

## BALANCE, TENSION, AND CHANGE: INSURANCE JURISPRUDENCE AND THE DYNAMICS OF THE COMMON LAW

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This essay discusses some recent examples of how evolution in the common law can go wrong, even while going also right. The examples come from Texas insurance jurisprudence. That body of law has been in one state of dramatic flux after another for two decades, or so. At first, Texas courts, the legislature, and the State Board of Insurance dramatically expanded the rights of policyholders. This growth had profound effects upon insurance litigation. Now, Texas courts are shrinking those rights. Texas bad faith law is an excellent example. In 1987, the Texas Supreme Court created the protean common law tort of insurance bad faith.<sup>1</sup> In 1994, the Texas Supreme Court said that tort victims lack standing to assert certain bad faith claims against liability insurers.<sup>2</sup> In 1996, it held that the tort of insurer bad faith did not apply to liability policies—apparently not even to the duty to defend, ostensibly a first-party right.<sup>3</sup> Similarly, the Texas Supreme Court has signaled firmly that the duty to defend is only somewhat malleable and that it is not subject to more than limited manipulation.<sup>4</sup> Significantly, these are not the only examples of retrenchment.

Unfortunately, several cases in which the rights of policyholders appear to have been diminished, or at least limited, contain problematic reasoning. This feature of the decisions is independent of whether the decisions are correct, as one of them certainly is. Poor legal reasoning is always an insult to the common law, even if it is inevitable in periods of shift, transition, transformation, retrenchment, and other kind of

change. Ultimately, the common law must make sense. That is one way it generates legitimacy. Poor reasoning is eventually recognized as such by (most of) the (elite) bar. Its perceptions trickle both down and out. People begin to distrust the law. As allegiance declines, so does authority. Not a good thing!

### I.

#### The Common Law: A Bundle of Paradoxes

The common law contains a number of features which are perpetually in tension and which judges must balance—and keep in balance—at all times. This is always a difficult process, because individual judges have different normative visions of the world. It is even harder to accomplish when society is changing rapidly. In that situation, the common law must be dynamic. At the same time, the common law is always looking in three directions: to the past, to the present, and to the future.

The common law as a whole is oriented to the past mostly because it depends upon and is generated out of precedent. A precedent is essentially an authoritative judicial decision which has taken place in the past. But that is not the end of the backward-looking focus of the common law. It also emphasizes both tradition and temporal continuity. In general, the law loves old things.

Even the central function of adjudication — truth-determination — is essentially focused on the past. If lawsuits are supposed to establish which propositions are true, which ones are false, and which ones cannot be known, adjudication is essentially oriented to the past. The outcome of lawsuits, when they are properly conducted, always depends upon the way the world *was*.

Contract law in particular is especially oriented to the past. After all, it is designed to enforce promises.

1. *Arnold v. Nat'l County Mut. Ins. Co.*, 725 S.W.2d 165 (Tex. 1987).

2. *Allstate Ins. Co. v. Watson*, 876 S.W.2d 145 (Tex. 1994).

3. *Maryland Ins. Co. v. Head Industrial Coatings & Services, Inc.*, 938 S.W.2d 27 (Tex. 1996).

4. *National Union Fire Ins. Co. of Pgh, Pa. v. Merchantsfest Motor Lines, Inc.*, 939 S.W.2d 139 (Tex. 1997).

Of necessity, those promises have already been made when the lawsuit begins. The fundamental principle of contract law is to try to determine what the parties to the contract intended—what arrangements the parties actually made. Thus, contract law is essentially oriented to the past. Even lawyers who love economics and who say that a party morally should breach a contract, if the breach will lead to economic efficiency, acknowledge that such breaches of contract should also trigger awards of damages.

At the same time, the common law is oriented towards the present. Litigants must be treated fairly *in the present*. The rule of law essentially relates things in the *now*. It tells those who run the legal system how they must behave today. Similarly, considerations of equity often focus on the present. Advocacy is conducted, regulated, and limited today. Although the foundation of contract law is the search for mutual intent, usually the overriding evidence of mutual intent is a writing, and that is—at least most often—construed in the present. The writing, after all, is before us now. We read and interpret it now.

The common law, however, is also oriented towards the future. Many common law rules, and many exceptions to those rules, are generated by considerations of public policy. Public policy is almost always utilitarian, in at least some loose sense. Public policy is always looking towards how to make things better, on the whole, in the future.

In addition, the common law is, to a limited degree, results-oriented. If a rule compels an atrocious result, the right-thinking common law judge might well say, "To hell with the rule," although she may try to do it subtly, critically, reluctantly, and surreptitiously. Sometimes, common law judges try to preserve the appearance of a given rule, while generating a better-than-awful result in spite of the rule. (Of course, this sort of thing cannot be done very often, and it must be done *very carefully*. Self-deception is a constant danger.) If one makes a decision in order to obtain a certain result, one is oriented to the future.

Some dimensions of the common law are oriented to the past, the present, and the future, all at once. Sound reasoning is like this. Insofar as it involves canons of logic, sound reasoning never changes. What counts as good reasoning is the same, whether judged yesterday, today, or tomorrow. At the same time, sound legal reasoning involves elements

of rhetoric. Rhetoric is always social. Since social systems change, what counts as good rhetoric changes. Paradigms of the Just shift. Archetypal stories alter. Even so, there are limits. Socrates' speech to the Athenians in the APOLOGY, the speeches to be found in Thucydides, Cicero's trial orations, and the text of Aristotle's RHETORIC are still models today of rhetorical excellence.

The three temporalities of the common law necessitate that it is always in conflict with itself. Truth conflicts with advocacy; policy conflicts with precedent; equity conflicts with rule; continuity and tradition both conflict with sound reasoning, from time-to-time; and so forth. Moreover, some fundamental values of the common law conflict with one another. The law should be precise, but at the same time it ought to be suggestive, generative, flexible, susceptible to analogical reasoning, and therefore open-textured. All of these traits are, to one degree or another, inconsistent with precision. Sound reasoning is a virtue in the common law judicial opinion, but legal reasoning cannot be so subtle that ordinary people cannot understand it, so clever that it seems tricky, or so convoluted that it appears to be contrived. Mathematics and logic ultimately care little for how an argument is socially perceived. Formal validity counts for everything. Sound reasoning in rhetorical contexts is quite different. It must not only be valid, the attentive public must be satisfied with its reliability. Legal arguments must not only be sound, they must be holistically appealing to practical people.

The dual nature of sound legal reasoning—the fact that it consists of a combination of logic and rhetoric—also creates a conflict internal to the common law. Logic does not change. Rhetoric changes, as the prevailing attitudes in society change. Hence, as society changes, what counts as sound reasoning must change. But, common law judges don't always get this right. Sometimes they try to change logic, as if it were rhetoric. And sometimes they try to change rhetoric too fast. Where a court overthrows established paradigms of sound reasoning, sectors of the observant public worry, become dissatisfied, and—sometimes, to some degree—lose a measure of allegiance. Change can destabilize. Rapid changes in modes of reasoning are no exception.

Oliver Wendell Holmes made a remark to the

effect that experience, and not logic, is the life of the law. Properly understood, Justice Holmes' remark is not inconsistent with my view. What Holmes meant was that fossilized precedent should not be sacrosanct. We need not be completely ruled from the graves of our judicial ancestors. That was the "logic" to which Holmes was referring. Moreover, he would have acknowledged that all experience must be interpreted and that interpretations of experience must be clear, consistent, rational, and so, logical.

In some ways the common law is like a person. People have many dimensions; their personalities have many sides; their lives have lots of nooks and crannies; and all these parts pull in different directions. The law is like that too. Martha Shelton Wolf, a Jungian analyst friend of mine, told me once that mental health is essentially learning how to *Hold the tension* comfortably and generatively. Aristotle and Confucius said something of the same thing when they advised their students to *Achieve balance*, and *Steer the middle course*. The law is like Martha's Vision of human excellence, such as it is. If any one of its many elements becomes too dominant—or, as it were, gets out of control—then sophisticated observers and participants will have a sensibility that things have gone wrong. (Juggling is a good image here. Also, the personified common law rejects the principle to which all too many people subscribe: *If a thing is worth doing, it is worth over doing*.)

Usually, when things go wrong in the common law, it is not so much that a potentially pernicious principle has perversely triumphed in a particular case or that a given court has made a singular mistake. Problems arise in the common law as the result of unacceptable patterns (not individual anomalies). Difficulties in the common law often arise through mistakes in emphasis. Systemically problematic errors can often be traced to the common law's failure to *Hold the tension* among its many dimensions in the right sort of way.

## II.

### Retrenchment: Texas Style

For a number of years, culminating in the late 1980s, Texas jurisprudence changed rapidly in the direction of more individual and actionable rights.

Indeed, Texas achieved some status around the country as a plaintiff's heaven. Part of this resulted from legislative action, such as the Texas Deceptive Trade Practices—Consumer Protection Act.<sup>5</sup> Some of it resulted from politics. But some of it resulted from actions of common law courts. These transformations had profound practical effects.

As everyone knows, most cases—even multimillion dollar cases—settle. This is especially true if a defendant with money at its disposal is trapped in what it takes to be a hostile bailiwick. Most lawsuits are bargained to conclusion in the long shadow of the law. They are not litigated to finality. Since the job of lawyers is to advocate, lawyers for plaintiffs often exaggerate the scope of the rights courts have created. During the 1980s, the defense bar could not confidently tell their clients that the Princes of Exaggeration, who frequently represented plaintiffs in big money cases, were merely puffing—simply blowing hard. Indeed, under many circumstances, defense counsel had to predict to their clients they would probably lose the jury verdict, suffer a judgment, perhaps even lose in the court of appeals, and win—if at all—only in the Texas Supreme Court. Solvent defendants with genuine liability do not usually find unpredictability and risk appetizing. Insurance companies are no exception: they thrive on regularity. The bottom-line practicality of this situation was that settlements became larger; insurance companies reduced the amount of coverage they would sell in Texas (or pulled out entirely); carrier and industry lobbying increased; and so-called "tort reform" in the legislature gathered momentum.

There was also strident criticism of many of the most significant, transformative opinions of the Supreme Court. When the *Arnold* case created the law of insurer bad faith, for example, there was howling in the halls of many an insurer. Many of the intellectual criticisms directed at these opinions were well-taken. The duty of good faith and fair dealing *is* vague. The line between bad faith and negligence *is* fuzzy. And one had little *feel* for what constitutes the sort of "prompt, fair, and equitable" payment required by insurance bad faith statutes. (What is the

5. TEXAS BUSINESS AND COMMERCE CODE § 17.41ff (1997).

binding and time-honored precedent from the Texas Supreme Court stating that Texas courts could not enter judgments declaring the absence of a duty to indemnify before the underlying tort case was resolved. That rule has been known as the *Burch* Doctrine.<sup>7</sup> The holding of *Burch* was that Texas courts could not issue judgments declaring the existence or non-existence of a liability insurer's duty to indemnify before the final resolution of the underlying tort case. The basis of this holding was that the Texas Constitution prohibited the courts from delivering advisory opinions and that this constitutional stricture could not be suspended by the enactment of the Uniform Declaratory Judgment Act.<sup>8</sup> Thus, prior to the resolution of the underlying tort case, duty-to-indemnify questions were not justiciable.

The Texas Supreme Court decided *Griffin* a second time.<sup>9</sup> *Griffin* moved the court for a rehearing. The court responded by requiring the parties to address *Burch*. In the end, the Supreme Court denied *Griffin*'s motion for rehearing but substituted a new opinion for its old one. The new opinion was virtually identical to the old one, so far as substantive insurance law was concerned. However, the court deleted the section in which it said that lack of a duty to defend always entailed the lack of a duty to indemnify and expressly took up the *Burch* case.

When *Burch* was decided, Article V, Section 8 of the Texas Constitution—as adopted in 1876—provided, in part, that district courts would have original jurisdiction over all “suits, complaints, or pleas, whether in law or in equity, when the matter in controversy valued at an amount to Five Hundred dollars exclusive of interest. . . .” In 1985 that section was amended so that district courts had jurisdiction over “all actions, proceedings, and remedies.” Thus, the jurisdiction of district courts was broadened because of the elimination of the \$500 lower jurisdictional limit. According to the court, “[t]he language of the amended version is broad enough to allow district courts jurisdiction to resolve declaratory

judgment actions and the duty to indemnify.” The reasoning of the court was that so long as the Texas Constitution imposed a minimum dollar limit on district court jurisdiction, district judges “could only speculate that the matter or the value in controversy exceeded \$500.00,” when they were confronted with pleadings seeking duty-to-indemnify declaratory judgments.

The new rule created by the court in *Griffin* permits Texas courts to decline to consider duty-to-indemnify issues when their resolution is contingent upon the outcome of the underlying liability litigation. To be precise, the new rule is that “a duty to indemnify is justiciable before the insured's liability is determined in the liability lawsuit when the insured has no duty to defend *and the same reasons that negate the duty to defend likewise negate any possibility the insurer will ever have a duty to indemnify.*”<sup>10</sup>

*Griffin* illustrates the central point of this article. The case was surely decided correctly, both as to substantive insurance law and as to the *Burch* Doctrine. Nevertheless, the court's reasoning about declaratory judgment aspects of the case is at least questionable. First, the \$500 lower limit on the jurisdiction of district courts formerly present in the constitution did not entail that courts would have to “speculate” about the monetary worth of the underlying lawsuits. The parties might stipulate as to that fact. Moreover, district courts made initial determinations all the time that the cases before them were worth more than \$500. If the court's reasoning were taken seriously, then no district court would ever be able to process any case, because it would always have to speculate as to whether or not the case was really worth \$500. Second, the rule adopted by the court, while salutary, and a step in the right direction, ignores the fact that there is complete freedom of amendment in Texas until shortly before trial. In Texas, the duty to defend is determined by reference to the Eight Corners Rule: a pleading is construed broadly; all of its factual propositions are taken to be true; the pleading is compared to the policy; and if there would be a duty to indemnify, then there is a duty to defend (irrespective of whether the factual propositions are true). The Eight Corners Rule

6. *Farmer's Texas County Mut. Ins. Co. v. Griffin*, 40 Tex. Supp. Ct. J. 362 (February 21, 1997).

7. *Firemen's Ins. Co. v. Burch*, 442 S.W.2d 331 (Tex. 1968).

8. Texas Civil Practice & Remedies Code § 37.001ff.

9. 41 Tex. Sup. Ct. J. 103 (November 13, 1997).

10. *Griffin* at 105. (Emphasis in the original.)

difference between "fair" and "equitable" anyway?) Nor are these problems restricted to insurance law. The tort of invasion of privacy, with which Texas courts have toyed for quite a while, *is* amorphous. Negligent misrepresentation, a tort which tempted Texas jurisprudence for a bit, can be dangerous.

But, we live in a new era. The pendulum is swinging back. Retrenchment is the order of the day. Rules are being cut back, although not abolished (for the most part). Principles many thought had been firmly established are now being narrowed and weakened. Regrettably, when common law courts are in a stage of transition, one or more of the dimensions of the common law suffers. Established patterns of sound reasoning always suffer in periods of plaintiff innovation: rules are twisted; precedents are distorted; evidentiary standards are implicitly loosened; damages somehow become easier to prove; and so on. In periods of innovative retrenchment, rules are twisted back the other way, the implications of despised precedent are silently cut back; evidentiary requirements quietly go up; inferences favoring plaintiffs are harder to draw; and almost sound reasoning itself suffers.

At least in Texas, and probably in many other states, it is entirely predictable that in the 1990s one significant area of retrenchment would be in the area of insurance law. After all, that was one of the areas in which the rights of individuals and policyholders were expanded, while the rights of insurance companies diminished. Further, insurance law tends to follow tort law. Changes in the tort law would be meaningless, unless insurance coverages are adjusted to fit the changing scene. Contracting insurance coverage is a good way to reduce the reach of that law.

Large shifts in legal doctrines necessitate changes in modes of reasoning. Not only do acceptable premises change, but acceptable patterns of inference alter. Rapid changes in legal doctrine produce a kind of rhetorical instability. One cannot be sure what counts as a good reason in legal debate. This is troublesome to the trained mind. Wariness of head produces reluctance of heart. Disrespect for judicial reasoning reduces legitimacy.

But we live in a dynamic society. Social change is endemic to our way of life. Free markets continually transform the lived-world. So, legal doctrine and legal rhetoric will always appear to be a beautiful patchwork quilt, when viewed from a distance, but up

close, sometimes, they will resemble more of a contraption held together with chewing gum and bailing wire. Still, common law decisions constitute more than a series of workable improvisations. This question, therefore, becomes important: How much unsound reasoning, then, can the system tolerate when it is in a state of flux? This question is especially important when we think about *avoidable unsound reasoning*, particularly unsound reasoning which may be deliberate and in the service of getting preferred results.

Which instances of unsound judicial reasoning are unconscious, and the inevitable product of change, and which instances are intentional? These questions are problems that authentic lawyers ponder when they are alone, late at night. Engaged lawyers of every ideological persuasion worry about such questions, when they are not fulfilling their duties as advocates. The lawyer-as-advocate collects and then presents arguments which are intended to win; the lawyer-as-social-ruminator ponders the implications of what she has won (or lost). In any case, Texas is in the throws of rapid legal change. At least in some respects, it is in a period of retrenchment. Put less tendentiously, Texas jurisprudence is moving in a new direction which requires the courts to retrace their steps to some degree. What has been the impact of this change on legal reasoning in Texas? Arguably, sound legal reasoning has suffered, even when the results are correct. Consider the following three cases.

### III.

#### Griffin

This was a coverage case which arose out of a drive-by shooting. The insurance policy at issue was an auto liability policy. The insurer brought a declaratory judgment action. It sued both the policyholder and the alleged tortfeasor.

During 1997, the Texas Supreme Court decided this case twice. In both decisions, it held that injury did not result from an auto accident and that the origin of the damages was in intentional conduct. In the first decision, the Texas Supreme Court also deduced that there was no duty to indemnify from the proposition that there was no duty to defend.<sup>6</sup> This was a very odd decision, in some ways, since there was

is applied pleading by pleading. It follows that every duty-to-defend adjudication is really restricted to a particular pleading. A duty-to-defend adjudication can say no more than that an insurance company is not legally obligated to defend the insured against this or that pleading. As a general rule, the plaintiff can be counted upon to plead his case initially in such a way that he gets the best access to meaningful remedies. Nevertheless, under some circumstances, the plaintiff may find it necessary to replead it's case and bring in entirely new dimensions. Hence, there may be no duty to defend when the first pleading is filed, or under the first few amendments, and then—suddenly—duty to defend might arise in (say) the Eighth Amended Petition. Does it not follow that a duty to defend adjudication can never “negate any possibility that the insurer will have a duty to indemnify”? Does it not follow that the *Griffin* case, while correctly decided on two important points, is problematically reasoned and misformulated?

#### IV.

#### The Vendor's Endorsement Case

Vendor's endorsements are an extremely important component of manufacturers' liability insurance. They make the vendors of the insured manufacturers' products additional, though unnamed, insureds on the manufacturers' commercial general liability policies, and sometimes on excess policies as well. The point to the vendor's endorsement is to give manufacturers' liability insurance companies control over the defense of all litigation involving defective products, where nothing else has gone wrong in the distribution chain, i.e., where the vendor has not repackaged, relabeled, or reconfigured the product. Under common law principles, manufacturers must indemnify pure vendors anyway, and under state vouching statutes, unless the manufacturer takes over the case, it can lose valuable rights.<sup>11</sup>

And then, along came breast implants. Thou-

sands of women are suing the manufacturers of breast implants because they occasionally leak (as everyone acknowledges), and the plaintiffs allege that they have been injured by the leakage (a sharply disputed proposition). Dow Corning has vendor's endorsements attached to its commercial general liability policies for a number of years. For several, coverage in the vendor's endorsement is restricted to companies specifically named in designated schedules. For two years, the vendor's endorsement extends to “all vendors,” and for two other years the schedules are left blank. So, four years are at issue.

It looks as if the way that many plastic surgeons conduct business is that they not only insert the implants, but they sell the inserts to their patients, as well. Naturally, women dissatisfied with their breast implants have sued not only the manufacturer of the implant, but the physicians who installed them as well. Sometimes these lawsuits are for medical malpractice. It is alleged that the physicians wrongly recommended — prescribed — the use of implants when they should have known better. Other times, the physicians are sued for having sold the implant at all. And on still other occasions, the physician is sued upon both theories. (Are the women really looking to the doctors for damages? Or are the doctors impleaded to destroy diversity? Or both?) Significantly, whatever theories are employed, apparently many petitions filed by women sort of alleged that the doctors sold the implants.

The Texas Medical Liability Trust, and several other insurance companies selling medical malpractice insurance in Texas, sued Zurich Insurance Company, which insured Dow Corning during several pertinent years, seeking to require Zurich to participate in the defense of doctors TMLT (and others) insured.<sup>12</sup> TMLT's argument was quite simple. Doctors are alleged in petitions against them to be vendors of breast implants. Zurich insured the manufacturer of the breast implant. All of Zurich's policies contain a duty-to-defend, and some contained a vendor's endorsement. Zurich therefore owes each such doctor a defense. Zurich refused to defend. TMLT has provided those defenses. Zurich owes TMLT money.

11. See, TEXAS PRACTICE & REMEDIES CODE § 82.001 1997. For an extended discussion of a good number of vendor's endorsement cases, see, Michael Sean Quinn, *Vendor's Endorsements*, 16 INS. LITIG. RPT. 375 (July 1996).

12. *Texas Medical Liability Trust v. Zurich Ins. Co.*, 945 S.W.2d 839 (Tex. App.—Austin 1997, writ requested).

Zurich responded by contending that neither Zurich nor Dow Corning ever intended to insure any of the doctors, that the doctors were not parties to the contracts of insurance between Zurich and Dow Corning, that the doctors were not intended third-party beneficiaries of those contracts, that the doctors were not real vendors of the product, and so there was no coverage.

The district court and then Austin Court of Appeals sided with Zurich, even in those years when the identity of vendors was not restricted by any schedule. According to Justice Mack Kidd, who wrote for a unanimous panel, the doctors were not vendors of any product within the meaning of the insurance policies. Justice Kidd relied upon WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, and said that the term "vendor" means "one that offers goods for sale. . . habitually or as a means of livelihood." The vendor's endorsement at issue in the case extended coverage to "any person or organization. . . , but only with respect to 'bodily injury' . . . arising out of [the named insured's products] which are distributed or sold in the regular course of the vendor's business. . . ." So, according to Justice Kidd, the coverage extends to those who habitually or as a means of livelihood sell something, and then only if they sell the something in the regular course of their business. In effect, Justice Kidd holds that doctors are not additional insureds under the policy for two reasons. First, doctors are not in the business of habitually or as a means of livelihood selling breast implants; "rather, they earn a living by providing professional medical services." Second, doctors do not sell breast implants in the regular course of their businesses. The regular course of a doctor's business is cosmetic plastic surgery, not the sale of any products.

This holding seems result-oriented and its reasoning troubled. There is no absolute inconsistency between offering services and selling products. Certainly, physicians are in the business of providing medical services. There is no reason why a component of that business could not be a sale of products. Auto repair shops surely sell products along with repair services. Hairstyling salons provide services, but they also sell chemical products which are placed in the hair of their customers. Similarly, hospitals which provide their patients flammable gowns may be strictly liable in tort, because the tort

rests on a product defect rather than on the service component of the transaction.<sup>13</sup> If it is an established mode of doing business for physicians to sell the products they implant to their patients, there is no reason why they should not be classified as vendors. If that's the way business is regularly done, then the sale of a product is part of the regular course of the physician's business. If a cosmetic plastic surgeon includes the price of the implant in the price of the operation, and if the plastic surgeon performs a number of these operations, then the surgeon is habitually the vendor of a product who makes his livelihood from this activity.

The court has simply set up a false dichotomy between goods and services. As a matter of logic—as a matter of conceptual fact—they are simply not mutually exclusive. Of course, a physician could be guilty of medical malpractice in a variety of ways which are unconnected to the sale of the product. He could realize that the product was dangerous and insert it anyway. He could botch the surgery. Or he could puncture the implant as he inserted it. If the services are fine and if the product (allegedly) causes the injury, however, this is a problem for the manufacturer, and the surgeon should be treated as a mere vendor, but a vendor none the less.

As a result of the court's failure to draw the proper distinctions, it relies upon two inapposite cases; *Barbee v. Rogers*<sup>14</sup> and *Gormley v. Stoffer*.<sup>15</sup> The former case, *Barbee*, stands for the proposition that if a professional (in that case, an optometrist) prescribes the wrong treatment (in that case it was the use of contact lenses of the wrong shape), the professional cannot be held liable on a products liability theory. There was nothing wrong with the product prescribed. A professional prescribed the wrong product. Strict liability in tort was never

13. *Thomas v. St. Joseph Hospital*, 618 S.W.2d 791 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.). *But see Easterly v. H. S. P. of Texas, Inc.*, 772 S.W.2d 211 (Tex. App.—Dallas 1989, no writ) (strict tort liability not govern a catheter, which was part of an epidural kit and which broke off and stuck in the plaintiff's spine during child delivery). By statute in Texas blood transfusions and other transplants of body parts are expressly exempted from strict liability. Tex. Civ. Prac. & Rem. Code §§ 77.001-77.004 (1985).

14. 425 S.W.2d 342 (Tex. 1968).

15. 907 S.W.2d 448 (Tex. 1995).

intended for such a situation. In *Gormley*, the court held, in relevant part, that the law of implied warranties did not apply when a dentist prescribed false teeth which didn't fit. Again, the teeth were not defective, he simply prescribed the wrong ones. Neither *Barbee* nor *Gormley* have anything to do with *TMLT v. Zurich*, if the plaintiffs have alleged anything against the doctors other than negligence and the rendition of services.

Difficulties over distinguishing products from services have plagued the tort law for the last quarter century. Section 402A of the RESTATEMENT (SECOND) OF TORTS is expressly restricted to products. Services are not included within its purview.<sup>16</sup> When considering tort cases, courts around the country have been especially reluctant to classify providers of professional services (and most especially physicians) as also vendors of goods. This reluctance is unfortunate, when the physician provides defective goods and the price of the goods (and perhaps a mark up) are part of the physician's fees.

The position TMLT has taken in this lawsuit implies that many of these thoughts are irrelevant. The view of TMLT is that the plaintiffs have accused the doctors of selling breast implants. They are goods. Those goods are alleged to be defective. Being somewhere in the maker-to-seller chain for the defective goods is a necessary condition for the applicability of § 402A. Whether someone has regularly sold (and therefore is a seller) of a product is an issue of fact. Hence, for the purposes of determining the duty to defend, the assertion that a defendant is a seller must be taken to be true. The allegation of vendor status is integral—indeed, crucial—to the tort case. It is an element in the plaintiff's case-in-chief.

TMLT's is a nice clean-looking argument. Simplicity is not always a virtue, however, and, unfortunately, the argument suffers from two related problems. First, the pleading which the parties to the lawsuit seem to regard as a paradigm for the several hundred pleadings plaintiffs have filed asserts that "the plaintiffs purchased the breast implants for use

as prostheses when the plaintiff's physician inserted [them] into her body." From the insurance coverage point of view of the physicians, the petition could have been more helpful. It could have expressly alleged that the woman purchased the breast implants and purchased them *from the physician*. Instead, the plaintiff has alleged that she purchased them somehow obliquely: when they were inserted in her body. Plaintiffs' pleadings are, of course, to be construed broadly when making duty-to-defend decisions. Nevertheless, this language connotes a constructive sale, rather than an actual one.

Thus, the language of the pleading gives rise to a second problem—one TMLT does not wish to face: the product-service distinction. A continuing temptation in the law of products liability is the "Essence of the Transaction Rule."<sup>17</sup> On this rule, if the essence of a transaction is the provision of services, and a product is only incidentally involved, then § 402A does not apply. This rule is subject to lots of criticism, however, and it should probably be rejected. Nevertheless, from a jurisprudential point of view, it must be asked whether the physician should be considered to be the vendor of the breast implant. Given the history of the product-service distinction/controversy in the law of torts, this is naturally treated as an as-a-matter-of-law inquiry, which probably falls outside the limits of the "Eight Corners Rule."

TMLT has the better of the argument, and the Austin Court of Appeals went wrong on both the first and the second point. It failed to appreciate the force of the "Eight Corners Rule": it did not even so much as briefly discuss the text of any of the plaintiffs' pleadings. In addition, it did not appreciate the fact that a breast implant could not possibly be incidental to cosmetic plastic surgeon's activities. The essence of these activities is the insertion of a product. If a doctor does the insertion correctly but the product is crap, then there has been failure of exactly the sort § 402A was designed to cover.

TMLT is inclined to the view that whether a cosmetic plastic surgeon is also a vendor of goods is a factual matter upon which there was no summary judgment evidence. It therefore faults the court of

16. William C. Powers, Jr., *Distinguishing Between Products and Services and Strict Liability*, N. CAROLINA L. REV. 4015 (1984). See William Powers, Jr., TEXAS PRODUCTS LIABILITY LAW, § 10.07, p. 10-27 (2d Ed. 1994).

17. *G-W-L, Inc. v. Robichaux*, 643 S.W.2d 392, 394 (Tex. 1982).

appeals for deciding as-a-matter-of-law that a physician inserting breast implants cannot be the vendor of goods. TMLT would rivet the attention of the court on the bought-it-when-it-was-inserted language in the plaintiffs' petitions; infer that if the patient bought the product, the physician sold it; and require a defense. Perhaps TMLT is right. If it is, another serious—though narrow—problem arises. For a long time, the law has not made distinctions among physicians. If one type of physician is not a vendor, then no type of physician is a vendor. Perhaps this is a mistake. Perhaps family medicine physicians who give away samples but charge fees are not vendors of products, but cosmetic plastic surgeons are. That would not be an outrageous result, though parts of the medical community would surely be outraged.

Bottom line, the Austin Court of Appeals said that Dow Corning's products liability insurer had no duty to defend the doctors. At the same time, implicitly, the court recognized that duty-to-defend decisions are relative to live petitions. Thus, one reason the court gave for its decision was that the doctors had not been explicitly accused in the plaintiffs' pleadings of being vendors. This remark suggests that if plaintiffs now (or in the future) expressly accuse doctors of being vendors of the product, then, under the "Eight Corners Rule," Zurich might owe them a defense. It is hard to see how that remark can be reconciled with the bottom-line holding of *TMLT v. Zurich*. Nevertheless, if all factual propositions in every pleading are taken to be true, then the Eight Corner Rule would have to be reapplied to every new pleading. Here is a delicious prospect: the rule enunciated by the Austin Court of Appeals stands, and the plaintiffs—ever helpful—replead their cases making the claim that they purchased goods from the physician so clear that no one could possibly imagine that only a constructive purchase was being pleaded. Would we then be back to square one? Would the entire matter have to begin all over again? If the plaintiffs pleaded their cases all again making their allegations of a sale transaction completely clear, could TMLT properly file another declaratory judgment action?

What a marvelous case! We have a questionable holding, troublesome reasoning, and a paradox all in one short case. One suspects that the real problem bothering the court in this case is that a liability carrier

must defend an entire action if it must defend any part of the action. Perhaps it seems inappropriate to the Austin Court of Appeals that a products liability insurance company should have to defend a medical malpractice case. Perhaps the court of appeals thought that commercial general liability insurance company really never intended that the doctors should be vendors. The answers to these problems are perfectly straight-forward. First, many of the underlying tort cases appear to be products liability cases only, with no allegation of medical negligence. Even those cases which do allege medical negligence against the doctors, also allege that they sold the implant to the patient. For some of these cases, a real anomaly could arise: some of these physicians might be without insurance coverage at all. After all, if there is no allegation of medical malpractice, why would the malpractice carrier ultimately be liable. Why would the malpractice carrier even have to defend? Even if the malpractice carrier defends under a reservation, why should that company defend product defect cases? Of course, each insurance company owes the insured a duty to defend the entire case, if necessary. Since both insurance companies could be held to owe a defense, they can either work out or litigate who should pay how much at an appropriate time. Second, let us suppose that no underwriter of Zurich ever contemplated the possibility that plastic surgeons might be vendors. This fact is irrelevant to the inquiry. They surely intended to insure whoever it was that constituted a vendor of the product. As it happens, some of those vendors turn out to be physicians. This matter seems to be simple and straightforward. (There is a more complicated problem however. What if the manufacturer intended that all of its vendors be covered but also affirmatively intended that no doctor would be a vendor. Of course, if the doctors were expressly excluded from the vendor's endorsement, then the matter would again be simple and straightforward. If, however, the insurance company intended that the doctors would not be covered, but never included that language in the insurance policy, then it is difficult to see how the company could get beyond the language of its policy to its affirmative intent. This matter is again simple, though it may not be quite so straight forward.)

## V.

## Voluntary Intoxication

Should standard liability policies cover injuries inflicted by a person who is out-of-control drunk? Such policies, after all, authorize coverage for involuntary conduct because it is accidental or, at least, accident-like. In *Wessinger v. Fire Insurance Exchange*,<sup>18</sup> Wessinger got very, very drunk—so drunk he couldn't remember what happened—and beat the tar out of somebody. Both the tortfeasor and his victim wanted Wessinger's liability insurance to pay the judgment. The insurance company sought a declaratory judgment, and the court granted it. Justice Deborah Hankinson, who has since been elevated to the Texas Supreme Court, wrote for the Dallas Court of Appeals. She concluded that voluntary intoxication—even out-of-control drunkenness—does not “destroy the volitional and intentional nature of [the drunk's] conduct and that [his victim's] injuries naturally resulted from that conduct, [so the drunk's] act was not accidental and thus not a covered occurrence.”

Justice Hankinson derived this conclusion from following general rule: “[w]here acts are voluntary and intentional and the injury is the natural result of the act, the result was not caused by accident even though that result may have been unexpected, unforeseen, and unintended.”<sup>19</sup> Thus, according to Justice Hankinson, determining whether an act or event constitutes an accident requires a two-step analysis. First, the court determines whether a specific behavior, alleged to be the cause of injury, is voluntary and intentional. If it is not, then the analysis stops, because there is an accident. If, on the other hand, the tortfeasor's acts are voluntary and intentional, then there is a second step. The court must determine whether the consequences of the voluntary and intentional act are its natural result. If the consequences are not probable, then they are produced by accidental means, even though the initiating cause was a voluntary act. If the natural consequences of an act are the consequences that follow naturally, the results that ordinarily follow, or the flow that may be reasonably anticipated, then the

events that “ought to be expected.”<sup>20</sup> According to Justice Hankinson, the standard for determining whether a consequence is a natural result of an act is an objective standard: “[a] person is held to intend the natural and probable results of his acts even if he did not subjectively intend or anticipate those consequences.”

The panel thought that this line of reasoning was reinforced by considerations of public policy. Most significantly, the court wants to make sure that drunken miscreants, who engage in conduct which appears to be intentional and who inflict injury upon others, do not escape the consequences of their actions. Involuntary intoxication does not excuse bad behavior. The court is loath to make it possible for people to act unwisely and then avoid financial responsibility for their conduct.

The reasoning in this case seems puzzling. First, no one wishes to excuse a drunk who inflicts violence upon another. The question is whether insurance will pay it. Since many people who engage in this sort of conduct cannot pay for the injuries they inflict, a direct consequence of this policy is that injured people go away empty handed. Even if their personal health insurance policies take care of the medical expenses, there may be considerable pain, mental anguish, lost wages, and perhaps even disability. Hence, the direct and most significant consequence of the court's action is to make remedies to which victims are entitled purely theoretical. An unfunded remedy may interest students of the law, but it doesn't do much for an injured person.

Second, the court seems concerned about the moral hazard. In insurance theory, the moral hazard is the danger that the very purchase of insurance may increase the incidence of undesirable conduct. To be sure, the Texas Supreme Court takes concerns about the moral hazard seriously in the context of determining whether an event is an accident, and judicial concern with moral hazard is a matter of public policy.<sup>21</sup> All rational analyses of the moral hazard, however, must begin with the question *If this*

18. 949 S.W.2d 834 (Tex. App.—Dallas 1997, writ history unknown).

19. *Argonaut Southwest Ins. Co. v. Maupin*, 500 S.W.2d 633, 635 (Tex. 1973).

20. *Id.* at 837. The court is relying upon *Republic Nat'l Life Ins. Co. v. Heyward*, 536 S.W.2d 549, 555-56 (Tex. 1976), and *State Farm Fire & Cas. Co. v. S. S.*, 858 S.W.2d 374, 377 n. 2 (Tex. 1993).

21. *Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d 820, 827 (Tex. 1997).

conduct is insured, will it increase substantially? There is absolutely no evidence to suggest that either drunkenness or rampaging violence committed by out-of-control drunks would increase if such conduct were made insurable.

Third, there is a missing dimension to the analysis. The conduct which should be examined for voluntariness and intentionality is not physical beating which an out-of-control drunk administers to another. Rather, it is the act—or, activity—of getting drunk in the first place. That conduct might well be negligent, as well as (at least in the beginning) intentional. It may well be the case that the violence in which the binge ends is not a natural result of the “act” of getting drunk. Randy might well be a frequent binge-drunk but also might never have struck anyone. Randy might contrast sharply with Sandy, who beats somebody up every time he gets drunk. Randy’s conduct might well be insured, while Sandy’s conduct might not. (Then again, Sandy’s conduct might be compulsive in some way, and hence not voluntary.)

Fourth, the court relied upon a case which was probably inapposite. It followed *Group Insurance Company v. Czopek*,<sup>22</sup> in which a drunken adolescent injured two police officers while they were trying to protect him and then arrest him. This case is inapposite mostly because the insured-tortfeasor in that case is clearly not out of control. He was angry, to be sure, but he did not suffer from “blackout,” and he did not contend that he was subject to any kind of compulsion. At the same time, the court rejects a case decided by the Supreme Judicial Court of Massachusetts, *Hanover Insurance Company v. Talbouni*,<sup>23</sup> a case which really was apposite. In *Talbouni*, the insured tortfeasor took LSD and went nuts. While in the grip of his first bad trip, he went out of control, ran wild, assaulted a young woman, and treated her abominably, as well as violently. There was psychiatric testimony that Talbouni was “completely out of touch with reality, [that he] was hallucinating and delusional and [that he] did not know that he was assaulting another human being.” Significantly, the court found that there was no indication of a moral hazard problem.

The *Wessinger* court seemed determined to

22. 489 N.W.2d 440 (Mich. 1992).

23. 604 N.E.2d 689 (Mass. 1982).

create rigid and large categories. It clearly wanted, as they say, to paint with a broad stroke. Such techniques do not work well where subtlety is required. Moreover, trying to force insurance law to resemble criminal law and tort law is unfortunate. Insurance policies are contracts, and what may be good for Goose may not be good for Gander: they may be quite different, although of the same species. It is common practice to avoid subjectivity when possible in the negligence branch of the tort law. It is not at all clear where this should happen in insurance law. Making the system work efficiently is an important value, and insurance claims need to be processible with dispatch. Nevertheless, efficiency is not the only virtue, even in business. Truth and fittingness should count for something. It is often forgotten (although we pay lip service to the proposition) that insurance policies are contracts. It follows that insurance law is in great part a branch of contract law. In contract law, subjectivity plays a real role. We want to know what the parties actually intended. Of course, there are limits to subjectivity. If one party uses a term in a peculiar way and does not tell the other party, then we look to the way the language is ordinarily used. If we are to take seriously the contractual dimension of insurance policies, then — surely — we should determine whether the conduct of *this* insured was voluntary and intentional. We should be chary of creating as-a-matter-of-law rules for what constitutes voluntary and intentional conduct.<sup>24</sup> Similarly, we should ask whether *this*

24. Even in insurance cases involving the sexual abuse of children, where rigid, as-a-matter-of-law rules seem appropriate, *Cornhill Ins. PLC v. Valsamis*, 106 F.3d 80, 87-88 (5th Cir. 1997), there may be exceptions. Surely, every adult male knows that attempting to have sexual intercourse with a small child will be injurious. For every such person, he knows that if he performs this act, he will inflict injuries. Therefore, injuries of the small child are expected or intended. Moreover, virtually every adult male who attempts to perform such an act is acting both voluntarily and intentionally. But there may be exceptions. Some males may be so insane or so retarded they simply do not understand what they are doing. If they are also acting under the genuine grip of a real compulsion, then their action may not be voluntary. Obviously, little time should be spent on such issues in most cases. Nevertheless, when such a case does arise, it needs to be tried, not classified as something it's not.

insured expected or intended that result. Subjectivity has limits; then again, so does standardization. The use of form contracts does not dictate cookie-cutter results. The insurance branch of contract law exists for the purpose of funding meritorious tort claims. At the same time, the contract component of insurance law should not be completely "tortified."

## VI.

### Conclusion

*Griffin* was correctly decided. Assuming that the petitions filed against the doctors either expressly or implicitly accused them of vending defective products, *Texas Medical Liability Trust v. Zurich* was not correctly decided. The *Wessinger* case is a closer case. The common law is deeply suspicious of using drunkenness as a defense to circumvent responsibility. At the same time, insurance is somewhat different. No one was seeking to circumvent court-imposed damages or criminal responsibility. The only question was whether the risk could be transferred through a commercial risk-taker.

It seems clear that each of these cases involves some retrenchment. Permitting duty-to-indemnify declaratory judgments before the underlying suit is resolved makes the world a more certain place for insurance companies, and it reduces the ability of plaintiff-victims and defendant-insureds to enter into

deals which will unfairly injure insurance companies. *Texas Medical Liability Trust* makes malpractice insurers solely responsible for defending doctors, even when the doctors are accused of selling defective products. This takes general liability insurers "off the hook" not only in breast implant situations but potentially other situations as well. The *Wessinger* case is a boon for many sorts of liability insurance companies. It may even be a boon for some tort claimants. There will probably come a time when some (alleged) tortfeasors run out of general liability insurance money. There may be some tort claimants left. Possibly, money from medical malpractice carriers might fund some of these claims. Thus, the rule in *TMLT v. Zurich* may expand the pot of insurance dollars available to handle these claims. It does not make the decision right. It does not make it according to law. It may even be perverse and counter productive. Many med mal insurance policies are "wasting" policies, where the limits include the defense expenses. For those policies that the *TMLT* decision wastes coverage, since CGL policies have no limits on the duty to defend.

Yet each of these decisions involves problematic reasoning. Hopefully, this is simply a function of the fact that Texas insurance law is in a transitional stage. Hopefully, it does not involve deliberate subterfuge. Nevertheless, it is well to remember that the body of jurisprudence can tolerate only so many cognitive shortcuts and only so much faulty rhetoric.

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