Part I: Private Law - Torts

Page Keeton
I. OWNERS AND OCCUPIERS OF LAND

Employees of Independent Contractors. When an employee of an independent contractor is on the premises pursuant to the performance of a construction contract between the contractor and the occupier of the land, the employee is generally regarded, as indeed he should be, as an invitee or business guest of the occupier of the land. In general, therefore, the occupier's duty of care to the employee of an independent contractor is much the same as that to any other invitee, with the exception that under Delhi-Taylor Oil Co. v. Henry an adequate warning to an independent contractor of any dangers likely to be encountered discharges, as a matter of law, the occupier's duty to the contractor's employees. By law, the duty and responsibility for protecting employees of an independent contractor in such circumstances is solely that of his employer. Some doubt about the soundness of this rule was raised in my report of 1967, but arguably it can be justified on the notion that if the parties had considered the question they would have agreed that the occupier should thereby be relieved of all responsibility. If so, it can be regarded as an instance of an implied contractual delegation of a duty of care. It does not follow that such a contract, expressly or impliedly made, should be enforceable, but normally it is enforceable, as between the parties, so long as they are on an equality as to bargaining position. Whether or not it should also be enforceable as to third persons depends largely on policy questions related to whether the delegation of duty is to the kind of person that can and will provide adequate protection to third persons. It can also be argued that such a delegation should be disallowed because recovery pursuant to the Texas Workmen's Compensation Act is inadequate.

It has commonly been held that one who contracts to repair a particular condition on land assumes the risk of all dangers of that condition, known or unknown. The language of assumption of risk as applied to this principle is not very helpful. In a manner of speaking one assumes the risks of all kinds of accidents for which he cannot recover, but the defenses of assumption of the risk and volenti non fit injuria are used with a narrow meaning. The nonrecovery principle here involved would seem to be based on the notion that by implication this is what the parties to the contract intended, and, even though the repairman carried out the repair contract

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* B.A., LL.B., University of Texas; S.J.D., Harvard University. Dean, The University of Texas School of Law.
1 416 S.W.2d 390 (Tex. 1967).
2 Keeton, Torts, Annual Survey of Texas Law, 22 Sw. L.J. 4, 8-10 (1968).
through employees, the duty and responsibility to such employees is that of the employer. This is in reality another exception to the notion that the employee is to be treated like all other invitees. It is an example of an agreement implied in fact or an understanding that the contractor and not the occupier is to be responsible.

The supreme court was faced with a hard question in *City of Beaumont v. Graham*. In that case, an employee of an independent contractor was killed when he fell from the top of the city’s water storage tank while engaged in sandblasting on the interior of the tank. The fall occurred because the wall of the city’s water tank collapsed when one of the brackets being used by the victim pulled out. Apparently, the contractor was to make certain specific repairs, and the repairs that were to be made did not include the particular condition that brought about the damaging event. The court, in holding the city liable on the basis of jury findings of negligence on the part of the city in failing to make a proper inspection of the bracket assemblies prior to the commencement of the sandblasting, said: “In the absence of a contractual provision for complete general repair . . . or requiring Texas Tower to replace the bracket assemblies, we are unwilling to hold, as a matter of law, that the contract required Texas Tower to replace such assemblies and to repair the corroded tank wall beneath such assemblies.”

It would seem that the question of whether the city had a duty of inspection is simply a question of ascertaining the intention of the parties from the terms of the contract and other circumstances. If the work that a contractor was employed to do involves risks and dangers from conditions other than those that the contractor was employed to repair, and if the contract is silent about who should inspect, it would seem that the duty of inspection should be on that person to whom the parties would have allocated this responsibility, if they had adverted to the question. Contracts are generally interpreted to mean not only what the parties obviously intended from what was expressed, but also what the parties would probably have intended if the matter under consideration had not been overlooked. The issue would seem to be, as the city argued, whether the contract relieved the city of its duty. The fact that the condition that brought about the injury was not one of those to be repaired is not in itself a controlling factor. Except for the weak argument that the Texas Workmen’s Compensation Act provides inadequate recovery for employees, the probable intention of the contracting parties should control. On this issue, the fact question of importance would seem to be who commonly assumes this responsibility. Perhaps, after this case, municipal contracts will be more specific in providing for inspection by repairmen as to those conditions on the premises the safety of which is important because of their intimate connection with the work to be performed.

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4 441 S.W.2d 829 (Tex. 1969).
Open and Obvious Conditions. The complications attendant upon the trial of slip and fall cases continue to occupy a great deal of court time. In *El Rancho Restaurants v. Garfield* the plaintiff was tripped, or was caused to fall, by a serving tray stand at a restaurant. The defendant pleaded a general denial, failure to keep a proper lookout, and unavoidable accident, but neither party requested an issue on the open and obvious nature of the condition and no such issue was submitted. In affirming a judgment of the trial court for the plaintiff, the court of civil appeals said:

Neither plaintiffs nor defendant requested any issues on open and obvious. It is our opinion that the defendant was obligated to plead the defense of 'no duty—open and obvious' and having failed to do so it cannot complain of the court's action in failing to submit any issues thereon. We think such issues are in the nature of inferential rebuttal issues and should be specially pleaded.7

While the position that the defendant should be required to plead, prove and request an issue on the notion that one who elects to encounter a known and appreciated danger cannot recover is supportable, an affirmative finding that such an election was made does not in my judgment inferentially rebut anything. There is nothing inconsistent about a finding that an occupier failed to exercise ordinary care in the maintenance of an obvious danger and a finding that the plaintiff encountered the danger knowingly. While the plaintiff must plead the necessary facts and request issues to establish a breach of duty in most negligence causes, the supreme court has repeatedly referred to *Halepeska v. Callihan Interests* as establishing a "no duty" rule. If the policy should be to place the burden of persuasion on the defendant, then I submit this should not be one of the "no duty" rules, but rather an affirmative defense. Since the doctrine that one who elects to encounter a known and appreciated danger can not recover is in my judgment unsound, I do believe that the placing of the burden of requesting an issue and of persuasion should be on the defendant, but I submit that it cannot be justified as an inferential rebuttal issue.

Under *Halepeska* and its progeny the only issues for the jury as to the "no duty" obvious danger rule are whether plaintiff (1) actually knew of the condition, and (2) actually appreciated the danger. The mere fact that a condition is so obvious that anyone looking where he was going or keeping a proper lookout would see it and appreciate the danger is clearly not the test. If a plaintiff deliberately encounters an appreciated danger, however, then there is no recovery. But in *Williams v. Firestone Stores* a passenger in a car was denied recovery on the theory of *Halepeska* simply because the driver of the car unintentionally drove into a concrete pillar at a parking lot when he was blinded by the late evening sun. In the first place, even if the driver had been the plaintiff, *Halepeska* is not controlling unless it could be said that the driver had prior awareness of the danger and that the "no duty" rule applies even when the danger is not, under

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7 440 S.W.2d 873 (Tex. Civ. App.—San Antonio 1969), error ref. n.r.e. (emphasis added).
8 Id. at 878.
9 371 S.W.2d 368 (Tex. 1963).
those circumstances, deliberately encountered. In the second place, the passenger did not encounter the danger; it was the passenger’s driver. This was certainly an example of an “open and obvious danger” in an objective sense, and in the sense that one who was watching where he was going would ordinarily see the condition and would ordinarily appreciate its danger. Moreover, if the occupier’s duty is limited to providing the invitee with the same knowledge of danger as he has, then the occupier’s duty is satisfied. But this is not Halepeska. I would argue that if there is to be a “no duty” rule as to open and obvious dangers, it ought to apply to such a case as Williams because of the complexities of the present rule which undertakes to deal with the circumstances at the time and place of the damaging event. But even so this is an example of which there are numerous ones to illustrate the unsoundness of any “no duty” rule based on testimony related to whether or not the plaintiff saw and appreciated an obvious danger. The only issues should be those of negligence and contributory negligence, or the “no duty” rule should be based on a completely objective test.

Since Halepeska, the supreme court has always recognized the notion that a danger could be so open and obvious that the law would charge the plaintiff-user of the condition with knowledge of the condition and appreciation of the danger. This is another rule relating to the trial of slip and fall cases that is difficult of application to specific situations. In Thomas v. Bateson Co. the trial court granted a motion of the defendant for an instructed verdict after plaintiffs, in a wrongful death action, had introduced evidence to show that the deceased had fallen to his death while operating a cement buggy. The court of civil appeals concluded that the condition was not so open and obvious that any fool could plainly see. Under the evidence as set forth in the opinion, the position seems quite reasonable. Moreover, it does seem to me clearly inefficient and unsound for a trial judge to instruct a verdict after all the evidence has been introduced by both litigants. He should permit the case to go to the jury and then enter a judgment notwithstanding the verdict if he feels called upon to do so; thereby the necessity for a new trial or perhaps compromise settlement will be avoided in case his action is deemed by the appellate court to be error.

Licensees. Last year the Supreme Court of California11 overruled the distinctions as to the duty of care owed to licensees and invitees and concluded that the same rules should apply to all persons coming on land (i.e., with the consent or privilege by law, and perhaps even to trespassers) as are now applicable to invitees. This position avoids two difficult questions: First, the close question that often arises as to whether a person is a licensee or an invitee; and second, the question of the occupier’s duty of care to licensees, who stand somewhere in between trespassers and invitees. Two

10 437 S.W.2d 386 (Tex. Civ. App.—Dallas 1969), error ref. n.r.e.
cases decided by different courts of civil appeals are worth noting as regards this subject.

In *Olivier v. Snowden,* a case commented on last year, the supreme court apparently held, with four judges dissenting, that in order for a person to be an invitee his intrusion must be both by invitation of the occupier and of a kind that is beneficial to the occupier. The latter requirement seems always to have been necessary in Texas, and so a social guest who comes on the occupier’s land, even by invitation, is only a licensee and treated no differently from a naked trespasser or a bare licensee, i.e., one who comes on by sufferance. This was held to be so in *Weeks v. Kelley,* involving a social guest at a Christmas party. In the other case, *Mendez v. Knights of Columbus Hall,* the court of civil appeals affirmed the trial judge’s grant of a summary judgment for the defendant on the theory that the plaintiff was a mere licensee, thereby denying recovery to the plaintiff who was granted free admission because she was the wife of a member of a band that was playing for a dance. There was some evidence that it was customary to permit wives of band members to enter dance halls free. It was not a case of a plaintiff who had been invited, but some of the evidence would at least indicate that she was as much of a business guest as a child accompanying his mother to a grocery store. Nevertheless, the grant of the summary judgment was affirmed with one judge dissenting. It would seem to me that, as was suggested by the dissenting opinion in *Olivier v. Snowden,* an issue of fact was presented as to whether the occupier consented for business reasons or simply to accommodate the wife, and that if the former were true, an invitation should be regarded as unnecessary and immaterial.

The two cases also demonstrate that the law of Texas as to the exact nature of the duty of care of a licensee has not been clearly articulated, as is true in many jurisdictions. In both cases the plaintiff was injured when proceeding from one level to another level. Buildings and homes constructed with two levels and without warnings as to changes in such levels are often the source of falls. In dealing with the occupier’s duty of care, the vast majority of courts have distinguished between two general types of situations; damaging events resulting from dangerous conditions, and damaging events resulting from forces in motion or dangerous activities. As to the latter, ordinary negligence suffices in most jurisdictions just as it does for recovery on the part of an invitee, although this is not clear in Texas. As to the former, there is much confusion and too many efforts at making nice and complicated distinctions. The two cases illustrate this. The majority opinion in the dance hall case concluded that the licensee was in the same deplorable condition as a trespasser and thus had no recourse in the absence of recklessness. The court in the Christmas party situation recognized that a licensee might recover for “active negligence” in the maintenance of a dangerous condition and perhaps for “traps,” but

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12 426 S.W.2d 545 (Tex. 1968).
13 433 S.W.2d 769 (Tex. Civ. App.—Eastland 1968), error ref. n.r.e.
concluded that neither existed as a matter of law. Under the Restatement of Torts a simpler rule has been adopted. The licensee can recover for ordinary negligence in the maintenance of a known dangerous condition which is not likely to be discovered by the licensee. It would seem to be desirable for the supreme court to accept a case involving the duty of care to licensees and clarify the Texas law. One solution would be to eliminate the distinction between licensees and invitees. Another would be to state whether or not the licensee is to be treated as a trespasser and, if not, to adopt the Restatement rule. There is merit in Judge Cadena's observation in the dance hall case that even a legal outcast, like the mere licensee, is entitled to be warned of the existence of such a condition as an unexpected change of levels.

II. PRODUCTS LIABILITY

As the author has heretofore observed, the assault on fault and the assault on privity of contract as a basis for recovery against a manufacturer or other purveyor of products is almost complete in Texas by virtue of a decision rendered last year by the supreme court in Darryl v. Ford Motor Co. Plaintiffs in this case were man and wife, driver and passenger respectively, in a car which was struck from behind by a Ford truck driven by one of the defendants. The Ford truck had only been driven between 600 and 700 miles at the time of the collision, and it was undisputed that following the collision the push rod which connects the brake pedal to the master cylinder was bent. The jury found that (1) the push rod bent under pressure placed by the driver on the brake pedal, and (2) the brakes failed suddenly and unexpectedly when the driver stepped on the brake pedal. The supreme court in an opinion by Justice McGee extended the ambit of responsibility on the theory of strict liability to passengers in the non-defective car as well as passengers and users of the defective car. This extension of strict liability to persons other than those who are users or consumers is a logical one when liability for physical harm is based on a tort rather than a warranty theory. Courts approaching this problem on the theory of an implied warranty have tended to restrict liability to a purchaser or user on the theory that such a person is at least in the distributive chain, and these courts have argued that marketing privity can justifiably be disregarded simply because the ultimate purchaser is realistically dealing with the manufacturer and relying upon him. The purpose or objective is to prevent a frustration of the expectations of the purchaser about the product. The holding of the court extending liability to those not in the distributive chain gets away from warranty notions, but it does not necessarily mean that any and everyone who is victimized by defective and unreasonably dangerous products

16 Restatement (Second) of Torts § 342 (1965).
17 440 S.W.2d 610 (Tex. 1969); see Keeton, Products Liability, 3 TRIAL LAW. F. 5, 28 (Sept.-Oct. 1969).
will be able to recover. The ambit of responsibility seemingly ought to be the same as it would be if the defendant had been found to be negligent. This means that liability would extend to all those who would be in the range of apprehension of harm from an accident or damaging event of the kind that was likely to occur from a defect of the nature that was established. Stated another way, the maker or other purveyor would be liable to those to whom harm was reasonably foreseeable by a person with knowledge of the defect.

There would now seem to be no advantage to the plaintiff to seek recovery on a negligence theory. Moreover, a trial judge would not seem to be justified in complicating a lawsuit by trying a case on both strict tort liability and warranty theories and also including a negligence theory as well. This was perceived by Chief Justice Calvert in another opinion involving an injury from a bottle explosion when he said: "In view of our holding that the rule of strict liability is applicable to bottler defendants in this type of case, there would seem to be little, if any, advantage to plaintiffs injured by exploding bottles to continue to plead and submit their cases on res ipsa loquitur." It is submitted, however, that the change-over from a fault system to a non-fault system has not altered in any material way the claimant’s burden as to the nature and sufficiency of the evidence for a prima facie case when the claim is based on the theory of a defect due to a miscarriage in the manufacturing process. Plaintiff must now plead and prove the existence of a defect at the time of sale and a defect of a kind that is unreasonably dangerous. The same kind of circumstantial evidence normally referred to as res ipsa loquitur must be introduced as a basis for inferring the existence of a defect at the time of sale. As a matter of fact the court of civil appeals had concluded in the Ford Motor Co. case that the evidence was insufficient as a matter of law to establish that the braking mechanism was defective at the time of sale, and one judge on the supreme court agreed.

Another supreme court case deserving of mention is Hoover v. Franklin Serum Co., not so much for the holding of the case as for some of the implications. The product involved was an antibiotic serum for animals, and it precipitated the death of plaintiff’s calves. The jury found that the product was unfit for its intended use and further found that the serum was a producing cause of the death of the calves. The court of civil appeals concluded that the trial court had committed reversible error in using the concept “producing cause” rather than “proximate cause” and in failing to include the usual foreseeability requirement as a basis for finding that the defendant’s conduct constituted a proximate cause of the plaintiff’s injury. The supreme court held that for two reasons the element of foreseeability was unnecessary in the charge on causation: First, because the jury had found that the death was not due to an abnormal reaction, i.e., one that was not reasonably foreseeable in an appreciable number of ani-

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20 444 S.W.2d 596 (Tex. 1969).
mals, and thus this reason for nonliability was not present; and second, since the drug was found to have been impure the only issue was whether or not death resulted from the impurity. It is most important to note that the contents of the particular bottle of serum were entirely used, and no chemical analysis could be made; but the evidence was regarded as sufficient, and it would seem proper to infer that this bottle of serum was impure. The exact nature of the impurity could not be known. This being the situation, it would seem that if a jury finds that there was an impurity that caused the death of the calves, and further that the death was not the result of an abreaction, the reaction must be regarded as a matter of law as the kind of reaction that one would ordinarily expect from the kind of impurity that must have existed. No doubt this case will be construed as meaning that if a defect is a factual or producing cause of an injury to a victim there is recovery and the usual limitations on liability for negligence that are subsumed under the label of proximate cause are inapplicable. I would not necessarily say so. Let us assume a charge of dynamite is found to be defective and that it produced a much more violent explosion than normal; let us further assume a loud noise following the explosion that frightened a cow which delivered a fatal kick to the person who was milking her. The kind of accident that is foreseeable from that kind of a defective product would be injury from a concussion or from flying debris and not injury produced by a loud noise. Even if the jury had found negligence pursuant to the res ipsa loquitur doctrine in the serum case, there would have been good reason to argue that liability should follow as a matter of law, because the only reasonable inference is a damaging event of the kind that the defect in question would likely produce. Not so, however, in the dynamite situation. The fact that a manufacturer will not be excused for not knowing of the defect that can foreseeably cause harm does not mean that he should be held liable for a kind of damaging event that would not likely result from a defect of the kind that existed. While the policy questions related to fixing limits to legal liability may not necessarily be the same for both negligence and strict liability theories, they are similar. For example, it does not follow that a new and independent cause, such as an over-prescription of a drug by a doctor, would not be regarded as the sole proximate cause when the theory of recovery is one of strict liability if it would be so when the theory is negligence.

There is another aspect of the serum case, not brought in issue by the litigants, which is most interesting. This has to do with the test given to the jury as to the nature of the condition that would subject the manufacturer to liability. The test submitted was the warranty test of unfitness of the product for its intended use; furthermore, a product was said to be unfit for its intended use when "sold in a defective condition unreasonably dangerous to the user or consumer or to his property, that is to say, dangerous to an extent beyond that which would be contemplated

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21 This principle was set forth in Cudmore v. Richardson-Merrell, Inc., 398 S.W.2d 640 (Tex. Civ. App.—Dallas 1965), error ref. n.r.e.
by the ordinary user with the knowledge available to him as to the characteristics of the product."

I have suggested from time to time that the test for strict liability on a tort theory pursuant to section 402A of the Restatement of Torts is not the same as the test normally articulated on a warranty theory. I submit that a product should be regarded as unreasonably dangerous at the time of sale if the ordinary man, with full knowledge of the risks and dangers actually incident to the use of the particular product in question, would not have marketed the product under the same conditions. This simply means that the same kind of dangerous condition should be required as a basis for strict liability as is required for a finding of negligence; but whereas negligence can be found only if the maker knew, or in the exercise of ordinary care should have known, of the condition and should have perceived the danger, it is only danger in fact that must be established for strict liability. The latter test is much more favorable to the plaintiff as to obvious dangers; the former test could under some circumstances be more favorable as to hidden or unknown risks. As to the particular situation in Hoover, it probably makes no difference. It is possible that the Hoover test could be regarded as applicable when the claim is based on a warranty theory under the Uniform Commercial Code, whereas the other tests would be applicable when the claim is based on a tort theory. As reported year before last, the supreme court in McKisson v. Sales Affiliates, Inc. based liability on tort theory. It must, however, be recognized that the Uniform Commercial Code also contemplates a recovery for physical harm for a breach of warranty of merchantability or fitness for the product’s intended purpose.

Inadequacy of Warnings. The holding of the court of civil appeals in Flanery v. Terry Farris Stores, Inc. is one of many that could be cited for the purpose of illustrating the undesirability of an instructed verdict for the defendant after all the evidence on both sides has been introduced. The submission of the case to the jury, with a judgment n.o.v. if necessary, does not require much more time, and often a new trial is avoided. This is especially true of personal injury litigation, involving as it does so many questions related to the sufficiency of the evidence and to the application of general standards. The suit had been pending in Flanery for six years prior to trial, and now if the decision of the court of civil appeals stands, it must either be retried or settled. Plaintiff, a patron of a department store, was injured when a glass door weighing 200 pounds exploded. Plaintiff predicated his case largely on the theory of negligence of the maker in marketing the door without giving warning to the purchaser of the like-

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82 444 S.W.2d 596, 597 (Tex. 1969).
84 416 S.W.2d 787 (Tex. 1967); Keeton, Torts, Annual Survey of Texas Law, 22 Sw. L.J. 4, 5 (1968).
lihood of such occurring when the surface or edge of that kind of door becomes chipped or damaged to a depth that almost penetrates the compression layer. It is now obvious that the liability of any maker of even a good product can be affected by the failure to supply full information concerning the risks and dangers involved in its use. The evidence set forth in Flanery indicating that some doors were made with a metal frame completely across the top and bottom, in connection with all the other evidence in the case, would seem to have justified the submission of the case to the jury not only on the issue of negligence but also on the theory of strict liability, i.e., marketing a door under conditions that made it an unreasonably dangerous product in the hands of an uninformed user. This case and another case, Muncy v. Magnolia Chemical Co., are illustrations of how difficult it is becoming for the maker of a chemical product such as a drug or pesticide to avoid substantial liability because of some failure to supply full information concerning the risks and dangers involved in the use of the product and how to go about minimizing the extent of the injury when a mishap occurs in the course of the use of the product. In Muncy the plaintiff contracted a rather severe case of dermatitis as a result of being sprayed with an insecticide by a fellow employee while the latter was spraying cattle for lice as plaintiff was moving the cattle into the pens to be sprayed. While there are often both federal and state statutes specifying the precautionary warnings to be given, the court followed the general course of decisions in holding that such statutes and regulations adopted pursuant thereto are only minimum standards for products of like kind. A maker may be found to have been negligent even when in full compliance with all safety legislation of this character. It is obviously not possible to adopt policies and practices that will put all users on actual notice of the dangers involved and all that can be expected is that the maker take such precautions as a reasonable man would take to prevent or mitigate harm to users and those in the vicinity of the use. But the fact that the maker could always say more than he does say leaves him open to an ethical evaluation of his failure to say more. No doubt this is as it should be, but perhaps courts should be more inclined in these cases to hold that compliance with safety standards will normally suffice. In Muncy the court held that the trial judge erred in instructing a verdict for the defendant in view of his failure to include a warning that in case of contact with the skin the affected area should be washed immediately.

It would seem that if the basis for recovery against the maker of a product is the inadequacy of the warnings given, then the plaintiff should be required to show that an adequate warning or instruction would in reasonable probability have prevented the harm. Often this can be inferred from the evidence, but not always. There was no reading of the label by the user or his employer in Muncy, but the court held that the manufacturer could not avoid liability for harm of a kind that the warning would have been designed to guard against. But this violates the generally accepted notion

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9 437 S.W.2d 15 (Tex. Civ. App.—Amarillo 1968), error ref. n.r.e.
that the aspect of the defendant's conduct that is the basis for legal liability should be a factual cause of the resulting harm; thus, failure to blow a horn when passing and when required by the traffic code is not a cause of a collision if the driver of the other car was deaf and would not have heard it.

The cases relied upon by the court do not quite justify the sweeping proposition that the defendant is liable even though an adequate warning would not have prevented the injury. In one of the cases, it was said that if a warning of the poisonous nature of the furniture polish had been as prominent as the warning about its combustibility, the mother of the deceased child might not have left the product in the presence of the child. In the other, the court of civil appeals, relying on the former case, said: "The court [trial judge in overruling a plea of privilege] could have reasonably concluded that during the time the medicine was used (about eight years) by Mr. Branch, if there had been a proper warning, Mr. Branch would have learned of it and acted accordingly." The two cases do tend to indicate that if under all the circumstances there is any substantial chance that an adequate warning would have prevented the harm, the maker is either liable as a matter of law or at least an issue of fact is presented for the jury. This certainly constitutes a relaxation of the usual notion that the fact finder must believe that the aspect of the defendant's conduct that is the basis for responsibility was more likely than not a cause of the damaging event.

There was another and final statement by the court in Muncy that is worth noting. The court said: "We are of the opinion there could be no recovery under this record on the basis of implied warranty." This was because the product was knowingly purchased as a toxic substance for the purpose of using it as an insecticide to kill lice, and there was no evidence that the product was in any way defective or that it was not fit for the purpose of killing lice. This is similar to a statement made in Rumsey v. Freeway Manor Minimax that since the product sold was poison and was knowingly purchased as such for the purpose of using it as an insecticide to kill roaches, for which it was perfectly fit, there could be no recovery on a warranty theory for death of a small child from ingesting some of the poison. But the mere fact that a product made to kill pests is effective for such purpose does not mean that it is not unreasonably dangerous as marketed for the user or those in the vicinity of the use. The same kind of condition that is sufficient as a basis for a finding of negligence when the defendant knew or should have known about it in the exercise of ordinary care should likewise be a basis for finding that it is unreasonably dangerous as a basis for recovery on a 2

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3 Id. at 834.
5 322 S.W.2d 387 (Tex. Civ. App.—Houston 1968). This case was commented on last year in Keeton, Torts, Annual Survey of Texas Law, 23 Sw. L.J. 1, 3 (1969).
theory of strict liability. As stated before, if strict liability is made to include any recovery obtainable on a theory of negligence, the trial of a lawsuit in this area can be greatly simplified.

III. MEDICAL MALPRACTICE

Three supreme court cases involving appeals from summary judgments on behalf of medical doctors seemed to indicate that whereas trial judges do sometimes grant summary judgments for medical doctors, they are seldom justified in doing so. The cases involved an orthopedic surgeon, a general practitioner, and an obstetrician. Summary judgments were granted for defendants in each case, and in each case the supreme court reversed because the defendant had not conclusively established the exercise of the appropriate care required. Since these cases involved some substantive issues of importance, a brief statement about each would seem to be justified.

As stated last year, 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; (3) that he negligently undertook to treat when the patient should have been referred to a specialist or someone better qualified. The first ground was not involved in any of the three cases but the last two were.

In Snow v. Bond\footnote{Keton, Torts, Annual Survey of Texas Law, 23 Sw. L.J. 1, 4-6 (1969).} plaintiff's claim was based on alleged negligence of the surgeon in permitting an infection that developed subsequent to the removal of a ruptured disc to delay his recovery from the operation. The affidavits of defendants, which were not in any way denied, were to the effect that the infection could not have been prevented; however, except for general opinions expressed by the defendants and by a disinterested doctor in their various affidavits, there was no evidence set forth as to whether proper practices and procedures were followed in the diagnosis and treatment of the infection after it developed. 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 the standards of practice and procedure that are customarily followed in a particular case. This may be a very difficult line to draw in some situations, since a doctor may not honestly be able to say in a given situation what doctors would generally do. He could only say what he would do. Perhaps the latter is permissible since that, too, is quite different from a general opinion that the doctor in question was not negligent. But would such an opinion be sufficient to get plaintiff's case to the jury?

In King v. Flamm\footnote{438 S.W.2d 549 (Tex. 1969).} the plaintiff began experiencing pain in his chest early in November; after repeated calls and visits involving first a diagnosis of pleurisy, then lobar pneumonia, and also involving the prescription and use of different drugs, she was at her request examined by a specialist in January, sixty days later. The specialist promptly diagnosed her condi-
tion as pulmonary embolism. The ground of negligence alleged was the failure to refer the patient to a specialist at an earlier time as she had suggested. When the theory of recovery is based on negligence in the failure to refer a patient, plaintiff at the trial on the merits has the burden of proving that a reasonably careful and prudent general practitioner would have sought consultation (negligence) and that such consultation would have prevented some of the harm plaintiff suffered (causation). Therefore, on summary judgment the defendant must prove conclusively that either the doctor was not negligent in failing to refer or that a specialist could not have prevented any of the harm plaintiff suffered. While the evidence of the specialist was to the effect that the defendant's earlier diagnosis was reasonable for a general practitioner, as the court soundly observed, there was no evidence offered by defendant to show that a specialist would not have diagnosed the trouble correctly at an earlier date and thereby prevented some of the harm.

An interesting question was raised (but not answered since it was unnecessary to do so) as to whether a physician has an independent duty to refer a patient or to seek consultation when the patient wishes such consultation, even though the ordinary doctor of like kind would not for medical reasons do so under the conditions then existing. Anyone who has lived to be sixty and has experienced illnesses of various kinds both to himself and members of his family has pondered the question at one or more times whether to offend his usual doctor by either (1) requesting or suggesting consultation, or (2) seeking the services of another doctor, usually a specialist. In the latter event it may be that many specialists would act as the specialist did in this case and refuse to treat the patient until the latter's doctor authorized it. Since these matters are often raised and discussed between doctor and patient, I would think that the attitude of the patient as found by the jury should simply be one of the factors involved in ascertaining whether or not the ordinary doctor of like kind would have obtained consultation or referred the patient to a specialist. Surely doctors do take patients' wishes and suggestions into account. Another question not discussed is whether or not a specialist should be allowed to testify as to when most practitioners would have called in a specialist or should have called in a specialist. One of the specialists did so in one of the depositions. The test of the qualifications of a medical expert to testify against a doctor of a different kind would be his qualifications to know the practices and procedures of doctors of that kind, and it would seem that a specialist is in a good position to know the customs and practices of general practitioners.

In *Prestegord v. Glenn* plaintiff alleged negligence on the part of an obstetrician in failing to discover and diagnose her difficulties at an earlier date and at a time when a hysterectomy might have been avoided. Since there was a dispute in the evidence as to the preoperative symptoms of hard and constant pain, and since the resolution of this dispute admittedly

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441 S.W.2d 185 (Tex. 1969).
related to the issues as to proper procedures to be followed, it was obvious, as the court pointed out, that the trial judge erred in granting summary judgment.

It was pointed out in the court's opinion that a disinterested doctor in his deposition expressed general approval of the medical practices followed by the defendant doctor, and that he would probably have acted in the same manner. The court does not say this kind of evidence is inadmissible, but it was observed that the doctor was not asked about correct medical practices pertaining to the symptoms and the difficulties. I suggest that a doctor may not be able honestly to testify except as to what he would do in a given situation and that he should be allowed to do so. I would think that testimony to the effect that he would have acted differently should suffice to justify submission of the case to the jury on a trial of the merits.

IV. Traffic

Violation of Safety Regulations. As is well-known, there are two general lines of authority in the United States as to the effect of a violation of some legislative prohibition or safety measure on the issue of an actor's negligence. Some courts have adopted the position that his violation is only a factor to be weighed by the jury with the other circumstances in answering the usual inquiry as to whether the actor was in the exercise of ordinary care. Those jurisdictions following this notion sometimes go further and indicate that the violation of the safety measure is at least prima facie evidence of negligence and this often means that (1) the court can charge the jury on the fact that the actor was in violation of the safety measure, and (2) in the absence of any kind of exculpatory evidence the action is to be regarded as negligent. Texas has always followed the majority view in holding that the legislative standard of what constitutes proper conduct should be substituted for the ordinary man standard, and that the unexcused violation of a safety regulation is negligence per se. Many traffic and other safety regulations impose strict liability by way of a fine for engaging in the conduct prohibited, and the justification for so doing is based on administrative feasibility in the enforcement of the law. Thus, the fact that a driver is excusably unaware of the existence of defective equipment, including a burnt-out tail or headlight or brakes that are not in compliance with the statutory requirements, is normally not an excuse to the imposition of a fine; but the question of whether or not to impose tort liability on an actor for large sums, or to deny recovery to a seriously injured victim of a traffic accident on the theory of contributory negligence per se, when the actor was excusably unaware of a violation or when compliance was impossible, is an entirely different issue. The need for strict liability for effective law enforcement is not involved. Consequently, most courts adopting the majority view have concluded that it is only the unexcused violation of a safety measure that is negli-
gence. There are two standards for ascertaining negligence, therefore, in such a jurisdiction. One is the failure to exercise ordinary care; the other is the unexcused violation of a statute. A litigant who seeks to establish negligence can do so on either one or both standards.

In theory, at least, I can see no justification for the position that because the litigant charged with the violation of the statute raises a question of fact as to the existence of an excuse, the claim of the other litigant that he was guilty of an unexcused violation is thereby foreclosed. It should simply mean that the jury should be presented with two inquiries: whether there was a failure to exercise ordinary care and whether there was an excused violation of a safety measure. It is for the above reasons that I cannot agree with either the majority or dissenting opinion in Blades v. Christy. It does appear that the dissenting justice had a basis in prior decisions to support his position. The case involved a railroad crossing collision. Plaintiff's employee was driving a truck-trailer that was fifty-two feet in length and weighed 65,000 pounds. One theory was that he violated a traffic regulation in failing to stop within fifty feet, but not less than fifteen feet, from the nearest rail when the train was plainly visible and in dangerous proximity to the crossing. Although the issue was raised by the evidence, the jury was not given the opportunity to determine whether it was impossible for the truck driver to stop his truck after the train became plainly visible and in hazardous proximity to the crossing. The jury, in response to issues submitted, found the railroad to be negligent in blocking the vision of users of the highway by leaving boxcars on one of the tracks and in failing to have a flagman at the crossing, and further found that plaintiff was not contributorily negligent. The jury also found that the plaintiff failed to comply with the exact terms of the safety regulations, but no issue was submitted as to whether he was excused because of impossibility of compliance there-with. The majority held that once the defendant had established the violation of the statute, the truck driver should be regarded as negligent as a matter of law and the defendant thereby as having established his defense of contributory negligence. The issue as to his excuse was regarded therefore as one that should have been requested by the plaintiff. But it is not the violation of the statute that is blameworthy and negligent; it is the unexcused violation that is blameworthy and negligent. It seemingly should be the responsibility of the litigant who has the burden of proving negligence to prove the violation, and if an excuse is raised he has the burden of proving that it was not excused and of requesting the issues necessary to establish that fact.

If, however, there is to be a negligence per se doctrine for unexcused violations of statutes, then the majority would seem to be correct in saying that a jury finding that the plaintiff did not fail to exercise ordinary care is not at all determinative of the issue of whether he had a recognized

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8 437 S.W.2d 376 (Tex. 1969).
excuse for violating the statute. A legislature has said that proper care demands that the truck driver stop, after the train becomes plainly visible, within fifteen feet of the nearest rail. An excuse is recognized if he could not do so, but probably there would be no excuse for not seeing the train the moment it became visible. The fact that an ordinary man might have been justified in relying on the presence of a flagman at the crossing if a train were approaching does not mean that this is the standard of care that the legislature saw fit to require. Ordinary care does not necessarily constitute one of the excuses ingrafted by the courts to the legislative standard. Otherwise, the doctrine is meaningless; it would simply be another way of saying that the violation of a statute is negligence per se when the violation would constitute the failure to exercise ordinary care. But the ultimate position taken in the dissenting opinion is a supportable result if one accepts the minority view that the violation of a statute should only be prima facie evidence of negligence. Under such a view any evidence introduced by way of rebuttal of the initial presumption would leave the question of negligence to the jury under the usual ordinary care standard, and his violation of the safety measure would only be a factor that a jury could take into account. The submission of a case to the jury would be much simpler in Texas if this view were adopted, and I must say that the complications created by (1) the excuse doctrine, and (2) the complexities of our special issues submission system, have led me to the conviction that the court should overrule the negligence per se doctrine and adopt the view that the violation of safety legislation is only a circumstance to take into account on the issues related to ordinary care requirements.

The Guest Statute. When two cars collide, the negligence of each driver can often be found to be the proximate cause of the collision. A non-negligent passenger can be, in such a situation, in a dilemma as a result of two doctrines, both of which are of dubious soundness. If a passenger in one of the cars is regarded as either a joint-enterpriser with his driver, or in the relationship of master to the servant driver, then the negligence of his driver will be a roadblock to recovery against the other driver because of the defense of imputed contributory negligence. This rule is based on the notion that a passenger with the right to control a driver, or an equal right to control and manage the car with the driver, should be subject to a kind of vicarious liability and responsibility. It is then argued that if the negligence of a driver can be imputed to make a non-negligent passenger liable to a non-negligent third party, it ought also be imputable to an innocent passenger to bar recovery against the negligent driver. This is a non sequitur. When a passenger-joint-enterpriser is held vicariously liable to a non-negligent person in another car, the litigation is between two persons who are blameless, and it is thought to be better social policy to shift the loss to the innocent enterpriser, leaving him with the risk of insolvency of the negligent actor, rather than place this risk on the victim. But when a blameless enterpriser is suing a wrongdoer, the choice is not
between innocent persons. This doctrine of imputed contributory negligence should be abolished and it has been in some jurisdictions; however, the vast majority of courts continue to follow it.

The other doctrine is the "no duty" rule, created by the legislatures, to the effect that a driver-host is not liable to a guest-passenger in the absence of gross negligence or recklessness. Our guest statutes have generally been defended on two grounds: (1) the danger of collusion, and (2) the notion that a donee of anything, including the rendition of a service, should not be allowed to recover in the absence of morally reprehensible conduct on the part of the donor.

If by a guest it is meant a passenger in a car who is receiving the service of the driver as an act of hospitality or as an accommodation, and if by a joint-enterprise it is meant a passenger who by the agreement of the parties was intended to have an equal right with the driver in the management and control of the vehicle, then it would be possible for a blameless passenger to be victimized by the joint negligence of two drivers without a recovery against either. That would, of course, be a monstrous result.

So, it behooves the passenger to join both drivers in a lawsuit when his status in the car is in question. Certainly this is so when the passenger-victim was the owner of the car in which he was riding. This was the situation in Satterfield v. Satterfield. In this case the plaintiff was an owner-passenger sitting in the back seat with his granddaughter. The driver was his son and the father of plaintiff's granddaughter. The parties were proceeding to church. In the collision in which the plaintiff was injured, the jury found that negligent acts of both drivers caused the collision. The trial court concluded that the father and son were engaged in a joint enterprise as a matter of law and rendered judgment against the plaintiff as to the driver of the other car. The court entered judgment on the verdict against the plaintiff's own driver although the defendant pleaded as a defense that the plaintiff was a guest. The plaintiff did not allege or attempt to prove gross negligence. Nothing was said about whether an issue was requested. Normally, the burden of proving a breach of duty is on the plaintiff and so normally it would appear to be plaintiff's responsibility to establish that he was either not a guest or to establish gross negligence, and to request such issues as are necessary to obtain the necessary findings. Noting that the case was one of first impression in Texas, the court held, as a matter of law, that the father was not a guest in his own car under the circumstances. The court does not say that an owner could never be a guest of an operator of the owner's car since the statute speaks of a guest of an "owner or operator," but the court did say that because the driver's very presence in the automobile was subject to plaintiff's authority the operator-son could not therefore be extending hospitality to the father-passenger. Other courts have said that the driver and the passenger can

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41 448 S.W.2d 456 (1969).
be in the position of accommodating each other, the passenger-owner accommodating the driver by furnishing transportation and the driver accommodating the passenger-owner by operating the car. Although I disagree with the guest statute, it is difficult to reject the notion that in such a case as this the driver-son is in the position of an operator transporting his passenger-father as his guest and the danger of collusion is apparent.

The defendant failed to preserve for appellate review the argument that the court erred in holding that the parties were engaged in a joint enterprise as a matter of law. It would not be reasonable to hold that a passenger could be both a joint-enterpriser and a guest. Perhaps, therefore, the result can be justified on this basis without subscribing entirely to the notion that because under the circumstances the operator's very presence was subject to plaintiff's authority, he could not be regarded as a host.

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42 Murray v. Lang, 252 Iowa 260, 106 N.W.2d 643 (1960); Phelps v. Benson, 212 Minn. 417, 90 N.W.2d 533 (1958); Sackett v. Haeckel, 249 Minn. 290, 81 N.W.2d 833 (1957).