

House Bill 4

Article 13

Damages

by Robert J. Witte* and James G. Ruiz**

INTRODUCTION

Article 13 (Damages) modifies Texas law in four significant ways, including:

- Requiring a jury to base its award of punitive damages on a unanimous jury verdict.
- Limiting a claimant's recovery of healthcare expenses to those actually incurred.
- Removing certain non-intentive conduct from the statutory definition of "malice" and placing such conduct within a newly defined term, "gross negligence."
- Providing a jury with evidence regarding a claimant's income taxes to consider when awarding lost future income.

Article 13 became effective September 1, 2003.

I. DETAILED ANALYSIS

Section 13.01 amends the title of Civil Practice and Remedies Code Chapter 41 from "Exemplary Damages" to "Damages." Section 13.02 amends Civil Practice and Remedies Code § 41.001 (Definitions) by removing the reference to exemplary damages from Subdivisions 1-3 of the section, modifying the definition of "economic damages" in Subdivision 4, amending the definition of "exemplary damages" in Subdivision 5, amending the definition of "malice" in Subsection 7 to require a specific intent by the defendant to cause substantial injury or harm to the claimant, and adding definitions of "compensatory damages" (Subdivision 8), "future damages" (Subdivision 9), "future loss of earnings" (Subdivision 10), "gross negligence" (Subdivision 11), "non-economic damages" (Subdivision 12), and "periodic payments" (Subdivision 13).

In amending the definition of "malice" under Chapter 14, the Legislature has removed from this definition acts or omissions (i) which, when viewed objectively from the standpoint of the actor at the time of their occurrence, involve an extreme degree of risk,

considering the probability and magnitude of the potential harm to others; and (ii) of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others. The Legislature now refers to such conduct (similarly stated), absent specific intent, as "gross negligence."

Section 13.03 modifies Civil Practice and Remedies Code § 41.002 (Applicability) to delete the word "exemplary" throughout. Thus, as amended, the narrative applies to claimants seeking damages in general, as opposed to claimants seeking exemplary damages.

Consistent with the Legislature's modification of the definition of "malice" and the addition of a definition for "gross negligence," the Legislature has, in Section 13.04, amended Civil Practice and Remedies Code § 41.003 (Standards for Recovery of Exemplary Damages) to provide in Subsection (a) that, except as provided by Subsection (c), exemplary damages may be awarded only if the claimant proves by clear and convincing evidence that the harm with respect to which the claimant seeks recovery of exemplary damages results from fraud, malice, or gross negligence. In

adding "gross negligence," as modified, to the categories of conduct sufficient to justify exemplary damages, the Legislature deletes from § 41.003 that language applicable to willful acts or omissions or gross neglect in wrongful death actions.

Section 13.04 also adds Subsections (d) and (e) to Civil Practice and Remedies Code § 41.003, to provide that exemplary damages may be awarded only if the jury is unanimous in determining (1) liability for exemplary damages and (2) the amount of exemplary damages. Further, pursuant to the amended provision, in all cases where the issue of exemplary damages is submitted to the jury, the court's charge shall include the following instruction: "You are instructed that, in order for you to find exemplary



damages, your answer to the question regarding the amount of such damages must be unanimous.”

Section 13.05 amends the limiting text of Civil Practice and Remedies Code § 41.004(b) by deleting language stating that “a claimant may recover exemplary damages, even if only nominal damages are awarded, if the claimant establishes by clear and convincing evidence that the harm with respect to which the claimant seeks recovery of exemplary damages results from malice as defined in § 41.001(7)(A),” while maintaining language stating that “exemplary damages may not be awarded to a claimant who elects to have his recovery multiplied under another statute.”

Section 13.06 amends Civil Practice and Remedies Code § 41.008 (Limitation on Amount of Recovery) to make the section applicable to all damages cases, as opposed to just those in which the claimant seeks exemplary damages. The Legislature has also modified § 41.008(c)(7) to make the section applicable to injury to a child, elderly individual, or disabled individual, if such conduct occurred while providing healthcare as described in § 74.001.

Section 13.07 amends Civil Practice and Remedies Code § 41.010(b), which provides the trier of fact discretion concerning the existence and amount of exemplary damages, to make Subsection (b) subject to the amended version of § 41.008.

Section 13.08 adds to Chapter 41 of the Civil Practice and Remedies Code § 41.0105, which reads as follows:

Sec. 41.0105. EVIDENCE RELATING TO AMOUNT OF ECONOMIC DAMAGES. In addition to any other limitation under law, recovery of medical or health care expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant.

Section 13.09 amends Civil Practice and Remedies Code Chapter 18 (EVIDENCE), by adding Subchapter D, which reads as follows:

SUBCHAPTER D. CERTAIN LOSSES

Sec. 18.091. PROOF OF CERTAIN LOSSES; JURY INSTRUCTION.

(a) Notwithstanding any other law, if any claimant seeks recovery for loss of earnings, loss of earning capacity, loss of contributions of a pecuniary value, or loss of inheritance, evidence to prove the loss must be presented in the form of a net loss after reduction for income tax payments or unpaid tax liability pursuant to any federal income tax law.

(b) If any claimant seeks recovery for loss of earnings, loss of earning capacity, loss of contributions of a pecuniary value, or loss of inheritance, the court shall instruct the jury as to whether any recovery for compensatory damages sought by the claimant is subject to federal or state income taxes.

II. IMPACT ON LITIGATION PRACTICE

As is the case whenever a major legislative overhaul of the civil justice system is enacted, practitioners will experience a period of uncertainty during the initial implementation stages of the new legislation. Despite being touted as a comprehensive tort reform bill, some aspects of Article 13 of H.B. 4 are less than clear and will be subject to varied interpretations by the trial court judges. Until the legislation makes its way through the appellate process, the application of the new legislation may not be uniform

throughout the different jurisdictions.

The most significant change enacted by Article 13 is the raised standard for an award of exemplary damages. In the past, a claimant was entitled to an award of exemplary damages if at least ten of the twelve jurors agreed on the issue of liability and the amount of damages. The new legislation heightens the standard for obtaining an award of exemplary damages by requiring a unanimous jury verdict on the questions of liability and amount of damages. This change will place a greater emphasis on the jury selection phase of a future trial given that defense counsel will only need one juror to defeat an award of exemplary damages.

In cases seeking an award of exemplary damages, claimant’s counsel must dedicate a greater portion of the voir dire examination to more clearly identify those prospective jurors who may be reluctant to award exemplary damages. To ensure the additional time spent on the issue of exemplary damages during voir dire does not impair counsel’s ability to fully examine the jury panel on the other issues relevant to the case, counsel should request additional time to conduct voir dire and take the appropriate steps to preserve error should the amount of time allotted by the court for voir dire unnecessarily restrict counsel’s ability to fully examine the prospective jurors. Further, counsel may wish to challenge more jurors for cause on the issue of exemplary damages than has been the case in the past. Consequently, larger juror panels may be necessary in cases involving exemplary damages.

The change in the definitions of “malice” and “gross negligence” also impacts counsel’s voir dire examination on the issue of exemplary damages. While the same conduct on the part of a tortfeasor entitles the injured party to an award of exemplary damages, the subtle change in the characterization of the wrongful conduct alters the jury’s perception of the degree of culpability of the tortfeasor. Conduct done with “malice” evokes a visceral reaction to punish the evildoer. Conversely, harm resulting from one’s “gross negligence” can more easily be viewed as an isolated event by prospective jurors and diminish the need to punish the party. Ultimately, both of these changes likely will have their desired effect, *i.e.*, to lower exemplary damages awards, in that to reach unanimity among the jurors an award of exemplary damages may have to be reduced.

Uncertainty exists as to the manner in which jurors will be instructed on questions of liability and damages in cases where the issue of exemplary damages will be submitted to juries. The language in the standard Charge of the Court may require revision to reflect the new standards for an award of exemplary damages. The same language requiring verdicts of ten or more jurors on the issue of liability and damage questions can be viewed as inappropriate for the questions of liability giving rise to exemplary damages. In cases where exemplary damage issues will be submitted to the jury H.B. 4 requires the courts to include the following instruction: “You are instructed that, in order for you to find exemplary damages, your answer to the question regarding the amount of such damages must be unanimous.” The legislation, however, is silent as to the manner in which juries are to be instructed on the issues of liability, notwithstanding the requirement that the jury verdict be unanimous on the question of liability as well. Whether the Legislature’s silence on this issue was an oversight or intentional will be hotly debated during future charge conferences and will need to make its way through the appellate process before it is ultimately decided. In wording future jury instructions,

litigants must remain mindful of the prohibitions concerning comments on the weight of the evidence, misstatements regarding the applicable law governing the issue, and instructing the jury regarding the effect of their answers.

In all cases involving the potential award of exemplary damages, defense counsel should request a bifurcated trial under Civil Practice and Remedies Code § 41.009. This action will alleviate the need for providing an instruction pertaining to the amount of damages unless unanimity on the question of liability is achieved. Defense counsel will certainly argue that the Legislature's silence as to any jury instruction regarding the requirement of unanimity on the liability question was intentional and designed to ensure that no instruction be given to the jury advising of them of the effects of their answer. It remains true that a verdict on the question of liability can be rendered by at least ten jurors. The failure on the part of a jury to reach a unanimous verdict on the issue of liability, however, will not get the claimant to the punitive damages phase of the trial.

The standard additional instructions for a bifurcated trial provide that "all jurors have the right and responsibility to deliberate on this question, but at least ten of those who agreed to the verdict in the first stage must agree to this answer and sign the verdict accordingly. If your verdict was unanimous, the second verdict must be rendered by a vote of at least ten of you." Texas Pattern Jury Charge 100.4. The Legislature's new mandated instructions require these additional instructions to be rewritten to reflect the new standard.

Claimant's counsel may argue that the absence of an additional instruction concerning the unanimity requirement on the question of liability giving rise to a claim for an award of exemplary damages is misleading. Under the standard charge, a ten-juror vote on a question is a win for the party with the burden of proof. This would not be the case on the question of liability giving rise to exemplary damages. An instruction to the jury that in order to find a claimant is entitled to exemplary damages the liability question relating to exemplary damages requires a unanimous vote is problematic because it would advise the jury of the effect of their answer. A partial solution may be to require the jurors to sign each question in order to determine whether the question on liability was unanimous; however, this does not address the possible misperception on the part of the jury that the party with the burden prevailed on the issue with ten votes when the reality is that it did not.

The requirement that the trier of fact determine the amount of economic damages separately from the amount of compensatory damages is consistent with the existing practice that the elements of damages are found separately on the verdict form. Failure to segregate the compensatory elements of damages from the economic damages will make review of the appropriateness of an exemplary damages award that is near the statutory cap difficult and may result in a remand and new trial. Accordingly, a claimant must ensure that the proper verdict form is submitted to the jury. Defense counsel must ensure it properly preserves any errors to a defective question during the charge conference. The mandatory nature of the amendment appears to make a damage question fatally defective if it did not segregate out the elements of damages, thus giving rise to reversible error.

The prohibition against awarding exemplary damages to a party who elects to have his recovery multiplied under another statute appears to be an election of remedies issue to be made at the conclusion of the trial rather than

before the submission of questions to the jury. In that vein, a party can no longer recover exemplary damages if only nominal damages are awarded. Proving that the defendant had a specific intent to cause substantial injury will no longer suffice. The apparent effect of these changes in the law is to restrict a party's recovery in cases where only nominal damages have been incurred to the statutory multipliers governing the particular statutory cause of action. Given the effect of the multiplier on nominal damages will not be hard felt by a defendant; this change again will effectively diminish damage awards and may reflect the realities that a party only nominally injured should not be entitled to a massive award. Counsel is well advised to plead all additional causes of action in the alternative to ensure the greatest recovery.

The requirement that the courts instruct the jury whether any recovery for loss of earnings capacity, loss of contributions of a pecuniary value, or loss of inheritance is subject to federal or state income taxes may create new opportunities for accountants. Experts in tax law may be required to provide litigation support in deciphering tax returns, deciphering tax liability based on a claimant's unique financial situation, and to present evidence of the loss in the form of "net loss" after reduction for income tax payments or unpaid tax liability. How courts will deal with a situation where a party has failed to file income taxes when determining lost future earnings and avoid the prejudice associated with the failure to pay taxes is left to be seen. Counsel may want to ensure that their clients are current on their tax filings before the trial begins.

The amendments to Civil Practice and Remedies Code § 41 will take effect on September 1, 2003. Actions filed prior to this date will be governed by the law existing at the time the suit was filed, even if a party is joined in the suit after September 1, 2003. Counsel who intended to file future suits against other parties as a part of the much maligned practice of "stacking" should consider joining other parties in existing suits to avoid the effects of the statutory amendments on the damages recoverable on their claims.

III. CONCLUSION

The proposed "reform" movement is far from over. As has been the case in the past, interpretation of new statutes and their proper implementation will need to move through the appellate process to provide greater clarity as to their proper application to cases arising after September 1, 2003. Given the clear design of the amendments to reduce damages awards, a greater onus is placed on a claimant's counsel to select jurors who are inclined to award substantial damages in cases when only "gross negligence" may be found.

Additional limitations on future recoveries arrived with the September 13, 2003 passage of Proposition 12, which amended the Texas Constitution to authorize the Texas Legislature to set limits on non-economic damages in medical and other liability cases. Proposition 12 is intended to ensure that courts can no longer overturn the Legislature's enacted limitations on damage awards. Given that Proposition 12 seeks to encroach on the traditional role of courts in reviewing the propriety of an award of damages on a case-by-case basis, Proposition 12 will have far-reaching implications on the future of the civil justice system in this state.

* Attorney at Law, Winstead Sechrest & Minick, P.C., Dallas, Texas

** Attorney at Law, Winstead Sechrest & Minick, P.C., Austin, Texas