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Eirven file

Gregory D. Winfree, Esq.
Union Carbide Law Dept. - E3-282
39 Old Ridgebury Road
Danbury, CT 06817-0001

Re: Transportation Insurance Company v. Moriel

Dear Greg:

Enclosed is a copy of a casenote from the Tort & Insurance Law Journal regarding substantive and procedural controls by the Texas Supreme Court on punitive damages awards.

Sincerely,

Ted Theophilos (SR)

Theodore J. Theophilos

TJT/sr
Enclosure
cc: Scott Solberg, Esq.

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FALL 1994

Tort & Insurance Law Journal

In This Issue:

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CASENOTE

TRANSPORTATION INSURANCE COMPANY v. MORIEL: THE TEXAS SUPREME COURT SETS SUBSTANTIVE AND PROCEDURAL CONTROLS ON PUNITIVE DAMAGES AWARDS

Richard C. Mason

In its June 8, 1994, decision in *Transportation Insurance Co. v. Moriel*[1] the Texas Supreme Court held that punitive damages are not justified in bad faith cases unless the insurer's actions threatened its insured with extraordinary harm, such as "death, grievous physical injury, or financial ruin."[2] The court also required trial courts to bifurcate punitive damages trials to withhold from the jury evidence of a defendant's net worth until the liability phase of the trial has concluded.[3]

Moriel had been hotly anticipated by both sides of the tort reform battle, and the case attracted national attention, including that of the U.S. Chamber of Commerce, which targeted the case as a "vehicle" for changing Texas punitive damages law.[4] A representative of CNA Insurance Company described the outcome as "spectacular,"[5] but the insured's attorney complained, "[t]his is the result of all the insurance companies trying to do away with people's right to be able to punish them."[6]

In part, *Moriel* owes its pedigree to a trio of decisions by the U.S. Supreme Court recognizing that, absent appropriate procedural safeguards, punitive damage awards threaten defendants' due process rights. Despite these Supreme Court pronouncements, however, insurance companies would not be celebrating *Moriel* today

1. 879 S.W.2d 10 (Tex. 1994).
2. *Id.* at 24.
3. *Id.* at 29-30.
4. George Taylor, *Tougher Test Set for Punitives by Texas Supreme Court*, NAT'L L.J., Jan. 21, 1994, at 3.
5. Janet Elliot, *Justices Unite Against Punitives; Moriel's New Rules; Bifurcated Trials, More Appellate Scrutiny*, TEX. LAW, Feb. 27, 1994, at 1.
6. *Id.*

Richard C. Mason is an associate with Palmer, Biezup & Henderson in Philadelphia.

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were it not for events that have transformed the Texas Supreme Court in the last five years.

I. PRECURSORS OF CHANGE

A. *The Rise of the Phillips Court*

In the late 1980s, Texas was perceived to be a magnet for personal injury attorneys and plaintiffs.[7] The Texas Supreme Court had handed down a series of pro-plaintiff decisions, beginning in 1981 with ***Burk Royalty Co. v. Walls***,[8] in which the court overruled a line of decisions allowing a defendant to escape liability for punitive damages if it had exercised "some care" with respect to the plaintiff.[9] In 1985 the court handed down ***Williams v. Steves Industries, Inc.***,[10] holding that plaintiffs could prove gross negligence by evidence of "surrounding circumstances" tending to show that a "reasonable person would have realized that his conduct created an extreme degree of risk to the safety of others."[11] Perhaps the proverbial straw was the court's remarkable conclusion in ***Dow v. Castro Alfaro***[12] that the 1913 Texas Legislature abolished the doctrine of forum non conveniens, which in the intervening seventy-eight years had allowed Texas judges to dismiss lawsuits having little or no connection with Texas.[13] Defense attorneys and their clients complained of increasing numbers of punitive damage awards based on findings of mere negligence.[14]

The Texas Medical Association and insurance and business lobbies ultimately awoke to the concerted efforts of the Texas Trial Lawyers Association and began to participate seriously in funding and promoting candidates for the Texas Supreme Court.[15] Texans elected Tom Phillips as Chief Justice in 1988, and he became the

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7. In Dow Chem. Co. v. Castro Alfaro, 786 S.W.2d 674 (Tex. 1990), Justice Gonzalez complained that a Texas lawyer had flown to Scotland in 1988 and held a press conference regarding an oil rig disaster there. The lawyer had written the victims or their families, advising them that awards in Texas would be "much higher than elsewhere." *Id.* at 690 (Gonzalez, J., concurring).

8. 616 S.W.2d 911 (Tex. 1981).

9. *Id.* at 922 (overruling Sheffield Div., Armco Steel Corp. v. Jones, 376 S.W.2d 825 (Tex. 1964); Missouri Valley, Inc. v. Putman, 604 S.W.2d 545 (Tex. Civ. App. 1980); Delgadillo v. Tex-Con Util. Contractors, Inc., 526 S.W.2d 208 (Tex. Civ. App. 1975); Thomas v. T.C. Bateson Co., 437 S.W.2d 386 (Tex. Civ. App. 1969); Stephens v. Dunn, 417 S.W.2d 608 (Tex. Civ. App. 1967); LeJeure v. Gulf States Utils. Co., 410 S.W.2d 44 (Tex. Civ. App. 1966); Lloyd Elec. Co. v. DeHovos, 409 S.W.2d 893 (Tex. Civ. App. 1966); and Armstrong v. Texas Power & Light, 399 S.W.2d 922 (Tex. Civ. App. 1966)).

10. 699 S.W.2d 570 (Tex. 1985).

11. *Id.* at 573-74.

12. 786 S.W.2d 674 (Tex. 1990).

13. *Id.* at 691 (Gonzalez, J., dissenting). In 1993 the Texas Legislature responded to Justice Gonzalez's concerns and statutorily "overruled" much of the *Castro Alfaro* holding. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 71.051 (West Supp. 1994).

14. Elliot, *supra* note 5, at 1.

15. Walter Borges, *Mauzy Eclipsed, but New Stars Come Out*, TEX. LAW., Oct. 26, 1992, at 2.

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first Republican to sit as Chief Justice of the Texas Supreme Court.[16] The court is said to have undertaken a stricter interpretation of Texas law since his election.[17] In the 1992 elections conservative Craig Enoch decisively defeated Oscar Mauzy, a former plaintiffs' attorney. By 1994, the Phillips Court had become a blend of conservatives and, with the exception of former legislator Lloyd Doggett, moderate liberals, such as Rose Spector. Justice Jack Hightower, a Democrat and former member of the Texas Legislature, was endorsed in 1992 by the Independent Insurance Agents of Texas.[18] Justices Hecht and Gonzalez have earned reputations as strict constructionists.[19] In 1990 the Texas Medical Association, joined by other business and trade groups, successfully backed John Cornyn and Bob Gammage for the Court.[20] Cornyn, a conservative, and Gammage, a moderate, replaced Justice C.L. Ray, one of the Court's foremost liberals, and Justice Franklin Spears, the author of *Burk Royalty*.[21]

B. *The U.S. Supreme Court Recognizes Due Process Concerns*

The *Moriel* court was guided by a trio of decisions issued by the United States Supreme Court between 1989 and 1993. In 1989, the U.S. Supreme Court decided *Browning-Ferris Industries v. Kelco Disposal, Inc.*,[22] in which the Court first considered whether the Due Process Clause of the Fourteenth Amendment imposes constraints on awards of punitive damages.[23] The Court acknowledged the existence of "some authority in our opinions for the view that the Due Process Clause places outer limits on the size of a civil damage award made pursuant to a statutory scheme,"[24] but held that the petitioners had waived their due process argument by not raising it until after they had petitioned for certiorari.[25]

The due process issue raised in *Browning-Ferris* was considered again in 1991 in *Pacific Mutual Life Insurance Co. v. Haslip*.[26] The hopes of the insurance industry

16. UPI Texas, Newsfeature, *Super Collider No. 1 Texas News Story in 1988* (Dec. 21, 1988).

17. Laura Tuma, *Insurance Issues at Stake in Texas Supreme Court Race*, TEX. LAW., Oct. 26, 1992, at 2.

18. *Id.*

19. Janet Elliot, *I Advertise, Therefore I Win; Voters Show They Will Split Tickets down the Ballot*, TEX. LAW., Nov. 12, 1990, at 10.

20. *Id.* The TMA also backed Chief Justice Phillips in his winning campaign. *Id.*

21. *Id.*

22. 109 S. Ct. 2909 (1989).

23. Kelco had sued Browning-Ferris Industries (BFI) for antitrust violations and for interfering with Kelco's contractual relations in violation of Vermont tort law. *Id.* at 2911. A jury found BFI liable on both counts and awarded Kelco $51,146 in compensatory damages and $6,000,000 in punitive damages. *Id.* The Court, after an extensive "original intent" analysis, rejected BFI's primary argument—that the award violated the "Excessive Fines" Clause of the Eighth Amendment. *Id.* at 2915-20.

24. *Id.* at 2921 (citing St. Louis, I.M. & S.R. Co. v. Williams, 251 U.S. 63, 66-67 (1919)).

25. *Id.*

26. 111 S. Ct. 1032 (1991). In *Haslip* Pacific Mutual's agent received premium payments in the form of payroll deductions, most of which he misappropriated. *Id.* at 1036. The agent had been authorized to receive the payments on behalf of Union Fidelity Life Insurance Company, which provided life insurance under a municipal group health plan arranged by Pacific Mutual. Because it had not received its premium payments, Union Fidelity cancelled its policies and issued cancellation notices to

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were largely frustrated when the Court held in *Haslip* that a large punitive damage verdict was constitutional because Alabama's trial procedures provided adequate due process safeguards.[27]

Another challenge fell short in 1993, when in *TXO Production Corp. v. Alliance Resources Corp.*[28] the Court found a $10,000,000 award constitutional even though it was accompanied by only $19,000 in compensatory damages. The punitive damage award in *TXO* was objectively justifiable because it was predicated on a pattern of "fraud, trickery and deceit."[29]

Although the Supreme Court rejected the defendants' arguments in each of these cases, in *Haslip* and *TXO* the Court carefully scrutinized the state procedural mechanisms.[30] In both cases the Court reviewed the applicable procedural standards, such as jury instructions and trial court review of the defendant's new trial motion, and concluded that the defendants had received due process.[31] Both decisions contained implicit warnings that some state procedures may be so inadequate as to violate the U.S. Constitution.[32]

When the Texas Supreme Court decided *Moriel*, it did so in light of these recent, repeated U.S. Supreme Court pronouncements regarding due process concerns in punitive damages cases.

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the Pacific Mutual agent, who neglected to forward the notices to the formerly insured municipal employees. *Id.*

Haslip was a municipal employee who was hospitalized and incurred hospital and physician's charges. Because Union Fidelity had cancelled her coverage, the hospital required Haslip to pay her bill upon discharge. Her physician ultimately obtained a judgment against her, which had a predictable effect on her credit rating. *Id.* After trial Haslip obtained a general verdict of $1,040,000, roughly $840,000 of which represented punitive damages. *Id.* at 1037 & n.2.

27. *Id.* at 1043-46.

28. 113 S. Ct. 2711 (1993).

29. *Id.* at 2723-24.

On June 24, 1994, the U.S. Supreme Court decided that an Oregon law restricting judicial review of punitive damage awards violated the Due Process Clause. Honda Motor Co. v. Oberg, 114 S. Ct. 2331, 2341 (1994). The state law in question, an amendment to the Oregon Constitution, prohibited judicial review of the amount of punitive damages awarded " 'unless the court can affirmatively say there is no evidence to support the verdict.' " *Id.* at 2338 n.5 (quoting OR. CONST art. VII, § 3). The Court held that the law effectively denied judicial review of the size of punitive damage awards, providing "no assurance that those whose conduct is sanctionable by punitive damages are not subjected to punitive damages of arbitrary amounts." *Id.* at 2339.

30. *See TXO*, 113 S. Ct. at 2723-24; *Haslip*, 109 S. Ct. at 1043-46.

31. *TXO*, 113 S. Ct. at 2724; *Haslip*, 111 S. Ct. at 1046. In *TXO* the Court declined to address TXO's jury instruction challenge, but agreed with TXO "that the emphasis on the wealth of the wrongdoer increased the risk that the award may have been influenced by prejudice against large corporations." 113 S. Ct. at 2723.

32. *See TXO*, 113 S. Ct. at 2723 ("We agree with TXO that the emphasis on the wealth of the wrongdoer increased the risk that the award may have been influenced by prejudice against large corporations . . . ."); *Haslip*, 111 S. Ct. at 1046 ("While the monetary comparisons are wide and, indeed, may be close to the line, the award here did not lack objective criteria. We conclude, after careful consideration, that in this case it does not cross the line into the area of constitutional impropriety.").

II. *MORIEL*: FROM TI
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34. 879 S.W.2d at 12. The co
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35. He was joined by Justice
36. 879 S.W.2d at 12.
37. *Id.*
38. *Id.*
39. *Id.*

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II. *MORIEL*: FROM THE "BACKWATERS" TO THE "FOREFRONT" OF PUNITIVE DAMAGES REFORM[33]

In *Moriel* the Texas Supreme Court resolved two substantive legal issues: (1) how to apply the definition of gross negligence under Texas state law to determine whether punitive damages may be awarded, and (2) what constitutes sufficient evidence of gross negligence to support an award of punitive damages.[34] Justice Cornyn delivered the majority opinion.[35] The court commenced by explaining that its opinion was intended generally to "clarify" the standard for imposing punitive damages for bad faith insurance practices.[36] The underlying facts in *Moriel* involved a genuine injury, workers' compensation claims embracing rather unusual medical treatment, and the claimant's two-year quest for reimbursement from the insurer.

A. *The Insured's Very Personal Injury and His Pursuit of Coverage*

Juan Moriel was an employee of a building materials company when a stack of counter tops fell on him, causing him to suffer three broken ribs, a broken wrist, and a fractured pelvis. Moriel was hospitalized for twelve days. His employer's workers' compensation carrier, Transportation Insurance Company (Transportation), paid his hospitalization costs.[37] Complications arose when, shortly after leaving the hospital, Moriel began experiencing "periodic" loss of movement in one leg.[38] It was not until he attempted to resume sexual relations with his wife six weeks after the accident, however, that Moriel discovered he was impotent. A plethora of medical examinations and opinions followed, beginning with Moriel's orthopedist, who referred him to Dr. Abel Garduno, a urologist. Dr. Garduno sent Moriel to Pathlab, an El Paso institution, for tests, but the tests revealed no physical cause for Moriel's impotence. Hormones prescribed by Dr. Garduno had no effect. Searching for an answer, Dr. Garduno referred Moriel to Dr. Diaz at the "Sun Towers Sleep Disorder Center" for further testing. Moriel underwent the tests, but the equipment failed and nothing could be made of the test results. The same equipment failure precluded further testing for months. Eventually, on the advice of Dr. Diaz, Moriel underwent testing at the Baylor College of Medical Sleep Disorders and Research Center in Houston.[39]

33. *See* Taylor, *supra* note 4, at 3 (quoting Stephen A. Bokat, Vice President and General Counsel of the U.S. Chamber of Commerce).

34. 879 S.W.2d at 12. The court declined Transportation's invitation to review the constitutionality of the punitive damages verdict. *Id.* The court noted that the U.S. Supreme Court had considered the issue of due process in punitive damages cases in *Browning-Ferris*, *Haslip*, and *TXO*, but had "given lower courts no bright-line guidance." *Id.* n.1. The court decided that Moriel was not entitled to punitive damages, which made the question of their constitutionality moot. *Id.* at 13.

35. He was joined by Justices Phillips, Gonzalez, Hightower, Hecht, Enoch, and Spector.

36. 879 S.W.2d at 12.

37. *Id.*

38. *Id.*

39. *Id.*

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On August 9, 1986, Les Huss, a claims adjuster for Crawford & Company, an independent adjusting company employed by Transportation, entered the picture.[40] Moriel wanted Transportation to pay for his tests at the Baylor Sleep Disorders Center. Moriel testified that Huss demanded he obtain an authorization letter from his orthopedist, the doctor from whom he had first sought treatment. Moriel testified that he sent Huss the requested letter within three days, but Huss then demanded a letter from Moriel's urologist, Dr. Garduno. After Moriel provided that letter, Huss advised him that the company also required a letter from Dr. Diaz. Moriel testified that he complied with the further request and Huss then advised he could not authorize the Baylor tests without approval from his superiors at Transportation's Dallas office.[41]

By September 10, 1986, Moriel had retained an attorney.[42] Moriel's attorney accepted Transportation's proposal to pay for the Baylor tests, but Transportation refused to pay for his travel expenses to Houston. According to Moriel, Transportation's delay in approving the tests held up the tests for ten days. The tests at Baylor revealed that his impotence could be attributed at least in part to physical causes. The Baylor report recommended, however, that Moriel obtain counseling for "emotional" problems. Moriel underwent therapy until April 1987 for problems characterized by his therapist as having physical and mental components. He ultimately overcame the "mental component" of his impotence, which allowed him to resume sexual relations with his wife.[43]

When Moriel received a $3,155 bill for the Baylor test he presented it to Transportation Insurance Company.[44] Transportation denied payment on the ground that no medical report had accompanied the Baylor bill, although Moriel testified he personally delivered the Baylor report to Huss shortly after the tests were completed. When Transportation eventually received the report, it denied payment on the ground that Moriel's impotence was unrelated to his on-the-job injury. Transportation did not pay for the Baylor test until two years after Moriel submitted the bill. For more than one year Transportation declined to pay $2,075 for Moriel's therapist's services on the ground it had not received the therapist's report. Dr. Perez, however, testified he had submitted his detailed report promptly at the conclusion of Moriel's treatment.[45] Transportation also delayed paying a bill for $382.25 for follow-up outpatient tests, responding

40. *Id.* The court of appeals noted that the adjuster had visited Moriel in the hospital to arrange compensation for his lost wages. Transportation Ins. Co. v. Moriel, 814 S.W.2d 144, 147 (Tex. Civ. App. 1991) ("Moriel I"), *rev'd*, 879 S.W.2d 10 (Tex. 1994).

41. *Id.* 879 S.W.2d at 13.

42. *Id.*

43. *Id.* at 13-14.

44. *Id.*

45. *Id.* at 14. Transportation did not pay a $238.20 Pathlab bill until Moriel filed his lawsuit, but Pathlab had mailed the bill to the wrong address, and Transportation did not receive the bill until after Moriel filed suit. *Id.*

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B. *The Court's Clarification*

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46. *Id.* Under the Texas wo
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at 25 n.18.
47. Under Texas law, an "a
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48. 879 S.W.2d at 12.
49. *Id.* at 16
50. *Id.* (citing Cavnar v. Qua
51. *Id.* (quoting W. PAGE K
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52. *Id.* at 16 (opinion of the c
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53. *Id.*
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only when the hospital that conducted the tests filed an (apparently illegal) collection action against Moriel.[46]

While he was being tested and treated, Moriel filed a workers' compensation claim against Transportation and obtained a verdict of slightly more than $30,000. After Transportation appealed, Moriel counterclaimed for bad faith claims practices and additional compensation.[47] In July 1988, Moriel and Transportation settled the workers' compensation claim, leaving the bad faith claim to be litigated in the trial court. After trial of the bad faith claim, the jury found Transportation liable to Moriel for $1,000 in actual damages, $100,000 in damages for "mental anguish," and $1,000,000 in punitive damages. The jury found that Transportation should have known it had no reasonable basis to delay payment and that it had acted with "heedless and reckless disregard" of Moriel's rights. The Texas Court of Appeals affirmed the verdict.[48]

B. *The Court's Clarification of the Punitive Damages Standard*

The Texas Supreme Court prefaced its explication of the punitive damages standard with a brief discussion of the "Exceptional Nature of Punitive Damages."[49] Justice Cornyn's opinion on punitive damages begins by pointing out that the standard remedy in civil cases is compensatory damages, which are deemed sufficient to make the plaintiff "whole."[50] In contrast, punitive damages are a " 'rather anomalous' " consequence of civil law borrowing from the field of criminal law.[51] The court noted that one of its first opinions addressing punitive damages emphasized that punitive damages are a child of criminal jurisprudence and are merited only by conduct that is "morally criminal."[52] Punitive damages in Texas are reserved for defendants guilty of "outrageous, malicious, or otherwise morally culpable conduct," as provided in the Texas Civil Practice and Remedies Code.[53] Furthermore, the court explained that, unlike compensatory damages, punitive damages proceeds become "a private windfall," demonstrated in part by the fact the proceeds are

46. *Id.* Under the Texas workers' compensation laws, the hospital should have sought recourse against Transportation, not against Moriel, who was only secondarily liable for health care costs. *Id.* at 25 n.18.

47. Under Texas law, an "appeal" of a decision by the Industrial Accident Board resulted in a jury trial "to set aside [the Board's] final ruling and decision." TEX. REV. CIV. STAT. ANN. art. 8307a (Repealed 1989).

48. 879 S.W.2d at 12.

49. *Id.* at 16.

50. *Id.* (citing Cavnar v. Quality Control Parking, Inc., 696 S.W.2d 549, 552 (Tex. 1985)).

51. *Id.* (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 82 (5th Ed. 1984)). Justice Doggett pointed out that punitive damages have been in existence " 'since the Code of Hammarabi in 2000 B.C.' " *Id.* at 36 (Doggett, J., concurring) (quoting LINDA L. SCHLUETER & KENNETH R. REDDEN, PUNITIVE DAMAGES § 1.0, at 3 (2d ed. 1989)).

52. *Id.* at 16 (opinion of the court) (citing Southern Cotton Press & Mfg. Co. v. Bradley, 52 Tex. 587, 600-01 (1880)).

53. *Id.*

As part of the 1987 Texas Omnibus Tort Reform Act, the Texas Legislature modified *Burk Royalty* by providing a definition of "gross negligence" which emphasizes that the evidence must "establish" the defendant's "actual" conscious indifference, as opposed to a "mere belief" that conscious indifference might be attributable to a "hypothetical reasonable defendant." TEX. CIV. PRAC. & REM. CODE ANN.

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taxable under federal law as "income," whereas compensatory damages are not.[54] Consequently, "[t]he legal justification for punitive damages is similar to that for criminal punishment, and like criminal punishment, punitive damages require appropriate substantive and procedural safeguards to minimize the risk of unjust punishment."[55]

1. Bad Faith Revisited and Distinguished

Having prefaced the discussion, the court turned to an analysis of the nature of bad faith insurance disputes. Texas insurance law, the court stated, has three "tiers" of insurance coverage disputes, each providing for a different kind of damages: (1) benefit of bargain damages for breach of contract; (2) compensatory damages for the tort of bad faith; and (3) punitive damages for intentional, malicious, fraudulent, or grossly negligent conduct.[56]

The court's concern was that failure to preserve distinct boundaries between these bases of recovery could result in arbitrary verdicts.[57] Neither "mental anguish"

§ 41.001(5) (West Supp. 1994). The new law further provides that exemplary damages may be awarded only if the claimant proves "fraud," "malice," or "gross negligence." *Id.* § 41.003. The amount of exemplary damages recoverable is limited to four times actual damages or $200,000, whichever is greater. *Id.* § 41.007. The cap does not apply, however, to exemplary damages accompanying an intentional tort or a finding of "malice." *Id.* § 41.008.

The *Moriel* suit was filed prior to the effective date of the Act. The court stated: "Because the Tort Reform Act codified the common law definition and made no change affecting the basic elements of gross negligence . . . the language defining gross negligence to be applied in a particular case should not turn on the applicability of the Act." *Moriel*, 879 S.W.2d at 20.

54. 879 S.W.2d at 17 n.7 (citing *Haslip*, 111 S. Ct. at 1045). " 'The impact of such a windfall recovery is likely to be both unpredictable and, at times, substantial.' " *Haslip*, 111 S. Ct. at 1040 (quoting Newport v. Fact Concerts, Inc., 453 U.S. 247, 270-71 (1981)).

55. 879 S.W.2d at 16-17. Justice Doggett criticized the majority for regarding Texas civil courts "solely as forums for compensation." *Id.* at 38 (Doggett, J., concurring). Justice Doggett went on to suggest that the majority's view that punitive damages are a "windfall" and cause "overdeterrence" betrayed its affinity for Judge Richard Posner's law and economics school of thought. *Id.* (citing RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 147-52, 176-77, 191-95 (3d ed. 1986)). As evidence that this view had been discredited by the courts, Justice Doggett referred to the California Court of Appeals opinion in Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348 (Ct. App. 1981) (courts "explicitly reject the economic view that the optimal level of violations is greater than zero."). 879 S.W.2d at 38 (Doggett, J., concurring). According to Justice Doggett, the danger is not "overdeterrence," but the risk that "some may think it cheaper to pay damages or a forfeiture than to change a business practice." *Id.* (citing Sturm, Ruger & Co. v. Day, 594 P.2d 38, 47 (Alaska 1979), and Wangen v. Ford Motor Co., 294 N.W.2d 437 (Wis. 1980)). In *Sturm, Ruger* and *Wangen* there was direct evidence of knowledge of the likelihood of serious harm. *Sturm, Ruger*, 594 P.2d at 47 ("[T]op officials at Sturm, Ruger knew that the safety and loading notches of their single action revolver presented a danger of accidental discharge . . . ."); *Wangen*, 294 N.W.2d at 440 ("Ford 'knew' that the fuel tanks on [plaintiff's car were] dangerously defective . . . .").

56. 879 S.W.2d at 17.

57. *Id.* (citing Lyons v. Millers Casualty Ins. Co., 866 S.W.2d 597, 598-99 (Tex. 1993)). In *Lyons* the court, in an opinion by Justice Cornyn, held that an insured must offer at least a "scintilla" of evidence of bad faith. 866 S.W.2d at 601 n.3. The insurer in *Lyons* had relied on two expert reports in concluding that structural damage plaintiff claimed had been caused by a windstorm actually had resulted from "settling," a cause of loss excluded under the policy. *Id.* at 599-600. The court affirmed the lower court's decision that the insured had offered "no evidence" on the critical bad faith issue—"the reasonableness of the insurer's conduct in rejecting the claim." *Id.* at 601.

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59. *Id.*

60. *Id.* at 17-18 (citing *Lyons*, 86
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62. 879 S.W.2d at 18.

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damages nor exemplary damages should ordinarily accompany an insurer's nonpayment of a covered claim.[58] Exemplary damages are not permitted unless the insurance company commits a "bad faith" tort in addition to being wrong about coverage.[59] Moreover, an insurer who simply misconstrues the facts or takes an erroneous legal position on proper policy interpretation does not act in "bad faith."[60] Bad faith requires proof contradicting the insurer's evidence that it had a reasonable basis for denying or delaying payment of the claim.[61]

That an insurer has acted in bad faith, however, does not mean the insurer is guilty of conduct worthy of punishment.[62] The remedy for bad faith conduct is

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Justices Doggett, Gammage, and Hightower dissented, arguing that the court's review of the evidence violated the Texas Constitution, which bars the supreme court from deciding the "sufficiency" of the facts. *Id.* at 602 (Doggett, J., dissenting) (citing Coulson v. Lake LBJ Municipality Util. Dist., 781 S.W.2d 594, 597 (Tex. 1989)).

58. 879 S.W.2d at 17 (citing Dean v. Dean, 837 F.2d 1267 (5th Cir. 1988) (declining to extend Texas rule to allow mental anguish damages in contract action), and Jim Walter Homes, Inc. v. Reed, 711 S.W.2d 617 (Tex. 1986) ("breach of contract cannot support recovery of exemplary damages"))

59. *Id.*

60. *Id.* at 17-18 (citing *Lyons*, 866 S.W.2d at 598-99, and National Union Fire Ins. Co. v. Dominguez, 873 S.W.2d 373, 376-77 (Tex. 1994)). In *Dominguez* the court held that a letter from the insured's doctor to his attorney stating that his injury was work-related amounted to only a "scintilla" of evidence that the workers' compensation carrier had denied the claim in bad faith. 873 S.W.2d at 376-77.

Justices Doggett and Gammage dissented, arguing that there was evidence that the insured had informed his supervisor that his injury was work-related and that the insurer's claims adjuster's report had contained misrepresentations. *Id.* at 378 (Doggett, J., dissenting). *Dominguez* exemplifies the rift between Justices Doggett and Gammage and the *Moriel* majority. Justice Doggett wrote that the court's "review must be narrowly focused on what *supports* the judgment, not what opposes it." *Id.* at 379 (emphasis original). To Justice Doggett, evidence tending to establish coverage—if ignored or disregarded by the insurance carrier—supports a bad faith verdict. Justice Cornyn opined in *Moriel* that bad faith requires the insured to "prove a negative"—that the insurer had *no* reasonable basis for denial—and, therefore, the insured must offer some evidence contradicting the insurer's excuse for declining to pay. *See* 879 S.W.2d at 18.

61. 879 S.W.2d at 18 (citing Arnold v. National County Mut. Fire Ins. Co., 725 S.W.2d 165 (Tex. 1987), and Aranda v. Insurance Co. of N. Am., 748 S.W.2d 210 (Tex. 1988)). Justice Doggett objected that the majority, without having the dispute before it, had embraced the "bona fide" dispute rule adopted in National Union Fire Ins. v. Hudson Energy Co., 780 S.W.2d 417 (Tex. Ct. App. 1989), *aff'd*, 811 S.W.2d 552 (Tex. 1991). Under the bona fide dispute rule, if the insurer has a legitimate policy position, the insured cannot prove gross negligence unless the insurer offers a "strained and unconscionable interpretation of policy coverage." *Id.* at 427. Though not disapproving the bona fide dispute rule, Justice Doggett declared that courts of appeals are poorly suited for this sort of review because the Texas Constitution bars appellate review of factual sufficiency. *Moriel*, 879 S.W.2d at 39-40 (Doggett, J., concurring) (citing Wilson v. Wilson, 201 S.W.2d 226, 227 (Tex. 1947) ("[The] Supreme Court is not invested with the power to determine facts.")). Justice Doggett wrote that bad faith claims for delay and inconvenience should be allowed even if the insurer has a reasonable coverage defense. *Id.* He agreed with the majority in only one respect: breach of contract claims are distinct from bad faith claims. *Id.* From this he concluded that bad faith can exist even when the insurer does *not* breach the contract.

The majority responded to this part of the concurrence by stating that *Hudson* does not insulate an insurer who invents a pretexual coverage defense from bad faith. Rather, *Hudson* means that an insured does not create evidence of bad faith merely by filing suit. *Id.* at 18, n.8 (opinion of the court).

62. 879 S.W.2d at 18.

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compensatory damages, not punitive damages.[63] Punitive damages are justified only when bad faith is accompanied by "malicious, intentional, fraudulent or grossly negligent conduct."[64]

Because civil "punishment" by way of punitive damages may result in "overdeterrence and overcompensation," the court deemed it critical to accentuate the distinction between "simple" and "aggravated" bad faith.[65] That distinction is illuminated by the Arizona Supreme Court's holding in ***Rawlings v. Apodaca***.[66] In ***Rawlings*** the court held that, to obtain punitive damages, a plaintiff must show "that the evil hand that unjustifiably damaged the objective . . . of the insurance contract was guided by an evil mind."[67] Justice Cornyn observed that the prevailing case law yields "two core requirements":

(1) the insurer must have acted with an "aggravated mental state," such as intent, recklessness, or gross negligence involving at least an "actual subjective awareness that serious injury is highly probable"; and
(2) this intended or probable injury must be "independent and qualitatively different" from the breach of contract and the compensable harms associated with it.[68]

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63. *Id.*

64. *Id.* (citing ***Arnold***, 725 S.W.2d at 168, and Ware v. Paxton, 359 S.W.2d 897 (Tex. 1962)). In *Ware* the court noted, as an example of the standard for "outrageous" conduct, the exploits of a collection agency whose behavior, though vile, did not merit punitive damages:

> "Daily telephone calls to [the debtors,] Mr. and Mrs. Duty, which extended to great length; threatening to blacklist them with the Merchants' Retail Credit Association; accusing them of being deadbeats; talking to them in a harsh, insinuating, loud voice; stating to their neighbors and employers that they were deadbeats; asking Mrs. Duty what she was doing with her money; accusing her of spending money in other ways than in payments on the loan transaction; threatening to cause both plaintiffs to lose their jobs unless they made the payments demanded; calling each of the plaintiffs at the respective places of their employment several times daily; threatening to garnishee their wages; berating plaintiffs to their fellow employees; requesting their employers to require them to pay; calling on them at their work; flooding them with a barrage of demand letters, dun cards, special delivery letters, and telegrams both at their homes and their places of work; sending them cards bearing this opening statement: "Dear Customer: We made you a loan because we thought that you were honest."; sending telegrams and special delivery letters to them at approximately midnight, causing them to be awakened from their sleep; calling a neighbor in the disguise of a sick brother of one of the plaintiffs, and on another occasion as a stepson; calling Mr. Duty's mother at her place of employment in Wichita Falls long distance, collect; leaving red cards in their door, with insulting notes on the back and thinly-veiled threats; calling Mr. Duty's brother long distance, collect, in Albuquerque, New Mexico, at his residence at a cost to him in excess of $11, and haranguing him about the alleged balance owed by plaintiffs."

359 S.W.2d at 899-900 (quoting Duty v. General Fin. Co., 273 S.W.2d 64, 65 (Tex. 1954))

65. 879 S.W.2d at 18.

66. 752 P.2d 565 (Ariz. 1986).

67. *Id.* at 578.

68. 879 S.W.2d at 19 (citing Continental Assurance Co. v. Kountz, 461 So. 2d 802, 809 (Ala. 1984); ***Rawlings***, 726 P.2d at 578; Lymphicom v. Nationwide Life Ins. Co., 723 P.2d 675 (Ariz. 1986) (en banc); Borland v. Safeco Ins. Co., 709 P.2d 552 (Ariz. Ct. App. 1985); Weisman v. Blue Shield, 209 Cal Rptr. 169, 173-74 (Ct. App. 1984); Newton v. Standard Fire Ins. Co., 229 S.E.2d 297, 302 (N.C. 1976); Shimola v. Nationwide Ins. Co., 495 N.E.2d 391, 393 (Ohio 1986) (per curiam); Anderson v. Continental Ins. Co., 271 N.W.2d 368, 378-79 (Wis. 1978); and Guaranty Abstract & Title Co. v. Interstate Buyer & Casualty Co., 652 P.2d 665, 668 (Kan. 1982)). In *Kountz*

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2. Dethroning *Burk Royalty*:
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69. 879 S.W.2d at 19

70. *Id.*

71. 616 S.W.2d 911 (Tex. 1981

72. *Id.* at 920 (citing Missouri Pac
Cotton Press & Mfg. Co. v. Bradley,

73. *Id.* at 922

74. 879 S.W.2d at 20-21 (citing
Chem. Corp. v. De La Lastra, 852 S
699 S.W.2d 570, 574 (Tex. 1985); 1
(Tex. 1985); Trenholm v. Ratcliffe, 6
Properties, Inc., 639 S.W.2d 452, 45
testimony or that of his doctors. *See*

75. *Id.* at 21. *Burk Royalty* was
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Although a consensus appears to be emerging in favor of predicating gross negligence on the probability of an injury "qualitatively different" from bad faith breach of contract injury, no jurisdiction had satisfactorily addressed the critical distinctions between gross negligence and bad faith conduct.[69] The *Moriel* court therefore endeavored to add its refinement to the existing case law, with the overriding objective of harmonizing the emerging consensus with Texas law.[70]

2. Dethroning *Burk Royalty*: The Objective Component of "Gross Negligence" Requires Proof of More than "Some Negligence"

The Court's first step was to identify the basic elements of gross negligence. In *Burk Royalty v. Walls*[71] the court had recognized that the standard in Texas for "gross negligence" for over one hundred years had contained a general requirement of "conscious indifference" to the well-being of other persons.[72] *Burk Royalty* had emphasized that courts must demand evidence of the defendant's mental state, as opposed to focusing exclusively on the defendant's failure to exercise care.[73] Because the Texas appeals process of "no evidence" review requires appellate courts to look only to the evidence that favors the verdict and to ignore facts that tend to contradict the verdict, however, *Burk Royalty* had proved arbitrary in practice.[74]

Although the court agreed with much of *Burk Royalty*'s holding, the court concluded that the *Burk Royalty* method had given lower courts difficulty in applying the gross negligence standard.[75] Under *Burk Royalty*, "some negligence" commonly

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the Alabama Supreme Court found evidence of "malice, wilfulness, or wanton and reckless disregard" when a group health insurer advised its insured that it would pay for an emergency dental operation, but denied payment after the insured underwent the operation. 461 So. 2d at 809.

69. 879 S.W.2d at 19.

70. *Id.*

71. 616 S.W.2d 911 (Tex. 1981).

72. *Id.* at 920 (citing Missouri Pac. Ry. v. Shuford, 10 S.W. 408, 411 (Tex. 1888), and Southern Cotton Press & Mfg. Co. v. Bradley, 52 Tex. 587, 600-01 (1880)).

73. *Id.* at 922.

74. 879 S.W.2d at 20-21 (citing Garza v. Alviar, 395 S.W.2d 821, 824 (Tex. 1965), General Chem. Corp. v. De La Lastra, 852 S.W.2d 916, 921 (Tex. 1993), Williams v. Steves Indus., Inc., 699 S.W.2d 570, 574 (Tex. 1985); International Armament Corp. v. King, 686 S.W.2d 595, 597 (Tex. 1985); Trenholm v. Ratcliffe, 646 S.W.2d 927, 931 (Tex. 1983), and Neely v. Community Properties, Inc., 639 S.W.2d 452, 454 (Tex. 1982)). Virtually all of Moriel's evidence was his own testimony or that of his doctors. *See id.* at 13-14.

75. *Id.* at 21. *Burk Royalty* was decided by a Texas Supreme Court consisting of none of the current justices. The court overruled a line of cases holding that "legally sufficient" evidence of gross negligence cannot exist if "some care" was exercised by the defendant. 616 S.W.2d at 922. The defendant in *Burk Royalty* argued that evidence it conducted safety meetings and posted safety notices insulated it from a finding of "gross negligence." *Id.* at 923. The court held that the absence of safety devices and warnings at the time of the accident constituted some evidence of gross negligence, which the court could not question. *Id.* The difficulty in applying *Burk Royalty* to insurance disputes, however, *is* that the conduct in *Burk Royalty arose* in the context of oil rig work—where malfeasance leads naturally to serious physical harm—while in coverage disputes the inference is not—or should not be according to *Moriel*—so easily drawn.

Joe Greenhill, who was Chief Justice when the court decided *Burk Royalty*, filed an amicus brief in

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led reviewing courts to find "some evidence" of gross negligence.[76] In effect, ***Burk Royalty***'s holding that courts could infer subjective awareness from surrounding circumstances, when filtered through Texas's "no evidence" review process, obliterated the distinction between "gross" and "ordinary" negligence.[77] Appellate courts were affirming punitive damage verdicts when there was no evidence of gross negligence. In *General Chemical Corp. v. De La Lastra*,[78] for example, a chemical manufacturer had been held "grossly negligent" in failing to include the word "death" in a lengthy warning label, based on evidence it knew of an incident involving misuse of an ***unlabeled*** product fifteen years earlier.[79]

Mindful of ***Burk Royalty***'s troubled reign, the ***Moriel*** court endeavored to devise a "gross negligence" evidentiary standard that would work in practice to distinguish gross negligence from lesser degrees of misconduct, such as bad faith.[80]

3. Actual Conscious Indifference Means Awareness of an "Extreme" Risk of a "Serious Injury"

Under Texas law, plaintiffs must prove two aspects of wrongful conduct: (1) the defendant's act or omission and (2) the defendant's mental state.[81] To constitute gross negligence, the act or omission must imperil the "rights, safety, or welfare"

Moriel on behalf of Transportation. He had concurred in ***Burk Royalty*** because "the facts were so bad," but by 1993 had concluded that "the scales were tipped very strongly toward exemplary damages [under ***Burk Royalty***]." Elliot, *supra* note 5, at 1.

76. 879 S.W.2d at 21.

77. *Id. Moriel* followed on the heels of the court's exegesis on the Texas "no evidence" appellate review standard, Lyons v. Millers Casualty Ins. Co., 866 S.W.2d 597 (Tex. 1993). Under the "no evidence" standard, Texas appellate courts must consider an appeal based on the "legal sufficiency" of the facts presented at trial. *Id.* at 599. Traditionally, this standard of review called for the reviewing court to "consider only the evidence favoring the judgment for the insured and to disregard all evidence to the contrary." *Id.*

78. 852 S.W.2d 916 (Tex. 1993).

79. *Id.* at 921. Justice Hecht, concurring, noted that the chemical manufactured by the defendant contained a warning stating "WARNING! REACTS WITH ACIDS AND WATER, RELEASING TOXIC SULFUR DIOXIDE GAS . . . USE WITH PROPER VENTILATION." *Id.* at 926 (Hecht, J., concurring). The label covered about two-thirds of each side of each package. *Id.*

80. *See* 879 S.W.2d at 21-23. A Texas statute provides: " 'Gross negligence' means more than momentary thoughtlessness, inadvertence, or error of judgment. It means such an entire want of care as to establish that the act or omission was the result of actual, conscious indifference to the rights, safety or welfare of the person affected." TEX. CIV. PRAC. & REM. CODE ANN. § 41.001(5) (West Supp. 1994). The legislative sponsor of this statute explained its objective during hearings in the state senate:

> "[*W*]*hat we're trying to do is go back to . . . what the law was intended to be* [*before* Burk Royalty] *and that is where you have the imposition of punishment for an act that is more than ordinary negligence but less than criminal or intentional there should be a requisite burden of proof and evidentiary standard required that meets that test* . . . ."

John T. Montford & Will G. Barber, *1987 Texas Tort Reform: The Quest for a Fairer and More Predictable Texas Civil Justice System*, 25 HOU. L. REV. 245, 323 (1988) (quoting Texas Senate debate) (emphasis original in Montford & Barber).

81. 879 S.W.2d at 21.

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83. *Id.* (quoting Williams v. Steve
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84. 879 S.W.2d at 21-22

85. *Id.* at 22

86. *Id.* at 20

87. *Id.* at 23

88. *Id.* (citing *Williams*, 699 S.W.
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89. 699 S.W.2d 570 (Tex. 1985

90. 879 S.W.2d at 23. In fact, the
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supra note 80, at 324 ("To prove obj
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91. 897 S.W.2d at 23

92. *Id.* n.15

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of the affected party.[82] This means a defendant must engage in conduct creating an " 'extreme degree of risk.' "[83] Even if, subjectively, the defendant knew his conduct was wrongful, "gross negligence" does not exist unless "objectively" the defendant's conduct actually created an extreme degree of risk.[84]

Because the "extreme risk" element takes into account the magnitude of the harm, there must in fact have been a likelihood of "serious injury" to the plaintiff or a gross negligence finding cannot be made.[85] The court noted that "nobody is subject to punishment under [Texas Criminal law] if they are aware of [only] a relatively minor risk . . . ."[86]

Thus, even a high probability of minor harm does not satisfy the "extreme risk" prong of the gross negligence definition.[87] The court conceded that proof of "extreme risk" may be established by circumstantial evidence.[88] The problem with the *Williams v. Steves Industries*[89] objective standard, however, was that it invited a jury to infer from the circumstances that danger existed without viewing the circumstances from the position of the defendant ***prior to the injury***.[90] Consequently, the court held in *Moriel* that a plaintiff cannot prove gross negligence based on serious harm unless that risk was present at the time when the defendant acted wrongfully.[91] Nonetheless, even a person who causes a minor injury may be found grossly negligent if his act or omission—firing a gun in a crowd, for example—creates a great peril.[92]

4. Gross Negligence in Insurance Coverage Disputes: "Inconvenience" Is Not Tantamount to a "Serious Injury"

Having clarified the distinction between gross negligence and bad faith, the court turned to application of the distinction to insurance coverage disputes. Because refusal to pay an insured's claim without reasonable basis is bad faith,

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82. *Id.*

83. *Id.* (quoting Williams v. Steves Indus., Inc., 699 S.W.2d 570, 573 (Tex. 1985) (entrustment of loaded 20-ton truck to unlicensed driver was not gross negligence because absence of license did not make probability of harm extreme)); *cf.* Go Int'l, Inc. v. Lewis, 601 S.W.2d 495, 500 (Tex. Civ. App. 1980) (upholding gross negligence finding when truck driven by underage driver carried explosives)

84. 879 S.W.2d at 21-22

85. *Id.* at 22.

86. *Id.* at 20

87. *Id.* at 23.

88. *Id.* (citing *Williams*, 699 S.W.2d at 573). In *Williams* the defendant was negligent in entrusting a dangerous instrumentality—a 20-ton truck—to an unlicensed driver, but he was not "consciously indifferent" because the driver had a clean driving record. 699 S.W.2d at 573.

89. 699 S.W.2d 570 (Tex. 1985).

90. 879 S.W.2d at 23. In fact, the 1987 Tort Reform Act's gross negligence standard was designed to remedy the very problem created by the *Williams* "reasonable person" test. *See* Montford & Barber, *supra* note 80, at 324 ("To prove objectively what a reasonable person should have realized is not to ***establish*** that a particular defendant was ***actually*** indifferent.") (emphasis original)

91. 897 S.W.2d at 23.

92. *Id.* n.15.

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not gross negligence, punitive damages are available only upon proof of different, and worse, conduct than that which ordinarily constitutes bad faith insurance claims practices.[93]

Insurance bad faith arises in the context of a contractual relationship, and an insured who has merely proved breach of contract has as yet offered no proof of "serious injury."[94] Nor do injuries such as delay or inconvenience satisfy the requirement.[95] Because inconvenience accompanies any breach of contract, inconvenience (or annoyance) is not "qualitatively different" from breach of contract injuries.[96] Nonetheless, some forms of insurance, such as disability insurance, are of such a nature that an insurer can expect denying coverage will likely result in extreme hardship to an insured, warranting punitive damages in some cases.[97]

Although the court declined to enumerate the circumstances in which gross negligence can arise, the most notable phrase in the court's holding clearly indicates that the threatened harm must be extraordinary: "[d]eath, grievous physical injury, or financial ruin" are sufficiently "serious" to support a punitive damages claim, the court held, but anything less may not suffice."[98]

5. The Standard in Application: Legally Insufficient Evidence of Gross Negligence

Having prescribed firm guidelines for application of the Texas gross negligence standard, the court applied the standard to the facts of the *Moriel* case. The court's task was to determine whether there was "legally sufficient" evidence of gross negligence, which under Texas law means sufficient evidence that reasonable people could conclude that Transportation consciously disregarded an extreme risk of harm to Moriel.[99]

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93. *Id.* at 23 (citing Aranda v. Insurance Co. of N. Am., 748 S.W.2d 210, 215 (Tex. 1988), and Arnold v. National County Mut. Fire Ins. Co., 725 S.W.2d 165, 168 (Tex. 1987)). *Aranda*, like *Moriel*, arose from a workers' compensation claim against the carrier. The court, in a 1988 opinion by Justice Spears, established as Texas law that a contractual relationship exists between a workers' compensation carrier and a worker, creating a "duty of good faith and fair dealing" between the two. 748 S.W.2d at 212. Associate (now Chief) Justice Phillips dissented on the ground that no contractual relationship exists in this scenario. *Id.* at 216 (Phillips, J., dissenting).

94. 879 S.W.2d at 23.

95. *Id.* at 24.

96. The court noted that bad faith may justify an award of consequential damages for mental anguish, *id.*, but recovery for mental anguish does not mean that punitive damages should follow in the ordinary course. *Id.* The court was pointing out that the harm caused by a bad faith breach often will be the same as the harm caused by an innocent breach. An unreasonable denial of coverage might enrage a policyholder, but it is not necessarily criminally punishable. *See id.* at 23-24

97. *Id.* at 24 (citing Delgado v. Heritage Life Ins. Co., 203 Cal. Rptr. 672, 680-81 (Ct. App 1984)). In *Delgado* a disability carrier urged that it could not be guilty of "conscious disregard" of an insured's rights absent proof that it actually knew its denial of coverage would cause harm 203 Cal Rptr. at 681. The court observed that "[w]hen a person buys disability insurance '[t]he very risks insured against presuppose that if and when a claim is made, the insured will be disabled and in strait financial circumstances . . . .' " *Id.* (quoting Fletcher v. Western Nat'l Life Ins. Co., 89 Cal. Rptr 78 (Ct. App. 1970)).

98. 879 S.W.2d at 24.

99. *Id.* at 24-25.

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The court noted that the evidence showed: (1) Transportation agreed in advance to pay for Moriel's testing, but not his travel; (2) Transportation's process of deciding whether to pay caused a ten-day delay in testing; (3) Transportation delayed for two years before paying the testing expenses; (4) Transportation delayed for over one year before paying subsequent treatment expenses; and (5) Transportation paid for the treatment only after it learned that Moriel had become subject to collection efforts.[100] Based on these facts, the jury had found that Transportation acted with "heedless and reckless disregard," or gross negligence.[101]

The court held that the jury could reasonably have found that Transportation knew or should have known Moriel's claims were covered, but that no facts tended to prove gross negligence.[102] To establish gross negligence, Moriel had to offer proof that Transportation was "consciously indifferent" to the likelihood of great harm.[103] The evidence presented did not support a finding that Transportation knew of an extreme risk of serious harm to Moriel.[104] Even viewed in its most favorable light, Moriel's evidence did not support either (1) an inference that Transportation had "subjective awareness" that Moriel would likely suffer serious harm because of its delay or (2) an inference that Transportation's action *created any probability* of serious injury to Moriel.[105] The evidence showed the only harm Transportation's delay caused Moriel was his "anxiety" in knowing he had unpaid bills until Providence Hospital filed a collection action against him, at which time Transportation paid him.[106]

The degree of anxiety Moriel endured was not "serious" harm of the sort that must be deterred by punitive damages.[107] Moreover, even assuming "aggravating circumstances" had existed, Moriel had offered nothing at all indicating that Transportation had subjective awareness Moriel would suffer mental anguish.[108] Thus, Transportation's "legal sufficiency" point was sustained because, although there was evidence of bad faith, there was no evidence of "serious harm" or Transportation's

100. *Id.* at 25. Transportation did offer evidence, which it had believed, that Moriel's impotence was not work-related. However, Transportation conceded for purposes of appeal that it had acted without reasonable basis and was liable for bad faith. *Id.*

101. *Id.*

102. *Id.* at 25-26.

103. *Id.*

104. *Id.*

105. *Id.* at 26.

106. *Id.*

107. *Id.*

108. *Id.* The court wrote: "We cannot rule out the possibility that evidence of aggravating circumstances might, in a different case, justify punitive damages for an insurer's conscious indifference to the probability of mental anguish." *Id.* Although the court did not define them, "aggravating circumstances" have been grounds for punitive damages in Texas since at least 1888, *see* Freiberg v. Elliot, 8 S.W. 322, 323 (Tex. 1888) (plaintiff "asserted a claim for punitory as well as actual damages . . . and the matters alleged might be looked to show the aggravating circumstances"), and the phrase has developed generally to mean that, in addition to engaging in wrongful behavior, such as intentionally breaching a contract, the defendant also had an illicit motive, desiring to harm or revenge himself upon the plaintiff. *See, e.g.*, Anthony Pools v. Charles & David, Inc., 797 S.W.2d 666, 677 (Tex. Civ. App. 1990) (defendant's "profit-motivated business interests," though "self-serving," did not amount to

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knowledge of the likelihood thereof.[109] Although reversal on this point of error usually would result in judgment for the appellant, the court remanded the case because, at the time of trial, no opinion had specifically addressed standards governing the imposition of punitive damages in bad faith lawsuits.[110]

C. *The Court Sets New Procedural Standards to Provide Safeguards Against "Grossly Excessive" Punitive Damage Awards*

The court's articulation of the gross negligence standard was plainly momentous, but the court did not stop there. Exercising its common-law power, the court identified "procedural standards" to govern trial courts.[111] The court acknowledged the U.S. Supreme Court's decision in *Pacific Mutual Life Insurance Co. v. Haslip*,[112] in which the Supreme Court expressed its concern that unlimited jury discretion could "invite extreme results."[113] The Texas Supreme Court noted that *Haslip* had approved Alabama's controls on punitive damages, which include (1) *jury instructions* explaining that punitive damages are "not compulsory," but should be awarded "only where necessary to prevent similar wrongs," which has the effect of limiting the jury's discretion; (2) a *postverdict review system*, which examines the "culpability" of the defendant, the need for discouraging others from similar conduct, and the impact of the award on the parties and on innocent third parties; and (3) *appellate review*, which in Alabama requires that the award not exceed the amount needed to "accomplish society's goals of punishment and deterrence."[114]

Justice Cornyn also looked to the U.S. Supreme Court's opinion in *TXO Products*

"ill-will, spite, evil malice" or other "aggravating circumstances"); Group Hosp. Servs., Inc. v. Daniel, 704 S.W.2d 870, 875 (Tex. Civ. App. 1986) (health insurance provider's representative did not know his statements were false; no aggravating circumstances present); Top Value Enters., Inc. v. Carlson Mktg. Group, Inc., 703 S.W.2d 806, 813-14 (Tex. Civ. App. 1986) (punitive damages not justified absent "presence of spite and revenge" or "concealed plan to bring about the contractual breach"); Lubbock Bail Bond v. Joshua, 416 S.W.2d 523 (Tex. Civ. App. 1967) (bail bondsman, who entered woman's home, harassed her and her children, pursued her to work, "tussled" with her in parking lot, and attempted to handcuff her without warrant or other authority, guilty of aggravated conduct, but $5,000 award "excessive").

Given that TEX. CIV. PRAC. & REM. CODE ANN. § 41.003 (West Supp. 1994) expressly confines recovery of exemplary damages to three categories—gross negligence, "fraud," and "malice"—Texas plaintiffs should take notice that "aggravating circumstances" must fall into one of the three categories

109. 879 S.W.2d at 26.

110. *Id.*

111. *Id.* The Texas Constitution authorizes the state supreme court to ordain rules of practice and procedure for the proper administration of justice. TEX. CONST. art. V, § 31. In July 1987 the Texas Supreme Court cited article V as authority to amend Texas Rule of Civil Procedure 13. *See* Bruce L. Dean, *Rule-Making in Texas: Clarifying the Judiciary's Power to Promulgate Rules of Civil Procedure*, 20 ST. MARY'S L.J. 139, 139-40 (1988). Rule 13, aimed at curtailing the filing of frivolous pleadings, had been passed nine months earlier as part of the 1987 Tort Reform Act. *Id.*

112. 111 S. Ct. 1032 (1991).

113. *Id.* at 1043.

114. *Id.* at 1045 (citing Hammond v. City of Gadsden, 493 So. 2d 1374, 1379 (Ala. 1986); Green Oil Co. v. Hornsby, 539 So. 2d 218, 222 (Ala. 1989); and Wilson v. Dukona Corp., 547 So. 2d 70, 73 (Ala. 1989)).

Corp. v. Alliance Resources Corp.,
dures for punitive damages.[116]
Alabama procedures affirmed
trial courts to articulate their
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1. Bifurcated Trials

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115. 113 S. Ct. 2711 (1993).
116. *Moriel*, 879 S.W.2d at 28
117. *Id.*
118. *Id.* at 28-29
119. *Id.* (citing Alamo Nat'l Bank
Motor Co., 715 S.W.2d 629, 635 (T
120. *Id.* at 29
121. *Id.*
122. *Id.* at 30. In Justice Doggett
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n. 1 (Doggett, J., concurring)
123. *Id.* (opinion of the court).
124. *Id.* Evidence of net worth w
Lunsford v. Morris, 746 S.W.2d 471
court could not make such a rule in th
reversal on mandamus is "clear abuse
trial court had followed 100 years of
125. Hodges v. S.C. Toof & Co.,
1121, 1132 (Wyo. 1981); CAL. CIV. C
5.1(d) (Michie Supp. 1992); KAN. S
§ 549.20(4) (West Supp. 1993); MO.

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Corp. v. Alliance Resources Corp.,[115] in which the Court reviewed West Virginia's procedures for punitive damages.[116] The West Virginia procedures nearly equated with the Alabama procedures affirmed in *Haslip*, though West Virginia does not require its trial courts to articulate their reasons for upholding punitive damage verdicts.[117]

Texas courts had not observed procedures similar to those extolled in *Haslip* and *TXO*.[118] The Texas Supreme Court identified several shortcomings in Texas procedure:

(1) trial courts were not required to scrutinize punitive damage awards and set forth reasons on the record for refusing to disturb jury verdicts;

(2) the courts of appeals were precluded from reviewing for factual sufficiency of the evidence supporting a punitive damage award; and

(3) Texas courts of appeals were not required to enumerate in their opinions the factors for reviewing punitive damage awards.[119]

The court maintained that certain procedural safeguards could be added without affecting "[t]he broad jury discretion that is the hallmark of the common law punitive damages system."[120] Accordingly, the court announced two changes to enhance the fairness and predictability of punitive damage awards.[121]

1. Bifurcated Trials

The court held that trial courts must bifurcate proceedings in punitive damage cases.[122] Proceedings determining the amount of punitive damages should be held separately from the main proceedings.[123] Evidence of a defendant's net worth, though relevant to the amount of punitive damages justifiably awarded, "has a very real potential for prejudicing the jury's determination of other disputed issues in a tort case."[124] At least thirteen states currently require bifurcation of trials in which punitive damages are sought.[125] The court declined to take a step adopted

115. 113 S. Ct. 2711 (1993).

116. *Moriel*, 879 S.W.2d at 28.

117. *Id.*

118. *Id.* at 28-29

119. *Id.* (citing Alamo Nat'l Bank v. Kraus, 616 S.W.2d 908, 910 (Tex. 1981), and Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986)).

120. *Id.* at 29.

121. *Id.*

122. *Id.* at 30. In Justice Doggett's opinion, Transportation had waived its complaint regarding bifurcation by failing to make a request for bifurcation until its motion for new trial. *Id.* at 34 & n. 1 (Doggett, J., *concurring*).

123. *Id.* (opinion of the court).

124. *Id.* Evidence of net worth was inadmissable in Texas before the court's 1988 decision in Lunsford v. Morris, 746 S.W.2d 471 (Tex. 1988). In that case Justice Gonzalez complained that the court could not make such a rule in the context of a mandamus proceeding because the standard for reversal on mandamus is "clear abuse of discretion," and in refusing to admit net worth evidence the trial court had followed 100 years of Texas precedent. *Id.* at 474 (Gonzales, J., dissenting)

125. Hodges v. S.C. Toof & Co., 833 S.W.2d 896 (Tenn. 1992); Campen v. Stone, 635 P.2d 1121, 1132 (Wyo. 1981); CAL. CIV. CODE § 3295(d) (West Supp. 1993); GA. CODE ANN. § 51-12-5.1(d) (Michie Supp. 1992); KAN. STAT. ANN. § 60-3701(a) (Supp. 1993); MINN. STAT. ANN. § 549.20(4) (West Supp. 1993); MO. ANN STAT. § 510.263 (Vernon Supp. 1992); MONT. CODE

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by three other states and require a separate trial on *punitive damages liability*.[126] Instead, the court held that trial courts must separately try the issue of the *amount* of punitive damages to eliminate the "most serious risk of prejudice, while minimizing the confusion and inefficiency that could result from a bifurcated trial."[127]

2. Appellate Articulation

The court imposed one additional procedural safeguard. In Texas a court of appeals may vacate a damage award or suggest a remittitur only if the award is "so factually insufficient or so against the great weight and preponderance of the evidence as to be manifestly unjust."[128] In reviewing the reasonableness of punitive damages awards courts of appeals are expected to consider the factors set forth in *Alamo National Bank v. Kraus*:[129] (1) the nature of the wrong, (2) the character of the conduct, (3) the degree of culpability of the wrongdoer, (4) the situation and sensibilities of the parties concerned, and (5) the extent to which such conduct offends a public sense of justice and propriety.[130] The court took care not to interfere with the existing level of appellate deference, but emphasized that appellate courts "must carefully scrutinize punitive awards to ensure that they are supported by the evidence."[131] In so doing, Texas courts of appeals now must state the relevant evidence in their opinions and explain "why that evidence either supports or does not support the punitive damages award in light of the *Kraus* factors."[132]

3. Two Safeguards Deferred

The court declined, however, to impose two additional safeguards recommended by the United States Supreme Court. The Texas Supreme Court noted that many states now require "clear and convincing evidence" to support findings of gross

ANN. § 27-1-221(7) (1991); NEV. REV. STAT. § 42.005(3) (1991); N.J. STAT. ANN. § 2A:58C-5(b) (West 1987); N.D. CENT CODE § 32-03.2-11(2) to -11(4) (1993); OHIO REV. CODE ANN. § 2315.21(C) (Baldwin 1993); UTAH CODE ANN. § 78-18-1(2) (1992).

126. 879 S.W.2d at 30.

127. *Id.* The court did not hold that bifurcation is constitutionally required. It found bifurcation necessary to provide needed "procedural safeguards" against "grossly excessive" punitive damages awards. *Id.*

128. Pope v. Moore, 711 S.W.2d 622 (Tex. 1986).

129. 616 S.W.2d 908 (Tex. 1981).

130. *Id.* at 910. The standards approved by the U.S. Supreme Court in *Haslip* included (a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct, as well as the harm that actually has occurred; (b) the degree of responsibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the "financial position" of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct (to be considered in mitigation); and (g) the existence of other civil awards against the defendant for the same conduct (also to be considered in mitigation). 111 S. Ct. at 1045.

131. 879 S.W.2d at 32.

132. *Id.* at 31.

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133. *Id.*

134. 111 S. Ct. at 1046.

135. 879 S.W.2d at 32.

136. *Id.*; *see* TEX. CIV. PRAC. & RE

137. 879 S.W.2d at 32.

138. *Id.*; *see* 111 S. Ct. at 1045. Jus
articulation since *Haslip*. *Moriel*, 879 S
1374, 1379 (Ala. 1986), O'Dell v. Basa
Ins. Soc'y v. B. Dixon Evander & Assc
required per se, but trial court's failure
Danavo, Inc. v. Starkey Labs. Inc., 47
S. Ct. 2940 (1992), Gamble v. Stevens
& Co., 833 S.W.2d 896, 902 (Tenn. 1
1991) (requiring trial court articulation
3.1), Games v. Fleming Landfill, Inc.,

139. 879 S.W.2d at 32 (citing Croo
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v. Oppenheimer & Co., 637 F.2d 318, 3
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v. Armstrong Cork Co., 946 F.2d 108

140. 879 S.W.2d at 32 (citing Cole
Union Nat'l Bank v. Mosbacher, 933 F
(1992), American Employers Ins. Co. v
Cir. 1991), and Robertson Oil Co. v. Pl
see also Honda Motor Co. v. Oberg, 114 S
tional because it prevented reviewing co
"passion or prejudice").

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negligence and punitive damage awards.[133] The U.S. Supreme Court commented favorably on the "clear and convincing" standard in *Haslip*.[134] Nonetheless, the *Moriel* court noted the Texas Legislature had specifically considered and rejected the "clear and convincing" standard in the course of approving 1987 tort reform legislation.[135] Accordingly, the court would not impose the standard on cases governed by the 1987 act, which applies to most common-law tort actions. Although some tort actions are not subject to the 1987 legislation,[136] the court declined to create different evidentiary standards depending upon the applicability of the legislation.[137]

Finally, Justice Cornyn observed that in *Haslip* the Supreme Court endorsed the practice of requiring trial courts to scrutinize punitive damage awards and note on the record their reasons for upholding or refusing to uphold an award.[138] Such a practice has much to recommend it, given that only the trial court can evaluate whether the jury has acted with "passion or prejudice" and rendered an award too small or too large in light of the evidence.[139] Several recent federal appellate court decisions have remanded cases to trial courts with instructions to articulate their reasons for upholding punitive damage awards.[140] Despite this fact and despite an apparent trend since *Haslip* in favor of requiring state courts to articulate reasons

133. *Id.*

134. 111 S. Ct. at 1046.

135. 879 S.W.2d at 32.

136. *Id.*; *see* TEX. CIV. PRAC. & REM. CODE ANN. § 41.002(b) (West Supp. 1994).

137. 879 S.W.2d at 32.

138. *Id.*; *see* 111 S. Ct. at 1045. Justice Cornyn noted that eight jurisdictions have required such articulation since *Haslip*. *Moriel*, 879 S.W.2d at 32; *see* Hammond v. City of Gadsden, 493 So. 2d 1374, 1379 (Ala. 1986); O'Dell v. Basabe, 810 P.2d 1082, 1092 (Idaho 1991); Medical Mut. Liab. Ins. Soc'y v. B. Dixon Evander & Assocs., 609 A.2d 353, 368-69 (Md. Ct. Spec. App. 1992) (not required per se, but trial court's failure to explain reasoning may constitute abuse of discretion); G.N. Danavo, Inc. v. Starkey Labs, Inc., 476 N.W.2d 172, 177 (Minn. Ct. App. 1991), *cert. denied*, 112 S. Ct. 2940 (1992); Gamble v. Stevenson, 406 S.E.2d 350, 354 (S.C. 1991); Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 902 (Tenn. 1992); Crookston v. Fire Ins. Exch., 817 P.2d 789, 811 (Utah 1991) (requiring trial court articulation whenever ratio of punitive damages to actual damages exceeds 3:1); Garnes v. Fleming Landfill, Inc., 413 S.E.2d 897, 910 (W. Va. 1991).

139. 879 S.W.2d at 32 (citing Crookston v. Fire Ins. Exch., 817 P.2d 789, 804 (Utah 1991)). In *Crookston* the Utah Supreme Court employed its common-law power to impose procedural guidelines on trial and appellate courts, although the insurer in that case had failed to preserve its due process objections under the state constitution. 817 P.2d at 800. The court noted that the Fifth Circuit, in considering an award of punitive damages in an intentional business tort case under Texas law, had stated that " '[a] formula of punitive damages equal to three times compensatory damages is a fairly good standard against which to assess whether a jury abused its discretion.' " *Id.* at 809 (quoting Miley v. Oppenheimer & Co., 637 F.2d 318, 331 (5th Cir. 1981)). The Fifth Circuit, however, has concluded that Texas procedures for imposing punitive damage awards do not violate federal due process. Glasscock v. Armstrong Cork Co., 946 F.2d 1085 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1778 (1992).

140. 879 S.W.2d at 32 (citing Cole v. Control Data Corp., 947 F.2d 313, 321 (8th Cir. 1991); Union Nat'l Bank v. Mosbacher, 933 F.2d 1440, 1448 (8th Cir. 1991), *cert denied*, 112 S. Ct. 870 (1992); American Employers Ins. Co. v. Southern Seeding Servs., Inc., 931 F.2d 1453, 1458 (11th Cir. 1991); and Robertson Oil Co. v. Phillips Petroleum Co., 930 F.2d 1342, 1347 (8th Cir. 1991)); *see also* Honda Motor Co. v. Oberg, 114 S. Ct. 2331, 2339-41 (1994) (holding Oregon statute unconstitutional because it prevented reviewing courts from overturning punitive damage awards resulting from "passion or prejudice").

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for awarding punitive damages, the *Moriel* court declined to require such a standard in Texas.[141] The court was hesitant to increase demands placed on its trial courts, most of which are understaffed in terms of both secretaries and law clerks.[142] The court restrained its holding to a recommendation that such findings be made "to the extent practicable."[143]

D. *Justices Doggett and Gammage Find Little with Which to Concur*

Justice Doggett, joined only by Justice Gammage, concurred but took issue with much of the majority opinion. Justice Doggett's concurring opinion opens with the statement: "[T]he majority's mission in recent months has been to dismantle . . . the different safeguards that insurance policyholders and beneficiaries have been previously assured by the laws of Texas."[144] Continuing, Justice Doggett inveighed: "Instead of fairness to all, the majority has replaced protection of insureds with protection of insurers, leaving the insurance industry largely free to do as it pleases."[145] The apparent motive: "[T]his majority never met an insurance company it didn't like."[146]

Contrary to the majority, the concurring justices would have remanded *Moriel* for trial court articulation of the reasons for denying the insurer's motion for new trial.[147] Justice Doggett explained that articulation is a valuable and "meaningful" procedure to aid the trial court in deciding whether the jury exceeded its proper bounds.[148] The concurring justices would have granted Transportation's request for articulation—to " 'facilitate meaningful post-verdict review of punitive damage awards' "—and remanded the case to the trial court on that basis.[149]

Justice Doggett moved on to criticize the majority's holding that, for gross negligence to exist, the injury risked by the insurer's misconduct must be "independently and qualitatively different" from the injuries that typically follow from bad faith or breach of contract.[150] According to Justice Doggett, this opinion has "absolutely no basis in Texas law" and represents a "notorious first" in Texas jurisprudence.[151] Justice Doggett pointed to the *Moriel* case itself as an example of "arbitrary" use of the majority's requirement that the insured's harm differ qualitatively from breach of contract damages.[152] To the concurring justices, the

141. 879 S.W.2d at 33.
142. *Id.*
143. *Id.*
144. *Id.* at 33 (Doggett, J., concurring).
145. *Id.*
146. *Id.*
147. *Id.* at 34.
148. *Id.*
149. *Id.* at 34-35 (quoting opinion of the court, 879 S.W.2d at 33).
150. *Id.* at 40-41.
151. *Id.* at 40. The majority responded to this part of the concurrence, noting that numerous jurisdictions require a "separate injury" (other than breach of contract injury) to justify an award of punitive damages). *Id.* at 19 n.9 (opinion of the court).
152. *Id.* at 41 (Doggett, J., concurring).

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Prior to *Moriel*, Justice Dog
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153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.*
158. 699 S.W.2d 70 (Tex. 1985)
159. The 1987 Tort Reform Act
T. Montford & Will G. Barber, *198*
Texas Civil Justice System, 25 HOUS.
endorsed finding gross negligence base
160. 879 S.W.2d at 42 (Doggett,
161. *Id.* at 42-43 (citing Clifton v.
Denham v. United States, 834 F.2d 5
Inc., 652 F. Supp. 219, 225-26 (N.D
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521-22. The *Toomer* court employed
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even though the company explicitly in
materials. 652 F. Supp. at 225-27
162. *See* 879 S.W.2d at 22 ("It is
determined by an objective 'extreme
163. *Id.* at 44 (Doggett, J., concur
164. *Id.* Justice Doggett accused the
gence contained in the record." *Id.* A
insurer not to pay submitted medical bi
Accident Board. Transportation had
settlement. *Id.* Furthermore, Transport

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severity of Moriel's distress had been well established.[153] Moriel's injury had "affected an intimate and personal part of his life."[154] He was sued. He resorted to heavy drinking, and his marriage was jeopardized."[155] Nonetheless, the majority had found no "extreme harm," ignoring Moriel's "trauma of struggling with the resistant Transportation Insurance Company to obtain the means to recover his full masculinity."[156]

Prior to *Moriel*, Justice Doggett related, the test for gross negligence had alternative "objective" and "subjective" components.[157] Justice Doggett argued that the majority "deliberately misconstrued" *Williams v. Steves Industries*[158] and surreptitiously reversed its holding.[159]

Justice Doggett noted that the Texas state courts and federal courts sitting in Texas had experienced little difficulty interpreting the *Williams* standard.[160] These courts had consistently upheld *Williams* to allow proof that, under the circumstances, the defendant should have known his conduct created an extreme degree of risk.[161] Thus, although the *Moriel* holding does appear to accept that gross negligence may be proved by circumstantial evidence,[162] according to the concurrence *Moriel* insulates an insurance company from punishment "unless the policyholder it victimized can prove not only unusual harm from the misconduct, but also that the insurer knew or expected the unusual to happen."[163] Justice Doggett remonstrated that this holding would insulate those causing grievous injury to others from any obligation to "summon up even the most minimal awareness possessed by a reasonable person."[164]

153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.*
158. 699 S.W.2d 70 (Tex. 1985).
159. The 1987 Tort Reform Act was intended to "modify" the objective test of *Williams*, *see* John T. Montford & Will G. Barber, *1987 Texas Tort Reform: The Quest for a Fairer and More Predictable Texas Civil Justice System*, 25 HOUS. L. REV. 245, 320 (1988), at least to the extent that *Williams* endorsed finding gross negligence based on what a "reasonable person" probably would have known.
160. 879 S.W.2d at 42 (Doggett, J., concurring).
161. *Id.* at 42-43 (citing Clifton v. Southern Pac. Transp. Co., 709 S.W.2d 636, 640 (Tex. 1986); Denham v. United States, 834 F.2d 518, 522 (5th Cir. 1987); and Toomer v. United Resin Adhesives, Inc., 652 F. Supp. 219, 225-26 (N.D. Ill. 1986)). In *Denham* the court applied *Williams* in affirming a jury finding that the U.S. Army Corps of Engineers was grossly negligent in allowing an abandoned concrete anchor to remain in a swimming area, where it caused injury to a trespasser. 834 F.2d at 521-22. The *Toomer* court employed *Williams* in upholding a jury finding that a trucking company was grossly negligent in providing an economic incentive for truckers to clean truck tanks themselves even though the company explicitly instructed the drivers not to clean any tank containing hazardous materials. 652 F. Supp. at 225-27.
162. *See* 879 S.W.2d at 22 ("It is true that the relative riskiness of the defendant's action can be determined by an objective 'extreme risk' test.").
163. *Id.* at 44 (Doggett, J., concurring).
164. *Id.* Justice Doggett accused the majority of "deliberately disregard[ing] evidence of gross negligence contained in the record." *Id.* A Transportation adjuster had acknowledged it was wrong for an insurer not to pay submitted medical bills unless the insurer had filed a controversion with the Industrial Accident Board. Transportation had failed to controvert any of the four bills it refused to pay until settlement. *Id.* Furthermore, Transportation's adjuster testified that she sometimes (although not necessar-

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The concurring opinion closes with an empirical argument that punitive damages are assessed far less frequently than critics suggest and that the amounts assessed are also far less than punitive damages opponents' statistics indicate.[165] The concurrence concludes: "In the long run, the American emphasis on safety, backed by the social control of punitive damages, will produce the top quality products needed to compete in the international marketplace."[166]

Justices Doggett and Gammage granted that they would have joined the majority in implementing certain reforms—such as requiring specific enumeration of findings by the trial court in punitive damages cases—but concluded that they could not join in "abandoning" the punitive damages system.[167]

III. CONCLUSION

Moriel has clarified the distinction between insurer bad faith and gross negligence and, as part of the process, announced practical guidelines to govern imposition of punitive damages.

Regarding insurer bad faith, the court reiterated that bad faith requires proof contradicting the insurer's "reasonable basis" for denying the insured's claim. If the insurer is guilty of bad faith insurance practices, the plaintiff ordinarily will recover compensatory damages, but not the exceptional remedy of punitive damages.

Punitive damages require a finding of gross negligence, and the court held that gross negligence cannot exist unless the defendant's acts or omissions generated a likelihood of "serious harm" to the plaintiff. This holding applies to all tort cases. The jury must consider and weigh the risk of "serious harm" from the defendant's perspective as it stood prior to the injury.

In insurance bad faith disputes "serious harm" presupposes that the insurer's conduct created a likelihood of death, grievous physical injury, financial catastrophe, or other harm that is both different from and worse than the harm ordinarily resulting from mere bad faith. Further, the insured must offer proof that the insurer knew that its conduct created such a risk. Except in the cases involving disability insurance, juries may no longer assume that an insurer who denied coverage in bad faith knew or was consciously indifferent that its behavior would cause the insured extreme harm.

As a procedural matter, trial courts must bifurcate proceedings in all punitive damage cases and try the issue of the amount of punitive damages separately from

ily in Moriel's case) consciously declined to notify an injured worker of the insurer's decision to deny payment. The adjuster admitted that such delays could cause harm beyond that resulting from the work-related injury. *Id.* The majority had held that such additional harm would justify emotional distress damages in some cases, but would not necessarily justify punitive damages. *Id.* at 24 (opinion of the court).

165. *Id.* at 45 (Doggett, J., concurring).

166. *Id.* at 46.

167. *Id.* at 47.

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169. Doss v. McGhan Medical Cor
170. Elliot, *supra* note 5, at 1
171. Taylor, *supra* note 4, at 3
172. *See Moriel*, 879 S.W.2d at 24
may justify an award of consequential d
damages alone does not ordinarily warr
173. *See id.* ("[W]e must rely on the
distinction over time.")
174. *See Williams*, 699 S.W.2d at 57
negligence.")

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the issue of the defendant's liability for punitive damages. The practical effect of this ruling is that the jury will decide the defendant's liability before hearing evidence as to the defendant's net worth.[168]

At the appellate level, the reviewing court must state in its opinion the factors supporting the award or denial of punitive damages. Presumably, the appellate court must take particular care to state the facts establishing or disproving the threat of "serious harm" to the plaintiff.

The early indications are that *Moriel* will not insulate the most egregious wrongdoers, particularly if the plaintiffs have suffered physical harm. One month after *Moriel* was decided, a Texas jury handed down a $15 million punitive damages verdict after a bifurcated trial held pursuant to *Moriel*.[169] Notably, this jury award was the first in which a major company has been found liable for leaking silicone implants.

Moriel's influence undoubtedly will extend beyond the borders of the Lone Star State. *Moriel* was decided by a 7-2 margin, and the majority opinion was joined by moderates, such as Justice Hightower, as well as the liberal Justice Spector.[170] The decision has been praised by the United States Chamber of Commerce.[171]

Judicial opinions do not become influential merely by breaking new ground. *Moriel's* innovation, however, is its plain dictate that punitive damages are not proper absent a substantial threat of serious harm. This is a practical standard, designed quite simply to rule out punitive damages in the majority of insurance bad faith disputes.[172] *Moriel's* "serious harm" standard gives notice to insurers that knowledge or reason to know that wrongful denial of a claim will, for example, cause an insured to lose her business may result in liability for punitive damages. On the other hand, large, corporate insureds, who easily can absorb an unpaid insurance claim, are effectively barred from securing punitive damages. The common law will swiftly establish the classes of insureds who qualify for punitive damages,[173] which promises to be a clear improvement over the preexisting regime, under which virtually all insureds were potential punitive damages recipients.[174]

168. Evidence of a defendant's net worth, if admitted prior to the jury's determination of liability, has been found to prejudice juries unfairly against wealthy defendants. *See* 2 AMERICAN LAW INSTITUTE, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY—REPORTERS' STUDY 265-69 (1991). Juries who are told the net worth of companies making substantial profits have tended to find such companies liable regardless of the nature of their actual conduct or the causal connection between their conduct and the plaintiffs' injuries. *Id.*

169. Doss v. McGhan Medical Corp., No. 92-14155 (Tex. Dist. Ct., 189th Dist. Mar. 3, 1994).

170. Elliot, *supra* note 5, at 1.

171. Taylor, *supra* note 4, at 3.

172. *See Moriel*, 879 S.W.2d at 24 ("Although the bad faith breach of an insurance contract . . . may justify an award of consequential damages for mental anguish . . . the existence of mental anguish damages alone does not ordinarily warrant legal punishment.").

173. *See id.* ("[W]e must rely on the evolution of the common law to increase the precision of this distinction over time.").

174. *See Williams*, 699 S.W.2d at 574 ("No exact line can be drawn between negligence and gross negligence.").

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Moriel thus presents a practical tool for courts, regardless of whether one views the *Moriel* standard as just or unjust.[175] In *Moriel* the Texas Supreme Court fashioned a workable standard that will return certainty and predictability to an area of the law that may have lost its bearings. Other jurisdictions that value certainty and predictability in the law soon may be looking to Texas as the source of practical solutions to knotty legal issues.

175. Judicial decisions become influential when they are perceived to be "logical and justly pragmatical." State v. Fontano, 97 A.2d 498, 500 (N.J. Super. Ct. App. Div. 1953). Of particular value and influence are decisions that set forth useful tests, *see, e.g.*, *In re* Fernstrom Storage & Van Co., 938 F.2d 731, 735 (7th Cir. 1991), or author pragmatic definitions, *see, e.g.*, Commonwealth v. Kean, 556 A.2d 374, 377 (Pa. Super. Ct. 1989).

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