

**A QUICK CRUISE THROUGH PERSONAL INJURY
CAUSES OF ACTION IN TEXAS**

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INTRODUCTION

Personal injury law in Texas defies being condensed to one paper or reduced to a brief discussion. Like our grand state, our tort system is large, varied, often misunderstood and maligned by critics, and dear to the hearts of many. Generally speaking, it embodies the rights of the aggrieved to seek redress at the courthouse for wrongs done to them. Perhaps no other area of law suffers the same assaults levied upon our tort system. Cries to “fix,” overhaul or outright repeal aspects of our tort system ring out and the battle over Texans’ rights in the courtroom is pitched as never before.

Often lost in all the emotional hyperbole, however, is the fundamental purpose of tort law, which is *prevention* of accidents and injuries. It is only when this initial goal fails that the secondary purpose of tort law is invoked, that of determining *just compensation* for the injured person. In such situations, practitioners prosecuting the rights of the aggrieved or defending the rights of the alleged wrongdoer enter the litigious realm of liability and damages. Broadly speaking, the analyses of whether there should be compensation (liability) and if so, how much (damages) originate in the personal injury causes of action covered briefly in this paper.

Caveat: It would be impossible to cover the entire spectrum of personal injury issues and causes of action that Texas practitioners might face, and this paper is obviously not exhaustive on the subject. When in doubt, contact a qualified attorney to discuss specific cases.

Examples of topics which are not covered in this paper include case evaluation; discovery; evidence; trial and appellate procedure; expert witness challenges (“*Daubert/Robinson*” issues); breach of warranty actions under the Uniform Commercial Code, Texas Business & Commerce Code or warranty liability express or implied or in contract; DTPA actions; Workers Compensation actions; employment law and ERISA actions; intentional torts (*e.g.*, defamation, assault and battery, false arrest and trespass); third-party and insurance actions, including bad faith and Insurance Code violations; contribution, indemnity and subrogation issues; admiralty actions; and other federal laws, statutes and causes of action.

The authors suggest that the practitioner unfamiliar with personal injury law first consult, at a minimum, comprehensive resources such as Dorsaneo’s *Texas Litigation Guide*, O’Conner’s *Texas Causes of Action* or Edgar & Sales’ *Texas Torts & Remedies* for general guidelines to follow in any particular case.

NEGLIGENCE

Negligence, the root of tort law, permeates every personal injury cause of action. Simply stated, it is the examination and determination of liability or fault and the damages flowing therefrom, if any. Thus, the most basic and common causes of action encountered in Texas personal injury actions are those based simply in negligence.

a. Elements of Negligence Actions

The elements of negligence are: (1) the existence of a legal duty owed by one person to another to protect the latter against injury; (2) a breach of that duty; and (3) damages proximately resulting from the breach. *Firestone Steel Products Co. v. Barajas*, 927 S.W.2d 608, 613 (Tex. 1996).

Duty, the threshold element, is a question of law for the court to decide based on the facts surrounding the occurrence in question. *Joseph E. Seagram & Sons, Inc. v. McGuire*, 814 S.W.2d 385, 387 (Tex. 1991). Generally, one’s duty is to observe a standard of care (*e.g.*, ordinary care while driving) or to take some affirmative action (*e.g.*, to correct or warn of a dangerous condition one creates). That standard of care in negligence cases is typically that of “ordinary care,” or that which a person of ordinary prudence would or would not have done under the same or similar circumstances. *See Colvin v. Red Steel Co.*, 682 S.W.2d 243, 245 (Tex. 1984); TEXAS PATTERN JURY CHARGE – GENERAL NEGLIGENCE & INTENTIONAL PERSONAL TORTS (2000), PJC 2.1.

Some duties are obvious and presumed, others are statutory or nondelegable, while others are more tenuous and may provide ready challenges to this element of negligence. In essence, the question of whether a duty exists is “Would reasonable people recognize and agree that a duty should exist between the parties?” See, e.g., *Childs v. Greenville Hospital Authority*, 479 S.W.2d 399, 399-401 (Tex.Civ.App. – Texarkana 1972, writ ref’d n.r.e.).

Once the plaintiff establishes that the defendant owed him a duty, the issue of whether that duty was breached becomes a factual question for the jury. That is, the plaintiff must present evidence showing that the defendant did not act as an ordinary prudent person would have acted in the same or similar circumstances. See *Brown v. Goldstein*, 685 S.W.2d 640, 641-42 (Tex. 1985). When the negligent conduct is not within the common experience of a layperson, expert testimony must be used to establish the standard of care for that individual (e.g., physicians, attorneys, accountants and pilots).

The plaintiff must then prove that this violation, or breach, was the proximate cause of the plaintiff’s injury. Proximate cause is determined by looking at the cause in fact (“but for” the breach, the injury would not have occurred) and foreseeability of the injury. *Doe v. Boys Clubs, Inc.*, 907 S.W.2d 472, 477 (Tex. 1995). The test for cause in fact is whether the negligent act or omission was a substantial factor in bringing about the injury and without it the injury would not have occurred. *Id.* The evidence must be sufficient for the jury to determine within a reasonable probability that the plaintiff’s injury would not have occurred without the defendant’s negligence. *Lenger v. Physician’s General, Inc.*, 455 S.W.2d 703, 706 (Tex. 1970). To prove foreseeability, the plaintiff must establish that a person of ordinary intelligence should have anticipated the danger created by the negligent act or omission. *Boys Clubs*, at 478. Foreseeability requires only that the injury be of such a general character as might reasonably have been anticipated, and the injured party be so similarly situated in relation to the wrongful act that the injury to him or to someone similarly situated might reasonably have been foreseen. *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 551 (Tex. 1985).

Examples of underlying claims sounding in negligence are extensive and limited in theory only by the ability to prove the three elements of duty, breach and causation. In a broad sense, all of the practitioner’s typical personal injury claims emanate from the basic negligence elements. Statute-sensitive causes of action such as medical malpractice and claims under the Texas Tort Claims Act add procedural hurdles necessary to recovery, but those claims too must ultimately be distilled to their essential negligence elements. In cases where the standard of care is defined by statute and adopted by the courts as defining the conduct of a reasonably prudent person, the breach of that standard of care is called negligence per se. See, e.g., *Carter v. William Somerville & Son, Inc.*, 584 S.W.2d 274, 278 (Tex. 1979).

b. Statute of Limitations

The statute of limitations for negligence is generally two years, and the cause of action accrues when a wrongful act causes an injury. *Childs v. Haussecker*, 974 S.W.2d 31, 36 (Tex. 1998). When an action for negligence involves wrongful conduct inflicted over a period of time, a continuing-tort exception may apply to the accrual period. *First General Realty Corp. v. Maryland Casualty Corp.*, 981 S.W.2d 495, 501 (Tex.App. – Austin 1998, pet. denied). If at the

time the cause of action accrues, the plaintiff is under age 18, is of unsound mind, or is serving in the United States military, the limitations period is tolled until after the disability is removed. TEX. CIV. PRAC. & REM. CODE §16.001.

The “discovery rule” may apply to an action for negligence when the nature of the plaintiff’s injury is inherently undiscoverable and the injury is objectively verifiable by physical evidence. *HECI Exploration Co. v. Neel*, 982 S.W.2d 881, 886 (Tex. 1998). The discovery rule defers the accrual of a cause of action until the plaintiff knows, or exercising reasonable care and diligence, should have known, of the wrongfully caused injury. The discovery rule specifically does not apply in health care liability claims and wrongful death claims.

WRONGFUL DEATH AND SURVIVAL ACTIONS

At common law, a cause of action for personal injuries terminated on the death of the victim. Thus, in cases which often had the most significant injuries and damages, neither the decedent’s estate nor the decedent’s heirs could recover. Enter the Texas Legislature, which created the right to recover these damages under TEXAS CIVIL PRACTICE & REMEDIES CODE §71.001, *et seq.*, commonly known as the Wrongful Death Act and the Survival Statute.

The most significant distinction between wrongful death actions and survival actions is that under the Wrongful Death Act, the heirs of a decedent can pursue claims for their own personal injuries arising out of the death of the decedent, whereas the Survival Statute allows the heirs or representatives of an estate to pursue the decedent’s claims for personal injuries. The Wrongful Death Act created a new cause of action (*e.g.*, permitting heirs to pursue their individual claims for mental anguish due to the loss of the decedent), whereas the Survival Statute merely permits the decedent’s cause of action to survive his or her death and be prosecuted by the estate. *Kramer v. Lewisville Memorial Hospital*, 858 S.W.2d 397, 404 (Tex. 1993).

a. Elements of Wrongful Death Actions

The Wrongful Death Act repealed the common law rule that prohibited surviving spouses, parents and children from suing for their damages arising out of another’s death by creating a statutory cause of action. *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 356 (Tex. 1990); *Kramer v. Lewisville Memorial Hospital*, 858 S.W.2d 397, 404 (Tex. 1993).

The elements of a cause of action for wrongful death are: (1) the plaintiff is the surviving spouse, parent or child of the decedent; (2) the defendant is a person or corporation; (3) the defendant’s wrongful act caused injury to the decedent; (4) the injury resulted in the death of the decedent; (5) the decedent would have been entitled to bring an action for the injury if he or she had lived; and (6) the plaintiff suffered actual injuries. *See* TEX. CIV. PRAC. & REM. CODE §§71.001-71.004; *Russell v. Ingersoll-Rand Co.*, 841 S.W.2d 343, 345-46 (Tex. 1992).

A plaintiff in a wrongful death action can recover actual damages of the following four basic types: (1) pecuniary losses (*e.g.*, loss of care, maintenance, support, services, advice and counsel); (2) mental anguish; (3) loss of companionship and society; and (4) loss of inheritance.

Moore v. Lillebo, 722 S.W.2d 683, 687 (Tex. 1986). Punitive damages can also be recovered, but only by a surviving spouse or heirs of the body. *General Chemical Corp. v. De La Lastra*, 852 S.W.2d 916, 923 (Tex. 1993). Parents of a child cannot recover exemplary damages for wrongful death. *Id.*

b. Statute of Limitations

The statutory beneficiaries must file a wrongful death claim within two years from the date of the decedent's death, which is in most cases the date the cause of action accrues. TEX. CIV. PRAC. & REM. CODE §16.003(b); *Russell*, at 348. However, if the wrongful death action is based on medical negligence, the time limitations of the Medical Liability & Insurance Improvement Act control over the wrongful death statute of limitations. *Brown v. Shwarts*, 968 S.W.2d 331, 333-34 (Tex. 1998); see TEX. REV. CIV. STAT. art 4590i, §10.01. Thus, a wrongful death plaintiff suing on a medical negligence claim does not necessarily have two full years from the time of death to bring a lawsuit. Rather, the statute of limitations expires at the same time it would have for the decedent, that is, two years after the negligence occurred. *Bala v. Maxwell*, 909 S.W.2d 889, 892-93 (Tex. 1995).

When a wrongful death beneficiary dies, his or her cause of action for damages arising from the death of another ceases to exist. *Johnson v. City of Houston*, 813, S.W.2d 227, 230 (Tex.App. – Houston [14th Dist.] 1991, writ denied). In other words, the wrongful death action dies with the beneficiary.

c. Elements of Survival Actions

The elements of a survival action are: (1) the plaintiff is the legal representative of the estate of the decedent; (2) the decedent had a cause of action for personal injury to his or her health, reputation or person before she died; (3) the decedent would have been entitled to bring a cause of action for the injury if he or she had lived; and (4) the defendant's wrongful act caused the decedent's injury. See TEX. CIV. PRAC. & REM. CODE §71.021; *Russell*, at 345. If the defendant dies, a survival action can be brought against the defendant's legal representative. See *Hofer v. Lavender*, 679 S.W.2d 470, 475 (Tex. 1984).

In a survival action, the plaintiff can recover only those damages suffered by the decedent before death (*e.g.*, physical pain, mental anguish, medical expenses, etc.) and funeral expenses. *Russell*, at 345. Future earnings are not recoverable in a survival action. *Yowell v. Piper Aircraft Corp.*, 703 S.W.2d 630, 632 (Tex. 1986). Exemplary damages are recoverable. *Hofer*, at 475. The damages awarded in a survival action belong to the estate and are distributed to those who would have received them had the decedent obtained them immediately before death. *Russell*, at 345.

d. Statute of Limitations

The limitations period for a survival action is the same as the limitations period for the decedent's underlying cause of action, and if the decedent's action would have been barred by limitations had it been asserted immediately before the decedent's death, a survival action based

on the same alleged wrong is likewise barred. TEX. CIV. PRAC. & REM. CODE §16.003(a). Likewise, the “discovery rule” does not apply. *Moreno*, at 352-53 & n. 6.

MEDICAL MALPRACTICE

No area of personal injury law has seen greater evolution in the past 20 years than medical malpractice, and no area is so inundated with pitfalls, hurdles and briar patches as this. As this paper is being written, legislation is pending which will further complicate medical negligence claims and confound practitioners, and more changes in this area are on the horizon. Coverage of all procedural requirements and the unique nuances involved in medical negligence claims exceeds the scope of this paper, and practitioners unfamiliar with these causes of action are encouraged to seek the assistance of qualified co-counsel.

a. Elements of Medical Negligence Actions

Medical negligence claims in Texas are governed by the “Medical Liability & Insurance Improvement Act,” TEXAS REVISED CIVIL STATUTES ANNOTATED art. 4590i. The elements of a cause of action for medical negligence are: (1) the defendant was a medical care provider (as defined in the §1.03(a)(3) of the Act)¹; (2) the defendant had a duty to the plaintiff; (3) the defendant breached that duty, that is, he or she did not conform to the required standard of care; and (4) the defendant’s breach proximately caused the plaintiff’s injury. *Denton Regional Medical Center v. LaCroix*, 947 S.W.2d 941, 950 (Tex.App. – Fort Worth 1997, writ denied).

The general duty of a medical professional is to act as a medical professional of reasonable and ordinary prudence would act under the same or similar circumstances. *Chambers v. Conway*, 883 S.W.2d 156, 158 (Tex. 1993). The standard of care for a specialist is likewise to exercise the degree of skill ordinarily employed in similar circumstances by similar specialists in the field, as a specialist is expected to possess a higher degree of skill and learning than a general practitioner. *James v. Brown*, 637 S.W.2d 914, 918 (Tex. 1982); *King v. Flamm*, 442 S.W.2d 679, 681 (Tex. 1969). The standard of care is determined as of the date of the medical decision or procedure which forms the basis of the claim and is established by expert testimony. *See, e.g., Guidry v. Phillips*, 580 S.W.2d 883, 885-86 (Tex.App. – Houston [14th Dist.] 1979, writ ref’d n.r.e.).

Like other negligence claims, the plaintiff in a medical negligence claim must establish that the defendant’s breach of duty proximately caused the plaintiff’s injury. *Duff v. Yelin*, 751 S.W.2d 175, 176 (Tex. 1988). The plaintiff must establish by “reasonable medical probability” that the defendant’s breach was the cause-in-fact of the plaintiff’s injury. *See, e.g., Park Place Hospital v. Estate of Milo*, 909 S.W.2d 508, 511 (Tex. 1995).

¹“Health care provider” has been held to include physicians, hospitals, nursing homes, registered nurses, dentists, podiatrists and pharmacists. It has been held not to include veterinarians, occupational therapists, psychologists, ambulance companies, blood banks, dialysis centers, licensed counselors and pharmacies. It is presently unclear whether chiropractors and optometrists fall under the definition of “health care providers” for purposes of 4590i.

The types of damages recoverable in medical negligence cases are the same as for any other action for personal injury, wrongful death or survival action. There are, however, two (as of writing this paper) separate caps that limit damages in medical negligence cases: (1) Article 4590i, §11.02(a), which limits actual damages in medical malpractice cases; and (2) TEXAS CIVIL PRACTICE & REMEDIES CODE §41.008, which limits exemplary damages in all cases. The 4590i cap on damages was held unconstitutional for common law negligence claims (under the Open Courts doctrine), but it has been held constitutional as to statutory cases of action. Thus, the 4590i caps apply to statutory wrongful death and survival actions. *See Lucas v. U.S.*, 757 S.W.2d 687, 692 (Tex. 1988); *Rose v. Doctors Hospital*, 801 S.W.2d 841, 846 (Tex. 1990); *Horizon v. Auld*, 34 S.W.3d 887, 892 (Tex. 2000).

b. Statute of Limitations

Article 4590i establishes an absolute 2 year statute of limitations for health care liability claims. *See* §10.01; *Diaz v. Westphal*, 941 S.W.2d 96, 99 (Tex. 1997). The limitations period begins to run on one of three dates: (1) the date the breach occurred; (2) the date the treatment that is the subject of the claim is completed; or (3) the date the hospitalization for which the claim is made is completed. *Id.* However, the statute does not allow a plaintiff to choose the most favorable of the three dates. If the specific date of the breach is ascertainable, the limitations period begins on that date. *See, e.g., Husain v. Khatib*, 964 S.W.2d 918, 919 (Tex. 1998); *Gormley v. Stover*, 907 S.W.2d 448, 449-50 (Tex. 1995).

A plaintiff must provide 60 days' notice before filing a negligence claim against a physician or health care provider, or the suit when filed is abated for 60 days. However, a plaintiff who gives proper notice of a claim as required under §4.01(a) of the Act tolls the state of limitations for 75 days. *See* §4.01(c). The statute of limitations is tolled beginning on the date the notice is mailed, not the date it is received by the defendant. *McClung v. Komorn*, 629 S.W.2d 813, 814-16 (Tex.App. – Houston [14th Dist.] 1982, writ ref'd n.r.e.). The 75 day tolling period applies to all parties and potential parties, and notice to any defendant will toll the limitations period for all the defendants against whom the claim is timely asserted. *See* §4.01(c); *De Checa v. Diagnostic Center Hospital*, 852 S.W.2d 935, 938 (Tex. 1993).

PREMISES LIABILITY

As a general rule, an owner or occupier of land has a duty to use reasonable care to keep the premises under his or her control in a safe condition. *Good v. Dow Chemical Co.*, 945 S.W.2d 877 (Tex.App. – Houston [1st Dist.] 1997). Typically, a premises liability case is a type of ordinary negligence action brought by someone who claims to have been injured by a condition of property (a premises defect case), as opposed to a claim brought by someone who was injured by a negligent activity on the property (a negligence case). *See H.E. Butt Grocery Co. v. Warner*, 845 S.W.2d 258, 259 (Tex. 1992); *Keetch v. Kroger Co.*, 845 S.W.2d 262, 264 (Tex. 1992).

a. Elements of Premises Liability Actions

The elements of a typical premises liability cause of action are: (1) the owner or occupier of land had actual or constructive knowledge of some condition on the premises; (2) the condition posed an unreasonable risk; (3) the owner or occupier did not exercise reasonable care to reduce or eliminate the risk of harm; and (4) the owner or occupier's failure to use such care proximately caused the plaintiff's injuries. *See, e.g., Meeks v. Rose*, 988 S.W.2d 216 (Tex. 1999).

However, there are aspects of premises liability cases that can complicate the ordinary negligence analysis, such as the status of the injured party (*e.g.*, invitee, licensee or trespasser) and the status of the possessor of the property (*e.g.*, owner or controller). Determination of the status of the parties will impact the duty of care owed by the defendant to the plaintiff and the elements necessary to prevail (for example, the defendant "knew or should have known" of a dangerous condition where the plaintiff is an invitee, but must have actual knowledge of a dangerous condition where the plaintiff is a licensee). A brief description of the types of plaintiffs follows:

Invitee. An invitee is a person who enters the possessor's premises in answer to an express or implied invitation by the possessor and for the benefit of both parties. *Rosas v. Buddies Food Store*, 518 S.W.2d 534, 536 (Tex. 1975). This can include business patrons and employees.

Licensee. A licensee is a person who enters the premises of the possessor for his or her own convenience or on business for someone other than the possessor. *Knorrp v. Hale*, 981 S.W.2d 469, 471 (Tex.App. – Texarkana 1998, no pet.). This can include members of a family, social guests, door-to-door salesmen, and visitors to businesses who, for example, duck inside to get out of the rain.

Trespasser. A trespasser is a person who enters the property of another without any right, lawful authority or express or implied invitation, who is not in performance of any duty for the owner and who is there merely for his or her own purposes or pleasure. *Texas-Louisiana Power Co. v. Webster*, 91 S.W.2d 302, 306 (Tex. 1936).

b. Statute of Limitations

The limitations period in premises liability cases is the same for other negligence cases, which is generally two years.

PRODUCTS LIABILITY

Products liability causes of action in Texas, often known as strict liability, are controlled by TEXAS CIVIL PRACTICE & REMEDIES CODE §82.001, *et seq.* This statute applies to any action against a manufacturer or seller for recovery of damages arising out of an injury, death or property damage allegedly caused by a defective product, regardless of the theory of liability. Theories of liability commonly involve allegations of defects in manufacturing, design or marketing of a product. The concept is that all those involved in the product enterprise, and who have reaped profits by placing a defective product in the stream of commerce, should bear the cost of injuries caused by the product.

a. Elements of Product Defect Actions

Manufacturing Defect. A manufacturing defect exists when a finished product deviates, in terms of its construction or quality, from the specifications or planned output in a manner that renders it unreasonably dangerous. *See Torrington Co. v. Stutzman*, 46 S.W.3d 829, 844 (Tex. 2000). That is, the product is flawed. It does not conform to the manufacturer's own specifications and is not identical to its mass-produced siblings. The policy behind this theory is that a consumer expects that a mass-produced product will not differ from others like it in a way that makes it more dangerous than the others. *See Green v. R.J. Reynolds Tobacco Co.*, 274 F.3d 263, 268 (5th Cir.).

Design Defect. The duty to design and reasonably safe product is an obligation imposed by law. *American Tobacco Co., Inc. v. Grinnell*, 951 S.W.2d 420, 432 (Tex. 1997). This duty extends to both intended and reasonably foreseeable uses of the product. *General Motors Corp. v. Hopkins*, 548 S.W.2d 344, 351 (Tex. 1977). This duty also includes providing guards and other devices that would protect the user against the foreseeable risk of harm presented by the particular design. *Webb v. Rodgers Machinery Manufacturing Co.*, 750 F.2d 368, 372-73 (5th Cir. 1985).

To prove a design defect, a plaintiff must show that: (1) there was a safer alternative; (2) the safer alternative would have prevented or significantly reduced the risk of injury, without substantially impairing the product's utility; and (3) the safer alternative was both technologically and economically feasible when the product left the control of the manufacturer. *Smith v. Aqua-Flo, Inc.*, 23 S.W.3d 473, 476-77 (Tex.App. – Houston [1st Dist.] 2000, pet. denied)(citing TEX. CIV. PRAC. & REM. CODE ANN. §82.005(a)-(b) (West 2002)). *See also Grinnell*, at 433 (if no evidence is offered that a safer design existed, the product is not unreasonably dangerous as a matter of law).

Marketing Defects. Generally, a manufacturer has a duty to warn if it knows or should know of the potential harm to a user because of the nature of its product. *Bristol-Myers Co. v. Gonzalez*, 561 S.W.2d 801, 804 (Tex. 1978). Thus, a marketing defect claim arises when a defendant knows or should have known of a potential risk involving a product but markets it without adequate warning of the danger or providing instructions for safe use. *See Ritz Car Wash, Inc. v. Kastis*, 976 S.W.2d 812, 814 (Tex.App. – Houston [1st Dist.] 1998, pet. denied). Manufacturers, as well as all suppliers of a product, have a duty to inform users of the hazards associated with the use of their products. *Aluminum Company of America v. Alm*, 785 S.W.2d 137, 139 (Tex. 1990). This duty to warn extends beyond the purchaser to the ultimate user. *Lopez v. Aro Corp.*, 584 S.W.2d 333, 334 (Tex.Civ.App. – San Antonio 1979, writ ref'd n.r.e.).

Finally, while strict liability focuses on the condition of the product, ordinary negligence claims may exist as to the acts of the manufacturer which are separate and apart from the strict liability claims outlined above. In a negligence claim, one looks at the acts of the manufacturer and determines if it exercised ordinary care in design and production. *Grinnell*, at 437. Negligent design and manufacturing claims are predicated on the existence of a safer alternative

design for the product. *Id.* Such negligence theories are often pleaded with strict liability theories as alternative grounds for recovery in products liability cases.

b. Statute of Limitations

The limitations in products liability cases is the same for other negligence cases, which is generally two years.

NONSUBSCRIBER CLAIMS

a. Elements of Nonsubscriber Actions

An employer who is a subscriber under the Texas Workers Compensation Act, TEXAS LABOR CODE §406.001, *et seq.*, maintains the requisite insurance to cover on-the-job injuries and is immune from lawsuits brought by injured workers, except in very limited circumstances. Nonsubscriber employers, on the other hand, are those who are subject to the Act but who choose to opt out of the system by not maintaining the requisite coverage. By being a nonsubscriber, these employers are subject to lawsuits by injured employees. Such suits are typically based in negligence (*e.g.*, the employer breached its duty to provide a safe workplace, to properly train employees, to have proper tools, etc.).

In addition to being subject to lawsuits by injured employees, the Texas Legislature has encouraged employers to be subscribers by stripping nonsubscriber employers of certain common law affirmative defenses (*e.g.*, contributory negligence of the employee, assumption of the risk and negligence of a fellow employee). The employer may defend the action on the grounds that the injury was caused by an act of the employee designed to bring about the injury, or while the employee was intoxicated. TEX. LAB. CODE, §406.033. Further, in practice, an employer often asserts that the employee was the sole proximate cause of his injury, which if left unchallenged can open a back door to allow in evidence of the employee's comparative negligence.

A word of caution about pleading for medical or wage benefits in addition to negligence in a nonsubscriber claim: The plaintiff may unwittingly invoke ERISA, the federal statutes pertaining to employee benefits, which may lead to removal of the entire case to federal court. Thus, proceed with caution when asserting extra-negligence claims involving anything that pertains to employee benefits.

b. Statute of Limitations

The limitations in nonsubscriber cases is the same for other negligence cases, which is generally two years.

TEXAS TORT CLAIMS ACT

a. Elements of Texas Tort Claims Act Actions

As a general rule, the State of Texas and its agencies, political subdivisions and officials are immune from tort liability based on the doctrine of sovereign immunity. However, these governmental units may be sued and held liable when their sovereign immunity is waived.

Sovereign immunity consists of two basic principles of law: immunity from suit and immunity from liability. *Texas Department of Transportation v. Jones*, 8 S.W.3d 636, 637-38 (Tex. 1999). First, the state as sovereign is immune from suit without consent even though there is no dispute regarding the state's liability. Second, the state has immunity from liability even though the state has consented to be sued. *Dillard v. Austin I.S.D.*, 806 S.W.2d 589, 592 (Tex.App. – Austin 1991, writ denied). Immunity from suit is jurisdictional, while immunity from liability is an affirmative defense. For a sovereign entity to be subject to suit, both immunity from suit and immunity from liability must be waived.

The Texas Tort Claims Act, TEXAS CIVIL PRACTICE & REMEDIES CODE §101.001, *et seq.*, pertains to claims against governmental entities. In addition to those “governmental units” defined in §101.001(3) of the Act, other governmental entities which have been held to be covered include county hospital districts and county owned hospitals; city owned hospitals; independent school districts and junior college districts; community centers providing mental health and mental retardation services; and regional transit authorities.

Examples of specific causes of action which may be pursued against a governmental entity once sovereign immunity is waived include injury by motor vehicles and equipment; injury by inmate's negligence; injury by condition or use of personal property; injury by premises defects; injury by special defects; and injury by traffic control device. The elements of a negligence suit against a governmental entity are: (1) the defendant is a governmental unit; (2) the act that the defendant is sued for is governmental; (3) the defendant's immunity from suit is waived; (4) the defendant's immunity from liability is waived; (5) there are no exceptions to waiver of the defendant's immunity from liability; and (6) presuit notice was provided. TEX. CIV. PRAC. & REM. CODE §101.021(1); *DeWitt v. Harris County*, 904 S.W.2d 650, 654 (Tex. 1995).

Despite the long history of viewing sovereign immunity as a jurisdictional issue that cannot be waived and can be raised for the first time on appeal, the Texas Supreme Court has held that sovereign immunity is an affirmative defense which is waived if not raised by the pleadings or tried by consent. *Davis v. City of San Antonio*, 752 S.W.2d 518, 519 (Tex. 1988).

b. Statute of Limitations

Before suit can be brought against a governmental unit, the plaintiff must give the governmental unit notice of the negligent act giving rise to the plaintiff's injury. The purpose of the notice requirement is to ensure prompt reporting of claims so governmental units can gather information needed to guard against unfounded claims, settle claims and prepare for trial. *Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995). Most governmental units must have notice no later than six months after the day the incident giving rise to the claim occurred. TEX. CIV. PRAC. & REM. CODE §101.101(a). However, cities can – and frequently do – adopt shorter notice periods. Consult city charters or ordinances for specific notice deadlines.

Notice of claim may be by formal written notice or by actual notice. Actual notice means that the governmental unit has knowledge of (1) the death, injury or property damage; (2) the governmental unit's alleged fault in producing or contributing to the death, injury or property damage; and (3) the identity of the parties involved. *Cathey*, at 341. Actual notice may be imputed to a governmental entity by an agent or representative who has a duty to gather facts and investigate. *Gaskin v. Titus County Hospital District*, 978 S.W.2d 178, 182-83 (Tex.App. – Texarkana 1998, pet. denied).

Provided the notice provisions have been complied with, the limitations period in Texas Tort Claims Act cases is the same for other negligence cases, which is generally two years.

DAMAGES

The types of damages typically available in Texas personal injury causes of action include actual damages (general and special), nominal damages, exemplary or punitive damages, interest and court costs.

a. Actual Damages

Actual damages, also known as compensatory damages, are awarded to repair a wrong or to compensate for an injury. Actual damages are either general (also known as “direct”) or special (also known as “consequential”). See *Arthur Anderson & Co. v. Perry Equipment Corp.*, 945 S.W.2d 812, 816 (Tex. 1997). General damages are those that are the necessary and usual result of the defendant's wrongful act. *Id.* These damages compensate the plaintiff for the loss or injury that is conclusively presumed to have been foreseen by the defendant as a consequence of the wrongful act. *Id.* The plaintiff does not have to specifically plead general damages. *Green v. Allied Interests, Inc.*, 963 S.W.2d 205, 208 (Tex.App. – Austin 1998, pet. denied). In a typical personal injury suit, general damages include past pain and suffering, past mental anguish, physical disfigurement, and aggravation of preexisting injury.

Special damages, on the other hand, are those that result naturally but not necessarily from the defendant's wrongful act. *Arthur Anderson*, at 816. Special damages need not be the usual result of the wrong, but they must be foreseeable. *Id.* If the damages are too remote or too uncertain, they cannot be recovered. *Id.* The plaintiff must specifically plead special damages. TEX. R. CIV. P. 56; *Harkins v. Crews*, 907 S.W.2d 51, 61 (Tex.App. – San Antonio 1995, writ denied.). In a typical personal injury suit, special damages include future pain and suffering, future mental anguish, physical impairment, medical expenses in the past and future, loss of wages in the past, loss of future earning capacity, loss of consortium, loss of household services and exemplary damages.

b. Nominal Damages

Nominal damages can be awarded in a case where a legal right has been invaded but actual damages are not proved. *Huntington Corp. v. Inwood Construction Co.*, 472 S.W.2d 804, 808 (Tex.App. – Dallas 1971, writ ref'd n.r.e.). These are damages in name only and are awarded in

a trivial amount, sometimes only one dollar. Nonetheless, if sought, they should be specifically pleaded.

c. Exemplary Damages

Exemplary damages, also known as punitive damages, are designed to penalize a defendant for outrageous or malicious conduct and to deter such conduct in the future. *Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 39-40 (Tex. 1998). Exemplary damages are not compensatory but rather are awarded as a penalty or punishment. See TEX. CIV. PRAC. & REM. CODE §41.001, *et seq.*; *Transportation Insurance Co. v. Moriel*, 879 S.W.2d 10, 16 (Tex. 1994). They must be specifically pleaded.

By comparison to the plaintiff's burden of proving liability and the amount of actual damages by a preponderance of the evidence, the burden to prove liability for exemplary damages is by clear and convincing evidence. With limited exceptions, an award of actual damages is required in order to support an award of exemplary damages. TEX. CIV. PRAC. & REM. CODE §41.004(a); *Juliette Fowler Homes, Inc. v. Welch Associates*, 793 S.W.2d 660, 667 (Tex. 1990).

The aggravated conduct that will support exemplary damages, if proven by clear and convincing evidence, is listed in TEX. CIV. PRAC. & REM. CODE §41.003(a) and includes fraud and malice. "Malice" is defined by statute as either a specific intent to substantially injure or an act or omission involving a conscious indifference to an extreme degree of risk.

In "specific intent malice," the Exemplary Damages Act codified the common law "actual malice" standard, and the plaintiff must prove that the defendant acted with a specific intent to cause a substantial harm to the plaintiff. Specific intent is characterized by ill will, spite, evil motive or a purpose to injure. Far more frequently, the personal injury practitioner encounters "conscious indifference" malice, which is the codification of the common law "gross negligence" standard. To establish conscious indifference malice, the plaintiff must prove that the defendant's acts or omissions, when viewed objectively from the defendant's standpoint, involved an extreme degree of risk, and that the defendant had actual, subjective awareness of the risk but proceeded anyway with conscious indifference to the rights, safety or welfare of others. TEX. CIV. PRAC. & REM. CODE §41.001(7)(B); *Universe Life Insurance Co. v. Giles*, 950 S.W.2d 48, 75 (Tex. 1997).

The Exemplary Damages Act in most cases limits recovery of punitive damages to the greater of either twice the amount of economic damages, plus any non-economic damages (up to \$750,000) found by the jury, or \$200,000. TEX. CIV. PRAC. & REM. CODE §41.008(b). There are limited exceptions to this cap. *Id.*, at §41.008(c).

Ordinarily, a governmental entity cannot be liable for exemplary damages. *Board of Regents v. Denton Construction Co.*, 652 S.W.2d 588, 592 (Tex.App. - Fort Worth 1983, writ ref'd n.r.e.). For example, the Texas Tort Claims Act waives sovereign immunity for actual damages in certain instances, but it does not waive immunity for exemplary damages.

d. Interest

Prejudgment interest compensates for the lost use of the money in a damages award during the time lapse between the accrual of the plaintiff's claim and the date of the judgment. *Johnson & Higgins, Inc., v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 528 (Tex. 1998). Prejudgment interest is permitted by an enabling statute or under general principles of equity. *Id.* The primary statute dealing with prejudgment interest in personal injury actions is found in the TEXAS FINANCE CODE, §304.102. Postjudgment interest accrues from the date the judgment is signed until the date the judgment is satisfied. *Id.*, §304.002.

e. Court Costs

Generally, the successful party in a lawsuit can recover all of its court costs from the unsuccessful party. TEX. R. CIV. P. 131; *Martinez v. Pierce*, 759 S.W.2d 114, 114 (Tex. 1988). By statute, recoverable court costs include clerk fees and service fees, court reporter fees, fees for masters, interpreters and guardians ad litem, and other costs permitted by law. *See* TEX. CIV. PRAC. & REM. CODE §31.007(b)(4).

AFFIRMATIVE DEFENSES

Those defending personal injury actions in Texas enjoy a wide variety of affirmative defenses which may preclude or reduce liability. These are not included in a general denial and must be specifically pleaded by the defendant. TEX. R. CIV. P. 94. Many, but not all, of the affirmative defenses are listed in Rule 94 and those commonly encountered in personal injury actions include accord and satisfaction; arbitration and award; contributory negligence; discharge in bankruptcy; estoppel; release; res judicata; statute of limitations; and waiver. *Id.* Contributory negligence is now embodied in the proportionate responsibility analysis found in Chapter 33 of the TEXAS CIVIL PRACTICE & REMEDIES CODE.

Additionally, defendants may raise inferential rebuttals to claims for negligence. An inferential rebuttal seeks to disprove an essential element of the plaintiff's case. *Select Insurance Co. v. Boucher*, 561 S.W.2d 474, 477 (Tex. 1978). Some inferential rebuttals which should be specifically pleaded are new and independent cause; sole proximate cause; unavoidable accident; sudden emergency; and act of God.