Texas Civil Justice League **Advocate**

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INSIDE

Chairman's Column Pg 2

Punitive Damages Reform Drive Pg 3

Supreme Court Rejects LULAC Pg 3

The Crisis in the Civil Justice System Pg 4

Small Businesses & Tort Reform Pg 5

Run-Off Election Dates Pg 6

Justices Address Punitive Damages

In a series of cases handed down last month, the Texas Supreme Court has attempted to clarify the standards for awarding punitive damages based on the defendant's "gross negligence" and bolster the procedural safeguards against unjust awards.

"We are pleased that the Court has finally addressed punitive damages," said Nub Donaldson, TCJL's Legislative Counsel and Chair of the TCJL Punitive Damages Task Force. "While we are encouraged with the progress that has been made, there still remains much to do legislatively, both to codify improvements made by the Court and solve problems the Court left untouched."

Probably the most important decision came in *Transportation Insurance Company v. Moriel*, a case that was argued more than two years ago and has been eagerly awaited ever since. As you recall, the Texas Civil Justice League, in conjunction with the American Tort Reform Association and Texas Association of Defense Counsel, filed an amicus curiae brief with the Court in this case. The brief was prepared by former Texas Supreme Court Chief Justice Joe Greenhill, who is now of counsel to the law firm of Baker & Botts. Judge Greenhill was assisted by Baker & Botts lawyers Shelley Austin and Joseph Knight.

TCJL's brief urged the Court to reconsider a 1981 Supreme Court decision (*Burk Royalty Co. v. Walls*) that severely weakened an appellate court's ability to review punitive damages awards and correct manifest injustices. The Court heeded Justice Greenhill's advice and took another look at Burk Royalty. Although legal experts are still assessing the ultimate effect of the decision, the Court clearly has made it a lot harder for a plaintiff to recover punitive damages in bad faith insurance claims. What is not clear is how the standard of gross negligence articulated by the Court applies to other types of cases involving punitive damages.

The Court also ruled that in all future cases including claims for punitive damages a defendant is entitled to bifurcation of the trial. If a defendant opts for bifurcation, the issue of the amount of punitive damages will be separated from the other issues in the trial, such as liability and the amount of actual damages. The effect of bifurcation is that evidence of the defendant's financial condition may not be introduced by the plaintiff until the second phase of the trial. Under current procedure, the evidence comes in as part of the plaintiff's case on liability, which is extremely prejudicial to the defendant. *Moriel* is thus a clear improvement over current law in this respect.

Courts of appeals will be taking a closer look at the evidence supporting a jury award of punitive damages, as well. The Court is requiring appellate courts to detail the evidence that justifies a punitive damages award. Stronger appellate review is a key element of protecting the defendant's due process rights, and the Court's decision is a positive step toward providing adequate procedural safeguards to defendants hit with a punitive damages claim.

The Court flirted with raising the burden of proof for punitive damages claims from "preponderance of the evidence" to "clear and convincing evidence." Noting that a number of states have done so either

continued on page 2

Gonzalez-Haas Run-Off Set for April 12

Texas Supreme Court Justice Raul Gonzalez will face Corpus Christi plaintiff's lawyer Rene Haas in the Democratic primary run-off on Tuesday, April 12. Gonzalez led the ticket with 42.1 percent of the vote, with Haas garnering 34.7 percent. Bedford lawyer Bill Yarborough trailed with 23.2 percent. Despite being outspent more than 2-1, Gonzalez ran strongly in major metropolitan areas and South Texas. He even carried Nueces County—Haas' own backyard.

In other Supreme Court races, Justice Nathan Hecht easily bested perennial candidate Charles Ben Howell in the Republican primary. Hecht's Democratic opponent in November is Houston court of appeals judge Alice Oliver Parrott, who defeated Corpus Christi district judge Mike Westergren.

In the race for the seat vacated by Lloyd Doggett, Republican lawyer Priscilla Owen, who was unopposed, will square off against Austin court of appeals judge Jimmy Carroll. Carroll won the Democratic primary over another court of appeals judge, Margaret Mirabal of Spring.

A bitter, intra-party fight for Presiding Judge of the Texas Court of Criminal Appeals was won by incumbent Mike McCormick, who turned back a challenge from associate judge Charlie Baird in the Democratic primary. McCormick, a "law and order" judge, is unopposed in November.

In the other two Court of Criminal Appeals races,

continued on page 2

Chairman's Column

by J.P. Word

The March 8 primary election is a grim reminder of how our system of partisan judicial elections penalizes good judges and rewards moneyed candidates.

One of the most highly respected state Supreme Court justices in the country—Raul Gonzalez—was forced into a run-off by plaintiff's lawyer Rene Haas, whose campaign was sponsored by her law partner-spouse David Perry. They spent more than $2 million to unseat Gonzalez, and may spend that much again in the five weeks leading up to the April 12 run-off election.

Perry, a wealthy and influential leader in the plaintiff's bar (and a former president of the Texas Trial Lawyers Association), is a major player in Supreme Court and legislative politics. He led the TTLA's fight against worker's compensation reforms in 1989, and his high-dollar political contributions to judicial and legislative candidates are almost legendary. Now he wants his spouse to sit on the Supreme Court.

Haas' campaign has set a new standard in judicial ethics. She has openly accused Justice Gonzalez—a man whose integrity has never been questioned in his ten years on the court—of selling his vote for $500 campaign contributions. This from a candidate who collected fistfuls of $25,000 contributions from plaintiff's firms with cases before the Court.

Haas has treated the Code of Judicial Conduct with utter contempt. She has commented freely on at least one case that is still pending before the court, and has stated how she would vote in others if she ever had a chance. At least she's being honest about one thing: her political and personal agenda is more important to her than the fair and impartial administration of justice.

The Gonzalez-Haas race boils down to a battle over what kind of Supreme Court we're going to have in Texas. Do we want independent judges who make decisions based on the law and facts of particular cases, or ideologues bent on reshaping the law to satisfy their own personal and financial interests?

During the next month, the the thousands of Texans who are members of the Texas Civil Justice League PAC will do everything in their power to help inform Texas voters of what this campaign is all about. The integrity of our Supreme Court is at stake on April 12.

Punitive Damages *continued...*

legislatively or by judicial decision, the Court declined to raise t burden at this time, sending a clear signal to the legislature that this issue should be addressed during the 1995 session.

Unfortunately, Moriel does little to address the problems of punitive damages at the trial court level.

- Instructions to the jury on punitive damages are inadequate and may not accurately reflect the law.
- Trial judges are not required to review a jury award of punitive damages to make sure it complies with appropriate legal standards and the evidence in the case.
- The burden of proof for establishing "gross negligence" is minimal.
- The "gross negligence" standard itself is one of the weakest in the nation.
- Caps on punitive damages do not apply in all types of cases and, when they do apply, are ineffective because huge awards of "soft" damages, such as mental anguish, raise the ceiling too high.

Businesses and individuals are being socked with criminal fines in our civil courts every day without the same constitutional safeguards afforded to people charged with criminal offenses. As helpful as Moriel is in some respects, it achieves only incremental progress where a complete overhaul is needed.

Gonzalez-Haas *continued...*

incumbent Charles Campbell, unopposed in the Democratic primary, will face Republican lawyer Steve Mansfield for Place 1. The crowded field in Place 2 has been reduced to four candidates in the run-off. On the Democratic side, Fort Worth prosecutor Betty Marshall is in the run-off with Universal City lawyer Gene Kelly. Republicans will choose from lawyers Sam Bayless of San Antonio and Sharon Keller of Dallas.

Only two legislative incumbents lost their jobs, one from each party. Republican State Representative Jim Tallas lost to Sugarland businessman Charlie Howard, and one-term incumbent Tony Parra (D-El Paso) was nosed out of a run-off in a three-candidate race.

Incumbents winning primary battles include:

- Senator Jeff Wentworth (R-San Antonio) in District 25;
- Senator Eddie Lucio (D-Brownsville) in District 27;
- State Representatives Huey McCoulskey (D-Richmond); Bob Hunter (R-Abilene); Harvey Hilderbran (R-Kerrville); Ric Williamson (R-Weatherford); Pete Patterson (D-Paris); Yvonne Davis (D-Dallas); Jesse Jones (D-Dallas); Jim Horn (R-Denton); Elvira Reyna (R-Mesquite); Leticia Van de Putte (D-San Antonio); Sylvia Romo (D-San Antonio); Mike Krusee (R-Austin); Nancy Moffat (R-Southlake); Sergio Munoz (D-Mission); Rene Oliveira (D-Brownsville); Eddie de la Garza (D-Edinburg); Al Price (D-Beaumont); Vilma Luna (D-Corpus Christi); Irma Rangel (D-Kingsville); Betty Denton (D-Waco); Roberto Alonzo (D-Dallas); Scott Hochberg (D-Houston); Kevin Bailey (D-Houston); and Harold Dutton (D-Houston).

The race for Senate District 6 in Houston is going to a run-off between former State Representative Roman Martinez and State Representative Mario Gallegos. Martinez led Gallegos by 12 points.

Associations Seek to Repeal New Tax Law

The American Society of Association Executives (ASAE) is mounting a two-pronged attack aimed at restoring the deductibility of association dues. The 1993 Omnibus Budget Reconciliation Act repealed the deductibility of lobbying expenses, including association dues attributable to lobbying activities.

ASAE, joined by its many Texas members, will seek to restore the deduction through legislation during this congressional term. On another front, ASAE is challenging the repeal of the deduction in federal court on constitutional grounds.

If you would like more information about this effort, please contact Ralph Wayne at (512) 320-0474.

TCJL Mounts Punitive Damages Reform Drive

With the 1995 legislative session less than a year away, TCJL is gearing up for our toughest challenge to date: punitive damages reform.

Why can we expect the plaintiff's lawyers to fight to the last ditch to avert genuine reform?

"Punitive damages are one of their biggest money-makers," says Nub Donaldson, TCJL's legislative counsel and chair of the Punitive Damages Task Force. "They know that the law of punitive damages in Texas is so favorable to them that most defendants will pay inflated settlements rather than risk a devastating award. It's a billion-dollar racket for plaintiff's lawyers, who rake off a third to half of the protection money."

Although plaintiff's lawyers argue that there's no problem with punitive damages because so few cases go to trial, the reality is that the very real threat of punitive damages makes even marginal lawsuits much more expensive to settle. Because of the lack of definitive guidelines for awarding punitive damages and the legal obstacles to an effective appeal, going to trial on a punitive damages issue is like betting the house on a winning lottery ticket.

TCJL's Punitive Damages Task Force is currently preparing legislation and the back-up research. This is a difficult process, since settlements of lawsuits involving punitive damages claims are nearly impossible to access on a systematic basis. As always, we are counting on our members to assist us in gathering the necessary information.

If you have any information or data that you think would be valuable to the Task Force, please contact Ralph Wayne at (512) 320-0474, or Nub Donaldson at (512) 469-0624.

Don't Be Confused . . .

About now TCJL members should be receiving their 1994 dues notices in the mail. Individuals and PACs who are associated with TCJL members may be getting requests for contributions to the TCJL PAC as well.

These are separate requests. Dues payments support the League and its tort reform lobbying efforts before the Texas Legislature. Contributions to the PAC are pooled and contributed to pro-reform candidates for the legislature and candidates for the Supreme Court who advocate judicial restraint.

Remember, TCJL dues may be paid from corporate funds, while contributions to the TCJL PAC must be personal or from another PAC.

U.S. Supreme Court Rejects LULAC Appeal

The long-running *LULAC v. Clements* voting rights lawsuit is finally over. A unanimous United States Supreme Court refused to hear an appeal by Attorney General Dan Morales and minority groups, who sought to impose a single-member district scheme for electing state district judges in contravention of the Texas Constitution.

"Electing judges from single-member districts is the worst system imaginable," said Ralph Wayne, TCJL President. "We hope that the resolution of this lawsuit will lead to the adoption of a merit election plan that gets partisanship and big money out of judicial races and puts more minorities on the bench."

In rejecting the appeal, the Supreme Court upheld a decision by the U.S. Fifth Circuit Court of Appeals that our system of electing judges at-large on a countywide basis does not violate the Voting Rights Act.

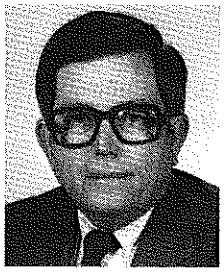
Minority groups contended that the at-large system discriminated against minority voters. Attorney General Morales agreed and signed a settlement agreement that would have carved up nine metropolitan counties into tiny subdistricts for purposes of electing district judges, who would still exercise jurisdiction countywide (former AG Jim Mattox also attempted to settle the case on this basis).

When a pair of Texas Attorneys General refused to defend the state, two state district judges stepped in. Houston District Judge Sharolyn Wood and Dallas District Judge Harold Entz carried the state's case to the end, arguing that partisanship explained the outcomes in judicial races, not racial voting. It was this argument that ultimately prevailed.

The end of the lawsuit puts the issue back where it belongs—before the legislature. Clearly, Texas needs a new system of electing judges. The current system is rotten with partisanship, excessive campaign money, and failure to promote minority candidates.

State Representatives Mark Stiles (D-Beaumont) and Robert Duncan (R-Lubbock), and Senator David Sibley (R-Waco) already have announced their intention to mount a bipartisan effort to pass a merit election plan in the 1995 session. Their goal is to put a constitutional amendment on the 1995 ballot, so that the voters—not the politicians—will have the final say.

Judicial selection reform is central to the fairness of our civil justice system. TCJL pledges its unqualified support to Representatives Stiles and Duncan and Senator Sibley in this effort.



Ken Roberts

The Crisis in the Civil Justice System

by Ken Roberts, General Counsel, Exxon Corporation

The following remarks were excerpted from an address given to the University of Texas Law School Alumni Reunion on May 1, 1993.

. . . I am not here today to pursue theories of legal education, a subject about which I know very little. Instead I wish to discuss a subject about which I will claim some substantial knowledge. What I want to discuss is the crisis in our civil justice system. I will, of course, approach this subject mostly from the standpoint of the business community.

If you feel that I am exaggerating when I use the term "crisis," than I ask you to reflect upon the fact that a major industry—ADR—has developed with the sole objective of developing ways to avoid the use of our traditional civil justice system . . .

I have also joined that bandwagon, but I am somewhat sad about it and I am somewhat embarrassed as a member of the legal profession to find that our civil justice system has failed so badly that individuals and institutions will go to great lengths to avoid using it.

At one end of the spectrum is the failure of the system to provide adequate legal services for the poor. The legal profession seems to have been struggling with that problem during most of my career. I recently heard the president of the ABA say this remains the bar's most serious problem. At the other end of the spectrum, the one in which I have been functioning for all of these years, the civil justice system has damaged the competitiveness of American business in world markets and in some cases has impacted the ability of American business to provide services for the public.

You will recall that the President's Council on Competitiveness published a report on this subject a couple of years ago. Dan Quayle, who headed that Council, spoke at the American Bar Convention in August of 1991 and outlined problems that were impacting the competitiveness of American business. He was rudely treated by the officials of the ABA and many of the recommendations of that Council have been belittled by officials of the Bar.

Last fall I attended a meeting of the Corporate Law Department Committee of the American Bar Association. This committee is made up of about 100 General Counsel of major U.S. corporations. The current president of the ABA was a speaker at that meeting and told the General Counsel that the ABA supported some of the recommendations of the President's Council on Competitiveness, but disagreed with most. He disagreed in particular with many of the statistics relied upon by the Council. He went on to explain that the statistics about the number of lawyers in the U.S. versus other societies—particularly Japan—were misleading.

His remarks caused an uproar in that roomful of General Counsel. These were senior members of the legal profession, frustrated by the treatment of their clients by the civil justice system and under pressures from their management to reduce costs. The ABA president listened to our complaints, and much to his credit he came back and joined us for dinner that night and then returned the next day to hear us out. I am sure he went away from that meeting with a better perspective on the seriousness of the problem the President's Council on Competitiveness was attempting to address.

Perhaps the most telling comment made by any of the General Counsel in that meeting was that of one individual who stated that he wasn't interested in the debate about whether the statistics were correct. He said "my company has about half of its business in the U.S. and half abroad and yet 90% of its legal cost are in the U.S." He said "this is a real statistic I know to be correct and that is the one my management looks at, not how many lawyers Japan has versus the U.S. . . ."

I can state flatly that the costs imposed upon American business by the civil justice system have become totally unacceptable. There is a great deal of frustration and a great deal of bitterness building in the business community and sooner or later we are going to have to face up to a solution.

I believe the problem can be divided, perhaps loosely, into three categories. First, there is the area I will call "substantive." This includes, among other things, the erosion of traditional negligence standards for liability and the treatment of deep-pocket defendants who are required to provide windfalls to plaintiffs far in excess of actual damages. Several states, including Texas, have the reputation as the most troublesome. For example, a recent publication by the Washington Legal Foundation contained statistics showing that the total dollar volume of million dollar plus jury verdicts in Dallas and Harris Counties during the first seven months of 1992 exceeded the amount in all of the other 49 states combined. I am not going to pursue this aspect of the problem since it involves a conflict between the plaintiff's bar and the defense bar and this is not the place to discuss that dispute.

The second problem is, I believe, the proliferation in government regulations issued without regard to the costs and administrative burdens they create. I am not going to pursue this aspect of the problem either because it leads to debates between liberals and conservatives and this is not the time or place for that debate.

The third aspect of the problem is the one I will focus on for a while because I can pick on the plaintiffs' bar, the defense bar, liberals and conservatives and provide equal treatment for all. I am referring to "transaction costs" or what I like to refer to as "delivery costs"—that is, the cost of delivering legal services required to resolve a legal problem.

I expect many of you remember the report on asbestos litigation a few years ago by the Institute for Civil Justice. It showed that for each 40 cents received by a victim, about 60 cents went to plaintiff and defendant attorneys' fees. Costs to taxpayers for court expenses are additional transaction costs. A further study showed that in tort cases generally, the amount received by the victim is only slightly higher . . .

This leads us to the question of why are the costs of delivering legal services so great. I think that there are two basic reasons. First

The Crisis *continued...*

procedural rules, and the most serious by far are the discovery rules. About the time I was in law school, discovery was being touted as a great contributor to the efficiency of our civil justice system. In my view it has been a total disaster that has driven costs to astronomical levels . . .

Defendants are not always the victims in the use of discovery. The massive discovery permitted by the rules frequently works to the benefit of the defendant. I don't really view discovery as solely a plaintiffs' tool. I simply believe that it has bogged down the system, making it more expensive for everyone. Even individuals and small businesses who are plaintiffs with a contingent fee arrangement may not be able to afford document production costs. Those who advocate returning to trial by ambush like to point out that in our criminal justice system, in which lives rather than dollars are at stake, trials take place with very little discovery.

The other aspect of delivery costs which I want to mention is the hourly fee system that is now deeply ingrained in the legal profession. Other than cases handled on a contingent fee, almost all fee systems today are based on hourly rates. Conceptually I believe this is dead wrong because is penalizes productivity and rewards inefficiency. I have been writing and speaking on this subject for years, but until recently I seemed to be a part of a small minority. That has now changed.

At the ABA convention last August an overflow crowd in a large hotel ballroom listened intently to a panel discussion on this subject. A series of prominent General Counsel and private practitioners denounced the hourly fee system (and high transaction costs generally). Some progress is being made in finding alternative fee arrangements—particularly in "cookie cutter" cases, but no acceptable alternative has been found with wide application. However, a lot of experimenting with alternative fees is going on.

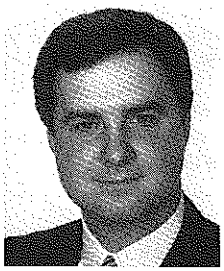
Meanwhile, most General Counsel, under severe pressures to cut costs, are taking other steps. Detailed guidelines on acceptable billing practices are issued to firms, discounts in hourly fees are being demanded by a large number of companies, fee shopping is common, supervision by inside lawyers is increasing, and so on. Long term relationships are fragile and changes in outside counsel are frequent. Unfortunately most of these steps are simply patches on the hourly fee system that is conceptually flawed and must eventually change . . .

The crisis in our civil justice system is very complex. I have mentioned only a few of the problems and I have not adequately described the many dimensions of those.

Solutions are not going to come solely from the organized bar or from practicing lawyers. Solutions may come from the business community as the revolt now taking place continues to grow. Eventually some solutions may come from consumer advocates when they realize the unnecessary costs borne by consumers. Finally, as in all changes in our society, academia has a role to play and has a challenge to use impartial objective analysis to contribute to the solution.

Small Businesses Have Vital Stake in Tort Reform

by Robert Howden, State Director, NFIB/Texas



Robert Howden

Tort reform is often portrayed as a battle between huge, faceless multi-national companies and a small band of courageous lawyers, fighting for consumer rights. This might be good comic book material, but it has little to do with the truth.

As Texas State Director of the National Federation of Independent Business, I talk to small business people every day about the problems they face in keeping their businesses alive. Taxes, health care costs, government regulation, worker's compensation—all are major issues affecting small business.

But one problem that affects all small businesses, their employees, and their customers is our lottery-style civil justice system. In Texas, filing lawsuits is a major industry. Small businesses are a frequent target of predatory lawyers who threaten enormous damages unless the business comes up with settlement money. It is a chilling, Mafia-like operation.

The result of this extortion racket is higher costs for businesses and consumers, not to mention the cost of the personal emotional distress suffered by the business owner and his or her employees. Many business people, after enduring the agony of being sued, have gone out of business, costing workers their jobs, diminishing the tax base of the state and local governments, and sapping the economic vitality of our local communities. All of this so that a plaintiff's lawyer can make a fast buck.

Small business people have had enough. In a recent survey of Texas small businesses, NFIB found that a whopping 1 in 8 had been sued for damages. The cost to small business from these lawsuits is staggering.

On punitive damages, feelings run just as high. More than 93 percent of Texas small businesses support restrictions on punitive damages awards. No other issue we polled—from the tax structure to school finance to employment issues—reached that degree of unanimity.

Simply put, tort reform is a small business issue, no matter what type of business is involved. Plaintiff's lawyers like to hide behind the big companies when they spew their self-righteous rhetoric about "consumer rights," but it's small businesses, their employees, and the public that pay the price for their greed.

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Legislative advertising contracted for by Ralph Wayne, President, Texas Civil Justice League, 401 West 15th Street, Suite 975, Austin, Texas 78701, representing the Texas Civil Justice League (same address).

TCJL PAC to Gear Up for Run-Off Election

Thanks to all of you who contributed to TCJL PAC prior to the March primaries! Unfortunately, there is still some unfinished business. The primary run-off is on April 12, less than one month away. And Supreme Court Justice Raul Gonzalez is in a fight for his life against plaintiff's lawyer Rene Haas. Haas, her plaintiff lawyer spouse, and their friends will throw millions more into negative TV ads and character assassination in an attempt to buy a seat on the Court!

Only you can stop them. Send a lot now or a little at a time—but send it. What happens in the next four weeks—to businesses, to medicine and health care, to professionals, to local government—hangs in the balance!

Dates to Remember:
Tuesday, April 12—Primary runoff election
Wednesday, October 19—Early voting begins for November 8 general election
Tuesday, November 8—Election Day

YES! I want to help reform our civil justice system. Enclosed is my check (no corporate checks, please) in the amount of:

❑ $1000 ❑ $500 ❑ $250 ❑ $200 ❑ $100 ❑ $50 ❑ Other _____

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Moriel Decision Stops Short of Comprehensive Punitive Damages Reform

After two years of internal wrangling, a near-unanimous Texas Supreme Court handed down its decision in *Transportation Insurance Company v. Moriel* (No. D-1507), a case which gave the Court its best opportunity in over a decade to redress the injustices of the law of punitive damages in Texas. While the decision contains some promising procedural safeguards for appellants who throw the dice and proceed to judgment, it falls well short of the reforms that are needed at the trial court level to end the predatory use of punitive damages claims to jack up settlement values.

Moriel involves a one million dollar award of punitive damages based on an insurance company's bad faith claims practices (i.e., it delayed payment of some medical bills). The economic damages in the case were $1,000, and the jury gave Moriel another $100,000 for mental anguish. In effect, the amount of punitive damages awarded were 1000 times greater than Moriel's hard damages, and ten times greater than his "soft" damages. The award was upheld by the 8th Court of Appeals in El Paso.

The insurance company appealed to the Supreme Court, urging it to revisit the "no evidence" standard of appellate review set out in *Burk Royalty Co. v. Walls* and consider a number of constitutional due process claims. The Court declined to reach the constitutional questions after it found that Moriel was not entitled to punitive damages. Unfortunately, those claims will have to wait for another case—after an unlucky defendant has taken a potentially ruinous punitive damages hit.

However, the Court agreed to re-examine the standards for awarding punitive damages in bad faith insurance claims. In tracing the history of punitive damages in Texas, the majority opinion by Justice Cornyn notes that punitive damages are closely linked to criminal law, and therefore require "appropriate substantive and procedural safeguards to minimize the risk of unjust punishment." The Court also points out that punitive damages are a private windfall, unlike criminal fines, and that excessive or erroneous punishment must be prevented by the civil courts.

The Court next moves to an analysis of the standard for punitive damages in bad faith claims against insurers. To prove a bad faith claim, an insured must show that "the insurer had no reasonable basis for denying or delaying payment of the claim, and that it knew or should have known that fact." However, proof of bad faith alone does not entitle the insured to punitive damages. According to the Court, only "when accompanied by malicious, intentional, fraudulent, or grossly negligent conduct does bad faith justify punitive damages."

Having said that, the Court goes about explaining what elements are required to prove "gross negligence." Comparing the common law definition found in *Burk Royalty* with the statutory definition of "gross negligence" (§41.001(5), Tex.Civ.Prac.&Rem.Code Ann.), the Court notes that the defendant's "actual conscious indifference" to the plaintiff is the key. The problem with *Burk Royalty*, says the Court, is that while it "admonished courts to concentrate on the defendant's mental state," it offered "no other ground to distinguish gross from ordinary negligence." Thus, *Burk Royalty* can be read to subject a merely negligent defendant to a gross negligence finding simply because the defendant made "a conscious decision to act negligently."

Moreover, *Burk Royalty* permitted the factfinder to infer the defendant's mental state from "surrounding circumstances." By operation of the "no evidence" review standard on appeal (in which only evidence that favors the verdict is reviewable), a verdict awarding punitive damages based on an inference of gross negligence from evidence of "some" carelessness by the defendant could not be reversed—despite evidence that the defendant exercised "some" care. In this manner, *Burk Royalty* stood the standard of legal sufficiency for punitive damages on its head. Prior to the case, if there was evidence that the defendant exercised some care, there could be no "conscious indifference." After *Burk Royalty*, if there was evidence that the defendant acted with "some carelessness," conscious indifference could be inferred from the defendant's conduct, essentially eliminating any substantive difference between gross and ordinary negligence.

The Court then restates the definition of gross negligence: "the defendant must be 'consciously indifferent' and his or her conduct must 'create an extreme degree of risk.'" In other words, the defendant "must have actual awareness of the extreme risk created by his or her conduct," and "the defendant's conduct must involve an 'extreme degree of risk.'" The Court defines "extreme risk" as "the likelihood of serious injury to the plaintiff." Thus, to prove a claim for punitive damages, a plaintiff must prove "both that the act was likely to result in serious harm and that the defendant was consciously indifferent to the risk of harm."

Evidence of conscious indifference may be either direct or circumstantial, says the Court. But "[D]etermining whether an act or omission involves extreme risk or peril requires an examination of events and circumstances from the viewpoint of the defendant at the time the events occurred, without viewing the matter in hindsight." The injury suffered may be grave, but it may be "entirely disproportionate to the riskiness of the behavior."

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The Court moves on to apply the gross negligence standard to bad faith insurance claims, and concludes that the analysis should be no different than in other cases. "In general," the Court says, "an insurance carrier's refusal to pay a claim cannot justify punishment unless the insurer was actually aware that its action would probably result in extraordinary harm not ordinarily associated with breach of contract or bad faith denial of a claim—such as death, grievous physical injury, or a genuine likelihood of financial catastrophe."

Applying this test to the facts of *Moriel*, the Court looks for the "legally sufficient" evidence of gross negligence necessary to sustain the award of punitive damages. "In evaluating legal sufficiency, we are required to determine whether the proffered evidence as a whole rises to a level that would enable reasonable and fair-minded people to differ in their conclusions," writes the Court. Although in this case the insurance company acted without a reasonable basis and "should have known" it was acting in bad faith, the evidence, viewed in its most favorable light, did not support a finding that it "was actually aware of an extreme risk—some genuine and unjustifiable likelihood of serious harm to Moriel that was independent and qualitatively different from the inconvenience of an unreasonable delay in payment."

The Court leaves open the possibility that an insurance company, by delaying payment, could be consciously indifferent to the probability of mental anguish, and thus liable for punitive damages. The plaintiff must still prove that the insurance company had subjective awareness of that fact, which Moriel failed to do in this case. Rather than reversing and rendering for the insurance company, however, the Court remanded the case for a new trial on the punitive damages issue, applying the standards announced in the decision.

The Court then articulates procedural standards for the trial court to apply in all future punitive damages cases. After examining the U.S. Supreme Court's opinions in *Haslip* and *TXO*, the Court notes that few procedural safeguards exist in Texas to prevent excessive, unfair punitive damages awards. The Court thus makes two significant procedural changes:

1. Bifurcation. The Court discusses the prejudicial impact of the admission of evidence of the defendant's net worth in a case involving a punitive damages claim. Based on this prejudicial effect, the Court holds that upon timely motion a trial court should bifurcate the determination of the amount of punitive damages from the remaining issues. If a jury finds that the defendant is liable for punitive damages in the first phase of the trial, then evidence of net worth is admissible on the amount of punitive damages to be awarded in the second phase of the trial. The Court declined to bifurcate the entire punitive damages issue from the rest of the case, reasoning that evidence of gross negligence is relevant to liability for actual damages and should not be excluded in the first phase of the trial.

2. Court of appeals review of the evidence. In order to affirm an award of punitive damages, the Court will now require courts of appeals, when conducting a factual sufficiency review of a punitive damages award, to "detail the relevant evidence in its opinion, explaining why that evidence either supports or does not support the punitive damages award in light of the factors" set out in *Alamo Nat'l Bank v. Kraus*, 616 S.W. 2nd 908, 910 (Tex. 1981). These include the nature of the wrong, the character of the conduct involved, the degree of culpability of the wrongdoer, the situation and sensibilities of the parties concerned, and the extent to which the conduct offends the public sense of justice and propriety.

Although the Court refers to a number of states that have raised the burden of proving a punitive damages claim to "clear and convincing evidence," it doesn't go that far—yet. Citing the 1987 tort reform act and the fact that the Legislature did not adopt that standard as part of the act, the Court declines to create a different burden of proof for cases not covered by the 1987 reform act "at this time." However, the court's opinion sends a clear signal to the Legislature to consider a higher burden of proof for punitive damages claims, or the Court may well decide to go forward on its own.

The Court also declined to require trial courts to articulate their reasons for upholding an award of punitive damages, although it encouraged trial courts to do so. It cited lack of funding as the reason for not affording a defendant this basic procedural safeguard.

There is much to applaud in this decision. At least in bad faith insurance cases, it will be very difficult for a plaintiff to succeed on a claim for punitive damages. This is not as draconian as it looks, however, since enormous awards for "mental anguish" can easily soften the blow. What is unclear is the extent to which the Court's rearticulated definition of "gross negligence" applies in cases other than bad faith claims. Arguably, the Court's analysis could be disregarded as dicta when applied to a different set of facts. At any rate, we still are left with a large number of cases in which the common law definition of gross negligence is still around (e.g., tortious interference with contract), making it even more difficult to evaluate how much impact this part of *Moriel* will ultimately have.

Bifurcation and specific court of appeals review are positive steps. However, they do not address what many believe is the real problem: how juries are instructed on gross negligence and whether the trial court is required to exercise any significant control over verdicts awarding punitive damages. Without safeguards at this level, such as specific instructions to the jury that reflect what the law actually is, the risk of a capricious and disabling award remains as daunting as ever. If due process is good for the appellate courts, it ought to be good for the trial courts as well.

The Court's perceived inability to deal with the burden of proof issue is further evidence of the need for continued efforts to reform the law of punitive damages. Though apparently willing, and clearly of the mind that punitive damages are indeed criminal in nature, the Court invited the legislature to act to raise the burden of proof. Criminal punishment should not be meted out based on evidence about which "reasonable minds can differ."

Moriel is a major decision. Seven justices—Phillips, Cornyn, Enoch, Hightower, Gonzalez, Hecht, and Spector—were willing to go a long way toward substantive reform. The other two—Doggett and Gammage—concurred that bifurcation was needed and that further reforms may be appropriate, although they disagreed with the Court's analysis with respect to bad faith insurance claims. *Moriel* vindicates the calls from various perspectives for punitive damages reform and points the way for legislative action.

In the end, statutory reforms are the only sure way to rationalize the punitive damages system. Future Supreme Courts may not be as farsighted as this one.

More Punitive Damages: *What Does "Extreme Risk" Mean?*

Moriel makes it clear that a finding of gross negligence requires a finding that the defendant's conduct created an "extreme risk of serious harm" to the plaintiff. Issued only a week before the *Moriel* decision, *Wal-Mart Stores, Inc. v. Alexander* (No. D-2388) turns on what constitutes an "extreme risk."

Walmart leased a building and put a store in it. The lease included only the area within the exterior walls, but Walmart built a ramp from the parking lot to the sidewalk. Later Walmart's lessor repaved the parking lot. When the new pavement settled, it left a ridge at the bottom of the ramp. An elderly woman tripped on the ridge and was injured. She sued Walmart and the lessor, and introduced evidence that the store managers knew about the ridge before the accident (although no one had tripped over it) and that they fixed the ridge after the accident occurred. The trial court awarded actual and punitive damages against Walmart, and the 13th Court of Appeals affirmed.

The Supreme Court reversed and remanded on the punitive damages issue. In a nutshell, the Court found that although Walmart had a duty of ordinary care to maintain the ramp in a safe condition, its failure to do so did not constitute "gross negligence." Citing Burk Royalty, the Court states that a plaintiff must prove that the defendant acted with "gross negligence" in order to recover punitive damages. "Gross negligence" is defined as "that want of care which would raise the belief that the act or omission complained of was the result of a conscious indifference to the right or welfare of the person or persons to be affected by it." Under a 1985 case, *Williams v. Steves Industries Inc.*, the Court notes that a defendant "must have a subjective awareness of the extreme risk created by its conduct" in order to meet the *Burk Royalty* test. The Court held that Walmart's conduct in this case did not create an "extreme risk," and that therefore Walmart is not liable for punitive damages.

Justice Phillips wrote the opinion, joined by Justices Gonzalez, Hightower, Hecht, Cornyn, and Enoch. Justice Gonzalez wrote a concurring opinion in which he states that a trial court should permit a bifurcated trial when punitive damages are an issue, that only a defendant's net income and capital should be admissible on the issue of punitive damages, and that a plaintiff should prove its basis for claiming punitive damages before the defendant's financial records can be discovered.

Dissenting were Justices Doggett, Gammage and Spector, who opined that the ridge in the ramp was indeed an "extreme risk."

The Walmart case does little more than restate earlier precedents and apply them to the specific facts. Whether a ridge in a ramp is an "extreme risk" was important to the plaintiff and to Walmart, but the case provides little guidance on wider issues. The curious chronology in which *Walmart* and *Moriel* were issued suggests that *Moriel's* discussion of gross negligence really may be as narrow as feared. Why didn't *Moriel* go first?

Until the legislature steps in with statutory punitive damages reforms, confusion and uncertainty like that found in the *Walmart* case will continue to reign.

Supreme Court Says Warnings Are Meant To Be Read

If a plaintiff sues a product manufacturer alleging personal injuries caused by an inadequate warning, the plaintiff must actually have read the warning in order for it to have caused the plaintiff's injuries. If you think this statement makes sense and has always been the law in Texas, think again.

In November the Texas Supreme Court handed down its long-awaited opinion in *General Motors Corp. v. Saenz* (No. D-2578), a key products liability case in which the limits of a manufacturer's duty to warn were tested. General Motors built a truck and attached a metal plate to the doorjamb giving the maximum safe weight for the truck, a warning that overloading could be hazardous, and a proviso that overloading the truck would void the warranty. The first purchaser of the truck welded a 2,000-gallon water tank onto it and used the truck to dispense water at construction sites. The purchaser resold the truck to the plaintiff's employer, who modified the truck again by welding spacers to the frame to stop the fenders from rubbing against the tires when the water tank was full. The plaintiffs were killed when a rear tire blew out while hauling a full load of water and the truck turned over.

The plaintiff's decedents sued GM, the tank manufacturer, the tire manufacturer, and first purchaser, and the employer for wrongful death in Hidalgo County district court. They contended that the defendants failed adequately to warn the plaintiff of the dangers of overloading the truck. All defendants except GM settled before trial. After trial the jury found that GM did not provide adequate warnings, that the inadequate warning caused the accident, and that the first purchaser of the truck attached the tank to the truck in a defective manner, contributing to the accident. GM was held 70 percent responsible, and the plaintiff was awarded $4.8 million. The 13th Court of Appeals in Corpus Christi upheld the trial court.

The Supreme Court reversed and rendered judgment for GM. In an opinion by Justice Hecht, the Court drew the startling conclusion that warnings generally must be read before their alleged inadequacies may be the legal cause of an accident.

Noting that GM had a duty to warn against known and foreseeable dangers of the product actually made (which in this case did not include an enormous water tank), the Court distinguishes a troublesome 1986 precedent (*Magro v. Ragsdale Brothers Inc.*) that established a presumption in favor of the plaintiff in warnings cases. Under *Magro*, if a manufacturer fails to give an adequate warning, a presumption arises that the plaintiff would have read and heeded the warning. The presumption shifts the burden to the defendant to prove that the plaintiff failed to read and follow the warning.

However, the court points out that in *Magro*, the manufacturer gave no warning at all; in this case GM warned that overloading the truck was hazardous. Where some warning that possibly could have prevented the accident is given, according to the Court, there is no presumption that "a plaintiff who ignored

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instructions that would have kept him from injury would have followed better instructions."

The Court found that even if the warning given did not address rolling over under an excess load, it wouldn't have made any difference: no one actually read the warning. Moreover, in response to the plaintiff's allegations that the warning should have been placed more prominently (e.g., the dashboard), the Court points out that GM placed the warning exactly where federal regulations require it. Just because it was not also posted somewhere else on or inside the truck does not justify a presumption that the plaintiff would have read and followed it.

Justices Doggett and Gammage separately dissented (Justice Spector did not sit). Justice Doggett's dissent focuses on the duty of the manufacturer to provide adequate warning or instruction and decries the majority opinion as a release of that duty. Of course, the plaintiff's own responsibility to read and heed is discounted.

Justice Gammage's dissent is very different, indeed. He would have held that GM had no duty to warn of the potential danger arising from the modifications to the truck occurring after the truck left the factory.

General Motors Corp. v. Saenz marks a return to common sense in products liability cases based on warnings. How can an "inadequate warning" possibly cause an injury if the warning actually given was ignored? It is telling of the state of tort law in Texas that a Supreme Court decision like this is even necessary.

Another important aspect of the case is the role played by the modifications to the truck subsequent to the original purchase. Without a doubt, if the modifications had not been made, the accident never would have happened. The Court of Appeals specifically found that the first purchaser's modifications did not relieve GM of its duty ot warn against "known and foreseeable dangers of the product actually made." While affirming this general principle, the Supreme Court has made it harder for a plaintiff to prove that an inadequate warning caused the injury where an intervening product misuse of the type warned against occurred—even if the warning failed to specify the actual misuse.

Third Party Suits Against Insurers Blocked

In plaintiff's lawyer heaven, the guy with the most money is liable for everything. Texas may be the closest thing to heaven on earth for plaintiff's lawyers, but it's not that bad yet.

Allstate Insurance Company v. Watson is the latest plaintiff's lawyer attempt to create lawsuits where none have existed before. As with so much litigation, this case began with a car accident. The plaintiff was injured and sued the driver of the other vehicle for negligence. She also sued the driver's insurance company, Allstate, claiming (among other things) that the company engaged in unfair claims settlement practices under Article 21.21, Insurance Code, and violated the Deceptive Trade Practices Act. The trial court rejected the plaintiff's claim against Allstate, but the 2nd Court of Appeals reversed, holding that the plaintiff was a third party beneficiary of the insured's liability policy and could sue the insurer directly under Article 21.21.

The Supreme Court, in an opinion by Justice Enoch, reversed the court of appeals, holding that a third-party claimant does not have a direct cause of action against an insurance company under Article 21.21 and related State Board of Insurance regulations. According to the Court, only a policyholder, who has a contractual relationship with the insurance company, can assert unfair claims practices against the company. Article 21.21 was never intended to confer rights and remedies to third-party plaintiffs. The Court noted that extending the insurance company's duty to third-party claimants could create a conflict between the company's interests and the policyholder's, a length the Court was unwilling to go absent "explicit directive from the legislature."

The Court also ruled that the DTPA does not include unfair claim settlement practices under Article 21.21.

Justice Spector concurred with the majority, but would allow the third-party plaintiff to proceed against the insurance company if the plaintiff proves that the company has a legal obligation to pay damages to the plaintiff. Justice Doggett, joined by Justice Gammage, dissented. They would have permitted third-party claims for any unfair practices committed by insurers.

We Didn't Forget . . .

- Exxon v. Tidwell, involving a lessor's responsibility for criminal acts committed by third parties; or
- Exxon v. Chick Kam Choo, a forum non conveniens case involving an accident in Singapore and a lawsuit in Texas.

We ran out of room here, but we'll talk about these cases and others next time.