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PERSONAL TORTS

by
Frank L. Branson*

I. NEGLIGENCE

A. Duty

The duty owed a tort plaintiff is an ever-changing concept, constantly developing to meet society's expectations.1 Cases involving duty decided during the Survey period were no exception to the precept, and several merit closer attention. El Chico Corp. v. Poole2 and Joleemo, Inc. v. Evans3 are two prime examples of the evolution of duty within the State of Texas. These two cases, consolidated on appeal to the Texas Supreme Court,4 moved Texas into the majority of states with regard to the duty owed by alcoholic beverage licensees.5 In each case the plaintiff brought a wrongful death and survival action against a bar for serving alcoholic beverages to intoxicated persons later involved in automobile accidents. The supreme court affirmed both courts of appeals' opinions, holding that a duty existed not to sell alcoholic beverages to persons known, or who should be known, to be intoxicated.6 In determining that this duty existed the court first focused on the element of foreseeability of the risk. The court held that the risk was foreseeable based upon the common knowledge of the effects of alcohol on automobile drivers.7 Given the court's concern with the number of alcohol-induced motor vehicle accidents, the court had no difficulty recognizing a common law duty to act reasonably under the circumstances and avoid selling alcohol to obviously intoxicated persons.8 Further, a statutory

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2. 713 S.W.2d 955 (Tex. App.—Houston [14th Dist.] 1986), aff’d, 732 S.W.2d 306 (Tex. 1987).
3. 714 S.W.2d 394 (Tex. App.—Corpus Christi 1986), aff’d, 732 S.W.2d 306 (Tex. 1987).
5. The court reserved the question of whether a social host could be liable under the same circumstances. 732 S.W.2d at 309.
6. Id. at 314.
7. Id. The court relied upon Texas Department of Public Safety, A Look at DWI... Accidents, Victims, Arrests 1-4 (1985), indicating that intoxicated drivers were involved in over 30,000 motor vehicle accidents within the State of Texas, killing 989 persons and wounding 25,000 more. 732 S.W.2d at 311.
8. 732 S.W.2d at 311.
duty exists that requires alcoholic beverage licensees to refrain from serving intoxicated persons. Guided by the public policy enunciated in the Alcoholic Beverage Code, the court interpreted the statute as implying a duty not knowingly to sell alcoholic beverages to intoxicated persons and allowing civil liability for breach of the duty. The court remanded both cases for determination of proximate cause.

Seay v. Travelers Indemnity Co. held that a party undertaking a duty on behalf of another must reasonably perform that duty. Travelers Indemnity Company insured the boilers at the Gaston Episcopal Hospital and employed authorized inspectors (insurance personnel commissioned by the state) who inspected and certified the hospital's boilers. Scalding water that spewed from one of the recently certified boilers fatally injured Jack Seay, a maintenance worker at the hospital. The Dallas court of appeals applied the Restatement (Second) of Torts to impose a duty on Travelers to exercise reasonable care when inspecting the boilers.

Howell v. City Towing Associates, Inc. held that tow truck drivers owe a duty to their passengers. City Towing Associates created a special relationship with Mr. Howell by giving him a ride home while delivering his wrecked car. Mr. Howell suffered a heart attack while in the tow truck. Instead of driving two blocks to the hospital, the tow truck driver called his dispatcher to report the emergency and waited for emergency personnel to reach him. Mr. Howell's widow brought suit alleging that City Towing acted negligently by failing to provide immediate transportation to the nearby hospital. Finding that the "good samaritan" statute did not shield the

9. TEX. ALCO. BEV. CODE ANN. § 101.63(a) (Vernon 1978). The Code states, "A person commits an offense if he knowingly sells an alcoholic beverage to an habitual drunkard or an intoxicated or insane person." Id.
10. Id.
11. 732 S.W.2d at 314.
12. Id. at 315. In the El Chico case the court also remanded for a determination of negligence. While the dram shop was negligent per se in Joleemo, the court required a factual determination in El Chico as to whether the employees of the tavern sold alcohol to a person when they knew, or should have known, of that person's intoxication.
13. 730 S.W.2d 774 (Tex. App.—Dallas 1987, no writ).
14. Id. at 776.
15. RESTATEMENT (SECOND) OF TORTS § 324A (1965). Recognizing that no Texas court explicitly adopted § 324A, the court found that Fox v. Dallas Hotel Co., 111 Tex. 461, 473-75, 240 S.W. 517, 520-21 (1922), subscribed to the ruling underlying the Restatement position.
16. 730 S.W.2d at 776.
17. 717 S.W.2d 729 (Tex. App.—San Antonio 1986, writ ref'd n.r.e.).
18. Id. at 733-34.
19. TEX. CIV. PRAC. & REM. CODE § 74.001 (Vernon 1986). The statute states:
   (a) A person who in good faith administers emergency care at the scene of an emergency or in a hospital is not liable in civil damages for an act performed during the emergency unless the act is wilfully or wantonly negligent.
   (b) The section does not apply to care administered:
      (1) for or in expectation of remuneration;
      (2) by a person who was at the scene of the emergency because he or a person he represents as an agent was soliciting business or seeking to perform a service for remuneration;
      (3) by a person who regularly administers care in a hospital emergency room; or
trucking company from liability, the court held that the special relationship between a towing company and its customer gave rise to a duty to aid ill customers.\textsuperscript{20}

Two other court of appeals cases marked the outer boundary of Texas duty development. \textit{Hendricks v. Todora} \textsuperscript{21} used the Restatement (Second) of Torts\textsuperscript{22} to hold that a tavern owner owes no duty to protect customers from the reckless criminal acts of third persons. Tony Hendricks was injured when an automobile crashed through a glass wall of the entrance area of Todora's bar and restaurant. Tracking the Restatement, the Dallas court held that though Todora may have realized the possibility that an intoxicated person could drive off the parking lot and into the restaurant, the risk of that occurrence was so low that a reasonable person would disregard it.\textsuperscript{23} Further, the court found that requiring Todora to erect barriers around the entrance ways, or to erect warning signs for the waiting patrons, would not be reasonable.\textsuperscript{24} Similarly, the court in \textit{Corpus v. K-J Oil Co.} \textsuperscript{25} refused to impose a duty on an oil well owner to warn independent contractors of the dangerous condition of the premises. K-J Oil Co. hired Cox Oil Well Service to pull pipe and other underground equipment from the oil well. The Cox crew included Pablo Corpus. A K-J employee parked near the rig to watch the Cox crew perform its duties. Pablo Corpus touched the metal portions of the rig when another Cox employee touched the rig's boom to several overhead electrical wires. The Austin court held that the K-J employee's presence did nothing to alter Cox's independent contractor status because K-J did not exercise control over Cox's work.\textsuperscript{26} In addition, only exceptional circumstances can create a duty to warn independent contractors of dangers arising from the performance of their work, and the plainly visible electrical wires foreclosed any special circumstances.\textsuperscript{27}

(4) by an admitting physician of the patient bringing a health-care liability claim.

\textit{Id.}

\textsuperscript{20} 717 S.W.2d at 733. Like the Dallas court in \textit{Seay}, the San Antonio court relied upon the Restatement (Second) of Torts to clarify the duty owed. See \textsc{Restatement (Second) of Torts} \section{314A} (1965) (special relationship between the parties may create a duty to protect one against harm during the course of the special relationship).


\textsuperscript{22} 722 S.W.2d at 461; see \textsc{Restatement (Second) of Torts} \section{291} (1956) ("[T]he risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done.").

\textsuperscript{23} 722 S.W.2d at 462.

\textsuperscript{24} \textit{Id.}

\textsuperscript{25} 720 S.W.2d 672 (Tex. App.—Austin 1986, writ ref'd n.r.e.).

\textsuperscript{26} \textit{Id.} at 674.

\textsuperscript{27} \textit{Id.} at 675.
B. Res Ipsa Loquitur

The doctrine of res ipsa loquitur was a significant topic in at least two cases during the Survey period. The first of these, *Porterfield v. Brinegar*, arose out of a one-car accident. Lorene Brinegar was riding home in Walter Williams's car when it ran off the road and rolled over, killing Williams and injuring Brinegar. Brinegar, who was asleep at the time of the accident, brought suit against Williams's estate for her injuries. The trial court instructed a verdict for the estate because Brinegar failed to demonstrate Williams's negligence.

The supreme court affirmed the court of appeals' reversal, applying the doctrine of res ipsa loquitur. The theory applied because no evidence existed of any nonnegligent reason for the car to leave the road. All evidence pointed to the fact that Williams fell asleep at the wheel. The traditional factors of res ipsa loquitur appeared in this case, raising some evidence of Williams’s negligence. The court held the instructed verdict improper and remanded the case for trial.

In the second case, *Conaway v. Roberts*, the court applied res ipsa loquitur to the situation in which Roberts, cutting her grass one morning, suddenly found herself pinned beneath her riding mower. Suit was brought by her neighbor, Conaway, who sustained injuries while rescuing the helpless Roberts. Testimony showed that Roberts remembered pointing the lawn mower up a small incline and attempting to set the brake. She did not know whether her foot slipped off the clutch, how she fell off the lawn mower, or how she became trapped beneath the machine. Additionally, Roberts could never explain why the lawn mower was found in reverse gear. Coupling Robert's poor memory with an engineer's opinion that Roberts's foot probably slipped from the clutch, causing her to tumble off the back of the machine, the court of appeals held that some evidence existed that Roberts's actions constituted negligence under the doctrine of res ipsa loquitur and reversed the directed verdict.

C. Premises Liability

In *Exxon Corp. v. Quinn* the supreme court found a leaseholder liable for failing to provide a reasonably safe place for an independent contractor to work. The court recognized that a leaseholder is under no duty to require an independent contractor to perform on-premise activities in a safe man-

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28. 719 S.W.2d 558 (Tex. 1986).
31. 719 S.W.2d at 560.
32. 725 S.W.2d 377 (Tex. App.—Corpus Christi 1987, no writ).
33. Id. at 380.
34. 726 S.W.2d 17 (Tex. 1987).
ner, but imposed a duty upon the leaseholder to provide safe premises for the independent contractor. The facts of the case showed that Quinn worked for Woodard Electric Company on Exxon’s utility poles. Quinn’s job required him to climb an energized power pole and reach across several electrified wires in order to perform his task. The typical procedure for safely performing this operation is known as a red-tag procedure. No one followed the red-tag procedure in this instance. As a result, after Quinn had performed his duties at the top of the pole and began descending, his foreman re-energized the area. The court found some evidence supporting the jury’s finding that Exxon acted negligently by having poorly designed poles on its property.

In Amara v. Lain the court of appeals held that an independent contractor may be liable for precariously stacking 1500 pounds of sheetrock in an area frequented by children. Rejecting the argument that the Restatement (Second) of Torts shields independent contractors from liability for their negligence, the court found fact issues concerning the independent contractor’s knowledge that children played in and near the construction site.

D. Negligent Entrustment

Two cases addressed the evidence necessary to show negligent entrustment. Jacobini v. Hall dealt with both the legal and factual sufficiency of evidence supporting a jury finding of negligent entrustment. The evidence showed that Lewis Jacobini allowed a good friend and sometime-employee

35. See supra notes 25-27 and accompanying text.
36. During a red tag procedure the electric company would usually come out to the energized pole and disconnect the power. The electric company would then write the name of the person who climbed the pole on a red tag and would not re-energize the pole until the employee completed the task and signed his name on the red tag.
37. 726 S.W.2d at 21. Chief Justice Hill, writing for a four-judge minority, stated that no evidence supported the finding that Exxon was negligent. The dissent characterized the case as involving the unforeseeable conduct of a third person (Quinn’s foreman). As a result, the dissent stated, Exxon did not proximately cause the accident and therefore should not have been held liable. 726 S.W.2d at 22.
38. 725 S.W.2d 734 (Tex. App.—Fort Worth 1986, no writ).
39. Id. at 739.
40. RESTATEMENT (SECOND) OF TORTS § 384 (1965) reads:
One who on behalf of the possessor of land erects a structure or creates any other condition on the land is subject to the same liability, and enjoys the same freedom from liability, as though he were the possessor of the land, for physical harm caused to others upon and outside of the land by the dangerous character of the structure or other condition while the work is in his charge.
Lain argued that under the Restatement he enjoyed the same freedom from liability as the general contractor. Abalos v. Oil Dev. Co., 544 S.W.2d 627 (Tex. 1976), provides that the general contractor is not liable for injuries caused by independent contractors. Id. at 631. The duty not to injure third parties in that situation belongs to the subcontractor, not the general contractor. Lain claimed immunity by coupling the Restatement view with the Abalos rule. The Fort Worth court correctly recognized the circularity of this reasoning. Further, Lain’s argument ignored the RESTATEMENT OF TORTS § 339 (1934), concerning “Artificial Conditions Highly Dangerous to Trespassing Children” first adopted in Banker v. McLaughlin, 146 Tex. 434, 446, 208 S.W.2d 843, 849-50 (1948).
41. 725 S.W.2d at 739.
42. 719 S.W.2d 396 (Tex. App.—Fort Worth 1986, no writ).
to drive his truck. The friend/employee had no Texas driver's license and had two previous convictions for driving while intoxicated. The court held these facts sufficient to support the jury's finding of negligence on Jacobini's part. Parker v. Fox Vacuum, Inc. concerned the admissibility of prior convictions for driving while intoxicated in a negligent entrustment case. The case was unusual in that no one disputed that the driver's intoxication did not cause the accident giving rise to the lawsuit. The theory of negligent entrustment, however, focuses on the driver's abilities not at the time of the accident, but rather at the time of the entrustment. The court held the prior convictions relevant and admissible to show that someone provided an incompetent driver with a vehicle, regardless of whether the driver was drunk at the time of the accident. Further, the convictions shed light on the gross negligence allegations, and thus the trial court erred in failing to admit the testimony regarding convictions.

E. Interspousal Immunity

Texas first recognized the doctrine of interspousal immunity in Nickerson & Matson v. Nickerson in 1886. The Survey period saw the doctrine eliminated 101 years later. The Texas Supreme Court first considered the issue in Stafford v. Stafford, but declined to reach the issue of interspousal immunity because the party claiming immunity did not properly plead the doctrine as a defense in the trial court. The Stafford opinion thus did not pass on the validity of the interspousal immunity doctrine. Nevertheless, a concurring opinion by Justice Mauzy, joined by Justice Gonzalez, set the stage for elimination of the immunity doctrine.

Price v. Price presented the court's first clear opportunity to reach the subject. The thesis of the doctrine began in the notion that a husband and wife were one person. This basis lost much of its support during the latter half of the nineteenth century and the early twentieth century, however, when the Married Women Acts recognized wives as separate legal beings. After the collapse of the unity fiction, the justification for the interspousal immunity doctrine shifted to the premise that allowing suits between husbands and wives would lead to matrimonial strife or collusive lawsuits. The court saw through both of these artifices and pointed out that denying a

43. Id. at 399.
44. 732 S.W.2d 722 (Tex. App.—Beaumont 1987, writ ref'd n.r.e.).
45. Id. at 723.
46. Id.
47. 65 Tex. 281 (1886).
48. 726 S.W.2d 14 (Tex. 1987). The case involved an award of damages to a wife for a venereal disease she contracted from her ex-husband.
49. Id. at 16.
50. Id. at 16-17.
51. 732 S.W.2d 316 (Tex. 1987).
52. Id. (citing Firebrass v. Pennant, 2 Wils. 255, 256 (C.P. 1764)).
53. The Married Women Acts typically gave women the rights to acquire and dispose of property, to contract, and to sue. For an examination of the Texas legislative acts, see 1913 Tex. Gen. Laws, ch. 32, at 61.
54. 732 S.W.2d at 317 (citing RESTATEMENT (SECOND) OF TORTS § 895F, comment d
forum for the redress of negligent acts probably does little to encourage do-
mestic peace.\textsuperscript{55} As to collusive lawsuits, the adversary system appears well
equipped to ferret out and prevent such frauds without the use of a legal
fiction denying just compensation to injured victims.\textsuperscript{56} Texas thus joined the
vast majority of jurisdictions in banishing this common law dinosaur.\textsuperscript{57}

\textit{F. Special Issues}

\textit{Luna v. Southern Pacific Transportation Co.},\textsuperscript{58} a personal injury suit, arose
out of a railroad grade-crossing collision. The jury found that the railroad
company, acting through its agents, servants, and employees negligently
failed to issue speed restrictions at the crossing in question. In response to
another issue, the jury failed to find that the train crew acted negligently
with respect to the speed of the train, but found negligence in the failure to
apply the brakes or reduce the throttle. Seeing a conflict between the finding
of negligence by the railroad company and the failure to find negligence on
the part of the train crew, the court of appeals reversed the jury
verdict.\textsuperscript{59} The supreme court held that the findings could be harmonized since the first
issue asked about the company policy itself, while the second issue inquired
about the train crew's actions.\textsuperscript{60} The jury possibly failed to find the crew
negligent by speeding because the crew adhered to the company speed limit.

\textbf{II. PRODUCTS LIABILITY}

\textit{A. Duty}

As with Texas negligence law, products liability theories saw major devel-
opments in the concept of duty. The leading case in this area, \textit{Alm v. Aluminum
Co. of America},\textsuperscript{61} came about because of an exploding bottle cap.

During the 1960s the Aluminum Company of America (Alcoa) developed
a system for applying aluminum caps to carbonated soft drink bottles. JFW
Enterprises, Inc., the owner of the Houston 7-Up Bottling Company,
purchased an Alcoa capping machine and used it to apply Alcoa-designed

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(1979)). These concurrent reasons seem rather contradictory; presumably a collusive family is
a happy family.

55. \textit{Id.} at 318.

56. \textit{Id.; see also} Whitworth v. Bynum, 699 S.W.2d 194, 197 (Tex. 1985), holding the auto-
guest statute unconstitutional. The stated rationale for the auto-guest immunity was the same
desire to avoid collusive lawsuits.

57. 732 S.W.2d at 319. The court cited thirty-eight other jurisdictions that have abolished
the immunity in whole or in part. \textit{Id.} Justice Mauzy, in his concurring opinion, took the State
Board of Insurance to task for incorporating the interspousal immunity doctrine into a pre-
scribed automobile insurance policy. 732 S.W.2d at 320.

58. 724 S.W.2d 383 (Tex. 1987).


60. 724 S.W.2d at 384.

61. 717 S.W.2d 588 (Tex. 1986). For further discussion, see Note, Alm v. Aluminum
Idaho Supreme Court followed the \textit{Alm} analysis in Sliman v. Aluminum Co. of America, 112
pilfer-proof caps\textsuperscript{62} to the 7-Up bottles. JFW purchased the aluminum capping material from a manufacturer that produced the Alcoa-designed and patented caps under a licensing agreement. On June 3, 1976, James Alm was blinded by an aluminum cap that blew off a thirty-two ounce bottle of 7-Up bottled and distributed by JFW Enterprises.

The principal issue addressed by the supreme court concerned Alcoa's duty to warn consumers about the dangers of bottle-cap explosions. Alcoa occupied a unique position regarding the bottle cap because it did not manufacture or sell any component part of the final defective product. The court held that Alcoa, as the designer and marketer of the closure process, cap, and capping machine, had a duty to warn consumers.\textsuperscript{63} A manufacturer has long been held to have a duty to exercise ordinary care in the design of a product.\textsuperscript{64} As a number of cases in other states have held, a designer owes the same duty even though he is not a manufacturer.\textsuperscript{65}

Costilla v. Aluminum Co. of America\textsuperscript{66} followed the Alm teachings on a manufacturer's ability to warn consumers through the use of a learned intermediary. Costilla was another exploding cap case, but the case was tried before Alm was handed down. The Fifth Circuit remanded the case for trial and required a jury instruction concerning Alcoa's ability to fulfill its duty to warn through the use of a learned intermediary.\textsuperscript{67}

The federal court also addressed a manufacturer's duty to warn in Osburn v. Anchor Laboratories, Inc.\textsuperscript{68} In Osburn a cowboy, Clois Osburn, was exposed to the veterinary drug, chloramphenicol. Later he was diagnosed as having leukemia. In 1982 Osburn began treating sick calves on the range, administering the antibiotic drug manufactured by Anchor Laboratories and Rachelle Laboratories. In order to administer the drug effectively, he straddled the sick calf, inserted a syringe into the rubber lid containing the antibiotic, and injected the calf with a syringe full of the drug. The difficulty of the process regularly resulted in the antibiotic's splashing and washing onto Osburn's hands and arms.\textsuperscript{69} In their appeal of the jury verdict in favor of Osburn, the chemical companies argued that they had discharged their duty to warn Osburn by providing warnings through their learned intermediary, the veterinarian. Since the antibiotic was a prescription drug, the laboratory argued that a proper warning to the prescribing physician satisfied their duty to warn Osburn. The Fifth Circuit rejected this interpretation of Alm since

\begin{itemize}
  \item \textsuperscript{62} Pilfer-proof caps typically have a small band of aluminum attached to the bottom of the cap itself.
  \item \textsuperscript{63} 717 S.W.2d at 591.
  \item \textsuperscript{64} Id. (citing \textsc{Restatement (Second) of Torts} § 388 (1965); Olivarez v. Broadway Hardware, Inc., 564 S.W.2d 195 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.).
  \item \textsuperscript{66} 826 F.2d 1444 (5th Cir. 1987).
  \item \textsuperscript{67} Id. at 1448.
  \item \textsuperscript{68} 825 F.2d 908 (5th Cir. 1987).
  \item \textsuperscript{69} The evidence showed that Osborn's arms were usually bathed with the chloramphenicol by the time he was through administering the drug. Id. at 910. The testimony also showed that he used more than sixty bottles of the antibiotic over an eighteen-month period. Id.
the "mere presence" of a learned intermediary does not excuse a manufacturer's failure to warn the ultimate user.\textsuperscript{70} While the laboratories could expect the veterinarian to have expertise and knowledge concerning the dangers of the antibiotic to animals, the court found it unreasonable to expect the dispensing veterinarian to warn about the risks of incidental exposure.\textsuperscript{71}

The drug companies also challenged the Osburn recovery on the grounds that the Food, Drug and Cosmetic Act,\textsuperscript{72} and the Food and Drug Administration's regulations\textsuperscript{73} preempted the Osburn state common law tort claims based upon the failure to warn. The drug companies contended that the FDA labeling requirements that the antibiotic have an approved label on the package conflicted with the state's duty to warn in a products case.\textsuperscript{74} The Fifth Circuit rejected this false conflict between FDA labeling requirements and state common law tort doctrines because the FDA regulations pertaining to this veterinary product did not prescribe a specific label.\textsuperscript{75} Instead of setting out a particular label, the FDA required the laboratories to submit a proposed label, which it would then approve or reject. Further, federal regulations specifically permitted the drug companies to add additional warnings to previously approved labels as soon as the laboratory became aware of the need for such warnings. Since the federal law did not prevent the drug companies from using warning labels, there was no conflict between the federal regulations and state common law, and hence no federal preemption.\textsuperscript{76}

A contrasting case is Hurley v. Lederle Laboratories,\textsuperscript{77} in which the court held that FDA requirements preempted Texas tort law concerning allegedly defective whole-cell diphtheria, pertussis, and tetanus (DPT) vaccines. The district court in Hurley granted the defendant's motion for summary judgment, finding evidence of congressional intent to supersede state common law with regard to drug dispensing.\textsuperscript{78} The court looked for both express and implied preemption of the state cause of action.\textsuperscript{79} Recognizing that no specific language in any of the relevant acts cut off the plaintiff's right to proceed under a state cause of action, the court found three factors in the labeling acts that implied a preemption of the state cause of action. First, federal labeling requirements are so comprehensive as to indicate an intent

\textsuperscript{70} Id. at 913.

\textsuperscript{71} Id.


\textsuperscript{73} See 21 C.F.R. §§ 201.105, 514 (1987).

\textsuperscript{74} The preemption doctrine recognizes that since federal law is the "Supreme Law of the Land," it supplants state laws on the same subject. In addition federal regulations have the same amount of preemptive effect as federal statutes. Fidelity Federal Savings & Loan Ass'n v. Cuesta, 458 U.S. 141, 152-54 (1982). A federal law's preemptive effect is not limited to state statutes, but extends to common law as well. Chicago & North W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 327 (1981).

\textsuperscript{75} 825 F.2d at 912.

\textsuperscript{76} Id. at 912-13.

\textsuperscript{77} 651 F. Supp. 993 (E.D. Tex. 1986).

\textsuperscript{78} Id. at 1000.

\textsuperscript{79} For a full discussion of the different types of federal preemption, see id. at 997, and the authorities cited therein.
to occupy the field and preclude any state regulation. Second, the nature of
the DPT labeling requires exclusive federal jurisdiction in order to achieve a
uniformity vital to national interests. Finally, state regulation of labeling or
warning requirements would seriously and irreconcilably conflict with the
federal statutory and regulatory scheme in this area. The court held that,
as a matter of law, the warning given to the learned intermediary was
adequate.

B. Defenses

Defenses to a product liability action was the subject of Magro v. Ragsdale
Brothers, Inc. Lewis Magro sued the manufacturer of a beer can making
machine for failing to warn him of the dangers involved in cleaning the
machine. Magro's job required him to reach into the machine's internal
workings and clean the tool-pack. Although the machine usually stopped
automatically when Magro opened a small access door, a co-worker defeated
this safety device by restarting the machine, severely injuring Magro.

Accepting that the manufacturer gave no adequate warning or instruction
concerning the safe cleaning of the machine, the question was whether this
failure to warn proximately caused Magro's injuries. Relying upon Technical
Chemical Co. v. Jacobs, the court ruled that when the Ragsdale Broth-
ers failed to give adequate warnings or instructions, it created a presumption
that the co-worker would read and heed the sign, satisfying the proximate
cause requirement.

Another issue in the case concerned whether the Duncan v. Cessna formula for
determining the liability of settling defendants required submission of an issue inquiring about the co-worker's negligence. The court of
appeals remanded the case with an instruction to the trial court requiring an
issue on the co-worker's negligence. Reversing that decision, the supreme
court relied upon Varela v. American Petrofina Co. in holding that the
workers' compensation statute creates an exception to former article 2212a
so that a negligent co-worker is not treated as a settling defendant for con-
tributory negligence purposes.

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80. Id. at 998-1001. The court also found that federal regulations concerning the design
of DTP vaccines also preempted state regulation in that area. Id. at 1003. For further discus-
sion of factors implying preemption of a state cause of action, see KVUE, Inc. v. Austin
Broadcasting Corp., 709 F.2d 922, 931-32 (5th Cir 1983), aff'd sub nom. Texas v. KVUE, Inc.,
81. 651 F. Supp. at 1002.
82. 721 S.W.2d 832 (Tex. 1986).
83. 480 S.W.2d 602 (Tex. 1972).
84. 721 S.W.2d at 834-35.
85. 665 S.W.2d 414, 427 n.8 (Tex. 1984).
86. 693 S.W.2d 530, 543 (Tex. App.—San Antonio 1985), rev'd, 721 S.W.2d 832 (1986).
87. 655 S.W.2d 561 (Tex. 1983).
88. TEX. REV. CIV. STAT. ANN. art. 2212a (repealed 1985), recodified at TEX. CIV.
PRAC. & REM. CODE § 33.001 (Vernon Supp. 1988).
89. 721 S.W.2d at 835-36.
Two other cases, *Short v. Black & Decker, Inc.*\(^{90}\) and *Caterpillar Tractor Co. v. Cropper*,\(^{91}\) represent examples of courts of appeals’ treatment of defenses to products liability suits. In *Short* the court found evidence supporting an implied jury finding that a worker who knew of and realized the grave dangers involved in working with an ungrounded impact wrench\(^{92}\) acted negligently.\(^{93}\) While *Short* upheld a jury finding of contributory negligence, *Caterpillar Tractor* reversed the trial court judgment because the jury refused to find contributory negligence on the part of an experienced truck driver who suffered an injury when his vehicle ran over an obstruction. The Texarkana court concluded that the jury’s finding that the driver did not act negligently was so contrary to the great weight of the evidence as to be manifestly unjust.\(^{94}\) The failure of the driver to look around the vision-blocking portions of his truck, failure to utilize alternative driving methods, and in fact accelerating near the obstruction constituted sufficient grounds to require a new trial on the issue.\(^{95}\)

*Placencio v. Allied Industrial International, Inc.*\(^{96}\) involved the proper method of submitting a product misuse defense to the jury. The misuse issue contained in the Texas Pattern Jury Charges accompanies a rather lengthy predicate preceding the question.\(^{97}\) The predicate, which Allied omitted from its tendered issue, is designed to prevent any comment on the weight of the evidence.\(^{98}\) The court held that rule 279\(^{99}\) and its call for “substantially correct” wording of tendered issues justified the trial court’s decision not to submit the issue.\(^{100}\) Since the tendered issue was affirmatively incorrect, the trial court did not err in refusing to submit the issue.\(^{101}\)

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90. 728 S.W.2d 832 (Tex. App.—Beaumont 1987, no writ).
91. 720 S.W.2d 824 (Tex. App.—Texarkana 1986, writ granted).
92. The worker had previously inspected and repaired this particular type of wrench and had been responsible for connecting the defective wrench to the power source.
93. 728 S.W.2d at 842 n.1.
94. 720 S.W.2d at 827.
95. *Id.* The supreme court granted Cropper’s application for writ of error on points concerning this holding. 30 Tex. Sup. Ct. J. 478 (June 17, 1987).
96. 724 S.W.2d 20 (Tex. 1987).
97. 3 State Bar of Texas, Texas Pattern Jury Charges § 72.02A (1982).
98. 724 S.W.2d at 22; see also 3 R. McDonald, *Texas Civil Practice in District and County Courts* § 12.03.2 n.4 (1983).
100. 724 S.W.2d at 21.
101. The parties in the case backed the trial court into a corner: the tendered issue was not so incorrect that its submission would amount to reversible error, nor was it so correct that its refusal was reversible error. The result was predicted by Professor McDonald’s hypothetical: Assume … that the plaintiff requests a special issue which … comments on the weight of the evidence … If such an issue could be deemed “substantially” correct, the court must either give it and be reversed upon an appeal in the event of a verdict adverse to the opponent of the requesting party; or decline to give it and be reversed upon appeal in the event of a verdict adverse to the requesting party; or attempt to frame a correct issue and perhaps be reversed on objections by either party to the form of the wording adopted. A rule imposing such a dilemma on the trial judge would be intolerable.

Placencio also reaffirmed the ruling in General Motors, Inc. v. Hopkins\(^{102}\) by stating that the alteration of a product is a type of misuse and an affirmative defense to a products liability suit, upon which the defendant has the burden of proof.\(^{103}\)

Strick Corp. v. Keen\(^{104}\) is another products liability case with Duncan overtones. Daryel Keen suffered an injury when he pulled his vehicle next to a tractor trailer stored in his employer’s workyard. While no one questioned that Keen did not cause the trailer to fall over onto him, rules prohibited him from parking so closely to a leaning trailer. The relevant question before the court was whether contributory negligence meant that the plaintiff contributed to the accident or contributed to the injuries.\(^{105}\) The court concluded that the defective product did not solely cause Keen’s injuries, and as such Keen’s conduct constituted a defense under Duncan.\(^{106}\)

C. Definition of “Product”

Houston Lighting & Power Co. v. Reynolds\(^{107}\) held that electric utilities providing power are subject to strict product liability. Electricity is a form of energy made, controlled, confined, transmitted, and distributed by man. As such, the court held that electricity qualifies as a consumable product for strict liability purposes.\(^{108}\) Further, the court ruled that electricity enters the stream of commerce as soon as it flows into high-voltage transmission lines, regardless of whether it is in its final consumable form.\(^{109}\) The court imposed a duty upon Houston Lighting & Power, the distributor, to warn of those reasonably foreseeable dangers of which the plaintiff was reasonably unaware.\(^{110}\)

III. Damages

A. Mental Anguish

The survey period saw significant changes in the area of tort damages. Moore v. Lillebo\(^{111}\) abolished the rule requiring mental anguish to be accompanied by physical manifestation in a wrongful death case. The parents of

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\(^{102}\) 548 S.W.2d 344, 351 (Tex. 1977).
\(^{103}\) 724 S.W.2d at 22.
\(^{104}\) 709 S.W.2d 292 (Tex. App.—Houston [14th Dist.] 1986, writ granted).
\(^{106}\) 709 S.W.2d at 294.
\(^{107}\) 712 S.W.2d 761 (Tex. App.—Houston [1st Dist.] 1986, writ granted).
\(^{108}\) Id. at 766; see also Smith v. Home Light & Power Co., 734 P.2d 1051, 1054 (Colo. 1987) (court defined electricity as a consumable product).
\(^{109}\) 712 S.W.2d at 767.
\(^{110}\) The case was submitted on April 8, 1987. 30 Tex. Sup. Ct. J. 341 (Apr. 8, 1987). The court granted application for writ of error on at least five points, which would appear to place the strict liability holdings of the opinion before the court. 30 Tex. Sup. Ct. J. 267, 268 (Mar. 4, 1987).
\(^{111}\) Sisson v. Texas-New Mexico Power Co., 722 S.W.2d 260 (Tex. App.—Fort Worth 1986, no writ), appears to involve issues similar to those raised by Houston Lighting & Power Co. v. Reynolds, but the court disposed of the appeal on other grounds.
Paul Moore sued Douglas Lillebo in a wrongful death action, alleging that Lillebo negligently fell asleep while driving his car. Lillebo's car drifted off the road, and Moore, a passenger in the vehicle, died in the resulting accident. The supreme court held that the existence of a family relationship establishes some evidence of mental anguish in the surviving family members when one of the family members dies.\(^{112}\)

Providing evidence of physical manifestation of mental anguish is no longer the only method of proving mental anguish.\(^{113}\) Courts have previously recognized the inequity of a rule requiring some physical manifestation as a prerequisite to mental anguish damages.\(^{114}\) The unfairness of the manifestation requirement forced courts to go to great lengths to find some evidence of a physical manifestation, and the supreme court chose to abolish the rule completely rather than condone such judicial straining.\(^{115}\)

After finding some evidence of a family relationship, the court went on to detail the jury instructions necessary for mental anguish submissions in wrongful death cases. The court prescribed several factors to prevent any double recovery.\(^{116}\) Juries should be instructed that mental anguish and loss of society and companionship constitute separate elements of recovery and should not allow damages to overlap.

*St. Elizabeth Hospital v. Garrard*\(^{117}\) extended the *Moore v. Lillebo* rationale to non-wrongful-death cases. *Garrard* involved a mental anguish claim brought by the parents of a stillborn infant mistakenly buried in an unmarked common grave. The Garrards did not plead any facts suggesting a

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112. *Id.* at 685. The court recognized the unlikelihood in the typical wrongful death case that the surviving family members genuinely suffer no mental anguish. *Id.*

113. *Id.* at 686.


In a dissenting opinion, Justice Spears argued that no evidence showed that Paul Moore's mother suffered mental anguish of any kind. The recovering mother had not seen her son for six years (except for a two-week period two weeks before his death). Paul Moore's father had not seen his son for over two years prior to the accident, and had communicated with his son on only three different occasions during those two years. 722 S.W.2d at 689. Further, the dissent would require physical manifestation of mental anguish in order to insure that the mental anguish rose to a compensable level (more than mere sorrow, anger, worry, or fear) and defined the mental anguish as a severe emotional distress. *Id.* at 690. Finally, the minority foresaw a double recovery because the loss of society and companionship would overlap the new mental anguish recoveries. *Id.* at 691.

116. The factors prescribed by the court include: "(1) the relationship between husband and wife or a parent and child; (2) the living arrangements of the parties; (3) any absence of the deceased from the beneficiary for extended periods; (4) the harmony of family relations; and (5) common interests and activities." 722 S.W.2d at 688.

117. 730 S.W.2d 649 (Tex. 1987).
physical component to their mental anguish. Joining the trend in other jurisdictions, the court held that the Garrard petition stated a claim for relief. The justifications underlying the physical manifestation requirement no longer have a place in our society. First, as pointed out in *Lillebo*, plaintiffs can almost always demonstrate some modicum of physical manifestation of mental anguish. Second, medical science now understands and appreciates mental anguish and psychological suffering more fully than in the past.

**B. Wrongful Death**

*Witty v. American General Capital Distributors, Inc.* saw the supreme court refuse to adopt a cause of action for the death of an unborn fetus. While working at American General Capital Distributors, Kimberly Witty tripped and fell over a utility outlet. At the time of her fall, Mrs. Witty carried a viable fetus. Though a sonogram performed shortly after the accident showed that the fetus was alive, a second sonogram, taken six days later, indicated that the fetus had died. Dissatisfied with her $546 workers' compensation award, Mrs. Witty brought suit against American General under the Wrongful Death Act and Survival Statute for the death of her unborn child. The supreme court affirmed the summary judgment rendered in favor of American General. Holding that it was bound to an interpretation of the Wrongful Death Act, the court refused to expand the Act to cover actions for the death of unborn children. Analogizing to *Yandell v. Delgado*, which granted recovery for prenatal injuries to a child

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118. The majority cited twelve jurisdictions that since 1978 had abolished the rule requiring physical manifestation as a prerequisite for recovery of mental anguish damages. For a listing of jurisdictions, see *id.* at 652 n.3.
119. *Id.* at 654.
120. *Id.* at 652-53. Compare this reasoning to *Moore*, 722 S.W.2d at 686.
121. 730 S.W.2d at 653. A four-member minority would limit the holding to cases involving mishandled corpses. *Id.* at 654. The minority, including Justice Campbell, the author of *Moore v. Lillebo*, would have maintained the physical manifestation requirement in non-wrongful death cases in order to discern between compensable and noncompensable mental anguish. *Id.* at 655.
122. The difference between compensable and noncompensable anguish was the issue addressed in *Larrumbide v. Doctors Health Facilities*, 734 S.W.2d 685 (Tex. App.—Dallas 1987, no writ). The court denied parents recovery for future mental anguish that they might suffer because of their daughter's death. The court allowed the award of damages for past mental anguish, but upheld the jury's "zero" award for future mental anguish. Testimony showed the Larrumbides were over the worst part of their grief and emotionally stable. As opposed to the severe mental suffering that they had undergone, in the court's opinion the parents would only suffer normal fear, anger, and sorrow in the future. *Id.* at 690.
125. § 71.021.
126. 727 S.W.2d at 506.
127. The court specifically declined to recognize a new cause of action or to rewrite the act in the absence of legislative history demonstrating an intent to cover an unborn fetus within the scope of the act. 727 S.W.2d at 504.
128. 471 S.W.2d 569 (Tex. 1971).
born alive and surviving, the court refused to allow a cause of action for the
death of an unborn child not born alive.\textsuperscript{129} The \textit{Yandell} holding further cut
off rights under the Survival Act, since Mrs. Witty could sue only for those
causes of action that her fetus would have had if born alive.\textsuperscript{130}

A strongly written dissent\textsuperscript{131} took the majority to task for refusing to ex-
and Texas tort law to allow recovery for the unborn child's death. Initially,
the dissent argued that the court had a responsibility to interpret the statute
in such a way as to recognize this cause of action. By relying upon the lack
of legislative history, the majority severely restricted the court's ability to
adjust and develop statutory causes of action.\textsuperscript{132} \textit{Yandell}, according to the
dissent, held only that a fetus had to be viable at the time the injury occurred
in order to recover for that injury after birth.\textsuperscript{133} Further, \textit{Yandell} involved
personal injuries, and should not be used as authority for interpreting the
Wrongful Death Act.\textsuperscript{134} A sweeping portion of the dissent then reviewed
the common law and concluded that the legislature did not mean to restrict
the Wrongful Death Act to living children.\textsuperscript{135}

\section*{C. Foreseeability}

\textit{Hinojosa v. South Texas Drilling \\& Exploration, Inc.} \textsuperscript{136} is another opinion
restricting damage law development. This case denied a bystander the right
to recover mental anguish damages. Reuben Hinojosa watched his close
friend fall to his death from a South Texas drilling rig. In denying recovery
for Hinojosa's mental anguish, the court of appeals reaffirmed Texas's adher-
ence to \textit{Dillon v. Legg}.\textsuperscript{137} That case enumerated three factors to be consid-
ered when allowing recovery for emotional distress by a bystander.\textsuperscript{138}

\begin{itemize}
\item \textsuperscript{129} \textit{Id.} at 570.
\item \textsuperscript{130} 471 S.W.2d at 569.
\item \textsuperscript{131} \textit{Witty}, 727 S.W.2d at 506-12 (Kilgarlin, J., dissenting).
\item \textsuperscript{132} The dissent argued that the Texas Supreme Court is largely responsible for the develop-
ment of Texas tort law. \textit{Id.} at 507 (citing Yowell v. Piper Aircraft Corp., 703 S.W.2d 630
(Tex. 1986); Sanchez v. Schindler, 651 S.W.2d 249 (Tex. 1983); Leal v. C.C. Pitts Sand &
Gravel Co., 419 S.W.2d 820 (Tex. 1967); Hugo Schmeltzer & Co. v. Paiz, 104 Tex. 563, 141
S.W. 518 (1911); Nelson v. Galveston, H. \\& S.A. Ry. Co., 78 Tex. 621, 14 S.W. 1021 (1890)).
\item \textsuperscript{133} 727 S.W.2d at 507-08.
\item \textsuperscript{134} \textit{Id.} at 508.
\item \textsuperscript{135} The dissent quoted Blackstone:
\begin{quote}
Life . . . begins in contemplation of law a[s] soon as an infant is able to stir in the
mother's womb. For if a woman is quick with child . . . [and] if anyone beat her,
whereby the child dieth in her body, and she is delivered of a dead child; this
though not murder, was by the antient law homicide or manslaughter.
\end{quote}
\textit{Id.} at 509 (quoting 1 W. BLACKSTONE, \textit{COMMENTSARYES} *129).
\item \textsuperscript{136} 727 S.W.2d 320 (Tex. App.—San Antonio 1987, no writ).
\item \textsuperscript{137} 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968). Texas adopted the \textit{Dillon} test
\item \textsuperscript{138} The \textit{Dillon} factors are:
\begin{enumerate}
\item Whether the plaintiff was located near the scene of the accident as con-
trasted with one who was a distance away from it.
\item Whether the shock re-
sulted from a direct emotional impact upon plaintiff from the sensory and
contemporaneous observance of the accident, as contrasted with learning of the
accident from others after its occurrence.
\item Whether the plaintiff and the vic-
tim were closely related, as contrasted with an absence of any relationship or the
presence of only a distant relationship.
\end{enumerate}
Because Hinojosa had no familial relationship with his co-worker, the court decided that no recovery should be granted for mental anguish.\footnote{727 S.W.2d at 706 (Tex. App.—Amarillo 1987, no writ).}

Another traditional foreseeability case, \textit{Padget v. Gray},\footnote{Id. at 711.} allowed a plaintiff to recover for post-accident depression and withdrawal. The court sanctioned recovery despite testimony that the plaintiff’s severe mental anguish resulted from psychological problems that had occurred years before the collision giving rise to the lawsuit.\footnote{Id. at 255.}

\section*{D. Gross Negligence}

\textit{Wright v. Gifford-Hill & Co.}\footnote{725 S.W.2d 712 (Tex. 1987).} held that an award of exemplary damages under the Workers’ Compensation Act does not depend upon a finding of actual damages.\footnote{Id. at 714.} Disapproving portions of \textit{Fort Worth Elevators Co. v. Russell},\footnote{123 Tex. 128, 70 S.W.2d 397 (1934).} the court held that a workers’ compensation plaintiff need not submit an actual damages issue to the jury before seeking an award of punitive damages.\footnote{725 S.W.2d at 714.} Logically, a workers’ compensation claimant cannot recover actual damages, and as a result the court should not force the claimant to submit a meaningless issue to the jury.

Two other gross negligence cases are also noteworthy. \textit{Winn Dixie-Texas, Inc. v. Buck}\footnote{730 S.W.2d 843 (Tex. App.—Dallas 1987, writ ref’d n.r.e.).} held that post-verdict trial amendments for the purpose of increasing the damages requested to meet the amount of damages awarded by the jury are improper when made without the consent of the opposing party.\footnote{Id. at 845.} \textit{Lawrence v. TD Industries}\footnote{727 S.W.2d 706 (Tex. App.—Amarillo 1987, no writ).} virtually foreclosed the possibility of summary judgment in favor of the defendants in gross negligence cases. Because the defendant’s mental attitude is critical to a determination of gross negligence, those issues allow little component summary judgment proof. Proof of intent, knowledge, and state of mind generally do not easily fit into affidavits, and are best left to the determination of the jury.\footnote{Id. at 714.}
E. Pretrial Interest

1. Date of Commencement

In *Morgan v. Ceiling Fan Warehouse, Inc. No. 3* 150 the supreme court reaffirmed the rule that prejudgment interest commences six months after the date of the injury and not six months after the plaintiff actually incurred medical expenses. 151 The court explained that the time for the commencement of prejudgment interest as enforced in *Cavnar v. Quality Central Parking, Inc.* 152 is arbitrary and something of a compromise. Nevertheless, *Cavnar* meant exactly what it said, and interest can begin to run on damages even before the plaintiff incurs them. 153 The alternative method, calculating interest from a date six months after actual incurrence, would unduly burden the trial system by requiring a determination of precisely when the plaintiff incurred each element of damages. 154

2. Segregation of Damages

*Benavidez v. Isles Construction Co.* 155 another supreme court case, clarifies the *Cavnar* rules for prejudgment interest. In *Cavnar* the court limited the recovery of prejudgment interest to accrued actual damages, and did not include prejudgment interest on punitive and future damages. 156 The rule required claimants to segregate accrued and future damages awards. The court awarded the *Benavidez* plaintiff a single lump sum recovery that combined both past and future damages. 157 The supreme court allowed the plaintiff to recover prejudgment interest on some of his past damages, in spite of his failure to segregate his recovery. 158 First, a stipulation read into the record at the beginning of the trial stated the amount of past medical expenses and lost wages. Since the stipulation provided the only evidence of those damages, the plaintiff sufficiently proved an amount of accrued damages. Further, the trial court judgment stated that Benavidez sustained $1500 in property damage (the cost of his motorcycle). Again, the court held that amount a sufficient segregation of past and future expenses. 159 A similar Fifth Circuit case, *Harmon v. Grande Tire Co.*, 160 relied upon *Benavidez* to allow recovery of prejudgment interest awarded to the estate of a plaintiff who died before trial. Even though there was no segregation, the Fifth Circuit determined that the dead plaintiff’s damage necessarily ac-

150. 725 S.W.2d 715 (Tex. 1987).
151. *Id.* at 716.
152. 696 S.W.2d 549, 555 (Tex. 1985).
153. 725 S.W.2d at 716.
154. 696 S.W.2d at 555.
155. 726 S.W.2d 23 (Tex. 1987).
156. 696 S.W.2d at 556.
158. 726 S.W.2d at 25.
159. *Id.*
160. 821 F.2d 252 (5th Cir. 1987).
crued prior to trial and did not include future damages.161

3. Equity

DeSoto v. Matthews162 clearly established that a plaintiff may recover prejudgment interest as damages making him whole. Disapproving of the court of appeals' language suggesting that a trial court has discretion to reduce the plaintiffs prejudgment interest award because of dilatory tactics,163 the supreme court noted that prejudgment interest is not a tool to force a case to trial. Instead, prejudgment interest compensates, the plaintiff for denial of the opportunity to invest and earn interest on the amount of damages caused by the defendant's actions. No equitable exception allows a trial judge to reduce or eliminate that amount of recovery.164 Lyons v. Ayala165 followed DeSoto in rejecting the argument that prejudgment interest should not accrue if the defendant offered more to settle the case than the amount finally awarded by the jury after trial.166 While other states deny prejudgment interest after the defendant makes a settlement offer,167 those jurisdictions require an unconditional tender (such as paying the money into the registry of the court) in order to toll prejudgment interest.168 Wood v. Armco, Inc.169 also tracked DeSoto in holding that a showing of dilatory tactics on a defendant's part is not a prerequisite to a recovery of prejudgment interest under the Cavnar principles.170

4. Procedure for Recovery of Prejudgment Interest

Procedurally, Benavidez v. Isles Construction Co.171 relies on well-established principles to require that plaintiffs seeking prejudgment interest bring such a request to the trial court's attention.172 While Cavnar created some difficulties because it applied to all cases "still in the judicial process" as well as future cases, it did not eliminate the need to plead for prejudgment interest or to object to a trial court's failure to award it.173 Home Interiors & Gifts, Inc. v. Veliz174 and Houston Power & Lighting Co. v. Reynolds175 both

161. Id. at 259. The plaintiff died of causes unrelated to the accident giving rise to the lawsuit. Id. at 254 n.1.
162. 714 S.W.2d 133 (Tex. App.—Houston [1st Dist.]), writ ref'd n.r.e. per curiam, 721 S.W.2d 286 (Tex. 1986).
163. 714 S.W.2d at 136.
164. 721 S.W.2d at 287.
165. 723 S.W.2d 254 (Tex. App.—Fort Worth 1986, no writ).
167. See, e.g., MICH. COMP. LAWS § 600.6013 (1987); WIS. STAT. § 807.01 (1987).
168. 723 S.W.2d at 258.
169. 814 F.2d 211 (5th Cir. 1987).
170. Id. at 214.
171. 726 S.W.2d 23 (Tex. 1987); see supra text accompanying notes 155-59.
172. For instance, TEX. R. CIV. P. 301 requires that the judgment conform to the pleading.
173. 726 S.W.2d at 25; see Vidor Walgreen Pharmacy v. Fisher, 728 S.W.2d 353 (Tex. 1987) (court reversed award granting prejudgment interest because of plaintiff's failure to request prejudgment interest in the pleadings).
175. 712 S.W.2d 761, 774 (Tex. App.—Houston [1st Dist.] 1986, writ granted).
clearly require a dissatisfied plaintiff to inform the court of his desire to re-
cover prejudgment interest. Further, Veliz held that trial courts cannot
award prejudgment interest after losing plenary jurisdiction.

F. Contribution and Indemnity

1. Contribution

One of the most complex cases in this complicated area of law is Beech
Aircraft Corp. v. Jinkins. Two doctors, Wiley Jinkins and Richard Wi-
ner, were injured when the engine of Jinkins's Beech aircraft failed during
take-off. Both doctors filed products liability suits against the engine sup-
plier, Beech, and the manufacturer, Teledyne. Teledyne and Beech settled
with Wiener by an agreement in which Wiener assigned to them any rights
to sue Jinkins. Wiener nonsuited Beech and Teledyne, who promptly filed
cross-actions against Jinkins for contribution or indemnity.

The trial court granted Jinkins's motion for summary judgment, holding
that the defendants had no right to contribution. The court of appeals af-

177. Veliz, 725 S.W.2d at 297; Reynolds, 712 S.W.2d at 774.
178. 725 S.W.2d at 297.
179. 739 S.W.2d 19 (Tex. 1987).
180. Beech Aircraft Corp. v. Jenkins, 698 S.W.2d 722 (Tex. App.—Houston [1st Dist.]
181. 739 S.W.2d 19 (Tex. 1987).
182. TEX. REV. CIV. STAT. ANN. art. 2212 (repealed 1985), recodified at TEX. REV. CIV.
183. 665 S.W.2d 414, 427 (Tex. 1984).
184. The order of dismissal following the Wiener nonsuit did not incorporate the settle-
185. 698 S.W.2d at 726.
186. 739 S.W.2d at 21.
his or her liability. Agreed judgments, however, cannot provide a basis for a subsequent contribution claim in a comparative negligence case.

*Jinkins* also stands for the proposition that settling defendants cannot buy a plaintiff’s cause of action against then-unnamed defendants. Dr. Weiner never named the pilot, Jinkins, as a defendant, and the court found it against public policy to allow such secondary suits.

*Ralston-Purina Co. v. Barkley Feed & Seed Co.* grew out of a lawsuit filed by Barkley against Purina and its fish-meal supplier, International Proteins Corporation (IPC), alleging that Purina and IPC had sold contaminated chicken feed. Before trial, Purina settled with Barkley for $340,000 and an assignment to Purina of any possible recovery due Barkley from any third party. Barkley’s suit against Purina and IPC, originally set in 1978, was dismissed sometime in early 1984. Purina filed a motion to reinstate Barkley’s lawsuit and filed an amended cross-action against IPC. The amended cross-action sought contribution for the amounts that Purina paid to Barkley and contained independent causes of action against Barkley. The court of appeals held that Purina had the right to recover from IPC on the indemnity agreement, but the supreme court granted IPC’s application for writ of error on points alleging that the release between Barkley and Purina did not assign a cause of action to Purina and that Purina lacked standing to reinstate Barkley’s lawsuit.

2. **Indemnity**

*Ethyl Corp. v. Daniel Construction Co.* involved an indemnity agreement between a workers’ compensation subscribing employer and the owner of premises who contracted with the employer. Donald Metcalf, employed by Daniel Construction Co., worked on property owned by the Ethyl Corporation when he was injured in an accident caused by Ethyl’s negligence. After settling his workers’ compensation claim against Daniel Construction Co., Metcalf sued Ethyl. Ethyl in turn sued Daniel, seeking contractual indemnity. The court of appeals reversed the trial court and held that the

187. *Id.* The dissenting opinion, authored by Justice Ray and in which Justice Gonzales joined, would allow contribution rights in favor of settling defendants in order to encourage the settlement of lawsuits. *Id.* at 22-23.

188. *Id.* at 21-22.

189. *Id.* at 22.

190. The court created an exception to the general rule that the cause of action for damages may be sold or assigned. Finding that public policy discourages such assignments, the court declined to allow such actions in order to preserve contribution rights. *Id.*


192. The full text of the relevant portions of the agreement appears at 722 S.W.2d at 434.

193. *Id.*


195. 725 S.W.2d 705 (Tex. 1987).

196. The contract between Ethyl and Daniel provided that “[Daniel Construction Co.] shall indemnify and hold [Ethyl] harmless against any loss or damage to persons or property as a result of operations growing out of the performance of this contract and caused by the negligence or carelessness of [Daniel Construction Co.]. [Daniel Construction Co.’s] employees, Subcontractors, and agents or licensees.” 725 S.W.2d at 707.
language did not “clearly and unequivocably” require Daniel to indemnify Ethyl for Ethyl’s own negligence. In affirming the court of appeals, the supreme court adopted a new standard for examining contracts purporting to indemnify parties for their own negligence. Moving away from the “clear and unequivocal” language standard, the court adopted the “express negligence” test for determining the meaning of indemnity contracts. Under the express negligence doctrine, the intent of the parties must appear within the writing of the contract. The effect is to require parties wishing to indemnify themselves for their own negligence to expressly state that intent within the contract. The court abandoned the old standard because of the number of lawsuits generated in attempts to construe the specific language of those agreements. Overruling portions of three earlier supreme court cases, the court appeared to fashion policy designed to cut through the ambiguity and double-speak occasioned by the old standard.

Courts applied the express negligence rule to similar indemnity contracts in Singleton v. Crown Central Petroleum Corp. and Gulf Coast Masonry v. Owens-Illinois, Inc. One court of appeals opinion, Adams v. Spring Valley Construction Co., properly held that the express negligence rule applied to all documents purporting to contain indemnity contracts. Another court of appeals decision, Crown Central Petroleum Corp. v. Jennings, applied the Ethyl express negligence rule to a contract purporting to indemnify one party for its own gross negligence.

3. Mary Carter Agreements

One of the most complicated cases in the Survey period, Scurlock Oil Co. v. Smithwick, arose when George Smithwick and Clay Carrol Dove, two Missouri Pacific Railroad Company employees, died in a van/trailer truck collision. The Smithwick heirs filed suit in Nueces County against the railroad company, the truck owner (Scurlock Oil Company), the truck driver (Ernest Lewis), the van owner (Victoria Carrier Services), and the van driver

197. 714 S.W.2d 51 (Tex. App.—Houston [14th Dist.] 1986), aff’d, 725 S.W.2d 705 (Tex. 1987).
198. 725 S.W.2d at 708.
199. Id.
200. “[T]he scriveners of indemnity agreements have devised novel ways of writing provisions which fail to expressly state the true intent of those provisions. The intent of the scriveners is to indemnify the indemnitee for its negligence, yet be just ambiguous enough to conceal that intent from the indemnitor.” Ethyl, 725 S.W.2d at 707-08.
202. The court held that Ethyl's contract with Daniel did not expressly indemnify Ethyl for its own negligence. 725 S.W.2d at 708.
203. 729 S.W.2d 690, 691 (Tex. 1987).
204. 739 S.W.2d 239, 240 (Tex. 1987).
205. 728 S.W.2d 412 (Tex. App.—Dallas 1987, writ ref’d n.r.e.).
206. Id. at 415.
207. 727 S.W.2d 739 (Tex. App.—Houston [1st Dist.] 1987, no writ).
208. Id. at 742. Interestingly, Jennings and Singleton arose out of the same accident.
209. 724 S.W.2d 1 (Tex. 1986).
(Ronnie Wayne Bounds). The Dove heirs filed suit in Matagorda County against the same defendants. In the Dove action, Scurlock Oil Company entered a Mary Carter Agreement, guaranteeing the plaintiffs at least a 2.5 million dollar recovery. A jury found that the Missouri Pacific Railroad, through its borrowed servant, Bounds, ninety percent negligent.210

Because the Dove case was still on appeal when the court set the second lawsuit for trial,211 Scurlock Oil Company sought to abate the Smithwick trial until the Dove judgment became final, and use collateral estoppel to preserve the jury finding that Missouri Pacific was ninety percent responsible.212 The Nueces County District Court overruled this plea in abatement and allowed the Smithwick case to proceed to trial.

In the Nueces County litigation, Missouri Pacific Railroad entered into a similar Mary Carter Agreement guaranteeing the Smithwick plaintiffs 2.5 million dollars. The details of this Mary Carter Agreement were not read to the jury in the Nueces County suit, but Smithwick’s lawyers advised the jury panel of its existence during voir dire examination, and the Scurlock Oil Company lawyer commented upon the guaranty agreement during closing argument.

Although the Smithwicks had nonsuited Ernest Lewis, the Scurlock Oil driver, they called him as an adverse witness and sought to impeach him with the Mary Carter Agreement that the Dove heirs and his employer had entered into in the first suit. Lewis denied knowing that Scurlock Oil had guaranteed any amount of money to the Dove heirs and denied knowing any details about the Matagorda case. After Lewis was finished testifying, and without any witness on the stand, the Smithwick's attorney read to the jury portions of the Mary Carter Agreement between the Dove heirs and Scurlock Oil Company.

The supreme court held the Mary Carter Agreement inadmissible in this case.213 Though the Smithwicks purported to admit the agreement in order to show Lewis's bias, the fact that Lewis did not sign the agreement, coupled with the fact that he had no pecuniary interest in the outcome of the prior suit or his employer's settlement, meant that the Mary Carter Agreement could not be introduced into evidence.214 Further, attempting to blunt the effect of the Mary Carter Agreement admission during closing argument did not waive Scurlock's objection to it.215

211. Judgment was not yet final in Huebner. See id.
212. See Bonniwell v. Beach Aircraft Corp., 663 S.W.2d 816 (Tex. 1984) (court acknowledged potential applicability of collateral estoppel doctrine in product liability case, but plaintiff failed to establish requisite factors for its use).
213. 724 S.W.2d at 4.
214. Id.
215. Id. The court also announced a new rule on finality of judgments in Texas. Prior to Smithwick, Texas was one of the few jurisdictions holding that a judgment on appeal is not final for issue preclusion purposes. The court adopted the Restatement rule “that a judgment is final for the purposes of issue and claim preclusion ‘despite the taking of an appeal unless what is called an appeal actually consists of a trial de novo.’ ” Id. at 6 (citing RESTATEMENT (SECOND) OF JUDGMENTS § 13 comment f (1982)).
Another suit based on the same cause of action, *Bounds v. Scurlock Oil Co.*,216 followed the *Smithwick* rationale and held that a party can introduce Mary Carter Agreements into evidence only to impeach or show bias on the part of witnesses. In the *Bounds* case, the agreement was between Bounds and Missouri Pacific, yet was offered to show bias or prejudice upon the part of Scurlock Oil Company.217

Mary Carter Agreements are no different from any other contracts, and the court typically looked to contract rules for determining the meaning and intent of Mary Carter Agreements. In *Allison v. National Union Fire Insurance Co.*218 the supreme court interpreted an unambiguous Mary Carter Agreement as requiring reimbursement based upon a gross recovery in order to satisfy fully the party’s intent.219

IV. PROFESSIONAL MALPRACTICE

A. Medical Malpractice—Statute of Limitations

Several cases during the Survey period clarified the statutes of limitation applicable to medical malpractice actions. The supreme court refused the writ of error in *Tinkle v. Henderson*,220 adopting the Tyler court's opinion as its own. The case involved a patient who became mentally incapacitated because of oxygen deprivation during an adverse reaction to morphine. In reversing the summary judgment rendered in favor of the hospital, the court held that the two-year statute of limitations under the old insurance code221 did not apply to extinguish the right of a mentally incompetent person before that person regained legal capacity. The Tyler court of appeals relied upon the open courts provision of the Texas Constitution,222 and analogized the situation to the child-plaintiff in *Sax v. Votteler*.223 In *Sax* the court held that the legislature could not impose an absolute two-year statute of limitations upon a minor injured by medical malpractice. The court held the statute of limitations unconstitutional in *Sax* because the statute abolished the minor's right to bring a common law cause of action without providing a reasonable alternative.224 In *Tinkle* the same analysis applied to the six-month notice requirement under the Torts Claims Act.225


216. 730 S.W.2d 68 (Tex. App.—Corpus Christi 1987, writ ref’d n.r.e.).
217. 730 S.W.2d at 70.
218. 734 S.W.2d 645 (Tex. 1987).
219. Id. at 646.
220. 730 S.W.2d 163 (Tex. App.—Tyler 1987, writ ref’d).
223. 648 S.W.2d 661 (Tex. 1983).
224. Id. at 667.
226. 725 S.W.2d 271 (Tex. App.—Corpus Christi 1986, writ ref’d n.r.e.).
227. 685 S.W.2d 11 (Tex. 1985).
Krusen in holding that the open courts provision of the Texas Constitution creates a modified discovery rule that tolls the two-year statute of limitations of article 4590i until a claimant has had a reasonable opportunity to discover a cause of action. In Tsai silk sutures that led to pelvic inflammatory disease allegedly caused the injuries in a young woman. The court of appeals upheld the jury's finding that the plaintiff did not have a reasonable opportunity to discover the wrong that occurred until follow-up surgery revealed the use of the nondissolving sutures. Del Rio v. Jinkins tracked Tsai in a case in which a doctor improperly performed radiation treatment eventually necessitating a colostomy. The opinion upon motion for rehearing made it clear that the Corpus Christi court viewed the Texas open courts provision as requiring a modified discovery rule, providing a reasonable opportunity to discover the injury before the statute of limitations can run.

Rascoe v. Anabtawi relied upon Hill v. Milani to conclude that the wrongful survival statute does not toll the statute of limitations in a wrongful death survival action arising out of medical malpractice. Hill held that an absence from the state does not affect the two-year statute of limitations in spite of the tolling provisions of the survival statute. Absence from the state was not a specific tolling provision within the meaning of article 4590i and as such could not override the two-year statute of limitations. The Beaumont court of appeals relied upon the same analysis to conclude that the survival statute cannot trump article 4590i. Rascoe also declined to hold that article 4590i is a per se violation of the open courts provision of the Texas Constitution.

228. 678 S.W.2d 918 (Tex. 1984).
231. Tsai, 725 S.W.2d at 273.
232. Id.
233. 730 S.W.2d 125 (Tex. App.—Corpus Christi 1987, writ ref'd n.r.e.).
235. 730 S.W.2d at 128. The opinion on motion for rehearing emphasizes that the court did not directly apply the discovery rule. Id.
236. 730 S.W.2d 640 (Tex. App.—Beaumont 1987, no writ).
237. 686 S.W.2d 610 (Tex. 1985).
238. TEX. CIV. PRAC. & REM. CODE ANN. § 16.062 (Vernon 1986).
239. Rascoe, 730 S.W.2d at 461.
240. TEX. REV. CIV. STAT. ANN. art. 4590i, § 10.01 (Vernon Supp. 1988).
241. 868 S.W.2d at 611.
242. 730 S.W.2d at 461.
244. 730 S.W.2d at 463. Under Morris v. Chan, 699 S.W.2d 205 (Tex. 1985), a statute of limitations violates the constitution when it cuts off the right to bring suit "before the person has a reasonable opportunity to discover the wrong and bring suit." Id. at 207 (emphasis in original) (citing Nelson v. Krusen, 678 S.W.2d 918, 923 (Tex. 1984)). The Rascoe plaintiffs did not demonstrate themselves unable to discover their injuries before the statute of limitations ran, and thus did not show that the statute denied them a reasonable opportunity to bring suit. 730 S.W.2d at 463.
B. Medical Malpractice—Proof

Rodriguez v. Reeves\textsuperscript{245} stands for the proposition that the plaintiff must still establish the standard of care in a malpractice case.\textsuperscript{246} At trial Rodriguez failed to introduce any evidence establishing the medical standard of care in the community. All of the testimony on the standard of care came from defense witnesses who stated that the defendants acted in accordance with good medical practices. With no evidence to show that the treating physician or the hospital staff breached the standard for medical care in the community, the court did not have to address the threshold issue on medical malpractice; therefore, a directed verdict was proper.\textsuperscript{247}

Two other cases, Kissinger v. Turner\textsuperscript{248} and Duff v. Yelin,\textsuperscript{249} are primarily cases regarding the sufficiency of the evidence, but also involve discussions of res ipsa loquitur as it applies to medical malpractice cases. In Kissinger the majority held that leaving a surgical clamp attached to a plaintiff’s intestine was not negligence as a matter of law.\textsuperscript{250} Foreign object cases are subject to the doctrine of res ipsa loquitur, which eliminates the need for expert testimony in order to justify jury submission, but the court reasoned that the doctrine does not supplant the necessity of showing the defendant’s negligence.\textsuperscript{251} Duff involved allegations that the plaintiff suffered nerve injury because of improper arm positioning during neck surgery. The court refused to allow the application of res ipsa loquitur because no evidence established that the injury was the sort that did not ordinarily occur in the absence of negligence.\textsuperscript{252} Further, the plaintiff introduced no evidence that the cause of the injury was an instrumentality or occurrence within the defendant’s control.\textsuperscript{253}

C. Medical Malpractice—Other Cases

Smith v. Baptist Memorial Hospital System\textsuperscript{254} overturned a summary judgment based upon material issues of fact concerning the ostensible agency of an emergency room physician. Recognizing that public policy requires

\textsuperscript{245} 730 S.W.2d 19 (Tex. App.—Corpus Christi 1987, writ ref’d n.r.e.).
\textsuperscript{246} Id. at 21; Perdue, The Law of Texas Medical Malpractice, Standard of Care, 22 Hous. L. Rev. 47, 59 (1985).
\textsuperscript{247} 730 S.W.2d at 21; see Webster v. Johnson, 737 S.W.2d 884, 887 (Tex. App.—Houston [1st Dist.] 1987, no writ) (doctor’s post-operative treatment did not meet standard of care established by the community).
\textsuperscript{248} 727 S.W.2d 750 (Tex. App.—Fort Worth 1987, writ ref’d n.r.e.).
\textsuperscript{249} 721 S.W.2d 365 (Tex. App.—Houston [1st Dist.] 1986, writ granted).
\textsuperscript{250} 727 S.W.2d at 755.
\textsuperscript{251} Id.
\textsuperscript{252} 721 S.W.2d at 371.
\textsuperscript{253} Id. Chief Justice Evans would have allowed a jury issue on the hospital’s liability. Id., at 374 (Evans, C.J., dissenting). The dissent pointed out that some testimony showed that external pressure on the plaintiff’s elbow caused the damage to the ulnar nerve. The evidence also indicated that pressure most likely occurred while the plaintiff was unconscious or after the plaintiff regained consciousness in a recovery room. Expert testimony further showed that the hospital had an affirmative duty to position a patient’s arms so that any movements did not apply undue pressure to the ulnar nerve. Id.
\textsuperscript{254} 720 S.W.2d 618 (Tex. App.—San Antonio 1986, writ ref’d n.r.e.).
the imposition of strict duties upon institutions billed as full-service hospitals.\textsuperscript{255} the court held that an agency by estoppel arises when the hospital creates an appearance that the emergency room personnel are hospital employees.\textsuperscript{256} Patients arriving in an emergency room are thus entitled to conclude that a doctor providing emergency care is a hospital employee.\textsuperscript{257}

\textit{Williams v. Sun Valley Hospital}\textsuperscript{258} declined to extend a hospital’s duty to protect third persons against dangerous patients. The case arose when a patient committed to Sun Valley’s Acute Cases Ward escaped from the hospital and threw himself in front of a car driven by Pamela Williams. She brought suit for the injuries that she suffered in the resulting accident, but the El Paso court of appeals held that the hospital owed no duty to third persons.\textsuperscript{259} Distinguishing \textit{Tarasoff v. Regents of University of California}\textsuperscript{260} and relying upon the reasoning in \textit{Thompson v. County of Alameda},\textsuperscript{261} the court refused to impose a duty absent evidence of a mental patient’s dangerousness to readily identified persons.\textsuperscript{262} \textit{Otis Engineering Corp. v. Clark}\textsuperscript{263} did not apply because the hospital took no affirmative act that would have increased Williams’s danger.\textsuperscript{264} The evidence showed that, unlike Otis Engineering’s obviously drunken employee,\textsuperscript{265} the Sun Valley patient had never shown an intent to escape from the institution, nor had the hospital acted to facilitate his escape.\textsuperscript{266}

Also of interest in the area of medical malpractice is the certified question in \textit{Lucas v. United States},\textsuperscript{267} which gives the Texas Supreme Court the opportunity to address the constitutionality of section 11.02 of the Medical Liability and Insurance Improvement Act.\textsuperscript{268} Section 11.02 limits the civil liability for damages caused by a health care provider. The Fifth Circuit in \textit{Lucas} held that the statutory cap on damages did not violate the United States Constitution.\textsuperscript{269} The court passed to the Texas Supreme Court the

\textsuperscript{255} Hannola v. City of Lakewood, 68 Ohio App.2d 61, 66, 426 N.E.2d 1187, 1190-91 (1980) (patient died due to medical malpractice by third party emergency room personnel of a full-service hospital).
\textsuperscript{256} Smith, 720 S.W.2d at 625.
\textsuperscript{257} Id. The opinion also held that the physician’s professional association that contracted with the hospital to provide emergency room personnel could be vicariously liable for the negligence of their employee. \textit{Id.} at 627.
\textsuperscript{258} 723 S.W.2d 783 (Tex. App.—El Paso 1987, writ ref’d n.r.e.).
\textsuperscript{259} at 787.
\textsuperscript{260} Cal. 3d 425, 439, 551 P.2d 334, 345, 131 Cal. Rptr. 14, 25 (1976) (court imposed duty on hospital to exercise reasonable care to control behavior of patient known to be dangerous to others).
\textsuperscript{261} 27 Cal. 3d 741, 754-55, 614 P.2d 728, 735-37, 167 Cal. Rptr. 70, 77 (1980) (court failed to impose duty to warn foreseeable victim of patient’s harm).
\textsuperscript{262} Williams, 723 S.W.2d at 787.
\textsuperscript{263} 668 S.W.2d 307 (Tex. 1983).
\textsuperscript{264} 723 S.W.2d at 787.
\textsuperscript{265} 668 S.W.2d at 311.
\textsuperscript{266} 723 S.W.2d at 784. In his dissenting opinion Justice Fuller argued that the hospital had knowledge that the patient was dangerous, as evidenced by the fact that the hospital admitted him to a ward reserved for acute crises patients needing careful scrutiny. In addition, the patient had previously assaulted a staff member. \textit{Id.} at 787.
\textsuperscript{267} 807 F.2d 414 (5th Cir. 1986).
\textsuperscript{268} TEX. REV. CIV. STAT. ANN. art. 4590, § 11.02 (Vernon Supp. 1988).
\textsuperscript{269} Lucas, 807 F.2d at 422.
question of the cap's constitutionality under the Texas Constitution.\textsuperscript{270} 

Lucas was submitted on October 7, 1987, and five weeks later, the court granted the application for writ of error in\textit{Rose v. Doctor's Hospital},\textsuperscript{271} in which the Dallas court broke rank with the Beaumont and Corpus Christi courts of appeals in holding the damage limitation a permissible exercise of legislative power.\textsuperscript{272}

\section{D. Legal Malpractice}

\textit{Heath v. Herron}\textsuperscript{273} involved an attorney's failure to verify a rule 93 pleading.\textsuperscript{274} While representing Glenn Earl Herron in a dissolution of partnership suit, attorney Bob Heath filed an answer on Herron's behalf, denying the existence of a partnership between the former business associates. The case went to trial, and at the close of Herron's defense opposing counsel moved to strike all controverting testimony and require a directed verdict on grounds that the denial had not been verified. Since it appeared that the trial court would grant the directed verdict, the parties quickly undertook settlement negotiations and Herron paid $250,000 to settle the case. Herron then sued his attorney for legal malpractice, alleging that the pleading defect led to a one-sided settlement. Reviewing the jury's verdict returned against the attorney in the legal malpractice claim, the court of appeals held that the measure of damages equalled the difference between the settlement amount actually paid and the amount that would have been paid had the pleading been properly verified.\textsuperscript{275} The court declined to allow the recovery for mental anguish in legal malpractice cases absent evidence of unusual circumstances.\textsuperscript{276} Finally, an announcement of "ready" in open court at the commencement of the underlying suit did not amount to a representation within the meaning of the Deceptive Trade Practices Act.\textsuperscript{277}

\textit{Willis v. Maverick},\textsuperscript{278} a statute of limitations case, involved an attorney accused of committing malpractice by representing both sides in a divorce. Upon appeal, the court first considered whether the four-year or two-year statute of limitations governed the case.\textsuperscript{279} Rejecting the view that a legal malpractice claim is an action for debt, the court held that the claim sounds in tort and the tort limitations statute controls.\textsuperscript{280} The court then addressed when the cause of action arose. Declining to adopt the discovery rule, the court of appeals held that in a legal malpractice case the statute begins to

\begin{footnotes}
\footnotetext{270} The court used rule 114 to pass the question of constitutionality to the supreme court.\textit{TEX. R. APP. P. 114(a).}\textsuperscript{271} \textit{735 S.W.2d 244 (Tex. App.—Dallas 1987, no writ).}\textsuperscript{272} \textit{Id. at 254.}\textsuperscript{273} \textit{732 S.W.2d 748 (Tex. App.—Houston [14th Dist.] 1987, no writ).}\textsuperscript{274} \textit{TEX. R. CIV. P. 93.}\textsuperscript{275} \textit{732 S.W.2d at 753.}\textsuperscript{276} \textit{Id.}\textsuperscript{277} \textit{Id.}\textsuperscript{278} \textit{723 S.W.2d 259 (Tex. App.—San Antonio 1986, writ granted).}\textsuperscript{279} The two-year statute of limitations found in \textit{TEX. CIV. PRAC. & REM. CODE ANN. § 16.003 (Vernon 1986)} governs tort actions. The four-year statute of limitations found in \textit{id. § 16.004} governs contract actions and actions for recovery of debt.\textsuperscript{280} \textit{723 S.W.2d at 261.}
\end{footnotes}
run at the date of "legal injury."\textsuperscript{281} A legal injury occurs when the force producing an injury is wrongfully set in motion and eventually causes damages.\textsuperscript{282} Here, the legal injury occurred when the attorney first undertook to represent both parties to a divorce. The existence of a fiduciary relationship, however, creates a duty on the part of the attorney to disclose matters that might breach that fiduciary duty.\textsuperscript{283} The failure to disclose facts in a fiduciary relationship strongly implies a fraudulent concealment. The existence of a fiduciary relationship tolls the statute of limitations during the period of time in which the fiduciary relationship exists.\textsuperscript{284} In \textit{Maverick} the fiduciary duty ended two years and eleven days before the plaintiff filed the malpractice suit against the former attorney; therefore, the statute of limitations barred the action.\textsuperscript{285}

Another noteworthy legal malpractice case is \textit{Berry v. Dodson, Nunley & Taylor, P.C.}\textsuperscript{286} The case presents the question of whether an attorney owes any duty to the intended beneficiaries of a will when the attorney fails to prepare the will in accordance with the testator's instructions. Henry Berry employed an attorney to write a new will for him, but died before executing the will. Mr. Berry's former will, executed in 1977, was admitted into probate and the estate was disposed according to its terms. Only Berry's children by a former marriage took under the probated will. Berry's widow brought an action against the attorney who was supposed to have drafted the new will, alleging that under the proposed will, her own children would have shared on an equal basis and that the proposed will would have devised certain business interests to her. The trial court granted a motion for summary judgment on the premise that the attorneys owed no duty to Mrs. Berry and her children, and the court of appeals affirmed that decision.\textsuperscript{287} The court of appeals noted that although several states have allowed intended beneficiaries to recover in such cases, Texas privity does not allow recovery in such a situation.\textsuperscript{288} Resolution of this issue by the supreme court must await another case.

\section*{V. IMMUNITY}

\subsection*{A. \textit{Texas Tort Claims Act}}

Three recent cases turn on the meaning of the term "use" for purposes of the Texas Tort Claims Act.\textsuperscript{289} \textit{Brown & Root, Inc. v. Cities Municipal Utility}

\begin{center}
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281. \textit{Id.} \\
282. \textit{Id.} (citing Liles v. Phillips, 677 S.W.2d 802, 808 (Tex. App.—Fort Worth 1984, writ ref'd n.r.e.); Pack v. Taylor, 584 S.W.2d 484, 486 (Tex. Civ. App.—Fort Worth 1979, writ ref'd n.r.e.)). \\
283. 723 S.W.2d at 262. \\
284. \textit{Id.} \\
285. \textit{Id.} The dissent argued that the legal injury test violates the open courts doctrine because it extinguishes a cause of action without a reasonable opportunity to bring suit. 723 S.W.2d at 263 (Cadena, J., dissenting). \\
286. 717 S.W.2d 716 (Tex. App.—San Antonio 1986, writ dism'd). \\
287. \textit{Id.} at 719. \\
288. \textit{Id.} \\
\end{tabular}
\end{center}
PERSONAL TORTS

District held that allegations of negligence in the design, installation, and use of a culvert system stated a claim under the Tort Claims Act. The suit arose after subsidence in a housing subdivision caused foundation problems and made the homes uninhabitable. The court relied upon the definition in Salcedo v. El Paso Hospital District, and held that designing and installing the culvert system constituted a use of real property. The court also required no physical manifestation in order to recover for mental anguish damages inflicted by the Utility District’s negligence because of an exception to the requirement to the general rule requiring proof of physical injury resulting from mental anguish.

Bryant v. Metropolitan Transit Authority involved an assault that occurred on a Metropolitan Transit Authority bus. Timothy Bryant brought suit alleging that the bus driver acted negligently in failing to exercise due care to prevent the assault and in aggravating Bryant’s injuries. Recognizing that the transit authority, as a common carrier, owed a high duty of care to its passengers, the Houston court gave the Tort Claims Act a broad interpretation and held that Bryant sufficiently alleged a use of the vehicle as to allow the cause of action. In reaching that holding the court distinguished those cases involving incidents on school buses, noting that the Tort Claims Act subjects school districts to much narrower liability.

Diaz v. Central Plains Regional Hospital involved a nonuse of tangible personal property. Racquel Diaz sought admission to the Central Plains Regional Hospital (operated by the Hale County Hospital Authority). The hospital denied her admission because she had neither money nor health insurance with which to pay for her treatment. Three days later another hospital admitted Mrs. Diaz and she underwent an unsuccessful treatment for a cancerous tumor. The Fifth Circuit relied upon City of Denton v. Van

290. 721 S.W.2d 881 (Tex. App.—Houston [1st Dist.] 1986, no writ).
291. Id. at 884.
292. 659 S.W.2d 30 (Tex. 1983). The court defined use as “to put or bring into action or service; to employ for or apply to a given purpose.” Id. at 33 (citing Beggs v. Texas Dep’t of Mental Health & Mental Retardation, 496 S.W.2d 252 (Tex. Civ. App.—San Antonio 1973, writ ref’d)).
293. Brown & Root, 721 S.W.2d at 884.
294. Id. at 885. The court held that the petition stated a claim for mental anguish because of an exception to the general rule requiring that physical manifestation is a prerequisite to the recovery of mental anguish damages. Id. St. Elizabeth’s Hospital v. Garrard abolished the physical manifestation rule in cases seeking recovery for negligent infliction of mental anguish. See supra notes 117-21 and accompanying text.
295. 722 S.W.2d 738 (Tex. App.—Houston [14th Dist.] 1986, no writ).
296. Id. at 740.
298. 722 S.W.2d at 741.
299. 802 F.2d 141 (5th Cir. 1986).
and Texas Department of Corrections v. Herring to hold nonadmission to a hospital not a use of tangible property subject to the Tort Claims Act. The Fifth Circuit went further than City of Denton or Herring and added a requirement that the tangible property be defective before an action will lie. Citing Velasquez v. Jamar, the court apparently grafted an additional requirement on a Tort Claims Act claim. The court also determined that the day the cause of action arises determines whether sovereign immunity attaches to a governmental unit. In this case the hospital refused to admit Mrs. Diaz on May 16, 1983. Between that date and the date she died in 1985, the Hale County Hospital Authority sold the hospital to a private corporation.

Two cases involving school districts also merit consideration. Hopkins v. Spring Independent School District confirmed the Bryant court’s analysis that the Tort Claims Act subjects school districts to very narrow windows of liability. Although Hopkins qualifies primarily as a Texas Education Code immunity case, the court held that the Tort Claims act provided no cause of action for injuries not proximately caused by the use or operation of the school bus. Celeste Adeline Hopkins suffered a head injury at school, allegedly caused by a teacher’s negligence in leaving a classroom unsupervised and allegedly aggravated by the school nurses’ failure to take action when the child appeared to be ill. The teachers and nurses allowed Celeste to stay in the classroom until the end of the day, when she took the school bus to a day care center. While on the bus, Celeste suffered severe convulsions, and although the driver radioed a request for help, the school district instructed him to continue onto the day care center where the girl was eventually treated. Since the operation of the school bus did not proximately cause Celeste’s injuries, the court affirmed the summary judgment in favor of the school district.

In addition to its Tort Claims Act holdings, Hopkins also applied an immunity found in the Texas Education Code. This broad grant of immunity prevented imposition of liability on the part of the school nurse, a school teacher, and a principal who failed to aid an elementary school child

300. 701 S.W.2d 831, 834-35 (Tex. 1986).
301. 513 S.W.2d 6, 9 (Tex. 1974).
302. 802 F.2d at 144. Language in Herring indicated that “a failure to give medical care cannot involve the use of tangible property.” 513 S.W.2d at 9 (citing Beggs v. Texas Dept. of Mental Health & Mental Retardation, 496 S.W.2d 252 (Tex. Civ. App.—San Antonio 1973, writ ref’d).
303. 802 F.2d at 144.
304. 584 S.W.2d 729 (Tex. Civ. App.—Tyler 1979, no writ).
305. 802 F.2d at 144.
306. Id. at 143.
307. The court did not reach the issue of whether governmental immunity could have extended past the date of the sale. Id. at 144 n.2.
308. 736 S.W.2d 617 (Tex. 1987).
309. See supra note 295-98.
311. 736 S.W.2d at 619.
312. Id.
313. See supra note 310.
who suffered a head injury in her classroom. Deferring to *Barr v. Bernhard,* the court held that only injuries resulting from the excessive use of force during discipline are actionable. Merely submitting a child to the authority of a nurse, teacher, or principal is not discipline that would qualify as an exception to the immunity. A three-judge minority would have followed other jurisdictions in holding that tort immunity of school districts does not preclude tort liability from the negligence of professional school employees.

*Stout v. Grand Prairie Independent School District* affirmed the statutorily granted immunity within the Texas Education Code in the context of a constitutional challenge based upon the open courts and due process guarantees. In balancing the legislative basis for the immunity versus the plaintiff's right to recovery, the court held that the state's interest in quality public education outweighed the infringement on the right to redress occasioned for the immunity. The court also rejected an opportunity to abrogate the doctrine of sovereign immunity, employing the same balancing test.

The second case, *Heyer v. North East Independent School District,* found a school district not liable for injuries allegedly sustained as a result of the school district's failure to control traffic on its premises properly. Since the school district did not own or operate the automobile that struck the plaintiff, there was no operation or use of a motor vehicle within the scope of the tort claims exception.

### B. Governmental Immunity

*Wyse v. Department of Public Safety* erected a shield of official immunity around public officials conducting investigations as part of their official duties. Two Hillsboro police officers, Thomas Wyse and H.E. Wardlow, sued the local district attorney, the sheriff of Hill County, and two Texas Rangers for the tortious interference with business relationships and invasion of privacy. The suit arose out of an investigation that revealed that

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314. 736 S.W.2d at 618.
315. 562 S.W.2d 844 (Tex. 1978).
316. 736 S.W.2d at 618.
317. *Id.* at 619.
318. 736 S.W.2d at 620 (Kilgarlin, J., dissenting). The dissent cited to twenty-four opinions from other jurisdictions holding professional school employees liable for negligence. *Id.* at 620 n.1.
319. 733 S.W.2d 290 (Tex. App.—Dallas 1987, writ ref'd n.r.e.).
322. 733 S.W.2d at 294.
323. *Id.* at 298.
324. 730 S.W.2d 130 (Tex. App.—San Antonio 1987, writ ref’d n.r.e.).
325. *Id.* at 132.
326. 733 S.W.2d 224 (Tex. App.—Waco 1986, writ ref’d n.r.e.).
327. The Texas Department of Public Safety was also a defendant, but the court held that there was no waiver of sovereign immunity for any cause of action under the Tort Claims Act. *Id.* at 228. The employees' immunity also shielded their employer. *Id.*
the two police officers participated in several criminal activities. The Waco court of appeals concentrated on the quasijudicial immunity enjoyed by public officials acting in good faith within the scope of their authority. The chief of police, the district attorney, and the Texas Rangers were all acting in good faith and within the scope of their authority when investigating the alleged criminal conspiracies. In *City of Dallas v. Moreau* the court upheld a claim of sovereign immunity for city officials who fired an employee for violating rules of conduct governing city personnel. The court held that the doctrine of governmental immunity shielded city activities performed as part of the police power of the municipality. Both the operation of the city marshall's office and the hiring and firing of city employees are governmental functions relating to a city's police power, and are not actionable in Texas.

*Dent v. City of Dallas* held that a police officer has no duty to arrest a person even though probable cause would justify a detention. In *Dent* the police declined to arrest a suspect accused of forgery and instead attempted to follow him while waiting for assistance. A high speed chase resulted when the suspect attempted to avoid arrest and Kathy Dent's husband died when the suspect ran a stop sign and smashed into his automobile. The court declined to fashion a rule that would have required the arrest of the forger, and refused to involve the courts in the internal operations of police activities. Further, to impose liability in this situation would require police officers to ensure the results of high speed chases, a position contrary to the great weight of authority.

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329. 733 S.W.2d at 227.
330. 718 S.W.2d 776 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.).
331. *Id.* at 779.
332. *Id.* at 780.
333. 729 S.W.2d 114 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).
334. *Id.* at 116.
335. *Id.* at 117.
336. *Id.*