SMU | Dedman School of Law

SMU Law Review

Volume 49
Issue 4 *Annual Survey of Texas Law*

Article 21

January 1996

Personal Torts

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Recommended Citation
Frank L. Branson, *Personal Torts*, 49 SMU L. Rev. 1221 (1996)
https://scholar.smu.edu/smulr/vol49/iss4/21

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PERSONAL TORTS

*Frank L. Branson**

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I. NEGLIGENCE

A. DUTY

IN *Caterpillar, Inc. v. Shears*[1] a worker was injured when struck by a front-end loader while operating another loader. The loaders came equipped with removable cages that would have prevented the worker's injury, but his employer had removed the cages. The loaders' manufacturer failed to warn of the dangers of operating a loader without the cages. The Texas Supreme Court held that this particular danger was so indisputably obvious that the manufacturer did not have a duty to warn.[2] Thus, the duty to warn applies to hazards of which the consumer is unaware, and not to risks that are within the community's common knowledge or that are obvious to anyone who observes the product.[3]

In *SmithKline Beecham Corp. v. Doe*[4] the laboratory performed a urinalysis drug test as ordered by Doe's prospective employer. The laboratory did not inform Doe that poppy seeds were known to cause positive test results. Doe failed the test, due to her ingestion of poppy seeds, and, as a result, was not hired by A potential employer. The court declined to impose a duty on drug-testing laboratories to warn test subjects about possible influences on test results.[5] Since the lab did not control the use of the test results, the court did not suggest that any duty be placed on the laboratory under these limited facts.[6]

In *Durham Transportation, Inc. v. Valero*[7] a child was struck by a car while crossing a two-lane highway to reach a parked school bus. The Corpus Christi Court of Appeals stated that "[t]he exercise of ordinary care towards a child may require different conduct than would be required towards an adult."[8] The court held that a bus driver's "duty to use reasonable care extends to children awaiting or approaching the bus," not just to children on the bus.[9] Also, the court found that there was legally sufficient evidence to support the jury's finding of proximate cause; that the child would cross the street in order to board the bus was a foresee-

1. 911 S.W.2d 379 (Tex. 1995).
2. *Id.* at 382.
3. *Id.*
4. 903 S.W.2d 347 (Tex. 1995).
5. *Id.* at 354.
6. *Id.*
7. 897 S.W.2d 404 (Tex. App.—Corpus Christi 1995, writ denied).
8. *Id.* at 410.
9. *Id.*

able result of the school bus being parked across the street.[10]

In *Pettitte v. SCI Corp.*[11] the Houston Court of Appeals held that a building owner did not owe a duty to a previous tenant suffering from "sick building syndrome" whose injuries occurred before the owner bought the building and who had left the building before the owner bought it.[12] However, the court held that the owner might still owe a duty to those occupants whose injuries occurred before the owner bought the building but who continued to work in the building after he bought it.[13]

The San Antonio Court of Appeals held in *Ryan v. Friesenhahn*[14] that a social host owes a duty to a minor guest to whom alcohol is served at a party. The court stated that this duty exists because serving minors any amount of alcohol is a criminal offense, and because the adult host may control the minor.[15]

B. Causation

In *Union Pump Co. v. Allbritton*[16] the Texas Supreme Court declined to find causation under attenuated facts. In *Allbritton*, a pump manufactured by the defendant caught fire and ignited the surrounding area. An employee assisted in abating the fire. After the fire was extinguished, the employee walked across an above-ground pipe rack, rather than taking the safer route around it. The employee slipped off the pipe rack, which was wet because of the fire, and was injured. Although the fire caused by the defective pump might be considered the "but for" cause of the employee's injuries, the court held that the "circumstances surrounding [the] injuries [were] too remotely connected with Union Pump's conduct or pump to constitute a legal cause of [the] injuries."[17] The court stated that all forces generated by the fire had come to rest by the time the employee fell off the pipe rack.[18] The Austin Court of Appeals also addressed the issue of causation in *Kerrville State Hospital v. Clark*.[19] A hospital released a patient, who was not complying with his oral medication regimen, without using an injectable anti-psychotic drug to ensure medication compliance. The patient then brutally murdered his estranged wife. The court held that the hospital's failure to use the drug was a cause-in-fact of the woman's death.[20] Expert testimony concerning past violence and the dangers of not medicating, along with the fact that the patient murdered his wife just seven days after his release, provided

10. *Id.* at 411.
11. 893 S.W.2d 746 (Tex. App.—Houston [1st Dist.] 1995, n.w.h.).
12. *Id.* at 749.
13. *Id.*
14. 911 S.W.2d 113 (Tex. App.—San Antonio 1995, writ requested).
15. *Id.* at 117.
16. 898 S.W.2d 773 (Tex. 1995).
17. *Id.* at 776.
18. *Id.*
19. 900 S.W.2d 425 (Tex. App.—Austin 1995, writ granted).
20. *Id.* at 438.

evidence from which the jury could conclude that the hospital's failure to medicate caused the wife's death.[21] The murder was foreseeable because the hospital could have reasonably anticipated that the patient might commit an act of violence against his wife if he was not medication compliant.[22]

In *Click v. Owens-Corning Fiberglass Corp.*[23] the Houston Court of Appeals applied the *Lohrmann*[24] test to determine causation from circumstantial evidence in an asbestos case. The *Lohrmann* test requires "evidence of exposure to a specific product on a regular basis over some extended period of time in proximity to where plaintiff actually worked" to support causation.[25] In *Click*, an employee worked for a company which used asbestos-containing products during his employment, including the products made by the defendant. The products were seen near the employee, but the evidence that the employee was actually exposed to the products was circumstantial.[26] However, the court held that this evidence was sufficient to support an inference of causation.[27]

C. Vicarious Liability

The Texas Supreme Court addressed several cases concerning liability for the criminal conduct of third parties. In *Doe v. Boys Clubs of Greater Dallas, Inc.*[28] the court held that the club's failure to investigate a volunteer did not proximately cause the sexual molestation of several boys by that volunteer.[29] "Assuming the Boys Club had investigated [the volunteer's] criminal record, revelation of the two misdemeanor DWI convictions would not have precluded [his] presence at the club."[30] Also, the court held that the connection between the assaults on the boys and the club's failure to find the DWIs was so remote that reasonable minds would not have anticipated the danger.[31]

In *Centeq Realty, Inc. v. Siegler*[32] a condominium resident was attacked and kidnapped from the condominium's parking garage. The court found that although the corporation had the power to elect board members, it had no direct power to make security decisions, and therefore had no control over security at the condominium.[33] Thus, the corporation's influence upon the board was too attenuated to impose a legal duty upon it

21. *Id.*
22. *Id.*
23. 899 S.W.2d 376 (Tex. App.—Houston [14th Dist.] 1995, no writ).
24. Lohrmann v. Pittsburgh Corning Corp., 782 F.2d 1156 (4th Cir. 1986).
25. *Id.* at 1162-63.
26. *Click*, 899 S.W.2d at 378.
27. *Id.*
28. 907 S.W.2d 472 (Tex. 1995).
29. *Id.* at 477.
30. *Id.*
31. *Id.* at 478.
32. 899 S.W.2d 195 (Tex. 1995).
33. *Id.* at 198-99.

to protect condominium residents from criminal acts of third parties.[34]

Similarly, the court held in *Butcher v. Scott*[35] that the beneficial owner of a house was not in control of the premises when a child was sexually abused on the premises, and thus owed no duty to the child.[36] The court stated that neither the beneficial owner's presence on the premises, nor the fact that his future interest in the premises was insured against loss establish that he controlled the premises.[37] Both the *Centeq* and *Butcher* holdings rest on fact-specific issues concerning the amount of control that the specific defendants possessed.

In *Porter v. Nemir*[38] plaintiffs sued the employer for negligently hiring and retaining a counselor who had a sexual encounter with the patient's wife. The counselor had previously informed his supervisor that he had begun a sexual relationship with another former client in violation of the program's policy. The Austin Court of Appeals held that the drug and alcohol counselor's employer had a duty to investigate the counselor's conduct upon becoming aware of the first relationship.[39] This investigation would have revealed the counselor's lack of fitness.[40] The employer also had a heightened duty to hire and retain competent counselors, as the program treated psychologically fragile clientele.[41] The court stated that the fact that the sexual encounter occurred off-premises and after-hours does not absolve the employer of liability.[42]

D. Premises Liability

In *City of McAllen v. De la Garza*[43] the Texas Supreme Court held that as a matter of law, a city (as owner of a "caliche" pit abutting the highway) did not have a duty to make the pit safe for those who deviated from an adjoining roadway onto the city's property.[44] The landowner only has a duty to those who deviate from the highway in the ordinary course of travel.[45] In this case, the driver was intoxicated, was not traveling with reasonable care and did not deviate from the road in the ordinary course of travel.[46]

The Houston Court of Appeals addressed the Texas recreational use statute in *Lipton v. Wilhite*.[47] In that case, a social guest sued the landowner for injuries sustained while diving from the landowner's dock. The

34. *Id.* at 199.
35. 906 S.W.2d 14 (Tex. 1995).
36. *Id.* at 16.
37. *Id.* at 15-16.
38. 900 S.W.2d 376 (Tex. App.—Austin 1995, no writ).
39. *Id.* at 386.
40. *Id.*
41. *Id.* at 387.
42. *Id.*
43. 898 S.W.2d 809 (Tex. 1995).
44. *Id.* at 812.
45. *Id.*
46. *Id.* at 810.
47. 902 S.W.2d 598 (Tex. App.—Houston [1st Dist.] 1995, writ denied).

guest asserted that the recreational use statute "does not shield a landowner from liability for injuries that a social guest sustains while engaged in a recreational activity on the owner's property."[48] The court held that "the statute was only intended to apply to persons who would otherwise be trespassers but [were given] permission" to be on the property.[49] The statute encourages landowners "to allow persons whom he would not otherwise invite as social guests to enter his land for recreational purposes free of charge."[50] The Austin Court of Appeals held similarly in *McMillan v. Parker*.[51]

In *Moreno v. Brittany Square Assocs.*[52] the Houston Court of Appeals held that the Property Code's notice requirements did not preempt a tenant's personal injury claim.[53] The tenant fell down stairs inside her apartment, the fall allegedly resulting from her landlord's negligence in not providing rails on the stairway and in failing to disclose the dangerous condition. Since the plaintiff was unaware of the condition, she could not have given notice.[54] The court stated that if the notice requirements were applied to this type of case, a plaintiff could rarely sue for personal injury damages resulting from such a hidden defect because of the impossibility of providing notice.[55]

The Waco Court of Appeals in *Stein v. Gill*[56] held that a landlord owed no duty to a tenant who was injured when she slipped and fell on concrete steps.[57] Since the steps were within the tenant's exclusive control, the landlord would only be liable for any hidden defects which he failed to disclose.[58] The court stated, however, that a landlord owes a duty to exercise reasonable care when he retains control over a part of the premises that the tenant is entitled to use.[59]

In *Endsley v. Johnson County Sheriff's Posse, Inc.*[60] the Waco Court of Appeals held that a lessor is liable to a lessee when the land is leased for public admission.[61] A lessor leased a rodeo arena to a lessee for one day in order to conduct a barrel race where the public would be invited. While attending the race, a man was struck in the eye by a rock that was most likely kicked in the air by a horse. The court stated that because the "lessee [was] only in possession for a short period of time, it would be futile to expect [him or] her to undertake any meaningful repairs to make

48. *Id.* at 599.
49. *Id.* at 600.
50. *Id.*
51. 910 S.W.2d 616 (Tex. App.—Austin 1995, writ denied).
52. 899 S.W.2d 261 (Tex. App.—Houston [14th Dist.] 1995, writ denied).
53. *Id.* at 263.
54. *Id.*
55. *Id.*
56. 895 S.W.2d 501 (Tex. App.—Fort Worth 1995, no writ).
57. *Id.* at 503.
58. *Id.* at 502.
59. *Id.*
60. 910 S.W.2d 5 (Tex. App.—Waco 1995, writ granted).
61. *Id.* at 8-9.

the premises safe for the public."[62] The duty must be placed with the lessor who has the actual ability to adequately inspect the premises on a regular basis for dangerous conditions and correct them.[63]

E. Joint Enterprise

In *Blount v. Bordens, Inc.*[64] the Texas Supreme Court discussed the third, of four, elements necessary to prove a joint enterprise: a community of pecuniary interest.[65] Two men, both passengers in the same truck, were killed in a collision with a milk truck. At the time of the accident, the men were returning from picking up racehorses, and one of the men indicated to his father that he would be able to pay some bills when he returned. The court held that under the facts of this case, the plaintiff did not establish common pecuniary interest to support his claim of joint enterprise.[66] Thus, the negligence of one man will not bar recovery by the other.[67]

II. PROFESSIONAL NEGLIGENCE

A. Medical Malpractice

In *St. John v. Pope*[68] the Texas Supreme Court held that an on-call physician, consulted by an emergency room physician over the phone, did not owe a duty to an emergency room patient.[69] Although the on-call physician expressed his opinion that the patient should be transferred to another facility, he never agreed to examine or treat the patient. Thus, no patient-physician relationship was created. Although the physician "listened to [the emergency room physician's] description of [the patient's] symptoms, and came to a conclusion about the basis of [the patient's] condition, he did so for the purpose of evaluating whether he should take the case, not as a diagnosis for a course of treatment."[70]

Park Place Hospital v. Milo[71] involved a patient that had only a forty percent chance of surviving her preexisting conditions, yet received substandard care which allegedly resulted in her death. The court held that since the plaintiff would not, in reasonable medical probability, have survived the underlying illness, the hospital was not liable.[72]

The Texas Supreme Court granted writ in *Heise v. Presbyterian Hospital of Dallas*[73] to consider whether a medical degree automatically quali-

62. *Id.* at 9.
63. *Id.* at 8.
64. 910 S.W.2d 931 (Tex. 1995).
65. *Id.* at 933.
66. *Id.*
67. *Id.*
68. 901 S.W.2d 420 (Tex. 1995).
69. *Id.* at 423.
70. *Id.* at 424.
71. 909 S.W.2d 508 (Tex. 1995).
72. *Id.* at 511.
73. 888 S.W.2d 264 (Tex. App.—Eastland 1994, writ granted).

fied a witness to testify on any medical issue. In *Heise*, an emergency room doctor was called to testify that, if doctors had performed a CT scan during the first emergency visit, the plaintiff would have been properly treated. The Eastland Court of Appeals held that even though the doctor was not a neurosurgeon, "he possessed knowledge and skill not possessed by people generally."[74] Therefore, his testimony should not have been excluded by the trial court.[75] The San Antonio Court of Appeals reached a similar conclusion in *Hernandez v. Altenberg*[76] where an anesthesiologist was held qualified to testify about the negligence in leaving a guide wire in a patient's heart—even though he was not a hematologist.[77]

The Fourteenth Court of Appeals in *Penick v. Christensen*[78] held that the Medical Liability and Insurance Improvement Act's procedure for obtaining a patient's informed consent through disclosure of risks specified by the Texas Medical Disclosure Panel did not violate patients' constitutional rights to privacy, open courts, freedom to contract, equal protection, or due process.[79]

In *Schexnider v. Scott & White Memorial Hospital*[80] the Austin Court of Appeals held that affidavits which merely state that the affiant is familiar with the standard of care and that the approximate standard was met were insufficient to support summary judgment in a medical malpractice case.[81] The court held that the affiants "'must state what the standard is and say what was done to meet it,'" not just that the standard was met.[82]

B. Legal Malpractice

In *Peeler v. Hughes & Luce*[83] a client sued her attorney for malpractice because he failed to tell her that she had been offered absolute transactional immunity. She learned about this offer three days after pleading guilty. The court held that plaintiffs who have been convicted of a criminal offense may recover on their legal malpractice claims only if their conviction has been exonerated on direct appeal.[84]

In *Haynes & Boone v. Bowser Bouldin, Ltd.*[85] the Texas Supreme Court held that a law firm's handling of a client's litigation defense was not a producing cause of the foreclosure of the client's shopping center.[86] The client claimed that the loss of its lawsuit contributed to the loss of its

74. *Id.* at 266.
75. *Id.* at 267.
76. 904 S.W.2d 734 (Tex. App.—San Antonio 1995, no writ).
77. *Id.* at 738.
78. 912 S.W.2d 276 (Tex. App.—Houston [14th Dist.], 1995, writ requested).
79. *Id.*
80. 906 S.W.2d 659 (Tex. App.—Austin 1995, no writ).
81. *Id.* at 661-62.
82. *Id.* at 661 (quoting Armbruster v. Memorial Southwest Hosp., 857 S.W.2d 938, 941 (Tex. App.—Houston [1st Dist.] 1993, no writ).
83. 909 S.W.2d 494 (Tex. 1995).
84. *Id.* at 497-98.
85. 896 S.W.2d 179 (Tex. 1995).
86. *Id.* at 183.

tenant, which eventually caused the foreclosure. However, the court stated that the loss of a tenant is not the same as the loss of a lawsuit. Therefore, the law firm could not be held liable.[87]

The court held in *Sanchez v. Hastings*[88] that the limitations period governing a legal malpractice claim based on failure to sue all tortfeasors was tolled until the litigation against others liable for the same injury had concluded.[89] The court reasoned that a client should not be forced to take inconsistent positions in the underlying litigation and in the malpractice action that might jeopardize his or her success in both.[90]

III. INFLICTION OF EMOTIONAL DISTRESS

The Texas Supreme Court held in *Randall's Food Markets, Inc. v. Johnson*[91] that questioning an employee about a possible theft did not constitute the "extreme and outrageous conduct" necessary to sustain a claim for intentional infliction of emotional distress.[92] The court stated that the employer merely asked a management-level employee to explain a credible report of wrongdoing, which was within the employer's legal rights.[93]

Although the duty not to negligently inflict emotional distress no longer exists, the Houston Court of Appeals in *Daigle v. Phillips Petroleum Co.*[94] ruled that a plaintiff may recover for the infliction of emotional distress or mental anguish when a defendant breaches another legal duty.[95] Here, the plaintiff alleged he rescued people injured as a result of defendant's negligence, and in so doing, he was exposed to great risk of injury or death, which resulted in emotional distress that was reasonably foreseeable.[96] The court held that the rescue doctrine applies even when the person needing rescue does not survive, or there is no one in "imminent peril."[97]

IV. PRODUCT LIABILITY

A. Strict Liability

In *Houston Lighting & Power Co. v. Atchison, Topeka & Santa Fe Railway*[98] the Texas Supreme Court held that under the Federal Employers' Liability Act, a Federal Safety Appliance Act claim is considered a strict liability claim, rather than a claim of negligence per se.[99]

87. *Id.* at 182.
88. 898 S.W.2d 287 (Tex. 1995).
89. *Id.* at 288.
90. *Id.*
91. 891 S.W.2d 640 (Tex. 1995).
92. *Id.* at 644.
93. *Id.*
94. 893 S.W.2d 121 (Tex. App.—Houston [1st Dist.] 1995, writ dism'd by agr.).
95. *Id.* at 122.
96. *Id.*
97. *Id.* at 123.
98. 890 S.W.2d 455 (Tex. 1994).
99. *Id.* at 457.

B. Breach of Warranty

In *Walden v. Jeffrey*[100] the Texas Supreme Court held that implied warranties do not apply to "a product provided as an inseparable part of the rendition of medical services."[101] Thus, a dentist who supplied ill-fitting dentures was not liable for a breach of implied warranty relating to the product. Instead, the dentist was liable for negligence in rendition of dental services, which included fitting the dentures.[102]

C. Federal Preemption

In *Quest Chemical Corp. v. Elam*[103] the Texas Supreme Court held that the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") preempted all common law tort suits based solely upon labeling claims against manufacturers of EPA-registered pesticides.[104] On the other hand, FIFRA does not always preempt state-law claims for strict liability or breach of implied warranty.[105] Under the facts of this case, FIFRA preempted the plaintiff's strict liability and breach of implied warranty claims "because they [were] based solely upon [the defendant's] alleged failure to provide adequate warnings and instructions on its product."[106]

V. DECEPTIVE TRADE PRACTICES ACT

As stated above, the Texas Supreme Court case of *Walden v. Jeffery*[107] involved a patient who alleged that her dentist was liable for breach of implied warranty for supplying her with ill-fitting dentures. The patient also alleged a violation of the Deceptive Trade Practices Act ("DTPA"). However, the court stated that the patient's allegation did not indicate anything other than negligence by the dentist.[108] The court found that the patient "simply recast her negligence claim as a DTPA claim," which is precluded by section 12.01(a) of the Medical Liability and Insurance Improvement Act.[109] The court held similarly in *Gormley v. Stover,*[110] where the issue was whether the dentist's selection and performance of a surgical procedure met the standard of care for dentists in such circumstances. The court stated that the allegations were merely an attempt to disguise a malpractice claim as a DTPA action.[111] While a plaintiff may use the DTPA against a physician who engages in knowing misrepresentations or breaches an express warranty, a doctor is not liable under the

100. 907 S.W.2d 446 (Tex. 1995).
101. *Id.* at 448.
102. *Id.*
103. 898 S.W.2d 819 (Tex. 1995).
104. *Id.* at 820.
105. *Id.*
106. *Id.* at 820-21.
107. 907 S.W.2d 446 (Tex. 1995).
108. *Id.* at 448.
109. *Id.*
110. 907 S.W.2d 448 (Tex. 1995).
111. *Id.* at 450.

DTPA for his acts in providing medical services.[112]

The Texas Supreme Court held in *Transport Insurance Co. v. Faircloth*[113] that a minor did not have an actionable DTPA claim against the tortfeasor's insurer for failure to disclose information in negotiating a settlement of a wrongful death claim.[114] The court reasoned that "an insurer negotiating with a third party [was] neither inducing a 'consumer' into a transaction nor withholding information concerning 'goods and services'" as those terms are defined by the DTPA.[115]

In *Trimble v. Itz*[116] the San Antonio Court of Appeals held that a multi-million dollar insurance company could not assume the "consumer" status of its subrogee for DTPA purposes.[117] As a result, an insurer may not bring a claim under the DTPA separate from its subrogee's claims.[118] The court stated that this is true, even when an insurer receives the insured's rights in a subrogation action, because the statutory definition of "consumer" contains no exception for subrogees.[119]

VI. DEFAMATION AND FALSE LIGHT INVASION OF PRIVACY

In *Star-Telegram, Inc. v. Doe*[120] the Texas Supreme Court held that a newspaper was not liable for disclosing private facts about a victim of sexual assault which made her identifiable by her acquaintances.[121] In this case, a reporter obtained an unredacted copy of a police report describing an assault and disclosing certain identifying information about the victim, such as her age, occupation, make of her car, and her business ownership. The reporter wrote articles which included this information, and the newspaper published the articles. The court stated that "[f]acts which do not directly identify an innocent individual but which make that person identifiable to persons already aware of uniquely identifying personal information, may or may not be legitimate public interest."[122] The court felt that it was unreasonable to require the media to "sort through an inventory of facts" and "catalogue . . . them according to their . . . impact."[123] Further, such an approach may cause "critical information of legitimate public interest to be withheld."[124] The Court stated that the articles did not disclose "embarrassing private facts which were not of

112. Sorokolit v. Rhodes, 889 S.W.2d 239, 241 (Tex. 1994).
113. 898 S.W.2d 269 (Tex. 1995).
114. *Id.* at 273-74.
115. *Id.* at 273.
116. 898 S.W.2d 370 (Tex. App.—San Antonio 1995, *writ denied per curiam*, 906 S.W.2d 481).
117. *Id.* at 372.
118. *Id.*
119. *Id.*
120. 915 S.W.2d 471 (Tex. 1996).
121. *Id.* at 721.
122. *Id.*
123. *Id.*
124. *Id.*

legitimate public concern."[125] Therefore, the newspaper could not be found liable under an invasion of privacy cause of action.[126]

VII. IMMUNITIES

The Texas Supreme Court held in *City of LaPorte v. Barfield*[127] that the 1981 version of the Political Subdivisions Law waives governmental immunity for retaliatory discharges, but only for the limited relief of reinstatement and back pay. Similarly, the court in *Kuhl v. City of Garland*[128] held, in a per curiam decision, that the 1989 Political Subdivisions Law waives governmental immunity for retaliatory discharges, and in addition to reinstatement and back pay, authorizes recovery of actual damages subject to the restrictions of the Texas Tort Claims Act.[129]

In *DeWitt v. Harris County*[130] the plaintiff sued an officer in a wrongful death action, but the officer had official immunity. The Texas Supreme Court held that a governmental entity did not have respondeat superior liability under the Texas Tort Claims Act for the negligence of an employee possessing official immunity.[131] The court in *Kassen v. Hatley*[132] held that government-employed medical personnel are not immune from tort liability if the character of the discretion they exercise is medical and not governmental.[133] In *Kassen*, doctors claimed they did not admit a patient into the hospital because her file indicated that hospitalization was not therapeutic for her. Because this exercise of discretion was medical only, the doctors were not entitled to official immunity.[134]

VIII. DAMAGES

A. Mental Anguish Damages

In *State Farm Life Insurance Co. v. Beaston*[135] the Texas Supreme Court held that a finding of knowing conduct is a prerequisite to the recovery of mental anguish damages as "actual damages" available under article 21.21 of the Insurance Code.[136] A married couple bought their life insurance policies from an agent. The couple failed to pay the premium on the policy, so the 31-day grace period went into effect. Three days after the grace period expired, the husband died. The insurance company refused to pay the benefits under his life insurance policy, claiming that coverage had expired before his death.

125. 915 S.W.2d at 721.
126. *Id.*
127. 898 S.W.2d 288, 297 (Tex. 1995).
128. 910 S.W.2d 929 (Tex. 1995).
129. *Id.* at 930.
130. 904 S.W.2d 650 (Tex. 1995).
131. *Id.* at 654.
132. 887 S.W.2d 4 (Tex. 1994).
133. *Id.* at 11.
134. *Id.* at 12.
135. 907 S.W.2d 430 (Tex. 1995).
136. *Id.* at 436.

The wife sued for mental anguish damages under the Insurance Code. The Insurance Code provides that parties may recover their actual damages against a defendant who has violated the Code's provisions.[137] The court construed "actual damages" to mean those damages which are recoverable at common law, including mental anguish.[138] The court held that a culpable mental state is required in addition to the other prerequisites for recovery of mental anguish damages under common law.[139]

In *Cathey v. Booth*[140] the court held that a mother could recover mental anguish damages resulting from negligent medical care, including the loss of a fetus.[141] Similarly, the Corpus Christi Court of Appeals in *Edinburg Hospital Authority v. Trevino*[142] held that a mother had a cause of action for medical negligence even though the stillborn fetus did not have a claim.[143] Also, her husband could recover as a bystander to the negligent treatment of his wife because his emotional distress resulted from tangible physical injury to her.[144]

In *Star Houston, Inc. v. Shevack*[145] the Houston Court of Appeals held that the facts presented sufficient evidence to support an award for mental anguish.[146] The defendant committed fraud on the plaintiff at a time when the customer had a short life expectancy and financial difficulties. The customer was diagnosed with a life-threatening pancreatic condition, lost his business and his house, had banks suing him, and had huge unpaid medical bills. The court noted that a tortfeasor whose actions cause another to suffer mental anguish must take his plaintiff as he finds him.[147] The court also held that the demeanor of the plaintiff and other witnesses, the emotion evident in their testimony, and the "gut feeling" they projected to the jury may all be presented as proof of mental anguish.[148]

In *Wyatt v. Kroger Co.*[149] the Fort Worth Court of Appeals held that the "relationship between a business owner and an invitee does not encompass liability for emotional distress absent evidence of physical harm."[150] A mother and daughter witnessed an act of indecent exposure at a grocery store. Since they received no criminally inflicted physical injury or property loss, they could not seek mental anguish damages against the grocery store owner based upon the criminal conduct of a

137. *Id.* at 435.
138. *Id.*
139. *Id.* at 436.
140. 900 S.W.2d 339 (Tex. 1995).
141. *Id.* at 342.
142. 904 S.W.2d 831 (Tex. App.—Corpus Christi 1995, n.w.h.).
143. *Id.* at 835.
144. *Id.* at 837.
145. 886 S.W.2d 414 (Tex. App.—Houston [1st Dist.] 1995, writ denied).
146. *Id.* at 421.
147. *Id.* at 418.
148. *Id.* at 420.
149. 891 S.W.2d 749 (Tex. App.—Fort Worth 1994, writ denied).
150. *Id.* at 753.

third-party.[151]

B. EXEMPLARY DAMAGES

The Texas Supreme Court in *Twin City Fire Insurance Co. v. Davis*[152] held that in order to recover punitive damages, a workers' compensation claimant must obtain a jury finding entitling her to damages in addition to the insurance policy proceeds being wrongfully withheld.[153] The jury only awarded damages for the benefits not paid and not for any additional, independent injury flowing from the insurer's refusal to pay.[154] The jury did not find any injury to the claimant independent of the claim for the wrongfully denied workers' compensation benefits. Therefore, no independent tort existed on which to base punitive damages.[155]

Similarly, the Court in *Travelers Indemnity Co. of Illinois v. Fuller*[156] held that article 16, section 26 of the Texas Constitution does not create an independent cause of action for punitive damages where no cause of action for compensatory damages otherwise exists.[157] The plaintiff sued the insurance company, claiming that their gross negligence proximately caused her father's death. The Supreme Court held that the constitution only guarantees the remedy of punitive damages when a wrongful death beneficiary otherwise possesses a cause of action for compensatory relief, which does not violate the Open Courts Provision.[158]

In *Universal Services Co. v. Ung*[159] the court discussed the test for gross negligence when determining whether the defendant's conduct created an extreme degree of risk. The court held that the evidence was legally insufficient to support the jury's finding that an employee's death while working with a cleaning crew alongside an interstate highway was a result of gross negligence on the employer's part.[160] The employee was killed when a truck hit a pothole and its trailer came off. Under these limited and specific facts of this case, the court held that the risk created was not so extreme as to create a "likelihood of serious injury" and there was insufficient evidence to establish an entire want of care or conscious indifference to the employee.[161] A vigorous dissent argued otherwise and reminded the majority of the court's restricted standard of review.[162]

151. *Id.*
152. 904 S.W.2d 663 (Tex. 1995).
153. *Id.* at 667.
154. *Id.*
155. *Id.*
156. 892 S.W.2d 848 (Tex. 1995).
157. *Id.* at 852.
158. *Id.* at 853.
159. 904 S.W.2d 638 (Tex. 1995).
160. *Id.* at 642.
161. *Id.* at 639.
162. *Id.* at 642.

C. Prejudgment Interest

In *Owens-Illinois, Inc. v. Burt*[163] the Texas Supreme Court held that the statute dealing with the calculation of prejudgment interest in wrongful death, personal injury, and property damage cases does not apply to actions commenced before the statute's effective date.[164] The court applied *Cavnar v. Quality Control Parking*[165] to determine that in cases arising prior to the statute's effective date, "prejudgment interest in personal injury and wrongful death cases involving asbestos-related injury or disease accrues from a date six months after the date the defendant received notice of the claim or the lawsuit was filed, whichever occurs first."[166]

In *Robinson v. Brice*[167] the Austin Court of Appeals held that the prejudgment interest statute "plainly requires not merely written notice of an accident and resulting injuries, but also written notice of a claim" in order for the award of prejudgment interest to accrue.[168] In *Brice*, a passenger was injured while riding in an automobile belonging to the driver's employer. The passenger sent a letter to the insurer of the driver's employer in which he requested that the insurer pay certain medical bills and inquired as to when the next lost wages check was due. The court held that this constituted "written notice of the claim" so as to satisfy the requirements of the prejudgment interest statute.[169] It was sufficient to notify the insurer that the passenger was claiming compensation for his injuries, even though the letter was phrased as a request.[170] The Forth Worth Court of Appeals held similarly in *Bevers v. Soule*.[171]

IX. STATUTE OF LIMITATIONS

In a per curiam opinion, the Texas Supreme Court held in *Bala v. Maxwell*[172] that the Medical Liability Act preempts the wrongful death statute of limitations when a wrongful death claim is based on medical negligence.[173] Therefore, the statute of limitations expires two years after the alleged negligence occurred and not necessarily two years from the time of death.[174] The court stated that this preemption is not a violation of the open courts provision of the Texas Constitution.[175]

In *Sonnier v. Chisholm-Ryder Co., Inc.*[176] the court addressed the construction of the statute of repose, which requires that suits for damages

163. 897 S.W.2d 765 (Tex. 1995).
164. *Id.* at 768.
165. 696 S.W.2d 549 (Tex. 1985).
166. *Owens-Illinois*, 897 S.W.2d at 769.
167. 894 S.W.2d 525 (Tex. App.—Austin 1995, writ denied).
168. *Id.* at 528.
169. *Id.* at 529.
170. *Id.*
171. 909 S.W.2d 599 (Tex. App.—Fort Worth 1995, no writ).
172. 909 S.W.2d 889 (Tex. 1995).
173. *Id.* at 892-93.
174. *Id.* at 893.
175. *Id.*
176. 909 S.W.2d 475 (Tex. 1995).

against a person who constructs or repairs an improvement to real property must be brought not later than 10 years after the substantial completion of the improvement.[177] The plaintiff was injured by a tomato chopping machine and sued the manufacturer. The chopper was originally purchased and installed in Sugarland, but was later removed and installed in Brazoria County. The manufacturer raised the 10-year statute of repose as a defense. The court held that the statute was not intended to grant repose to manufacturers in product liability suits, rather the statute was only to preclude suits against those in the construction industry that annex personalty to realty.[178] The court also held that the subsequent annexation in Brazoria County created a new 10-year statute of repose protecting those who annexed the chopper to the realty there, assuming the facts support a finding that the chopper was considered an improvement.[179]

In *Smith v. Gray*[180] plaintiffs purchased a house from defendants and later discovered major structural damage. They immediately filed a claim with their insurance company. While investigating the claim, the insurance company discovered that prior to the time of the sale, defendants knew about the damage but failed to disclose it to plaintiffs. The plaintiffs filed suit and alleged violations of the DTPA, and the defendants moved for summary judgment based on the statute of limitations. The court of appeals held that the plaintiffs' action was barred because the statute of limitations commenced when the plaintiffs discovered the damage, rather than when the plaintiffs discovered the alleged DTPA violation.[181]

In *Cox v. Upjohn Co.*[182] the Dallas Court of Appeals applied the doctrine of fraudulent concealment to the statute of limitation and reversed the trial court's grant of summary judgment. The Dallas Court held that "[t]o hold otherwise would, in effect, be telling a wrongdoer that as long as it conceals the existence of a cause of action for two years after the injured party's death, it is free and clear of responsibility."[183]

X. TEXAS TORT CLAIMS ACT

A. PREMISE OR SPECIAL DEFECT

The Tyler Court of Appeals held in *Hindman v. State Department of Highways and Public Transportation*[184] that a bump on the shoulder of the highway is not considered a "special defect" so as to accord a bicyclist the status of an invitee.[185] The court stated that the bump was not an

177. *Id.* at 478.
178. *Id.* at 482.
179. *Id.* at 483.
180. 907 S.W.2d 444 (Tex. 1995).
181. *Id.*
182. 913 S.W.2d 225 (Tex. App.—Dallas 1995, no writ).
183. *Id.* at 231.
184. 906 S.W.2d 43 (Tex. App.—Tyler 1994, writ denied).
185. *Id.* at 46.

"excavation" or an "obstruction" since it only occupied about one-third of the shoulder's width.[186] Further, the bump could not be considered unexpected or unusual, especially because it was "not hidden or obscured from the vision of one approaching it."[187] The same court in *Texas v. Williams*[188] held that a sign that was lying in the middle of a traffic lane was a special defect.[189]

B. Use or Nonuse of Tangible Personal Property

In *Kassen v. Hatley*[190] a government hospital refused to admit a patient and return her medicine based on the patient's medical records, file, and the hospital's emergency room procedures manual. Subsequently, the patient committed suicide, and her parents filed a wrongful death action against the hospital. The hospital argued that the parents "failed to allege a use of tangible personal property as required under the Texas Tort Claims Act."[191] The plaintiff relied on the condition or use of the following property: Johnson's medical records, the difficult patient file, an emergency room procedures manual, and the confiscated medicine.[192] The Texas Supreme Court held that this property is not considered "tangible personal property" within the meaning of the Texas Tort Claims Act.[193] Thus, the hospital was immune from liability. Also, the court held that "the non-use of available drugs during emergency medical treatment is not a use of tangible personal property that triggers waiver of sovereign immunity."[194] This case followed the court's earlier retreat from the 1993 case of *Texas Dept. Mental Health and Mental Retardation v. Petty*.[195]

In *Kerrville State Hospital v. Clark*[196] the Austin Court of Appeals held that the state hospital's prescription of oral medications instead of injectable ones for a patient constituted a misuse of tangible personal property, where oral medications were inappropriate based on the patient's history.[197]

The Corpus Christi Court of Appeals in *Vela v. City of McAllen*[198] held that the arranging of furniture by law enforcement officers to facilitate a booking process constituted the use of tangible personal property.[199] In

186. *Id.* at 45.
187. *Id.* at 45-46.
188. No. 12-93-00236-CV, 1995 WL 515834 (Tex. App.—Tyler, Aug. 31, 1995, writ requested).
189. *Id.* at *2.
190. 887 S.W.2d 4 (Tex. 1994).
191. *Id.* at 7.
192. *Id.* at 13.
193. *Id.* at 14 (*citing* University of Tex. Med. Branch v. York, 871 S.W.2d 175, 176 (Tex. 1994)).
194. *Id.*
195. 848 S.W.2d 680 (Tex. 1992).
196. 900 S.W.2d 425 (Tex. App.—Austin 1995, writ granted).
197. *Id.* at 434.
198. 894 S.W.2d 836 (Tex. App.—Corpus Christi 1995, no writ).
199. *Id.* at 840.

Vela, police took the plaintiff into custody on a public intoxication charge. The plaintiff's son informed the police that his father suffered from epilepsy and was about five hours late in taking his medication. While the plaintiff was in the booking room, he fell, hit his face on a metal stool, and had a seizure, injuring himself even further. The court held that the booking officer's placement of the stool was equivalent to "use" of the booking room, and that the officer improperly "used" the room because he failed to use it in such a manner as to avoid injury to plaintiff.[200]

C. Notice Provisions

In *Cathey v. Booth*[201] the Texas Supreme Court discussed the Tort Claim Act's formal notice requirements and actual notice exception. The plaintiffs sued a hospital, alleging that its negligence resulted in the stillbirth of their child and in physical pain and mental anguish to themselves. The plaintiffs failed to provide the hospital with appropriate notice of their claims pursuant to § 101.101(c) of the Texas Civil Practice and Remedies Code. However, plaintiffs claimed that the hospital received actual notice of their claims in that it had knowledge that a death occurred. The court disagreed, holding that actual notice requires that the hospital have knowledge of: (1) death or injury; (2) its alleged fault producing or contributing to the death or injury; and (3) the identity of the parties involved.[202]

In *Texas v. Williams*[203] the Tyler Court of Appeals held that Highway Department employees who witnessed an accident that ensued when the plaintiff drove over a sign lying in the middle of a traffic lane had actual notice of the plaintiff's claim against the Department.

D. Municipal Liability

In *Gibson v. Spinks*[204] the Texas Supreme Court reversed the court of appeals and held that a judgment in an action against a governmental unit under the Tort Claims Act bars the simultaneous rendition of judgment against the employee whose actions gave rise to the claim.[205] A passenger was riding in a car struck by a police car. The trial court held that the town's immunity was waived under the Tort Claims Act, but that the town's liability was statutorily limited to $250,000.[206]

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200. *Id.*

201. 900 S.W.2d 339 (Tex. 1995).

202. *Id.* at 341.

203. No. 12-93-00236, 1995 WL 515834 (Tex. App.—Tyler, Aug. 31, 1995 writ requested).

204. 895 S.W.2d 352 (Tex. 1995).

205. *Id.* at 356-57.

206. *Id.* at 354.

XI. OTHER AREAS

A. EXPERT TESTIMONY

The Texas Supreme Court in *E.I. Du Pont de Nemours and Co. v. C.R. Robinson*[207] considered the standards applicable for the admissibility of expert testimony concerning novel scientific evidence. The court effectively adopted the factors cited by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals*[208] to use when determining the admissibility of this type of evidence. The four non-exclusive factors for the trial court to consider are: (1) has the theory or technique at issue is testable, and has it been tested? (2) has the theory or technique been subjected to peer review and publication? (3) what is the known or potential error rate, and are there standards controlling the technique's operation? and (4) is the theory or technique generally accepted?[209]

The court held that in addition to showing that an expert is qualified, Rule 702 of the Texas Rules of Civil Evidence also requires the proponent to show that the expert's testimony is relevant and reliable.[210] The trial court is responsible for making that preliminary determination and may use the above four factors in doing so.[211]

In *Burroughs Wellcome Co. v. Crye*[212] the expert testified in a products liability case that the plaintiff suffered from frostbite as a result of using the defendant's product (Polysporin spray). The expert based his opinion on the *assumptions* (1) that there was no redness on the plaintiff's foot after the spray was applied; and (2) that the plaintiff did not apply the spray as directed. The Texas Supreme Court held that this testimony did not constitute evidence to support causation.[213] The court stated that "when an expert's opinion is based on assumed facts that vary materially from the actual, undisputed facts, the opinion is without probative value and cannot support a verdict or judgment."[214]

B. WORKERS' COMPENSATION

The Texas Supreme Court granted writ in *Medina v. Herrera*[215] to determine whether the election of remedies doctrine applies to a situation in which an employee receives workers' compensation benefits and then sues the employer for an intentional tort. The Fourteenth Court of Appeals held that once an injured employee had received workers' compensation, the election of remedies doctrine precluded him from bringing an intentional tort claim for the same injuries against his employer.[216] How-

207. 38 Tex. Sup. Ct. J. 852 (Feb. 7, 1995).
208. 113 S. Ct. 2786 (1993).
209. *Id.* at 2797-98.
210. *Du Pont*, 38 Tex. Sup. Ct. J. at 858.
211. *Id.*
212. 907 S.W.2d 497 (Tex. 1995).
213. *Id.* at 499-500.
214. *Id.* at 499.
215. 905 S.W.2d 624 (Tex. App.—Houston [14th Dist.] 1995, writ granted).
216. *Id.* at 627.

ever, the court held that the claims were "not mutually exclusive if the intentional act produced an injury independent from that for which workers' compensation was claimed."[217] The court also stated that although the employee asserted a lack of understanding of his right to pursue an intentional tort claim, this did not preclude a finding that he made an "informed" election of remedies when he accepted workers' compensation, if such a finding is even necessary.[218]

In *Texas Workers' Compensation Commission v. Bridge City*[219] the Austin Court of Appeals discussed the Workers' Compensation Act provision under which a carrier is not entitled to reimbursement for payments made between the contested case decision requiring payment and the affirming appeals panel decision. The court held that even if the latter decision is overturned on judicial review, the provision does not violate the due process or takings provisions of the Texas Constitution.[220]

The Fort Worth Court of Appeals in *ESIS, Inc., Servicing Contractor v. Johnson*[221] held that: (1) decisions of the Workers' Compensation Commission Appeals Panel are admissible in district court review proceedings; (2) issues not raised during the administrative proceedings cannot be raised for the first time in district court; and (3) the Commission has the right to intervene in the judicial review proceedings regardless of whether it has a justiciable interest in the outcome.[222] *ESIS* was decided under the new Workers' Compensation Act.

C. Insurance Policy Exclusions

In *Truck Insurance Exchange v. Musick*[223] the Fort Worth Court of Appeals addressed the fellow employee exclusion in a standard form motor vehicle insurance policy. The exclusion applied to bodily injury to the insured's fellow employees arising out of and in the course of the fellow employee's employment. The court held that the exclusion precluded coverage for a suit based on an accident in which the insured construction company employee backed his truck over another employee.[224] It was stipulated that the two were fellow employees and that the injury arose out of and in the course and scope of the injured employee's employment.[225] The court also held that the fellow employee exclusion is not against public policy.[226]

In *Potomac Insurance Co. of Illinois v. Peppers*[227] the Houston division of the federal district court held that the knowledge of falsity exclusion

217. *Id.* at n.2 (*citing* Massey v. Armco Steel Co., 652 S.W.2d 932, 933 (Tex. 1983)).
218. *Id.* at 628.
219. 900 S.W.2d 411 (Tex. App.—Austin 1995, writ denied).
220. *Id.* at 416.
221. 908 S.W.2d 554 (Tex. App.—Fort Worth 1995, writ requested).
222. *See generally id.*
223. 902 S.W.2d 68 (Tex. App.—Fort Worth 1995, writ denied).
224. *Id.* at 71.
225. *Id.*
226. *Id.*
227. 890 F. Supp. 634 (S.D. Tex. 1995).

and the employee practices exclusion barred a shareholder's claim that the president of the corporation, another shareholder, defamed him.[228] The shareholder claimed that the alleged defamation arose out of the president's respective position in the corporation and killed many valuable business relationships. The court held that because the defamation was considered personal injury arising from employment-related practices, the exclusions bar the shareholder's claim.[229]

XII. TORT REFORM UPDATE

The legislature recently made sweeping changes in the area of tort reform. Changes to both procedural and substantive law are evidenced in several major areas: medical malpractice, exemplary damages, joint and several liability, venue, and the Deceptive Trade Practices Act.

A. MEDICAL MALPRACTICE

Perhaps some of the most dramatic changes are within the Medical Liability and Insurance Improvement Act.[230] A claimant now must file a cost bond of $5000 supporting a claim against each defendant within 90 days after filing, or must place $5000 cash in an escrow account for each defendant.[231] In the alternative, he or she may file an expert report for each defendant instead of filing a cost bond or placing cash in escrow.[232] The parties may agree to extend any time period. Such agreements must be honored by the court if signed by the affected parties or their council and filed with the court.

By the 180th day after filing of the lawsuit, a claimant must file an expert report and the expert's curriculum vitae.[233] There are no discovery or deposition questions permitted regarding these expert reports. The deadline may be extended for various reasons, such as a showing of good cause or an agreement by the parties.

A claimant may file an unlimited number of the expert reports. The reports must address the issues of liability and causation, but not damages. A summary of the expert's opinion regarding the standard of care, departures from the standard of care, and proximate cause must also be provided for in the report.[234] The reports cannot be admitted into evidence by a defendant.

New qualifications for experts were also addressed. The expert must presently be practicing medicine or practicing when the malpractice occurred and must know the standard of care. He or she must be qualified based on training, meaning the expert is board certified or has other sub-

228. *Id.* at 644-45.
229. *Id.* at 645.
230. TEX. REV. CIV. STAT. ANN. art. 4590i (Vernon 1996).
231. *Id.* § 13.01(a)(1).
232. *Id.* § 13.01(a)(2).
233. *Id.* § 13.01(d).
234. *Id.* § 13.01(r)(6).

stantial training. These qualifications apply to standard of care issues only.[235] Generally, any objections to the qualifications of a claimant's expert must be made no later than the twenty-first day after the date the objecting party received a copy of the expert's curriculum vitae or the date of the witnesses' deposition.

B. Exemplary Damages

Another major area in which changes have been made is exemplary damages. With the exception of cases where the wrongdoer's conduct can be considered felonious, Texas' new "Punitive Damages Bill" caps punitive damages to the greater of $200,000 or two times the amount of economic damages plus any non-economic damages up to $750,000. The court must bifurcate the trial upon motion by any defendant. The burden of proof for punitive damage claims is raised from a "preponderance of the evidence" standard to "clear and convincing evidence."[236]

A defendant will be liable for punitive damages when the harm resulted from fraud, malice, willful acts, omissions, or gross neglect in wrongful death actions brought under article 16, section 26 of the Texas Constitution. The new statute's definition of "malice" is gleaned from the *Moriel* opinion's definition of gross negligence.[237]

Further, additional limitations have been placed on the circumstances under which punitive damages can be recovered for the criminal acts of third parties. The defendant is liable for certain criminal acts committed by his or her employees or agents, where the defendant was a party to the criminal act, or where the criminal act resulted from the defendant's intentional or knowing violation of the specified apartment standards set forth in the Property Code.

Juries now have specific instructions relating to what is to be considered in an award of punitive damages. The trier of fact shall consider the *Alamo* factors: (1) the nature of the wrong; (2) the character of the conduct involved; (3) the degree of culpability of the wrongdoer; (4) the situation and sensibilities of the parties concerned; (5) the extent to which the conduct offends a public sense of justice and propriety; and (6) the net worth of the defendant.

C. Joint and Several Liability

This new bill establishes a comparative bar for claimants in any tort action at greater than fifty percent.[238] It only allows for several liability except where the responsibility of a defendant is greater than fifty percent. The Bill also allows a defendant to join certain third-parties and have their responsibility submitted to the trier of fact.

235. Tex. Rev. Civ. Stat. Ann. art. 4590i; § 14.01 (Vernon 1996).
236. Tex. Civ. Prac. & Rem. Code Ann. § 41.003 (Vernon 1996).
237. *Id.*
238. *Id.* § 33.001.

D. Deceptive Trade Practices Act

This legislative session saw significant changes in the prohibitions against unfair insurance and consumer practices.[239] A person may now sue for insurance practices declared to be unfair or deceptive in section 4 of article 21.21, which was amended to add additional prohibitions against misrepresentations and unfair claim settlement practices. Suit is allowed by any person who has sustained actual damages "caused by" a violation of the DTPA. Also, the statute now specifically precludes double recovery.

Rather than a mandatory trebling of actual damages, the bill provides for discretionary trebling of actual damages if the defendant acted knowingly. Notice to the defendant must be given in the form of a written demand at least sixty days before suit is filed.

There have been legislative changes within the Consumer Protection Act as well. The new bill allows a written waiver to be signed by a consumer in any transaction where the consumer is not in a significantly disparate position and is represented by independent legal counsel.

The definition of "knowingly" is now defined as an actual awareness, *at the time of the act or practice complained of*, of the falsity, deception, or unfairness of the act or practice. "Knowingly" also means actual awareness of the *condition, defect, or failure* constituting a breach of warranty.[240]

The new law adds a laundry list of prohibitions for price gouging during a natural disaster. A showing of detrimental reliance is necessary to recover for a violation of the prohibition on this list.

Another important new provision is the exemption for any person who provided professional services and any vicariously liable entities. Also, the bill excludes all claims for bodily injury, death, and mental anguish, but mental anguish is allowed if the defendant acted knowingly. There is no longer automatic trebling of the first $1,000 of economic damages. Instead, the court has discretion if the defendant acted knowingly.

E. Venue

"Tort Reform" also made a big impact on venue issues. For example, the general venue rule was changed to make four potential places proper in all situations: (1) where all or a substantial part of the events or omissions giving rise to the claim occurred; (2) in the county of the defendant's residence at the time the cause of action accrued if the defendant is a natural person; (3) in the county of the defendant's principal office if the defendant is not a natural person; or (4) if 1, 2, and 3 do not apply, in the county where the plaintiff resided at the time the cause of action accrued.[241]

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239. Tex. Rev. Civ. Stat. Ann. art. 21.21 (Vernon 1996).
240. *Id.* § 2(c).
241. Tex. Civ. Prac. & Rem. Code Ann. § 15.002 (Vernon 1996).

A court may transfer from one county of proper venue to another if: (1) maintenance in the original county would work an injustice; (2) the balance of interests of all of the parties predominates in favor of transfer; and (3) transfer would not work an injustice to any other party.[242]

242. *Id.* § 15.002(b).