SMU | Dedman School of Law

SMU Law Review

Volume 8
Issue 3 *Survey of Southwestern Law for 1953*

Article 13

1954

Torts

Hubert Jr. Gentry

TORTS

WRONGFUL DEATH STATUTE — CONTRIBUTORY NEGLIGENCE AS A DEFENSE

New Mexico. Le Doux v. Martinez[1] called for a construction of the New Mexico wrongful death statute with regard to defenses which might be interposed to an action based thereon. A child two years and eight months of age had attempted to cross a street in the middle of a block and had been struck and killed by a taxicab driven by an agent of the defendant. The child was, at the time, in the care and custody of an uncle. As a first separate defense the taxi company pleaded the contributory negligence of the plaintiffs in permitting the child on the street at the time and place of the accident, and as a second separate defense pleaded the contributory negligence of the child.

The statute to be construed is in part as follows:

> Whenever any person shall die from any injury resulting from, or occasioned by the negligence, unskillfulness or criminal intent of any officer, agent, servant or employee . . . or of any driver of any state [stage] coach or other public conveyance, while in charge of the same as driver . . . the corporation, individual or individuals, in whose employ any such officer, agent, servant, employee, engineer or driver, shall be at the time such injury was committed, or who owns any such railroad, locomotive, car, stage coach, or other public conveyance, at the time any injury is received . . . shall forfeit and pay for every person or passenger so dying, the sum of ten thousand dollars ($10,000), which may be sued and recovered. . . .[2]

This statute was patterned after the Missouri wrongful death statute[3] but differs from that statute in one respect, among others. The Missouri statute provides for specific defenses, among which is negligence of the deceased, whereas the New Mexico statute makes no mention of defenses.

---

[1] ____N. M.____, 254 P. 2d 685 (1953).
[2] N. M. STAT. 1941 ANN. (1951 Supp.) § 24-104.
[3] MO. REV. STAT. (1949) §§ 537.070, 537.090.

The trial court returned a verdict for the defendant taxicab company. The case was one of first impression in the Supreme Court of New Mexico with reference to the defenses permissible in an action under the wrongful death statute. The statute having been adopted by New Mexico from another state, the general rules applicable to such adoptions should apply in this case. It is a general rule that the adoption of a statute of another state will carry with it the interpretation or construction placed upon the statute by the highest court in the jurisdiction from which the statute was adopted.[4] To this general rule there are several exceptions, one of these being that if the legislature in the adopting state clearly indicates, expressly or by implication, that it does not intend to adopt the construction of the courts of the foreign jurisdiction, the rule is inapplicable. Where the adopted statute differs substantially from its form in the foreign state, it will not be presumed that the construction announced by the courts of the foreign jurisdiction has been adopted.[5] The New Mexico legislature omitted the provision in the Missouri statute setting forth permissible defenses, thereby indicating that it was not the intent of the legislature to adopt that provision. Since the provision of the Missouri statute with regard to defenses had not been adopted, it could not be inferred that the decisions of Missouri courts on the question of defenses controlled or had any weight in New Mexico. In its opinion the New Mexico Supreme Court stated that the legislature manifested an intent to admit all common law defenses through the omission of any provision setting forth specific defenses, and that decision seems correct. Contributory negligence of the deceased being a well recognized common law defense, it was held a defense to an action brought under the New Mexico wrongful death statute.

The verdict in the trial court was based on an imputation of contributory negligence. The negligence of the uncle, having

[4] CRAWFORD, STATUTORY CONSTRUCTION (1940) § 234.
[5] *Id.*, § 235.

charge of the child at the time, was found, under instruction by the court, to bar a recovery by the parents of the child.

The supreme court reversed the trial court, stating as grounds that the pleadings of the defendant did not support an instruction encompassing negligence of the uncle. The only parties alleged to be contributorily negligent were the parents of the child and the child itself. Since the defendant had specifically pleaded contributory negligence, such specific pleadings served to limit the scope of general allegations of negligence.[6] The trial court also was held to have erred in not submitting the plaintiff's requested instruction giving consideration to the age of the child in determining the standard of care which the taxicab driver owed to the child. The court stated the rule long recognized by American courts: "More care must be exercised toward children than towards persons of mature years."[7]

The case has value as precedent and authority on the construction of the New Mexico wrongful death statute, as the reversal by the supreme court was on grounds other than the statutory construction, of which it approved.

INTENTIONALLY INFLICTED MENTAL SUFFERING — A NEW TORT?

Texas. The case on which most comment has been made in the field of tort law coming out of the Texas Supreme Court in several years is that of *Harned v. E-Z Finance Co.*[8] W. R. Harned and wife sued four loan companies and one insurance company for statutory penalties of $137.50 growing out of alleged charges of usurious interest. The plaintiffs sought additional recovery of $100 actual damages for the mental pain and anguish suffered as a result of the defendants' collection methods, and an additional $50 as exemplary or punitive damages. The suit was filed in the County Court at Law, Dallas County, and the defendants

[6] 41 AM. JUR., *Pleading*, § 33.
[7] 38 AM. JUR., *Negligence*, § 40.
[8] 151 Tex. 641, 254 S.W. 2d 81 (1953).

filed a special exception as to substance asserting that the plaintiffs had stated no cause of action in that part of their petition alleging mental suffering and claiming that the county court had no jurisdiction to hear the case. The plaintiffs' allegations were that the defendants had made telephone calls to the plaintiffs at all hours of the day and night, had threatened to cause Harned to lose his job, and had threatened to "take up a collection in the neighborhood"[9] to apply to the debt. Plaintiffs further alleged that the harassment was "wanton, willful, and malicious."[10] The trial court sustained the defendant's exception.

On the plaintiff's failure to amend, the trial court dismissed the case for want of jurisdiction. The court of civil appeals wrote a tentative opinion concluding that the plaintiffs had stated no cause of action as to the mental suffering, and then on its own motion certified the question of its correctness to the supreme court. The supreme court answered in an unanimous decision that no error had been committed.

In announcing its decision the court reviewed at length the cases cited by the plaintiffs in support of recovery[11] and distinguished only one, *Clark v. Association Retail Credit Men of Washington, D. C.*, from the case at bar. The court then analyzed the writings of two prominent text writers in the field, Prosser and Magruder,[12] and proceeded to state the recognition given the "new tort" in the *Restatement of Torts*.[13] Having waded through this quite formidable array of authority, the court concluded

[9] 151 Tex. at 642, 254 S.W. 2d at 82.

[10] *Ibid.*

[11] Clark v. Association Retail Credit Men of Washington, D. C., 70 App. D. C. 183, 105 F. 2d 62 (1939); Herman Saks & Sons v. Ivey, 263 Ala. App. 246, 157 So. 265 (1934); State Rubbish Collectors Ass'n v. Siliznoff, 38 Cal. 2d 330, 240 P. 2d 282 (1952); Barnet v. Collection Service Co., 214 Iowa 1303, 242 N.W. 25 (1932); La Salle Extension University v. Fogarty, 126 Neb. 457, 253 N.W. 424 (1934).

[12] Prosser, *Intentional Infliction of Mental Suffering, A New Tort*, 37 Mich. L. Rev. 874 (1939); Magruder, *Mental and Emotional Disturbances in the Law of Torts*, 49 Harv. L. Rev. 1033 (1936).

[13] AMERICAN LAW INSTITUTE, RESTATEMENT OF THE LAW (1948 Supp.) 612.

that Texas cases cited in prior years announced a rule of law inconsistent with the "new tort" and upheld the action of the court of civil appeals in sustaining the dismissal of the suit.

The two decisions cited by the court as stating the Texas rule in mental suffering cases are certainly distinguishable upon their facts from the present case. *Gulf, C. & S. F. Ry. Co. v. Trott*[14] involved an attempt by a woman to recover for anguish caused by the negligent operation of defendant's train by which she was put in fear of her life. There was no allegation or suggestion in the case or any cases mentioned or cited that the complained of acts were willfully perpetrated. *Renfro Drug Co. v. Lawson*[15] was an attempt on the part of a father to recover damages for mental suffering caused him by a story printed in a magazine, alleged to have been sold by the defendant, containing libelous remarks about the plaintiff's deceased daughter. The main question before the court was the right of a survivor to sue for a libel committed against the deceased, and the court was principally concerned with a construction of the Texas libel statute.

The case of *So Relle v. Western Union Telegraph Co.*,[16] relied on by the Harneds, was said by the court to have been overruled by later decisions, but it is to be noted that the rule of the *So Relle* case has been applied by the Texas courts in many subsequent cases.

Stating that the collection of usurious interest was neither a crime nor a tort and therefore there existed no "peg" on which to hang the damage caused by the mental suffering of the plaintiffs, the court commented that if there should be a recovery in cases of the *Harned* type the legislature was the body appropriate to provide for it. Mental suffering alone was regarded as too subtle and speculative, its consequences too intangible and peculiar, to permit of the court's ascertainment and measurement.

[14] 86 Tex. 412, 25 S.W. 419 (1894).
[15] 138 Tex. 434, 160 S.W. 2d 246 (1942).
[16] 55 Tex. 308 (1881).

Thus, the position of the Texas court seems to be firmly established, refusing recovery for mental suffering wilfully, wantonly and maliciously inflicted when such suffering is unconnected with property damage, bodily injury of a physical nature, or some independent crime or tort.[17] In this respect Texas appears to be in that transitory stage of legal evolution in which the damage element of mental suffering is treated exclusively as a parasitic factor.

ATTRACTIVE NUISANCE — REJECTION OF THE "IMPLIED INVITATION" FICTION

Texas. The Texas Supreme Court in *Eaton v. R. B. George Investments, Inc.*,[18] reiterated the new Texas rule on the doctrine of "attractive nuisance," as first stated in the now famous decision of *Banker v. McLaughlin.*[19] In the *Eaton* case Ginger Dale Ensley, three years and eight months old stepdaughter of the plaintiff, was drowned in a cattle dipping vat enclosed by a white fence and chute on the premises of the defendant. Testimony showed that the vat had been unused for two years, had not been drained, was not known to the plaintiff to be on the premises, and could have been easily covered with lumber in two hours with hammer and saw at a cost of about thirty dollars. The case was tried on the theory of attractive nuisance. In answer to a special issue the jury found that the structure was not unusually attractive to children such as Ginger Dale Ensley, and therefore it did not answer the corollary questions as to the other elements of liability under the doctrine of attractive nuisance. The jury further found in answer to unconditional issues that the defendant was negligent in failing to notify the plaintiff of the vat and in failing to cover the vat, and that such negligence was the proximate cause of the

[17] See Green, *"Mental Suffering" Inflicted by Loan Sharks No Wrong*, 31 Tex. L. Rev. 471 (1953), for an extensive comment on the *Harned* case and its background.

[18] ____Tex____, 260 S.W. 2d 587 (1953).

[19] 146 Tex. 434, 208 S.W. 2d 843 (1948).

child's death; that plaintiff was not contributorily negligent; and that damages were suffered by the plaintiff in the amount of $11,597.50. Both parties moved for judgment, and defendant's motion was sustained on the ground that the finding of the jury that the structure was not unusually attractive to young children negatived any implied invitation to the child to enter on the premises, leaving her a bare trespasser or licensee to whom the defendant owed no duty. The court of civil appeals affirmed the trial court, using virtually the same reasoning. The supreme court in disposing of the case recognized that ordinarily it would reverse and render, but stated that since the case had been tried on the wrong theory, it would remand for further proceedings in the trial court consistent with the principles announced by the court.

Under the old forms of action trespassers were owed no duty by the landowner with regard to their personal safety while on the land. The Supreme Court of the United States established an exception to this general rule in the case of children in *Sioux City & P. R. R. v. Stout*,[20] holding that a railroad owed a trespassing child the duty to exercise reasonable care to see that the child was not hurt on the railroad's turntable. Later cases, in attempting to justify the exception, created the fiction of "implied invitation," saying that the presence of the object or structure on the defendant's land, naturally attractive to those of tender years, was an invitation to children to enter the premises.[21] Texas decisions early adopted the rule of the *Stout* case.[22] However, with the rule came misapplications and misconceptions. The most noteworthy of these judicial slips was *United Zinc & Chemical Co. v. Britt*,[23] in which the Supreme Court of the United States held that before the doctrine of attractive nuisance would apply, the child must have been attracted onto the premises by the object

[20] 17 Wall. 657 (U.S. 1873).

[21] San Antonio & A. P. Ry. v. Morgan, 92 Tex. 98, 46 S.W. 28 (1898); Fort Worth, D. C. Ry. v. Measles, 81 Tex. 474, 17 S.W. 124 (1891); Gulf, C. & S. F. Ry. v. McWhirter, 77 Tex. 356, 14 S.W. 26 (1890).

[22] See note 21 *supra*.

[23] 258 U.S. 268 (1922).

which injured him. The Texas Supreme Court was led astray by this opinion and was induced to hold that the landowner owed no duty where a mother and child trespassed to gather persimmons and the child fell in an old cesspool and drowned.[24]

In 1948 came the opportunity to set the errant feet of Texas judges back on the path of justice. James McLaughlin's five-year-old son drowned in a hole of water on a vacant, weed-grown lot owned by H. F. Banker in a newly-developed subdivision near Orange, Texas. The water hole was created by Banker in securing fill for adjacent lots. It was of little or no utility at the time of the drowning and had been of such character for some time. The supreme court, in allowing recovery, stated that the attractive nature of the property and its proximity to traveled ways, far from being controlling on the issue of liability, were merely factors to be considered in determining the owner's ability to anticipate the presence of members of the public.[25]

The *Eaton* case follows the *Banker* case explicitly and sets out the four criteria for liability of a landowner to a trespassing child found in the *Restatement of Torts*[26] and in a leading treatise.[27] These standards impose liability if

> (a) the place where the condition is maintained is one upon which the possessor knows or should know that such children are likely to trespass, and,
>
> (b) the condition is one of which the possessor knows or should know and which he realizes or should realize as involving an unreasonable risk of death or serious bodily harm to such children, and
>
> (c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling in it or in coming within the area made dangerous by it, and
>
> (d) the utility to the possessor of maintaining the condition is slight as compared with the risk to young children involved therein.[28]

---

[24] Gotcher v. City of Farmersville, 137 Tex. 12, 151 S.W. 2d 565 (1941).
[25] PROSSER, TORTS (1941) 617, 619.
[26] § 339.
[27] PROSSER, TORTS (1941) 620-625.
[28] 2 RESTATEMENT, TORTS (1934) § 339.

The court said that the finding by the jury that the structure was not unusually attractive to children in no way barred recovery since the findings of negligence and proximate cause, and the evidence as to the age of the child and lack of utility of the vat were sufficient to allow recovery under the modern Texas rule.

Thirteen jurisdictions, composed chiefly of the leading industrial states, do not recognize the attractive nuisance doctrine.[29] Among the remainder there is some hesitancy to apply the doctrine in the case of water hazards.[30] The reasoning of the courts in this regard is that water hazards exist everywhere in nature, taking a yearly toll of both young and old, and to compel a landowner to guard against such misfortunes would be untenable.[31] Texas, while formerly denying the applicability of the doctrine in many instances,[32] now has adopted the doctrine in all its applications but in doing so has shown that "attractive nuisance" is a misnomer. For the attractive nature of the object is merely a factor in determining the duty owed by the landowner to the child, and the object causing the harm need not be a common law nuisance so long as it meets the requirements of little or no utility, possesses a quality of danger not within the comprehension of children, and is known to the landowner to involve a danger to such children as may come in contact with it.

CONTRIBUTORY NEGLIGENCE — MATTER OF FACT OR MATTER OF LAW?

Texas. The case of *Sargent v. Williams*[33] finds the Texas Supreme Court, by a six-to-three decision, extending the doctrine of contributory negligence as a matter of law to a new fact situ-

[29] Connecticut, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Vermont, Virginia and West Virginia.

[30] See Note, 8 A. L. R. 2d 1262 (1948).

[31] Cobb v. Lowe Mfg. Co., 227 Ala. 456, 150 So. 687 (1933); Salladay v. Old Dominion Copper Mining Co., 12 Ariz. 124, 100 Pac. 441 (1909); Edmond v. Kimberly-Clark Co., 159 Wis. 83, 149 N.W. 760 (1914).

[32] Missouri, K. & T. Ry. Co. of Texas v. Edwards, 90 Tex. 65, 36 S.W. 430 (1896); Dobbins v. Missouri, K. & T. Ry. Co. of Texas, 91 Tex. 60, 41 S.W. 62 (1892); Texas-Louisiana Power Co. v. Bihl, 66 S.W. 2d 672 (Tex. Comm. App. 1933).

[33] .....Tex....., 258 S.W. 2d 787 (1953).

ation. A boy of thirteen, having borrowed the family car, was taking two girls of the same age on a social trip to a city some sixty miles distant. Ten miles short of their destination, while traveling approximately 110 miles per hour, the boy lost control of the car with resulting serious injury to the two girls. The parents of the girls sued in their own right and as next friends of the girls for damages resulting from the injuries. The jury found, on the question of the girls' contributory negligence, that they knew the boy was an incompetent and reckless driver and knew that he had no driver's license, but that riding with the boy having this knowledge did not constitute negligence on the part of the girls. The jury further found that the girls did not fail to protest the speed at which the boy was driving and so were not negligent in that regard. Judgment was rendered for the plaintiffs, and the defendant appealed. The court of civil appeals reversed the trial court, finding the girls guilty of contributory negligence as a matter of law, and rendered the case in favor of the defendant. Petition for writ of error was granted by the supreme court. After argument the court of last resort affirmed the court of civil appeals.

Both the court of civil appeals and the supreme court based their decision on the recent holding in *Schiller v. Rice*.[34] The latter case was a suit by the guests in the car of a drunken host who were injured when the car struck a pole and a lamp post. Prior to the accident the guests had had several opportunities to leave the group, and all were well aware of the condition of the driver for some time prior to the accident. In the court of civil appeals the guests stated as a counterpoint to the host's point of appeal that "[c]ontributory negligence and assumed risk are questions for jury unless driver is obviously intoxicated."[35] The jury found that the driver was intoxicated and that the guests knew of that fact. Therefore, the contributory negligence of the guests was no longer a question of fact for the jury but could be found by the

[34] 151 Tex. 116, 246 S.W. 2d 607 (1952).
[35] *Id.* at 122, 246 S.W. 2d at 611.

court as a matter of law. Since the only requirement to defeat an action under the Texas Automobile Guest Statute,[36] even where the defendant is shown to have been heedless or in reckless disregard of the rights of others, is ordinary contributory negligence on the part of the plaintiff,[37] the plaintiff is denied recovery where such negligence is found whether as a matter of fact or of law.

In drawing analogy between *Schiller v. Rice* and the present case, the supreme court declared that the doctrine of "voluntary exposure to risk"[38] applies to instances of a guest knowingly entrusting his fate to an incompetent driver. The court found no difference between the risk of a driver who is drunk and that of one who is both reckless and incompetent in his natural state. Proceeding to the logical conclusion of an application of *Schiller v. Rice*, the girls were held negligent in undertaking the trip with the defendant, notwithstanding jury findings to the contrary, and such negligence was held contributory to their injury notwithstanding the absence of findings on the issues of proximate cause. The seemingly ameliorating facts that the girls protested the speed at which the boy was driving and had no opportunity to leave the car after beginning the trip were rendered ineffective by the reasoning of the supreme court that the negligent act of the girls was the entering of the car rather than remaining in the car after the defendant began to drive recklessly. This reasoning was based on the knowledge of the girls as to the defendant's "wild" driving habits, and on the fact that inherently reckless drivers do not become safe drivers in the twinkling of an eye or after a promise to drive carefully. The girls, having with knowledge submitted themselves to the very danger which injured them, would not be heard to protest the occurrence of the injuring incident.[39]

[36] TEX. REV. CIV. STAT. (Vernon, 1948) art. 6701b.

[37] Schiller v. Rice, 151 Tex. 116, 129, 246 S.W. 2d 607, 615 (1952).

[38] The Texas courts apply the doctrine of assumption of risk only to master-servant relationships. To take the place of this doctrine in instances not involving these two parties the "voluntary exposure to risk" doctrine was created by the legal theorists. The two doctrines differ only in their application.

[39] See 2 RESTATEMENT, TORTS (1934) § 466, Comment e on Clause (a).

A strong dissenting opinion, citing much authority, stressed the general rule that contributory negligence, by its very nature, is a question of fact for the jury. [40] There was also a discussion of assumption of risk, which was apparently included to counter the mention in the majority opinion of the Texas doctrine of "voluntary exposure to risk."[41] The dissent distinguished *Schiller v. Rice* on the facts. In the *Schiller* case the injured persons were mature, experienced women with the power to appreciate the danger to which they exposed themselves. They had ample opportunity to leave the host's car with little inconvenience to themselves on several occasions. The girls injured in the *Sargent* case were young and of immature judgment, had ridden with the defendant previously without injury and had every right to suppose another ride would be free of danger. They had no opportunity to leave the car after embarking on the trip. Under such facts there was at least a question presented on which reasonable men could differ, and the matter should have been submitted to the jury for decision under a proper charge.

In following the *Schiller* case the Texas Supreme Court did not abrogate the general rule that contributory negligence is a question of fact for the jury. The court simply applied the equally well recognized exception to the rule that where facts are not such that reasonable men may differ as to the consequences to follow from them, the court may determine such consequences as a matter of law without referring the question to a jury. As to whether the facts in the *Sargent* case fit the exception there is room for doubt, as shown by the dissenting opinion. The law in the case is not revolutionary, but the application is novel, and the case will provide a guidepost for future litigation in similar fact situations.

Hubert Gentry, Jr.

---

[40] Walsh v. Dallas Ry. & Terminal Co., 140 Tex. 385, 167 S.W. 2d 1018 (1943); Gulf, C. & S. F. Ry. Co. v. Gasscamp, 69 Tex. 545, 7 S.W. 227 (1888); 5 AM. JUR., *Automobiles*, § 47.

[41] 38 AM. JUR., *Negligence*, § 173; 65 C. J. S., *Negligence*, § 174.