SUMMER 2021

TLR ADVOCATE

TEXANS FOR LAWSUIT REFORM: MAKING TEXAS A BEACON FOR CIVIL JUSTICE IN AMERICA

SUMMER 2021

IN THIS ISSUE

OUR MISSION

Texans for Lawsuit Reform is a volunteer-led organization working to restore fairness and balance to our civil justice system through political action, legal, academic and market research, and grassroots initiatives. The common goal of our more than 18,000 supporters is to make Texas the Beacon State for Civil Justice in America.

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MAKE TEXAS A BEACON for CIVIL JUSTICE in AMERICA

Leg Ad Pd for by Texans for Lawsuit Reform
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Session Wrap-Up

By Richard J. Trabulsi Jr., TLR Chairman

The 87th Texas Legislature was unique in my decades of experience. Our State Capitol during session is a crowded, bustling, loud agora of Texans hawking their ideas and interests to our policymakers. The broad sweep of our expansive, diverse state is on glorious display.

Not this year.

The rotunda and halls were eerily empty and quiet, collateral damage from the COVID-19 pandemic. Nevertheless, the people's business was done, only with less color and texture.

Here were TLR's priorities this session.

Correct the abuses in personal injury lawsuits concerning commercial vehicles of all types and sizes. This needed a two-avenue path—one concerning how these cases are tried in our courtrooms, the other concerning how medical damages are proven in trials.

Lt. Gov. Dan Patrick and **House Speaker Dade Phelan (R-Beaumont)** signaled their support for addressing trucking litigation by assigning low bill numbers to the first legislative remedy, **SB 17** by **Sen. Larry Taylor (R-Friendswood)** and **HB 19** by **Rep. Jeff Leach (R-Plano)**. A coalition comprising nearly every industry of the Texas economy, the **Keep Texas Trucking Coalition**, supported the legislation. In addition to wide backing for the bill in the House Republican Caucus, several Democrats played a key role in gaining bipartisan support for HB 19 on the House floor, especially **Rep. Leo Pacheco (D-San Antonio)**, a co-author; **Rep. Eddie Lucio III (D-Brownsville)**, who offered a floor amendment that assured passage; and **Rep. Ina Minjarez (D-San Antonio)**, who recognized that small businesses are especially harmed by abusive litigation.

Two physician-legislators carried the bills addressing how medical damages are proven in trial—**Sen. Charles Schwertner (R-Georgetown)** and **Rep. Greg Bonnen (R-Friendswood)**. They worked tirelessly with stakeholders in the medical community to craft a bill that would be fair to medical providers and their patients, while also correcting the practices of certain plaintiff lawyers and their healthcare collaborators to inflate medical damages. Fortunately, Drs. Schwertner and Bonnen were able to stand down on this legislation because of two decisions by the Texas Supreme Court issued in May (discussed on page 7 herein), which adequately addressed the problems.

Many plaintiff trial lawyers looked upon COVID-19 as a potential bonanza of litigation. **Gov. Greg Abbott** made reasonable liability protections one of his priorities by giving **SB 6** "emergency" status in his State of the State address. **Sen. Kelly Hancock (R-North Richland Hills)** and **Rep. Leach** worked with stakeholders to pass a fair bill, which encourages compliance with good practices in pandemics.

You will read about these bills and others in which we participated in the pages of this *Advocate*. ■

Peeling Back the Layers of Commercial Vehicle Litigation Abuse

By Lee Parsley, TLR General Counsel

A Philosophical Divide

As we began working through the legislative process, HB 19 exposed a philosophical divide between the tens of thousands of Texas businesses that create jobs and drive our economy and the lawyers who sue them.

What is the true purpose of compensatory damages?

The advertising personal injury trial lawyers who pursue commercial vehicle lawsuits believe they are entitled to use compensatory damages to profit themselves and regulate social conduct. The businesses targeted by these lawsuits believe compensatory damages are not intended to be a profit center and the Texas Legislature should decide how and when to regulate conduct.

This division animated the fight about HB 19.

Under Texas law, compensatory damages are intended to make plaintiffs whole for injuries caused by the wrongful conduct of a defendant. These damages are not intended to enrich plaintiffs or their lawyers. Compensatory damages consist of economic damages (i.e., past and future lost earnings and medical expenses) and noneconomic damages (i.e., past and future mental anguish, physical pain and suffering, and disfigurement).

Compensatory damages are focused on the plaintiff, not the defendant. A jury must determine, for example:

- *What amount of money did the plaintiff fail to earn, or will the plaintiff fail to earn in the future, due to the injury?*
- *How much money did the plaintiff pay or does the plaintiff owe for medical treatment, and how much is the plaintiff likely to owe in the future?*
- *How much physical pain and mental anguish did the plaintiff suffer as a result of the injury, and how much will the plaintiff suffer in the future?*

These inward-facing damages are not related to the relative wrongfulness of the defendant's conduct. Whether the defendant willfully exposed society to a risk of substantial harm or merely made a single bad mistake in a lifetime of cautious behavior does not change how much the plaintiff is owed. The same may be said for all forms of plaintiff-centric compensatory damages—they all are unchanged by the relative wrongfulness of the defendant's conduct.

Of course, beyond compensatory damages, Texas law also allows a civil jury to consider the relative wrongfulness of a defendant's conduct. That is the role of exemplary damages. An award of exemplary damages is intended to punish a defendant—to "send a message" to that defendant and others who engage in egregiously dangerous conduct.

Simply put, exemplary damages serve a different purpose in our law than compensatory damages. But, as explained in the sidebar (on page 3 herein), proving an entitlement to impose punishment via a civil lawsuit can be challenging for a plaintiff, and rightfully so. Consequently, plaintiff lawyers would rather try to inflate compensatory damages than attempt to recover exemplary damages.

An Unsustainable Litigation Environment Begets an Unsustainable Insurance Environment

Aided by too many of our state's trial judges, plaintiff lawyers began to focus on turning compensatory damages into exemplary damages, particularly in lawsuits involving commercial vehicles. The strategy they employed was to put the company—not the cause of the collision—on trial.

These attorneys typically plead that: (1) the commercial vehicle driver caused the collision, and (2) the company was negligent *and grossly negligent* in entrusting the vehicle to the driver and in hiring, training, supervising and retaining the driver. The gross negligence pleading allows them to conduct broad discovery about the company defendant's employment and safety practices, hoping to find any blemish—no matter how irrelevant to the cause of the accident—that can be presented at trial to inflame the passions of the jury.

For the plaintiff lawyers in these cases, their goal is to convince the jury that the company has a culture that threatens the motoring public, while giving very little attention to the actual cause of the collision that

injured the plaintiff. The mere assertion of gross negligence in a pleading allows a plaintiff to present evidence at trial that is unrelated to the collision, having to do with other vehicles, other drivers or activities in the distant past. The strategy is most often employed when the plaintiff indicated no injury at the time of the accident or was the one who caused the collision. As they say, the best defense is a good offense!

Based on the company's alleged unsafe culture or history of misconduct, the lawyers urge the jury to award huge amounts of money for pain and suffering and mental anguish, which fall under the category of compensatory damages. They seldom seek a jury submission on their gross negligence claims, thus foregoing the recovery of exemplary damages. In effect, they seek to punish defendants through the enhanced award of compensatory damages. This is a distortion of tort law.

The plaintiff bar is highly organized. In continuing legal education courses, they teach each other how to employ this methodology to maximize the return in cases that otherwise have little or no value. As a result of this years-long attack on operators of commercial vehicles, Texas' commercial vehicle insurance market is on the verge of collapsing.

Many small businesses operating commercial vehicles either cannot find insurance or cannot afford the insurance that is available. Larger companies are better equipped to weather the storm, but they, too, are seeing a constriction in the insurance market that is depriving them of the ability to hire employees, increase wages and expand operations. The current environment is unsustainable.

Bifurcated Trials Under HB 19

To address these trial abuses, HB 19 has four main provisions. First, it allows defendants to divide the trial into two parts. In the first phase, only evidence that helps the jury determine liability for and the amount of compensatory damages is admissible—in other words, who or what caused the collision that harmed the plaintiff and how much in monetary damages would make the plaintiff whole.

In the second phase, the admissible evidence is broader, allowing the jury to consider whether the company or its driver was grossly negligent and, if so, the amount of exemplary damages to award.

Assessing Punishment in Criminal and Civil Cases

As we all know, criminal law exists to punish conduct that society, through its elected representatives, has deemed antisocial. In criminal law, punishment is pursued by the state and can include the loss of liberty (prison time) or the payment of fines to the state.

The due process clause of the U.S. Constitution places meaningful limitations on the imposition of criminal penalties. The statute describing the crime cannot be vague. Instead, it must be sufficiently specific that an average person of common intelligence can reasonably know without speculation the actions that are prohibited. The state must prove the case beyond a reasonable doubt and the jury's decision must be unanimous. Punishment cannot be excessive in comparison to the conduct being punished.

In Texas and most other states, punishment can also be imposed through the civil justice system in the form of exemplary (punitive) damages. The damages are assessed by a judge or jury and paid to the plaintiff, not the state. In effect, a private citizen steps into the place of the state by imposing punishment for antisocial behavior.

Before 1987, there were virtually no limits on the imposition of exemplary damages in Texas. A judge or jury, using 20/20 hindsight, would determine if a mere preponderance of the evidence supported a conclusion that the defendant's conduct was grossly negligent. Ten members of a 12-person jury could award unlimited damages.

Since 1987, the Texas Legislature has seen the wisdom of putting reasonable limitations on the imposition of exemplary damages. Punishment may be assessed for harmful conduct that is grossly negligent or malicious.

Texas law provides that gross negligence occurs only if the defendant's action involves an extreme degree of risk and the defendant has actual awareness of the risk involved but nevertheless proceeds with conscious indifference to the rights, safety or welfare of others.

Exemplary damages may be awarded only if the claimant proves the elements of exemplary damages by clear and convincing evidence. A jury must be unanimous in awarding exemplary damages and the amount awarded is capped.

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Consequently, evidence about an alleged unsafe culture or history of misconduct is not heard by the jury until *after* it has decided who caused the accident. Presentation of evidence in Phase 1 that is not relevant to causation and compensatory damages—but rather used in today's courtrooms to inflame the jury to increase compensatory damages—is prevented through the bifurcated trial provision. But that evidence may be admissible in Phase 2, as the jury considers whether the defendant's actions were sufficiently antisocial to warrant punishment.

Put simply, evidence is presented at the stage of trial in which it is relevant.

The plaintiff attorneys who most engage in this kind of litigation vigorously opposed the bifurcated trial provision in HB 19 because it limits their ability to use compensatory damages as the mechanism to grossly inflate noneconomic damages, such as pain and suffering, to enrich themselves under the guise of regulating conduct.

Rep. Jeff Leach, author of HB 19

Sen. Larry Taylor, Senate sponsor of HB 19

Violations of Government Regulations

The second element of HB 19 provides that in the first trial phase, the jury may hear evidence of a defendant's violations of state or federal regulations if a violation caused the accident. This prevents the presentation of evidence in Phase 1 of safety-rule violations related to other drivers, other vehicles and other events.

It is important to note that any safety-rule violation related to the company's equipment or conduct that caused the accident is admissible in Phase 1 under HB 19. If the truck was improperly loaded or maintained, the jury will hear about these errors in the first phase of trial. Likewise, if the claim is that the driver was intoxicated, texting while driving or had too many hours behind the wheel, HB 19 allows the jury to hear about these violations in the first phase of trial.

Incorporation of the Doctrine of Respondeat Superior

The third element of HB 19 addresses employer liability for employee negligence. Under the longstanding principle of *respondeat superior*, an employer is fully liable for the negligent acts of an employee who was working in the scope of employment at the time of the negligent event.

HB 19 incorporates this principle, providing that when a company stipulates its vehicle was driven by an employee acting within the scope of employment, its liability is based on *respondeat superior*, not on other claims, such as negligent entrustment, hiring, training, supervision or retention.

Lawyers opposing HB 19 strenuously argued that this provision granted "immunity" to commercial vehicle owners that persisted in unsafe practices. They claimed that, unless plaintiff attorneys could present evidence in Phase 1 about a company's employment practices, the companies would ignore safe hiring practices and fill the highways with unsafe drivers, destined to cause injury and death.

The fallacy of this argument, of course, is that it ignores the fact that the employer is already responsible for *all* of the plaintiff's compensatory damages under the *respondeat superior* doctrine *and* is subject to exemplary damages in the second phase of trial under HB 19.

As discussed above, a plaintiff's compensatory damages are inward looking, based solely on the plaintiff's economic, mental and physical condition, and those conditions are not affected by the relative wrongfulness of the defendant's conduct. The amount of income a plaintiff lost due to a collision-caused injury is a fixed amount determined by the jury. The plaintiff's past or future medical bills are based on the severity of the plaintiff's collision-caused injury, as is the level of physical pain and mental anguish felt by the plaintiff.

Under respondeat superior, the company defendant is responsible for the injury caused to the plaintiff. Companies are not immune from liability or shielded from responsibility under HB 19.

Negligent Entrustment in Phase 1 of the Trial

In the give-and-take of the legislative process, the House added an amendment to HB 19 that allows a plaintiff to pursue a negligent entrustment cause of action against a defendant who stipulated that the driver was an employee working in the scope of employment at the time of the collision. The amendment references

a number of federal safety regulations that can be discussed in the first phase of a bifurcated trial that are applicable to the truck driver or owner, even if unrelated to the collision.

Importantly, the amendment applies only to companies and drivers who are regulated by state or federal law, as in 18-wheelers and other larger commercial vehicles. Companies and drivers that do not have to register with the U.S. Department of Transportation or Texas Department of Public Safety—such as pickup trucks and minivans used to deliver goods and supplies—are not included and a negligent entrustment claim cannot be pursued against them in Phase 1 of the trial.

Rep. Leo Pacheco

Rep. Eddie Lucio III

Rep. Ina Minjarez

Among the regulations referenced in HB 19 are those requiring the defendant driver to be properly licensed, physically capable of driving the vehicle and not intoxicated. These safety-rule violations are already admissible under another provision of HB 19 (discussed above) allowing presentation of evidence of any regulatory violation that caused the accident. The list also references regulations that might not be admissible in the first phase of trial absent the House floor amendment, including regulations requiring prospective employees to complete an employment application and employers to conduct an investigation of the applicant's background.

The amendment provides these violations are the only evidence that can be presented and only to support a claim for the company's negligent entrustment of the vehicle to the employee. We were concerned about the impact of these limitations on the broad tort of negligent entrustment. Acts of negligence in addition to the regulatory violations listed in HB 19 might support a common law negligent entrustment claim prior to enactment of HB 19. Additionally, evidence concerning the stated regulatory violations could be admissible for more than one purpose, such as proving that the driver caused the collision. The opponents of HB 19, however, rebuffed TLR's proposal to address these issues in a Senate amendment to the House bill.

Photo and Video Evidence

The final provision of HB 19 provides that photos and videos of the vehicles and objects involved in an accident are presumed admissible into evidence. All too often, photos and videos showing minor damage and the plaintiff's culpability in causing the accident are excluded from evidence at the plaintiff lawyer's request. The lawyers don't want jurors to see this evidence because it disproves the plaintiff's claim of hundreds of thousands of dollars in injuries from the collision even though there is minimal property damage to the plaintiff's vehicle. But, as the saying goes, "a picture is worth a thousand words."

In Conclusion

We are confident HB 19 will deter the worst abuses in commercial vehicle litigation in Texas, thus improving the commercial vehicle insurance market. If, however, HB 19 in practice results in any unfairness to either plaintiffs or defendants, or the bill fails to have the desired effect, TLR is ready to work with the Legislature to correct any flaws that become apparent and seek further reforms to achieve the goal of a fair civil justice system for all participants in commercial vehicle litigation. ■

The San Antonio Delegation Steps Up

San Antonio and South Texas have long been critical logistics hubs for our state's robust international trade with Mexico. This was reflected in strong engagement throughout the legislative process by the San Antonio members of the **Keep Texas Trucking Coalition**. Their persistent and compelling outreach to the San Antonio legislative delegation in both the House and Senate had a meaningful impact on securing key votes for HB 19. Most members of the delegation—both Republicans and Democrats—stood on the side of small businesses in their districts in the face of immense pressure from the personal injury trial bar.

Building the Broadest Coalition in TLR History

By Mary Tipps, TLR Executive Director

When TLR first heard of the issues with abusive commercial vehicle litigation several years ago, we had no idea just how wide-ranging and serious the problem was.

We were approached by the Texas Trucking Association in 2015 to discuss how to fix the abuses and assumed this was a niche problem affecting only the trucking industry. To be frank, we hoped it would eventually sort itself out without the need for our legislative involvement, either through the courts or because plaintiff lawyers would simply move on.

Boy, were we wrong.

The deeper we dove into commercial vehicle litigation abuse, the more we realized it *wasn't* just a big truck problem. *It was a Texas economy problem.*

Yes, big trucks were definitely in the crosshairs (look no further than the string of personal injury billboards along any of our highways for proof). But as abusive litigation often does, what started as a controlled burn eventually grew into a five-alarm fire that was engulfing Texas businesses across the board, even if they had never been involved in an accident.

It quickly became clear that our opposition would be fierce—there's simply too much money at stake for the plaintiff's attorneys who engage in these lawsuits. We knew we couldn't go it alone.

So we teamed up with the Texas Trucking Association to form the **Keep Texas Trucking Coalition**. Our goal was to centralize efforts into one united front and help give Texas businesses—no matter their size, legislative sophistication, location or resources—a voice and a seat at the table in this discussion.

We built a website (**www.KeepTexasTrucking.com**) and began reaching out to companies, business and trade associations in Austin and their member companies to join the coalition. Our initial goals were modest, but we were quickly blown away by the interest in the coalition—further confirming that this was an economy-wide problem.

Within the first week, 130 companies, individuals and organizations joined the coalition. After a month, we had nearly 200 members. And by the end of the legislative session, we had more than 600 members across the state, spanning everything from agriculture to oil and gas, retail to foodservice, document delivery to ambulances. I could go on, but a quick visit to the coalition's website will show you more than I could ever tell.

I cannot overstate how critical the coalition members' involvement was to getting HB 19 passed.

Their participation helped demonstrate to lawmakers the breadth of the problem caused by abusive commercial vehicle litigation. They provided us with real-world stories of how their businesses had been affected by this abuse. Their experiences in litigation served as a roadmap that led us to what specifically needed to be fixed in the litigation process.

They contacted their legislators, filling the critical role that constituent contact always plays in successfully passing a bill. They gave their time, coming to Austin to testify in marathon committee hearings and walk the halls of the Capitol to make in-person visits to legislative offices. They spread the word among their employees, customers, friends, families and colleagues, helping us grow the coalition and support for HB 19.

Simply put, the Keep Texas Trucking Coalition and the individual efforts made by its members gave effect to our First Amendment right to assemble and petition government. Democracy in action.

We as a team learned a lot throughout this session, and we met many passionate Texans who helped get this legislation over the finish line. While many of them may not have been familiar with tort reform when this began, today they have a strong appreciation for the critical role a fair legal system plays in our state's economic prosperity and the role every Texan can play in influencing the legislative process. ■

KEEP TEXAS TRUCKING COALITION

SMALL BUSINESS STORIES

The Keep Texas Trucking Coalition created a series of videos to illustrate the serious impact abusive commercial vehicle lawsuits have on Texas small businesses. Watch them at: *www.keeptexastrucking.com/small-business-stories/*

An Important Turn of Events, Courtesy of the Texas Supreme Court

Our major priority in the 87th Legislature was to address abusive commercial vehicle litigation. **SB 207**, authored in the Senate by **Dr. Charles Schwertner (R-Georgetown)** and sponsored in the House by **Dr. Greg Bonnen (R-Friendswood)**, addressed a major component of this lawsuit abuse.

Sen. Charles Schwertner

Rep. Greg Bonnen

In too many Texas courtrooms, rulings by trial judges prevent juries from hearing relevant evidence concerning medical charges claimed as damages by plaintiffs in personal injury lawsuits.

The lawyers who solicit clients in these cases often have a network of medical providers who overtreat and overbill their clients. Those medical providers then testify about the necessity of their services and reasonableness of their bills, which are often inflated beyond what health insurers or government payors would pay. Then, rulings by some trial judges prevent the defendants from introducing counter evidence about the necessity of the medical services and reasonableness of the billed charges.

SB 207 would have amended two state statutes to prevent these abuses. Fortunately, the Texas Supreme Court handed down two decisions in May—*In re Allstate* and *In re K & L Auto Crushers*—that negated the need for the legislation. Drs. Schwertner and Bonnen therefore decided not to pursue passage of SB 207.

A plaintiff seeking to recover past medical expenses must prove the reasonable value of necessary medical expenses provided. Under Section 41.0105 of the Texas Civil Practice and Remedies Code, a plaintiff can recover only those amounts "actually paid or incurred" by or on behalf of the plaintiff. This means when the bills have been paid by a third party (such as an insurer, Medicare or Medicaid) the amount *actually paid* is the amount presented to the fact finder in trial.

Section 18.001 of the same code allows a plaintiff to use a pre-trial affidavit to preliminarily establish the reasonable value of medical expenses and necessity of medical treatment. A defendant is supposed to be able to controvert the plaintiff's affidavit by serving a counter-affidavit, thus forcing the plaintiff to prove reasonableness and necessity at trial.

This mechanism worked well until recently, when many judges simply refused to recognize a defendant's counter-affidavit. Once the counter-affidavit was rejected, the defendant was precluded from offering countervailing medical evidence at trial.

Justice Rebecca Huddle delivered the unanimous opinion in *In re Allstate*, wherein the court significantly limited plaintiff lawyers' ability to manipulate Texas law regarding the presentation of medical damages. *In re Allstate* states the ground rules for consideration of the efficacy of counter-affidavits, particularly clarifying that "even non-doctors could provide expert testimony on a specific medical issue, provided that the offering party establishes the expert's knowledge, skill, experience, training, or education regarding the specific issue."

Additionally, the court firmly established that Section 18.001 "nowhere provides for the exclusion of any evidence based on the absence of a proper counter-affidavit." Consequently, even if a trial judge rejects a counter-affidavit, this does not prevent the defendant from offering relevant evidence at trial concerning the necessity and reasonableness of fees charged for medical services.

In **Justice Jeffrey Boyd's** opinion in *In re K & L Auto Crushers*, the court stated that "the rates healthcare providers charge to private insurers and public payors and their costs for providing services to a patient constitute relevant facts and data . . . to whether the chargemaster rates the providers billed for the same services and devices are reasonable." The court opined that because the reasonableness of the provider's charges "goes to the heart" of the defense (i.e., if the charges are unreasonable, they are not recoverable by the plaintiff), the defendant's narrowly tailored requests for discovery sent to the healthcare providers were appropriate in that case.

These rulings by the Texas Supreme Court—paired with the enactment of HB 19—will create meaningful changes in how personal injury lawsuits are tried, helping stem the most abusive aspects in the current commercial vehicle litigation environment. ■

Remembering Alan Waldrop

Alan Waldrop

The TLR family lost one of its own this May. Alan Waldrop, who was instrumental to the passage of some of our state's most historic lawsuit reforms, passed away suddenly at the age of 59. Below, TLR Chairman Dick Trabulsi and General Counsel Lee Parsley reflect on their professional and personal relationships with Alan.

A Texas story: A boy grows up in tiny Lamesa on the Llano Estacado, the fabled land of roaming Apaches and Comanches. He goes on to become an accomplished litigator, a noted jurist on the Texas Third Court of Appeals in Austin, a crafter of the most transformative legislative tort reforms in America, and my dear friend.

Alan Waldrop and Lee Parsley were lawyers at Locke Lord when Hugh Rice Kelly discovered them for TLR in 1999. With the exception of the five years Alan served on the bench, he was engaged with TLR until his untimely death. He was TLR's primary advocate in the Legislature for the historic Omnibus Tort Reform Act of 2003 (HB 4) and the Asbestos and Silica Litigation Reform Act of 2005 (SB 15).

Complex legal reforms of that nature are tremendous undertakings, involving legal research, interviews with lawyers and parties in lawsuits, extensive statutory drafting and redrafting, discussions with bill authors and other interested legislators, negotiations with stakeholders, advocacy in legislative committees, and the preparation of exhaustive "floor books" for the bill authors in the floor debates. To the task, Alan brought experience in the courtroom, inexhaustible energy and an extraordinarily incisive legal mind.

As I worked with Alan, a brotherly bond formed. The shared work and accomplishments were important to me. But more important is the lasting impact Alan has on me because of the breadth of his intellectual curiosity and the depth of his knowledge on a sweeping range of topics, to include the novels of Somerset Maugham, marine architecture and music of all forms. What I will miss most is the laughter we shared. No matter how hard the task before us, no matter how tired we were of body and soul, we made each other laugh.

Alan's life was too short, but fully and well lived.

—Dick Trabulsi

Let's Count that Together!

Alan and I played golf together from time to time. Others would join us to complete the foursome. We always had a little wager going to "make things interesting," as Alan liked to say.

In one of these matches, we were joined by a good friend who was a prominent judge. Alan and I were both in private practice, so you'd naturally expect the judge to handily win the match.

We reported our scores as we walked off the green of par five. The judge said he made five. Alan stopped abruptly and said, "Let's count that together."

He meticulously walked us through each of the judge's shots, pointing to the place each occurred and counting them. He arrived at six. Six! Any other practicing lawyer would have stopped at four.

Of course, the wager didn't matter. It was just that Alan was scrupulously, sometimes annoyingly, honest. But he also sought fairness in these games. If a bet turned out one-sided, Alan would propose a mid-game adjustment to make it fair. When he lost a bet—which he hated—he was cheerful and gracious.

But we didn't just play golf together.

In January 2003, Tom Craddick was elected House Speaker. Alan and I were at the same law firm and he was TLR's lead outside attorney. He said TLR was optimistic real tort reform measures could be enacted and asked me for ideas. We traded our drafts. This was the beginning of our partnership drafting, redrafting and perfecting TLR's legislative proposals.

On the Friday before his passing, we had a long conversation about a particular aspect of HB 19. The following Monday, we talked again. I redrafted the relevant section based on our conversations, but still was not satisfied. The morning of his death, I had planned to talk to Alan, again seeking his experience, wisdom and knowledge. I was sure we would ultimately find another solution to another thorny problem.

For more than two decades, Alan and I laughed, needled and cajoled each other in bars and restaurants and on golf courses across Austin. When I needed clear thinking and sound advice about anything, I went to Alan, my dear friend. He often said I could depend on him for any help I needed.

He meant it. And I did. ■

—Lee Parsley

The Pandemic Liability Protection Act

By Richard W. Weekley, TLR Senior Chairman

COVID-19 had a pervasive impact on every aspect of American society and economic activity. As our economy recovers and Texas' small businesses seek to reopen and reemploy, it is essential that the public health pandemic not be followed by a litigation epidemic promoted by entrepreneurial plaintiff lawyers. Equally important, our healthcare providers who dealt with this unprecedented medical emergency need protection from a rash of lawsuits.

Fortunately, many of TLR's reforms of the past quarter-century will help protect against abusive litigation, such as reforms concerning scientific evidence, causation, proportionate responsibility and medical malpractice. Nevertheless, every mass event causing injury or death presents an opportunity for exploitation by some plaintiff lawyers.

Sen. Kelly Hancock, author of SB 6

For that reason, the 87th Legislature passed **SB 6**, authored by **Sen. Kelly Hancock (R-North Richland Hills)** and sponsored in the House by **Rep. Jeff Leach (R-Plano)**. In January, Gov. Abbott declared pandemic liability protection an emergency item, giving the bill priority status in the legislative process. The lieutenant governor and House speaker signaled their support early. The bill provides reasonable, retroactive civil liability protections for large and small businesses, religious institutions, non-profit entities, healthcare providers, first responders and educational institutions.

Protections for healthcare providers apply to care rendered to known or suspected COVID-19 patients and to care affected by the pandemic. Conduct is governed by gross negligence or a willful and wanton standard. Liability protections are retroactive to March 13, 2020, when Gov. Abbott declared COVID-19 a public health emergency. Legislative findings were made to counter the anticipated constitutional challenges to the retroactivity of the bill.

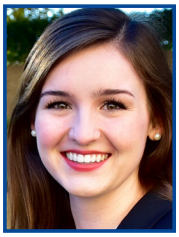
The willful and wanton standard in the Pandemic Liability Protection Bill mirrors the standard that applies in Good Samaritan law and in Texas' emergency care protections, which have been in place in our state since 2003. Importantly, the COVID-19 bill does not provide unchecked liability protection; it simply applies the willful and wanton standard to situations in which COVID-19 was the producing cause of the patient's medical conditions treated by the healthcare provider.

SB 6 does not protect bad actors who are grossly negligent, engage in willful misconduct or are consciously indifferent to their patient's welfare and safety. Instead, it protects all those who put their safety at risk when working in a healthcare setting if they make a good faith effort to provide appropriate medical care. The gross negligence standard is triggered only when the pandemic disease was a producing cause of the injury or death.

Concerning businesses, SB 6 establishes common-sense liability protections for Texans who, in good faith, do their best to comply with appropriate health and safety guidelines. The bill does not protect bad actors who intentionally or with gross negligence put other Texans in harm's way. The bill:

- Protects a person from liability for exposing an individual to a pandemic disease unless the person knowingly failed to implement applicable health and safety guidelines or flagrantly disregarded the guidelines.
- Protects a person from liability if the person in good faith substantially complied with an applicable rule, order or declaration of the governor, legislature, a state agency or a local governmental entity that was in conflict with another rule, order or declaration.
- Shields public and private higher education institutions from liability for canceling or modifying a course, program or activity because of the pandemic emergency.
- Protects manufacturers, designers, distributors, sellers, labelers or donors of products used to combat a pandemic disease unless they acted with actual malice.

While COVID-19 served as the impetus for these common-sense reforms, the passage of SB 6 better positions our state and our healthcare system to respond in the event of a future pandemic. ■



Additional TLR Priority Bills

By Rebecca Ward Helterbrand, TLR Outside Counsel

Closing a Loophole in a Previous Reform

SB 1821, authored by **Sen. Joan Huffman (R-Houston)** and sponsored in the House by **Rep. Terry Canales (D-Edinburg)**, is a bipartisan "clean up" bill that gives better effect to a bill passed in 2019.

The 86th Texas Legislature amended Chapter 2254 of the Government Code to require a political subdivision to make and publish findings supporting the necessity of entering into a contingent-fee contract for legal services, and to approve the contract in an open meeting. A political subdivision must also receive the Attorney General's approval of a contingent-fee contract before it is effective and enforceable.

Additionally, the contract itself must establish hourly rates for attorneys, which can be as high as $1,000 per hour. All attorneys must record time spent working on the contracted matter, and the attorneys' base fee is calculated by multiplying the number of hours worked by the hourly rate. The contract may provide for a multiplier to enhance the base fee. All of these fee provisions are the same as those the state itself must adhere to when entering into contingent fee contracts.

A contract entered into or an arrangement made in violation of these provisions is void and no fees may be paid to any person under the contract.

Some local governments have been circumventing Chapter 2254's requirements by amending existing contracts rather than entering into new ones that must go through the statutory process.

For example, at least one political subdivision contracted with attorneys before Sept. 1, 2019, to pursue a multimillion-dollar lawsuit for alleged defects in the construction of a public building, then amended the contract after Sept. 1, 2019, to allow the attorneys to pursue other multimillion-dollar lawsuits for alleged defects in other buildings. Of course, these actions defy the intent of the Legislature, which was to create a transparent process for entering into legal-services contracts and ensure local governments keep the lion's share of money recovered in a lawsuit brought on the public's behalf.

SB 1821 simply provides that a contingent-fee contract includes an amendment to the contract for legal services if the amendment changes the scope of representation or may result in the filing of a civil action or the amending of a petition in an existing civil action.

Sen. Joan Huffman

Rep. Terry Canales

Rep. Reggie Smith

Tweaking the Multidistrict Litigation Statute

The multidistrict litigation (MDL) panel has the power to transfer factually-related cases from multiple courts to a single trial court for consolidated or coordinated pretrial proceedings.

This helps ensure consistency, predictability and efficiency, and saves time and money when multiple lawsuits arise from the same facts in multiple counties. Cases that are not settled return to the original counties for a trial on the merits.

HB 2950, which was authored by **Rep. Reggie Smith (R-Van Alstyne)** and sponsored in the Senate by **Sen. Huffman**, amends the Government Code in three sensible ways:

- Provides that the Texas Supreme Court as a whole will appoint judges to the MDL panel. Currently, those appointments are made by the chief justice alone.
- Adds former and retired court of appeals justices to the list of people who can serve on the MDL panel.
- Deceptive Trade Practices Act (DTPA) cases brought by the Consumer Protection Division of the Texas Attorney General's Office will remain exempt from the MDL process. Clarifies that other DTPA cases not brought by the AG's office would be subject to the MDL process.

Eminent Domain Reform

This session, TLR supported **HB 2730**, which was backed by a strong coalition of stakeholders and landowners, and resolves an eminent domain issue that had been contentious and unsolved over the past three sessions. ■

Faces of Leadership in the 87th Session

By Lucy Nashed, TLR Communications Director

Throughout the years, TLR has had the privilege of working with a wide range of elected officials in our pursuit of a fair and efficient legal system. This session was no different.

Lt. Gov. Dan Patrick and **House Speaker Dade Phelan (R-Beaumont)** both indicated their strong support for common-sense reforms to abusive commercial vehicle litigation by assigning low bill numbers to that legislation (SB 17 and HB 19). Lt. Gov. Patrick and Speaker Phelan have been staunch advocates for improving the fairness and efficiency of our state's legal system throughout their public careers.

Lt. Gov. Dan Patrick

Speaker Dade Phelan

Sen. Eddie Lucio Jr.

Sen. Chuy Hinojosa

HB 19's success is directly attributable to the hard work of its author, **Rep. Jeff Leach (R-Plano)** and Senate sponsor **Sen. Larry Taylor (R-Friendswood)** and their capable staffs. Both legislators worked diligently to incorporate good feedback from stakeholders and lawmakers throughout the legislative process.

The broad support for HB 19 in the business community was reflected in its bipartisan support in both the House and Senate. **Rep. Leo Pacheco (D-San Antonio)** was an early coauthor of the bill. He, along with **Rep. Eddie Lucio III (D-Brownsville)** and **Rep. Ina Minjarez (D-San Antonio)**, helped attract Democratic votes for HB 19. **Rep. Trent Ashby (R-Lufkin)** and **Rep. Morgan Meyer (R-Dallas)** joint-authored HB 19. **Rep. John Smithee (R-Amarillo)** amended the bill to require the Texas Department of Insurance to monitor its impact on the commercial vehicle insurance market. In the Senate, **Sen. Eddie Lucio Jr. (D-Brownsville)** and **Sen. Chuy Hinojosa (D-McAllen)** helped shepherd the bill's passage by a remarkable 30 votes to one.

Sen. Charles Schwertner (R-Georgetown), a physician, authored SB 207 and was joined by the Senate's other two physicians, **Sen. Donna Campbell (R-New Braunfels)** and **Sen. Dawn Buckingham (R-Lakeway)**. **Rep. Greg Bonnen (R-Friendswood)**, a neurosurgeon, sponsored this bill in the House. Their in-depth knowledge of how medical damages are handled in personal injury suits was critical to developing a legislative solution for this issue. In addition to his leadership on SB 207, Rep. Bonnen capably chaired the House Appropriations Committee, a formidable task.

Sen. Kelly Hancock (R-North Richland Hills), who chaired the Senate Business & Commerce Committee, carried the COVID-19 liability bill (SB 6), a priority for both the governor and lieutenant governor this session. As a small business owner, Sen. Hancock deeply understands the need for reasonable liability protections, and has been a champion for common-sense reforms throughout his distinguished career. Rep. Leach, who also serves as chair of the House Judiciary and Civil Jurisprudence Committee, sponsored this bill in the House.

Sen. Joan Huffman (R-Houston) and **Rep. Terry Canales (D-Edinburg)** worked together to pass SB 1821 to close a loophole in a previous reform regarding government contingent fee contracts for legal services. Both Sen. Huffman and Rep. Canales are attorneys who quickly and capably developed and passed a solution to ensure the will of the Legislature is carried out when local governments hire a private attorney to work on a contingency fee basis.

While many of the bills supported by TLR this session addressed lawsuit abuses, there were some important improvements made to the fairness and efficiency of our state's legal system. **Rep. Reggie Smith (R-Van Alstyne)** authored an important bill to improve Texas' multidistrict litigation (MDL) process. The MDL bill was sponsored by Sen. Huffman, who chairs the Senate Committee on Jurisprudence and the Senate Special Committee on Redistricting. Rep. Smith, a member of the House Judiciary & Civil Jurisprudence Committee, also worked closely with Rep. Leach on HB 19.

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The Unsung Heroes of Every Session

The unsung heroes of the Legislature are the experienced, hard-working staffers in the legislators' offices and legislative committees. The staff must be deeply engaged with every aspect of the legislative process—from the drafting of bills, to preparation for committee hearings, to talking to constituents and lobbyists.

With each passing week, the pressure intensifies as constitutional deadlines approach and emotions run high. Members with dedicated staffs are able to accomplish significantly more in the short time allotted to the legislative session.

In a session marked by a pandemic, the staffs' task became further complicated.

Not only did each chamber institute its own protocols related to masking, testing and remote work, but individual legislative offices were given that discretion as well. Chiefs of staff learned how to administer COVID-19 tests from their desks—one more hat added to an already full rack.

Committee clerks capably navigated a new world of socially distanced hearings, incorporating virtual testimony to ensure Texans could still engage with their government. Drafters from the Texas Legislative Council worked to keep bills moving through revisions and amendments.

This is not to mention the speaker's, lieutenant governor's and governor's staffs, who all play a complex and critical role in the process.

We at TLR are particularly grateful to have worked closely with these staff members who were most engaged in the bills we advocated: **Luis Saenz, Jeff Oldham** and **Gardner Pate** in the Governor's Office; **Darrell Davila** and **Sherry Sylvester** in the Lieutenant Governor's Office; **Julia Rathgeber**, **Mark Bell, Margo Cardwell** and **Jay Dyer** in the Speaker's Office; Senate staffers **Cari Christman, Davis Hairston**, **Drew Graham**, **Luisa Venegoni** and **Sean Opperman**; and House staffers **Lauren Young, Cassidy Zgabay**, **Brigitt Hartin**, **Samantha Durand**, **Sara Hays** and **Sergio Cavazos**.

TLR is fortunate to work with all of these men and women, whose passion comes through daily in their service to our state. Their hard—and largely unrecognized—work is inspiring. It's one reason we host events, like **Puppy Paws and Making Laws** (pictured below). ■






"A small body of determined spirits fired by an unquenchable faith in their mission can alter the course of history."

—MAHATMA GANDHI