Coalition for a Fair Judiciary

JUSTICE PRISCILLA OWEN: MYTH VS. REALITY

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I. The Real Priscilla Owen

The colleagues of Texas Supreme Court Justice Priscilla Owen know her to be a common-sense, restrained jurist who strives to follow the law in all cases, defers to the precedents of the United States Supreme Court, and refuses to interfere with the policy choices of the people's elected representatives in the legislature. Justice Owen, whom the President has nominated to the U.S. Court of Appeals for the Fifth Circuit, neither reflexively bends the law to benefit the interests of ordinary citizens, nor does she instinctively strain to rule in favor of businesses. Instead, a fair-minded assessment of her eight-year career on the Texas Supreme Court reveals her to be a balanced jurist well within the mainstream of Texas, and American, law.

Justice Owen has written or joined a number of opinions that protected the safety and well-being of children. In *Hernandez v. Tokai Corp.*, 2 S.W.3d 251 (Tex. 1999), she rejected a manufacturer's claim that it had no duty to ensure that its cigarette lighters were child resistant since they were only intended for use by adults. In *In re D.A.S.*, 973 S.W.2d 296 (Tex. 1998), she extended the right of indigent juveniles to have the assistance of counsel on appeal. And in *Abrams v. Jones*, 35 S.W.3d 620 (Tex. 2000), a bitterly contested child custody battle,

she applied statutory protections denying access to the child's mental health records, because releasing them would have harmed the child's physical, mental, or emotional health.

During her tenure on the Texas Supreme Court, Justice Owen has also actively protected the legal rights of workers and employees. To name only a few examples, in *Kroger Co. v. Keng*, 23 S.W.3d 347 (Tex. 2000), she prohibited employers from raising "comparative negligence" defenses—under which employees could be held responsible for their own injuries—if they opt out of the workers' compensation insurance system. In *Pustejovsky v. Rapid-American Corp.*, 35 S.W.3d 643 (Tex. 2000), she ruled that a worker who developed asbestos-related cancer could pursue his claims against asbestos suppliers, even though he had received an earlier settlement from another asbestos supplier. And in *Lee Lewis Construction, Inc. v. Harrison*, 70 S.W.3d 778 (Tex. 2001), she upheld a $12.9 million jury verdict—$5 million of which was punitive damages—in a case where a construction worker died after the general contractor had knowledge of, but refused to stop, the use of an extremely dangerous device.

Justice Owen likewise has helped ensure that consumers get a fair shake before the Texas Supreme Court. In *Chilkewitz v. Hyson*, 22 S.W.3d 825 (Tex. 1999), for instance, Justice Owen held that a defendant doctor could not escape a valid lawsuit simply because the plaintiff sued him personally, rather than his physician's association. And in *Mid-Century Insurance Co. v. Lindsey*, 997 S.W.2d 153 (Tex. 1999), she required an insurance company to pay $50,000 in uninsured motorist coverage, because she concluded that the policy's coverage of "accidents" included a boy's inadvertent act.

Finally, Justice Owen has faithfully enforced Texas statutes and ordinances designed to protect the environment. In *Barshop v. Medina County Underground Water Conservation District*, 925 S.W.2d 618 (Tex. 1996), Justice Owen upheld the constitutionality of the Edwards Aquifer Act, which regulates withdrawals of water from wells drilled in the aquifer and limits the drilling of future wells. In doing so, she rejected landowners' claims that the Act deprived them of their property rights, and concluded that the state has the authority to regulate and conserve groundwater usage. Similarly, in *Quick v. City of Austin*, 7 S.W.3d 109 (Tex. 1999), she rejected landowners' challenges to a city ordinance that was designed to protect water quality and control pollution.

These rulings, and many others like them, do not suggest that Justice Owen sets out in any given case to rule in favor of children, workers, consumers, or the environment. But they give the lie to any claim that she instinctively favors any one type of litigant. Instead, Justice Owen decides cases according to the governing law—by applying U.S. Supreme Court precedents, or by deferring to the wishes of the legislature—and follows those authorities wherever they might lead her.

The people of Texas have benefited from more than Justice Owen's legal rulings. In addition, Justice Owen has gone to great lengths to improve the quality of legal services provided to the poor. In *Griffin Industries v. Honorable Thirteenth Court of Appeals*, 934 S.W.2d 349 (Tex. 1996), Justice Owen stressed that "[o]ur state Constitution and our rules of procedure recognize that our courts must be open to all with legitimate disputes, not just those

who can afford to pay the fees to get in." *Id*. at 353. These are not mere words to Justice Owen; she has put them into practice. Justice Owen has served on the Texas Supreme Court's Mediation Task Force, and on statewide committees that focus on providing *pro bono* legal services to the less fortunate. She successfully urged the Texas Legislature to pass a law that has resulted in millions of dollars per year in additional funds for those who provider legal services to the poor. In recognition of her dedicated service, a past president of Legal Aid of Central Texas wrote to the Senate Judiciary Committee that "Justice Owen has an understanding of and a commitment to the availability of legal services to those who are disadvantaged and unable to pay for such legal services. It is that type of insight and empathy that Justice Owen will bring to the Fifth Circuit."

Justice Owen also has distinguished herself as one of the strongest voices in Texas calling for the overhaul of the state's judicial selection system. As is true in many states, the people of Texas, through their constitution, have chosen to select their judges in partisan, contested elections. *See* TEX. CONST. art. V, § 2(c). For that reason, Texas law specifically provides that judicial candidates may solicit and accept campaign contributions. *See* TEX. CODE OF JUDICIAL CONDUCT, Canon 4D(1).

Since first taking the bench in 1994, Justice Owen unwaveringly has urged that the Texas judicial selection system be reformed, to minimize any possible appearances of impropriety that could arise when judges preside over cases involving contributors to their campaigns. In 1994, when Texas law imposed no limits on contributions to judicial candidates, Justice Owen voluntarily signed a judicial reform pledge to limit the contributions she would accept. She has publicly supported a number of proposed amendments to the Texas constitution, one of which would require judges to run in uncontested, nonpartisan, retention elections. And after the 2000 election, in which she did not draw a major-party opponent, Justice Owen went so far as to return a significant portion of her campaign contributions.

II. The TPJ Caricature

Given Justice Owen's sterling pro-reform credentials, one would expect to count among her supporters Texans for Public Justice, or "TPJ," a group that characterizes itself as "promot[ing] campaign finance and judicial-selection reforms." Regrettably, TPJ's recent report on Justice Owen is riddled with half truths and outright distortions. Although the organization is innocuously named, TPJ is in fact an advocacy group for trial lawyers. TPJ habitually denounces Texas judges who accept campaign contributions from businesses, but steadfastly refuses to criticize judges whose campaigns are funded by trial lawyers. Earlier in 2002, Elizabeth Ray ran for a seat on the Texas Supreme Court, and received 83% of her campaign contributions from trial lawyers. According to the *Austin American-Statesman*, "Ray's top donors have been four plaintiffs' firms, which gave her a total of $100,000." AUSTIN AM.-STATESMAN, Mar. 27, 2002, at B1. Yet TPJ's director refused to criticize her as beholden to trial lawyers, instead arguing that: "It shows she's not locked into an anti-consumer, pro-tort reform agenda." *Id*.

TPJ's officers have admitted publicly that their principal sources of funding are trial lawyers and liberal foundations. According to the *Houston Chronicle*, TPJ's director "has said that $273,000 of his organization's operating budget of $326,200 was raised mostly from liberal or progressive, public interest-type foundations." HOUSTON CHRON., Nov. 28, 2001, at A29. The director further has acknowledged that: "There are some wealthy liberal individuals, including trial lawyers, who have given to me over the years." HOUSTON CHRON., Nov. 4, 2001, at 2. And in an extraordinary moment of candor, TPJ's spokesman during an August 14, 1998 press event admitted the following:

> Are we getting money from lawyers? I mean, that's the question here. Sure. Yeah. We've gotten money from trial lawyers, absolutely. And we solicit money from trial lawyers. . . . If you want to talk about trial lawyers, uh, you know, there are trial lawyers in this state who just made a lot of money on the tobacco case. And, frankly, we'd like to get a lot more money from those people. We feel that they have a duty to support groups like ours.

No wonder the *Legal Times* recently described TPJ as "a liberal activist group." LEGAL TIMES, July 8, 2002, at 1.

Despite TPJ's repeated calls for public officials to come clean on their sources of funding, the group refuses to respond to media requests that it identify its individual contributors. TPJ makes no effort to live up to the standards it seeks to impose on others. For this reason, the *Houston Chronicle* recently labeled the group "hypocritical because it doesn't fully make public its own list of donors." HOUSTON CHRON., Nov. 4, 2001, at 2. The *Chronicle* also took TPJ's director to task for suggesting that publicizing his donors' names would expose them to the same dangers as civil rights activists in the Jim Crow South: "Whatever differences he may have with Texas officialdom, his contributors don't have to fear being lynched or seeing their houses burned." *Id*.

TPJ is hardly a disinterested observer of the legal system. Instead, it brings a particular mindset to bear when weighing in on important matters of public concern. No one would argue that groups like TPJ should be silenced, or have no legitimate role to play in public debates, including debates over judicial nominations. But neither should TPJ be mistaken for an objective, impartial voice. The group's pronouncements, like those of any activist group with a particular ideological orientation, should be taken with a grain of salt.

A. Justice Owen's Judicial Restraint

Judicial restraint means that judges have a proper understanding of the scope of their own powers. Judging is not the same as legislating. When deciding a case, judges are required to give effect to the intent of the lawgiver, whether the people themselves through a constitution, or the people's elected representatives through a statute. Judged by this standard, Justice Owen certainly qualifies as a practitioner of judicial restraint. She consistently defers to the policy choices of the Texas Legislature, refusing to substitute the Court's policy preferences. And she consistently applies the authoritative precedents of the U.S. Supreme Court.

TPJ proposes that Justice Owen's concurrence in *In re Jane Doe 2*, 19 S.W.3d 278 (Tex. 2000), is somehow evidence of "judicial activism." Nothing could be further from the truth. In fact, *Doe 2* reveals Justice Owen's demonstrated commitment to following and applying the precedents of the United States Supreme Court.

In *Doe 2*, Justice Owen concluded that an exception to Texas's Parental Notification Act, which permits an underage girl to have an abortion without telling a parent when doing so is in her "best interest," required the Court to consider *both* whether abortion is in her best interest, *and* whether notification is not. She came to this conclusion by citing the U.S. Supreme Court's decision in *Lambert v. Wicklund*, 520 U.S. 292 (1997) (per curiam). In that case, the Court interpreted an identical "best interest" exception in a Montana statute, and concluded that "a judicial bypass procedure requiring a minor to show that *parental notification is not* in her best interests is equivalent to a judicial bypass procedure requiring a minor to show that *abortion without notification* is in her best interest." *Id*. at 297. "Judicial restraint" involves deferring to and applying the precedents of a superior tribunal, and that is precisely what Justice Owen did in *Doe 2*.

In *Ford Motor Co. v. Miles*, 967 S.W.2d 377 (Tex. 1998), a products liability case arising out of an automobile accident, a bipartisan majority of the Texas Supreme Court held that the lawsuit had been filed in the wrong county, and therefore remanded for transfer and a new trial in a different county. It must be stressed that this decision did not eliminate the plaintiffs' ability to sue for the injuries they had suffered; it simply ordered that the case be reassigned to the appropriate venue. *See id*. at 389 ("remand[ing] this case to the trial court for transfer to Dallas County and a new trial.")

Justice Owen's majority opinion, which was joined by Justices from both major political parties, concluded that the plaintiffs should have filed suit in Dallas County (where the plaintiffs lived, the car was purchased, and the accident occurred), rather than Rusk County (where an unrelated Ford dealership was located). Indeed, the plaintiffs even "concede[d] that the Rusk County dealership has no connection with the collision or to the Ranger." *Id*. at 379. Because, as the plaintiffs themselves admitted, the Ford dealership in Rusk County had "no connection" to their case, the Court concluded that the lawsuit should have been filed elsewhere. Significantly, the dissenting Justices agreed that the majority "cite[d] the correct standard of review for venue determinations," and disagreed only as to the proper application of that standard. *Id*. at 390 (Hankinson, J., dissenting). Both the majority and the dissent agreed that it was appropriate to resolve the venue issue, even though the Court did not grant review solely for the purpose of addressing that question; no member argued that the Court should not consider whether venue was appropriate.

B. A Balanced Approach to Consumer Lawsuits

Justice Owen's voting tendencies in lawsuits filed by consumers defies easy categorization. As discussed above, she has rejected the claim of a cigarette lighter manufacturer that it had no duty to make its products child resistant; she has held that doctors cannot escape

valid lawsuits simply because a plaintiff fails to name the physician's associations as defendants; and she has upheld a multimillion-dollar jury verdict against a general contractor who allowed workers to use dangerous devices that resulted in one worker's death. Justice Owen did not reach these conclusions because she wanted to assist any particular party. Rather, these and other cases illustrate Justice Owen's commitment to faithfully applying the law regardless of the parties' identities.

In *Provident American Ins. Co. v. Castaneda*, 988 S.W.2d 189 (Tex. 1998), a substantial majority of the Texas Supreme Court (only two members dissented) agreed with Justice Owen that an insurance company did not act in bad faith when it denied a young woman's claim under a policy that, by its very terms, did not apply to her illness. After the court of appeals reversed in part the trial court's decision to award her $150,000 in money damages, the Supreme Court reversed the remainder of the decision.

The very first paragraph of Denise Castaneda's policy expressly stated that the policy only provided benefits for an illness "which first manifests itself more than thirty (30) days after the effective date of this Policy." *Id*. at 193 n.20. But the "undisputed evidence" showed that Denise's hemolytic spherocytosis (a blood disease) had manifested itself long before the 30-day period passed. In fact, she experienced symptoms years before her father even applied for the policy. As her father explained in a letter to the insurance company: "Denise and [her brother] had their skin a little yellow throughout their whole lifes [sic]." *Id*. at 195. And, again according to the letter, Denise was "checked and diagnosed" by a physician on July 20, 1991—just three days after the 30-day period expired. Because Denise's illness had manifested itself well before the end of the 30-day waiting period, her insurance company had no legal obligation to cover it.

In *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001), Justice Owen's six-member majority concluded that Texas law did not require a city to disclose a report that was covered by the attorney-client and work-product privileges. In doing so, Justice Owen deferred to and applied the precedents of the U.S. Supreme Court, as well as Texas's rules of evidence and civil procedure.

Texas law specifically provides that cities need not disclose to the public "information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party." TEX. GOV'T CODE § 552.103(a). That certainly describes Georgetown, which had prepared the report in connection with two then-pending lawsuits over discharges at a water treatment plant, and which expected to be named in several other suits. In addition, Texas law allows cities to keep private any information that is "expressly confidential under other law." *Id*. § 552.022(a). According to the six-Justice majority, the phrase "other law" includes the Texas rules of evidence and civil procedure, both of which specifically deem certain work product and certain attorney-client communications—including the report at issue in the case—to be confidential.

Significantly, Justice Owen interpreted the phrase "expressly confidential under other law" in light of *Norfolk & Western Railway v. American Train Dispatchers Association*, 499 U.S. 117 (1991), where the U.S. Supreme Court held that similar language included federal statutes, state statutes, municipal ordinances, and judicial decisions. Justice Owen also relied on

the U.S. Supreme Court's decision in *Hickman v. Taylor*, 329 U.S. 495 (1947), where the Court recognized the confidentiality of work product prepared in anticipation of litigation.

Justice Owen dissented in *FM Properties Operating Co. v. City of Austin*, 22 S.W.3d 868 (Tex. 2000) from the majority's decision to hold unconstitutional a Texas law that allowed private entities to designate their land as "water quality protection zones." In doing so, she refused to interfere with the choices of the people's elected representatives in the state Legislature.

Justice Owen disagreed that the law was an unconstitutional delegation of "legislative power" to landowners. Indeed, the Justices in the majority themselves conceded that "[d]efining what legislative power is or when it has been delegated is no easy task." *Id*. at 873. In essence, Justice Owen argued that legislatures should be allowed the flexibility to develop creative, innovative solutions to pressing social problems, and that courts should not interfere with such experimentation. "How the Legislature chooses to regulate is left to the Legislature, not this Court." *Id*. at 915 (Owen, J., dissenting). Justice Owen thus rejected the majority's "nondelegation doctrine"—a theory that, if adopted by the federal courts, would imperil Congress's ability to delegate lawmaking authority to all manner of administrative agencies.

Nor is it proper to describe Justice Owen's opinion as favoring a past campaign contributor. In fact, Justice Owen sided with the state of Texas, whose Attorney General—Dan Morales, a Democrat—had intervened in the proceedings to defend the law's constitutionality. The majority's decision to invalidate the law, she argued, "usurps authority that is reserved to another branch of government—the Legislature." Justice Owen's willingness to defer to the politically accountable branches of government is a hallmark of judicial restraint.

C. Allocating Responsibilities Among Judges and Juries

Judges and juries perform very different functions at trial. As a general matter, judges are charged with the task of ruling on questions of law—e.g., whether a particular piece of evidence should be admitted—whereas the jury's function is limited to making findings of fact. Justice Owen has sought to respect this traditional distinction, and to faithfully apply more recent U.S. Supreme Court decisions on the respective responsibilities of judges and juries.

In *Merrell Dow Pharmaceuticals v. Havner*, 953 S.W.2d 706 (Tex. 1997), the members of the Texas Supreme Court—including both Republicans and Democrats—unanimously concluded that a girl born with birth defects had not proven that a drug manufactured by the defendant was responsible for her injuries. The opinion, authored by Justice Owen, assiduously followed the precedents of the U.S. Supreme Court, as well as the lower federal courts.

According to the unanimous Court, there was no reliable evidence that Bendectin—a drug taken by pregnant women to combat morning sickness—was responsible for birth defects. As Justice Owen pointed out, the federal courts have heard identical lawsuits over the years, and every single one ultimately has failed: "The federal courts have dealt extensively with Bendectin litigation. To date, no plaintiff has ultimately prevailed in federal court. The evidence in those

cases has been similar to that offered by the Havners." *Id.* at 709-10 (citing 19 federal cases in which Merrell Dow was exonerated).

In concluding that the plaintiffs had not proven that Bendectin caused the injuries, Justice Owen's opinion applied the U.S. Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). That decision instructs courts to disregard evidence, offered by self-described scientific experts, that is not based on "valid science." Because the plaintiffs' evidence did not satisfy the U.S. Supreme Court's standard of reliability, the Texas Supreme Court unanimously concluded that Merrell Dow could not be held responsible.

A bipartisan majority of the Texas Supreme Court agreed with Justice Owen's conclusion in *State Farm Insurance Co. v. Beaston*, 907 S.W.2d 430 (Tex. 1995), that, because the plaintiff's husband decided not to renew his insurance policy, the plaintiff was not entitled to receive benefits after her husband's death. David Beaston failed to pay the premium on his life insurance policy by its due date of December 28, 1983. The policy lapsed on that day, and the 31-day grace period expired on January 28, 1984—three days before the husband died. Because the husband's death occurred after the expiration of his life insurance policy, the Court held, the wife had no right to receive benefits.

An even larger majority (with just two Justices dissenting) joined Justice Owen in ruling that the wife was not entitled to recover "mental anguish damages," since the jury did not find that the insurance company had acted knowingly. Justice Owen reasoned that, under Texas common law and other statutes, plaintiffs are not entitled to such damages unless they convince a jury that the defendant acted knowingly; she therefore concluded that the Texas Insurance Code likewise requires a showing of willful action. In other words, Justice Owen simply construed the Texas Insurance Code to be consistent with another act of the Legislature (which was passed at the same time as the Insurance Code), and with the common law of tort. (In this respect, Justice Owen agreed with the trial judge, who likewise concluded that mental anguish damages are available only if the jury finds that the defendant acted knowingly.)

In *Universe Life Insurance Co. v. Giles*, 950 S.W.2d 48 (Tex. 1997), Justice Owen agreed with the unanimous Court that an insurance company had denied a policyholder's claim "in bad faith." Along with three other colleagues from both political parties, she also joined a concurring opinion, which argued that the question of what constitutes "bad faith" should be decided by judges, to ensure that such determinations can be reviewed on appeal. (Justice Owen joined, but did not author, the concurrence.)

According to the concurrence, allowing juries to decide whether an insurance company has acted in "bad faith" prevents appellate courts from meaningfully reviewing their decisions. This is so because Texas law forbids appellate courts, when examining a jury's findings, from weighing the evidence before the trial court; appellate courts can only consider "undisputed evidence and evidence to support the finding." *Id*. at 43 (concurring opinion). To ensure that higher courts have the opportunity to consider whether "bad faith" exists in a given case, it is necessary to allow judges—whose decisions are fully reviewable on appeal—to determine "bad faith." The concurrence hardly reflects a disdain for the prerogatives of juries, as TPJ now

claims. It reflects the well-settled legal principle that juries should not be able to wield an unchecked, unreviewable power to make legal determinations.

Even the majority acknowledged that Texas law effectively prevented appellate review of a jury's "bad faith" determinations, and tried to resolve the problem by adopting a narrower definition of "bad faith." According to the majority, "[a]lthough we attempted to resolve this dilemma in [past cases], it is clear that our efforts have not been entirely successful." *Id*. at 52. In other words, the majority and concurrence agreed that an unchecked jury was a significant problem; they simply differed on the best way to solve it.

D. Impartiality Toward Campaign Contributors

For better or worse, the people of Texas have chosen to elect their judges in contested, partisan elections. Texas law therefore explicitly authorizes judicial candidates to solicit and receive campaign contributions. *See* TEX. CODE OF JUDICIAL CONDUCT, Canon 4D(1). In her eight years as a member of the Texas Supreme Court, Justice Owen consistently has called for reform of the state's judicial-selection laws, believing that judges should never be in a position where observers, with or without reason, could doubt their integrity and impartiality. Justice Owen's commitment to impartially resolving legal questions is equally apparent in the evenhanded, disinterested way she has ruled in cases involving contributors to her own judicial campaigns.

TPJ hits farthest from the mark when it suggests that Justice Owen has been influenced by campaign contributions to rule favorably toward her donors. These charges are no more than insinuation: TPJ has not alleged, let alone produced any evidence of, a quid pro quo. Nor has it proposed that any contributor-related case was legally incorrect—i.e., that it involved an erroneous application of law to fact. Indeed, no litigant has ever so much as asked Justice Owen to recuse herself from a case involving a contributor. And by way of clarification, Justice Owen has never received a contribution from a corporation, which is not permitted under Texas law. She has only received contributions from the employees of corporations, either individually or collectively through their political action committees. In a word, then, Justice Owen has done no more than comply with Texas law—which allows judicial candidates to receive campaign contributions, and which Justice Owen consistently has sought to reform.

In *Peeler v. Hughes & Luce*, 909 S.W.2d 494 (Tex. 1995), the Texas Supreme Court held that criminal convicts cannot sue their defense attorneys for malpractice if they are guilty of the offenses for which they were convicted. In so ruling, the Court aligned itself with the vast majority of states that overwhelmingly have concluded that guilty clients may not bring malpractice claims.

According to the Court's ruling, which Justice Owen joined, public policy weighs against allowing those who are guilty to sue their lawyers for malpractice: "convicts may not shift the consequences of their crime to a third party." *Id*. at 498. For this reason, only two states allowed guilty clients to bring malpractice claims. In fact, the dissent agreed that ordinarily, only the innocent should be able to sue their lawyers for malpractice: "In most cases the law should not

permit a person convicted of a crime to recover for legal malpractice." *Id*. at 501 (Phillips, C.J., dissenting). Because Carol Peeler never even asserted that she was innocent of federal tax fraud—and indeed admitted to many other crimes—the Court therefore concluded that her malpractice claim was without merit. (The trial court and court of appeals both had reached the same conclusion.)

Nor can the *Peeler* case be characterized as an attempt by Justice Owen to shield the law firm, which had contributed to her campaign, from the consequences of its actions. The Court went out of its way to emphasize that the convict's claims about her lawyer's misconduct "merit review by the State Bar." *Id*. at 500. And the Court specifically instructed that, even though there was no basis for a malpractice lawsuit, the lawyer still could be disciplined under state ethics rules.

Efforts to portray Justice Owen's opinion in *Enron Corp. v. Spring Independent School District*, 922 S.W.2d 931 (Tex. 1996), as a payoff to a campaign contributor are no more credible. In that arcane tax case, the unanimous Texas Supreme Court, Republicans and Democrats alike, applied two on-point rulings of the U.S. Supreme Court to determine the manner in which business property should be valued for tax purposes.

The specific issue in *Spring I.S.D.* was whether the Texas Legislature violated the state constitution when it enacted a law that allowed business to choose whether their inventories will be valued for tax purposes on January 1 or September 1. The Court concluded that the statute passed constitutional muster, in large measure by applying the U.S. Supreme Court's decisions in *Thomas v. Gay*, 169 U.S. 264 (1897), and *Shotwell v. Moore*, 129 U.S. 590 (1889). As a result, Enron's tax liability was lowered by about $200,000. Again, *Spring I.S.D.* was decided unanimously, and Justice Owen's opinion for the Court was joined by members of both political parties.

The lawyer for the losing school district recently wrote the Senate Judiciary Committee to dispel any suggestion that the Court was influenced in its rulings by the campaign contributions its members received. Although he was disappointed with the outcome in *Spring I.S.D.*, the lawyer had no reason to doubt the integrity of the process that produced that result.

> I have been disturbed by the suggestions that Justice Priscilla Owen's decision in this case was influenced by the campaign contributions she received from Enron employees. I personally believe that such suggestions are nonsense. Justice Owen authored the opinion of a unanimous court consisting of both Democrats and Republicans. While my clients and I disagreed with the decision, we were not surprised. The decision of the Court was to uphold an act of the Legislature regarding property valuation. It was based upon United States Supreme Court precedent, of which we were fully aware when we argued the case. I firmly believe there is absolutely no reason to question Justice Owen's integrity based upon the decision in this case.

Nor can any discernable pattern be seen in the 13 other Enron-related cases the Texas Supreme Court has heard during Justice Owen's tenure. Six of the 14 cases (including *Spring*

I.S.D.) could be characterized as "favorable" to Enron (although three were simply decisions to deny review, and hence did not involve any analysis of the parties' rights and responsibilities). Five of the 14 cases could be characterized as "unfavorable" to Enron. And the remaining three cases neither benefited nor harmed Enron. (Justice Owen did not participate in one of the three cases because her former law firm was involved in the litigation, and another case was dismissed by agreement of the parties.)

On the same day the unanimous *Spring I.S.D.* decision was handed down, the Texas Supreme Court decided another tax-valuation case without recorded dissent: *H.E. Butt Grocery Co. v. Jefferson County Appraisal District*, 922 S.W.2d 941 (Tex. 1996). As was true of the *Spring I.S.D.* case, the *HEB* ruling was the unanimous and bipartisan decision of the Court. And, again like *Spring I.S.D.*, *HEB* was based on two on-point decisions of the U.S. Supreme Court, as well as a ruling by another state's supreme court.

In a closely divided HEB case handed down two years later, *H.E. Butt Grocery Co. v. Bilotto*, 985 S.W.2d 22 (Tex. 1998), Justice Owen joined dissents that faithfully applied a Texas procedural rule forbidding trial judges from informing juries about the legal effect of their factual findings. In effect, the dissents sought to preserve the unique role of the jury as the finder of fact, without assigning it the power of a judge to resolve questions of law.

Texas Rule of Civil Procedure 277 prohibits a judge from "advis[ing] the jury of the effect of their answers." But when charging the jury in a lawsuit involving a man who slipped at an HEB grocery store, the trial judge's instructions implied that the plaintiff could not recover damages unless the jury found him 50% or less responsible for the injuries he suffered. In fact, it had been long-settled Texas law that to tell jurors that a certain amount of negligence on the plaintiff's part will bar his recovery, is to impermissibly tell them the legal effect of their answers. *See Grasso v. Cannon Ball Motor Freight Lines*, 81 S.W.2d 482 (Tex. 1935). The separate opinions thus were based on time-tested principles regarding the allocation of responsibilities among judges and juries.

III. Conclusion

Judged by any standard, Justice Priscilla Owen is a restrained, common-sense jurist with a deep and abiding commitment to deciding cases consistent with the rule of law. According to Al Gonzales, currently the White House Counsel and Justice Owen's former colleague on the Texas Supreme Court, Justice Owen "possesses exceptional integrity, character and intellect" and "extensive experience as a judge and lawyer in private practice." "She is an outstanding jurist and will perform superbly as a federal appeals court judge." DALLAS MORNING NEWS, July 16, 2002.

As Gonzales knows from first-hand experience, Justice Owen disinterestedly follows the law wherever it leads—including to rulings that benefit children, workers, consumers, and the environment—because she takes seriously her obligation to adhere to the precedents of the U.S. Supreme Court, and to give effect to the choices of the people's representatives in the legislature. Moreover, Justice Owen has proven herself to be an unswerving champion of reforming the

Texas judicial-selection system to preserve the integrity and independence of the courts. We enthusiastically support her nomination to the U.S. Court of Appeals for the Fifth Circuit, and call on the Senate to approve her immediately.

Appendix

City of McAllen v. De La Garza
Landowner's Duty to Warn

Allegation: Justice Owen, writing for the majority, held without oral argument, that the city had no duty to warn drivers of the roadside danger where there was a limestone pit at the side of a road.

Facts: ***City of McAllen v. De La Garza*, 898 S.W.2d 809 (Tex. 1995)**

- ➢ Justice Owen's opinion, joined by six other Justices, upheld the trial court's initial grant of summary judgment for defendant, which had been overturned by the Court of Appeals.

- ➢ Justice Owen's opinion applied the First and Second Restatement of Torts, which had been relied upon by the Texas Supreme Court in numerous other settings, to the facts of this case. The Restatement makes clear that the town's duty of care only applied to passengers in the "ordinary course of travel." Travelers who "intentionally deviate[] from the highway for a purpose not reasonably connected with travel upon it" are not subject to a duty of care.

  - ✓ The decedent was a passenger in a vehicle driven by an intoxicated man (over the legal limit). The driver either blacked out or fell asleep, veered off the left side of the road onto adjoining land, traveled 100 feet, went through a wire fence (knocking over seven fence poles), traveled another 110 feet, became airborne, and landed in a limestone caliche pit. The decedent passenger was not wearing a safety belt.

- ➢ The majority opinion did not hold that the defendant city owed no duty to decedent. In fact, it reestablished the principle that the city owed a duty of reasonable care to those traveling on the highway or those who foreseeably deviate from it in the ordinary course of travel.

- ➢ Justice Owen examined numerous other cases on the subject from other jurisdictions and came to the conclusion that the trial court was correct. The driver, by driving while intoxicated, blacking out or falling asleep and driving through a fence, was "not traveling in the ordinary course of travel." Because of this conclusion, the court never reached the question of whether the placement of the city's caliche pit would violate a duty of care to travelers operating their vehicles in a proper fashion.

- ➢ Justice Cornyn's dissent claimed that oral argument was necessary in the case. However, as Justice Owen noted in her opinion, the Texas Supreme Court had already established in a prior case the legal duty of reasonable care of landowners to travelers who deviate from an adjoining roadway onto the landowner's property.

Clayton W. Williams, Jr., Inc. v. Olivo
Premises Defects/Workers Injuries

Allegation: In a majority opinion joined by Justice Owen, the Texas Supreme Court reversed the damage award to a man paralyzed in a fall from an oil rig, trumping the jury's factual findings.

Facts: ***Clayton W. Williams, Jr., Inc. v. Olivo*, 952 S.W.2d 523 (Tex. 1997)**

- **All nine Justices on the Texas Supreme Court – Democrats and Republicans alike – agreed that the plaintiff had sued under the wrong theory of law.** Only one judge would have remanded for a new trial.

- The plaintiff was an employee of an independent contractor and the injury resulted from a premises defect that the independent contractor created, unbeknownst to the general contractor -- the defendant in the case.

  - ✓ The Court reversed the jury award because the plaintiff sued the general contractor for negligence rather than obtaining jury answers about the premises defect as the law requires.

  - ✓ The opinion specifically noted that "there are no jury findings against Williams" on the issue of premises defects.

- In their appeal to the Texas Supreme Court, the plaintiffs did not "complain, even conditionally, that the trial court should have submitted their proposed question" on premises defects elements to the jury, thus waiving that argument for appeal.

- Issues regarding punitive damages were disposed of in the Court of Appeals and were not before the Texas Supreme Court.

- The United States Supreme Court denied certiorari in the case. *Bossley v. Dallas County Mental Health*, 525 U.S. 1017 (1998).

Concord Oil Co. v. Pennzoil Exploration & Production Co.

Contract Interpretation

Allegation: In an plurality opinion authored by Justice Owen, the Texas Supreme Court reversed a trial court judgment in a contract dispute. Justice Owen found ambiguity in a contract in which there was no ambiguity, and in the process overturned a jury verdict.

Facts: ***Concord Oil Co. v. Pennzoil Exploration & Production Co.*, 966 S.W.2d 451 (Tex. 1998)**

➢ This case concerned a 1937 minerals deed. The granting clause of the deed describes the interest conveyed as a 1/96 interest in minerals, but a subsequent clause stated that the conveyance covered and included 1/12 of all rentals and royalty of every kind and character. Concord Oil claimed through the grantee, and Pennzoil claimed an interest in a portion of the remainder of the estate.

➢ At trial, the parties stipulated to the facts, and the trial court ruled in favor of Pennzoil. **The case was tried by the court and not by a jury.** No allegations that the decision usurped the power of the jury can be made. Additionally, since the parties stipulated to the operative facts, the trial court's decision was, in essence, a purely legal determination.

➢ Justice Owen relied on controlling Texas Supreme Court precedent in overruling the trial court's legal determination.

- ✓ In *Luckel v. White*, 819 S.W.2d 459, the Court recognized that the intent of the parties must be determined from what the expressed in the instrument, read as a whole, and that the labels given to clauses in a deed (*e.g.*, "granting") would not be relied upon.
- ✓ Justice Owen concluded that the only proper way to read the contract would be to find that the grantor intended to convey a 1/12 interest in the entire estate.
- ✓ She followed Texas Supreme Court precedent that dealt with the arcane subject of the types of errors made in fractionation in the drafting of old mineral rights deeds. (*Garrett v. Dils Co.*, 199 S.W.2d 904 (Tex. 1957)).

➢ The dissenters in this case claimed that Justice Owen "complicate[d] the deed's plain language to create a false conflict." However, in her opinion, Justice Owen criticizes the dissent's approach, which would have awarded Concord Oil only 1/96th of the mineral estate (and 1/12 of all other rentals and royalties of the estate).

- ✓ Justice Owen notes that there must have been a clear conflict in the deed, for a very simple reason: if the strict language of both clauses of the deed were followed, Concord Oil would end up with more than 1/12 of the mineral estate (1/96 of the mineral estate, plus 1/12 of the royalties of the mineral estate – *i.e.*, 9/96ths of the mineral estate).

Continental Coffee Products v. Cazarez
Employment Law

Allegation: In a majority opinion joined by Justice Owen, the Texas Supreme Court reversed the award of $500,000 in punitive damages to a woman fired in retaliation for the filing of a workman's compensation claim.

Facts: ***Continental Coffee Products v. Cazarez*, 937 S.W.2d 444 (Tex. 1996)**

➢ All Texas Supreme Court Justices signed the **unanimous and bipartisan** opinion.

➢ This trial was before a judge, not a jury, so no allegations that the decision usurped the power of the jury can be made.

➢ The Supreme Court allowed the trial court's actual damages award of $150,000, but vacated the additional $500,000 punitive award as not permissible under clear Texas law, which requires a showing of actual malice to award punitive damages.

➢ The plaintiff sued her employer and a manager for allegedly firing her in retaliation for filing a workers' compensation claim, alleging such retaliation violated state law.

- ✓ The Court denied the punitive damages claim because of the absence of evidence of ill-will, spite, or specific intent to cause the injury (actual malice).

➢ The Court noted that they "found nothing to indicate that the [Texas] Legislature intended that heightened conduct necessary for damages under the Texas Anti-Retaliation law may be implied from the employer's intentional wrongdoing" without a showing of actual malice.

- ✓ The employer's agent who fired the plaintiff in this case "had never met [the plaintiff] before he fired her . . . , nor did he even review her file before the firing." This evidence was insufficient to show that the employer acted with "ill-will, spite, or specific intent to cause the injury."

Dallas County Mental Health v. Bossley

Sovereign Immunity

Allegation: In a majority opinion joined by Justice Owen, the Texas Supreme Court barred the estate of a suicidal mental patient from collecting against defendant mental hospital. It found no causal link between the mental hospital leaving its doors open, and the patient escaping and killing himself.

Facts: ***Dallas County Mental Health v. Bossley*, 968 S.W.2d 339 (Tex. 1998)**

- ➢ This case concerned a deceased mental patient at a governmental mental health care facility. The patient had been recovering from a recent suicide attempt. The front door of the facility was normally kept locked by center employees. One day, when an employee was unlocking the door so as to permit herself to leave, the patient approached her, pushed her aside, and ran out of the facility. On foot, he led police on a mile-and-a-half long chase before he jumped in front of a passing truck and was killed.

- ➢ The trial court granted summary judgment for the government hospital based on sovereign immunity. The Texas legislature has proscribed that government immunity is waived only for "personal injury or death so caused by a condition or use of tangible or real property."

  - ✓ Under Texas Supreme Court precedent, property does not cause injury if it does no more than furnish the condition that makes the injury possible.

  - ✓ Because the momentarily open door did not "cause" decedent's suicide under controlling Texas Supreme Court precedent, the Court agreed with the trial court that the claim was barred, reversing the Texas Court of Appeals.

- ➢ The majority went on to note that "[t]he real substance of plaintiff's complaint is that [decedent]'s death was caused, not by the condition or use of the property, but by the failure of [the government hospital]'s staff to restrain him once they learned he was suicidal."

  - ✓ Deferring to the decision made by the Texas legislature, the court stated, "The Tort Claims Act does not waive Dallas County['s] immunity from such a complaint." To have permitted decedent's claim to proceed, the Court would have had to ignore and reject the legislature's considered decision to bar such claims.

Dickinson Arms-Reo., L.P. v. Campbell
Landlord Liability for Crimes

Allegation: Justice Owen joined a dissent from the denial of petition for review that would have reviewed (likely to overturn) a court of appeals opinion that held an apartment complex owner liable for a murder on his property.

Facts: ***Dickinson Arms-Reo., L.P. v. Campbell*, 35 S.W.3d 633 (Tex. 2000).**

➢ The dissent sought to apply Supreme Court of Texas precedent to this case to determine whether third-party criminal conduct is foreseeable so that an owner must anticipate and protect others against that criminal conduct.

- ✓ A visitor to an apartment complex was shot and killed in the parking lot while waiting in his truck by another visitor who had left a party at the complex. The owner of the complex was held liable at the trial court.

- ✓ There was a dissent in the court of appeals and two justices dissented from the refusal to grant a hearing en banc.

➢ The dissent from the denial of petition for review noted that there was no evidence of the type of crime that would support a judgment in this case. There had not been a murder in the entire town in years, and no murder at this apartment complex ever.

- ✓ Additionally, although there had been reports of crime at the complex, there had been no reports of "violent crimes" (as defined by the FBI) at the complex in the three-and-a-half years before the incident in question.

➢ The dissent also noted that a grant of review was necessary to resolve conflicts in the Texas lower courts, which were "troubled" over the issue of the extent to which a landowner may be liable for a crime committed on his or her premises.

Enron Corp. v. Spring Independent School District
Valuation of Property for Tax Purposes

Allegation: "Both opinions overturned lower appeals court rulings against Enron and both occurred in 1996, two years after Owen and consultant Karl Rove raised $8,600 from Enron's PAC and executives. In the court's first Enron ruling, Owen wrote a unanimous opinion that prevented Enron from having to pay $224,989 in school taxes."

Facts: ***Enron Corp. v. Spring Independent School District*, 922 S.W.2d 931 (Tex. 1996)**

- The **unanimous** Texas Supreme Court, Republicans and Democrats alike, applied two arcane rulings of the U.S. Supreme Court to determine the manner in which business property should be valued for tax purposes.
  - ✓ The specific issue was whether the Texas legislature violated the state constitution when it enacted a law that allowed business to choose whether their inventories will be valued for tax purposes on January 1 or September 1.
  - ✓ The Court concluded that the statute passed constitutional muster, in large measure by applying the U.S. Supreme Court's decisions in *Thomas v. Gay*, 169 U.S. 264 (1897), and *Shotwell v. Moore*, 129 U.S. 590 (1889).
- The lawyer for the losing school district recently wrote the Senate Judiciary Committee to dispel any suggestion that the Court was influenced in its rulings by the campaign contributions its members received:
  - ✓ "I have been disturbed by the suggestions that Justice Priscilla Owen's decision in this case was influenced by the campaign contributions she received from Enron Employees. I personally believe that such suggestions are nonsense. Justice Owen authored the opinion of a unanimous court consisting of both Democrats and Republicans. While my clients and I disagreed with the decision, we were not surprised. The decision of the Court was to uphold an act of the Legislature regarding property valuation. It was based upon United States Supreme Court precedent, of which we were fully aware when we argued the case. **I firmly believe there is absolutely no reason to question Justice Owen's integrity based upon the decision in this case.**"
- No discernable pattern can be seen in the 14 Enron-related cases the Texas Supreme Court has heard during Justice Owen's tenure.
- Six of the 14 cases could be characterized as "favorable" to Enron. Five of the 14 cases could be characterized as "unfavorable" to Enron. And the remaining three cases neither benefited nor harmed Enron.

Ford Motor Co. v. Miles
Remand for New Trial in Proper Venue

Allegation: "Owen's activist plurality opinion in *Ford Motor Co. v. Miles* overturned a $40 million jury verdict, a court of appeals affirmance and years of well-established venue precedents. Although the court did not grant review on the venue issue (which had not been argued or briefed), Owen's opinion nevertheless reversed and remanded on this issue."

Facts: ***Ford Motor Co. v. Miles*, 967 S.W.2d 377 (Tex. 1998)**

- A bipartisan majority of the Texas Supreme Court held that the lawsuit, which arose out of a car accident, was filed in the wrong county, and therefore remanded for transfer and a new trial in a different county.
  - ✓ The Court concluded that the plaintiffs should have filed suit in Dallas County (where the plaintiffs lived, the car was purchased, and the accident occurred), rather than Rusk County (where an unrelated Ford dealership was located).
  - ✓ Indeed, the plaintiffs even "concede[d] that the Rusk County dealership has no connection with the collision or to the Ranger." *Id*. at 379.
  - ✓ The dissenting Justices agreed that the majority "cite[d] the correct standard of review for venue determinations," and disagreed only as to the proper application of that standard.
- The decision did not eliminate the plaintiffs' ability to sue for the injuries they had suffered; it simply ordered that the case be reassigned to the appropriate venue. *See id*. at 389 ("remand[ing] this case to the trial court for transfer to Dallas County and a new trial.")
- Both the majority and the dissent agreed that it was appropriate to resolve the venue issue. No member argued that the Court should not consider whether venue was appropriate.
- Justice Owen's majority opinion was joined by Justices from both major political parties.

FM Properties Operating Co. v. City of Austin
Deferring to Legislative Policy Choices

Allegation: "In a test of the constitutionality of a state law tailored to exempt a specific land developer from the City of Austin's water quality rules, Owen wrote a forceful dissent that decried the majority for finding this special-interest statute unconstitutional (*FM Properties Operating Co. v. City of Austin*). The dissenting Owen, who received $2,500 in campaign contributions from the same developer and $45,000 from the developer's attorneys, criticized the majority for curtailing the developer's private property rights."

Facts: ***FM Properties Operating Co. v. City of Austin*, 22 S.W.3d 868 (Tex. 2000)**

- Justice Owen dissented from the majority's decision that a Texas law, which allowed landowners to designate their property as "water quality protection zones," was an unconstitutional delegation of legislative power.
  - ✓ The Justices in the majority themselves conceded that "[d]efining what legislative power is or when it has been delegated is no easy task."
- Justice Owen argued that legislatures should be allowed the flexibility to develop creative, innovative solutions to pressing social problems, and that courts should not interfere with such experimentation.
  - ✓ "How the Legislature chooses to regulate is left to the Legislature, not this Court."
  - ✓ The majority's decision to invalidate the law "usurps authority that is reserved to another branch of government—the Legislature."
- Justice Owen rejected the majority's "nondelegation doctrine"—a theory that, if adopted by the federal courts, would imperil Congress's ability to delegate lawmaking authority to all manner of administrative agencies.
- Texas Attorney General Dan Morales, a Democrat, had intervened in the proceedings to defend the law's constitutionality.

Grain Dealers Mutual Insurance Co. v. McKee

Insurer's Contractual Right to Deny a Claim

Allegation: Refusing to let a jury decide the issue, Justice Owen reversed both the trial court and the appellate court deciding that the insurer, a contributor to Justice Owen's campaign, was entitled to summary judgment on the issue of whether Mr. McKee's daughter, who was injured in an automobile accident, was covered by an insurance policy issued to a company owned by Mr. McKee.

Facts: ***Grain Dealers Mutual Insurance Co. v. McKee*, 943 S.W.2d 455 (Tex. 1997)**

➢ Mr. McKee wanted to recover for injuries to his daughter the underinsured/uninsured motorists coverage and the personal injury protection coverage from an insurance policy issued to his corporation. Mr. McKee's daughter was injured in a one-car accident, in which her step sister was driving a car not insured by Mr. McKee. The car was owned by her step-sister's husband, not by Mr. McKee's business.

- ✓ In addition to suing his company's insurer, Mr. McKee also sued his personal automobile insurance carrier and the step sister of his injured daughter, both of whom settled and provided recovery for the eleven year old daughter of Mr. McKee.

➢ The court held that the insurance policy was unambiguous and that the daughter was not a designated person or a family member under the policy.

- ✓ As the sole shareholder of Future Investments, Mr. McKee was responsible for the insurance policy that the company obtained, which insured only the company, any family members of the company (of which a corporate entity has none), any designated persons designated by the insured company, and their family members.

- ✓ Mr. McKee failed to designate himself or any family members; thus, the insurance coverage applied only to the corporate entity and any property owned by it.

- ✓ The court found that the child would have been covered as passenger in a covered auto or as family member of a designated person, if her father, the president of the company, had been designated on the policy.

➢ Most, if not all, jurisdictions leave interpretation of an insurance contract to the courts and not to juries, unless the contract is ambiguous.

- ✓ Although the trial court and appellate court's concluded that the contract's provision for coverage for "family members" was ambiguous, the Texas Supreme Court, with only one dissenting member, disagreed based on well established law that a corporation is a separate and distinct entity from its shareholders and that

the contract used in this case was a form contract and not tailored to the relationship between Grain Dealers and Future Investments.

➢ Addressing an issue of insurance contract interpretation similar to the one in this case, over 10 other jurisdictions, a majority of courts to decide the issue, agreed with the Texas Supreme Court's conclusion.

- ✓ The courts agreeing with the Texas Supreme Court included state and federal courts and courts located across the country, including Pennsylvania, Florida, Georgia, Illinois, Indiana, Massachusetts, New Hampshire, New York, North Carolina, Oregon, and Washington.

- ✓ Only courts in Montana, Connecticut, Colorado, Minnesota and Ohio could be said to have disagreed with the Texas Supreme Court's rationale.

➢ Justice Owen did not author this opinion, but merely joined all but one of her colleagues in applying settled Texas law to the interpretation of a contract.

GTE Southwest, Inc. v. Bruce, et al.
Intentional Infliction of Emotional Distress

Allegation: Justice Owen refused to qualify profanity, bullying, and harassing behavior as rising to the level of extreme and outrageous conduct necessary to support a claim for intentional infliction of emotional distress.

Facts: ***GTE Southwest, Inc. v. Bruce, et al.*, 998 S.W.2d 605 (Tex. 1999)**

- In a **unanimous** result, with which Justice Owen concurred, the Texas Supreme Court affirmed the court of appeals decision to uphold a jury verdict against GTE in favor of three employees on their claims for intentional infliction of emotional distress, who suffered extreme abuse at the hands of their supervisor, including physical threats and sexual harassment.

- Voting in favor of these employees, Justice Owen disagreed with GTE's contention that the employees' injuries were compensable through workers' compensation, which would have limited their recovery to statutory levels and would have barred this suit.

- Justice Owen also disagreed with other claims of GTE, including its claim that the statute of limitations barred the plaintiff employees' claim.

- In a brief concurrence, Justice Owen wrote only to explain that much of the supervisor's actions in this case, such as the mere use of profanity, yelling, and making threats of termination were not, by themselves or categorically, extreme enough to support a claim of intentional infliction of emotional distress.

- In this case, Justice Owen voted against the appeal of GTE, from whose "Good Government Club" Justice Owen had received $1,000, concluding that the abuse suffered by these employees was enough to support the claim.

Gunn Infiniti, Inc. v. O'Byrne
Deceptive Trade Practices Act

Allegation: Justice Owen, in an activist opinion, determined that insufficient evidence existed for the jury's verdict in favor of the plaintiff under the Texas Deceptive Trade Practices Act.

Facts: ***Gunn Infiniti, Inc. v. O'Byrne*, 996 S.W. 2d 854 (Tex. 1999)**

➢ The plaintiff, a resident of Louisiana, purchased an Infiniti automobile from a Texas dealership. The dealership assured the plaintiff that the car had never been wrecked, an assertion that turned to be false. When the plaintiff inquired after the vehicle's purchase, the dealership admitted the car had been wrecked and offered a number of options to the plaintiff, including at one point a full refund. The plaintiff refused the offers, choosing to sue under the Texas Deceptive Trade Practices Act, which permitted additional damages.

➢ A jury found in favor of the plaintiff and awarded him $10,500 to make him whole with respect to the car purchase, plus $11,000 for mental anguish and $50,000 in additional damages under the TDTPA.

➢ Justice Owen, writing for all but one member of the court, reversed only with respect to the mental anguish damages, which in turn reduced by a fraction the additional damages, which under the Act must be tied to total recovery awarded to the plaintiff. Thus, once mental anguish damages are eliminated the appeals court was directed to reassess these additional damages.

➢ Every day appellate courts determine the legal sufficiency of the evidence heard by juries. Evidence of the plaintiff's mental anguish came largely from his own testimony, which reflected the true reason for his mental anguish was unrelated to any misrepresentation of the dealership, but was instead due to the reaction of the plaintiff's friends to his having purchased an Infiniti.

  ✓ The plaintiff testified that "my friends pick on me a lot."

  ✓ He further testified that this activity of his friends took the form of their telling him, even before he purchased the car, that he should not buy an Infiniti.

  ✓ Since his mental anguish was unconnected to the defendant's conduct, the damages awarded on this claim could not under the law be permitted to stand.

Haynes & Boone v. Bowser Bouldin
Assessing Damages for Legal Malpractice

Allegation: Justice Owen overturned a jury award of damages stemming from a legal malpractice suit against a law firm from which she received over $16,000 in contributions.

Facts: ***Haynes & Boone v. Bowser Bouldin*, 896 S.W.2d 179 (Tex. 1995)**

- Justice Owen joined a **unanimous** decision in which the court upheld the finding of legal malpractice but reversed a judgment of $4.4 million due to the lack of evidence to support the finding.

- The damage award to Bouldin (which was overturned by the Court) was based on the loss of investment from the foreclosure on a mall, not from the loss of the lease with a particular store -- Blockbuster. It was therefore necessary for Bouldin to prove not only that Haynes & Boone's representation was deficient, but that the loss of the litigation against Blockbuster was the reason that the entire mall project was subsequently foreclosed upon.

- The **unanimous** court in this case, applying Texas law on producing cause, logically concluded that the loss of the suit with Blockbuster, which Haynes & Boone was responsible for, was not the same thing as the loss of Blockbuster as a tenant. Indeed, it was undisputed that Blockbuster intended to quit the premises before the Haynes & Boone associate who performed deficiently was ever even retained.

- Unable to prove that the loss of the litigation against Blockbuster led to the foreclosure, the damages awarded to Bouldin legally could not be sustained.

H.E. Butt Grocery Co. v. Bilotto
Jury Charges

Allegation: "In *HEB Grocery Co. v. Vinnie Bilotto*, an appeals court and a Supreme Court majority both affirmed a trial court judgment that granted $91,000 in actual damages to a customer who was injured in a grocery store fall. Owen joined two dissents in the case that argued that damages questions to the jury should not have been predicated on the degree of negligence attributed to the defendant."

Facts: ***H.E. Butt Grocery Co. v. Bilotto*, 985 S.W.2d 22 (Tex. 1998)**

- Justice Owen joined dissents that faithfully applied a Texas procedural rule forbidding trial judges from informing juries about the legal effect of their factual findings.
  - ✓ Texas Rule of Civil Procedure 277 prohibits a judge from "advis[ing] the jury of the effect of their answers."
  - ✓ When charging the jury in a lawsuit involving a man who slipped at a grocery store, the trial judge's instructions implied that the plaintiff could not recover damages unless the jury found him 50% or less responsible for the injuries he suffered.
  - ✓ Under long-settled Texas law, telling jurors that a certain amount of negligence on the plaintiff's part will bar his recovery, impermissibly advises them about the legal effect of their answers. *See Grasso v. Cannon Ball Motor Freight Lines*, 81 S.W.2d 482 (Tex. 1935).
- In effect, the dissent sought to preserve the unique role of the jury as the finder of fact, without assigning it the power of a judge to resolve questions of law.

H.E. Butt Grocery Co. v. Jefferson County Appraisal District

Valuation of Property for Tax Purposes

Allegation: "*HEB Grocery Co. v. Jefferson County* allowed a grocery store chain to pay taxes on just one of six stores that it operated in Jefferson County. This decision benefited HEB Chair Charles Butt, who has hosted fundraisers for justices in his home and who was the justices' second-largest individual donor at the time. The Butt family had given the justices $53,098, including $2,000 to Owen."

Facts: ***H.E. Butt Grocery Co. v. Jefferson County Appraisal District*, 922 S.W.2d 941 (Tex. 1996)**

- In *HEB*, the Court simply applied its ruling in *Enron Spring Independent School*, which was handed down on the same day. As was true in *Spring Independent School* case, the *HEB* ruling was the **unanimous and bipartisan** decision of the Court.

- The Texas Supreme Court applied two arcane rulings of the U.S. Supreme Court to determine the manner in which business property should be valued for tax purposes.

  - ✓ The specific issue was whether the Texas legislature violated the state constitution when it enacted a law that allowed business to choose whether their inventories will be valued for tax purposes on January 1 or September 1.

  - ✓ The Court concluded that the statute passed constitutional muster, in large measure by applying the U.S. Supreme Court's decisions in *Thomas v. Gay*, 169 U.S. 264 (1897), and *Shotwell v. Moore*, 129 U.S. 590 (1889).

Hernandez v. Tokai Corp.
Child Safety and Product Liability

Allegation: Owen joined a majority opinion that severely curtails the responsibility of manufacturers to incorporate child safety into the design of products intended for adult use.

Facts: ***Hernandez v. Tokai Corp*., 2 S.W.3d 251 (Tex. 1999)**

➢ A federal trial court had granted the defendant's motion for summary judgment thereby not allowing the matter to go to a jury.

➢ However, the Fifth Circuit Court of Appeals, seeking clarification of Texas law on this matter, certified the question to the Supreme Court of Texas to see whether a defective-design products liability claim could be maintained.

➢ Contrary to the allegation, **a unanimous court rejected the product manufacturer's argument that it could not be held liable**. Instead, what the Supreme Court of Texas found was that such a claim could indeed be maintained and applying both statutory and common law, the proper analysis in deciding upon such issues was to engage in a risk-utility analysis.

  ✓ As stated by the Court, this analysis includes considerations of the intended users of the product, safer alternative designs, whether the design defect makes the product unreasonably dangerous, and whether the defect is the producing cause of the injury.

  ✓ The court rejected the manufacturer's argument that it had no duty to make its product child resistant if it was intended only for adult use.

In Re City of Georgetown
Confidential Government Reports

Allegation: "In this opinion, Owen rewrote the Texas Public Information Act to block the media from seeing an engineering report that a city commissioned in response to a lawsuit over sewage discharges. To reach this result, Owen had to overrule the trial court and the state Attorney General and plowed under statutory language that said that the courts could not bar from disclosure any information that is not expressly made confidential by the statute."

Facts: ***In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001)**

- Justice Owen's six-member majority concluded that Texas law did not require a city to disclose a report that was covered by the attorney-client and work-product privileges. In doing so, Justice Owen deferred to and applied the precedents of the U.S. Supreme Court, as well as Texas's rules of evidence and civil procedure.

- Texas law specifically provides that cities need not disclose to the public "information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party." TEX. GOV'T CODE § 552.103(a).

  - ✓ Georgetown prepared the report in connection with two then-pending lawsuits over discharges at a water treatment plant, and expected to be named in several other suits.

- Texas law also allows cities to keep private any information that is "expressly confidential under other law." *Id*. § 552.022(a).

  - ✓ The Texas rules of evidence and civil procedure both specifically deem certain work product and certain attorney-client communications—including the report at issue in the case—to be confidential.

  - ✓ Justice Owen interpreted the phrase "expressly confidential under other law" in light of *Norfolk & Western Railway v. American Train Dispatchers Association*, 499 U.S. 117 (1991).

  - ✓ Justice Owen also relied on the U.S. Supreme Court's decision in *Hickman v. Taylor*, 329 U.S. 495 (1947), where the Court recognized the confidentiality of work product prepared in anticipation of litigation.

In Re Jane Doe 2
Parental Notification Act

Allegation: "The majority opinion in *In re Jane Doe 2* instructed trial courts on how to judge if notification would be in a minor's best interest. Although the statute mentioned no such criteria, Owen's concurring opinion criticized the majority for not requiring judges to find that the abortion itself would be in the applicant's best interest."

Facts: ***In re Jane Doe 2*, 19 S.W.3d 278 (Tex. 2000)**

- Justice Owen concluded that an exception to Texas's Parental Notification Act, which permits an underage girl to have an abortion without telling a parent when doing so is in her "best interest," required the court to consider *both* whether abortion is in her best interest, *and* whether notification is not.

- Justice Owen reached this conclusion by applying the U.S. Supreme Court's decision in *Lambert v. Wicklund*, 520 U.S. 292 (1997) (per curiam), which interpreted a similar Montana statute.

  - ✓ In *Lambert*, the Court concluded that "a judicial bypass procedure requiring a minor to show that *parental notification is not* in her best interests is equivalent to a judicial bypass procedure requiring a minor to show that *abortion without notification* is in her best interest."

- The fact that the *Lambert* Court required the girl to prove *both* that abortion is in her best interest, *and* that notification is not, is indicated by Justice Stevens's separate opinion.

  - ✓ Concurring in the judgment, Justice Stevens faulted the majority for concluding that "a young woman must demonstrate both that abortion is in her best interest and that notification is not."

Johnson & Johnson Medical v. Sanchez
Wrongful Termination of an Injured Worker

Allegation: Justice Owen's dissent argued that a wrongful termination suit of an injured worker was unequivocally barred by the statute of limitations, an issue that the majority deemed ambiguous, demonstrating her reluctance to recognize employees' rights.

Facts: ***Johnson & Johnson Medical v. Sanchez*, 924 S.W.2d 925 (Tex. 1996)**

➢ The fact that the decision regarding the running of the statute limitations was a 5 to 4 decision demonstrates that this was a very close question and that Justice Owen, joined by three other justices, was not deciding in an arbitrary manner.

➢ Under Texas law, a suit for wrongful termination must be commenced within two years after such cause of action accrues. A cause of action accrues when the employee receives unequivocal notice of his or her termination or *when a reasonable person should have known of his or her termination*.

➢ Sanchez was put on "indefinite medical layoff" on November 20, 1987, but was informed that she had "recall rights," meaning that if a position became available she would be rehired. The slim five justice majority found that because she had these recall rights, it could not definitively determine at what point she should have known that she had been terminated, thus triggering accrual of the cause of action.

➢ In rendering her dissent, Justice Owen pointed to a number of facts contained in the record which indicated that not only would a reasonable person have known she had been terminated more than two years before filing the suit, but that Sanchez's own actions showed that she had actual knowledge that she was no longer employed by the defendant. These facts included:

- ✓ In the letter advising her that she had been placed on "indefinite medical lay-off," she was also notified that her medical benefits would terminate at the end of the month and they were indeed terminated. She therefore knew more than three years before her suit that she no longer had a job or any source of income from Johnson & Johnson.

- ✓ In March of 1988, three years before the suit was initiated, Sanchez was again told by Johnson & Johnson that they did not have a position for her. She therefore filed for and received unemployment benefits.

- ✓ When she received permission from her doctor to begin work again, Sanchez filed an application with Johnson & Johnson and when asked on the form if she had ever worked there before, she indicated yes and wrote "1981-1987," evincing the fact that she knew that she was no longer employed there after 1987.

Kerrville State Hosp. v. Clark
Sovereign Immunity

Allegation: Justice Owen joined an anti-consumer and anti-jury majority opinion which held that a state mental hospital was immune from a wrongful death claim brought by the family of a woman who was murdered by a mental patient.

Facts: ***Kerrville State Hosp. v. Clark*, 923 S.W.2d 582 (Tex. 1996)**

- Plaintiffs in this case alleged that the state mental hospital was liable for the death of their daughter, Rebecca, because it had released her husband after administering short-term drugs rather than longer-term drugs. Evidence was presented at trial that longer-term drugs – lasting more than a month – were available and might have prevented the murder.

- In a 5-4 decision authored by Democrat Justice Raul Gonzalez, the court held that the state mental hospital was entitled to sovereign immunity unless it could be construed to have waived its immunity under the Texas Tort Claims Act. This Act waives immunity for "death . . . caused by a condition or use of tangible personal or real property."

- The court concluded that a failure to prescribe a certain form of drug did not fall within the definition of "use" under the Act, and that the state mental hospital had therefore not waived immunity.

- The court also explains that to hold otherwise would extend the Tort Claims Act's waiver provision to almost every case in which the state mental hospital had dispensed a drug, because a patient could always claim that a different treatment regime would have been preferable.

- The dissent argues that the patient in question had a history of not taking his medicine, and that this history of non-use and misuse accounted to "use of tangible property."

Lozano v. Lozano
Equal Inference Rule

Allegation: Justice Owen joined in a dissent from a *per curiam* opinion reinterpreting the "equal inference rule" in a case concerning liability for interfering with child custody rights. Justice Owen's view would severely curtail the fact-finding function of juries.

Facts: ***Lozano v. Lozano*, 52 S.W.3rd 141 (Tex. 2001)**

- The "equal inference rule," a longstanding principle in Texas jurisprudence, provides that a jury "may not reasonably infer an ultimate fact from meager circumstantial evidence which could give rise to any number of inferences, none more probable than another."

- The opinion in the case would be confusing to even the most experienced lawyer. Of the seven Justices participating in this case, five concurred in Chief Justice Phillips' opinion – which is the opinion that sets forth the novel interpretation of the equal inference rule.

  - ✓ Chief Justice Phillips' opinion asserts that, under the equal inference rule, "if circumstantial evidence will support more than one reasonable inference, it is for the jury to decide which is more reasonable."

- The four jurists who joined in Chief Justice Phillips' opinion concurred in a second opinion, not relying on the equal inference rule, that set forth a different interpretation of the use of circumstantial evidence.

- Justice Owen joined a dissenting opinion that criticized Justice Phillips' interpretation of the equal inference rule. The dissent asserts that the equal inference rule bars a jury from drawing conclusions based on circumstantial evidence from which more than one reasonable inference can be drawn.

  - ✓ The dissenting opinion joined by Justice Owen agrees with a majority of the court that the finder of fact must consider the totality of the evidence and that additional evidence may make one of multiple possible inferences more probable.

  - ✓ Critics therefore misconstrue this opinion as "anti-jury"– the dissent explicitly states that juries should weigh the evidence where a reasonable conclusion can be drawn from it.

- The Texas Supreme Court has issued at least 10 other opinions in the past twenty-five years construing the equal inference rule and supporting the interpretation of the rule joined by Justice Owen.

Merrell Dow Pharmaceuticals v. Havner
Reliability of Scientific Experts

Allegation: "The Havner family alleged that the morning sickness drug Bendectin caused severe birth defects in their daughter, Kelly. Owen's opinion used extremely strict limits on the admissibility of expert testimony to overturn a jury award (after trial court modification) of $3.75 million in actual damages and $15 million in punitive damages."

Facts: ***Merrell Dow Pharmaceuticals v. Havner*, 953 S.W.2d 706 (Tex. 1997)**

- The Texas Supreme Court—including both Republicans and Democrats—**unanimously** concluded that a girl born with birth defects had not proven that a drug manufactured by the defendant was responsible for her injuries. The opinion, authored by Justice Owen, followed the precedents of the U.S. Supreme Court, as well as the lower federal courts.

- There was no reliable evidence that Bendectin—a drug taken by pregnant women to combat morning sickness—was responsible for birth defects.

  - ✓ The federal courts have heard identical lawsuits over the years, and every single one ultimately has failed: "The federal courts have dealt extensively with Bendectin litigation. To date, no plaintiff has ultimately prevailed in federal court. The evidence in those cases has been similar to that offered by the Havners." *Id.* at 709

  - ✓ Justice Owen cited 19 federal cases in which Merrell Dow was exonerated.

- Justice Owen's opinion applied the U.S. Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). That decision instructs courts to disregard evidence, offered by self-described scientific experts, that is not based on "valid science."

Mid-American Indemnity Ins. Co. v. King
Minimum Capital Requirements for Insurers

Allegation: Justice Owen dissented from a majority opinion interpreting an insurance statute setting forth minimum capital requirements for certain types of insurers. Justice Owen's "activist" and "anti-consumer" dissent would have allowed then-existing insurance policies to grandfather out of the new requirements.

Facts: ***Mid-American Indemnity Ins. Co. v. King*, 22 S.W.3d 321 (Tex. 1995)**

➢ The Texas Insurance Code requires unlicensed and unauthorized insurers – "surplus insurers" – to post a bond in an amount determined by the court before filing a pleading in a lawsuit.

  ✓ According to the unambiguous language of the statute, the requirement "does not apply to . . . insurers which were deemed eligible surplus line insurers . . . at the date applicable coverage was issued."

➢ The majority construed this statute to require that insurers meet the minimum capital requirements to be considered an "eligible surplus line insurer" both at the time the applicable coverage was issued and at the time the lawsuit was filed.

  ✓ The majority based its interpretation on its view that the Texas legislature had intended to make a prerequisite for appearance in court that an insurer have the means to satisfy any potential judgment.

➢ Justice Owen, joined by four other justices, including Democrat Justice Raul Gonzalez, argued that the plain language of the statute was unambiguous and that it required the insurer to be eligible only at the time the original policy was issued. Because the language of the statute was unambiguous, making it unnecessary to look to the legislature's intent. Her analysis of the statute at issue in this case is entirely consistent with the well-settled principles of statutory construction.

  ✓ Justice Owen followed well-settled principles of statutory review in looking to the plain meaning of an unambiguous statute.

➢ In the dissent, Justice Owen specifically voiced her support for the legislature's "compelling" intent "to give the broadest possible protection to Texas policyholders."

Operation Rescue v. Planned Parenthood
Buffer Zones Between Clinics and Protestors

Allegation: Justice Owen supported the elimination and narrowing of buffer zones around reproductive health care clinics in Houston.

Facts: ***Operation Rescue v. Planned Parenthood*, 975 S.W.2d 546 (Tex. 1998)**

- Justice Owen joined the majority opinion in the Texas case upholding virtually all of the buffer zones established in the trial court's permanent injunction, with some limited modifications.

- Leading abortion rights supporters hailed the Court's decision at the time it was handed down. "Planned Parenthood officials cheered the court's decision to leave the monetary damages intact. 'This is a complete and total victory,' said Judy Reiner, senior vice president for Planned Parenthood of Houston and Southeast Texas." *(Austin American-Statesman,* p. B2, July 4, 1998).

- "Neal Manne, attorney for Planned Parenthood of Houston and Southeast Texas, said he believes this is the first time the Texas Supreme Court has upheld punitive damages against anti-abortion protesters. 'It wasn't a home run. It was a grand slam,' he said. Manne said the order correctly balanced the right to peaceful protest against the legitimate business interests of the clinics. Planned Parenthood operates one of the clinics targeted by the protesters." *(Houston Chronicle,* p. A1, July 4, 1998).

- A headline in a Planned Parenthood Newsletter released at the time the buffer zone holding was released stated that: "Anti-abortion protestors lose in Texas Supreme Court: $1.2 million in damages upheld; protestor restrictions remain."

  - ✓ The newsletter specifically stated that, "**minor** changes were made to injunction limits on protestors activities. Buffer zones were lifted around five clinics but left in place around Planned Parenthood and three other clinics and the homes of four physicians." They added, "[r]estrictions on protestors' aggressive behavior remain in effect."

- The Court's decision upheld most of the restrictions set out in the permanent injunction ordered by the trial court, but in some of the instances directed modification of the injunction to permit a limited number of peaceful demonstrators to approach patients to discuss the issue as long as upon request by the patient such conversations were ended by the demonstrators.

Peeler v. Hughes & Luce
Malpractice Lawsuits by Criminal Convicts

Allegation: "After pleading guilty to federal tax fraud, a securities worker tried to sue Hughes & Luce (which this plaintiff had retained for $250,000) for failing to tell her that a prosecutor had offered her immunity in exchange for her testimony in a wider probe. After taking $14,236 from Hughes & Luce in her 1994 race, Owen joined the court's plurality opinion that ruled that convicted criminals cannot bring malpractice lawsuits. Three dissenting justices pointed out that the plaintiff arguably never would have been indicted or convicted if her attorney had told her about the immunity offer."

Facts: ***Peeler v. Hughes & Luce*, 909 S.W.2d 494 (Tex. 1995)**

- The Court held that criminal convicts cannot sue their defense attorneys for malpractice if they are guilty of the offenses for which they were convicted. This decision is consistent with the vast majority of states, which overwhelmingly have concluded that guilty clients may not bring malpractice claims.
  - ✓ According to the Court's ruling public policy weighs against allowing those who are guilty to sue their lawyers for malpractice: "convicts may not shift the consequences of their crime to a third party." *Id*. at 498.
  - ✓ Only two states allowed guilty clients to bring malpractice claims.
- The dissent agreed that ordinarily, only the innocent should be able to sue their lawyers for malpractice: "In most cases the law should not permit a person convicted of a crime to recover for legal malpractice."
- The *Peeler* case cannot be characterized as an attempt by Justice Owen to shield the law firm, which had contributed to her campaign, from the consequences of its actions.
  - ✓ The Court went out of its way to emphasize that the convict's claims about her lawyer's misconduct "merit review by the State Bar." *Id*. at 500.
  - ✓ The Court specifically instructed that, even though there was no basis for a malpractice lawsuit, the lawyer still could be disciplined under state ethics rules.
- The trial court and court of appeals both reached the same conclusion as the Texas Supreme Court.

Praesel v. Johnson
Physician's Duties

Allegation: Justice Owen wrote the majority opinion in this case, holding that three doctors who had treated a man with epilepsy did not have a duty to third parties to keep the epileptic man from driving.

Facts: ***Praesel v. Johnson*, 967 S.W.2d 391 (Tex. 1998)**

➢ Justice Owen wrote the majority opinion, which was joined by seven other justices, including Democrat Justices Raul Gonzalez and Rose Spector. The ninth Justice concurred.

➢ As Justice Owen recognized in her opinion, it is well-settled in common law that physicians do not bear a duty to unidentified third parties.

- ✓ Some courts have held that a psychiatrist, for instance, has a duty to warn an identified party when a patient poses a threat to that party.
- ✓ For instance, if a mental patient tells a psychiatrist that he is going to kill his girlfriend, the psychiatrist has a duty to warn the girlfriend.
- ✓ But if the mental patient tells the psychiatrist that he is going to kill "someone" or "everyone," the psychiatrist has no duty to inform the general public of the threat.

➢ In *Praesel*, Justice Owen applied the well-settled principle that there is no duty to unidentified third parties. She held that the three physicians in this case did not have a duty to inform the Medical Advisory Board that the patient was an epileptic.

- ✓ It was clear from the evidence that the Medical Advisory Board would not have automatically revoked the patient's license even if it had been informed of his epilepsy.

➢ Justice Owen relied in part on medical evidence that demonstrates that individuals who have been seizure-free for three or more years suffer seizures at a very low rate.

➢ Justice Owen also held that the duty to determine whether an individual should continue to drive rests with the individual. She, along with seven other members of the court, found that the physicians had no duty to warn the patient himself that his epilepsy posed a risk to driving.

- ✓ Justice Owen's opinion reinstated the trial court's original grant of summary judgment to the defendants.

Provident American Ins. Co. v. Castaneda

Scope of Coverage Under Insurance Policy

Allegation: "In *Provident American Ins. v. Castaneda*, Denise Castaneda sued her insurer for not covering her medical costs after she had her spleen and gallbladder removed due to a hereditary blood disease. A jury awarded her $50,000 in damages, which the trial court trebled under the Deceptive Trade Practices Act. But Owen's majority opinion overturned two lower courts, finding insufficient evidence of liability and creating a new defense for insurers to deny claims on pre-existing conditions."

Facts: *Provident American Ins. Co. v. Castaneda*, 988 S.W.2d 189 (Tex. 1998)

- A substantial majority of the Texas Supreme Court agreed with Justice Owen that an insurance company did not act in bad faith when it denied a young woman's claim under a policy that, by its very terms, did not apply to her illness.
  - ✓ The very first paragraph of Denise Castaneda's policy expressly stated that the policy only provided benefits for an illness "which first manifests itself more than thirty (30) days after the effective date of this Policy."
  - ✓ The "undisputed evidence" showed that Denise's hemolytic spherocytosis (a blood disease) had manifested itself long before the 30-day period passed. In fact, she experienced symptoms years before her father even applied for the policy.
  - ✓ As her father explained in a letter to the insurance company: "Denise and [her brother] had their skin a little yellow throughout their whole lifes [sic]." *Id*. at 195. And, again according to the letter, Denise was "checked and diagnosed" by a physician on July 20, 1991—just three days after the 30-day period expired.
- Only two members of the Court dissented from Justice Owen's ruling.

Read v. The Scott Fetzer Co.

Manufacturer Liability for Sexual Assaults by Independent Contractor Salesmen

Allegation: Justice Owen joined an "extreme dissent" in a case involving business liability for the acts of a door-to-door vacuum cleaner salesman who raped a customer. The dissent argued that a distributor had no legal duty to perform background checks on door-to-door salesmen, and that failure to perform these checks could not result in foreseeable assaults.

Facts: ***Read v. The Scott Fetzer Co.*, 990 S.W. 2d 732 (Tex. 1998)**

- Ms. Read was raped at her home by a vacuum cleaner salesman, Mr. Carter. She sued the vacuum manufacturer, Kirby, and Kirby's distributor who hired Mr. Carter as an independent contractor/salesman.

- The issue was whether a company that requires in-home sales but markets through an independent contractor, who in turn, retains other independent contractors to make the sales exercises sufficient control to subject it to liability.

- **Justice Owen attempted to follow what she believed was settled Texas law in this case.** She believed that this case was governed by and indistinguishable from two prior decisions of the Texas Supreme Court, *Golden Spread Council, Inc. v. Akins*, 926 S.W.2d 287 (Tex. 1996) and *Greater Houston Transportation Co. v. Phillips*, 801 S.W.2d 523 (Tex. 1990).

  - ✓ In *Akins*, the Court held that the Boys Scouts of America had no duty to monitor its independent local volunteer councils' selection of troop leaders to prevent sexual assaults by these leaders, even though the Boy Scouts created an organization in which the risk of misconduct by troop leaders was inherently possible.

  - ✓ In *Phillips*, the Court rejected the argument that the Yellow Cab Company of Houston should have known that it was likely that one of its drivers would carry a gun, get into an altercation while on the job, and shoot someone. Despite the fact that the Yellow Cab Company had operated in Houston for nearly twenty years, and was involved in nearly 1,000 traffic accidents per year, the Court held that the company had no duty to warn its cab drivers not to carry guns.

- Justice Owen specifically agreed in the case that a contractor, like Kirby, has a duty to exercise reasonably the control it retains over the independent contractor's work.

- In addition, she noted that the plaintiff had suffered "a terrible injury" and that it was beyond doubt that the victim was due compensation from her rapist AND the local distributor for failing to exercise reasonable care in hiring him.

- ✓ Kirby, however, did not control the hiring of Mr. Carter. Ms. Read sued for injuries related to the selection of Mr. Carter as a salesman without a background check.

- ✓ The contract between Kirby and its distributors says that Kirby "shall exercise no control over the selection of ... Dealers," and that distributors have the "full ... responsibility for recruiting, hiring, firing, terminating ... independent contractors. *Id*. at 745.

Saenz v. Fidelity Insurance Underwriters
Workers Compensation: Reversed Jury Award for Mental Anguish

Allegation: Justice Owen joined a concurring/dissenting opinion which reversed a jury award for mental anguish in a worker's compensation case. The opinion "reversed Texas case law, which previously relied on juries to assess mental anguish awards."

Facts: ***Saenz v. Fidelity Insurance Underwriters*, 925 S.W.2d 607 (Tex. 1996)**

➢ Justice Owen joined an opinion concurring in part and dissenting in part, which reversed a jury's finding that the plaintiff was entitled to $250,000 in damages for mental anguish arising out of her insurance carrier's alleged fraudulent conduct in inducing her to settle her worker's compensation claim.

➢ **Justice Owen's view of this case was MORE generous to the plaintiff than the view adopted by the majority opinion.**

- ✓ The majority opinion reversed a $5 million jury verdict -- including $250,000 for mental anguish, $500,000 for future medical bills and $4.25 million in punitives -- and rendered a take nothing judgment against the plaintiff.
- ✓ Justice Owen joined a concurring/dissenting opinion which would have given the plaintiff another bite at the apple.
- ✓ While they agreed that the plaintiff could not recover for actual or punitive damages for fraud, Justice Owen and Chief Justice Phillips believed that the interests of justice required that the case be remanded back to the trial court to allow the plaintiff to rescind and re-open her worker's compensation settlement.
- ✓ They so argued despite testimony presented at trial by the state hearing examiner with decades of experience that he "had never seen a compromise settlement as high" as plaintiff's original settlement, and "had never seen one that high since."

➢ **The opinion in *Saenz* was limited to the facts presented in the case. It did not, as alleged, create new Texas law and did not affect the ability of juries to make mental anguish awards in future cases**.

- ✓ Later Texas appellate cases affirmed jury awards for mental anguish. *See Hoffman-LaRoche v. Zeltwanger*, 69 S.W.3d 634 (Tex.App.-Corpus Christi 2002)(affirming a jury award of $1 million for mental anguish arising out of a case of extreme and outrageous sexual harassment); *Lone Star Ford v. Wilson,* 2002 WL 356711 (Tex.App.-Houston 2002)(affirming a jury award of $250,000 for mental anguish arising out of wrongful termination); *Haskett v. Butts,* 2002 WL 1485290 (Tex.App.-Waco 2002)(affirming a jury's award of $250,000 for

mental anguish arising out of a medical malpractice case involving a still-born child).

➢ **The Texas Supreme Court reversed the mental anguish award in this case because it was based on insufficient evidence at trial– which appellate courts do every day across the country.**

✓ To support an award of mental anguish damages under Texas law, a plaintiff must either present "direct evidence of the nature, duration, and severity of their mental anguish, thus establishing a substantial disruption in the plaintiff's daily routine," or "evidence of 'a high degree of mental pain and distress' that is 'more than mere worry, anxiety, vexation, embarrassment, or anger.'"

➢ **The only evidence of mental anguish presented during the three-day trial in *Saenz* consisted of ONE question to the plaintiff by her attorney:**

Q: Can you tell the jury what it is that you were concerned about this lifetime medical benefits and who was going to wind up paying for the lifetime medical benefits that you were told you were going to incur?

A: I worried about that a lot. My husband was already working two jobs, and I was worried also that we were going to lose our house because when we bought it we had two incomes and, I knew that we couldn't afford the medical bills that we were going to have.

➢ Because this testimony did not specifically address the plaintiff's mental anguish, the evidence presented at trial in this case was clearly insufficient to support an award of damages for mental anguish.

Sonnier v. Chisholm-Ryder
Statute of Repose in a Products Liability Case

Allegation: Owen joined an "activist dissent" in arguing that all manufacturers who construct or repair improvements to real property should be subject to a ten-year statute of repose.

Facts: ***Sonnier v. Chisholm-Ryder*, 909 S.W.2d 475 (Tex. 1995)**

➢ In *Sonnier*, an employee injured by a tomato chopper installed by the Texas Department of Corrections sued the chopper's manufacturer some 25 years after the manufacturer constructed the machine.

➢ This case turned on the interpretation of section 16.009 of the Texas Civil Practice and Remedies Code, which stated that "a claimant must bring suit for damages.... against a person who constructs or repairs an improvement to real property not later than 10 years after the substantial completion of the improvement...."

➢ **Justice Owen and her three fellow dissenters (which included Democrat Justice Gonzalez) attempted to follow what they believed was well-settled Texas law.**

- ✓ According to the dissent, the activist majority opinion ignored a prior decision of the Texas Supreme Court and no fewer than seven Texas courts of appeals.

- ✓ In *Conkle v. Builders Concrete Products*, 749 S.W.2d 489 (Tex. 1988), the Court held that off-site manufacturers were protected by Section 16.009's repose, but only if the manufacturer constructed the entire improvement and not a component part of it.

- ✓ Seven Texas courts of appeal had issued similar holdings. *See Karisch v. Allied-Signal, Inc*., 837 S.W.2d 679 (Tex.App.-- Corpus Christi 1992); *Big West Oil Co. v. Willborn Bros. Co.*, 836 S.W.2d 800 (Tex.App.--Amarillo 1992); *Ablin v. Morton Southwest Co.*, 802 S.W.2d 788 (Tex.App.--San Antonio 1990); *Dubin v. Carrier Corp.*, 798 S.W.2d 1 (Tex.App.--Houston [14th Dist.] 1989); *Rodarte v. Carrier Corp*., 786 S.W.2d 94 (Tex.App.--El Paso 1990); *Dubin v. Carrier Corp*., 731 S.W.2d 651 (Tex.App.-- Houston [1st Dist.] 1987); *Ellerbe v. Otis Elevator Co.*, 618 S.W.2d 870 (Tex.App.--Houston [1st Dist.] 1981).

St. Luke's Episcopal Hosp. v. Agbor
Medical Malpractice Claim Barred

Allegation: Justice Owen joined a majority opinion that utilized an activist interpretation of a patient protection law to harm malpractice victims. The majority's twisted summary judgment reversed an appeals court and kept the case from the jury. The opinion was activist, anti-consumer, and anti-jury.

Facts: ***St. Luke's Episcopal Hosp. v. Agbor*, 952 S.W.2d 503 (Tex. 1997)**

➢ Justice Owen joined four other justices in a majority opinion written by Democrat Raul Gonzalez.

- ✓ The majority found that the Texas Medical Practice Act barred a patient's claim against a hospital for its credentialing of a doctor.
- ✓ During birth, the plaintiffs' baby suffered an injury that permanently disabled one arm. The plaintiffs alleged that the hospital should not have renewed the doctor's staff privileges because she had been the subject of other malpractice cases and was not properly insured.

➢ The majority, far from being activist, followed a well-established rule of law that "when a statute is clear and unambiguous, courts need not resort to rules of construction or extrinsic aids to construe it, but should give the statute its common meaning."

- ✓ On its face, the Texas statute was clear and unambiguous.
- ✓ **The dissent agreed that the statute was clear and unambiguous:** "Read literally, these provisions do bar the Agbor's claims."
- ✓ It was the dissent that then pursued an activist approach, stating, "we must consider the entire act, its nature and object, and the consequences that would follow from a proposed construction."

➢ The majority, including Justice Owen, recognized that it must take a statute as it finds it: "**[courts] are not responsible for omissions in the legislation**. They are responsible for a true and fair interpretation of the **written law**."

- ✓ Based on the plain meaning of the language used by the legislature, the statute provided the hospital immunity in this case.

➢ The majority's opinion agreed with the trial court's original decision in granting summary judgment.

- ✓ There was no factual issue for the jury to decide in this case because, as a matter of **law**, the hospital had immunity in this case.

State Farm Fire & Cas. Co. v. Simmons

Bad Faith by Insurers

Allegation: In a case where an insurer refused to pay the claim of a family whose home had burned to the ground, Justice Owen joined an extreme dissent that questioned the damages awarded by the jury for the bad faith of the insurer. The case shows that Justice Owen is activist, anti-consumer, and anti-jury.

Facts: ***State Farm Fire & Cas. Co. v. Simmons*, 963 S.W.2d 42 (Tex. 1998)**

➢ The **trial court** in this case found that there **was not legally sufficient evidence to support a jury's finding** that the insurer breached its duty of good faith and the jury's award of $2 million in punitive damages.

- ✓ The majority opinion, written by Democrat Justice Rose Spector, reversed the jury's punitive damages award, but left the bad faith finding under a revised legal standard.

➢ Justice Owen joined a dissent that argued that the majority opinion did not consider the bad faith claim under the standards the Texas Supreme Court itself had established.

- ✓ The court in earlier opinions held that there are two elements to proving bad faith: (1) the insurer had no reasonable basis for denying the claim and that it knew or should have known that fact; (2) an insurer denied a claim after liability was reasonably clear.

➢ The dissent criticized the majority opinion for being driven not by legal principles, but rather, by the belief that the insurer had not been entirely fair and therefore should pay some money to the plaintiffs.

- ✓ The dissent joined by Justice Owen applied the law as it was established in precedent. It was the majority opinion which ignored the legal standards and created an exception unique to the case.

- ✓ Although Justice Owen had dissented from the opinion setting forth the original standard, once it became precedent, she faithfully applied the standard.

➢ Both the majority opinion, written by Democrat Justice Rose Spector, and the dissent found that there was insufficient evidence to support the jury's verdict, a decision made by appellate courts every day.

State Farm Insurance Co. v. Beaston

Scope of Policy Coverage and Mental Anguish Damages

Allegation: "Terri Beaston sued an insurer that denied a life insurance claim after her husband died in a car crash. The trial court judgment granted Beaston the $250,000 value of her husband's policy but overruled a jury award of $200,000 in mental anguish damages on the grounds that there was no finding that the defendants acted knowingly. A court of appeals reinstated the mental anguish award and trebled it under a state Insurance Code provision. Owen's majority opinion overturned the jury and two lower courts to rule that Beaston take nothing. This opinion created new obstacles for consumers who are deceived by insurers."

Facts: ***State Farm Insurance Co. v. Beaston*, 907 S.W.2d 430 (Tex. 1995)**

- A bipartisan majority of the Texas Supreme Court agreed that, because the plaintiff's husband decided not to renew his insurance policy, the plaintiff was not entitled to receive benefits after her husband's death.
  - ✓ David Beaston failed to pay the premium on his life insurance policy by its due date of December 28, 1983. The policy lapsed on that day, and the 31-day grace period expired on January 28, 1984—three days before the husband died.
  - ✓ Because the husband's death occurred after the expiration of his life insurance policy, the Court held, the wife had no right to receive benefits.
- An even larger majority (with just two Justices dissenting) joined Justice Owen in ruling that the wife was not entitled to recover "mental anguish damages," since the jury did not find that the insurance company had acted knowingly.
  - ✓ Under Texas common law and other statutes, plaintiffs are not entitled to "mental anguish damages" unless they convince a jury that the defendant acted knowingly.
  - ✓ Justice Owen simply construed the Texas Insurance Code to be consistent with another act of the legislature (which was passed at the same time as the Insurance Code), and with the common law of tort.
  - ✓ The trial judge likewise had concluded that mental anguish damages are available only if the jury finds that the defendant acted knowingly.

State Farm Lloyds v. Nicolau
Bad Faith by Insurers

Allegation: In a case finding that an insurer breached its contract and acted in bad faith in denying most of the plaintiff's claims for foundation damage to their home, Justice Owen joined a dissent that reweighed the trial court evidence and found that no tort was committed at all. The dissent itself was striking in its disdain for plaintiffs in general.

Facts: ***State Farm Lloyds v. Nicolau*, 951 S.W.2d 444 (Tex. 1997)**

➢ The dissent, joined by Justice Owen and 3 other justices including Democrat Raul Gonzalez, focused on the Texas Supreme Court's failure to define the limits of bad faith liability.

- ✓ The opinion stated: "Individuals and entities, even insurance companies, are entitled to know before they act what the law expects of them, what behavior is culpable and what is not. A legal cause of action must be adequately defined by principles and standards."

- ✓ A court of appeals also noted the problem, stating that the Texas Supreme Court "has ultimately done little to provide lower courts with any guidance for conducting a legal sufficiency review in bad faith cases."

➢ The dissent specifically stated that as a reviewing court, it was not reweighing the evidence, "as that is the province of the jury." The dissent, following well-settled principles, viewed the evidence in the light most favorable to the plaintiffs, and determined that the evidence did not support the jury's finding of bad faith – a finding also arrived at by the trial court.

➢ Rather than criticizing the jury finding, the dissent sympathized with jurors who had to grapple with a decision on bad faith liability without being told what the clear legal standard was to apply.

➢ The dissent found that, even using the bad faith standard set forth in the majority opinion that an insurer breaches its duty when it "fails to settle a claim if [it] knew or should have known that it was reasonably clear that a claim was covered," the insurance company should not have been liable.

- ✓ The dissent argued that the evidence showed that there was a legitimate dispute among the experts hired by each side.

➢ The dissent, far from attacking plaintiffs, criticizes a system that encourages attorneys to add an allegation of bad faith to the complaint, because the odds of recovery – regardless of the facts – are good.

Stier v. Reading & Bates Corp.
Federal Preemption and Workplace Injury

Allegation: Justice Owen wrote the majority opinion holding that the federal Jones Act (which provides broad remedies to injured seamen) preempted the state claims of a German worker injured near Trinidad on an off-shore drilling rig owned by a Texas company.

Facts: ***Stier v. Reading & Bates Corp.*, 992 S.W.2d 423 (Tex. 1999)**

- The plaintiff was a German citizen, resided in Brazil, was not a citizen of the U.S., was not a resident of the U.S., and was injured on an offshore drilling vessel berthed in Trinidad. The plaintiff sued his employer, a Texas company, for injuries suffered on the deck of a rig when he was hit in the head by a hook on a sling operated by others.

- Under the specific case facts, federal law mandates that the case not be heard in Texas because federal law preempts state law.

- Justice Owen's opinion relied, among other law, upon two United States Supreme Court decisions, *American Dredging Co. v. Miller*, 510 U.S. 443 (1994) and *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 61 L. Ed. 1086, 37 S. Ct. 524 (1917).

- The plaintiff, Mr. Stier, does not dispute that he was a foreign seaman employed in the exploration of offshore energy sources or that he has remedy for his injuries under the laws of Trinidad, Germany, or Brazil.

Stringer v. Cendant Mortgage Corp.
Consumer Protections from Home Equity Lenders

Allegation: Justice Owen joined a majority opinion gutting the consumer protections in a Texas state constitutional amendment in which home equity lenders were prohibited from forcing borrowers to apply home equity loan funds to other debts. The opinion was activist and anti-consumer.

Facts: ***Stringer v. Cendant Mortgage Corp.*, 23 S.W.3d 353 (Tex. 2000)**

- The Fifth Circuit Court of Appeals, seeking clarification of Texas law, certified the question to the Texas Supreme Court of whether a home-equity lender may require the borrower to pay off third party debt that is not secured by the home with the proceeds of the home equity loan.
  - ✓ The Fifth Circuit found that two sections of the constitutional amendment conflict and could not be reconciled.
- The Texas Supreme Court, in a **unanimous** opinion, applied well-settled rules of constitutional interpretation and relied upon the plain meaning of the text.
  - ✓ The court found that the first section, which provided the substantive rights and obligations of lenders and borrowers, allowed lenders to require a borrower to pay off debts secured by the home or debts to third party creditors.
  - ✓ The second section only provided the language for the mandatory notice to borrowers, and laid out no rights or obligation under the Amendment.
- The **unanimous** court held that the substantive provisions of the amendment, which allowed lenders to require a borrower to pay off debts to third party creditors, prevailed over the notice provision.
  - ✓ The Regulatory Commentary on Equity Lending Procedures, which represents four Texas administrative agencies' interpretation of the Home Equity Constitutional Amendment, supported the court's interpretation.
- In an extra effort to provide protection to consumers, the **unanimous** court required all home equity lenders to include in their notice to borrowers, information about the conflict in the amendment and the court's ruling on the conflict.

Texas Utilities Electric Co. v. Timmons
Attractive Nuisance Doctrine

Allegation: Justice Owen joined a majority opinion that reinstated a trial court's summary judgment for the power company in a case where a 14 year-old boy was electrocuted while climbing an electric tower in his neighborhood. The opinion failed to follow precedent on "attractive nuisance," and was activist, anti-consumer, and anti-jury.

Facts: ***Texas Utilities Electric Co. v. Timmons*, 947 S.W.2d 191 (Tex. 1997)**

➢ The majority opinion, joined by Justice Owen and six other justices, agreed with the trial court, which granted summary judgment to the utility. The Texas Supreme Court held that based on precedent, the boy's mother could not invoke the attractive nuisance doctrine.

➢ The majority applied well-settled law on the attractive nuisance doctrine, where a landowner may be held liable for physical harm to a trespassing child caused by a dangerous condition on the land if, among other requirements, the child, because of his youth, did not realize the risk.

➢ The majority found that the boy, who was 14 years-old, was mature enough to be aware of the risk and was actually aware of the risk.

- ✓ There was testimony that the boy's family and friends had repeatedly warned the boy not to climb the tower because it was dangerous.
- ✓ There was testimony that while he was climbing the tower, the boy acknowledged but refused to heed his friends' warnings to him that he could be electrocuted and that he should come down.
- ✓ Prior to climbing the tower, the 14 year-old boy had spent the evening drinking beer and malt liquor at a friends house. His blood alcohol level was .10, Texas' legal standard for intoxication.

➢ The court had previously refused to apply the attractive nuisance doctrine to a youth who had climbed an electrical tower and was injured by electrical arcing, as this boy was, because the youth realized the risk of being near electrical wires, even if he was not aware of arcing – where the electricity could arc from a line into a nearby object that was not touching the line.

- ✓ The majority distinguished cases applying the doctrine in other electrical tower cases that did not include similar warnings and barricades.

- ✓ In this case, the tower was 90 feet tall and did not have a ladder allowing access to the top. The boy had to climb the actual tower by using the metal braces supporting each side.

- ✓ The utility had erected a 12 ½ foot barricade around the tower that was encircled by barbed wire.

- ✓ There were signs posted on the barricade stating: **"KEEP AWAY" "DANGER" "WIRES HEAVILY ELECTRIFIED"**

Timberwalk Apartments v. Cain
Duty of Landlords to Protect against Crime

Allegation: In a case where a woman alleged that she was raped in her apartment because her landlord failed to provide adequate security, Justice Owen joined in the majority opinion overruling the court of appeals' grant of a new trial to the plaintiff. Ruling that, as a matter of law, the defendant owed no duty to provide additional security, the majority took what should have been a factual finding away from a jury.

Facts: ***Timberwalk Apartments v. Cain*, 972 S.W.2d 749 (Tex. 1998)**

- The Texas Supreme Court **unanimously** found that the risk that a tenant would be sexually assaulted was not foreseeable to Timberwalk, the apartment owners. It is well settled law, that if there is not a foreseeable risk of the crime in question, there can be no duty to provide security measures against such a crime.

- Justice Spector, a Democrat, analyzed in her concurrence whether there was a duty under her own broader criteria and came to the same conclusion as the majority: "Cain presented no evidence that the character, use made, or location of the apartment complex created a heightened risk of foreseeable criminal conduct. I therefore concur in the Court's rendition of judgment for Timberwalk."

- The court **unanimously** agreed that whether a duty exists is a question of law for the court to decide under the facts surrounding the occurrence in question. The court followed well-settled law, its own precedent, and the Restatement (Second) of Torts.

- The second defendant in the case, the apartment management company, had not argued on appeal that it had no duty to provide special security measures against the crime in question. The court **unanimously** agreed that the case as to the second defendant would be remanded for a new trial.

- Rather than being hostile to the decisions made by juries, the court, including Justice Owen, recognized that an improper jury instruction was reversible error in the case and sent the case against the second defendant back for a new trial.

- Critics claim that Justice Spector's concurrence criticized the majority's opinion for ignoring caselaw on other foreseeability evidence. She does cite caselaw from other states – **not binding on Texas**, but ultimately agrees with the majority that there was no duty under her more stringent standard as well.

Universe Life Insurance Co. v. Giles
"Bad Faith" in Insurance Cases

Allegation: "In this bad-faith insurance case, the majority overturned the jury's punitive damages award citing a lack of evidence. Owen joined a more extreme dissent that would have directed judges to replace juries in making bad-faith determinations. The majority criticized this dissent, saying it 'would take the resolution of bad-faith disputes away from the juries that have been deciding bad faith cases for more than a decade.'"

Facts: ***Universe Life Insurance Co. v. Giles*, 950 S.W.2d 48 (Tex. 1997)**

- Justice Owen agreed with the unanimous Court that an insurance company had denied a policyholder's claim "in bad faith."

- She also joined a concurring opinion—along with other colleagues from both political parties—which argued that the question of what constitutes "bad faith" should be decided by judges, to ensure that such determinations can be reviewed on appeal.

  - ✓ Allowing juries to decide whether an insurance company has acted in "bad faith" prevents appellate courts from meaningfully reviewing their decisions.

  - ✓ Texas law forbids appellate courts, when examining a jury's findings, from weighing the evidence before the trial court. They can only consider "undisputed evidence and evidence to support the finding." *Id*. at 43 (concurring opinion).

  - ✓ To ensure that higher courts have the opportunity to consider whether "bad faith" exists in a given case, it is necessary to allow judges—whose decisions are fully reviewable on appeal—to determine "bad faith."

  - ✓ The concurrence reflects the view that juries should not be able to wield an unchecked, unreviewable power to make legal determinations.

- Even the majority acknowledged that Texas law effectively prevented appellate review of a jury's "bad faith" determinations, and tried to resolve the problem by adopting a narrower definition of "bad faith."

  - ✓ According to the majority, "[a]lthough we attempted to resolve this dilemma in [past cases], it is clear that our efforts have not been entirely successful." *Id*. at 52.

  - ✓ The majority and concurrence agreed that an unchecked jury was a significant problem; they simply differed on the best way to solve it.

- Justice Owen joined, but did not author, the concurrence.