Will Your Insurance Cover an Award of Punitive Damages?

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Seven Thresholds

1) Conduct
2) Actor
3) Caps
4) Statutory Bars
5) Common Law Bars
6) Damages Required
7) Causation of Harm

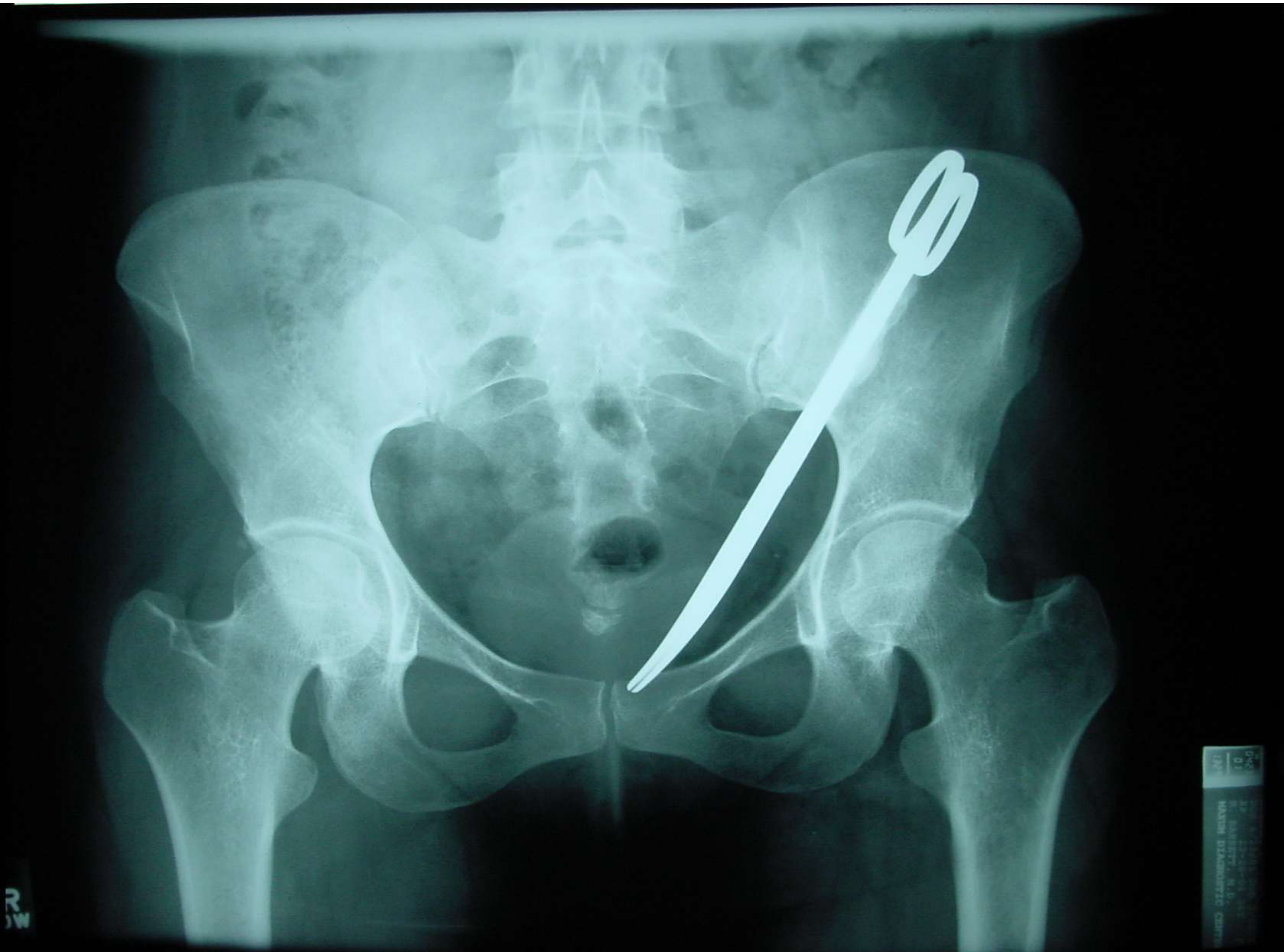
1. Conduct

- Texas Civil Practice and Remedies Code § 41.001.

  (11) "**Gross negligence**" means an act or omission:

  (A) which when viewed objectively from the standpoint of **the actor** at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and

  (B) of which **the actor** has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.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2) Actor

Corporate Liability for Punitive Damages

An employer is liable in punitive damages for the acts of its agents when:

(a) the employer authorized the doing and the manner of the act;

(b) the employee was unfit and the employer was reckless in employing him;

(c) the employee was employed in a managerial capacity and was acting within the scope of employment; or

(d) the employer or a manager of the employer ratified or approved the act.

3) Caps

Texas Civil Practice and Remedies Code § 41.002. Applicability

(a) This chapter applies to any action in which a claimant seeks damages relating to a cause of action.

(b) This chapter establishes the maximum damages that may be awarded in an action subject to this chapter, including an action for which damages are awarded under another law of this state. This chapter does not apply to the extent another law establishes a lower maximum amount of damages for a particular claim.

Exemplary Damage Caps

Texas Civil Practice and Remedies Code § 41.008

(b) Exemplary damages awarded against a defendant may not exceed an amount equal to the greater of:

(1)(A) two times the amount of economic damages; plus

(B) an amount equal to any noneconomic damages found by the jury, not to exceed $750,000; or

(2) $200,000

Economic Damages	Non-Economic Damages	Punitive Cap Calculation
$200,000	$500,000	2×$200,000 ($400,000) + $500,000 = $900,000 ➔ capped at $750,000
$50,000	$50,000	2×$50,000 ($100,000) + $50,000 = $150,000 ➔ default to $200,000

§ 41.008 Cap Buster

(c) This section does not apply to a cause of action against a defendant from whom a plaintiff seeks recovery of exemplary damages based on conduct described as a felony in the following sections of the Penal Code if, except for Sections 49.07 and 49.08, the conduct was committed knowingly or intentionally.

Cap Busters

- Murder; capital murder; aggravated kidnapping; aggravated assault; sexual assault; aggravated sexual assault; injury to a child, elderly individual, or disabled individual, but not if the conduct occurred while providing health care as defined by Section 74.001; forgery; commercial bribery; misapplication of fiduciary property or property of financial institution; securing execution of document by deception; fraudulent destruction, removal, or concealment of writing; theft, the punishment level for which is a felony of the third degree or higher; intoxication assault; intoxication manslaughter; continuous sexual abuse of young child or children; or trafficking of persons.

- CPRC § 74.303 re: Health Care Liability Claims

§ 74.303. LIMITATION ON DAMAGES. (a) In a wrongful death or survival action on a health care liability claim … all damages, including exemplary damages, shall be limited to an amount not to exceed $500,000 for each claimant…

- Finance Code § 341.402 re: Prohibited Discrimination in Loans and Financed Transactions
- Health & Safety Code § 712.009 re: Claims Against Perpetual Care Cemeteries
- Labor Code §416.002 re: Actions against Workers' Comp Carrier for Breach of Duty of Good Faith/Fair Dealing

Sec. 416.002. EXEMPLARY DAMAGES. (a) In an action against an insurance carrier for a breach of the duty of good faith and fair dealing, recovery of exemplary damages is limited to the greater of:

(1) four times the amount of actual damages; or

(2) $250,000.

- Labor Code § 21.2585 re: Employment Discrimination Cases

4) Statutory Bars

41.005 HARM RESULTING FROM CRIMINAL ACT.

(a) In an action arising from harm resulting from an assault, theft, or other criminal act, a court may not award exemplary damages against a defendant because of the criminal act of another.

(b) The exemption provided by Subsection (a) does not apply if:

(1) the criminal act was committed by an employee of the defendant;

(2) the defendant is criminally responsible as a party to the criminal act under the provisions of Chapter 7, Penal Code;

(3) the criminal act occurred at a location where, at the time of the criminal act, the defendant was maintaining a common nuisance under the provisions of Chapter 125, Civil Practice and Remedies Code, and had not made reasonable attempts to abate the nuisance; or

(4) the criminal act resulted from the defendant's intentional or knowing violation of a statutory duty under Subchapter D, Chapter 92, Property Code, and the criminal act occurred after the statutory deadline for compliance with that duty.

(c) In an action arising out of a criminal act committed by an employee, the employer may be liable for punitive damages but only if:

(1) the principal authorized the doing and the manner of the act;

(2) the agent was unfit and the principal acted with malice in employing or retaining him;

(3) the agent was employed in a managerial capacity and was acting in the scope of employment; or

(4) the employer or a manager of the employer ratified or approved the act.

5) Common Law Bars

- Article XVI, Section 26, Texas Constitution

Section 26 - HOMICIDE; LIABILITY IN DAMAGES

Every person, corporation, or company, that may commit a homicide, through willful act, or omission, or gross neglect, shall be responsible, in exemplary damages, to the surviving husband, widow, heirs of his or her body, or such of them as there may be, without regard to any criminal proceeding that may or may not be had in relation to the homicide

6) Damages Required

- § 41.004(a) states: "Except as provided by Subsection (b), exemplary damages may be awarded only if damages other than nominal damages are awarded.“
- § 41.004(b) provides the only exception: exemplary damages may not be awarded to a claimant who elects to have their recovery multiplied under another statute. This prevents double recovery when separate statutory schemes already enhance damages.
- This chapter further reinforces this structural distinction by separately defining "compensatory damages" as economic and noneconomic damages, and "exemplary damages" as "any damages awarded as a penalty or by way of punishment but not for compensatory purposes," explicitly stating that "[e]xemplary damages are neither economic nor noneconomic damages."
- Thus, it treats compensatory and exemplary damages as categorically distinct, with the former being a necessary predicate for the latter.

7) Causation of Harm

§ 41.003. STANDARDS FOR RECOVERY OF EXEMPLARY DAMAGES.

(a)Except as provided by Subsection (c), exemplary damages may be awarded only if the claimant proves by <u>clear and convincing evidence</u> that the harm with respect to which the claimant seeks recovery of exemplary damages results from: (1) fraud; (2) malice; or (3) gross negligence.

(b)The claimant must prove by clear and convincing evidence the elements of exemplary damages as provided by this section. This burden of proof may not be shifted to the defendant or satisfied by evidence of ordinary negligence, bad faith, or a deceptive trade practice.

(c) If the claimant relies on a statute establishing a cause of action and authorizing exemplary damages in specified circumstances or in conjunction with a specified culpable mental state, exemplary damages may be awarded only if the claimant proves by clear and convincing evidence that the damages result from the specified circumstances or culpable mental state.

7) Causation of Harm

(d) Exemplary damages may be awarded only if the jury was unanimous in regard to finding liability for and the amount of exemplary damages.

(e) In all cases where the issue of exemplary damages is submitted to the jury, the following instruction shall be included in the charge of the court:

"You are instructed that, in order for you to find exemplary damages, your answer to the question regarding the amount of such damages must be unanimous.”

Does Texas Allow Insurance Coverage for Punitive Damages?

Well, it depends…

- From what type of claim do the damages originate?
- What does the policy have to say?
- Which factor carries more weight under the circumstances: Texas public policy, or freedom of contract?

Fairfield Ins. Co. v. Stephens Martin Paving, LP

- TXSC case on a certified question from 5^{th} Circuit:
- “Does Texas public policy prohibit a liability insurance provider from indemnifying an award for punitive damages imposed on its insured because of gross negligence?”
- Stephens Martin Paving, a highway paving company, employed Roy Edward Bennett as a brooming machine operator. On December 20, 2002, Bennett died as a result of injuries that occurred when a brooming machine rolled over.
- Established a 2-step framework for Courts to use

Fairfield Ins. Co. v. Stephens Martin Paving, LP

(1) Court must determine whether the plain language of the policy covers the exemplary damages sought in the underlying suit, and,

(2) If the policy language does provide coverage, the court must determine whether the public policy of Texas allows or prohibits such coverage in the circumstances of that underlying suit

Does the Policy Cover Exemplary Damages?

- If an insurance policy's plain language does not cover punitive damages, the court need not even reach the public policy question.
- In *Farmers Tex. Cnty. Mut. Ins. Co. v. Zuniga*, an auto liability policy that promised to "pay damages for bodily injury" was held not to provide coverage for a punitive damage award, even though the policy contained no express exclusion for punitive damages.
- "Absence of an exclusion cannot confer coverage." *American Mfrs. Mut. Ins. Co. v. Schaefer.*

Does the Policy Cover Exemplary Damages?

- By contrast, umbrella or general liability policies that contain broad "all sums" language—agreeing to pay all sums the insured becomes legally obligated to pay as damages—have been interpreted to encompass exemplary damages under certain circumstances
- In *American Home Assur. Co. v. Safway Steel Products Co., Inc*., the Austin Court of Appeals upheld coverage for punitive damages under umbrella liability policies that required carriers to pay the “total sum” or “all sums” arising out of bodily injuries caused by an occurrence.
  - “As long as insurance companies are willing, for a price, to provide protection against liability for punitive damages to corporations they deem “good risks,” and as long as punitive damage liability continues to extend to “gross negligence,” we see no reason why these contracts should not be enforced.”

Does Texas Public Policy Allow Coverage for Punitive Damages?

- Courts must weight two primary factors: Freedom of Contract vs. Public Policy
- Freedom of Contract:
  - The Texas Constitution protects freedom of contract, and Texas public policy strongly favors enforcing voluntarily negotiated insurance agreements that provide coverage for exemplary damages based on gross negligence.
  - When an insurer charges premiums and accepts risk of gross negligence claims, it has voluntarily assumed the risk of exemplary damage awards and should be held to its contractual promise

Does Texas Public Policy Allow Coverage for Punitive Damages?

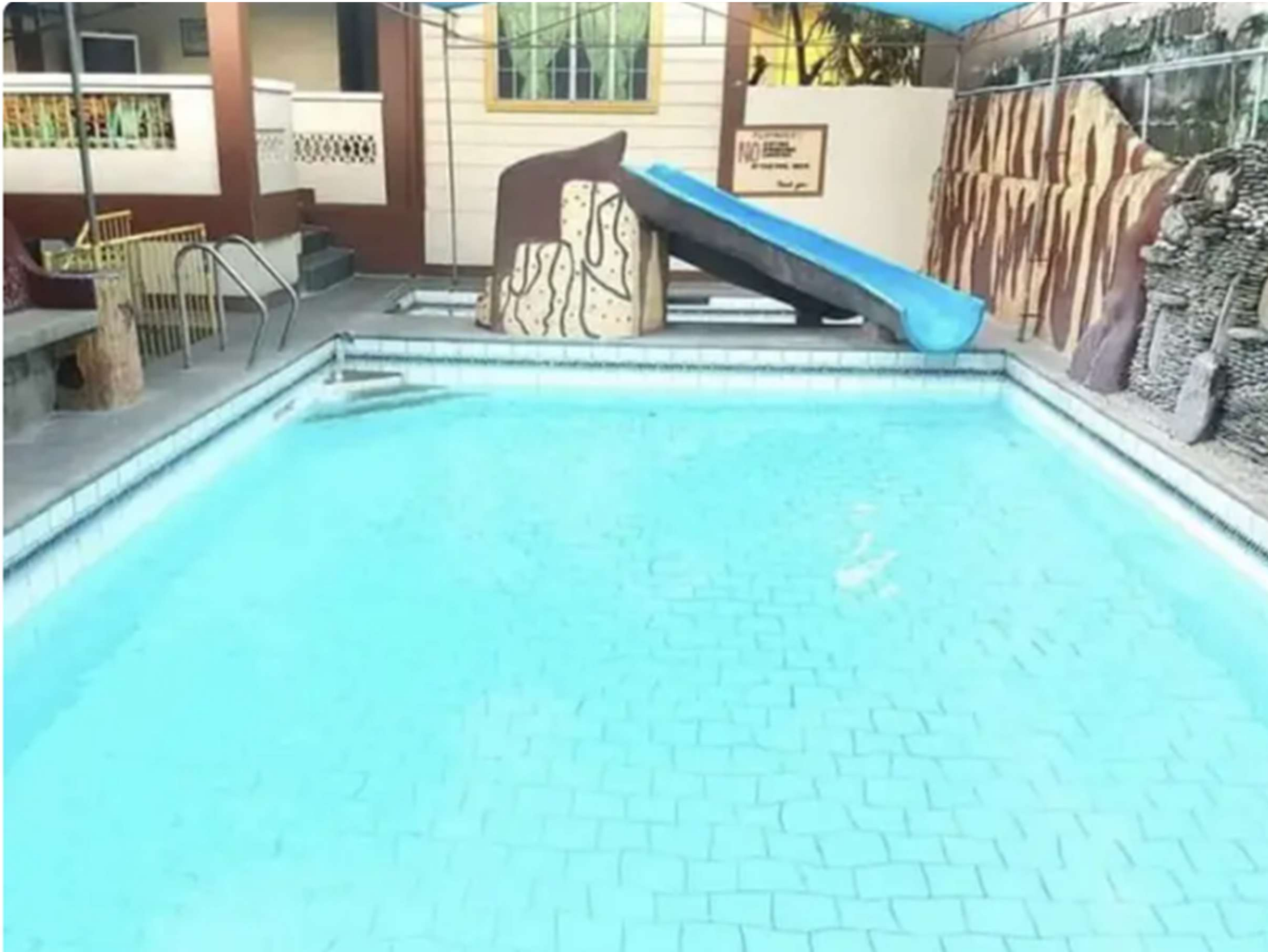
- Public Policy:
  - Exemplary damages exist to punish the wrongdoer and deter future misconduct, and allowing insurance coverage shifts the punishment to the insurer, defeating the underlying purpose of punitive damages
  - Generally disfavored for damages arising out of intentional acts

Does Texas Public Policy Allow Coverage for Punitive Damages?

- Other considerations:
  - Legislative Authorization/Prohibition:
    - Where the Legislature has authorized exemplary damages in a particular context (e.g., for employer gross negligence under § 408.001 of the Labor Code) and the TDI has approved standard policies covering "all sums," the legislative framework implicitly sanctions coverage.
    - The UM/UIM context, the medical professional liability context (for non-hospital providers), and public-entity, guaranty, and nonprofit insurance pools all reflect legislative judgments that such coverage is inappropriate
    - Thus, the Legislature has demonstrated it knows how to prohibit punitive damages coverage when it chooses to do so; its silence in other contexts signals implicit approval

Does Texas Public Policy Allow Coverage for Punitive Damages?

- Other considerations continued:
  - Coverage of insured’s conduct vs. conduct of others
    - Where the insured is the actual wrongdoer and the policy indemnifies that insured's liability, the insurer's payment satisfies judgments against the actual tortfeasor.
      - In the *Safway Steel Products* case, the court discussed how financial consequences may still flow through the insurance relationship, including the possibility of damages exceeding policy limits and the impact on future premiums
    - However, under UM/UIM policies, allowing the insured to recover punitive damages from their own carrier does nothing to punish or deter the actual tortfeasor; the wrongdoer receives no financial consequence and is in no way made to feel the sting of the exemplary award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