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Non-Actor Liability For Sexual Assaults in Texas and the Effect of Insurance on Recovery

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NON-ACTOR LIABILITY FOR SEXUAL ASSAULTS IN TEXAS AND THE EFFECT OF INSURANCE ON RECOVERY

JANET K. COLANERI† & BOBBI REILLY‡

INTRODUCTION	280
I. THEORIES OF RECOVERY	282
A. <i>Negligence</i>	282
1. Duty	283
a. <i>Voluntary Assumption</i>	285
b. <i>Implied Contract</i>	288
c. <i>Special Relationships</i>	291
i. Employer/Employee	291
ii. School Official/Student	294
iii. Doctor/Patient	295
2. Breach / Causation	296
B. <i>Negligent Invasion of Privacy</i>	298
C. <i>Breach of Warranty</i>	299
D. <i>Statutory Violations</i>	300
1. Texas Deceptive Trade Practices Act	301
2. Texas Family Code	302
3. Texas Property Code	304
E. <i>Common Law Defenses</i>	304
1. Statute of Limitations	304
2. The Discovery Rule	305
II. INSURANCE COVERAGE AND ITS LIMITATIONS	307
A. <i>Policy Provisions</i>	308
B. <i>The Inferred Intent Doctrine</i>	312
C. <i>The Complaint Allegation Rule</i>	314
CONCLUSION	315

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INTRODUCTION

Legal scholars teach us that contemporary tort law attempts to strike a balance between society's interest in commerce and an individual's interest in obtaining compensation for injuries. However, the practical world often demonstrates that this premise is not so axiomatic. The difficulty in achieving this balance is perhaps most apparent when sexual assault victims attempt to hold property and business owners civilly liable for the criminal acts of third parties.

During the past decade, Texas courts have continually struggled with the scope of liability in these circumstances. Until recently, the scope of such liability was expanding; however, in the past several years, the Texas Supreme Court has taken appropriate steps to limit the prior trend toward ever-broadening liability against property and business owners for sexual assaults committed by third party perpetrators.

It is difficult to justify placing the burden of compensating sexual assault victims on property and business owners, or their insurance companies, for activities over which they have little or no control. The difficulty in determining whether liability exists in these circumstances involves two important policy considerations: deterrence of wrongful behavior and compensation for injury. These authors do not dispute that rapists and pedophiles should be civilly, as well as criminally, liable for their heinous acts. However, the issue becomes more complicated when these individuals are not the parties involved in the litigation resulting from their wrongful behavior.

Generally, property and business owners do not have a duty to warn or protect individuals from criminal acts committed by others.¹ Until recently, Texas courts were increasingly imposing liability upon commercial and residential property owners for sexual assaults by third parties occurring on or near their property.² The practical result was that insurance companies burdened with these increased risks were forced to pass them on to the public in the form of higher premiums.

One commentator characterizes this growth in tort liability as "a drastic metamorphosis."³ Today, sexual assault victims seek recovery

1. W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* 201 (5th ed. 1984) ("Under all ordinary and normal circumstances . . . the actor may reasonably proceed upon the assumption that others will obey the criminal law.").

2. See, e.g., *Berry Property Management v. Bliskey*, 850 S.W.2d 644 (Tex. App.—Corpus Christi 1993, writ dism'd by agr.); *Blaustein v. Gilbert-Dallas Co.*, 749 S.W.2d 633 (Tex. App.—Eastland 1988, no writ); *Allright Inc. v. Pearson*, 711 S.W.2d 686 (Tex. App.—Houston [1st Dist.] 1988), *aff'd in part, rev'd in part*, 735 S.W.2d 240 (Tex. 1987); *Morris v. Barnette*, 535 S.W.2d 648 (Tex. Civ. App.—Texarkana 1977, writ ref'd n.r.e.).

3. B.A. Glesner, *Landlords as Cops: Tort, Nuisance & Forfeiture Standards Imposing Liability on Landlords for Crime on the Premises*, 42 CASE W. RES. L. REV. 679, 684 (1992).

under all types of insurance policies: comprehensive, general liability, commercial, homeowner, and professional liability, as well as educator, day care, and foster care liability.⁴ Moreover, business owners, commercial property owners, homeowners, health care providers, day care providers, school employees, law enforcement officers, and members of the clergy are increasingly finding themselves the objects of sexual assault claims resulting from the despicable acts of others.⁵

4. David S. Florig, *Insurance Coverage for Sexual Abuse or Molestation*, 30 *TORT & INS. L.J.* 699, 699 (Spring 1995).

5. See, e.g., *Berry Property Management, Inc. v. Bliskey*, 850 S.W.2d 644 (Tex. App.—Corpus Christi 1993, writ dismissed by agr.) (resident of a townhome brought a negligence action against a property manager relating to a sexual assault); *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546 (Tex. 1985) (owners and managers of an apartment building where a minor was raped were sued in negligence for alleged failure to keep the vacant building secure to prevent unauthorized entry); *Benser v. Johnson*, 763 S.W.2d 793 (Tex. App.—Dallas 1988, writ denied) (landlord refused to replace broken window locks and was sued in negligence by a tenant who was raped by an unknown intruder entering through the window); *Blaustein v. Gilbert-Dallas Co.*, 749 S.W.2d 633 (Tex. App.—Eastland 1988, no writ) (landlord sued in negligence by a tenant who was raped by an unidentified assailant entering her apartment with a key, after the apartment manager refused to change the locks); *Vineyard v. Kraft*, 828 S.W.2d 248 (Tex. App.—Houston [14th Dist.] 1992, writ denied) (doctor sued for intentional infliction of emotional harm after misdiagnosing alleged sexual abuse); *Bembenista v. United States*, 866 F.2d 493 (D.C. Cir. 1989) (patient at an Army medical center brought a negligence action under the Federal Torts Claims Act for sexual molestation committed by a medical technician); *Larson v. Miller*, 55 F.3d 1343 (8th Cir. 1995) (school bus driver accused of sexually assaulting a handicapped student); *Martin v. United States*, 984 F.2d 1033 (9th Cir. 1993) (family of a child who was sexually assaulted after being abducted from a government-operated day care center brought an action against the government for negligent infliction of emotional distress); *State Mut. Ins. Co. v. Russell*, 462 N.W.2d 785 (Mich. Ct. App. 1990) (husband of an owner of a licensed in-home day care center accused of sexually assaulting a minor child using the child care service); *Doe v. United States*, 976 F.2d 1071 (7th Cir. 1992) (parents sued under the Federal Torts Claims Act for the sexual abuse of two minor children that occurred at a government-operated day care center); *Doe v. United States*, 838 F.2d 220 (7th Cir. 1988) (parents brought negligence action under the Federal Torts Claims Act for sexual molestation of children occurring at an Air Force base day care center); *Young v. Austin Indep. Sch. Dist.*, 885 F. Supp. 972 (W.D. Tex. 1995) (student sexually assaulted by other students on school property brought a civil rights claim against the school district); *Walton v. Alexander*, 44 F.3d 1297 (5th Cir. 1995) (resident of a state school sued the superintendent for failing to protect the resident from a sexual assault committed by a classmate); *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443 (5th Cir. 1994) (high school student sued the school district, the school superintendent, and the principal for an act of sexual molestation committed by a teacher); *McLaren v. Imperial Casualty and Indem. Co.*, 767 F. Supp. 1364 (N.D. Tex. 1991) (police officer accused of sexual assault after stopping a motorist for a traffic infraction); *Pfeifer v. Sentry Ins.*, 745 F. Supp. 1434 (E.D. Wis. 1990) (police officer accused of sexual assault after stopping motorist); *Applewhite v. City of Baton Rouge*, 380 So. 2d 119 (La. Ct. App. 1979) (police officer and a corrections officer were accused of sexually assaulting a pedestrian); *Maryland Casualty Co. v. Havey*, 887 F. Supp. 195 (C.D. Ill. 1995) (insurer of diocese sought a declaratory judgment that it had no duty to defend a priest accused of sexually abusing minor parishioners); *Sanchez v. Archdiocese of San Antonio*, 873 S.W.2d 87 (Tex. App.—San Antonio 1994, writ denied) (former parochial school student brought a sexual abuse action against a Catholic church, priests, and nuns).

Part I of this article discusses the theories of recovery relied upon by sexual assault victims in civil proceedings and provides a survey of related Texas cases. This section specifically examines duty, breach, causation, and foreseeability as they relate to negligence, as well as other common law and statutory theories. Part II discusses insurance recovery for sexual assaults, and the manner in which this body of law has evolved.

I. THEORIES OF RECOVERY

In Texas, when seeking to impose liability on property and business owners for sexual assaults committed by others, victims rely upon a number of theories, including negligence, breach of warranty, and statutory violations. Until the 1980's, it was uncommon for individuals and businesses to be civilly sued as a result of sexual assaults committed by third party perpetrators. The present trend in Texas is to limit liability for non-actor business and property owners. Today, most civil sexual assault cases involve one of two situations: sexual assaults occurring in apartment complexes or abandoned property, in which case the plaintiffs are seeking recovery from property owners for the criminal conduct of third party perpetrators, or sexual molestation of children occurring at a residence or place of business. Currently, Texas courts, particularly the Texas Supreme Court, are becoming less inclined to hold individuals and organizations liable for third party criminal conduct.⁶

A. Negligence

One legal theory under which sexual assault victims may recover from business and property owners is *negligence*. Under traditional common law negligence, plaintiffs must prove four elements: *duty*, *breach of duty*, *proximate causation*, and *damages*.⁷ Property and business owners claim they should not be held liable in negligence for sexual assaults committed by third parties. Today, after more than a decade of expanding the scope of such liability, beginning with *Nixon v. Mr. Property Management Co.*,⁸ Texas courts have begun to limit liability in these circumstances.

6. See, e.g., *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 549 (Tex. 1985); *Blaustein v. Gilbert-Dallas Co.*, 749 S.W.2d 633, 634 (Tex. App.—Eastland 1988, no writ); *Castillo v. Sears, Roebuck & Co.*, 663 S.W.2d 60, 66 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.).

7. KEETON, *supra* note 1, at 164-65.

8. 690 S.W.2d 546 (Tex. 1985); see also *Blaustein v. Gilbert-Dallas Co.*, 749 S.W.2d 633 (Tex. App.—Eastland 1988, no writ).

1. Duty

A *duty* is a “legally enforceable obligation to comply with a certain standard of conduct.”⁹ As a general rule, property and business owners do not have a duty to protect others from the criminal acts of third parties.¹⁰ “Early common law bestowed immunity on landlords for the condition of their premises based on the rationale that the landlord-tenant relationship was considered to be one of strangers, a relationship entailing no legal duty of protection.”¹¹

Throughout this century, courts have created exceptions to this traditional no-duty rule by imposing liability upon property and business owners for failing to disclose known latent defects,¹² for failing to exercise reasonable care in making repairs after assuming a duty to act,¹³ and for failing to maintain common areas under a landlord’s control.¹⁴ Today, in Texas, if a business or property owner creates or ignores a dangerous situation, he has a duty to warn or prevent injury if it appears to a reasonably diligent person that others may be injured.¹⁵ The Texas Supreme Court has stated: “[T]he common law recognizes the duty to take affirmative action to control or avoid increasing the danger from another’s conduct which the actor has at least partially created.”¹⁶

In *Nixon v. Mr. Property Management Co.*,¹⁷ the inquiry was whether an apartment owner had a duty to protect an injured child who had been raped on the premises, but who did not live on the apartment owner’s property.¹⁸ Although criminal conduct of a third party is generally a superseding cause that relieves a property owner

9. *Wyatt v. Kroger Co.*, 891 S.W.2d 749, 751 (Tex. App.—Fort Worth 1994, writ denied); see also KEETON, *supra* note 1, § 53 at 356.

10. See, e.g., *El Chico Corp., v. Poole*, 732 S.W.2d 306, 309 (Tex. 1987) (at common law a vendor of alcohol was not liable for a patron’s intoxication that resulted in injury to a third party); *DeLuna v. Guynes Printing Co. of Texas*, 884 S.W.2d 206, 208 (Tex. App.—El Paso 1994, writ denied) (stating the general rule that there is no duty to control the conduct of third persons); *Washington v. RTC*, 68 F.3d 935, 938 (5th Cir. 1995) (stating the general rule that a landowner does not have a duty to prevent criminal acts committed by third parties acting outside his supervision and control).

11. GLESNER, *supra* note 3, at 685; see also *Divines v. Dickinson*, 174 N.W. 8, 9 (Iowa 1919) (holding that in the absence of an agreement, a landlord has no duty to keep the premises in a safe condition).

12. *Marsh v. Bliss Realty, Inc.*, 195 A.2d 331, 333 (R.I. 1963) (holding a landlord liable for failing to disclose a known latent defect which proximately causes a tenant’s injury).

13. *Damron v. C.R. Anthony Co.*, 586 S.W.2d 907, 913 (Tex. App.—Amarillo 1979, no writ) (holding a landlord liable for failing to exercise reasonable care in making repairs whether a duty arises through contract or through voluntary assumption of performance).

14. KEETON, *supra* note 1, § 63 at 440.

15. *Morris v. Barnette*, 553 S.W.2d 648, 650 (Tex. Civ. App.—Texarkana 1977, writ ref’d n.r.e.).

16. *El Chico Corp., v. Poole*, 732 S.W.2d 306, 312 (Tex. 1987).

17. 690 S.W.2d 546 (Tex. 1985).

18. *Id.* at 548.

of liability, the Texas Supreme Court noted that because there had been previous crimes in the area, the property owner's negligence was not excused when the criminal conduct was foreseeable.¹⁹ The court held the property owner had such a duty under a city ordinance,²⁰ concluding that a reasonable inference existed that "but for [defendant's] failure to comply with the ordinance regarding maintenance of its apartment complex, this crime would have never taken place."²¹ *Nixon* marked the beginning of a rapid expansion of property and business owner liability in these circumstances.

The latest in this line of cases is *Barefield v. City of Houston*.²² In *Barefield*, the plaintiffs sued a concert promoter, a security company, and the City of Houston for injuries sustained in a criminal assault on a public sidewalk after leaving a concert.²³ The trial court rendered summary judgment in favor of all three defendants.²⁴ The Fourteenth Court of Appeals affirmed, and held the defendants had no duty to prevent criminal activities by third parties over whom they had no control.²⁵ While this case may appear to be a refreshing departure from *Nixon* and its progeny, it would be a mistake to regard it in this manner. Rather, the decision turned upon what was missing from the summary judgment record:

Appellants claim . . . [the promoter] had a duty to warn or protect appellants from the attackers because . . . [the promoter] had knowledge of criminal assaults occurring at other concerts held at the Coliseum. There was no summary judgment proof that any alleged prior incidents occurred at . . . [the promoter's] concerts. There was no summary judgment proof that . . . [the promoter] knew or should have known of potential criminal attacks occurring outside the Coliseum. The general knowledge of criminal activity in the Houston downtown area is not enough to raise a fact issue that the confrontation between appellants and the group of attackers was foreseeable.²⁶

From this statement, it may be inferred that inclusion of prior notice in the summary judgment record would have yielded a different result. The *Barefield* court stated the duty in the alternative: Before a defendant may be held to a duty of protection from the criminal acts of

19. *Id.* at 550; see also *Old v. Lefmark Management Co.*, 908 S.W.2d 16 (Tex. App.—Houston [1st Dist.] 1995, writ filed), where the First District Court of Appeals in Houston also held a property manager has a duty to disclose an area's crime rate. *Id.* at 20. This could be interpreted as a further step toward imposing what arguably amounts to strict liability upon property owners for crimes committed on their property.

20. *Nixon*, 690 S.W.2d at 549.

21. *Id.*

22. 846 S.W.2d 399 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

23. *Id.* at 402.

24. *Id.*

25. *Id.* at 406.

26. *Id.* at 403.

third parties, that defendant "must have the power of control over the places where the criminal acts were committed, or [the defendant] must reasonably foresee the criminal conduct."²⁷

Texas courts have used a *risk-utility* balancing test²⁸ to determine when a property or business owner owes a duty to sexual assault victims. Recently, the Fifth Circuit Court of Appeals, interpreting Texas law, held: "Texas courts weigh risk, foreseeability, and likelihood of injury against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury and the consequences of placing that burden on the defendant."²⁹ As a result, Texas courts have found duties arising through voluntary assumption,³⁰ implied contract,³¹ or due to the existence of a special relationship.³²

a. *Voluntary Assumption*

Under a *voluntary assumption* theory, duties arise if a person voluntarily assumes an undertaking.³³ "Voluntary assumption may occur through actions designed to provide security measures, through oral statements or promises or through express lease terms."³⁴ Moreover, liability may attach if a defendant undertakes such a responsibility, performs in a negligent manner, and an individual relying on that performance is injured. The Restatement (Second) of Torts states:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

(a) his failure to exercise such care increases the risk of such harm, or

27. *Id.* at 404.

28. *Berry Property Management v. Bliskey*, 850 S.W.2d 644, 654 (Tex. App.—Corpus Christi 1993, writ *dism'd* by *agr.*); *see also* *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990); *see also* KEETON, *supra* note 1, § 31 at 171 (stating some courts use a risk-utility balancing test).

29. *Washington v. RTC*, 68 F.3d 935, 938 (5th Cir. 1995).

30. *Blaustein v. Gilbert-Dallas Co.*, 749 S.W.2d 633 (Tex. App.—Eastland 1988, no writ).

31. *See, e.g.,* *Butcher v. Scott*, 906 S.W.2d 14 (Tex. 1995); *Cain v. Cain*, 870 S.W.2d 676 (Tex. App.—Houston [1st Dist.] 1994, no writ).

32. *See, e.g.,* *Akins v. Estes*, 885 S.W.2d 35 (Tex. App.—Amarillo 1994, writ granted); *DeLuna v. Guynes Printing Co. of Texas*, 884 S.W.2d 206 (Tex. App.—El Paso 1994, writ denied).

33. *See, e.g.,* *Damron v. C.R. Anthony Co.*, 586 S.W.2d 907 (Tex. App.—Amarillo 1979, no writ); *Morris v. Barnette*, 553 S.W.2d 648 (Tex. Civ. App.—Texarkana 1977, writ *ref'd n.r.e.*). Justice Cardozo stated, "It is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all." *H.R. Moch Co. v. Rensselaer Water Co.*, 159 N.E. 896, 898 (N.Y. 1928).

34. GLESNER, *supra* note 3, at 696.

(b) the harm is suffered because of the other's reliance upon the undertaking.³⁵

In *Morris v. Barnette*,³⁶ the Texarkana Court of Appeals examined whether a washateria operator should be held liable for a criminal sexual assault committed by a third party.³⁷ In *Morris*, the plaintiff was sexually assaulted at an all-night washateria and sued the operator for negligence.³⁸ The plaintiff alleged that the defendant failed to warn its patrons of danger, and failed to take necessary security precautions.³⁹ The *Morris* court appeared to impose a general duty upon the defendant to be the insurer of patron safety:

[T]he operator of a washateria business who, by reason of location, mode of doing business, or observation or past experience, should reasonably anticipate criminal conduct on the part of third persons, either generally or at some particular time, has a duty to take precautions against it and to provide an effective warning or a reasonably sufficient number of servants to afford reasonable protection to invitees on the premises.⁴⁰

Notwithstanding this broadly stated characterization of the defendant's duty, the court remanded the case for determination of whether the defendant should have reasonably anticipated the criminal activity.⁴¹

In another premises liability case, the First District Court of Appeals in Houston addressed the issue of voluntary assumption of duty arising through affirmative conduct. In *Allright Inc. v. Pearson*,⁴² an unknown assailant robbed a patron in an unsecured parking garage.⁴³ The garage was located in a high-crime area with a posted sign requiring patrons to pay an attendant.⁴⁴ The plaintiff stated that she understood from a conversation with the defendant's manager that an attendant would be on duty during all hours of operation.⁴⁵ Further, the plaintiff argued, due to the presence of the sign and her conversation, it was reasonable to infer that an attendant was present during all hours of operation.⁴⁶

The trial court agreed and found the defendant negligent in failing to provide adequate security, in failing to provide a safe and secure

35. RESTATEMENT (SECOND) OF TORTS § 323 (1965).

36. 553 S.W.2d 648 (Tex. Civ. App.—Texarkana 1977, writ ref'd n.r.e.).

37. *Id.* at 649.

38. *Id.*

39. *Id.*

40. *Id.* at 650.

41. *Id.* at 650-51.

42. 711 S.W.2d 686 (Tex. App.—Houston [1st Dist.] 1986), *aff'd in part, rev'd in part*, 735 S.W.2d 240 (Tex. 1987).

43. *Id.* at 691.

44. *Id.* at 692.

45. *Id.* at 691.

46. *Id.*

place for the plaintiff to park her car, and in failing to warn the plaintiff that security was not provided at all hours of the day.⁴⁷ On appeal, the defendant asserted he did not owe the plaintiff a duty to warn of the lack of security, or to provide security.⁴⁸ The court concluded that the absence of previous similar occurrences was not dispositive on the issue of foreseeability or duty.⁴⁹ The court of appeals disagreed and held that the defendant did have such a duty, which was breached by displaying a conscious indifference to the welfare of his customers, stating:

The operator of a premises has a duty to an invitee to exercise ordinary care to keep the premises in a reasonably safe condition so that the invitee will not be injured. This includes the duty to inspect the premises to discover dangerous conditions. The operator of a premises is charged with knowledge of any dangerous condition that a reasonable inspection would have revealed, if a reasonable prudent person should have foreseen a probability that the condition would result in injury to another.⁵⁰

In *Blaustein v. Gilbert-Dallas Co.*,⁵¹ the Eastland Court of Appeals found that breach of an express contract provision may give rise to a negligence claim if the risk of injury is foreseeable.⁵² In *Blaustein*, a tenant in an apartment complex was raped by an unknown assailant who used a key to gain entry to her apartment.⁵³ An express provision in the plaintiff's lease required the landlord to change her lock upon request, but he refused to comply.⁵⁴ The trial court granted summary judgment in favor of the landlord, but the Eastland Court of Appeals reversed, holding that a lease provision which required the landlord to change the locks upon request constituted an assumption of the burden to provide security sufficient to establish a duty.⁵⁵ The landlord, however, argued that the plaintiff's rape was an unforeseeable result of his failure to change the lock.⁵⁶ The Eastland court disagreed, defining foreseeability more broadly: "The test for foreseeability is whether a person of ordinary intelligence and prudence should anticipate the danger to others created by his negligent act even though it is not required that he anticipate exactly how injuries might arise."⁵⁷ Thus, the court remanded the case to determine

47. *Id.* at 688.

48. *Id.* at 689.

49. *Id.* at 690.

50. *Id.* at 689 (citation omitted).

51. 749 S.W.2d 633 (Tex. App.—Eastland 1988, no writ).

52. *Id.* at 634.

53. *Id.* at 633-34.

54. *Id.*

55. *Id.* at 634.

56. *Id.* at 634-35.

57. *Id.* at 634.

whether the landlord should have anticipated the danger created by his refusal to change the lock.⁵⁸

b. Implied Contract

Sexual assault victims have asserted that property owners may be held liable for negligence based on *implied contract*.⁵⁹ In these cases, courts consider the amount of control exercised by a property owner over the premises in determining whether a duty exists.⁶⁰ This right to exercise control is a key factor, and some courts have held that if an individual claims a right of control, he has an implied duty to take reasonable precautions to protect others against injury.⁶¹

In *Cain v. Cain*,⁶² a defendant was held liable for the rape of his teenage niece by his son-in-law because the defendant had possession and control of the premises, and allowed his son-in-law to live in his house.⁶³ The defendant, despite knowledge that his son-in-law was a convicted sex offender, invited his niece to stay in his home.⁶⁴ It was undisputed that the defendant had possession and control of the premises, and consequently, the First District Court of Appeals held the defendant was liable because he controlled the premises and "helped create a volatile and dangerous situation."⁶⁵ The Texas Supreme Court, however, expressly refused to extend this type of liability in *Butcher v. Scott*.⁶⁶

In *Butcher*, the Texas Supreme Court distinguished *Cain*, holding that the extent of the named defendant's control over the premises was dispositive of liability to an injured third party.⁶⁷ *Butcher* raised the question of whether Randy Butcher, a beneficial co-owner of a house, should be held liable for child sexual molestation committed by his brother, the other co-owner.⁶⁸ The plaintiff offered two theories of liability: first, the defendant violated a duty under the Texas Family Code to *report* suspected child abuse,⁶⁹ and second, the defendant violated a common-law duty to *prevent* such abuse.⁷⁰

58. *Id.* at 635.

59. *See, e.g.,* *Butcher v. Scott*, 906 S.W.2d 14 (Tex. 1995); *Cain v. Cain*, 870 S.W.2d 676 (Tex. App.—Houston [1st Dist.] 1994, no writ).

60. *Washington v. RTC*, 68 F.3d 935, 938 (5th Cir. 1995); *Brooks v. National Convenience Stores, Inc.*, 897 S.W.2d 898, 903 (Tex. App.—San Antonio 1995, n.w.h.) (holding a duty to exercise ordinary care arises from a right to control).

61. *Washington*, 68 F.3d at 938.

62. 870 S.W.2d 676 (Tex. App.—Houston [1st Dist.] 1994, no writ).

63. *Id.* at 680.

64. *Id.*

65. *Id.*

66. 906 S.W.2d 14 (Tex. 1995).

67. *Id.* at 15.

68. *Id.* at 14.

69. *Id.* at 15.

70. *Id.*

The trial court granted summary judgment in Randy Butcher's favor, but the Tyler Court of Appeals reversed, holding that a fact issue existed as to whether Randy Butcher exercised control over the premises.⁷¹ The Tyler court based its reversal on the finding that Randy Butcher was physically present in the house, and his name was on the insurance policy.⁷² The Texas Supreme Court, however, reversed and affirmed the summary judgment, stating, "[t]he record is clear that Randy Butcher had no right to control the premises[.]"⁷³ and that a duty to prevent harm to others is imposed by virtue of control over the property.⁷⁴

The Texas Supreme Court did not address the question of whether the Texas Family Code imposed a duty upon Randy Butcher. In dicta, the court reasoned that, if such a duty exists, it is merely the duty to warn or notify authorities of the suspected abuse.⁷⁵ The court noted that Randy Butcher did voice his concerns to the child's mother, and stated that this should entitle Randy Butcher to summary judgment even under the duty imposed by the appellate court.⁷⁶

In 1995, in *Childers v. A.S.*,⁷⁷ the Fort Worth Court of Appeals applied the *Butcher* standard, holding that parents of children who commit intentional torts do not owe a duty to third parties if the parents do not control the premises where the intentional acts occur.⁷⁸ *Childers* involved two girls, twelve-year old A.S. and ten-year old J.C., who engaged in sexual play and touching.⁷⁹ J.C. complained to her mother, who related these concerns to A.S.' mother and stepfather.⁸⁰ A.S.' mother told A.S. to stop these games, and instructed her not to play at J.C.'s house.⁸¹ The stepfather, however, did not discuss the problem with A.S.⁸² A.S. continued to play at J.C.'s house without her mother's knowledge, continued the sex games with J.C., and threatened J.C. with physical violence if she did not continue the sex games.⁸³ J.C.'s mother sued A.S.' parents for negligence,⁸⁴ and sued A.S. for false imprisonment, battery, and negligence.⁸⁵ The plaintiff asserted that A.S.' parents were negligent in failing to adequately supervise A.S., failing to report the abuse, failing to provide an environ-

71. *Id.*

72. *Id.* at 15-16.

73. *Id.* at 15.

74. *Id.*

75. *Id.* at 16.

76. *Id.*

77. 909 S.W.2d 282 (Tex. App.—Fort Worth 1995, no writ).

78. *Id.* at 287.

79. *Id.* at 285.

80. *Id.* at 286.

81. *Id.*

82. *Id.*

83. *Id.* at 293.

84. *Id.* at 286.

85. *Id.* at 290.

ment for J.C. free from mental and physical abuse, failing to exercise reasonable care in maintaining family relations between J.C. and her mother, and failing to exercise reasonable care in providing psychotherapy to A.S.⁸⁶

The plaintiff argued that Section 316 of the Restatement (Second) of Torts⁸⁷ imposed a duty on A.S.' parents to exercise reasonable care to control their child and prevent her from committing intentional torts.⁸⁸ The trial court, however, granted summary judgment for the defendants, and declined to adopt Section 316 of the Restatement.⁸⁹ The Fort Worth Court of Appeals affirmed the trial court's summary judgment as to the negligence claims against the twelve-year-old defendant and her parents,⁹⁰ but reversed as to the intentional tort claims against A.S.⁹¹

The *Childers* court held that under the rule from *Butcher*,⁹² A.S.' parents owed no duty to J.C. or her mother for the sexual acts between A.S. and J.C.⁹³ The court reasoned that the acts took place at J.C.'s home where A.S.' parents were not in control of the property, and were without knowledge and presence.⁹⁴

86. *Id.* at 286.

87. Section 316 states:

A parent is under a duty to exercise reasonable care so to control his minor child as to prevent it from intentionally harming others or from so conducting itself as to create an unreasonable risk of bodily harm to them, if the parent

(a) knows or has reason to know that he has the ability to control his child, and

(b) knows or should know of the necessity and opportunity for exercising such control.

RESTATEMENT (SECOND) OF TORTS § 316 (1965).

88. *Childers*, 909 S.W.2d at 287.

89. *Id.*

90. *Id.* at 289.

91. *Id.* at 292; *see also* *Rodriguez v. Spencer*, 902 S.W.2d 37 (Tex. App.—Houston [1st Dist.] 1995, no writ). In *Rodriguez*, the mother of an adult child beaten and stabbed to death in a "gay bashing" incident brought a negligence suit against the actual participants, and the parents of the minors who participated in the beating. *Id.* at 40. The plaintiff alleged negligent failure to supervise, failure to provide reasonable discipline, failure to impose a reasonable curfew, and negligently permitting a child to engage in conduct likely to cause injury to third parties. *Id.* Summary judgment was granted for the defendants, and the First District Court of Appeals in Houston affirmed, holding that although actual knowledge of a child's dangerous proclivities is not necessary to impute liability to a parent, the law requires "knowledge, consent, sanction, or participation in the child's activities" for parental liability. *Id.* at 42.

92. *Butcher v. Scott*, 906 S.W.2d 14, 16 (Tex. 1995). "Randy Butcher did nothing to create the dangerous situation [and] had no control over who stayed in the house." *Id.* Further, "[t]o the extent that Randy alerted J.L.R.'s mother to the potential abuse, he would have been entitled to summary judgment even under the duty [to warn of suspected abuse] imposed by the court of appeals." *Id.*

93. *Childers*, 909 S.W.2d at 289.

94. *Id.*

c. Special Relationships

Violation of duties to protect third parties from injuries may also be alleged based upon *special relationships* under general agency principles.⁹⁵ Individuals in special relationships have a duty to act in a non-negligent manner as to others in the relationship, and as to peripheral third parties affected by such relationships.⁹⁶ Special relationships may include employer/employee, school official/student, or doctor/patient.⁹⁷

i. Employer/Employee

Employers may be sued in negligence for sexual assaults committed by their employees. These cases are based upon allegations that an employer has negligently hired, retained, or supervised an employee, and the employee's wrongful conduct proximately caused injury. *Negligent supervision* cases are based upon the theory that an employer who is in a position of authority fails to properly direct or oversee the conduct of an employee subject to his control.⁹⁸ Similarly, in *negligent hiring* or *negligent retention* cases, the issue is whether the negligence of an employer in selecting or retaining its employees causes harm to a third party.⁹⁹ Under the *negligent hiring* doctrine, "[b]y negligently placing an unfit employee in an employment situation in which harm to others is reasonably foreseeable, the employer is rendered liable."¹⁰⁰

[N]egligent hiring is a doctrine of primary liability; the employer is principally liable for negligently placing an unfit person in an employment situation involving an unreasonable risk of harm to others. Negligent hiring, therefore, enables plaintiffs to recover in situations where respondeat superior's "scope of employment" limitation previously protected employers from liability.¹⁰¹

Negligent hiring cases arise when an employer allegedly fails to adequately investigate an employee's background. *Negligent retention* cases are based upon allegations an employer has retained an unfit employee whom he knows or reasonably should have known poses a potential risk or danger.¹⁰²

A claim of negligent hiring is based on the defendant's direct negligence rather than the defendant's vicarious liability for the torts of

95. See KEETON, *supra* note 1, §§ 69-70, at 499.

96. *Id.* § 33, at 201.

97. *Id.* at 202.

98. *Id.* § 70, at 502.

99. *J. v. Victory Tabernacle Baptist Church*, 372 S.E. 391, 394 (Va. 1988); *Akins v. Estes*, 888 S.W.2d 35, 42 (Tex. App.—Amarillo 1994, writ granted).

100. Jill Fedje, *Liability For Sexual Abuse: The Anomalous Immunity of Churches*, 9 LAW & INEQ. J. 133, 155 (1990).

101. *Victory Tabernacle*, 372 S.E. at 394 (citation omitted).

102. Fedje, *supra* note 100, at 155.

its workers. Negligent hiring addresses a different wrong from that sought to be addressed by the doctrine of respondeat superior. The tort of negligent hiring addresses the risk created by exposing members of the public to a potentially dangerous individual, while the doctrine of respondeat superior is based on the theory that the employee is the agent of the employer.¹⁰³

For example, charitable organizations may be sued by their beneficiaries for sexual assaults committed by their employees and volunteer workers if the organization fails to exercise ordinary care in selection and retention of its workers. As one commentator notes, "Unfortunately, sexual exploitation by members of the clergy occurs with surprising frequency. Between 1983 and 1987 approximately two hundred Roman Catholic priests or brothers were publicly accused of sexual contact with children."¹⁰⁴ However, many states, including Texas, provide charitable organizations with limited statutory immunity. Under these statutes, an organization's direct service volunteers are immune from civil liability for acts or omissions resulting in injuries or damages if the volunteers were acting in good faith and in the course and scope of their duties within the organization.¹⁰⁵ However, acts of sexual molestation by a charitable organization's volunteers may subject organizations to liability if the organization negligently allows conduct or circumstances to occur which lead to abuse or assault.¹⁰⁶

In *Doe v. Boys Clubs of Greater Dallas, Inc.*,¹⁰⁷ the grandparents of two boys who were sexually molested by a Boy Scout volunteer sued the organization for negligence.¹⁰⁸ The plaintiffs contended that the defendant failed to investigate, screen, and supervise its volunteers, and failed to disclose material information regarding the volunteer's DWI convictions and subsequent sentence to provide community service to the Boy Scouts.¹⁰⁹ The trial court granted summary judgment for the defendant, and the appellate court affirmed. The Texas Supreme Court held that "[i]f the Boys Club breached a duty to investigate, screen, or supervise volunteers, this breach was not the cause in fact of the plaintiffs' injury."¹¹⁰ In this context, the court noted that the acts of molestation occurred off the premises. The court reasoned there was no evidence that the Boys Club would have refused to allow the volunteer to perform service even if it had known he had been

103. *Akins*, 888 S.W.2d at 42.

104. Fedje, *supra* note 100, at 133 (citations omitted).

105. See, e.g., TEX. CIV. PRAC. & REM. CODE ANN. § 84.04(b) (West Supp. 1993).

106. See, e.g., *Akins v. Estes*, 888 S.W.2d 35 (Tex. App.—Amarillo 1994, writ granted).

107. 907 S.W.2d 472 (Tex. 1994).

108. *Id.* at 475.

109. *Id.*

110. *Id.*

convicted of DWI.¹¹¹ Thus, regardless of the volunteer's prior DWI conviction, or the Boys Club's failure to investigate his background, it was not foreseeable that the volunteer would sexually molest the children off the premises.¹¹²

In *Akins v. Estes*,¹¹³ a case which was decided before *Doe*, with writ currently pending, a Boy Scout was sexually molested by his scoutmaster, and the boy's mother sued the Boy Scouts of America, the scoutmaster, and the local chartered council of Boy Scouts.¹¹⁴ The trial court granted summary judgment on behalf of the Boy Scouts, but the appellate court reversed and remanded, holding an organization has a duty to reasonably select, screen, train, supervise, and retain scoutmasters.¹¹⁵ The Amarillo Court of Appeals stated the general rule for liability regarding negligent hiring: "An employer who negligently hires or retains in his employ an individual who is incompetent or unfit for the job may be liable to a third party whose injury was proximately caused by the employer's negligence."¹¹⁶ Moreover, the court held the fact that the scoutmaster was a volunteer rather than a paid employee did not allow the organization to escape liability.¹¹⁷ In addition, the *Akins* court found the organization's lack of direct control over the day-to-day activities of the local Scout troops was insufficient to shield it from liability.¹¹⁸ The court reasoned:

Certainly, the Boy Scouts, as 'a party dealing with the public,' should be required to use reasonable care in the selection and retention of its scoutmasters. In fact, organizations such as the Boy Scouts, whose primary function is the care and education of children, owe a higher duty to their patrons to exercise care in the selection of their workers than would other organizations. A higher standard of care is owed to children than to similarly situated adults.¹¹⁹

In an earlier Virginia case, *J. v. Victory Tabernacle Baptist Church*,¹²⁰ a ten-year-old girl was sexually assaulted by a church clerical employee.¹²¹ The child's family filed suit alleging the church was negligent for failing to conduct a pre-employment investigation of an employee who had been previously convicted of aggravated sexual assault, and had been forbidden by the terms of his probation from having contact with children.¹²² Moreover, the complaint alleged that the

111. *Id.* at 477-78.

112. *Id.* at 478.

113. 888 S.W.2d 35 (Tex. App.—Amarillo 1994, writ granted).

114. *Id.* at 40.

115. *Id.* at 40, 43, 44.

116. *Id.* at 42.

117. *Id.* at 44.

118. *Id.*

119. *Id.* at 42-43 (citation omitted).

120. 372 S.E.2d 391 (Va. 1988).

121. *Id.* at 392.

122. *Id.*

church placed the employee where contact with children was foreseeable.¹²³ The Virginia Supreme Court held the church was liable for negligent hiring by failing to conduct a background investigation before hiring the employee.¹²⁴

Likewise, in *Infant C. v. Boy Scouts of America*,¹²⁵ another Virginia case, a child and his parents sued the national organization, the local branch, and the group leader of the Boy Scouts, alleging that the group leader had sexually abused the child.¹²⁶ On the claim of ordinary negligence for the selection and retention of the scoutmaster, the jury exonerated the national organization, but found the local branch negligent.¹²⁷ The negligence claim against the scoutmaster was dismissed by the trial court because the actions of the group leader were intentional.¹²⁸ On appeal, the local branch and the national organization argued they were protected from liability by charitable immunity.¹²⁹ However, the court held charitable immunity did not apply because a charitable organization is liable to its beneficiaries for the negligence of its employees if it fails to exercise ordinary care in the selection and retention of its employees.¹³⁰ The Virginia Supreme Court affirmed the trial court's judgment as to the national and local organizations and reversed the dismissal of the claim against the scoutmaster, holding the evidence supported the plaintiff's pleadings.¹³¹

ii. School Official/Student

School districts and their officials may be sued in negligence for improper sexual acts committed by their teachers against students where school officials fail to investigate allegations reported by students. Although there is no Texas case specifically on point, Texas courts will likely treat school officials similarly to other employees, particularly in light of the standard of care for children as enunciated in *Akins*.

In *Stoneking v. Bradford Area School Dist.*,¹³² a former student brought a civil rights action against the school district, the principal,

123. *Id.*

124. *Id.* at 394.

125. 391 S.E.2d 322 (Va. 1990).

126. *Id.* at 323.

127. *Id.* at 324.

128. *Id.* at 326.

129. *Id.* at 325.

130. *Id.*

131. *Id.* at 326, 329; see also Cliona M. Robb, *Bad Samaritans Make Dangerous Precedent: The Perils of Holding An Employer Liable For An Employee's Sexual Misconduct*, 8 ALASKA L. REV. 181 (1991).

132. *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720 (3d Cir. 1988); see also *Doe v. Durtschi*, 716 P.2d 1238 (Idaho 1986) (holding a school district may be liable in negligence when a teacher sexually assaults students); *Schultz v. Gould Academy*, 332 A.2d 368 (Me. 1975) (holding a boarding school liable in negligence when an assailant entered a dormitory room and assaulted a student).

an assistant principal, and the school superintendent for damages arising out of a teacher's repeated sexual assaults.¹³³ The district court denied the defendants' motion for summary judgment based on qualified immunity.¹³⁴ Evidence existed that some of the incidents occurred on school grounds and school trips, and school officials had notice of the teacher's sexual abuse.¹³⁵ The plaintiff argued that the defendants adopted and maintained a policy of reckless indifference, concealed complaints regarding the sexual abuse, and discouraged students from reporting the sexual assaults.¹³⁶ The Third Circuit held that, if true, such conduct violates a student's liberty interest in freedom from sexual abuse and his right to personal bodily integrity.¹³⁷ Thus, the principal and assistant principal were not entitled to qualified immunity because "public officials in administrative positions with notice of assaultive behavior by their subordinates must not take actions which communicate that they encourage or even condone such behavior."¹³⁸

iii. Doctor/Patient

Sexual assault victims may sue in negligence for professional malpractice committed by health care providers, physicians, dentists, and mental health practitioners if the perpetrator was acting within the scope of his professional duties at the time of the occurrence. In an Idaho case, *Hirst v. St. Paul Fire & Marine Ins. Co.*,¹³⁹ a patient sued a physician for medical malpractice, alleging that the physician committed unauthorized, unlawful, unprofessional, and improper sex acts upon him, prescribed contra-indicated medication, rendering him susceptible to the physician's actions, and failed to follow proper medical standards.¹⁴⁰ The *Hirst* court concluded, "The scope of 'professional services' does not include all forms of a doctor's conduct simply because he is a doctor."¹⁴¹

Similarly, in *L.L. v. Medical Protective Co.*,¹⁴² a Wisconsin case, a patient brought a malpractice action against a psychiatrist for damages resulting from sexual acts occurring during the course of treatment.¹⁴³

133. *Stoneking*, 882 F.2d at 722.

134. *Id.* "The doctrine of qualified immunity entitles government officials performing discretionary functions to immunity from liability for civil damages when their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Stoneking v. Bradford Area Sch. Dist.*, 856 F.2d 594, 598 (3d Cir. 1988) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

135. *Stoneking*, 882 F.2d at 730-31.

136. *Id.* at 724-25.

137. *Id.* at 727.

138. *Id.* at 729.

139. 683 P.2d 440 (Idaho Ct. App. 1984).

140. *Id.* at 446.

141. *Id.* at 444.

142. 362 N.W.2d 174 (Wis. Ct. App. 1984).

143. *Id.* at 175.

The patient alleged she was damaged by the psychiatrist's failure to provide proper treatment and his failure to exercise the degree of skill and care exercised by other psychiatrists.¹⁴⁴ Consequently, the court found that the claim was covered by the physician's medical malpractice insurance because the psychiatrist was acting within the scope of his professional duties at the time of the acts or omissions.¹⁴⁵

2. Breach / Causation

Under a negligence theory, in addition to proving that a defendant owed a duty to the sexual assault victim, and breached that duty, the victim must also prove that the defendant actually and proximately caused her harm.¹⁴⁶ The two elements of proximate cause are *cause in fact* and *foreseeability*.

Cause in fact is "but for cause," meaning the negligent act or omission was a substantial factor in bringing about the injury and without which no harm would have been incurred. . . . Foreseeability . . . means the actor, . . . as a person of ordinary intelligence should have anticipated the dangers [his] negligent act creates for others.¹⁴⁷

In third party premises liability cases, foreseeability has been identified as the key factor by Texas courts.¹⁴⁸ As previously stated, Texas courts apply a *risk-utility* balancing test to determine foreseeability.¹⁴⁹ In these circumstances, foreseeability depends upon a multitude of factors such as whether the property was located in a high crime area, the risk and likelihood of injury, whether the defendant knew or should have known of criminal activity in the area, the costs and diffi-

144. *Id.* at 178.

145. *Id.* at 176; *see also* American Home Assurance Co. v. Cohen, 815 F. Supp. 365 (W.D. Wash. 1993) (malpractice insurer denied declaratory judgment because an exclusion provision for wrongful acts was ambiguous and unenforceable but holding the policy sublimit was enforceable to the extent of the sexual misconduct); *cf.* Cosgrove v. Lawrence, 520 A.2d 844 (N.J. Super. Ct. Law Div. 1986) (sexual relationship between therapist and patient did not fall within scope of employment, and thus, the therapist's employer was not vicariously liable); Dennis v. Allison, 698 S.W.2d 94 (Tex. 1985) (plaintiff denied recovery for breach of implied warranty for a sexual assault committed by a psychiatrist during the course of treatment because other adequate remedies existed).

146. Berry Property Management, Inc. v. Bliskey, 850 S.W.2d 644, 655 (Tex. App.—Corpus Christi 1993, writ *dism'd* by *agr.*).

147. *Id.*; *see also* L.M.S. v. Angeles Corp., 621 So. 2d 246 (Ala. 1993) (landlord was not liable for a rape committed by an intruder entering through a tenant's window absent a statutory duty, or evidence that the landlord knew of the condition that could foreseeably result in the attack).

148. *Id.* at 654. In determining whether a duty is owed, a "court considers several interrelated factors including the risk, foreseeability, and likelihood of injury weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the defendant." *Id.*; *see also* Hendricks v. Todora, 722 S.W.2d 458, 460 (Tex. App.—Dallas 1986, writ *ref'd n.r.e.*); Turner v. General Motors Corp., 514 S.W.2d 497, 503 (Tex. Civ. App.—Houston [14th Dist.] 1974, writ *ref'd n.r.e.*).

149. Berry, 850 S.W.2d at 654.

culty in taking preventive measures to guard against such injuries, and how much control the property or business owner exercised over an area.¹⁵⁰ Foreseeability generally requires that the defendant knew or should have known of the likelihood of the danger, and that some condition on the premises enhanced the risk of the conduct.¹⁵¹

In *Benser v. Johnson*,¹⁵² a woman and her minor daughter were awarded damages when they sued their landlord after an intruder entered their apartment through a window with defective locks, and raped the woman in front of her daughter.¹⁵³ On appeal, the landlord argued that his failure to provide workable locks was not the proximate cause of the woman's injuries.¹⁵⁴ The Dallas Court of Appeals, however, held that there was sufficient evidence to support the negligence finding.¹⁵⁵ The landlord knew that the locks were inoperative and refused to provide working locks in violation of a statute.¹⁵⁶ Moreover, the apartment was located in a high crime area, and a makeshift lock revealed the inoperative condition of the locks to the attacker.¹⁵⁷ Consequently, the court held that the landlord's negligence in failing to provide functioning locks was the proximate cause of the woman's injury.¹⁵⁸

In *Havner v. E-Z Mart Stores, Inc.*,¹⁵⁹ the Texas Supreme Court took *Nixon v. Mr. Property Management Co.* one step further. In *Havner*, a female convenience store clerk was abducted, raped, and murdered.¹⁶⁰ The trial record included no evidence of how the plaintiff was abducted. The central issue was whether evidence existed from which reasonable minds could infer that the failure to provide a safe workplace was the cause-in-fact of the plaintiff's death.¹⁶¹ The Texas Supreme Court found there was evidence that the defendant failed to maintain an adequate security system, and that this failure was indeed the cause-in-fact of the decedent's abduction and murder.¹⁶²

Dissenting, Justice Cornyn criticized the *Havner* majority for excusing "the lack of proof of a causal link between E-Z Mart's negligence and Diana Havner's death."¹⁶³ There was evidence adduced that the plaintiff's estranged boyfriend was responsible for the attack, yet how

150. *Id.*

151. *Id.*

152. 763 S.W.2d 793 (Tex. App.—Dallas 1988, writ denied).

153. *Id.* at 794-95.

154. *Id.* at 795.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* at 797.

159. 825 S.W.2d 456 (Tex. 1992).

160. *Id.* at 457.

161. *Id.* at 459.

162. *Id.* at 461.

163. *Id.* at 466 (Cornyn, J., dissenting).

it occurred remained unclear. Justice Cornyn attributed the majority's decision to the justices' empathy with "the public's sense of impotency and frustration" due to the inability of the courts, the police, and the public to control violent crime.¹⁶⁴ Cornyn stated that the majority was directing "the public's rightful outrage about the rising level of crime toward businesses . . . when there is no evidence that E-Z Mart's negligence caused Diana Havner's abduction and death."¹⁶⁵ Justice Cornyn noted that since the courts and police cannot create crime-free zones, it is unfair to impose that burden upon the proprietor of a convenience store.

Shortly after *Havner*, in *Delaney v. University of Houston*,¹⁶⁶ the Texas Supreme Court held that a sexual assault intervening between a property owner's negligent act and a victim's injury does not always vitiate the property owner's negligence liability. In *Delaney*, a student athlete on scholarship at the University of Houston was raped in her dormitory room by an armed intruder.¹⁶⁷ While she was at the university on a recruitment visit, the student had raised concerns regarding the high crime rate in the university housing area.¹⁶⁸ In response to these concerns, university officials repeatedly assured the student that the university would provide adequate security and a safe residence. She accepted the athletic scholarship and enrolled in reliance upon these representations. After moving into her dormitory, the student noticed a broken lock on an exterior door, and repeatedly complained.¹⁶⁹ One night, an armed intruder entered the dormitory through the exterior door with the faulty lock, and raped the student at gunpoint in front of her boyfriend. The student sued the university for negligence.¹⁷⁰ Based upon the university's affirmative representations which induced the plaintiff to accept a scholarship despite the high crime rate, as well as the failure to repair the broken lock after receiving notice from the plaintiff herself, the Texas Supreme Court ruled that "intentional conduct intervening between a negligent act and a result does not always vitiate liability for the negligence."¹⁷¹

B. Negligent Invasion of Privacy

One Texas court has held that sexual assault victims may sue for negligent invasion of privacy. In *C.T.W. v. B.C.G.*,¹⁷² the Beaumont Court of Appeals held that the sexual abuse of a child, although an intentional act, may give rise to a claim for negligent invasion of pri-

164. *Id.* (Cornyn, J., dissenting).

165. *Id.* (Cornyn, J., dissenting).

166. 835 S.W.2d 56 (Tex. 1992).

167. *Id.* at 57.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* at 60.

172. 809 S.W.2d 788 (Tex. App.—Beaumont 1991, no writ).

vacy, as well as negligent infliction of emotional distress.¹⁷³ In *C.T.W.*, an action was brought on behalf of grandsons who had been sexually assaulted by their pedophilic stepgrandfather. The Beaumont court held that "an unlawful and criminal invasion of the right to privacy gives rise to a remedy for such legal injury."¹⁷⁴ Furthermore, the court held that even though an act, or action, may be viewed as intentional, the actor's invasion of privacy may be negligent if the harm inflicted on the victim was foreseeable.¹⁷⁵ The court reasoned that it was foreseeable that the grandfather's long-term intrusions placed the children in danger of harmful effects and found the grandfather negligent for his failure to seek counseling, or to avoid children.¹⁷⁶ This holding appears to be in direct conflict with the majority rule that an individual cannot intend an act of sexual molestation without intending harm. It is also in apparent conflict with the rule from *Boyles v. Kerr*,¹⁷⁷ wherein the Texas Supreme Court refused to stretch and characterize intentional conduct as negligence in order to invoke insurance coverage.¹⁷⁸

C. Breach of Warranty

In addition to negligence, sexual assault victims often incorrectly allege breach of implied warranty as a theory of recovery. *Quiet enjoyment* and *habitability* are the implied warranties created by operation of law relating to leaseholds.¹⁷⁹ Some sexual assault plaintiffs contend that criminal sexual assaults by third parties constitute a breach of these warranties. These warranties, however, encompass only the right to possess the premises in a habitable condition of repair and free from claims by others to the right of occupancy.¹⁸⁰ They do not purport to ensure that the resident will be free from crimes committed by third parties.¹⁸¹ From 1978 until 1984, when the Texas Property Code was codified,¹⁸² plaintiffs relied on the rule set forth in *Kamarath v. Bennett*¹⁸³ for recovery in these cases. In *Kamarath*, a

173. *Id.* at 796.

174. *Id.*

175. *Id.*

176. *Id.* at 797.

177. 855 S.W.2d 593 (Tex. 1993).

178. *Id.* at 599.

179. See *Kamarath v. Bennett*, 568 S.W.2d 658 (Tex. 1978) (holding an implied warranty of habitability exists in rental units and a landlord has a duty to provide safe, sanitary and fit premises).

180. *Fabrique, Inc. v. Corman*, 796 S.W.2d 790 (Tex. App.—Dallas 1990, writ denied) (holding a landlord has a duty to deliver possession to a tenant at the agreed time of delivery, but has no duty to prevent trespassers from subsequently entering the premises and obtaining possession).

181. *Dennis v. Allison*, 698 S.W.2d 94 (Tex. 1985) (patient may not recover for beating and sexual assault committed by psychotherapist under theory of implied warranty because other adequate remedies existed to redress wrongs).

182. See TEX. PROP. CODE ANN. §§ 92.001-.170 (West Supp. 1996).

183. 568 S.W.2d 658 (Tex. 1978).

plaintiff brought an action against his lessor for breach of the implied warranty of habitability.¹⁸⁴ The Texas Supreme Court held that under a dwelling unit lease there is an implied warranty of habitability warranting that the dwelling is habitable and fit for living.¹⁸⁵

In a more recent case,¹⁸⁶ the Texas Supreme Court held that an implied warranty of habitability simply means the lessee takes the property in a habitable condition, and is not applicable in tort cases for personal injuries inflicted by fellow residents or third parties.¹⁸⁷

In response to *Kamarath*, the Texas Legislature amended the Property Code, and today *Kamarath* is no longer the law. The Texas Property Code now states:

The duties of a landlord and the remedies of a tenant under this subchapter are in lieu of existing common law and other statutory law warranties and duties of landlords for maintenance, repair, security, habitability, and nonretaliation, and remedies of tenants for a violation of those warranties and duties. Otherwise, this subchapter does not affect any other right of a landlord or tenant under contract, statutory law, or common law that is consistent with the purposes of this subchapter or any right a landlord or tenant may have to bring an action for personal injury or property damage under the law of this state. This subchapter does not impose obligations on a landlord or tenant other than those expressly stated in this subchapter.¹⁸⁸

The Texas Property Code abrogates the implied warranty theory by expressly stating that these statutory landlord-tenant duties are in lieu of the common law remedy for breach of the implied warranty of habitability.¹⁸⁹ Consequently, today sexual assault victims may not recover for breach of implied warranties.

D. Statutory Violations

In Texas, sexual assault victims have sued for breach of civil statutes such as the Deceptive Trade Practices Act ("DTPA"),¹⁹⁰ the Texas Family Code,¹⁹¹ and the Texas Property Code.¹⁹²

184. *Id.* at 659.

185. *Id.* at 661.

186. *Melody Homes Mfg. Co. v. Barnes*, 741 S.W.2d 349 (Tex. 1987).

187. *Id.* at 353; *see also* *Morris v. Kaylor Eng'g Co.*, 565 S.W.2d 334 (Tex. Civ. App.—Houston [14th Dist.] 1978, writ ref'd n.r.e.).

188. TEX. PROP. CODE ANN. § 92.061 (West 1995).

189. *See, e.g., Bolin Dev. Corp. v. Indart*, 803 S.W.2d 817, 819 (Tex. App.—Houston [14th Dist.] 1991, writ denied).

190. *See* TEX. BUS. & COM. CODE ANN. §§ 17.41-.854 (West 1987).

191. *See* TEX. FAM. CODE ANN. § 17.08 (West 1986); *id.* § 34.03 (West Supp. 1993).

192. TEX. PROP. CODE ANN. §§ 92.001-.170 (West Supp. 1996).

1. Texas Deceptive Trade Practices Act

As a general rule, in order to state a cause of action under the DTPA, a plaintiff must prove that a defendant committed a fraudulent or deceptive act which was the producing cause of the plaintiff's damages.¹⁹³ However, the September 1, 1995 amendments to the DTPA specifically eliminate recovery under the DTPA for bodily injury, death, or infliction of mental anguish.¹⁹⁴ Nevertheless, litigation will continue for some years on cases filed before September 1, 1995.

In *Berry Property Management, Inc. v. Bliskey*,¹⁹⁵ a townhome resident brought suit against a property manager, alleging negligence and breach of the DTPA relating to a sexual assault.¹⁹⁶ In *Berry*, an intruder used a key to enter the tenant's townhome at night and sexually assault her.¹⁹⁷ Afterward, the intruder told the tenant that since she had cooperated with him, he would tell her how he chose her as a victim.¹⁹⁸ The assailant explained that he broke into the property management office, searched the files for single women with good jobs, found the corresponding keys, and used them.¹⁹⁹

The tenant sued the property management company, alleging negligence for mishandling the keys and for violating the DTPA by failing to provide adequate door locks.²⁰⁰ The jury awarded her compensatory and punitive damages.²⁰¹ The Corpus Christi Court of Appeals upheld the finding, stating that a property manager owes a duty to safeguard keys and rental information regarding the property.²⁰² The court found that possible harm to a tenant is foreseeable when apartment keys are kept on an unsecured pegboard in the property management office, and an intruder can readily match a resident's records with her key to ascertain an apartment number.²⁰³

Moreover, prior to the attack, the tenant had requested that the property manager install a dead bolt lock which could not be opened from the outside.²⁰⁴ In response, the property manager stated he could not comply with her request because it was necessary for management to have a key to any lock placed on her front door.²⁰⁵ The appellate court ruled that since the respondent was entitled by statute to a dead bolt door lock, the property manager's actions were decep-

193. See TEX. BUS. & COM. CODE ANN. §§ 17.41-.854 (West 1987).

194. *Id.* § 17.49(e) (West 1995).

195. 850 S.W.2d 644 (Tex. App.—Corpus Christi 1993, writ *dism'd* by *agr.*).

196. *Id.* at 651.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.* at 655.

203. *Id.* at 654.

204. *Id.* at 659.

205. *Id.*

tive and unconscionable.²⁰⁶ Accordingly, the court affirmed the jury's award of compensatory and punitive damages, based on negligent acts and deceptive trade practices.²⁰⁷

Recently, the Texas Supreme Court granted writ on another suit for violation of the DTPA. In *State Farm & Casualty v. Gandy*,²⁰⁸ a stepdaughter sued her stepfather for damages resulting from sexual abuse.²⁰⁹ The insurer agreed to defend the stepfather under a reservation of rights.²¹⁰ Subsequently, the stepfather complained of inadequate representation by the criminal attorney whom he had selected, but whose fee was paid by the insurer. At his own expense, he retained another attorney who entered into a "sweetheart deal" with the stepdaughter's attorney,²¹¹ settling for more than six million dollars and assigning his rights against the insurer to the stepdaughter in exchange for a covenant not to execute.²¹²

The stepdaughter then sued the insurer, seeking recovery for sexual abuse, and for failing to provide an adequate defense for her stepfather.²¹³ The trial court granted summary judgment for the insurer on the issues of coverage, but sent the remaining issue to the jury.²¹⁴ The jury found that the insurer violated the DTPA by failing to advise the stepfather that his criminal defense attorney was not his only alternative for legal representation, and found the insurer negligent in its handling of the stepfather's defense.²¹⁵ The jury awarded actual damages of \$202,000 plus attorneys' fees and additional damages under the DTPA.²¹⁶ The Texarkana Court of Appeals affirmed.²¹⁷ The Texas Supreme Court has granted writ on this case, but has not ruled as of the date of publication.

2. Texas Family Code

In *Albright v. Texas Department of Human Services*,²¹⁸ a mother sued the Texas Department of Human Services and three of its employees under the Texas Tort Claims Act.²¹⁹ The mother claimed the defendants acted negligently when they removed her child from her home because the defendants lacked just cause for suspecting child

206. *Id.* at 660.

207. *Id.* at 666, 669.

208. 880 S.W.2d 129 (Tex. App.—Texarkana 1994, writ granted).

209. *Id.* at 132.

210. *Id.*

211. *Id.* at 133.

212. *Id.* at 132.

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.* at 140.

218. 859 S.W.2d 575 (Tex. App.—Houston [1st Dist.] 1993, no writ).

219. *Id.* at 578.

abuse.²²⁰ The Texas Department of Human Services, however, claimed its employees were immune from suit under the Texas Family Code. The defendant further asserted that its employees were acting in good faith because they reasonably believed the child had been sexually abused and was in immediate danger, and the employees' actions in removing the child were within the scope of their employment.²²¹ The defendants claimed both statutory and common-law official immunity.²²² The Texas Family Code provides immunity for those individuals who take possession of a child whom they reasonably believe is in immediate physical danger, and for those reporting or assisting in an investigation of child abuse, provided they act in good faith.²²³

Moreover, "Under the [common law] doctrine of official immunity, state employees whose job status is classified as 'quasi-judicial' are immune from personal tort liability for erroneous or negligent conduct as long as they act in good faith and within the scope of their employment."²²⁴ The First Court of Appeals in Houston affirmed the trial court's summary judgment in favor of the government employees, and dismissed the action as to the Texas Department of Human Services.²²⁵ The *Albright* court stated that in cases of suspected child abuse, protection of the child is of paramount importance, and individuals acting in good faith to protect a child are granted special statutory immunity under the Texas Family Code.²²⁶

In *Bird v. W.C.W.*,²²⁷ the Texas Supreme Court held there was no duty running from a psychologist to a parent to not negligently misdiagnose the sexual abuse of a child under the Texas Family Code.²²⁸ In *Bird*, a psychologist examined a child for signs of sexual abuse. After examining the child, the psychologist concluded the child had been sexually abused and the natural father was the abuser.²²⁹ The child's mother used the diagnosis as the basis to modify a child custody and visitation order. Consequently, the natural father sued the psychologist for the misdiagnosis. The trial court granted summary judgment in favor of the psychologist, and the appellate court reversed and remanded for trial on the merits.²³⁰ The Texas Supreme Court reversed,

220. *Id.*

221. *Id.*

222. *Id.*; see also TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(5) (West Supp. 1993); TEX. FAM. CODE ANN. § 17.08 (West 1986); *id.* § 34.03 (West Supp. 1993); *Travis v. City of Mesquite*, 830 S.W.2d 94 (Tex. 1992) (holding the doctrine of official immunity confers immunity from both civil liability and civil suit).

223. TEX. FAM. CODE ANN. § 17.08 (West 1986); *id.* § 34.03 (West Supp. 1993).

224. *Albright*, 859 S.W.2d at 579.

225. *Id.* at 583.

226. *Id.* at 580; see also TEX. FAM. CODE ANN. § 34.03 (West Supp. 1993); *id.* § 17.03(a)(3) (West 1986); *id.* § 17.08.

227. 868 S.W.2d 767 (Tex. 1994).

228. *Id.* at 768.

229. *Id.*

230. *Id.*

holding that there is no professional duty running from a psychologist to a third party who is not a patient to not negligently misdiagnose a condition of a patient.²³¹

Under the Texas Family Code, a psychologist has a duty to report suspected abuse. The Family Code requires, "[any] person having cause to believe that a child's physical or mental health has been or may be adversely affected by abuse or neglect" to report the abuse.²³² To encourage the reporting of child abuse, the Family Code protects reporting persons from civil or criminal liability.²³³ Moreover, it is a Class B misdemeanor to knowingly fail to report suspected child abuse or neglect.²³⁴ Chapter 34 of the Family Code defines abuse and neglect to include sexual, obscene, and pornographic acts.²³⁵ Presently, there is no private cause of action expressly created by any of the statutes in the Texas Family Code.

The statutory duty to report suspected abuse creates another area of potential civil liability with respect to sexual wrongs perpetrated by others. The Family Code's immunity expressly applies only to reports made in good faith. The question of what constitutes a report made in good faith has yet to be fully examined by Texas courts.

3. Texas Property Code

Another area of potential litigation regarding *negligence per se* involves recent amendments to the Texas Property Code requiring owners of multi-family housing units to provide, at their own expense, keyed and keyless dead bolts, door viewers, pin locks or charlie bars on sliding glass doors, and window latches.²³⁶ However, no case for breach of these amendments has been reported. Because this is new legislation and there are no reported cases, it is unclear whether violation of these statutes will give rise to liability and how Texas courts might rule in these circumstances.

E. Common Law Defenses

1. Statute of Limitations

In Texas, the statute of limitations may bar a claimant's recovery in sexual assault cases. Once the limitations defense is raised, the burden is on a plaintiff to demonstrate that the limitations period has not expired.²³⁷ Plaintiffs may attempt to toll limitations by claiming disa-

231. *Id.*

232. TEX. FAM. CODE ANN. § 34.01 (West Supp. 1994).

233. *Id.* § 34.03.

234. *Id.* § 34.07 (West Supp. 1994).

235. *Id.*

236. See TEX. PROP. CODE ANN. § 92.153 (West Supp. 1996).

237. See, e.g., *Smith v. Erhard*, 715 S.W.2d 707, 709 (Tex. App.—Austin 1986, writ ref'd n.r.e.).

bility.²³⁸ For instance, statutes are tolled while the plaintiff is a minor;²³⁹ regardless of the plaintiff's age when the alleged incident occurred; the statute of limitations does not bar a claim until two years after the plaintiff reaches the age of majority.²⁴⁰ Limitations may also be tolled if a plaintiff is under a mental disability. However, section 16.001(d) of the Texas Civil Practice and Remedies Code provides that if a disability arises after the onset of the limitations period, the disability does not suspend the running of the period.²⁴¹ Therefore, a plaintiff must plead and prove that she was disabled from the time the cause of action accrued until less than two years prior to filing suit.²⁴² If a disability arises prior to, or contemporaneously with the cause of action, the limitations is not tolled.²⁴³ Further, if the plaintiff's disability ends at any time — for example, she has a "lucid interval" — limitation begins to run and is not tolled if the disability subsequently recurs.²⁴⁴

2. The Discovery Rule

The *discovery rule* may toll the running of limitations until the date a plaintiff discovers, or with reasonable diligence should have discovered, the nature of her injury.²⁴⁵ Sexual assault victims alleging *repressed memory syndrome* have relied on the discovery rule by claiming the discovery of the nature and existence of their cause of action was delayed due to a psychological condition.²⁴⁶

The Texas Supreme Court recently rejected application of the discovery rule to repressed memory allegations in *S.V. v. R.V.*²⁴⁷ In *S.V.*, a daughter intervened in her parents' divorce proceedings, alleging her father was negligent by sexually abusing her until she was seventeen years old.²⁴⁸ The father contended that because his daughter did not sue within two years of her eighteenth birthday as required by the applicable statute of limitations, her action should be barred as a matter of law.²⁴⁹ The daughter argued that the discovery rule should apply in this case because she repressed all memory of her father's abuse

238. TEX. CIV. PRAC. & REM. CODE ANN. § 16.001(b) (West 1986 & Supp. 1996).

239. *Id.* § 16.001(a).

240. *Id.*

241. *Id.* § 16.001(d).

242. *Smith v. Erhard*, 715 S.W.2d 707, 709 (Tex. App.—Austin 1986, writ ref'd n.r.e.).

243. *See, e.g., Roman v. A.H. Robins Co.*, 518 F.2d 970 (5th Cir. 1975).

244. *Kaack v. Stanton*, 112 S.W. 702, 704 (Tex. Civ. App. 1908, writ ref'd).

245. *See, e.g., Gaddis v. Smith*, 417 S.W.2d 577, 579-80 (Tex. 1967); *Woods v. Mercer*, 760 S.W.2d 642 (Tex. 1988).

246. *See, e.g., Archambault v. Archambault*, 846 S.W.2d 359 (Tex. App.—Houston [14th Dist.] 1992, no writ); *Sanchez v. Archdiocese of San Antonio*, 873 S.W.2d 87 (Tex. App.—San Antonio 1994, writ denied).

247. 39 Tex. Sup. Ct. J. 386 (March 14, 1996).

248. *Id.* at 386.

249. *Id.*

until approximately a month after she turned twenty, some three months before she intervened in the divorce proceedings.²⁵⁰ The trial court granted a directed verdict for the father on the grounds that the discovery rule did not apply in a case where the daughter adduced no evidence of abuse. The appellate court reversed and remanded for a new trial.²⁵¹ The Texas Supreme Court, however, stated:

In sum, the literature on repression and recovered memory syndrome establishes that recent fundamental theoretical and practical issues remain to be resolved. . . . Opinions in this area simply cannot meet the 'objective verifiability' element for extending the discovery rule.

. . .
In sum, any trend in state caselaw is simply too small, contradictory and intermixed with legislative initiative to provide clear guidance as to the rule a court should adopt.²⁵²

In an earlier decision, *Archambault v. Archambault*,²⁵³ the Fourteenth Court of Appeals in Houston demonstrated a willingness to apply the discovery rule, holding that a defendant did not prove when the plaintiff discovered or should have discovered her injury.²⁵⁴ In *Archambault*, a plaintiff brought suit in July 1991 for incest occurring when she was age four to nine.²⁵⁵ She claimed that she did not discover the abuse until May 1990 while under hypnosis.²⁵⁶ The trial court granted the defendant's motion for summary judgment on the grounds that the limitations period had expired.²⁵⁷ However, the Houston court, in effect applying the discovery rule, reversed and remanded the case to determine when the plaintiff discovered or should have discovered her injury.²⁵⁸

Application of the discovery rule was further considered in *Sanchez v. Archdiocese of San Antonio*,²⁵⁹ in which a former student sued the church, priests, and nuns for sexual abuse occurring more than forty years earlier.²⁶⁰ The former student alleged that she repressed her memory of childhood abuse until psychotherapy triggered her memory.²⁶¹ The court noted that the plaintiff was aware of the abuse at the time of its occurrence, and reasoned that all of the witnesses who could corroborate the plaintiff's claims were dead.²⁶² "Thus, the

250. *Id.*

251. *Id.*

252. *Id.* at 401, 402.

253. 846 S.W.2d 359 (Tex. App.—Houston [14th Dist.] 1992, no writ).

254. *Id.* at 360.

255. *Id.*

256. *Id.*

257. *Id.* at 359-60.

258. *Id.* at 360.

259. 873 S.W.2d 87 (Tex. App.—San Antonio 1994, writ denied).

260. *Id.* at 89.

261. *Id.*

262. *Id.* at 91, 92.

question becomes, should Texas law permit such time to lapse so that corroborative evidence becomes an impossibility and still apply the discovery rule to toll the statute of limitations?"²⁶³

This court recognizes that the acts of sexual abuse of the appellant while she was a child, at the hands of a nun, are absolutely reprehensible and a shock to the conscience of the court; however, the inordinate lapse of time and . . . the imprecise art of psychology and psychiatry, coupled with the figments of imagination enlarged by the passage of time and the uncertainty of the present memories of past events, require this court to deny the application of the discovery rule under the facts presented. To do otherwise would be an open invitation to ignore the purpose of the statute of limitations and to subject persons to claims after all hope of evidence to refute such claims had passed.²⁶⁴

The San Antonio Court of Appeals affirmed summary judgment in favor of the defendants,²⁶⁵ holding the discovery rule does not apply to claims for childhood sexual abuse where the victim "brings an action based solely on an alleged recollection of events which were repressed from her consciousness and there is no means of independently verifying her allegations in whole or in part."²⁶⁶

The *Sanchez* court distinguished *Archambault*, stating: "As we read *Archambault*, it stands for the proposition that when the discovery rule is raised as a defense to a motion for summary judgment based upon a statute of limitations, it becomes incumbent upon the movant for summary judgment to negate its application as a matter of law."²⁶⁷ The devastating harm caused by sexual abuse, combined with the fact that abuse victims often suffer a long process of acknowledging the abuse, offers temptation for Texas courts to open the floodgates for these victims to seek recourse, regardless of the amount of time that has passed since the abuse occurred. The Texas Supreme Court resisted the temptation in *S.V. v. R.V.*

II. INSURANCE COVERAGE AND ITS LIMITATIONS

One area which is of tangential concern to legal scholars, but of great concern to claimants and their attorneys, is damages. The choice of which defendant to sue, and the theory of recovery to utilize, are to a great extent determined by a defendant's insurance policy. "The insurance contract, by its nature, is a contract in which one undertakes to indemnify another against damage arising from 'contingent or unknown event[s].'"²⁶⁸ As one commentator notes:

263. *Id.* at 90.

264. *Id.* at 97.

265. *Id.* at 92.

266. *Id.* at 91.

267. *Id.*

268. *Allstate Ins. Co. v. Talbot*, 690 F. Supp. 886, 888 (N.D. Cal. 1988).

In exchange for the payment of a premium, an insurer assumes certain risks that otherwise would be the obligation of the insured. In order to have predictable and affordable insurance rates, the insurers' assumptions of risk are usually limited to those beyond the "effective control" of the insured. . . . The purpose of liability insurance is to protect the insured from the financial consequences of unfortunate circumstances which are beyond the "effective control" of the insured.²⁶⁹

Recently, public sentiment has been shifting in favor of decreasing the responsibility and liability of insurers. This trend has heightened the debate over the scope of coverage provided by standard insurance policies for sexual assaults committed by third party perpetrators. Although past courts have interpreted coverage provisions broadly in favor of allowing indemnification, coverage should never extend the scope of liability beyond that which was originally contemplated by the parties. Furthermore, it can reasonably be argued that homeowners, landlords, and their insurers never contemplated that the scope of their insurance agreements would include liability for sexual assaults committed by third party perpetrators.

A. Policy Provisions

James M. Fischer states, "The increased frequency of the assertion of claims for intentionally brought about losses, coupled with the increased availability of insurance for misconduct by homeowners, municipalities, and businesses has led to a significant increase in the importance of the intentional act exclusion of insurance coverage."²⁷⁰ Coverage and exclusion provisions in liability policies are drafted to provide certainty as to what risks an insurer is underwriting. Exclusions operate to prevent perpetrators of sexual assaults from obtaining insurer-provided defenses and indemnification for damages resulting from intentional acts. In these cases, insurance companies generally request a declaratory judgment determining that an insured's conduct was intentional as a matter of law. If successful, an insurance company has no duty to defend or indemnify against the party committing the act.

The formulation of a bright line rule as to which acts are intentional has undergone considerable discussion. "Under the Restatement (Second) of Torts [§ 8A (1965)], an insured intended injury or harm if he intends the consequences of his act, or believes they are substan-

269. Roderick D. Blanchard & Jeffrey M. Thompson, *Insurance Coverage for the Sexual Transmission of Disease*, 13 *HAMLIN L. REV.* 37, 56 (1990) (citation omitted).

270. James M. Fischer, *The Exclusion From Insurance Coverage of Losses Caused by the Intentional Acts of the Insured: A Policy in Search of a Justification*, 30 *SANTA CLARA L. REV.* 95, 99 (1990).

tially certain to follow."²⁷¹ There are currently three views as to what constitutes *intent*:

- (1) The minority view follows the classic tort doctrine of looking to the natural and probable consequences of the insured's acts; (2) The majority view is that the insured must have intended the act to cause some kind of bodily injury; (3) A third view is that the insured must have had the specific intent to cause the type of injury suffered.²⁷²

Courts have disagreed as to what constitutes *intent*. Some jurisdictions apply an objective standard²⁷³ to determine intent, others apply a subjective standard,²⁷⁴ and because no consensus exists as to which standard applies, courts look to the specific language of the exclusion provision for guidance. For this reason, the exact language of a policy may determine the outcome of a particular case. Cases concerning other intentional torts may provide guidance as to how Texas courts will decide similar issues regarding sexual assaults.

For instance, in *Misle v. State Farm Automobile Insurance Co.*,²⁷⁵ a drive-by shooting victim sued the shooter, the owner of the weapon, the driver and occupants of the car, and the car's owner.²⁷⁶ The plaintiff claimed that the defendants were grossly negligent.²⁷⁷ The shooter testified that he did not intend to harm anyone when he shot the weapon into a crowd, but only wanted to watch their reaction.²⁷⁸ The occupants of the car told the shooter to stop, but he ignored them.²⁷⁹

271. *State Farm Fire & Casualty Co. v. S.S.*, 858 S.W.2d 374, 378 (Tex. 1993). Prosser and Keeton have attempted to clarify intent:

[I]ntent is broader than a desire or purpose to bring about physical results. It extends not only to those consequences which are desired, but also to those which the actor believes are substantially certain to follow from what the actor does. . . .

On the other hand, the mere knowledge and appreciation of a risk—something short of substantial certainty—is not intent. The defendant who acts in the belief or consciousness that the act is causing an appreciable harm to another may be negligent, and if the risk is great the conduct may be characterized as reckless or wanton, but it is not an intentional wrong. In such cases the distinction between intent and negligence obviously is a matter of degree. The line has been drawn by the courts at the point where the known danger ceases to be only a foreseeable risk which a reasonable person would avoid, and becomes in the mind of the actor a substantial certainty.

KEETON, *supra* note 1, § 8, at 35, 36 (citation omitted).

272. *Western Nat'l Assurance Co. v. Hecker*, 719 P.2d 954, 960 (Wash. Ct. App. 1986).

273. *Linebaugh v. Berdish*, 376 N.W.2d 400 (Mich. Ct. App. 1985).

274. *Allstate Ins. Co. v. Thomas*, 684 F. Supp. 1056 (W.D. Okla. 1988); *State Mut. Ins. Co. v. Russell*, 462 N.W.2d 785 (Mich. Ct. App. 1990).

275. 908 S.W.2d 289 (Tex. App.—Austin 1995, n.w.h.).

276. *Id.* at 290.

277. *Id.*

278. *Id.*

279. *Id.*

The liability insurance carrier moved for summary judgment, asserting that it did not owe a duty to defend the owner of the car, the driver of the car, the shooter, or the other defendants on the basis of a provision which excluded coverage for "any person . . . [w]ho intentionally causes bodily injury."²⁸⁰ The trial court granted summary judgment and the case was appealed.²⁸¹ The Austin Court of Appeals stated: "[A]n insured intends to injure or harm another if he intends the consequences of his act, or believes they are substantially certain to follow."²⁸² The court found although an actor need not intend the harmful consequences of his actions, "[i]t is enough that he intends to bring about an offensive contact or an apprehension of either a harmful or offensive contact."²⁸³ Since the shooter intended to cause offensive bodily contact or apprehension,²⁸⁴ the intent exclusion provision precluded coverage.²⁸⁵

The court further found that the summary judgment rested correctly on grounds that the victim was not injured as a result of an accident.²⁸⁶ The court further noted that when an insured's acts are voluntary and intentional, and the injury is the natural result of the intentional acts, the event is not an accident under the policy, "even though the particular injury may have been unexpected, unforeseen and unintentional."²⁸⁷

Misle is of interest in light of the same court's apparently contradictory decision only a month earlier in *Trinity Universal Insurance Co. v. Cowan*.²⁸⁸ In that case, the same court reached a different result on the same issue. In *Cowan*, a woman was successful in recovering damages for negligence when a photo lab clerk intentionally displayed private, provocative photographs of her.²⁸⁹ The woman delivered a roll of film containing provocative pictures of herself to a photo lab for development.²⁹⁰ A photo lab clerk made unauthorized duplicate prints of several of the photographs.²⁹¹ The clerk carried the photographs home, showed them to his friends, and instructed one friend to destroy them.²⁹² Instead of destroying the photos, the friend showed the photos to a third person who happened to be a friend of the wo-

280. *Id.* (alteration in original).

281. *Id.*

282. *Id.* at 291 (quoting *State Farm Fire & Casualty Co. v. S. S.*, 858 S.W.2d 374, 378 (Tex. 1993) (paraphrasing RESTATEMENT (SECOND) OF TORTS § 8A (1965))).

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.*

288. 906 S.W.2d 124 (Tex. App.—Austin 1995, writ requested).

289. *Id.* at 127.

290. *Id.* at 126.

291. *Id.*

292. *Id.*

man pictured.²⁹³ In her subsequent suit for personal injuries, the woman was awarded damages for negligence and gross negligence.²⁹⁴

The woman subsequently brought an action against the clerk's parent's insurer to collect on the judgment.²⁹⁵ However, to be included within the scope of the policy, the policy required that any *bodily injury* or *property damage* be caused by an *occurrence*.²⁹⁶ An *occurrence* was defined in the policy as an *accident*.²⁹⁷ The word *accident* was not defined in the policy, and consequently, the Austin Court of Appeals interpreted the word "to include unforeseen and unexpected consequences of otherwise intentional acts."²⁹⁸

The court held, "[A]n occurrence takes place where the resulting injury or damage was unexpected or unintended, regardless of whether the policyholder's acts were intentional."²⁹⁹ Thus, because the plaintiff's injury was unexpected, unintended, and based on the discovery of the photo clerk's acts, the *Trinity* court held that the defendant's conduct was included within the definition of an *occurrence* under the policy.³⁰⁰ It is interesting that the same court made a distinction between intentionally shooting into a crowd with the intent to get a shocked reaction without intent to cause harm in *Misle*, and intentionally showing photographs with the intent of getting a shocked reaction without intent to cause harm in *Trinity*.

In *Burlington Insurance Co. v. Mexican American Unity Council, Inc.*,³⁰¹ a recent negligence case, the San Antonio Court of Appeals granted a declaratory judgment in favor of an insurer based upon an intentional act exclusion provision.³⁰² In *Burlington*, the plaintiff alleged negligence against a youth home for allowing her to leave the premises whereupon she was physically and sexually assaulted by an unknown attacker.³⁰³ The San Antonio Court of Appeals found that the plaintiff's alleged damages were based upon assault and battery—conduct expressly excluded under the policy. The court refused to separate the negligence of the defendant from the intentional acts of the third party because the assault was "the origin of the plaintiff's damages."³⁰⁴ This interpretation, if adopted by other courts, would

293. *Id.* at 126-27.

294. *Id.* at 127.

295. *Id.*

296. *Id.* at 128 (emphasis added).

297. *Id.* at 129 (emphasis added).

298. *Id.* (emphasis added).

299. *Id.*

300. *Id.* at 130.

301. 905 S.W.2d 359 (Tex. App.—San Antonio 1995, n.w.h.).

302. *Id.* at 360.

303. *Id.*

304. *Id.* at 363; see also *State Mut. Ins. Co. v. Russell*, 462 N.W.2d 785 (Mich. Ct. App. 1990) (holding that the business exclusion provision in a homeowners' policy relieved an insurer of its duty to defend and indemnify an in-home day care provider

eliminate *all* insurance coverage for sexual assaults by either insureds or others.

In *State Farm Fire & Casualty Co. v. Smith*,³⁰⁵ the federal Ninth Circuit refused to apply a subjective standard despite similar language contained in an exclusion provision.³⁰⁶ In *Smith*, a homeowner's insurer brought a declaratory judgment action to determine if the insurance company was liable for the insured's sexual molestation of his adopted daughter.³⁰⁷ The insurance policy contained exclusion provisions prohibiting coverage for "bodily injury . . . which is either intended or expected by an insured," prohibiting coverage for injuries resulting from willful and malicious acts of the insured, and prohibiting claims brought by relatives of the insured who reside in the same household.³⁰⁸ Although the plaintiffs argued that a subjective standard should apply, the Ninth Circuit held that Nevada law presumes that sexual molestation of minors under the age of fourteen is harmful.³⁰⁹ The court reasoned, "One cannot intend the act of molestation without also intending the harm."³¹⁰ As a result, the *Smith* court concluded that the claim was not covered by the homeowner's policy.³¹¹

B. *The Inferred Intent Doctrine*

A majority of Texas courts have held intent may be inferred as a matter of law in sexual assault cases. In these cases, the status of the perpetrator and the victim play an important role in determining whether an insured is deemed to have intent necessary to bar coverage. Courts are more willing to apply the doctrine of *inferred intent* in cases where an adult is the perpetrator and a child is the victim,³¹²

in an action arising from a husband's intentional sexual assaults on a child using the day care services).

305. 907 F.2d 900 (9th Cir. 1990).

306. *Id.* at 903.

307. *Id.* at 901.

308. *Id.* at 902.

309. *Id.*

310. *Id.*

311. *Id.* at 903.

312. See, e.g., *Rodriguez v. Williams*, 729 P.2d 627, 630 (Wash. Ct. App. 1986) (en banc) (holding an intent to harm is inferred as a matter of law where an adult commits incest); *Linebaugh v. Berdish*, 376 N.W.2d 400, 405 (Mich. Ct. App. 1985) (holding an intent to injure may be inferred as a matter of law when an adult sexually penetrates a minor child); *Allstate Ins. Co. v. Kim W.*, 160 Cal. App. 3d 326, 332 (Cal. App. 1984) (an intent to cause harm may be inferred as a matter of law where a guardian sexually assaults a child); *CNA Ins. Co. v. McGinnis*, 666 S.W.2d 689, 691 (Ark. 1984) (intent to harm may be inferred from an adult's repeated sexual abuse of a minor); *Horace Mann Ins. Co. v. Independent Sch. Dist.*, 355 N.W.2d 413, 416 (Minn. 1984) (holding an intent to injure may be inferred where a teacher had sexual contact with a child); *Fireman's Fund Ins. Co. v. Hill*, 314 N.W.2d 834, 835 (Minn. 1982) (holding an intent to inflict injury may be inferred as a matter of law where a custodial foster parent molested a minor child in his custody); cf. *MacKinnon v. Hanover Ins. Co.*, 471 A.2d 1166, 1168 (N.H. 1984) (refusing to infer an intent to harm

than in cases where a child is the perpetrator³¹³ or where the perpetrator and the victim are both adults.³¹⁴

In *Maayeh v. Trinity Lloyds Insurance Co.*,³¹⁵ the Dallas Court of Appeals applied the inferred intent doctrine where an adult molested a child.³¹⁶ In *Maayeh*, the trial court granted summary judgment for the insurer, declaring that the insured stepfather's acts of child molestation were excluded from coverage under a homeowner's policy.³¹⁷ The Dallas Court of Appeals held that intentional exclusion provisions preclude coverage for acts of molestation.³¹⁸ The court stated, "[An] intent to harm can be inferred as a matter of law in cases of sexual molestation."³¹⁹

More recently, the Dallas Court of Appeals expanded this doctrine and held that in cases of child sexual molestation, intent to injure is inferred as a matter of law regardless of the perpetrator's status. In *J.T. v. D.B. & C.B.*³²⁰ the parents of a four-year-old child sued a thirteen-year-old and his parents for sexual abuse committed by the thirteen-year-old on multiple occasions while babysitting.³²¹ The plaintiff argued that intent to injure should not be inferred in cases where both the victim and the perpetrator are children.³²² The plaintiff asserted that the court should use a subjective standard to determine intent,³²³ but the Dallas Court of Appeals refused to distinguish child perpetrators from adult perpetrators, and held that when children are victims of sexual abuse, injury is substantially certain to follow.³²⁴

Likewise, in *Government Employees Insurance Co. v. McGinty*,³²⁵ a federal district court granted an insurer's motion for declaratory judgment, stating that an insurer has no duty to defend against or indem-

where an adult sexually abused his minor stepdaughter because the policy language expressly excluded only acts which were certain to produce injury).

313. *Allstate Ins. Co. v. Jack S.*, 709 F. Supp. 963, 966 (D. Nev. 1989) (refusing to infer an intent to harm where a minor committed sexual acts upon another minor).

314. *State Farm Fire & Casualty Co. v. Eddy*, 218 Cal. App. 3d 958, 970 (Cal. App. 1990) (refusing to infer an intent to harm because sexual conduct between adults did not constitute rape).

315. 850 S.W.2d 193 (Tex. App.—Dallas 1992, no writ).

316. *Id.* at 196. In *Reed Tool Co. v. Copelin*, 689 S.W.2d 404 (Tex. 1985), the Texas Supreme Court defined the standard used to determine if intent to injure is present. Intent to injure exists when "the actor desires to cause consequences of his act, or he believes that the consequences are substantially certain to result from it." *Id.* at 406 (quoting RESTATEMENT (SECOND) OF TORTS § 8A (1965)).

317. *Maayeh*, 850 S.W.2d at 195.

318. *Id.* at 197; see also *Commercial Union Ins. Co. v. Roberts*, 815 F. Supp. 1006 (W.D. Tex. 1992) (intent may be inferred in sexual molestation cases).

319. *Maayeh*, 850 S.W.2d at 197.

320. 1995 WL 221970 *1 (Tex. App.—Dallas April 13, 1995, writ denied) (unpublished opinion).

321. *Id.* at *1.

322. *Id.* at *4.

323. *Id.*

324. *Id.*

325. 832 F. Supp. 1092 (W.D. Tex. 1993), *aff'd*, 37 F.3d 633 (5th Cir. 1994).

nify a claim for child sexual molestation.³²⁶ In *McGinty*, although the underlying action was for negligence, the court held that intent may be inferred as a matter of law.³²⁷ The court reasoned:

Intent is inferred as a matter of law irrespective of the pleadings in the underlying action. This is because the core of the lawsuit revolves around allegations of sexual molestation of a child. Thus while some of McGinty's actions might technically be characterized as "negligence," his actions were substantially certain to cause injury to the child, and therefore intent can be inferred.³²⁸

Because sexual molestation is substantially certain to cause injury to a child, the *McGinty* court held the summary judgment for the insurer was appropriate.³²⁹ To consider these acts as anything but intentional, regardless of an actor's status, belittles a heinous and harmful act.

C. *The Complaint Allegation Rule*

Under the *complaint allegation rule*, unless it is clear from the pleadings that a claim is excluded from coverage, an insurer has a duty to defend.³³⁰ A duty will arise if the factual allegations, as set forth in the pleadings, when fairly and reasonably construed, state a cause of action covered under the policy. In determining whether such a duty exists, courts do not consider the truth or falsity of the pleadings, rather they apply the *eight corners rule*.³³¹ Courts look to the insurance policy and the pleadings to determine whether a duty to defend exists. While an insurance company may have a duty to initially defend against a suit, if an insured is later found to have acted with intent, the insurer does not have a duty to indemnify any subsequent judgment, regardless of how artfully a claim is pleaded. A narrow exception to this rule exists where references to extraneous facts are permitted.³³² These references are permissible when a plaintiff's complaint fails to allege facts sufficient to determine if her allegations are covered under the policy.³³³

326. *Id.* at 1094-95.

327. *Id.*

328. *Id.*

329. *Id.* at 1095.

330. *See, e.g.,* Trinity Univ. Ins. Co. v. Cowan, 906 S.W.2d 124 (Tex. App.—Austin 1995, writ requested). "[T]he complaint allegation rule . . . enables an insurer to rely on the plaintiff's allegations in determining whether the facts are within coverage." *Id.* at 131; *see also* Fidelity & Guaranty Ins. Underwriters, Inc. v. McManus, 633 S.W.2d 787 (Tex. 1982).

331. *See, e.g.,* Cullen/Frost Bank of Dallas, N.A. v. Commonwealth Lloyd's Ins. Co., 852 S.W.2d 252, 255 (Tex. App.—Dallas 1993), writ denied *per curiam*, 899 S.W.2d 266 (Tex. 1994).

332. W. Shelby McKenzie, *Fifth Circuit Symposium: Insurance Law*, 40 LOY. L. REV. 733, 740 (1994).

333. *See* Western Heritage Ins. Co. v. River Entertainment, 998 F.2d 311 (5th Cir. 1993) (plaintiff in a wrongful death action amended the pleadings in order to remove

CONCLUSION

Texas courts have struggled for the past decade with the question of where the burden of responsibility should rest to civilly compensate the victims of the most brutal conduct in the realm of human experience. An expansive approach toward liability for parties other than the actual perpetrators of these heinous acts began with *Nixon v. Mr. Property Management Co.* and peaked with *Havner v. E-Z Mart*. More recent decisions, as well as enactments by the Texas Legislature, have appropriately curbed the trend toward holding persons other than the perpetrators civilly responsible for harms suffered by sexual assault victims.

all references to alcohol but the insurer filed a declaratory action because the policy contained a liquor liability exclusion).

