Personal Torts

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PERSONAL TORTS

by
Frank L. Branson*

I. NEGLIGENCE
A. Duty

AN examination of the duty concept represents the logical starting point for any discussion of negligence case law.1 Several cases in this survey deal with the obligations owed tort plaintiffs. Greater Houston Transportation Co. v. Phillips2 analyzed the duty concept arising from a motorist’s gun shot wounds sustained in an altercation after a motor vehicle accident. Kurt Phillips was seriously injured when he and a companion were shot by a yellow cab driver after an auto wreck. Yellow Cab neither instructed its drivers not to carry weapons nor provided any instructions on the proper procedures to be followed when confrontations arose from traffic accidents. The cab drivers regularly carried weapons and Yellow Cab drivers were known to have carried weapons on at least four separate incidents. The jury found that Yellow Cab breached their duty to other motorists and awarded Phillips more than $3,000,000.00 in damages. The trial court rendered a take-nothing judgment on the grounds that Yellow Cab owed no duty to Mr. Phillips.3 The court of appeals reversed, holding that Yellow Cab had a duty to attempt to prohibit their drivers from carrying guns.4 The Texas Supreme Court, in turn, reversed the court of appeals, holding that as a matter of law Yellow Cab was under no duty to control the actions of its drivers, who were independent contractors.5 A duty to control an independent contractor arises only upon a showing that the risk of harm was foreseeable, and that the independent contractor was under the control of the contractee.6 In Byrd v. Skyline Equipment Co.7 the Austin court of appeals held that a duty of care created by a service contract extended to an injured hotel worker.8 Patricia Byrd was injured because of the alleged negligence of a service company who maintained and repaired washing ma-

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2. 801 S.W.2d 523 (Tex. 1990).
3. Id. at 524.
5. Greater Houston, 801 S.W.2d at 527.
6. Id. at 525-26.
7. 792 S.W.2d 195 (Tex. App.—Austin 1990, no writ).
8. Id. at 197.
chines at a local hotel. The trial court granted summary judgment against Byrd.9 The court of appeals reversed, concluding that, as a matter of law, the service contract incorporated a common law duty to perform tasks “with care, skill, reasonable expedience and faithfulness.”10 According to the court, the common law obligation extended to any person who used the machine, regardless of whether they were a party to the service contract between the hotel and the equipment company.11 Moreover, the court concluded that summary judgment was improper because the equipment company could not simply discharge its obligations by retaining an independent contractor to perform the services.12

In contrast, the Fifth Circuit in *Harper v. Agency Rent-A-Car*13 declined to impose a higher duty on rental car companies.14 In *Harper*, a rental car company offered a ride to two rental customers. During the trip, the rental company driver collided with another vehicle, and the customers brought suit for injuries sustained in the wreck. The trial court instructed the jury that the agency could be found negligent if it failed to use a “high standard of care,”15 a duty typically owed by common carriers. The Fifth Circuit reversed, holding that the agency, unlike a common carrier, should only have been held to an ordinary standard of care.16 Since the rental car company was not in the business of regularly transporting passengers and did not charge for carrying the customers, the court found that it was not obligated to use the same standard of care imposed upon common carriers.17 The Fifth Circuit’s reasoning stemmed from a Texas Supreme Court case18 holding that school bus operators are only under a duty to act reasonably.19

**B. Proximate Cause**

Proximate cause is the next element to be considered in a negligence case. In Texas, proximate cause requires that the negligence be both a foreseeable and a producing cause of the event in question.20 The first case in this survey to discuss foreseeability is *Lofton v. Texas Brine Corp.*21 The decision represents the last in a long line of battles between the supreme court and the court of appeals on this issue. In *Lofton*, Andrew Lofton sued the Brine Corporation and its employees for injuries he received in a collision between

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9. *Id.* at 196.
10. *Id.* at 197 (quoting Montgomery Ward v. Scharrenbeck, 146 Tex. 153, 204 S.W.2d 508, 510 (1947)).
11. *Byrd*, 792 S.W.2d at 197.
12. *Id.*
13. 905 F.2d 71 (5th Cir. 1990).
14. *Id.* at 73.
15. *Id.* at 72.
16. *Id.*
17. *Id.* at 73.
his pickup truck and an 18-wheeler belonging to the Texas Brine Corporation. After a jury trial, the trial court rendered judgment in Lofton's favor. The court of appeals reversed, concluding that the evidence was factually insufficient to support the finding that the rig driver's negligence was a proximate cause of the accident. The court of appeals reasoned that there was irrefutable evidence that the pick up truck pulled out in front of the 18-wheeler less than two seconds before impact. The court, therefore, concluded that contributory negligence was the only proximate cause of the occurrence in question. The supreme court reversed on the grounds that the lower court failed to apply the proper standard in reviewing the jury's findings. Moreover, the appeals court incorrectly held that the negligent tractor-trailer driver could not have foreseen the exact sequence of events which produced the wreck. According to the supreme court, the rig driver's negligence was a proximate cause of the accident if he could have foreseen the general danger inherent in his conduct, rather than the precise sequence of events involved. The case was remanded to the court of appeals. The case then went to the supreme court a second time and was again remanded to the court of appeals to apply the proper standard of review.

The court in Deerings West Nursing Center v. Scott also considered the foreseeability requirement of the proximate cause analysis. The jury in Deerings found a nursing home negligent and grossly negligent for hiring an unlicensed nurse who assaulted a visitor in the nursing home. The altercation arose when an eighty-year-old relative of a patient in the nursing home came to visit early one morning. An unlicensed, thirty-six-year-old male nurse attempted to prevent her from visiting and a dispute ensued. The jury found both that the nursing home had breached its duty of exercising reasonable care in the selection of its medical staff and that the attack was foreseeable. Although the nurse had no history of prior physical assaults, the court of appeals affirmed, reasoning that a nursing home employee charged with looking after the needs of the elderly should be a person of "sound personality strengths and not be subject to a proven pattern of impulsive behavior." The court of appeals pointed to the nurse's fifty-six convictions for theft and

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23. Id.  
24. Id.  
25. 720 S.W.2d 804 (Tex. 1986).  
26. Id. at 805. The proper standard is annunciated in Alm v. Aluminum Co., 717 S.W.2d 588, 599 (Tex. 1986), and Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).  
27. Lofton, 720 S.W.2d at 805.  
28. Id.  
29. Id.  
32. Id. at 495.  
33. Id.  
34. Id. at 496.
his forged license as proof of foreseeability. The court analogized the nursing home's negligent hiring to the negligent entrustment of an automobile. The concurring and dissenting opinions shed light on this truly bizarre fact pattern.

By contrast, the court in Works v. Arlington Memorial Hospital found that a hospital's duties did not extend to foreseeing harm inflicted by prospective adoptive parents. Victor and Lois Works sued Arlington Memorial Hospital alleging that their adopted child had been physically abused while in the custody of the first set of prospective parents. In granting summary judgment in favor of the hospital, the trial court concluded that the hospital could not have foreseen the danger that the child was facing. The court of appeals affirmed, recognizing that the hospital had no direct contact with the prospective parents, did not arrange for the initial adoption, and performed no screening procedures in connection with the first set of undesirable parents. As a result, the harm was unforeseeable. Two notable cases in this survey address the actual cause requirement of the proximate cause analysis. In re Air Crash at Dallas/Fort Worth Airport on August 2, 1985 involved the lawsuit brought against the federal government by the survivors of the flight crew of Delta flight 191. Faced with pending and settled lawsuits of almost $200,000,000.00, the air carrier sought contribution from the United States government for its share of the responsibility for the crash. The government responded with claims of contributory negligence on the part of the crew involved. The federal district court had to decide whether the negligence of the air traffic controllers and/or the pilots proximately caused the crash of Delta 191 and the subsequent loss of 137 passengers, crew, and bystanders. After reviewing the volumes of evidence presented, the court concluded that the air traffic controllers had been negligent in failing to properly relay weather information to the crew, but that such negligence was not a proximate cause of the disaster because the flight crew itself possessed substantial weather information available from government sources. According to the evidence, the crew would have flown into the hazardous weather conditions even if they had been provided a complete weather picture. The court concluded that since the flight crew chose to fly into the weather rather than break off the landing attempt, their negligence was the proximate cause of the crash. The car-

35. Id.
36. Id.
37. Id. at 497 (Fuller, J., concurring).
38. Id. at 500 (Koehler, J., dissenting).
40. Id. at 314.
41. Id.
42. 782 S.W.2d at 313.
43. Id. at 313-314.
44. 720 F. Supp. 1258 (N.D. Tex. 1989). The litigation is also known as Connors v. United States.
45. Id. at 1290.
46. Id. For another interesting case, see Transco Leasing Corp. v. United States, 896 F.2d 1435, 1448 (5th Cir. 1990) where the Fifth Circuit held that the air traffic controllers were
rrier was thus solely responsible for the staggering amount of damages involved.

*Yap v. ANR Freight Systems*\(^47\) presents another example of how the producing cause requirement is applied in the proximate cause analysis. In *Yap*, the driver of a pickup truck was seriously injured when a tractor-trailer rig veered into oncoming traffic to avoid another potential wreck. After a jury verdict exonerating the truck driver, the court of appeals upheld the jury's finding that the negligence per se, veering into oncoming traffic, was not a substantial factor in causing the wreck.\(^48\) The court held that an unrelated driver's negligence was the sole proximate cause of the collision since the wreck would not have occurred but for the (presumed) negligence of another car suddenly swerving into the tractor-trailer rig's lane of traffic.\(^49\)

### C. Vicarious Liability

*Ramos v. Frito-Lay, Inc.*\(^50\) was instrumental in developing Texas case law with respect to the relationship between corporate employers and their managers. The case arose when Jose Padilla, a Frito-Lay District Sales Manager, substituted for one of his vacationing salesmen. Padilla made a routine stop at a convenience store operated by Salvador Ramos. A dispute arose between the two men concerning the ownership of a rack displaying Frito-Lay items, and a shoving incident followed in which the store owner was injured. A jury determined that the District Manager was guilty of assault and battery. In addition, the jury concluded that Padilla was not deviating from Frito-Lay's service when the assault occurred, and assessed exemplary damages against the corporation. The court of appeals reversed on the grounds that the employee was not acting in a managerial capacity and thus solely responsible for the midair collision of two private planes. In contrast to the Delta 191 litigation, the Government's negligence was the only proximate cause of the collision, and the pilots were cleared of allegations of contributory negligence. *Id.* at 1448.

\(^47\) 789 S.W.2d 424 (Tex. App.—Houston [1st Dist.] 1990, no writ).

\(^48\) *Id.* at 428.

\(^49\) *Id.* The jury was given definitions of unavoidable accident and sudden emergency. The unavoidable accident instruction seems improper in light of the facts presented. Case law typically restricts the use of this particular inferential rebuttal issue to instances where the cause of the occurrence is a nonhuman or nonnegligent physical condition completely unrelated to either party. The unrelated physical cause must be completely removed and unaffected by the defendant's negligence. The cases allow such an instruction/definition only when the event is caused by some condition "not attributable to the parties." *Leatherwood Drilling Co. v. TXL Oil Corp.*, 379 S.W.2d 693, 697 (Tex. Civ. App.—Dallas 1964, writ ref'd n.r.e.). Most cases where instructions are given deal with physical conditions or nonnegligent actions of innocent third parties. See *McDonald v. Brennan*, 704 S.W.2d 136, 138 (Tex. App.—El Paso 1986, writ ref'd n.r.e.) (unforeseen brake failure); *Kralik v. Martin*, 659 S.W.2d 136, 138 (Tex. App.—Corpus Christi 1983, writ ref'd n.r.e) (wet and slick pavement). *But see Lemos v. Montez*, 680 S.W.2d 798, 800 (Tex. 1984) (instruction improper when defendant was negligent in failing to keep a proper lookout). The proper submission would have been an instruction on "sole proximate cause", typically submitted when a nonparty's conduct is the only cause of the occurrence. *Jackson v. Fontaine's Clinics*, 499 S.W.2d 87, 89-90 (Tex. 1973); *Herrera v. Balmorhea Feeders, Inc.*, 539 S.W.2d 84, 87-88 (Tex. Civ. App.—El Paso 1976, writ ref'd n.r.e.).

\(^50\) 784 S.W.2d 667 (Tex. 1990).
the corporation was immune from exemplary damages.\textsuperscript{51} The court of appeals focused on the character of the employee's act to determine whether it was managerial or nonmanagerial.\textsuperscript{52} The supreme court rejected this formulation, and declared that the appropriate test was whether the manager was acting within the scope of his employment when the conduct occurred.\textsuperscript{53} Under the supreme court's opinion in \textit{King v. McGuff},\textsuperscript{54} the test was whether the manager was acting in the course and scope of his employment. Under \textit{Ramos}, a corporate master is liable for exemplary damages imposed due to the conduct of its managers.\textsuperscript{55} The purpose of this test is to deter the selection of "unfit persons for important positions",\textsuperscript{56} and such test is consistent with the policy annunciated in the Restatement Second of Torts.\textsuperscript{57} To hold otherwise would allow an employer "to escape liability for the outrageous acts of its management-level employee [merely] because the employee was performing a non-managerial task."\textsuperscript{58} The opinion is well-reasoned, and seems consistent with existing Texas case law.\textsuperscript{59}

A number of cases in this survey period develop the relationship between general contractors and supposedly independent subcontractors. \textit{Enserch Corp. v. Parker}\textsuperscript{60} involved a wrongful death action brought against a pipeline for the asphyxiation of two workers employed by a pipeline service company. One of the issues on appeal was whether the service company was truly an independent contractor. The issue turned on the supreme court's interpretation of \textit{Redinger v. Living, Inc.}\textsuperscript{61} As a general rule, the owner and occupier of a premises does not have a duty to see that independent contractors perform their work in a safe manner.\textsuperscript{62} An exception created in \textit{Redinger}, however, imposes liability when the general contractor "retains the control of any part of the work."\textsuperscript{63} The contract in \textit{Enserch} gave the pipeline operator the right to "order work changes in the nature of additions, deletions or modifications."\textsuperscript{64} The operator provided a book to employees outlining the procedures to be followed and frequently sent inspectors to supervise the work performed by the supposedly independent contractors. The supreme court held that this evidence created fact issues concerning

\begin{itemize}
\item \textsuperscript{51} Id. at 668.
\item \textsuperscript{52} Id.
\item \textsuperscript{53} Id. at 669.
\item \textsuperscript{54} 149 Tex. 432, 435, 234 S.W.2d 403, 405 (1950).
\item \textsuperscript{55} \textit{Ramos}, 784 S.W.2d at 669.
\item \textsuperscript{56} Id.
\item \textsuperscript{57} \textit{RESTATEMENT (SECOND) OF TORTS} § 909 comment b (1979).
\item \textsuperscript{58} \textit{Ramos}, 784 S.W.2d at 669.
\item \textsuperscript{59} \textit{Purvis v. Prattco, Inc.}, 595 S.W.2d 103, 104 (Tex. 1980); \textit{Fisher v. Carrousel Motor Hotel}, 424 S.W.2d 627, 630 (Tex. 1967).
\item \textsuperscript{60} 794 S.W.2d 2 (Tex. 1990).
\item \textsuperscript{61} 689 S.W.2d 415 (Tex. 1983). In \textit{Exxon v. Quinn}, 726 S.W.2d 17, 20 (Tex. 1987), the supreme court developed the exceptions further by imposing liability on a leaseholder who failed to provide a reasonably safe place for independent contractors to work. The case is discussed in \textit{Branson, Personal Torts}, 42 Sw. L.J. 139, 142 (1988).
\item \textsuperscript{62} \textit{Abalos v. Oil Dev. Co.}, 544 S.W.2d 627, 631 (Tex. 1976).
\item \textsuperscript{63} \textit{Redinger}, 689 S.W.2d at 418 (quoting \textit{RESTATEMENT (SECOND) OF TORTS} § 414 (1977)).
\item \textsuperscript{64} \textit{Enserch}, 794 S.W.2d at 6.
\end{itemize}
whether the operator’s rights to exercise control fell within the *Redinger* exception.65

Similar cases applying the *Redinger* exception include *Lawson-Avila Construction v. Stoutamire*,66 *Edco Production, Inc. v. Hernandez*67 and *Sherard v. Smith*.68 The issue in each case involved whether the general contractors retained enough control over the subcontractors to create liability under the *Redinger* exception. Following *Redinger* and the Restatement69 view, the *Lawson-Avila* court concluded that the general contractor retained control by virtue of the terms of the contract and the right to enforce safety requirements.70 Likewise, the court in *Edco Production* imposed liability on the operator of an oil lease whose employee actually supervised and gave advice concerning the safety of welding operations.71 The *Sherard* court upheld the summary judgment granted in favor of a farmer who employed an independent truck driver who was later involved in a fatal collision.72 Evidence at trial revealed that the farmer did not retain sufficient control over the driver, the driver was paid a specific price for the amount of grain hauled, the farmer did not withhold any portion of the payment for taxes or benefits, and the farmer provided no fuel instructions for doing the job. As such, the court concluded that the relationship between the farmer and the driver was clearly one of independent contractor-owner, and therefore, no liability was imposed.73

Of historical importance is the possible termination of some of the most complicated litigation in recent Texas history. *Scurlock Oil Co. v. Smithwick*74 is the fourth reported appellate opinion arising from a van/trailer truck collision which killed George Smithwick and Clay Dove (both Missouri Pacific Railroad Company workers).75 Punitive damages were assessed against the oil company which owned the tractor-trailer involved.76 The oil company attempted to escape liability on the ground that it did not ratify or approve its driver’s conduct. The court of appeals held that regardless of ratification or adoption of the acts, there was evidence that the oil company itself was negligent by failing to properly supervise and train the driver.77 The court noted that the oil company paid its drivers based upon the number of loads hauled and the number of miles driven.78

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65. *Id.*
66. 791 S.W.2d 584, 588 (Tex. App.—San Antonio 1990, writ denied).
67. 794 S.W.2d 69, 73 (Tex. App.—San Antonio 1990, writ denied).
68. 778 S.W.2d 546, 549 (Tex. App.—Corpus Christi 1989, writ denied).
70. *Lawson-Avila*, 791 S.W.2d at 591.
71. *Edco Production*, 794 S.W.2d at 74, 76.
72. *Sherard*, 778 S.W.2d at 547.
73. *Id.* at 549.
74. 787 S.W.2d 560 (Tex. App.—Corpus Christi 1990, no writ).
75. *See* *Scurlock Oil Co. v. Smithwick*, 701 S.W.2d 4 (Tex. App.—Corpus Christi 1985), *rev’d*, 724 S.W.2d 1 (Tex. 1986); *Missouri Pac. R.R. v. Huebner*, 704 S.W.2d 353 (Tex. App.—Corpus Christi 1985, writ ref’d n.r.e.).
76. *Scurlock*, 787 S.W.2d at 561.
77. *Id.* at 564.
78. *Id.*
practice encouraged truck drivers to maximize the number of trips and miles driven at the expense of safety. According to the court, direct corporate gross negligence subjects an employer to exemplary damages, regardless of vicarious liability principles.\(^\text{79}\)

### D. Premises Liability

In *Reyna v. Ayco Development Corp.*\(^\text{80}\) a three-year-old was injured when she wandered into an unlocked open electrical switching cabinet. Although the cabinet was located on the grounds of the Coronado Apartments (managed by Ayco Development Corp.), it was entirely within the City of Austin's easement in the complex. The City of Austin was initially a defendant in the case but settled with the parents of the injured girl. The trial court granted summary judgment in favor of the apartment owners on the ground that the owners had no duty to the plaintiff since the granting of the easement gave the city exclusive right to construct, operate, repair and maintain the electrical systems contained within the easement\(^\text{81}\). The court of appeals affirmed the summary judgment, concluding that the easement extinguished the apartment owner's duty.\(^\text{82}\) This decision is consistent with general easement law, holding that serving owners have no duties to third parties upon the premises.\(^\text{83}\) Additionally, the *Reyna* case is consistent with the holding in *Bryan v. Dockery.*\(^\text{84}\) In *Bryan*, a postman was injured when stairs leading to a rental unit collapsed on him. Suit was filed against both the property owner and the lessor. After a jury award, the property owners appealed arguing they owed no duty to the postal employee. The court of appeals upheld the jury verdict on the ground that landlords had the responsibility to keep leased premises in repair.\(^\text{85}\) Relying upon supreme court precedent\(^\text{86}\) and a prior course of dealing between the landlord and tenant, the court held that the property owner had a duty to third parties to keep the premises in good repair.\(^\text{87}\)

The appellants in *Bryan* also alleged errors in the trial court's submission of the case to the jury. The landlord requested issues concerning the tenant's right to require repair of defects, the tenant's possession of the leased premises, the condition of the stairs, and the landlord's attempts to make repairs. The court of appeals upheld the trial court's decision not to submit these issues because the right to repair and the condition of the steps prior to injury were irrelevant to the ultimate question of the landlord's negligence.\(^\text{88}\) The tendered issue regarding the landlord's diligence in making repairs was

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79. *Id.*
80. 788 S.W.2d 722 (Tex. App.—Austin 1990, writ denied).
81. *Id.* at 723-24.
82. *Id.* at 724.
84. 788 S.W.2d 447, 450 (Tex. App.—Houston [1st Dist.] 1990, no writ).
85. *Id.* at 450.
87. *Bryan*, 788 S.W.2d at 450.
88. *Id.* at 452.
properly rejected since it was an inferential rebuttal issue forbidden by the
rules of procedure.\footnote{Id.} Under the new rules concerning issue submission,\footnote{TEX. R. CIV. P. 277.} trial courts are prohibited from submitting separate questions relating to de-

sensive theories which negate a plaintiff’s cause of action.

Sanchez v. Excelo Building Maintenance\footnote{780 S.W.2d 851 (Tex. App.—San Antonio 1989, no writ).} also involved proper jury is-

sues. Sanchez was a slip-and-fall case in which the trial court submitted two

jury questions encompassing the four elements required by substantive

law.\footnote{In most slip-and-fall cases, the plaintiff must show that a condition of the premises
posed an unreasonable risk of harm to the plaintiff, that the defendant had actual or construct-
ive knowledge of the condition of the premises, that the defendant did not exercise reasonable


care to reduce or eliminate the risk, and that the defendant’s failure to do so was a proximate

cause of the injuries. Corbin v. Safeway Stores, 648 S.W.2d 292, 296 (Tex. 1983); see also City

of Denton v. Van Page, 701 S.W.2d 831, 834 (Tex. 1986).} The injured party complained on appeal that all four liability ele-

ments should have been combined into one question instead of a “two-ques-
nion cluster.”\footnote{Sanchez, 780 S.W.2d at 853.} While recognizing that the rules of procedure require


that the trial court had some discretion in submitting “two reasonably broad

liability questions instead of one.”\footnote{Sanchez, 780 S.W.2d at 854.}

In Montelongo v. Goodall\footnote{788 S.W.2d 717 (Tex. App.—Austin 1990, no writ).} a tenant tripped and fell on defective trailer

house steps and sued the landlord to recover for the injuries sustained. The

trial court granted the landlord’s directed verdict motion. The court of ap-

peals affirmed on the basis that the tenant had exclusive rights to possession

and control of the premises and that the defects were not known to the land-

lord.\footnote{Id. at 719.} The court noted that landlords who transfer possession of premises
to tenants generally owe no obligation to exercise ordinary care unless the

landlord has knowledge of hidden defects which he fails to disclose.\footnote{Id. at 718.} In the

absence of any evidence either that the contract created a duty to repair or

that the landlord knew of the hidden defects, the appeals court concluded

that the directed verdict absolving the landlord was proper.\footnote{Id. at 720.}

A similar case, Flint v. Mickelsen,\footnote{781 S.W.2d 409 (Tex. App. — Houston [1st Dist.] 1989, no writ).} confirmed that in order to recover, a

licensee must show either that her injuries were the result of the premises

owner’s willful, wanton conduct (or gross negligence), or that the premises

owner had actual knowledge of a dangerous condition which was unknown

to the licensee.\footnote{Id. at 410-11.} Because the licensee did not request issues inquiring into

the landlord’s willful, wanton or grossly negligent conduct, she could re-
cover only if the jury had found that she was ignorant of the existence of a dangerous condition known to the premises owner.\textsuperscript{102}

II. PRODUCTS LIABILITY DEFENSES

\textit{Aluminum Company of America v. Alm} \textsuperscript{103} was the culmination of a long series of appeals arising from a trial of an exploding bottle cap case. Aluminum Company of America (Alcoa) developed a system for applying aluminum caps to carbonated soft drink bottles. The owner of a Houston 7-Up Bottling Company, J. F. W. Enterprises, Inc., purchased one of Alcoa’s capping machines and used it to apply the Alcoa-designed caps to soft drink bottles. The capping material was purchased from an independent manufacturer that produced the Alcoa-designed caps. In 1976, a J. F. W. applied cap blew off of a thirty-two ounce bottle of 7-Up and blinded James Alm. A previous supreme court opinion had already clarified that Alcoa, as the designer and marketer of the closure process, cap, and capping machine, had a duty to warn consumers of the hazards of bottle-cap explosions.\textsuperscript{104}

The most recent supreme court case was appealed after the remand to consider evidence of Alcoa’s warnings. Alcoa maintained that the local 7-Up bottler was an “appropriate intermediary through which Alcoa could have fulfilled its duty to warn the ultimate consumer.”\textsuperscript{105} Alcoa further contended that the evidence showed they had discharged their duty by passing adequate warning to the intermediary who supplied the bottle. The supreme court rejected Alcoa’s argument since there was no evidence that 7-Up had anything to do with the closure system which Alcoa sold to the local bottler.\textsuperscript{106} 7-Up was not in the chain of distribution of the bottles or bottle caps themselves. 7-Up merely licensed J. F. W. to bottle the soft drink and did not exercise control over the method or materials used to cap the bottles. Under these circumstances, the supreme court concluded that 7-Up was not a learned intermediary through which Alcoa’s duty could be discharged.\textsuperscript{107}

The supreme court’s treatment of the exemplary damages assessed against Alcoa was another controversy in the \textit{Alm} opinion. After remand from \textit{Alm I}, the court of appeals held that there was insufficient evidence supporting the jury’s finding.\textsuperscript{108} The supreme court affirmed the jury’s finding on the ground that there was “no evidence in the record to negate” the jury’s finding of gross negligence.\textsuperscript{109} A four-judge dissent would have remanded the \textit{Alm I} gross negligence findings to the trial court for further development.\textsuperscript{110} In the dissent’s view, the supreme court inappropriately declared Alcoa

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  \item \textsuperscript{102} \textit{Id.} at 411.
  \item \textsuperscript{103} 785 S.W.2d 137 (Tex. 1990).
  \item \textsuperscript{104} \textit{Alm v. Aluminum Co. of America}, 717 S.W.2d 588, 595 (Tex. 1986) [hereinafter \textit{Alm I}].
  \item \textsuperscript{105} \textit{Id.}, 785 S.W.2d at 139.
  \item \textsuperscript{106} \textit{Id.} at 140.
  \item \textsuperscript{107} \textit{Id.}
  \item \textsuperscript{108} 753 S.W.2d at 478.
  \item \textsuperscript{109} 785 S.W.2d at 140.
  \item \textsuperscript{110} \textit{Id.} at 141.
\end{itemize}
guilty of gross negligence as a matter of law and thus denied the company a right to a jury trial on that issue.\textsuperscript{111}

At first blush, the dissent seems to be correct. A close reading of the \textit{Alm} opinion and an understanding of the context out of which it arose helps explain the true nature of the court's holding. The \textit{Alm} opinions are the latest skirmish in a long-running battle between the supreme court and the court of appeals over the appropriate standard to be used in reviewing a jury finding. Recall that an 1891 amendment to the Texas Constitution granted the court of appeals the final say on questions of fact.\textsuperscript{112} In theory, the courts of appeal have the exclusive right to review jury findings to determine whether factually sufficient evidence exists to support them. On the other hand, the Texas Bill of Rights and Rules of Civil Procedure guarantee both that the right to trial by jury shall be protected and that the jury is the sole judge of the credibility of witnesses.\textsuperscript{113} Thus, a potential conflict between the constitutional provisions exists,\textsuperscript{114} since the courts of appeal are often said to be substituting their opinions for the jury's findings.\textsuperscript{115} The supreme court attempted to correct the situation by enunciating a clearer, more pragmatic standard for the courts of appeal to follow when reviewing the factual sufficiency of evidence.\textsuperscript{116} The standard announced in \textit{Herbert v. Herbert}\textsuperscript{117} and \textit{Pool v. Ford Motor Company}\textsuperscript{118} requires courts of appeal to clearly set forth what evidence did and did not support the jury's finding. Understandably, there was much resistance to the supreme court's new standard, and the \textit{Alm} opinions were ripe for the development of this newly enunciated standard. The \textit{Alm II} opinion is best understood as an example of the supreme court's deference to jury findings in hotly disputed cases rather than its usurpation of a court of appeals' ability to review jury findings. It is also important to note that the supreme court did not determine Alcoa to be grossly negligent as a matter of law, but merely held that there was legally insufficient evidence to negate the jury's finding of gross negligence.\textsuperscript{119}

Another defense to products liability cases in Texas is that there was an unforeseeable alteration of a product after its introduction into the stream of commerce.\textsuperscript{120} The policy behind strict product liability applies only when a product is expected to and does reach the consumer without a substantial change in the condition in which it was sold.\textsuperscript{121} The defense effectively immunizes a manufacturer from liability when the product undergoes an un-

\begin{itemize}
  \item \textsuperscript{111} \textit{Id.} at 142.
  \item \textsuperscript{112} \textsc{Tex. Const.} art. V, § 6.
  \item \textsuperscript{113} \textsc{Tex. Const.} art. I, § 15; art. V, § 10; \textsc{Tex. R. Civ. P.} 226a.
  \item \textsuperscript{114} \textit{Dyson v. Olin Corp.}, 692 S.W.2d 456, 458 (Tex. 1985) (Robertson, J., concurring).
  \item \textsuperscript{115} \textit{See Lofton v. Texas Brine Corp.}, 777 S.W.2d 384, 387 (Tex. 1989).
  \item \textsuperscript{116} 717 S.W.2d at 594-95.
  \item \textsuperscript{117} 754 S.W.2d 141, 143 (Tex. 1988).
  \item \textsuperscript{118} 715 S.W.2d 629, 634 (Tex. 1986); \textit{see also} \textit{Cropper v. Caterpillar Tractor Co.}, 754 S.W.2d 646, 648 (Tex. 1988).
  \item \textsuperscript{119} "There is no evidence in the record to negate the jury's finding of gross negligence." \textit{Alm II}, 785 S.W.2d at 140.
  \item \textsuperscript{120} \textit{Woods v. Crane Carrier Co.}, 693 S.W.2d 377, 380 (Tex. 1985).
  \item \textsuperscript{121} \textsc{Restatement (Second) of Torts} § 402A (1965).
\end{itemize}
foreseeable change or alteration.\textsuperscript{122} Ramirez \textit{v. Volkswagen of America}\textsuperscript{123} was a wrongful death case arising from a fiery collision involving a Volkswagen van. The plaintiffs contended that the fuel-fed fire was a result of a design defect. Volkswagen defended on the grounds that there had been a substantial and unforeseeable change to the configuration of the van because the driver had removed the middle seat and replaced it with a large wooden box. According to the testimony, the wooden box hampered the crash control system and made the van uncrashworthy. The court of appeals agreed that a jury instruction on subsequent modification was proper in light of the uncontroverted evidence.\textsuperscript{124}

The effect of governmental regulations was the subject of two other opinions during this survey period. Lorenz \textit{v. Celotex Corp.}\textsuperscript{125} was a Fifth Circuit case in which the jury was instructed that the asbestos manufacturer’s compliance with government safety standards was strong and substantial evidence that the product was not defective. The substance of the instruction came from prior federal opinions\textsuperscript{126} and was held to be a correct statement of the general rule of law.\textsuperscript{127}

The federal district court case, Dallas \textit{v. General Motors Corporation},\textsuperscript{128} dealt with federal preemption of state product liability claims. The plaintiffs alleged that a 1980 Oldsmobile Omega was defectively designed because it did not include a passive restraint system (airbag). General Motors claimed, and the court agreed, that the Federal Safety Act\textsuperscript{129} and the Federal Motor Vehicle Safety Standard\textsuperscript{130} gave the manufacturer the option of installing manual seat belts instead of automatic airbags. The state design defect claims were thus implicitly preempted by the corresponding federal law.\textsuperscript{131}

Much of the confusion concerning defenses to product liability claims arises when a case is tried on competing theories, such as products liability and common law negligence. Garcia \textit{v. Dependable Shell Core Machines}\textsuperscript{132} was a case which arose from injuries a worker received while cleaning a sand mixer. The injured worker received a take-nothing judgment on his twin theories of marketing defect and common law negligence. In response to one question, the jury determined that the manufacturer failed to give adequate warnings and instructions for use with the sand mixer but failed to find that this marketing defect made the product unreasonably dangerous.\textsuperscript{133} In response to a later question, the jury refused to find that the failure to give

\textsuperscript{122}. \textit{Restatement (Second) of Torts} § 402A comment g (1965).
\textsuperscript{123}. 788 S.W.2d 700 (Tex. App.—Corpus Christi 1990, writ denied).
\textsuperscript{124}. \textit{Id.} at 702. Apparently, the plaintiffs were prohibited from introducing testimony from certain expert witnesses as a sanction related to the discovery process. \textit{Id.} at 703.
\textsuperscript{125}. 896 F.2d 148 (5th Cir. 1990).
\textsuperscript{126}. Gideon \textit{v. Johns-Manville Sales Corp.}, 761 F.2d 1129, 1144 (5th Cir. 1985); Dartez \textit{v. Fibreboard Corp.}, 765 F.2d 456, 471 (5th Cir. 1985).
\textsuperscript{127}. Lorenz, 896 F.2d at 150.
\textsuperscript{130}. 49 C.F.R. § 571.208, § 4.2.2 (1989).
\textsuperscript{131}. Dallas, 725 F. Supp. at 906.
\textsuperscript{132}. 783 S.W.2d 246 (Tex. App.—Corpus Christi 1989, no writ).
\textsuperscript{133}. \textit{Id.} at 248.
adequate warning was negligent.\textsuperscript{134} Since the questions involved different theories of liability, there was no irreconcilable conflict between the answers, and the take-nothing verdict was upheld.\textsuperscript{135}

Several cases decided in this survey period discussed the sufficiency of evidence of various product failures and defenses to such failures. In Smith v. Technibilt, Inc.\textsuperscript{136} the court held that there was insufficient evidence to conclude that a grocery cart was defectively designed when it allegedly caused a shopper to trip.\textsuperscript{137} The court in Rodriguez v. Universal Fastenings Corp.\textsuperscript{138} upheld the jury's failure to find a series of bolts used in a construction support system defective.\textsuperscript{139} The court in Roberts v. Harnischfeger Corp.\textsuperscript{140} upheld a decision under the Federal Rules of Evidence to exclude certain post-accident design changes as irrelevant to the issue of reasonableness of the design at the time of manufacture.\textsuperscript{141} Finally, the court in King v. Armstrong World Industries\textsuperscript{142} upheld a jury's finding of causation in a suit for injuries sustained as a result of asbestos exposure.\textsuperscript{143}

III. PROFESSIONAL NEGLIGENCE

A. Medical Malpractice

One group of cases included in this survey period concerned a patient's right to make informed decisions about medical intervention. In 1977, the legislature enacted a statute creating the Texas Medical Disclosure Panel.\textsuperscript{144} The panel established minimum levels of disclosure that physicians and other health care providers are required to make to their patients\textsuperscript{145} regarding certain surgical and medical procedures. Depending on which category a specific procedure falls into, certain disclosures may or may not be required.\textsuperscript{146} If the health care provider complies with the statute by providing the required disclosure, the consent form is rebuttal evidence of the discharge of the duty to warn.\textsuperscript{147}

Jones v. Papp\textsuperscript{148} involved whether a cardiologist had made a proper disclosure of both the risks of allergic reactions to certain dyes and of postsurgical bleeding. Although there was some variance between the risks disclosed and the actual injuries suffered, the court held that the physician

\begin{itemize}
\item \textsuperscript{134} Id.\textsuperscript{.}
\item \textsuperscript{135} Id. at 250.
\item \textsuperscript{136} 791 S.W.2d 247 (Tex. App.—Texarkana 1990, no writ).
\item \textsuperscript{137} Id. at 249.
\item \textsuperscript{138} 777 S.W.2d 513 (Tex. App.—Corpus Christi 1989, no writ).
\item \textsuperscript{139} Id. at 517.
\item \textsuperscript{140} 901 F.2d 42 (5th Cir. 1989).
\item \textsuperscript{141} Id. at 44.
\item \textsuperscript{142} 906 F.2d 1022 (5th Cir. 1990).
\item \textsuperscript{143} Id. at 1027.
\item \textsuperscript{144} TEX. REV. CIV. STAT. ANN. art. 4590i § 6.03 (Vernon 1976 & Supp. 1991).
\item \textsuperscript{145} Id. § 6.03 (Vernon 1976 & Supp. 1991).
\item \textsuperscript{146} Id. § 6.05 (Vernon 1976 & Supp. 1991).
\item \textsuperscript{147} Id. § 6.07 (Vernon 1976 & Supp. 1991).
\item \textsuperscript{148} 782 S.W.2d 236 (Tex. App.—Houston [14th Dist.] 1989, writ denied).
\end{itemize}
abided by his duty to disclose the risks inherent in the procedures.\textsuperscript{149} \textit{Evans v. Conley}\textsuperscript{150} involved the disclosure of risks accompanying reconstructive breast surgery. The court of appeals concluded that summary judgment granted in favor of the physician was improper because there was no evidence indicating that the physician had informed the patient of the risks involved in the surgical procedures.\textsuperscript{151} The court in \textit{Ritter v. Delaney}\textsuperscript{152} clarified that only the operating physician need obtain the required informed consent.\textsuperscript{153} In \textit{Ritter}, the patient alleged that the hospital and attending physician failed to obtain informed consent before she underwent a complicated procedure. Claims were made against both the hospital and the internist who apprised the patient of the alternatives to surgery and the complications of the procedure. The court of appeals examined one section of the disclosure act and determined that only the treating physician had a duty to make the required disclosure.\textsuperscript{154} According to the court of appeals, hospitals and other attending physicians are not required to make any disclosure or to obtain consent.\textsuperscript{155}

Summary judgments granted in favor of physicians are frequently encountered on appeal. Typically summary judgment is granted on the basis that the physician's conduct was not negligent and was not a proximate cause of the patient's injuries. Summary judgment in such an instance is appropriate only when there are no genuine issues of material fact concerning the physician's alleged negligence.\textsuperscript{156} In order to maintain such a burden, the physician must establish by affidavit or other competent evidence, the standard of care used and prove that the conduct complained of was not a breach of such standard. \textit{Elam v. Yale Clinic},\textsuperscript{157} \textit{Knapp v. Eppright},\textsuperscript{158} and \textit{Connor v. Waltrip}\textsuperscript{159} are examples of effective presentation of this basic procedural tool. In each case, competent summary judgment proof established the appropriate standard of care and showed that the defendant did not deviate from the standard.\textsuperscript{160} On the other hand, the summary judgments granted in \textit{Trevino v. Houston Orthopedic Center}\textsuperscript{161} and \textit{White v. Wah}\textsuperscript{162} were reversed because the affiants failed to establish the appropriate standard of care.\textsuperscript{163}

In \textit{Wisenbarger v. Gonzales Warm Springs Rehabilitation Hospital}\textsuperscript{164} an

\textsuperscript{149} \textit{Id.} at 241.
\textsuperscript{150} 787 S.W.2d 570 (Tex. App.--Corpus Christi 1990, writ denied).
\textsuperscript{151} \textit{Id.} at 572.
\textsuperscript{152} 790 S.W.2d 29 (Tex. App.--San Antonio 1990, writ denied).
\textsuperscript{153} \textit{Id} at 31.
\textsuperscript{154} \textit{Id.} The court's decision turned on an analysis of \textit{TEX. REV. CIV. STAT. ANN. art. 4590i} \textit{§} 6.02 (Vernon Supp. 1989).
\textsuperscript{155} \textit{Ritter}, 790 S.W.2d at 31.
\textsuperscript{156} \textit{Id.} at 32. The court held that the patient did not sufficiently raise a fact issue as to whether the physician was acting as agent for the hospital. \textit{Id.}
\textsuperscript{157} 783 S.W.2d 638 (Tex. App.--Houston [14th Dist.] 1989, no writ).
\textsuperscript{158} 783 S.W.2d 293 (Tex. App.--Houston [14th Dist.] 1989, no writ).
\textsuperscript{159} 791 S.W.2d 537 (Tex. App.--Dallas 1990, no writ).
\textsuperscript{160} 791 S.W.2d at 540; 783 S.W.2d at 642; 783 S.W.2d at 296.
\textsuperscript{161} 782 S.W.2d 515 (Tex. App.--Houston [14th Dist.] 1989, no writ).
\textsuperscript{162} 789 S.W.2d 312 (Tex. App.--Houston [1st Dist.] 1990, no writ).
\textsuperscript{163} 789 S.W.2d at 316; 782 S.W.2d at 517.
\textsuperscript{164} 789 S.W.2d 688 (Tex. App.--Corpus Christi 1990, no writ).
injured patient brought suit against a hospital for negligence and violations of the Texas Deceptive Trade Practices Act (DTPA). The patient developed a decubitus ulcer which progressed to the point that it exposed his spinal cord. He argued that the hospital breached an implied warranty of services with relation to the health care provided. Holding that the Medical Liability and Insurance Improvement Act precluded DTPA based claims against health care providers, the court of appeals upheld a partial summary judgment rendered in favor of the hospital. On its face, the court of appeals’ opinion seems correct. In spite of the expansion of warranty-based liability in other areas, health care providers are shielded from liability for breaches of implied warranty concerning certain improper treatment. What the court of appeals did not address was whether a health care provider could be subject to liability based upon misrepresentation, an unconscionable act, or breach of an express warranty. Since DTPA claims should be based upon statutory violations, negligence and implied warranties are not necessary to this special claim. In at least one supreme court case, Birchfield v. Texarkana Memorial Hospital, the court allowed recovery under the DTPA for various misrepresentations made by the hospital involved.

At least three cases during this survey period addressed the statute of limitations in medical negligence cases. Generally, the statute of limitations for medical negligence cases in Texas is two years from the date of the treatment in question. According to a recent supreme court opinion, whenever a specific ascertainable deviation from the standard of care occurs, the two-year statute is absolute (subject only to a special 75-day tolling provision). In Wilson v. Braeuer the court of appeals held that the injury sustained from an alleged case of surgical negligence occurred on an ascertainable precise date and that the statute of limitations began to run from the date of surgery. Furthermore, the court concluded that retrospective application of the supreme court’s decision in Kimball v. Brothers was not an ex post

167. 688 S.W.2d at 691.
170. Wisenburger, 789 S.W. 70 at 690.
172. 747 S.W.2d 361 (Tex. 1987).
173. Id. at 368.
176. Id. at 372.
177. 788 S.W.2d 186 (Tex. App.—Houston [14th Dist.] 1990, writ denied).
178. Id. at 188.
179. 741 S.W.2d 370 (Tex. 1987).
Two other cases have stressed that the two-year statute of limitations is subject to a modified discovery rule. The court in *Gatling v. Perna*181 reversed a summary judgment which had been granted on the ground that more than two years had elapsed between the date of the alleged negligence and the date that suit was filed.182 The lawsuit alleged that a psychiatrist's treatment of Jean Gatling had caused her a painful neuromuscular condition known as tardive dyskinesia. Although the patient learned of her diagnosis more than two years before filing the suit, she did not learn until after the limitation period had expired that the powerful drugs prescribed by the psychiatrist could have caused the condition. Since the statute of limitations cannot begin to run until the claimant discovers both an injury and its cause,183 the court concluded that the limitations period had not run before suit was filed.184 Likewise, the court in *Stotter v. Wingo*185 reversed a granting of summary judgment because the patient had raised genuine fact issues concerning the date that he learned of his dentist's negligence.186 The court concluded that rigid application of the two-year statute of limitations would have been unconstitutional because Mr. Stotter did not have a reasonable opportunity to discover the negligence before the statute of limitations ran.187

In *Haddock v. Arnspiger*188 the plaintiff suffered a perforated colon while undergoing a routine proctological examination. The plaintiff relied upon the doctrine of res ipsa loquitur, contending both that his injury would not ordinarily have occurred without negligence and that the defendant's physician had sole control of the instrumentality that caused his injury. After a jury trial, the trial court rendered judgment in favor of the physician on the negligence claims.

The supreme court ultimately concluded that the doctrine of res ipsa loquitur did not apply in this particular medical negligence case.189 Section 7.01 of the Medical Liability and Insurance Improvement Act190 limits the use of the doctrine of res ipsa loquitur to those cases in which it had been applied prior to the effective date of the act.191 Some courts use this eviden-
tiary rule in medical negligence cases when the nature of the alleged malpractice and injuries are plainly within the common knowledge of laymen. Such instances include operating on the wrong portion of the body, negligence in the use of mechanical instruments, and leaving surgical instruments and sponges within the body.\textsuperscript{192} In \textit{Haddock} the court concluded that the use of a colonoscope was not a matter within the common knowledge of laymen.\textsuperscript{193} A four-judge dissent argued that the doctrine of res ipsa loquitur should apply in this case.\textsuperscript{194} Written by Justice Doggett, the dissent convincingly argued that established precedent allowed the use of the res ipsa loquitur doctrine in precisely this sort of case.\textsuperscript{195} Although the dissent cited at least five other cases where the doctrine had been allowed prior to the enactment of Article 4590i,\textsuperscript{196} the majority nevertheless overruled this precedent.\textsuperscript{197}

Likewise, the court in \textit{Wendenburg v. Williams}\textsuperscript{198} declined to allow application of the doctrine of res ipsa loquitur where a physician allegedly operated on the wrong part of the body.\textsuperscript{199} As mentioned earlier, the use of the evidentiary rule is generally allowed in medical negligence cases involving operations on the wrong portion of the body.\textsuperscript{200} In this case, the plaintiffs alleged that the wrong part of the body had been affected when the physician perforated the iliac artery and the iliac vein while performing a lumbar laminectomy. While the physician certainly did not intend to puncture the artery and vein, both vessels touched the anterior ligament of the disc where the surgery was performed. The court concluded that any injury to the vessels was a mistake and this was not a case of operating on the wrong part of the body.\textsuperscript{201} The court further held that use of the specialized tools necessary to perform a laminectomy did not qualify as the misuse of a tool within the common knowledge of laymen.\textsuperscript{202}

The type of evidence admissible in a medical negligence case was discussed in \textit{Metot v. Danielson}.\textsuperscript{203} In \textit{Metot} the court held that it was error to exclude testimony offered by a board certified medical toxicologist to establish the standard of care common to all areas of medical practice.\textsuperscript{204} According to the court, the fact that the defendant's physician was a neurosurgeon did not mandate exclusion of the toxicologist's testimony. Under the old rule, a practitioner of one school of medicine was not compe-

\begin{itemize}
\item \textsuperscript{192} See \textit{Martin v. Petta}, 694 S.W.2d 233, 239 (Tex. App.—Fort Worth 1985, writ ref'd n.r.e.); \textit{Williford v. Banowsky}, 563 S.W.2d 702, 705 (Tex. Civ. App.—Eastland 1978, writ ref'd n.r.e.).
\item \textsuperscript{193} \textit{Haddock}, 793 S.W.2d at 951.
\item \textsuperscript{194} \textit{Id.} at 955 (Doggett J., dissenting).
\item \textsuperscript{195} \textit{Id.}
\item \textsuperscript{196} \textit{Id.}
\item \textsuperscript{197} \textit{Id.} at 954.
\item \textsuperscript{198} 784 S.W.2d 705 (Tex. App.—Houston [14th Dist.] 1990, writ denied).
\item \textsuperscript{199} \textit{Id.} at 707.
\item \textsuperscript{200} \textit{Id.}
\item \textsuperscript{201} \textit{Id.}
\item \textsuperscript{202} \textit{Id.}
\item \textsuperscript{203} 780 S.W.2d 283 (Tex. App.—Tyler 1989, writ denied).
\item \textsuperscript{204} \textit{Id.} at 287.
\end{itemize}
tent to testify as an expert in a medical negligence case involving a practitioner of another school of medicine. A recognized exception to this, however, occurs when the particular subject under scrutiny is "common to and equally recognized and developed in all fields of practice." The exception to the "same school" rule should have allowed the toxicologist to testify concerning the proper standard of care in relation to prescription medicine. In addition, the court of appeals held that the patient could properly elicit testimony from the expert witness concerning the ultimate issues of negligence and proximate cause. Under the Rules of Evidence, experts in medical malpractice cases are allowed to give their opinions on ultimate issues and may testify that certain conduct is, or is not, negligent, grossly negligent or the proximate cause of an occurrence.

Two other cases also warrant discussion. The court in Hernandez v. Nueces County Medical Society Community Blood Bank reversed a summary judgment motion granted in favor of a blood bank. The trial court had concluded that no fact issues existed concerning the blood bank's negligence in light of evidence that the facility complied with federal and other minimum standards promulgated by various licensing agencies in connection with the testing of stored blood for certain types of hepatitis. While the court of appeals noted that compliance with regulation standards and licensing requirements are some evidence of nonnegligence, the court also recognized that compliance does not conclusively establish that the health care provider met its duty and was not negligent. Watson v. Isern was an appeal from a medical negligence case in Beaumont. The court of appeals in Watson ruled admissible testimony that the defendant's expert allowed defendant to treat the expert's family and that the expert had a long standing relationship with the defense attorney. The excluded evidence, however, would have established that the expert witness was a defendant in four or five other medical malpractice lawsuits.

B. Attorney Malpractice

The supreme court in Millhouse v. Wiesenthal was presented with a
claim of attorney malpractice arising from a failure to timely file certain appellate documents. The plaintiff, himself an attorney, brought suit against one of his former lawyers for negligently failing to file a statement of facts necessary for an appeal. In an unpublished opinion, the appellate court in the underlying lawsuit affirmed the judgment against Millhouse allegedly on the grounds that the statement of facts was not timely filed.

The defendant’s lawyer filed a motion for summary judgment on the grounds that his failure to file a statement of facts was not a proximate cause of the damages sustained. The court of appeals and the supreme court agreed that the proximate cause question in an attorney malpractice case is a question of law for the court and is not to be determined by the jury.\(^{218}\) The majority reasoned both that appellate practice is too complicated for a jury to understand and that judges are in the best position to make this type of determination.\(^{219}\) The supreme court declared that only another court is qualified to determine the merits and probable outcome of an allegedly mishandled appeal.\(^{220}\) A three-judge dissent argued that the determination of proximate cause in cases of attorney negligence are no more complicated or difficult than other fields of professional negligence, such as medicine, construction and engineering.\(^{221}\)

In *Simpson v. James\(^{222}\)* the Fifth Circuit, applying Texas law, concluded that the two-year statute of limitations for legal negligence actions does not begin to run until the plaintiff discovers, or in the exercise of reasonable care should have discovered, the nature and cause of the injury.\(^{223}\) Relying upon *Willis v. Maverick*,\(^{224}\) the court found sufficient evidence to support the jury’s finding that the injured client did not know, and should not have known, of the alleged negligence more than two years before filing suit.\(^{225}\)

### IV. IMMUNITIES

#### A. Texas Tort Claims Act

Three cases decided in this survey period dealt with special defects under the Texas Tort Claims Act.\(^{226}\) As a general rule, a governmental entity owes third parties “only the duty that a private person owes to a licensee on private property.”\(^{227}\) Typically this is construed to exonerate the government from liability unless it is shown that the governmental entity knew of the presence of a hidden defect and neither warned the licensee nor made the

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218. *Id.* at 627-28.
219. *Id.* at 626.
220. *Id.* at 628.
221. *Id.* (Mauzy, J., dissenting).
222. 903 F.2d 372 (5th Cir. 1990).
223. *Id.* at 375.
225. 903 F.2d at 376.
227. *Id.* § 101.022 (Vernon 1986).
conditions safe.228 Such a restricted duty does not apply, however, in instances of special defects. Such defects create a special duty to warn on the part of the governmental units.229 As such, the question of what is or is not a special defect is typically an area of much debate.

The court of appeals in City of San Antonio v. Schneider230 held that the dangerous layout of a road, including resurfacing efforts and the tendency of the roadway to become slippery when wet, constituted a special defect which imposed on the government a higher standard of care.231 Evidence presented at trial demonstrated that traffic engineers for the City of San Antonio were familiar with the hazards and that the complications posed by the particular stretch of road were the proximate cause of the occurrence in question.232 Similarly, in State Dept. of Highways & Public Transp. v. Payne233 an obscured culvert placed near a roadway was found to be a special defect.234 The court of appeals cited other cases which held that ditches235 and arroyos236 were special defects, and analogized them to the hidden culvert in this case.237 On the other hand, an unusually high water level and unlighted bridge did not constitute special defects according to Tarrant County Water Control and Improvement Dist. No. 1 v. Crossland.238 The court held that use of the special defects doctrine was restricted to instances where construction or other obstructions had created some unusual condition.239 In this case, no such construction or obstructions existed, and the lake level could not be considered a special defect so as to increase the standard of care owed by the government.240 Crossland also held that the decision not to light a bridge or give warnings of its existence were discretionary acts immunized by a special section of the Tort Claims Act.241 Likewise, the court in City of El Paso v. Ayoub242 declined to impose liability for the city's decision not to place or upgrade guardrails and barricades on an overpass.243

228. Typically, a premises owner owes a licensee a duty not to injure the licensee wilfully, wantonly or through gross negligence. Furthermore, unless the owner has knowledge of a dangerous condition, the existence of which is unknown to a licensee, the premises owner does not owe a duty to warn or make the condition reasonably safe. Lower Neches Valley Authority v. Murphy, 536 S.W.2d 561, 562-63 (Tex. 1976); State v. Tennison, 509 S.W.2d 560, 562 (Tex. 1974).
229. TEX. CIV. PRAC. & REM. CODE ANN. § 101.022(b) (Vernon 1986).
231. Id. at 468.
232. Id.
234. Id. at 322.
237. 781 S.W.2d at 322.
238. 781 S.W.2d 427, 434 (Tex. App.—Fort Worth 1989, writ denied).
239. Id. at 433.
240. Id. at 434.
243. Id. at 554.
In Delaney v. University of Houston the court of appeals held that the University of Houston was not liable for claims based upon the rape of a student in a dormitory. The court noted that the Texas Tort Claims Act does not waive immunity for claims arising out of intentional torts. The University of Houston student, however, attempted to circumvent the Texas Tort Claims Act by arguing that running a dormitory was a proprietary function and thus completely outside the scope of the Act. Pointing to a wealth of out-of-state precedent, the victim argued that since the state had undertaken a non-governmental function, it should be held liable for its negligence. The court of appeals rejected this argument, concluding that the University of Houston is a branch of the State of Texas. According to the court, the State of Texas has no proprietary capacity and acts only in a governmental role.

Driskill v. State involved an exception to the Texas Tort Claims Act which grants the government immunity for claims arising from the assessment or collection of taxes. The Tort Claims Act does not allow suit for allegations arising out of “the assessment or collection of taxes by a governmental unit.” In this case, a State Comptroller’s employee was driving to a delinquent taxpayer’s place of business to discuss the payment of past-due taxes. While in the course and scope of her employment, the state employee collided with another motorist. Since the employee was technically engaged in the collection of taxes, the State of Texas argued that it was immune from suit according to the provisions of the Act. The supreme court rejected this contention, holding that the exception under discussion granted governmental immunity only for injuries which resulted directly from the assessment or collection of taxes. The court held that the automobile accident was not directly related to the assessment of taxes and had nothing to do with the implementation of policy decisions on how to collect or assess taxes. The court also concluded that the motorist’s settlement with the state employee did not extinguish any claims against the state itself.

B. Sovereign Immunity

Domínguez v. Kelly was a suit brought against an examining physician who reported that a child had been the victim of sexual abuse. Although the physician examined the child at the request of the State Social Services

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244. 792 S.W.2d 733 (Tex. App.—Houston [14th Dist.] 1990, writ granted).
245. Id. at 738.
247. 792 S.W.2d at 738.
248. Id.
249. 787 S.W.2d 369 (Tex. 1990).
250. Id. at 370.
252. Driskill, 787 S.W.2d at 370.
253. Id. at 371.
254. Id.
255. 786 S.W.2d 749 (Tex. App.—El Paso 1990, writ denied).
Agency, the wrongfully accused parents alleged that the doctor was negligent and guilty of various intentional torts. The court of appeals held that the doctor had no duty to the parents and further stated that a specific section of the Family Code granted immunity to "any person reporting pursuant to this chapter."256

V. STATUTES OF LIMITATION AND REPOSE

In a significant departure from prior Texas case law, the supreme court in Moreno v. Sterling Drug257 declared that the discovery rule does not toll the statute of limitations in wrongful death actions.258 The case came to the supreme court via the Fifth Circuit as a certified question in two consolidated cases.259 In both cases the infants died of Reye's Syndrome, allegedly from taking aspirin manufactured by the Sterling Drug Company. Construing the Wrongful Death Act,260 the supreme court held that regardless of whether the parents knew or should have known of the cause of their child's death, the parents had a maximum of two years in which to bring suit.261 The court held that the plain meaning of the Wrongful Death Act was unambiguous and required an absolute statute of limitations.262 Moreover, use of the statute to determine when a cause of action accrues supplants the use of the discovery rule.263 The court followed what it perceived as the majority of jurisdictions in declining to grant parents a reasonable opportunity to discover the cause of their child's death.264 The majority then concluded that the new construction of the statute did not violate the open courts provision of the Texas Constitution.265

The dissent rightfully pointed out that the opinion had once again made it more efficient to kill someone than to injure them.266 Had the child merely been injured, as in Nelson v. Krusen,267 the discovery rule would have preserved the patient's right to sue for injuries received by the child. The dissent pointed out that at the time of the children's death, the critical causation between Reye's Syndrome and the use of aspirin had not yet been determined.268 Furthermore, none of the outside precedent considered by the court involved limitations provisions which were analogous to the Texas Wrongful Death/Survival Acts.269 The separate opinion also concluded that the open courts provision of the constitution protected wrongful death

256. Id. at 751; TEX. FAM. CODE ANN. § 34.03 (Vernon 1986 & Supp. 1991).
257. 787 S.W.2d 348 (Tex. 1990).
258. Id. at 349.
259. Id. The questions were certified under TEX. R. APPL. P. 114.
261. 787 S.W.2d at 354.
262. Id. at 352.
263. Id. at 353.
264. Id.
265. Id. at 357; TEX. CONST. art. I, § 13.
266. 787 S.W.2d at 358.
267. 678 S.W.2d 918 (Tex. 1984). Incidentally, the Krusen case was authored by the same judge who wrote Moreno.
268. 787 S.W.2d at 361 (Doggett J., dissenting).
269. Id.
and survival action claimants and mandated the use of the discovery rule.\textsuperscript{270}

The court in \textit{Twyman v. Twyman}\textsuperscript{271} held that a husband's intentional infliction of mental anguish was a continuing tort which extended the statute of limitations for claims arising out of a divorce.\textsuperscript{272} According to the court, a continuing tort is not complete until the tortious acts have ceased.\textsuperscript{273} Another relatively minor exception to the statute of limitations was discussed in \textit{Hooper v. Torres}.\textsuperscript{274} The court in \textit{Hooper} reversed a jury verdict in favor of an injured automobile driver.\textsuperscript{275} Suit was filed two years and three days after the automobile accident which injured Janie Torres. In response to a statute of limitations defense, Torres relied upon a special provision of the Civil Practice and Remedies Code to toll the statute of limitations during any period of time that a defendant was out of the state.\textsuperscript{276} The jury found that the truck driver had, indeed, been out of the state. Evidence established, however, that the absence was before the filing of suit as opposed to after litigation had ensued.\textsuperscript{277} Without this evidence, the plaintiff could not meet her burden of proof for avoiding the effective statute of limitations.\textsuperscript{278}

The statute of repose was considered in \textit{Rodarte v. Carrier}.\textsuperscript{279} The suit arose out of the death of a worker repairing a heater-air conditioning unit attached to a building. The air conditioning unit was designed, installed, and maintained by the Carrier Corporation, but was attached to the premises more than ten years before the date of the lawsuit. The statute of repose protects those who construct or impair an improvement to real property such as heating and refrigeration systems.\textsuperscript{280} As such, the statute of repose extinguished liability for any damages.\textsuperscript{281}

\section*{VI. Damages}

\subsection*{A. Exemplary Damages}

The court in \textit{Rainbow Express v. Unkenholz}\textsuperscript{282} addressed the type of evidence constituting gross negligence.\textsuperscript{283} In \textit{Rainbow Express} a truck hauling tractor tires to Illinois suffered a blow out of the front left tire and injured a motorist. Testimony revealed that badly worn tires caused the blowout, and that the tires were in violation of several Department of Transportation stan-
The issue on appeal was whether sufficient evidence was presented to indicate a conscious indifference for the rights, welfare, and safety of the public. Upholding the jury's finding, the Texarkana court of appeals concluded that the driver and his terminal manager were consciously indifferent to the extreme dangers that the worn tires presented. The terminal manager who allowed the truck to be driven with the substandard tires was a vice-principal of Rainbow Express. In order to impose exemplary damages upon a corporation for the acts of its agents, there must be sufficient evidence that the actor was employed in some managerial capacity or was performing an act which was later authorized or ratified by the principal. Because he had supervisory powers, the manager was determined to be a vice-principal with the power to bind the corporation for gross negligence.

The issue of vice-principals was also discussed in *Mercy Hospital of Laredo v. Rios* where the court upheld a jury finding that a head nurse was vice-principal of the hospital. Relying upon another appellate court decision, the court reasoned that a hospital is responsible for the actions of a registered nurse in charge of a patient. The gross negligence of the vice-principals could thus be imparted to the hospital. In this connection, the supreme court case of *Ramos v. Frito Lay* is instructive. As discussed earlier, the case arose from the alleged intentional tort committed by a vice-principal of a corporation. The supreme court held that the nature of the employment, as opposed to the nature of the specific act, is determinative of whether the actor is a vice-principal. According to *Ramos*, a vice-principal performing any type of act, whether or not managerial, can create liability for exemplary damages on the part of a corporation.

**B. Actual Damages**

In *Vaughn v. Reagan* a father of a young girl was severely injured through the negligence of a tavern owner. During a bar fight, William Reagan was smashed in the head with a baseball bat and suffered severe brain damage. The jury awarded damages to the daughter based upon loss of parental care, nurture and guidance. The defendants appealed on the grounds...
that a minor plaintiff in Texas in not entitled to recover for lost parental consortium except in wrongful death cases.\footnote{299}{Id. at 90.} The court of appeals agreed, holding that the decision to recognize the new cause of action was reserved to the legislature or the supreme court.\footnote{300}{Id. at 92.} The court of appeals refused to recognize this cause of action even though it was clear that the diminished capabilities of the parent (he had the capacity of a five or six year-old) severely injured his relationship with his minor child.\footnote{301}{Reagan v. Vaughn, 34 Tex. Sup. Ct. J. 189 (Dec. 19, 1990).} The Texas Supreme Court, in a landmark decision, reversed the court of appeals and reinstated the jury's award of consortium damages to the daughter.\footnote{302}{Id.} The decision represents an extension of Texas law because such damages are no longer limited to wrongful death cases.

Several cases reported in this survey period reversed jury verdicts which refused to award damages despite overwhelming evidence to the contrary. For instance, in \textit{Gray v. Floyd}\footnote{303}{783 S.W.2d 214 (Tex. App.—Houston [1st Dist.] 1990, no writ).} the court of appeals reversed a verdict which awarded the plaintiff the amount of her full surgeon's bill but refused to award any damages for hospital and anesthesia fees.\footnote{304}{Id. at 217.} \textit{Jackson v. Taylor}\footnote{305}{912 F.2d 795 (5th Cir. 1990).} reversed a federal jury's decision not to award damages for future medical expenses, past or future pain or suffering, and past or future lost earnings and earning capacity.\footnote{306}{Id. at 797.} Faced with objective and uncontroverted evidence concerning these damages, the court reversed and remanded for another jury trial.\footnote{307}{Id. at 798.}