

**FACING A STACKED DECK:
FAMILIES AT THE TEXAS SUPREME COURT**

Texas Supreme Court Year-in-Review 2003-2004

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EXECUTIVE SUMMARY

When consumers stood before the Texas Supreme Court during the 2003-2004 term, they faced a deck stacked in favor of insurance companies and government agencies. These obstacles rendered plaintiffs virtually powerless in their efforts to seek justice through the courts. The record is clear: out of the 49 cases in which consumers faced off against insurance companies, doctors, hospitals, corporations, or government entities they prevailed a paltry 12% of the time.

Texas Supreme Court Plaintiff-Defendant Win Ratios, 1996-2004

Years	Defendant Win Rate	Plaintiff Win Rate
1996-1997	71%	24%
1997-1998	69%	22%
1998-1999	60%	27%
1999-2000	57%	31%
2000-2001	52%	41%
2001-2002	68%	27%
2002-2003	79%	19%
2003-2004	82%	12%

The Texas Supreme Court has long been defendant oriented; however, recent decision-making from the Court reflects a growing hostility toward individual plaintiffs and a willingness to overlook abuses by corporate and government defendants. While there should never be a target win/loss percentage for plaintiffs or defendants in any court, the prejudice against Texas families and towards insurance and special interest defendants on this Court tells an important story of activism and bias.

The Court's 2003-2004 term (July 7, 2003 through June 25, 2004) was dominated by expansions in government immunity and insurance company protections, as well as the whittling away of plaintiffs' procedural rights. The Court actively shielded insurance companies and government entities from liability – even flatly ignoring the clear intent of the Texas Legislature. Moreover, the Court rose to new levels of activism by establishing new evidentiary standards for plaintiffs that are at best ambiguous and at worst malicious in their attempt to protect corporate interests.

WINNERS AND LOSERS

- Big winners on the Court this year: insurance companies, the medical industry, and government entities.
- Big losers on the Court this year: employees, patients, and insurance policyholders.

NEW RECORD OF INEQUALITY

With consumers prevailing in just 12% of cases in which they were pitted against corporate, professional, or governmental defendants, the 2003-2004 term of the Texas Supreme Court exemplifies more than any session of the past decade the severe lack of judicial balance on the Court.

To be sure, the Court has consistently sided with defendants over the past decade. During this session, however, the Court exhibited pro-defendant activism at nearly every turn. Out of 49 cases in which consumers faced corporate defendants, the individual plaintiff prevailed only 6 times.

Beginning with the departure of its more temperate members in 2002, the Court began its lurch toward a staunchly pro-defendant ideology.

NEW POWER BASE

In last year's Court Watch Year-In-Review Report (2002-2003), we noted that Justices Priscilla Owen and Nathan Hecht were rising to prominence with the departure of their more judicially restrained colleagues. Previously, Justices James Baker, Craig Enoch, and Deborah Hankinson blunted the impact of this staunchly pro-defendant faction of the Court. With their departure, judicial debate and restraint on the Court has all but evaporated.

In the 40 cases in which consumers lost in 2003-2004, Justices Owen and Hecht did not dissent in a single case. In fact, since 1999, Justices Owen and Hecht have not dissented in a single consumer loss.

LIMITING JUSTICE

Without doubt, the loss of the restraining influences of Craig Enoch and then-Governor George W. Bush-appointees James Baker and Deborah Hankinson has allowed the extreme activist faction centered around Owen, Hecht, and now Scott Brister to severely limit consumer access to justice. This session was dominated by pro-defendant activism with three distinct trends emerging: significant victories for insurers, erosion of procedural rights for plaintiffs, and increases in immunity protections for governmental entities.

Insurance Industry Victories

As has been the case for the last several years, insurance companies staked out significant victories this year before the Court, which will certainly be used against future policyholder claims.

In three cases, the Court handed down rulings that eliminate a policyholder's ability to seek relief for the loss of market value of a repaired vehicle. After appellate courts determined that this is an issue for jury consideration, the Court actively intervened and slammed shut the door on diminished value claims (*American Manufacturers Mutual Insurance Company, et al. v. Gary Schaefer*; *Progressive County Mutual Insurance Company v. Brent Bailey and Heather Bailey*; *State and County Mutual Fire Insurance Company v. Santos Macias and Patricia M. Macias*).

In *Old American County Mutual Fire Insurance Company v. Michael Renfrow*, the Court gave insurers the ability to arbitrarily deny coverage in any case involving an individual who is operating an automobile with the permission of the vehicle's owner.

The trend toward arbitrary protections for insurers is especially disturbing in light of insurers' continued encroachment on consumers' rights in their handling of everyday insurance claims. Policyholders expect that when they are faced with having to file a legitimate claim with their insurance company they will be fairly compensated; however, as a result of the Court's decision-making that is no longer a safe assumption. Predictably, insurers are seeking relief through the courts because the anti-consumer, pro-insurance industry nature of the high court is well known to industry insiders, and more often than not the Court is supporting the aggressive anti-claimant behavior of insurance companies in this state.

Procedural Rights

This session, plaintiffs saw a significant erosion of procedural and recovery rights in the form of confusing deadlines for appeal, overly narrow and distorted interpretations of established standards, the establishment of an ambiguous new standard for factual sufficiency, and a lower standard for document discovery.

In *Naaman v. Grider*, the Court established deadlines that thwart a plaintiff's ability to seek recovery. The "informed consent" (*Binur v. Jacobo*) and "common carrier" (*Speed Boat Leasing v. Elmer*) standards were interpreted so narrowly that plaintiffs were unable to use even these most longstanding and established of standards in their pursuit of justice. Furthermore, in *Golden Eagle Archery v. Jackson*, the Court created a "factual sufficiency" standard that is so vague that Justice O'Neill was compelled to write in her concurring opinion that the new standard is "confusing at best and completely unnecessary." Finally, in the *DuPont* case the Court employed an extremely low standard to prove that privilege applied to a series of pertinent documents, making it easier for corporate defendants to shield documents from the courts and plaintiffs.

Sovereign Immunity

This session, the Court significantly extended the bounds of protection for government agencies. The most disturbing trend was the uniformity of the justices despite contradictory rulings from both trial and appellate courts. It seems as though the Court is making a concerted effort to shield governmental entities from the justice they might face in trial.

Perhaps the most egregious decision of this year's term was *San Antonio State Hospital v. Cowan*. In this case, a state hospital was ordered to confiscate a patient's personal belongings and place him on suicide watch. In direct violation of a court order, the hospital allowed the patient to keep his personal belongings, which he then used to commit suicide. It had been established law that "use" of personal property that results in death lifts the veil of government immunity. Shockingly, the Court ruled that even failing to comply with a court order by not confiscating the instruments of a patient's death does not lift the veil of immunity.

The Court also made significant rulings undermining whistleblower protections for employees of health facilities. In both *Center for Healthcare Services v. Quintanilla* and *Dallas Metrocare v. Pratt*, the Court claimed that the legislature did not lift sovereign immunity by creating whistleblower protections in the Health & Safety Code. However, the statute's intent is clear.

Section 161.134 of the Health and Safety Code reads:

- (a) A hospital, mental health facility, or treatment facility may not suspend or terminate the employment of or discipline or otherwise discriminate against an employee for reporting to the employee's supervisor, an administrator of the facility, a state regulatory agency, or a law enforcement agency a violation of the law, including a violation of this chapter, a rule adopted under this chapter, or a rule adopted by the Texas Board of Mental Health and Mental Retardation, the Texas Board of Health, or the Texas Commission on Alcohol and Drug Abuse.
- (b) A hospital, mental health facility, or treatment facility that violates Subsection (a) is liable to the person discriminated against. A person who has been discriminated against in violation of Subsection (a) may sue for injunctive relief, damages, or both.

Despite the statute's plain language, the Court went out of its way to weaken whistleblower protections, shielding government entities from responsibility.

BROADENING THE COURT'S PERSPECTIVE

With two new vacancies on the Texas Supreme Court, Governor Perry has a unique opportunity to broaden the perspective of the Court by seeking out appointees with broader or more varied experience and philosophy. As this report indicates, the current Court speaks with one voice on almost every issue and every case, voting in unison in over 82% of the cases before them. The current Court is largely made up of judges sharing the same legal experiences, philosophies and perspectives, which lends itself to the conformity we currently see in the Texas Supreme Court.

Chart 1: Consumer Case Categories

Texas Supreme Court 2003-2004

49 decisions*

Category	Record (D-P-S)	% for D	% for P	% Split **
Arbitration	1-0-0	100	0	0
Class Action	5-0-0	100	0	0
Employee	7-1-0	88	12	0
Federal/Common Law	2-0-1	67	0	33
Sovereign Immunity	8-3-0	73	27	0
Medical Malpractice	3-0-0	100	0	0
Products Liability	2-1-0	67	33	0
Insurance	5-0-1	83	0	17
Procedure/Evidence	4-1-0	80	20	0
Other	3-0-1	75	0	25
Overall	40-6-3	82	12	6

* Total number of cases including signed and Per Curiam opinions that deal with consumer issues. The plaintiffs are individuals or business consumers suffering a property loss or personal injury. Cases dealing with family law issues were not included.

** A split decision is a decision that includes aspects that are beneficial and detrimental for consumers.

- **Big Winners:** It was a banner year for insurance companies, the medical industry, and government entities.
- **Big Losers:** It was a bad year for patients, employees, policyholders and class action plaintiffs. In all of these categories, the Court found in favor of defendants and against consumers more than 88 percent of the time, and 100 percent in medical malpractice and class actions.
- **Losing Across the Board:** Consumers failed to win more than a third of their cases in any single category during the 2003-2004 term.

Chart 2: Voting Alliances
40 Decisions (33 Unanimous, 7 Majority)

	Brister	Enoch	Hecht	Jefferson	O'Neill	Owen	Phillips	Schneider	Smith	Wainwright
Brister			94	87	90	94	90	87	87	90
Enoch										
Hecht				85	81	100	91	84	86	96
Jefferson					74	85	79	79	76	84
O'Neill						81	75	78	78	83
Owen							91	84	84	96
Phillips								83	85	95
Schneider									88	83
Smith										90
Wainwright										

Average Cohesion=86
Bloc=93

blank boxes: not enough cases together for accurate study

Average agreement (cohesion): 85.92% (3093/36)
Bloc Calculation: $100 - 85.92 = 14.08$
 $14.08 / 2 = 7.04$
 $85.92 + 7.04 = 92.96$
Bloc is 93 or greater

Case source: *Texas Supreme Court unanimous and majority opinions (40 total). Does not include Per Curiam opinions (28).*

- ❑ **Century Club:** Justices Owen and Hecht have long been a traditional faction. This session, the pair agreed 100% of the time.
- ❑ **Alliances for 2003-2004:** Three voting blocs emerged in the 2003-2004 term. The first bloc includes Justices Owen, Hecht, and Brister. In the second, Justice Wainwright teams with Justices Owen and Hecht. Finally, Justice Wainwright votes with Chief Justice Phillips.

Bloc voting analysis

Bloc voting analysis is a political science technique for measuring the strength of voting alliances on collegial courts. It analyzes agreement to create a spectrum of voting behavior, but does not define an ideological spectrum.

Blocs are measured by defining a threshold that is halfway between the average agreement of the court and the perfect agreement score of 100 percent. At least 20 opinions with a split result are required to make the study accurate.

Result analysis measures agreement on result, counting concurrence as agreement with the majority. Concurring and dissenting opinions are scored so that justices on C&D opinions are counted as being half in agreement with the majority and half in agreement with each dissenter.

Chart 3: Agreement with the Majority on Result

Texas Supreme Court 2003-2004

40 decisions*

	Majority Opinions		Unanimous and Majority Opinions	
	Agreed/Cases*	Agreement (%)	Agreed/Cases*	Agreement (%)
Justice	7 decisions		40 decisions	
Brister	3/5	60 %	29/31	94 %
Enoch	1/1	100 %	7/7	100 %
Hecht	6.5/7	93 %	39.5/40	99 %
Jefferson	2.5/6	42 %	33.5/37	91 %
O'Neill	4/6	67 %	33/35	94 %
Owen	6.5/7	93 %	39.5/40	99 %
Phillips	5/7	71 %	37/39	95 %
Schneider	3/7	43 %	34/38	89 %
Smith	4/7	57 %	35/38	92 %
Wainwright	6/7	86 %	39/40	98 %

* participated in

- **Conformity on the Court:** Even the most independent justice (Schneider) voted with the majority of the Court in 89% of the cases. This is a shocking level of conformity for any court and speaks to the severe lack of diversity in perspective, experience and philosophy on the Court.
- **Compliance on the Bench:** There were only seven consumer cases this entire term in which one of the justices dissented from his or her colleagues.
- **Polarized Alliances:** Agreeing over 98% of the time in unanimous and majority opinions, Justices Hecht, Wainwright, and Owen form a strong hard-line alliance operating in significant agreement throughout a session of defendant wins.

Chart 4. Authors of Opinions

Texas Supreme Court 2003-2004

40 decisions total*

Justice	Unanimous	Majority	Concurring	Concurring & Dissenting	Dissenting	Total
Brister	1	2	1	0	1	5
Enoch	1	0	0	0	0	1
Hecht	3	0	3	1	0	7
Jefferson	5	1	0	0	2	8
O'Neill	5	1	1	0	0	7
Owen	2	4	0	0	0	6
Phillips	1	3	0	0	1	4
Schneider	4	0	2	0	2	8
Smith	2	2	0	0	0	4
Wainwright	2	1	1	0	0	4
TOTALS	26	14	8	1	6	54

Chart 5. Consumer Win/Loss Dissents

Texas Supreme Court 2003-2004

Justices	Total Consumer Wins	Consumer Wins: Dissents (authored or joined)	Total Consumer Losses	Consumer Loss: Dissents (authored or joined)
Phillips	6	0	40	2
Hecht	6	0	40	0
Jefferson	6	0	40	3
O'Neill	6	0	40	3
Owen	6	0	40	0
Schneider	6	0	40	3
Smith	6	0	40	2
Wainwright	6	0	40	2
Enoch	6	0	40	1
Brister	6	0	40	1

* Percentages out of 40 losses

Lack of Consumer Loss Dissents

Year	Justices	Total Consumer Wins	Consumer Wins Dissents	Total Consumer Losses	Consumer Loss Dissents
1999-2000	Hecht	18	12	32	0
	Owen	18	9	32	0
2000-2001	Hecht	16	8	26	0
	Owen	16	7	26	0
2001-2002	Hecht	19	6	39	0
	Owen	19	5	39	0
2002-2003	Hecht	9	3	38	0
	Owen	9	1	38	0
2003-2004	Hecht	6	0	40	0
	Owen	6	0	40	0

- **Federal Appointee Continues to Take a Side:** For the fifth year in a row, Justice Priscilla Owen has not dissented in a single consumer loss case.
 - **Total consumer losses 1999-2004: 175**
 - **Dissents by Justice Owen in these consumer loss cases: 0**
 - **Total consumer wins 1999-2004: 68**
 - **Dissents by Justice Owen in these consumer win cases: 22**

TERRIBLE TEN of 2003-2004

San Antonio State Hospital v. Kimberly Cowan, et al. (Hecht 9-0)

Expands immunity protections of government hospitals in cases involving clear negligence.

Dallas Metrocare Services v. Dorothy Pratt (Per Curiam)

Weakens whistleblower protections by expanding immunity rights for government entities.

Shell Oil Company v. Mohammed Khan and Jamila Williams (Brister 9-0)

Decreases business and landowner obligations to provide a safe work environment for employees.

Ramiro Garza and J&R Valley Oilfield Services, Inc. v. Ines Gonzalez Garcia (Brister 6-2)

Allows defendants to shop for more favorable venue alternatives.

Nir S. Binur, M.D. v. Donna Jacobo (Owen 9-0)

Allows medical professionals to escape liability by narrowing the agreement necessary for a patient to consent to a medical procedure.

Old American County Mutual Fire Insurance Company v. Michael D. Renfrow, et al. (Per Curiam)

Enables insurance companies to arbitrarily deny coverage for permitted use of insured company vehicles.

American Manufacturers Mutual Insurance Company, et al. v. Gary Schaefer (O'Neill 9-0)

Establishes a precedent that reduces insurance companies' responsibility to policyholders for loss of value in repaired vehicles.

Golden Eagle Archery, Inc. v. Ronald Jackson (Owen 8-0)

Prevents appellate courts from awarding plaintiffs a fair recovery for compound and overlapping injuries.

In re E.I. DuPont de Nemours and Co. (Per Curiam)

Makes it easier for corporate defendants to shield documents from the courts.

Speed Boat Leasing, Inc. and Paradise Cruises, Inc. v. Doris Graf Elmer (Per Curiam)

Reduces liability for injuries caused by certain types of commercial transportation companies.

TERRIBLE TEN of 2003-2004

Texas Supreme Court

San Antonio State Hospital v. Kimberly Cowan, et al. (Hecht 9-0)

IMPACT: Expands immunity protections of government hospitals in cases involving clear negligence.

James Roy Cowan was involuntarily committed to the San Antonio State Hospital because of his psychotic behavior, acute depression and suicidal tendencies. The hospital was ordered to take possession of his personal effects, including his suspenders and walker, and to observe him every fifteen minutes. Two days later, Cowan used his suspenders and a piece of pipe from the walker to commit suicide.

The hospital claimed that it was shielded from suit by sovereign immunity; however, the Texas Tort Claims Act waives sovereign immunity for death caused by the “use” of tangible personal property. The Supreme Court ruled that providing someone with tangible property that is not itself inherently unsafe was not “use” of tangible property, thus immunizing the hospital from the suit. The Court is using this case to continue to narrow the definition of “use.”

Dallas Metrocare Services v. Dorothy Pratt (Per Curiam)

IMPACT: Weakens whistleblower protections by expanding immunity rights for government entities.

After Dorothy Pratt’s employment was terminated by Dallas Metrocare Center, she brought an action against the Center for retaliatory termination and intentional infliction of emotional distress, claiming whistleblower protection. The Center claimed that it was immune from suit on sovereign immunity grounds. The trial court ruled against the Center.

On appeal, the Court of Appeals upheld the protections granted to whistleblowing employees by holding that the statute in question authorized persons “who allege they were subject to retaliation for reporting a violation of law, or ‘whistleblowers,’ to sue both public and private mental health facilities.”

Despite all of this, the Supreme Court granted review and reversed both lower courts, holding that the Legislature did not manifestly waive the State’s sovereign immunity by enacting a whistleblower provision in the Health and Safety Code, and that even though a “mental health facility” was within the scope of the Code, the Center was protected.

Shell Oil Company v. Mohammed Khan and Jamila Williams (Brister 9-0)

IMPACT: Decreases business and landowner obligations to provide a safe work environment for employees.

Mohammed Khan was shot in the leg while performing outside duties at the Shell gas station where he was employed. The Court of Appeals found that Shell had a “right to control” the security on the property it owned.

The Supreme Court ruled that Shell did not possess the “right to control” required for liability, despite the fact that the contract required the station owner to furnish security reports and hire a security guard if Shell demanded it. Also, they held that a landlord “is not liable for existing premises defects merely by retaining the right to re-enter the premises to make alterations.”

With this ruling, the Court has significantly lowered the guarantee of premises safety for employees and members of the public.

Ramiro Garza and J&R Valley Oilfield Services, Inc. v. Ines Gonzalez Garcia (Brister 6-2)

IMPACT: Allows defendants to shop for more favorable venue alternatives.

The original suit was filed in Starr County because it is defendant Garza’s home county. The defense filed a motion to transfer venue to Hidalgo County, which was granted by the trial judge without explanation.

The Supreme Court’s ruling upheld the venue transfer permitting trial judges to grant transfers using the broadly-worded language of convenience without requiring an explanation. This insulates trial judges from review and allows defendants to relocate a trial to a more favorable venue without accountability. The Court’s decision encourages convenience transfers, and severely restricts the scope of procedural remedies in cases where trial courts are unclear about the reason for granting a transfer motion.

Nir S. Binur, M.D. v. Donna Jacobo (Owen 9-0)

IMPACT: Allows medical professionals to escape liability by narrowing the agreement necessary for a patient to consent to a medical procedure.

According to Donna Jacobo, her physician, Dr. Nir Binur, told her that she would develop breast cancer unless she had a prophylactic bilateral mastectomy. Given this prognosis, Ms. Jacobo consented to the operation. After the procedure, she discovered that the prognosis was overstated.

The Court determined that Ms. Jacobo had brought her claim under an incorrect theory, asserting that negligence – not informed consent – was the proper label. Rather than giving Ms. Jacobo the opportunity to make the proper claim, the Court shut the door on her ability to hold the negligent physician accountable. Additionally, the Court severely limits the requisite level of information a physician must give a patient in order to qualify as “informed consent.”

Old American County Mutual Fire Insurance Company v. Michael D. Renfrow, et al. (Per Curiam)

IMPACT: Enables insurance companies to arbitrarily deny coverage for permitted use of insured company vehicles.

This case involved “permissive use” as it applies to automobile insurance coverage. Michael Renfrow regularly used a company truck for personal use with the permission of his employer.

After Renfrow was involved in an accident in Saginaw, which is a number of miles from his home and work, the employer’s automobile insurer (Old American) refused to pay on the policy, claiming that Renfrow was not insured as a “permissive user.” The trial court found that Renfrow was covered during the accident.

The Court ruled that Renfrow was not covered as a permissive user in this instance. Although Renfrow had express permission to drive the truck home, and implied permission to drive it elsewhere on personal business, he did not have permission to drive it to Saginaw. The Court arbitrarily split hairs in an effort to allow the insurer to deny coverage using minor distinctions of distance.

American Manufacturers Mutual Insurance Company, et al. v. Gary Schaefer (O’Neill 9-0)

IMPACT: Prevents policyholders from being compensated for the full loss of value of a repaired vehicle.

Gary Schaefer was involved in an accident while driving his personal vehicle. He filed a claim with his insurance company, American Manufacturers Mutual (AMM). The insurer inspected the car and elected to repair it; however, they refused to pay for the diminished value of the car based on market perceptions that a repaired vehicle is worth less than one that had never been damaged. The Court of Appeals held that this was a legitimate claim that should be considered by a jury.

Even while agreeing that his vehicle would likely command a smaller sum in the market, the Supreme Court ruled that insurers can avoid fully compensating the insured for the loss of value for a damaged vehicle.

See also similar cases:

Progressive County Mutual Insurance Company v. Brent Bailey and Heather Bailey

State and County Mutual Fire Insurance Company v. Santos Macias and Patricia M. Macias

Golden Eagle Archery, Inc. v. Ronald Jackson (Owen 8-0)

IMPACT: Prevents appellate courts from awarding plaintiffs a fair recovery for compound and overlapping injuries.

Ronald Jackson suffered severe traumatic injuries while using a compound bow manufactured by Golden Eagle Archery Inc. The trial jury awarded zero damages for impairment other than loss of vision. The Court of Appeals held that “the jury’s failure to award any damages for a category of physical impairment was so against the great weight and preponderance of the evidence that the zero damages award was manifestly unjust and required a new trial.”

The Supreme Court created a “factual sufficiency review” to evaluate a set of evidence for one jury question at a time, and concluded that the same evidence cannot be used twice. This was intended to limit any damage award. Once the evidence is already used to answer one question (i.e. loss of income), it cannot be used again to find for non-economic damages. This decision appears to be deliberately ambiguous to shield negligent manufacturers from potentially overlapping claims.

In re E.I. DuPont de Nemours and Co. (Per Curiam)

IMPACT: Makes it easier for corporate defendants to shield documents from the courts.

A group of individuals affected by toxic pollution requested documents relating to their disease from DuPont. Pointing to an affidavit in which a paralegal states merely that the documents were addressed to the legal department, DuPont claimed that the documents were privileged as either communications between attorney and client or work product. The trial and appellate courts denied this claim, saying that DuPont had failed to meet the minimum standard for a privilege claim.

Without reviewing the contents of the documents and relying solely on the paralegal’s affidavit, the Supreme Court ruled that DuPont did meet the minimum standard. This decision will allow corporate defendants to shield information from plaintiffs that previously would have been subject to discovery.

Speed Boat Leasing, Inc. and Paradise Cruises, Inc. v. Doris Graf Elmer (Per Curiam)

IMPACT: Reduces liability for injuries caused by certain types of commercial transportation companies.

In this case, Doris Elmer, a seventy-year-old woman, fractured her spine while riding in a boat operated by tour boat company Speed Boat Leasing. At issue here is whether Speed Boat should be considered a “common carrier” and, therefore, be held to a higher standard of care.

The Court concluded that Speed Boat was not a common carrier, in that it was not in the business of transporting people or goods. In an attempt at rationalizing this decision, the Court wrote: “The fact that it transports people is only incidental to its primary purpose.”

Common sense tells families that those who provide transportation to the public should have responsibility to the public. The Court creates a loophole for companies that transport individuals for amusement, holding them to a lower standard than other carriers.