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Paying for the Sins of Anotherparental Liability in Texas for the Torts of Children

David F. Johnson

PAYING FOR THE SINS OF ANOTHER— PARENTAL LIABILITY IN TEXAS FOR THE TORTS OF CHILDREN

David F. Johnson[†]

I. INTRODUCTION

With all of the violence that is perpetrated by the youth of today's society, victims are often left with no redress because youthful offenders rarely have any assets or any insurance coverage. Therefore, victims are seeking compensation for their injuries from the offender's parents under a negligence cause of action, i.e., that the parents did not properly supervise or control their child. This Article focuses on the current law in Texas of holding parents responsible for the torts of their minor and adult children. Additionally, this Article attempts to give some insight into the various issues that may arise in prosecuting or defending this type of lawsuit.

II. STATUTORY BASIS FOR HOLDING PARENTS LIABLE FOR MINOR CHILDREN'S TORTS

Texas Family Code section 41.001, entitled "Liability of Parents for Conduct of Child," provides for some parental liability for minor children's torts. This statute states:

† B.A. Baylor University; J.D. Baylor Law School, *magna cum laude*; currently an associate with Winstead Sechrest & Minick P.C. in Fort Worth, Texas. The Author would like to dedicate this Article to Dale Williams.

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> A parent or other person who has the duty of control and reasonable discipline of a child is liable for any property damage proximately caused by:
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> (1) the negligent conduct of the child if the conduct is reasonably attributable to the negligent failure of the parent or other person to exercise that duty; or
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> (2) the wilful and malicious conduct of a child who is at least 10 years of age but under 18 years of age.[1]

The first part of this statute provides that a person who has the duty to control a minor may be liable for the property damage that is incurred due to the negligent conduct of the minor that is attributable to the person's negligent breach of his duty to control the minor.[2] In other words, if a person is supposed to control a minor, he can be liable to a third party for property damage that is attributable to the minor's negligent conduct if the person's negligent lack of control allowed the minor to be negligent.

The second part of this statute provides that persons who have the duty to control a minor are liable for the wilful and malicious conduct of the minor who is between the ages of ten and eighteen.[3] This "part imposes liability without fault and without necessity for a parent-child relationship."[4] It only requires "that the person to be held liable have a duty of control and reasonable discipline over the child."[5] The purpose of this provision "is to protect and compensate property owners from the wilful and malicious destruction of their property by minors."[6]

This provision provides protection up to $25,000 in actual property damages per occurrence plus court costs and reasonable attorney's fees.[7] One court has held that where a minor made an unauthorized

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1. TEX. FAM. CODE ANN. § 41.001 (Vernon Supp. 2002). This provision formerly provided for liability of the "conduct of a child who [was] at least 12 years of age," but in 2001, it was amended and the age limit was lowered to "at least 10 years of age." *Id.* historical note [Act of May 21, 2001, 77th Leg., R.S., S.B. 233, § 1]. This change took "effect September 1, 2001, and applies only to property damage that occurs on or after that date." *Id.* historical note [Act of May 21, 2001, 77th Leg., R.S., S.B. 233, § 2]. A cause of action upon which property damage occurred before the effective date is governed by the law in effect at that time. *Id.* historical note [Act of May 21, 2001, 77th Leg., R.S., S.B. 233, § 2].

2. *See id.*

3. *See id.*

4. Carl David Adams, Note, *Has the Family Code Made Any Changes in the Liability of a Parent for His Child's Conduct?*, 26 BAYLOR L. REV. 687, 691 (1974).

5. *Id.*

6. Buie v. Longspaugh, 598 S.W.2d 673, 675 (Tex. Civ. App.—Fort Worth 1980, writ ref'd n.r.e.).

7. *See* TEX. FAM. CODE ANN. § 41.002. This provision formerly provided for only "$15,000 per occurrence, plus court costs and reasonable attorney's fees," but in 1997, it was amended and the amount raised to "$25,000 per occurrence, plus court costs and reasonable attorney's fees." *Id.* historical note [Act of June 17, 1997, 75th Leg., R.S., ch. 783, § 1, 1997 Tex. Gen. Laws 2571, 2571]. This change took "effect September 1, 1997, and applies only to a cause of action that accrues on or after that

withdrawal from his parents' account, the bank incurred only economic damages and not property damages.[8]

This provision does not extend any liability upon parents for the bodily injuries that their children may tortiously inflict upon third parties.[9] However, parents may still be liable under common law causes of action for the bodily injuries that are tortiously caused by their children. Section 41.001 does not abrogate any common law causes of action.[10] The older statute expressly provided that it was intended to impose liability in addition to all other actions and that the purpose of the statute was to impose liability on parents in situations where they would not otherwise be liable.[11]

Finally, some victims have attempted to use Texas Family Code section 151.001(a)(2) as a statutory basis to impose a duty upon parents to control their children.[12] This provision states, among other things, that a parent of a child has "the duty of care, control, protection, and reasonable discipline of the child."[13] However, at least one court has held that this provision is limited to the parent-child relationship and that it does not create a duty on the part of parents to protect third parties from their children's actions.[14]

III. Common Law Basis

As stated before, parents may be liable under common law causes of action for bodily injuries that are tortiously caused by their children. The general rule is that "there is no legal duty in Texas to control the actions of third persons absent a special relationship, such as master/servant or parent/child."[15] Further, "[a]t common law, the mere fact of paternity did not make a parent liable for the torts of his

date." *Id.* historical note [Act of June 17, 1997, 75th Leg., R.S., ch. 783, § 2, 1997 Tex. Gen. Laws 2571, 2571]. "A cause of action that accrued before the effective date . . . is governed by the law in effect at the time the cause of action accrued." *Id.* historical note [Act of June 17, 1997, 75th Leg., R.S., ch. 783, § 2, 1997 Tex. Gen. Laws 2571, 2571].

8. Amarillo Nat'l Bank v. Terry, 658 S.W.2d 702, 704 (Tex. App.—Amarillo 1983, no writ).

9. *See* Tex. Fam. Code Ann. § 41.002.

10. *See* Adams, *supra* note 4, at 692–93.

11. *See id.* at 692–93; *see also* Act of May 31, 1957, 55th Leg. R.S., ch. 320, § 3, 1957 Tex. Gen. Laws 783, 783–84, *repealed by* Act of June 15, 1973, 63rd Leg., R.S., ch. 543, § 3, 1973 Tex. Gen. Laws 1411, 1458.

12. *See* Tex. Fam. Code Ann. § 151.001(a)(2).

13. *Id.*

14. See Rodriguez v. Spencer, 902 S.W.2d 37, 42 (Tex. App.—Houston [1st Dist.] 1995, no writ).

15. Triplex Communications, Inc. v. Riley, 900 S.W.2d 716, 720 (Tex. 1995); Ely v. Gen. Motors Corp., 927 S.W.2d 774, 782 (Tex. App.—Texarkana 1996, writ denied); *see also* Villacana v. Campbell, 929 S.W.2d 69, 75 (Tex. App.—Corpus Christi 1996, writ denied) (holding no cause of action for negligent control of *adult* child).

or her minor child[ren]."[16] The existence of a special relationship, such as parent-child, is not controlling.[17] Indeed, in Texas, parents are not strictly liable for their children's intentional actions.[18] However, under certain circumstances, where a parent has some culpability, he can be held responsible for his child's intentional conduct that injures another.[19] Additionally, parents can be vicariously liable for their child's torts under a respondeat superior or joint enterprise theory, where applicable.[20]

A. *Actions of Minor Children*

A parent whose minor child commits a tort can be found negligent in the supervision and control of his or her child.[21] Negligence is a common law cause of action under which a court can hold a defendant liable for damages suffered by the plaintiff that were proximately caused by the breach of a duty owed by the defendant to the plaintiff.[22] The victim must present evidence to support each element of a cause of action for negligence; those elements are: (1) a legal duty; (2) breach of that duty; (3) proximate cause; and (4) compensable damages.[23] Therefore, in order to establish a cause of action for negligence, the victim must prove that the parents owed him a duty.[24]

Whether a duty exists is a threshold issue that should be answered by a court when the facts are undisputed.[25] In looking at whether a duty exists, courts should look to several factors: (1) the foreseeability of the general nature of the harm; (2) the degree of risk of injury to the plaintiff; (3) the "likelihood of injury weighed against the social utility of the actor's conduct;" (4) the magnitude of the burden that would be imposed if a duty to guard against or avoid the activity is

16. Childers v. A.S., 909 S.W.2d 282, 287 (Tex. App.—Fort Worth 1995, no writ); *Rodriguez*, 902 S.W.2d at 42; Aetna Ins. Co. v. Richardelle, 528 S.W.2d 280, 285 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.); Moody v. Clark, 266 S.W.2d 907, 912 (Tex. Civ. App.—Texarkana 1954, writ ref'd n.r.e.).

17. *See Rodriguez*, 902 S.W.2d at 42.

18. *See id.* at 45.

19. Therefore, it is important to know whether the child is a minor or an adult. A child is "a person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes." TEX. FAM. CODE ANN. § 101.003(a) (Vernon 1996); *see also Villacana*, 929 S.W.2d at 75. Further, an adult is any other person. TEX. FAM. CODE ANN. § 101.003(c).

20. *See Rodriguez*, 902 S.W.2d at 42; de Anda v. Blake, 562 S.W.2d 497, 499 (Tex. Civ. App.—San Antonio 1978, no writ); *Aetna Ins. Co.*, 528 S.W.2d at 285.

21. *See* Isbell v. Ryan, 983 S.W.2d 335, 339 (Tex. App.—Houston [14th Dist.] 1998, no pet.); *Aetna Ins. Co.*, 528 S.W.2d at 285; *Moody*, 266 S.W.2d at 912.

22. El Chico Corp. v. Poole, 732 S.W.2d 306, 311 (Tex. 1987).

23. *See* Werner v. Colwell, 909 S.W.2d 866, 869 (Tex. 1995); Northwest Mall, Inc. v. Lubri-Lon Int'l, Inc., 681 S.W.2d 797, 802 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.); Oldaker v. Lock Constr. Co., 528 S.W.2d 71, 77 (Tex. Civ. App.—Amarillo 1975, writ ref'd n.r.e.).

24. *See* Otis Eng'g Corp. v. Clark, 668 S.W.2d 307, 309 (Tex. 1983).

25. *See* Praesel v. Johnson, 967 S.W.2d 391 (Tex. 1998); Graff v. Beard, 858 S.W.2d 918, 919 (Tex. 1993).

imposed; and (5) "the consequences of placing that burden on the [defendant]."[26] Of these factors, foreseeability is the most important.[27]

The Second Restatement of Torts sets forth a duty of care for parents of minor children and 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.[28]

This provision requires that the parent "knows or should know of the necessity . . . for exercising such control."[29] Therefore, before imposing a duty of control upon a parent, the Restatement of Torts requires that the parent foresee a need to control, i.e., have some degree of foreseeability. Despite the fact that no Texas court has ever adopted this provision, Texas courts also impose the requirement of foreseeability before they impose a duty to control or supervise a child upon a parent.[30]

In *Moody v. Clark*, a mother left her son and another young boy in the back seat of a running car.[31] The boys climbed into the front seat and operated the running car causing the plaintiff to suffer property damage and personal injuries.[32] The plaintiff sued the boy's mother claiming that she negligently entrusted the car to the boy.[33] The case went to a jury, who awarded the plaintiff $10,000, and the defendant appealed.[34] The appellate court affirmed the judgment and stated that although the mother did not "entrust" her vehicle to the boy, she could still be liable where she makes accessible a dangerous instrumentality to the hands of a child.[35] Commenting on this case, one court has stated that "[d]eciding whether instrumentalities are inher-

26. *See* Bird v. W.C.W., 868 S.W.2d 767, 769 (Tex. 1994); Cent. Power & Light Co. v. Romero, 948 S.W.2d 764, 766–67 (Tex. App.—San Antonio 1996, writ denied); Berry Prop. Mgmt., Inc. v. Bliskey, 850 S.W.2d 644, 654 (Tex. App.—Corpus Christi 1993, writ dism'd by agr.); *see generally El Chico Corp.*, 732 S.W.2d at 311–12.

27. Greater Houston Transp. Co. v. Phillips, 801 S.W.2d 523, 525 (Tex. 1990).

28. RESTATEMENT (SECOND) OF TORTS § 316 (1965). For a good discussion of this provision, see Jefferey L. Skaare, Note, *The Development and Current Status of Parental Liability for the Torts of Minors*, 76 N.D. L. REV. 89 (2000).

29. RESTATEMENT (SECOND) OF TORTS § 316.

30. Rodriguez v. Spencer, 902 S.W.2d 37, 43 (Tex. App.—Houston [1st Dist.] 1995, no writ).

31. Moody v. Clark, 266 S.W.2d 907, 909 (Tex. Civ. App.—Texarkana 1954, writ ref'd n.r.e.).

32. *Id.*

33. *See id.* at 908–09.

34. *Id.* at 908.

35. *Id.* at 912–13.

ently or potentially dangerous involves an element of anticipation, what a parent knows or should know . . . . Although *Moody* does not use the word 'foreseeability,' we conclude that parental anticipation of danger was an element necessary to establish liability."[36]

In *Rodriguez v. Spencer*, the mother of a boy, who was beaten to death due to a "gay bashing" incident, sued the parents of one of the boys who participated in the beating.[37] The plaintiff sued the defendant claiming that the parent-child relationship created a duty to supervise, control, and discipline the child.[38] The defendant filed a motion for summary judgment, which the trial court granted.[39]

The plaintiff appealed, and the appellate court held that several factors are to be considered in determining the existence of a duty, including: "risk, foreseeability, and likelihood of injury weighed against the social utility of the defendant's conduct, the magnitude of the burden of guarding against the injury and consequences of placing that burden on the defendant."[40] The court held that the most important of these factors was foreseeability.[41] The court held that to establish liability there must be parental anticipation of danger.[42] "[T]he basis of [a] parent's duty to third persons is [established through] the parent's knowledge, consent, sanction, or participation in the child's activities," including the child's "violent tendencies."[43]

Importantly, the court held that "[a]ctual knowledge is not required if the parent should, under the circumstances, reasonably anticipate the consequences of his or her actions."[44] The court then went into a lengthy discussion of the evidence to determine whether the child's act was foreseeable to his mother.[45] The evidence showed that the mother established curfews and maintained discipline for the child.[46] It further established that the defendant did not know her child to lie, had never seen him with a weapon, had warned the child to stay away from undesirable acquaintances, and had never known the child to harbor negative feelings about homosexuals.[47] The court determined that it was not foreseeable to the defendant that her child would have committed the crime because the child had never before demonstrated a propensity to act in such a heinous manner.[48] Thus, the

36. Rodriguez v. Spencer, 902 S.W.2d 37, 42 (Tex. App.—Houston [1st Dist.] 1995, no writ).
37. *Id.* at 39–40.
38. *See id.* at 40.
39. *See id.*
40. *Id.* at 41.
41. *Id.*
42. *Id.* at 42.
43. *Id.*
44. *Id.* (emphasis omitted).
45. *Id.* at 43–44.
46. *Id.* at 44.
47. *Id.*
48. *Id.* at 45.

court affirmed the trial court's granting of the defendant's summary judgment.

In *Childers v. A.S.*, the plaintiff was the mother of a child that played sexual games with the defendant's child.[49] The plaintiff sued the defendant based on a negligence cause of action and alleged: (1) that the defendant failed to adequately supervise her child's activities and conduct; (2) the defendant failed to report her child's actions to local authorities; (3) the defendant failed to provide an environment for the plaintiff's child free of mental and physical abuse; (4) the defendant failed to exercise reasonable care in maintaining family relations of the plaintiff and her child when the defendant knew or should have known about the acts of her child; and (5) the defendant failed to exercise reasonable care in providing her child with reasonable psychotherapy and other necessary medical treatments.[50] The defendant moved for summary judgment based on the lack of duty, which the trial court granted, and the plaintiff appealed.[51]

The court of appeals affirmed the trial court.[52] The court first followed and expressly adopted *Rodriguez* in determining whether the defendant owed a duty to the plaintiff's child.[53] The evidence showed that the sexual acts took place in the plaintiff's home, the defendant was not present or supervising the children when the acts took place, and the plaintiff was often home when the acts took place.[54] The court also held that the defendant did not owe the plaintiff a duty as an owner or occupier of property where the molestation took place.[55]

In *Prather v. Brandt*, the victim of a drive-by shooting sued a father and son, alleging that they were both responsible for the shooting.[56] The father purchased a shotgun for his son and loaned his automobile to his son, and the son then participated in a drive-by shooting.[57] The victim of that shooting sued the boy and his father on various claims, including strict liability and negligence.[58] The trial court granted the father a directed verdict after the plaintiff rested, and the plaintiff appealed.[59]

First, the appellate court affirmed the trial court's directed verdict as to the plaintiff's strict liability cause of action.[60] The plaintiff argued that the parents should have been held liable under strict liability

49. Childers v. A.S., 909 S.W.2d 282, 285 (Tex. App.—Fort Worth 1995, no writ).
50. *Id.* at 286.
51. *Id.*
52. *Id.* at 285.
53. *Id.* at 289.
54. *Id.*
55. *Id.*
56. Prather v. Brandt, 981 S.W.2d 801, 804 (Tex. App.—Houston [1st Dist.] 1998, pet. denied).
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*

"because the shotgun was an inherently dangerous instrumentality and [the child's] actions on the night [the plaintiff] was shot were abnormally dangerous."[61] The appellate court found that "Texas does not recognize a cause of action of strict liability for 'ultrahazardous' or 'abnormally dangerous' activities."[62]

Second, the appellate court cited to *Rodriguez* and affirmed the trial court's directed verdict as to the plaintiff's negligence cause of action.[63] The appellate court stated:

> A parent may be liable if the parent negligently allows his child to act in a manner likely to harm another, if he gives his child a dangerous instrumentality, or if he does not restrain a child known to have dangerous tendencies. A parent's duty to protect third parties from his child's acts depends on whether the injury to the third party is foreseeable. Foreseeability is evaluated by looking at the parent's knowledge of, consent to, or participation in the child's activity.[64]

The court noted the son's "record of being . . . responsible, respectful, and well-behaved."[65] It noted that the father "did not know of any disobedience or discipline problems," and that the son always followed the family's gun rules.[66] Thus, the court held that the plaintiff had not produced any "evidence raising a fact issue as to whether [the father] should have foreseen [the son's] actions."[67]

In *Isbell v. Ryan*, a stepmother brought an action against her stepson's mother claiming that the stepson's mother negligently failed to warn her that the stepson was a potential danger to her two young daughters based on the stepson's alleged prior sexual molestation of his cousin.[68] The defendant had a report that her son likely molested his young cousin.[69] However, the defendant did not warn either her son's father or his new wife, the plaintiff, when the boy went to stay with his father for the summer.[70] The defendant filed a no-evidence motion for summary judgment based on the fact she has no duty to the plaintiff, and the trial court granted it.[71]

The appellate court reversed the summary judgment and held that there was more than a scintilla of evidence that the defendant owed

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61. *Id.*
62. *Id.* (citing Turner v. Big Lake Oil Co., 128 Tex. 155, 166, 96 S.W.2d 221, 226 (1936)); *see also* Barras v. Monsanto Co., 831 S.W.2d 859, 865 (Tex. App.—Houston [14th Dist.] 1992, writ denied).
63. *Id.* at 806–07.
64. *Id.* (citations omitted).
65. *Id.* at 807.
66. *Id.*
67. *Id.*
68. Isbell v. Ryan, 983 S.W.2d 335, 337–38 (Tex. App.—Houston [14th Dist.] 1998, no pet.).
69. *Id.* at 337.
70. *Id.*
71. *Id.* at 338.

the plaintiff a duty to warn of the boy's potential dangerousness.[72] The court stated:

> This court agrees that *Rodriguez* controls the case at bar with regard to the issue of foreseeability in the context of the *parent-child relationship as it gives rise to a legal duty to protect third persons*. . . . [T]he *Rodriguez* rule [states] that the basis of the parent's duty to third persons is the parent's knowledge, consent, sanction, or participation in the child's tendencies to commit bad acts.
>
> The evidence in this case shows that [the defendant] did not negate the issues of misrepresentation and foreseeability . . . . Based upon [the report of molestation] and her knowledge of the situation by virtue of her position as [the boy's] mother and the [cousin's] aunt, [the defendant] could have reasonably anticipated the danger of allowing [her son] to go to the [plaintiff's] home without giving the [plaintiff] adequate warning of the possibility of danger to [the boy's] half-sisters.[73]

Thus, the court reversed the summary judgment and held that the mother could be liable for her son's intentional acts because they were foreseeable.

In *Ordonez v. Gillespie*, the defendants' mentally challenged son sexually assaulted the plaintiff, who was a hotel housekeeper, while she attempted to clean the defendants' room.[74] The plaintiff sued the defendants and alleged that they were negligent in the supervision and control of their son.[75] The defendants filed a no-evidence summary judgment alleging that there was no evidence that the defendants' son's conduct was foreseeable.[76] The trial court granted the defendants' motion, and the plaintiff appealed.[77]

The appellate court affirmed the summary judgment. The court stated:

> Duty is the threshold inquiry. It is the function of several interrelated factors, the foremost and dominant consideration being foreseeability of the risk. A parent's duty to protect third parties from the acts of the parent's minor child depends on whether the injury to the third party is reasonably foreseeable. Foreseeability means the actor, as a person of ordinary intelligence, should have anticipated the dangers his negligent act created for others. In the absence of foreseeability, there is no duty.[78]

The court reviewed the plaintiff's evidence and stated:

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72. *See id.* at 341.

73. *Id.* (citations omitted) (emphasis added).

74. Ordonez v. Gillespie, No. 05-99-02095-CV (Tex. App.—Dallas Mar. 28, 2001, no pet.) (not designated for publication), 2001 Tex. App. LEXIS 1965, at *1.

75. *Id.* at *1–2.

76. *Id.* at *2.

77. *Id.*

78. *Id.* at *4–5 (citations omitted).

> [e]vidence that [the defendants' son] did not like school and disrupted class is no evidence that his parents should have foreseen the possibility that he was capable of assaultive conduct. Likewise, evidence that [the defendants] considered him to be mentally handicapped is no evidence that it was foreseeable he might be a danger to others.[79]

In *Milligan v. Soto*, the plaintiff left three of her children in the defendant's day care.[80] The defendant's son, who was mentally retarded, sexually abused two of the plaintiff's children.[81] The plaintiff sued the defendant based on negligence and breach of contract.[82] The defendant filed a summary judgment motion on these claims, which the trial court granted.[83] The plaintiff appealed, and the court of appeals affirmed the summary judgment.[84] The court stated that the plaintiff's only evidence that it was foreseeable that the defendant's son would sexually assault the plaintiff's children was that he was mentally retarded.[85] The court also stated that the plaintiff presented no evidence that a mentally retarded person was any more likely to sexually abuse a child than someone without mental retardation.[86] The court found that because the defendant's son never had any disciplinary problems, never engaged in criminal or sexual conduct, and never stated any sexual interest in children, his sexual assault on the plaintiff's children was not foreseeable.[87] Accordingly, the court affirmed the summary judgment as to the plaintiff's negligence cause of action.[88] Regarding the plaintiff's breach of contract cause of action, the court held that where a contract fails to expressly set forth the duties and responsibilities of the parties, the reasonableness of a party's actions is relevant to whether there was a breach of the contract.[89] Consequently, the court found that because the defendant's son's actions were not foreseeable, there was no breach of the contract.[90]

The basic theme running through all of these cases is that before a parent owes a third party a duty to control his or her minor child, the parent must reasonably be able to foresee the minor child's complained of conduct. If a court determines that, under the facts of the case, the parent could not have foreseen the child's conduct, then the

79. *Id.* at *7–8.
80. Milligan v. Soto, No. 07-00-0543-CV (Tex. App.—Amarillo June 22, 2001, no pet.) (not designated for publication), 2001 Tex. App. LEXIS 4167, at *1.
81. *Id.*
82. *See id.* at *2.
83. *Id.* at *2–3.
84. *Id.* at *3, *12.
85. *Id.* at *8.
86. *Id.*
87. *Id.* at *8–9.
88. *Id.* at *9.
89. *Id.* at *10–12.
90. *Id.* at *12.

parent owes no duty to third parties to control his child or to warn third parties of his child. A determination as to foreseeability is obviously a case-specific determination. Texas has not set out a clear standard for what prior acts will give a parent notice that his child may commit a tortious act. However, before a child's violent acts can be foreseeable, there certainly should be some similar prior violent activity by that child. Other jurisdictions seem to have adopted the very strict and narrow standard that where the child does not commit the same act in the past, the complained of act is not foreseeable.[91] Thus far, the only Texas case reversing a finding of no parental liability for the tortious acts of a minor child involved the parent having actual knowledge that the child committed the exact same act (sexual assault) in the past.[92] Though Texas's standard may not be clear, there should still be some evidence of a prior similar tortious act by the child before the child's parents owe a duty to third parties.

B. *Actions of Adult Children*

Where an adult child lives with his parents and commits a tortious act, the victim of that tortious act may attempt to hold the parents liable for the act. Once again, plaintiffs often allege that the adult child's parents had a duty to control and supervise the child or a duty to warn the victim of the child's dangerous nature. However, generally, the law imposes no duty upon persons to act.[93] As the Texas Supreme Court has stated,

> if a party negligently creates a dangerous situation it then becomes his duty to do something about it . . . [but] it may be said generally, as a matter of law, that a mere bystander who did not create the

91. *E.g.*, Snow v. Nelson, 475 So. 2d 225, 226 (Fla. 1985) (finding it was not foreseeable that the child would attempt to injure others with a croquet mallet because there was no prior acts by the child of swinging the mallet); *see, e.g.*, Dinsmore-Poff v. Alvord, 972 P.2d 978, 979, 986 (Alaska 1999) (holding that prior act of shooting a person in the hand was not sufficient to put parents on notice that child would commit murder); Parsons v. Smithey, 504 P.2d 1272, 1273, 1275–76 (Ariz. 1973) (in banc) (finding that prior threats that child would throw rocks at a strange woman did not put parents on notice that child would beat the victim with a hammer); Gissen v. Goodwill, 80 So. 2d 701, 702, 705 (Fla. 1955) (concluding that prior act of striking hotel employees where child lived was not sufficient to put parents on notice that child would sever employee's finger by slamming door on employee's hand); Wells v. Hickman, 657 N.E.2d 172, 178 (Ind. Ct. App. 1995) (holding that prior acts of beating a dog to death and killing a hamster and knowledge that child needed psychological help were not sufficient to put parents on notice that child would beat neighborhood child to death); *see generally* Skaare, *supra* note 28.

92. *See* Isbell v. Ryan, 983 S.W.2d 335, 340–41 (Tex. App.—Houston [14th Dist.] 1998, no pet.).

93. Nash v. Perry, 944 S.W.2d 728, 729 (Tex. App.—Austin 1997), *rev'd on other grounds sub nom.* Perry v. S.N., 973 S.W.2d 301 (Tex. 1998); Venetoulias v. O'Brien, 909 S.W.2d 236, 242 (Tex. App.—Houston [14th Dist.] 1995, writ dism'd by agr.).

> dangerous situation is not required to become the good Samaritan and prevent injury to others.[94]

The "[m]ere knowledge of a dangerous situation imposes only a moral duty to warn or render aid, [it does not impose any] legal duty."[95] Further, a parent is not liable to third persons solely because he or she has been appointed guardian of his adult child under the Texas Probate Code.[96]

In *Villacana v. Campbell*, the defendants' adult son, who had been living with them, shot and killed a man.[97] The victim's parents sued the defendants alleging that they negligently failed to control their adult child and negligently entrusted their adult child with a firearm.[98] The trial court granted the defendants' motion for summary judgment, and the plaintiffs appealed.[99] The appellate court affirmed the summary judgment and stated:

> Liability for negligence requires the existence of a legally cognizable duty . . . . A court can, therefore, properly dispose of a negligence case by summary judgment if it finds no duty in the actor even assuming all facts alleged in the petition are true.
>
> There is no general duty to control the conduct of third persons. This rule applies even if the actor has the practical ability to control the third person. The law creates exceptions to this rule when the actor and the third person have a special relationship which imposes a duty upon the actor to control the third person's conduct. Included within these special relationships is that of parent/child.
>
> . . . No current Texas law imposes liability on a parent for the actions of an adult child. We hold that, as a matter of law, appellants have no cause of action for negligent control, and the trial court's grant of summary judgment was proper.[100]

The court then held that the parents were not liable under a theory of negligence for failing to control their adult child.[101]

In *Melchor v. Zapata*, the defendants' adult son killed the plaintiffs' son with a bat at a party thrown by the defendants' son at the defendants' house.[102] The plaintiffs sued the defendants and alleged that

94. Abalos v. Oil Dev. Co. of Tex., 544 S.W.2d 627, 633 (Tex. 1976) (ellipsis in original) (quoting Buchanan v. Rose, 138 Tex. 390, 391–92, 159 S.W.2d 109, 110 (1942)).

95. Barras v. Monsanto Co., 831 S.W.2d 859, 865 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

96. *See* TEX. PROB. CODE ANN. § 673 (Vernon Supp. 2002).

97. Villacana v. Campbell, 929 S.W.2d 69, 72 (Tex. App.—Corpus Christi 1996, writ denied).

98. *Id.*

99. *Id.*

100. *Id.* at 75 (citations omitted).

101. *See id.*

102. Melchor v. Zapata, No. 01-95-01226-CV (Tex. App.—Houston [1st Dist.] Aug. 29, 1996, no writ) (not designated for publication), 1996 Tex. App. LEXIS 3953, at *1–2.

they "were negligent and created a dangerous condition on the premises by allowing [their son] to have an unsupervised party."[103] The defendants filed a motion for summary judgment, which was granted, and the plaintiffs appealed.[104]

The appellate court held that under the plaintiffs' negligence cause of action for failing to control their son, the defendants did not owe a duty to third parties in their role as the parents of an adult son who lived at home.[105] However, the court went ahead and assumed that even if a duty was owed, there was no evidence that the defendants' son's actions could have been foreseen by the defendants.[106] The court analyzed the evidence and found that there was no evidence that the defendants knew or should have known that their son had violent tendencies.[107] Further, under the plaintiffs' landowner claim, the appellate court held that because the plaintiffs' son was not invited to the party, he was a trespasser.[108] The court held that there was no evidence that the defendants willfully or wantonly caused the plaintiffs' son's death as is required by a trespasser to prove that a landowner owes him a duty.[109] Additionally, the court held that the defendants' actions in leaving their son alone did not proximately cause the plaintiffs' son's death; the court stated, "[t]he connection between the [defendants'] leaving [their son] at home unsupervised and the events leading to [the plaintiffs' son's] death is too attenuated to establish legal cause."[110] Therefore, the appellate court affirmed the trial court's summary judgment in favor of the defendants.[111]

In *Kovar v. Krampitz*, an eighteen-year-old threw a party where the plaintiff's son had consumed alcohol.[112] The plaintiff's son was then permitted to drive an automobile, which he wrecked, killing himself.[113] The plaintiff sued the eighteen-year-old and his parents under theories of negligence per se and common law negligence.[114] The court of appeals held that the parents of a child who is eighteen years of age or older are not responsible for the acts of their adult child.[115]

103. *Id.* at *2.
104. *Id.*
105. *Id.* at *7.
106. *Id.*
107. *Id.* at *7–9.
108. *Id.* at *5.
109. *Id.*
110. *Id.* at *6.
111. *Id.* at *9.
112. Kovar v. Krampitz, 941 S.W.2d 249, 251–52 (Tex. App.—Houston [14th Dist.] 1996, no writ).
113. *Id.* at 252.
114. *Id.*
115. *Id.* at 255.

In *Cain v. Cain*, the defendant allowed his daughter and son-in-law to move into his home.[116] The defendant also allowed his minor niece to move into his home.[117] While the defendant's niece was living in the home, she was raped repeatedly by the defendant's son-in-law.[118] The evidence showed that the defendant knew that his son-in-law had been placed on probation for sexually assaulting a seventeen-year-old girl at his job and knew that he had been jailed for violating his probation.[119] Further, many of the rapes occurred after the defendant's son-in-law and niece had been drinking alcohol in the defendant's presence, and drinking alcohol was a violation of the son-in-law's probation.[120] The niece sued the defendant and his daughter, and the jury found for the niece.[121]

The defendant appealed, and the appellate court affirmed the jury's verdict.[122] The court relied upon an exception found in section 448 of the Restatement (Second) of Torts,[123] which states:

> The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.[124]

The appellate court reasoned that when the defendant's niece moved into his home, the defendant knew that his home was already inhabited by an adult male on probation for sexually assaulting a minor and that his son-in-law had violated his probation.[125] Therefore, the court ruled that it reasonably should have appeared to the defendant that his son-in-law would attack his niece and that the defendant owed a duty to prevent harm to the niece.[126]

Therefore, it appears that absent a parent's creating a situation where an adult child will foreseeably injure a third person, a parent of an adult child should not be liable for the adult child's tortious conduct.

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116. Cain v. Cain, 870 S.W.2d 676, 679 (Tex. App.—Houston [1st Dist.] 1994, writ denied).
117. *Id.*
118. *Id.*
119. *Id.* at 678–79.
120. *Id.* at 679.
121. *Id.* at 680.
122. *Id.* at 680–82.
123. *See id.* at 680.
124. RESTATEMENT (SECOND) OF TORTS § 448 (1965). The Texas Supreme Court has previously adopted the exception found in section 448. Nixon v. Mr. Prop. Mgmt. Co., 690 S.W.2d 546, 550 (Tex. 1985).
125. *Cain*, 870 S.W.2d at 680.
126. *Id.* at 680–81.

C. *Negligent Entrustment*

One potentially valid claim that a victim can raise against the parents of a tortfeasor is negligent entrustment. This would occur where the parents of the tortfeasor loaned the tortfeasor some instrument by which he injured the plaintiff. As one court has stated:

> [a] person who gives a chattel to another, knowing the other person, due to youth, inexperience, or other factors, is likely to use the chattel in a manner involving unreasonable risk of harm to himself or others, may be held liable for harm caused by the use of the chattel.[127]

The well established elements of negligent entrustment of a vehicle are: "(1) the owner entrusted the automobile (2) to a person who was an incompetent or reckless driver, (3) who the owner knew or should have known was incompetent or reckless, (4) the driver was negligent, and (5) and [sic] the driver's negligence proximately caused the accident and the plaintiff's injuries."[128] These elements can be useful in the determination of a negligent entrustment claim concerning the entrustment of chattels other than vehicles.[129]

In *Kennedy v. Baird*, the plaintiffs went to the defendant's house.[130] The defendant's son began shooting at them and injured them.[131] The plaintiffs sued the defendant for negligently entrusting his son with a gun.[132] The defendant filed a motion for summary judgment, which was granted, and the plaintiffs appealed.[133] After deciding that it was possible to bring an action for negligent entrustment of a firearm, the appellate court examined the affidavit of the defendant.[134] That affidavit stated that the defendant's son was self-employed, had his own car, and that the defendant seldom saw him.[135] He stated that he had no knowledge of his son ever using a gun on any person or car and did not believe that his son had a violent temper.[136] The plaintiffs responded by offering affidavits that proved that the son had pushed another boy down on one occasion and had a reputation for having a violent temper.[137] The court found that the defendant had no knowl-

127. Prather v. Brandt, 981 S.W.2d 801, 806 (Tex. App.—Houston [1st Dist.] 1998, pet. denied) (citing RESTATEMENT (SECOND) OF TORTS § 390).

128. *Id.* (citing Soodeen v. Rychel, 802 S.W.2d 361, 362 (Tex. App.—Houston [1st Dist.] 1990, writ denied)).

129. *See id.*

130. Kennedy v. Baird, 682 S.W.2d 377, 377 (Tex. App.—El Paso 1984, no writ).

131. *Id.*

132. *Id.*

133. *See id.*

134. *Id.* at 378–79.

135. *Id.* at 379.

136. *Id.*

137. *Id.*

edge of his son's propensity to commit the type of act complained of or to use rifles dangerously and affirmed the summary judgment.[138]

IV. Availability of Exemplary Damages Against Parents

A victim's cause of action for exemplary damages will be controlled by the Texas Civil Practice and Remedies Code sections 41.001 through 41.013, as amended in 1995.[139] Texas Civil Practice and Remedies Code section 41.005 precludes a plaintiff's claim for exemplary damages against parents of children who commit torts.[140] That provision states: "In an action arising from harm resulting from an assault, theft, or other criminal act, a court may not award exemplary damages against a defendant because of the criminal act of another."[141] However, this exemplary damage limitation does not apply when:

> [The parents are] criminally responsible as a party to the criminal act under the provisions of Chapter 7, [Texas] Penal Code;
>
> . . . the criminal act occurred at a location where, at the time of the criminal act, the [parents were] maintaining a common nuisance under the provisions of Chapter 125, [Texas] Civil Practice and Remedies Code, and had not made reasonable attempts to abate the nuisance; or
>
> . . . the criminal act resulted from the [parents'] intentional or knowing violation of a statutory duty under Subchapter D, Chapter 92, [Texas] Property Code and the criminal act occurred after the statutory deadline for compliance with that duty.[142]

Other than these few narrow exceptions, parents of children who commit tortious acts should not have to face a claim for exemplary damages.

V. Minor Child's Liability for His or Her Tortious Conduct

"As a general rule, minors are civilly liable for their own torts,"[143] provided that the child has the capacity to commit the particular tort

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138. *Id.* at 379–80.

139. *See* Tex. Civ. Prac. & Rem. Code Ann. §§ 41.001–.013 (Vernon 1997 & Supp. 2002).

> (a) This chapter applies to any action in which a claimant seeks exemplary damages relating to a cause of action.
>
> (b) This chapter establishes the maximum exemplary damages that may be awarded in an action subject to this chapter, including an action for which exemplary damages are awarded under another law of this state.

Id. § 41.002 (Vernon Supp. 2002).

140. *See id.* § 41.005 (Vernon 1997).

141. *Id.*

142. *Id.* (citation omitted).

143. Prather v. Brandt, 981 S.W.2d 801, 806 (Tex. App.—Houston [1st Dist.] 1998, pet. denied).

involved.[144] Further, minor children can commit wilful and intentional torts, thus opening themselves up to punitive damages.[145] Because a minor child can be held responsible for his or her tortious conduct, the parents of a child that commits a tort may want to join their child in the suit as a party defendant to lessen the parents' proportionate liability findings.

A. *Submission of Child Under Proportionate Liability Questions in Charge*

The Texas Civil Practice and Remedies Code sections 33.001 through 33.017 (Chapter 33) describe the current practice of proportionate liability in Texas.[146] Before tort reform, Chapter 33 did not apply to a claim based on intentional torts. However, as of September 1, 1995, Chapter 33 does apply to intentional torts. Chapter 33 provides:

> The trier of fact, as to each cause of action asserted, shall determine the percentage of responsibility, stated in whole numbers, for the following persons with respect to each person's causing or contributing to cause in any way the harm for which recovery of damages is sought, whether by negligent act or omission, by any defective or unreasonably dangerous product, by other conduct or activity that violates an applicable legal standard, or by any combination of these:
>
> (1) each claimant;
>
> (2) each defendant;
>
> (3) each settling party; and
>
> (4) each responsible third party who has been joined under Section 33.004.[147]

The term "responsible third party" is defined as

> any person to whom all of the following apply:
>
> (i) the court in which the action was filed could exercise jurisdiction over the person;
>
> (ii) the person could have been, but was not, sued by the claimant; and
>
> (iii) the person is or may be liable to the plaintiff for all or a part of the damages claimed against the named defendant or defendants.[148]

144. Williams v. Lavender, 797 S.W.2d 410, 412 (Tex. App.—Fort Worth 1990, writ denied); *see also* Chandler v. Deaton, 37 Tex. 406, 407 (1872–73); Bailey v. C.S., 12 S.W.3d 159, 162–63 (Tex. App.—Dallas 2000, no pet.); *Prather*, 981 S.W.2d at 806; Childers v. A.S., 909 S.W.2d 282, 287 (Tex. App.—Fort Worth 1995, no writ).

145. *See Williams*, 797 S.W.2d at 412.

146. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 33.001–.017 (Vernon 1997 & Supp. 2002).

147. *Id.* § 33.003.

148. *Id.* § 33.011(6)(A).

Under this definition, a parent's child that commits an intentional tort would be considered a "responsible third party." Therefore, if the child who is the active tortfeasor is brought into the suit as a responsible third party, the jury will have the opportunity to determine the percentage of responsibility for each person who contributed to cause the claimant's harm by either a negligent act or any other conduct or activity that violates an applicable legal standard.[149] The use of comparative responsibility to attribute the cause of the plaintiff's damages to the criminal is potentially one of the main defenses of negligent defendants, and this defense has been recognized in many jurisdictions.[150] Therefore, the only remaining step to having the offending child submitted under the proportionate liability question in the charge is that the child has to be joined under section 33.004 of the statute.[151]

B. *Joinder of the Child*

Chapter 33 has its own joinder provision. Section 33.004 states, "[e]xcept as provided in Subsections (d) and (e), prior to the expiration of limitations on the claimant's claim for damages against the defendant and on timely motion made for that purpose, a defendant may seek to join a responsible third party who has not been sued by the claimant."[152] Therefore, if the statute of limitations has not run on the plaintiff's cause of action against the child, the parent is entitled to join the child in the suit as a responsible third party if the motion is made in a timely fashion.

Traditionally, Texas Rule of Civil Procedure 38 (Rule 38) has governed joinder of third parties.[153] The Author is not altogether certain that Rule 38 governs joinder of responsible third parties as Chapter 33 has its own joinder provision in section 33.004. However, Rule 38 does not necessarily conflict with Chapter 33, and cases interpreting Rule 38 may be applicable in interpreting Chapter 33's joinder provision.

Rule 38 states,

> [a]t any time after commencement of the action a defending party, as a third-party plaintiff, may cause a citation and petition to be served upon a person not a party to the action who is or may be liable to him or to the plaintiff for all or part of the plaintiff's claim against him.[154]

149. *See id.* § 33.003.

150. *See generally* Martin v. United States, 984 F.2d 1033, 1038–40 (9th Cir. 1993).

151. Whiteside v. Watson, 12 S.W.3d 614, 623 (Tex. App.—Eastland 2000, pet. dism'd by agr.) (interpreting that a person must be a party to be submitted under proportionate liability question). *See generally Martin*, 984 F.2d at 1039.

152. TEX. CIV. PRAC. & REM. CODE ANN. § 33.004.

153. *See* TEX. R. CIV. P. 38.

154. *Id.*

Therefore, under this rule, parents would be entitled to a joinder of their child as the child "may be liable to . . . the plaintiff for all or part of the plaintiff's claim."[155]

However, one limitation is that joinder must be done in a timely fashion.[156] Section 33.004 states, "on *timely* motion . . . a defendant may seek to join a responsible third party who has not been sued by the claimant."[157] Further, Rule 38 states that a defendant has to have leave of court to join a third party defendant if he does so later than thirty days after the service of his original answer.[158] Therefore, if parents wait until after thirty days from their original answer, they must ask for leave of court and may face some argument that their motion is not timely. However, there is no requirement that a third party claim be brought within thirty days of the date of the defendant's answer.[159]

In determining whether leave should be granted and any additional parties should be joined, Texas Rule of Civil Procedure 37 prescribes, "[b]efore a case is called for trial, additional parties . . . may be brought in, either by the plaintiff or the defendant, upon such terms as the court may prescribe; but not at a time nor in a manner to *unreasonably delay* the trial of the case."[160] Therefore, the timeliness inquiry is whether the joinder of the child will unreasonably delay the trial of the case.

One leading commentator in Texas procedural law states, "[l]eave should be liberally granted."[161] "[T]he rules of procedure encourage joinder of all interested parties."[162] The very basis of joinder and severance rests on the concept of "judicial efficiency as well as on the policy of providing full and adequate relief to the parties."[163] "A court has great discretion as to whether or not to permit joinder . . . , and its decision [should be] based on practical considerations with a view to [what is] fair [and] orderly."[164] The key is whether a delay is reasonable or not under the facts and circumstances of the suit, keep-

155. *Id.*

156. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 33.004.

157. *Id.* (emphasis added).

158. *See* TEX. R. CIV. P. 38.

159. Conroe Truck & Tractor, Inc. v. Childs Truck Equip. Inc., 723 S.W.2d 207, 209 (Tex. App.—Beaumont 1986, writ ref'd n.r.e.).

160. TEX. R. CIV. P. 37 (emphasis added).

161. 1 ROY W. MCDONALD, TEXAS CIVIL PRACTICE § 5:75 (1992).

162. *In re* E.L.P., 636 S.W.2d 579, 581 (Tex. App.—San Antonio 1982, no writ); *see also* Lloyds Cas. Insurer v. Farrer, 167 S.W.2d 221, 228 (Tex. Civ. App.—Dallas 1942), *aff'd*, 141 Tex. 497, 174 S.W.2d 302 (1943).

163. OKC Corp. v. UPG Inc., 798 S.W.2d 291, 293 (Tex. App.—Dallas 1984, no writ); *see also* Valley Indus., Inc. v. Martin, 733 S.W.2d 720, 721 (Tex. App.—Dallas 1987, orig. proceeding); Threeway Constructors, Inc. v. Aten, 659 S.W.2d 700, 701–02 (Tex. App.—El Paso 1983, no writ); Williamson v. Tucker, 615 S.W.2d 881, 886–87 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.).

164. Fireman's Fund Ins. Co. v. McDaniel, 327 S.W.2d 358, 373 (Tex. Civ. App.—Beaumont 1959, no writ).

ing in mind the history of the suit and not simply that a delay will occur.[165] A trial court may consider, among other things, whether the joinder would delay the trial of the case and what effect the joinder would have on discovery in the case.[166]

Obviously, the sooner the child is joined, the less chance there is that the plaintiff will object to the timeliness of the joinder. However, the decision to join the child, the active tortfeasor, is not so simple. The parents may well believe that having the benefit of a reduction in their responsibility percentage will be offset by an increase in the damage award because a jury is likely to award a higher amount of damages with the active tortfeasor sitting in the courtroom and participating in the trial. Therefore, all of the ramifications of having the child joined in the suit should be considered by the parents.

VI. CONCLUSION

Victims of juvenile crime often feel that the child and the child's parents are morally at fault for their injuries and damages. However, moral responsibility and legal responsibility do not always coincide. To some extent, the juvenile justice system can relieve some of the victim's feelings of anger toward the child, but there is often no crime committed by, and no criminal proceedings brought against, the parents. Therefore, the victim may attempt to seek justice and compensation from the parents through the civil justice system. This Article has attempted to set forth the current state of the law in determining when parents are legally responsible for the tortious acts of their children and other affiliated issues that arise with the prosecution of this type of suit.

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165. *See* TEX. R. CIV. P. 37.

166. *See Valley Indus., Inc.*, 733 S.W.2d at 721; *Threeway Constructors, Inc.*, 659 S.W.2d at 701–02.