REPEAL OF THE INTERSPOUSAL IMMUNITY:

TORTS COME TO FAMILY LAW

Karl O. Bayer, Austin
Pluymen & Bayer

James E. Farris, Austin
Farris & Green

April, 1988 E

TABLE OF CONTENTS

I. INTRODUCTION

"The maddest advocate for women's rights and for the abolition on earth of all divine institutions, could wish for no more decisive blow from the courts than this. The flames which litigation would kindle on the domestic hearth would consume in an instant the conjugal bond, and bring on a new era indeed -- an era of universal discord, of unchastity, of bastardy, of dissoluteness, of violence, cruelty, and murders." **Ritter v. Ritter**, 31 Pa. 396 (1858) [quoted in **Price v. Price**, 732 S.W.2d 316, 317 (Tex. 1987)]

In quoting the above language, the Texas Supreme Court referred to this "fire and brimstone opinion" in setting forth the early state of law in American jurisdictions respecting interspousal immunity.

To the extent that this quotation may accurately reflect "the way we were," it certainly no longer reflects the current status of Texas law.

With the abolition of interspousal immunities, divorce lawyers must now seriously consider, if not actually prosecute and defend, court actions involving negligent as well as intentional torts arising in the marital or family context.

Of course, this is yet another vehicle for creative counsel to employ in invading separate property and future acquisitions in obtaining more justice and equity for one's client than may be available through a mere disparate division of the community estate.

This paper presumes that the more experienced family law practitioners attending this course will have of necessity grown less experienced in other areas of law, particularly respecting personal injury and other tort matters.

It is then the purpose of this paper to reacquaint the reader with basic tort principles, to provide an update on recent developments in tort law, to serve as a refresher for the trial of family law matters, and to stimulate questions and thoughts now for the first time, arising in Texas law with the abrogation of the interspousal immunities.

It is specifically not the purpose of this paper to deal with proprietary torts between spouses which have never been subject to interspousal immunities; e.g. fraud, diversion of community opportunities, and breach of fiduciary relations.

II. BACKGROUND OF THE ABROGATION OF INTERSPOUSAL IMMUNITY

When in the spring of 1987 the Texas Supreme Court granted writ of error in **Price v. Price**, **supra**, many practitioners saw the abolition of interspousal immunity as a highly probable change in Texas law, particularly in light of Justice Mauzy's dissent in **Stafford v. Stafford**, 726 S.W.2d 14 (Tex. 1987).

Price dealt with a situation where the Court clearly could have granted writ of error on only those points of error limited to the interspousal immunity concept in negligent torts occurring prior to the marriage or merely involving vehicular-collision types of torts.

A. Price v. Price

In **Price**, the Texas Supreme Court specifically dealt with the following traditional bases for the existence of interspousal immunity concept: Concern for disrupting marital harmony and the potential for collusive law suits.

Of course, in **Bounds v. Caudle**, 560 S.W.2d 925 (Tex. 1977), the Texas Supreme Court had dismissed both of these arguments in the circumstances of intentional torts. Therein the Court tried to envision what marital harmony could still be left to be disrupted after the occurrence of such intentional torts. In **Price** and regarding all other sorts of torts, the Texas Supreme Court observed, "It is difficult to fathom how denying a form for the redress of any wrong could be said to encourage domestic tranquility. It is equally difficult to see how suits based in tort would destroy domestic tranquility, while property and contract actions do not." **Id.** at 318.

As to the potential for fraud and collusion, the Supreme Court again dismissed this asserting, "Our system of justice is capable of ascertaining the existence of fraud and collusion." **Id.** at 318.

The Texas Supreme Court in **Price** quoted the following from the Supreme Court of West Virginia in its opinion abolishing interspousal immunity in **Coffindaffer v. Coffindaffer**, 161 W. Va. 557, 244 S.E.2d 338, 343 (1978):

"Anyone who has confronted insurance defense counsel in personal injury cases knows that it is a rare occasion when the false or collusive claim escapes their searching examination. We do an injustice not only to the intelligence of jurors, but to the efficacy of the adversary system, when we express undue concern over the quantum of collusive or meritless law suits.

There is, to be sure, a difference between the ability to file a suit and to achieve a successful result. It is upon the anvil of litigation that the merit of a case is finally determined. Forged in the heat of trial, few but the meritorious survive."

B. **Stafford v. Stafford**

Although Mr. Stafford had failed to preserve the issue of interspousal immunity for review, the Texas Supreme Court in **Price** specifically stated that **Stafford** types of torts would be included in the "any causes of action" as to which interspousal immunity was being abolished:

"We do not limit our holding to suits involving vehicular accidents only, as has been done by some jurisdictions and as has been urged upon us in this case. To do so would be to negate meritorious claims such as was presented in **Stafford v. Stafford** [cite included]. In that case a husband had transmitted a venereal disease to his wife, resulting in an infection that ultimately caused Mrs. Stafford the loss of her ovaries and fallopian tubes, ending for all time her ability to bear children. While we ruled for her, the issue of interspousal immunity had not been preserved for our review. To leave in place a bar to suits like that of Mrs. Stafford or other suites involving non-vehicular torts would amount to a refutation of the constitutional guarantee of equal protection of the laws. Tex. Const. Ann. art. 1, section 3. This we will not do." [at 319-320]

In **Stafford v. Stafford**, **supra**, the husband sued the wife for divorce with the wife counterclaiming to recover personal injury damages for the husband's transmission of a venereal disease to her.

The case was not severed, the divorce proceeding was tried by the District Court, with the personal injury case tried before the jury.

The Stafford jury found that (1) husband had transmitted a venereal disease to wife; (2) husband was negligent; (3) husband was grossly negligent; (4) wife sustained damages for past pain and suffering and mental anguish in the amount of $100,000.00, future pain and suffering and mental anguish in the amount of $150,000.00, past lost earnings in the amount of $4,320.00 and the stipulated past medical expenses of $3,318.00; and (5) punitive damages should be set in the amount of $100,000.00.

The Court divided the Stafford's community property equally [the subject of wife's subsequent complaint on appeal], awarded attorneys fees to the extent incurred solely for the divorce action, and rendered judgment for $357,638.00.

In an unpublished opinion, the Court of Appeals affirmed the division of the marital estate and reversed the personal injury judgment finding no evidence to support the judgment.

Reviewing the record respecting the no evidence point, the Texas Supreme Court stated the following:

"We have carefully reviewed the record in this case and find that it contains more than a scintilla of evidence that during this marriage that Robert had adulterous relationships; that he contracted a venereal disease; that he transmitted to Margarita such venereal disease; that the venereal disease was a proximate cause of injury to Margarita; that such injury caused her to suffer mental anguish; and, that such injury caused her to lose several thousand dollars in lost wages. Thus there is some evidence to support the jury's findings, and the Court of Appeals erred in its holding of no evidence." Id. at 726.

After noting that husband's failure to plead or raise interspousal immunity as a defense in the trial court constituted a waiver of such defense [actually, such was first asserted in an Amended Motion for New Trial tardily filed], the Texas Supreme Court remanded the case to the Dallas Court of Appeals for consideration of the insufficiency of the evidence point which the Court of Appeals did not address.

Although the subsequent opinion of the Dallas Court of Appeals was ordered not to be published, the Court on remand did find sufficient evidence to support the judgment despite its earlier finding of no evidence. [By telephone conversation, Mrs. Stafford's counsel attributes this to the Court's correct interpretation of the "mandate" of the Texas Supreme Court.]

Subsequently, on October 28, 1987, the Texas Supreme Court refused writ of error, finding no reversible error. 31 Tex. Sup. Ct. J. 28.

C. Effective Date of Abolition of Interspousal Immunity

In **Bounds v. Caudle**, **supra**, the Court extended the abolition of interspousal immunity for intentional torts only to those torts occurring on or after March 1, 1971, the date Mrs. Bounds was shot.

In **Price v. Price**, **supra**, the Texas Supreme Court appeared to make no exceptions to its abolition of the doctrine of interspousal immunity " . . . completely as to any cause of action." **Id.** at 319.

In its opinion, the Texas Supreme Court seemed to only

casually mention the July 1983 motorcycle-truck collision and the fact that "Six months after the accident, Dwayne and Kimberly were married."

One must read the San Antonio Court of Appeals' decision in **Price v. Price** at 718 S.W.2d 65 (1986) to learn the date of the collision was July 17, 1983 and the date of the marriage was December 24, 1983.

The casualness of the Texas Supreme Court's opinion in this regard seems to buttress the argument that no exceptions are made as to torts occurring prior to either the July 17, 1983 collision or the subsequent December 24, 1983 marriage.

Accordingly, it would seem that even intentional torts are now actionable even if the tort occurred prior to Mrs. Bounds' being shot on March 1, 1971.

III. PARENTAL IMMUNITY

Although not the immediate subject of this paper, the subject of parental immunity should at least be addressed as to the current apparent status of Texas law.

A. General Rule

The general rule in Texas is expressed in **Felderhoff v. Felderhoff**, 473 S.W.2d 928 (Tex. 1971). Therein the Texas Supreme Court continued to apply the rule of parental immunity to "alleged acts of ordinary negligence which involve a reasonable exercise of parental authority or exercise of ordinary parental discretion with respect to provisions for care and necessities of the child." **Id.** at 933.

In **Felderhoff**, the Court gave credence to the underlying principles of preserving domestic tranquility and the desirability of necessary parental discipline. The Court in **Felderhoff** specifically rejected as a sound basis for parental immunity the possibility of collusion between the parent and the child for the purposes for recovering from a third party insurance carrier.

B. Inapplicable to Tortious Conduct Outside the Sphere of Parental Duties and Responsibilities

In **Felderhoff v. Felderhoff**, **supra**, the Supreme Court expressly held the grant of parental immunity inapplicable for torts arising out of business activities of the parent.

C. Inapplicable to Intentional or Malicious Torts

The Court in **Felderhoff** seemed to be repeating the general rule expressed in **Aboussie v. Aboussie**, 270 S.W.2d 636 (Tex. Civ. App. -- Fort Worth 1954, writ ref'd) to the effect that the parental immunity doctrine does not prevent suit against a parent for willful or malicious torts, although the rule is applicable to ordinary negligence situations.

In 1975, the Texas Supreme Court reaffirmed this policy in **Farley v. M & M Cattle Company**, 529 S.W.2d 751 (Tex. 1975) where the Court held parental immunity inapplicable when the tortious conduct is part of the parent's business activity and wholly outside the sphere of the father's parental duties and responsibilities.

In **Sneed v. Sneed**, 705 S.W.2d 396 (Tex. Civ. App. -- San Antonio 1986, writ ref'd n.r.e.), the parental immunity doctrine was held to be inapplicable to a surviving daughter's suit against her deceased father for bodily injuries arising out of an airplane crash of an airplane piloted by the father.

In **Sneed**, the Court noted previous authorities citing the public policy reason for the parental immunity doctrine being the need to support family harmony and parental discipline. The Court found neither of these rationales applicable to the **Sneed** situation.

D. Restatement (Second) of Torts, Sec. 895G (1977)

1. "A parent or child is not immune from tort liability to the other solely by reason of that relationship."

2. "Repudiation of general tort immunity does not establish liability for an act or omission that, because of the parent-child relationship, is otherwise privileged or is not tortious."

E. Child Immunity

In holding that a father cannot sue a minor child for a negligent automobile injury, the Court in **Wallace v. Wallace**, 466 S.W.2d 416 (Tex. Civ. App. -- Eastland 1971, writ dism'd agr.), the Court indicated that the same immunities applicable to a parent would apply to a child.

With the parental discipline rationale being absent, and the collusion principle seeming to be widely discredited if not wholly abrogated, the authors query whether the family harmony concern is still sufficient to sustain this immunity.

IV. SPECIFIC EXAMPLES OF MARITAL TORTS

A. Assault and Battery

A person who:

1. intentionally, knowingly or recklessly causes bodily injury to another;

2. intentionally or knowingly threatens another with imminent bodily injury; or

3. intentionally or knowingly causes physical contact with another when they know or should reasonably believe that the other will regard the contact as offensive or provocative;

commits an assault. Tex. Penal Code Sec. 22.01(a). Intent may be inferred if the evidence shows that the defendant acted with conscious indifference to his or her actions, or to the rights of others. **Bundick v. Weller**, 705 S.W.2d 777 (Tex. Civ. App.--San Antonio 1986, no writ).

Words alone, no matter how insulting or offensive, are not enough and the victim must be touched (battery) or be apprehensive of physical contact, either a touching of the body or something connected with and closely identified with the victim's body. **Fisher v. Carrousel Motor Hotel, Inc.**, 424 S.W.2d 627 (Tex. 1967).

People who command, direct, advise, procure, instigate, promote, control, assist or abet the assailant are jointly and severally liable. **Francis v. Kane**, 246 S.W.2d 279 (Tex. Civ. App.--Amarillo 1951, no writ).

Foreseeability is not required to award damages for the direct and immediate consequences of the assault, but proximate cause is required for other injuries. **Thompson v. Hodges**, 237 S.W.2d 757 (Tex. Civ. App.--San Antonio 1951, ref'd n.r.e.).

Exemplary damages are not capped by tort reform, but they do require an element of maliciousness or wantonness. Tex. Civ. Prac. & Rem. Code Sec. 41.002.

Provocation is not a defense but it can be considered to mitigate both compensatory and punitive damage. **Taylor v. Gentry**, 494 S.W.2d 243 (Tex. Civ. App.--Fort Worth 1973, no writ).

Defenses include consent, self-defense (if honest and reasonable belief of immediate danger), defense of another and defense of property (if lawful possessor and force is no more than is reasonably necessary to protect the property).

If self-defense is in issue, evidence of the alleged victim's character for violence is admissible and evidence of the alleged victim's peaceable nature may be admitted to rebut the issue of self-defense. T.R.E. 404(a)(2) and 405(a),(b).

For a most interesting factual situation and courtroom outcome which would seem to involve comparative/contributive negligence as a defense to intentional torts of assault and battery, see the divorce case described in Elliott, Laura and Fedders, Charlotte. Shattered Dreams (Harper and Row, 1987).

This case, of course, involves the divorce of Charlotte and John Fedders.

The Maryland Circuit Court Judge agreed with Mrs. Fedders' contentions of cruelty and "excessively vicious conduct" by Mr. Fedders against Mrs. Fedders.

However, the Domestic Relations Master ruling on the division of marital assets in divorce cases found both parties equally at fault for the marital breakup and observed that Mrs. Fedders would have to share the blame for Mr. Fedders' violence because she denied him emotional support during his periods of depression.

It should be noted that Mrs. Fedders charged that the periodic beatings caused injuries including a broken ear drum, a wrenched back and neck, cuts, bruises, and blackened eyes.

"`This sends terrible messages out into the community,' said a spokeswoman for the Women's Legal Defense Fund, Ann Pauley. `It says to men there are some circumstances in which you are justified in physically abusing your wife or girlfriend. It says to women that you are responsible for the domestic violence.'" "A Battered Wife's Fight, In and Out of Court," The New York Times, November 9, 1987, page 23.

It should also be noted that in **Bounds v. Caudle**, **supra**, the case was remanded to the trial court by the Supreme Court due to the trial court's failure to submit a self-defense jury issue upon request.

If some evidence exists that the defendant was placed in fear of imminent danger or great bodily harm at the hands of the plaintiff, then the defendant is clearly entitled to the "self-defense" issue.

B. Negligent Transmission of Venereal Diseases

In many states actions for the transmission of sexual diseases have previously been nonexistent for two primary reasons: interspousal immunities when the parties were married, and penal statutes criminalizing fornication when the parties were not married.

However, the authors were extremely surprised on researching this matter to discover the "wealth" of cases in other jurisdictions addressing causes of action for the transmission of sexual diseases.

For authorities in this area and for an excellent examination of the subject, see Alexander, Louis A. "Liability in Tort for the Sexual Transmission of Disease: Genital Herpes and the Law," 70 Cornel Law Review 101 (1984). Another highly recommended article in this area is "Liability for the Sexual Transmission of Disease," 10 Maryland Law Forum 71 (Spring 1987).

Cases dealing with this issue primarily have involved suits for recovery founded upon one of three theories: battery, misrepresentation, and negligence.

1. Negligence vs. battery

Battery involves the obvious problem of finding the degree of scienter necessary to satisfy the "intent" requirement. However, where one spouse failed to disclose the known infection, at least one court has allowed an action for battery, inferring the intent to communicate the disease from the "actual results" because of such failure to disclose. **State v. Lankford**, 102 A. 63 (Delaware 1917).

Likewise, battery actions of this nature also have the particular obstacle of consent as a defense. The general rule is that an individual who "effectively consents to conduct of another intended to invade his interest cannot recover in an action of tort for the conduct or for harm resulting from it." Restatement (Second) of Torts, Section 892A (1979).

However, numerous courts such as that in **Lankford** have been able to "distinguish between consent to sexual activity and consent to infection with a venereal disease." See **Crowell v. Crowell**, 180 N.C. 516, 105 S.E. 206 (1920), rehearing denied, 181 N.C. 66, 106 S.E. 149 (1921).

2. Negligence vs. misrepresentation

Misrepresentation is a theory which many courts have appeared reluctant to expand to the privacy of sexual activity. See Note, "Fraud Between Sexual Partners Regarding the Use of Contraceptives," 71 Ky. L. Jrnl. 593 (1982-3).

The elements of misrepresentation include:

a. A false representation by the defendant;

b. The defendant's knowledge or belief of the falsity of the representation or the absence of any reasonable basis for the defendant to believe in its truth;

c. The defendant's intention to induce the plaintiff to act in reliance upon the misrepresentation;

d. The plaintiff's justifiable reliance upon the representation; and

e. Damage to the plaintiff resulting from such reliance.

Restatement (Second) of Torts, Section 525 (1977).

While certainly a viable cause of action in the circumstance of a false representation or an intentional and knowing concealment, an action founded on misrepresentation would seem a more appropriate action as against third parties while relying on simple negligence against the transmitting partner. See **Leventhal v. Liberman**, 262 N.Y. 209, 186 N.E. 675 (1933) [father and a sister of former husband held liable for damages for false representations that had induced plaintiff to marry and to the effect that the future husband was in good health, although defendants knew he was tubercular and addicted to drugs].

3. Higher interspousal degree of care

Certain parties in Texas have always been held to higher degrees of care than ordinary care. This is certainly true of common carriers and those in fiduciary relationships.

A similar higher degree of care may be applicable as between husband and wife due to the existence of their fiduciary relationship as discussed in **Miller v. Miller**, 700 S.W.2d 941 (Tex. Civ. App. -- Dallas, 1985, writ ref'd n.r.e).

It would certainly appear that given the inherent significance of procreation and the intimacy of sexual relations in the marital relationship, a similar higher degree of care would be required during the marriage.

Appropriate definitions for this high degree of care would be as follows:

"Negligence," when used with respect to the conduct of (Plaintiff or Defendant), means failure to use a high degree of care; that is, failing to do that which a very cautious, competent, and prudent person would have done under the same or similar circumstances, or doing that which a very cautious, competent, and prudent person would not have done under the same or similar circumstances.

"High degree of care" means that degree of care that would have been used by a very cautious, competent, and prudent person under the same or similar circumstances.

4. Plaintiff's duty of inquiry

In the comparative negligence context, counsel for the tort plaintiff must consider the actions which a reasonable and prudent spouse would have taken to inquire as to the nature of the spouse's extramarital activities.

If the plaintiff's spouse has demonstrated a history of staying out all night and returning home smelling of cheap perfume and cheaper liquor, a duty of inquiry or even of refusing sexual relations may arise in the mind of a "reasonable" spouse.

Of course, other defensive theories formerly submitted as special issues are now subsumed under the comparative negligence question and include: "assumption of the risk," **Farley v. M & M Cattle Co.**, 529 S.W.2d 751 (Tex. 1975); "imminent peril," **Davila v. Sanders**, 557 S.W.2d 770 (Tex. 1977); "last clear chance" or "discovered peril", **French v. Grigsby**, 571 S.W.2d 867 (Tex. 1978); and "no duty" and "open and obvious" in premises cases. **Parker v. Highland Park, Inc.**, 565 S.W.2d 512 (Tex. 1978) and **Massman-Johnson v. Gundolf**, 484 S.W. 2d 555 (Tex. 1972).

5. Multiple Parties and "Tort Reform"

a. Potential defendants and third-party defendants

Besides the defendant spouse, some of the potential defendants and third-party defendants who should be considered include the spouse's sexual partner, whoever infected the sexual

partner, the manufacturer and distributors of the ineffective protection device, doctor who did not properly warn the transmitters or notify the infected, the laboratory which did blood work that failed to detect the disease, the product manufacturer that made the test equipment that failed to detect, and the health department that did not prosecute or notify the infected party.

b. Potential responsibility of defendants and third-party defendants

Of course, the prudent practitioner must direct his or her attention to the potential liability of the third-party defendants and not limit attention merely to the potential liability of the defendant spouse.

If counsel for plaintiff fails to join potential third-party defendants, counsel for the initial defendant may do so.

When looking to certain third-party defendants, plaintiff may be well assisted in not actually having to prove ordinary negligence with its problems concerning foreseeability if plaintiff can prove a statutory violation under circumstances which give rise to negligence per se.

(1) Ordinary negligence

Ordinary "negligence" means failure to use ordinary care, that is, failing to do that which a person of ordinary prudence would have done under the same or similar circumstances or doing that which a person of ordinary prudence would not have done under the same or similar circumstances.

(2) Negligence per se

(a) Elements

The unexcused violation of a legislative enactment or administrative regulation adopted by the court as defining the standard of conduct of a reasonable person is negligence in itself. **Southern Pacific Co. v. Castro**, 493 S.W.2d 491 (Tex. 1973) (citing Restatement (Second) of Torts, Section 288B (1965)).

The unexcused violation of a statute or ordinance constitutes negligence as a matter of law if such statute or ordinance was designed to prevent injuries to a class of persons to which the injured party belongs. **El Chico Corp. v. Poole**, 732 S.W. 2d 306 (Tex. 1987).

Under the Restatement, the guidelines for the court to adopt a statute or regulation as a standard are:

1. Protection of class to which plaintiff belongs;

2. Protection of interest which has been invaded;

3. Protection of the same interest against the kind of harm that took place;

4. Protection of the interest against the particular hazard from which the harm resulted.

See also **Rudes v. Gottschalk**, 324 S.W.2d 201 (Tex. 1959) and **Impson v. Structural Metals, Inc.**, 487 S.W.2d 694 (Tex. 1972).

Negligence per se is now submitted simply by placing an instruction before the broad-form question. Three alternative forms of an instruction that would be acceptable are as follows:

1. The law (forbids some type of behavior). A failure to comply with this law is negligence in itself.

2. The violation of a (health, traffic, etc.) law is negligence in itself, and you are instructed that the law (forbids some type of behavior).

3. It is also negligence to (do whatever type of behavior that is proscribed).

(b) Excuse

Under **Missouri Pac. R.R. Co. v. American Statesman**, 552 S.W. 2d 99 (Tex. 1977) and the Restatement (Second) of Torts, Section 288A, the general categories of excuse are as follows:

1. incapacity;

2. reasonably unaware of noncompliance;

3. inability to comply after reasonable diligence;

4. emergency;

5. compliance would involve greater risk of harm to the actor or others.

(c) Texas Venereal Disease Act [Tex. Rev. Civ. Stat. Ann. art. 4445d (Vernon Supp. 1987)]

Sec. 1.02. In this Act:

(5) "Venereal disease" means an infection, with or without symptoms or clinical manifestations, that is or may be transmitted from one person to another during or as a result of sexual relations of whatever kind between two persons and that produces or might produce a disease in or otherwise impair the health of either person or might cause an infection or disease in a fetus in utero or a newborn.

Sec. 1.03. Syphilis, gonorrhea, chancroid, granuloma inguinale, condyloma acuminata, genital herpes simplex infection, and genital and neonatal chlamydial infections, including lymphogranuloma venereum, are venereal diseases within the scope of this Act. The board is authorized to make rules that add, delete, or otherwise modify the list of venereal diseases subject to this Act.

Sec. 1.04. A health authority is a physician designated to administer state and local laws relating to public health.

Sec. 2.01

(a) Syphilis and gonorrhea are declared to be venereal diseases that are reportable to the department.

(b) The board may adopt rules which require other venereal diseases to be reported to the department as necessary for the public health. Before the board requires other venereal diseases to be reported, the board must find that the disease:

(1) causes significant morbidity or mortality; and

(2) can be cost-effectively screened, diagnosed, and treated in a public health control program.

(c) Reporting of venereal diseases other than those designated as reportable is not required. The board is authorized to establish and to use funds appropriated to the department for the maintenance of registries of those venereal diseases that are not required to be reported, provided that any information provided to such a registry shall be on a voluntary basis.

Sec. 2.02

(a) A physician who diagnoses or treats a reportable venereal disease and every administrator of a hospital, dispensary, or charitable or penal institution in which there is a case of reportable venereal disease shall report the case within a reasonable period of time to one of the following:

(1) The director of the local health department if the case is diagnosed or treated in a city or county which has a local health department; or

(2) the director of the department's public health region in which the case is diagnosed or treated where there is no local health department.

Sec. 2.03. It shall be the duty of every physician and of every other person who examines or treats a person having a venereal disease to instruct him or her in measures for preventing the spread of such disease and of the necessity for treatment until cured or free from the infection.

Sec. 2.04. If the department or a health authority knows that a person is infected with a venereal disease or is reasonably suspected of being infected based upon laboratory evidence or exposure to a reported case of venereal disease, the department or health authority may implement control measures which are necessary to prevent the introduction, transmission, and spread of the disease within the state.

(a) The department or health authority is authorized to instruct a person who is known to be infected with a venereal disease or who is reasonably suspected of same to place himself or herself under the medical care of a licensed physician for examination or treatment. The physician shall furnish notification to the department or health authority that such person examined or treated is free from such venereal disease infection.

(b) If a person refuses or fails within a reasonable time to comply with the instructions of the department or health authority as required in Subsection (a) of this section, the department or health authority may order the person to place himself or herself under the medical care of a licensed physician for examination or treatment within a reasonable time. The orders shall be in writing and delivered personally or by registered or certified mail. If the person is a minor whose consent to treatment has not been obtained under Section 35.03, Family Code, the orders shall be sent to the minor's parent, legal guardian, or managing conservator. The person shall furnish notification to the department or health authority of the name and address of the physician visited.

(c) If a person fails or refuses to comply with the written orders of the department or health authority as required in Subsection (b) of this section and the department or health authority knows that the person is infected with a reportable

venereal disease or is reasonably suspected of being infected based upon laboratory evidence or exposure to a reported case of a reportable venereal disease, the department or health authority may request a magistrate to issue a warrant. Based upon the sworn affidavit of the department or a health authority that the person is infected with a reportable venereal disease or is reasonably suspected of being infected based upon laboratory evidence or exposure to a reported case of a reportable venereal disease, the magistrate shall issue a warrant ordering any peace officer to take the person into custody and immediately transport him or her to the nearest venereal disease clinic or other facility suitable for examination. If found to be infected with a reportable venereal disease, the infected person may be detained for treatment.

(d) Nothing in this section shall be construed to deny a person, as an exercise of religious freedom, to rely solely on spiritual means through prayer to prevent or cure disease, provided that the person complies with all control measures, other than treatment, imposed by the health authority or the department that are reasonable and necessary to prevent the introduction, transmission, and spread of the disease.

Sec. 4.05.

(a) Any person who is in charge of a clinical or hospital laboratory, blood bank, mobile unit, or other facility in which a laboratory examination of any specimen derived from a human body yields microscopical, cultural, serological, or other evidence suggestive of a reportable venereal disease shall notify the department of its findings . . .

Sec. 6.01.

(a) A person commits an offense if the person knowingly exposes another person to infection with a reportable venereal disease.

(b) An offense under this section is a Class B misdemeanor.

Sec. 6.02.

(a) A person commits an offense if the person:

(1) is a physician or other person in attendance upon a pregnant woman either during pregnancy or at delivery; and

(2) fails to perform any duty required in Article III of this Act.

(b) An offense under this section is a Class B misdemeanor.

Sec. 6.03.

(a) A person commits an offense if the person:

(1) has received a written order from the department or a health authority under Section 2.04 of this Act to be examined for a venereal disease; and

(2) fails or refuses to comply with the order.

(b) An offense under this section is a Class B misdemeanor.

(d) Texas Communicable Disease and Reporting Act [Tex. Rev. Civ. Stat. Ann. art. 4419b-1 (Vernon Supp. 1987)]

Sec. 1.04. In this Act:

(8) "Reportable disease" means a disease or condition for which the board requires a report.

Sec. 3.03.

(a) Every physician, dentist, and veterinarian licensed to practice in this state shall report to the local health authority, after his first professional encounter, each patient or animal he examines having or suspected of having a reportable disease.

(b) The local school authorities shall report to the local health authority those children attending school who are suspected of having a reportable disease. The board shall adopt rules establishing procedures for determining which children should be suspected and reported and procedures for their exclusion from school pending appropriate medical diagnosis or recovery.

(c) If a case of a reportable disease has not been reported as required by Subsections (a) and (b) of this section, it is the duty of the following persons to notify the local health authority or the department and to provide all information known to them concerning any person who has or is suspected of having a reportable disease:

(1) each professional, registered nurse;

(2) each medical laboratory director;

(3) each administrator or director of a public or private temporary or permanent child-care facility or day-care center;

(4) each administrator or director of a nursing home, personal care home, maternity home, adult respite care center, or adult day-care center;

(5) each administrator of a home health agency;

(6) each superintendent or superintendent's designee of a public or private school;

(7) each administrator or health official of a public or private institution of higher learning;

(8) each owner or manager of a restaurant, dairy, or other food handling or food processing establishment or outlet;

(9) each superintendent, manager, or health official of a public or private camp, home, or institution;

(10) each parent, guardian, or householder;

(11) each health professional; and

(12) each chief executive officer of a hospital.

Sec. 6.01.

(a) A person commits an offense if the person knowingly conceals or attempts to conceal from the board, a health authority, or a peace officer, during the course of an investigation authorized by this Act, the fact that:

(1) he has, has been exposed to, or is the carrier of a communicable disease that constitutes a threat to the public health; or

(2) a minor child or incompetent adult of whom he is a parent, managing conservator, or guardian, has been exposed to, or is the carrier of a communicable disease that constitutes a threat to the public health.

(b) An offense under this section is a felony of the third degree.

Section 6.04.

(a) A person commits an offense if the person knowingly refuses to perform or to allow the performance of certain control measures ordered by a health authority or the department under Sections 4.02 through 4.06 of this Act.

(b) An offense under this section is a felony of the third degree.

Section 6.05.

(a) A person commits an offense if:

(1) the person attends or attempts to attend a public or private place or gathering where he will be brought into contact with others if the person knows he has a communicable disease that constitutes a threat to the public health; or

(2) the person is a parent, managing conservator, or guardian of a child or an incompetent adult and allows the child or incompetent adult to attend or attempt to attend a public or private place or gathering where the child or incompetent adult will be brought into contact with others if the person knows the child or incompetent adult has a communicable disease that constitutes a threat to the public health.

(b) An offense under this section is a Class C misdemeanor.

(c) This section does not apply if the individual is en route to or from a physician's office or medical facility and makes no intermediate stops that are not necessary to the individual's transportation.

(e) Is there insurance coverage?

Prior to July 1, 1987, the Standard Texas Homeowners Insurance Policy, Section II, Liabilities, read in part as follows:

Subject to the provisions and conditions of the policy, and of this form and endorsements attached, the Company agrees with the Insured named on Page 1 as follows:

COVERAGE D -- PERSONAL LIABILITY

To pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of

bodily injury or property damage, and the Company shall defend any suit against the Insured alleging such bodily injury or property damage and seeking damages which are payable under the terms of this policy, even if any of the allegations of the suit are groundless, false or fraudulent . . .

However, for policies effective July 1, 1987, Form HO-8 added the following exclusion:

EXCLUSIONS -- Coverage D shall not apply:

11. to bodily injury or property damage which arises out of the transmission of sickness or disease by an insured through sexual contact.

The entirety of Coverage D regarding personal liability is reproduced in the Appendix to demonstrate the otherwise considerable extent of such coverage.

Of course, when homeowners insurance personal liability coverage does exist, not only the defendant spouse but also the co-owning plaintiff spouse will want to immediately put the homeowners insurance carrier on notice of the litigation.

d. Impact of "Tort Reform"

(1) Exemplary damages

The "Tort Reform" provisions of the Texas Civil Practice & Remedies Code provide for when exemplary damages may be awarded, provide specific definitions of terms, and in many cases place a cap on the maximum recovery.

Sec. 41.001, Tex. Civ. Prac. & Rem. Code: Definitions.

In this chapter:

(3) "Exemplary damages" means any damages awarded as an example to others, as a penalty, or by way of punishment. "Exemplary damages" includes punitive damages.

(4) "Fraud" means fraud other than constructive fraud.

(5) "Gross negligence" means more than momentary thoughtlessness, inadvertence, or error of judgment. It means such an entire want of care as to establish that the act or omission was the result of actual conscious indifference to the rights, safety, or welfare of the person affected.

(6) "Malice" means:

(a) conduct that is specifically intended by the defendant to cause substantial injury to the claimant; or

(b) an act that is carried out by the defendant with a flagrant disregard for the rights of others and with actual awareness on the part of the defendant that the act will, in reasonable probability, result in human death, great bodily harm, or property damage.

Sec. 41.003, Tex. Civ. Prac. & Rem. Code: Standards for Recovery of Exemplary Damages

(a) Exemplary damages may be awarded only if the claimant proves that the personal injury, property damage, death, or other harm with respect to which the claimant seeks recovery of exemplary damages results from:

(1) fraud;
(2) malice; or
(3) gross negligence.

(b) The claimant must prove the elements of Subsection (a)(1), (a)(2), or (a)(3). This burden of proof may not be shifted to the defendant or satisfied by evidence of ordinary negligence.

Sec. 41.004, Tex. Civ. Prac. & Rem. Code: Factors Precluding Recovery.

(a) Exemplary damages may be awarded only if damages other than nominal damages are awarded.

(b) Exemplary damages may not be awarded to a claimant who elects to have his recovery multiplied under another statute.

The new provisions of the Texas Civil Practice & Remedies Code, however, specifically except from these requirements cases involving statutory interference with child custody:

Sec. 41.002, Tex. Civ. Prac. & Rem. Code: Applicability.

(a) This chapter applies to an action in which a claimant seeks exemplary damages relating to a cause of action as defined by Section 33.001.

(b) This chapter does not apply to:

(13) an action brought under Chapter 36, Family Code;

(2) Limitations on amount of exemplary damages

The "Tort Reform" provisions limit recovery of exemplary damages awarded against a defendant to the greater of either $200,000.00 or four times the amount of actual damages. Sec. 41.007, Tex. Civ. Prac. & Rem. Code (1987).

However, these limitations specifically do not apply to exemplary damages resulting from malice, as defined above, or from an intentional tort. Sec. 41.008, Tex. Civ. Prac. & Rem. Code (1987).

(3) Comparative responsibility and recovery with multiple party defendants

Sec. 33.001, Tex. Civ. Prac. & Rem. Code: Comparative Responsibility.

(a) In an action to recover damages for negligence resulting in personal injury, property damage, or death or an action for products liability grounded in negligence, a claimant may recover damages only if his percentage of responsibility is less than or equal to 50 percent.

(b) In an action to recover damages for personal injury, property damages, or death in which at least one defendant is found liable on a basis of strict tort liability, strict products liability, or breach of warranty under Chapter 2, Business & Commerce Code, a claimant may recover damages only if his percentage of responsibility is less than 60 percent.

(c) In an action in which a claimant seeks damages for harm other than personal injury, property damage, or death, arising out of any action grounded in negligence, including but not limited to negligence relating to any professional services rendered by an architect, attorney, certified public accountant, real estate broker or agent, or engineer licensed by this state, a claimant may recover damages only if his percentage of responsibility is less than or equal to 50 percent.

Sec. 32.002, Tex. Civ. Prac. & Rem. Code: Right of Action.

A person against whom a judgment is rendered has, on payment of the judgment, a right of action to recover payment from each co-defendant against whom judgment is also rendered.

Sec. 32.003, Tex. Civ. Prac. & Rem. Code: Recovery.

(a) The person may recover from each co-defendant against whom judgment is rendered an amount determined by dividing the

number of all liable defendants into the total amount of the judgment.

(b) If a co-defendant is insolvent, the person may recover from each solvent co-defendant an amount determined by dividing the number of solvent defendants into the total amount of the judgment.

(c) Each defendant in the judgment has a right to recover from the insolvent defendant the amount the defendant has had to pay because of the insolvency.

ec.

Sec. 33.002, Tex. Civ. Prac. & Rem. Code: Applicability.

(a) This chapter does not apply to a claim based on an intentional tort or a claim for exemplary damages included in an action to which this chapter otherwise applies.

Sec. 33.013, Tex. Civ. Prac. & Rem. Code: Amount of Liability.

(a) Except as provided in Subsections (b) and (c), a liable defendant is liable to a claimant only for the percentage of the damages found by the trier of fact equal to that defendant's percentage of responsibility with respect to the personal injury, property damage, death, or other harm for which the damages are allowed.

(b) Notwithstanding Subsection (a), each liable defendant is, in addition to his liability under Subsection (a), jointly and severally liable for the damages recoverable by the claimant under Section 33.012 with respect to a cause of action if:

(1) the percentage of responsibility attributed to the defendant is greater than 20 percent; and

(2) only for a negligence action pursuant to Section 33.001(a) or (c), the percentage of responsibility attributed to the defendant is greater than the percentage of responsibility attributed to the claimant.

(c) Notwithstanding Subsection (a), each liable defendant is, in addition to his liability under Subsection (a), jointly and severally liable for the damages recoverable by the claimant under Section 33.012 with respect to a cause of action if:

(1) no percentage of responsibility is attributed to the claimant and the percentage of responsibility attributed to the defendant is greater than 10 percent; or . . .

C. Negligent Infliction of Emotional Distress

Perhaps the greatest impact of the **Price** abrogation of interspousal immunities will be seen in conjunction with the Texas Supreme Court's opinion in **St. Elizabeth Hospital v. Garrard**, 730 S.W. 2d 649 (1987).

1. Emotional injuries do not require physical manifestations of injury for recovery.

Although the Garrards had sought damages only for mental anguish without pleading any facts suggesting the mental anguish manifested itself physically, the court held that "proof of physical injury is no longer required in order to recover for negligent infliction of mental anguish." **St. Elizabeth Hospital v. Garrard**, **supra**, at 650.

> [W]e are convinced the rule [requiring physical manifestation in actions based on simple negligence] serves as nothing more than an arbitrary restraint on the rights of individuals to seek redress for wrongs committed against them. **St. Elizabeth Hospital v. Garrard**, **supra**, at 651.

> The requirement is overinclusive because it permits recovery for mental anguish when the suffering encompasses or results in any physical impairment, regardless of how trivial the injury. More importantly, the requirement is underinclusive because it arbitrarily denies court access to persons with valid claims they could prove if permitted to do so.
>
> . . .
>
> Additionally, the requirement is defective because it `encourages extravagant pleading and distorted testimony' . . . **St. Elizabeth Hospital v. Garrard**, **supra**, at 652.

> Moreover, medical research has provided modern mankind with a much more detailed and useful understanding of the interaction between mind and body. It is well recognized that certain psychological injuries can be just as severe and debilitating as physical injuries. **St. Elizabeth Hospital v. Garrard**, **supra**, at 653.

> Clearly, freedom from severe emotional distress is an interest which the law should serve to protect . . .Having recognized that an interest merits protection, it is the duty of this court to continually monitor the legal doctrines of this state to insure the public is free from unwarranted restrictions on the right to seek redress for wrongs committed against them. The physical manifestation requirement is one such restriction. **St. Elizabeth Hospital v. Garrard**, **supra**, at 653-4.

While the **St. Elizabeth Hospital** opinion's initial impact seemed to be in its landmark decision to allow recovery for mental and emotional distress in the absence of physical manifestations of injury, it is questionable as to the "real world" significance of this portion of the decision.

The authors would submit that it is only the truly rare jury which will be inclined to make a finding of substantial emotional injury in the absence of physical manifestations--even if no greater than loss of appetite, headaches, diarrhea, etc.

2. Establishment of cause of action for negligent infliction of emotional distress.

Despite the Supreme Court's statements in the **St. Elizabeth Hospital** opinion, considerable doubt had existed in Texas as to whether a cause of action for intentional or negligent infliction of emotional distress existed prior to the opinion.

Therefore, the opinion may enjoy "landmark" status not merely for allowing recovery for negligent infliction of emotional distress, but for allowing it for intentional infliction as well.

D. Some miscellaneous but important notes about tort development.

1. Inferential rebuttals now may only be submitted by instruction.

An inferential rebuttal question is a question inquiring about facts that deny or rebut an element of an opponent's cause of action or defense. Under Rule 277 of the Texas Rules of Civil Procedure, inferential rebuttals may not be questions, and instead must be submitted as instructions.

There are now five inferential rebuttal instructions contained in PJC 1:

(a) New and independent cause -- destroys the causal connection.

(b) Sole proximate cause -- non-party was the only cause.

(c) Emergency -- arises suddenly and unexpectedly, not caused by actor's negligence, requires immediate action without time for deliberation.

(d) Unavoidable accident-- event not proximately caused by the negligence of any party to it.

(e) Act of God -- unavoidable accident plus caused directly and exclusively by the violence of nature, without human intervention or cause, and could not have been prevented by reasonable foresight or care.

2. Pure comparative causation under **Duncan v. Cessna Aircraft Co.**, 665 S.W. 2d 414 (Tex. 1984).

Tort law practitioners are most familiar with problems arising from the interrelationship of the cause of the occurrence and the cause of the injuries and with the interrelationship of comparative negligence of the plaintiff and strict liability of the defendant.

The current state of Texas law in dealing with these problems in cases involving negligence and some other legal theory, e. g. product liability, is expressed in the landmark case of **Duncan v. Cessna Aircraft Co.**, 665 S.W.2d 414 (Tex. 1984) wherein the doctrine of pure comparative causation for all cases involving negligence and another liability theory was adopted for all products cases tried after July 13, 1983.

For a "major update" on **Duncan**, see **Keen v. Ashkelen**, _____ S.W.2d _____, 31 Tex. Sup. Ct. Jrnl. 209 (Feb. 10, 1988).

3. New Texas Pattern Jury Charges

Lemos v. Montez, 680 S.W.2d 798 (Tex. 1984) and broad-form submission.

Volume I of the new Texas Pattern Jury Charges seeks to comply with the Texas Supreme Court's preference for broad-form questions, referred to in **Lemos** as "the correct method for jury

submission." Additionally, the amended Texas Rule of Civil Procedure 277 which becomes effective January 1, 1988, provides "the Court shall, whenever feasible, submit the case upon broad form of questions."

The Supreme Court has also disapproved the practice of embellishing standard definitions and instruction, **Lemos**, or adding unnecessary instructions, **First International Bank v. Roper Corp.** 686 S.W.2d 602 (Tex. 1985).

Definitions of terms that apply to a number of questions should be given immediately after the general instructions required by Rule 226a of the Texas Rules of Civil Procedure. **See Woods v. Crane Carrier Co.**, 693 S.W.2d 377 (Tex. 1985). If a definition applies only to one question, or cluster of questions (for example, damage questions), it should be placed with that question or cluster.

4. Child's degree of care

Another standard of care that may be applicable in family torts would be the lower standard of care required of children. The conduct of a child "of tender years" is judged by the standard of a child and not that of an adult. **Dallas Railway & Terminal v. Rogers**, 218 S.W.2d 456 (Tex. 1949).

If a child's conduct is involved, the responsibilities would be as follows:

"Negligence," when used with respect to the conduct of (the child), means failing to do that which an ordinary prudent child of the same age, experience, intelligence, and capacity would have done under the same or similar circumstances or doing that which such a child would not have done under the same or similar circumstances.

"Ordinary care," when used with respect to the conduct of a child, means that degree of care which an ordinary prudent child of the same age, experience, intelligence, and capacity would have used under the same or similar circumstances.

In **MacConnell v. Hill**, 569 S.W.2d 525 (Tex. Civ. App. -- Corpus Christi 1978, no writ), the Court recommended the following instruction in comparative negligence cases when the jury must apportion negligence between a child and an adult:

"In answering this question, you should take into consideration that _____ was an adult and _____ was a child."

5. Product liability

A copy of portions of **"Strategic Considerations in Selecting a Product Theory"** presented at the recent University of Texas School of Law 11th Annual Products Liability and Personal Injury Law Conference is included in the Appendix and provides a comparison of most current theories under Texas Law for recovering in a product liability case.

6. Proximate cause

"Proximate cause" means that cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a person using ordinary care would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event. (emphasis added. The applicable standard of care should be substituted here.)

7. Comparative responsibility

   (a) Causation of "occurrence in question" or "injuries"?

   (b) Threshold for recovery.

   (c) Instructions on injury causing behavior generally better than issues.

8. Joint and several liability

   (a) Culpable claimant vs. non-culpable claimant

   (b) Negligence vs. non-negligence

   (c) Hazardous discharges or toxic torts

9. Settlement credits and procedures

   (a) Credits vs. sliding scale.

   (b) What is a settlement?

   (c) Who decides the scheme?

10. Contribution

   (a) Claimant's control of who is submitted to the jury.

(b) Allocation between liable defendants and contribution defendants.

11. Exemplary damages

(a) Malice and gross negligence defined.

(b) Cap of greater of ($200,000 or 4 X actuals)

(c) Action brought under chapter 36, Family Code (interference with child custody/possession) is exempt.

(d) Intentional torts are exempt.

12. Governmental immunity

(a) Cap on municipality increased to $250,000 / $500,000 and $100,000.

(b) Only proprietary functions exempted are public utilities, amusements, abnormally dangerous or ultra-hazardous activities.

13. Frivolous pleadings

(a) Groundless -- no basis in fact or not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.

(b) Signature equals swearing on knowledge and belief that pleading is not:

(1) Groundless and brought in bad faith;

(2) Groundless and brought for the purpose of harassment; or

(3) Groundless and interposed for any improper purpose, such as to cause unnecessary delay or needless increase in the cost of litigation.

(c) New Rule 13 under the Texas Rules of Civil Procedure.

E. Interference With Child Custody/Possession

1. Statutory provisions

As a part of the nationwide effort attempting to halt child snatching and disobedience of valid child conservatorship orders, the Texas Legislature in 1983 enacted Chapter 36 of the Texas Family Code.

This Chapter provides for a civil cause of action against a person who unlawfully interferes with a court order regarding the possession of or access to a child, including BOTH custody and visitation rights.

Of course, Chapter 36 is expressly nonexclusive and does not affect a person's or the child's right to any other civil or criminal remedy available at law or in equity. Tex. Fam. Code Secs. 14.30(d) and 36.06.

Additionally, a Chapter 36 action may be joined with any other enforcement proceeding. Tex. Fam. Code Sec. 14.31(b)(2)(K) and Sec. 36.06.

2. Parties liable

Under Chapter 36, civil liability applies to any person who takes or retains possession of a child or conceals the whereabouts of a child in violation of a temporary or permanent court order of a court of Texas, a sister state, or another nation which provides for the possessory interest of a child. Tex. Fam. Code Secs. 36.01(1) and (2) and 36.02(a).

The taking or rentention of the possession of a child or the "child's concealment" is deemed to be a violation of a court order "if it occurs at any time during which a person other than the person committing the act is entitled under the court order to a possessory interest in the child." Tex. Fam. Code Sec. 36.02(b). Also, any person aiding or assisting in the prohibited conduct may be liable -- perhaps including an advising attorney. Tex. Fam. Code Sec. 36.02(c).

However, it should be noted that if the person charged with violating the provision of Chapter 36 is not a party to the suit from which the court order in question arose, that person is not liable under Chapter 36 unless the person "at the time of the violation: (1) had actual notice of the existence and contents of the order; or (2) had reasonable cause to believe that the child was the subject of a court order and that his actions were likely to violate the order." Tex. Fam. Code Sec. 36.02(d).

3. Notice required as prerequisite

As a statutory prerequisite to filing a Chapter 36 suit, one denied a possessory interest of a child in violation of a court order "shall give written notice of the specific violation of the order to the person violating the order." Tex. Fam. Code Sec. 36.07(a).

However, such required statutory notice interestingly enough does not need to be given to parties "aiding or assisting in conduct" prohibited by the Chapter. Tex. Fam. Code Sec. 36.07(d).

The notice must be by certified or registered mail, return receipt requested, to the alleged violating party's last known address. Such notice must include a statement of the offended party's intent "to file suit no less than thirty (30) days after the date of mailing unless the order is promptly and fully complied with." Tex. Fam. Code Sec. 36.07(b) and (c).

There does not appear to be any requirement that the notice actually be received by the potential defendant.

4. Damages -- actual and punitive

Actual damages may include: the actual costs and expenses in locating the child and recovering possession of the child, if the Petitioner is entitled to possession of the child; enforcing the court order that was violated and bringing the suit, including attorney's fees; and including the value of mental suffering and anguish incurred by the Petitioner because of a violation of the court order. Tex. Fam. Code Sec. 36.03(a)(1-5).

In addition, if the Respondent acted with malice or with an intent to cause harm to the person who is denied a possessory interest in the child, the Petitioner may recover against the Respondent an award of exemplary damages. Tex. Fam. Code Sec. 36.03(b).

Regarding common law actions, the measure of damages was addressed in **Silcott v. Oglesby**, 721 S.W.2d 290 (Tex. 1986):

"As we noted in **Sanchez v. Schindler**, 651 S.W.2d 249, 251 (Tex. 1983), the real loss sustained by a parent is not the loss of any financial benefit to be gained from the child, but is the loss of love, advice, comfort, companionship and society. The arguments for allowing damages for mental anguish in a child abduction case are also strong. First, the mental anguish experienced by parents when their child is abducted can be extremely intense. The child may remain for a long period of time with the parent's worry, uncertainty, and fear increasing

daily. Second, allowing damages for mental suffering without the necessity for showing actual physical injury when the tort is willful or intentional is well established. **Brown v. American Transfer and Storage Company**, 601 S.W.2d 931, 939 (Tex. 1980); **Fischer v. Carrousel Motor Hotel, Inc.**, 424 S.W.2d 627 (Tex. 1967)." Id. at 292.

5. Joint and several liability

Each party aiding or assisting in conduct for which a cause of action is authorized under Chapter 36 "enjoys" possible joint and several liability for damages. Tex. Fam. Code Sec. 36.02(c).

Although Chapter 36 does not appear to make such distinction, it should be noted that multiple defendants are not necessarily jointly and severally liable for exemplary damages. **St. Louis and S.W. Railway Company of Texas v. Thompson**, 102 Tex. 89, 113 S.W. 144 (1908).

Of course, in the event of a conspiracy to commit a tort involving malice or wanton behavior, then malice may be attributable to all defendants with resultant punitive damages as to which all defendants are jointly and severally liable. **Akin v. Dahl**, 611 S.W.2d 917 (Tex. 1983).

6. Venue

Chapter 36 suits may be brought in any county where either the Petitioner or the Respondent resides or in any county where a suit affecting the parent-child relationship is authorized to be brought. Tex. Fam. Code Sec. 36.05.

7. Affirmative defenses

The nonexclusive affirmative defenses under Chapter 36 include that the Respondent violated the order with the express consent of the Petitioner and that after receiving notice of the violation in accordance with Texas Family Code Section 36.07, the Respondent promptly and fully complied with the order. Tex. Fam. Code 36.04(1)(2).

8. Frivolous suits

Respondents are entitled to recover attorney's fees and court costs if the damage claim of Petitioner is dismissed or judgment is awarded to the Respondent and the court or jury finds that the claim for damages is frivolous, unreasonable or without foundation. Tex. Fam. Code Sec. 36.08(1) and (2).

9. Pre-existing common law actions

While noting that in cases tried after September 1, 1983, the new statutory cause of action must be applied in the manner above stated as is set forth in the Family Code, as to cases tried prior to September 1, 1983, the Texas Supreme Court has held that a common law actionable tort for child abduction in violation of a custody order existed prior to the creation of the civil cause of action by statute. **Silcott v. Oglesby**, **supra**.

F. False Imprisonment

Of course, Texas law has long recognized the tort of false imprisonment involving a willful detention of a person, without the authority of law, and against the consent of the party detained. **Morales v. Lee**, 668 S.W.2d 867 (Tex. App.--San Antonio 1984, no writ); **Cronen v. Nix**, 611 S.W.2d 651 (Tex. App.--Houston [1st Dist.] 1980, no writ); **J. C. Penny Company v. Duran**, 479 S.W. 2d 374 (Tex. App.--San Antonio 1972, writ ref'd n.r.e.).

In **Armes v. Campbell**, 603 S.W.2d 249 (Tex. App.--El Paso 1980, writ ref'd, n.r.e.) the dispute arose out of a battle for custody between the paternal grandmother and the mother of the child. The Defendant was a private investigator, hired by the mother to obtain physical possession of the child who was presently living with the paternal grandmother. While it would appear that the child's father had prior legal custody subsequently relinquished to his mother, the facts respecting legal custody are unclear in the opinion. The Defendant's private investigator followed the paternal grandmother Plaintiff's automobile upon her leaving her residence with the minor child after receiving threatening phone calls. The Defendant forced the Plaintiff's car to the curb and told her she was under arrest for kidnapping. When the Plaintiff attempted to leave, the Defendant's vehicle chased the Plaintiff's at such a high speed that the engine in Plaintiff's car blew up. The Defendant then blocked her from leaving until the police arrived, reviewed the papers, and gave the child (improperly they later admitted) to the mother.

The Plaintiff sued the Defendant for both assault and false imprisonment and was awarded a total judgment of $12,000.00 for actual and exemplary damages as a result thereof.

An interesting case for recovery by the child for imprisonment in a custody dispute situation may be found in **Kajtazi v. Kajtazi**, 488 F. Supp. 15 (E.D.N.Y. 1978). Therein the mother brought suit, individually and as ad litem for ("next friend of") the child, against the father, the father's stepfather and the father's older brother for tort arising from the child's abduction and removal to Yugoslavia.

The Court applied New York law and found the father guilty of both false imprisonment and unlawful detention. The Defendant's father and brother knew the child was brought to their home under their control and falsely represented under oath that they did not know the father's whereabouts. The Court further held all Defendants jointly liable for punitive damages under the theory of conspiracy and that the conduct of the father constituted the tort of intentional infliction of mental suffering.

While the mother received $50.00 per day for loss of services and wounded feelings (14,950.00), $500.00 personal living expenses incurred in recovering the child, $5,000.00 in legal fees, and $10,000.00 for punitive damages, the child separately received $20.00 per day for each day of false imprisonment ($5,980.00), $5,000.00 for the false imprisonment and $50,000.00 for punitive damages.

G. Invasion of Privacy

These authors have found no Texas cases dealing with invasion of privacy in either the interspousal or the parent-child context.

Perhaps the duty owed is so extremely limited in these contexts that the intrusion has not been upon the necessary extent of seclusion, solitude, and private affairs to have been breached by the defendant. For Texas cases dealing with this tort, see **Industrial Foundation, etc. v. Texas Industrial Accident Board**, 540 S.W.2d 668 (Tex. 1976); **Billing v. Atkinson**, 489 S.W. 2d 858 (Tex. 1973); **Gill v. Snow**, 644 S.W.2d 222 (Tex. App.--Fort Worth 1982, no writ); **Gonzalez v. Southwestern Bell Telephone Company**, 555 S.W.2d 219 (Tex. App.--Corpus Christi 1977, no writ).

V. DAMAGES

A. Proof of Damages

1. Medical expenses -- belong only to parent. **Sax v. Votteler**, 648 S.W. 2d 661 (Tex. 1983).

2. Physical pain, mental anguish and physical impairment -- units of time.

3. Earning capacity -- education, age, training and experience, inclination, physical and emotional limitations.

4. Inheritance -- **Yowell v. Piper Aircraft Corp.**, 703 S.W. 2d 630 (Tex. 1986).

5. Disfigurement

B. Damages For the Loss of a Child

1. **Sanchez v. Schindler**, 651 S.W.2d 249 (Tex. 1983)

2. Loss of services and earnings -- See Tex. Fam. Code Section 12.04 (5).

3. Consortium-type damages -- See **Bedgood v. Madalin**, 600 S.W.2d 773 (Tex. 1980) (concurring opinion).

C. Prejudgment Interest

See **Cavnar v. Quality Control Parking, Inc.**, 696 S.W.2d 549 (Tex. 1985).

D. Causation and Experts

As an excellent illustration of expert testimony, the following are excerpts from the Statement of Facts (herein "S.F.") in **Stafford v. Stafford**, supra:

(S.F. 161, line 21)

Q. When did you first meet Markie Stafford as a patient, if you recall?

A. May I refer to my notes?

Q. Certainly, sir.

A. I first saw Markie for a new visit on October the 5th, 1982.

Q. At that time, what history did the patient give you, sir?

A. She presented complaining that she had a yeast infection of the vagina that was very hard to clear up, very difficult to clear up.

Q. Once you took the history from her, what did you do next?

A. I took what I felt was a fairly complete history, and then went into the physical examination and did some laboratory examination as well.

Q. All right. As a result of the physical examination and history, the laboratory examination, were you able to arrive at a diagnosis as to what her problem was?

A. Yes, I did.

Q. And is that a diagnosis based upon your education and training and experience as a medical doctor?

A. Yes, sir, it is.

Q. And was that diagnosis based upon a reasonable medical probability?

A. Yes, sir, it is.

Q. And when we talk about a reasonable medical probability, for the members of the jury, what are we talking about?

A. My understanding of legal term "reasonable medical probability" is greater than fifty percent. In other words, fifty percent won't do it, but fifty-one percent will.

Q. What was your diagnosis as to her problem in October of 1982?

A. On that day I felt that she had a mixed vaginitis with both yeast and Hemophilus vaginitis.

(S.F. 163, line 20)

Q. When is the next time that you saw Mrs. Stafford?

A. The next time that I saw her was on May 9th, 1983.

Q. Okay. Now, from the period of time from October 5, 1982 through May 9, 1983, were you made aware of any further complaints about mixed vaginitis?

A. No, sir.

Q. Now, that diagnosis of mixed vaginitis yeast and ---

A. Hemophilus.

Q. H-E-M-O-P-H-I-L-U-S?

A. Yes, sir.

Q. Is that a venereal disease?

A. No.

Q. Now, when she presented herself to you again May 9th, 1983, what type of history did she give you that time?

A. She presented with the history that she had had an extremely short period on the 2nd of May and had not had a normal menstrual period since the month of April. She was considering the possibility that she could be pregnant.

Q. Is that one of the clinical symptoms of short menstrual cycle?

A. In pregnancy, in early pregnancy, there can be an abnormally short period of bleeding. In very early pregnancy it can be mistaken for menstrual cycle.

Q. Once you took the history from her, doctor, what did you do next?

A. Physical examination directed toward the problem that brought her to see me.

Q. What did your physical examination reveal, if anything?

A. At that time, physical examination revealed a small retroverted uterus that was nonpregnant. In particular, also, I didn't note any unusual tenderness on examination at that time. I would have noted it had it been there, but since it's not noted, I feel certain that it wasn't there.

Q. Is that what your medical record means by "no adnexal-masses [sic] or tenderness noted"?

A. Correct.

Q. What would have been the significance of any tenderness?

A. That would have been evidence that there would have been an infection or some infectious process causing pain, possibly causing abnormal bleeding.

Q. Did you prescribe any course of treatment following this visit on May 9th?

A. No, not at that time.

(S.F. 165, line 18)

Q. When is the next time that you saw Mrs. Stafford?

A. The next time is September 12, 1983.

Q. And at that time, what history did she give you?

A. At that time she presented with a very painful tender --My nurse describes it as a cyst-like bump on introitus on particular part of the external female genitalia.

Q. Did you examine her following taking the history?

A. Yes, I did.

Q. What did your examination reveal?

A. My examination revealed a sebaceous cyst very much like an ingrown hair that was not pointing, could not be drained at the time I saw her in September on the right side of the labia, two centimeters, just under an inch in diameter.

Q. Is the presence of that cyst indicative of any venereal disease?

A. No, sir, it is not.

(S.F. 189, line 17)

Q. Do you have an opinion based upon reasonable medical probability, and assuming additionally, that Mrs. Stafford cohabitated with Mr. Stafford and had had sexual relations with him from December, 1980 up until the time that you saw them in December of 1983, do you have an opinion as to who is the cause of that venereal disease in Mrs. Stafford?

A. I do.

Q. What is that opinion?

A. My opinion is that the source in that couple, the first partner of the couple to get it probably was Mr. Stafford.

(S.F. 190, line 2)

Q. Let me ask you further to assume that Mr. Stafford has committed adultery and had had sexual relations with women other than his wife during the period from December 1980 through December, 1983. Does that effect [sic] your opinion at all?

A. It confirms it.

Q. And is that your opinion based upon reasonable medical probability?

A. Yes, sir, it is.

(S.F. 307, line 24)

MR. LYON: Your Honor, at this time we would like to read a portion of Mr. Stafford's deposition into evidence.

Starting on page 53, line 25, my question to Mr. Stafford was: "Do you deny having been treated by any medical physician for venereal disease since September 3, 1983, up to the present time?"

"ANSWER: I have not seen a physician -- now.

"QUESTION: My question was --

"ANSWER: The question is do I deny --

"MR. MORRIS: Can you deny getting treated for venereal disease from September of '83 to today? It can be answered yes or no. Yes, you deny; or no, you do not deny.

ANSWER: No."

(S.F. 184-185)

Q. What was the result of the biopsies? What generally -- put in another way, as a result of the biopsies and surgery performed, were you able to arrive at a definitive diagnosis as to what the problem was?

A. Yes, sir.

Q. And did you so arrive at an opinion?

A. Yes, I did.

Q. Based on your education and training as a medical doctor?

A. Yes sir, it is.

Q. Is that opinion based upon a reasonable medical probability?

A. Yes, sir.

Q. What was that opinion?

A. The opinion that I have is that Mrs. Stafford sustained injury to her Fallopian tubes as a result of an infection that most likely was transmitted venereally. Most likely is much greater than 50%, probably greater than 80%.

E. Is The "Community Property Defense" Resurrected As To Damages For Lost Wages And Medical Expenses Incurred During The Marriage?

Experienced practitioners will recall the old "Community Property Defense" dealing with negligence of the spouse-driver for injuries incurred by the spouse-passenger which would be of a community property nature and thereby allow the spouse-driver's benefiting from his own wrong doing.

Of course, these matters became of minimal concern with the Texas Supreme Court's opinion in **Graham v. Franco**, 488 S.W.2d 390 (Tex. 972) and subsequent cases. **Graham v. Franco** held that the plaintiff's recovery for pain and suffering during marriage is the separate property of the injured spouse. While language therein initially excepted only loss of earning capacity during the marriage, subsequently this exception was extended to recovery for medical expenses which were the burden of the community. **Dawson v. Garcia**, 666 S.W.2d 254 (Tex. App.--Dallas 1984, no writ).

After a division of the parties' community estate after payment of medical expenses and loss of community earnings, and after considering any outstanding and unpaid medical charges,

should these expenses incurred during the marriage then be the subject of damage recovery by one spouse against another?

Should the recovery be allowed but permitted just to such spouse's community one-half interest? Should the spouse's community interest be equitably awarded rather than limited to 50 percent?

VI. AFFIRMATIVE DEFENSES

A. General Rule

Rule 94 of the Texas Rules of Civil Procedure requires the affirmative pleading of matters constituting an avoidance or affirmative defense. Matters listed therein include accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitation, waiver, and any other matter constituting an avoidance or affirmative defense.

B. The Defenses of Recrimination and Condonation

Attorneys practicing longer than these authors may remember the existence of recrimination and condonation as defenses to the divorce itself.

In 1969, the 61st Legislature abolished the defense of recrimination and specified that condonation would be a defense only if the court finds there to be a reasonable expectation of reconciliation. Texas Family Code, Section 3.08.

Are these matters now nonexistent as possible affirmative defenses in tort actions, or is their abolition restricted to issues concerning grounds for divorce?

C. Regarding Existing Immunities

See **Stafford v. Stafford**, **supra**, for the necessities of affirmatively setting forth any existing immunities as defense.

D. Regarding Statutes of Limitations

Of course, the general statute of limitations for personal injuries is two years. Texas Civil Practice and Remedies Code, Section 16.003 (1986).

As to most cause of actions, however, public policy tolls the statutes during certain circumstances such as minorities or disabilities. Texas Civil Practice and Remedies Code, Section 16.001 (1986).

Regarding marital torts, does the public policy of encouraging family harmony (which **Price** held there inapplicable but did not hold as no longer a matter of legitimate concerns) mandate the tolling of statutes of limitation for torts committed during the marriage until either the dissolution of the marriage, filing for divorce, or separation of the parties?

E. Plaintiff Not Previously Free of Venereal Disease

It should be noted that in the Court of Appeals' first decision in **Stafford v. Stafford**, **supra**, they noted that they were dealing with the wife's failure to prove she was previously free of the venereal disease since such had not been affirmatively pleaded by the husband.

F. Regarding Guest Statute

It should be noted that the Guest Statue has in Texas been declared unconstitutional and repealed. **Whitworth v. Bynum**, 699 S.W.2d 194 (Tex. 1985); Tex. Rev. Civ. Stat. Ann. art. 6701b (Vernon 1977) (Repealed 1985).

VII. ARE MARITAL TORTS IN THE NATURE OF A MANDATORY COUNTERCLAIM THAT MUST BE ASSERTED IN DIVORCE?

Obviously, an interspousal tort action dealing with an automobile collision or a similar type of injury would not be barred if not asserted in the divorce action.

But what about the circumstance of the tort's being of such a nature that it shares an exceptionally close relationship to issues material to and certain to be tried in the divorce action itself -- for example, a "fault divorce" and either a history of an infliction of emotional distress or an interspousal transmission of one or more sexual diseases?

A. Rule 97(a)

"Compulsory Counterclaims. A pleading shall state as a counterclaim any claim within the jurisdiction of the court, not the subject of a pending action, which at the time of filing the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its

adjudication the presence of third parties of whom the court cannot acquire jurisdiction; provided, however, that judgment based upon a settlement or compromise of a claim of one party to the transaction or occurrence prior to a disposition on the merits shall not operate as a bar to the continuation or assertion of the claims of any other party to the transaction or occurrence unless the latter has consented in writing that said judgment shall operate as a bar."

"The rule is only a means of bringing all logically related claims into a single litigation, through precluding a later assertion of omitted claims, and it should receive a liberal construction to accomplish this objective. . . . But when the Defendant's claim to affirmative relief asserts a theory wholly distinct from and independent of the issues raised by the Plaintiff's claim it is not a compulsory counterclaim." McDonald, Texas Civil Practice, Section 7.49 (1982).

B. Res Judicata

"Res judicata is frequently characterized as claim preclusion because it bars litigation of all issues connected with a cause of action or defense which, with the use of diligence might have been tried in the prior suit. **Russell v. Moeling**, 526 S.W.2d 533, 536 (Tex. 1975). When a prior judgment is offered in a subsequent suit in which there is identity of parties, issues and subject matter, such judgment is treated as an absolute bar to retrial of claims pertaining to the same cause of action on the theory that they have merged into the judgment. [authority cited]." [emphasis added] **Bonniwell v. Beech Aircraft Corp.**, 633 S.W.2d 816, 818 (Tex. 1984).

C. Collateral Estoppel

"Collateral Estoppel is narrower than res judicata. It is frequently characterized as issue preclusion because it bars relitigation of any ultimate issue of fact actually litigated and essential to the judgment in a prior suit, regardless of whether the second suit is based upon the same cause of action. [authority cited] Under principles of collateral estoppel the court of appeals reasons that [the parties] have fully litigated their relative liability and that the findings of the [prior] jury are binding on the cross-parties and all subsequent litigation arising out of the accident." [emphasis added] **Bonniwell v. Beech Aircraft Corp.**, **supra**, at p. 818.

A party seeking to invoke the doctrine of collateral estoppel must establish that:

(1) The facts sought to be litigated in the second action were fully and fairly litigated in the prior actions;

(2) Those facts were essential to the judgment in the first action; and

(3) The parties were cast as adversaries in the first action. **Bonniwell v. Beech Aircraft Corp.**, **supra**, at p. 818.

If the issue on which collateral estoppel is urged was not essential to the judgment in the first action, then the facts found are not binding on the parties to that action. **Bonniwell v. Beech Aircraft Corp.**, **supra**, at p. 818-819.

On February 3, 1988, the Texas Supreme Court further clarified the doctrine of collateral estoppel in **Tarter v. Metropolitan Savings and Loan Ass'n**, _____ S.W.2d_____, 31 Tex. Sup. Ct. Jrnl. 195 (Tex. 1988).

In **Tarter** the Texas Supreme Court emphasized the importance of determining the ultimate issue of fact which was actually litigated and essential to the judgment in the prior suit.

> The doctrine applies when the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior suit.
>
> . . .
>
> Ultimate issues are those factual determinations submitted to a jury that are necessary to form the basis of a judgment. [authority cited] The term "ultimate issue" does not refer to a cause of action or claim. **Tarter v. Metropolitan Savings and Loan Ass'n**, **supra**, at p. 196.

In **Tarter v. Metropolitan Savings and Loan Ass'n**, **supra**, Metropolitan Savings and Loan Ass'n contended that the issue of wrongfulness of foreclosure, previously determined against the Tarters in their prior suit against Albers & Brownstad was the same ultimate issue as in the immediate action against Metropolitan for breach of contract and deceptive trade practices.

Metropolitan maintained that the prior determination that the foreclosure was valid necessarily presupposed that Metropolitan had not engaged in any conduct such as breach of contract or deceptive trade practices that would have invalidated the foreclosure.

However, the court found the ultimate issue in the prior suit regarding the validity of the foreclosure to have been whether certain procedural irregularities occurred in the sale of

the property. This was different from the issues submitted to the jury in the immediate case and dealing with breach of contract and violation of the Texas Deceptive Trade Practices Act.

> Breach of contract and deceptive trade practices were not merely alternative evidentiary grounds for the claim of wrongful foreclosure [in the prior action] but were, instead, separate and independent causes of action. **Tarter v. Metropolitan Savings and Loan Ass'n**, **supra**, at p. 196.

The court rejected Metropolitan's contentions that the doctrine of collateral estoppel nevertheless applied because of the implied negative findings in the suit against Albers and Brownstad that Metropolitan did not breach its contract or commit a deceptive trade practice.

> There is nothing in the record to show that a question of fact regarding Metropolitan's conduct was necessarily determined as a prerequisite to the rendition of the first judgment. [citations] Thus, an affirmative jury finding that Metropolitan breached the contract or committed a deceptive trade practice is not fundamentally inconsistent with the prior determination of a valid foreclosure. The doctrine of collateral estoppel applies when relitigation would result in an inconsistent determination of the same ultimate issue; it does not bar litigation merely because the outcomes of two suits may appear to be inconsistent. See 2 A. Freeman, Freeman on Judgments, Sec. 677, at 1429-32 (5th ed. 1925). **Tarter v. Metropolitan Savings and Loan Ass'n**, **supra**, at p. 197.

D. Equitable Estoppel

The reader will recall the following as necessary elements for the defense of equitable estoppel to apply:

1. False representation or concealment of material facts
2. Made with knowledge, actual or constructive, of those facts
3. To a party without knowledge, or the means of knowledge, of those facts
4. With the intention that it should be acted on, and
5. The party to whom it was made must have relied or acted on it to his prejudice.

Gulbenkian v. Penn, 151 Tex. 412, 252 S.W.2d 929 (1952); **Concord Oil Co. v. Alco Oil & Gas Corp.**, 387 S.W.2d 635 (Tex. 1965).

In **Stuart v. Stuart**, 410 N.W.2d 632 (Wis. App. 1987) the Wisconsin Second Court of Appeals dealt with this defense of equitable estoppel which had been asserted.

The **Stuart** court noted that the defense of equitable estoppel consists of an action or nonaction by a party against whom estoppel is asserted that induces reliance thereon by the party asserting estoppel, either in action or nonaction which is to that party's detriment.

The court noted that for equitable estoppel to apply, the reliance on the action or nonaction of the other must be reasonable. The court held that Mrs. Stuart's failure to disclose the potential tort claims against her husband arising from alleged incidents occurring during the marriage did not act as a bar to the tort action brought after the no-fault divorce, absent evidence that husband relied to his detriment upon any such representation.

The court further stated that although in the divorce proceeding the wife may have been aware of her right to claim damages as a result of her husband's alleged tortious conduct, her merely proceeding in that form did not constitute a waiver of her right to subsequently proceed in tort and seek damages.

E. Necessity of Pleading as Affirmative Defense

As discussed above, Rule 94 requires res judicata and collateral estoppel be pleaded as affirmative defenses.

F. Sister State Treatment of Issue

In **Stuart v. Stuart**, 410 N.W.2d 632 (Wis. App. 1987) the Wisconsin Second Court of Appeals held res judicata to be inapplicable as a bar to a post-divorce tort action for intentionally inflicted injuries by one spouse against the other. However, it is to be specifically noted that such issues were immaterial to the Stuarts' prior divorce action because therein the 50/50 division of the marital property was mandated by law.

The Court noted that for res judicata to act as a bar to the subsequent action, there must be not only an identity of parties but also an identity of causes of action claimed in the two actions.

The Court further noted that in dividing the parties' financial accumulations, the divorce court in the Wisconsin no-fault action could not consider one spouse's tortious conduct or, based upon that conduct, award the injured spouse punitive damages or compensatory damages for past pain, suffering and emotional distress.

The Court further noted that the defense of equitable estoppel consists of an action or nonaction by a party against whom estoppel is asserted that induces reliance thereon by the party asserting estoppel, either in action or nonaction which is to that party's detriment.

The Court noted that for equitable estoppel to apply, the reliance on the action or nonaction of the other must be reasonable. The Court held that Mrs. Stuart's failure to disclose the potential tort claims against her husband arising from alleged incidents occurring during the marriage did not act as a bar to the tort action brought after the no-fault divorce, absent evidence that husband relied to his detriment upon any such representation.

The Court further stated that although in the divorce proceeding the wife may have been aware of her right to claim damages as a result of her husband's alleged tortious conduct, her merely proceeding in that form did not constitute a waiver of her right to subsequently proceed in tort and seek damages.

VIII. CONSIDERATIONS FOR SEVERING OR NOT SEVERING FROM DIVORCE ACTION

As authorities will show below, these matters are addressed to the trial court's discretion. Accordingly, the text herein will set forth specific authorities.

However, this author cannot imagine a situation where a trial court's ruling regarding severance or consolidation of the divorce action with the interspousal tort would amount to a reversible abuse of discretion.

Accordingly, the following should be considered as arguments to persuade the trial court's ruling -- not to overturn it.

In **Mogford v. Mogford**, 616 S.W.2d 936 (Tex. Civ. App.--San Antonio, 1981, writ ref'd n.r.e.), the Court recognized that the suits for personal injury and the suit for divorce may be severed or may be joined. The Court further indicated that public policy favors resolution in one suit of all matters existing between the parties and arising out of the same transaction.

In **Mogford**, the court held that the husband's failure to request severance of a suit for intentional personal injuries and a suit for divorce waived his right to have this matter reviewed on appeal.

However, the court made reference to this as a type of suit otherwise covered by the Rules of Civil Procedure allowing a plaintiff to join as independent claims any or as many claims either legal or equitable or both as he may have against the opposing party. Further, the court noted that under the rules a party may state as many separate claims as he or she has regardless of consistency and whether they are based on legal or equitable grounds or both.

> The courts favor the avoidance of a multiplicity of suits. The courts favor resolution in one suit of all matters existing between the parties and arising out of the same transaction. **Parkhill Produce Co. v. Pecos Valley Southern Railway Co.**, 348 S.W.2d 208 (Tex. App.--San Antonio 1961, writ ref'd n.r.e.). Appellant's remedy if he did not want both causes of action to be considered at the same time was to file a Motion for Severance. Any claim against a party may be severed and proceeded with separately. Tex. R. Civ. P. 41; 1 Tex. Jur. 3d Actions, Section 77 (1979). This refers to a claim that is a severable part of a controversy that involves more than one cause of action. **Rose v. Baker**, 143 Tex. 202, 183 S.W.2d 438 (1944). **Mogford v. Mogford**, **supra** at pp. 940-1.

A. Consolidation

Rule 174(a), T.R.C.P. states:

Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all of the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

Rule 40(a), T.R.C.P. states:

Permissive Joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally,

or in the alternative any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

Rule 51, T.R.C.P. states:

(a) Joinder of Claims. The plaintiff in his petition or in a reply setting forth a counterclaim and the defendant in an answer setting forth a counterclaim may join either as independent or as alternate claims as many claims either legal or equitable or both as he may have against an opposing party. There may be a like joinder of claims when there are multiple parties if the requirements of Rules 39, 40, and 43 are satisfied. There may be a like joinder of cross claims or third-party claims if the requirements of Rules 38 and 97, respectively, are satisfied.

(b) Joinder of Remedies. Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. This rule shall not be applied in tort cases so as to permit the joinder of a liability or indemnity insurance company, unless such company is by statute or contract directly liable to the person injured or damaged.

McDonald Texas Civil Practice, Section 10.24.1 at p. 49 (1983) states:

Two types of consolidation are authorized: the true consolidation, merging the separate suits into a single proceeding thereafter handled as though they were originally joined, and the consolidation for trial of one, some, or all issues. In order to avoid confusion the trial judge's order should make clear which type of consolidation he intends.

An application for consolidation is addressed to the court's discretion. A refusal to consolidate causes which could be properly merged will be reviewed only on a showing of prejudice from the abuse of discretion.

Both actions must be pending before the court which orders the consolidation, but when they are pending in the same county

in district courts governed by Rule 330, the actions may be brought into the same court.

B. Severance

Rule 40(b), T.R.C.P. states:

Separate Trials. The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and may order separate trials or make other orders to prevent delay or prejudice.

Rule 174(b), T.R.C.P. states:

Separate Trials. The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues.

Rule 41, T.R.C.P. states:

Misjoinder and Nonjoinder of Parties. Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added, or suits filed separately may be consolidated, or actions which have been improperly joined may be severed and each ground of recovery improperly joined may be docketed as a separate suit between the same parties, by order of the court on motion of any party or on its own initiative at any stage of the action, before the time of submission to the jury or to the court if trial is without a jury, on such terms as are just. Any claim against a party may be severed and proceeded with separately.

A severance may be granted on the court's own motion, on consent of the parties, or upon the motion of a party. **Rice v. Travelers Express Co.**, 407 S.W.2d 534 (Tex. App.--Houston 1966).

Whether a severance should be granted is within the sound discretion of the trial judge, and his order will be disturbed only on a showing of abuse. **Hamilton v. Hamilton**, 154 Tex. 511, 280 S.W.2d 588 (1955).

When the severance does not result from the sustaining of a plea of misjoinder of actions or parties, "the controlling reasons for a severance are (1) the doing of justice, (2) the avoiding of prejudice, (3) the furthering of convenience." **Utilities Natural Gas Corp. v. Hill**, 239 S.W.2d 431 (Tex. App.--Dallas 1951, writ ref'd n.r.e.).

A severance is proper when the interest of the parties, or the claims or counterclaims asserted by the party, are separate, and it is clear that some of the independent controversies can be determined promptly while others may be long delayed. **Jack R. Allen & Co. v. Wyler Textiles, Ltd.**, 371 S.W.2d 728 (Tex. App.--Dallas 1963); **Pure Oil Co. v. Fowler**, 302 S.W.2d 461 (Tex. App.--Dallas 1957, writ ref'd n.r.e.); **Kimble v. Baker**, 285 S.W.2d 425 (Tex. App.--Eastland 1955).

Herein may well lie the most deciding factor regarding the severance issue where it is desired to allow the prompt resolution of a divorce action with no jury issues and then to allow the subsequent prolonged trial of the tort matter.

"But a severance is designed to avoid confusion, prejudice, or unreasonable delay, and should not be ordered when the result will merely be to multiply the expense of duplicitous litigation." McDonald Texas Civil Practice, Section 10.25 at p. 57 (1983).

When plaintiff sues two or more defendants asserting that their separate acts contributed to an indivisible injury under circumstances making it impossible to separate and allocate the damages among the individual defendants, the defendants are jointly and severally liable for the entire damage, and a severance should not be ordered. **Riley v. Industrial Finance Service Co.**, 157 Tex. 306, 302 S.W.2d 652 (1957); **Landers v. East Texas Salt Water Disposal Co.**, 151 Tex. 251, 248 S.W.2d 731 (1952).

C. SAPCR Exceptions to Privileges

Of course, the reader is well familiar with the exceptions in the Texas Rules of Evidence to the Physician/Patient and Health Care Provider/Patient privileges otherwise existing.

This obviously may provide an infinitely valuable opportunity for discovery otherwise not available in only a tort action.

D. Prejudice Fact Finder Regarding Other Discretionary Issues

E. Concern for "Double-Dipping" on Disparate Division of Property

The practitioner should be careful under the circumstances of **Stafford v. Stafford**, **supra**, where the divorce has not been severed from the personal injury claim. In **Stafford**, the wife

complained of the trial court's 50/50 division of the community estate despite the considerable award for actual and punitive damages for the personal injury.

Attention is specifically drawn to the case of **Belz v. Belz**, 667 S.W.2d 240 (Tex. App.--Dallas 1984, writ ref'd n.r.e.). In **Belz**, the Court stated that while fraud may be used to justify either a disproportionate division of property or a judgment for damages as an independent cause of action between spouses, the application of both remedies constitutes an abuse of discretion as double recovery.

If other substantial bases for a disproportionate division of property do exist, consideration for severing may be desired without having the tort issues brought into the separately tried divorce action.

F. Exempt Property Considerations

Counsel for the tort action Plaintiff may well wish to avail his or her client of the opportunity to have the homestead, retirement accounts, and other types of exempt properties set aside to the Plaintiff recovering a judgment for tort damages against the Defendant who is receiving thoroughly identified non-exempt properties.

IX. TRIAL BY JURY OR TRIAL TO THE COURT

A. Are Divorce Judges Too "Numbed"?

Most experienced family law practitioners are well acquainted with the mental state which sometimes permeates the reasoning of experienced, "worn out" family law judges.

This mental state frequently tends to reduce any and all episodes of marital discord to the characterization referenced in **Murff v. Murff**, 615 S.W.2d 696 (Tex. 1981) and **Young v. Young**, 609 S.W.2d 758 (Tex. 1980) as "mere bickers, nags and pouts".

B. Are Judges Comparatively More Conservative Than Juries in Assessing Monetary Damages?

Counsel contemplating the decision as to whether a judge or jury would be more likely to award a greater monetary recovery would be well advised to first consult local experienced personal injury attorneys.

While most cases would suggest that a jury has a greater propensity for larger awards than a trial judge, particularly one well seasoned in hearing divorce "bickers, nags and pouts," issues of local preferring a trial to the court.

C. Prejudicing the Court Respecting Discretionary Issues

D. Buttressing/Criticizing Expert Psychological Testimony

X. THIRD PARTY PROCEDURE

Rule 37 of the Texas Rules of Civil Procedure provides as follows:

"Additional Parties: Before a case is called for trial, additional parties, necessary or proper parties to the suit, may be brought in, either by the plaintiff or the defendant, upon such terms as the court may prescribe; but not at a time nor in a manner to unreasonably delay the trial of the case."

Rule 38 of the Texas Rules of Civil Procedure provides as follows:

"Third-Party Practice: (a) When defendant may bring in third party. At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a citation and petition to be served upon a person not a party to the action who is or may be liable to him or to the plaintiff for all or part of the plaintiff's claim against him. The third-party plaintiff need not obtain leave to make the service if he files the third-party petition not later than thirty (30) days after he serves his original answer. Otherwise, he must obtain leave on motion upon notice to all parties to the action. The person served, hereinafter called the third-party defendant, shall make his defenses to the third-party defendant, shall make his defenses to the third-party plaintiff's claim under the rules applicable to the defendant, and his counterclaims against the third-party plaintiff's claim under the rules applicable to the defendant, and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 97. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his

defenses and his counter-claims and cross-claims. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or who may be liable to him or to the third-party plaintiff for all or part of the claim made in the action against the third-party defendant.

"(b) When plaintiff may bring in third party. When a counterclaim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.

"(c) This rule shall not be applied, in tort cases, so as to permit the joinder of a liability or indemnity insurance company, unless such company is by statute or contract liable to the person injured or damaged.

"(d) This rule shall not be applied so as to violate any venue statute, as venue would exist absent this rule."

Regarding suits where the plaintiff or the defendant desires to bring in a third party, McDonald Texas Civil Practice, Section 3.19.3 at p. 236 (1981) summarizes the law as follows:

It is now settled that "where two or more wrongdoers join to produce an indivisible injury, all the wrongdoers are jointly and severally liable to the person wronged for the entire damage suffered. The wronged person as plaintiff may sue one or more of the tort-feasors. If less than all tort-feasors are joined as defendants by plaintiff, then those joined may bring in the others." [**Riley v. Industrial Finance Service Co.**, 157 Tex. 306, 302 S.W.2d 652 (1957)] Joinder is proper where defendants, though acting independently, "joined in creating the same set of circumstances which produced a single and indivisible injury to the plaintiff which rendered it impossible to make an apportionment of the damages with reasonable certainty to the individual wrongdoers." [**Phillips v. Gulf and South American S. S. Co.**, 323 S.W.2d 631, 634 (Houston 1959 ER)]. The principle does not apply where plaintiff is contending that the separate acts of negligence by separate defendants on separate occasions months apart caused separate injuries with one indivisible result. [**Phillips v. Gulf and South American S.S. Co.**, **supra**]

McDonald Texas Civil Practice, Section 3.25 at pp. 253-4 (1981) further states:

In an action for damages based upon a tort, parties jointly interested may be persons to be joined if feasible but are not indispensable parties plaintiff. [authority cited] Joint

tortfeasors, being separately as well as jointly liable, are not event those to be joined if feasible. The injured party may sue one or all of them, and may recover a number of judgments, though of course he may have but one satisfaction. But where two or more parties are sued on the theory that they participated in a joint and common enterprise, which liability predicated upon the theory that, because of the community of interest and the equality of their right of control, the fault of each is imputable to all, all of the participants in such joint enterprise should at least be joined if feasible. [**Whitley v. King**, 227 S.W.2d 241 (Tex. Civ. App.--Waco 1950)]

Rule 51(a) of the Texas Rules of Civil Procedure provides the plaintiff with a broad guide to permissive joinder:

Joinder of Claims. The plaintiff in his petition or in a reply setting forth a counterclaim and the defendant in an answer setting forth a counterclaim may join either as independent or as alternate claims as many claims either legal or equitable or both as he may have against an opposing party. There may be a like joinder of claims when there are multiple parties if the requirements of Rules 39, 40, and 43 are satisfied. There may be a like joinder of cross claims or third-party claims if the requirements of Rules 38 and 97, respectively, are satisfied.

McDonald Texas Civil Practice, Section 2.16 at p. 181 (1981) states:

When an action involves a single plaintiff suing defendant (or plaintiffs or defendants or both joint interested in all the joined claims and hence treated as a unit) suing and sued in the same capacity, the rules impose no limit upon the number of claims based upon separate sets of operative facts which may be joined so long as the composite suit falls within the jurisdiction of the court. Misjoinder of actions here, assuming that the court has jurisdiction, is therefore impossible. And since separate claims as to which jurisdiction is fixed by the amount in controversy are aggregated and the total determines the jurisdiction, the plaintiff can join a heterogeneous aggregation of claims in a single action.

McDonald Texas Civil Practice, Section 3.16 at p. 229 (1981) states:

In dealing with questions of party joinder, three categories of parties may be distinguished:

A proper party is one whose interest in the subject matter in controversy or the relief sought is such that his nonjoinder does not affect the controversy as between those before the court. The plaintiff may elect to join him, but is not required to do so.

A person to be joined if feasible, formerly described as a necessary, conditionally necessary, or indispensable party, is one in whose absence complete relief cannot be accorded among those already parties, or who claims an interest relating to the subject of the action and is so situation that the disposition of the action in his absence may as a practical matter impair or impeded his ability to protect that interest or leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

An indispensable party is a person to be joined if feasible who cannot be joined and the court determines that in equity and good conscience that in his absence the action should be dismissed. ([for the above see Texas Rules of Civil Procedure 39(a) and (b)]).

McDonald Texas Civil Practice, Section 3.18 at p.231 (1981) states as follows:

Rule 40 follows without change Federal Rule 20, which in turn was the outgrowth of liberal rules found in a number of states, all which owed much to the English reforms of 1875. The theory is that questions of permissive party joinder shall be handled as a matter of trial convenience allowing litigants virtually unlimited freedom to bring controversies before the court so long as they are sufficiently interrelated to justified prima facie there consideration in a single action, and to leave to the judge, armed with the power to direct severances or separate hearings and trials when desirable, the regulation of the manner of actual trial.

XI. MISCELLANEOUS CONSIDERATIONS

A. When the Domestic Relations Court is County Court at Law

Of course, the interspousal tort action is subject to the dollar amount in controversy jurisdictional restrictions.

An action filed in county court wherein the amount in controversy exceeds the maximum jurisdictional amount must be dismissed even though otherwise properly joined with another action over which the court has jurisdiction.

Likewise, when the action has been brought in a statutory county court with domestic relations jurisdiction, an otherwise properly joined counterclaim will not be entertained if it puts in controversy an amount exceeding the maximum jurisdictional

limit of the court. Where the defendant's plea prays for a sum above the court's jurisdiction, the counterclaim should be dismissed. **Montgomery Elevator Co. v. Tarrant County**, 604 S.W.2d 363 (Tex. App.--Fort Worth 1980, writ ref'd n.r.e).

Original pleadings, whether an original pleading, counterclaim, cross-claim, or third party claim, in actions for unliquidated damages are no longer to state a specific dollar amount sought but are merely to state that the damages sought exceed the minimum jurisdictional limits of the court. Rule 47 T.R.C.P.

Accordingly, the Petitioner/Plaintiff is given the initial advantage in such cases, subject, of course, to local rules, of joining a substantial tort action with the divorce action in district court or of filing the divorce in statutory county court and the tort action in district court.

No provisions exist in the Rules of Civil Procedure for the transfer of a case from county court to district court in circumstances of concurrent jurisdiction. Unless there are provisions of the local rules otherwise applicable, the Respondent desiring a consolidation of the divorce and the tort action must file a divorce action in district court as well and request that the county court abate the divorce action there pending while awaiting a disposition by the district court.

Fortunately, however, the Texas Government Code provides for local rules allowing transfer between district courts and statutory county courts in cases of concurrent jurisdiction.

Tex. Government Code, Section 74.093 (1987) provides:

(a) The district and statutory county court judges in each county shall, by majority votes, adopt local rules of administration.

(b) The rules must provide for:

(1) assignment, docketing, transfer, and hearing of all cases, subject to jurisdictional limitations of the district courts and statutory county courts;
. . .

(d) Rules relating to the transfer of cases or proceedings shall not allow the transfer of cases from one court to another unless the cases are within the jurisdiction of the court to which it is transferred . . .

Tex. Government Code, Section 74.093 (1987) also provides:

(a) A district or statutory county court judge may hear and determine a matter pending in any district or statutory county court in the county regardless of whether the matter is preliminary or final or whether there is a judgment in the matter. The judge may sign a judgment or order in any of the courts regardless of whether the case is transferred . . .

(b) The judges shall try any case and hear any proceeding as assigned by the local administrative judge.

(c) The clerk shall file, docket, transfer, and assign the cases as directed by the local administrative judge in accordance with the local rules.

B. Non-Dischargeability of Certain Torts in Bankruptcy

While the Bankruptcy Code makes no distinction between actual versus punitive damages, Section 523(a)(6) of the Bankruptcy Code provides that the Debtor is not discharged for "willful or malicious injury by the Debtor to another entity or the property of another entity."

However, Section 507 of the Bankruptcy Code should be read to the extent that the claim while staying alive moves to Classification 7 which is at the end of the line.

C. Conflict of Laws Problems When Tort Occurs in Sister State

In tort cases, the law of the state where the tort occurs generally controls.

Of course, exceptions are created under certain circumstances where neither party is a resident of that state and no other substantial contact with the state exists.

However, in the domestic relations context, such torts will most frequently have occurred while the parties were actual residents of the sister state.

In **Robertson v. McKnight**, 609 S.W.2d 534 (Tex. 1980), a New Mexico couple were killed when their plane crashed in Texas. New Mexico law allowed one spouse to recover from the other injuries caused by negligence; however, the Texas doctrine of interspousal tort immunity then barred a suit by the wife's estate against the husband's estate for wrongful death.

The Texas Supreme Court reversed the trial court's finding that the Texas doctrine of interspousal tort immunity barred the suit. The Texas Supreme Court held that the conflict-of-laws rule to be applied in tort suits between members of the same family as the law of the state of residence of the parties, which was New Mexico. The Court specifically held that the conflict as to interspousal immunity between New Mexico and Texas law did not mean that the New Mexico and Texas law did not mean that the New Mexico rule was contrary to our public policy so that our courts would refuse to enforce it.

It should be noted that the statutory quasi-community property statute and the nonstatutory rights set forth in **Cameron v. Cameron**, 641 S.W.2d 210 (Tex. 1982) do not apply to torts committed in other states.

D. Stowers and Related Doctrines

In the event insurance coverage is available but in a limited amount, the Plaintiff should beware of the principles known in torts/insurance law as the "Stowers Doctrine."

When the litigation has the potential for damages being awarded in excess of the insurance policy limits, a duty arises between the insurance carrier and the insured Defendant which may inure to the Plaintiff's advantage, both for purposes of settlement and for purposes of actual recovery from the insurance company in excess of policy limits.

For an update on the Stowers and related doctrines, see the following cases:

1. **G. A. Stowers Furniture Co. v. American Indemnity Co.**, 15 S.W.2d 244 (Tex. Comm'n App. 1929, holding approved)--accept a reasonable offer.

2. **Allstate Ins. Co. v. Kelley**, 680 S.W.2d 595 (Tex. Civ. App.--Tyler 1984, writ ref'd n.r.e.)--accept a reasonable settlement offer timely.

3. **Ranger County Insurance Co. v. Guin**, 723 S.W.2d 656 (Tex. 1987)--insurer's duty to insured includes investigation, preparation for defense of the lawsuit, trial of the case, and reasonable attempts to settle (even without a complete release).

4. **Employers Casualty Company v. Tilley**, 496 S.W.2d 552 (Tex. 1973)--prevents the insurer in conflict of interest situations from asserting policy defenses including that of noncoverage or in some instances to create coverage by estoppel when in fact none existed.

5. **Arnold v. National County Fire Insurance Co.**, 725 S.W.2d 165 (Tex. 1987). **The Aetna Casualty & Surety Co. v. Marshall**, 699 S.W.2d 896 (Tex. Civ. App.--Houston [1st Dist.] 1985), aff'd on other grounds, 724 S.W.2d 770 (Tex. 1987)--duty of good faith and fair dealing in first party and workers' compensation cases.

6. **Aranda v. Insurance Company of North America, et al.**, 31 Tex. Sup. Ct. J. 23 (Mar 26, 1988). Worker's Compensation carriers give a duty of good faith and fair dealing to claimants and ordinary tort damages are recoverable for a breach of this duty,

XII. LIST OF CASES

PAGE

PAGE

PAGE

PAGE

PAGE

XIII. BIBLIOGRAPHY

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FORM HO-8
EFFECTIVE 07-01-87

SECTION II—LIABILITY SECTION

Subject to the provisions and conditions of the policy, and of this form and endorsements attached, the Company agrees with the Insured named on Page 1 as follows:

COVERAGE D—PERSONAL LIABILITY

To pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of bodily injury or property damage, and the Company shall defend any suit against the Insured alleging such bodily injury or property damage and seeking damages which are payable under the terms of this policy, even if any of the allegations of the suit are groundless, false or fraudulent; but the Company may make such investigation and settlement of any claim or suit as it deems expedient.

The Limit of Liability stated on Page 1 for Coverage D is the limit of the Company's liability for all damages, including damages for care and loss of services, as the result of any one occurrence.

To pay in addition to the applicable Limit of Liability for Coverage D:

a. all expenses incurred by the Company, all costs taxed against the Insured in any defended suit and all interest on the entire amount of any judgment therein which accrues after entry of the judgment and before the Company has paid or tendered or deposited in court that part of the judgment which does not exceed the limit of the Company's liability thereon;
b. premiums on appeal bonds required in any such suit, premiums on bonds to release attachments for an amount not in excess of the applicable limit of liability of this policy, but without any obligation to apply for or furnish any such bonds;
c. expenses incurred by the Insured for such immediate medical and surgical relief to others as shall be imperative at the time of the accident;
d. all reasonable expenses, other than loss of earnings, incurred by the Insured at the Company's request.

EXCLUSIONS—Coverage D shall not apply:

1. to any business pursuits of an Insured except activities therein which are ordinarily incidental to non-business pursuits;
2. to the rendering of any professional service or the omission thereof;
3. to any act or omission in connection with premises, other than as defined, which are owned, rented or controlled by an Insured, but this does not apply with respect to bodily injury to residence employee arising out of and in the course of his employment by the Insured;
4. a. to the ownership, maintenance, operation, use, loading or unloading of:
   (1) any aircraft; or
   (2) any motor vehicle owned or operated by or rented or loaned to any Insured; but this subdivision (2) does not apply to bodily injury or property damage occurring on the residence premises if the motor vehicle is not subject to motor vehicle registration because it is used exclusively on the residence premises or kept in dead storage on the residence premises; or
   (3) any recreational motor vehicle owned by any Insured, if the bodily injury or property damage occurs away from the residence premises; but this subdivision (3) does not apply to golf carts while used for golfing purposes.

   This exclusion does not apply to bodily injury to any residence employee arising out of and in the course of his employment by any Insured except while such employee is engaged in the operation or maintenance of aircraft;
   b. to bodily injury or property damage arising out of the ownership, maintenance, operation, use, loading or unloading of any watercraft:
   (1) owned by or rented to any Insured if the watercraft has inboard or inboard-outboard motor power of more than 50 horsepower or is a sailing vessel (with or without auxiliary power) 26 feet or more in overall length; or
   (2) powered by any outboard motor(s), singly or in combination of more than 25 total horsepower, if such outboard motor(s) is owned by any Insured at the inception of this policy and not endorsed hereon, unless the Insured reports in writing to this Company within 45 days after acquisition his intention to insure the outboard motor or combination of outboard motors, ownership of which was acquired prior to the policy term.

   This exclusion does not apply to (a) bodily injury or property damage occurring on the residence premises or (b) bodily injury to any residence employee arising out of and in the course of his employment by any Insured.
   c. To bodily injury or property damage arising out of:
   (1). The entrustment by any Insured to any person; or
   (2). The negligent supervision by any Insured of any person.

   With regard to the ownership, maintenance or use of any aircraft, watercraft or motor vehicle (or any other motorized land conveyance) which is not covered under Section II of this policy;
5. to bodily injury or property damage caused intentionally by or at the direction of the Insured;
6. to bodily injury to any person (a) if the Insured has in effect on the date of the occurence a policy providing workmen's compensation or occupational disease benefits therefor, or (b) if benefits therefor are in whole or in part either payable or required to be provided under any workmen's compensation or occupational disease law, but this part (b) does not apply with respect to Coverage D unless such benefits are payable or required to be provided by the Insured;
7. to liability assumed by the Insured under any contract or agreement but this exclusion does not apply to (1) any indemnity obligation assumed by the Insured under a written contract directly relating to the ownership, maintenance or use of the premises or (2) liability of others assumed by the Insured under any other written contract;
8. to property damage to property used by, rented to or in the care, custody or control of the Insured or property as to which the Insured for any purpose is exercising physical control, except that this exclusion shall not apply to liability which would be imposed upon the Insured, by common or statutory law in the absence of agreement by the Insured, for injury to or destruction of residential premises or house furnishings resulting from (a) fire, (b) explosion, or (c) smoke or smudge caused by sudden, unusual and faulty operation of any heating or cooking unit;
9. to sickness or disease of any residence employee unless prior to 36 months after the end of the policy period written claim is made or suit is brought against the Insured for damages because of such sickness or disease or death resulting therefrom.
10. to bodily injury or property damage arising out of the ownership, maintenance, operation, use, loading or unloading of any self propelled land vehicle while being used in any pre-arranged or organized racing, speed or demolition contest or in any stunting activity or in practice or preparation for any such contest or activity.
11. to bodily injury or property damage which arises out of the transmission of sickness or disease by an insured through sexual contact.

COVERAGE E—PERSONAL MEDICAL PAYMENTS

To pay all reasonable expenses incurred within one year from the date of accident for necessary medical, surgical, X-ray and dental services, including prosthetic devices, and necessary ambulance, hospital, professional nursing and funeral services, to or for each person who sustains bodily injury caused by accident:

1. while on the premises with the permission of an Insured;
2. while elsewhere if such bodily injury:
   a. arises out of the premises or a condition in the ways immediately adjoining;
   b. is caused by the activities of an Insured;
   c. is caused by the activities of or is sustained by a residence employee and arises out of and in the course of his employment by an Insured, or
   d. is caused by an animal owned by or in the care of an Insured.

The Limit of Liability stated on Page 1 for Coverage E as applicable to each person is the limit of the Company's liability for all expenses incurred by or on behalf of each person who sustains bodily injury, as the result of any one accident; subject to the above provision respecting each person, the total limit of the Company's liability for all expenses incurred by or on behalf of two or more persons who sustain bodily injury as a result of any one accident is $25,000.

EXCLUSIONS—Coverage E shall not apply to bodily injury:

1. of any person, other than a residence employee, if such person is regularly residing on the premises including any part rented to such person or to others, or is on the premises because of a business conducted thereon, or is injured by an accident arising out of such business; or
2. of any Insured with the meaning of parts (a) and (b) of the "Definition of Insured."

Exclusions 1 through 6, 10 and 11 which apply to Coverage D, shall also apply to Coverage E.

COVERAGE F—PHYSICAL DAMAGE TO PROPERTY OF OTHERS

To pay for loss of property of others caused by an Insured. "Loss" means damage or destruction but does not include disappearance, abstration or loss of use. The limit of the Company's liability for loss of property arising out of any one occurrence shall not exceed the actual cash value of the property at time of loss, nor what it would then cost to repair or replace the property with other of like kind and quality, nor in any event shall the Company's liability exceed the Limit of Liability shown on Page 1. The Company may pay for the loss in money or may repair or replace the property and may settle any claim for loss of property either with the Insured or the owner thereof. Any property so paid for or replaced shall, at the option of the Company, become the property of the Company. Payment hereunder shall not constitute an admission of liability of the Insured or, except hereunder, of the Company.

EXCLUSIONS—Coverage F shall not apply to:

1. loss arising out of the ownership, maintenance, operation, use, loading or unloading of any land motor vehicle, trailer or semi-trailer, farm machinery or equipment, aircraft or watercraft;
2. to loss of property owned by or rented to any Insured, any resident of the Named Insured's household or any tenant of the Insured;
3. loss caused intentionally by an Insured over the age of 12 years;
4. any business pursuits of an Insured or the rendering of any professional service or the omission thereof;
5. any act or omission in connection with premises other than as defined, which are owned, rented or controlled by an Insured.

APP. #1

TEXAS

STANDARD PROVISIONS FOR AUTOMOBILE POLICIES

[575. TEXAS PERSONAL AUTO POLICY—AMENDATORY ENDORSEMENT] [1]

[This endorsement forms a part of Policy No. _____ issued to _____

by the _____ at its Agency
(Name of Insurance Company)

located (city and state) _____ and is effective from _____
(12:01 A.M. Standard Time)

(The information above is required only when this endorsement is issued subsequent to preparation of the policy.)

This endorsement forms a part of the policy to which attached, effective from its date of issue unless otherwise stated herein.] [1]

[1. Part A—Liability Coverage—Exclusions, Paragraph C. is added as follows:][1]

C. We do not provide Liability Coverage for you or any **family member** for bodily injury to you or any **family member.**

[By _____ [1]
(Duly Authorized Representative)]

[FORM 575. TEXAS PERSONAL AUTO POLICY—AMENDATORY ENDORSEMENT
Texas Standard Automobile Endorsement
Prescribed May 1, 1987] [1]

Note 1: The provision of this endorsement may be overprinted on the Texas Personal Auto Policy or incorporated therein. In the event of the latter, matter in brackets is to be omitted.

Instruction

The provision of this endorsement must be made a part of all policies affording Personal Auto Liability

App. L

INTERSPOUSAL TORTS AND REMEDIES
[ACCOUNTABILITY: REDRESSING WRONGS/WITHSTANDING SCRUTINY]

JOHN F. NICHOLS
Nichols & Cole
440 Louisiana, Suite 1440
Drawer 149
Houston, Texas 77002-1690
(713) 227-7100

Presented to The
American Academy of Matrimonial Lawyers
@ The Westin Maui, Hawaii
March 17, 1988

TABLE OF CONTENTS

STRATEGIC CONSIDERATIONS IN SELECTING A PRODUCT THEORY

I. Why are we asking these questions?

A. Introduction

A "checkchart" within this paper attempts to summarize in practical form and substance, the answers to many questions about the strategy of choosing one product liability theory over another. The form is an expansion and updating of one suggested by former Chief Justice Pope in a 1983 article in TTLA's Forum. The checkchart is essentially a two dimensional checklist and should be used only as you would any other checklist. It is a side-by-side comparison of most of the major questions that occur in the preparation and trial of a product liability case. The columns correspond to a particular theory of product liability. The rows correspond to a particular issue that someone might need to consider in the case preparation. Notes to a particular box are contained in Appendix A and are identified by row and column number. For example, a note for the box in row 1, column 2 (concerning potential plaintiffs under a 402A design defect theory) would be found under note "1,2" in Appendix A. Similarly, a note to the box on the seventh row and sixth column (the causation standards under a negligence theory) would be found in Appendix A under note "7,6".

The check chart is intended to be a useful tool for the practicing lawyer and trial judge and the four pages are designed to be taped together into one larger chart. The next portion of this paper is a summary of some of he theoretical underpinnings of the chart. An understanding of these few theoretical points will hopefully, enhance the checkchart's utility without substantially increasing its riskiness.

CONSIDERATIONS	THEORIES				
	STRICT LIABILITY				
	402A			402B	Ultra Hazardous
	Manufacturing	Design	Marketing (warnings and instructions)	Misrepresentation	
Potential Plaintiffs	Purchaser User Bystander	same as Manufacturing	same as Manufacturing	Purchaser User (if rely)	
Potential Defendants	regular business, product (not service), public commerce, sellers and retailers (new or used), component part manufacturers and suppliers manufacturers and assemblers distributors and wholesalers lessors and bailors			Same as 402A	
Defendant's Responsibility	defective product unreasonably dangerous			representation; product failure; material fact; normal purchaser; justifiably influenced; reliance	
	consumer expectation; ordinary user; knowledge common to community.	consider utility of product and risk in use; crashworthiness	consumer expectation - adequate; catch attention; average understanding; extent and avoid		
Plaintiff's Responsibility (Defendant's Burden)	Must be more than failure to discover defect; ordinary prudence in same or similar circumstances.			ordinary prudence in same or similar circumstances	
Defendant's Rebuttal (Defenses and instructions)	substantial change, but for not foreseeable				
			clearly obvious; could not know when marketed; sophisticated intermediary		
	P's comparative negligence if not foreseeable misuse				

THEORIES						
NEGLIGENCE		WARRANTY/CONTRACT			DTPA	
Ordinary	Per se	Express	Implied			
			Merchant-ability	Fitness for a Particular Purpose	Laundry List	Warranty
anyone for whom duty can be articulated. At least includes same as 402A plus purchase from non-merchants		Same as 402A; privity of contract between P and supplier is not required. Merchantability does not include purchase from non-merchant. Difficult to conceive of bystander under express or particular purpose.			Buyer or trying to buy goods or services	
anyone for whom duty can be articulated. At least includes same as 402A plus non-merchants		Same as 402A; privity of contract between P and supplier is not required. Merchantability does not include non-merchants			Sellers including non-merchants	
failure to use ordinary prudence in same or similar circumstances	unexcused violation of government standard adopted by court	representation; part of basis of bargain; failure	unfit for ordinary purpose for which product is used	reason to know purpose; reason to know P relying on D's skill; unfit for particular purpose	17.46(b)(5)(7)(13)(19)(21)(23) [essentially representations]; (23) is like intentional failure to warn	Same as express or implied warranty
ordinary prudence in same or similar circumstances		ordinary prudence in same or similar circumstances			?	?
		affirmation of value of goods; sellers opinion of goods	Excluded or modified; not ordinary use		Responsibility of P and D not compared under 33.001 et seq. possibly compared purely under Duncan if based on warranty.	
comparative negligence		comparative negligence				

Discovery	No apparent differences except relevance				
sation	producing-effecient exciting or contributing cause of occurrence	producing-same except in crashworthiness use cause of injury	producing-same as manufacturing		
	Plaintiff's is proximate cause of occurrence or injury				
	Causation of injuries is compared in cases involving theory cases involving negligence only P recovers if less than or				
Compensatory Damages	Physical injury or death and associated losses. No economic losses for product.				
Exemplary damages	Actual malice or conscious indifference to limited to greater of 4 times actuals or No prejudgment interest				
idence	TRE 407(a) subsequent remedial measures admissible; 407(b) notification of defect admissible against manufacturer on issue of defect				
	Prior similar incidents admissible;				
Statute of Limitations	2 years from time cause of action arises; discovery rule tolls until P had reason to know.				
Settlement	usually easier to settle	involves whole product line, thus more difficult to settle			
	Defendants election for settlement credits under 33.012 and 33.014.				
Joint and Several	joint and several d>20% or [P=0 and d>10%] Exception for toxic tort and hazardous discharge				
tribution	No right against settlor; jury figures % of responsibility for injury for everyone				
Miscellaneous					

Proximate - natural and continuous, pro- es, without which; . .son using ordinary care would have reasonably forseen same or similar event occurrence in question.		Proximate, occurrence	Proximate, occurrence	Proximate, occurrence	Producing, damages Perhaps can argue reliance as part of causation	Producing damages
ether than negligence		P recovers if less than 60%. In equal to 50%.			?	?
ny actual damages		Economic losses; loss of product only; reasonable liquidation; consequential damages includes p.i.; limitation for p.i. with consumer goods (personal, family or household purposes) is unconscionable			any actual damages	
rights, $200,000	safety or welfare of			Plaintiff	Knowing violation (can be inferred) 2X actuals plus attorney's fees	
407(a) subsequent remedial measures admissible only on ownership, control asibility or purpose other than culpable conduct						
government		and	industry	standards	admissible	
ame as 02A	Same as 402A	4 years from date product is delivered				2 years from deceptive act; discovery rule; 180 day extension
					33.012 and 33.014 regarding selection of credits for settlement do not apply	
					?	?
d greater than 20% & 's negligence greater than P's] or P=0 and d>10%]		Same as 402A			33.013, does not apply	
					33.015 and 33.016 do not apply	
		May require notice to seller			30 day notice letter before suit	

A P P E N D I X A

APPENDIX A

NOTES TO CHART

Row, Column	
1,1 thru 1,3	Turner v. General Motors Corp., 584 S.W.2d 844 (Tex. 1979)
1,3	Need not be actual buyer. McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787 (Tex. 1967) Repairman. Hamilton v.Motor Coach Industries, Inc., 569 S.W.2d 571 (Tex. App. -- Texarkana 1978), no writ) Bystander - Darryl v. Ford Motor Co., 440 S.W.2d 630 (Tex. 1969) Bystander - foreseeability that a particular class or group of persons may be injured. Colvin v. Red Steel Co., 682 S.W.2d 243 (Tex. 1985)
1,8 thru 1,10	Privity not required Garcia v. Texas Instruments, Inc., 610 S.W.2d 456 (Tex. 1980)
1,8 thru 1,10	UCC 2.103(a)(1)
1,11 thru 1,12	DTPA 17.45(4)
2,1 thru 2,3	Potential defendants -- entities integral to distributive or marketing chain Rourke v. Garza, 511 S.W.2d 331 (Tex. App. -- Houston [1st Dist.] 1974), aff'd, 530 S.W.2d 794 (Tex. 1975) Defendant must still be in the business of introducing products into the channels of commerce for use by the public. Armstrong Rubber Co. v. Urguidez, 570 S.W.2d 374 (Tex. 1978). But, see, Houston Lighting & Power Co. v. Reynolds, 712 S.W.2d 761 (Tex. App. -- Houston [1st Dist.] 1986, writ pending) Potential sale is sufficient. Davis v. Gibson Products Co., 505 S.W.2d 682 (Tex. App. -- San Antonio 1973, writ ref'd n.r.e), per curiam, 513 S.W.2d 4 (Tex. 1974) Used products -- McLain v. Hodge, 474 S.W.2d 772 (Tex. App. -- Waco 1971, writ ref'd n.r.e)
2,8 thru 2,10	UCC 2.103(a)(4)
2,11 thru 2,12	DTPA 17.50(a)(1) and (2), and 17.45(3)

3,1 In the usual manufacturing case, the defect and its unreasonable danger seem to be two separate elements and the defect must make the product unreasonably dangerous. Defect is usually proved by manufacturer's specifications. Shamrock Fuel & Oil Sales Inc. v. Tunks, 416 S.W.2d 779 (Tex. 1967); Darryl v. Ford Motor Co., 440 S.W.2d 630 (Tex. 1969)

3,1 thru 3,3 Restatement 2d, Torts Section 402A, comment i(1965)

3,2 Design defects include those designs that enhance the user's injury even if they did not cause the occurrence. Turner v. General Motors Corp., 584 S.W.2d 844 (Tex. 1979)

3,2 Turner v. General Motors Corp., 584 S.W.2d 844 (Tex. 1979)
Defective design -- consider utility of product and risk involved with its use.

3,2 and 3,3 In both design and marketing cases (unlike manufacturing), proof of defect is proof of unreasonably dangerous.

3,3 Bituminous Casualty Corp. v. Black and Decker Manufacturing Co., 518 S.W.2d 868 (Tex. App. -- Dallas 1974, writ ref'd n.r.e.)

3,4 Crocker v. Winthrop Laboratories, 514 S.W.2d 429 (Tex. 1974)

3,6 See Appendix B
Examples of negligence
1) Company failed to establish safety program
2) Company failed to provide adequate test procedures (e.g., too few products tested, too few tests conducted, product not tested with various accessories which were included in the product offering).
3) Products tested poorly in comparison with product lines offered by competitors.
4) Product test information not adequately compiled so as to provide useful information to evaluate further offerings of the product which might alter the operational characteristics.
5) Lack of organized or definite procedure of fielding customer complaints (i.e., receiving them)
6) Failure to establish an adequate procedure for responding to customer complaints.
7) Lack of adequate program for field testing

or evaluation of the product under actual operational conditions.

8) Knowledge of high accident or failure rate for the product.

9) Failure to determine the existence of a high accident or failure rate or high frequency of consumer complaints.

10) Lack of adequate warnings for known conditions.

11) Lack of adequate instructions on the use of the product.

12) Lack of adequate instructions on the maintenance of the product.

13) Providing optional safety equipment without making clear and appropriate recommendations.

14) Failure to establish an adequate program of quality control.

15) Variance of product from published manufacturer's specifications.

16) Failure to adequately and clearly communicate operating and safety warnings and instructions.

17) False or misleading advertising and product claims:
   (a) Promotional pictures delete safety equipment
   (b) Promotional pictures depict machine operating under unrealistic conditions.

18) Variances between manufacturer's specifications and maintenance specifications.

3,7 See Appendix C

3,8 UCC 2.313

3,9 UCC 2.314

Goods to be merchantable must be at least such as

(1) pass without objection in the trade under the contract description; and

(2) in the case of fungible goods, are in fair average quality within the description; and

(3) are fit for the ordinary purposes for which such goods are used; and

(4) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

(5) are adequately contained, packaged, and labeled as the agreement may require; and

(6) conform to the promises or affirmations of fact made on the container or label if any.

3,10 UCC 2.315

3,11 DTPTA 17.46(b) and 17.50(a)(1)
Except as provided in Subsection(d) of this section the term "false, misleading, or deceptive acts or practices" includes, but is not limited to, the following acts:

(5) representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he does not;

(7) representing that goods or services are of a particular standard quality, or grade, or that goods are of a particular style or model, if the are of another;

(13) knowingly making false or misleading statements of fact concerning the need for parts, replacement, or repair service;

(19) representing that a guarantee or warranty confers or involves rights or remedies which it does not have or involve, provided however, that nothing in this subchapter shall be construed to expand the implied warranty of merchantability as defined in Sections 2.314 through 2.318 of the Business & Commerce Code to involve obligations in excess of those which are appropriate to the goods;

(21) representing that work or services have been performed on, or parts replaced in, goods when the work or services were not performed or the parts replaced; and

(23) the failure to disclose information concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed.

3,12 DTPA 17.50(a)(2)

4,1 thru 4,10 Duncan v. Cessna Aircraft Co., 665 S.W.2d 414 (Tex. 1984)

5,9 and 10 UCC 2.316 and 2.317

7,7 Forseeability much easier as a practical matter because usually the adopted standard has much evidence that type of harm was expected
Restatement 2nd, Tort Sections 285, 286

Guidelines for court to adopt standard

1. protection of class to which plaintiff belongs
2. protection of interest which has been invaded
3. protection of the same interest against the kind of harm that took place
4. protection of the interest against the particular hazard from which the harm resulted.

Rudes v. Gottschalk, 324 S.W.2d 491 (Tex. 1973)
Impson v. Structural Metals, Inc., 487 S.W.2d 694 (Tex. 1972)
Southern Pac. Co. v. Castro, 493 S.W.2d 491 (Tex. 1973)
Missouri Pac. R.R. Co. v. American Statesman, 552 S.W.2d 99 (Tex. 1977)
Restatement 2nd, Torts Sections 288A
General Categories of excuse:

1. incapacity
2. reasonably unaware of non-compliance
3. inability to comply after reasonable diligence
4. emergency
5. compliance would involve greater risk of harm to actor or others.

8,8 — UCC 2.718 and 2.719(c) together with 9.109

9,1 thru 9,10 — Civ. Practice and Remedies Code 41.001(5) and (6), and 41.007 and 41.006

9,8 thru 9,10 — Economic losses -- Nobility Homes of Texas, Inc. v. Shivers, 557 S.W.2d 77 (Tex. 1977)
Loss of Product only -- Mid-Continent Aircraft Corp. v. Curry County Spraying Service Inc., 572 S.W.2d 308 (Tex. 1978)
Mixed with collateral property or personal injury then all theories available Garcia v. Texas Instruments, Inc., 610 S.W.2d 456 (Tex. 1980)

10,3 — may not be applicable in warning