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

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**BOYLES V. KERR: THE WRONG DECISION AT THE RIGHT TIME:
IMPLICATIONS FOR MENTAL ANGUISH DAMAGES
UNDER THE DTPA**

Charles E. Cantu*
Jared R. Woodfill, V**

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I. INTRODUCTION

On February 5, 1883, C.B. Stuart received a telegram from his brother: “John is very low. Come on first train.”¹ He rushed to his

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The authors would like to express their gratitude to their research assistants: Scott Allen Carlson and Rob G. Dickinson. Both are second year law students and exhibited a great deal of enthusiasm and dedication in this endeavor.

¹Stuart v. Western Union Telegraph Co., 18 S.W.2d 351 (Tex. 1885). On February 3, 1883, C.B. Stuart, a practicing Waco attorney, was informed that his brother, who resided in Marshall, Texas, was very sick. *Id.* After receiving the news, he instructed his other brother, who also lived in Marshall, to contact him by telegraph if his brother's condition worsened. *Id.* When the ailing brother's condition deteriorated, a telegram was sent to Stuart from a Western Union office in Marshall. *Id.*

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.² Stuart blamed his untimely arrival on Western Union's failure to promptly deliver the telegram.³ 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."⁴ In 1885, the Texas Supreme Court upheld the trial court's award for mental anguish, holding that "injury to the feelings was actual damage."⁵

Over a century later, seventeen-year old Dan Boyles, Jr. engaged in sexual intercourse with Susan Leigh Kerr.⁶ Unbeknownst to Kerr, Boyles covertly videotaped the intimate act and then showed the tape to ten friends.⁷ Gossip about the event soon spread and Kerr became "stigmatized with the reputation of 'porno queen' . . ."⁸ After being confronted by Kerr, Boyles surrendered the only copy of the tape.⁹ Kerr then filed suit, alleging "that she suffered humiliation and severe emotional distress from the videotape and the gossip surrounding it."¹⁰ 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-

¹¹*Id.*

¹²TEX. BUS. & COM. CODE ANN. § 17.41-63 (Vernon 1987 & Supp. 1992).

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 a 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.'" *Cracker 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,¹⁵ defamation,¹⁶ assault,¹⁷ battery,¹⁸ and malicious prosecution cases,¹⁹ 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).

¹⁵*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).

¹⁶See *Greybill v. De Young*, 73 P. 1067, 1069 (Cal. 1903) (awarding defamation and mental anguish damages); *Louisville Press Co. v. Tennely*, 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).

¹⁷See *I. de S. et ux W. de S.*, Y.B. 22 Edw. 3, f. 99 pl. 60 (1348) (mental anguish damages awarded in an assault case); *Leach v. Leach*, 33 S.W. 703, 703 (Tex. Civ. App.

common law has been hesitant "to accept the interest in peace of mind as entitled to independent legal protection."²⁰

1895, writ denied) (holding that in an action for assault, compensation for mental suffering may be recovered, though there was no battery) (an assault and an assault and battery violated alike the right of personal security, and are attended with like injuries to the person, differing only in the extent thereof); *San Antonio Traction Co. v. Crawford*, 71 S.W. 306, 306 (Tex. Civ. App. 1902, no writ) (stating that where a wrongful act is accompanied by insult, abuse or oppression, the decided weight of authority is that compensatory damages for mental suffering may be recovered, though there has been no physical injury) (civil jurisprudence gives compensation for mental sufferings occasioned by the acts of wanton injustice equally whether they operate by way of direct or consequential injuries); *William Small & Co. v. Lonergan*, 105 P. 27, 29 (Kan. 1909) (holding that an assault upon another is an intentional infringement upon the absolute right of personal security, for which the law gives a right of action against the wrongdoer in which damages for mental suffering, which is the proximate and natural result of such wrong, may be awarded, although there is no battery or bodily injury inflicted); *See generally* W.A.E., Annotation, *Right to Recover for Mental Pain and Anguish Alone, Apart from other Damages*, 23 A.L.R. 361, 389-90 (1923) (physical injury is not a necessary prerequisite to receive compensation due to an assault of the person and mental suffering is inflicted); 6 AM. JUR. 2D Assault and Battery §§ 178, 183 (1963) (damages may be recovered in an action for assault, although there was no battery and no bodily injury was inflicted).

¹⁸*See Draper*, 21 N.W. at 527 (malicious prosecution and mental anguish); *Craiker*, 36 Wis. at 678 (holding that all mental suffering directly consequent upon tort, irrespectively of all such inscrutable distinctions, is ground for compensatory damages in action for tort); *See generally* W.A.E., Annotation, *Right to Recover for Mental Pain and Anguish Alone, Apart from other Damages*, 23 A.L.R. 361, 383 (1923) (where the act was wrongful and wilful, mental anguish damages should be awarded from which such result should be reasonably anticipated); 6 AM. JUR. 2D Assault and Battery §§ 178, 183 (1963) (damages for mental suffering may be recovered whether or not the plaintiff received any physical injury as a result of the battery).

¹⁹*Haeissig v. Decker*, 166 N.W. 1085 (Minn. 1918); *Anthony v. Norton*, 56 P. 529 (Kan. 1899); *Morgan v. Curley*, 7 N.E. 726, 728 (Mass. 1886) (the plaintiff may recover compensation for loss of time and for any indignity he may have suffered as a result of an arrest which is illegal); *Wheeler v. Hanson*, 37 N.E. 382, 386 (Mass. 1894) (holding that the injury to the plaintiff's feeling and subjecting him to indignity was sufficient to warrant compensation as damages); *Flam v. Lee*, 90 N.W. 70, 71 (Iowa 1902) (holding that in an action for malicious prosecution, it was not error to permit the plaintiff to show that, on his arrest at his home his mother fainted, or was prostrated by the shock, and that plaintiff thereby suffered distress of mind); *Seidler v. Burns*, 85 A. 369, 369 (Conn. 1912) (holding that the infliction of mental anguish was an element which the jury might have properly considered in assessing damages).

²⁰William Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 874 (1939); *See also* 52 AM. JUR. 2D Malicious Prosecution § 97 (1970) (the plaintiff may recover for humiliation, embarrassment, and mental suffering provided these can be shown to have resulted as a proximate consequence of the defendant's act); *See generally* W.E.A., Annotation, *Right to Recover for Mental Pain and Anguish Alone, Apart from other Damages*, 23 A.L.R. 361, 361 (1923) (it may be stated that where the act of the defendant was negligent merely, there is a tendency to hold that damages from mental pain and suffering are not recoverable); *but see Id.* at 361-362, 391 (but where the act of the defendant was wilful or malicious or both, there is a general tendency to hold that damages for mental pain and suffering may be recovered, although these are the only damages recoverable in the case) ("A man may recover for any injury or indignity done the body, and it would be a reproach to the law if physical injuries might be recovered for, and not those incorporeal injuries which would cause much greater suffering and humiliation.").

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."²¹ Although Lord Wensleydale's dictum may have been somewhat misleading, courts have been reluctant to recognize one's interest in peace of mind.²² 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."²³ 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.²⁴ 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

²¹Lynch v. Knight, 11 Eng. Rep. 854 (1861). See Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV L. REV. 1033, 1033 (1936) (quoting Lynch v. Knight, 9 H.L. Cas. 577, 598 (1861)); see also William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 875 (1939) (discussing the law's reluctance to recognize mental anguish as an independent cause of action).

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).

²³*Mitchell 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).

²⁴*Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc.*, 770 P.2d 278 (Cal. 1989); *Allstate Ins. Co. v. Mugavero*, 589 N.E.2d 365 (N.Y. 1992).

liability."²⁵ As a result of academicians, rather than courts, the prophetic words of this commentator have been realized in most jurisdictions.²⁶

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 1948.²⁷ Although most jurisdictions currently allow recovery for the intentional infliction of mental anguish,²⁸ the tort still remains largely undefined.²⁹

²⁵ See David Crump, *Evaluating Independent Torts Based Upon "Intentional" or "Negligent" Infliction of Emotional Distress: How Can We Keep the Baby from Dissolving in the Bath Water?*, 34 ARIZ. L. REV. 438, 457 (1992) (discussing limits of tort of negligent infliction of emotional distress).

²⁶ 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).

²⁷ RESTATEMENT OF THE LAW, SUPPLEMENT, TORTS § 46 (1948); RESTATEMENT (SECOND) OF TORTS § 46 (1965). See Daniel Gilvelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L. REV. 42, 42 (1982) (discussing the advent of the tort of intentional infliction of emotional distress). THE RESTATEMENT (SECOND) states:

§ 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).

²⁸ E.g. *Savage v. Boies*, 272 P.2d 349 (Ariz. 1954); *State Rubbish Collectors Ass'n v. Siliznoff*, 240 P.2d 282 (Cal. 1952); *Rugg v. McCarty*, 476 P.2d 753 (Colo. 1970); *Amsden v. Grinnel Mut. Reins Corp.*, 203 N.W.2d 252 (Iowa 1974); *Dawson v. Associates Financial Servs. Co.*, 529 P.2d 104 (Kan. 1974); *Vicnire v. Ford Motor Credit Co.*, 401 A.2d 148 (Me. 1979); *George v. Jordan Marsh Co.*, 268 N.E.2d 915 (Mass. 1971). See Daniel Gilvelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L. REV. 42, 43 n.9 (1982) (listing states that have adopted the Restatement).

²⁹ 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.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.³¹ Some jurisdictions hold that emotional damages are recoverable only if the plaintiff proves a recognized tort.³² Finally, most jurisdictions recognize bystander claims where the negligence causes an emotional injury.³³ By definition, a negligent act is not as culpable as an

Suffering: A New Tort, 37 MICH. L. REV. 874 (1939). See W. PAGE KEETON, PROSSER AND KEETON ON TORTS 55 n. 1 (5th ed. 1984) (listing series of influential mental anguish articles).

³⁰Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc., 770 P.2d 278 (Cal. 1989); Allstate Ins. Co. v. Mugavero, 589 N.E.2d 365 (N.Y. 1992).

³¹See David Crump, *Evaluating Independent Torts Based Upon "Intentional" or "Negligent" Infliction of Emotional Distress: How Can We Keep the Baby from Dissolving in the Bath Water?*, 34 ARIZ. L. REV. 438, 457 (1992) (discussing limits of tort of negligent infliction of emotional distress). Some relationships between parties are assumed to include a contractual obligation. Review of the contractual obligation has been undertaken by an analysis of whether the contractual duty has been breached through the negligence of the defendant. See, e.g., St. Elizabeth Hosp. v. Garrard, 730 S.W.2d 649, 650-54 (Tex. 1987) (the hospital's mishandling of the infant corpse lead to liability imposed for negligence); Western Union Tel. Co. v. Shaw, 177 S.W.2d 52, 54-55 (Tex. 1944) (stating that the defendant entered into a contractual relationship with the plaintiff, and the resulting negligent failure to promptly deliver a death telegram, which resulted in the grandparents' inability to attend the funeral of the deceased child); Clark v. Smith, 494 S.W.2d 192, 197 (Tex. Civ. App.-Dallas 1973, writ ref'd n.r.e.) (holding that a contractual relationship existed between the funeral home and the plaintiffs and the negligent failure to embalm the body, resulting in the putrefying of the body, was actionable and the attachment of liability is appropriate); cf. Dunn v. Western Union Tel. Co., 59 S.E. 189, 190-91 (Ga. Ct. App. 1907) (telegraph agent insulted plaintiff while having an implied duty of extending their facilities free of abuse, humiliation, insult); See also Johnson v. State, 334 N.E.2d 590, 590 (N.Y. 1975) (imposing liability for hospital's negligently informing patient that her mother had died when she had not through analogy of corpse cases).

³²See David Crump, *Evaluating Independent Torts Based Upon "Intentional" or "Negligent" Infliction of Emotional Distress: How Can We Keep the Baby from Dissolving in the Bath Water?*, 34 ARIZ. L. REV. 438, 457 (1992) (discussing limits of tort of negligent infliction of emotional distress). E.g., Sanchez v. Schindler, 651 S.W.2d 249, 253 (Tex. 1983) (holding that emotional distress is an element of damages recoverable in a negligence claim such as a wrongful death action as a result of an automobile accident); Tacket v. General Motors Corp. Delco Remy Div., 818 F. Supp. 1243, 1247-48 (S.D. Ind. 1993) (under Indiana law, plaintiff may recover compensatory damages for mental anguish when tort involves intentional invasion of legal right); Ball v. Joy Mfg., 755 F. Supp. 1344, 1364 (S.D. W. Va. 1990) (holding that damages for emotional distress may be recovered where distress accompanies or contemporaneously follows actual physical injury caused by impact upon occurrence of a tort); Tran v. General Motors Acceptance Corp., No. Civ. A. 88- 1836, 1989 WL 64564 (E.D. Pa. 1989) (Pennsylvania courts have allowed recovery for mental suffering in cases involving intentional torts).

³³See David Crump, *Evaluating Independent Torts Based Upon "Intentional" or "Negligent" Infliction of Emotional Distress: How Can We Keep the Baby from Dissolving in the Bath Water?*,

intentional act and, therefore, makes recovery of mental anguish more likely.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.³⁵ That same year, the court awarded damages to a plaintiff

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).

³⁴See David Crump, *Evaluating Independent Torts Based Upon "Intentional" or "Negligent" Infliction of Emotional Distress: How Can We Keep the Baby from Dissolving in the Bath Water?*, 34 ARIZ. L. REV. 438, 457 (1992) (discussing limits of tort of negligent infliction of emotional distress).

³⁵*Texas & Pacific Ry. v. Curry*, 54 Tex. 86 (Tex. 1885). In *Victorian Railways Comm'rs v. Coultas*, the Privy Counsel 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 Comm'rs v. Coultas*, 13 App. Cas. 222 (P.C. 1888)). The *Coultas* 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.³⁶ A decade later, in *Gulf, C. & S. F. Ry. Co. v. Hayter*, 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.³⁷ 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."³⁸ 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."³⁹

tion for the proximate results of the wrongful act. . . [w]hen injury to the feeling [en-sues]. . . ." *Stuart v. Western Union Tel. Co.*, 18 S.W. 351, 353 (Tex. 1885).

³⁶*Stuart*, 18 S.W. at 351.

³⁷54 S.W. 944 (Tex. 1900).

³⁸Timothy G. Chovanec, David F. Bragg and John D. Gill, *Mental Anguish Damages*, Tex. Bar Assn. (1992). The rule has been stated that there can be no recovery for mental pain and suffering unaccompanied by any physical injury. *Galveston, H. & S.A. Ry. v. Porfert*, 10 S.W. 207, 207 (Tex. 1888); *Gulf, C. & S. F. Ry. v. Trott*, 25 S.W. 419, 419 (Tex. 1894) (mental suffering is not an element of damages if no physical injury to the plaintiff).

In contrast, the Texas Supreme Court in *Leach v. Leach* held that one who is guilty of assault upon another is liable for the mental suffering resulting from such assault, although there is no battery or bodily injury inflicted. 33 S.W. at 703; *San Antonio Traction Co. v. Crawford*, 71 S.W. 306 (Tex. Civ. App. 1902, no writ) (stating that where a wrongful act accompanied by insult, abuse, or oppression, damages for mental suffering may be recovered, though there has been no physical injury). In *Missouri P. Ry. Co. v. Martino*, the court held a carrier liable for humiliation and mental suffering resulting to a passenger from verbal abuse, unaccompanied by any other breach of duty. 21 S.W. 781, 781 (Tex. Civ. App. 1893, rev'd on other grounds).

³⁹*Trevino v. Southwestern Bell Tel. Co.*, 582 S.W.2d 582, 584 (Tex. Civ. App.—Corpus Christi 1979, no writ). See, e.g., *Ryder Truck Rentals, Inc. v. Latham*, 593 S.W.2d 334, 339 (Tex. Civ. App.—El Paso 1979, writ ref'd n.r.e.); *K-Mart Corp. Store No. 7441 v. Trotti*, 677 S.W.2d 632, 639 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.)

Migraine headaches,⁴⁰ humiliation,⁴¹ inability to sleep,⁴² fear for safety,⁴³ embarrassment,⁴⁴ anxiety,⁴⁵ despondency,⁴⁶ loss of self-esteem,⁴⁷ shock,⁴⁸ and nervousness⁴⁹ 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).

⁴⁰*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 dismissed) (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).

⁴¹*Metro Ford Truck Sales, Inc. v. Davis*, 709 S.W.2d 785, 793-95 (Tex. App.—Fort Worth 1986, writ refused n.r.e.); *Havens v. Tomball Community Hosp.*, 793 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).

⁴²*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).

⁴³*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).

⁴⁴*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 plaintiffs 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 refused n.r.e.) (embarrassment of plaintiff was sufficient to support award of \$2,000 for mental anguish).

⁴⁵*Clawson*, 794 S.W.2d at 43 (stating distress [anxiety] was an element within calculation of damages).

⁴⁶*Marshall*, 699 S.W.2d at 904.

⁴⁷*Id.*

⁴⁸*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).

⁴⁹*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,⁵⁰ and what must be proven for this recovery.⁵¹ Currently, the Texas courts allow mental anguish damages when the plaintiff is a direct victim of the wrongdoing,⁵² a bystander to the wrongful conduct,⁵³ or a family member whose loved one has been injured as a result of another's conduct.⁵⁴ In 1987, in *St. Elizabeth Hospital v. Garrard*,⁵⁵ 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.⁵⁶

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.⁵⁷ Although this requirement has been eliminated, "[t]here is considerable confusion presently as to the elements of proof necessary to sustain mental anguish damages."⁵⁸ This confusion is further heightened by the

⁵⁰TIMOTHY 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).

⁵²See *St. Elizabeth Hosp. v. Garrard*, 730 S.W.2d 649 (Tex. 1987) (mental anguish damages for victim); *Missouri Pac. R.R. v. Lane*, 720 S.W.2d 830 (Tex. App.—Texarkana 1986, no writ).

⁵³See *Landreth v. Reed*, 570 S.W.2d 486, 489-90 (Tex. Civ. App.—Texarkana 1978, no writ); *Bedgood v. Madalin*, 589 S.W.2d 797 (Tex. Civ. App.—Corpus Christi 1975), *rev'd on other grounds*, 600 S.W.2d 773 (Tex. 1980) (mental anguish damages and bystander).

⁵⁴See *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").

⁵⁵730 S.W.2d 649 (Tex. 1987).

⁵⁶*Boyles v. Kerr*, 855 S.W.2d 593 (Tex. 1993).

⁵⁷See *St. Elizabeth Hosp.*, 730 S.W.2d at 649 (discussing history of mental anguish in Texas).

⁵⁸TIMOTHY G. CHOVANEC, ET AL., MENTAL ANGUISH DAMAGES, s-11 (1992).

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."⁵⁹ Plaintiffs' attorneys were hesitant to take consumer cases because the amount in controversy was unusually small, making the cost of litigation prohibitive.⁶⁰ Although the common law allowed exemplary damages, the majority of cases lacked the requisite intent necessary for such an award.⁶¹

In 1973, the Legislature radically revolutionized consumer law in Texas by adopting the Texas Deceptive Trade Practices and Consumer Protection Law.⁶² 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.⁶³ This legislative reform package replaced the traditional notions of *caveat emptor*⁶⁴ and supplanted it with the doctrine of *caveat venditor*.⁶⁵

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

⁵⁹RICHARD ALDERMAN, TEXAS DECEPTIVE TRADE PRACTICES 1 (1988).

⁶⁰*Enterprise Laredo Assocs. v. Hachar's Inc.*, 839 S.W.2d 822, 833 (Tex. App.—San Antonio 1992, writ denied) *per curiam*, 843 S.W.2d 476 (Tex.) (discussing the economic inefficiency of individual consumer deceptive trade practices suits; State *ex rel.* Danforth v. Independence Dodge Inc., 494 S.W.2d 362, 370 (Mo. Ct. App. 1973) (stating that the expenses of litigation often outweigh the amount of recovery; Jeff Sovern, *Private Actions Under the Deceptive Trade Practices Acts: Reconsidering the FTC Act as Rule Model*, 52 OHIO ST. L.J. 437, 439-40 (1991) (discussing the probative costs associated with deceptive trade practice suits at common law); John L. Hill, Introduction, *Consumer Protection Symposium*, 8 ST. MARY'S L.J. 609 (1977).

⁶¹See *Hall v. Cole*, 412 U.S. 1, 4 (1973) (disallowing attorneys fees in deceptive trade practices suit); e.g. *Gale v. Spriggs*, 346 S.W.2d 620, 625 (Tex. Civ. App.—Waco 1961, writ ref'd n.r.e.); David A. Rice, *Exemplary Damages in Private Consumer Actions*, 55 IOWA L. REV. 307 (1969). John L. Hill, Introduction, *Consumer Protection Symposium*, 8 ST. MARY'S L.J. 609 (1977).

⁶²See Consumer Protection Act, 63rd Leg., R.S. ch. 143, 1973 Tex. Gen. Laws 322 (current version at TEX. BUS. & COM. CODE ANN. § 17.41-.63 (VERNON 1987 & SUPP. 1992)). SOVERN, *supra* n.60 at 445. T. LE., PROTECTING CONSUMER RIGHTS § 2.10 at 21 (1987).

⁶³E.g. *Cameron v. Terrel & Garrett Inc.*, 618 S.W.2d 535, 537 (1981); *Riverside Nat'l Bank v. Lewis*, 603 S.W.2d 169, 172 (Tex. 1980); and *Woods v. Littleton*, 554 S.W.2d 662, 666 (Tex. 1977); See also G. Richard Shell, *Trends in the Law: Substituting Ethical Standards for Common Law Rules in Commercial Cases: An Emerging Statutory Trend*, 82 NW. U.L. REV. 1198 (1988); Daniel F. Bragg, *Now We're All Consumers: The 1975 Amendments to the Consumer Protection Acts*, 28 BAYLOR L. REV. (1976).

⁶⁴BLACK'S LAW DICTIONARY 222 (6th ed. 1990) ("Let the buyer beware").

⁶⁵BLACK'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.⁶⁶ 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."⁶⁷

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;⁶⁸ 2) that the defendant has violated the Act;⁶⁹ and 3) that the defendant's conduct was a producing cause of the consumer-plaintiff's actual damages.⁷⁰

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."⁷¹ 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."⁷² The Act,

⁶⁶*E.g. Cameron*, 618 S.W.2d 535; TEX. BUS. & COM. CODE ANN. § 17.45 & 17.50(b) (Vernon 1987 & Supp. 1993); *Riverside Nat'l Bank*, 603 S.W. 2d at 173; RICHARD M. ALDERMAN, TEXAS DECEPTIVE TRADE PRACTICES ACT, at preface (1988); Goodfriend & Lynn, *Of White Knights and Black Knights: An Analysis of the 1979 Amendments to the Texas Deceptive Trade Practices Act*, 33 SW L.J. 941, 948-50 (1979) (discussing the lack of scienter required for recovery of actual damages).

⁶⁷RICHARD ALDERMAN, TEXAS DECEPTIVE TRADE PRACTICES ACT, at preface (1988).

⁶⁸TEX. 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).

⁷⁰*See* TEX. BUS. & COM. CODE ANN. § 17.50 (Vernon 1987); *Flenniken v. Longview Bank & Trust Co.*, 661 S.W.2d 705, 707 (Tex. 1983); *Cameron*, 618 S.W.2d at 539; Julie A. Davies, *Direct Actions for Emotional Harm: Is Compromise Possible?*, 67 WASH. L. REV. 1, 1 (1992); John L. Hill, Introduction, *Consumer Protection Symposium*, 8 ST. MARY'S L.J. 609 (1977).

⁷¹TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (Vernon 1987 & Supp. 1992); *See also Knight v. International Harvester Credit Corp.*, 627 S.W.2d 382, 388; *Riverside National Bank*, 603 S.W. 2d at 173 (Tex. 1980); Julie Davies, *Direct Actions for Emotional Harm: Is Compromise Possible?*, 67 WASH. L. REV. 1, 24 (1992).

⁷²TIMOTHY G. CHOVANEC, ET AL, MENTAL ANGUISH DAMAGES, s-6 (1992).

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 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 denying 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 manifestation.⁷⁸ The common law further perpetuated these require-

⁷³*E.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).

⁷⁴*E.g.*, *Keller Industries, Inc. v. Reeves*, 656 S.W.2d 221 (Tex. App.—Austin 1983, writ 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; writ ref'd n.r.e.); TEXAS BAR ASSOCIATION MANUAL ON DTPA J-10 (1992).

⁷⁵*See American Commercial Colleges v. Davis*, 821 S.W.2d 450, 453 (Tex. App.—Eastland 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: Expanding the Rule Evolved Since Dillon*, 17 TEX. TECH L. REV. 1557 (1987).

⁷⁶*Brown*, 601 S.W.2d at 939.

⁷⁷TEXAS BAR ASSOCIATION, MANUAL ON DTPA J-11 (1992).

⁷⁸*See 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 Curry, *The 1979 Amendment 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.⁷⁹

In 1984, the Supreme Court of Texas extended its holding in *Brown*, making it difficult for a DTPA plaintiff to recover mental anguish damages.⁸⁰ In *Luna v. North Star Dodge Sales, Inc.*⁸¹ the defendant, North Star Dodge Sales, made representations to the plaintiff, Luna, regarding the sale of a car.⁸² The trial court, after remitting the jury's award of \$66,600 to Luna, awarded \$55,400 against North Star Dodge.⁸³ Included in the award was \$5,200 for mental anguish damages.⁸⁴ 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'. . . ."⁸⁵ The Texas Supreme Court then reversed and remanded "the court of appeal's judgment concerning the mental anguish. . . ."⁸⁶ Relying on *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."⁸⁷ 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."⁸⁸ The court then concluded that on the continuum of blameworthiness, "knowing conduct is more culpable than gross

⁷⁹ See *Farmers & Merchants State Bank v. Ferguson*, 617 S.W.2d 918 (Tex. 1981) (holding that special proof of grossly negligent conduct is necessary to recover mental anguish damages); *Duncan v. Luke Johnson Ford, Inc.*, 603 S.W.2d 777 (Tex. 1980) (holding that mental anguish damages were recoverable upon showing gross negligence); *Fisher v. Carrousel Motor Hotel, Inc.*, 424 S.W.2d 627 (Tex. 1967) (stating that recovering mental anguish damages requires the showing of grossly negligent conduct); Charles E. Cantu, *Negligent Infliction of Emotional Distress: Expanding the Rule Evolved Since Dillon*, 17 TEX. TECH L. REV. 1557 (1987); Michael Curry, *The 1979 Amendment To The Deceptive Trade Practices: Consumer Protection Act, 1980*, 32 BAYLOR L. REV. 51 (1980).

⁸⁰ *Luna*, 667 S.W.2d at 116 (holding that a plaintiff must prove both that injury resulted from willful 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."⁸⁹

Three years after the court's decision in *Luna*, mental anguish jurisprudence in Texas was radically revolutionalized. 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.⁹⁰

C. Radical Revolution

This jurisprudential coupe de 'etat materialized in a case styled *St. Elizabeth Hospital v. Garrard*.⁹¹ 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.⁹² Relying on the court's decision in *Sanchez v. Schindler*,⁹³ which "authorized recovery for mental anguish damages without proof of physical injury or conduct worse than negligence,"⁹⁴ 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.⁹⁵

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.⁹⁶ Recently, the Third Court of Appeals in Austin,⁹⁷ and the Fourth Court of Appeals in San Antonio,⁹⁸ have gravitated to the

⁸⁹*Id.* at 118. (holding that mental anguish damages are recoverable in the absence of a knowing finding, if the plaintiff suffered from physical injury as a result of the defendant's conduct).

⁹⁰*See St. Elizabeth Hosp. v. Garrard*, 730 S.W.2d 649, 651 (Tex. 1987) (stating that the supreme court abolished proof of physical injury as a requirement to recover damages for the negligent infliction of mental anguish); *Sanchez v. Schindler*, 651 S.W.2d 249 (Tex. 1983) (holding that mental anguish damages authorized without proof of physical injury or conduct worse than negligence); Charles E. Cantu, *Negligent Infliction of Emotional Distress: Expanding the Rule Evolved Since Dillon*, 17 Tex. Tech L. Rev. 1557, 1574-76 (1987) (discussing the historical evolution of mental anguish damages in Texas).

⁹¹*St. Elizabeth Hosp.*, 730 S.W.2d at 651.

⁹²*Id.* at 654.

⁹³*Sanchez v. Schindler*, 651 S.W.2d 249 (Tex. 1983).

⁹⁴*St. Elizabeth Hosp.*, 730 S.W.2d at 651.

⁹⁵*Id.* at 650.

⁹⁶*See Milt Ferguson Motor Co. v. Zeretzke*, 827 S.W.2d 349 (Tex. App.—San Antonio 1991, no writ) (holding that mental anguish damages were recoverable upon showing gross negligence); *E.g.*, *State Farm Fire & Cas. Co. v. Gros*, 818 S.W.2d 908 (Tex. App.—Austin 1991, no writ); *Duncan*, 603 S.W.2d 777 (Tex. 1980).

⁹⁷*State Farm Fire & Cas. Co.*, 818 S.W.2d at 908.

⁹⁸*Milt Ferguson Motor Co.*, 827 S.W.2d 349.

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.⁹⁹ Included in the purchase was a new car warranty of 5 years/60,000 miles.¹⁰⁰ Three months later, the car began losing oil pressure.¹⁰¹ Mr. Zeretzke returned the car, and after it was repaired, was informed that "the repairs were done."¹⁰² 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.¹⁰³ The Zeretzkes then brought suit under the DTPA and were awarded damages for repairs, loss of use and mental anguish.¹⁰⁴

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. . . ."¹⁰⁵ 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.¹⁰⁶ 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."¹⁰⁷ 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*,¹⁰⁸ *Baptist Hosp. of Southeast Texas, Inc. v. Baber*¹⁰⁹ and *St. Elizabeth Hosp. v. Garrard*.¹¹⁰" The Court fur-

⁹⁹*Id.* at 352.

¹⁰⁰*Id.*

¹⁰¹*Id.*

¹⁰²*Id.*

¹⁰³*Id.* at 353.

¹⁰⁴*Id.*

¹⁰⁵*Id.* at 356.

¹⁰⁶*Id.* at 357.

¹⁰⁷*Id.*

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).

¹⁰⁹*Baptist Hosp. of Southeast Texas, Inc. v. Baber*, 672 S.W.2d 296 (Tex.App.—Beaumont 1984) (requiring proof of "knowingly" requires undue burden), *per curiam*, 714 S.W. 2d 310 (Tex. 1986).

¹¹⁰*St. Elizabeth Hosp. v. Garrard*, 730 S.W.2d 649 (Tex. 1987).

ther held that *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."¹¹¹

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

D. Reaffirming *Luna*: *Boyles v. Kerr*

On December 2, 1992, the Supreme Court of Texas held that *St. Elizabeth Hospital v. Garrard* was overruled "to the extent that it recognizes an independent right to recover for negligently inflicted emotional distress."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."¹¹⁴ Although the facts in *Boyles v. Kerr*¹¹⁵ did not involve the DTPA, the Court reaffirmed its decision in *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."¹¹⁶ By eliminating the tort of negligent infliction of severe mental distress, the *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.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.¹¹⁸ This uniformity has resulted, in large part, from the courts' willingness to adhere to certain guiding principles when applying

¹¹¹ *Milt Ferguson Motor Co. v. Zeretzke*, 827 S.W.2d at 357.

¹¹² *Id.* at 357.

¹¹³ See *Boyles v. Kerr*, 855 S.W.2d 593 (Tex. 1993) (affirming the knowledge requirement of *Luna v. North Star Dodge*).

¹¹⁴ *Id.* at 595-96.

¹¹⁵ *Id.*

¹¹⁶ For a brief discussion of the facts of *Boyles v. Kerr*, see introduction.

¹¹⁷ 855 S.W.2d 513 (tex. 1993). *Boyles v. Kerr*, NO. D-0963, WL 353277, at 4 (Tex. Dec. 2, 1992).

¹¹⁸ Mark L. Kincaid, *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, *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.¹¹⁹ 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.¹²⁰

A. *Liberal Construction*

In 1977, in a case styled *Woods v. Littleton*,¹²¹ 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.¹²² 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."¹²³ 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."¹²⁴

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.¹²⁵ 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).

¹²¹Mark L. Kincaid, *Rules of Judicial Construction-Making and Arguing the Law in DTPA Cases*, 23 TEX. TECH. L. REV. 687, 688 (1992).

¹²²*Woods v. Littleton*, 554 S.W.2d 662 (Tex. 1977).

¹²³*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).

¹²⁴*Woods*, 554 S.W.2d at 665.

¹²⁵*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

enforce 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.

; citing *City of Mason v. West Tex. Util. Co.*, 237 S.W.2d 273, 278 (1951); see TEX. BUS. & COMM. CODE ANN. SEC. 17.44 (Vernon 1993); accord Mark L. Kincaid, *Rules of Judicial Construction- Making and Arguing the Law in DTPA Cases*, 23 TEX. TECH. L. REV. 687, 689 (1992) (discussing liberal construction of the DTPA).

¹²⁶ See *Melody Home Mfg. Co. v. Barnes*, 741 S.W.2d 349, 355 (Tex. 1987); *Weitzel v. Barnes*, 691 S.W.2d 598, 600 (Tex. 1985); *McKiley v. Drozd*, 685 S.W.2d 7, 9 (Tex. 1985); Mark L. Kincaid, *Rules of Judicial Construction-Making and Arguing the Law in DTPA Cases*, 23 TEX. TECH. L. REV. 687, 690 (1992) (discussing the consistency of DTPA interpretation).

¹²⁷ 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).

¹²⁸ 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).

¹²⁹ *Pennington*, 606 S.W.2d at 690.

¹³⁰ *Pennington*, 606 S.W.2d at 690-91 (Tex. 1980); Mark L. Kincaid, *Rules of Judicial Construction-Making and Arguing the Law in DTPA Cases*, 23 TEX. TECH. L. REV. 687, 692 (1992) (discussing the prohibitive costs associated with deceptive trade practice suits); John Hill, Introduction, *Consumer Protection Symposium*, 8 ST. MARY'S L.J. 609 (1977).

DTPA plaintiff to recover under the Act.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."¹³² By refusing to apply the parole evidence rule,¹³³ by rejecting an intent requirement,¹³⁴ by rejecting the common law definition of reliance,¹³⁵ and by rejecting the defenses of estoppel and waiver,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-

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).

¹³² 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, *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).

¹³³ *Smith v. Baldwin*, 611 S.W.2d 611, 616 (Tex. 1980) (common law defenses are not controlling); e.g. *Alvarado v. Bolton*, 749 S.W.2d 47, 48 (Tex. 1988); *Shanandoah Assoc. v. J.K. Properties*, 741 S.W.2d 470, 496 (Tex. App.—Dallas 1987, writ denied); Mark L. Kincaid, *Rules of Judicial Construction-Making and Arguing the Law in DTPA Cases*, 23 TEX. TECH. L. REV. 687, 699-70 (1992) (discussing the DTPA and its relationship to the common law); John L. Hill, Introduction, *Consumer Protection Symposium*, 8 ST. MARY'S L.J. 609 (1977) (discussing the changes the DTPA made to the common law).

¹³⁴ *Alvarado v. Bolton*, 749 S.W.2d 47, 48 (Tex. 1988); *Weitzel v. Barnes*, 691 S.W.2d 598, 599-600 (Tex. 1985); Mark L. Kincaid, *Rules of Judicial Construction-Making and Arguing the Law in DTPA Cases*, 23 TEX. TECH. L. REV. 687, 699 (1992); See also Karen Guerra, *DTPA Precludes Use of Merger & Parole Evidence Rule in Breach of Warranty Suits: Alvarado v. Bolton*, 41 BAYLOR L. REV. 373 (1989).

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, *Rules of Judicial Construction-Making and Arguing the Law in DTPA Cases*, 23 TEX. TECH. L. REV. 687, 700 (1992).

¹³⁶ *Celtex Corp. v. Gracy Meadow Owners Assoc., Inc.*, 847 S.W. 2d 384, 391 (Tex. App.—Austin 1993, writ denied); *Weitzel*, 691 S.W.2d at 600; Mark L. Kincaid, *Rules of Judicial Construction-Making and Arguing the Law in DTPA Cases*, 23 TEX. TECH. L. REV. 687, 699 (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,¹³⁷ “[b]ecause 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.”¹³⁸ The Act should, however, “incorporate common-law theories that are consistent with the mandate of liberal construction and the underlying policy of protecting consumers.”¹³⁹

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.¹⁴⁰ In 1987, the court allowed recovery when the mental anguish resulted only from the negligence of the defendant.¹⁴¹ 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-

¹³⁷ *Chrysler Corp., v. Texas Motor Vehicle Comm’n*, 755 F.2d 1192, 1197 (5th Cir. 1992); *Eagle Properties, Ltd., v. Scharbauer*, 807 S.W.2d 714, 724 (Tex. 1990); *Kenmore v. Bennet*, 755 S.W.2d 89, 91 (Tex. 1988); Mark L. Kincaid, *Rules of Judicial Construction-Making and Arguing the Law in DTPA Cases*, 23 TEX. TECH. L. REV. 687, 699 (1992).

¹³⁸ *Alvarado*, 749 S.W.2d at 48 (citing *Smith v. Baldwin*, 611 S.W.2d at 616); *Shanandoah Assoc. v. J.K. Properties*, 741 S.W.2d 470, 496 (Tex. App.—Dallas 1987, writ denied); Mark L. Kincaid, *Rules of Judicial Construction-Making and Arguing the Law in DTPA Cases*, 23 TEX. TECH. L. REV. 687, 699-70 (1992) (discussing the DTPA and its relationship to the common law); John L. Hill, Introduction, *Consumer Protection Symposium*, 8 ST. MARY’S L.J. 609 (1977) (discussing the changes the DTPA made to the common law).

¹³⁹ Mark L. Kincaid, *Rules of Judicial Construction-Making and Arguing the Law in DTPA Cases*, 23 TEX. TECH. L. REV. 687, 688 (1992).

¹⁴⁰ *Id.* at 700.

¹⁴¹ See *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*, 17 TEX. TECH. L. REV. 1557, 1574-76 (1987) (noting that courts have acknowledged mental distress without an accompanying physical impairment).

ples articulated prior to 1987.¹⁴²

C. *Creating Common Law Obstacles*

Liberal construction requires that the court not imply any obstacles to recovery.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."¹⁴⁴ This view is evidenced by the court's rejection of implied defenses,¹⁴⁵ its refusal to confine the DTPA to merchants,¹⁴⁶ and its broad application of the term "consumer."¹⁴⁷ In fact, courts have consistently rejected defendants who try to bypass the provisions of the DTPA by developing loopholes.¹⁴⁸ "The Texas Supreme Court has never wavered, and in case after case it has refused to imply any additional" obstacles into the DTPA.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. *Legislative Intent*

In numerous decisions interpreting the DTPA, courts have looked

¹⁴²*St. Elizabeth Hosp.*, 730 S.W.2d at 649.

¹⁴³*Boyles v. Kerr*, 855 S.W.2d 593 (Tex. 1993).

¹⁴⁴TEX. 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).

¹⁴⁵Mark L. Kincaid, *Rules of Judicial Construction-Making and Arguing the Law in DTPA Cases*, 23 TEX. TECH. L. REV. 687, 693 n.45 (1992).

¹⁴⁶See *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).

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).

¹⁴⁸See 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).

¹⁴⁹See 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).

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

¹⁵⁰Mark L. Kincaid, *Rules of Judicial Construction-Making and Arguing the Law in DTPA Cases*, 23 TEX. TECH. L. REV. 687, 693 n.45 (1992).

¹⁵¹*E.g.* Robinson v. Preston Chrysler-Plymouth, Inc., 633 S.W.2d 500, 502 (Tex. 1982) (discussing legislative history); Smith v. Baldwin, 611 S.W.2d 611, 615-16 (Tex. 1980) (looking to the legislative intent); Woods v. Littleton, 554 S.W.2d 662, 667 (Tex. 1977) (considering legislative intent in light of the 1975 amendments); Mark L. Kincaid, *Rules of Judicial Construction- Making and Arguing the Law in DTPA Cases*, 23 TEX. TECH L. REV. 687, 693 (1992) (discussing the Texas Supreme Court's refusal to allow defenses, exceptions or exclusions to be implied into the DTPA).

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).

¹⁵³TEX. BUS. & COMM. CODE § 17.50(b)(1) (Vernon 1979).

¹⁵⁴Timothy 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."¹⁵⁵ Traditionally, we have relied on the ability of "twelve Texas citizens, empaneled as a jury, to distinguish between the fraudulent and the genuine."¹⁵⁶ 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.¹⁵⁷

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;¹⁵⁸ thus honoring the principle that "[f]reedom from severe emotional distress is an interest which the bar should serve to protect."¹⁵⁹ By adopting the tort of negligent infliction of emotional distress, the Texas courts took a leadership role, providing an example for other jurisdictions.¹⁶⁰ However, the majority in *Kerr* retreated from this position, holding that the decision in *Garrard* was

¹⁵⁵*Id.*

¹⁵⁶*Id.*

¹⁵⁷*Boyles v. Kerr*, 855 S.W.2d 593, 613 (Tex. 1992) (Doggett, J., dissenting).

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).

¹⁵⁹*St. Elizabeth Hosp. v. Garrard*, 730 S.W.2d 649, 653 (Tex. 1987); *e.g.* Charles E. Cantu, *Negligent Infliction of Emotional Distress: Expanding the Rule Evolved Since Dillon*, 17 *TEX. TECH L. REV.* 1557, 1574-76 (1987).

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[ies] 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

¹⁶¹ *Boyles v. Kerr*, 855 S.W.2d 593, 612 (Tex 1992) (Doggett, J., dissenting).

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.¹⁶⁸ Despite the precedent supporting mental anguish claims, there has not been an explosion of mental anguish litigation,¹⁶⁹ nor has there been any evidence to indicate that the *Garrard* decision "has strained Texas courts by requiring litigation of trivial claims."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 *Luna*.¹⁷¹

The court in *Garrard* held that the lack of physical symptoms does not impact the authenticity of the mental injury.¹⁷² Likewise, the fact that the DTPA defendant's actions were committed "knowingly" does not affect the authenticity of the emotional injuries sustained.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.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?

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,"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.

¹⁶⁸*Id.* at 613.

¹⁶⁹*Id.* at 613 (Doggett, J., dissenting).

¹⁷⁰*Id.* at 613 (Doggett, J., dissenting); 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, *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., *PROSSER AND KEETON ON THE LAW OF TORTS*, § 54, at 360 (5th ed., 1984) (no corresponding increase in litigation).

¹⁷¹*Boyles v. Kerr*, 855 S.W.2d at 614. (Doggett, J., dissenting).

¹⁷²*Id.* at 613.

¹⁷³*Id.* at 616.

¹⁷⁴*Id.*

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 revolutionized 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.

