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PERSONAL TORTS

by

Frank L. Branson*

I. NEGLIGENCE

DURING the Survey period major developments in Texas’s negligence law took place in the areas of dram-shop liability, premises liability, contributory negligence, parental and interspousal immunity, and the law under the Tort Claims Act.

A. Dram-Shop and Related Liability

One of the most surprising developments in Texas law during the Survey period was the imposition of dram-shop liability on restaurant and tavern owners.1 In two cases, Poole v. El Chico Corp.2 and Evans v. Joleemo, Inc.,3 appellate courts found that tavern owners owed a duty to the motoring public not to sell liquor to an intoxicated person. The Texas Supreme Court found no reversible error in denying a writ in the Poole case. Saenz, the defendant in Poole, arrived at the El Chico Restaurant during a happy hour when drinks were priced two-for-one. Saenz left the El Chico about three hours later, drove through a red light, and struck the plaintiff’s auto, killing the driver. The police arrested Saenz for driving while intoxicated, and a breathalyzer test resulted in a reading of .18, well above the point at which a driver is presumed intoxicated.4 Saenz pleaded guilty to involuntary manslaughter. The plaintiffs sued Saenz and El Chico; the trial court severed the El Chico action and entered summary judgment for El Chico.5

The plaintiffs argued that El Chico employees violated section 101.63(a) of the Texas Alcoholic Beverage Code,6 and that the violation constituted neg-

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1. BLACK’S LAW DICTIONARY 444 (5th ed. 1979) defines a dram-shop as “A drinking establishment where liquors are sold to be drunk on the premises; a bar or saloon.”
2. 713 S.W.2d 955 (Tex. App.—Houston [14th Dist.] 1986, writ ref’d n.r.e.).
3. 714 S.W.2d 394 (Tex. App.—Corpus Christi 1986, no writ).
4. TEX. REV. CIV. STAT. ANN. art. 6701-1 (Vernon Supp. 1986) provides that a driver is presumed intoxicated when he exhibits a .10 percent blood, breath, or urine alcohol concentration.
5. 713 S.W.2d at 957.
6. TEX. ALCO. BEV. CODE ANN. § 101.63(a) (Vernon 1978) provides: “A person com-
ligence, negligence per se, and gross negligence. The court refused to address the question of negligence per se. The court held, however, that “a bar operator owes a duty to the motoring public to not knowingly sell an alcoholic beverage to an already intoxicated person.” The court further held that the jury should decide whether El Chico breached the duty.

The appellate court noted that section 101.63(a) does not provide plaintiffs in a civil suit with a statutory cause of action. The court stated, however, that criminal statutes may provide standards for determining tort liability, and noted that a duty of care may be found in a legislative enactment that does not provide for civil liability. The court in Poole relied on the Texas Supreme Court’s decision in Nixon v. Mr. Property Management Co., in which the court found that a city ordinance, requiring that doors and windows on a vacant structure be securely closed, imposed a duty on the apartment manager to protect a minor child raped in a vacant apartment. In Nixon the court found that the purpose of the ordinance was to deter criminal activity and protect the general public. The court reasoned, therefore, that the apartment manager owed a duty to the general public. In Poole the appellate court found that the purpose of the Alcoholic Beverage Code is to prevent injury to the public. Section 101.63(a), like the ordinance in Nixon, gave rise to a duty owed to members of the general public.

In Evans v. Joleemo the plaintiffs sued an intoxicated driver and a tavern owner after the driver collided with the plaintiffs’ son’s motorcycle, killing the son. Plaintiffs sought to show that (1) the tavern served alcoholic drinks to the driver when he was intoxicated, (2) the tavern’s agents knew or should have known of the driver’s intoxication, and (3) the tavern’s agents knew or should have known the driver would drive away from the premises in his auto. The plaintiffs alleged that the tavern owner was negligent in failing to provide transportation for an intoxicated driver, or, in the alternative, in failing to alert police that the patron left in an intoxicated state. The trial

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7. 713 S.W.2d at 957.
8. Id. at 958.
9. Id.
10. Id. at 957.
11. Id.
12. Id. (citing Vesely v. Sager, 5 Cal. 3d 153, 164, 486 P.2d 151, 159, 95 Cal. Rptr. 623, 631 (1971)).
14. 690 S.W.2d at 549.
15. Id.
16. Id.
17. 713 S.W.2d at 957. TEX. ALCO. BEV. CODE ANN. § 1.03 (Vernon 1978) provides, “This code is an exercise of the police power of the state for the protection of the welfare, health, peace, temperance, and safety of the people of the state.”
18. 713 S.W.2d at 957-58. The court noted: “As a member of the motoring public, Larry Poole was of the class of persons intended to be protected by section 101.63(a) and someone to whom El Chico owed a duty to not knowingly sell an alcoholic beverage to an intoxicated Rene Saenz.” Id.
19. 714 S.W.2d 394 (Tex. App.—Corpus Christi 1986, no writ).
court severed and dismissed the action against the tavern owner.\textsuperscript{20}

The appellate court noted the general common law rule that selling liquor to an ordinary, able-bodied person is not a tort.\textsuperscript{21} The court said, however, that the rule does not apply when the seller knows that the purchaser is intoxicated and impaired in his ability to conform to ordinary, rational conduct.\textsuperscript{22} The court held that at common law a tavern owner who encourages and serves persons he knows or should know are intoxicated, and who knows or should know the drinker will drive a motor vehicle, owes a duty to third persons to take reasonable precautions to prevent the intoxicated person from driving.\textsuperscript{23} The court noted that a breach of the duty could foreseeably cause injury to third persons.\textsuperscript{24} As in the Poole case, the court in Evans refused to decide whether a violation of section 101.63(a) constituted negligence per se.\textsuperscript{25}

In a lengthy dissent Chief Justice Nye attacked the court's imposition of dram-shop liability in Evans.\textsuperscript{26} Justice Nye argued that at common law a tavern owner is not liable for off-premises injuries sustained by third persons as a result of an intoxicated person's acts, even when the tavern owner's negligence in serving the patron contributed to the injury.\textsuperscript{27} Justice Nye observed that the Texas rule concerning dram-shop liability was not one of immunity, but was instead one of nonliability based on the concepts of causation and foreseeability.\textsuperscript{28} Absent a legislative act, the dissent stated, an intermediate appellate court cannot alter the common law.\textsuperscript{29} The dissent

\begin{itemize}
\item \textsuperscript{20} 714 S.W.2d at 395.
\item \textsuperscript{21} Id. at 396.
\item \textsuperscript{22} Id. The court relied on McCue v. Klein, 60 Tex. 168 (1883). In McCue defendants induced a habitual drunkard to drink three pints of whiskey, causing his death. The supreme court noted that a party can recover no damages for an injury to which he consented. Id. at 168. The court held, however, that when intoxication impairs one's ability to refuse, liability could not be excused on the ground of consent. Id. at 169. The court ultimately held that persons who take advantage of a drunk's mental condition are liable for damages. Id. at 171.
\item \textsuperscript{23} 714 S.W.2d at 396.
\item \textsuperscript{24} Id.
\item \textsuperscript{25} Id. at 397. The court stated, "While it is not necessary to decide if the statute establishes negligence per se, we believe that the legislature, in adopting . . . § 101.63(a), intended to protect the public as well as intoxicated persons." Id.
\item \textsuperscript{26} Id. at 397-401.
\item \textsuperscript{27} Id. at 397 (citing Vesely v. Sager, 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971)).
\item \textsuperscript{28} Id. at 398. The dissent stated:
\begin{quote}
In Texas, the common law rule concerning dramshop liability was not a rule of immunity. Indeed, it is impossible to imagine why, of all occupations, those who furnish liquor would be singled out for a judicially conferred blessing of immunity to respond in damages for their wrongful acts. The common law rule in Texas is one of non-liability, founded upon concepts of causation and foreseeability. I would acknowledge the logical syllogism that one cannot become intoxicated by drinking liquor unless someone furnishes it. However, the converse is equally logical: one cannot become intoxicated if one does not drink. Common sense dictates that both the furnishing and the drinking are part of the chain of cause and effect that produces accidents such as the one in this case.
\end{quote}
\item \textsuperscript{29} Id. at 397. The dissent noted, "[t]he function of the intermediate court of appeals is primarily a stare decisis court. Inventiveness belongs to the legislature and, in some cases, the Supreme Court and Court of Criminal Appeals, but not to the intermediate appellate courts."
\end{itemize}
asserted further that the legislature has rejected dram-shop liability, and that courts should not create liability when the legislature has not done so. The dissent did not address the assertion in Poole that courts should not be bound by legislative inaction in the area of tort law, an area in which development has come primarily through the judicial process as prompted by changing social conditions.

*Pinkham v. Apple Computer, Inc.* limited the scope of dram-shop liability. In *Pinkham* a temporary employee attended a company-sponsored, weekend picnic in the company parking lot. The temporary employee, Denney, drank throughout the day and smoked marijuana off-premises. Several employees believed that Denney was intoxicated. As Denney was leaving, another employee told Denney that a wallet and sunglasses were on top of Denney's car, and asked if Denney was all right. Denney replied affirmatively. Subsequently, Denney drove his vehicle into a bicycle, killing the plaintiffs' son and injuring another youth. The trial court granted Apple Computer a summary judgment.

The plaintiffs in *Pinkham* relied on the supreme court's holding in *Otis Engineering Corp. v. Clark.* The *Otis* court held an employer liable for injuries when an intoxicated employee killed a third party in an auto accident because the employer took affirmative action in helping the incapacitated employee to his car, possibly breaching the duty a reasonable, prudent employer owes the public. The court in *Pinkham* found the crucial question in *Otis* to be whether the employer took affirmative action to control the employee. The court found that Apple's supervisory personnel took no action to control the temporary employee. The court noted that the one supervisory employee's conversation with Denney, advising him that his glasses and wallet were on top of the car, was the nearest Apple came to taking control over Denney's actions. The only Apple supervisory employee who testified stated he had no knowledge of Denney's intoxication.

The court noted that the picnic was a company function and that the com-

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Id. at 398. Chief Justice Nye asserted, without citation, that bills creating dram-shop liability had been introduced in the legislature three times within the last decade. *Id.*

31. *Id.* at 399.

32. 713 S.W.2d at 958 (citing *Otis Eng'g Corp. v. Clark*, 668 S.W.2d 307 (Tex. 1983); *Sanchez v. Schindler*, 651 S.W.2d 249 (Tex. 1983)).

33. 699 S.W.2d 387 (Tex. App.—Fort Worth 1985, writ ref'd n.r.e).

34. *Id.* at 388.

35. 668 S.W.2d 307 (Tex. 1983).

36. *Id.* at 311. The court related the standard of care:

> Therefore, the standard of duty that we now adopt for this and all other cases currently in the judicial process, is: when, because of an employee's incapacity, an employer exercises control over the employee, the employer has a duty to take such action as a reasonably prudent employer under the same or similar circumstances would take to prevent the employee from causing an unreasonable risk of harm to others.

*Id.*

37. 699 S.W.2d at 390.

38. *Id.*

39. *Id.*

40. *Id.*
pany intended to benefit from the picnic through better employee morale and employee-employer relations. The court held, however, that these facts, absent some measure of employer control, would not support imposing liability on Apple.

In two related cases the appellate courts considered evidence of intoxication in negligence actions. In *Missouri-Kansas-Texas Railroad v. Alvarez* the court held that intoxication, in and of itself, does not constitute negligence. The trier of fact, however, may consider evidence of intoxication in determining whether or not a person is negligent. The court in *Harris v. Cantu* held that while intoxication is evidence of negligence, the trial court erred by calling attention to drinking in the jury instruction. The court held, however, that the error was not reversible error.

**B. Premises Liability**

A number of cases considered the Texas Supreme Court’s 1985 holding in *Nixon v. Mr. Property Management Co.* In *Nixon* the owner of a vacant apartment was held liable for the injuries to a minor after she was abducted and raped in the apartment. The supreme court held that a city ordinance requiring vacant buildings to be secured created a duty owed by the owner to the general public. The *Nixon* court held that a premises owner may be liable for the intentional torts of another if the owner knew or should have known that the third party might use the premises to commit a tort or crime.

In *Allright, Inc. v. Pearson* the plaintiff leased parking space in a down-

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41. *Id.* The court noted that beer was only one beverage served at the family social event, and that the amount of alcohol was not disproportionate to the amount of food provided.
42. *Id.* at 391. The plaintiffs also argued that the employee's intoxication resulted from the use of the employer's chattels. *Id.* Argued that the employer's chattels which would subject the employer to liability for negligent use of the chattel by the employee.

43. 703 S.W.2d 367 (Tex. App.—Austin 1986, writ ref’d n.r.e.).
44. *Id.* at 369.
45. *Id.* (citing Benoit v. Wilson, 150 Tex. 273, 239 S.W.2d 792 (1951)).
46. 697 S.W.2d 721 (Tex. App.—Corpus Christi 1985, writ granted).
47. *Id.* The jury was instructed, inter alia, to consider the defendant's act or omission of driving while under the influence of intoxicating liquors. *Id.* at 724.
48. *Id.* at 725.
49. 690 S.W.2d 546 (Tex. 1985); see supra notes 13-16 and accompanying text.
50. 690 S.W.2d at 547.
51. *Id.* at 549.
52. *Id.* at 550. The court cited *Restatement (Second) of Torts* § 448 (1965), which states:

The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.

(Emphasis added.)
53. 711 S.W.2d 686 (Tex. App.—Houston [1st Dist.] 1986, no writ).
town Houston parking garage, believing that the garage would be attended while open. The garage manager did not tell the plaintiff that the garage would be unattended from 5:30 p.m. to 8:00 p.m. The plaintiff testified that she would not have leased the space had she known the lot would be unattended. On the second night she parked in the garage she was robbed at 7:15 p.m.; no attendant was on duty. The plaintiff recovered damages for her property, damages for pain and mental suffering, and exemplary damages. Allright appealed, contending that it had no duty to provide security or warn that it did not provide security. The appellate court in Pearson held that a premises owner owes a duty of reasonable care to foresee and prevent the injury of invitees through the criminal acts of third persons. The court rejected Allright's argument that the dangerous condition was open and obvious by noting that, "Allright's duty of reasonable care to provide adequate security for its invitees . . . would justify an invitee's assumption that the garage would be a safe place to park." The court noted that the fact that a similar event had not occurred previously did not control; rather, the controlling issue was whether the garage manager could have reasonably foreseen that a crime would occur. The court concluded that when evidence leads the jury to conclude an event is foreseeable, and when the owner's negligence proximately causes the plaintiff's injuries, an owner will be liable to a third party.

The plaintiff in Ronk v. Parking Concepts of Texas, Inc. was assaulted in an outdoor parking lot at 1:30 p.m. Parking Concepts manned a booth across the street from the parking lot, but the lot had no security features. The trial court granted Parking Concepts a summary judgment. The appellate court noted the Nixon rule that criminal conduct of a third party is a superseding cause of injury unless the premises owner could reasonably have foreseen that his conduct would result in the commission of a crime. The appellate court held that a premises owner has a duty to protect business invitees from crime if the owner believes from past experience that such activities are likely to occur. The court ultimately held, however, that testi-

54. The manager told the plaintiff that the garage remained open until 8:00 p.m., but the manager did not mention that the lot was unattended after 5:30 p.m., and no signs indicated that fact. The plaintiff left work at 5:15 p.m. on the first night she parked in the garage, and she noticed an attendant on duty.
55. 711 S.W.2d at 689; see also Walkoviak v. Hilton Hotels Corp., 580 S.W.2d 623 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.) (hotel owed duty to guest robbed in parking garage); Morris v. Barnette, 553 S.W.2d 648 (Tex. Civ. App.—Texarkana 1977, writ ref’d n.r.e.) (all-night washateria owed duty to customer who was raped); Eastep v. Jack-in-the-Box, Inc., 546 S.W.2d 116 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ ref’d n.r.e.) (restaurant owed duty to customer beaten on premises).
56. 711 S.W.2d at 692-93.
57. Id. at 690.
58. Id.
59. 711 S.W.2d 409 (Tex. App.—Fort Worth 1986, writ ref’d n.r.e.).
60. Id. at 411.
61. Id. at 412 (citing Nixon, 690 S.W.2d at 549).
62. 711 S.W.2d at 414. The Ronk court emphasized past similar acts, while the Pearson court held that past similar acts were not dispositive of the issue. See supra notes 53-58 and accompanying text.
mony of the plaintiff's co-workers that the lot was in a high crime area, and police reports showing fifteen crimes near the parking lot over a two-year period, did not raise an issue of material fact as to whether the parking lot owner should have known that crimes were likely. The appellate court, therefore, affirmed the summary judgment.

In *Yarborough v. Erway* a patron sued a bar owner after another patron stabbed him. The appellate court addressed the issue of foreseeability. Rather than stressing the evidence of similar events in the past, the *Yarborough* court stressed the time frame in which the crime in question was committed. The court held that owners whose businesses do not attract crime owe no duty to guard against crime unless the owners have reason to know acts occurring or about to occur pose an imminent likelihood of harm to an invitee. The court did not focus, as had the *Nixon* court, on criminal conduct over a period of months, but instead focused on the events leading to the crime at issue. The court noted that the crime in *Yarborough* occurred in less than two minutes, and added that the bar's employees could not have prevented the fight had they known it was imminent. The court distinguished *Eastep v. Jack-in-the-Box, Inc.*, in which a two-minute argument led to an altercation injuring an invitee. The *Yarborough* court noted that the Jack-in-the-Box employees had ample time to warn police before the plaintiff was injured. The *Yarborough* court held that the evidence did not support the jury's conclusion that the fight was foreseeable.

Several cases addressed the duty a premises owner owes to an independent

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63. Co-workers related the area's undesirable reputation and potentially dangerous character.

64. *Id.* at 416-17. Ten of the crimes occurred in the adjacent office building where plaintiff worked, and five were committed in an adjacent parking lot.

65. *Id.* at 419.

66. 705 S.W.2d 198 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.).

67. *Id.* at 203-04.

68. See Pearson, *supra* notes 53-58 and accompanying text; Ronk, *supra* notes 59-64 and accompanying text.

69. 705 S.W.2d at 202.

70. *Id.* The court cited Castillo v. Sears, Roebuck & Co., 663 S.W.2d 60, 66 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.) (invitees attacked outside a mall; no employees witnessed the attack).

71. 705 S.W.2d at 203.

72. The court stated, "[T]he fight between Erway and Henderson occurred suddenly. The time which elapsed between their decision to go outside and the stabbing was only a matter of seconds or one to two minutes." *Id.*

73. *Id.*

74. 546 S.W.2d 116 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ ref'd n.r.e.).

75. Two minutes elapsed between the argument and the actual fight. The fight lasted three to five minutes before the plaintiff was injured, and police arrived three to five minutes later.

76. 705 S.W.2d at 202.

77. *Id.* at 204. The *Yarborough* decision makes no analysis of the long-term foreseeability discussed in *Ronk* and *Pearson*. However, had the courts in *Ronk* and *Pearson* focused on the length of the commission of the crime, it is doubtful that premises owners would be liable. Given the lack of witnesses and short duration of most crimes, one must question whether premises owners would be liable under *Yarborough* even in the most egregious circumstances. For instance, in *Nixon* the supreme court lists examples of violence at the apartments and of vagrants in the area. 690 S.W.2d at 550-51. Since the only witness in *Nixon* was the minor
contractor. In *Shell Oil Co. v. Songer*\(^7\) an employee of an independent contractor was electrocuted while repairing lightning damage to power lines at a Shell facility. The employee alleged that Shell was negligent in failing to deactivate the high voltage lines under repair.\(^7\) The appellate court recognized the general rule that an owner owes an independent contractor a duty of ordinary care to maintain the premises in a reasonably safe condition.\(^8\) The court held, however, that an owner need not anticipate the methods by which a contractor performs his task.\(^9\) An owner would expect an electrician to appreciate the dangers associated with live wires, and the owner need not anticipate a contractor's failure to furnish its employees with safety equipment and appropriate warnings.\(^8\) The court did not address the issue of hidden dangers, limiting its opinion to dangers known to a contractor with specialized knowledge.\(^8\)

In *Moore v. Noble Drilling Co.*\(^8\) an employee of an independent contractor who provided housekeeping services to offshore drilling rigs fell from a table while making a top bunk bed and injured himself.\(^8\) The district court held that an owner's duty to keep his premises reasonably safe does not require the owner to furnish the independent contractor with the equipment to perform a task.\(^8\) The court further held that Noble Drilling was not required to furnish the plaintiff with an alternative means of completing his task.\(^8\) The task was not inherently dangerous, and any danger was open and obvious to the plaintiff.\(^8\) The district court also noted that an owner might be liable for conditions prior to work, but not for conditions the contractor created.\(^8\)

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78. 710 S.W.2d 615 (Tex. App.—Houston [1st Dist.] 1986, no writ).
79. The jury found Shell and the plaintiff each 50% negligent. *Id.*
80. *Id.* at 620 (citing *RESTATEMENT (SECOND) OF TORTS* § 343 (1965)). The court noted:
This section of the Restatement of Torts provides that a possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he (a) knows or by the exercise or reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger.
710 S.W.2d at 620.
81. 710 S.W.2d at 620.
82. *Id.*
83. *Id.* at 621.
85. The plaintiff's height required him to stand on top of chairs and tables to make the top bunks. The plaintiff's injury occurred while he attempted to step from a table top to a chair. The district court found that the plaintiff could have used safe alternative means to reach the bunks, and that the plaintiff could have used proper care in stepping from the table. *Id.* at 100.
86. *Id.*
87. *Id.*
88. *Id.* The court noted that an open and obvious condition is not characterized as a latent defect. *Id.*
89. *Id.*
Although a premises owner need not furnish tools to an independent contractor, the Fifth Circuit held in *Richendollar v. Diamond M Drilling Co.* that an owner who furnishes equipment must furnish safe equipment. In *Richendollar* a contractor's employee was injured when the bottom broke from a basket in which the employee, the plaintiff, stood. The plaintiff brought suit under the Longshoreman's and Harbor Worker's Compensation Act, and the court awarded compensation. The court found the basket negligently built, but evidence conflicted as to the ownership of the basket. The Fifth Circuit held that if Diamond M, the rig owner, provided the plaintiff with the basket or allowed him to rummage around to find the basket, it failed to provide him with a safe workplace. The court noted in dictum that if the basket belonged to the contractor, it did not benefit the contractor but related solely to Diamond M's interest in preparing the rig. Thus, the court reasoned, Diamond M would be liable in any event for providing the plaintiff with a workplace presenting a latent defect. The Fifth Circuit granted rehearing en banc for this case.

In *Harrod v. Grider* the court addressed a premises owner's duty to oversee children on her property. In *Harrod* Saccomen, age twenty, accidentally shot Harrod, age twelve, while Saccomen and two boys were "goofing around." Harrod's parents sued the owner of the premises, Grider, for allowing various negligent acts on the premises. The court approved Grider's motion for summary judgment. On appeal Harrod argued that a premises owner injuring an invitee through active negligence falls under an exception to the general rule that a host owes only the duty not to injure his guests by willful, wanton, or gross negligence. The appellate court held that Harrod failed to present evidence of active negligence sufficient to withstand the motion for summary judgment. Harrod also argued an excep-
tion to the general rule that would require a person controlling children to meet a standard of care that a reasonable parent would exercise, and not the standard of care an owner owes a social invitee.\textsuperscript{106} In rejecting the exception, the court noted that no other Texas court has recognized such an exception.\textsuperscript{107}

\section*{C. Contributory Negligence}

In \textit{Mayo v. Tri-Bell Industries, Inc.}\textsuperscript{108} two trucks collided on a Texas highway, killing both drivers. The widow of one driver brought a wrongful death action against the Montana-based employer of the other driver. The jury found the plaintiff’s husband fifty-five percent negligent and the other driver forty-five percent negligent.\textsuperscript{109} The jury awarded the plaintiff $300,000 pecuniary losses, $250,000 for mental anguish, and $225,000 for loss of consortium.\textsuperscript{110} The trial court refused to enter judgment for the plaintiff because of the finding that the plaintiff’s husband’s negligence exceeded that of the defendant’s driver.\textsuperscript{111}

On appeal the plaintiff argued that nonpecuniary claims are separate from wrongful death claims, and are not barred by the comparative negligence statute.\textsuperscript{112} The court noted that article 2212a has been construed to bar

\textsuperscript{106}The proposed exception is based on 65 C.J.S.\textit{Negligence} § 63(60) (1966), which provides in part:

When a person undertakes to control and watch over a young child, even without compensation, he becomes responsible for injury to the child through his negligence, and his duty to use reasonable care to protect the child is not measured by what his duty would have been to a social guest or licensee. However, the measure of duty of a person undertaking control and supervision of a child to exercise reasonable care for the safety of the child is to be gauged by the standard of the average reasonable parent; such person is not an insurer of the safety of the child and has no duty to foresee and guard against every possible hazard (footnotes omitted).

\textsuperscript{107}701 S.W.2d at 939.

\textsuperscript{108}787 F.2d 1007 (5th Cir. 1986).

\textsuperscript{109}Id. at 1008.

\textsuperscript{110}Id.

\textsuperscript{111}Id.


Contributory negligence shall not bar recovery in an action by any person or party or the legal representative of any person or party to recover damages for negligence resulting in death or injury to persons or property if such negligence is not greater than the negligence of the person . . . against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributed to the person or party recovering.

\textsuperscript{106}TEX. REV. CIV. STAT. ANN. art. 2212a (repealed 1985).

This section has been recodified and redrafted to provide:

(a) In an action to recover damages for negligence resulting in death or injury
recovery by survivors in a wrongful death action when the deceased's negligence is greater than that of the alleged tortfeasor. The loss of consortium action, the court held, does not constitute a separate cause of action from the wrongful death claim.

The court noted that in Whittlesey v. Miller the Texas Supreme Court held that a wife's claim for loss of consortium is derivative of the tortfeasor's liability to her husband for his physical injuries. The court found the cases cited by the plaintiff to support her argument, Graham v. Franco and Gulf Production Co. v. Quisenberry, distinguishable because the plaintiff here, as a third party, did not seek to recover for injuries derived from the injuries of a contributorily negligent plaintiff, but instead sought to recover for separate and distinct injuries inflicted upon her by the tortfeasor.

In support of her argument that her mental anguish claim was separate from her wrongful death claim the plaintiff cited the Fort Worth court of appeals opinion in City of Denton v. Page. In Page the appellate court held that a spouse's claim for mental anguish is separate from the injured spouse's claims. The Fort Worth court of appeals noted, in dictum, that

to person or property, contributory negligence does not bar recovery if the contributory negligence is not greater than the negligence of the person or persons against whom recovery is sought.

(b) Damages allowed are diminished in proportion to the amount of negligence attributed to the person recovering.


113. 787 F.2d at 1009; see Velasquez v. Levingston, 598 S.W.2d 346, 349 (Tex. Civ. App.—Corpus Christi 1980, no writ); New Terminal Warehouse Corp. v. Wilson, 589 S.W.2d 465, 470 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.).

114. 787 F.2d at 1010.

115. 572 S.W.2d 665 (Tex. 1978).

116. Id. at 667.

117. 488 S.W.2d 390 (Tex. 1972) (husband's negligence may not be imputed to bar wife's separate property recovery).

118. 128 Tex. 347, 97 S.W.2d 166 (1936) (parent's negligence is not imputable to child so as to bar child's recovery for personal injuries).

119. 787 F.2d at 1010. The court distinguished Graham and Gulf Production by noting:

We do not find the nonpecuniary loss remedies asserted here to constitute separate causes of action. The first two cases cited by Mrs. Mayo, Graham and Gulf Production and their progeny, are distinguishable, because in each case, the third party is seeking to recover for personal injuries that are not derived from the injuries of the plaintiff who was contributorily negligent, but which are separate and distinct injuries inflicted directly upon the third party by the tortfeasor. The distinction is illustrated by the recent Williams v. Steves Indus., Inc., 678 S.W.2d 205, 210 (Tex. App.—Austin 1984), aff'd, 699 S.W.2d 570 (Tex. 1985), where the court reduced the recovery for the loss of society of the mother, as the driver of the car in the collision where her children were killed, in proportion to her contributory negligence. By contrast, the court awarded the father, whose claim for loss of society derived from his nonnegligent children's death pursuant to the wrongful death statute, full recovery.

Id. (footnotes omitted).

120. 683 S.W.2d 180 (Tex. App.—Fort Worth 1985), rev'd on other grounds, 701 S.W.2d 831 (Tex. 1986); see Branson, supra note 13, at 107.

121. 683 S.W.2d at 206. The court noted:

Mental anguish is an injury separate and apart from that suffered by an injured spouse. It might well be possible that the injured spouse's suit against the tortfeasor could be barred and yet the spouse suffering mental anguish could still recover against such tortfeasor. We find that a cause of action for mental
an injured spouse's suit could be barred while the spouse suffering mental anguish could recover. The Fifth Circuit found the holding without authority and observed that the Dallas court of appeals reached the opposite conclusion in Dawson v. Garcia. The Fifth Circuit described the holding as "a tenuous, alien graft on a sturdy framework of Texas law mandating the opposite conclusion," and found all of the plaintiff's nonpecuniary claims barred by her husband's contributory negligence.

In Phelan v. Lopez the plaintiff sued to recover for injuries he suffered in two different construction accidents. The plaintiff settled the second suit and maintained the first suit, alleging acts of negligence by the property owners and the building architect. The jury found the plaintiff thirty percent negligent, the architect twenty percent negligent, and the building owners fifty percent negligent. The jury found, however, that the architect's negligence was not a proximate cause of the plaintiff's injuries. The trial court entered judgment against the building owners, but reduced the plaintiff's award by thirty percent.

The building owners argued on appeal that their contribution to the damage award should be in proportion to their percentage of negligence. The building owners relied on article 2212a, section 2(b) and Haney Electric Co. v. Hurst. The court believed the building owners' reliance on article 2212a, section 2(b) misplaced because section 2(b) deals only with contribution among defendants. The court observed that there were no defendants with which to compare negligence and held that section 2(b) did not

This section has been recodified and redrafted to provide: "If there is more than one defendant and the claimant's negligence does not exceed the total negligence of all defendants, contribution to the damages awarded to the claimant shall be in proportion to the percentage of negligence attributable to each defendant."

Id. at 333.

122. Id.
123. 787 F.2d at 1010.
124. 666 S.W.2d 254, 260 (Tex. App.—Dallas 1984, no writ) (bystander's claim for mental anguish brought by widow and children denied under art. 2212a when decedent was 75% negligent).
125. 787 F.2d at 1011.
126. Id.
127. 701 S.W.2d 327 (Tex. App.—Beaumont 1985, no writ).
128. Id. at 333.
129. Id. at 330.
130. Id.
131. Comparative Negligence Act, ch. 28, § 2(b), 1973 Tex. Gen. Laws 41 (repealed 1985) provided: "In a case in which there is more than one defendant, and the claimant's negligence does not exceed the total negligence of all defendants, contribution to the damages awarded to the claimant shall be in proportion to the percentage of negligence attributable to each defendant."

This section has been recodified and redrafted to provide: "If there is more than one defendant and the claimant's negligence does not exceed the total negligence of all defendants, contribution must be in proportion to the percentage of negligence attributable to each defendant."

TEX. CIV. PRAC. & REM. CODE ANN. § 33.012 (Vernon 1986).
132. 624 S.W.2d 602 (Tex App.—Dallas 1981, writ dism'd). In Haney Electric two plaintiffs sued one defendant. The jury found each plaintiff 30% negligent and the defendant 40% negligent. Rather than allow each plaintiff a 70% recovery, the appellate court ruled that the negligence of the other plaintiff would be ignored and each plaintiff's recovery would be diminished by 30/70ths. Id. at 611-12.
133. 701 S.W.2d at 334.
The court distinguished Haney Electric on the grounds that Haney involved multiple plaintiffs and a single defendant. The court found that the trial court properly reduced the plaintiff’s judgment against the building owner by only thirty percent.

In Duncan v. Banks a plaintiff found seventy-five percent negligent sought to recover from a defendant found twenty-five percent negligent. The plaintiff argued that article 2212a did not create a contributory negligence bar, but only ameliorated the harsh common law rule that prevented recovery. The court recognized the policy reasons underlying the plaintiff’s argument, but held that a plain reading of article 2212a barred a recovery when the plaintiff's negligence exceeded the defendant’s. The court further held that Duncan v. Cessna Aircraft Co. abolished pure comparative negligence in product liability cases, but did not abolish the system in non-product liability cases.

D. Texas Tort Claims Act

In City of Denton v. Page the Texas Supreme Court reversed the appellate court and held that the city was immune from liability for injuries resulting from a fire marshal’s negligent inspection. In Page the plaintiff rented a house located in front of a storage building. On three occasions arsonists attempted to destroy the storage building. On each occasion the city of Denton fire department extinguished the fire and the fire marshal investigated the scene. The plaintiff’s injuries occurred when a fourth fire destroyed the building. The fire marshal discovered empty and full cans of gasoline both inside and outside the building after the fourth fire. The plaintiff sued the premises owner and the city of Denton, alleging that the fire marshal was negligent in not finding gasoline inside the building. The fire marshal negligent, and the appellate court upheld the jury’s verdict.

The plaintiff argued that the city of Denton was liable under section 3 of
the Texas Tort Claims Act. Specifically, the plaintiff asserted that the
dangerous condition of the real property constituted a waiver of the city of
Denton's governmental immunity. The supreme court rejected the plain-
tiff's argument, reasoning that section 3 of the Tort Claims Act does not
create new duties but merely waives the common law doctrine of govern-
mental immunity in circumstances in which a private person would be lia-
ble. The court cited the general rule that one assuming control over
property owes the same duty as the premises owner to keep the premises
reasonably safe for invitees, or to warn of dangerous conditions. The
court held that the city of Denton did not exercise control over the building,
and did not contract to remedy the dangerous conditions. The fire mar-
shal's inspection was not a promise to find an unsafe condition or to make
the building safe from arson. The supreme court held, therefore, that the
city of Denton did not waive governmental immunity.

Justice Kilgarlin, in a concurring opinion, sought to clarify the provisions
of the Tort Claims Act. Justice Kilgarlin noted that the Tort Claims Act
imposes liability on governmental entities in situations in which a private
person would be liable. Justice Kilgarlin observed, however, that the ma-
ajority's statement that a governmental unit is liable if it "owns, occupies or
controls the premises, or creates the dangerous condition" should not be
construed to limit governmental liability to those situations. In Texas,
one voluntarily undertaking an affirmative course of action for the benefit of
another must exercise reasonable care to avoid injury to the other. One
undertaking such affirmative action is liable if (1) his failure to exercise rea-
sonable care increases the risk of harm, or (2) he has undertaken to perform
a duty owed by the other to a third person, or (3) the harm results from the

147. Texas Tort Claims Act, ch. 530, § 3(b), 1983 Tex. Gen. Laws 3084-85, repealed by
waives immunity (1) when claims arise from the use of motor vehicles, (2) when claims arise
from some use or condition of personal property, and (3) when claims arise from some use or
condition of real property.

148. 701 S.W.2d at 834. The court noted that "[A] plaintiff relying on section 3 of the Act
must prove the existence and violation of a legal duty owed him by the defendant." Id.

149. Id. at 835. The supreme court noted:

Ordinarily a person who does not own the real property must assume control
over and responsibility for the premises before there will be liability for a dan-
gerous condition existing on the real property. It is possession and control
which generally must be shown as a prerequisite to liability. . . . Additionally, a
private person who has created the dangerous condition may be liable even
though not in control of the premises at the time of injury.

Id. (citation omitted).

150. Id.

151. Id.

152. Id.

153. Id. Justice Ray joined the opinion. Id.

1985), provided that a governmental unit is liable for negligence "if a private person would be
liable to the claimant in accordance with the law of this state."

155. 701 S.W.2d at 836.

156. Id. Justice Kilgarlin noted that, "The duties of a private person are not so
limited." Id.

157. Id. (citing Colonial Sav. Ass'n v. Taylor, 544 S.W.2d 116, 119 (Tex. 1976)).
reliance of the other or the third person upon the undertaking.158 Justice Kilgarlin noted that a governmental unit would be liable if the plaintiff proved any of the three elements, but found that, in the present case, the plaintiff did not prove any of the elements.159

In *Vela v. Cameron County*160 the plaintiffs filed suit after the decedent drowned seaward of the mean low tide line of a county-owned beach.161 The plaintiffs alleged that the county was negligent in failing to warn of dangerous undertows and in failing to provide lifeguards and emergency services at the beach. The appellate court held that since the drowning occurred seaward of the mean low tide line, the injury did not occur on county property.162 The court further held that the county owed no duty to warn of dangers off its premises.163 The court also addressed the issue of whether the county waived immunity under section 3(b) of the Tort Claims Act.164 The court held that the failure to provide lifeguards or emergency services did not constitute a use of tangible real or personal property.165 The court noted that the waiver provisions of section 3 do not extend to nonuse of property.166

**E. Parental and Interspousal Immunity**

In *Sneed v. Sneed*167 a minor was injured when an airplane piloted by her father crashed. The crash killed the child's father, mother, and brother. The daughter, the only surviving child of her deceased parents, sued her father's estate to recover damages for her pain and suffering and for the

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158. 701 S.W.2d at 836; See Restatement (Second) of Torts § 324A (1965).
159. 701 S.W.2d at 836. Justice Kilgarlin stated:
   
   In this case, there is no evidence that the fire marshal's negligent inspection of the storage building increased the risk of harm . . . . Further, there is no evidence in the record to show that the city undertook with [the property owner] to perform the duty owed by [the owner] to [the plaintiff] . . . .
   
   Finally, there is no evidence that [the plaintiff] relied on the fire marshal's inspection to discover the dangerous condition of the storage building . . . . Without proof of any of the three elements, the city cannot be charged with a duty under section 324A of the Restatement.

160. 703 S.W.2d 721 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.).
161. Id. at 723. Tex. Nat. Res. Code Ann. § 61.001(5) (Vernon 1978) defines a public beach as:
   
   [A]ny beach area, whether publicly or privately owned, extending inland from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico to which the public has acquired the right of use or easement to or over the area by prescription, dedication, presumption, or has retained a right by virtue of continuous right in the public since time immemorial, as recognized in law and custom.

162. 703 S.W.2d at 723.
163. Id. The court noted: "[T]he duty of the County extends only over that area that it controls, which is between the vegetation line and that of mean low tide. . . . Before a duty may be imposed, it is generally necessary that the injury occur on the premises owned or occupied by the defendant." Id. (citation omitted).
164. See supra note 147.
165. 703 S.W.2d at 724-25.
166. Id. at 725.
167. 705 S.W.2d 392 (Tex. App.—San Antonio 1986, writ ref'd n.r.e.).
death of her brother and mother. The trial court granted summary judgment for the defendant.168

On appeal, the court first addressed the common law doctrine of interspousal immunity,169 and noted that applying the doctrine in the present case would bar the actions.170 The court noted that the supreme court limited interspousal immunity in Bounds v. Caudle.171 In Bounds the court held that the doctrine of interspousal immunity would not bar a suit for intentional torts,172 and added that when one spouse intentionally injures another, the public's interest in preserving marital harmony is no longer served.173 In Sneed the court held that when the husband and wife die in a common disaster, the doctrine of interspousal immunity no longer serves any purpose.174 The court noted that when both spouses die, the need for marital harmony ends, and no possibility of collusion to defraud an insurance company exists.175 Thus, the court in Sneed announced a common disaster exception to the doctrine of interspousal immunity.176

The court next addressed the issue of parental immunity.177 The court noted that, in Texas, parents are immune from liability only for acts of ordinary negligence arising from discharge of their parental duties.178 The court held that parental immunity would not bar a suit in which the parent's alleged negligence did not arise from the discharge of parental duties.179 The court also held that the immunity rule does not bar a child's suit for the

168. Id. at 393.
169. The Texas Supreme Court adopted the doctrine of interspousal immunity in Nickerson v. Nickerson, 65 Tex. 281 (Tex. 1886). The court advanced two policy considerations to justify the immunity rule: that the rule (1) promotes marital harmony and (2) prevents collusive claims. 705 S.W.2d at 394.
170. 705 S.W.2d at 394.
171. 560 S.W.2d 925 (Tex. 1977).
172. Id. at 927.
173. Id.
174. 705 S.W.2d at 396.
175. Id. The court stated:

In the case before us, if the wife had survived the crash which killed her husband, there would have been no obstacle to awarding her compensation for her injuries. The death of the husband in the same disaster terminated the marriage relationship, and it cannot seriously be asserted that her claim against her husband's estate should be denied in order to preserve marital harmony and tranquility. Since the husband was killed, there is no possibility of collusion between the widow and the decedent for the purpose of raiding an insurance company.

Id.
176. Id.
177. Hewellette v. George, 68 Miss. 703, 9 So. 885 (1891), first established the doctrine of parental immunity.
178. 705 S.W.2d at 396; see Felderhoff v. Felderhoff, 473 S.W.2d 928, 933 (Tex. 1971) (doctrine of parental immunity not applicable when tort arises from business activities of a parent). The Felderhoff decision was reaffirmed in Farley v. MM Cattle Co., 529 S.W.2d 751 (Tex. 1975).
179. 705 S.W.2d at 397. The court stated:

In this case the father's conduct which resulted in the death of plaintiff's mother and brother is not referable to his parental responsibilities to plaintiff. . . . The Supreme Court's concern with the result of holding parents liable for ordinary negligence in the discharge of their parental duties is irrelevant
wrongful death of a parent.\textsuperscript{180} The court noted that a wrongful death action involves a child's property, and held that the immunity rule does not bar a suit for injury to a child's property.\textsuperscript{181} The court ultimately held that the child's suits for her personal injuries and for her mother's wrongful death were allowable, but that the child could not sue under the wrongful death statute for her brother's death.\textsuperscript{182}

II. MEDICAL MALPRACTICE

A. Informed Consent

During the Survey period a number of cases addressed the various applications of the locality rule. Several courts took steps to abolish further the locality rule as it applies to a physician's duty to disclose risks to the patient.\textsuperscript{183} In \textit{Barclay v. Campbell}\textsuperscript{184} the Texas Supreme Court reaffirmed the position taken in \textit{Peterson v. Shields},\textsuperscript{185} and held that article 4590i\textsuperscript{186} abolishes the locality rule in informed consent cases.\textsuperscript{187} The \textit{Barclay} opinion, however, further holds that when the Medical Disclosure Panel\textsuperscript{188} lists a disclosure risk, the failure of a physician to make a disclosure creates a re-

\textsuperscript{180} see Felderhoff v. Felderhoff, 473 S.W.2d 928, 930 (Tex. 1971).
\textsuperscript{181} 705 S.W.2d at 397. The court stated:

[The parental immunity rule] is limited to cases in which the child is seeking to recover for personal bodily injuries. . . . The rule has never been applied to prevent suits by minors against their parents for negligent damage to the child's property. . . . An action under the wrongful death statute is not a suit seeking redress for bodily injury inflicted on the child by the parent. Such an action is beyond the ambit of the immunity rule.

\textit{Id.} (citations omitted).

\textsuperscript{182} Id. at 398.

\textsuperscript{183} In Wilson v. Scott, 412 S.W.2d 299 (Tex. 1967), the supreme court held that a physician has a duty to make a reasonable disclosure of risks inherent in the diagnosis or treatment to the patient. \textit{Id.} at 301. In determining whether a physician had met that duty, the court held, "[T]he standard is a medical one which must be proved by expert medical evidence of what a reasonable practitioner of the same school and the same or similar locality would have advised a patient under similar circumstances." \textit{Id.}

\textsuperscript{184} 704 S.W.2d 8 (Tex. 1986).

\textsuperscript{185} 652 S.W.2d 929, 931 (Tex. 1983) (TEX. REV. CIV. STAT. ANN. art. 4590i, § 6.02 (Vernon Supp. 1987) abolished the common law locality rule in favor of a reasonable person rule).

\textsuperscript{186} TEX. REV. CIV. STAT. ANN. art. 4590i, § 6.02 (Vernon Supp. 1987) provides:

In a suit against a physician or health care provider involving a health care liability claim that is based on the failure of the physician or health care provider to disclose or adequately to disclose the risks and hazards involved in the medical care or surgical procedure rendered by the physician or health care provider, the only theory on which recovery may be obtained is that of negligence in failing to disclose the risks or hazards that could have influence a reasonable person in making a decision to give or withhold consent.

\textsuperscript{187} 704 S.W.2d at 9.

\textsuperscript{188} Article 4590i, § 6.03 creates the Texas Medical Disclosure Panel to determine which risks a physician or health care provider must disclose to the patient. TEX. REV. CIV. STAT. ANN. art. 4590i, § 6.03(a) (Vernon Supp. 1987). The panel has the duty of preparing lists of risks that must be disclosed. \textit{Id.} § 6.04(b).
buttable presumption of negligence.189 When the Panel makes no determination concerning the disclosure risks, the physician is under a duty to disclose “otherwise imposed by law.”190 The court cited the Peterson decision in holding that a “duty otherwise imposed by law” is the duty “to disclose the risks or hazards that could have influenced a reasonable person in making a decision to give or withhold consent.”191 The court added that when no presumption is raised the plaintiff must introduce expert testimony showing (1) that risk is inherent in the medical procedure, and (2) that the risk is so material that it could influence a reasonable person’s decision to consent to the procedure.192

The court in Beal v. Hamilton193 cited Barclay in holding that the plaintiff raised issues regarding a physician’s failure to disclose the hazards inherent in the use of a drug.194 The court held that expert testimony that a material risk is inherent in the use of a drug meets the requirements of Peterson and could sustain a judgment.195 In Ford v. Ireland196 the court held that when the plaintiff meets the requirements of Peterson, summary judgment is improper.197 The Ford action involved a physician’s failure to remove a metal splinter from the patient’s eye, which resulted in the loss of the eye. Thus, the Peterson disclosure requirements extend to hazards involving both drugs and surgical procedures.

B. Standard of Care

The appellate courts issued split opinions as to whether the locality rule is required in suits against physicians for negligence. In Hickson v. Martinez198 the plaintiff argued that the Texas Supreme Court has tacitly abandoned the locality rule by recognizing that all physicians must meet the minimum standard of care exercised by physicians in the same or similar circumstances.199 The Dallas court disagreed, holding that the supreme court has not abandoned the locality rule in suits against physicians for negligence.200 The court further held that, since all of an expert’s testimony

189. 704 S.W.2d at 9. The supreme court relied on art. 4509i, § 6.07(a), which provides that failure to make a listed disclosure creates a rebuttable presumption of negligence against the physician. Id.
191. Id. (citing Peterson, 652 S.W.2d at 931).
192. Id. at 9-10.
194. Id. at 877. The action involved thrombophlebitis, a possible side effect of the drug Premarin.
195. Id.
196. 699 S.W.2d 587 (Tex. App.—Texarkana 1985, no writ).
197. Id. at 589. Price v. Hurt, 711 S.W.2d 84 (Tex. App.—Dallas 1986, no writ), reaches a similar holding.
198. 707 S.W.2d 919 (Tex. App.—Dallas 1985, writ ref’d n.r.e.).
200. 707 S.W.2d at 925. The court noted, “[A]ll of the testimony concerning the applicable standard of care which the defendant should have observed will be based on the standard in the defendant’s community or one similar thereto.” Id. (emphasis in original). The Dallas court recognized the locality rule although the necessity of the rule was questioned more than
would be based on the standard of care in the same or a similar community, the jury need be instructed only as to whether the defendant physician acted as a reasonable practitioner would have acted in similar circumstances, and the jury need not be instructed as to the locality rule.\textsuperscript{201}

Less than a month later the Dallas court affirmed the \textit{Hickson} holding in \textit{Horvath v. Baylor University Medical Center}.\textsuperscript{202} The court stated that the plaintiff had the burden of producing probative evidence of the standard of practice in the community where the action arose.\textsuperscript{203} The court noted, however, that instances may arise in which the standard of care may be identical nationwide.\textsuperscript{204} In such circumstances, the court held, a court does not err in instructing the jury that ordinary care means the degree of care used by a hospital in similar circumstances in a specific locality.\textsuperscript{205}

In \textit{Wheeler v. Aldama-Luebbert} the court held that the standard of care is not defined in terms of locality or same school.\textsuperscript{206} The court relied on the supreme court case of \textit{Hood v. Phillips},\textsuperscript{208} which made no mention of a locality rule requirement, in which the supreme court articulated the standard of care in medical malpractice actions.\textsuperscript{209} The \textit{Wheeler} court observed that the supreme court's abandonment of the concepts of locality and same school in defining the standard of care exemplifies a modern trend away from such definitions.\textsuperscript{210} The supreme court's ambiguous language in \textit{Hood} has, therefore, created a difference of opinion among the appellate courts regarding a locality requirement in the standard of care.

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\item\textsuperscript{201} The court instructed the jury that ordinary care means 'that degree of care which would be used by a hospital of ordinary prudence under the same or similar circumstances in December 1972 in Dallas, Texas.' \textit{Id.} The plaintiff objected to the inclusion of "Dallas, Texas" because no evidence showed that the standard of care in Dallas differed from the national one. \textit{Id.} The court held that "if the standards were indeed identical nationwide, the inclusion of 'in Dallas, Texas' was harmless because Dallas is a part of the nation." \textit{Id.}
\item\textsuperscript{202} 704 S.W.2d 213 (Tex. App.—Houston [1st Dist.] 1986, no writ).
\item\textsuperscript{203} \textit{Id.} at 217.
\item\textsuperscript{204} 554 S.W.2d 160 (Tex. 1977).
\item\textsuperscript{205} The supreme court characterized the standard of care by noting "A physician who undertakes a mode or form of treatment which a reasonable and prudent member of the medical profession would undertake under the same or similar circumstances shall not be subject to liability for harm caused thereby to the patient." \textit{Id.} at 165. In \textit{Wheeler} the court found that this language represented a tacit rejection of the locality rule. 707 S.W.2d at 217. The court in \textit{Hickson}, however, held that this same language did not represent a departure from the locality requirement. 707 S.W.2d at 925.
\item\textsuperscript{206} 707 S.W.2d at 217.
\end{enumerate}
In *Wall v. Noble* the Texarkana court addressed the type of evidence that would establish the standard of care. The plaintiff in *Wall* alleged that the defendant physician negligently performed breast reduction surgery, and introduced evidence that the defendant had a consensual sexual liaison with the patient in the context of treatment. The court held that the evidence of the sexual liaison was "relevant, competent and material" in determining the physician's compliance with the standard of care and in determining the degree of negligence.

**C. Statutes of Limitations**

In *Bradley v. Etessam* the Dallas court of appeals addressed the issue of whether, under the Medical Liability and Insurance Improvement Act, a complaint alleging medical malpractice could be amended to include wrongful death and survival actions. The plaintiff in *Bradley* filed a complaint alleging malpractice within the two-year limitations period provided under article 4590i. After his wife's death the plaintiff amended his complaint to include wrongful death and survival actions. The court rejected the defendant's claim that the court should disallow the wrongful death and survival actions because they were not filed within the two-year period required by article 4590i, section 10.01. The court instead decided that a complaint filed within the two-year period could be amended to include additional causes of action, and that such amendments would relate back under article 5539b. The language of article 4590i, section 10.01 refers only to

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211. 705 S.W.2d 727 (Tex. App.—Texarkana 1986, writ ref’d n.r.e.).
212. Id. at 731.
213. The doctor's sexual advances were allegedly accompanied with the statement, “I am your doctor—trust me.” Id.
214. Id.
215. 703 S.W.2d 237 (Tex. App.—Dallas 1985, writ ref’d n.r.e.).
216. TEX. REV. CIV. STAT. ANN. art. 4590i, § 10.01 (Vernon Supp. 1987) provides: Notwithstanding any other law, no health care liability claim may be commenced unless the action is filed within two years from the occurrence of the breach or tort or from the date the medical or health care treatment that is the subject of the claim or the hospitalization for which the claim is made is completed. . . .
219. 703 S.W.2d at 240.
220. Id. Act of May 13, 1931, ch. 115, § 1, 1931 Tex. Gen. Laws 194, repealed by Act of Sept. 1, 1985, ch. 959, § 9(1), 1985 Tex. Gen. Laws 3322, provided: Whenever any pleading is filed by any party to a suit embracing any cause of action, cross-action, counter-claim, or defense, and at the time of filing such pleading such cause of action, cross-action, counter-claim, or defense is not subject to a plea of limitation, no subsequent amendment or supplement changing any of the facts or grounds of liability or of defense shall be subject to a plea of limitation, provided such amendment or supplement is not wholly based upon and grows out of a new, distinct or different transaction and occurrence. Provided, however, when any such amendment or supplement is filed, if any new or different facts are alleged, upon application of the opposite party, the court may postpone or continue the case as justice may require. This section has been recodified and redrafted to provide:
the filing of the original suit and has no effect on further pleadings or proceed-

ings. The court further held that the term action, for purposes of article 4590i, section 10.01 means suit and not cause of action.

D. Texas Tort Claims Act

In two separate opinions the Corpus Christi court of appeals addressed a hospital's liability under the Texas Tort Claims Act for the alleged nonuse of property. The plaintiff in Seiler v. Guadalupe Valley Hospital alleged that hospital employees negligently failed to review the patient's emergency room chart upon admitting the patient to the surgical floor. The court held that the waiver of sovereign immunity under the Tort Claims Act should be strictly construed to extend only to uses of property, not to nonuses of property. In Floyd v. Willacy County Hospital District the plaintiff alleged that the hospital negligently failed to provide emergency aid to her husband, who was suffering from a heart attack. Although the plaintiff alleged a misuse of property, the court characterized the hospital's actions as a nonuse of property. The court held that a nonuse of property does not waive governmental immunity under the Tort Claims Act. Both cases relied on the Texas Supreme Court's holding in Salcedo v. El Paso Hospital District. In Salcedo the plaintiff alleged that the defendant hospital "misused, by fail-

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If a filed pleading relates to a cause of action, cross action, counterclaim, or defense that is not subject to a plea of limitation when the pleading is filed, a subsequent amendment or supplement to the pleading that changes the facts or grounds of liability or defense is not subject to a plea of limitation unless the amendment or supplement is wholly based on a new, distinct or different trans-

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221. 703 S.W.2d at 240. The court noted:

Because [the plaintiff's] action was timely filed, the limitations provision, section 10.01, has been complied with, and thus its "notwithstanding any other law" language is irrelevant as to further pleadings and proceedings in the case. Reliance on this exclusive, introductory language is misplaced where the conditions of the limitations provision have been satisfied.

Id.

222. Id. at 241. The court reasoned that a suit must be filed within the two-year period, but additional causes of action may be added after the limitations period. Id.


Each unit of government in the state shall be liable for money damages for property damage or personal injuries or death when proximately caused by the negligence or wrongful act or omission of any officer or employee acting within the scope of his employment or office arising from . . . some condition or some use of tangible property, real or personal, under circumstances where such unit of government, if a private person, would be liable to the claimant in accordance with the law of this state.

224. 709 S.W.2d 37 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.).

225. Id. at 38.

226. 706 S.W.2d 731 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.).

227. The hospital alleged that its cardiac equipment was being used to aid another patient.

228. Id. at 733.

229. Id.

230. 659 S.W.2d 30 (Tex. 1983).
The supreme court held that the hospital waived liability by negligently using the electrocardiograms, but the court did not rule on the alleged nonuse of tangible property. Although the supreme court emphasized use of property, it expressly noted that the Tort Claims Act should be liberally construed. The Corpus Christi court's decision in Seiler cited Salcedo, however, for the proposition that the Tort Claims Act does not extend to nonuse of property by a government entity.

E. Miscellaneous

In Sullivan v. Methodist Hospitals the Corpus Christi court of appeals held that the doctrine of res ipsa loquitur may be applied in some medical malpractice cases. In Sullivan a patient and her husband sued for injuries incurred when a sponge was left in the patient's abdomen following a caesarean section. A jury in Hidalgo County found the defendant hospital and doctor not negligent, and the plaintiff appealed. The court held that article 4590i, section 7.01 restricts the use of res ipsa loquitur to situations in which courts applied the doctrine to medical malpractice cases before August 1977. Res ipsa loquitur, the court held, has long been applied to situations when doctors left surgical instruments or supplies inside the body of the patient. The court failed, however, to find error in the failure of the trial judge to give special issues on res ipsa loquitur, reasoning that the judge had no reason to submit res ipsa loquitur because the record contained "direct evidence of the appellees' acts which were allegedly negligent." The effect of the court's holding is to preserve one situation in which res ipsa loquitur will be applied in medical malpractice cases.

The Texas Supreme Court refused to resolve the issue of whether the dam-

231. Id. at 31.
232. Id. at 33.
233. See id. at 34.
234. Id. at 32. The supreme court noted a number of problems in interpreting the language of the Act, but noted that the legislature had not acted to remedy those problems. See id. at 34. Section 13 of the Act, the court noted, provided that the Act should be liberally construed to achieve its purposes. Id. at 32. The recodification of the Tort Claims Act, see supra note 223, does not contain the provision of art. 6252-19(13) that the Act be liberally construed. See TEX. REV. CIV. STAT. ANN. art. 4590i, § 7.01 (Vernon Supp. 1987) provides: "The common-law doctrine of res ipsa loquitur shall only apply to health care liability claims against health care providers or physicians in those cases to which it has been applied by the appellate courts of this state as of the effective date of this subchapter." The court determined that August 29, 1977, was the effective date of § 7.01. 699 S.W.2d at 266.
235. 709 S.W.2d at 38.
236. 699 S.W.2d 265 (Tex. App.—Corpus Christi), writ ref'd n.r.e. per curiam, 714 S.W.2d 302, 303 (Tex. 1985).
237. 699 S.W.2d at 266.
238. Id. TEX. REV. CIV. STAT. ANN. art. 4590i, § 7.01 (Vernon Supp. 1987) provides: "The common-law doctrine of res ipsa loquitur shall only apply to health care liability claims against health care providers or physicians in those cases to which it has been applied by the appellate courts of this state as of the effective date of this subchapter." The court determined that August 29, 1977, was the effective date of § 7.01. 699 S.W.2d at 266.
239. 699 S.W.2d at 267 (citing Dobbins v. Gardner, 377 S.W.2d 665 (Tex. Civ. App.—Houston 1964, writ ref'd n.r.e.)).
240. 699 S.W.2d at 267.
241. In Martin v. Petta, 694 S.W.2d 233 (Tex. App.—Fort Worth 1985, writ ref'd n.r.e.), the court hinted that article 4590i, § 7.01 had abolished common law res ipsa loquitur in medical malpractice cases. See Branson, supra note 13, at 113 (discussing Martin).
The limitations of article 4590i, section 11.02 violate the Texas Constitution. In Baptist Hospital of Southeast Texas, Inc. v. Baber the court rendered a joint and several judgment of $1,327,000 against two defendants. The supreme court noted that changes in the consumer price index had raised the liability limit from $500,000 to $804,419. Because the judgment did not exceed the combined statutory liability of the defendants the supreme court found that the court of appeals did not need to pass on the constitutionality of the damage limit. The supreme court therefore refused the application for writ, finding no reversible error, but expressly refrained from ruling on the constitutionality of the damage limitations.

In Wheat v. United States the district court held that the liability limitation of article 4590i would not apply to cases brought under the Federal Tort Claims Act. The court relied on Detar Hospital, Inc. v. Estrada and the appellate court opinion in Baptist Hospital of Southeast Texas, Inc. v. Baber in support of its conclusion that Texas courts have found the liability limitation unconstitutional. The district court noted that the Texas Supreme Court had not ruled on the constitutionality issue, but observed that the Texas court "has always endeavored to interpret the laws of Texas to avoid inequity." The district court speculated that the liability limitations would be held invalid by the Texas Supreme Court.

In Park North General Hospital v. Hickman the plaintiff alleged that the defendant hospital breached the duty of care owed a patient by allowing a physician to perform an operation he was not qualified to perform. The defendant physician performed a subcutaneous mastectomy with reconstruction on the plaintiff. The plaintiff introduced evidence showing that the hospital specifically authorized the defendant to perform plastic surgery and that a subcutaneous mastectomy involved plastic surgery. The plaintiff also

242. TEX. REV. CIV. STAT. ANN. art. 4590i, § 11.02 (Vernon Supp. 1987) provides that a physician or health care provider's liability for damages shall not exceed $500,000. Section 11.04 provides that the liability limit will be adjusted according to changes in the consumer price index. Id. § 11.04.
243. 714 S.W.2d 310 (Tex. 1986).
244. Id.
246. 714 S.W.2d at 310.
247. Id. The defendants did not attack the joint and several aspect of the judgment.
248. Id.
251. 694 S.W.2d 359 (Tex. App.—Corpus Christi 1985, no writ); see Branson, supra note 13, at 112.
252. 672 S.W.2d 359 (Tex. App.—Beaumont 1984), writ ref'd n.r.e. per curiam, 714 S.W.2d 310 (1986). The supreme court had not issued its opinion in Baber when the district court issued the Wheat opinion.
253. 630 F. Supp. at 719.
254. Id. at 720.
255. Id. (quoting Sanchez v. Schindler, 651 S.W.2d 249, 252 (Tex. 1983)).
256. Id.
257. 703 S.W.2d 262 (Tex. App.—San Antonio 1985, writ ref’d n.r.e.).
introduced evidence that a physician on the hospital’s admission committee complained, verbally and in writing, that the defendant physician was unqualified to perform a subcutaneous mastectomy. The complaining staff physician also suggested that the hospital investigate the defendant’s practice in Las Vegas, Nevada. Although members of the admission committee knew the defendant practiced in that city, the committee never instituted an investigation. The appellate court held that a hospital owes a duty to its patients and may be liable for damages for a breach of that duty. The duty owed includes the exercise of reasonable care in selecting medical personnel and in granting specialized privileges. The duty also includes the periodic monitoring of personnel, and the review of their competency. The court of appeals, however, reversed the judgment of the trial court in favor of the defendant hospital. The basis for reversal was that the plaintiff’s petition did not allege any gross negligence on the part of the defendant hospital in its care and treatment of plaintiff, and that the trial court therefore erroneously submitted the issue of gross negligence to the jury.

III. PRODUCTS LIABILITY

Considering the substantive impact of decisions during prior Survey periods, a relatively slight amount of activity affecting Texas’s substantive law of products liability occurred during this Survey period. A few decisions of some importance, however, which will be mentioned herein, were written during this Survey period.

A. Duty to Warn

In several decisions the Fifth Circuit held that the duty to warn, as defined in Ragsdale Brothers, Inc. v. Magro, is to be assessed in connection with the relative knowledge and expertise of the expected user. Under the current state of the law, as expressed in Ragsdale, the expertise and knowledge of the user are factors for consideration in deciding the adequacy of the warning given. The Fifth Circuit, in accordance with this principle, upheld an instruction to a jury that no duty to warn exists when the user possesses sufficient expertise and knowledge to permit the user to appreciate the dangers inherent in using the product.
In *Reese v. Mercury Marine Division of Brunswick Corp.* the Fifth Circuit addressed the issue of whether the failure of an independent third party to comply with its duty to warn would relieve a manufacturer of its own duty to warn a user of the inherent dangerousness of a product. In *Reese* the defendant sought to offer evidence that the retailer who dealt with the plaintiff failed to issue adequate warnings to the user of the boat motor in question. The court excluded this evidence because the evidence had no bearing on the existence of the manufacturer's duty to warn and the failure to comply with that duty. The Fifth Circuit, in *Reese*, held the failure of a third party to issue adequate warnings irrelevant with respect to the issue of causation in a suit against a manufacturer when the manufacturer also did not issue adequate warnings.

**B. Duties of a Retailer**

*Sears, Roebuck & Co. v. Black* presented an interesting twist affecting the duties of a retailer. In *Sears* the product in question was a washing machine that the store sold as a Sears Kenmore, but that Whirlpool manufactured. In this case the plaintiffs brought suit against Sears, the retailer of the machine, for the negligent design of a switch that overheated, causing a fire that resulted in significant damage to the plaintiff's property. The trial court entered judgment on behalf of the plaintiffs. The court of appeals affirmed, holding that one who puts out a product, manufactured by another, as its own product owes the same duty as a manufacturer.

**IV. WORKERS' COMPENSATION**

A major area of interest during the Survey period related to the constitutionality of limiting the recovery for gross negligence to a restricted class of heirs of a deceased worker under the Workers' Compensation Act. This and other developments affecting recovery under the Act are discussed below.

**A. Gross Negligence**

In *Edmunds v. Highrise, Inc.* an injured plaintiff challenged the constitutionality of the provision of the Workers' Compensation Act that prohibits recovery for the employer's gross negligence. The plaintiff claimed that the inability to maintain an action outside the Act for the employer's gross negli-
gence violated the plaintiff's equal protection rights\(^2\)\(^7\)\(^6\) and the open courts provision of the Texas Constitution.\(^2\)\(^7\)\(^7\) The court summarily dismissed both contentions,\(^2\)\(^7\)\(^8\) reasoning that action for gross negligence is preserved for the heirs of a decedent in compliance with constitutional requirements, and that an action afforded the heirs is not created within the Act itself.\(^2\)\(^7\)\(^9\) As to the open courts provision, the court acknowledged that article 8306, section 3(a), the challenged section of the Act, provides that upon timely notice to the employer, an employee may forgo his claim under the Workers' Compensation Act and pursue whatever common law or statutory claims might exist as a result of the employer's conduct.\(^2\)\(^8\) The court emphasized that section 3(a) was drafted so that an injured employee might relinquish his common law remedies for a faster, more efficient means of recovery.\(^2\)\(^9\) In *Glisson v. General Cinema Corp.*\(^2\)\(^8\)\(^2\) the parents of a deceased worker challenged article 8306, section 5 of the Workers' Compensation Act, which limits the ability to recover under the Act, and allows an action for gross negligence only on behalf of a surviving spouse or the children of a deceased worker. The parents alleged that exclusion of a worker's parents from the class of claimants entitled to bring an action for gross negligence violated the parents' equal protection right.\(^2\)\(^8\)\(^3\) In applying the rational relation standard the Dallas court noted that the class of claimants excluded was not suspect, and the right infringed upon was not fundamental.\(^2\)\(^8\)\(^4\) In finding the classification rationally related to a state purpose, the court suggested several plausible motives of the legislature in limiting recovery to only those beneficiaries specified in the statute.\(^2\)\(^8\)\(^5\) The court referred to the financial dependence of a spouse and children, the need to control the costs of workers' compensation, and the need to prevent overburdening the judicial system, as possible

\(^{276}\) The plaintiff asserted that the Act violates *Tex. Const.* art. I, § 3, the Texas equal protection clause, because § 5 of the Workers' Compensation Act allows recovery of a worker's compensation claim and an independent action for gross negligence only when the injury results in the death of the employee. The plaintiff alleged that the limitation denies the equal protection rights of those employees suffering less than fatal injuries.

\(^{277}\) *Tex. Const.* art. I, § 13 provides: "All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law."

\(^{278}\) 715 S.W.2d at 379.

\(^{279}\) *Tex. Const.* art. XVI, § 26 provides:

> Every person, corporation, or company, that may commit a homicide, through wilful act, or omission, or gross neglect, shall be responsible, in exemplary damages, to the surviving husband, widow, heirs of his or her body, or such of them as there may be, without regard to any criminal proceeding that may or may not be had in relation to the homicide.

\(^{280}\) 715 S.W.2d at 379.

\(^{281}\) *Id.* (citing *Bridges v. Phillips Petroleum Co.*, 733 F.2d 1153 (5th Cir. 1984), *cert. denied*, 469 U.S. 1163 (1985)).

\(^{282}\) 713 S.W.2d 694 (Tex. App.—Dallas 1986, no writ).

\(^{283}\) Article 8306, § 5 provides: "Nothing in this law shall be taken or held to prohibit the recovery of exemplary damages by the surviving husband, wife, heirs of his or her body, or such of them as there may be of any deceased employee . . . ." *Tex. Rev. Civ. Stat. Ann.* art. 8306, § 5 (Vernon 1967).

\(^{284}\) 713 S.W.2d at 695 (citing *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973)).

\(^{285}\) *Id.*
justifications for limiting gross negligence recoveries to the heirs enumerated within the statute.\footnote{286 Id.}

Another case, \textit{Davis v. Sinclair Refining Co.},\footnote{287 704 S.W.2d 413 (Tex. App.-Houston [14th Dist.] 1985, writ ref’d n.r.e.).} also touched on the ability to recover damages for an employer’s gross negligence. In \textit{Davis} the plaintiff had a cause of action for negligence and gross negligence against a third party tortfeasor as well as a workers’ compensation claim.\footnote{288 The plaintiff suffered severe burns while in the course and scope of his employment due to a third party’s defective design of a pipe that he was working on.} Arco, the injured worker’s employer, became the successor in interest to the third party against whom the plaintiff would have had a cause of action, Sinclair, through subsequent corporate mergers. While the court acknowledged that the plaintiff had a valid claim for damages outside the statute against a third party, the issue before the court was whether the plaintiff could bring this claim against the plaintiff’s employer as a successor in interest to the third party tortfeasor.\footnote{289 Id. at 414. The plaintiff contended that he had no employee-employer relationship with Sinclair, that a successor corporation is responsible for all valid liabilities and obligations of a merged corporation, and, therefore, that Arco should have been precluded from asserting the exclusive remedy provision of article 8306, § 3 of the Workers’ Compensation Act.} The court rejected this contention, and failed to follow decisions in other states allowing actions similar to the one brought by this plaintiff.\footnote{290 Id. at 414-16.} In so holding the court noted the public policy behind the Act: to provide a fast and efficient avenue of recovery for an injured employee, and to give the worker a voluntary choice of remedies under the Act.\footnote{291 Id. at 415.} The court concluded that had the plaintiff wished to pursue a gross negligence action against his employer, the real party at interest, he should have abandoned his right to recovery against the employer under the Act.\footnote{292 Id. at 416.}

\textbf{B. The Industrial Accident Board.}

Several recent decisions have reviewed the role of the Industrial Accident Board (IAB) in an employee’s claim for damages against his employer. One such decision was \textit{Ryan v. Travelers Insurance Co.}\footnote{293 715 S.W.2d 172 (Tex. App.-Houston [1st Dist.] 1986, writ ref’d n.r.e.).} Subsequent to an initial trial court judgment on his claim, the plaintiff went before the IAB to recover additional medical expenses, which were related to his on-the-job injury.\footnote{294 Id. at 174.} By definition, the plaintiff’s claim was for a successive award of the expenses under article 8307, section 5.\footnote{295 TEX. REV. CIV. STAT. ANN. art. 8307, § 5 (Vernon Supp. 1987) provides: After the first such final award or judgment, the Board shall have continuing jurisdiction in the same case to render successive awards to determine the liability of the association for the cost or expense of any such items actually furnished to and received by said employee not more than six (6) months prior to the date of each such successive award, until the association shall have fully discharged its obligation under this law to furnish all such medical aid, hospital services, nursing, chiropractic services, medicines or prosthetic appliances to which said employee may be entitled; provided, each such successive award of the Board}
tional expenses in January of 1983, filed a claim for those expenses with the IAB in February of 1983, and the Board awarded repayment in April of 1984.\textsuperscript{296} The issue before the court was whether the IAB must act within six months of the date the employee incurs the expenses for a successive award to be valid.\textsuperscript{297}

In ruling on the validity of the award the court pointed to several important factors.\textsuperscript{298} First, the purpose of the Workers' Compensation Act is "to benefit and protect injured employees, and to expedite settlement of meritorious claims."\textsuperscript{299} Second, while the procedures for obtaining final judgment of a claim are not specified, the plaintiff had complied with the provisions of the Act that set out the method for providing notice of, and actually filing, a claim.\textsuperscript{300} The court also pointed to a dispositive factor, the lack of control a claimant has over the IAB and the amount of time the Board takes to resolve a claim.\textsuperscript{301} In weighing all of these factors the court refused to accept a literal reading of the Act, opting instead to interpret section 5 as requiring that claims for successive awards of expenses be filed within six months of the date on which they are incurred.\textsuperscript{302}

In \textit{King v. Texas Employers' Insurance Association} the Fort Worth court of appeals reviewed the IAB's jurisdiction to hear claims or disputes arising out of a compromise settlement approved in district court. The worker entered into a settlement agreement providing that the employer would meet future medical expenses. A dispute arose about the reasonableness of the expenses incurred, and the worker brought an action in the district court for breach of contract. The defendant employer alleged that the district court lacked jurisdiction to hear the suit because, under article 8307, section 5, the IAB had exclusive jurisdiction over the dispute. The plaintiff contended that jurisdiction arose not under section 5, but instead arose under article 8307, section 12(b).\textsuperscript{303}

shall be subject to a suit to set aside said award by a court of competent jurisdiction, in the same manner as provided in the case of other awards under this law.

\textsuperscript{296} The employee filed his claim within one month of incurring the additional expense, but the IAB made a final ruling on his claim fifteen months later.

\textsuperscript{297} \textit{715 S.W.2d} at 174. The trial court, on request of the employer's insurer, set aside the IAB's successive award by reading article 8307, § 5 literally to find that the IAB may only award those expenses incurred within the six months preceding the successive award. \textit{Id.}

\textsuperscript{298} \textit{Id.} at 175-77.

\textsuperscript{299} \textit{Id.} at 175.

\textsuperscript{300} \textit{Id.} (citing TEX. REV. CIV. STAT. ANN. art. 8307, § 4(a) (Vernon Supp. 1987)).

\textsuperscript{301} \textit{715 S.W.2d} at 176.

\textsuperscript{302} \textit{Id.}

\textsuperscript{303} \textit{716 S.W.2d} 181 (Tex. App.—Fort Worth 1986, no writ).

\textsuperscript{304} TEX. REV. CIV. STAT. ANN. art. 8307, § 12(b) (Vernon Supp. 1987) provides:

\begin{quote}
Whenever in any compromise settlement agreement approved by the board or in any agreed judgment approved by the court, any dispute arises concerning the payment of medical, hospital, nursing, chiropractic or podiatry services or aids or treatment, or for medicines or prosthetic appliances for the injured employee as provided in Section 7, Article 8306, Revised Statutes, as amended, or as provided in such compromise settlement agreements or agreed judgments, all such disputes concerning the payment thereof shall be first presented by any party to the Industrial Accident Board within six months from the time such dispute has arisen (except where "good cause" is shown for any delay) for the board's deter-
The court held that the Act required the worker to file her claim with the IAB. The court rejected the defendant’s contention that section 12(b) does not apply because only the employer or its insurer can file a written refusal of payment, thereby giving rise to a dispute. Again, the court refused to accept a literal reading of the statute. In the court’s judgment, when such a dispute arises the Act entitles the employee, and in fact compels the employee, to present the IAB with notice of the dispute within six months from the time it arises, and then to proceed to final resolution of the dispute before seeking to invoke the jurisdiction of the district court.

C. Actions Against the Compensation Carrier

In Aetna Casualty & Surety Co. v. Marshall, a decision that could have significant future ramifications, the Court of Appeals for the First District in Houston held that an injured employee entitled to open medical claims under a worker's compensation agreed judgment has a cause of action against a worker's compensation carrier under the common law duty of good faith and fair dealing and also under article 21.21 of the Texas Insurance Code. An injured employee entered into a settlement agreement providing him with open medical for treatment incurred within five years of the date of the settlement. In a short and concise manner the court unequivocally held that in actions based upon open medical provisions of worker’s compensation settlements the claimant does have a cause of action against the compensation carrier for failure to act in good faith and for violations of the Insurance Code.

V. WRONGFUL DEATH AND SURVIVAL ACTIONS

A. Prenatal Injury

Several important cases were decide during the Survey period that affect recovery under the Texas wrongful death statute. Foremost among these cases was Witty v. American General Capital Distributors, Inc. In Witty the mother of a deceased unborn child brought an action against her employer alleging that, while employed by the defendant as a receptionist, she tripped over a utility outlet and fell with such force that her unborn fetus was fatally injured. As the baby’s surviving parent the plaintiff sought damages for her child’s prenatal injuries. The plaintiff sought damages in her individual capacity for: (1) the loss of her baby’s support and companion-

305. 716 S.W.2d at 183.
306. Id.
307. Id.
308. Id. at 183-84.
310. Id. at 901; TEX. INS. CODE ANN. art 21.21 (Vernon 1985).
311. 699 S.W.2d at 901.
312. 697 S.W.2d 636 (Tex. App.—Houston [1st Dist.] 1985, writ granted (opinion pending)).
ship; (2) her own emotional trauma and mental anguish; and (3) the loss of her child (e.g., property damages). The trial court entered a take-nothing summary judgment on behalf of the defendant, and the plaintiff appealed.

On appeal the court held that the trial judge had correctly followed the principle announced by the Texas Supreme Court in Yandell v. Delgado that a wrongful death action to recover damages for a child is not maintainable unless the child is born alive. The court said that while the representative of the estate of a deceased child is generally entitled to recover damages for the child’s physical pain and suffering and other damages related to the child’s death under the Texas survival statute Delgado held that “a cause of action does exist for prenatal injuries sustained at any prenatal stage provided the child is born alive and survives.”

The court in Witty held, however, that the plaintiff was entitled to maintain a suit, in her individual capacity, at common law and under the Texas wrongful death statute for damages resulting from her fetus’s death. Those damages, the court held, properly included damages allegedly sustained because of her emotional distress and the loss of her baby’s society and companionship. Additionally, the plaintiff was entitled to seek damages for emotional distress based upon her contemporaneous perception of the injury allegedly inflicted by the defendant’s negligence. Justice Dunn, concurring in part and dissenting in part, criticized the majority’s reluctance to grant a cause of action to the baby.

Less than a year after the decision in Witty the Fort Worth court of appeals decided Lobdell v. Tarrant County Hospital District. In Lobdell the parents appealed from the summary judgment in their medical malpractice case arising from the intrauterine death of their child. The trial court granted summary judgment, holding that the Texas wrongful death statute

313. The plaintiff, under Survival Act, ch. 239, § 1, 1927 Tex. Gen. Laws 356 (repealed 1985), sought damages for pain and suffering and mental anguish suffered by the fetus, and under Wrongful Death Act, ch. 530, § 1, 1975 Tex. Gen. Laws 1381-82 (repealed 1985), sought loss of support, companionship, affection and comfort, and her own mental anguish suffered as a result of the injuries to the fetus. Both statutes have been recodified at TEX. CIV. PRAC. & REM. CODE ANN. § 71.001 (Vernon 1986).
314. 471 S.W.2d 569 (Tex. 1971).
315. 697 S.W.2d at 639.
317. 471 S.W.2d at 570.
318. 697 S.W.2d at 639.
319. Id.
320. Id.
321. 697 S.W.2d 641-47.
322. Justice Dunn stated:

It is unjust, as well as artificial and unreasonable, to condition a right of action for prenatal injuries on whether a fatally injured child is born dead or alive. To slavishly follow the judicially engrafted proposition that an unborn child must be born alive, though it may die a few minutes after birth, is to give new vigor to the revolting common law maxim that “it is more profitable for the defendant to kill the plaintiff than to scratch him.”

Id. at 642 (citing W. PROSSER, HANDBOOK OF THE LAW OF TORTS 127 (4th ed. 1971)).
323. 710 S.W.2d 811 (Tex. App.—Fort Worth 1986, no writ).
provides no cause of action for the intrauterine death of a fetus.\textsuperscript{324} The court of appeals reversed, holding that a right of recovery exists under the wrongful death statute for negligent conduct proximately causing the intrauterine death of a viable fetus.\textsuperscript{325} The fetus in \textit{Lobdell} was a viable, full-term fetus. The fetus's ability to survive apart from the mother was not an issue. In holding that a viable but unborn child is a person for the purposes of the Texas wrongful death statute the court of appeals joined the majority of jurisdictions.\textsuperscript{326}

The court of appeals in \textit{Lobdell} circumvented the holding of the Texas Supreme Court in \textit{Delgado v. Yandell}.\textsuperscript{327} In \textit{Delgado}, the court of appeals said, the supreme court held only that there may be a recovery for a prenatal injury to a \textit{nonviable} fetus, but only in the event that the fetus is born alive and survives.\textsuperscript{328} The court of appeals said that to the extent that the supreme court's opinion might be interpreted to conclude that "live birth is a requirement for a right of action for a prenatal injury to a viable fetus, such conclusion is dicta which we reject."\textsuperscript{329}

\section*{B. Adopted Children}

In \textit{Byrnes v. Ford Motor Co.}\textsuperscript{330} the plaintiff sought to extend the application of the wrongful death and survival statutes to an adopted child. The plaintiff sought recovery under the wrongful death and survival statutes for the death of a "to be" or "equitably" adopted child.\textsuperscript{331} In considering the application of the wrongful death statute to equitably adopted children the court noted that the class of beneficiaries entitled to recover under the statute has been strictly construed to exclude equitably adopted children.\textsuperscript{332} Because equitable adoption does not allow a child to recover for the death of a parent, the court held that nothing short of formal adoption under the Texas Family Code would entitle a parent to recover for the death of an adopted child.\textsuperscript{333}

The court, however, reached a quite different result about application of the survival statute.\textsuperscript{334} The defendant asserted that because formal adoption had not been achieved, the parent was not entitled to serve as a legal representative of the child's estate. The appellate court held to the contrary, finding that this plaintiff could bring a survival action for the benefit of the estate

\begin{itemize}
  \item \textsuperscript{324} \textit{Id}. at 812.
  \item \textsuperscript{325} \textit{Id}.
  \item \textsuperscript{326} \textit{See cases cited id}. at 812-13 n.1.
  \item \textsuperscript{327} \textit{See supra} notes 314-15 and accompanying text.
  \item \textsuperscript{328} 710 S.W.2d at 813.
  \item \textsuperscript{329} \textit{Id}. The supreme court's per curiam opinion in \textit{Delgado} stated that "a cause of action does exist for prenatal injuries sustained at any prenatal stage provided the child is born alive and survives." \textit{Yandell v. Delgado}, 47 S.W.2d 569, 570 (Tex. 1971) (citing \textit{Delgado v. Yandell}, 468 S.W.2d 475, 478 (Tex. Civ. App.—Fort Worth 1971)).
  \item \textsuperscript{330} 642 F. Supp. 309 (E.D. Tex. 1986).
  \item \textsuperscript{331} No Texas court had entered a final adoption decree although the decree, in all probability, would have been entered.
  \item \textsuperscript{332} 642 F. Supp. at 310.
  \item \textsuperscript{333} \textit{Id}; see \textit{TEX. FAM. CODE ANN}. § 16.04 (Vernon 1986).
  \item \textsuperscript{334} 642 F. Supp. at 311-12.
\end{itemize}
of the deceased child.\textsuperscript{335} The court noted, in support of the decision, that the parental rights of the deceased's natural parents had been terminated prior to the time the plaintiff became a parent by equitable adoption.\textsuperscript{336} The court also pointed out that the estate had suffered some damage and would be left without recourse if not represented by the plaintiff.\textsuperscript{337} The court ordered that any recovery from the survival action be placed in the registry of the probate court, subject to a finding by the probate court that the plaintiff is an heir by means of the equitable adoption.\textsuperscript{338}

\section*{C. Damages}

In \textit{Yowell v. Piper Aircraft Corp.}\textsuperscript{339} the Texas Supreme Court removed all doubt as to the recoverability of damages for loss of inheritance in a wrongful death action. In \textit{Yowell}, a case of first impression on the issue, the supreme court recognized that many states allow loss of inheritance as an element of damages in wrongful death actions and that those states not allowing this element of damages refrain from doing so because of the speculative nature of the amount sought.\textsuperscript{340} The court, however, rejected the speculative argument because wrongful death damages are generally speculative by nature.\textsuperscript{341} Following the trend set in other states, the court held that damages for loss of inheritance are recoverable in wrongful death actions when such damages would, in reasonable probability, have occurred.\textsuperscript{342} The court also held that loss of inheritance need not be specially pleaded when the pleadings give fair notice of recovery in the form of lost pecuniary benefits.\textsuperscript{343} The court reasoned that disallowing the heirs' recovery of the value that would necessarily have passed to them upon the natural death of the deceased would allow a wrongdoer to benefit from the consequences of his wrongful act.\textsuperscript{344} In holding that loss of inheritance is recoverable, the court dispensed with the double recovery argument asserted by the defendants, finding that the decedent's estate did not have a cause of action for lost future earnings.\textsuperscript{345} A literal reading of this portion of the opinion leads to the conclusion that loss of future earnings would not be a proper element of recovery in an action brought by the estate of the decedent under the Texas

\begin{footnotesize}
\begin{itemize}
\item 335. \textit{Id.} at 311.
\item 336. \textit{Id.}
\item 337. \textit{Id.}
\item 338. \textit{Id.}
\item 339. 703 S.W.2d 630 (Tex. 1986).
\item 340. \textit{Id.} at 632.
\item 341. \textit{Id.}
\item 342. \textit{Id.} at 633. The court defined loss of inheritance as "the present value that the deceased, in reasonable probability, would have added to the estate and left at natural death to the statutory wrongful death beneficiaries but for the wrongful act causing the premature death." \textit{Id.}
\item 343. \textit{Id.} The plaintiffs alleged lost future earnings, and estimated the decedent's life expectancy, expected increases in salary and benefits, as well as their own life expectancies.
\item 344. \textit{Id.} (citing San Antonio & A.P. Ry. v. Long, 87 Tex. 148, 158 27 S.W. 113, 117 (1894)).
\end{itemize}
\end{footnotesize}
survival statute. The interpretation is clouded by the court's citation of the wrongful death statute in support of its holding, and the court's failure to refer to the survival statute. The court thus created the impression that its true holding is that the heirs of the estate are not, in their own right, entitled to recover the lost future earnings of the decedent. This alternative interpretation seems more in line with the intentions of the court in allowing recovery for loss of inheritance under the wrongful death statute.

VI. DAMAGES

A. Remittitur

The scope of a court's power to remit damages is an issue with significant impact, especially in the area of personal torts. The case of Benavidez v. Isles Construction Co. addressed the remittitur issue during the Survey period. In that case the court reviewed a remittitur by the trial court of damages a jury awarded the plaintiff. After trial of the cause the defendant filed a motion for judgment notwithstanding the verdict, which requested, in the alternative, a remittitur. The trial court ordered the remittitur of the plaintiff's damages, but did so without conditioning the order on the overruling of a motion for new trial.

On appeal the Corpus Christi court held that the action taken by the trial court was analogous to granting a motion for judgment n.o.v. Since the trial court's reduction of damages was, in effect, a judgment n.o.v., because it was not conditioned upon the overruling of a motion for new trial, the court reviewed the record at trial according to the standard for judgments n.o.v. Thus, appellant's only burden in achieving reinstatement of the jury's verdict was to show some evidence to support the jury's finding. The appellate court found that the evidence supported the verdict and reinstated the verdict. The court stated that when reviewing findings of damages for pain and suffering the jury's findings should be given special weight.

The Texas Supreme Court resolved the question of what standard courts should apply in determining the necessity of ordering remittitur. In Pope v. Moore the court required application of a factual sufficiency standard, expressly disapproving any attempt by the remitting court to base the remit-

346. See 703 S.W.2d at 632.
348. 716 S.W.2d 588 (Tex. App.—Corpus Christi 1986, writ granted).
349. Id. at 589.
350. Id. at 590.
351. Id.
352. Id.
353. Id.
354. Id.
355. 711 S.W.2d 622 (Tex. 1986) (the proper standard to apply is a question of law, thereby invoking the jurisdiction of the supreme court).
remittitur on factors outside the record. Pope stands for the proposition that courts should uphold a jury’s damages finding unless the award is so against the great weight and preponderance of the evidence as to be manifestly unjust. In this regard, the case of Pool v. Ford Motor Co. will have significant impact. Pool necessarily requires that a court ordering remittitur specify the relevant evidence and state clearly why the finding of the jury is, in the court’s opinion, so factually insufficient or so much against the great weight and preponderance of the evidence as to be manifestly unjust. The supreme court, in light of Pope and Pool, will have a greater policing power to prevent courts of appeal from substituting their own judgment for that of the jury by making baseless assertions that the evidence is factually insufficient or against the great weight and preponderance of the evidence.

Another significant case dealing with the power of a court to order remittitur is Ford Motor Co. v. Durrill. Durrill involved an action under the wrongful death and survival statutes by the parents of a nineteen-year-old girl who received fatal injuries when the gas tank of the Ford Mustang II she was driving ruptured, engulfing the automobile in flames. At trial the court admitted evidence that Ford knew of the defect in the fuel system, and yet did not modify the system for financial reasons. The jury returned a sizeable verdict for the plaintiffs, the most significant element of which was an award $100,000,000 in punitive damages in favor of the decedent’s estate. The trial court upheld the jury’s award of actual damages, but ordered the plaintiffs to file an $80,000,000 remittitur of the damages awarded. On appeal the Corpus Christi court ordered the remittitur of all elements of actual damages awarded, and ordered the further remittitur of punitive damages. In ordering remittitur of the punitive damages awarded, the court recognized that the evidence supported findings of gross negligence. The court justified its order for the further remittitur of the

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356. Id. at 624. The court specifically disapproved of Armellini Express Lines of Florida, Inc. v. Ansley, 605 S.W.2d 297, 310 (Tex. Civ. App.—Corpus Christi 1980, writ ref’d. n.r.e.) in which the appellate court found the evidence factually sufficient to uphold the jury’s award of damages, but ordered remittitur because the amount awarded shocked the court’s conscience.

357. 711 S.W.2d at 624.
358. 715 S.W.2d 629 (Tex. 1986).
359. Id. at 635.
360. See Pool, 715 S.W.2d at 535; Pope, 711 S.W.2d at 624.
361. 714 S.W.2d 329 (Tex. App.—Corpus Christi 1986, no writ).
362. Id. at 333.
363. The plaintiff presented evidence at trial that Ford saved more than $200 million by not modifying the defective fuel system.
364. The jury also awarded $2.5 million in actual damages to the estate of the decedent for physical pain and suffering, mental anguish, disfigurement, and loss of physical capacity; it awarded $2.3 million and $2.05 million to the individual parents of the decedent for their mental anguish, loss of society, and pecuniary loss.
365. 714 S.W.2d at 333.
366. Id. at 344-47. The recovery awarded to the estate for pecuniary damages was remitted to $10 million, and damages for physical pain and suffering, mental anguish, disfigurement, and loss of physical capacity were remitted to $1.7 million, while the mental anguish, loss of society, and pecuniary damages to each parent was remitted to $300,000.
367. Id. at 346.
punitive damages awarded by the jury solely on the grounds that the award shocked the court's conscience.368

In ordering the remittitur of the plaintiffs' actual damages, the court endeavored to review the relevant evidence from which it concluded that the evidence did not support the jury's verdict.369 The court's opinion, when viewed as a whole, suggests that the court again utilizes the shocking to the conscience standard expressly disapproved of by the supreme court.370 In addition, the appellate court did not discuss the relevant evidence in detail, nor did the court state clearly why it considered the evidence of the damages factually insufficient.371 The court, however, rendered the Durrill decision prior to both Pool and Pope; thus, the guidelines in ordering remittitur were not so clearly defined when the court wrote the opinion.

B. Punitive Damages

In regard to the recovery of punitive damages the courts of appeals continue to follow the lead of the Dallas court in Anderson v. Trent372 by disallowing the reduction of exemplary damages by the amount of plaintiff's contributory negligence. The prevailing policy behind these holdings is that the public benefits from punishment of the defendant's conduct, and it would not serve the public's best interests to diminish this punishment simply because the plaintiff might have been contributorily negligent.373 Further, that the purpose served by awarding exemplary damages is not to compensate the plaintiff is well established.374

C. Prejudgment Interest

After Cavnar v. Quality Control Parking, Inc.375 no question exists that prejudgment interest is proper in personal injury actions. The issue arising most frequently concerning Cavnar has been the plaintiff's pleading requirement as to prejudgment interest.376 The Texas state courts have held, without exception, that the plaintiff must specifically plead a request for prejudgment interest and segregate damages into past damages and future

368. Id. at 346-47. The court, significantly, cites Armellini for the proposition that remittitur may be ordered when the award of the jury, though supported by the evidence, shocks the conscience of the court. In Pope v. Moore, 711 S.W.2d 622 (Tex. 1986), the Texas Supreme Court unequivocally disapproved of the "shock the conscience" standard as a justification for the remittitur of actual damages. See supra notes 355-57 and accompanying text. While the court did not expressly find the standard inappropriate for the remittitur of punitive damages, one might assume so because holding otherwise would allow the appellate court to go outside the record and substitute its own judgment for that of the jury.

369. 714 S.W.2d at 344.
370. Id. at 344-46.
371. Id. at 345.
372. 685 S.W.2d 712 (Tex. App.—Dallas 1984, writ ref'd n.r.e.).
373. See, e.g., Hondo's Truck Stop Cafe, Inc. v. Clemmons, 715 S.W.2d 725 (Tex. App.—Corpus Christi 1986, no writ); Olin Corp. v. Dyson, 709 S.W.2d 251 (Tex. App.—Houston [14th Dist.] 1986, no writ).
374. See Clemmons, 716 S.W.2d at 725; Dyson, 709 S.W.2d at 253.
375. 696 S.W.2d 549 (Tex. 1985), cited in Branson, supra note 13, at 105.
376. See, e.g., Monsanto Co. v. Johnson, 696 S.W.2d 558, 559 (Tex. 1985).
damages to recover under *Cavnar*. At least one case in federal court reached a contrary result.

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377. See *Ford Motor Co. v. Durrill*, 714 S.W.2d at 348.

378. See *Bowers v. Firestone Tire & Rubber Co.*, 800 F.2d 474, 479 (5th Cir. 1986). The court held that while the question of entitlement is a question of state law, the notice pleading requirements apply while in federal court. *Id.*