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TORTS

by

Reba Graham Rasor*

IN THE always-lively field of tort law more than a hundred new cases were decided by Texas appellate courts during the period reviewed. Some old doctrines were carefully reinforced, while others, after determined assault, were left in an uncertain condition. For example, the future of charitable immunity in Texas is now surrounded by question marks. Determination of what is "open and obvious" in the "no duty" and *volenti* cases is apparently being very strictly construed. And the supreme court has officially recognized what every parent knows—that it is not possible to make a place "childproof."

I. INTENTIONAL INJURY

A jury finding that the defendant committed an assault and battery—provided the jury was given a legal definition of assault and battery in conjunction with the question—is more than a finding that the defendant hit or attacked the plaintiff. The case involved an elderly Chinese vegetable peddler who was thrown off a produce company's premises by the company president.¹ The jury was asked if the defendant had committed an assault and battery and was told that such would not be the case if the defendant had used no more force than necessary for the defense of property. The supreme court held that the jury's affirmative finding on this issue could only mean that the defendant had committed an assault and battery without legal justification.

II. NEGLIGENCE INJURY

No Duty-Volenti. The decisions of the past year further developed the novel Texas doctrine of assumed risk. Two cases seem to indicate a tendency of the supreme court to be sparing in the use of the concepts of "no duty" and *volenti*.

"No duty" is the tag given to assumed risk in Texas in situations where the plaintiff is injured on the defendant's land. Briefly, the doctrine is this: the occupier of land owes his invitees a duty to keep the premises in a reasonably safe condition or to warn them of dangers. But the occupier owes "no duty" if (1) the invitee knows about the condition and appreciates

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¹ Pon Lip Chew v. Gilliland, 398 S.W.2d 98 (Tex. 1965).

the danger or (2) the dangerous condition is so open and obvious that the invitee will be charged in law with knowledge and appreciation of the danger. With respect to this doctrine, the burden is on the plaintiff to show that the defendant owed him a duty.² *Volenti*,³ on the other hand, is an affirmative defense. It is applicable to injuries on the defendant's land and to other assumed risk situations. *Volenti* applies when the plaintiff either had actual knowledge of the dangerous condition or, because the condition was so patent, he is charged in law with knowledge. In addition, it requires a finding that the plaintiff, with this knowledge, nevertheless proceeded.⁴

Under each of these doctrines the critical question usually is whether the plaintiff had knowledge and appreciation of the danger, either actually or as a matter of law. In previous cases the court has considered, among other things, whether the plaintiff had previously encountered the condition.⁵

A case in which the plaintiff walked through the plate glass door of his motel room suggests that previous encounter is not always determinative.⁶ No tapes marked the clear glass in the sliding door, and the handle and lock were part of the door frame. The plaintiff had been at the motel "a day or two" and had used the sliding door during the daytime. On the night in question, the plaintiff went to get a road map from his car, leaving the door open. While he was out, his wife shut the door and when he returned the plaintiff walked through the glass. The supreme court held that the plaintiff could not be charged in law with knowledge of the dangerous condition because he had not had sufficient exposures at night to charge him with knowledge. The court intimated it would be different if the plaintiff had closed the door himself and had walked back through it. It can be inferred from the decision that if the previous encounter is to be determinative it must have occurred under the same conditions or circumstances as the encounter at the time of the injury.

The court took a similar, limiting view of knowledge of the danger in a case involving a sixteen-year-old farm employee injured by a defective tractor.⁷ The tractor was not working properly, and this was known by both the plaintiff and the defendant's foreman. The jury found that the plaintiff did not fully realize and appreciate the nature and extent of the danger. The supreme court held that the plaintiff was not barred from recovery because he continued to use the tractor with knowledge of the defect. "[K]nowledge of the defect is not enough," said the supreme court. "[T]here must be knowledge and appreciation of the particular danger in-

² *Halepeska v. Callihan Interests, Inc.*, 371 S.W.2d 368, 378 (Tex. 1963). See generally Greenhill, *Assumed Risk*, 20 Sw. L.J. 1 (1966).

³ Shortened designation of *volenti non fit injuria* (he who consents cannot receive an injury).

⁴ 371 S.W.2d at 379.

⁵ Greenhill, *Assumption of Risk*, 28 TEXAS B.J. 21, 65 (1965).

⁶ *Scott v. Liebman*, 404 S.W.2d 288 (Tex. 1966).

⁷ *Ellis v. Moore*, 401 S.W.2d 789 (Tex. 1966).

volved so that the plaintiff proceeds to encounter the risk as the result of an intelligent choice.⁸ The court reiterated its previous observance that assumed risk is a relatively harsh doctrine which must be kept within "justifiable limits."⁹

The *volenti* doctrine was applied, however, to a plaintiff who was an invitee on the defendant's premises where the defendant's employee was trying to back a truck onto blocks of wood.¹⁰ While the plaintiff was trying to push a block in place, the wheels spun, and his hand was caught under them. The jury found that the plaintiff knew and realized the danger of attempting to place the blocks and that he assumed the risk of the danger. It also found that the danger of the truck's moving while the plaintiff was attempting to place the blocks under the truck wheels was open and obvious. The court of civil appeals affirmed judgment for the plaintiff.¹¹ It spoke in terms of "no duty" and stated that the doctrine does not apply when an activity changes the condition, as it did here when the truck wheels moved. The supreme court reversed, holding that *volenti* applied. It pointed out that the requirements of knowledge and appreciation of the danger and voluntary exposure were met.

About twenty other assumed risk cases were decided by the courts of civil appeals, but the supreme court granted writ of error in only one.¹² In that case, too, controversy centered on whether the plaintiff knew and appreciated the danger which caused his injury. It involved an independent contractor's employee who was working on the relocation of the defendant oil company's pipelines. The plaintiff-employee was operating a welding torch when a dragline punctured a pipeline containing a highly flammable hydrocarbon product under pressure. The defendant urged that he had warned the plaintiff's employer that the pipelines were "charged" (contained gas under pressure). The court of civil appeals held that this warning was not sufficient to charge the plaintiff with knowledge and appreciation of the specific danger.¹³

⁸ *Id.* at 793. Similar reasoning was applied in *W. R. Grimshaw Co. v. Zoller*, 396 S.W.2d 477 (Tex. Civ. App. 1965) *error ref. n.r.e.* The plaintiff was leaving defendant's premises at night and tripped over a roll of wire mesh. The darkness was, of course, an open and obvious danger, but it was held that he could not be charged with knowledge of the wire mesh.

⁹ *Id.* at 792. As an example of the doctrine's harshness, see *Gulfway Gen. Hosp. v. Pursley*, 397 S.W.2d 93 (Tex. Civ. App. 1966) *error ref. n.r.e.* The plaintiff was entering the hospital for emergency medical treatment. She conceded she knew and appreciated the danger of the hospital's icy porch but urged that she was justified in proceeding. Held: for defendant. "Plaintiff's exigency does not impose a duty on defendant." *Id.* at 94.

¹⁰ *J. & W. Corp. v. Ball*, 10 Tex. Sup. Ct. J. 170, *rehearing denied*, 10 Tex. Sup. Ct. J. 236 (1967).

¹¹ *J. & W. Corp. v. Ball*, 404 S.W.2d 616 (Tex. Civ. App. 1966) *error granted*.

¹² *Delhi-Taylor Oil Corp. v. Henry*, 403 S.W.2d 885 (Tex. Civ. App. 1966) *error granted*.

¹³ A similar case was *Coleman v. Hudson Gas & Oil Corp.*, 403 S.W.2d 482 (Tex. Civ. App. 1966) *error ref. n.r.e.* Plaintiff was repairing a high pressure gas system when the unit on which he was working blew out. Plaintiff prevailed on the ground that he did not have knowledge of the particular danger which caused his injury—the fact that the high pressure line had not been "bled."

Medical Malpractice. In a case of first impression in Texas, the supreme court took a new approach to the question of the warning a doctor must give a patient concerning the risks incident to an operation.¹⁴ The court of civil appeals held that there was a fact issue for the jury presented on whether the patient was given information sufficient to enable him to give an "informed consent" to the operation.¹⁵ Without such consent, said the civil appeals court, the operation was an assault and battery. The supreme court, which considered the case twice, brushed aside the assault and battery theory and characterized the action as "one of malpractice for a physician's failure to conform to medical standards in obtaining the patient's consent."¹⁶ The court said that the plaintiff has the burden of proving by expert medical testimony that the disclosure made by the doctor was not one which would be made by a reasonable medical practitioner of the same school, in the same or a similar community, and under the same or similar circumstances. The case was remanded for a new trial to determine if the doctor's disclosures met the medically accepted standard.

The ultimate effect of the decision is difficult to foretell. One view is that it enlarges the area in which a doctor may be sued for malpractice. On the other hand, the plaintiff's burden of proof is increased by the change in labels. One jurist observed, "[I]f negligence must be established, then hard to come by medical testimony must be obtained to sustain it. This is not true under the trespass theory."¹⁷

Another case involving informed consent was decided by a court of civil appeals.¹⁸ The patient consented to an operation and to use of "any anesthetic." But the patient contended that her consent was ineffective because (1) the anesthesiologist did not reveal the method by which the anesthetic would be administered and (2) the method of administering it caused her injury. The court disagreed, saying that it would be unreasonable and undesirable to place a burden of full and complete disclosure upon each and every specialist involved as to the specific methods intended to be used.

Sole Proximate Cause. Texas law on what must be proved and by whom with respect to sole proximate cause was reviewed in a Fifth Circuit case.¹⁹ The plaintiff was the employee of an independent contractor employed to dismantle an abandoned power line on the defendant's premises. The plaintiff was killed when a pole fell during the work. The defense was that the conduct of the independent contractor and his employees was the sole proximate cause of the accident that killed the plaintiff. The court reversed the

¹⁴ *Wilson v. Scott*, 10 Tex. Sup. Ct. J. 187 (1967).

¹⁵ *Scott v. Wilson*, 396 S.W.2d 532 (Tex. Civ. App. 1965).

¹⁶ 10 Tex. Sup. Ct. J. at 190.

¹⁷ *Bell v. Umstatted*, 401 S.W.2d 306, 314 (Tex. Civ. App. 1966) *error dismissed* (dissenting opinion).

¹⁸ *Bell v. Umstatted*, 401 S.W.2d 306 (Tex. Civ. App. 1966) *error dismissed*.

¹⁹ *Eastman Kodak Co. v. Martin*, 362 F.2d 684 (5th Cir. 1966).

trial court's judgment for the plaintiff on the ground that the lower court erred in instructing the jury with respect to sole proximate cause. Texas law, said the appellate court, is that (1) defendant has the burden of introducing the issue of sole proximate cause and of making out a prima facie case; (2) the plaintiff then has the burden, as part of his case, to disprove the facts relied on to show sole proximate cause; and (3) it is not necessary that the conduct relied on as the sole proximate cause be negligent.

Res Ipsa Loquitur. The fact that a plaintiff attempts and fails to prove specific acts of negligence does not bar his recovery under the doctrine of *res ipsa loquitur*. This was the holding in a civil appeals case²⁰ in which the defendant's employee was making a delivery of butane gas to a tank located on the plaintiff's premises. While the employee left the truck unattended, gas escaped and ignited, burning the plaintiff's house. Issues on specific acts of negligence were answered favorably to the defendant. But the jury found for the plaintiff on the *res ipsa* issues. The argument against this holding might be that *res ipsa* is a theory that allows an inference of negligence. Thus, if in answer to specific questions the defendant has been acquitted of negligence, the inference cannot be drawn. On the other hand, it could be said that the jury may have inferred negligence from facts other than those about which specific inquiries were made.

Automobile Accidents. In the usual flood of litigation involving personal injuries on the road, the cases reaching the supreme court centered on problems of proper lookout and loss of control.

A defendant may not rely on his loss of control to excuse his own negligence, the supreme court held.²¹ The defendant urged that when it proved the general and unexplained loss of control, the burden was then cast upon the plaintiff to show the specific negligent act or omission which caused the loss of control. The supreme court disagreed, stating that the burden was upon the defendant to go forward with the evidence to prove that the loss of control was excusable.

Of the numerous cases in this field decided by the lower appellate courts, the supreme court has granted writ of error in two. One involved loss of control;²² the other was a rear-end collision.²³ Both decisions turned on interpretation of the answers to special issues.

Problems of Proof. A recent court of civil appeals holding, though in

²⁰ Smith v. Koenning, 398 S.W.2d 411 (Tex. Civ. App. 1965) *error ref. n.r.e.* For a case in which a plaintiff failed to come within the exacting requirements for *res ipsa loquitur*, see Holeman v. Greyhound Corp., 396 S.W.2d 507 (Tex. Civ. App. 1965) *error ref. n.r.e.* A box from the defendant's luggage rack fell on plaintiff's head. It was held that *res ipsa* did not apply inasmuch as the bus company exercised no control over the passenger's luggage.

²¹ Hammer v. Dallas Transit Co., 400 S.W.2d 885 (Tex. 1966).

²² Alamo Ambulance Serv., Inc. v. Moulton, 402 S.W.2d 200 (Tex. Civ. App. 1966) *error granted*.

²³ Jackson v. Ewton, 405 S.W.2d 443 (Tex. Civ. App. 1966) *error granted*.

line with Texas precedents, seems at variance with common knowledge of business practice.²⁴ In a case in which the plaintiff slipped on an onion stalk in the defendant's grocery, the court withdrew the case from the jury and rendered judgment for the defendant. The appellate court agreed that the fact that the onion was "dirty and dark brown with black places on it" would not justify a conclusion that it was probable the onion had been on the floor long enough that the defendant should have removed it.²⁵ The implication was that the onion might have been in this condition when it fell to the floor. However, such an event seems unlikely in view of the time and effort expended by large, successful supermarkets in keeping their vegetable displays fresh and alluring.

III. SPECIAL STATUS OR RELATIONSHIP AFFECTING LIABILITY

Charitable Immunity. The supreme court upheld the Texas rule of charitable immunity in a splintered decision,²⁶ but the rule's future is shaky at best. The case involved a slip-and-fall accident in a church. The plaintiff argued (1) that charitable immunity is outmoded and should be overruled and (2) that the defendant church had waived its immunity to the extent of the coverage of a liability insurance policy it had procured. The main opinion rejected both arguments and reaffirmed the rule that charitable institutions are not liable for the acts or omissions of their servants under the doctrine of *respondeat superior*.²⁷ Nor did the church waive its immunity by having insurance. The main opinion indicated also a preference for legislative, rather than judicial, action if charitable immunity is to be abandoned. The court said that statutes are generally adopted following a period of deliberation accompanied by a sufficient and practical notice to all those who might be affected. The court noted that the legislature can be more flexible in selecting the charities and charitable activities to be affected. Justice Walker concurred but added that he favored announcing now that the doctrine of charitable immunity will not be recognized in future cases. Justice Greenhill, also concurring, suggested that the court give notice that it will feel free to re-examine the doctrine in future cases. He made no commitment on what he felt the result should be after this re-examination. Justice Steakley joined with Justice Greenhill. Justice Calvert urged outright judicial abolition of the doctrine, preferably at once. Justice Smith joined Justice Calvert.²⁸

²⁴ *Green v. Weingarten, Inc.*, 398 S.W.2d 447 (Tex. Civ. App. 1965).

²⁵ *Ibid.*

²⁶ *Watkins v. Southcrest Baptist Church*, 399 S.W.2d 530 (Tex. 1966), 20 Sw. L.J. 163.

²⁷ *Southern Methodist Univ. v. Clayton*, 142 Tex. 179, 176 S.W.2d 749 (1943).

²⁸ See generally Keeton, *Judicial Reform—A Perspective on the Performance of Appellate Courts*, 44 TEXAS L. REV. 1254, 1258 (1966). For advancements in the field of torts, the author gives Texas "honorable mention," partly based on the concurring and dissenting opinions in *Watkins v. Southcrest Baptist Church*.

In summation, the box score on charitable immunity would seem to be: for preserving the doctrine or leaving the question to the legislature, four; for abolishing it now or in the future, three; for re-examination, two.

In another case a lower court ruled for the defendant under the charitable immunity doctrine but the supreme court refused to grant writ of error.²⁹ The supreme court made it clear, however, in a per curiam statement that the decision rested strictly on procedural grounds.

The court refused to review a decision in which a charitable hospital was sued for its alleged negligence in supplying a heating pad that burned plaintiff.³⁰ Despite the immunity doctrine, the court of civil appeals noted that a charitable corporation is liable for injuries caused by the corporation's negligence in the exercise of its non-delegable duty to select and supply proper equipment. Evidence that heating pads were available which would not burn a patient under any circumstances raised a question of fact as to whether the hospital was negligent, and the case was remanded for new trial.

Governmental Immunity. Should charitable immunity fall, speculation inevitably will turn to the future of governmental immunity. None of the new decisions, however, suggest immediate peril. Four governmental immunity cases were decided by the courts of civil appeals, and none were reviewed by the supreme court.

In one case the defendant city was held liable where city waterworks employees pulled the plaintiff's boathouses out of Lake Waco, breaking them into pieces.³¹ The court held that the "maintenance of a waterworks by a city is a proprietary function," thus falling within the long-recognized exception to governmental immunity.³²

Governmental immunity barred recovery in a suit against a navigation district,³³ and in a suit against a city with respect to its garbage collecting activities.³⁴ The doctrine also was applied against a plaintiff who sued in behalf of a person killed in a collision with an unmarked police car engaged in a high speed chase.³⁵

Guest Statute. Negligent entrustment of an automobile may, under some circumstances, meet the guest statute³⁶ requirement of gross negligence. This would seem to be the meaning of dicta in a short per curiam opinion

²⁹ Tunnell v. Otis Elevator Co., 404 S.W.2d 307 (Tex. 1966).

³⁰ Milner v. Huntsville Memorial Hosp., 398 S.W.2d 647 (Tex. Civ. App. 1966) error ref. n.r.e.

³¹ Waco v. Busby, 396 S.W.2d 469 (Tex. Civ. App. 1966) error ref. n.r.e.

³² Such exception to governmental immunity has long been recognized for the operation by a municipality of a service, such as a waterworks, which could be performed by a private corporation. See White v. City of San Antonio, 94 Tex. 313, 60 S.W. 426 (1901).

³³ Jones v. Texas Gulf Sulphur Co., 397 S.W.2d 304 (Tex. Civ. App. 1966) error ref. n.r.e.

³⁴ Bean v. City of Monahans, 403 S.W.2d 155 (Tex. Civ. App. 1966) error ref. n.r.e.

³⁵ Mayes v. City of Wichita Falls, 403 S.W.2d 852 (Tex. Civ. App. 1966) error ref. n.r.e.

³⁶ TEX. REV. CIV. STAT. ANN. art. 6701b (1960).

of the supreme court.³⁷ In that case the defendant, owner of an automobile with a defective steering mechanism, entrusted it to his daughter, an inexperienced, unlicensed driver. The plaintiff was riding in the car with the daughter at the time of the accident. The supreme court agreed with the lower court's holding³⁸ that the owner-defendant was not liable to the guest for ordinary negligence. It noted that the lower court stated that proof of knowledge by the owner that his automobile had a dangerous defect when he permitted his daughter to use it did not show gross negligence. But the supreme court said: "That might be taken to mean that an owner can never be guilty of gross negligence in the entrustment of a motor vehicle, and we are not satisfied that this is necessarily so."³⁹

In several other guest statute cases decided in the courts of civil appeals, the trend was to hold firm against any chipping away of the definition of a "guest." The oft-repeated standard is that one is a guest unless the person furnishing the ride expects definite tangible benefit and unless the securing of the benefit is the motivating influence for furnishing the transportation.⁴⁰

Infant Plaintiffs. Though an infant plaintiff enjoys a special status in tort law, the supreme court recognizes that a defendant landowner cannot possibly foresee all the ways in which youngsters might hurt themselves.⁴¹ A five-year-old boy was climbing a fence to cross defendant's back yard to get to his own home. Next to the fence was a greenhouse with a broken glass pane. In scrambling over the fence, the boy grabbed the broken pane and cut off a finger. The supreme court held that the landowner could not foresee that the boy's injury would be the natural consequence of failure to repair the broken pane. The court quoted the very quotable passage from Prosser's *Law of Torts*, on the impossibility of forestalling all accidents to children: "There is virtually no condition upon any land with which a child may not possibly get himself into trouble . . . Unless the possessor is to shoulder the impossible burden of making the land completely 'child-proof,' which might mean razing it to the bare earth, something more is called for than the general possibility of somehow coming to some harm which follows the child everywhere throughout his daily existence."⁴²

Infant plaintiffs were successful, though, in three court of civil appeals cases in which the supreme court refused to grant writ of error, no reversible error. One involved two small boys who found signaling devices near the defendant's railroad tracks and were injured when the devices exploded

³⁷ *Forgus v. Hodnett*, 405 S.W.2d 337 (Tex. 1966).

³⁸ *Forgus v. Hodnett*, 401 S.W.2d 104, 105 (Tex. Civ. App. 1966) *error ref. n.r.e.*

³⁹ 405 S.W.2d at 338. For indication of difficulties of showing that negligent entrustment is gross negligence, see Annot., 91 A.L.R.2d 323, 327, 336 (1963).

⁴⁰ *Dietrich v. F. R. Young Co.*, 400 S.W.2d 572, 575 (Tex. Civ. App. 1966) *error ref. n.r.e.*

⁴¹ *McClary v. Jones*, 404 S.W.2d 314 (Tex. 1966).

⁴² *Id.* at 315, quoting PROSSER, *TORTS* § 59 (3d ed. 1964).

in their hands.⁴³ In another case a child aged three and one-half was drowned in a neighbor's swimming pool.⁴⁴ The gate to the fence surrounding the pool did not have a self-closing latch. In the third case, the child was picnicking in a city park which adjoined a city golf course.⁴⁵ On the golf course were barrels of liquid fertilizer with spigots which made it possible for the child to help himself to a fatal dose.

Respondeat Superior. Whether a newspaper's district manager is an independent contractor or an employee may present a close question. In a hard-fought case which has been through the appellate courts twice, the relationship, under the particular circumstances shown, was found to be that of employer-employee, permitting the plaintiff to invoke the doctrine of *respondeat superior* against the newspaper.⁴⁶ The contract between the paper and the manager designated him as an independent contractor, but evidence was introduced to show that the paper, nevertheless, exercised a right to control details of the work.⁴⁷ The supreme court refused to grant error, holding no reversible error was present, but it added, per curiam, this caveat: "Our action . . . is not to be taken as any disregard for the rule established in this state that the distribution of newspapers to individual purchasers may be accomplished through the medium of independent contractors, provided that such distribution is effected under and consistently with a contract similar in terms to the one considered in *Carter Publications, Inc. v. Davis*"⁴⁸

The supreme court refused to grant writ of error in two other *respondeat superior* cases. A life insurance agent, though engaged in a company training program in which he was closely supervised, was held not to be an employee.⁴⁹ But a golf club caddy who drove a golf cart into a plaintiff was found to be an employee despite the fact that he was paid by the players, not the club.⁵⁰ A somewhat related question, whether an employee was acting within the scope of his employment, was decided in favor of a taxicab company whose driver assaulted a passenger.⁵¹

IV. PRODUCTS LIABILITY

No supreme court cases were decided in this field, but the court gave qualified approval to four lower court decisions. Paradoxically, the owner

⁴³ *Missouri Pac. R.R. v. Covarrubias*, 400 S.W.2d 599 (Tex. Civ. App. 1966) *error ref. n.r.e.*

⁴⁴ *Mitchell v. Akers*, 401 S.W.2d 907 (Tex. Civ. App. 1966) *error ref. n.r.e.*

⁴⁵ *City of Lampasas v. Roberts*, 398 S.W.2d 612 (Tex. Civ. App. 1966) *error ref. n.r.e.*

⁴⁶ *Newspapers, Inc. v. Love*, 405 S.W.2d 300 (Tex. 1966).

⁴⁷ See *Newspapers, Inc. v. Love*, 397 S.W.2d 469 (Tex. Civ. App. 1966) *error ref. n.r.e.*

⁴⁸ 405 S.W.2d 300, referring to *Carter Publications v. Davis*, 68 S.W.2d 640 (Tex. Civ. App. 1934) *error ref.* (Emphasis added.)

⁴⁹ *Allen v. Reliable Life Ins. Co.*, 394 S.W.2d 835 (Tex. Civ. App. 1963) *error ref. n.r.e.*

⁵⁰ *Riverbend Country Club v. Patterson*, 399 S.W.2d 382 (Tex. Civ. App. 1966) *error ref. n.r.e.*

⁵¹ *Dart v. Yellow Cab, Inc.*, 401 S.W.2d 874 (Tex. Civ. App. 1966) *error ref. n.r.e.*

of a flock of turkeys which failed to thrive on bad turkey feed came out better than a man who developed cataracts on his eyes as a result of an abnormal reaction to a drug. The turkey owner obtained a judgment of more than \$250,000 upon jury findings that feed was unfit.⁵³ It was found that the feed resulted in death, loss of weight, unfitness for breeding, and condemnation by government inspectors. A written disclaimer of warranty by the feed company was held to be of no effect because of the strict liability that the law imposes.

In the drug case the plaintiff sought recovery on both negligence and implied warranty.⁵³ He lost on both counts because special issues predicated on foreseeability of harm by the defendant were answered unfavorably to the plaintiff. The court cited *Jacob E. Decker & Sons v. Capps*⁵⁴ which imposed liability on a non-negligent food manufacturer and expressed "no doubt" that the same rule applies to "drugs such as MER-29."⁵⁵ But the court said the liability of the manufacturer is not that of an insurer and does not extend to persons injured as the result of an "abreaction," *i.e.*, an unusual susceptibility which could not have been reasonably foreseen in an appreciable class or number of potential users.

Ordinarily, the question of proximate cause (with its element of foreseeability) is one that is asked only after it has been established that the defendant was guilty of a negligent act or omission. It might be asked whether, in product liability cases not requiring proof of negligence, the plaintiff should be required to prove proximate cause or only producing cause (causation in fact). On the other hand, it might be argued that legal theories are beside the point inasmuch as the law of products liability has developed on broad grounds of social policy. In that context, the question might be: should protection of the public through strict liability be carried to such an extent that development of new drugs will be discouraged? Such beneficial drugs as penicillin produce harmful effects in a small number of users.

In the third case, a plaintiff who claimed damages as the result of a defective fire extinguisher, did not recover.⁵⁶ The plaintiff's suit was based on implied warranty, but since it was against the manufacturer the plaintiff could not show privity of contract. The court said that the rule of *Decker*, which does not require privity, applies only to food cases.

The privity requirement was circumvented, however, by a plaintiff who based his suit, not on implied warranty, but on negligence.⁵⁷ The plaintiff

⁵³ *McMillen Feeds, Inc. v. Harlow*, 405 S.W.2d 123 (Tex. Civ. App. 1966) *error ref. n.r.e.*

⁵³ *Cudmore v. Richardson-Merrell, Inc.*, 398 S.W.2d 640 (Tex. Civ. App. 1966) *error ref. n.r.e.*

⁵⁴ 139 Tex. 609, 164 S.W.2d 828 (1942).

⁵⁵ 398 S.W.2d at 644.

⁵⁶ *Cruz v. Ansul Chem. Co.*, 399 S.W.2d 944 (Tex. Civ. App. 1966) *error ref. n.r.e.*

⁵⁷ *Starr v. Koppers Co.*, 398 S.W.2d 827 (Tex. Civ. App. 1966) *error ref. n.r.e.*

contended that the manufacturer and distributor of the "bitumastic-type" product were negligent in failing to warn him of the product's harmful effects.⁵⁸ The court of civil appeals said, "Whatever may be the present embattled status of the privity doctrine in cases based on so-called implied warranty . . . the courts have excised the privity requirement from the law of negligence."⁵⁹

V. INJURIES BY PUBLICATION

The rule, cherished by Texas newspapers, that substantial truth will shield them from a libel suit was reiterated in a court of civil appeals case.⁶⁰ The defendant newspaper published a story which stated that the plaintiff and Hunter "were arrested in connection with an extensive burglary operation An estimated \$25,000 worth of stolen items have been recovered by Amarillo police."⁶¹ The defendant claimed the privilege afforded by article 5432 to publish "a fair, true and impartial account of the proceedings in a court of justice"⁶² The plaintiff contended the account was untrue by implication since, in fact, a large portion of the stolen property was recovered from Hunter rather than from the plaintiff. The court held that the paper was entitled to the protection of the statute. When the story is substantially true, it does not have to be literally true.

VI. NUISANCE

A firm operating a chain of fried chicken restaurants built a rendering plant near the plaintiff's property.⁶³ Feathers and other waste products from the chicken processing were burned at the plant. The defendant's position was that action was barred by limitation. It contended that since the plant was permanent, limitations began to run when it was erected in 1962. Plaintiffs urged that the nuisance was temporary in that they were only

⁵⁸ Though not decided last year, an interesting and complex products liability case brought by an automobile purchaser was argued before the supreme court last year. The decision had not been handed down at the time of this writing.

The case is *Ford Motor Co. v. Puskar*, 394 S.W.2d 1 (Tex. Civ. App. 1965) *error granted*. The plaintiff bought a 1959 Thunderbird with power steering and power brakes. He was involved in an accident when the engine died and he was unable to control the car with only manual steering and brakes. He testified that he told the dealer the engine died on full application of the brakes and that the dealer told him to wait and get this fixed in the 1,000-mile check-up.

The court of civil appeals found the dealer liable for negligent refusal to repair. But it held there was no evidence to support jury findings that the manufacturer's manual made false representations to the buyer that the car could be safely steered and controlled when the engine was stopped.

⁵⁹ 398 S.W.2d at 830.

⁶⁰ *Walker v. Globe-News Publishing Co.*, 395 S.W.2d 686 (Tex. Civ. App. 1965) *error ref. n.r.e.*

⁶¹ *Id.* at 687.

⁶² TEX. REV. CIV. STAT. ANN. art. 5432 (1958).

⁶³ *Youngblood's, Inc. v. Goebel*, 404 S.W.2d 617 (Tex. Civ. App. 1966) *error ref. n.r.e.* For further discussion see Larsen, *Property*, this Survey at footnote 26.

affected when prevailing winds carried noxious odors to their property in 1963 and 1965. The plaintiffs prevailed. The court agreed that the nuisance was temporary and that the cause of action accrued when the plaintiffs first sustained injury.

VII. MISREPRESENTATION

A defendant who induces a plaintiff through misrepresentation to enter into a contract cannot defend on the ground that the defendant was unduly gullible.⁶⁴ An agent of the defendant insurance company represented to the plaintiff that it was offering him new policies at no cost to him. What the plaintiff actually received were four new policies with the first one and one-half annual premiums paid by a loan on his old paid-up policies. Additional premiums were due on the new policies. In affirming judgment for the plaintiff, the court of civil appeals said, "[A] fraud-feasor cannot excuse his fraudulent acts by asserting that the defrauded person was unduly credulous and guilty of contributory negligence in believing the fraudulent statements made to him."⁶⁵

⁶⁴ Southern States Life Ins. Co. v. Newlon, 398 S.W.2d 622 (Tex. Civ. App. 1966) *error ref. n.r.e.*

⁶⁵ *Id.* at 626.