



Legal Beat

By MICHAEL SEAN QUINN

Defining Negligence, Misconduct

Recent Supreme Court Ruling Muddies the Water

Insurers, insureds and agents all worry about oblique liability. Issues of oblique liability come up where two or more people each have some responsibility for an injury, but one of them with lesser liability ends up paying the entire tab. Sometimes this happens because one defendant has insurance and the other doesn't or because one defendant is fully solvent and the other isn't.

This problem arises because of joint and several liability. In theory, if one tortfeasor pays the whole tab, he can get part of the money back from the other tortfeasors. Often this does not happen, for obvious reasons.

I. The problem

This problem is particularly bothersome

when a less blameworthy person hasn't affirmatively done anything at all, but has only failed to do something—usually some small thing—which perhaps he should have done. It is also troubling when the relatively non-liable person is the guy who just owned the premises where the bad stuff happened. It is even worse when the injury is caused by a long, complex chain of events where causation is complicated.

One paradigm of this kind of situation arises when A drags B onto premises owned by C and causes B injury. The Texas Supreme Court has found C liable in a rape-of-a-child case, when a city ordinance prescribed that its building be better secured. Two months ago, a similar issue came before the Texas Supreme Court. At 3:30 a.m., a police officer (A) induced a woman (B) to

follow him into a downtown parking garage owned by C. There he raped her. B sued C for inadequate security.

C won summary judgment, and the high court affirmed. As a consequence, the cost of liability insurance for buildings such as parking garages should decline slightly. This is the teaching of classical price theory.

Alas, life is not so simple. The case, *Mellon Mortgage v. Holder*, decided by the Supreme Court on Sept. 9, 1999 is a split decision—indeed a fractured one. There is no majority opinion. Three justices joined in a plurality opinion. Two judges wrote separate concurring opinions. Each of these three opinions is based upon a different approach to the law. In addition, three judges dissented, and one did not participate. Consequently, the rule announced by the court is tentative and tepid.

II. What is Negligence?

Mellon Mortgage was purely about the tort of negligence. There is widespread agreement about the general structure of this tort. It should be thought of as six separate elements, although sometimes these are run together.

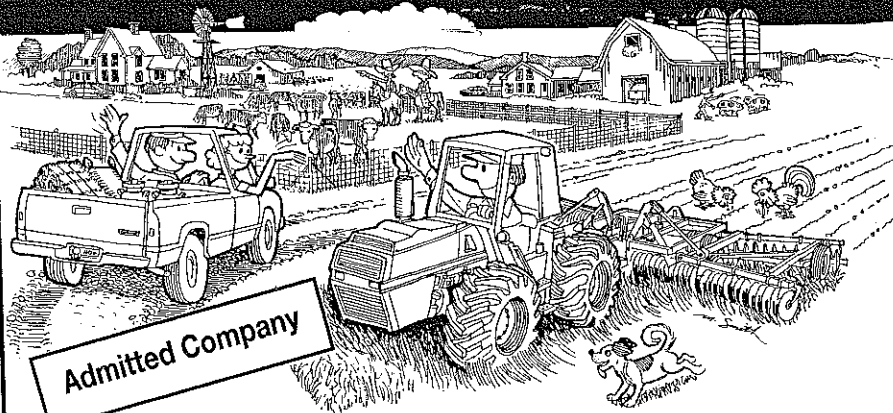
1. Duty. One person, A, can commit the tort of negligence—the tort of carelessness—upon another, B, only when A has a duty to refrain from treating B in a negligent manner. Correlatively, A can commit the tort of negligence on B only when B has the right that A should refrain from being negligent with respect to him.

2. Breach. A commits the tort of negligence upon B only when A breaches his duty not to be negligent towards B—only when A breaches his duty to B to be careful. This happens only when A performs a relevant act negligently or when B carelessly omits to do something he should do. Often, duty is proved by looking at the customs of the community and determining whether A has acted unreasonably with respect to B, given the customary norms.

3. Cause-In-Fact. A commits the tort of negligence upon B only if A's careless act causes B harm. This causation is a pure question of fact—an empirical question. Did the conduct of A make an injury to B more likely than it would have been otherwise?

4. Proximate Cause. Not only must the conduct of A as a matter of empirical fact cause harm to B, the fact that A's conduct might well cause this harm must be foreseeable. This means that A should have fore-

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seen that his conduct might well cause some harm either to B or someone similarly situated. One way to put this is that the hypothetical reasonable person would have foreseen that such conduct might well cause some injury to a person in B's situation. The exact injury need not be foreseeable, but the fact of some injury must be foreseeable.

5. Injury. In order for A to commit the tort of negligence upon B, B must actually sustain some injury. No injury, no tort. There are many sorts of injuries: injuries to the body, injuries to property, mental anguish,

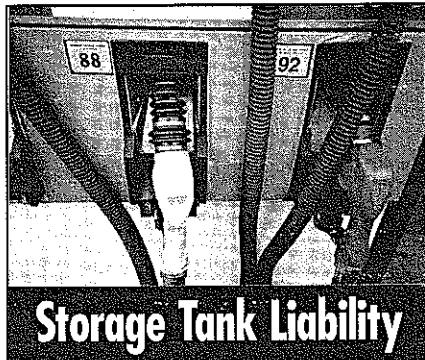
financial injury, and injury to relationships. All of these are compensable—at least under some circumstances.

6. Damages. In order for A to have committed the tort of negligence upon B, B's injury must generate actual damages. It must be possible to place a monetary value upon the injuries being sustained. After several centuries, the law has become ingenious at valuing injuries.

There are volumes written on these six elements, but, by far, the most compli-

cated is the first one. Everyone agrees that A can commit the tort of negligence upon B only if A owes B a duty. But when does A owe B a duty? There is not widespread disagreement about this.

According to one school of thought, if A owes a duty to anyone, and A breaches that duty, so that someone else is injured, then A is liable to the injured person. According to a second school, everyone owes everyone else the duty to be careful. Only bleeding heart professors subscribe to this second view. According to yet a third school, A is liable to a person injured, only if he owed that very person a duty to be reasonably careful.



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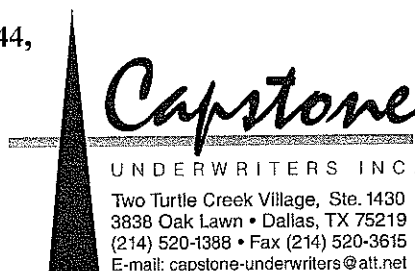
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This decision should have some impact on the world of liability insurance, although the impact will not be obvious.

But when does A have a duty not to injure B? One has a duty not to injure only those who are the foreseeable victims of one's carelessness. Thus, I have a duty to everyone using a highway, not to injure them. Everyone around is a foreseeable victim. This includes drivers, passengers, bicyclists, motorcyclists, hitchhikers, jaywalkers, and so forth. Roadway accidents involve relatively predictable victims. Of course, the fact that someone is a foreseeable victim does not imply that I have actually been negligent—that I have breached my duty to them—if I cause them injury.

In contrast, if (1) I foul something up, (2) cause someone else to drop something, (3) the dropping of that thing causes something else to happen, (4) that something else causes yet something else to happen, and (5) that last happening—much to everyone's astonishment—injures someone no one ever would have thought of as a probable victim, then I have not committed the tort of negligence upon the injured person, even though I have been careless.

Notice that the concept of foreseeability gets used twice in the third analysis of duty. Not only must the potential harm be foreseeable, but the potential victim must be foreseeable, as well. Thus, the concept of foreseeability is used once to distinguish

proximate causation from causation-in-fact, and again to circumscribe the idea of the duty not to be negligent (i.e., the duty to be reasonably careful).

III. The plurality

The three-person plurality held that Holder was not a foreseeable victim of the arguably negligent security Mellon Mortgage provided its parking garage. To be sure, said the plurality, Mellon might owe its employees or people who park their cars in its garage

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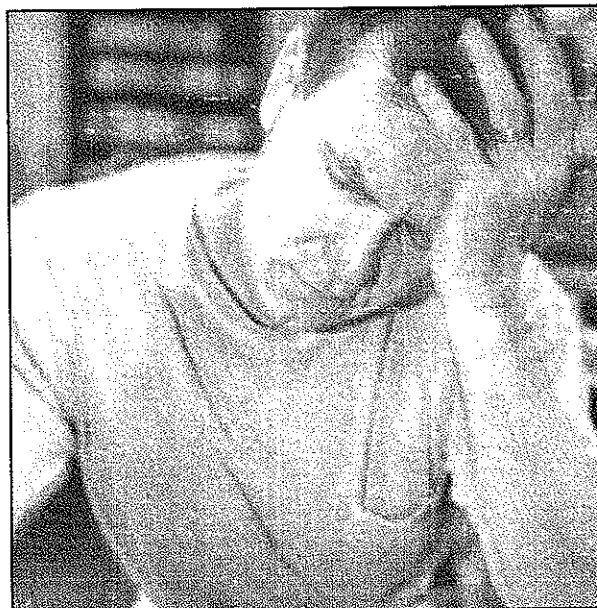
some sort of duty, but Holder was neither of these. She was simply driving around semi-nearby in the middle of the night.

IV. First concurring opinion

Justice Enoch objected to the approach of the plurality, although not its decision. He thought that the court should use the traditional categories utilized from time of memorial to regulate the tort duties of landowners. So far as Justice Enoch was concerned, Holder was a trespasser, and so was owed no duties at all.

V. Second concurring opinion

Justice Baker thought that one shouldn't have to worry about the complexities of



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whether Holder was a foreseeable victim. He thought the harm inflicted upon Holder was not foreseeable. To be sure, there had been some violent crime in downtown Houston. It is entirely foreseeable that a car might be stolen from a parking garage, but that doesn't mean it's foreseeable that a woman would be raped there.

VI. Dissenting opinion

Three judges dissented. They agreed with Justice Enoch that the traditional categories for understanding premises lia-

bility should be used. According to the dissenters, however, some evidence suggested that Holder was not a trespasser but a licensee.

They deduced this conclusion from three bodies of evidence. First, Mellon knew that people trespassed upon its premises. Second, Mellon did nothing to attempt to stop it. Third, Mellon could have stopped it had it wished to do so. On this basis, the dissenters inferred that some evidence supported the view that Mellon had implicitly consented, through its inaction, to some unauthorized uses of its parking garage. After all, bums and drunkards lounged and loitered around the premises, and Mellon did not throw them out.

In this vein, it follows that once the pernicious policeman induced Holder to come into the parking garage with him, what happened thereafter was entirely foreseeable.

VII. Conclusion

This decision should have some impact on the world of liability insurance, although the impact will not be obvious. At the same time, there is a lot to argue about in this opinion.

Why isn't Holder a foreseeable victim? Don't rapists try to find out-of-the-way, enclosed spaces?

Why did Holder follow the policeman? There is no discussion of this politically incorrect question by any judge on the court, but it seems odd she did not say, "I will go with you to the police station, but I will not go with you to a parking garage." On the other hand, how on earth could anyone see Holder as a trespasser when policeman (with a uniform, a marked car, and

a badge) ordered her to enter the premises?

How could the owners of a parking lot possibly not realize that there premises might be used for sexual purposes? Everyone knows that downtown parking garages are used for voluntarily sexual purposes all the time. What can be done in a car in a parking garage voluntarily can be also done there involuntarily. □

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