

Damages Update  
1999

Presented by

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### **Ad Litem Fees**

The amount of an ad litem fee award is in the trial court's sound discretion, and will not be set aside absent evidence that the trial court clearly abused its discretion. The court abuses its discretion when it acts without reference to any guiding principles. Because the agreed judgment which included the ad litem fee taxed costs "pro rata," the court held that the defendant was only responsible for the proportion of the court costs, including the ad litem fee, that corresponds to that defendant's portion of the contribution to the settlement.

*Garcia v. Martinez*, 988 S.W. 2d 219 (Tex. 1999)

### **Attorney's Fees**

Generally, attorney's fees are not recoverable unless permitted by statute or contract. However, when a party seeks to recover attorney's fees and costs as damages (incurred in underlying litigation), no contractual or statutory authorization is necessary.

*Estate of Arlitt v. Paterson*, 1999 WL 214882 (Tex. App. – San Antonio, April 14, 1999, n.w.h.)

Attorney's fee denied for failure of plaintiff to segregate fees between contract and tort causes of action.

*AU Pharmaceutical, Inc. v. Boston*, 986 S.W. 2d 331 (Tex. App. – Texarkana 1999, no writ)

### **Calculation – Net Present Values**

When contract repudiated without just excuse, obligee is entitled to damages for present value of the future payments due under contract. Specific evidence of present value discount rate is not required. Trial court may determine present value of future damages.

*Jenkins v. Jenkins*, 991 S.W.2d 440 (Tex. App. – Fort Worth 1999, n.w.h.)

### **Court Costs**

The trial court erred in taxing costs against the prevailing party. Plaintiff sued her insurance company for uninsured motorist benefits. Because the plaintiff settled for \$20,000 from the negligent driver, and only proved damages in the amount of \$6,550 in her underinsured motorist claim, she was not the "prevailing party," and thus not entitled to costs.

*State Farm Mutual Auto. Ins. Co. v. Grayson*, 983 S.W. 2d 769 (Tex. App. – San Antonio 1998, no writ)

### **Credit Reputation**

In both contract and tort cases, a plaintiff does not suffer actual damage merely because he or she is unable to obtain a loan. Rather, the plaintiff must show that his or her inability to obtain a loan resulted in injury, and the amount of that injury.

*St. Paul Surplus Lines Ins. Co. v. Dal-Worth Tank Co.*, 974 S.W.2d 51 (Tex. 1998)

### **Divorce Proceedings – Separate Property**

The amount received in settlement by H & W for personal injury to wife is wife's separate property in divorce action where husband did not provide clear and convincing evidence as to his suffering as a result of wife's injury, but wife did. *Slaton v. Slaton*, 987 S. W. 2d 180 (Tex. App. – Houston [14th Dist.] 1999, writ denied)

### **Financial Loss**

Business (financial) losses of owners of Texas A& M campus health club were not personal injury damages, as required for State to have waived sovereign immunity under the Texas Tort Claims Act.

*Hencerling v. Texas A. & M. University*, 986 S.W.2d 373 (Tex. App. – Houston [1st Dist.] 1999, writ denied)

### **Future Damages**

Texas follows the “reasonable probability” rule with respect to recovery of future damages. To meet the reasonable probability test, (1) the plaintiff must present evidence that, in reasonable probability, it will incur expenses in the future and (2) prove the probable reasonable amount of the future expenses.

*MCI Telecomm. Corp. v. Texas Util. Elec. Co.*, 42 Tex. Sup. Ct. J. 656, 1999 WL 335722 (May 27, 1999)

Proof of Life Expectancy is not required to recover for lost future earnings. The jury may reach its own conclusion as to the life expectancy of a plaintiff, based upon evidence of the injured party’s age, health, and physical condition prior to the injury, and the permanence of the injury.

*Wal-Mart Stores, Inc. v. Ruby Ard and J.C. Ard*, 991 S.W.2d 518 (Tex. App. – Beaumont 1999, n.w.h.)

### **Insurance Code art. 21.55**

Under Texas Insurance Code Ann. art. 21.55 § 6, an insurer is liable to pay the holder of a policy, or the beneficiary making the claim under a policy, in addition to the amount of the claim, 18 percent per annum of the amount of such claim as damages, together with reasonable attorney’s fees, where a claim is made pursuant to a policy of insurance and the insurer is not in compliance with the requirements of the act.

*Dunn v. Southern Farm Bureau Casualty Insurance Company*, 991 S.W.2d 467 (Tex. App. – Tyler 1999, n.w.h.)

### **Intentional Infliction of Emotional Distress**

To support claim for damages for intentional infliction of emotional distress, “[t]he conduct complained of must be ‘so outrageous in character, and so extreme in degree, as to go beyond all

possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.’”

*Leatherman v. Rangel*, 986 S.W. 2d 759 (Tex. App. – Texarkana 1999, writ denied) (citation omitted).

Extreme and outrageous character of the conduct giving rise to claim for intentional infliction of emotional distress may arise from an abuse of a position or a relation with the victim that gives the tortfeasor actual or apparent authority over the victim, or power to affect his or her interests. The court first is to decide whether the defendant’s conduct could reasonably be regarded as so extreme and outrageous as to permit recovery. When reasonable minds could disagree, “it is for the jury to determine whether, in a particular case, the conduct is sufficiently extreme and outrageous to result in liability. The jury must then decide whether the employee’s conduct in making sexual advances amounted to extreme and outrageous conduct, going beyond the bounds of decency, to be regarded as atrocious and utterly intolerable in a civilized community.”

Anger, depression, and humiliation are not sufficient to establish severe emotional distress, and the conduct is not actionable merely because it may damage a person’s reputation. “The law intervenes only where the distress inflicted is so severe that no reasonable [person] could be expected to endure it.” *Gonzales v. Willis*, 1999 WL 238897 (Tex. App. – San Antonio, April 21, 1999)

### **Jury Charge**

The jury was presented with an instruction to answer the damages question only if it found an answer to a previous question that the plaintiff was not negligent or if it found, in response to another question, that the plaintiff was 50 percent or less negligent. The

Supreme Court held that because Rule 277 explicitly permits trial courts to predicate a damages question on an affirmative finding of liability, the trial court did not err in giving the jury instruction.

*H.E. Butt Grocery Co. v. Bilotto*, 985 S.W.2d 22 (Tex. 1998).

Texas Rule of Civil Procedure 277 prohibits informing the jury of the effect of its answers to the questions posed. However, Rule 277 also allows the court to predicate the damage question or questions upon an affirmative finding of liability. Thus, predicating the damages question on an affirmative answer to liability does not improperly inform the jury of the legal effect of its answers.

*Wal-Mart Stores, Inc. v. Scholl*, 990 S.W.2d 412 (Tex. App. – Corpus Christi 1999, n.w.h.)

“The proper measure of damages is a question of law for the court and the court’s charge should limit the jury’s consideration to facts that are properly a part of the damages allowable.”

*Allied Vista, Inc. v. Holt*, 987 S.W.2d 138, 141 (Tex. App. – Houston [14th Dist.] 1999, writ denied)

### **Legal Malpractice**

An attorney who breaches his fiduciary duty to his client may be required to forfeit all or part of his fee, irrespective of whether the breach caused the client actual damages. The Supreme Court held that a client need not prove actual damages in order to obtain forfeiture of an attorney’s fee for the attorney’s breach of fiduciary duty to the client. The jury is to determine any and all factual disputes concerning the alleged breach (as example, whether or when the misconduct complained of occurred, the attorney’s mental state at the time, and the existence or extent of any harm to

the client). Thereafter, the court determines whether the attorney’s conduct was a clear and serious breach of duty to his client and whether any of the attorney’s compensation should be forfeited, and if so, what amount.

*Burrow, et al. v. Arce, et al.*, 1999 WL 456770 (Tex. July 1, 1999)

Mental anguish damages cannot be recovered for legal malpractice if a plaintiff’s loss is purely economic. “[W]hen the injuries caused by an attorney’s negligence are economic, the plaintiff can be fully recompensed by the recovery of any economic loss.” *Douglas v. Delp*, 987 S.W.2d 879, 885 (Tex. 1999)

### **Liquidated Damages**

Entire oil and gas lease must be analyzed in construing meaning of a term in liquidated damages clause.

*Holman v. Meridian Oil, Inc.*, 988 S.W.2d 802 (Tex. App. – San Antonio 1999, writ denied)

### **Loss of Consortium**

District court abused its discretion in permitting an economic expert to testify in detail as to how the jury should value non-economic damages -- the value of loss of love and affection, guidance, and companionship. The court found that the expert’s testimony on such topics amounts to an abuse of the expert’s position as an expert. The court further determined that the expert’s testimony was not relevant because it was not a proper topic of expert testimony. Moreover, the court determined that the testimony was not reliable within the meaning of *Robinson* as a “novel assertion that such damages as loss of society and loss of consortium can be rationally calculated on a per diem basis, and that this loss can be assumed to remain constant over the projected life span of an individual. This theory has

not been published, has not been reviewed by peers, and was created solely for the purposes of litigation. In other words, it is ‘not based on a reliable foundation.’” Moreover, the court found that the expert’s testimony “does violence to the deeply rooted concept in Texas that the duty of resolving the monetary value to be placed on loss of society damages, such as loss of consortium, falls upon the jury and its impartial conscience and judgment acting reasonably, intelligently, and in harmony with the evidence. Evaluating these damages is primarily and peculiarly within the province of the jury.”

*Traylor Bros., Inc. v. Garcia*, 1999 WL 15937 (Tex. App. – San Antonio, January 13, 1999)

### **Loss of Earning Capacity**

A plaintiff may recover for loss of earning capacity “where he is shown a physical impairment affecting his ability to earn a living.” Damages do not have to be based on any specific degree of physical impairment, but can be based upon a composite of all factors affecting earning capacity. The plaintiff had not demonstrated a physical impairment where the evidence presented was in the nature and character required to support recovery for mental anguish damages -- he was petrified, feared for his reputation, did not have the same level of “work stamina” and fears for his career.

*Metropolitan Life Ins. Co. v. Haney*, 987 S.W. 2d 236 (Tex. App – Houston [14th Dist.] 1999, writ requested)

### **Lump Sum Award**

The trial court apparently simply multiplied monthly child support by number of months before child reaches majority in determining lump sum award to provide for specific monthly payments. A discount rate must be

applied to arrive at the present value of the future payments.

*In the Interest of Gonzalez*, 1999 WL 125434 (Tex. App. – San Antonio, March 10, 1999)

### **Medical Liability Damages Cap**

Article 4590(i) of the Medical Liability & Insurance Improvement Act caps damages against a physician or healthcare provider at \$500,000. That article further provides that the cap does not apply to damages awarded for necessary medical, hospital and custodial care received before judgment or required in the future. The court concluded that the statutory damages cap applied only to compensatory damages, aside from the expenses of necessary medical, hospital and custodial care, and that it does not apply to prejudgment interest or exemplary damages in suits to which the statute applies. The court also addressed the constitutionality of the damages cap. It noted that the Texas Supreme Court had previously determined that applying the cap in common law personal injury suits, like plaintiff’s, was unconstitutional. However, while the plaintiff was alive when the matter was filed, she died during the pendency of the suit and it was continued as a survival action. The court noted that the Texas Supreme Court had previously considered the constitutionality of the cap as applied to wrongful death suits, and determined that they were constitutional when applied to a statutory suit for wrongful death. The court noted that while the matter may have originally been filed as a personal injury action, the common law personal injury action would have perished at plaintiff’s death. The survival action is a remedy conferred by statute, not common law. Thus, the open court’s provision of the Texas Constitution did not forbid the trial

court's reliance on the damages cap of compensatory damages.

*Horizon/CMS Healthcare Corp. v. Auld*, 985 S.W.2d 216 (Tex. App. – Fort Worth 1999, writ requested)

### **Mental Anguish**

The court determined that there was not legally sufficient evidence to support the jury's verdict on mental anguish damages. The court, relied on *Parkway Co. v. Woodruff*, 901 S.W.2d 434 (Tex. 1995), where it held that “an award of mental anguish damages will survive a legal sufficiency challenge when the plaintiffs have introduced direct evidence of the nature, duration and severity of their mental anguish, thus establishing a substantial disruption in the plaintiffs' daily routine,” when it denied plaintiff's claim for mental anguish here. The plaintiff testified that he was severely disappointed, publicly humiliated, ridiculed by his friends, and embarrassed. The Court noted that this did not rise to the level of “a high degree of mental pain and distress” that is “more than mere worry, anxiety, vexation, embarrassment, or anger.” The court determined that much of the testimony plaintiff offered to establish his mental anguish was “conclusory” and did “not present evidence of the nature, duration, or severity of his mental anguish.” In sum, “[s]imply because a plaintiff says he or she suffered mental anguish does not constitute evidence of the nature, duration, and severity of any mental anguish that is sufficient to show a substantial disruption of one's daily routine.”

*Gunn Infiniti, Inc. v. O'Byrne*, 42 Tex. Sup. Ct. J. 828, 1999 WL 417294 (June 24, 1999)

The Supreme Court vacated the court of appeals' judgment, which reversed the granting of the summary judgment in

favor of the defendant, on a claim for mental anguish damages resulting from damage to plaintiff's property. The Supreme Court had decided *City of Tyler v. Likes*, 962 S.W.2d 489 (Tex. 1997) after the court of appeals' judgment in the case. In *City of Tyler*, the Texas Supreme Court held that “mental anguish based solely on negligent property damage is not compensable as a matter of law.”

*City of Palestine v. Davis*, 977 S.W.2d 328 (Tex. 1998)

Mental anguish damages cannot be recovered for legal malpractice if a plaintiff's loss is entirely economic. A mental anguish claim, as a consequence of economic loss, may not be maintained. Restoration of the pecuniary interest suffices to return a plaintiff to her prior circumstances.

*Douglas v. Delp*, 987 S.W.2d 879, 885 (Tex. 1999)

The Texas Tort Claims Act does permit a cause of action for bystander injuries. The bystanders' injuries were direct, not derivative, and were thus not subject to the monetary cap under the TTCA. The mother and sister of the victim could thus recover under the Texas Tort Claims Act because they suffered direct personal injury in the form of mental anguish from witnessing severe personal injuries to the victim.

*Hermann Hospital v. Martinez*, 990 S.W. 2d 476 (Tex. App. – Houston [14th Dist.] 1999, writ requested)

In order to recover mental anguish damages under the labor code, a plaintiff must prove that the employer acted willfully and with malice. While an employer's violation of the labor code is, of itself, unlawful, such a violation is not enough, standing alone, to support a punitive damages award. Only egregious violations of a labor code are

subject to punitive damages awards. Where an employee testified as to feeling devastated and depressed as a result of termination, that she would not leave the house for extended period of time, that she lost weight, and that she became moody, the court held that this was “some evidence” of the nature, duration, and severity of mental anguish sufficient to support a jury’s findings.

*Stevens v., National Education Centers, Inc.*, 990 S.W. 2d 374, 377 (Tex. App. – Houston [14th Dist.] 1999, writ requested)

In order to recover from mental anguish, a plaintiff is required to show “by direct evidence ‘the nature, duration, or severity of [her] anguish, thus establishing a substantial disruption in her daily routine,’ or show by other evidence ‘a high degree of mental pain and distress that is more than mere worry, anxiety, vexation, embarrassment, or anger.’” The amount awarded for mental anguish damages must be “fair and reasonable.”

*Dallas County Civ. Service Com’n v. Warren*, 988 S.W.2d 864, 872 (Tex. App. – San Antonio 1999, no writ)

Mental anguish damages are not recoverable in a cause of action for breach of contract or for a tort action arising from a breach of contract. While the court found that the relationship between the parties was sufficient to give rise to a fiduciary duty, and the plaintiff’s cause of action arose from his opponent’s “fraudulent failure to fulfill” the agreement, plaintiff’s cause of action “in its essence” arises from the agreement. The court thus found that the action before it was “of a nature sufficiently similar to those breach of contract actions” as to prohibit the recovery of mental anguish damages.

*Carr v. Weiss*, 984 S.W. 2d 753, 770 (Tex. App. – Amarillo 1999, writ denied)

Under Insurance Code art. 21.21, a culpable mental state is required to recover mental anguish damages. Under that Article, “knowingly” is defined as “actual awareness of the falsity, unfairness, or deception of the act or practice made the basis for a claim for damages [under art. 21.21].” As explained by the court, “actual awareness” requires that a person know that he is doing something false, deceptive, or unfair, not that he just know what he is doing. Significantly, the court noted that “[t]his is a more culpable mental state than gross negligence.” Thus, although there was some evidence of misconduct by the carrier, there was no evidence that the carrier knew that it was acting falsely, deceptively or unfairly toward plaintiffs. *Mid-Century Life Ins. Co. of Texas v. Foreman*, 1999 WL 301638 Tex. App. – Fort Worth, May 13, 1999)

Where plaintiffs alleged and presented evidence that their attorney not only did not timely file suit, but also affirmatively misrepresented to them that he had filed and was actively prosecuting their claim, plaintiffs would not be required on their DTPA claim to “prove the ‘suit within a suit’ element.” However, plaintiffs must prove damages and that the unconscionable action was a producing cause of the actual damages. Mental anguish damages are actual damages at common law. Because the term “actual damages” used under the DTPA means those recoverable at common law, the Supreme Court held that the plaintiffs did “not have to first prove that they have suffered economic damages in order to recover mental anguish damages” under the DTPA.

*Latham v. Castillo*, 972 S.W.2d 66, 69 (Tex. 1998)

### **Mental Anguish Damages -- Physical Injury Requirement**

The Texas Supreme Court determined that plaintiffs cannot recover mental anguish damages absent physical injury where, although plaintiffs were exposed to asbestos, they do not presently suffer any asbestos-related disease and the increased risk of their exposure is no higher than one chance in one hundred over 20 to 30 years. The Court reiterated its holding in *City of Tyler v. Likes*, 962 S.W.2d 489, 496 (Tex. 1997) that “[w]ithout intent or malice on the defendant’s part, serious bodily injury to the plaintiff, or a special relationship between the two parties, we permit recovery for mental anguish in only a few types of cases involving injuries of such a socking and disturbing nature that mental anguish is a highly foreseeable result.” The Supreme Court held that, even assuming genuine distress over their exposure to asbestos, plaintiffs could not recover for fear of an increased risk of developing an asbestos-related disease when no disease is presently manifest.

*Temple-Inland Prods. Corp. v. Carter*, 42 Tex. Sup. Ct. J. 592, 1999 WL 254718 (April 29, 1999).

### **Mitigation of Damages**

“[A] plaintiff in a DTPA case has the same duty to mitigate damages as in other cases.” In order for an offer by a defendant to be an “offer to mitigate,” and thus be admissible at trial, the offer “cannot implicitly or explicitly seek a release of the plaintiff’s claims.” Thus, “when a defendant seeks a question or instruction regarding mitigation based on its own offer to a claimant, the defendant is entitled to that question or instruction only if the offer was clearly one of mitigation rather than settlement.”

*Gunn Infiniti, Inc. v. O’Byrne*, 42 Tex. Sup. Ct. J. 828, 1999 WL 417294 (June 24, 1999)

When evidence shows plaintiff contributed to his losses (when the negligence complained of contributed or added to the extent of the losses but has no part in causing the incident in question), jury instruction on mitigation should be issued.

*Hygeia Dairy Co. v. Gonzalez*, 1999 WL 238864 (Tex. App. – San Antonio, April 21, 1999)

### **Negligent Misrepresentation**

The “benefit-of-the-bargain” measure of damages (the different between the value as represented and the value as received) is not available in a claim for negligent misrepresentation; the plaintiff can only recover the amount necessary to compensate him or her for direct pecuniary loss. “Therefore, lost profits are not available in a claim for negligent misrepresentation.”

*Metropolitan Life Ins. Co. v. Haney*, 987 S.W.2d 236, 246 (Tex. App. – Houston [14th Dist.] 1999, writ requested)

### **Prejudgment Interest**

An injured motor vehicle passenger was not entitled to underinsured motorist benefits until he secured the liability and damages findings from the jury, not when he first made a claim under the policy. Because he was timely paid thereafter, he is not entitled to prejudgment interest.

*Henson v. Texas Farm Bureau Mutual Insurance Co.*, 989 S.W. 2d 837 (Tex. App. – Amarillo 1999, writ requested)

### **Promissory Estoppel**

Damages for promissory estoppel are “not measured by the profits that such party’s reliance led him to expect, but instead are limited to the amount necessary to compensate that party for a

