1993

Boyles v. Kerr: The Wrong Decision at the Right Time: Implications for Mental Anguish Damages Under the DTPA

Charles E. Cantú

Jared Woodfull V

Follow this and additional works at: https://commons.stmarytx.edu/facarticles

Part of the Law Commons

Recommended Citation


This Article is brought to you for free and open access by the School of Law Faculty Scholarship at Digital Commons at St. Mary's University. It has been accepted for inclusion in Faculty Articles by an authorized administrator of Digital Commons at St. Mary's University. For more information, please contact jlloyd@stmarytx.edu.
I. INTRODUCTION

On February 5, 1883, C.B. Stuart received a telegram from his brother: "John is very low. Come on first train." He rushed to his
brother’s side only to find that he was too late and had not only missed his dying brother’s final three hours but also his funeral. Steuart blamed his untimely arrival on Western Union’s failure to promptly deliver the telegram. He then sued for mental anguish, claiming that as a result of the untimely delivery of the telegram he had “suffered great disappointment, grief, and mental anguish.”

In 1885, the Texas Supreme Court upheld the trial court’s award for mental anguish, holding that “injury to the feelings was actual damage.”

Over a century later, seventeen-year old Dan Boyles, Jr. engaged in sexual intercourse with Susan Leigh Kerr. Unbeknownst to Kerr, Boyles covertly videotaped the intimate act and then showed the tape to ten friends. Gossip about the event soon spread and Kerr became “stigmatized with the reputation of ‘porno queen’...” After being confronted by Kerr, Boyles surrendered the only copy of the tape. Kerr then filed suit, alleging “that she suffered humiliation and severe emotional distress from the videotape and the gossip surrounding it.” On December 2, 1992, the

---

2 Id. at 352. Although the Western Union agent was informed of the necessity for speedy delivery, the telegram remained in Western Union’s Waco office for two days. Id.
3 Id. Western Union owned and operated a telegraph line from Marshall, Texas to Waco, Texas. Id. For a fee, Western Union transmitted telegrams between the two cities. Id. The message was delivered for fifty-cents. Id. It was received at the Western Union office in Waco on February 3, 1893, at 3:00 p.m. Id. C.B. Stuart called Western Union’s Waco office at 4:00 p.m. the same day and asked if a message had been received for him. Id. The Western Union agent responded in the negative. Id. C.B. Stuart then informed the agent that his brother was ill and that he was expecting a telegram regarding his condition. Id. The telegram was not delivered until February 5, 1893. Id.
4 Id.
5 Id. at 353.
6 Boyles v. Kerr, 855 S.W.2d 593, 594 (Tex. 1993). On August 10, 1985, Dan Boyles, Jr., a seventeen year old male, and Susan Leigh Kerr, a nineteen year old female, had sexual relations. The teenagers had shared several previous sexual encounters, however, they had not had sexual intercourse prior to August 10. Id. The teens were both home in Houston for the summer and had arranged a date the night of the incident. Prior to picking Kerr up, Boyles and a friend, Karl Broesche, arranged to use the Broesche house for the sexual encounter. Id. Boyles agreed to Broesche’s idea of videotaping the activity. Id. Prior to Boyles’ and Kerr’s arrival, Broesche and two friends concealed a camera in the bedroom. Id. They left with the camera running, and the ensuing activities were recorded. Id.
7 Id. Boyles showed the tape three times in a private residence. Id.
8 Id. “At social gatherings, friends and even casual acquaintances would approach her and comment about the video wanting to know ‘what she was going to do’ or ‘why did [she] do it.’” Id.
9 Id. at 1.
10 Id. Kerr claimed that the embarrassment surrounding the event affected her academic performance and made it difficult for her to relate to men. During trial, however, she testified to engaging in sexual intercourse subsequent to the event. Id.
Supreme Court of Texas reversed and remanded the trial court's award, stating that "there is no general duty in Texas not to negligently inflict emotional distress."11

During the one-hundred and nine years spanning from Mr. Stuart's untimely arrival at his brother's funeral and Dan Boyles' surreptitiously produced videotape, mental anguish jurisprudence has witnessed a tumultuous evolution. Consumer law, as codified in the Texas Deceptive Trade Practices Act,12 (hereinafter the "DTPA") has been uniquely impacted by the evolving law of mental anguish.

This article analyzes issues raised by a recent Texas Supreme Court opinion which reaffirmed the standard for recovery of mental anguish damages under the DTPA. The article concludes by rejecting the standard. To support this conclusion, the discussion centers on: 1) an historical overview of mental anguish; 2) the Texas Supreme Court's current view of mental anguish under the DTPA; and 3) mental anguish damages under the DTPA in relation to the rules of judicial construction.

II. HISTORICAL DEVELOPMENT: MENTAL ANGUISH JURISPRUDENCE

Historically, mental anguish has been treated as the proverbial "orphan child,"13 disguising itself in one tort or another.14 Not-

---

11Id.
13In a 1939 law review article, William L. Prosser referred to mental anguish as an "orphan child," positing that mental anguish should be considered as an independent tort. William L. Prosser, Intentional Infliction of Mental Suffering: A New Tort, 37 Mich. L. Rev. 874, 874 (1939).
14Beginning in the mid-fourteenth century, the court recognized the right to mental anguish damages when damages were awarded to a tavern keeper's wife who avoided a hatchet thrown by a dissatisfied customer. I. de S. et ux v. W. de S., Y.B. 22 Edw. 3, fol. 99, pl. 60 (1348). "Although the defendant's conduct was intentional, the importance of the decision lay in the court's recognition of mental injuries as worthy of compensation." St. Elizabeth's Hosp. v. Garrard, 730 S.W.2d 649, 651 n.2 (Tex. 1987). Instances abound of torts recognizing the plaintiff's interest in peace of mind. For instance, "the amorous railroad conductor who let his affections get the best of him, showering kisses upon an innocent young school marm. Such conduct cost the unwanted suitor's company $1,000 in compensatory damages for her "terror and anguish ... her mental humiliation and suffering.""
15Cracker v. Chicago & N.W. Ry., 36 Wis. 657 (1875). The plaintiff's right to peace of mind was compensated when the defendant, in the presence of others, spit in the plaintiff's face. Draper v. Baker, 21 N.W. 527 (Wis. 1884). Mental anguish was also found when a hotel detective entered the plaintiff's room at night, claiming she was a prostitute, even though the man who had come to visit her was her husband. Emmke v. De Silva, 293 F. 17 (8th Cir. 1923); See also 22 Am. Jur. 2d Damages § 483 (1988) (to warrant a recovery for pain and suffering, including mental anguish, that pain and suffering must be the proximate result of the defendant's wrongful act and must be merely an aggravation of damages naturally ensuing from the act forming the basis of the complaint); W.A.E., Annotation, Right to Recover for Mental Pain and Anguish Alone,
withstanding its early recognition in false imprisonment, defamation, assault, battery and malicious prosecution cases, the

Apart from other Damages, 23 A.L.R. 361, 383 (1923) (it has been stated that the rule that damages cannot be recovered for mental suffering unaccompanied by physical injury is not applicable where the wrong complained of is a wilful one, intended by the wrongdoer to wound the feelings and produce mental anguish and suffering, or from which such result should be reasonably anticipated). See generally Restatement (Second) of Torts § 435A cmt. (1977) (stating there must be a causal connection between the defendant's act and the result).

Reicheneder v. Skaggs Drug Center, 421 F.2d 307, 313 (5th Cir. 1970) (stating mental suffering is an element of damages recoverable in a false imprisonment case and lack of physical injury can not be a bar to recovery); S.H. Kress & Co. v. Rust, 97 S.W.2d 997, 1001 (Tex. Civ. App.—Fort Worth 1936) (stating physical injury is not necessary to find damages of mental suffering), aff'd 132 Tex. 89, 120 S.W.2d 425 (Tex. 1938); J.C. Penney Co. v. Duran, 479 S.W.2d 374, 382 (Tex. Civ. App.—San Antonio 1972, writ ref'd n.r.e.) (stating the fact that no physical injury was inflicted on one complaining of false imprisonment is not a ground for denying recovery of reasonable compensation for mental suffering of which humiliation, shame, and fright are elements to be considered); McDonald v. Henderson, 250 S.W. 463, 463 (Tex. Civ. App.—Amarillo 1923, no writ) (stating the fact that no physical hurt was inflicted on one complaining of a false imprisonment is no ground for denying recovery of reasonable compensation for mental suffering); Gadsden Gen. Hospital v. Hamilton, 103 So. 553, 554 (Ala. 1925) (plaintiff awarded $1,500 after being wrongfully detained for not paying bill); Mental and Emotional Disturbance in the Law of Torts, 149 Harv. L. Rev. 1033, 1034 (1936) ("[s]ubstantial sums have been recovered for false imprisonments, though the detention was of short duration and involved no damage other than annoyance and indignity"). See generally 32 Am. Jur. 2d False Imprisonment § 138 (1982) (stating the fact that no physical injury was inflicted on one complaining of false imprisonment or arrest has been said not to be grounds for denying recovery of reasonable compensation for mental suffering).

See Greybill v. De Young, 73 P. 1067, 1069 (Cal. 1903) (awarding defamation and mental anguish damages); Louisville Press Co. v. Tennelly, 49 S.W. 14 (Mo. 1899) (holding mental anguish damages recoverable in defamation claim); Renfro Drug Co. v. Lawson, 160 S.W.2d 246, 250 (Tex. 1942) (stating that if the publication is a defamation as defined in the statute, injury to the reputation of the person defamed is presumed, and that, with that injury presumed, the mental anguish of the person defamed may be taken into consideration in awarding damages); A. H. Belo & Co. v. Fuller, 19 S.W. 616, 617 (Tex. 1892) (holding injuries to the feelings need not be proved, they are presumed in an action of libel, and are thus a proper item of damages); Little Stores v. Isenberg, 172 S.W.2d 13, 16 (Tenn. Ct. App. Eastern Section 1943, writ denied) (holding that damages may be recovered for mental suffering proximately resulting from publication of defamatory words which are actionable per se); Jozsa v. Moroney, 51 So. 908, 911 (La. 1910) (stating that damages for mental suffering alone can be recovered, although the plaintiff may have suffered no other injury); see also Calvert Magruder, Mental Disturbance In Torts, 49 Harv. L. Rev. 1033, 1035 (1936) (discussing early mental anguish jurisprudence and its relationship to the tort of defamation). See generally 33 Am. Jur. Libel and Slander § 205 (1941) (while it has been held that mental suffering is not a necessary consequence of a defamatory publication, the great weight of authority appears to support the view that damages can be recovered for an injury of such character, where it can be shown to be the proximate result of the use of words that are actionable per se); 50 Am. Jur. 2d Libel and Slander § 358 (1970) (the prevailing view is that damages for mental suffering are recoverable for defamations which are actionable per se, even though the plaintiff has suffered no other injury).

common law has been hesitant “to accept the interest in peace of mind as entitled to independent legal protection.”\textsuperscript{20}
In 1861, in the parent of a long line of decisions refusing to recognize mental anguish, Lord Wensleydale wrote, "Mental pain or anxiety, the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone." Although Lord Wensleydale's dictum may have been somewhat misleading, courts have been reluctant to recognize one's interest in peace of mind. This judicial reluctance stemmed from traditional notions that mental anguish was too "metaphysical," too subtle, and too "speculative to be capable of admeasurement by any standard known to the law." Instead, such "minor annoyances" were relegated to instruments of social control other than the law, believing that a certain toughening of the mental hide was a better protection than the law could ever be. One commentator described mental anguish damages as parasitic, predicting that "[t]he treatment of any element of damages as a parasitic factor belongs essentially to a transitory stage of legal evolution. A factor which is today recognized as parasitic will, forsooth, tomorrow be recognized as an independent basis of

---


22In a large number of cases, from a substantial number of jurisdictions, it has been stated that there can be no recovery for mental pain and suffering alone resulting from the merely negligent act of another. Gulf, C. & S.F. Ry. v. Trott, 25 S.W. 419, (Tex. 1894) (defendant was negligent in attaching horses to the plaintiff's wagon, which caused damage to the plaintiff's property, but with no physical injury to the plaintiff mental suffering cannot be recovered as an element of those damages); Texarkana & FT. S. Ry. v. Anderson, 53 S.W. 673, 675 (Ark. 1899) (where a passenger was carried beyond her destination, without circumstance of aggravation of personal injury, and suffered an unimportant delay of two hours, there being nothing to show the value of time and labor lost, nominal damages are all that can be recovered, without an independent personal injury, one cannot recover for mental suffering alone); Kansas City, FT. S. & M.R. Co. v. Dalton, 70 P. 645, 646 (Kan. 1902) (in an action for damages sustained by reason of the negligence of a railway company in carrying a passenger beyond her point of destination in the nighttime, thereby causing her expense, annoyance, inconvenience, loss of time, fright, and mental suffering, no recovery can be had for the fright or mental suffering as an independent element of damages, unaccompanied by physical or bodily injury); Southern Express Co. v. Byers, 240 U.S. 612, 612-13 (1916) (defendant's failure to promptly deliver casket and graves clothes to plaintiff for his wife's burial was not sufficient to merit recovery of any damages for mere mental suffering occasioned by such delay); Calvert Magruder, Mental and Emotional Disturbance in the Law of Torts, 49 Harv. L. Rev. 1033, 1035 (1936).

23Mitchell v. Rochester Ry Co., 45 N.E. 354 (N.Y. 1896). Asserting the inherent difficulty in evaluating mental anguish damages, and the propensity to open the floodgates of litigation, early jurisprudence was reluctant to recognize an independent cause of action for articles).

liability." As a result of academicians, rather than courts, the prophetic words of this commentator have been realized in most jurisdictions.

Introduced in the articles of law journals and other scholarly legal writing, the tort of intentional infliction of severe mental distress was formally defined in the pages of the Restatement of Torts in 1948. Although most jurisdictions currently allow recovery for the intentional infliction of mental anguish, the tort still remains largely undefined.

---


Some relationships between parties are assumed tort of intentional infliction of emotional distress); See also RESTATEMENT (SECOND) OF TORTS § 46 (1965) (the modern tort was introduced in the pages of law reviews, and then refined and finally defined by the American Law Institute in its Restatements).


§ 46 Outrageous Conduct Causing Severe Emotional Distress

1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to others results from it, for such bodily harm.

2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress
   a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm
   b) to any other person who is present at the time, if such distress results in bodily harm.

RESTATEMENT (SECOND) OF TORTS (1965).


The development of the tort of mental anguish through the first half of the twentieth century is evidenced through a series of law review articles: Bohlen, Right to Recover for Injury Resulting from Negligence Without Impact, 41 AM. L. REG. (1902); Throckmorton, Damages for Fright, 34 HARV. L. REV. 260 (1921); Goodrich, Emotional Disturbances as Legal Damages, 20 MICH. L. REV. 497 (1922); Bohlen and Polikoff, Liability in Pennsylvania for Physical Effects of Fright, 80 U. PA. L. REV. 627 (1932); Hallen, Damages for Physical Injuries Resulting from Fright or Shock, 19 VA. L. REV. 253 (1933); Hallen, Hill v. Kimball - A Milepost in the Law, 12 TEX. L. REV. 1 (1953); Magruder, Mental and Emotional Disturbance in the Law of Torts, 49 HARV. L. REV. 1033 (1936); William Prosser, Intentional Infliction of Mental
In some jurisdictions, mental anguish jurisprudence has evolved at a more rapid pace. Numerous courts have bypassed the intent requirement and adopted the tort of negligent infliction of emotional distress.\textsuperscript{30} This tort has been limited, however, to three situations. Many jurisdictions hold that a duty not to negligently inflict emotional distress arises from the contractual relationship.\textsuperscript{31} Some jurisdictions hold that emotional damages are recoverable only if the plaintiff proves a recognized tort.\textsuperscript{32} Finally, most jurisdictions recognize bystander claims where the negligence causes an emotional injury.\textsuperscript{33} By definition, a negligent act is not as culpable as an...
intentional act and, therefore, makes recovery of mental anguish more likely.\textsuperscript{34}

III. MENTAL ANGUISH DAMAGES IN TEXAS

In Texas, mental anguish jurisprudence has witnessed a tumultuous evolution. Its genesis can be traced back to 1885 when the Supreme Court of Texas authorized mental anguish damages for a plaintiff who suffered physical injury as a result of the defendant's conduct.\textsuperscript{35} That same year, the court awarded damages to a plaintiff

\textsuperscript{34} Ariz. L. Rev. 438, 457 (1992) (discussing limits of tort of negligent infliction of emotional distress). See also Dillon v. Legg, 441 P.2d 912, 925 (Cal. 1968) (damages may be recovered for emotional trauma and physical injury resulting from plaintiff's witnessing fatal accident in which her sister was killed) (this was a landmark case adopting the theory of bystander recovery and since then most other jurisdictions have adopted variations of this concept); cf. Landreth v. Reed, 570 S.W.2d 486, 490 (Tex. Civ. App.—Texarkana 1978, no writ) (holding that the plaintiff was "so close to the reality of the accident as to render her experience an integral part of it."); Corso v. Merrill, 406 A.2d 300, 306 (N.H. 1979) (the plaintiffs were "relatively close . . . in both time and geography [to] the negligent act . . . "); Barnhill v. Davis, 300 N.W.2d 104, 108 (Iowa 1981) (when the plaintiff is related to the victim within the second degree of affinity or consanguinity he may recover); Leong v. Takasaki, 520 P.2d 758, 766 (Haw. 1974) (absence of a blood relationship should not foreclose recovery when the plaintiff witnessed his foster grandmother being killed as he stood several feet away); See generally Restatement (Second) of Torts §§ 313(2), 436(3) (1965) (the jurisdictions that have recognized bystander claims have used various means to limit them by the inclusion or adoption that the claimant be in the zone of physical danger, the claimant be within a familial relationship to the victim, and the resulting harm be foreseeable) (the restatement approach requires that the claimant be in the zone of physical danger).


\textsuperscript{36} Texas & Pacific Ry. v. Curry, 54 Tex. 86 (Tex. 1885). In Victorian Railways Commissioners v. Coulta, the Privy Council held that "damages for shock arising from fear unaccompanied by physical injury were too remote and could not be considered a consequence which, in the ordinary course of things, would flow from the negligence. . . ." St. Elizabeth Hosp. v. Garrard, 730 S.W.2d 649, 651 n.2 (1987) (quoting Victorian Railways Commissioners v. Coulta, 13 App. Cas. 222 (P.C. 1888). The Coulta case was soon overruled, in Dulieu v. White & Sons, 2 K.B. 669 (D.C. 1901), but not before its holding was adopted by an American court in Mitchell v. Rochester Ry. Co., 45 N.E. 354 (N.Y. 1896). Soon, a majority of jurisdictions, including Texas, gravitated to the language of Mitchell, establishing barriers to mental anguish damages.

Relying on the New York court's holding in Mitchell, in 1885 the Texas Supreme Court held that mental distress damages were appropriate only when the plaintiff suffers physical injury. Texas & Pacific Ry. v. Curry, 54 Tex. 86 (1885). In 1890, however, the Texas Supreme Court awarded mental anguish damages to a plaintiff where the ensuing mental anguish resulted in physical injury. In Hill v. Kimball, the plaintiff suffered a miscarriage as a result of witnessing a street fight. 13 S.W. 59 (Tex. 1890). The court further defined its stance on mental anguish when it awarded damages to a plaintiff who suffered mental anguish as a result of the defendant's negligence. In Stuart, the court further held that "the complaining party may . . . recover, as actual damages, compensa-
whose injuries were limited to mental anguish. A decade later, in *Gulf, C. & S. F. Ry. Co. v. Hayler*, the state's highest court further defined mental anguish jurisprudence in Texas, holding that mental anguish damages were recoverable when the ensuing mental anguish results in physical injury. Thus, during the early stages of mental anguish jurisprudence in Texas, "mental anguish damages were recoverable when they were the product of or caused by physical injuries, or even in the absence of physical injury." However, decades of litigation have proven that these early cases can be somewhat misleading.

**IV. Modern Mental Anguish Damages in Texas**

Years of vexatious litigation have complicated the law of mental anguish in Texas. This is illustrated by the variety of definitions of mental anguish cited by Texas courts. Courts frequently cite the definition articulated in *Trevino v. Southwestern Bell Telephone Co.*, which describes mental anguish as an element of damages

"impl[ying] a relatively high degree of mental pain and distress. It is more than mere disappointment, anger, resentment, or embarrassment, although it may include all of these. It includes a mental sensation of pain resulting from such painful emotions as grief, severe disappointment, indignation, wounded pride, shame, despair and/or public humiliation." 

...
Migraine headaches, humiliation, inability to sleep, fear for safety, embarrassment, anxiety, despondency, loss of self-esteem, shock, and nervousness have all been found by Texas courts to be symptoms of mental anguish.

*per curiam*, 686 S.W.2d 593 (Tex. 1985); City of Ingleside v. Kneuper, 768 S.W.2d 451, 460 (Tex. App.—Austin 1989, writ denied); Worsham Steel Co. v. Arias, 831 S.W.2d 81, 85-86 (Tex. App.—El Paso 1992, no writ). In wrongful death cases, mental anguish has a different definition. It is described as "the emotional pain, torment, and suffering that the plaintiff would, in reasonable probability, experience from the death of a family member." Moore v. Lillebo, 722 S.W.2d 683, 688 (Tex. 1986).

"North Star Dodge Sales, Inc. v. Luna, 653 S.W.2d 892, 897 (Tex. App.—San Antonio 1983), aff'd, 667 S.W.2d 115 (Tex. 1984); Skaggs Alpha Beta, Inc. v. Nabhan, 808 S.W.2d 198, 202 (Tex. App.—El Paso 1991, writ dism'd) (stating that the plaintiff testified that she suffered chronic headaches which affected her domestic environment and had trouble sleeping); Kneip v. UnitedBank—Victoria, 734 S.W.2d 130, 136 (Tex. App.—Corpus Christi 1987, no writ) (plaintiff, among other things, suffered from loss of sleep and headaches held sufficient to support award for mental anguish).

"Metro Ford Truck Sales, Inc. v. Davis, 709 S.W.2d 785, 793-95 (Tex. App.—Fort Worth 1986, writ ref’d n.r.e); Havens v. Tomball Community Hosp., 795 S.W.2d 690, 691-92 (Tex. App.—Houston [1st Dist.] 1990, writ denied) (stating that suffering of humiliation was sufficient to award the plaintiff mental anguish damages).

"J.B. Custom Design & Bldg. v. Clawson, 794 S.W.2d 38, 42 (Tex. App.—Houston[1st Dist.] 1990, no writ); State Farm Mut. Auto. Ins. Co. v. Zubiate, 808 S.W.2d 590, 601 (Tex. App.—El Paso 1991, writ denied) (stating that plaintiffs felt intimidated, confused, frightened, betrayed, scared, angry and devastated and were unable to sleep held sufficient to prove mental anguish); Skaggs, 808 S.W.2d at 202 (stating the plaintiff’s inability to sleep was a proper element of damages); Kneip, 734 S.W.2d at 136 (plaintiff testified that he suffered from loss of sleep).

"Group Hosp. Servs., Inc. v. Daniel, 704 S.W.2d 870, 878-79 (Tex. App.—Corpus Christi 1985, no writ) (stating that the evidence of mental anguish contained in the record was that the appellee was "scared" because of her personal financial situation); Kneuper, 768 S.W.2d at 460 (stating that testimony that the plaintiff was in "great fear" and "total panic" because they had seven children and no way to support them was sufficient to award mental anguish damages).

"Aetna Casualty & Sur. Co. v. Marshall, 699 S.W.2d 896, 904 (Tex. App.—Houston [1st Dist] 1985), aff'd, 724 S.W.2d 770 (Tex. 1987); J.B. Custom Design & Bldg. v. Clawson, 794 S.W.2d 38, 43 (Tex. App.—Houston [1st Dist.] 1990, no writ) (holding that the plaintiff experienced a "tremendous amount of mental anguish, embarrassment, and distress" is legally and factually sufficient to support award for mental anguish); Miller v. Dickenson, 677 S.W.2d 253, 259-60 (Tex. App.—Fort Worth 1984, writ ref'd n.r.e.) (embarrassment of plaintiff was sufficient to support award of $2,000 for mental anguish).

"Clawson, 794 S.W.2d at 43 (stating distress [anxiety] was an element within calculation of damages).

"Marshall, 699 S.W.2d at 904.

"Id.

"Underwriters Life Ins. Co. v. Cobb, 746 S.W.2d 810, 819 (Tex. App.—Corpus Christi 1988, no writ) (stating shock was an element of mental anguish damages).

"Id.; Kneip v. UnitedBank—Victoria, 734 S.W.2d 130, 136 (Tex. App.—Corpus Christi 1987, no writ) (stating that plaintiff testified that she suffered from loss of sleep, headaches, and a nervous stomach); City of Ingleside v. Kneuper, 768 S.W.2d 451, 460 (Tex. App.—Austin 1989, writ denied) (plaintiff among other things was "nervous and irritable").
In Texas, the courts have tended to concentrate on who can recover mental anguish damages, and what must be proven for this recovery. Currently, the Texas courts allow mental anguish damages when the plaintiff is a direct victim of the wrongdoing, a bystander to the wrongful conduct, or a family member whose loved one has been injured as a result of another's conduct. In 1987, in St. Elizabeth Hospital v. Garrard, the Supreme Court of Texas afforded greater protection to emotional injuries by recognizing the tort of negligent infliction of mental distress. Recently however, in Boyles v. Kerr, the Supreme Court of Texas abolished this tort, returning mental anguish jurisprudence in Texas back to the pre-Garrard days.

In the past, the mental anguish plaintiff had the burden to prove that there was a physical injury to demonstrate that the mental anguish resulted in a physical manifestation. Although this requirement has been eliminated, "[t]here is considerable confusion presently as to the elements of proof necessary to sustain mental anguish damages." This confusion is further heightened by the

---

50 Timothy G. Chovanec, ET AL., MENTAL ANGUISH DAMAGES, s-12 (1992); See cases cited infra notes 52-54.
51 Id.; In order to recover for mental anguish it is necessary to offer proof of more than mere worry, anxiety, vexation, or anger. Freedom Homes of Texas, Inc. v. Dickinson, 598 S.W.2d 714, 718 (Tex. Civ. App.—Corpus Christi 1980, writ ref’d n.r.e.); Cactus Drilling Co. v. McGinty, 580 S.W.2d 609, 611 (Tex. Civ. App.—Amarillo 1979, no writ); Ryder Truck Rentals, Inc. v. Latham, 593 S.W.2d 334 (tex. Civ. App.—El Paso 1979, writ ref’d n.r.e.). See also Cobb, 746 S.W.2d at 819 (stating that to recover for mental anguish, the plaintiff must prove "such painful emotions as grief, severe disappointment, indignation, wounded pride, shame, despair, or public humiliation"); Tidelands Auto Club v. Walters, 699 S.W.2d 939, 944 (Tex. App.—Beaumont 1985, writ ref’d n.r.e.) (stating proof of physical injury is no longer required).
54 See Cavnar v. Quality Control Parking, Inc., 696 S.W.2d 549, 551 (Tex. 1985) (holding that recovery is available to surviving spouse, children, and parents; Moore v. Lillebo, 722 S.W.2d 683, 688 Tex. 1986) (defining "mental anguish" in cases brought under the Wrongful Death Act as "the emotional pain, torment, and suffering that the named plaintiff would, in reasonable probability, experience from the death of the family member").
55 730 S.W.2d 649 (Tex. 1987).
56 Boyles v. Kerr, 855 S.W.2d 593 (Tex. 1993).
57 See St. Elisabeth Hosp., 730 S.W.2d at 649 (discussing history of mental anguish in Texas).
Texas Supreme Court's treatment of mental anguish damages in DTPA cases.

V. DEFINING THE DTPA

Prior to 1973, consumers' remedies were limited "when it came to dealing with unscrupulous, or simply careless, merchants." Plaintiffs' attorneys were hesitant to take consumer cases because the amount in controversy was unusually small, making the cost of litigation prohibitive. Although the common law allowed exemplary damages, the majority of cases lacked the requisite intent necessary for such an award.

In 1973, the Legislature radically revolutionalized consumer law in Texas by adopting the Texas Deceptive Trade Practices and Consumer Protection Law. By adding this powerful weapon to the plaintiffs' litigation arsenal, consumers' remedies were no longer limited to fraud, breach of contract, misrepresentation, and warranty actions. This legislative reform package replaced the traditional notions of caveat emptor and supplanted it with the doctrine of caveat venditor.

By adopting a broad definition of "consumer" and allowing treble

---

64 BLACK'S LAW DICTIONARY 222 (6th ed. 1990) ("Let the buyer beware").
65 BLACK'S LAW DICTIONARY 222 (6th ed. 1990) ("Let the seller beware").
damages and attorney's fees, the DTPA has revolutionized consumer law over the past fifteen years. In fact, one commentator posits that it may be "a DTPA violation for an attorney to not be familiar with the provisions of this Act." To recover under the DTPA, the plaintiff has the burden of pleading and proving three things: 1) that they are a "consumer" under the Act; 2) that the defendant has violated the Act; and 3) that the defendant's conduct was a producing cause of the consumer-plaintiff's actual damages.

A. Actual Damages

In 1979, the DTPA was amended to allow a consumer to receive "the amount of actual damages found by the trier of fact." While debating the amendment, the 66th Legislature concluded that the Act "would include any damages that you could convince the jury had occurred as a result of a violation of the DTPA." The Act,

---


68 Tex. Bus. & Com. Code Ann. § 17.45(4) (Vernon 1987) defines consumer as:

[A]n individual, partnership, corporation, this state, or a subdivision or agency of this state who seeks or acquires by purchase or lease, any goods or services, except that the term does not include a business consumer that has assets of $25 million or more, or that is owned or controlled by a corporation or entity with assets of $25 million or more.

Cf. Riverside Nat'l Bank, 603 S.W.2d at 173; Rutherford v. Whataburger, Inc., 601 S.W.2d 441, 444 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.).

69 Dwight's Discount Cleaner City, Inc., v. Scott Fetzer Co., 860 F.2d 646, 649 (5th Cir. 1988), cert. denied, 490 U.S. 1108 (1989); Cameron, 618 S.W.2d at 539; e.g. Nobility Homes of Texas, Inc. v. Shivers, 557 S.W.2d 77 (Tex. 1977) (stating that the act is designed to protect consumers from any deceptive trade practices); Jeff Sovern, Private Actions Under the Deceptive Trade Practices Act: Reconsidering the FTC as Rule Model, 52 Ohio St. L.J. 437, 440 (1991); John L. Hill, Introduction, Consumer Protection Symposium, 8 St. Mary's L.J. 609 (1977).


however, failed to define actual damages.73 Where the Act left off,
the common law picked up, including physical injuries and wrongful
death as actual damages under the Act.74 The courts further de-
defined actual damages to include mental anguish regardless of
whether it resulted from physical injury.75

B. Mental Anguish Under the DTPA

In 1980, the Supreme Court of Texas held that DTPA plaintiffs
could recover mental anguish damages which did not result from
physical injuries.76 In Brown v. American Transfer & Storage Co.,
the court refused to award mental anguish damages to a plaintiff who
failed to prove either of the two common law requirements of
mental anguish damages: 1) that “the mental anguish was caused
by a willful tort, willful and wanton disregard or gross negligence; or
that 2) the mental anguish resulted in physical injury.”77 By deny-
ing recovery on these grounds, the court upheld the common law
predicates for mental anguish damages, i.e., that mental anguish
must result from gross negligence or an intentional or willful tort,
and that the mental anguish evidence itself through a physical mani-
estation.78 The common law further perpetuated these require-

73E.g., Kish v. Van Note, S.W.2d 463, 466 (Tex. 1985); (holding that actual damages
are defined as total injury sustained); Brown v. American Transfer & Storage Co., 601
S.W.2d 931, 939 (Tex. 1980) (stating that the Act does not define “actual damages” but
the term has been construed to mean damages available at common law); Woo v. Great
Southwestern Acceptance Corp., 565 S.W.2d 290 (Tex. Civ. App.—Waco 1978 writ
ref’d n.r.e.) (holding that actual damages not defined but determined by total loss
sustained).
74E.g., Keller Industries, Inc. v. Reeves, 656 S.W.2d 221 (Tex. App.—Austin 1983,
with ref’d n.r.e.); Mahan Volkswagen, Inc. v. Hall, 648 S.W.2d 324 (Tex. App.—Houston
[1st Dist] 1982, no writ); Tom Benson Chevrolet, Inc. v. Alvarado, 636 S.W.2d 815
(Tex. App.—San Antonio 1982, wrif ref’d n.r.e.); TEXAS BAR ASSOCIATION MANUAL
75See American Commercial Colleges v. Davis, 821 S.W.2d 450, 453 (Tex. App.—East-
land 1991, writ denied) (a DTPA plaintiff may recover mental anguish damages for
either proving a tort or a resulting physical injury); See Duncan v. Luke Johnson Ford,
Inc., 603 S.W.2d 777 (Tex. 1980) (holding that mental anguish damages are recoverable
for tort committed in a grossly negligent manner); Brown, 601 S.W.2d at 939 (holding
that mental anguish damages are recoverable upon proof of willful or knowing act which
results in physical injury; Charles E. Cantu, Negligent Infliction of Emotional Distress:
76Brown, 601 S.W.2d at 939.
78See Luna, 667 S.W.2d 115, 116 (Tex. 1984) (recovery allowed when there is proof of
a willful tort and physical injury); accord Brown, 601 S.W.2d 931; Ybarra, 624 S.W.2d at
952-53; Charles E. Cantu, Negligent Infliction of Emotional Distress: Expanding the Rule
Evolved Since Dillon, 17 TEX. TECH L. REV. 1557 (1987); Michael Cutty, The 1979 Amend-
ment To The Deceptive Trade Practices: Consumer Protection Act, 1980, 32 BAYLOR L. REV. 51
(1980).
ments, treating mental anguish differently when it did not result from physical injury, and requiring special proof that the mental anguish was caused by gross negligence or a willful tort.\(^7^9\)

In 1984, the Supreme Court of Texas extended its holding in \textit{Brown}, making it difficult for a DTPA plaintiff to recover mental anguish damages.\(^8^0\) In \textit{Luna v. North Star Dodge Sales, Inc.}\(^8^1\) the defendant, North Star Dodge Sales, made representations to the plaintiff, Luna, regarding the sale of a car.\(^8^2\) The trial court, after remitting the jury's award of $66,600 to Luna, awarded $55,400 against North Star Dodge.\(^8^3\) Included in the award was $5,200 for mental anguish damages.\(^8^4\) The Fourth Court of Appeals in San Antonio reversed and rendered the mental anguish damages, holding that there "was no allegation or proof of 'willfulness'..."\(^8^5\) The Texas Supreme Court then reversed and remanded "the court of appeal's judgment concerning the mental anguish. . . ."\(^8^6\) Relying on \textit{Brown}, the court held that the jury's finding, that the unconscionable actions of North Star Dodge "were committed 'knowingly,' was sufficient to support recovery of mental anguish damages."\(^8^7\) The court further held that the trial court correctly defined "knowingly" to mean "actual awareness of the falsity, deception, or unfairness of the act or practice giving rise to the consumer's claim of actual awareness of an act or practice constituting a breach of warranty, but actual awareness may be inferred when objective manifestation indicate that a person acted with actual awareness."\(^8^8\) The court then concluded that on the continuum of blameworthiness, "knowing conduct is more culpable than gross


\(^{80}\) \textit{Luna}, 667 S.W.2d at 116 (holding that a plaintiff must prove both that injury resulted from wilful or knowing misconduct and that a physical injury resulted).

\(^{81}\) Id.

\(^{82}\) Id.

\(^{83}\) Id.

\(^{84}\) Id.

\(^{85}\) Id. at 117.

\(^{86}\) Id.

\(^{87}\) Id. at 117.

\(^{88}\) Id. (stating that the definition of "knowingly" follows the statutory definition section 17.45(9) of the DTPA).
negligence, yet less culpable than intentional actions."

Three years after the court’s decision in Luna, mental anguish jurisprudence in Texas was radically revolutionaryized. By abolishing the physical manifestation requirement, and recognizing the tort of negligent infliction of emotional distress, it was thought that the standard articulated in Luna had become somewhat antiquated.

C. Radical Revolution

This jurisprudential coupe de ‘etat materialized in a case styled St. Elizabeth Hospital v. Garrard. By recognizing the tort of negligent infliction for mental anguish, and eliminating the physical injury requirement, the court in Garrard repaved the path for DTPA plaintiffs seeking mental anguish damages. Relying on the court’s decision in Sanchez v. Schindler, which “authorized recovery for mental anguish damages without proof of physical injury or conduct worse than negligence,” the court held that the Garrard’s were entitled to mental anguish damages resulting from their stillborn daughter’s body being buried in an unmarked grave without their knowledge or consent.

Although the Texas Supreme Court has not expressly overturned Luna, numerous appellate courts have used Garrard as a springboard for overturning the “knowing” requirement established by the Luna court. Recently, the Third Court of Appeals in Austin, and the Fourth Court of Appeals in San Antonio, have gravitated to the
language on *Garrard*, dispensing with the “knowing” requirement imposed by *Luna*.

On June 26, 1987 the Zeretzkes purchased an automobile from Milt Ferguson Motor Company. Included in the purchase was a new car warranty of 5 years/60,000 miles. Three months later, the car began losing oil pressure. Mr. Zeretzke returned the car, and after it was repaired, was informed that “the repairs were done.” The Zeretzkes had addition problems with the car, and after having the car repeatedly worked on, the Zeretzkes took the car to an independent mechanic who told them that the engine block was cracked. The Zeretzkes then brought suit under the DTPA and were awarded damages for repairs, loss of use and mental anguish.

Relying on *Luna v. North Star Dodge Sales, Inc.*, appellants argued that there was “no evidence or insufficient evidence, or plaintiff failed as a matter of law to prove the predicate finding of a knowing violation of the DTPA, to allow recovery of damages for mental anguish...” The Court of Appeals disagreed, holding that in *St. Elizabeth Hospital v Garrard* the Court recognized a less stringent standard for recovering mental anguish damages. Furthermore, the court held that in *Garrard* the Supreme Court, in a footnote, recognized the holding of the Beaumont Court of Appeals which held, “We believe [Sanchez] has now authorized the recovery of mental anguish without proof of physical injury or conduct worse than negligence.” The court concluded by stating that “[t]o hold that mental anguish damages are only recoverable upon pleading and proof that the tort complained of was committed willfully or knowingly, would be to require a higher standard of proof, contrary to the holdings of *Sanchez v. Schindler,* *Baptist Hosp. of Southeast Texas, Inc. v. Baber* and *St. Elizabeth Hosp. v. Garrard.* The Court fur-

---

100 *Id.* at 352.
101 *Id.*
102 *Id.*
103 *Id.* at 353.
104 *Id.*
105 *Id.* at 355.
106 *Id.*
107 *Id.* at 356.
108 *Sanchez v. Schindler*, 651 S.W.2d 249 (Tex. 1983) (allowing recovery for mental anguish without proof of physical injury or conduct worse than negligence).
ther held that \textit{Luna} was "no longer the law with respect to the necessity to plead and prove that an act was committed willfully or knowingly to recover damages for mental anguish."\textsuperscript{111}

Until recently, it was believed that the rule articulated in \textit{Luna} had limited relevancy. In December of 1992, however, the Supreme Court of Texas made it very clear that \textit{Luna} was still good law.\textsuperscript{112}

D. \textit{Reaffirming Luna: Boyles v. Kerr}

On December 2, 1992, the Supreme Court of Texas held that \textit{St. Elizabeth Hospital v. Garrard} was overruled "to the extent that it recognizes an independent right to recover for negligently inflicted emotional distress."\textsuperscript{113} The Court further held that "mental anguish damages should be compensated only in connection with defendant's breach of some other duty imposed by law."\textsuperscript{114} Although the facts in \textit{Boyles v. Kerr}\textsuperscript{115} did not involve the DTPA, the Court reaffirmed its decision in \textit{Luna}. In dicta, the Court stated that "mental anguish damages may not be recovered under the Texas Deceptive Trade Practices Act absent proof of a knowing violation."\textsuperscript{116} By eliminating the tort of negligent infliction of severe mental distress, the \textit{Kerr} court answered any unresolved question raised by the lower courts concerning the proper role of mental anguish under DTPA.

VI. The Role of Mental Anguish under the DTPA

Since its inception in 1973, the DTPA has been interpreted and analyzed in more than 150 opinions.\textsuperscript{117} Despite the diversity of jurisprudential philosophies that have graced the court during the past two decades, the construction of the Act has remained consistent.\textsuperscript{118} This uniformity has resulted, in large part, from the courts' willingness to adhere to certain guiding principles when applying

\textsuperscript{111}Milt Ferguson Motor Co. v. Zeretzke, 827 S.W.2d at 357.
\textsuperscript{112}Id. at 357.
\textsuperscript{113}See \textit{Boyles v. Kerr}, 855 S.W.2d 593 (Tex. 1993) (affirming the knowledge requirement of \textit{Luna v. North Star Dodge}).
\textsuperscript{114}Id. at 595-96.
\textsuperscript{115}Id.
\textsuperscript{116}For a brief discussion of the facts of \textit{Boyles v. Kerr}, see introduction.
\textsuperscript{118}Mark L. Kincaid, \textit{Rules of Judicial Construction-Making and Arguing the Law in DTPA Cases}, 23 TEX. TECH. L. REV. 687, 689 (1992). In 1992, Mark L. Kincaid wrote an article titled, \textit{Rules of Judicial Construction - Making and Arguing the Law in DTPA Cases}. These principles articulated by Mr. Kincaid are helpful in deciding the proper role of mental anguish under the DTPA.
the Act. By analyzing some of these principles and applying them to the law of mental anguish as interpreted by the Act, one can better understand the proper role of mental anguish in the DTPA case.

A. Liberal Construction

In 1977, in a case styled Woods v. Littleton, the Supreme Court of Texas made it clear that the DTPA was to be liberally construed so as to give effect to the legislature's intent that the Act be a powerful remedy for the consumer. In fact, the language of the Act perpetuates this same theme, stating that "[t]his subchapter shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty and to provide efficient and economical procedures to secure such protection." In Woods, the Court further defined this section of the DTPA, holding that courts "shall look diligently for the intention of the Legislature, keeping in view at all times the old law, the evil and the remedy."

Although this mandate for liberal construction is not unique to the DTPA, the courts' consistent application of this principle emphasizes its importance when interpreting the Act. However, lib-

119 Id. (discussing the consistency of the construction given to the DTPA by Texas courts).
120 See Woods v. Littleton, 554 S.W.2d 662, 664-65 (Tex. 1977) (setting out the principles applicable to construing the DTPA); accord Pennington v. Singleton, 606 S.W.2d 682, 686 (Tex. 1980); City of Mason v. West Tex. Util. Co., 150 Tex. 18, 237 S.W.2d 273, 278 (1951) (holding that construing the DTPA is determined by legislative intent); Mark L. Kincaid, Rules of Judicial Construction-Making and Arguing the Law in DTPA Cases, 23 Tex. Tech. L. Rev. 687, 688 (1992).
122 Id. at 665; e.g. Pennington, 606 S.W. 2d at 686 (construing the DTPA requires primary emphasis on the intention of the Legislature); City of Mason, 150 Tex. 18, 237 S.W.2d at 278 (construing an act of the Legislature is not confined to the literal meaning of the words) citing Tex. Bus. & Comm. Code § 17.44 (Vernon 1993); Mark L. Kincaid, Rules of Judicial Construction-Making and Arguing the Law in DTPA Cases, 23 Tex. Tech. L. Rev. 687, 689 (1992) (stating that Texas courts have consistently given the DTPA a liberal construction).
123 Woods, 554 S.W.2d at 665.
124 Id. which further states:

[T]he fundamental rule controlling the construction of a statute is to ascertain the intention of the Legislature expressed therein. That intention should be ascertained from the entire act, and not from isolated portions thereof. This court has repeatedly held that the intention of the Legislature in enacting a law is the law itself; and hence the aim and object of construction is to ascertain and
eral construction should be pursued in light of the statutory goals of encouraging injured consumers to seek compensation and deterring sellers from taking advantage of naive consumers.126 By awarding treble damages to the injured consumer, the Legislature emphasized the importance of these twin goals.127 Furthermore, the public policy of this state, as embodied in the DTPA, encourages consumer litigation. The Supreme Court of Texas recognized this in Pennington v. Singleton where it held that the DTPA is intended "to encourage privately initiated consumer litigation, reducing the need for public enforcement."128 In fact, the incentives in the Act, i.e., treble damages and attorney fees, encourage the consumer to pursue small claims.129 Surprisingly, however, this liberal construction has not been extended to mental anguish damages under the DTPA.130

Requiring proof of a "knowing" violation to recover mental anguish damages under the DTPA made it more difficult for the

effect the legislative intent, and not to defeat, nullify, or thwart it. . . . It is settled that the intention of the Legislature controls the language used in an act, and in construing such an act the court is not necessarily confined to the literal meaning of the words used therein, and the intent rather than the strict letter of the act will control.


122 See Chastain v. Koonce, 700 S.W.2d 579, 581 (Tex. 1985) (interpreting DTPA liberally promotes its purpose of protecting consumers); Pennington, 606 S.W.2d at 691 (stating that the DTPA provides a remedy for one time offenses which can not be handled effectively by state law); Woods, 554 S.W.2d at 669 (stating that DTPA allows consumers to bring suit where it might not otherwise be economically efficient); John Hill, Introduction, Consumer Protection Symposium, 8 ST. MARY'S L.J. 609, 611 (1977) (providing remedy under DTPA makes sellers more accountable to the consumer).

123 See Pope v. Rollins Protective Servs. Co., 703 F.2d 197, 201 (5th Cir. 1983) (holding that treble damages provide consumers with a remedy for deceptive trade practices without the burdens of common law); Pennington, 606 S.W.2d at 686 (DTPA provides treble damages to discourage deceptive trade practices); Woods, 554 S.W.2d at 671 (trebling damages is mandatory); TEX. BUS. & COM. CODE ANN § 17.50(b) (Vernon Supp. 1992); Philip K. Maxwell, Public and Private Rights and Remedies Under The Deceptive Trade Practices - Consumer Protection Act, 8 ST. MARY'S L.J. 617 (1977).

124 Pennington, 606 S.W.2d at 690.

DTPA plaintiff to recover under the Act.\textsuperscript{131} Furthermore, by adopting a more culpable mental state than required by the common law, the Supreme Court has violated the twin goals of the DTPA by discouraging consumer litigation and thwarting the deterrence effect of the statute.

B. Statutory Obstacles

In 1980, the Supreme Court of Texas further defined the scope of the DTPA, holding that "[t]he DTPA does not represent a codification of the common law."\textsuperscript{182} By refusing to apply the parole evidence rule,\textsuperscript{133} by rejecting an intent requirement,\textsuperscript{134} by rejecting the common law definition of reliance,\textsuperscript{135} and by rejecting the defenses of estoppel and waiver,\textsuperscript{136} the court removed the common law obstacles that consumers once faced.

Prior to Boyles v. Kerr, the Texas Supreme Court in Garrard recognized the tort of negligent infliction of mental distress, removing obstacles to the recovery of mental anguish damages. By allowing a plaintiff to recover when the mental anguish resulted merely from the negligence of the defendant, the court recognized the importance of emotional injuries. Conversely, by implementing a know-

---

\textsuperscript{131} Boyles v. Kerr, 855 S.W.2d 593 (Tex. 1993)(Doggett, J., dissenting); e.g. Luna, 667 S.W.2d 115 (Tex. 1984) (recovery absent proof of knowing violation is barred); Duncan, 603 S.W.2d 777 (Tex. 1980)(stating that recovery under DTPA requires proof of a knowing violation).

\textsuperscript{182} See Luna, 667 S.W.2d 115 (stating that a knowledge requirement is necessary for recovery under DTPA); e.g. Duncan, 603 S.W.2d 777 (Tex. 1980)(holding that recovery under the DTPA requires proof of knowing violation); Rabin, \textit{Tort Recovery for Negligently Inflicted Economic Loss: A Reassessment}, 37 STAN. L. REV. 1513, 1526 (1985) (relying only on foreseeability provides virtually no limit on liability for mental anguish).


\textsuperscript{135} Chastain v. Koonce, 700 S.W.2d at 581; Alvarado, 749 S.W.2d at 48; Weitzel, 691 S.W.2d at 600 (Tex. 1985); Mark L. Kincaid, \textit{Rules of Judicial Construction-Making and Arguing the Law in DTPA Cases}, 23 TEX. TECH. L. REV. 687, 700 (1992).

ing requirement, and making it more difficult to recover mental anguish damages under the DTPA than under the common law, the standard in *Luna* created an obstacle for consumers seeking mental anguish damages under the Act. Although the DTPA is not a codification of the common law, because the DTPA was intended to help consumers overcome common-law obstacles to recovery, it necessarily follows that implying into the DTPA any...obstacle to recovery that has been dispensed with at common law, or giving less relief under the DTPA than would be available at common law, is improper.”

The Act should, however, “incorporate common-law theories that are consistent with the mandate of liberal construction and the underlying policy of protecting consumers.”

In 1984, when *Luna* was decided, a plaintiff could recover for mental anguish only when the defendant’s conduct was either grossly negligent or more culpable and, therefore, establishing a “knowing” finding for recovery was somewhat consistent with the underlying policies of the Act and the liberal construction prerequisite. However, as mental anguish jurisprudence evolved, and the common law recognized the importance of one’s interest in their emotional well being, the common law eventually loosened the standard for recovering mental anguish damages. In 1987, the court allowed recovery when the mental anguish resulted only from the negligence of the defendant. In December of 1992, the Supreme Court of Texas stopped the evolution of the law of mental anguish in Texas, and retreated back to the Draconian common law princi-

---


140*Id.* at 700.

141*St. Elizabeth Hosp.* v. Garrard, 730 S.W.2d at 654 (abolishing physical manifestation requirement); *see also Natividad v. Alexis*, Inc., 833 S.W.2d 545, 549 (Tex.App.—El Paso 1992, no writ) (holding that mental anguish is a fact question for the court); Sanchez v. Schindler, 651 S.W.2d 249 (Tex. 1983) (mental anguish damages authorized without proof of physical injury); Charles E. Cantu, *Negligent Infliction of Emotional Distress: Expanding the Rule Evolved Since Dillon*, 17TEX. TECH. L. REV. 1557, 1574-76 (1987) (noting that courts have acknowledged mental distress without an accompanying physical impairment).
pies articulated prior to 1987.\textsuperscript{142}

C. \textbf{Creating Common Law Obstacles}

Liberal construction requires that the court not imply any obstacles to recovery.\textsuperscript{143} The purpose of the DTPA is to overcome, not create, "common-law obstacles to recovery that ha[ve] made effective consumer relief difficult to obtain."\textsuperscript{144} This view is evidenced by the court's rejection of implied defenses,\textsuperscript{145} its refusal to confine the DTPA to merchants,\textsuperscript{146} and its broad application of the term "consumer."\textsuperscript{147} In fact, courts have consistently rejected defendants who try to bypass the provisions of the DTPA by developing loopholes.\textsuperscript{148} "The Texas Supreme Court has never wavered, and in case after case it has refused to imply any additional" obstacles into the DTPA.\textsuperscript{149} By requiring a knowing finding, the court has created a common law obstacle to recovery, making it more difficult for the DTPA plaintiff to recover mental anguish damages.

D. \textbf{Legislative Intent}

In numerous decisions interpreting the DTPA, courts have looked

\begin{itemize}
  \item \textsuperscript{142}St. Elizabeth Hosp., 730 S.W.2d at 649.
  \item \textsuperscript{143}Boyles v. Kerr, 855 S.W.2d 593 (Tex. 1993).
  \item \textsuperscript{144}TEX. BUS. \\ & COMM. CODE ANN § 17.50 (Vernon 1987 & Supp. 1992); see Kennedy v. Sale, 689 S.W.2d 545, 549 (Tex. 1985) (giving the Act its most comprehensive application possible); Cameron, 618 S.W.2d at 539-40 (restricting the application of the DTPA is against legislative intent); Mark L. Kincaid, Rules of Judicial Construction-Making and Arguing the Law in DTPA Cases, 23 TEX. TECH. L. REV. 687, 693 n.45 (1992).
  \item \textsuperscript{145}Mark L. Kincaid, Rules of Judicial Construction-Making and Arguing the Law in DTPA Cases, 23 TEX. TECH. L. REV. 687, 693 n.45 (1992).
  \item \textsuperscript{146}See Pope v. Rollins Protective Serv. Co., 703 F.2d at 201 (removing the burdens of the numerous common law defenses is the reason DTPA was enacted); see also Alvarado, 749 S.W.2d at 48; Smith v. Baldwin, 611 S.W.2d at 616; Joanne M. D'Alcomo, Resolving the Conflict Between Arbitration Clauses and the Claims Under the Deceptive Trade Practice Acts, 64 B.U. L. Rev. 377, 388 (1984) (discussing providing consumers with a cause of action without proving numerous defenses).
  \item \textsuperscript{147}Pennington v. Singleton, 606 S.W.2d at 691; e.g. Big H. Auto Auction v. Saenz Motors, 665 S.W.2d 756, 758 (Tex. 1984) (holding that the DTPA includes all who sell goods); Rotello v. Ring Around Products, Inc., 614 S.W.2d 455, 459 (Tex.App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.) (defining merchant as someone other than a consumer who is party to a transaction).
  \item \textsuperscript{148}See TEX. BUS. \\ & COMM. CODE ANN. § 17.50 (Vernon 1987 & Supp. 1992); also Kennedy v. Sale, S.W.2d 890, 892 (Tex. 1985) (construing the term liberally); Cameron v. Terrel \\ & Garrett, Inc., 618 S.W.2d at 541 (construing § 17.50 liberally is necessary to protect consumers).
  \item \textsuperscript{149}See Mark L. Kincaid, Rules of Judicial Construction-Making and Arguing the Law in DTPA Cases, 23 TEX. TECH. L. REV. 687, 693 n.45 (1992); see also Autohaus v. Aguilar, 794 S.W.2d 459, 466 (Tex. App.—Dallas 1990, writ denied) (seeking loopholes would circumvent legislative intent); Pennington, 606 S.W.2d at 687 (interpreting good and service broadly to prevent loopholes).
\end{itemize}
for guidance in the debates and amendments surrounding the legislation.\(^{150}\) To discern the legislature's intent, the courts frequently consider language that the legislature removed or chose not to include.\(^{151}\) In 1979, the Texas State Legislature amended section 17.50 of the DTPA to allow a consumer to recover "\([t]\)he amount of actual damages found by the trier of fact."\(^{152}\) The debate on the amendment evidences the legislature's intent with respect to mental anguish damages. The dialogue between Representatives Gibson and Hill is indicative of the legislature's intent:

**GIBSON (OF ECTOR):** would it include any damages that were incurred by the plaintiffs such as mental anguish?

**HILL (OF POTTER):** It would include any damages that you could convince the jury had occurred as a result of a violation of the DTPA.

**GIBSON:** So, in other words, any damages involving mental anguish, any damages that were consequential from the act of the defendant would be included in your amendment, is that correct?

**HILL:** That's correct.\(^ {153}\)

The legislative debates over the 1979 amendment indicate that actual damages included damages involving mental distress.\(^ {154}\) The legislature failed to distinguish mental anguish damages from other types of actual damages. In fact, no mention was made of increasing the culpability for mental anguish under the Act. Instead, the debates indicate that mental anguish should be awarded if the jury is

---


\(^{152}\)See Melody Homes Mfg. Co., v. Barnes, 741 S.W.2d 349, 354 (Tex. 1987) (looking to legislative history to assist in clarifying ambiguity); Chastain v. Koonce, 700 S.W.2d 579, 583 (holding that deleting a term from a definition bars the court from implying that term as an element); Smith v. Baldwin, 611 S.W.2d 611, 616 (Tex. 1980) (deleting a provision from a pending bill discloses the legislative intent to defeat that provision); Mark L. Kincaid, *Rules of Judicial Construction-Making and Arguing the Law in DTPA Cases*, 23 *Tex. Tech. L. Rev.* 687, 694 n.7 (1992) (looking to the legislative history of DTPA); John L. Hill, *Introduction*, Consumer Protection Symposium, 8 St. Mary’s L. J. 609, 613 (1977) (noting the intent of the legislature to leave the scope of the DTPA broad by abolishing exceptions).


\(^{154}\)Timothy G. Chovanec, et al., *Mental Anguish Damages*, S-7 (1992) (the actual language can be found in the legislative library located in Austin).
convinced that the harm occurred, regardless of whether or not there is a knowing finding.

By treating mental anguish damages differently from other damages, the Luna and Kerr courts violate the legislative intent which requires damages to be awarded if you can “convince the jury [that the damages] had occurred as a result of a violation of the DTPA.”

Traditionally, we have relied on the ability of “twelve Texas citizens, empaneled as a jury, to distinguish between the fraudulent and the genuine.” By distinguishing mental anguish damages from other actual damages under the DTPA, the Luna and Kerr courts not only invade the province of the jury, but also violate the legislative intent of the Act. Furthermore, by requiring a knowing finding, the court chose to do what the legislature rejected.

VII. Boyles v. Kerr—the Wrong Decision at the Right Time

Prior to December 2, 1992, mental anguish jurisprudence was evolving at rapid pace, recognizing the individual’s right to peace of mind. With the stroke of a pen, however, the Supreme Court of Texas reversed almost a decade of mental anguish jurisprudence.

Six years prior to Boyles v. Kerr, the Garrard court recognized that mental injuries can be “just as severe and debilitating” as physical injuries; thus honoring the principle that “[f]reedom from severe emotional distress is an interest which the bar should serve to protect.” By adopting the tort of negligent infliction of emotional distress, the Texas courts took a leadership role, providing an example for other jurisdictions. However, the majority in Kerr retreated from this position, holding that the decision in Garrard was

155 Id.
156 Id.
158 E.g. Melody Homes Mfg. Co. v. Barnes, 741 S.W.2d 349, 354 (Tex. 1987) (looking to legislative history to assist in clarifying ambiguity); Chastain v. Koonce, 700 S.W.2d 579, 583 (Tex. 1985) (deleting a term from a definition bars the court from implying that term as an element); Smith v. Baldwin, 611 S.W.2d 611, 616 (Tex. 1980) (deleting a provision from a pending bill discloses the legislative intent to defeat that provision); Mark L. Kincaid, Rules of Judicial Construction-Making and Arguing the Law in DTPA Cases, 23 Tex. Tech. L. Rev. 687, 694 n.7 (1992) (looking to the legislative history of DTPA); John L. Hill, Introduction, Consumer Protection Symposium, 8 St. Mary’s L. J. 609, 613 (1977) (noting the intent of the legislature to leave the scope of the DTPA broad by abolishing exceptions).
160 St. Elizabeth Hosp. v. Garrard, 730 S.W.2d at 653.
“out of step” with other jurisdictions.\(^{161}\)

To justify their decision, the majority adopted the logic articulated in the *Restatement (Second) of Torts* section 436A which held that an “‘emotional disturbance which is not so severe and serious as to have physical consequences is normally in the realm of the trivial, and so falls within the maxim that the law does not concern itself with trifles . . . so temporary, so evanescent, and so relatively harmless and unimportant, that the task of compensating for it would unduly burden the courts and the defendants. . . . [e]motional disturbance may be too easily feigned, depending, as it must, very largely upon the subjective testimony of the plaintiff . . . recovery for it might open too wide a door for false claimants who have suffered no real harm at all.’”\(^{162}\)

Three decades ago, this same logic was used to enforce a physical manifestation requirement. And although the court did not reimplement such a requirement, the courts recognition of the antiquated logic through its holding in *Kerr* is based on Draconian ideas of mental anguish jurisprudence.\(^{163}\)

Despite the fact that litigants can feign injuries, the Texas Supreme Court has empowered the jury with the responsibility of distinguishing between the malingerer and those who have suffered compensable injuries.\(^{164}\) The majority, however, through its decision in *Kerr* evidences the Texas Supreme Court’s “increasing disdain for mere ordinary Texans making such determination as jurors.”\(^{165}\) Moreover, by denying a remedy because of the warrantless conduct of some “arbitrarily den[i]es court access to persons with valid claims and do[es] not serve the best interests of the public.”\(^{166}\) Although mental anguish may be difficult to put a price tag on, it is no more difficult to evaluate in financial terms than pain and suffering, “and no less a real injury, than physical pain. . . . [T]he law is not for the protection of the physically sound alone.”\(^{167}\)

The *Kerr* court’s fear of unwarranted mental anguish claims has


\(^{162}\) Id.

\(^{163}\) *Restatement (Second) of Torts* § 436A, Cmt. b (1965) (as cited in Boyles v. Kerr, 855 S.W.2d at 613 (Doggett, J., dissenting)).

\(^{164}\) Boyles v. Kerr, 855 S.W.2d at 613 (Doggett, J., dissenting).

\(^{165}\) Id. (referring to St. Elizabeth Hospital, 730 S.W.2d at 654).

\(^{166}\) Id. at 613 (Doggett, J., dissenting); e.g. LeLeaux v. Hamshire-Fannet Indep. Sch. Dist., 835 S.W.2d 49, 54 (Tex. 1992) (Doggett, J., dissenting); Reagan v. Vaughan, 804 S.W.2d 463, 491 (Tex. 1991) (Doggett, J., concurring and dissenting).

\(^{167}\) Boyles v. Kerr, 855 S.W.2d at 613 (Doggett, J., dissenting) (quoting St. Elizabeth Hosp., 730 S.W.2d at 654).
been rejected by commentators and courts.\textsuperscript{168} Despite the precedent supporting mental anguish claims, there has not been an explosion of mental anguish litigation,\textsuperscript{169} nor has there been any evidence to indicate that the \textit{Garrard} decision "has strained Texas courts by requiring litigation of trivial claims."\textsuperscript{170} In order to maintain the balance between limiting parties exposure to trivial claims and the commitment to ensure compensation for serious injuries, the court should disregard the "knowing" finding articulated in \textit{Luna}.\textsuperscript{171}

The court in \textit{Garrard} held that the lack of physical symptoms does not impact the authenticity of the mental injury.\textsuperscript{172} Likewise, the fact that the DTPA defendant's actions were committed "knowingly" does not affect the authenticity of the emotional injuries sustained.\textsuperscript{173} The converse proposition rewards the less culpable and punishes the more blameworthy, when the emotional injury sustained may be more severe in the former case.\textsuperscript{174} If two DTPA defendants participate in conduct that results in a severe emotional injury, and only one commits the act knowingly, why should one plaintiff receive compensation and not the other?

\section*{VII. Conclusion}

The Texas Supreme Court has repeatedly recognized an individual's right to be free from mental anguish. "[A]n emotional loss can be 'just as severe and debilitating' as a physical one,"\textsuperscript{175} and the law should protect one's interest in freedom from emotional distress. The Supreme Court of Texas has rejected these principles and created obstacles for the DTPA plaintiff that not only violate the drafters' intent that the Act be liberally construed to compensate the victimized consumer, but that are also contrary to the Act's goals.

\textsuperscript{168}Id. at 613.

\textsuperscript{169}Id. at 613 (Doggett, J., dissenting).

\textsuperscript{170}Id. at 619 (Doggett, J., dissenting); \textit{e.g.} James v. Lieb, 375 N.W.2d 109, 117 (Neb. 1985) (stating that there is no litigation explosion); Schultz v. Barbeton Glass Co., 447 N.E.2d 109, 112-120 (Ohio 1983) (no increase in litigation); Peter A. Bell, \textit{The Bell Tolls: Toward Full Tort Recovery for Psychic Injury}, 36 U. Fla. L. Rev. 33, 362-65 (1984) (no increase in litigation); W. PAGE KEETON ET AL., \textit{PROSSER AND KEETON ON THE LAW OF TORTS}, \textsection 54, at 360 (5th ed., 1984) (no corresponding increase in litigation).

\textsuperscript{171}Boyles v. Kerr, 855 S.W.2d at 614. (Doggett, J., dissenting).

\textsuperscript{172}Id. at 613.

\textsuperscript{173}Id. at 616.

\textsuperscript{174}Id.

\textsuperscript{175}Id. at 613 (discussing the fact that implementing a physical manifestation requirement "rewards the weak and punishes the strong and states that the emotional injury sustained may be on par with the physical injury").
By narrowly interpreting the DPTA, the court begins to emasculate legislation that has revolutionalized consumer law in Texas.

In *Boyles v. Kerr*, the legal landscape afforded the Supreme Court of Texas an opportunity to reconcile mental anguish damages under the DTPA with mental anguish jurisprudence. Instead of aggressively recognizing one's interest in their emotional well being, the court retreated, reversing almost a decade of mental anguish jurisprudence. By reaffirming the court's decision in *Luna*, and holding the tort of negligent infliction of mental distress as being "out of step" with other jurisdictions, the court has retreated from its role as a leader in mental anguish jurisprudence. "In the march to justice, Texas should not fear leadership."\(^{176}\) If every such decision is to be "erased from the books as being 'out of step,' Texas is doomed to last place in legal thinking."\(^{177}\)

---

\(^{176}\) *Id.* at 611 quoting *St. Elizabeth Hosp.*, 730 S.W.2d at 653.

\(^{177}\) *Id.* at 612.