she struck it. It was urged that the door was defective as designed and marketed because of the absence of any decals or warnings that would put a person on notice when the door was closed. The court held that the door was not unreasonably dangerous as a matter of law, stressing three factors—the utility of transparency, the obviousness of the danger, and the ease with which users could supply decals to guard against the obvious risk involved. The desire for a view, the "gracious and spacious" concept and the "indoor-outdoor" feeling that transparency gives are esthetic considerations that cause people to want glass doors, even with the risk that is inherent in them.[15] Hopefully, decisions of this nature will produce instructions to the jury asking the jury to make this kind of an evaluation of products, and thus trials will be simplified by eliminating negligence theories and other tests such as those mentioned above.

II. Malpractice in the Rendition of Medical and Health Services

Standard of Care. The standard of care applicable to those engaged in the rendition of professional services, the kinds of experts that can be used as witnesses, and the nature of the testimony that is admissible from experts are, of course, all interrelated questions. There has been a growing amount of dissatisfaction with some of the orthodox rules pertaining to these matters. Moreover, litigation against hospitals, doctors, and others in the health service area is increasing. This increase in litigation is no doubt attributable in part to the elimination of all charitable immunites and to the erosion of governmental immunity.[16] The increase in litigation and the dissatisfaction with certain principles that have been obstacles to recovery will surely mean changes in the law and some uncertainty for a time, not unlike that which has occurred in the area of products liability. Massachusetts recently abandoned the "locality"

[13] Ross v. Up-Right, Inc., 402 F.2d 943, 947 (5th Cir. 1969); Helene Curtis Indus., Inc. v. Pruitt, 385 F.2d 841, 850 (5th Cir. 1968). In both of the opinions by the Fifth Circuit, it was said that "demanding that the defect render the product unreasonably dangerous reflects a realization that many products have both utility and value."

[14] 485 S.W.2d 355 (Tex. Civ. App.—Houston [14th Dist.] 1972).

[15] *Id.* at 358.

[16] *See* Watkins v. Southcrest Baptist Church, 399 S.W.2d 530 (Tex. 1966); Keeton, *Torts, Annual Survey of Texas Law*, 26 Sw. L.J. 3, 7 (1972).

rule and stated that a medical doctor would be required to use the care and skill of the ordinary doctor, taking into account the advances in the profession.[17] It has been held in New York that adherence to acceptable medical practice in a given case is not the sole test of professional malpractice, and that a physician must use his best judgment on the basis of whatever superior knowledge and skill he has.[18] And in Minnesota the supreme court recognized that almost anyone who occupies a position that makes him familiar with the practices and procedures followed by a particular kind of doctor can be qualified as an expert for the purpose of testifying as to customary practices of doctors of that kind.[19] In that case a five-year-old child suffered serious deformity in her arm as a result of a rare contraction of the muscles in the arm following treatment by the defendant, an orthopedic surgeon, for a fracture. The question was whether the defendant placed too tight a cast upon the plaintiff's arm. An accredited specialist in internal medicine was not allowed to testify. While the court upheld the action of the trial judge, it did so not because an internist can never give evidence against an orthopedic surgeon, but rather because the trial judge was justified in concluding that the internist had inadequate knowledge of orthopedic practices to give authoritative answers.

Now, the Supreme Court of Texas in *Webb v. Jorns*[20] has held that the locality or community practices in the medical and health area are not necessarily conclusive on the question of whether such practices will satisfy the requirements of due care. This could be a highly significant opinion. In *Webb* a patient, who was admitted to a Fort Worth hospital for the repair of a diaphragmatic hernia, died thirteen minutes after commencement of the administration of an anesthetic by a nurse anesthetist. An anesthesiologist from Lackland Air Force Base in San Antonio, a medical specialist, testified at the trial that the nurse anesthetist did not follow certain practices and procedures that she should have followed. It was defendant's contention, in support of an instructed verdict, that this testimony should be disregarded simply because of the anesthesiologist's lack of qualifications to testify to community practices and procedures. His testimony was that "there are certain minimum safe and accepted practices and procedures that cannot vary in any locality or between nurses and anesthesiologists, since the human tolerance to certain conditions are uniform and apply to all persons wherever they may be. He said that all teaching of anesthetics involves standards, below which no technician or practitioner should fall and that Mrs. Eakin's [the nurse] negligent acts did not conform with those minimum standards."[21] The court held that the testimony would support a finding of negligence. This could be the forerunner of a fundamental change in the substantive law for the standard of care applicable to all professionals. The standard of care as it normally has been articulated is the care customarily exercised by a doctor or technician of like kind in the same

[17] Brune v. Belinkoff, 354 Mass. 102, 235 N.E.2d 793 (1968). *See also* Douglas v. Bussabarger, 73 Wash. 2d 476, 438 P.2d 829 (1968).

[18] Toth v. Community Hosp., 22 N.Y.2d 255, 239 N.E.2d 368, 292 N.Y.S.2d 440 (1968) (a 4-3 decision).

[19] Swanson v. Chatterton, 281 Minn. 129, 160 N.W.2d 662 (1968).

[20] 488 S.W.2d 407 (Tex. 1972), *rev'g* 473 S.W.2d 328 (Tex. Civ. App.—Fort Worth 1971).

[21] 488 S.W.2d at 411.

or similar communities.[22] Moreover, the expert that has been allowed to testify has been required, generally speaking, to testify in terms of what was customary and not in terms of what he thinks ought to have been done. In *Snow v. Bond*[23] the court observed that a medical doctor is not competent to express an opinion about whether a doctor in a particular case acted negligently; rather he should testify as to standards of practice and procedure that are customarily followed. This rule was also adopted with respect to what a doctor has been required to disclose to a patient regarding the risks and dangers of a particular surgical procedure.[24] According to *Webb*, the doctor's testimony to the effect that the nurse *ought* to have followed a certain procedure is admissible because nurses are taught that this *ought* to be done. The problem which remains is how to articulate the standard of care to the jury to define *ought*. Custom has never fixed the standard of care for business practices generally,[25] but no doubt this difference between business and professional practices has been based on the notion that while courts and juries are competent to evaluate the ethical quality of customs in business when, at least, expert evidence is introduced to show that there were safer and feasible ways to act, the same is not true for professional practices. It may be argued that an explanation to the jury of the risks and dangers of alternative courses of action in the professional area would be virtually impossible. But an alternative would be to allow the expert to testify to what he thinks the person ought to have done in the light of the information and knowledge that has been made available to him.

No one would suggest that a technician or professional should be expected to exercise any more skill or knowledge than that which he holds himself out as possessing, and a nurse-anesthetist cannot be expected to have the skill and knowledge of a doctor-anesthesiologist. Without being definitive about the matter, the following is suggested as a possible standard or charge to the jury: Negligence of a nurse or other professional is the failure to exercise ordinary care in the exercise of the skill and knowledge customarily possessed by such a person [in the same or similar communities]. This simply means that allegedly inadvertent or unethical conduct on the part of professionals is to be judged in the same way as it is for drivers of cars. There is a universal standard of reasonable or ordinary care for such matters. This seems to be rather close to a statement in *Webb* that "[t]he community standard does not require a small office of a rural medical practitioner to possess either the skills or equipment of a sophisticated clinic; but the standard demands, at least, that one must exercise *ordinary care* commensurate with the equipment, skills, and time available."[26]

Causation. In *Webb* the plaintiff offered evidence from the anesthesiologist that, if believed, eliminated all but two possible causes of the patient's death,

[22] King v. Flamm, 442 S.W.2d 679 (Tex. 1969); Snow v. Bond, 438 S.W.2d 549 (Tex. 1969); Wilson v. Scott, 412 S.W.2d 299 (Tex. 1967).

[23] 438 S.W.2d 549 (Tex. 1969).

[24] Wilson v. Scott, 412 S.W.2d 299 (Tex. 1967), *discussed in* Keeton, *Torts, Annual Survey of Texas Law*, 22 SW. L.J. 4, 6 (1968).

[25] Northwest Airlines v. Glenn L. Martin Co., 224 F.2d 120 (6th Cir. 1955); The T.J. Hooper, 60 F.2d 737 (2d Cir. 1932).

[26] 488 S.W.2d at 411 (emphasis added).

and both of the possible causes were negligent acts of the nurse-anesthetist. The testimony as to causation was that death was attributable to one or the other of the negligent acts. The defendants urged as one reason for denying recovery that this evidence failed to establish causation because there was no evidence to show which of the particular grounds of negligence was more likely than not the cause of death from a cardiac arrest. But the evidence, if believed, did establish that negligence of the nurse was more likely than not the cause, and it was held to be unnecessary to prove which of the two negligent acts it was. Two observations should be added. The first is that the holding cannot logically be limited to the malpractice area. The second is that this will necessarily affect the proper way to submit the causation question to the jury in any situation in which the plaintiff relies on evidence of a kind that would indicate that one or the other of two or more negligent acts was more likely than not the cause of a damaging event.

III. Death or Injury to Spouse and Contributory Negligence of the Other Spouse

When a wife or husband is injured, and the injury is proximately caused by the actionable negligence of a third person, there are often two causes of action—the cause of action of the injured spouse and the cause of action of the non-injured spouse on the ground that the injury interfered with a relational interest of husband and wife. This legally protected interest in the husband and wife relationship has generally been described as the right of consortium.[27] The items of damages recoverable for an injury when that injury is to a single, emancipated person are pain, suffering, expenses, and loss of earnings. The items or elements attributable to the interference with the relational interest of husband and wife are loss of services, society, and sexual intercourse,[28] with loss of services being regarded initially as indispensable to the cause of action. For reasons that will not be explored here, until recently the common law recognized only a right of consortium on the part of the husband to the wife and did not recognize a similar right on the part of the wife to the husband.[29] The major break came in 1950, and most jurisdictions that have passed on the question since that date now provide for equality of the sexes.[30] This is as it should be.

There are no major problems regarding recovery of the various items of damages to the husband and wife when one of them is injured and neither contributes to that injury through contributory negligence. But when negligence of the non-injured spouse proximately causes the damaging event in which the other is injured, and in a state such as Texas where the community

[27] 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 8.9 (1956); W. PROSSER, LAW OF TORTS 889 (4th ed. 1971).

[28] Hitaffer v. Argonne Co., 183 F.2d 811 (D.C. Cir. 1950); Shreve v. Faris, 144 W. Va. 819, 111 S.E.2d 169 (1959).

[29] W. PROSSER, *supra* note 27, at 894. The main reason for the denial of the wife's recovery was that while the husband was regarded as being entitled to the domestic services of the wife, she was not entitled to his.

[30] Hitaffer v. Argonne Co., 183 F.2d 811 (D.C. Cir. 1950); Kotsiris v. Ling, 451 S.W.2d 411 (Ky. 1970); Millington v. Southeastern Elevator Co., 22 N.Y.2d 498, 239 N.E.2d 897, 293 N.Y.S.2d 305 (1968).

property system has been adopted, there are complications. This area of the law is further confounded by the fact that many states have totally or partially abandoned family immunities, thus making it possible for the injured spouse to recover against the negligent spouse as well as a third person.[31] This would also seem to lead to the result that a third person against whom a judgment is rendered could obtain contribution from the negligent spouse. Heretofore, that would not have been possible because contribution was not available to one tortfeasor from another, unless the latter was also liable to the plaintiff as a joint tortfeasor. Community of liability generally has been regarded as a prerequisite to recovery.[32] It is to be noted that this liability for contribution by a negligent spouse would not of itself prevent the family enterprise from, in effect, recovering all losses suffered by the injured spouse if the negligent spouse was insured against liability.

Arguably, the husband and wife, although clearly not one, should have been treated as an economic or financial unit with respect to the recovery of damages from a third person. But the adoption of such a principle would have meant, so long as contributory negligence is a complete bar to recovery, that there would have been no recovery for any of the items of damages arising out of the damaging event. This would mean that, because of the concept of inter-spousal immunity, the use of liability insurance would not be effective to avoid a private family disaster when the husband or the wife is injured through the negligence of the other and a third person. In any event, the courts have held in separate property states that the negligence of the non-injured spouse is not imputable to the injured spouse to bar recovery against a third person,[33] although, of course, it did bar recovery of the negligent spouse's losses resulting from the interference with the right of consortium.[34] The truth is, however, that realistically the negligent spouse normally benefits about as much from any recovery obtained by an injured spouse in a separate property state as in a community property state, and the rules of tort law should be adapted to the family enterprise with that fact in mind. If, therefore, the rule against imputation of negligence is sound, arguably it should also have been adopted in community property states. But this has not been done in Texas. The cause of action that came into existence upon injury of a spouse has been regarded for many years as property acquired after marriage, and since it was not acquired by gift, devise, or descent it was regarded as community property.[35] The further principle adopted was that the negligence of the non-injured spouse barred recovery because he or she would share in the proceeds. This

[31] Beaudette v. Frana, 285 Minn. 366, 173 N.W.2d 416 (1969); W. PROSSER, *supra* note 27, at 859.

[32] Satterfield v. Satterfield, 448 S.W.2d 456 (Tex. 1969); H.M.R. Constr. Co. v. Wolco, Inc., 422 S.W.2d 214 (Tex. Civ. App.—Houston [14th Dist.] 1967), *error ref. n.r.e. See also* Yellow Cab Co. v. Dreslin, 181 F.2d 626 (D.C. Cir. 1950) (Plaintiff was injured by the concurrent negligence of her husband and a cab driver. The cab company paid a judgment and then was denied contribution from the husband on the grounds that a right of contribution arises from a joint liability and the husband was not liable to the wife in tort at common law.)

[33] Keeton, *Imputed Contributory Negligence*, 13 TEXAS L. REV. 161, 176 (1935).

[34] Kimpel v. Moon, 113 N.J.L. 220, 174 A.2d 209 (Super. Ct. App. 1934); Lowery v. Berry, 153 Tex. 411, 209 S.W.2d 795 (1954).

[35] G.C. & S.F. Ry. v. Greenlee, 62 Tex. 334 (1884); Texas Cent. Ry. v. Burnett, 61 Tex. 638 (1884); Ezell v. Dodson, 60 Tex. 331 (1883); *see* TEX. CONST. art. XVI, § 15.

latter proposition was never a logical necessity. The fact that the negligent spouse has a joint interest in the recovery is hardly a necessary reason for barring the family unit of all recovery, especially if the legal right to management and control of the recovery would be in the injured spouse.

Pain and Suffering. Effective January 1, 1968, the legislature passed a statute providing that the spouse's separate property consists of "the recovery for personal injuries sustained by the spouse during the marriage, except any recovery for loss of earning capacity during marriage."[36] In *Graham v. Franco* the supreme court held that "independent of the statute . . . recovery for personal injuries to the body of the wife, including disfigurement and physical pain and suffering, past and future, is separate property of the wife."[37] In so holding, the court overruled prior decisions based on what the court considered to be dictum in *Ezell v. Dodson.*[38] The monetary recovery for pain and suffering is a replacement for the sound body that was brought into the marriage; it was not acquired as a result of effort; and the property once acquired must therefore be regarded as separate or personal to the injured spouse since it takes its character from the nature of the right violated. Therefore, the husband's negligence did not bar the wife's recovery for pain and suffering on the basis that he would legally share in the recovery. Having held that the recovery for pain and suffering was separate property, the court followed the prevailing view that the husband's negligence would not be imputed to the wife simply because of the family relationship.[39]

Expenses. The damages that are recoverable by an injured party which represent economic losses, expenses, and lost earnings were regarded by the supreme court in *Graham* as community property. As for expenses, the conclusion was that the recovery is not to replace a sound body but is rather to reimburse the community property, the idea being that it is the primary legal responsibility of the community to pay for expenses. The court specifically stated that no opinion was expressed about the result that would be reached if the expenses were paid from the separate funds of the injured spouse. As has already been stated, the fact that a negligent spouse has a joint interest in the recovery is hardly a necessary reason for barring the family unit from all recovery. The fact that contributory negligence bars recovery when the recovery is entirely that of an injured party does not necessarily mean that it should bar all recovery of an injured spouse simply because the negligent spouse would have a joint legal interest in it. The effect is to penalize the innocent injured spouse as well as the negligent spouse. The law could have been that the cause of action for personal injury is a personal right, unrelated to the character of the recovery after it is obtained, and, therefore, con-

[36] Ch. 309, §§ 1, 6, [1967] Tex. Laws 736 (codified at TEX. FAM. CODE ANN. tit. 1, § 5.01 (Supp. 1972)).

[37] 488 S.W.2d 390, 396 (Tex. 1972).

[38] 60 Tex. 331 (1883); *see* text accompanying note 35 *supra.* The court seems to have been much influenced by the thoughtful article by Green, *The Texas Death Act*, 26 TEXAS L. REV. 461 (1948).

[39] *See* note 33 *supra*, and accompanying text.

tributory negligence of one spouse would not bar recovery of any of the items of damages of the injured spouse. The problem of expenses is a difficult one even in separate property states, especially when the wife is the injured spouse and the husband has a common law obligation of maintenance and care. In a well reasoned opinion in which the court considered various problems related to this question, the Supreme Court of New Jersey held, overruling a prior decision, that the right to recover should not depend upon the irrelevant circumstance that the wife did or did not incur the bill.[40] Under that view only the uninformed would make the mistake of using the husband's credit or resources. The court went on to say something that is relevant in a community property state: "We think it better to say the claim for medical, past and future, is the wife's; that the tortfeasor can have no interest in whether the medical demands were or will be met by the wife or by her husband; and that any controversy between the husband and wife in that regard is a matter for adjustment by them alone."[41]

It is difficult to arrive at any conclusion other than that the recovery of lost earnings is community property since the recovery is to provide for what would have been earned. But this recovery would be under the management and control of the injured spouse—the wife in *Graham*—and the use of the contributory negligence doctrine to bar all recovery penalizes the innocent spouse as well as the negligent spouse.

The doctrine that contributory negligence is a complete bar to recovery appears to be on the way out. If and when comparative negligence or something similar is substituted, the problems here discussed will need to be reexamined. Perhaps the family should then be treated as an economic or financial unit or, if not, there should be a reexamination of interspousal immunity. Property concepts should not be controlling and the rules for recovery should be the same in community and separate property jurisdictions.

In *Schwing v. Bluebonnet Express, Inc.*[42] the mother of two children was killed in a collision that was proximately caused by the negligence of her husband and a third person. The accident occurred prior to the passage of the statute providing that a spouse's recovery for personal injuries would be separate property.[43] The court of civil appeals thought that it would be highly inappropriate for an intermediate court to entertain an argument that the long-standing construction of the wrongful death statute denying the innocent children a recovery was unconstitutional. Thus, the children were not allowed a recovery because at the time of death the mother could not have recovered had she lived, since the recovery would have been community property. As a result of the holding in *Graham*, the mother can now recover for pain and suffering. Moreover, the fact that the accident occurred prior to the passage of the provision making the recovery separate property is immaterial because the supreme court held that independent of the statute the recovery would be separate property. The court is now in a position to do what Professor Green

[40] Patusco v. Prince Macaroni, Inc., 50 N.J. 365, 235 A.2d 465 (1962).
[41] 235 A.2d at 469.
[42] 470 S.W.2d 133 (Tex. Civ. App.—Houston [14th Dist.] 1971), *rev'd*, 489 S.W.2d 279 (Tex. 1973).
[43] TEX. FAM. CODE ANN. tit. 1, § 5.01 (Supp. 1972).

urged many years ago.[44] It is in a position to allow recovery to the survivors who are not negligent. The items of recovery on behalf of a minor child clearly include loss of services and loss of maintenance and support and other pecuniary contributions.[45] Because of the husband-father's negligence, had the wife lived she could not have recovered for lost earnings and the family enterprise could not have recovered for lost services. Based on this fact the argument can be plausibly made that the construction previously applied to the wrongful death statute should preclude a recovery by the children of those items of damages. If so, the cause of action would be virtually worthless. But death, not injury, creates the cause of action in behalf of the children. In fact, injury without death is not a basis for a cause of action in their behalf in most jurisdictions.[46] So the fact that the wife's cause of action would be of a limited nature had she lived would seem to be totally irrelevant to the amount of recovery on behalf of the children since their recovery is clearly their separate property.*

[44] Green, *supra* note 38.

[45] 1 COMMITTEE ON PATTERN JURY CHARGES, STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES 266 (1969). The explanatory instruction proposed is as follows: "You may consider the following elements and none other: care, maintenance, support, services, education, advice, counsel and contributions of pecuniary value that such children would in reasonable probability have received from him during his lifetime had he lived." *Id.* § 12.02.

[46] Pleasant v. Washington Sand & Gravel Co., 26 F.2d 471 (D.C. Cir. 1958); Hayrynen v. White Pine Copper Co., 9 Mich. App. 452, 157 N.W.2d 502 (1968); W. PROSSER, *supra* note 27, at 896.

* Editor's Note: After Dean Keeton had submitted this Article the Texas Supreme Court reversed the court of civil appeals decision in *Schwing*, thus reaching the same result as suggested in this Article. Schwing v. Blue Bonnet Express, Inc., 489 S.W.2d 279 (Tex. 1973).