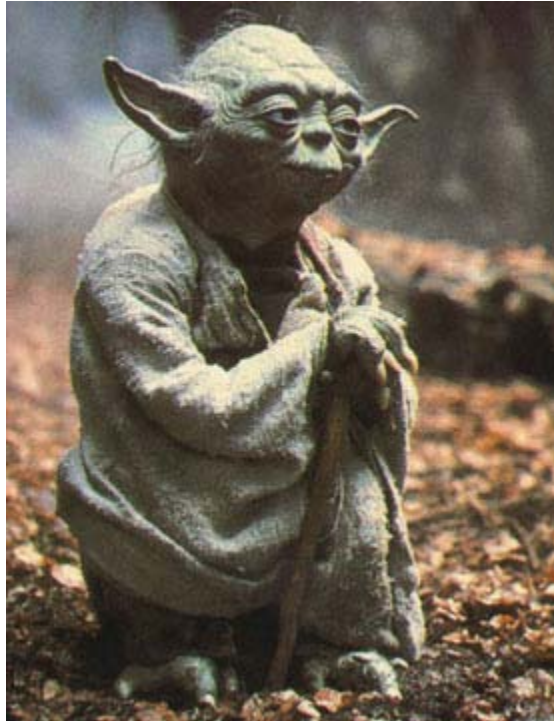


Attacking the Death Star, Gross Negligence and the Exemplary Damages Case

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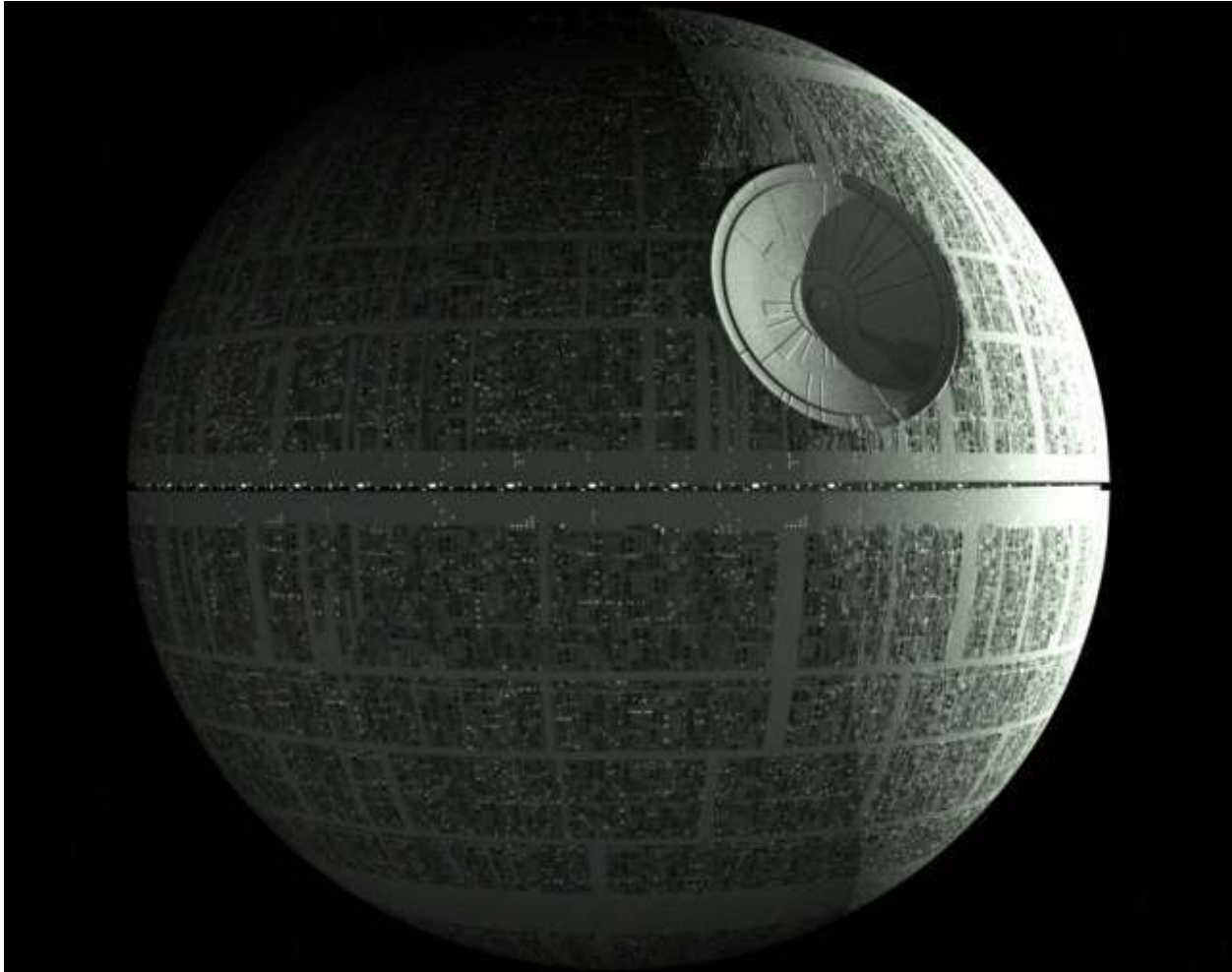
Do, or do not. There is no try.
- Yoda



Introduction

Winning a gross negligence case is a daunting and difficult task. At first blush, the defenses and powers arrayed against you appear formidable and overwhelming. But an understanding of the law, awareness of the traps and careful preparation can arm you with the tools you need to succeed.

This paper will provide an overview of the issues raised in a gross negligence case, review recent cases on the subject, reveal special issues involved in the cases and suggest methods to prevail in the struggle against the difficult odds.



Gross Negligence and Exemplary Damages – An Overview

Do you find by clear and convincing evidence that the harm to Paul Payne resulted from gross negligence?

“Clear and convincing evidence” means the measure or degree of proof that produces a firm belief or conviction of the truth of the allegations sought to be established.

“Gross negligence” means an act or omission by Don Davis,

- (a) Which when viewed objectively from the standpoint of Don Davis at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and
- (b) Of which Don Davis has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.

Answer “Yes” or “No.”

Answer _____

PJC 4.2C

This is the starting point for any gross negligence case. The jury must answer this question for you to prevail. The current Pattern Jury Charge has its origin in the definition of gross negligence set out by the Texas Supreme Court in *Transportation Insurance Co. v. Moriel*, 879 S.W.2d 10, 21 (Tex. 1994) (Citing Chapter 41 of the Texas Civil Practices and Remedies Code). In it, the Court identified the competing goals; deterring wrongful conduct while avoiding private windfalls, that subsequent courts have relied upon in shaping further decisions.

“Our duty in civil cases, then, like the duty of criminal courts, is to ensure that defendants who deserve to be punished in fact receive an appropriate level of punishment, while at the same time preventing punishment that is excessive or otherwise erroneous.”¹

The complex jury question requires plaintiffs to demonstrate that the wrongdoer’s conduct rises to a level that warrants “criminal punishment.” To do this, the courts have set out a two-part test designed to ensure that sufficient evidence of bad conduct exists. The first part of the test requires proof that the defendant had an objective awareness of the extreme degree of the risk of harm. The second part requires proof that the defendant had a subjective awareness of the risk. Both issues must be answered unanimously by the jury for the plaintiff to prevail. The burden of proof cannot be shifted to the defendant. It cannot be proved by evidence of ordinary negligence, bad faith or deceptive trade practices.²

If the plaintiff meets the burden of proof on the liability question, the jury must also unanimously agree to the amount of damages.

¹ Id. at 17.

² See Civ. Prac. & Rem. Section 41.003(b).

You are instructed that you must unanimously agree on the amount of any award of exemplary damages.

What sum of money, if any, should be assessed against Don Davis and awarded to Paul Payne as exemplary damages for the conduct found in response to Question _____.

“Exemplary damages” means any damages awarded as a penalty or by way of punishment but not for compensatory purposes. Exemplary damages includes punitive damages.

Factors to consider in awarding exemplary damages, if any, are –

- a. The nature of the wrong.
- b. The character of the conduct involved.
- c. The degree of culpability of the wrongdoer.
- d. The situation and sensibilities of the parties concerned.
- e. The extent to which such conduct offends a public sense of justice and propriety.
- f. The net worth of Don Davis

Answer in dollars and cents, if any.

Answer _____

PJC 8.6C

Limits On Amount of Recovery

The amount of exemplary damages is limited by law.

Exemplary damages awarded against a defendant may not exceed an amount equal to the greater of:

- 1) (a) two times the amount of economic damages; plus
(b) an amount equal to any non-economic damages found by the jury, not to exceed \$750,000; or
- 2) \$200,000

There are numerous causes of action that are not limited by the scope of this statute. However, most involve some form of criminal conduct.³ Give careful consideration to the impact that pursuing one of these exclusions will have on your case. You must essentially prove the elements of the underlying criminal offense to the “knowing and intentional” standards found in the Texas Penal Code.⁴ A simple finding of malice, no small feat in itself, is insufficient to meet the burden required for these cases.⁵

Bifurcation

If a defendant requests it, the Court shall bifurcate the issue of exemplary damages from the initial trial of the suit. A motion to request bifurcation must be filed prior to voir dire or at a time set out in a scheduling order.⁶ Once requested, the court separates the case into two phases, the first to determine the defendant’s liability for compensatory and exemplary damages, the

³ The exclusions include:

- (1) Section 19.02 (murder);
- (2) Section 19.03 (capital murder);
- (3) Section 20.04 (aggravated kidnapping);
- (4) Section 22.02 (aggravated assault);
- (5) Section 22.011 (sexual assault);
- (6) Section 22.021 (aggravated sexual assault);
- (7) Section 22.04 (injury to a child, elderly individual, or disabled individual, but not if the conduct occurred while providing health care as defined by Section 74.001);
- (8) Section 32.21 (forgery);
- (9) Section 32.43 (commercial bribery);
- (10) Section 32.45 (misapplication of fiduciary property or property of a financial institution);
- (11) Section 32.46 (securing execution of documents by deception);
- (12) Section 32.47 (fraudulent destruction, removal, or concealment of writing);
- (13) Chapter 31 (theft) the punishment level for which is a felony of the third degree or higher;
- (14) Section 49.07 (intoxication assault);
- (15) Section 49.08 (intoxication manslaughter); or
- (16) Section 21.02 (continuous sexual abuse of young child or children).

⁴ See Tex. Pen. Code §6.03(a). “A person acts knowingly if the person is (1) aware of the nature of the conduct, (2) aware that the circumstances surrounding the conduct exist, or (3) aware that the conduct is reasonably certain to cause the result. Tex. Pen. Code §6.03(b). A person acts intentionally if the person has the conscious objective or desire to engage in the conduct or cause the result.

⁵ *Madison v. Williamson*, 241 S.W.3d 145, 161 (Tex.App–Houston [1st Dist.] 2007).

⁶ Civ. Prac. & Rem. Code Section 41.009

second to determine the amount of exemplary damages.⁷ Plaintiffs can only object to the timeliness of the motion, otherwise, it shall be granted.⁸

So, there is the mountain that must be climbed. Within each element, however, our Supreme Court and others have laid traps for the unwary. Those traps are laid in the carefully selected terminology in the jury question. The Supremes, and others of a similar political bent, have used those terms in an effort to derail a plaintiff's effort to recover exemplary damages.

“Clear and Convincing Evidence”

The fact that the jury charge begins with this instruction should alert plaintiffs to the importance of meeting this threshold. So, what exactly does “clear and convincing evidence” mean?

“Clear and convincing evidence is defined as that measure or degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established. This is an intermediate standard, falling between the preponderance standard of ordinary civil proceedings and the reasonable doubt standard of criminal proceedings. While the state's proof must weigh heavier than merely the greater weight of the credible evidence, there is no requirement that the evidence be unequivocal or undisputed.”⁹

This threshold level of proof is substantially higher than what is normally used in civil cases. The threshold is the same as is applied in actions to commit mental ill people to state institutions, to terminate parent-child relationships and to acquit a wrongfully convicted man of

⁷ Civ. Prac. & Rem. Code Section 41.011(a-d)

⁸ Civ. Prac. & Rem. Code Section 41.009(a)

⁹ See *State v. Addington*, 588 S.W.2d 569, 570 (Tex. 1979)(Note this case involves the standard of proof necessary to involuntarily commit someone for mental incompetency. Reference to this case is not intended to be a comment on the soundness of mind of individuals pursuing gross negligence cases.)

sexual assault.¹⁰ In other words, this is a tough standard to comply with and must be taken into consideration.

Last year, the Supreme court held that there was clear and convincing evidence to support a medical malpractice gross negligence case. While you take a moment to savor that, there were two judges who dissented from the result – surprise. In *Columbia Medical Center of Las Colinas, Inc. v. Hogue*, 271 S.W.3d 238 (Tex. 2008), the court examined the sufficiency of a jury verdict against a hospital that failed to provide echocardiogram services on site. The patient in the case was ordered to undergo a “stat” echocardiogram by his doctors. The hospital did not have facilities to perform the test on site and had contracted to have them done by an outside service. Despite the important nature of the test, the hospital staff tarried in having it performed and the patient died as a result in the delay of treating his serious condition. To support the judgment, the plaintiffs produced evidence that 1) the hospital determined it needed the echocardiogram services to support its emergency room, 2) its employees testified that the service was an “obvious” and “elementary” need for a hospital emergency room, 3) the hospital could have contracted for “stat” echocardiogram services but chose not to, and 4) timely performance of the echocardiogram would have saved the patient’s life.

Writing in dissent, Green and Hecht took issue with the court’s reasoning and discussed the role of the “clear and convincing” language.

“The standard for establishing gross negligence sets a very high bar for claimants to overcome. And it should. Gross negligence equates to outrageous conduct for which severe punishment is justified. And because it is punitive in nature, the evidence of gross negligence must be clear and convincing before punitive damages are recoverable. This elevated clear and convincing standard, to have any meaning, must necessarily affect legal sufficiency review. It is not enough to simply conclude, as the Court does, that there is some evidence to support the

¹⁰*In re A.S.*, 2009 WL 3488336 (Tex. App.-Waco, 2009); *Hyatt v. Department of Family and Protective Services*, 2009 WL 3400992 (Tex. App.-Houston [1 Dist.], 2009); *Ex parte Evans*, 2009 WL 3368699 (Tex. Crim. App., 2009).

jury's gross negligence finding without determining whether that evidence is clear and convincing. We have explained this legal sufficiency review at length, recognizing that "a finding that must meet an elevated standard of proof must also meet an elevated standard of review." Even if an appellate court determines that the supporting evidence amounts to more than a scintilla, "the finding is invalid unless the evidence is also clear and convincing."

The two judges went on to say that the hospital's failure to include "stat" echocardiogram services might have been negligent, but that there was not clear and convincing evidence that it was grossly negligent.

"With regard to the objective prong of the gross negligence analysis, the record fails to show by clear and convincing evidence that Columbia Medical's failure to contract for "stat" echocardiogram services, or its failure to advise the treating physicians of this limitation, posed an extreme risk of harm to its patients. There is no evidence that, at the time when Columbia Medical was evaluating its need for medical diagnostic services, the hospital recognized that the lack of stat echo services would pose an extreme risk of harm to its patients."¹¹

This year, another court held there was not clear and convincing evidence to support a gross negligence jury verdict in a truck-car crash case. There, the evidence showed a truck driver crossed into oncoming traffic when he diverted his attention from the road to reach for a box of crackers. The jury heard testimony from highway patrol investigators and the plaintiff's driving expert that the driver's actions deviated from the standard of care in the industry. The Court held this was not enough to support the gross negligence requirements.¹²

The lesson to take away from these cases is that the "clear and convincing" threshold must be taken very seriously. The frequent references to criminal proceedings as the source of the burden demonstrate that your evidence supporting the elements must be substantial to withstand the scrutiny of our appeals courts. The dissent in the Columbia Medical Center case demonstrates that the minions of those arrayed against plaintiff's rights are still searching for ways to overturn gross negligence verdicts.

¹¹ Id. at 259.

¹² See *Matbon, Inv. v. Gries*, 288 S.W.3d 471 (Tex. App. – Eastland 2009).



“Objective Awareness of Risk”

The objective awareness prong of the gross negligence test focuses on the likelihood of serious injury to the plaintiff.¹³ The burden of proving that the defendant could appreciate the risk requires a significantly higher threshold than that involved in the objective reasonable person test for simple negligence.¹⁴ By contrast, it requires evidence that the act or omission involved in the case must depart from the ordinary standard of care to such an extent that it creates an extreme degree of risk of harming others.¹⁵ The “extreme” nature of the risk is a usually considered a function of the magnitude and the probability of the risk posed to the plaintiff. The courts have consistently held that the risk cannot be a “remote possibility” or a high degree of probability for a “minor harm.”¹⁶ It may only involve cases where there is a

¹³ See *R & R Contractors v. Torres*, 88 S.W.2d 685 (Tex. App. – Corpus Christi 2002, no writ)

¹⁴ See *Moriel*, 879 S.W.2d at 22.

¹⁵ *Lee Lewis Const.*, 70 S.W.3d at 784-86; *Universal Servs. Co. v. Ung*, 904 S.W.2d 638, 641 (Tex.1995).

¹⁶ *Moriel*, 879 S.W.2d at 22.

likelihood of serious, not minor, injury to the plaintiff.¹⁷ The inquiry is to be done from the perspective of the defendant at the time of the incident, not retroactively or with the benefit of knowing the result of the actions.¹⁸

The Supremes have given us this direction:

“An act or omission that is merely thoughtless, careless, or not inordinately risky cannot be grossly negligent.”¹⁹

The Texas Supreme Court recently wrote about the objective prong in a decision concerning gross negligence in a legal malpractice case. In *Smith v. O'Donnell*, 288 S.W.3d 417 (Tex. 2009), the Court evaluated the sufficiency of proof to support a no evidence summary judgment ruling concerning gross negligence. It reaffirmed the holding that the objective prong is a function of both the magnitude and the probability of potential injury and is not satisfied if the defendant's conduct merely creates a remote possibility of serious injury. The Court stated that the “extreme risk” element required more than a remote possibility of injury or even a high probability of minor harm. In *Smith*, the plaintiff offered evidence from an expert witness and other legal counsel outlining the legal malpractice committed by the defendant. While the decision does not cite specific language in the expert report or the testimony the plaintiff relied upon, it categorized it as “conclusory statements” that were insufficient to demonstrate objective awareness of the defendant. The wording of the decision seemed to blur the distinction between the objective and subjective prongs.

One case illustrative of the level of proof required to demonstrate an objective awareness of the risk is *R & R Contractors v. Torres*, 88 S.W.3d 685 (Tex. App. – Corpus Christi 2002, no writ). The case dealt with a truck driver killed when a thousand pound tank slipped off a sling

¹⁷ *Mobil Oil Corp. v. Ellender*, 968 S.W.2d 917, 921 (Tex.1998).

¹⁸ *Moriel*, 879 S.W.2d at 22.

¹⁹ *Id.*

and crushed his lower body. The case was tried under the Texas Workers Compensation Act for wrongful death and the jury returned a gross negligence verdict against his employer. In support of his case, the plaintiff introduced evidence that the thousand pound tank posed an extreme degree of risk with sections of the company's safety manual and employee testimony. The manual had sections that discussed safety procedures to use when moving the tank and the employees testified that they understood the dangers associated with the failure to control the heavy object. The Court determined that this evidence was sufficient to demonstrate an objective awareness of the risk on the part of the employer. The Court noted:

All witnesses questioned about the proper method to rig the tank agreed that the tank was not properly secured, the proper equipment for the lift was not used, and Sliney should not have made the lift until the load was secure.²⁰

The objective prong may be the easier of the two to establish because it relies on common sense and can be satisfied by building the circumstantial case through documents, manuals, testimony and expert opinions regarding the risk of harm.

²⁰ See *R & R Contractors*, 88 S.W.3d at 709.



“Subjective Awareness of the Risk”

Whether the defendant had a subjective awareness of the risk may be the harder element to prove. While the rules still allow circumstantial evidence to prove this element, the Supremes have made doing so even with tangible evidence even harder. In *Diamond Shamrock Refining Co., L.P. v. Hall*, 168 S.W.3d 164 (Tex. 2005), the court dealt with a Texas Workers Compensation Act wrongful death case stemming from a refinery explosion. The jury returned a verdict in the plaintiff’s favor, and the Supreme Court did whatever it could to overturn that result.

The Court focused its analysis on the subjective prong of the test. To carry their burden, the plaintiff introduced evidence showing the defendant knew that the valves involved in the explosion: 1) could explode if certain liquids were allowed to be sent through, 2) that sending liquids through the value had caused two prior explosions, 3) that the refinery foreman refused to divert liquids from going through the valve on the day of the explosion, 4) that a check valve had been leaking and would allow liquids to escape past it into the valve, 5) that operators had made requests for the valve to be fixed, 6) that one of Diamond Shamrock’s experts testified that to

know of a problem with the check valve was to know of a potential danger, and 6) that there were bleeder valves present in other parts of the refinery that could have been used to check for liquids to avoid an explosion.

Justice Hecht, writing in support of the powers that got him elected, felt that all of this evidence was insufficient to demonstrate Diamond Shamrock had a subjective awareness of the risk of explosion. The opinion does not set out what it actually would have taken to meet this test, but rather, provides a sort of “touchy-feely” approach to gross negligence.

The plaintiff complains that Diamond Shamrock’s arguments are tantamount to claiming that it was entitled to “one free explosion”, but that characterization is not supported by the evidence. For one thing, any explosion threatened the entire refinery and all of its employees, and this one certainly took a tremendous toll. It was by no means “free”. More importantly, the record establishes, and no one disputes, that refinery operations are by their very nature dangerous. Diamond Shamrock’s efforts to protect against those dangers were imperfect; they may have been negligent. But there is no evidence that Diamond Shamrock was unconcerned.²¹

Corporate Liability

A corporation may be liable in punitive damages for gross negligence only if the corporation itself commits gross negligence.²² Because a corporation can “act only through agents of some character,” tests have been developed for distinguishing between acts that are solely attributable to agents or employees and acts that are directly attributable to the corporation.²³ A corporation is liable for punitive damages if it authorizes or ratifies an agent’s gross negligence or if it is grossly negligent in hiring an unfit agent.²⁴

²¹ *Diamond Shamrock*, 168 S.W.3d at 171.

²² *See Fort Worth Elevators, Co. v. Russell*, 123 Tex. 128, 70 S.W.2d 397, 406 (1934), *overruled on other grounds by Wright v. Gifford-Hill & Co.*, 725 S.W.2d 712 (Tex.1987).

²³ *See Hammerly Oaks, Inc. v. Edwards*, 958 S.W.2d 387 (Tex.1997).

²⁴ *See King v. McGuff*, 149 Tex. 432, 234 S.W.2d 403, 405 (1950) (adopting the RESTATEMENT OF TORTS section 909); *Purvis v. Prattco, Inc.*, 595 S.W.2d 103, 104 (Tex.1980) (citing the RESTATEMENT (SECOND) OF TORTS section 909, *922 which is unchanged from the original RESTATEMENT OF TORTS section 909).

A corporation is also liable if it commits gross negligence through the actions or inactions of a vice principal.²⁵ “Vice principal” encompasses: (a) corporate officers; (b) those who have authority to employ, direct, and discharge servants of the master; (c) those engaged in the performance of non-delegable or absolute duties of the master; and (d) those to whom the master has confided the management of the whole or a department or a division of the business.²⁶

The determination of whether acts are directly attributable to the corporation requires a review of all the surrounding facts and circumstances to determine whether the corporation itself is grossly negligent.²⁷ Whether the corporation’s acts can be attributed to the corporation itself, and thereby constitute corporate gross negligence, is determined by reasonable inferences the fact finder can draw from what the corporation did or failed to do and the facts existing at relevant times that contributed to a plaintiff’s alleged damages.²⁸

²⁵ See *Hammerly Oaks*, 958 S.W.2d at 389.

²⁶ *Id.*

²⁷ See *McPhearson v. Sullivan*, 463 S.W.2d 174, 176 (Tex.1971).

²⁸ See *Bowman v. Puckett*, 144 Tex. 125, 188 S.W.2d 571, 574 (1945).



Workers Compensation Cases

The Texas Workers Compensation Act shields covered employers from suits for injured workers. It does, however, provide beneficiaries of workers killed on the job with a case for exemplary damages based on the employer's gross negligence or intentional torts.²⁹ Article XVI, § 26 of the Texas Constitution provides that:

“[e]very person, corporation, or company, that may commit a homicide, through willful act, or omission, or gross neglect, shall be responsible, in exemplary damages, to the surviving husband, widow heirs of his or her body, or such of them as there may be, without regard to any criminal proceeding that may or may not be had in relation to the homicide.”

In order to resolve the conflict between this constitutional provision and the exclusive remedy provisions of the TWCA, § 408.001 of the Texas Labor Code provides:

- (a) Recovery of workers' compensation benefits is the exclusive remedy of an employee covered by workers' compensation insurance coverage or a legal beneficiary against the employer or an agent or employee of the employer for the death of or a work-related injury sustained by the employee.

²⁹ See generally *Frias v. Atlantic Richfield*, 999 S.W.2d 97, 103 (Tex.App.–Houston [14 Dist.] 1999).

- (b) This section does not prohibit the recovery of exemplary damages by the surviving spouse or heirs of the body of a deceased employee whose death was caused by the employer's gross negligence.

Claims based on § 408.001 are challenging because they require proof of aggravated misconduct that meets the malice and gross negligence standards. This evidence must also meet the clear and convincing standard and unanimous jury verdicts normally applied to other gross negligence cases.

Be careful of the requirement that links exemplary damages to the plaintiff's recovery of actual damages. While the language of Section 408.001(b) does not require actual damages to be awarded to support a recovery of exemplary damages, cases interpreting the rule have created a new challenge.³⁰ The absence of an actual damages finding robs the court of any method to determine whether there is any cap on the exemplary damages. This requires the plaintiff to introduce proof and submit to the jury evidence of actual damages even though they will not be recovered to avoid being stuck with the \$200,000 exemplary damages cap in Section 41.008(b)(2).

In *Hall v. Diamond Shamrock*, 82 S.W.3d 5 (Tex.App.–San Antonio 2005) *rev'd on other grounds*, 168 S.W.3d 164 (Tex. 2005), the trial court excluded plaintiff's evidence of actual damages in a pure gross negligence case based on § 408.001 after the defendant objected to the evidence contending that since the only recoverable damages were punitive in nature, any evidence relating to actual damages was irrelevant.³¹ In reversing the trial court's ruling, the appellate court held:

Here, the evidence of compensatory damages is relevant because the jury needs this evidence to calculate the punitive damages using the formula pursuant to

³⁰ See *Wright v. Gifford-Hill & Co.*, 725 S.W.2d 712, 714 (Tex. 1987) (held that a surviving widow who failed to secure a jury finding of actual damages under the TWCA was not precluded from recovering exemplary damages because a plaintiff in such a suit cannot recover compensatory damages.)

³¹ *Id.* at 23.

Section 41.008(b)(1). In her pleadings, [plaintiff] prayed for an award of exemplary damages as allowed by law. In order to determine what exemplary damages are allowed by law, we need to review the statute. Section 41.008(a) requires a jury to determine the amount of economic damages separately from the amount of other compensatory damages when a claimant seeks a recovery of exemplary damages. These findings are necessary because the formula in section 41.008(b) is based on those findings. Therefore, by seeking to recover an award of exemplary damages, [plaintiff] should be permitted to introduce evidence and obtain jury findings as to the amount of economic and non-economic damages.³²

This poses the plaintiff with a dilemma. Introduce evidence and secure jury findings of actual damages that they will never actually receive. Then, ask the jury to award significant exemplary damages on top of the actual damages that they just determined. Unfortunately, the jury is not told of the significance of their findings and may feel that they have amply rewarded the plaintiff with actual damages and resist significant exemplary damages.



Recent Cases

Here is an overview of recent cases involving gross negligence for 2009.

Lockett v. HB Zachry Co., 285 S.W.3d 63 (Tex. App.-Houston [1 Dist.], 2009) - This case dealt with two wrongful death cases allegedly due to occupational exposure to benzene.

³² *Id.* at 24.

Clifford Lockett and Evelyn Jackson died of acute myelogenous leukemia. The Lockett heirs sued the Pharmacia Corporation, the H.B. Zachry Company, and Union Carbide, among others, for negligence and gross negligence, alleging that exposure to benzene at the defendants' work sites caused Lockett's death. The defendants moved for summary judgment claiming there was no evidence that the decedents were ever exposed to benzene at their worksites and no evidence to support the gross negligence causes. The trial court granted summary judgment. The Court of appeals sustained the trial court's findings. In support of the decision regarding gross negligence, the court noted that the decedents had been required to use safety devices such as gloves and ventilation hoods, to minimize the effects of any exposures. Further problematic for the plaintiffs was the lack of any clear evidence that the decedents were ever actually exposed to the benzene. It was unclear in the evidence whether there was any direct exposure to benzene at all.

In re Jacobs, 2009 WL 3347486 (Tex. App.- Houston [14 Dist.], 2009) – This case discusses the pleading requirements for gross negligence and reaffirms rule that defendant's net worth information is discoverable without requiring the plaintiff to put on proof that supports the gross negligence claims. Court held that pleadings setting out knowing violations constituted enough to give defendant "fair notice" of the claims against them and allow net worth discovery to proceed. A concurring opinion by Justice Kent Sullivan raises arguments that Texas' decades old net worth discovery rules need to be revisited. Justice Sullivan noted changes to the laws stemming from tort reform that have made it harder for litigants to recover punitive damages. He said "Trial courts have the necessary management tools to control the sequence, timing, and scope of discovery to minimize burden, maximize efficiency, and protect privacy rights. Still, we must acknowledge that there are literally hundreds of Texas trial-court judges-spread over

254 counties-who may preside over cases with claims for exemplary damages and, of necessity, disputes involving net-worth discovery. They each have different backgrounds, different approaches, and different dockets. Those dynamics are likely to produce a highly unpredictable and idiosyncratic approach to the management of these issues across the state-and history shows us that these are issues that regularly recur. I believe parties to litigation in Texas are entitled to greater clarity and predictability from our courts. Accordingly, I would urge that *Lunsford* be revisited and updated.”

Marin v. IESI TX Corp., 2009 WL 3321267 (Tex. App.- Houston [1 Dist.], 2009) - This case dealt with sufficiency of evidence to support jury verdict finding gross negligence. Case involved allegations of breach of fiduciary, fraud and forgery in a case against an employee of a waste management company. The court held there was sufficient evidence to demonstrate the employee had sent forged letters concerning balances owed to her employer and that those letters were sufficient to support the jury’s verdict.

City of Plano v. Homoky, 2009 WL 2596194 (Tex. App.- Dallas, 2009) – This case involved a golfer who tripped on a board inside a golf course club house. The golfer sued for injuries and alleged gross negligence for leaving the board inside the club house walkway. The Court of Appeals examined whether the pleadings were sufficient to meet the requirements for gross negligence. It concluded that the amended petition which alleged : (1) a long piece of wood was negligently placed on the clubhouse floor across a walking pathway for decorative purposes; (2) the placement of that wood created an unreasonably dangerous condition and caused Homoky to trip and fall, sustaining serious injuries; (3) the City knew about or should have known about the dangerous condition of the premises; (4) the condition of the premises created an unreasonable risk of harm; (5) the City violated several state building codes,

ordinances, and guidelines relating to means of ingress and egress in its placement of the wood on the floor; and (6) the City failed to exercise ordinary care in reducing or eliminating the dangerous condition, was not sufficient to meet the gross negligence standards.

Another issue in this case was whether the golfer was engaged in a recreational activity at the time of the fall. The plaintiff argued that the golf game was over and that she was inside the clubhouse to get something to eat, to avoid burdens created if the activity was deemed recreational. The Court disagreed and held that she was still engaged in the activity of golfing while inside the clubhouse.

Fath v. CSFB 1999-C1 Rockhaven Place Ltd. Partnership, 2009 WL 2274092 (Tex. App.- Dallas, 2009). – A business dispute case related to failure to maintain an apartment complex during a renovation. Suit alleged occupier of the complex was grossly negligent for failing to keep occupants in the property during the renovation and for failing to protect the property. Court reviewed statements from real estate experts indicating that it was “grossly below” industry standards to abandon the property during the renovation effort. Court held that this was sufficient to establish evidence to support gross negligence claim and jury verdict.

Dolan v. Dolan, 2009 WL 1688532 (Tex. App.- Houston [1 Dist.], 2009) - A breach of fiduciary duty and gross negligence case brought by beneficiary of a trust against the trustee. Suit claimed that the trustee was grossly negligent in handling and investing trust funds. Jury verdict against the trustee and court of appeals evaluated the sufficiency of the evidence to support the verdict.

Obstetrical and Gynecological Associates, P.A. v. McCoy, (Tex. App.- Houston [14 Dist.], 2009) – This medical malpractice case alleged the acts of an obstetricians and their employer constituted gross negligence. The court considered whether the Husband’s claim

against obstetricians' employer under theory of respondeat superior and statutory liability under the Professional Association Act with regard to alleged medical negligence of obstetricians in the care and treatment of his wife during birth of child constituted a direct-liability claim pursuant to the Chapter 74, requiring a separate expert report outlining the negligence of employer. The defendant argued that the expert report that criticized the individual obstetricians was insufficient to describe the negligence conduct of the corporation. The Court held that when liability is alleged against a professional association based solely on the actions of its principals, the question of the professional association's liability is based on a legal principle, not a medical standard of care, and so no expert report is required.

Benish v. Grottie, 281 S.W.3d 184 (Tex. App.- Fort Worth, 2009) – This medical negligence case involved the willful and wanton standard of proof required for emergency room cases. The defendants sought to dismiss claiming that the plaintiff's expert witness reports were insufficient because they did not apply the gross negligence standard of proof. The Court of appeals declined to require this as the standard. It noted:

Although Dr. Dingler and Nurse Hopson urge us to equate willful and wanton negligence with gross negligence, we decline to do so, and we do not purport here to construe the term "willful and wanton negligence" as used in section 74.153; it appears that conflicting definitions may exist. *Compare St. Paul Surplus Lines*, 974 S.W.2d at 53 (setting forth culpability continuum), *with Dunlap v. Young*, 187 S.W.3d 828, 836 (Tex.App.-Texarkana 2006, no pet.) (equating willful and wanton negligence with gross negligence), *and State v. Crawford*, 262 S.W.3d 532, 541 (Tex.App.-Austin 2008, no pet.) (explaining that "[t]he term 'willful' [sic] in a statute is 'a word of many meanings, its construction often being influenced by its context' " and quoting *Paddock v. Siemoneit*, 147 Tex. 571, 218 S.W.2d 428 (1949), which quotes *Spies v. United States*, 317 U.S. 492, 497, 63 S.Ct. 364, 367, 87 L.Ed. 418 (1943)). We hold only that, whatever definition of willful and wanton is utilized, section 74.153 requires proof at trial of a *mental state* or *state of mind* beyond mere negligence of the physician or health care provider at the time of the physician or health care provider's deviation from the medical standard of care.

Matbon, Inc. v. Gries, 288 S.W.3d 471 (Tex. App.- Eastland, 2009) – This case dealt with a crash between a truck and a car. The evidence showed the truck driver veered into the oncoming traffic when he stopped looking at the road to reach for a box of crackers. The jury awarded exemplary damages and found the driver grossly negligent. The Court of appeals reversed the jury verdict. While there was evidence that the driver’s decision to divert his attention from the road to get some crackers was below the industry standard, the Court of appeals focused on the fact that he did not intend to cause a crash.

Appellees proffered a great deal of evidence in support of the objective element of gross negligence. Trooper Beverage testified that Hutton’s truck-and-trailer-combination weighed over 72,000 pounds and that it constituted an inherently dangerous vehicle while traveling at seventy miles an hour down the highway. He additionally testified that Hutton’s act of taking his eyes off the road to retrieve a package of crackers constituted a gross deviation from the appropriate standard of care. Appellees’ accident expert, Larry Dwayne Self, testified that Hutton’s actions involved an extreme degree of risk because they caused him to veer into oncoming traffic. Self also pointed out that the weight and speed of Hutton’s truck produced almost “12 million foot-pounds of energy” while in motion that would require 300 feet of braking to stop the vehicle. Although Trooper Beverage and Self testified that Hutton’s conduct involved an extreme degree of risk considering the weight and speed of his vehicle, their testimony was only evidence that there was an extreme risk of a heavy truck not being able to stop in time and hitting someone.

There is no question that Hutton’s act of reaching for a package of crackers in his cab constituted a negligent act that caused him to veer into the oncoming lane of traffic. The critical inquiry under the objective component of gross negligence is whether this negligent conduct created the likelihood of serious injury to appellees. The legislature has mandated that we evaluate the risk from the viewpoint of the defendant at the time the events occurred without viewing the matter in hindsight. There are three factors that weigh significantly in this analysis. The first factor is the remote position of appellees’ vehicle in relation to Hutton’s truck. Appellees were traveling behind Willhite who was following Hutton. Secondly, Hutton’s truck did not make contact with either Christian’s vehicle or appellees’ vehicle. Lastly, Hutton did not force Christian off the road; Trooper Beverage testified that Christian’s vehicle did not leave the paved portion of the road. These facts constitute significant, contrary evidence that reasonable jurors could not have disregarded. We conclude that no reasonable fact finder could have formed a firm belief or conviction that, from the prospective viewpoint of Hutton, there was an extreme degree of risk of serious injury to

motorists following behind him when his action did not involve a collision of his vehicle with another vehicle or force another vehicle (the Christian vehicle) off the roadway. **Hutton's actions were no doubt negligent and blatantly careless, but they simply did not as a matter of law rise to the level of extreme risk necessary to establish gross negligence.**

It should also be noted that the defendant also complained about the fact that the Judge apparently wept in front of the jury during the plaintiff's closing arguments. The appeals court refused to consider the issue because the defendant failed to object to the actions during trial.

City of San Antonio v. Texas Mut. Ins. Co., 2009 WL 89700 (Tex. App.- San Antonio, 2009) – This claim concerns the condition of an approximately six-foot-wide grassy strip of land located between a sidewalk at Central Catholic High School and the curb abutting Dallas Street in San Antonio, Texas. The City owns a right-of-way on the parkway and has a storm drain pipe below it.

In July 2003, Fernando Hernandez, a high school employee acting in the course and scope of his employment, drove a Bobcat tractor onto the parkway. Hernandez was injured when he and the Bobcat “fell into the hole that was created when the earth beneath the Bobcat collapsed.” Hernandez made a workers' compensation claim that was paid by the high school's workers' compensation carrier, Texas Mutual Insurance Company (“TMIC”). TMIC then filed suit against the City as Hernandez's subrogee, claiming the City was responsible for the injuries. Hernandez intervened seeking damages exceeding those paid by TMIC. The City filed a plea to the jurisdiction on the ground that it had not waived governmental immunity.

The Court held that the City could not be held liable for gross negligence because even though it was aware of the risk of injury due to the sinkhole, it did not know that a sinkhole existed. There was evidence that a prior sink hole had occurred in the same spot, that the conditions that lead to the first sink hole were still present and that their employees believed

there would be another sink hole eighteen months before the incident. Despite this knowledge, the Court held they City did not have a subjective awareness of the risk.

Chief Justice Catherine Stone dissented.

“As the majority notes, when the City did its “patch job” on the drain that caused the first sinkhole, David Ibanez, the high school’s chief of maintenance, informed the City workers that the entire pipe needed to be replaced because it was collapsed in other areas than the area that was being patched. Ibanez also testified, “And knowing about [the first] sinkhole, yes, I knew there was going to be another sinkhole because of the amount of dirt that was missing from around the building. I finally concluded that this can’t be the glory hole, this is just one of the holes.” Ibanez also testified that he told the City workers, “That pipe is broken all the way through. Dirt is going-or *there is* another big cavern down there, and all it takes is for something to be above it, walking on it for it to cave in.” (emphasis added in original.)

The majority concludes that the City was warned only that a second sinkhole was likely; however, I believe a jury could find from Ibanez’s testimony that he warned the City that a second sinkhole actually existed.

