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Part I: Private Law - Torts

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In seeking to recover against a maker or purveyor of goods for physical harm produced by some characteristic or condition of a product, plaintiff may adopt one or more of three general approaches. He may contend that the product was defective at the time of sale by the defendant in that it was not in the condition that the maker intended it to be; he may contend that the product was purposely designed or produced with some condition that involved a risk of the kind that resulted in the plaintiff's harm, and that a maker who designs a product in such a way ought to be responsible for harm resulting from such an inherent risk; or, finally, the plaintiff may seek to recover because the maker or other seller supplied incomplete, incorrect, or misleading information about the risk and dangers involved in the use of such a product and the measures that can or ought to be taken to avoid harm.

Defective Products. When seeking a recovery on the theory that a product was defective when sold by the defendant, plaintiff has substantially the same proof problems for recovering on a theory of strict liability as he does on a theory of negligence. Under both theories plaintiff must establish to the satisfaction of the jury a defect at the time of sale. Once the proof is sufficient to get to the jury on the existence of a defect, there is generally a basis for an inference of negligence. Two opinions handed down this year by different courts of civil appeals involving injuries from bottle explosions or breakage illustrate this very well. According to the evidence in Coca-Cola Bottling Co. v. Hobart, plaintiff picked up a six-pack carton of Coke at a display counter of a retail outlet and placed the pack in the lower tier of a shopping cart. Plaintiff testified as to careful handling, but, according to the evidence, as he started to remove them from the carton to place in his refrigerator at home, two bottles came apart about a third of the distance from the base. Plaintiff placed the other four bottles from the pack along with two replacements in the refrigerator. Later, as the plaintiff went to open one of the bottles, the neck of the bottle broke, cutting his finger. The plaintiff joined both the bottling company and the retail outlet. The jury found that the bottle was defective when it was sold by the bottling company to the retail outlet, as well as when the retail outlet sold the bottle to the plaintiff. The trial court entered judgment in
favor of the plaintiff against both the retailer and the bottler, but then awarded indemnity in behalf of the retailer against the bottler. A majority of the court of civil appeals thought that the plaintiff’s evidence was insufficient to establish a “defect” when the bottle was sold to the retailer and the judgment against the bottler was reversed and rendered. Much can be said for the position of the majority. As regards the bottler, the court said: “The plaintiff did not satisfy the controlling requirement that he negative the possibility of an intermediate actor as the agency causing the injury by a preponderance of the evidence . . . .” A dissenting judge thought that “to infer that this bottle was tampered with by customers even at a self-service store appears, at best, highly speculative and conjectural” and the dissenter thought the better reasoned inference was that the bottle was defective when delivered to the retailer.

Theories of strict liability for defective products have been based largely on the argument that the maker-enterpriser has the capacity, or at least normally has the capacity, to accept this kind of legal responsibility without hardship because of his ability to distribute as a cost of doing business the losses of the few to the many who purchase his products. The retailer’s strict liability has been based on the notion that he is in a better position than the consumer to recover against the maker, whose liability should be primary and ultimate. But in this case the retailer was left without recourse, and it is this aspect of the case that is doubtful. Perhaps the first question is: Should retailers be held strictly accountable for physical harm resulting from defects occurring in the marketing process just as makers are held strictly liable for harm produced by defects occurring in the manufacturing process? Perhaps so, but at least there is more doubt about it. There is a second and more important question: Is a retailer to be held strictly liable for a defect existing at the time of the sale by the retailer, even though the proof does not show when the defect arose? If so, I submit that the maker and retailer should be regarded as joint tortfeasors even though it cannot be established that the defect was in existence at the time the maker surrendered the product; otherwise, the retailer is left with the entire liability even though it is just as likely that the maker was responsible for the defect. Such a result has been reached by other courts in bottle explosion situations when the claim was based on a negligence theory.

A writ of error has been granted by the supreme court but no opinion has at the time of this writing been handed down in another bottle explosion case, *Pittsburg Coca-Cola Bottling Works v. Ponder.* The plaintiff was a cafe owner and operator to whom Cokes were delivered directly. Ac-

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4 *Nichols v. Nold, 174 Kan. 613, 258 P.2d 317 (1953) (Pepsi-cola exploded; bottler, distributor, and retailer joined); Lock v. Confair, 372 Pa. 212, 93 A.2d 451 (1953) (ginger ale bottle exploded). The problem is not greatly different when a user of two or more products made by different persons is injured as a result of a defect of one of the products. This problem is well illustrated by Dement v. Olin-Mathieson Chem. Corp., 282 F.2d 76 (5th Cir. 1960) (gelatin dynamite, blasting cap, and booster—component parts of a charge of dynamite assembled by user).

cording to her evidence, she was in the process of placing three Cokes in a refrigerator when a bottle exploded. A bottle explosion is one of those rare kinds of occurrences on the basis of which the Texas Supreme Court has permitted the jury to infer a defect attributable to the bottler or maker without any proof of an identifiable defect, but simply with a showing by the plaintiff of careful handling after the control of the bottle was surrendered by the bottler. The court of civil appeals in this case held that the supreme court holdings on this matter were applicable. Apparently, there is much more to the case than appears from the opinion since the supreme court has granted a writ of error on several points. Apparently the trial court, in inquiring about fitness, did not carefully limit the question to fitness at the time when the bottle left the control of the bottler. Moreover, the trial court apparently gave instructions to the jury about res ipsa loquitur, and I suppose it has been argued that this constitutes a charge on the weight of the evidence.  

Inadequate or Misleading Information. There has been a substantial increase in the number of claims, both on negligence and strict liability theories, based on the argument that inadequate, incomplete, or misleading information was supplied to the ultimate user regarding the risks of harm involved in the use or misuse of the particular product, and the techniques that should or could be employed to avoid or mitigate the harm resulting from such risks. Some courts have regarded a product as "unreasonably dangerous" or "unfit" because of the way in which it is marketed, even though the product may be per se a good product. Moreover, there is conflict and uncertainty about the extent of the duty of disclosure and about the necessity for a finding as to the existence of a causal relationship between inadequacy of disclosure and the harm for which recovery is sought. Rumsey v. Freeway Manor Minimax, is illustrative of some of these problems. The product was roach poison; the plaintiff's small son died from ingesting some of the poison. The basis for recovery was that the label did not contain a statement that there was no known antidote for thalium, one of the ingredients of the poison. There was a direction on the label to use salt in a glass of warm water to produce vomiting, and the label did comply with federal and state statutory administrative regulations. Suit was brought against the retailer and the maker on negligence and warranty theories, and the trial court instructed a verdict for both defendants. 

The court of civil appeals reversed as to the maker, concluding that there was no basis for a recovery against either defendant on an implied or express warranty theory. The product sold was poison and was knowingly purchased as such for the purpose of using it as an insecticide to kill roaches. It was fit for this purpose, according to the court; thus recovery was possible only on a negligence theory. This position necessarily relieved

8 The writ of error was granted on six distinct points, including the trial court's failure to make it clear that the bottle must have been defective when it left petitioner's control, and the trial court's action in instructing the jury as to the legal theory of res ipsa loquitur. 12 Tex. Sup. Ct. J. 85 (Nov. 6, 1968).

the retailer of all responsibility, and greatly reduced the probability of recovery against the maker. There is some authority from other jurisdictions that the failure to make full or adequate disclosure of the risk and dangers involved in the use of a product will subject the maker to warranty or strict liability as well as to liability on a negligence theory. Such holdings, however, may be limited to situations where the maker failed to disclose some risk or danger involved in an appropriate or proper use of the product as distinguished from misuse such as occurred in this case. The notion of such a holding is that a product can be regarded as unfit or unreasonably dangerous because of the way or manner in which it is marketed as well as because of inherent defects or conditions involved.

Having concluded that recovery, if at all, must be based on a negligence theory, the court went on to hold that under the evidence submitted there was an issue of fact for the jury, both as to the negligence of the maker and the contributory negligence of the mother for not giving the child salt with warm water immediately in order to induce vomiting. As to negligence of the maker, it was held that compliance with federal and safety regulations as to labeling does not as a matter of law prevent a finding of common law negligence. This is the usual view about compliance with general safety standards. The violation of them constitutes negligence, but safety standards established by statute, city ordinance, or administrative regulation are to be regarded from the standpoint of tort law as minimum requirements, and compliance with them does not mean that the actor cannot be regarded as negligent in a particular situation.

Nothing was specifically said in the case about the necessity for a finding that an adequate warning would have prevented the injury. But in theory there must be a causal relation between the aspect of the defendant's conduct that made him negligent, namely the failure to warn, and the harm for which recovery is sought. This is a troublesome issue in situations of this kind. Should causal relation be presumed as a matter of law? If not, should there be a rebuttable presumption? If not, should the issue be submitted to the jury without any evidence introduced bearing on the question? Or, finally, must the claimant introduce evidence of some kind to show a warning of the proper kind would have been heeded and would have prevented the harm? Apparently, there was some evidence in this case to the effect that the mother might not have purchased the poison had she known that there was no known antidote.

II. PROFESSIONAL MALPRACTICE

Professional malpractice litigation is on the increase, and a variety of new problems are being raised. Some of this has been reflected during the

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6 Davis v. Wyeth Laboratories, Inc., 399 F.2d 121 (9th Cir. 1968) (Sabin polio vaccine caused polio). The vaccine victimized a 39-year old man who developed polio about thirty days after innoculation. Court regarded the product as subjecting the user to an unreasonable risk unless the maker made all reasonable efforts to advise the user as to the full extent of the risk.

past year in two cases that came before the supreme court. In one, suit was brought in behalf of a patient against an operating surgeon, the assisting surgeon, a nurse anesthetist, and the hospital on various theories. But the supreme court in this case dealt only with the battery theory. There are three important grounds of recovery against a medical doctor: (1) that he treated or operated in some unauthorized manner and therefore committed a battery; (2) that he treated or diagnosed negligently; and (3) that he negligently undertook to treat when the patient should have been referred to a specialist or someone better qualified. This case illustrates some of the complications that can arise as to the first theory. After X-rays and other examinations had revealed some dilatation of the small intestines, an exploratory operation was performed. An intestinal obstruction was found and corrected, but the patient suffered thereafter from a number of new physical disabilities. The patient had been under observation for about thirty-six hours before the operation had been performed and there was evidence that she was heavily sedated when the decision to operate was made. The consent of her husband was obtained but her consent was not obtained. The court of civil appeals reasoned that the patient’s consent was not necessary because an emergency existed, and she was under the influence of drugs to such an extent that she was incapable of giving consent. The supreme court arrived at the following conclusions: (1) there was a conflict in the evidence as to her mental condition and therefore an issue of fact was raised as to her capacity; (2) there was no emergency because even if the patient was unable to give consent at the time the decision was made, it did not appear that there was a “dire” emergency in the words of a doctor or an “immediate” emergency in the language of the court; (3) while consent of the husband may have been obtained, the relationship of husband and wife does not in itself make one spouse the agent of the other; (4) there was a conflict in the evidence as to whether she gave her consent orally to the exploratory operation and the use of a spinal anesthetic, it being plaintiff’s contention that she would never have consented to a spinal anesthetic because two previous spinals had produced severe headaches.

As to the first point, the difficult problem is the test to be applied by the jury as to competency to consent to medical treatment under circumstances such as this, and when the patient is under stress. The supreme court made no attempt to provide a test for the trial judge to give to the jury. There was evidence that the plaintiff was calm, that she was normal, and that she was lucid at or about the time the decision was made to operate. I suppose that about as good as one can do is to say that a person has capacity if he is at the time in question capable of understanding and appreciating the nature and seriousness of the treatment and the consequences of withholding such treatment, and his judgment has not been substantially impaired and reduced below normal.

As regards the second problem, some courts have undoubtedly been more liberal than others on what constitutes an emergency justifying a doctor in operating without obtaining consent. By a “dire” emergency I suppose one

10 Gravis v. Physicians & Surgeons Hospital of Alice, 427 S.W.2d 310 (Tex. 1968).
means a situation when a delay would probably result in death or permanent impairment of an important function of the body. This requires too much, in my judgment. It seems to be enough that circumstances are such that no normal person would object to the operation and a delay would subject the patient to a substantial additional risk of death or serious disability. In fact, under such circumstances, the doctor might well be regarded as negligent if he failed to act promptly.

As to the third point, it seems quite clear that one spouse is not the agent of the other when the latter is not unconscious or incapacitated. But what is to be the rule when one spouse is temporarily incapacitated? Does the court mean to hold that one spouse can never act as the agent of the other, even when there is an emergency and the latter is incapacitated? Perhaps so. I am inclined to the view that the judgment of the doctor rather than the judgment of the patient's spouse should control in the absence of information supplied to indicate that the patient's views on medical treatment made it likely that he would not have consented had he not been incapacitated.

As to the final point, the supreme court would probably hold that the patient must consent not only to the operation but also to the kind of anesthetic used. There is no evidence as to what is customary regarding the use of anesthetics. It is probably customary to advise patients about what anesthetic is to be used without advising about the relative advantages and dangers of different kinds of anesthetics. Custom or no, the patient must consent to a particular kind of treatment or to the use of a particular anesthetic, and the rule about what it is customary to disclose is applicable only to the dangers involved in a particular course of treatment. The duty to disclose the nature of the operation or the kind of treatment seems to be absolute. If a patient consents to an operation, but not to the anesthetic that was used, would the plaintiff have the burden of showing that the injuries complained of resulted from the anesthetic rather than the operation?

Optometrists. The nature of the liability of optometrists was the subject of treatment in Barbee v. Rogers. In the trial court the jury found that the plaintiff sustained injury to the cornea of his left eye following the prescription, fitting, and sale to him of contact lenses, and that the lenses were not reasonably fit for use upon the surface of his eyes which caused or contributed to his injury. The jury further found that the failure of the lenses to fit the curvature of the plaintiff's eyes was negligence but that such negligence was not the proximate cause of his injury. There were two defendants, the Texas State Optical—a partnership with eighty-four outlets, employing 125 licensed optometrists—and the Texas State Opti-

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11 Wilson v. Scott, 412 S.W.2d 299 (Tex. 1967), noted in 21 Sw. L.J. 843 (1967). This case was noted in last year's report on torts, also, Keeton, Torts, Annual Survey of Texas Law, 22 Sw. L.J. 4, 6 (1968). The supreme court held that the plaintiff has the burden of proving by expert medical evidence (1) that there was a failure to disclose information about the risks that a reasonable medical practitioner of the same school and same or similar community under the same or similar circumstances would have disclosed; (2) causation; and (3) damages.

12 425 S.W. 2d 342 (Tex. 1968).
The corporate entity apparently made various kinds of lenses and the optometrists, engaged as a partnership, did the fitting and selling to the individual consumer or ultimate purchaser. It is interesting to note that the charge to the patient is for the product, i.e., the lenses, and not for the time of the optometrist, although, as the court observed, the acts of filling the prescription and fitting the lenses are an art with many variables and call for the exercise of judgment by the practitioner. The trial court rendered judgment against the optometrist who prescribed and fitted and sold the contact lenses, but in favor of Texas State Optical, Inc. The court of civil appeals reversed the trial court and the supreme court affirmed. The supreme court said: "[W]e agree with respondents that the issues found favorably to the Petitioner did not submit the theory of implied contractual warranty." I am not clear as to why this was so, but in any event the court held that an optometrist who failed to supply suitable contact lenses could not be held strictly liable either on a warranty theory or on a tort theory. In concluding that strict liability was inapplicable the court did not deny the existence of a sale by the optometrist to the ultimate consumer, but rather concluded that if the injury flowed from a miscarriage in the practice or process of practicing optometry as defined in the statutes as to be distinguished from a miscarriage in the process of making the contact lenses, then there would be no strict liability even if the corporation and the partnership were regarded as one. The court said: "Apart, then, from Respondents [sic] way of practicing optometry, the fact remains that the contact lenses sold to Petitioner were designed in the light of his particular physical requirements and to meet his particular needs. . . . They were not a finished product offered to the general public in the regular channels of trade. The considerations supporting the rule of strict liability are not present." This is a difficult problem and I cannot conclude on such brief consideration as I have given it that the result should be any different, but I do raise two questions.

While the sale was made prior to the effective date of the Uniform Commercial Code, I never cease to marvel that virtually all of our courts seem to disregard completely the Uniform Commercial Code when considering whether or not to grant relief on a theory of breach of warranty for physical harm,1 and while I do not think that the Code was meant to be the exclusive source (and this is arguable) for ascertaining the liability of a seller for breach of a warranty, it is a source of liability in the form of legislation which the courts must follow unless declared to be unconstitutional. I would also suggest that the result in this particular case, if doubtful, should be the result that would be produced by the Uniform Commercial Code. The Code specifically provides not only for a warranty of merchantability, but also a warranty of fitness for a particular purpose.2

1969] TORTS 7

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1Id. at 344.
2Id. at 346.
3No doubt lawyers, in presenting these cases to the courts, often ignore the provisions of the Uniform Commercial Code and this necessarily means that the court does also.
4Uniform Commercial Code § 2-315. The provision is as follows: "Where the seller at the time of contracting has reason to know any particular purpose for which goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there
While the warranty of merchantability contemplates, it seems to me, the sale of numerous specific products of like kind to the general public, I do not believe this is so as regards the warranty of fitness for a particular purpose. Since the consumer in this case was purchasing a product for his personal use and was relying on the seller to provide a product that was fit for his use, why does not the warranty of fitness for a particular purpose apply?

In the second place, the supreme court said: "The considerations supporting the rule of strict liability do not apply." As to this reason, I am much more sympathetic but unconvinced. What are the considerations that support a strict liability question? At least three separate and distinct reasons underlie the general proposition that a maker should be subject to at least some liability for physical harm resulting from dangerous conditions of products without regard to either fault or privity of contract.

First, the consumer, it is said, is entitled to assume that the product is what it purports to be, and if harm results from the fact that his expectations were frustrated, he should be able to recover. Furthermore, he should be able to recover directly against the maker because he is realistically dealing with the maker who normally markets under a tradename and advertises nationally. Second, liability without proof of negligence on the part of the maker is calculated to reduce the incidence of harm resulting from unfit and unsafe products. And third, it is argued that the maker-enterpriser has the capacity, or at least normally has the capacity, to accept this kind of legal responsibility without hardship because of his capacity to distribute as a cost of doing business the losses of the few to the many who purchase his products.

It is true that the expectations of a purchaser of professional services, such as those of a physician or a lawyer, are certainly not of the same order as the expectations of the purchaser of most products. The medical doctor does not hold himself out as being able to effect a cure of a particular individual nor does a lawyer hold himself out as being able to win a case. But I am not so sure that this should be true when the service performed is in connection with the making of a product to fit the needs of a particular individual. The operator of a restaurant who prepares food for consumption is now generally liable for harm resulting from unwholesome food, whether or not the impurity occurred in the course of the preparation or in the raw food purchased by the restaurant. However, it must be said that the food is not prepared to meet any particular conditions of the consumer.

The most important reason for the imposition of strict liability on the maker of goods is the fact that goods are made and distributed for the

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is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose." (Emphasis added.)

17 As to warranty of merchantability, it seems that a product sold generally is fit for the purposes for which it is made if it is in general suitable.

18 Barbee v. Rogers, 423 S.W.2d 342, 346 (Tex. 1968).

most part by those who can absorb miscarriages in the process as a cost of doing business. The fact that the product sold must per se be altered to meet the needs of each purchaser does not necessarily mean that those who currently engage in this task should not be dealt with in the same way. The supreme court itself noted that the defendants operated with a multitude of offices throughout the state and on a statewide basis with statewide advertising. No doubt, however, the incidence of harm from miscarriage is greater when the product is of the type that must be altered by technically and highly trained persons to meet the need of each individual than would be the case of products sold for use generally. If this be so, the imposition of strict liability may very well be more questionable. But can it not be argued that if the incidence of harm is greater, then the argument for strict liability is also greater, especially in view of the fact that contact lenses are not necessities? I would observe in conclusion that the expectations of those purchasing contact lenses are not unlike the expectations of those purchasing drugs, automobiles, and other products, especially in the light of the way the defendant operated. In the making of those products, the services of professionals and technically trained persons are also required, but the maker is not excused simply because professional skills were required in the development of the product.

Builder-Vendors. The opinion of the supreme court in Humber v. Morton is somewhat of a landmark case insofar as Texas law is concerned. For various reasons, the home building business has vastly increased during the past twenty years and those engaged in it are not unlike the makers and purveyors of consumer goods generally. These changes in conditions and marketing practices led the supreme court to say through Justice Norvell that "the caveat emptor rule as applied to new houses is an anachronism patently out of harmony with modern home-buying practices." In Humber the new home which was purchased from the builder-owner was partially burned the first time a fire was lighted in the fireplace. It was contended by the builder that the fireplace was constructed by an independent contractor, and, furthermore, that the doctrine of caveat emptor was applicable. The supreme court reversed a summary judgment for the defendant and remanded the case for trial on the principle that the builder-vendor warrants that the house is constructed in a good, workmanlike manner, and is suitable for human habitation. This is in line with the general trend, and the court reviewed a number of recent cases in other jurisdictions. The holding has two aspects. First, the seller of the new house becomes liable for any defect arising out of negligence on the part of anyone. I do not regard this as a form of liability without fault but rather a type of vicarious liability for the negligence of independent contractors as well as servants. Second, the builder-owner warrants that the house is fit for human habitation. This subjects the seller to liability for harm resulting from defects attributable to products used as well as from negligence of

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20426 S.W.2d 554 (Tex. 1968).
21 Id. at 562 (emphasis added).
those involved in the construction so long as the defect made the house unfit for human habitation. I suppose, furthermore, that a defect that makes the house “unreasonably dangerous” to live in is a defect that makes the house “unfit for human habitation.” Thus, if a water heater explodes, the builder probably would be subject to liability without regard to whether the explosion was due to negligence in installation or to some defective condition of the water heater, and without the necessity for any evidence as to why it exploded so long as it was not due to any negligence on the part of the user.

III. OWNERS AND OCCUPIERS OF LAND

Open and Obvious Dangers. Several cases were decided during the year involving the much discussed and quite complex subject of injuries resulting from open and obvious dangers on land. One of the more questionable results was that finally reached by a majority of the supreme court in Greenwood v. Lowe Chemical Co. Decedent was an employee of an independent contractor when injured on the defendant’s premises. The defendant manufactured and regenerated chemicals and acid, and in the conduct of its business maintained open pits, containing hot water from which steam emitted from time to time, and containing corrosive elements. There were allegations to support the position that the defendant was negligent in failing to provide any kind of protective devices around the open vats, such as a fence or a rail or some kind of a covering. While Judge Barron indicated in the majority opinion of the court of civil appeals that there might be an issue of fact as to whether or not the decedent and his employer had actual knowledge of the condition and full appreciation of the danger, they probably did have such knowledge as a matter of law. But of significance is the fact that whereas deceased deliberately chose to work under these dangerous circumstances, he inadvertently stepped into the dangerous condition. As Judge Barron stated: “At the time and place in question the decedent was required to work where he did under his employer’s contract with Lowe Chemical Co. To quit his job would have been an unreasonable requirement. The facts show that he thought he could work in safety. But when he lost his balance he backed into the open vat unintentionally and received a fatal injury.”

In my opinion, the case was, as Judge Barron indicated, distinguishable from Halepeska even if one chooses to agree with Halepeska, which I do not. It was more like Walgreen-Texas Co. v. Shivers which has never been expressly overruled by the supreme court. However, it is probably in conflict with the full implication of Delhi-Taylor Oil Co. v. Henry if deceased’s employer was made fully aware of the danger, as it appears that

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22 433 S.W.2d 695 (Tex. 1968), reversing the court of civil appeals. That opinion is reported in 428 S.W.2d 338 (Tex. Civ. App. 1968).
25 137 Tex. 493, 154 S.W.2d 627 (1941).
26 416 S.W.2d 390 (Tex. 1967).
he was. As was observed last year, Delbi may have the effect of giving less protection to an employee of an independent contractor than an ordinary invitee or customer of an occupier enjoys, particularly if we construe Halepeska to require that at the time of the damaging event the injured party must have deliberately encountered the condition with full appreciation of the danger. Greenwood illustrates both the harshness of the absolute “no duty” rule of Halepeska as well as the limited duty rule of Delbi. It is submitted that an occupier of land should have the duty to take such precautions as a reasonable man would take to prevent harm from dangerous conditions on his premises, latent or obvious, unless there is some justification for a distrust of the jury to deal with problems involving open and obvious dangers. Under this approach, sometimes the giving of notice to an employee’s independent contractor would satisfy ordinary care requirements, but at other times, such as this, notice would not satisfy the ordinary person’s ethical or moral sense when at a slightly greater expense the occupier could provide a reasonably safe place.

Application for writ of error has been filed in the supreme court in another case of an injury from an open and obvious danger involving a liability of the holder of an easement, Howard v. Jackson Electric Co-operative, Inc.28 Plaintiff was the employee of a driller who had leased the land for the purpose of storing, parking, and repairing drilling equipment. The defendant maintained a high-voltage line across the property. The plaintiff received an electric shock while repairing a truck attached to a drilling rig which apparently came into contact with the electric wire. The defendant received judgment in the trial court on a motion for summary judgment, and this was affirmed by the court on the theory that the defenses of no duty and volenti non fit injuria were applicable. This result seems questionable. The majority rule of Halepeska applies to a situation when the relationship between the injured party and the defendant was consensual in character. For the doctrine to apply as it has been construed, the defendant should be in a position to deny to the intruder the privilege of coming on, and the easement holder is in no such position. The supreme court has already held that as against a landlord a tenant does not assume the risk of dangerous conditions arising after a lease is executed for the reason stated above. Since I do not subscribe to Halepeska, naturally I do not subscribe to this extension.

Freitas v. Twin City Fisherman’s Cooperative Ass’n29 involves a problem that constitutes another area of uncertainty as regards the “no duty” rule about open and obvious dangers. It has been said in a number of cases that the perception of some danger from a particular condition on the part of the plaintiff does not necessarily preclude his recovery. There must be appreciation of the occurrence of the kind of accident that resulted in the plaintiff’s harm. In this case, the plaintiff was an employee of a transport company. The defendants were the Gulf Oil Corporation and a fishermen’s

27 Keeton, Torts, Annual Survey of Texas Law, 22 Sw. L.J. 4, 8-10 (1968).
28 410 S.W.2d 689 (Tex. Civ. App. 1968), error ref. n.r.e.
29 430 S.W.2d 579 (Tex. Civ. App. 1968), error ref. n.r.e.
cooperative who were jointly in control and occupancy of some storage facilities for fuel oil. The defendant Gulf supplied the fuel oil to Fisherman's pursuant to a contract, and the plaintiff was injured in the course of delivery of the fuel oil to the storage facilities. The alleged negligence of defendants consisted in the supplying and use of a ladder for the storage tank without attaching the ladder either to the tank or to the ground, a circumstance as to which plaintiff seemed to be aware at and before the time he undertook to make use of the ladder. While plaintiff was descending from the tank, the ladder lurched to the right side, throwing plaintiff off and down to the ground. At the close of the evidence, the trial judge instructed the jury to return a verdict for defendants. However, the court of civil appeals remanded, saying: "[W]e think we should say that we have given much consideration to the opinion of the Supreme Court in the Halepeska case, and its opinions thereafter dealing with the 'no duty' situations." The court then quoted from Ellis v. Moore, seemingly on the point that plaintiff must have appreciated the particular danger involved and concluded that there was an issue of fact for the jury. While I am in sympathy with the result, if the plaintiff was aware of the unattached condition of the ladder, then it would seem that if Halepeska is sound, he should be charged as a matter of law with the appreciation of enough of the danger of ladder slippage for the application of the doctrine to the kind of occurrence in which the plaintiff was injured.

Slipping and Falling. Decisions related to the sufficiency of the evidence to satisfy the substantive requirements of tort law for liability and the reasonableness of the jury's evaluation of particular conduct are often of more importance as to the extent of liability than are the substantive rules themselves. When an invitee on land slips and falls because of an alleged dangerous condition produced by a foreign substance at the place in question, the substantive law related to liability is clear. In the absence of appreciation of the danger by the plaintiff, the occupier is subject to liability for any negligence in permitting such condition to obtain. Moreover, negligence is present if the occupier knew, or should have known in the exercise of ordinary care, of the presence of the foreign substance in time by the exercise of ordinary care to have eliminated the danger. Negligence is also present if he did something from which a reasonable man would perceive the likelihood of causing a foreign substance like that in issue to be at the place where the fall occurred. In perhaps most situations where an invitee slips and falls at a dangerous place due to the presence of a foreign substance, no evidence can be produced as to how long the foreign substance was there. Consequently, the question as to when inferences can be indulged from other facts is of utmost importance. In Weingarten v. Razey the defendant exposed potted flowers and shrubs for sale in a border along a covered concrete walkway in front of the main store. Some of

28 Id. at 583.
29 401 S.W.2d 789 (Tex. 1966).
30 426 S.W.2d 538 (Tex. 1968).
the plants were under a covered porch and some outside, but, in any event, the roof was of a height that permitted falling rain to be swept by air currents so as to fall upon the plants and the containers. There was a heavy downpour of rain preceding and at about the time of the plaintiff's appearance at the store. She fell in the aisle on the concrete and was injured. The jury found that there was mud and silt at the time and place where plaintiff fell, and that it came from the potted plants, and the supreme court concluded that the evidence was sufficient to justify such findings. However, the court concluded that there was no evidence to justify the further finding of negligence because "there is no evidence of any kind that petitioner realized, or should have realized, that the display of nursery plants in the way they were displayed involved an unreasonable risk or hazard to its invitees. Neither is there any evidence that petitioner knew the silt and mud was on the walkway prior to the fall of respondent. Nor was there evidence that the substance had been on the walkway such a length of time that the petitioner should have discovered it."

The court of civil appeals had concluded that the defendant ought to have from common knowledge perceived such danger as occurred, but this was questioned by the supreme court because of the lack of evidence as to the exact manner in which the plants were displayed. But if the mud and silt came from the plants, as the jury found, it can easily be argued that this is a res ipsa loquitur situation calling for an explanation on the part of the defendant. The case is quite different from that of a foreign substance attributable to the conduct of a third party.

Plaintiff met with a like fate in Carrell v. Williams. There, she fell on a sloping asphalt surface in the parking lot adjoining a shopping center. Plaintiff's evidence was that she slipped on a spot of oil or grease on the slope. The jury found the defendant to have been negligent on two grounds: Failure to provide ramps or other special walkways, and failure to discover and eliminate the slick condition. The court of civil appeals concluded that there was insufficient evidence to support either finding, and reversed and rendered for the defendant. As to the failure to provide a ramp or other special walkways (and I shall limit my comments on this case to this point), it is at least arguable that the only question was as to the reasonableness of the jury's evaluation of the conduct of the defendant in constructing the parkway in a sloping fashion without precautionary measures being taken to guard against slipping on oil or grease, substances that are quite likely to be in parking lots. This is not a question as to the sufficiency of the evidence unless the dangers involved and the burdens of eliminating such cannot be evaluated without expert evidence. The reasons given for concluding that the jury finding was unsupportable were that plaintiff had shown no statutory duty and "we know of no such common law duty. Moreover, the absence of any ramp or special walkway up the slight incline was open and obvious to the plaintiff." In
the first place, the use of the term "no duty" to mean that the defendant did not breach a duty of ordinary care, i.e., to mean that he was not negligent as a matter of law, is misleading and erroneous. The defendant certainly had the duty to take such precautions as a reasonable man would take to construct the parking lot in such a way as to avoid injuries to patrons. There is no duty problem here; nor is there a problem as to the sufficiency of the evidence. If a court believes that the jury acted unreasonably in concluding that given conduct was negligent, then the court should say so. The fact that the failure to have a ramp was open and obvious does not mean that there is an insufficiency of the evidence to show negligence. It relates to the "no duty" rule of Halepeska, but is by no means conclusive in this case, because the danger of slipping on grease was not necessarily open and obvious to this plaintiff on this particular occasion.

Licensees and Invitees. The line of distinction between licensees and invitees has never been very carefully drawn by most courts, and the same can be said in Texas. It is usually said that an invitee is one who comes on land with the express or implied invitation of the occupier and for a purpose involving some tangible or economic benefit. I have always maintained that a better description of the result of most cases is that an invitee is a business guest and a business guest is one who comes on with the consent, actual or apparent, of the occupier and under circumstances when the consent can be regarded as having been given for business reasons and not simply as an accommodation. Thus, the almost impossible distinction between "invitation" and "consent" is avoided. Moreover, the particular intrusion may be of indirect benefit to the occupier. It is enough that the occupier concludes that it is to his economic or business advantage to permit the intrusion on the occasion in question. If the latter is his motive, then the intruder is not a "donee" and is not in the position of being simply accommodated. It appears that the notion that there must be both an invitation and an intrusion of a kind that is directly beneficial to the occupier caused a majority of the supreme court to reach a questionable result in Olivier v. Snowden. In that case, an employee of a general contractor was injured while using a scaffold of a subcontractor. The jury found negligence on the part of the subcontractor in the use of a one-inch thick board on the scaffold. As regards the use of scaffolding owned by one contractor by the employees of another contractor, it is undisputed that such usage prevails in construction work of the character involved, and the evidence set forth in the opinion seems to be rather convincing that this custom was based on economic and practical grounds. The court said that since the facts were not in dispute, the question as to the status of the injured party was purely a question of law. While this may be true as to the particular facts in this case, it is certainly not always so. Under the various definitions of trespassers, licensees, and invitees,
there is often an issue for the jury in the application of the definition to admitted facts. Whether under the admitted and undisputed facts, one would infer that the occupier had or had not consented to this kind of intrusion is often debatable and reasonable men could disagree. Moreover, if an invitation is considered to be necessary in order for a person to have the status of a so-called invitee, it is often debatable whether under the undisputed facts the case is one of an implied invitation or merely bare permission.

After concluding that the issue was purely one of law, the majority said that "the evidence shows at most that Snowden was using and occupying the scaffold by acquiescence and not by invitation. Permission is not sufficient to turn the scale in favor of Snowden's status being that of an invitee. . . . The true test to be applied in the present case is whether the owner of a scaffold receives benefit or advantage from the permitted use by another of that particular piece of equipment, in this case a scaffold." 38

Four judges in an opinion of Justice Greenhill dissented on the ground that the custom among contractors of permitting the use of each other's scaffolds was based on sound business reasons, and thus "the consent or implied invitation under these circumstances would be given for business reasons and not merely to accommodate the other contractor or his employees who use the scaffold." 39

The fact that no benefit was calculated to flow from the particular intrusion was regarded as immaterial. Moreover, the court observed that the benefit need not be direct or certain so long as there is a mutual interest or business reason involved. With this I agree.

The small boy who accompanies his mother to the grocery store and is tolerated in the store by the occupier is a business guest; likewise, those who come on to an occupier's premises to use a restroom that is designed for public use are generally regarded as business guests even though they come on for no other purpose. It is submitted that the dissent reaches a result that is more in accord with the justification, if any, for the difference in the protection accorded to licensees and invitees.

IV. Medical Evidence—Causal Relation Between Physical Condition and a Particular Event

Often, plaintiff seeks recovery for physical harm or illness as a part of his damage arising out of a particular event proximately caused by the defendant's negligence when it cannot be said with certainty that the particular harm or illness from which plaintiff was suffering actually resulted from the event. Thus, when plaintiff suffers a miscarriage or a heart attack shortly after a frightful experience, it does not follow that the frightful experience produced the miscarriage or the heart attack. There are several different questions to be answered in such a situation. They include at least the following: (1) What is to be the test for the sufficiency of the evidence to support a jury finding of causal connection between the

38 Id. at 550, 552.
39 Id. at 553.
admitted harm and the event which was proximately caused by the defendant's negligence? (2) What should the trial judge's charge include, if anything, when the evidence is sufficient to justify such a connection but when a finding either way would be supportable, and in our special issues system, how and when is the question to be answered? (3) Finally, in what terms may a medical witness be allowed to testify?

Some of these questions are raised in Otis Elevator Co. v. Wood. Mrs. Wood, an employee in a department store, suffered a heart attack when she went to the rescue of a small child in apparent danger at the second-floor landing of a "down" escalator that led to the first floor. When she reached the escalator, she leaned over the moving handrail. As she did so, her body came into contact with the moving handrail, and it pulled her in the direction of the first floor and into an opening between the escalator and the balcony railing. Negligence on the part of the defendant, the supplier and designer of the escalator in the building, was found by the jury.

The court, as would no doubt most courts, adopted as a test for the sufficiency of the evidence to go to the jury on the issue of causal relation between the occurrence on the escalator and the heart attack, "whether the accident at the escalator did, in reasonable medical probability," cause the heart attack. I have never been certain what courts mean by "reasonable probability." The question is one of what the affinity of causal likelihood must be. I suppose it is clear that the jury must, in the final analysis, believe that the occurrence at the escalator did cause the heart attack in order to include such as part of the damages—and it was on the special issue as to damages that this causation problem was treated—and one cannot actually believe that the occurrence did cause the heart attack unless in his own mind he is of the opinion that the balance of probabilities are in favor of such, i.e., unless he thinks the chances are better than fifty-fifty. Moreover, I assume that if this is so there must be evidence in the record which, if believed, would justify a reasonable man in concluding that the balance of probabilities was in favor of such.

In this case, the court made a significant distinction, and it is submitted a sound distinction, between the test to be used for ascertaining the sufficiency of the evidence for a jury finding of causal relation, and the test for determining the admissibility of medical testimony as to probabilities or possibilities of causal relation. In the case a doctor was allowed to testify that in his opinion the heart attack could have been caused by the escalator experience. There has been some feeling that the medical witness should be required to testify in terms of reasonable probabilities, but requiring an expert to testify only in terms of "reasonable probability" may prevent the plaintiff from demonstrating, according to the court, that under all the expert's testimony there was actually a "reasonable probability." I would go even further than the court and say that where an event follows another event and there is only one explanation of how the last event happened, the mere fact that the expert chooses to speak of the first event

as being something that *could* or might have caused the second does not mean that a reasonable man could not believe that it was more likely than not. As the court suggests, all the evidence should be looked to at the close of the taking of testimony before passing on the sufficiency of the evidence to go to the jury, but experts should be allowed to testify in such terms as they choose as regards what could have been the cause for a particular injury from which the plaintiff is suffering.