



TEXAS PATTERN JURY CHARGES

GENERAL NEGLIGENCE,
INTENTIONAL PERSONAL TORTS
& WORKERS' COMPENSATION

2018 EDITION

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PATTERN JURY CHARGES

General Negligence • Intentional Personal Torts

Workers' Compensation

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PATTERN JURY CHARGES

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Workers' Compensation

Prepared by the
COMMITTEE
on
PATTERN JURY CHARGES
of the
STATE BAR OF TEXAS



Austin 2018

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International Standard Book Number: 978-1-938873-64-5

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2000, 2002, 2004–2006, 2008, 2010, 2012, 2014, 2016, 2018
State Bar of Texas
Austin, Texas 78711

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Printed in the United States of America

Texas Pattern Jury Charges—General Negligence, Intentional Personal Torts & Workers' Compensation was formerly titled *Texas Pattern Jury Charges—General Negligence & Intentional Personal Torts*. *Texas Pattern Jury Charges—General Negligence & Intentional Personal Torts* was formerly titled *Texas Pattern Jury Charges—General Negligence & Motor Vehicles*. *Texas Pattern Jury Charges—General Negligence & Motor Vehicles* was formerly titled *Texas Pattern Jury Charges, Volume I*.



*To the memory of
Russell H. McMains, 1946–2009,
whose contributions to Texas jurisprudence,
and particularly the Texas Pattern Jury Charges,
will be with us forever.*

Judicial history teaches that broad issues and accepted definitions suffice and that a workable jury system demands strict adherence to simplicity in jury charges.

—Judge Jack Pope, in *Lemos v. Montez*,
680 S.W.2d 798, 801 (Tex. 1984)

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PREFACE

The Pattern Jury Charges (volume 1) Committee for this second edition has worked for over three years on this keystone volume in the State Bar of Texas's PJC series. This volume is greatly changed from its 1969 predecessor, both in content to reflect extensive developments in Texas substantive and procedural law and in format to make it more easily usable by lawyers and judges. The members of the Committee, whose names appear on a preceding page, met for two days each month and spent much additional time between meetings on research and drafting. They augmented their own considerable expertise through consultations with other lawyers and judges. Their hard work and dedication were critical to the publication of this volume and are gratefully acknowledged.

The Committee's work was admirably aided and supported by four Texas State Bar presidents: Tom B. Ramey, Jr. (1984–85), Charles L. Smith (1985–86), Bill Whitehurst (1986–87), and Joe H. Nagy (1987–88). The Committee also benefited greatly from the help and advice of various members of the staff of the State Bar of Texas. Susannah R. Mills, director of Books and Systems for the State Bar, worked closely with the Committee throughout all phases of its work. Vickie Tatum, project legal editor, was a member of the Committee, participating in all meetings and deliberations, coordinating administrative matters, and providing excellent research and editing.

J. Hadley Edgar, Jr., is the chairman of the standing PJC Committee that oversees the publication of all volumes. His support and advice were important elements in the successful completion of this volume.

The Committee's board advisors were Charles L. Smith (1984–85), James L. Branton (1985–86), and Charles M. Jordan (1986–87). Frank Weathered was the Texas Young Lawyers Association representative (1985–87). Arturo González was the law student representative (1986–87) and regularly attended and participated in meetings.

This Committee was aided by the fact that an earlier State Bar committee had pioneered the use of pattern jury charges in the original volume 1, published in 1969. That committee was composed of—

Judge Walter E. Jordan, chair

Judge Charles W. Barrow

Royal H. Brin, Jr.

Judge Lewis Dickson

Judge Clarence A. Guittard

Gus M. Hodges

Judge Quentin Keith

Rollins M. Koppel

W. James Kronzer, Jr.

Judge James R. Meyers

Judge Phil Peden

George E. Pletcher

Judge Truman E. Roberts

Preston Shirley

Dean W. Turner

Judge Frank M. Wilson

PREFACE

Finally, many members of the Texas bench and bar were kind enough to give the benefit of their time and expertise in meeting with and advising the Committee, reading drafts, and making suggestions. This book is ultimately a tribute to their concern with achieving fairness and rationality in jury charge submissions in Texas.

—Edward F. Sherman, *Chair*

PREFACE TO THE 2018 EDITION

It is with great pleasure that the Pattern Jury Charges Committee on *General Negligence, Intentional Personal Torts & Workers' Compensation* presents its 2018 edition.

Our Committee strives to provide pattern questions and instructions that will aid both bench and bar in preparing the correct jury charge. Our Committee consists of appellate attorneys, trial attorneys, and members of the judiciary.

In response to recent legal developments, the property damages section has been updated. We have also modified comments for when to use “occurrence” versus “injury.” Other updates include a comment addressing the ongoing debate about whether physical pain and mental anguish should be submitted as separate damages elements. Last but not least, we have included a new chapter on theft liability as well as a new instruction that may be considered when a party to a civil matter asserts his or her Fifth Amendment privilege.

It should be noted that our publication does not provide guidance for every type of negligence case, intentional tort case, or workers' compensation case. Indeed, we are frequently asked to provide more guidance in certain areas. Although we would love to do so, we must be very careful not to offer sample questions or instructions without clear legal precedent.

Accordingly, there will be matters that our book does not address and will not address until the law has sufficiently developed. However, the Committee is very open to expansion into areas that are well established by legal precedent but have not yet been addressed by the book; any suggestions in this regard are greatly encouraged.

—Dan Linebaugh, *Chair*

CHANGES IN THE 2018 EDITION

The 2018 edition of *Texas Pattern Jury Charges—General Negligence, Intentional Personal Torts & Workers’ Compensation* includes the following changes from the 2016 edition:

1. Admonitory instructions—
 - a. Revised instruction on party assertion of privilege (1.10)
 - b. Added new instruction on party assertion of Fifth Amendment privilege (1.11)
 - c. Renumbered following PJC’s
2. “Injury” and “occurrence”—Revised last paragraph of 3.1 to include “[*injury*]” before “[*occurrence*]” and revised 4.1 Comment on use of those terms
3. Negligence per se—Added comment about complex standard (5.3) and reserved 5.4
4. Theft liability—added new chapter 7
5. Nuisance actions—Revised discussion of *Crosstex North Texas Pipeline, L.P. v. Gardiner*, 505 S.W.3d 580 (Tex. 2016), throughout chapter
6. Mental anguish—Added “mental anguish” caveat to Comments (11.8, 28.3, 28.5, 30.3)
7. Property damages—Revised PJC’s on partial and total destruction of property (31.3, 31.4)
8. Preservation of charge error—
 - a. Updated Comment (32.1)
 - b. Added new PJC on broad-form issues and the *Casteel* doctrine (32.2)

INTRODUCTION

1. PURPOSE OF PUBLICATION

The purpose of this volume, like those of the others in this series, is to assist the bench and bar in preparing the court's charge in jury cases. It provides definitions, instructions, and questions needed to submit jury charges in actions arising from general negligence, intentional personal torts, and workers' compensation. The pattern charges are suggestions and guides to be used by a trial court if they are applicable and proper in a specific case. Of course, the exercise of professional judgment by the attorneys and the judge is necessary to resolve disputes in individual cases. The Committee hopes that this publication will prove as worthy a contribution as have the earlier *Texas Pattern Jury Charges* volumes.

2. SCOPE OF PATTERN CHARGES

It is impossible to prepare pattern charges for every factual setting that could arise in the areas covered herein. The Committee has tried to prepare charges that will serve as guides in the usual types of litigation that might confront an attorney in a general negligence or intentional personal torts case. However, a charge should conform to the pleadings and evidence of the particular case, and occasions will arise for the use of questions and instructions not specifically addressed here.

3. USE OF ACCEPTED PRECEDENTS

The Committee has avoided recommending changes in the law and has based this material on what it perceives the present law to be. It has attempted to foresee theories and objections that might be made in a variety of circumstances but not to favor or disfavor a particular position. In unsettled areas, the Committee generally has not taken a position on the exact form of a charge. It has provided guidelines, however, in some areas in which there is no definitive authority. Of course, trial judges and practitioners should recognize that the Committee may have erred in its perceptions and that its recommendations may be affected by future appellate decisions and statutory changes.

4. PRINCIPLES OF STYLE

a. *Broad form to be used when feasible.* Rule 277 of the Texas Rules of Civil Procedure provides that "the court shall, whenever feasible, submit the cause upon broad-form questions." Accordingly, the basic questions are designed to be accompanied by one or more instructions. See *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647 (Tex. 1990). For further discussion, see PJC 32.2 regarding broad-form issues and the *Casteel* doctrine.

b. *Simplicity.* The Committee has sought to follow the court's admonition that "a workable jury system demands strict adherence to simplicity in jury charges." *Lemos v.*

INTRODUCTION

Montez, 680 S.W.2d 798, 801 (Tex. 1984). The Committee has, in a few instances, attempted to simplify questions and instructions previously approved by the courts.

c. *Replacing questions with instructions.* This volume also reflects Supreme Court of Texas precedents and Texas Rules of Civil Procedure amendments that have led to replacing questions with instructions for many theories and defenses. Rule 277 forbids inferential rebuttal questions (questions inquiring about facts that deny or rebut an element of an opponent's cause of action or defense). An inferential rebuttal, if appropriate, should be submitted by explanatory instruction. The use of instructions in chapter 3 for such rebuttals as "new and independent cause," "emergency," and "act of God" is consistent with current Texas law.

d. *Definitions and instructions.* The supreme court has disapproved the practice of embellishing standard definitions and instructions, *Lemos*, 680 S.W.2d 798, or adding unnecessary instructions, *First International Bank v. Roper Corp.*, 686 S.W.2d 602 (Tex. 1985). The Committee has endeavored to adhere to standard definitions and instructions. Also, definitions are stated in general terms rather than in terms of the particular event or names of the parties. A general form is deemed more appropriate for a definition and less likely to be considered a comment on the weight of the evidence.

e. *Placement of definitions and instructions in the charge.* Definitions of terms that apply to a number of questions should be given immediately after the general instructions required by rule 226a of the Texas Rules of Civil Procedure. See *Woods v. Crane Carrier Co.*, 693 S.W.2d 377 (Tex. 1985). However, if a definition or instruction applies to only one question or cluster of questions (e.g., damages questions), it should be placed with that question or cluster. Specific guidance for placement of instructions can be found in the comments to each PJC.

f. *Burden of proof.* As authorized by rule 277 of the Texas Rules of Civil Procedure, it is recommended that the burden of proof be placed by instruction rather than by inclusion in each question. When the burden is placed by instruction, it is not necessary that each question begin: "Do you find from a preponderance of the evidence that . . ." The admonitory instructions contain the following instruction, applicable to all questions:

Answer "yes" or "no" to all questions unless you are told otherwise. A "yes" answer must be based on a preponderance of the evidence [unless you are told otherwise]. Whenever a question requires an answer other than "yes" or "no," your answer must be based on a preponderance of the evidence [unless you are told otherwise].

The term "preponderance of the evidence" means the greater weight of credible evidence presented in this case. If you do not find that a preponderance of the evidence supports a "yes" answer, then answer "no." A preponderance of the evidence is not measured by the number of witnesses or by the number of documents admitted in evidence. For

a fact to be proved by a preponderance of the evidence, you must find that the fact is more likely true than not true.

g. Hypothetical examples. The names of hypothetical parties and facts have been italicized to indicate that the names and facts of the particular case should be substituted. In general, the name *Paul Payne* has been used for the plaintiff, *Don Davis* for an individual defendant, *Connie Contributor* for a contribution defendant (third-party defendant not sued by the plaintiff), *Responsible Ray* for a responsible third party, and *Sam Settlor* for a settling person. *ABC Company* or *ABC Corporation* is used for an employer in an agency relationship, *XYZ Company* for a borrowing employer, *Tim Thomas* for an employee or agent, and *ABC Railway* for a railroad in a negligence per se case. *Pete Provider* is used for a provider of alcoholic beverages in a “dramshop” case, *David Driver* for a person to whom a vehicle has been entrusted, *Edna Entrustor* for an owner of a vehicle who has entrusted it to another, *Paul and Mary Payne* for spouses or parents, and *Polly Payne* and *Paul Payne, Jr.*, for children. In wrongful death and survival cases, *Mary Payne* is also used for the decedent.

5. COMMENTS AND CITATIONS OF AUTHORITY

The comments to each PJC provide a ready reference to the law that serves as a foundation for the charge. The primary authority cited herein is Texas case law. In some instances, secondary authority—for example, *Restatement (Second) of Torts*—is also cited. The Committee wishes to emphasize that secondary authority is cited solely as additional guidance to the reader and not as legal authority for the proposition it follows. Some comments also include variations of the recommended forms and additional questions or instructions for special circumstances.

6. SUBMISSION OF NEGLIGENCE PER SE

For cases involving only negligence per se or claims of both negligence per se and common-law negligence, the Committee recommends a single broad-form question accompanied by instructions or definitions informing the jury about both the statutory and common-law standards.

In some situations, a broad submission should not be used. When it is uncertain whether violation of a statute, ordinance, or regulation constitutes negligence per se, a question phrased in the factual terms of the statute, along with a single broad-form question on common-law negligence, is preferred. This method may avoid a retrial if an appellate court disagrees with the trial court. The comments to PJC 5.1 provide a more detailed account of the recommended forms of submission in various negligence per se situations.

7. USING THE PATTERN CHARGES

Matters on which the evidence is undisputed should not be submitted by either instruction or question. Conversely, questions, instructions, and definitions not included in this volume may sometimes become necessary. Finally, preparation of a proper charge requires careful legal analysis and sound judgment.

8. INSTALLING THE DIGITAL DOWNLOAD

The complimentary downloadable version of *Texas Pattern Jury Charges—General Negligence, Intentional Personal Torts & Workers’ Compensation* (2018 edition) contains the entire text of the printed book. To install the digital download—

1. log in to www.texasbarcle.com,
2. go to www.texasbarcle.com/pjc-negligence-2018, and
3. install the version of the digital download you want.

Use of the digital download is subject to the terms of the license and limited warranty included in the documentation at the end of this book and on the digital download web pages. By accessing the digital download, you waive all refund privileges for this publication.

9. FUTURE REVISIONS

The contents of questions, instructions, and definitions in the court’s charge depend on the underlying substantive law relevant to the case. This volume as updated reflects all amendments to Texas statutes enacted through 2017. The Committee expects to publish updates as needed to reflect changes and new developments in the law.

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PJC 1.1 Instructions to Jury Panel before Voir Dire Examination

[Brackets indicate optional, alternative, or instructive text.]

MEMBERS OF THE JURY PANEL:

Thank you for being here. We are here to select a jury. Twelve [six] of you will be chosen for the jury. Even if you are not chosen for the jury, you are performing a valuable service that is your right and duty as a citizen of a free country.

Before we begin: Turn off all phones and other electronic devices. While you are in the courtroom, do not communicate with anyone through any electronic device. [For example, do not communicate by phone, text message, email message, chat room, blog, or social networking websites such as Facebook, Twitter, or Myspace.] [I will give you a number where others may contact you in case of an emergency.] Do not record or photograph any part of these court proceedings, because it is prohibited by law.

If you are chosen for the jury, your role as jurors will be to decide the disputed facts in this case. My role will be to ensure that this case is tried in accordance with the rules of law.

Here is some background about this case. This is a civil case. It is a lawsuit that is not a criminal case. The parties are as follows: The plaintiff is _____, and the defendant is _____. Representing the plaintiff is _____, and representing the defendant is _____. They will ask you some questions during jury selection. But before their questions begin, I must give you some instructions for jury selection.

Every juror must obey these instructions. You may be called into court to testify about any violations of these instructions. If you do not follow these instructions, you will be guilty of juror misconduct, and I might have to order a new trial and start this process over again. This would waste your time and the parties' money, and would require the taxpayers of this county to pay for another trial.

These are the instructions.

1. To avoid looking like you are friendly with one side of the case, do not mingle or talk with the lawyers, witnesses, parties, or anyone else involved in the case. You may exchange casual greetings like "hello" and "good morning." Other than that, do not talk with them at all. They have to

follow these instructions too, so you should not be offended when they follow the instructions.

2. Do not accept any favors from the lawyers, witnesses, parties, or anyone else involved in the case, and do not do any favors for them. This includes favors such as giving rides and food.

3. Do not discuss this case with anyone, even your spouse or a friend, either in person or by any other means [including by phone, text message, email message, chat room, blog, or social networking websites such as Facebook, Twitter, or Myspace]. Do not allow anyone to discuss the case with you or in your hearing. If anyone tries to discuss the case with you or in your hearing, tell me immediately. We do not want you to be influenced by something other than the evidence admitted in court.

4. The parties, through their attorneys, have the right to ask you questions about your background, experiences, and attitudes. They are not trying to meddle in your affairs. They are just being thorough and trying to choose fair jurors who do not have any bias or prejudice in this particular case.

5. Remember that you took an oath that you will tell the truth, so be truthful when the lawyers ask you questions, and always give complete answers. If you do not answer a question that applies to you, that violates your oath. Sometimes a lawyer will ask a question of the whole panel instead of just one person. If the question applies to you, raise your hand and keep it raised until you are called on.

Do you understand these instructions? If you do not, please tell me now.

The lawyers will now begin to ask their questions.

COMMENT

When to use. The foregoing oral instructions are prescribed in Tex. R. Civ. P. 226a. The instructions, “with such modifications as the circumstances of the particular case may require,” are to be given to the jury panel “after they have been sworn in as provided in Rule 226 and before the voir dire examination.”

Rewording regarding investigation by jurors. In an appropriate case, the sentence “Do not post information about the case on the Internet before these court proceedings end and you are released from jury duty” may be added in the second paragraph of this instruction, and the instructions admonishing against independent investigation by the jurors contained in item 6 of PJC 1.2 may be included in the instruction.

PJC 1.2 Instructions to Jury after Jury Selection

[Brackets indicate optional or instructive text.]

[Oral Instructions]

MEMBERS OF THE JURY:

You have been chosen to serve on this jury. Because of the oath you have taken and your selection for the jury, you become officials of this court and active participants in our justice system.

[Hand out the written instructions.]

You have each received a set of written instructions. I am going to read them with you now. Some of them you have heard before and some are new.

1. Turn off all phones and other electronic devices. While you are in the courtroom and while you are deliberating, do not communicate with anyone through any electronic device. [For example, do not communicate by phone, text message, email message, chat room, blog, or social networking websites such as Facebook, Twitter, or Myspace.] [I will give you a number where others may contact you in case of an emergency.] Do not post information about the case on the Internet before these court proceedings end and you are released from jury duty. Do not record or photograph any part of these court proceedings, because it is prohibited by law.

2. To avoid looking like you are friendly with one side of the case, do not mingle or talk with the lawyers, witnesses, parties, or anyone else involved in the case. You may exchange casual greetings like “hello” and “good morning.” Other than that, do not talk with them at all. They have to follow these instructions too, so you should not be offended when they follow the instructions.

3. Do not accept any favors from the lawyers, witnesses, parties, or anyone else involved in the case, and do not do any favors for them. This includes favors such as giving rides and food.

4. Do not discuss this case with anyone, even your spouse or a friend, either in person or by any other means [including by phone, text message, email message, chat room, blog, or social networking websites such as Facebook, Twitter, or Myspace]. Do not allow anyone to discuss the case with you or in your hearing. If anyone tries to discuss the case with you or in your

hearing, tell me immediately. We do not want you to be influenced by something other than the evidence admitted in court.

5. Do not discuss this case with anyone during the trial, not even with the other jurors, until the end of the trial. You should not discuss the case with your fellow jurors until the end of the trial so that you do not form opinions about the case before you have heard everything.

After you have heard all the evidence, received all of my instructions, and heard all of the lawyers' arguments, you will then go to the jury room to discuss the case with the other jurors and reach a verdict.

6. Do not investigate this case on your own. For example, do not:
- a. try to get information about the case, lawyers, witnesses, or issues from outside this courtroom;
 - b. go to places mentioned in the case to inspect the places;
 - c. inspect items mentioned in this case unless they are presented as evidence in court;
 - d. look anything up in a law book, dictionary, or public record to try to learn more about the case;
 - e. look anything up on the Internet to try to learn more about the case; or
 - f. let anyone else do any of these things for you.

This rule is very important because we want a trial based only on evidence admitted in open court. Your conclusions about this case must be based only on what you see and hear in this courtroom because the law does not permit you to base your conclusions on information that has not been presented to you in open court. All the information must be presented in open court so the parties and their lawyers can test it and object to it. Information from other sources, like the Internet, will not go through this important process in the courtroom. In addition, information from other sources could be completely unreliable. As a result, if you investigate this case on your own, you could compromise the fairness to all parties in this case and jeopardize the results of this trial.

7. Do not tell other jurors about your own experiences or other people's experiences. For example, you may have special knowledge of something in the case, such as business, technical, or professional information. You may even have expert knowledge or opinions, or you may know what

happened in this case or another similar case. Do not tell the other jurors about it. Telling other jurors about it is wrong because it means the jury will be considering things that were not admitted in court.

8. Do not consider attorneys' fees unless I tell you to. Do not guess about attorneys' fees.

9. Do not consider or guess whether any party is covered by insurance unless I tell you to.

10. During the trial, if taking notes will help focus your attention on the evidence, you may take notes using the materials the court has provided. Do not use any personal electronic devices to take notes. If taking notes will distract your attention from the evidence, you should not take notes. Your notes are for your own personal use. They are not evidence. Do not show or read your notes to anyone, including other jurors.

You must leave your notes in the jury room or with the bailiff. The bailiff is instructed not to read your notes and to give your notes to me promptly after collecting them from you. I will make sure your notes are kept in a safe, secure location and not disclosed to anyone.

[You may take your notes back into the jury room and consult them during deliberations. But keep in mind that your notes are not evidence. When you deliberate, each of you should rely on your independent recollection of the evidence and not be influenced by the fact that another juror has or has not taken notes. After you complete your deliberations, the bailiff will collect your notes.]

When you are released from jury duty, the bailiff will promptly destroy your notes so that nobody can read what you wrote.

11. I will decide matters of law in this case. It is your duty to listen to and consider the evidence and to determine fact issues that I may submit to you at the end of the trial. After you have heard all the evidence, I will give you instructions to follow as you make your decision. The instructions also will have questions for you to answer. You will not be asked and you should not consider which side will win. Instead, you will need to answer the specific questions I give you.

Every juror must obey my instructions. If you do not follow these instructions, you will be guilty of juror misconduct, and I may have to order a new trial and start this process over again. This would waste your time and the par-

ties' money, and would require the taxpayers of this county to pay for another trial.

Do you understand these instructions? If you do not, please tell me now.

Please keep these instructions and review them as we go through this case. If anyone does not follow these instructions, tell me.

COMMENT

When to use. The foregoing instructions are prescribed in Tex. R. Civ. P. 226a. The instructions, "with such modifications as the circumstances of the particular case may require," are to be given to the jury "immediately after the jurors are selected for the case."

PJC 1.3 Charge of the Court**PJC 1.3A Charge of the Court—Twelve-Member Jury**

[Brackets indicate optional or instructive text.]

MEMBERS OF THE JURY:

After the closing arguments, you will go to the jury room to decide the case, answer the questions that are attached, and reach a verdict. You may discuss the case with other jurors only when you are all together in the jury room.

Remember my previous instructions: Do not discuss the case with anyone else, either in person or by any other means. Do not do any independent investigation about the case or conduct any research. Do not look up any words in dictionaries or on the Internet. Do not post information about the case on the Internet. Do not share any special knowledge or experiences with the other jurors. Do not use your phone or any other electronic device during your deliberations for any reason. [I will give you a number where others may contact you in case of an emergency.]

[Any notes you have taken are for your own personal use. You may take your notes back into the jury room and consult them during deliberations, but do not show or read your notes to your fellow jurors during your deliberations. Your notes are not evidence. Each of you should rely on your independent recollection of the evidence and not be influenced by the fact that another juror has or has not taken notes.]

[You must leave your notes with the bailiff when you are not deliberating. The bailiff will give your notes to me promptly after collecting them from you. I will make sure your notes are kept in a safe, secure location and not disclosed to anyone. After you complete your deliberations, the bailiff will collect your notes. When you are released from jury duty, the bailiff will promptly destroy your notes so that nobody can read what you wrote.]

Here are the instructions for answering the questions.

1. Do not let bias, prejudice, or sympathy play any part in your decision.
2. Base your answers only on the evidence admitted in court and on the law that is in these instructions and questions. Do not consider or discuss any evidence that was not admitted in the courtroom.

3. You are to make up your own minds about the facts. You are the sole judges of the credibility of the witnesses and the weight to give their testimony. But on matters of law, you must follow all of my instructions.

4. If my instructions use a word in a way that is different from its ordinary meaning, use the meaning I give you, which will be a proper legal definition.

5. All the questions and answers are important. No one should say that any question or answer is not important.

6. Answer “yes” or “no” to all questions unless you are told otherwise. A “yes” answer must be based on a preponderance of the evidence [unless you are told otherwise]. Whenever a question requires an answer other than “yes” or “no,” your answer must be based on a preponderance of the evidence [unless you are told otherwise].

The term “preponderance of the evidence” means the greater weight of credible evidence presented in this case. If you do not find that a preponderance of the evidence supports a “yes” answer, then answer “no.” A preponderance of the evidence is not measured by the number of witnesses or by the number of documents admitted in evidence. For a fact to be proved by a preponderance of the evidence, you must find that the fact is more likely true than not true.

7. Do not decide who you think should win before you answer the questions and then just answer the questions to match your decision. Answer each question carefully without considering who will win. Do not discuss or consider the effect your answers will have.

8. Do not answer questions by drawing straws or by any method of chance.

9. Some questions might ask you for a dollar amount. Do not agree in advance to decide on a dollar amount by adding up each juror’s amount and then figuring the average.

10. Do not trade your answers. For example, do not say, “I will answer this question your way if you answer another question my way.”

11. [Unless otherwise instructed] The answers to the questions must be based on the decision of at least ten of the twelve jurors. The same ten jurors must agree on every answer. Do not agree to be bound by a vote of anything less than ten jurors, even if it would be a majority.

As I have said before, if you do not follow these instructions, you will be guilty of juror misconduct, and I might have to order a new trial and start this process over again. This would waste your time and the parties' money, and would require the taxpayers of this county to pay for another trial. If a juror breaks any of these rules, tell that person to stop and report it to me immediately.

*[Definitions, questions, and special instructions
given to the jury will be transcribed here.]*

Presiding Juror:

1. When you go into the jury room to answer the questions, the first thing you will need to do is choose a presiding juror.
2. The presiding juror has these duties:
 - a. have the complete charge read aloud if it will be helpful to your deliberations;
 - b. preside over your deliberations, meaning manage the discussions, and see that you follow these instructions;
 - c. give written questions or comments to the bailiff who will give them to the judge;
 - d. write down the answers you agree on;
 - e. get the signatures for the verdict certificate; and
 - f. notify the bailiff that you have reached a verdict.

Do you understand the duties of the presiding juror? If you do not, please tell me now.

Instructions for Signing the Verdict Certificate:

1. [Unless otherwise instructed] You may answer the questions on a vote of ten jurors. The same ten jurors must agree on every answer in the charge. This means you may not have one group of ten jurors agree on one answer and a different group of ten jurors agree on another answer.
2. If ten jurors agree on every answer, those ten jurors sign the verdict.
If eleven jurors agree on every answer, those eleven jurors sign the verdict.

If all twelve of you agree on every answer, you are unanimous and only the presiding juror signs the verdict.

3. All jurors should deliberate on every question. You may end up with all twelve of you agreeing on some answers, while only ten or eleven of you agree on other answers. But when you sign the verdict, only those ten who agree on every answer will sign the verdict.

4. *[Added if the charge requires some unanimity.]* There are some special instructions before Questions _____ explaining how to answer those questions. Please follow the instructions. If all twelve of you answer those questions, you will need to complete a second verdict certificate for those questions.

Do you understand these instructions? If you do not, please tell me now.

JUDGE PRESIDING

Verdict Certificate

Check one:

_____ Our verdict is unanimous. All twelve of us have agreed to each and every answer. The presiding juror has signed the certificate for all twelve of us.

Signature of Presiding Juror

Printed Name of Presiding Juror

_____ Our verdict is not unanimous. Eleven of us have agreed to each and every answer and have signed the certificate below.

_____ Our verdict is not unanimous. Ten of us have agreed to each and every answer and have signed the certificate below.

Signature

Name Printed

1. _____

2. _____

- 3. _____
- 4. _____
- 5. _____
- 6. _____
- 7. _____
- 8. _____
- 9. _____
- 10. _____
- 11. _____

If you have answered Question No. _____ [*the exemplary damages amount*], then you must sign this certificate also.

Additional Certificate

[Used when some questions require unanimous answers.]

I certify that the jury was unanimous in answering the following questions. All twelve of us agreed to each of the answers. The presiding juror has signed the certificate for all twelve of us.

[Judge to list questions that require a unanimous answer, including the predicate liability question.]

Signature of Presiding Juror

Printed Name of Presiding Juror

PJC 1.3B Charge of the Court—Six-Member Jury

[Brackets indicate optional or instructive text.]

MEMBERS OF THE JURY:

After the closing arguments, you will go to the jury room to decide the case, answer the questions that are attached, and reach a verdict. You may discuss the case with other jurors only when you are all together in the jury room.

Remember my previous instructions: Do not discuss the case with anyone else, either in person or by any other means. Do not do any independent investigation about the case or conduct any research. Do not look up any words in dictionaries or on the Internet. Do not post information about the case on the Internet. Do not share any special knowledge or experiences with the other jurors. Do not use your phone or any other electronic device during your deliberations for any reason. [I will give you a number where others may contact you in case of an emergency.]

[Any notes you have taken are for your own personal use. You may take your notes back into the jury room and consult them during deliberations, but do not show or read your notes to your fellow jurors during your deliberations. Your notes are not evidence. Each of you should rely on your independent recollection of the evidence and not be influenced by the fact that another juror has or has not taken notes.]

[You must leave your notes with the bailiff when you are not deliberating. The bailiff will give your notes to me promptly after collecting them from you. I will make sure your notes are kept in a safe, secure location and not disclosed to anyone. After you complete your deliberations, the bailiff will collect your notes. When you are released from jury duty, the bailiff will promptly destroy your notes so that nobody can read what you wrote.]

Here are the instructions for answering the questions.

1. Do not let bias, prejudice, or sympathy play any part in your decision.
2. Base your answers only on the evidence admitted in court and on the law that is in these instructions and questions. Do not consider or discuss any evidence that was not admitted in the courtroom.
3. You are to make up your own minds about the facts. You are the sole judges of the credibility of the witnesses and the weight to give their testimony. But on matters of law, you must follow all of my instructions.
4. If my instructions use a word in a way that is different from its ordinary meaning, use the meaning I give you, which will be a proper legal definition.
5. All the questions and answers are important. No one should say that any question or answer is not important.
6. Answer “yes” or “no” to all questions unless you are told otherwise. A “yes” answer must be based on a preponderance of the evidence [unless

you are told otherwise]. Whenever a question requires an answer other than “yes” or “no,” your answer must be based on a preponderance of the evidence [unless you are told otherwise].

The term “preponderance of the evidence” means the greater weight of credible evidence presented in this case. If you do not find that a preponderance of the evidence supports a “yes” answer, then answer “no.” A preponderance of the evidence is not measured by the number of witnesses or by the number of documents admitted in evidence. For a fact to be proved by a preponderance of the evidence, you must find that the fact is more likely true than not true.

7. Do not decide who you think should win before you answer the questions and then just answer the questions to match your decision. Answer each question carefully without considering who will win. Do not discuss or consider the effect your answers will have.

8. Do not answer questions by drawing straws or by any method of chance.

9. Some questions might ask you for a dollar amount. Do not agree in advance to decide on a dollar amount by adding up each juror’s amount and then figuring the average.

10. Do not trade your answers. For example, do not say, “I will answer this question your way if you answer another question my way.”

11. [Unless otherwise instructed] The answers to the questions must be based on the decision of at least five of the six jurors. The same five jurors must agree on every answer. Do not agree to be bound by a vote of anything less than five jurors, even if it would be a majority.

As I have said before, if you do not follow these instructions, you will be guilty of juror misconduct, and I might have to order a new trial and start this process over again. This would waste your time and the parties’ money, and would require the taxpayers of this county to pay for another trial. If a juror breaks any of these rules, tell that person to stop and report it to me immediately.

*[Definitions, questions, and special instructions
given to the jury will be transcribed here.]*

Presiding Juror:

1. When you go into the jury room to answer the questions, the first thing you will need to do is choose a presiding juror.
2. The presiding juror has these duties:
 - a. have the complete charge read aloud if it will be helpful to your deliberations;
 - b. preside over your deliberations, meaning manage the discussions, and see that you follow these instructions;
 - c. give written questions or comments to the bailiff who will give them to the judge;
 - d. write down the answers you agree on;
 - e. get the signatures for the verdict certificate; and
 - f. notify the bailiff that you have reached a verdict.

Do you understand the duties of the presiding juror? If you do not, please tell me now.

Instructions for Signing the Verdict Certificate:

1. [Unless otherwise instructed] You may answer the questions on a vote of five jurors. The same five jurors must agree on every answer in the charge. This means you may not have one group of five jurors agree on one answer and a different group of five jurors agree on another answer.
2. If five jurors agree on every answer, those five jurors sign the verdict.

If all six of you agree on every answer, you are unanimous and only the presiding juror signs the verdict.

3. All jurors should deliberate on every question. You may end up with all six of you agreeing on some answers, while only five of you agree on other answers. But when you sign the verdict, only those five who agree on every answer will sign the verdict.

4. *[Added if the charge requires some unanimity.]* There are some special instructions before Questions _____ explaining how to answer those questions. Please follow the instructions. If all six of you answer those questions, you will need to complete a second verdict certificate for those questions.

Do you understand these instructions? If you do not, please tell me now.

JUDGE PRESIDING

Verdict Certificate

Check one:

_____ Our verdict is unanimous. All six of us have agreed to each and every answer. The presiding juror has signed the certificate for all six of us.

Signature of Presiding Juror

Printed Name of Presiding Juror

_____ Our verdict is not unanimous. Five of us have agreed to each and every answer and have signed the certificate below.

Signature

Name Printed

1. _____

2. _____

3. _____

4. _____

5. _____

If you have answered Question No. _____ [*the exemplary damages amount*], then you must sign this certificate also.

Additional Certificate

[Used when some questions require unanimous answers.]

I certify that the jury was unanimous in answering the following questions. All six of us agreed to each of the answers. The presiding juror has signed the certificate for all six of us.

*[Judge to list questions that require a unanimous answer,
including the predicate liability question.]*

 Signature of Presiding Juror

 Printed Name of Presiding Juror

COMMENT

When to use. The above charge of the court includes the written instructions prescribed in Tex. R. Civ. P. 226a. The court must provide each member of the jury a copy of the charge, including the written instructions, “with such modifications as the circumstances of the particular case may require” before closing arguments begin.

Modification of additional certificate. The additional certificate set forth in Tex. R. Civ. P. 226a lists the questions that require unanimous answers for an award of exemplary damages and requires the presiding juror to sign the certificate only if the jury answered unanimously to all of the listed questions. This format may require modification in cases involving multiple claims and/or multiple parties. In such cases, the jury’s answers might be unanimous as to some but not all of the listed questions, and therefore the presiding juror will be unable to sign the certificate even though an award of exemplary damages might be appropriate based on the questions to which the jury answered unanimously. The Committee suggests that the additional certificate be modified in such multiclaim, multiparty cases. One possible approach is as follows:

Additional Certificate

I certify that the jury was unanimous in answering the following questions or parts of questions marked “yes” below. All [twelve/six] of us agreed to each of the answers marked “yes.” The presiding juror has signed the certificate for all [twelve/six] of us.

Answer “yes” or “no” for each of the following:

Question No. 1 _____

Question No. 2 _____

Defendant 1 _____

Defendant 2 _____

Defendant 3 _____

Question No. 3 _____

Defendant 1 _____

Defendant 2 _____

Defendant 3 _____

Signature of Presiding Juror

Printed Name of Presiding Juror

PJC 1.4 Additional Instruction for Bifurcated Trial

[Brackets indicate optional, alternative, or instructive text.]

MEMBERS OF THE JURY:

In discharging your responsibility on this jury, you will observe all the instructions that have been previously given you.

JUDGE PRESIDING

Certificate

I certify that the jury was unanimous in answering the following questions. All twelve [six] of us agreed to each of the answers. The presiding juror has signed the certificate for all twelve [six] of us.

[Judge to list questions that require a unanimous answer, including the predicate liability question.]

Signature of Presiding Juror

Printed Name of Presiding Juror

COMMENT

When to use. PJC 1.4 should be used as an instruction for the second phase of a bifurcated trial pursuant to Tex. Civ. Prac. & Rem. Code § 41.009. *See also Transportation Insurance Co. v. Moriel*, 879 S.W.2d 10, 29–30 (Tex. 1994). If questions that do not require unanimity are submitted in the second phase of a trial, use the verdict certificate in PJC 1.3.

Source of instruction. The foregoing instructions are prescribed in Tex. R. Civ. P. 226a.

Actions filed before September 1, 2003. For actions filed before September 1, 2003, add the following instruction derived from *Hyman Farm Service, Inc. v. Earth Oil & Gas Co.*, 920 S.W.2d 452 (Tex. App.—Amarillo 1996, no writ), along with signature lines for jurors to use if the verdict is not unanimous:

I shall now give you additional instructions that you should carefully and strictly follow during your deliberations.

All jurors have the right and the responsibility to deliberate on [this] [these] question[s], but at least ten [five] of those who agreed to the verdict in the first phase of this trial must agree to this answer and sign this verdict accordingly. If your first verdict was unanimous, this second verdict may be rendered by the vote of at least ten [five] of you.

Modification of additional certificate. The additional certificate set forth in Tex. R. Civ. P. 226a lists the questions that require unanimous answers for an award of exemplary damages and requires the presiding juror to sign the certificate only if the jury answered unanimously to all of the listed questions. This format may require modification in cases involving multiple claims and/or multiple parties. In such cases, the jury’s answers might be unanimous as to some but not all of the listed questions, and therefore the presiding juror will be unable to sign the certificate even though an award of exemplary damages might be appropriate based on the questions to which the jury answered unanimously. The Committee suggests that the additional certificate be modified in such multiclaim, multiparty cases. One possible approach is as follows:

Additional Certificate

I certify that the jury was unanimous in answering the following questions or parts of questions marked “yes” below. All [twelve/six] of us agreed to each of the answers marked “yes.” The presiding juror has signed the certificate for all [twelve/six] of us.

Answer “yes” or “no” for each of the following:

- Question No. 1 _____
- Question No. 2 _____
- Defendant 1 _____
- Defendant 2 _____
- Defendant 3 _____
- Question No. 3 _____
- Defendant 1 _____
- Defendant 2 _____
- Defendant 3 _____

Signature of Presiding Juror

Printed Name of Presiding Juror

PJC 1.5 Instructions to Jury after Verdict

Thank you for your verdict.

I have told you that the only time you may discuss the case is with the other jurors in the jury room. I now release you from jury duty. Now you may discuss the case with anyone. But you may also choose not to discuss the case; that is your right.

After you are released from jury duty, the lawyers and others may ask you questions to see if the jury followed the instructions, and they may ask you to give a sworn statement. You are free to discuss the case with them and to give a sworn statement. But you may choose not to discuss the case and not to give a sworn statement; that is your right.

COMMENT

When to use. The foregoing instructions are prescribed in Tex. R. Civ. P. 226a. The instructions are to be given orally to the jury “after the verdict has been accepted by the court and before the jurors are released from jury duty.”

PJC 1.6 Instruction to Jury If Permitted to Separate

You are again instructed that it is your duty not to communicate with, or permit yourselves to be addressed by, any other person about any subject relating to the case.

COMMENT

When to use. The foregoing instruction is required by Tex. R. Civ. P. 284 “[i]f jurors are permitted to separate before they are released from jury duty, either during the trial or after the case is submitted to them.”

PJC 1.7 Instruction If Jury Disagrees about Testimony

[Brackets indicate instructive text.]

MEMBERS OF THE JURY:

You have made the following request in writing:

[Insert copy of request.]

Your request is governed by the following rule:

“If the jury disagree as to the statement of any witness, they may, upon applying to the court, have read to them from the court reporter’s notes that part of such witness’ testimony on the point in dispute”

If you report that you disagree concerning the statement of a witness and specify the point on which you disagree, the court reporter will search his notes and read to you the testimony of the witness on the point.

JUDGE PRESIDING

COMMENT

When to use. This written instruction is based on Tex. R. Civ. P. 287 and is to be used if the jurors request that testimony from the court reporter’s notes be read to them.

PJC 1.8 Circumstantial Evidence (Optional)

A fact may be established by direct evidence or by circumstantial evidence or both. A fact is established by direct evidence when proved by documentary evidence or by witnesses who saw the act done or heard the words spoken. A fact is established by circumstantial evidence when it may be fairly and reasonably inferred from other facts proved.

COMMENT

When to use. PJC 1.8 may be used when there is circumstantial evidence in the case. It would be placed in the charge of the court (PJC 1.3) after the instruction on preponderance of the evidence and immediately before the definitions, questions, and special instructions. For cases defining circumstantial evidence, see *Blount v. Bordens, Inc.*, 910 S.W.2d 931, 933 (Tex. 1995) (per curiam), and *Russell v. Russell*, 865 S.W.2d 929, 933 (Tex. 1993). It is not error to give or to refuse an instruction on circumstantial evidence. *Larson v. Ellison*, 217 S.W.2d 420 (Tex. 1949); *Johnson v. Zurich General Accident & Liability Insurance Co.*, 205 S.W.2d 353 (Tex. 1947); *Adams v. Valley Federal Credit Union*, 848 S.W.2d 182, 188 (Tex. App.—Corpus Christi 1992, writ denied).

PJC 1.9 Instructions to Deadlocked Jury

I have your note that you are deadlocked. In the interest of justice, if you could end this litigation by your verdict, you should do so.

I do not mean to say that any individual juror should yield his or her own conscience and positive conviction, but I do mean that when you are in the jury room, you should discuss this matter carefully, listen to each other, and try, if you can, to reach a conclusion on the questions. It is your duty as a juror to keep your mind open and free to every reasonable argument that may be presented by your fellow jurors so that this jury may arrive at a verdict that justly answers the consciences of the individuals making up this jury. You should not have any pride of opinion and should avoid hastily forming or expressing an opinion. At the same time, you should not surrender any conscientious views founded on the evidence unless convinced of your error by your fellow jurors.

If you fail to reach a verdict, this case may have to be tried before another jury. Then all of our time will have been wasted.

Accordingly, I return you to your deliberations.

COMMENT

Source. The foregoing instructions are modeled on the charge in *Stevens v. Travelers Insurance Co.*, 563 S.W.2d 223 (Tex. 1978), and on Tex. R. Civ. P. 226a.

For use in civil trials only. The above charge is recommended for use in civil cases. For a sample instruction for use in criminal cases, see the current edition of State Bar of Texas, *Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions* CPJC 10.1 (Instruction—Allen Charge).

PJC 1.10 Privilege—Generally No Inference

[Brackets indicate instructive text.]

You are instructed that you must not infer anything by [*name of invoking party*]'s refusal to answer questions because of [*name of invoking party*]'s claim of [*privilege asserted*] privilege.

COMMENT

When to use. This instruction should be used in situations other than a claim of Fifth Amendment privilege. See PJC 1.11. On request by any party against whom the jury might draw any inference from a claim of privilege, the court must instruct the jury that no inference may be drawn therefrom. Tex. R. Evid. 513(d).

PJC 1.11 Fifth Amendment Privilege—Adverse Inference May Be Considered

[Brackets indicate instructive text.]

[Name of invoking party] refused to answer certain questions on the grounds that it may tend to incriminate *him*. A person has a constitutional right to decline to answer on the grounds that it may tend to incriminate *him*. You may, but are not required to, infer by such refusal that the answers would have been adverse to *[name of invoking party]*'s interests.

COMMENT

When to use. On request by any party after another party has invoked his Fifth Amendment privilege against self-incrimination in the present case, the above instruction may be given at the court's discretion, as controlling authorities neither require nor prohibit its inclusion in the written charge of the court. *See Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976); *Wilz v. Flournoy*, 228 S.W.3d 674, 677 (Tex. 2007); *Texas Department of Public Safety Officers Ass'n v. Denton*, 897 S.W.2d 757, 763 (Tex. 1995).

Nonparty witness. The Committee expresses no opinion as to the propriety of such an instruction when a nonparty witness asserts a privilege.

PJC 1.12 Parallel Theories on Damages

In answering questions about damages, answer each question separately. Do not increase or reduce the amount in one answer because of your answer to any other question about damages. Do not speculate about what any party's ultimate recovery may or may not be. Any recovery will be determined by the court when it applies the law to your answers at the time of judgment.

COMMENT

When to use. If several theories of recovery are submitted in the charge and any theory has a different legal measure of damages to be applied to a factually similar claim for damages, the Committee recommends that a separate damages question for each theory be submitted and that the above additional instruction be included earlier in the charge.

PJC 1.13 Instruction on Spoliation

[Brackets indicate optional, alternative, or instructive text.]

[Name of spoliating party] [destroyed/failed to preserve/destroyed or failed to preserve] [describe evidence]. You [must/may] consider that this evidence would have been unfavorable to [name of spoliating party] on the issue of [describe issue(s) to which evidence would have been relevant].

COMMENT

When to use. The above instruction is recommended for the adverse inference resulting from spoliation. In *Brookshire Bros. v. Aldridge*, 438 S.W.3d 9 (Tex. 2014), the Texas Supreme Court clarified the standards governing spoliation and the parameters of a trial court’s discretion to impose spoliation remedies based on the facts of the case. After the trial court has determined that a party has spoliated evidence, it has broad discretion to impose a remedy that is proportionate to the conduct, including, under appropriate circumstances, a spoliation instruction to the jury. *Brookshire Bros.*, 438 S.W.3d at 23–26. A spoliation instruction is a severe sanction the court may use to remedy an act of intentional spoliation that prejudices the nonspoliating party. *Brookshire Bros.*, 438 S.W.3d at 23. To find intentional spoliation, the spoliator must have “acted with the subjective purpose of concealing or destroying discoverable evidence.” *Brookshire Bros.*, 438 S.W.3d at 24. To submit a spoliation instruction the trial court must find that “(1) the spoliating party acted with intent to conceal discoverable evidence, or (2) the spoliating party acted negligently and caused the nonspoliating party to be irreparably deprived of any meaningful ability to present a claim or defense.” *Wackenhut Corp. v. Gutierrez*, 453 S.W.3d 917, 921 (Tex. 2015). Moreover, the court must find that a less severe remedy would be insufficient to reduce the prejudice caused by the spoliation. *Brookshire Bros.*, 438 S.W.3d at 25.

On rare occasions the negligent breach of the duty to reasonably preserve evidence may support the submission of a spoliation instruction. Where the spoliation “so prejudices the nonspoliating party that it is irreparably deprived of having any meaningful ability to present a claim or defense,” the court has discretion to remedy the extreme prejudice by submitting a spoliation instruction. *Brookshire Bros.*, 438 S.W.3d at 26.

Caveat. Because the imposition of a spoliation instruction is considered extremely severe, it should be used cautiously, as the wrongful submission of an instruction may result in a reversal of the case. *Brookshire Bros.*, 438 S.W.3d at 17 (citing *Wal-Mart Stores, Inc. v. Johnson*, 106 S.W.3d 718, 724 (Tex. 2003) (“[I]f a spoliation instruction should not have been given, the likelihood of harm from the erroneous instruction is substantial, particularly when the case is closely contested.”)).

Required findings by the court. Whether a spoliation instruction is appropriate is a question of law for the court. *Brookshire Bros.*, 438 S.W.3d at 20 (citing *Trevino v. Ortega*, 969 S.W.2d 950, 954–55, 960 (Tex. 1998) (Baker, J., concurring)). Before considering whether to instruct the jury on spoliation as a remedy for the loss, alteration, or unavailability of certain evidence, a court must consider—

1. whether there was a duty to preserve the evidence at issue,
2. whether the alleged spoliator breached that duty, and
3. prejudice.

Brookshire Bros., 438 S.W.3d at 20.

In evaluating prejudice the court must analyze—

1. relevance of the spoliated evidence to key issues in the case;
2. the harmful effect of the evidence on the spoliating party's case (or conversely, whether the evidence would be helpful to the nonspoliating party's case); and
3. whether the spoliated evidence was cumulative.

Brookshire Bros., 438 S.W.3d at 20; *see also Petroleum Solutions, Inc. v. Head*, 454 S.W.3d 482 (Tex. 2014). Because the imposition of a spoliation instruction is such a severe sanction, courts must first determine whether a direct relationship exists between the conduct, the offender, and the sanction imposed, and the sanction must not be more severe than necessary. *Petroleum Solutions, Inc.*, 454 S.W.3d at 489 (citing *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913 (Tex. 1991)).

Use of “may” or “must.” In *Brookshire Bros.*, the majority does not articulate the specific language that should be included in the instruction, particularly whether the jury “may” or “must” consider that the missing evidence would have been unfavorable to the spoliator. The dissent in *Brookshire Bros.* interpreted the majority as requiring the use of the term *must*. *Brookshire Bros.*, 438 S.W.3d at 34. The overarching guideline, as with any sanction, remains proportionality. “Upon a finding of spoliation, the trial court has broad discretion to impose a remedy that, as with any discovery sanction, must be proportionate; that is, it must relate directly to the conduct giving rise to the sanction and may not be excessive.” *Brookshire Bros.*, 438 S.W.3d at 14. Whether *may* or *must* is used should be based on the facts applied to the standards articulated above.

CHAPTER 2	BASIC DEFINITIONS IN NEGLIGENCE ACTIONS	
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PJC 2.1 Negligence and Ordinary Care

“Negligence” means failure to use ordinary care, that is, failing to do that which a person of ordinary prudence would have done under the same or similar circumstances or doing that which a person of ordinary prudence would not have done under the same or similar circumstances.

“Ordinary care” means that degree of care that would be used by a person of ordinary prudence under the same or similar circumstances.

COMMENT

When to use. These definitions should be included in the court’s charge in every case in which ordinary negligence is the standard of care. They include the standard and accepted elements of negligence. *See, e.g., Colvin v. Red Steel Co.*, 682 S.W.2d 243, 245 (Tex. 1984); *Great Atlantic & Pacific Tea Co. v. Evans*, 175 S.W.2d 249, 250–51 (Tex. 1943).

Modify if “ordinary care” not applicable to all. If “ordinary care” is not the standard applicable to all persons whose conduct is inquired about (as in cases involving a high degree of care owed by a common carrier to its passengers, cases involving the conduct of a child, or certain negligent entrustment cases), the phrase “when used with respect to the conduct of [*insert name of person held to standard of ordinary care*]” should be added after the first word, “negligence,” in the instruction.

When to use PJC 2.2 or 2.3. PJC 2.2 or 2.3 should be used *in addition to* PJC 2.1 in cases in which both “ordinary care” and either “high degree of care” or “child’s degree of care” are to be considered by the jury. See above paragraph. If only “high degree” or “child’s degree” is to be considered, PJC 2.2 or 2.3 should be used *in lieu of* PJC 2.1.

PJC 2.2 High Degree of Care

“Negligence,” when used with respect to the conduct of *ABC Company*, means failure to use a high degree of care, that is, failing to do that which a very cautious, competent, and prudent person would have done under the same or similar circumstances or doing that which a very cautious, competent, and prudent person would not have done under the same or similar circumstances.

“High degree of care” means that degree of care that would have been used by a very cautious, competent, and prudent person under the same or similar circumstances.

COMMENT

When to use. A high degree of care is called for in cases involving the duty of a common carrier to its passengers. See *Dallas Railway & Terminal v. Travis*, 78 S.W.2d 941, 942 (Tex. 1935) (streetcar); *Delta Airlines v. Gibson*, 550 S.W.2d 310, 312 (Tex. Civ. App.—El Paso 1977, writ ref’d n.r.e.) (airline, regarding use of escalator and boarding and unloading); *Skyline Cab Co. v. Bradley*, 325 S.W.2d 176 (Tex. Civ. App.—Houston 1959, writ ref’d n.r.e.) (taxi); see also *Robert R. Walker, Inc. v. Burgdorf*, 244 S.W.2d 506 (Tex. 1951) (handlers of dangerous commodities have duty to protect public that is commensurate with dangers involved).

When to use in addition to or in lieu of PJC 2.1. PJC 2.2 should be used *in addition to* PJC 2.1 in cases in which both “ordinary care” and “high degree of care” are to be considered by the jury. See PJC 2.1 Comment. If only “high degree of care” is to be considered, PJC 2.2 should be used *in lieu of* PJC 2.1.

Modify if only “high degree” submitted. In cases involving only a “high degree of care,” the phrase “when used with respect to the conduct of *ABC Company*” should be omitted. Also in such cases, the phrase *a high degree of care* should replace the phrase *ordinary care* in the definition of “proximate cause” in PJC 2.4 or 3.1.

PJC 2.3 Child's Degree of Care

“Negligence,” when used with respect to the conduct of a child, means failing to do that which an ordinarily prudent child of the same age, experience, intelligence, and capacity would have done under the same or similar circumstances or doing that which such a child would not have done under the same or similar circumstances.

“Ordinary care,” when used with respect to the conduct of a child, means that degree of care that an ordinarily prudent child of the same age, experience, intelligence, and capacity would have used under the same or similar circumstances.

COMMENT

When to use. These definitions should be used if the standard of “child’s degree of care” is submitted to the jury. The conduct of a child “of tender years” is judged by the standard of a child and not by that of an adult. *Dallas Railway & Terminal v. Rogers*, 218 S.W.2d 456, 458 (Tex. 1949); *Thompson v. Wooten*, 650 S.W.2d 499 (Tex. App.—Houston [14th Dist.] 1983, writ ref’d n.r.e.). For the appropriate age when a child is considered to be of such immaturity that the above definitions should be submitted, see *Rogers*, 218 S.W.2d at 456; *City of Austin v. Hoffman*, 379 S.W.2d 103, 107 (Tex. Civ. App.—Austin 1964, no writ).

When to use in addition to or in lieu of PJC 2.1. PJC 2.3 should be used *in addition to* PJC 2.1 if both “ordinary care” and “child’s degree of care” are to be considered by the jury. If only “child’s degree of care” is to be considered, PJC 2.3 should be used *in lieu of* PJC 2.1.

Modify “proximate cause” definition if only “child’s degree” submitted. If the only standard of care submitted is “child’s degree,” the phrase *a child’s degree of care* should replace the phrase *ordinary care* in the definition of “proximate cause” in PJC 2.4 or 3.1. See *Nabors Well Services, Ltd. v. Romero*, 456 S.W.3d 553, 564 (Tex. 2015); *Rudes v. Gottschalk*, 324 S.W.2d 201, 207 (Tex. 1959); *MacConnell v. Hill*, 569 S.W.2d 524, 528 (Tex. Civ. App.—Corpus Christi 1978, no writ).

Additional instruction in PJC 4.3 if negligence of child and adult apportioned. In *MacConnell*, 569 S.W.2d at 528, the court recommended the following instruction in comparative negligence cases if the jury must apportion negligence between a child and an adult:

In answering this question, you should take into consideration that *Don Davis* was an adult and *Paul Payne, Jr.* was a child.

If given, this instruction should be placed immediately after the proportionate responsibility question in PJC 4.3.

Age when too young to be capable of negligence. For a discussion of the age beneath which a child is considered too young to be capable of negligence, see *Yarborough v. Berner*, 467 S.W.2d 188 (Tex. 1971).

PJC 2.4 Proximate Cause

“Proximate cause” means a cause that was a substantial factor in bringing about an [injury] [occurrence], and without which cause such [injury] [occurrence] would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a person using *ordinary care* would have foreseen that the [injury] [occurrence], or some similar [injury] [occurrence], might reasonably result therefrom. There may be more than one proximate cause of an [injury] [occurrence].

COMMENT

Source of instruction. This definition of proximate cause is based on language from *Transcontinental Insurance Co. v. Crump*:

[W]e first examine the causation standards for proximate cause and producing cause. “The two elements of proximate cause are cause in fact (or substantial factor) and foreseeability. . . . Cause in fact is established when the act or omission was a substantial factor in bringing about the injuries, and without it, the harm would not have occurred.” *IHS Cedars Treatment Ctr. v. Mason*, 143 S.W.3d 794, 798–99 (Tex. 2004). “The approved definition of ‘proximate cause’ in negligence cases and the approved definition of ‘producing cause’ in compensation cases are in substance the same, except that there is added to the definition of proximate cause the element of foreseeableness.” [*Texas Indemnity Insurance Co. v. Staggs*, 134 S.W.2d 1026, 1028–29 (Tex. 1940).] In other words, the producing cause inquiry is conceptually identical to that of cause in fact.

Transcontinental Insurance Co. v. Crump, 330 S.W.3d 211, 221–23 (Tex. 2010). See also *Ford Motor Co. v. Ledesma*, 242 S.W.3d 32, 46 (Tex. 2007).

The *Crump* and *Ledesma* opinions address the definitions of “producing cause” and “cause in fact.” As of the publication date of this edition, there is no decision that expressly overrules the traditional definition of “proximate cause” below:

“Proximate cause” means that cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a person using *ordinary care* would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event.

Former PJC 2.4. This definition was based on the definition approved by the court in *Rudes v. Gottschalk*, 324 S.W.2d 201, 207 (Tex. 1959), and has been cited in many cases.

When to use. A definition of “proximate cause” should be used in every negligence case in which the cause of action requires that the negligence be a proximate cause of the occurrence. For discussion of the element of “foreseeability,” see *Motsenbocker v. Wyatt*, 369 S.W.2d 319, 323 (Tex. 1963); *Carey v. Pure Distributing Corp.*, 124 S.W.2d 847, 849 (Tex. 1939).

Modify if “ordinary care” not applicable to all. If “ordinary care” is not the standard applicable to all whose conduct is inquired about, the phrase *the degree of care required of him* should replace the phrase *ordinary care* in the second sentence of this definition of “proximate cause.” See *Rudes*, 324 S.W.2d at 206–07.

Substitute PJC 3.1 if evidence of “new and independent cause.” If there is evidence of a “new and independent cause,” the definitions in PJC 3.1 rather than PJC 2.4 should be submitted.

CHAPTER 3	INFERENCEAL REBUTTAL INSTRUCTIONS	
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Note

This chapter contains the inferential rebuttal instructions to submit if raised by the evidence. A number of traditional defensive or rebuttal theories once submitted as special issues are now subsumed under the comparative negligence question and are no longer submitted to the jury. These include “assumption of risk,” *Farley v. MM Cattle Co.*, 529 S.W.2d 751, 758 (Tex. 1975), *abrogated by Parker v. Highland Park, Inc.*, 565 S.W.2d 512, 517 (Tex. 1978); “imminent peril” (Comm. on Pattern Jury Charges, 1 State Bar of Tex., *Texas Pattern Jury Charges* PJC 3.08 (1969)); *Davila v. Sanders*, 557 S.W.2d 770, 771 (Tex. 1977); “last clear chance” or “discovered peril” (PJC 3.06 (1969)); *French v. Grigsby*, 571 S.W.2d 867 (Tex. 1978); and “no duty” and “open and obvious” in premises cases, *Parker*, 565 S.W.2d at 520–21; *Massman-Johnson v. Gundolf*, 484 S.W.2d 555, 556–57 (Tex. 1972). These theories should not be submitted by either question or instruction. The Committee also believes that the traditional doctrine of “rescue” (PJC 3.09 (1969)) is akin to “imminent peril” and is subsumed under comparative negligence. The Texas Supreme Court has also cautioned that “giving multiple instructions on every possible rebuttal inference has the potential to skew the jury’s analysis.” *Dillard v. Texas Electric Cooperative*, 157 S.W.3d 429, 433 (Tex. 2005).



PJC 3.1 New and Independent Cause

“Proximate cause” means a cause, unbroken by any new and independent cause, that was a substantial factor in bringing about an [injury] [occurrence], and without which cause such [injury] [occurrence] would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a person using *ordinary care* would have foreseen that the [injury] [occurrence], or some similar [injury] [occurrence], might reasonably result therefrom. There may be more than one proximate cause of an [injury] [occurrence].

“New and independent cause” means the act or omission of a separate and independent agency, not reasonably foreseeable, that destroys the causal connection, if any, between the act or omission inquired about and the [injury] [occurrence] in question and thereby becomes the immediate cause of such [injury] [occurrence].

COMMENT

When to use—given in lieu of PJC 2.4. PJC 3.1 should be used in lieu of the usual definition of “proximate cause” (see PJC 2.4) if there is evidence that the occurrence was caused by a new and independent cause. See *Tarry Warehouse & Storage Co. v. Duvall*, 115 S.W.2d 401, 405 (Tex. 1938); *Phoenix Refining Co. v. Tips*, 81 S.W.2d 60, 61 (Tex. 1935). Submission if there is no such evidence is improper and may be reversible error. *Galvan v. Fedder*, 678 S.W.2d 596, 598–99 (Tex. App.—Houston [14th Dist.] 1984, no writ); see also *James v. Kloos*, 75 S.W.3d 153, 162–63 (Tex. App.—Fort Worth 2002, no pet.).

Because a new and independent cause is in the nature of an inferential rebuttal, it should be submitted by instruction only. Tex. R. Civ. P. 277. For elements to consider when determining whether a new and independent cause exists, see *Columbia Rio Grande Healthcare, L.P. v. Hawley*, 284 S.W.3d 851, 857–59 (Tex. 2009). The “new and independent cause” instruction is not used when the intervening forces are foreseeable and within the scope of risk created by the actor’s conduct. *Dew v. Crown Derrick Erectors, Inc.*, 208 S.W.3d 448, 450–53 (Tex. 2006).

Modify if “ordinary care” not applicable to all. If “ordinary care” is not the standard applicable to all whose conduct is inquired about (see PJC 2.2 and 2.3), the phrase *the degree of care required of him* should replace the phrase *ordinary care* in the second sentence of this definition of “proximate cause.” See *Rudes v. Gottschalk*, 324 S.W.2d 201, 206–07 (Tex. 1959).

Caveat. The Texas Supreme Court has acknowledged that inferential rebuttals “serve a legitimate purpose.” The court also cautioned, however, that multiple inferential rebuttal instructions have “the potential to skew the jury’s analysis.” *Dillard v. Texas Electric Cooperative*, 157 S.W.3d 429, 433 (Tex. 2005).

PJC 3.2 Sole Proximate Cause

There may be more than one proximate cause of an [*injury*] [*occurrence*], but if an act or omission of any person not a party to the suit was the “sole proximate cause” of an [*injury*] [*occurrence*], then no act or omission of any party could have been a proximate cause.

COMMENT

When to use—given in lieu of last sentence of PJC 2.4. PJC 3.2 should be used in lieu of the last sentence in the definition of “proximate cause” in PJC 2.4 if there is evidence that a person’s conduct that is not submitted to the jury is the sole proximate cause of the occurrence. See *American Jet, Inc. v. Leyendecker*, 683 S.W.2d 121, 126 (Tex. App.—San Antonio 1984, no writ); *Herrera v. Balmorhea Feeders, Inc.*, 539 S.W.2d 84, 86 (Tex. Civ. App.—El Paso 1976, writ ref’d n.r.e.). Submission if there is no such evidence is improper and may be reversible error. See *Huerta v. Hotel Dieu Hospital*, 636 S.W.2d 208, 211 (Tex. App.—El Paso), *rev’d on other grounds*, 639 S.W.2d 462 (Tex. 1982). “Sole proximate cause” is an inferential rebuttal and should be submitted by instruction. *Jackson v. Fontaine’s Clinics*, 499 S.W.2d 87, 90–91 (Tex. 1973).

Definition. In *Dillard v. Texas Electric Cooperative*, 157 S.W.3d 429, 431 (Tex. 2005), the court recognized the following definition of “sole proximate cause”:

There may be more than one proximate cause of an event, but if an act or omission of any person not a party to the suit was the “sole proximate cause” of an occurrence, then no act or omission of any other persons could have been a proximate cause.

Conduct need not be negligence to be sole proximate cause. A person’s conduct need not be negligence to be a sole proximate cause. *Plemmons v. Gary*, 321 S.W.2d 625, 626 (Tex. Civ. App.—Beaumont 1959, orig. proceeding); *Gulf, Colorado & Santa Fe Railway v. Jones*, 221 S.W.2d 1010, 1014 (Tex. Civ. App.—Eastland 1949, writ ref’d n.r.e.); *Fort Worth & Denver City Railway v. Bozeman*, 135 S.W.2d 275, 281 (Tex. Civ. App.—Amarillo 1939, writ dismiss’d judgment corrected).

Caveat. The Texas Supreme Court has acknowledged that inferential rebuttals “serve a legitimate purpose.” The court also cautioned, however, that multiple inferential rebuttal instructions have “the potential to skew the jury’s analysis.” *Dillard*, 157 S.W.3d at 433.

Nonsubscribing employer actions. An employer that does not subscribe to the Texas workers’ compensation insurance program forgoes certain defenses. See Tex. Lab. Code § 406.033. However, a nonsubscribing employer is entitled to the defense

that the actions of its employee were the sole proximate cause of the employee's injury. *Kroger Co. v. Keng*, 23 S.W.3d 347, 352 (Tex. 2000) (citing *Brookshire Bros. v. Wagnon*, 979 S.W.2d 343, 347 (Tex. App.—Tyler 1998, pet. denied) (submitting employee's fault improper unless submission is on sole proximate cause)); *Najera v. Great Atlantic & Pacific Tea Co.*, 207 S.W.2d 365, 367 (Tex. 1948) (in nonsubscriber case, finding against injured worker on sole proximate cause issue would have prevented recovery). The above language for sole proximate cause, however, does not properly apply to a nonsubscriber case when there is evidence that the actions of the employee were the sole proximate cause of the employee's injury. In such cases, the following instruction should be used:

There may be more than one proximate cause of an [injury] [occurrence], but if an act or omission of the employee was the "sole proximate cause" of an [injury] [occurrence], then no act or omission of any party could have been a proximate cause.

See *Hall v. Timmons*, 987 S.W.2d 248, 255 (Tex. App.—Beaumont 1999, no pet.) (nonsubscribing employer may defend on ground that employee was responsible for some act that was sole proximate cause of her injury).

PJC 3.3 Emergency

If a person is confronted by an “emergency” arising suddenly and unexpectedly, which was not proximately caused by any negligence on his part and which, to a reasonable person, requires immediate action without time for deliberation, his conduct in such an emergency is not negligence or failure to use ordinary care if, after such emergency arises, he acts as a person of ordinary prudence would have acted under the same or similar circumstances.

COMMENT

When to use—given immediately after definition of “negligence.” PJC 3.3 should be given immediately after the definition of “negligence” in PJC 2.1 if there is evidence that a person whose conduct is inquired about was confronted by an emergency. “Emergency” is an inferential rebuttal and should be submitted by instruction. *McDonald Transit, Inc. v. Moore*, 565 S.W.2d 43, 44 (Tex. 1978); *Yarborough v. Berner*, 467 S.W.2d 188, 193 (Tex. 1971). *See also generally Thomas v. Oldham*, 895 S.W.2d 352 (Tex. 1995) (evidence insufficient to support submission of “sudden emergency”).

Definition. The above definition of “emergency” was recognized by the Texas Supreme Court in *Dillard v. Texas Electric Cooperative*, 157 S.W.3d 429, 432 (Tex. 2005).

Caveat. The Texas Supreme Court has acknowledged that inferential rebuttals “serve a legitimate purpose.” The court also cautioned, however, that multiple inferential rebuttal instructions have “the potential to skew the jury’s analysis.” *Dillard*, 157 S.W.3d at 433.

PJC 3.4 Unavoidable Accident

An occurrence may be an “unavoidable accident,” that is, an event not proximately caused by the negligence of any party to the occurrence.

COMMENT

When to use—given immediately after definition of “proximate cause.” PJC 3.4 should be given immediately after the definition of “proximate cause” in PJC 2.4 if there is evidence that the occurrence was caused by unforeseeable nonhuman conditions. “Unavoidable accident” is an inferential rebuttal and should be submitted by instruction. *Yarborough v. Berner*, 467 S.W.2d 188, 192 (Tex. 1971).

Definition. The above definition of “unavoidable accident” was recognized by the Texas Supreme Court in *Dillard v. Texas Electric Cooperative*, 157 S.W.3d 429, 432 (Tex. 2005). See also *Dallas Railway & Terminal v. Bailey*, 250 S.W.2d 379, 385 (Tex. 1952) (approving definition); *Yarborough*, 467 S.W.2d at 191 (darting out by child too young to be negligent was in nature of “physical condition or circumstance” constituting unavoidable accident).

Caveat. The Texas Supreme Court has acknowledged that inferential rebuttals “serve a legitimate purpose.” The court also cautioned, however, that multiple inferential rebuttal instructions have “the potential to skew the jury’s analysis.” *Dillard*, 157 S.W.3d at 433.

PJC 3.5 Act of God

If an occurrence is caused solely by an “act of God,” it is not caused by the negligence of any person. An occurrence is caused by an act of God if it is caused directly and exclusively by the violence of nature, without human intervention or cause, and could not have been prevented by reasonable foresight or care.

COMMENT

When to use—given immediately after definition of “proximate cause.” PJC 3.5 should be given immediately after the definition of “proximate cause” in PJC 2.4 if there is evidence that the occurrence was caused by an act of God. “Act of God” is a variation of “unavoidable accident.” It requires, in addition, that the occurrence be caused directly and exclusively by the violence of nature. It should be given in lieu of (and not in addition to) PJC 3.4 when it refers to the same condition. “Act of God” is an inferential rebuttal and should be submitted by instruction. *Scott v. Atchison, Topeka & Santa Fe Railway*, 572 S.W.2d 273, 279 (Tex. 1978).

Definition. PJC 3.5 is based on the definition given by the trial court and approved in *Scott*, 572 S.W.2d at 280. *See also Dillard v. Texas Electric Cooperative*, 157 S.W.3d 429, 433 (Tex. 2005).

Caveat. The Texas Supreme Court has acknowledged that inferential rebuttals “serve a legitimate purpose.” The court also cautioned, however, that multiple inferential rebuttal instructions have “the potential to skew the jury’s analysis.” *Dillard*, 157 S.W.3d at 433.



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PJC 4.1 Broad Form—Joint Submission of Negligence and Proximate Cause

QUESTION _____

Did the negligence, if any, of those named below proximately cause the [injury] [occurrence] in question?

Answer “Yes” or “No” for each of the following:

1. *Don Davis* _____
2. *Paul Payne* _____
3. *Sam Settlor* _____
4. *Responsible Ray* _____
5. *Connie Contributor* _____

COMMENT

When to use. PJC 4.1 is a broad-form question that should be appropriate in most negligence cases.

Broad form to be used when feasible. Rule 277 of the Texas Rules of Civil Procedure provides that “the court shall, whenever feasible, submit the cause upon broad-form questions.” Tex. R. Civ. P. 277. In *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990), the supreme court interpreted the phrase “whenever feasible” as mandating broad-form submission “in any or every instance in which it is capable of being accomplished.” The court has described the reasons for broad-form questions as follows: “Broad-form questions reduce conflicting jury answers, thus reducing appeals and avoiding retrials. Rule 277 expedites trials by simplifying the charge conference and making questions easier for the jury to comprehend and answer.” *E.B.*, 802 S.W.2d at 649; *see also Lemos v. Montez*, 680 S.W.2d 798, 801 (Tex. 1984). The court further stated, “The rule unequivocally requires broad-form submission whenever feasible. Unless extraordinary circumstances exist, a court must submit such broad-form questions.” *E.B.*, 802 S.W.2d at 649.

When broad-form questions not feasible. Broad-form questions must be used unless extraordinary circumstances exist making such questions not feasible. The term “extraordinary circumstances” would seem to contemplate only a situation in which the policies underlying broad-form questions would not be served. *See E.B.*, 802 S.W.2d at 649; *Lemos*, 680 S.W.2d at 801. More recent cases on proportionate responsibility, damages, and liability, however, indicate that broad-form submission may not be feasible in a variety of circumstances depending on the law, the theories, and the

evidence in a given case. See *Romero v. KPH Consolidation, Inc.*, 166 S.W.3d 212 (Tex. 2005) (single broad-form proportionate responsibility question may not be feasible if one theory is legally invalid or not supported by sufficient evidence); *Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2002) (broad-form submission of multiple elements of damage may cause harmful error if one or more of the elements is not supported by sufficient evidence); *Crown Life Insurance Co. v. Casteel*, 22 S.W.3d 378 (Tex. 2000) (broad-form submission combining valid and invalid theories of liability was cause of harmful error). As a result, although some modifications to the pattern jury charges have been made where a lack of feasibility appears to be the rule rather than the exception, the court and parties should evaluate all submissions to determine whether broad-form submission is feasible. When broad-form submission is feasible a harmless error analysis typically applies. See *Thota v. Young*, 366 S.W.3d 678, 693 (Tex. 2012) (applying harmless error analysis to broad-form question with separate answer blanks for plaintiff and defendant offered in single-theory-of-liability case).

Accompanying definitions and instructions. The broad-form questions required by rule 277 contemplate the use of appropriate accompanying instructions “as shall be proper to enable the jury to render a verdict.” In *E.B.*, 802 S.W.2d at 648, for example, the broad-form question was accompanied by instructions tracking the statutory grounds for the relief sought. See also chapter 2 in this volume, “Basic Definitions in Negligence Actions.”

Plaintiff’s negligence. If the plaintiff’s negligence is not in issue, the plaintiff’s name (*Paul Payne*) should not be included in the above question. In a case in which the plaintiff’s negligence is in issue, or in any case including more than one defendant, a proportionate responsibility question should follow PJC 4.1. Tex. Civ. Prac. & Rem. Code §§ 33.001–.017. See PJC 4.3 and 4.4.

Use of “injury” or “occurrence.” “Injury” should ordinarily be used in this question, as well as in PJC 4.3, particularly if there is evidence of the plaintiff’s preoccurrence negligence that is “injury causing” but not “occurrence causing,” such as the failure to wear a seat belt. *Nabors Well Services, Ltd. v. Romero*, 456 S.W.3d 553, 563–64 (Tex. 2015); see also Tex. Civ. Prac. & Rem. Code § 33.011(4) (defining “percentage of responsibility” in terms of “causing or contributing to cause in any way . . . the personal *injury*, property damage, death, or other harm for which recovery of damages is sought”) (emphasis added).

However, a plaintiff’s preoccurrence, injury-causing conduct is distinct from the plaintiff’s postoccurrence failure to mitigate damages, which is submitted as an exclusionary instruction to the damages questions. See PJC 28.10. See *Nabors*, 456 S.W.3d at 564.

In cases with no allegations of injury-causing negligence by a plaintiff, or in cases of injuries to multiple plaintiffs arising out of a single occurrence, it may be appropri-

ate to use “occurrence” in this question and in PJC 4.3. However, the concerns expressed in *Nabors* should be considered carefully.

In a case involving a death, the word “death” may be used instead of “injury.”

Failure to mitigate. If “injury” is used and there is a claim that the plaintiff failed to mitigate damages after the occurrence, the following additional instruction should be included:

In answering this question, do not consider *Paul Payne’s* failure, if any, to exercise ordinary care in caring for or treating *his* injury, if any.

When not to submit exclusionary instruction. If PJC 4.1 is submitted with the term *injury*, the exclusionary instruction in PJC 28.8 or 28.9 should not be submitted.

Settling person. If the case includes a settling person (*Sam Settlor*), that person’s responsibility should be determined by the trier of fact. Tex. Civ. Prac. & Rem. Code §§ 33.003, 33.011. Thus, the settling person’s name must be included in the basic liability question as well as in the proportionate responsibility question. See PJC 4.3. Section 33.003(b) provides that a question regarding conduct by any person may not be submitted to the jury without evidence to support the submission. Tex. Civ. Prac. & Rem. Code § 33.003(b).

Responsible third parties—causes of action accruing on or after September 1, 1995, and causes of action accruing before September 1, 1995, on which suit is filed on or after September 1, 1996, and before July 1, 2003. A “responsible third party” (Responsible Ray) should be included in the basic liability question only if joined under former Tex. Civ. Prac. & Rem. Code § 33.004 (Acts 1995, 74th Leg., R.S., ch. 136, § 1 (S.B. 28), eff. Sept. 1, 1995). A “responsible third party” is defined in former Tex. Civ. Prac. & Rem. Code § 33.011(6) (Acts 1995, 74th Leg., R.S., ch. 136, § 1 (S.B. 28), eff. Sept. 1, 1995). If submitted in the basic liability question, a responsible third party should also be submitted in the proportionate responsibility question. Former Tex. Civ. Prac. & Rem. Code § 33.003 (Acts 1995, 74th Leg., R.S., ch. 136, § 1 (S.B. 28), eff. Sept. 1, 1995). See PJC 4.3.

Responsible third parties—actions filed on or after July 1, 2003. In 2003 the legislature changed responsible third party practice from one of joinder to one of designation. Tex. Civ. Prac. & Rem. Code § 33.004. At least one Texas court has held that it is “only upon the trial court’s granting of a motion for leave to designate a person as a responsible third party that the designation becomes effective.” *Valverde v. Biela’s Glass & Aluminum Products, Inc.*, 293 S.W.3d 751, 754–55 (Tex. App.—San Antonio 2009, pet. denied); see also *Ruiz v. Guerra*, 293 S.W.3d 706, 714–15 (Tex. App.—San Antonio 2009, no pet.). The legislature also expanded the category of responsible third parties. Tex. Civ. Prac. & Rem. Code §§ 33.004, 33.011(6). “‘Responsible third party’ means any person who is alleged to have caused or contributed to causing in any way

the harm for which recovery of damages is sought, whether by negligent act or omission, by any defective or unreasonably dangerous product, by other conduct or activity that violates an applicable legal standard, or by any combination of these.” Tex. Civ. Prac. & Rem. Code § 33.011(6). Section 33.003(b) provides that a question regarding conduct by any person may not be submitted to the jury without evidence to support the submission. Tex. Civ. Prac. & Rem. Code § 33.003(b).

Contribution defendant. If there is a contribution defendant (*Connie Contributor*), that person’s name should be included in the basic liability question. See Tex. Civ. Prac. & Rem. Code §§ 33.003, 33.011. “Contribution defendant” is defined in Tex. Civ. Prac. & Rem. Code § 33.016. However, a pure contribution defendant—that is, one not otherwise joined or designated a responsible third party under the applicable version of Tex. Civ. Prac. & Rem. Code § 33.004—must not be included in the main proportionate responsibility question (PJC 4.3), but instead requires a separate question comparing the contribution defendant’s percentage of responsibility with the responsibility of the defendant. See PJC 4.4.

Employer immunity under Workers’ Compensation Act—actions filed before July 1, 2003. Because of the immunity from common-law claims for actual damages of the employer of an injured employee under the Workers’ Compensation Act, Tex. Lab. Code § 408.001, the conduct of an employer should not be submitted in the questions pertaining to negligence (PJC 4.1) and loss allocation (PJC 4.3). *Varela v. American Petrofina Co. of Texas*, 658 S.W.2d 561 (Tex. 1983); *Teakell v. Perma Stone Co.*, 658 S.W.2d 563 (Tex. 1983); see also *Magro v. Ragsdale Bros.*, 721 S.W.2d 832 (Tex. 1986) (coemployee liability).

Employer immunity under Workers’ Compensation Act—actions filed on or after July 1, 2003. Changes in the law of proportionate responsibility affecting cases filed on or after July 1, 2003, may require that the negligence of an employer, even one covered by worker’s compensation insurance, be submitted to the jury for its consideration. See Tex. Civ. Prac. & Rem. Code § 33.011.

Exceptions to the limitations on joint and several liability. The limitations on joint and several liability set forth in chapter 33 of the Civil Practice and Remedies Code do not apply in certain instances:

Actions filed before July 1, 2003. See former Tex. Civ. Prac. & Rem. Code §§ 33.002, 33.013(c)(1), (2) (Acts 1995, 74th Leg., R.S., ch. 136, § 1 (S.B. 28), eff. Sept. 1, 1995).

Actions filed on or after July 1, 2003. See Tex. Civ. Prac. & Rem. Code § 33.013. See also chapter 72 in the current edition of State Bar of Texas, *Texas Pattern Jury Charges—Malpractice, Premises & Products*.

PJC 4.2 Standards for Recovery of Exemplary Damages**PJC 4.2A Gross Negligence—Causes of Action Accruing before
September 1, 1995**

If, in answer to Question _____ [4.1 or other applicable liability question], you found that the negligence of *Don Davis* proximately caused the [injury] [occurrence], then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Was such negligence of *Don Davis* “gross negligence”?

“Gross negligence” means more than momentary thoughtlessness, inadvertence, or error of judgment. It means such an entire want of care as to establish that the act or omission in question was the result of actual conscious indifference to the rights, welfare, or safety of the persons affected by it.

Answer “Yes” or “No.”

Answer: _____

**PJC 4.2B Malice—Causes of Action Accruing on or after
September 1, 1995, and Filed before September 1, 2003**

If you answered “Yes” to Question _____ [4.1 or other applicable liability question], and you inserted a sum of money in answer to Question _____ [28.3 or other applicable damages question], then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Do you find by clear and convincing evidence that the harm to *Paul Payne* resulted from malice?

“Clear and convincing evidence” means the measure or degree of proof that produces a firm belief or conviction of the truth of the allegations sought to be established.

“Malice” means—

1. a specific intent by *Don Davis* to cause substantial injury to *Paul Payne*; or

2. an act or omission by *Don Davis*,
 - a. which when viewed objectively from the standpoint of *Don Davis* 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 *Don Davis* has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.

Answer “Yes” or “No.”

Answer: _____

**PJC 4.2C Gross Negligence—Actions Filed on or after
September 1, 2003**

Answer the following question regarding *Don Davis* only if you unanimously answered “Yes” to Question _____ [4.1 or other applicable liability question] regarding *Don Davis*. Otherwise, do not answer the following question regarding *Don Davis*.

To answer “Yes” to [any part of] the following question, your answer must be unanimous. You may answer “No” to [any part of] the following question only upon a vote of ten or more jurors. Otherwise, you must not answer [that part of] the following question.

QUESTION _____

Do you find by clear and convincing evidence that the harm to *Paul Payne* resulted from gross negligence?

“Clear and convincing evidence” means the measure or degree of proof that produces a firm belief or conviction of the truth of the allegations sought to be established.

“Gross negligence” means an act or omission by *Don Davis*,

1. which when viewed objectively from the standpoint of *Don Davis* at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and
2. of which *Don Davis* has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.

Answer “Yes” or “No.”

Answer: _____

COMMENT

When to use. PJC 4.2A should be used if exemplary damages for gross negligence are sought in a cause of action accruing before September 1, 1995. For causes of action accruing on or after September 1, 1995, and filed before September 1, 2003, PJC 4.2B should be used. For actions filed on or after September 1, 2003, PJC 4.2C should be used. See the comments below for the sources of these definitions and instructions. Also, if only one defendant is a party to the action, it may be unnecessary to include *any part of* in the conditioning instruction.

Exceptions to the limitation on exemplary damages. See Tex. Civ. Prac. & Rem. Code § 41.008(c); Acts 1995, 74th Leg., R.S., ch. 19, § 1 (S.B. 25), eff. Sept. 1, 1995. Note that the 2003 amendments to the statute added an exception to one of the exceptions in subsection (7).

[The following paragraphs apply only to PJC 4.2A.]

Use of “injury” or “occurrence.” See PJC 4.1 Comment. The term used in PJC 4.2A should match that used in PJC 4.1.

Source of definition. The definition in PJC 4.2A is from Acts 1987, 70th Leg., 1st C.S., ch. 2, § 2.12 (S.B. 5), eff. Sept. 2, 1987, *amended by* Acts 1995, 74th Leg., R.S., ch. 19, § 1 (S.B. 25), eff. Sept. 1, 1995. In *Transportation Insurance Co. v. Moriel*, 879 S.W.2d 10, 21 (Tex. 1994), the court stated:

The entire definition of “gross negligence” is “such an entire want of care as to establish that the *act or omission* was the result of actual conscious indifference to the rights, safety, or welfare of the person affected.” Tex. Civ. Prac. & Rem. Code Ann. § 41.001(5) (Vernon Supp. 1994) (emphasis added).

The court also stated:

[T]he definition of gross negligence includes two elements: (1) viewed objectively from the standpoint of the actor, the act or omission must involve an extreme degree of risk, considering the probability and magnitude of the potential harm to others, and (2) the actor must have actual, subjective awareness of the risk involved, but nevertheless proceed in conscious indifference to the rights, safety, or welfare of others.

Moriel, 879 S.W.2d at 23. The opinion is silent on whether these two elements are to be submitted.

[The following paragraphs apply only to PJC 4.2B.]

Wrongful death actions. In wrongful death actions arising on or after September 1, 1995, brought by or on behalf of a surviving spouse or heirs of the decedent's body, under a statute enacted under article XVI, section 26, of the Texas Constitution, "gross neglect" remains the standard of recovery. The definition of "gross neglect" is the same as alternative 2 in the definition of malice in PJC 4.2B above. Former Tex. Civ. Prac. & Rem. Code § 41.003(a)(3) (Acts 1987, 70th Leg., 1st C.S., ch. 2, § 2.12 (S.B. 5), eff. Sept. 2, 1987, amended by Acts 1995, 74th Leg., R.S., ch. 19, § 1 (S.B. 25), eff. Sept. 1, 1995).

Source of question and instructions. Acts 1995, 74th Leg., R.S., ch. 19, § 1 (S.B. 25), eff. Sept. 1, 1995; Acts 1995, 74th Leg., R.S., ch. 260, § 9 (S.B. 1), eff. May 30, 1995; Acts 1997, 75th Leg., R.S., ch. 165, § 4.01 (S.B. 898), eff. Sept. 1, 1997.

[The following paragraphs apply only to PJC 4.2C.]

Malice as a ground for exemplary damages. Malice is also a ground for recovery of exemplary damages. Tex. Civ. Prac. & Rem. Code § 41.003(a)(2). As a predicate for recovery of exemplary damages, the following instruction should be given:

"Malice" means a specific intent by *Don Davis* to cause substantial injury or harm to *Paul Payne*.

See Tex. Civ. Prac. & Rem. Code § 41.001(7).

Source of question and instructions. PJC 4.2C is for use in all cases filed on or after September 1, 2003. Tex. Civ. Prac. & Rem. Code §§ 41.001(7), (11), 41.003(a), (d), 41.004(a); Tex. R. Civ. P. 226a. Please note that in a case with only one defendant, the *any part of* language may be unnecessary.

PJC 4.3 Proportionate Responsibility

If you answered “Yes” to Question[s] _____ [*applicable liability question(s)*] for more than one of those named below, then answer the following question. Otherwise, do not answer the following question.

Assign percentages of responsibility only to those you found caused or contributed to cause the [*injury*] [*occurrence*]. The percentages you find must total 100 percent. The percentages must be expressed in whole numbers. The percentage of responsibility attributable to any one is not necessarily measured by the number of acts or omissions found. The percentage attributable to any one need not be the same percentage attributed to that one in answering another question.

QUESTION _____

For each person you found caused or contributed to cause the [*injury*] [*occurrence*], find the percentage of responsibility attributable to each:

- | | | |
|---------------------------|-------|-------|
| 1. <i>Don Davis</i> | _____ | % |
| 2. <i>Paul Payne</i> | _____ | % |
| 3. <i>Sam Settlor</i> | _____ | % |
| 4. <i>Responsible Ray</i> | _____ | % |
| Total | _____ | 100 % |

COMMENT

When to use. Rule 277 requires a percentage question “in any cause in which the jury is required to apportion the loss among the parties.” Tex. R. Civ. P. 277. Thus, PJC 4.3 should be used if the issue of the responsibility of more than one person is submitted to the jury under Tex. Civ. Prac. & Rem. Code §§ 33.001–.017.

Conditioned on responsibility of more than one person. PJC 4.3 is conditioned on findings that the acts or omissions of more than one person proximately caused the occurrence, because otherwise no comparison is possible.

Blanks for question numbers. The question number to be inserted in the blank space in the conditioning instruction should coincide with that of the underlying liability question.

Use of “injury” or “occurrence” in PJC 4.1. The term used in the question at PJC 4.1 (see PJC 4.1 Comment) should also be used in PJC 4.3.

Failure to mitigate. If “injury” is used and there is a claim that the plaintiff failed to mitigate damages after the occurrence, the following additional instruction should be included:

Do not include any amount in the percentage attributable to *Paul Payne* for any further injury resulting from the failure, if any, of *Paul Payne* to exercise reasonable care in caring for or treating *his* injury, if any.

Use of “responsibility” or “negligence.” Chapter 33 of the Civil Practice and Remedies Code applies not only to negligence but also to any cause of action based on tort or any action brought under the DTPA. Tex. Civ. Prac. & Rem. Code § 33.002(a)(1), (2). For this reason, and because section 33.011 expressly calls for the comparison of “responsibility,” that is the term the Committee suggests. Tex. Civ. Prac. & Rem. Code § 33.011(4). However, when negligence is the only theory by which any of the submitted persons could be found liable, an alternative submission might be as follows:

For each person you found caused or contributed to cause the [*injury*] [*occurrence*], find the percentage of negligence attributable to each:

- | | | |
|----|-----------------|-------------------|
| 1. | Don Davis | _____ % |
| 2. | Paul Payne | _____ % |
| 3. | Sam Settlor | _____ % |
| 4. | Responsible Ray | _____ % |
| | Total | _____ 100 _____ % |

Settling person. Upon showing of sufficient evidence to support the submission, the responsibility of a settling person shall be compared to the responsibility of the plaintiff and of the defendant. Tex. Civ. Prac. & Rem. Code § 33.003. If there is no settling person (*Sam Settlor*), then no such submission is required.

Responsible third parties—causes of action accruing on or after September 1, 1995, and causes of action accruing before September 1, 1995, on which suit is filed on or after September 1, 1996, and before July 1, 2003. A “responsible third party” (Responsible Ray) should be included in the basic liability question only if joined under former Tex. Civ. Prac. & Rem. Code § 33.004 (Acts 1995, 74th Leg., R.S., ch. 136, § 1 (S.B. 28), eff. Sept. 1, 1995). A “responsible third party” is defined in former Tex. Civ. Prac. & Rem. Code § 33.011(6) (Acts 1995, 74th Leg., R.S., ch. 136, § 1 (S.B. 28), eff. Sept. 1, 1995). If submitted in the basic liability question, a responsible third party should also be submitted in the proportionate responsibility question. Former Tex. Civ. Prac. & Rem. Code § 33.003 (Acts 1995, 74th Leg., R.S., ch. 136, § 1 (S.B. 28), eff. Sept. 1, 1995).

Responsible third parties—actions filed on or after July 1, 2003. In 2003 the legislature changed responsible third party practice from one of joinder to one of designation. Tex. Civ. Prac. & Rem. Code § 33.004. The legislature also expanded the category of responsible third parties. Tex. Civ. Prac. & Rem. Code § 33.004, 33.011(6). “‘Responsible third party’ means any person who is alleged to have caused or contributed to causing in any way the harm for which recovery of damages is sought, whether by negligent act or omission, by any defective or unreasonably dangerous product, by other conduct or activity that violates an applicable legal standard, or by any combination of these.” Tex. Civ. Prac. & Rem. Code § 33.011(6). Section 33.003(b) provides that a question regarding conduct by any person may not be submitted to the jury without evidence to support the submission. Tex. Civ. Prac. & Rem. Code § 33.003(b).

Entrustor. See PJC 10.12 comment, “Caveat when both entrustor and trustee are joined.”

Employer immunity under Workers’ Compensation Act—actions filed before July 1, 2003. Because of the immunity from common-law claims for actual damages of the employer of an injured employee under the Workers’ Compensation Act, Tex. Lab. Code § 408.001, the conduct of an employer should not be submitted in the questions pertaining to negligence (PJC 4.1) and proportionate responsibility (PJC 4.3). *Varela v. American Petrofina Co. of Texas*, 658 S.W.2d 561 (Tex. 1983); *Teakell v. Perma Stone Co.*, 658 S.W.2d 563 (Tex. 1983); see also *Magro v. Ragsdale Bros.*, 721 S.W.2d 832 (Tex. 1986) (coemployee liability).

Employer immunity under Workers’ Compensation Act—actions filed on or after July 1, 2003. Changes in the law of proportionate responsibility affecting cases filed on or after July 1, 2003, may require that the responsibility of an employer, even one covered by worker’s compensation insurance, be submitted to the jury for its consideration. See Tex. Civ. Prac. & Rem. Code § 33.011.

Second comparative question for contribution defendant. If the case includes a contribution defendant (see PJC 4.1 comment, “Contribution defendant”), a second comparative question is necessary. Tex. Civ. Prac. & Rem. Code § 33.016(c). See PJC 4.4. In such a case the following sentence should be added at the end of the instructional paragraph beginning “Assign percentages . . .”:

If you answered “Yes” as to *Connie Contributor* in Question[s] _____ [applicable liability question(s)], you will be asked to attribute the percentage of responsibility as to *Connie Contributor* in Question _____ [proportionate responsibility question].

PJC 4.4 Proportionate Responsibility If Contribution Defendant Is Joined

If you answered “Yes” to Question[s] _____ [*applicable liability question(s)*] for more than one of those named below, then answer the following question. Otherwise, do not answer the following question.

Assign percentages of responsibility only to those you found caused or contributed to cause the [*injury*] [*occurrence*]. The percentages you find must total 100 percent. The percentages must be expressed in whole numbers. The percentage of responsibility attributable to any one is not necessarily measured by the number of acts or omissions found. The percentage attributable to any one need not be the same percentage attributed to that one in answering another question.

QUESTION _____

With respect to causing or contributing to cause in any way the [*injury*] [*occurrence*] to *Paul Payne*, find the percentage of responsibility, if any, attributable as between or among—

1. <i>Don Davis</i>	_____	%
2. <i>Connie Contributor</i>	_____	%
Total	_____	100 %

COMMENT

When to use. PJC 4.4 is an additional comparative question designed to follow the comparative question in PJC 4.3. It submits the proportionate responsibility between the defendant and a contribution defendant under Tex. Civ. Prac. & Rem. Code § 33.016. Section 33.016 specifically requires this second comparative question. This question should not inquire about the responsibility of the claimant.

If there is more than one defendant. If the question inquires about the responsibility of more than one defendant, separate percentage answers should not be sought for each defendant in PJC 4.4; rather, the names of all defendants should be grouped on one answer line.

The ratio of responsibility between or among the defendants is fixed by the answer to PJC 4.3, in which a separate answer is obtained for each defendant; seeking a second set of separate answers in PJC 4.4 might result in jury confusion or conflicting answers. The contribution responsibility of each defendant is determined by allocating

the percentage attributed to all defendants in answer to PJC 4.4 in proportion to the relative percentages found for each defendant in answer to PJC 4.3.

If there is more than one contribution defendant. If the question inquires about the responsibility of more than one contribution defendant, a separate percentage answer should be sought for each such contribution defendant.

Blanks for question numbers. The question number to be inserted in the blank space in the conditioning instruction should coincide with that of the underlying liability question.

Use of “injury” or “occurrence” in PJC 4.1. The term used in the question at PJC 4.1 (see PJC 4.1 Comment) should also be used in PJC 4.4.



CHAPTER 5	NEGLIGENCE PER SE	
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PJC 5.1 Negligence Per Se and Common-Law Negligence

The law forbids driving the wrong way on a street designated and signposted as one-way. A failure to comply with this law is negligence in itself.

QUESTION _____

Did the negligence, if any, of those named below proximately cause the occurrence in question?

Answer “Yes” or “No” for each of the following:

- 1. *Don Davis* _____
- 2. *Paul Payne* _____

COMMENT

When to use. PJC 5.1 should be given if there are claims of both common-law negligence and negligence per se. It includes both an instruction, which should be placed immediately after the definition of “negligence,” and a broad-form question jointly submitting negligence and proximate cause.

What constitutes negligence per se. The unexcused violation of a legislative enactment or administrative regulation adopted by the court as defining the standard of conduct of a reasonable person is negligence in itself. *Perry v. S.N.*, 973 S.W.2d 301, 304 n.4 (Tex. 1998); *Southern Pacific Co. v. Castro*, 493 S.W.2d 491, 497 (Tex. 1973) (citing *Restatement (Second) of Torts* § 288B (1965)). The unexcused violation of a statute or ordinance constitutes negligence as a matter of law if such statute or ordinance was designed to prevent injuries to a class of persons to which the injured party belongs. *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 549 (Tex. 1985).

Two types of negligence per se standards. A few negligence per se standards found in statutes or regulations have been held simply to restate the standard of “ordinary care” and not to alter the duty that already exists at common law. *See, e.g., Louisiana-Pacific Corp. v. Knighten*, 976 S.W.2d 674, 675 (Tex. 1998) (article 6701d, § 61(a), now Tex. Transp. Code § 545.062(a) (maintaining an assured clear distance and stopping without colliding)); *Franco v. Burtex Constructors, Inc.*, 586 S.W.2d 590, 593 (Tex. Civ. App.—Corpus Christi 1979, writ ref’d n.r.e.) (article 6701d, §§ 67, 68(a), now Tex. Transp. Code § 545.402 (starting stopped vehicle), § 545.103 (turning vehicle)); *Booker v. Baker*, 306 S.W.2d 767, 774 (Tex. Civ. App.—Dallas 1957, writ ref’d n.r.e.) (article 6701d, §§ 68(a), 72, now Tex. Transp. Code §§ 545.103, 545.152 (turning left at intersection)). When a statute, such as these, adds nothing to the “ordinary care” standard, there is no reason to submit a question on the statutory standard or

to instruct the jury regarding it because to do so would be redundant. *See Louisiana-Pacific Corp.*, 976 S.W.2d at 675; *Williams v. Price*, 308 S.W.2d 185, 188 (Tex. Civ. App.—Fort Worth 1957, writ ref'd n.r.e.). In such cases, the negligence per se standard is subsumed under the broad-form negligence question (PJC 4.1). On the other hand, when a statute creates a standard different from “ordinary care,” it should be brought to the jury’s attention, as provided in PJC 5.1 or, in special situations, as provided in PJC 5.2 and 5.3.

Usual case involves both common-law negligence and negligence per se. Frequently a case involving a negligence per se claim also includes a claim of common-law negligence. In the example in PJC 5.1, one party claims that the other party drove the wrong way on a one-way street, in violation of Tex. Transp. Code § 545.059 (negligence per se). Each party also claims the other failed to use “ordinary care” (common-law negligence). In such cases, the Committee recommends the use of an instruction immediately after the definition of “negligence,” informing the jury that the statutory conduct is negligence in itself, along with a broad-form question jointly submitting negligence and proximate cause (see PJC 4.1).

Alternative instructions. The instruction accompanying the definition of “negligence” might be worded a variety of ways. Acceptable formulations for its first sentence include—

The violation of a traffic law is negligence in itself, and you are instructed that the law *forbids driving the wrong way on a street designated and signposted as one-way.*

or—

It is also negligence to *drive the wrong way on a street designated and signposted as one-way.*

If uncertain whether violation is negligence per se. It may not be advisable to use a broad-form submission if there is genuine uncertainty whether the violation constitutes negligence per se. Use of a broad-form question may require a new trial if the charge incorrectly makes no mention of a statute or regulation, the violation of which the appellate court finds amounts to negligence per se. Conversely, if the charge instructs on negligence per se but the appellate court finds (for example) that the party relying on the statute was not within the class intended to be protected, a new trial might also be required.

In this situation it would be better to submit *both* a separate question asking if the statutory conduct was committed *and* a broad-form question (as in PJC 4.1) accompanied by an instruction that excludes consideration of the statutory conduct (e.g., “In your determination of this question, you shall not consider whether *Don Davis drove the wrong way on a street designated and signposted as one-way.*”). This solution, however, should be used only when there is genuine and substantial doubt about the

intent of a statute or regulation. A party should not be able to force the use of a separate question, rather than a broad-form submission, simply by raising a weak claim that the violation might be interpreted as either ordinary or per se negligence.

Rephrase if no claim of plaintiff's negligence. If there is no claim that the plaintiff was negligent, the question should be—

Did the negligence, if any, of *Don Davis* proximately cause the occurrence in question?

Claims of both common-law negligence and violation of driving while intoxicated statute. It is a penal offense to drive or operate a motor vehicle in a public place while intoxicated. Tex. Penal Code § 49.04. The definition of “intoxication” includes—

(A) not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, a dangerous drug, a combination of two or more of those substances, or any other substance into the body; *or*

(B) having an alcohol concentration of 0.08 or more.

Tex. Penal Code § 49.01 (emphasis added).

In criminal matters, the statutory definition “effectively abolished the former presumption of intoxication based on an alcohol concentration of 0.10% or more in a defendant’s body. Intoxication . . . now *means* the presence of 0.10% or more alcohol concentration in a defendant’s body.” *Forte v. State*, 707 S.W.2d 89, 94 (Tex. Crim. App. 1986), *overruled in part on other grounds by McCambridge v. State*, 778 S.W.2d 70 (Tex. Crim. App. 1989). Note that the definition of “intoxication” has since been changed from 0.10% to 0.08%. Tex. Penal Code § 49.01.

In civil matters, the statutory limitation on use of the presumption of intoxication has been repealed; thus the 1986 supreme court holding that presumption of intoxication could not be rendered into negligence per se because of this limitation is no longer good authority. *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 631 (Tex. 1986); Acts 1995, 74th Leg., R.S., ch. 165, § 24 (S.B. 971), eff. Sept. 1, 1995.

One court has said that “there is probably no acceptable excuse for driving while intoxicated” and that, in a “proper case,” the trial court could find negligence as a matter of law and so instruct the jury. *Castro v. Hernandez-Davila*, 694 S.W.2d 575, 578 (Tex. App.—Corpus Christi 1985, no writ). However, it has long been the rule that evidence of intoxication alone does not establish negligence but is merely an evidentiary fact to be considered in determining whether a person is guilty or not of performing some act or failing to perform some act that an ordinarily prudent person would have performed. *Benoit v. Wilson*, 239 S.W.2d 792, 798 (Tex. 1951).

If driving while intoxicated is negligence per se, the following instruction could be used in lieu of that in PJC 5.1:

The law forbids driving a motor vehicle in a public place while intoxicated. The presence of an alcohol concentration in the blood of 0.08 or more is intoxication. Failure to comply with this law is negligence in itself.

If driving while intoxicated is not negligence per se, intoxication may be considered by the jury as evidence of negligence under the broad-form question in PJC 4.1.

**PJC 5.2 Negligence Per Se and Common-Law Negligence—
Excuse**

The law forbids driving the wrong way on a street designated and signposted as one-way. A failure to comply with this law is negligence in itself, unless excused. A failure to comply is excused if *the driver was incapacitated by a heart attack immediately before the accident.*

QUESTION _____

Did the negligence, if any, of those named below proximately cause the occurrence in question?

Answer “Yes” or “No” for each of the following:

1. *Don Davis* _____
2. *Paul Payne* _____

COMMENT

When to use. PJC 5.2 should be given if there is evidence of a permissible excuse for violating a negligence per se standard in a case involving claims of both common-law negligence and negligence per se. Like PJC 5.1, PJC 5.2 includes both an instruction—to be given immediately after the definition of “negligence”—and a broad-form question jointly submitting negligence and proximate cause.

Recognized excuses. In *Impson v. Structural Metals, Inc.*, 487 S.W.2d 694, 696 (Tex. 1972), the court adopted the formulation of the *Restatement (Second) of Torts* § 288A (1965) concerning negligence per se and excuse:

- (a) the violation is reasonable because of the actor’s incapacity;
- (b) the actor neither knows nor should know of the occasion for compliance;
- (c) the actor is unable after reasonable diligence or care to comply;
- (d) the actor is confronted by an emergency not due to his own misconduct;
- (e) compliance would involve a greater risk of harm to the actor or others.

Impson, 487 S.W.2d at 696.

The above example—driver incapacitated by heart attack—would fall under the first category. This excuse should, of course, be replaced with the one applicable to the particular case.

Use of instruction for excuse proper. The use of an instruction following the definition of “negligence,” informing the jury about negligence per se and excuse issues, is consistent with *Southern Pacific Co. v. Castro*, 493 S.W.2d 491, 498 (Tex. 1973) (if there is evidence of permissible excuse, court may give, along with common-law negligence question, instruction about nature of statutory standard and excuse).

PJC 5.3 Negligence Per Se—Simple Standard—Broad Form

“Negligence” means *driving on a street in a direction other than the direction designated and signposted as one-way.*

QUESTION _____

Did the negligence, if any, of *Don Davis* proximately cause the occurrence in question?

Answer “Yes” or “No.”

Answer: _____

COMMENT

When to use. The unexcused violation of a legislative enactment designed to prevent injury to the class of persons to which the injured party belongs constitutes negligence per se, also known as negligence as a matter of law. *See Murray v. O&A Express, Inc.*, 630 S.W.2d 633, 636 (Tex. 1982); *Missouri Pacific Railroad v. American Statesman*, 552 S.W.2d 99, 102 (Tex. 1977). PJC 5.3 should be given if the negligence per se standard can be stated simply and there is no claim of common-law negligence. In that case, negligence can simply be defined in the factual terms of the negligence per se standard, because the violation of that standard is the only question the jury will have to determine as to negligence. Thus, the first part of PJC 5.3, which consists of the above instruction on negligence, should be given *in lieu of* the usual definition of “negligence” if the case involves only negligence per se. If the case also involves a claim of common-law negligence, the statutory definition should be given *immediately after* the usual definition. Also in that case, the word “means” in the definition should be replaced with “also means.”

If different negligence per se claims are made by each party against the other, broad-form submission accompanied by an instruction may still be used. The definition may need to combine the two standards.

[PJC 5.4 is reserved for expansion.]

PJC 5.5 Statutory Dramshop Liability

“Negligence” as to *Pete Provider* means *providing, under authority of a license*, an alcoholic beverage to a recipient when it is apparent to the *provider* that the recipient is obviously intoxicated to the extent that he presents a clear danger to himself and others.

You are instructed that the negligence, if any, of *Pete Provider* was a proximate cause of the occurrence in question if the recipient’s intoxication was a proximate cause of the occurrence in question.

QUESTION _____

Did the negligence, if any, of those named below proximately cause the occurrence in question?

Answer “Yes” or “No” for each of the following:

1. *Don Davis* _____
2. *Pete Provider* _____
3. *Paul Payne* _____

COMMENT

When to use. PJC 5.5 should be given if a dramshop case is brought under Tex. Alco. Bev. Code § 2.02(b). Section 2.02(b) legislates an exclusive liability scheme for providing alcoholic beverages to persons eighteen years of age or older. Tex. Alco. Bev. Code § 2.03. *See Southland Corp. v. Lewis*, 940 S.W.2d 83, 84 (Tex. 1997) (common-law negligence and negligence per se claims barred by Act’s exclusive remedy provision). PJC 5.5 covers this exclusive basis for provider liability by including a definition and an instruction on section 2.02(b) elements, together with a broad-form question embracing both provider conduct and the common-law conduct of others. The broad-form negligence question is used because the supreme court characterized the statutory cause of action as grounded on negligence principles in *Smith v. Sewell*, 858 S.W.2d 350, 356 (Tex. 1993). A different standard may apply if an adult provides alcoholic beverages to a person under eighteen years of age. Tex. Alco. Bev. Code § 2.02(c).

Proximate cause as to *Pete Provider*. The provisions of section 2.02(b) impose liability on a provider if (1) at the time the provider sold or served the alcohol it was apparent to the provider that the recipient was obviously intoxicated to the extent that he presented a clear danger to himself and others and (2) the intoxication of that indi-

vidual proximately caused the damages suffered. *Lewis*, 940 S.W.2d at 84–85; *Smith*, 858 S.W.2d at 355.

Because section 2.02(b) requires a proximate cause connection between the recipient's intoxication and the damages, an instruction is needed to ensure determination of that issue. See *Borneman v. Steak & Ale, Inc.*, 22 S.W.3d 411, 412–13 (Tex. 2000) (per curiam). Without such an instruction, common-law negligence and proximate cause findings against the recipient would not necessarily determine that the recipient's intoxication was a proximate cause of the damages.

Moreover, the only causation element expressed in section 2.02(b) regarding the provider is the proximate cause link between the recipient's intoxication and the damages. Thus, there appears to be no necessity for a finding that the provider's conduct was a proximate cause as defined by common law. But see *Smith*, 858 S.W.2d at 356: "A breach of that duty which proximately causes damage gives rise to a statutory cause of action."

Therefore, PJC 5.5 includes an instruction that the provider's negligence is a proximate cause of the occurrence if the recipient's intoxication was a proximate cause of the occurrence. This instruction is similar to the special proximate cause instruction in PJC 10.12 concerning negligent entrustment to a reckless driver.

How to use. If *Pete Provider* is the only person whose conduct is submitted, the PJC 5.5 instruction should be given in lieu of the PJC 2.1 negligence definition. The PJC 5.5 proximate cause definition should be submitted in addition to the PJC 2.4 proximate cause definition.

If common-law negligence is also submitted (regarding someone other than *Pete Provider*), *Pete Provider* should be excluded from the PJC 2.1 negligence definition by beginning the definition: "With respect to *Don Davis* and/or *Paul Payne*, 'negligence' means . . ."

Proportionate responsibility. Chapter 33 of the Texas Civil Practice and Remedies Code applies to claims brought under the Dramshop Act and, thus, requires apportionment of responsibility as provided by PJC 4.3. See *F.F.P. Operating Partners, L.P. v. Duenez*, 237 S.W.3d 680, 682 (Tex. 2007); *Smith*, 858 S.W.2d at 356.

Substitution of terms. The statute imposes liability on a licensee who provides, sells, or serves alcoholic beverages. PJC 5.5 uses the most inclusive term, *providing*, but *selling* or *serving* may also be used if appropriate. The statute also applies to a nonlicensee, but only if there is a sale. In the case of a nonlicensee, the word *selling* should replace the phrase *providing, under authority of a license*, and the word *seller* should replace the word *provider*. Also, the phrase *under authority of a license* may be deleted in cases in which that element is undisputed.

Social host liability. The supreme court has declined to recognize social host liability for serving intoxicated adult guests, *Graff v. Beard*, 858 S.W.2d 918, 921 (Tex.

1993), guests from ages eighteen to twenty, *Smith v. Merritt*, 940 S.W.2d 602, 608 (Tex. 1997), and guests under age eighteen, *Reeder v. Daniel*, 61 S.W.3d 359, 360–61 (Tex. 2001).

Adult provides alcoholic beverages to person under eighteen. Section 2.02(c) provides:

(c) An adult 21 years of age or older is liable for damages proximately caused by the intoxication of a minor under the age of 18 if:

- (1) the adult is not:
 - (A) the minor’s parent, guardian, or spouse; or
 - (B) an adult in whose custody the minor has been committed by a court; and
- (2) the adult knowingly:
 - (A) served or provided to the minor any of the alcoholic beverages that contributed to the minor’s intoxication; or
 - (B) allowed the minor to be served or provided any of the alcoholic beverages that contributed to the minor’s intoxication on the premises owned or leased by the adult.

Tex. Alco. Bev. Code § 2.02(c).

Jury submissions of actions based on statutory liability should follow the language of the statute as closely as possible. See *Spencer v. Eagle Star Insurance Co. of America*, 876 S.W.2d 154, 157 (Tex. 1994). The following questions cover the statutory elements for an adult provider’s liability in an action based on section 2.02(c):

QUESTION _____

Did *Pete Provider* knowingly—

1. serve or provide to *Mary Minor* any of the alcoholic beverages that contributed to *Mary Minor*’s intoxication, if any; or

2. allow *Mary Minor* to be served or provided any of the alcoholic beverages that contributed to *Mary Minor*’s intoxication, if any, on the premises owned or leased by *Pete Provider*?

Answer “Yes” or “No.”

Answer: _____

QUESTION _____

Did the intoxication, if any, of *Mary Minor* proximately cause the occurrence in question?

Answer "Yes" or "No."

Answer: _____

Significantly, section 2.02(c) imposes liability on an adult for damages proximately caused by the intoxication of a minor. With regard to the liability of *Pete Provider*, however, section 2.02(c)(2) asks whether the adult knowingly provided any of the alcoholic beverages that contributed to the minor's intoxication, as opposed to whether the conduct of the adult proximately caused the occurrence made the basis of the suit. Consequently, both of the above questions should be necessary to the determination of the liability of *Pete Provider*.

If common-law negligence is also submitted, PJC 4.1 should be given separately for any person against whom a common-law negligence claim is submitted. For example, if a common-law negligence claim is asserted against *Mary Minor*, the jury should be provided with the following question: "Did the negligence of *Mary Minor*, if any, proximately cause the occurrence in question?" As to *Mary Minor*, the jury should further be provided with PJC 2.1 and 2.4 regarding negligence, ordinary care, and proximate cause.

Note that section 2.02(c) is not subject to the same exclusivity provisions that section 2.03 creates for section 2.02(b).

**PJC 5.6 Defense to Respondeat Superior Liability under Statutory
Dramshop Act or Common Law**

If you answered “Yes” to Question _____ [5.5] as to *Pete Provider*, then answer the following questions. Otherwise, do not answer the following questions.

QUESTION _____

Do you find that, before the occurrence in question—

1. *Pete Provider*’s employer required the employees to attend a commission-approved seller training program; and
2. *Pete Provider* actually attended such a training program?

Answer “Yes” or “No.”

Answer: _____

QUESTION _____

Do you find that, before the occurrence in question, *Pete Provider*’s employer directly or indirectly encouraged *Pete Provider* to violate the law regarding the selling or providing of alcoholic beverages to [*intoxicated persons*] [*minors*]?

Answer “Yes” or “No.”

Answer: _____

COMMENT

When to use. PJC 5.6 submits the employer’s “safe harbor” affirmative defense to respondeat superior liability that would otherwise result from the actions of an employee subject to statutory or common-law liability for the providing, selling, or serving of alcoholic beverages to an intoxicated person or to a minor. Tex. Alco. Bev. Code § 106.14.

Burden of proof. In *20801, Inc. v. Parker*, 249 S.W.3d 392, 397 (Tex. 2008), the Texas Supreme Court held that while it is the employer’s burden to establish the first two elements of section 106.14(a), the burden of proof rests on the claimant to establish the third element—i.e., that the employer has directly or indirectly encouraged the employee in question to violate the law regarding the selling or providing of alcoholic beverages.

Standard of care. To “encourage” its employees within the meaning of section 106.14, an employer “must act (or fail to act) at least negligently.” *Parker*, 249 S.W.3d at 398. In this sense—

[t]he relevant comparison will be to a reasonable provider of the defendant’s type (a bar or liquor store owner, for example), and the circumstances in these cases will include a provider’s awareness of, and reliance on, its employees’ successful completion of an approved seller training program. . . . Thus, a plaintiff can show encouragement not only by direct evidence that the provider knowingly ordered or rewarded over-service, but also by circumstantial evidence that the provider engaged in behavior that a reasonable provider should have known would constitute encouragement.

Parker, 249 S.W.3d at 398. Additional instructions defining the employer’s standard of care may therefore be appropriate here.

“Employer” includes “vice-principals.” For purposes of section 106.14(a), “employer” includes “vice principals.” *Parker*, 249 S.W.3d at 399. An additional instruction, similar to that found in PJC 10.14C, may therefore be appropriate here.

How to use. PJC 5.6 is appropriate if the statutory affirmative defense is pleaded and the evidence raises a question of fact on one or more of the elements. If either of the first two elements is indisputably established, or if the claimant fails to raise a question of fact with regard to the third element (in the second question in PJC 5.6), that element should not be submitted. If the employer is the only defendant, any percentage of responsibility question should be appropriately conditioned on a negative answer to PJC 5.6. If the employee and the employer are both defendants at the time of submission, the percentage of responsibility question, if applicable, should submit only the provider’s responsibility, which would then be imputed or not, depending on the answer to the above question.



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PJC 6.1 False Imprisonment—Question

QUESTION _____

Did *Don Davis* falsely imprison *Paul Payne*?

“Falsely imprison” means to willfully detain another without legal justification, against his consent, whether such detention be effected by violence, by threat, or by any other means that restrains a person from moving from one place to another.

Answer “Yes” or “No.”

Answer: _____

COMMENT

When to use. PJC 6.1 is a broad-form question. *See* Tex. R. Civ. P. 277. It should be appropriate in most cases involving claims for false imprisonment. *See* PJC 4.1 comments, “Broad form to be used when feasible” and “When broad-form questions not feasible.”

Source of question and instructions. The three elements of false imprisonment are (1) willful detention, (2) without consent, and (3) without authority of law. *Sears, Roebuck & Co. v. Castillo*, 693 S.W.2d 374, 375 (Tex. 1985).

Privilege to investigate theft. A detention is privileged at law if a person reasonably believes that another has stolen or is attempting to steal property and then detains that person in a reasonable manner and for a reasonable time to investigate ownership of the property. Tex. Civ. Prac. & Rem. Code § 124.001. If the facts are so indicated, an instruction relating to this privilege should be given. *See* PJC 6.3. If the detention is unrelated to an investigation relating to ownership of property, the instruction at PJC 6.3 should not be used. There may be other circumstances of legal justification requiring appropriate instructions. *See, e.g.*, Tex. Penal Code ch. 9.

**PJC 6.2 False Imprisonment—Instruction on Unlawful Detention
by Threat**

“Detention by threat, violence, or other means” requires proof that the threat was such as would inspire in an ordinary person just fear of injury to his person, reputation, or property.

COMMENT

When to use. PJC 6.2 is appropriate in cases in which there is a question about the existence of a detention. In such cases, if the detention is allegedly made by threats, violence, or other means, an instruction relating to this type of detention should be given. *Randall's Food Markets, Inc. v. Johnson*, 891 S.W.2d 640, 645 (Tex. 1995). See PJC 6.1.

PJC 6.3 False Imprisonment—Instruction on Defense of Privilege to Investigate Theft

When a person reasonably believes that another has stolen or is attempting to steal property, that person has legal justification to detain the other in a reasonable manner and for a reasonable time to investigate ownership of the property.

COMMENT

When to use. PJC 6.3 is appropriate in false imprisonment cases if the alleged detention relates to a person's investigation of ownership of property. Tex. Civ. Prac. & Rem. Code § 124.001. This privilege, as defined in the Code, is an affirmative defense that must be pleaded by the defendant. It should be used in conjunction with the broad-form question at PJC 6.1.

Source of instruction. PJC 6.3 is derived from *Sears, Roebuck & Co. v. Castillo*, 693 S.W.2d 374, 375 (Tex. 1985), and Tex. Civ. Prac. & Rem. Code § 124.001. See also *Dillard Department Stores, Inc. v. Silva*, 148 S.W.3d 370, 372 (Tex. 2004).

PJC 6.4 Malicious Prosecution

QUESTION _____

Did *Don Davis* maliciously prosecute *Paul Payne*?

“Malicious prosecution” occurs when one person initiates or procures, with malice, and without probable cause at the time the prosecution is commenced, the prosecution of an innocent person.

“Malice” means ill will, bad or evil motive, or such gross indifference to the rights of others as to amount to a willful or wanton act.

“Probable cause” means the existence of such facts and circumstances as would excite belief in a person of reasonable mind, acting on the facts or circumstances within his knowledge at the time the prosecution was commenced, that the other person was guilty of a criminal offense. The probable cause determination asks whether a reasonable person would believe that a crime had been committed given the facts as the complainant honestly and reasonably believed them to be before the criminal proceedings were instituted.

Answer “Yes” or “No.”

Answer: _____

COMMENT

When to use. PJC 6.4 is a broad-form question. *See* Tex. R. Civ. P. 277. It should be appropriate in most cases involving claims for malicious prosecution arising out of a criminal prosecution. *See* PJC 4.1 comments, “Broad form to be used when feasible” and “When broad-form questions not feasible.”

Source of question and instructions. The seven elements of malicious prosecution are (1) commencement of a criminal prosecution against the plaintiff, (2) initiated or procured by the defendant, (3) terminated in favor of the plaintiff, (4) who was innocent, (5) without probable cause, (6) with malice, (7) resulting in damage to the plaintiff. *Richey v. Brookshire Grocery Co.*, 952 S.W.2d 515, 517 (Tex. 1997). Note that the element relating to the prosecution’s being terminated in favor of the plaintiff is not included in the above instructions. In the Committee’s view, this element should be determined by the trial court as a matter of law before the submission of the case to the jury. *Cf. Davis v. City of San Antonio*, 752 S.W.2d 518, 523 (Tex. 1988). Under the supreme court’s formulation in *Richey*, the plaintiff’s innocence is a factual element that he bears the burden of establishing.

Dispute about procurement or initiation. In some situations there is a dispute about the procurement or initiation of the criminal prosecution. In the case of a dispute about “procurement,” the following instruction may be used:

A person procures a criminal prosecution if his actions were enough to cause the prosecution, and but for his actions the prosecution would not have occurred. A person does not procure a criminal prosecution when the decision whether to prosecute is left to the discretion of another, including a law enforcement official or the grand jury, unless the person fails to fully and fairly disclose all material information known to him or knowingly provides false information.

A criminal prosecution may be procured by more than one person.

King v. Graham, 126 S.W.3d 75, 77 (Tex. 2003); *Browning-Ferris Industries, Inc. v. Lieck*, 881 S.W.2d 288, 293 (Tex. 1994). “Initiation would not ordinarily need to be defined, as it would be demonstrated by evidence that defendant filed formal charges against plaintiff . . .” *Lieck*, 881 S.W.2d at 293.

Exemplary damages. A finding of malicious prosecution may support the submission of an exemplary damages question for causes of action accruing before September 1, 1995. *Ellis County State Bank v. Kever*, 936 S.W.2d 683 (Tex. App.—Dallas 1996, no writ). For causes of action accruing on or after September 1, 1995, a separate issue for exemplary damages must be submitted because of the burden of proof requirements for exemplary damages that were created by the 1995 amendment to chapter 41 of the Texas Civil Practice and Remedies Code. See PJC 4.2B. Further, for actions filed on or after September 1, 2003, the separate submission for exemplary damages must also account for the unanimity requirement created by the 2003 amendments to chapter 41. See PJC 4.2C. The practitioner should be aware, however, that there is otherwise little guidance in the case law for submissions in this area.

PJC 6.5 Intentional Infliction of Emotional Distress

QUESTION _____

Did *Don Davis* intentionally inflict severe emotional distress on *Paul Payne*?

Intentional infliction of emotional distress occurs when the defendant acts intentionally or recklessly with extreme and outrageous conduct to cause the plaintiff emotional distress and the emotional distress suffered by the plaintiff was severe.

“Extreme and outrageous conduct” occurs only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community.

Answer “Yes” or “No.”

Answer: _____

COMMENT

When to use. PJC 6.5 is a broad-form question. *See* Tex. R. Civ. P. 277. It may be used if a claim for intentional infliction of emotional distress is made. *See* PJC 4.1 comments, “Broad form to be used when feasible” and “When broad-form questions not feasible.” The tort is a “gap-filler” judicially created for the limited purpose of allowing recovery in those rare instances in which a defendant intentionally inflicts severe emotional distress in a manner so unusual that the victim has no other recognized theory of redress. *Standard Fruit & Vegetable Co. v. Johnson*, 985 S.W.2d 62, 68 (Tex. 1998); *see also Creditwatch, Inc. v. Jackson*, 157 S.W.3d 814, 816 (Tex. 2005); *Hoffmann-LaRoche, Inc. v. Zeltwanger*, 144 S.W.3d 438, 447 (Tex. 2004).

Source of question and instructions. The elements of intentional infliction of emotional distress are (1) the defendant acted intentionally or recklessly, (2) the conduct was extreme and outrageous, (3) the actions of the defendant caused the plaintiff emotional distress, and (4) the emotional distress suffered by the plaintiff was severe. *Twyman v. Twyman*, 855 S.W.2d 619, 621 (Tex. 1993). The courts have been reluctant to permit a cause of action relating to such conduct except in cases in which the conduct is so extreme in degree as to go beyond all possible bounds of decency and is regarded as atrocious and “utterly intolerable in a civilized community.” *See Twyman*, 855 S.W.2d at 621.

PJC 6.6 Assault and Battery

QUESTION _____

Did *Don Davis* commit an assault against *Paul Payne*?

A person commits an assault if he (1) intentionally, knowingly, or recklessly causes bodily injury to another; or (2) intentionally or knowingly threatens another with imminent bodily injury; or (3) intentionally or knowingly causes physical contact with another when he knows or should reasonably believe that the other will regard the contact as offensive or provocative.

Answer “Yes” or “No.”

Answer: _____

COMMENT

When to use. PJC 6.6 may be used in cases in which an assault or battery claim is made. Historically, assault and battery were two separate torts, but today the terms are used together or interchangeably to refer to conduct defined as “assault” in the Penal Code. The above definition is taken from Tex. Penal Code § 22.01, which has been held to apply in civil as well as criminal cases. *See, e.g., Wal-Mart Stores, Inc. v. Odem*, 929 S.W.2d 513, 522 (Tex. App.—San Antonio 1996, writ denied); *Childers v. A.S.*, 909 S.W.2d 282, 292 (Tex. App.—Fort Worth 1995, writ denied).

Caveat. The above instruction (identical minus the word “or” before item (2)) was used in *Wal-Mart Stores, Inc.*, 929 S.W.2d at 521, without objection. Because a charge should not burden the jury with surplus instructions, the Committee recognizes that there may be other ways of more succinctly submitting the conduct at issue.

Damages. Foreseeability is not required in determining damages for an intentional or knowing assault if recovery is sought for the immediate and direct consequences of the assault. *Thompson v. Hodges*, 237 S.W.2d 757, 759 (Tex. Civ. App.—San Antonio 1951, writ ref’d n.r.e.).



CHAPTER 7	THEFT LIABILITY	
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PJC 7.1 Owner of Property at Issue—Question

QUESTION _____

Did *Paul Payne* own the property at issue?

Paul Payne owned the property at issue if he had—

1. title to the property; or
2. possession of the property, whether lawful or not; or
3. a greater right to possession of the property than *Don Davis*.

“Possession” means actual care, custody, control, or management.

Answer “Yes” or “No.”

Answer: _____

COMMENT

When to use. PJC 7.1 should be used when the identity of the owner of the appropriated property is disputed.

Source. PJC 7.1 is derived from Tex. Penal Code § 1.07(a)(35), (39).

PJC 7.2 Theft of Property—Question

If you answered “Yes” to Question _____ [7.1] then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Did *Don Davis* commit theft of *Paul Payne*’s property?

Don Davis committed theft if *he*—

1. appropriated property; and
2. the appropriation was without the [*effective*] consent of the owner; and
3. *Don Davis* intended to appropriate the property.

Answer “Yes” or “No.”

Answer: _____

COMMENT

When to use. PJC 7.2 is a broad-form question. *See* Tex. R. Civ. P. 277. It should be appropriate in most cases involving a claim for theft of property under the Texas Theft Liability Act, Tex. Civ. Prac. & Rem. Code §§ 134.001–.005.

Source of instruction. The definition of theft is derived from Tex. Penal Code § 31.03(a), (b)(1). *See* also the current edition of State Bar of Texas, *Texas Criminal Pattern Jury Charges—Crimes against Persons & Property* CPJC 92.2. Depending on the specific circumstances, one or more of the following definitions may apply.

Definitions and elements of theft. The following definitions, derived from the Texas Penal Code, should be submitted where supported by the evidence:

Don Davis appropriates property if *he*—

1. acquires the property; or
2. otherwise exercises control over the property; or
3. brings about a transfer or purported transfer of title or any other nonpossessory interest in the property, whether that transfer or purported transfer is to *Don Davis* or another.

Don Davis intended to appropriate the property if *he* had the conscious objective or desire to—

[Include only those instructions supported by the evidence.]

1. withhold the property from the owner permanently; or
2. withhold the property from the owner for so extended a period of time that a major portion of the value or enjoyment of the property is lost to the owner; or
3. restore the property only on payment of reward or other compensation; or
4. dispose of the property in a manner that makes recovery of the property by the owner unlikely.

See Tex. Penal Code §§ 6.03(a), 31.01(2), (4).

Submission of conditioning instruction. The conditioning instruction should be used only if PJC 7.1 is submitted to the jury.

Submission of specific conduct constituting theft. The Theft Liability Act incorporates by reference the conduct defined as theft under Texas Penal Code sections 31.03 (theft), 31.06 (theft by check or draft), 31.07 (theft of vehicle), 31.11 (tampering with identification numbers), and 31.12, 31.13, and 31.14 (theft of multichannel video or information services). Depending on the specific circumstances, it might be appropriate to incorporate the statutory language of the specific provision that is most relevant to the conduct at issue.

Property. If the nature of the appropriated property is disputed, the following instruction should be included:

“Property” means—

1. [*tangible/intangible*] personal property [*including anything severed from land*]; or
2. real property; or
3. a document, including money, that represents or embodies anything of value.

See Tex. Penal Code § 31.01(5).

Effective consent rendered ineffective by deception. As an alternative to the basic instruction on theft, appropriation of property is without the consent of the owner where the consent is not effective. See Tex. Penal Code § 31.01(3). In specific circumstances, it might be appropriate to include all or part of the following instruction addressing ineffective consent:

Consent to the appropriation of property is not effective if *Don Davis* engaged in deception and by this deception induced that consent. *Don Davis* engaged in deception if—

[Include only those means of deception supported by the evidence.]

1. *Don Davis* created or confirmed by words or conduct a false impression of law or fact that was likely to affect the judgment of another in the transaction and *Don Davis* did not believe this impression of law or fact to be true; or

2. *Don Davis* failed to correct a false impression of law or fact that was likely to affect the judgment of another in the transaction, *Don Davis* previously created or confirmed this false impression, and *Don Davis* did not believe this impression of law or fact to be true; or

3. *Don Davis* prevented another from acquiring information likely to affect that person's judgment in the transaction; or

4. *Don Davis* promised performance that was likely to affect the judgment of another in the transaction and *Don Davis* either did not intend to perform or knew that *he* would not perform; or

5. *Don Davis* sold or otherwise transferred or encumbered property without disclosing a lien, security interest, adverse claim, or other legal impediment to the enjoyment of the property, whether the lien, security interest, claim, or impediment was or was not valid or was or was not a matter of official record.

See Tex. Penal Code § 31.01(1).

Effective consent rendered ineffective by coercion. As an alternative to the above instruction, appropriation of property is without the consent of the owner where the consent is not effective by reason of coercion. See Tex. Penal Code § 1.07(a)(9). In certain circumstances, it might be appropriate to include the following instruction addressing ineffective consent by reason of coercion:

Consent to the appropriation of property is not effective if *Don Davis* engaged in coercion and by this coercion induced that consent. *Don Davis* engaged in coercion if *he* threatened—

[Include only those types of coercion supported by the evidence.]

1. to commit a criminal offense [*identify criminal offense*];
or
2. to inflict bodily injury in the future on the person threatened or another; or
3. to accuse a person of any offense; or
4. to expose a person to hatred, contempt, or ridicule; or
5. to harm the credit or business repute of any person; or
6. to take or withhold action as a public servant, or to cause a public servant to take or withhold action.

A threat can be communicated in any manner.

See Tex. Penal Code § 1.07(a)(9).

Owner. If the identity of the owner of the appropriated property is disputed, see PJC 7.1.

PJC 7.3 Theft of Service—Question

QUESTION _____

Did *Don Davis* commit theft of *Paul Payne's* services?

Don Davis committed theft of *Paul Payne's* services if he—

1. intentionally or knowingly secured performance of a service by [*deception, threat, or false token*]; and
2. knew the service was provided only for compensation; and
3. intended to avoid payment for the service.

Answer “Yes” or “No.”

Answer: _____

COMMENT

When to use. PJC 7.3 is a broad-form question. *See* Tex. R. Civ. P. 277. It should be appropriate in most cases involving a claim for theft of service under the Texas Theft Liability Act, Tex. Civ. Prac. & Rem. Code §§ 134.001–.005.

Source of instruction. The definition of theft of service is derived from Tex. Penal Code § 31.04. *See* also the current edition of State Bar of Texas, *Texas Criminal Pattern Jury Charges—Crimes against Persons & Property* CPJC 92.7.

Definitions and elements of theft of service. The following definitions, derived from the Texas Penal Code, should be submitted where supported by the evidence:

The term “service” includes—

1. labor and professional services; and
2. telecommunication, public utility, or transportation services; and
3. lodging, restaurant service, and entertainment; and
4. the supply of a motor vehicle or other property for use.

Don Davis secured performance of a service by deception if *Don Davis* engaged in deception and by this deception induced the performance of a service. *Don Davis* engaged in deception if—

[Include only those means of deception supported by the evidence.]

1. *Don Davis* created or confirmed by words or conduct a false impression of law or fact that was likely to affect the judgment of another in the transaction and *Don Davis* did not believe this impression of law or fact to be true; or

2. *Don Davis* failed to correct a false impression of law or fact that was likely to affect the judgment of another in the transaction, *Don Davis* previously created or confirmed this false impression, and *Don Davis* did not believe this impression of law or fact to be true; or

3. *Don Davis* prevented another from acquiring information likely to affect that person's judgment in the transaction; or

4. *Don Davis* promised performance that was likely to affect the judgment of another in the transaction and *Don Davis* either did not intend to perform or knew that *he* would not perform; or

5. *Don Davis* sold or otherwise transferred or encumbered property without disclosing a lien, security interest, adverse claim, or other legal impediment to the enjoyment of the property, whether the lien, security interest, claim, or impediment was or was not valid or was or was not a matter of official record.

A person intentionally secures performance of a service by deception if it is the person's conscious objective to secure the performance of the service by deception.

A person knowingly secures performance of a service by deception if the person is aware the person is securing the performance of the service by deception.

A person knows a service is provided only for compensation if the person is aware that the service is provided only for compensation.

A person intends to avoid payment for services if the person has the conscious objective of avoiding the payment for the services.

See Tex. Penal Code §§ 6.03, 31.01(1), (6), 31.04(a).

Submission of specific conduct. The Theft Liability Act incorporates by reference the conduct defined as theft under Texas Penal Code sections 31.04 (theft of service) and 31.06 (theft by check or draft). Depending on the specific circumstances, it might be appropriate to include the statutory language of the specific provision that is most relevant to the conduct at issue.

Tex. Penal Code § 31.04(a) provides for several quite different ways of committing the offense of theft of service. The Committee has addressed the instructions appropriate for what it regarded as the primary form of the offense: obtaining services by deception, as defined in Tex. Penal Code § 31.04(a)(1).

Caveat regarding deception. Under Tex. Penal Code § 31.04(a)(1), the deception must be the means by which the services are secured. Thus deception—such as presenting as good an insufficient-funds check—after the service is rendered is not sufficient. *Gibson v. State*, 623 S.W.2d 324 (Tex. Crim. App. 1980); *Cortez v. State*, 582 S.W.2d 119 (Tex. Crim. App. 1979).

Definition of “false token.” There is no statutory definition of the term “false token.” In one unreported case it was defined by the following: “‘False token’ is a thing or object or document which is used as a means to defraud and which is of such character that, were it not false, it would commonly be accepted as what it obviously appears and purports to be.” *Middleton v. State*, Nos. 14-07-00946-CR, 14-07-00947-CR, 2009 WL 196063, at *5 (Tex. App.—Houston [14th Dist.] Jan. 29, 2009, pet. ref’d) (not designated for publication) (appellant did not dispute definition and did not deny that checks involved fell within definition).

PJC 7.4 Conversion of Property—Question

QUESTION _____

Did *Don Davis* convert *Paul Payne*'s property?

Don Davis converted *Paul Payne*'s property if *he* exercised dominion and control over *Paul Payne*'s property without *Paul Payne*'s consent and to the exclusion of *Paul Payne*'s right of possession and use.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 7.4 is a broad-form question. *See* Tex. R. Civ. P. 277. It should be appropriate in most cases involving a claim for conversion of property.

Source of instruction and definition of conversion. PJC 7.4 is derived from *Dolenz v. Continental National Bank*, 620 S.W.2d 572 (Tex. 1981).

PJC 7.5 Theft Damages—Question

If you answered “Yes” to Question _____ [*applicable liability question*], then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate *Paul Payne* for *his* damages, if any, that resulted from such conduct?

Consider the following elements of damages, if any, and none other.

[*Insert appropriate instructions. See examples in PJC 7.6.*]

In answering questions about damages, answer each question separately. Do not increase or reduce the amount in one answer because of your answer to any other question about damages. Do not speculate about what any party’s ultimate recovery may or may not be. Any recovery will be determined by the court when it applies the law to your answers at the time of judgment. Do not add any amount for interest on damages, if any.

Answer separately, in dollars and cents, for damages, if any.

1. [*Element A*] sustained in the past.

Answer: _____

2. [*Element A*] that, in reasonable probability, will be sustained in the future.

Answer: _____

3. [*Element B*] sustained in the past.

Answer: _____

4. [*Element B*] that, in reasonable probability, will be sustained in the future.

Answer: _____

COMMENT

When to use. PJC 7.5 should be predicated on a “Yes” answer to PJC 7.2 or 7.3 and may be adapted for use in most Texas Theft Liability Act cases by the addition of appropriate instructions setting out legally available measures of damages. See PJC 7.6. If only one measure of damages is supported by the pleadings and proof, the measure may be incorporated into the question.

Actual damages. A person who commits theft is civilly liable under the Act “for the damages resulting from the theft.” Tex. Civ. Prac. & Rem. Code § 134.003(a). A “person who has sustained damages resulting from theft may recover . . . the amount of actual damages found by the trier of fact and, in addition to actual damages, damages awarded by the trier of fact in a sum not to exceed \$1,000.” Tex. Civ. Prac. & Rem. Code § 134.005(a)(1). Because the Act does not further define “actual damages,” actual damages under the Act have been recognized as those recoverable at common law. *Beaumont v. Basham*, 205 S.W.3d 608, 619 (Tex. App.—Waco 2006, pet. denied); cf. *Arthur Andersen & Co. v. Perry Equipment Corp.*, 945 S.W.2d 812, 816 (Tex. 1997) (“actual damages” recoverable under DTPA “are those damages recoverable under common law”).

At common law, actual damages are either direct or consequential. Direct damages are the necessary and usual result of the defendant’s wrongful act; they flow naturally and necessarily from the wrong. Direct damages compensate the plaintiff for the loss that is conclusively presumed to have been foreseen by the defendant from its wrongful act. Consequential damages result naturally, but not necessarily, from the defendant’s wrongful act. Under the common law, consequential damages need not be the usual result of the wrong but must be foreseeable and must be directly traceable to the wrongful act and result from it. See *Houston Livestock Show & Rodeo, Inc. v. Hamrick*, 125 S.W.3d 555, 582 (Tex. App.—Austin 2003, no pet.).

If consequential damages are sought, that element should be submitted with the additional instruction that the element of damages was “a natural, probable, and foreseeable consequence of *Don Davis*’s theft of the property.” See the current edition of State Bar of Texas, *Texas Pattern Jury Charges—Business, Consumer, Insurance & Employment* PJC 115.5.

Elements of damages submitted separately. The Committee generally recommends that multiple elements of damages be separately submitted to the jury. *Harris County v. Smith*, 96 S.W.3d 230, 233–34 (Tex. 2002) (broad-form submission of multiple elements of damages may lead to harmful error if there is a proper objection raising insufficiency of the evidence to support one or more of the elements submitted); see also Tex. Civ. Prac. & Rem. Code § 41.008(a) (“In an action in which a claimant seeks recovery of damages, the trier of fact shall determine the amount of economic damages separately from the amount of other compensatory damages.”). Separating economic from noneconomic damages is required to allow the court to apply the limits

on recovery of exemplary damages based on economic and noneconomic damages as required by Tex. Civ. Prac. & Rem. Code § 41.008(b).

Further, “[p]rejudgment interest may not be assessed or recovered on an award of future damages.” Tex. Fin. Code § 304.1045 (wrongful death, personal injury, or property damage cases); *see also Johnson & Higgins of Texas, Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 514, 530 (Tex. 1998) (reconciling equitable prejudgment interest with statutory prejudgment interest). Therefore, separation of past and future damages is required.

Elements considered separately. *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 770 (Tex. 2002), provides an instruction for cases involving undefined or potentially overlapping categories of damages. In those cases, the following language should be substituted for the instruction to consider each element separately:

Consider the following elements of damages, if any, and none other. You shall not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any.

Prejudgment interest. Instructing the jury not to add interest is suggested because prejudgment interest, if recoverable, will be calculated by the court at the time of judgment. If interest paid on an obligation is claimed as an element of damages, it may be necessary to modify the instruction on interest.

PJC 7.6 Sample Instructions—Actual Damages for Theft

Explanatory note: Damages instructions in Texas Theft Liability Act actions are often necessarily fact-specific. Unlike most other form instructions in this volume, therefore, the following sample instructions are illustrative only, using a hypothetical situation to give a few examples of how instructions may be worded to submit various legal measures of damages for use in connection with the theft damages question, PJC 7.5.

Sample A—Market value of the appropriated property

“Market value” means the amount that would be paid in cash by a willing buyer who desires to buy, but is not required to buy, to a willing seller who desires to sell, but is under no necessity of selling.

Sample B—Market value of the appropriated services

“Market value” means the amount that would be paid in cash by a willing buyer who desires to buy, but is not required to buy, to a willing seller who desires to sell, but is under no necessity of selling.

Sample C—Lost income from appropriated business contacts and files that was a natural, probable, and foreseeable consequence of Don Davis’s theft of the property

The income that *Paul Payne* would have otherwise realized by providing services to *his* clients had *Don Davis* not unlawfully appropriated *Paul Payne*’s customer lists and files.

Sample D—Lost rental value of the appropriated property that was a natural, probable, and foreseeable consequence of Don Davis’s theft of the property

The income that *Paul Payne* would have otherwise realized from renting the property to others, the loss of which was a natural, probable, and foreseeable consequence of *Don Davis*’s theft of the property.

COMMENT

When to use. See explanatory note above. Because damages instructions in Texas Theft Liability Act suits are necessarily fact-specific, no true “pattern” instructions are given—only samples of some measures of general damages available in such actions. This list is not exhaustive. The samples are illustrative only, adapted to a hypothetical fact situation, and must be rewritten to fit the particular damages raised by the pleadings and proof and recoverable under a legally accepted theory. The instructions

should be drafted in an attempt to make the plaintiff factually whole but not to put the plaintiff in a better position than he would have been in had the defendant not appropriated the plaintiff's property.

The following are examples of damages that have been recovered.

Lost income from appropriated business contacts and files. The plaintiff can recover the income lost from clients who had their tax returns prepared by a former coworker who unlawfully appropriated the plaintiff's customer files and customer lists and solicited their business. *See Schmader v. Butschek*, No. 05-15-00278-CV, 2016 WL 4119474, at *3 (Tex. App.—Dallas July 29, 2016, no pet.).

Lost rental income. The plaintiff can recover the cost of purchasing the appropriated property as well as the lost rental value. *Southwest Grain Co. v. Pilgrim's Pride S.A. de C.V.*, No. 13-07-00557-CV, 2010 WL 2638483, at *5 (Tex. App.—Corpus Christi June 28, 2010, no pet.).

Mental anguish damages. In *Beaumont v. Basham*, 205 S.W.3d 608, 620 (Tex. App.—Waco 2006, pet. denied), the court recognized that the plaintiff could recover mental anguish damages under the Act where the party committing theft acted with malice.

PJC 7.7 Additional Damages—Question

If you found, in answer to Question[s] _____ [*applicable damages question(s)*], that *Paul Payne* sustained actual damages, then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

You are instructed that, in order for you to find additional damages, your answer to this question must be unanimous.

What sum of money, if any, if paid now in cash, should be assessed against *Don Davis* and awarded to *Paul Payne* as additional damages, if any, for the conduct found in response to Question _____ [*liability question for Texas Theft Liability Act claim*]?

Answer in dollars and cents, if any.

Answer: _____

COMMENT

When to use. PJC 7.7 is used to submit additional damages. It should be predicated on a finding of liability on a Texas Theft Liability Act claim and an award of actual damages. A “person who has sustained damages resulting from theft may recover . . . the amount of actual damages found by the trier of fact and, in addition to actual damages, damages awarded by the trier of fact in a sum not to exceed \$1,000.” Tex. Civ. Prac. & Rem. Code § 134.005(a)(1). The damages cap of \$1,000 can be applied postverdict. *See, e.g., Beaumont v. Basham*, 205 S.W.3d 608, 625 (Tex. App.—Waco 2006, pet. denied) (reversing trial court’s award of \$10,000 in additional damages and rendering judgment that plaintiff recover statutory maximum of \$1,000).

Answer must be unanimous. *See Wal-Mart Stores, Inc. v. Forte*, 497 S.W.3d 460, 464 (Tex. 2016) (holding that Texas Civil Practice and Remedies Code chapter 41 “applies to any action in which a claimant seeks damages relating to a cause of action”). *See* Tex. Civ. Prac. & Rem. Code § 41.003(d).

PJC 7.8 Attorney's Fees—Question**QUESTION _____**

What is a reasonable fee for the necessary services of [*Paul Payne's/Don Davis's*] attorney, stated in dollars and cents?

Answer with an amount for each of the following:

1. For representation in the trial court.

Answer: _____

2. For representation through appeal to the court of appeals.

Answer: _____

3. For representation at the petition for review stage in the Supreme Court of Texas.

Answer: _____

4. For representation at the merits briefing stage in the Supreme Court of Texas.

Answer: _____

5. For representation through oral argument and the completion of proceedings in the Supreme Court of Texas.

Answer: _____

COMMENT

When to use. Attorney's fees are recoverable by the prevailing party. *See* Tex. Civ. Prac. & Rem. Code § 134.005(b). Consequently, the above question should be submitted for all parties to a Texas Theft Liability Act claim.

PJC 7.9 Conversion Damages—Question

If you answered “Yes” to Question _____ [7.4], then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate *Paul Payne* for *his* damages, if any, that resulted from such conduct?

Consider the following elements of damages, if any, and none other.

[Insert appropriate instructions. See examples in PJC 7.10.]

In answering questions about damages, answer each question separately. Do not increase or reduce the amount in one answer because of your answer to any other question about damages. Do not speculate about what any party’s ultimate recovery may or may not be. Any recovery will be determined by the court when it applies the law to your answers at the time of judgment. Do not add any amount for interest on damages, if any.

Answer separately, in dollars and cents, for damages, if any.

1. [*Element A*] sustained in the past.

Answer: _____

2. [*Element A*] that, in reasonable probability, will be sustained in the future.

Answer: _____

3. [*Element B*] sustained in the past.

Answer: _____

4. [*Element B*] that, in reasonable probability, will be sustained in the future.

Answer: _____

COMMENT

When to use. PJC 7.9 should be predicated on a “Yes” answer to PJC 7.4 and may be adapted for use in most conversion cases by the addition of appropriate instructions setting out legally available measures of damages. See PJC 7.10. If only one measure of damages is supported by the pleadings and proof, the measure may be incorporated into the question.

Actual damages. In an action for conversion, the plaintiff can seek the return of the property plus actual damages. See *Winkle Chevy-Olds-Pontiac, Inc. v. Condon*, 830 S.W.2d 740, 746 (Tex. App.—Corpus Christi 1992, writ dismissed). At common law, actual damages are either direct or consequential. Direct damages are the necessary and usual result of the defendant’s wrongful act; they flow naturally and necessarily from the wrong. Direct damages compensate the plaintiff for the loss that is conclusively presumed to have been foreseen by the defendant from its wrongful act. Consequential damages result naturally, but not necessarily, from the defendant’s wrongful act. Under the common law, consequential damages need not be the usual result of the wrong but must be foreseeable and must be directly traceable to the wrongful act and result from it. See *Houston Livestock Show & Rodeo, Inc. v. Hamrick*, 125 S.W.3d 555, 582 (Tex. App.—Austin 2003, no pet.).

If consequential damages are sought, that element should be submitted with the additional instruction that the element of damages was “a natural, probable, and foreseeable consequence of *Don Davis’s* theft of the property.” See the current edition of State Bar of Texas, *Texas Pattern Jury Charges—Business, Consumer, Insurance & Employment* PJC 115.5.

Elements of damages submitted separately. The Committee generally recommends that multiple elements of damages be separately submitted to the jury. *Harris County v. Smith*, 96 S.W.3d 230, 233–34 (Tex. 2002) (broad-form submission of multiple elements of damages may lead to harmful error if there is a proper objection raising insufficiency of the evidence to support one or more of the elements submitted); see also Tex. Civ. Prac. & Rem. Code § 41.008(a) (“In an action in which a claimant seeks recovery of damages, the trier of fact shall determine the amount of economic damages separately from the amount of other compensatory damages.”). Separating economic from noneconomic damages is required to allow the court to apply the limits on recovery of exemplary damages based on economic and noneconomic damages as required by Tex. Civ. Prac. & Rem. Code § 41.008(b).

Further, “[p]rejudgment interest may not be assessed or recovered on an award of future damages.” Tex. Fin. Code § 304.1045 (wrongful death, personal injury, or property damage cases); see also *Johnson & Higgins of Texas, Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 514, 530 (Tex. 1998) (reconciling equitable prejudgment interest with statutory prejudgment interest). Therefore, separation of past and future damages is required.

Elements considered separately. *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 770 (Tex. 2002), provides an instruction for cases involving undefined or potentially overlapping categories of damages. In those cases, the following language should be substituted for the instruction to consider each element separately:

Consider the following elements of damages, if any, and none other. You shall not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any.

Prejudgment interest. Instructing the jury not to add interest is suggested because prejudgment interest, if recoverable, will be calculated by the court at the time of judgment. If interest paid on an obligation is claimed as an element of damages, it may be necessary to modify the instruction on interest.

PJC 7.10 Sample Instructions—Actual Damages for Conversion

Explanatory note: Damages instructions in conversion actions under the Texas Theft Liability Act are often necessarily fact-specific. Unlike most other form instructions in this volume, therefore, the following sample instructions are illustrative only, using a hypothetical situation to give a few examples of how instructions may be worded to submit various legal measures of damages for use in connection with the conversion damages question, PJC 7.9.

Sample A—Market value of the appropriated property

“Market value” means the amount that would be paid in cash by a willing buyer who desires to buy, but is not required to buy, to a willing seller who desires to sell, but is under no necessity of selling.

Sample B—Market value of the appropriated services

“Market value” means the amount that would be paid in cash by a willing buyer who desires to buy, but is not required to buy, to a willing seller who desires to sell, but is under no necessity of selling.

Sample C—Lost income from appropriated business contacts and files that was a natural, probable, and foreseeable consequence of Don Davis’s theft of the property

The income that *Paul Payne* would have otherwise realized by providing services to his clients had *Don Davis* not unlawfully appropriated *Paul Payne*’s customer lists and files, the loss of which was a natural, probable, and foreseeable consequence of *Don Davis*’s theft of the property.

Sample D—Lost rental value of the appropriated property that was a natural, probable, and foreseeable consequence of Don Davis’s theft of the property

The income that *Paul Payne* would have otherwise realized from renting the property to others, the loss of which was a natural, probable, and foreseeable consequence of *Don Davis*’s theft of the property.

Sample E—Intrinsic value of the property

The value of the property to *Paul Payne*.

Sample F—Loss of use of property

The rental value of the property.

Sample G—Travel expenses

The expenses incurred by *Paul Payne* in traveling to inspect the property after conversion.

COMMENT

When to use. See explanatory note above. Because damages instructions in conversion suits under the Texas Theft Liability Act are necessarily fact-specific, no true “pattern” instructions are given—only samples of some measures of general damages available in such actions. This list is not exhaustive. The samples are illustrative only, adapted to a hypothetical fact situation, and must be rewritten to fit the particular damages raised by the pleadings and proof and recoverable under a legally accepted theory. The instructions should be drafted in an attempt to make the plaintiff factually whole but not to put the plaintiff in a better position than he would have been in had the defendant not appropriated the plaintiff’s property.

The following are examples of damages that have been recovered.

Market value. *Prewitt v. Branham*, 643 S.W.2d 122, 123 (Tex. 1982) (one measure of damages for conversion is market value of converted items at time and place of conversion).

Intrinsic value. *International–Great N.R. v. Casey*, 46 S.W.2d 669, 670 (Tex. Comm’n App. 1932, holding approved) (intrinsic value of property may be recovered where there is no market or replacement value for the property); *see also Strickland v. Medlen*, 397 S.W.3d 184, 192 (Tex. 2013) (when dog’s market value cannot be ascertained, correct measure of damages is actual value).

Loss of use. *Luna v. North Star Dodge Sales, Inc.*, 667 S.W.2d 115, 119 (Tex. 1984) (loss-of-use damages may be recovered for period of time before property was returned to owner). Note: the plaintiff may not recover both loss of use and loss of rental value for the same time period.

Lost profits. *Winkle Chevy-Olds-Pontiac, Inc. v. Condon*, 830 S.W.2d 740, 746 (Tex. App.—Corpus Christi 1992, writ dismissed) (lost profits can be recovered where defendant has notice of them).

Travel expenses. *Clifton v. Jones*, 634 S.W.2d 883, 887 (Tex. App.—El Paso 1982, no writ) (plaintiff can recover expenses incurred in traveling to inspect property after conversion).

Lost income from appropriated business contacts and files. The plaintiff can recover the income lost from clients who had their tax returns prepared by a former coworker who unlawfully appropriated the plaintiff’s customer files and customer lists and solicited their business. *See Schmader v. Butschek*, No. 05-15-00278-CV, 2016 WL 4119474, at *3 (Tex. App.—Dallas July 29, 2016, no pet.).

Lost rental income. The plaintiff can recover the cost of purchasing the appropriated property as well as the lost rental value. *Southwest Grain Co. v. Pilgrim’s Pride S.A. de C.V.*, No. 13-07-00557-CV, 2010 WL 2638483, at *5 (Tex. App.—Corpus Christi June 28, 2010, no pet.). Note: the plaintiff may not recover both loss of use and loss of rental income for the same time period.

Mental anguish damages. Mental anguish damages cannot be recovered on a conversion claim. See *Winkle-Chevy-Olds-Pontiac, Inc.*, 830 S.W.2d at 746. Note that in *Beaumont v. Basham*, 205 S.W.3d 608, 620 (Tex. App.—Waco 2006, pet. denied), the court recognized that the plaintiff could recover mental anguish damages under the Act where the party committing theft acted with malice.

PJC 7.11 Predicate Question and Instruction on Award of Exemplary Damages for Conversion

PJC 7.11A Question and Instruction for Causes of Action Accruing on or after September 1, 1995, and Filed before September 1, 2003

If you answered “Yes” to Question _____ [*conversion liability question*], then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Do you find by clear and convincing evidence that the harm to *Paul Payne* resulted from malice?

“Clear and convincing evidence” means the measure or degree of proof that produces a firm belief or conviction of the truth of the allegations sought to be established.

“Malice” means—

1. a specific intent by *Don Davis* to cause substantial injury to *Paul Payne*; or
2. an act or omission by *Don Davis*,
 - a. which when viewed objectively from the standpoint of *Don Davis* 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 *Don Davis* has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.

Answer “Yes” or “No.”

Answer: _____

**PJC 7.11B Question and Instruction for Actions Filed on or after
September 1, 2003**

Answer the following question only if you unanimously answered “Yes” to Question _____ [*conversion liability question*]. Otherwise, do not answer the following question.

To answer “Yes” to the following question, your answer must be unanimous. You may answer “No” to the following question only upon a vote of ten or more jurors. Otherwise, you must not answer the following question.

QUESTION _____

Do you find by clear and convincing evidence that the harm to *Paul Payne* resulted from malice?

“Clear and convincing evidence” means the measure or degree of proof that produces a firm belief or conviction of the truth of the allegations sought to be established.

“Malice” means a specific intent by *Don Davis* to cause substantial injury or harm to *Paul Payne*.

COMMENT

When to use. PJC 7.11 is to be used as a predicate question to PJC 7.12, the question for exemplary damages. It is based on an affirmative finding to the liability question on conversion. PJC 7.11A applies only to causes of action accruing on or after September 1, 1995, and filed before September 1, 2003. PJC 7.11B applies to actions filed on or after September 1, 2003.

In a case in which a defendant has requested a bifurcated trial pursuant to Tex. Civ. Prac. & Rem. Code § 41.009, PJC 7.11 should be answered in the first phase of the trial.

Source of question. PJC 7.11A is derived from Acts 1987, 70th Leg., 1st C.S., ch. 2, § 2.12 (S.B. 5), eff. Sept. 2, 1987, *amended by* Acts 1995, 74th Leg., R.S., ch. 19, § 1 (S.B. 25), eff. Sept. 1, 1995; Acts 1997, 75th Leg., R.S., ch. 165, § 4.01 (S.B. 898), eff. Sept. 1, 1997. PJC 7.11B is derived from Tex. Civ. Prac. & Rem. Code §§ 41.001(7), (11), 41.003(a)(1), (2), (3), (d), 41.004(a); Tex. R. Civ. P. 226a.

Actual damages generally required. In general, exemplary damages may be awarded only if damages other than nominal damages are awarded. However, in actions filed before September 1, 2003, if the jury finds that the harm suffered by the

plaintiff was caused by a specific intent by the defendant to cause substantial injury to the plaintiff (the definition of “malice” in the question above), then an award of nominal damages will support an award of exemplary damages. Former Tex. Civ. Prac. & Rem. Code § 41.004. Actions filed on or after September 1, 2003, are governed by the 2003 amendments to the Civil Practice and Remedies Code that provide that a claimant may not recover exemplary damages if the jury awards only nominal damages. Tex. Civ. Prac. & Rem. Code § 41.004(a).

Unanimity instruction. The unanimity instruction is to be used in all cases filed on or after September 1, 2003. Tex. Civ. Prac. & Rem. Code §§ 41.001(7), (11), 41.003(a), (d), 41.004(a); Tex. R. Civ. P. 226a.

Multiple defendants. The following conditioning instruction may be substituted in a case involving claims against multiple defendants:

Answer the following question regarding a defendant only if you unanimously answered “Yes” to Question _____ [*conversion liability question*] regarding that defendant. Otherwise, do not answer the following question regarding that defendant.

PJC 7.12 Question and Instruction on Exemplary Damages

Answer the following question only if you unanimously answered “Yes” to Question _____ [7.11]. Otherwise, do not answer the following question.

You must unanimously agree on the amount of any award of exemplary damages.

QUESTION _____

What sum of money, if any, if paid now in cash, should be assessed against *Don Davis* and awarded to *Paul Payne* as exemplary damages, if any, for the conduct found in response to Question _____ [7.11]?

“Exemplary damages” means an amount that you may in your discretion award as a penalty or by way of punishment.

Factors to consider in awarding exemplary damages, if any, are—

1. The nature of the wrong.
2. The character of the conduct involved.
3. The degree of culpability of *Don Davis*.
4. The situation and sensibilities of the parties concerned.
5. The extent to which such conduct offends a public sense of justice and propriety.
6. The net worth of *Don Davis*.

[Insert additional instructions if appropriate. See, e.g., PJC 7.13.]

Answer in dollars and cents, if any.

Answer: _____

COMMENT

When to use. PJC 7.12 is used to submit exemplary damages. It should be predicated on a finding justifying the award of exemplary damages. See comments below.

Source of instructions. PJC 7.12 is derived from Tex. Civ. Prac. & Rem. Code §§ 41.001(5), 41.003(d), (e), 41.011(a); and the supreme court’s March 15, 2011, effective April 1, 2011, and April 13, 2011, effective April 13, 2011, orders under Tex. R. Civ. P. 226a.

Actions filed before September 1, 2003. A unanimous decision on the amount of exemplary damages is not required for actions filed before September 1, 2003. In such cases, substitute the following instruction:

If you answered “Yes” to Question _____ [*malice question*], then answer the following question. Otherwise, do not answer the following question.

Predicate finding. Section 41.003 of the Civil Practice and Remedies Code requires a predicate finding before an award of exemplary damages may be made. Tex. Civ. Prac. & Rem. Code § 41.003. That predicate question for a conversion claim is found at PJC 7.11. If a defendant has requested a bifurcated trial pursuant to Tex. Civ. Prac. & Rem. Code § 41.009, the predicate question should be submitted in the first phase of the trial. By the supreme court’s March 15, 2011, effective April 1, 2011, and April 13, 2011, effective April 13, 2011, orders under Tex. R. Civ. P. 226a, the supreme court requires unanimity on the exemplary damages question and the applicable liability question in cases governed by Tex. Civ. Prac. & Rem. Code § 41.003(d) that are filed after September 1, 2003. PJC 7.11B is conditioned accordingly.

Multiple defendants. There should be a separate question and answer blank for each defendant against whom exemplary damages are sought. Tex. Civ. Prac. & Rem. Code § 41.006; *Norton Refrigerated Express, Inc. v. Ritter Bros. Co.*, 552 S.W.2d 910, 913 (Tex. Civ. App.—Texarkana 1977, writ ref’d n.r.e.). In a case involving multiple defendants against whom exemplary damages are sought, the following instruction on unanimity may be substituted:

Answer the following question regarding a defendant only if you unanimously answered “Yes” to Question _____ [7.11] regarding that defendant. Otherwise, do not answer the following question regarding that defendant.

Multiple plaintiffs. For multiple plaintiffs, consideration may be given to an additional question asking the jury to apportion the exemplary damages among them. Tex. Civ. Prac. & Rem. Code § 71.010; *Burk Royalty Co. v. Walls*, 596 S.W.2d 932, 939 (Tex. Civ. App.—Fort Worth 1980), *aff’d on other grounds*, 616 S.W.2d 911 (Tex. 1981). For an example of submission of apportionment in a single question, see PJC 29.8.

Prejudgment interest not recoverable. Prejudgment interest on exemplary damages is not recoverable. Tex. Civ. Prac. & Rem. Code § 41.007.

Bifurcation. For actions filed before September 1, 2003, no predicated instruction is necessary if the court has granted a timely motion to bifurcate trial of the amount of punitive damages. See Tex. Civ. Prac. & Rem. Code § 41.009; *Transportation Insurance Co. v. Moriel*, 879 S.W.2d 10, 29–30 (Tex. 1994). For actions filed on

or after September 1, 2003, the instruction on unanimity must be given in the bifurcated phase.

If in the first phase of the trial the jury finds facts establishing a predicate for an award of exemplary damages, then a separate jury charge should be prepared for the second phase of the trial. See the comments above regarding predicate-finding and PJC 7.11. In such a second-phase jury charge, PJC 7.12 should be submitted with both PJC 1.3 and 1.4.

Factors to consider in determining amount of award. The “factors to consider” listed in PJC 7.12 are from Tex. Civ. Prac. & Rem. Code § 41.011(a).

Limits on conduct to be considered. When there is a significant risk that a jury may seek to punish a defendant for a constitutionally improper reason, the Due Process Clause requires that an additional instruction be given to protect against that risk. *Philip Morris USA v. Williams*, 549 U.S. 346, 355–57.

For example, the defendant’s lawful out-of-state conduct may be probative on some issues in a punitive damages case in certain circumstances. *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 422 (2003). When such evidence is admitted, “[a] jury must be instructed . . . that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred.” *Campbell*, 538 U.S. at 422.

In addition, evidence that the defendant’s conduct risked harm to persons who are not before the court may be probative in determining the reprehensibility of that conduct. But when such evidence is admitted, the jury should be instructed that it may not punish the defendant for any harm it may have caused to persons who are not parties to the litigation. *Williams*, 549 U.S. at 357.

Limitation on amount of recovery. Section 41.008 of the Civil Practice and Remedies Code limits recovery of exemplary damages. However, these limitations will not apply in favor of a defendant found to have “knowingly” or “intentionally” committed conduct described as a felony in specified sections of the Texas Penal Code. See Tex. Civ. Prac. & Rem. Code § 41.008(c), (d).

PJC 7.13 Question and Instruction for Imputing Liability for Exemplary Damages

If you answered “Yes” to Question _____ [7.11], and you inserted a sum of money in answer to Question _____ [applicable damages question], then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Do you find by clear and convincing evidence that the harm to *Paul Payne* resulted from malice attributable to *ABC Corporation*?

“Clear and convincing evidence” means the measure or degree of proof that produces a firm belief or conviction of the truth of the allegations sought to be established.

“Malice” means—

1. a specific intent by *Don Davis* to cause substantial injury to *Paul Payne*; or
2. an act or omission by *Don Davis*,
 - a. which when viewed objectively from the standpoint of *Don Davis* 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 *Don Davis* has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.

You are further instructed that malice may be attributable to *ABC Corporation* because of an act by *Don Davis* if, but only if—

[Insert one or more of the following grounds as supported by the evidence.]

1. *ABC Corporation* authorized the doing and the manner of the act, or
2. *Don Davis* was unfit and *ABC Corporation* was reckless in employing *him*, or
3. *Don Davis* was employed [as a vice-principal] [in a managerial capacity] and was acting in the scope of employment, or

4. *ABC Corporation* or a [vice-principal] [manager] of *ABC Corporation* ratified or approved the act.

Answer “Yes” or “No.”

Answer: _____

COMMENT

When to use. PJC 7.13 may be used if a plaintiff seeks to impute the malice of a defendant employee to his corporate employer. The grounds listed in this instruction are alternatives, and any of the listed grounds that are not applicable to or supported by sufficient evidence in the case should be omitted. Regarding broad-form submission, see Introduction 4(a). If imputation is not required, see PJC 7.11 and substitute *ABC Corporation* for *Don Davis*.

Source of instruction. The supreme court adopted the doctrine set out in *Restatement of Torts* § 909 (1979) in *King v. McGuff*, 234 S.W.2d 403 (Tex. 1950); see also *Fisher v. Carrousel Motor Hotel, Inc.*, 424 S.W.2d 627 (Tex. 1967). Section 909 sets out four distinct reasons to impute the malice of an employee to a corporate employer. As the court in *Fisher* set out:

The rule in Texas is that a principal or master is liable for exemplary or punitive damages because of the acts of his agent, but only if:

- (a) the principal authorized the doing and the manner of the act, or
- (b) the agent was unfit and the principal was reckless in employing him, or
- (c) the agent was employed in a managerial capacity and was acting in the scope of employment, or
- (d) the employer or a manager of the employer ratified or approved the act.

Fisher, 424 S.W.2d at 630; see also *Bennett v. Reynolds*, 315 S.W.3d 867, 883–84 (Tex. 2010). In *Fort Worth Elevators Co.*, the court held that the gross negligence of a “vice-principal” could be imputed to a corporation and listed the elements of “vice-principal” as set out in the grounds listed in PJC 7.13. *Fort Worth Elevators Co. v. Russell*, 70 S.W.2d 397, 406 (Tex. 1934), disapproved on other grounds by *Wright v. Gifford-Hill & Co.*, 725 S.W.2d 712, 714 (Tex. 1987). The court also discussed “absolute or nondelegable duties” for which “the corporation itself remains responsible for the manner of their performance.” *Fort Worth Elevators Co.*, 70 S.W.2d at 401.

Definition of “nondelegable or absolute duties.” If the evidence on vice-principal requires the submission of the element that includes the term “nondelegable or absolute duties,” further definitions may be necessary.

Nondelegable and absolute duties of a corporation are (1) the duty to provide rules and regulations for the safety of employees and to warn them as to the hazards of their positions or employment, (2) the duty to furnish reasonably safe machinery or instrumentalities with which its employees are to labor, (3) the duty to furnish its employees with a reasonably safe place to work, and (4) the duty to exercise ordinary care to select careful and competent coemployees. *Central Ready Mix Concrete Co. v. Islas*, 228 S.W.3d 649, 652 n.10 (Tex. 2007); *Fort Worth Elevators Co.*, 70 S.W.2d at 401.


Caveat. The decision to define nondelegable or absolute duties may need to be balanced against the consideration that this definition may constitute an impermissible comment on the weight of the evidence. In any event, only those elements of the definition raised by the evidence should be submitted.

Punitive damages based on criminal act by another person. Subject to certain exceptions, a court may not award exemplary damages against a defendant because of the harmful criminal act of another. *See* Tex. Civ. Prac. & Rem. Code § 41.005(a), (b). For causes of action accruing on or after September 1, 1995, an employer may be liable for punitive damages arising out of a criminal act by an employee 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.

Tex. Civ. Prac. & Rem. Code § 41.005(c); *see also Bennett*, 315 S.W.3d at 883–84.

Definition of “malice.” *See* PJC 7.11.



[Chapters 8 and 9 are reserved for expansion.]

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PJC 10.1 Employee

QUESTION _____

On the occasion in question, was *Don Davis* acting as an employee of *ABC Company*?

An “employee” is a person in the service of another with the understanding, express or implied, that such other person has the right to direct the details of the work and not merely the result to be accomplished.

Answer “Yes” or “No.”

Answer: _____

COMMENT

When to use. PJC 10.1 should be used if there is a factual dispute about the employment element essential to a defendant’s vicarious liability.

Source of definition. For the characteristics of “employee,” as distinguished from “independent contractor,” see *Limestone Products Distribution, Inc. v. McNamara*, 71 S.W.3d 308 (Tex. 2002); *Newspapers, Inc. v. Love*, 380 S.W.2d 582 (Tex. 1964); *Restatement (Second) of Agency* § 2 (1958). See PJC 10.8 for the definition of “independent contractor.”

Caveat. For cases involving employment as a defense under the Workers’ Compensation Act (Tex. Lab. Code ch. 401), see PJC 10.5.

PJC 10.2 Borrowed Employee—Liability of Borrowing Employer

QUESTION _____

On the occasion in question, was *Don Davis* acting as a borrowed employee of *XYZ Company*?

One who would otherwise be in the general employment of one employer is a “borrowed employee” of another employer if such other employer or his agents have the right to direct and control the details of the particular work inquired about.

Answer “Yes” or “No.”

Answer: _____

COMMENT

When to use—replaces PJC 10.1. PJC 10.2 should be given if a plaintiff seeks to impose vicarious liability on a borrowing employer (*XYZ Company*) for the negligence of one generally employed by another.

Source of definition. For discussion of the “borrowed employee” (sometimes called “loaned employee” or “special employee”) doctrine, see *St. Joseph Hospital v. Wolff*, 94 S.W.3d 513, 537–38 (Tex. 2002); *J.A. Robinson Sons, Inc. v. Wigart*, 431 S.W.2d 327, 334 (Tex. 1968), *overruled on other grounds by Sanchez v. Schindler*, 651 S.W.2d 249, 251 (Tex. 1983); *Producers Chemical Co. v. McKay*, 366 S.W.2d 220, 225–26 (Tex. 1963).

**PJC 10.3 Borrowed Employee—Lending Employer’s Rebuttal
Instruction**

QUESTION _____

On the occasion in question, was *Don Davis* acting as an employee of *ABC Company*?

An “employee” is a person in the service of another with the understanding, express or implied, that such other person has the right to direct the details of the work and not merely the result to be accomplished.

An employee ceases to be an employee of his general employer if he becomes the “borrowed employee” of another. One who would otherwise be in the general employment of one employer is a borrowed employee of another employer if such other employer or his agents have the right to direct and control the details of the particular work inquired about.

Answer “Yes” or “No.”

Answer: _____

COMMENT

When to use—replaces PJC 10.1. PJC 10.3 should be given if a general employer (*ABC Company*) who is claimed to be vicariously liable seeks to rebut the employment relationship with evidence that the employee was the borrowed employee of someone else on the occasion in question. See *Linden-Alimak, Inc. v. McDonald*, 745 S.W.2d 82, 84 (Tex. App.—Fort Worth 1988, writ denied).

Source of definition. For discussion of the “borrowed employee” (sometimes called “loaned employee” or “special employee”) doctrine, see *St. Joseph Hospital v. Wolff*, 94 S.W.3d 513, 537–38 (Tex. 2002); *J.A. Robinson Sons, Inc. v. Wigart*, 431 S.W.2d 327, 334 (Tex. 1968), *overruled on other grounds by Sanchez v. Schindler*, 651 S.W.2d 249, 251 (Tex. 1983); *Producers Chemical Co. v. McKay*, 366 S.W.2d 220, 225–26 (Tex. 1963).

**PJC 10.4 Borrowed Employee—Disjunctive Submission of Liability
of Lending or Borrowing Employer**

QUESTION _____

On the occasion in question, was *Don Davis* acting as an employee of *ABC Company* or of *XYZ Company*?

An “employee” is a person in the service of another with the understanding, express or implied, that such other person has the right to direct the details of the work and not merely the result to be accomplished.

An employee ceases to be the employee of his general employer if he becomes the “borrowed employee” of another. One who would otherwise be in the general employment of one employer is a borrowed employee of another employer if such other employer or his agents have the right to direct and control the details of the particular work inquired about.

For purposes of this question, the term “employee” includes “borrowed employee.” On the occasion in question, *Don Davis* could not have been an employee of both *ABC Company* and *XYZ Company*.

Answer “*ABC Company*” or “*XYZ Company*.”

Answer: _____

COMMENT

When to use—replaces PJC 10.1. PJC 10.4 should be given only if the plaintiff sues both the lending and the borrowing employers, contending that one or the other is vicariously liable for the conduct of an employee or borrowed employee. This form can be used only in the situation of alternative theories of recovery; otherwise the question would contain an impermissible inferential rebuttal. *Cf. Archuleta v. International Insurance Co.*, 667 S.W.2d 120 (Tex. 1984) (proper to ask about total and partial incapacity as alternative theories; inquiry about partial incapacity is improper inferential rebuttal if only total incapacity is claimed).

Source of definition. For discussion of the “borrowed employee” (sometimes called “loaned employee” or “special employee”) doctrine, see *St. Joseph Hospital v. Wolff*, 94 S.W.3d 513, 537–38 (Tex. 2002); *J.A. Robinson Sons, Inc. v. Wigart*, 431 S.W.2d 327, 334 (Tex. 1968), *overruled on other grounds by Sanchez v. Schindler*, 651 S.W.2d 249, 251 (Tex. 1983); *Producers Chemical Co. v. McKay*, 366 S.W.2d 220, 225–26 (Tex. 1963).

PJC 10.5 Employment as Defense under Workers' Compensation Act

QUESTION _____

On the occasion in question, was *Paul Payne* acting as an employee of *ABC Company*?

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 10.5 illustrates how PJC 10.1 may be adapted to submit a defendant's claim that a plaintiff was the defendant's employee and thus is barred by the exclusivity of the Workers' Compensation Act, Tex. Lab. Code § 408.001. In that event, the question would inquire about the *plaintiff's* rather than the *defendant's* employment status, and the definition of "employee" in PJC 10.1 should accompany the question. If the plaintiff seeks to avoid the exclusivity defense by rebutting the claim that he was the defendant's employee with evidence that he was a borrowed employee of another, an inferential rebuttal instruction, as in PJC 10.3, should also be included.

Similarly, PJC 10.2 may be adapted to submit a defendant's claim that a plaintiff was the defendant's borrowed employee and thus is barred by the exclusivity of the Workers' Compensation Act. In that event, the above question should be reworded so that the phrase *a borrowed employee of XYZ Company* replaces the phrase *an employee of ABC Company*. Also, the definition of "borrowed employee" in PJC 10.2 should accompany the question.

Temporary employment agency employment. When the plaintiff is an employee of a temporary employment agency, he may be considered the dual employee of both the employment agency and the client company if he is working under the direct supervision of the client company. *Wingfoot Enterprises v. Alvarado*, 111 S.W.3d 134 (Tex. 2003). To be entitled to claim protections of the exclusive remedy provision of the Workers' Compensation Act, however, a party must either obtain or specifically negotiate for and be a named insured on a worker's compensation insurance policy. *Garza v. Exel Logistics, Inc.*, 161 S.W.3d 473 (Tex. 2005); *see also Wingfoot Enterprises*, 111 S.W.3d 134.

Staff leasing agency employment. When the plaintiff is an employee of a licensed staff leasing company and the staff leasing company procures worker's compensation insurance, both the leasing company and the client company may be entitled

to the exclusive remedy provisions of the Workers' Compensation Act. *Wingfoot Enterprises*, 111 S.W.3d at 141. However, if the staff leasing company does not obtain worker's compensation insurance, both the staff leasing company and the client company may be treated as nonsubscribers. *Texas Workers' Compensation Insurance Fund v. DEL Industrial, Inc.*, 35 S.W.3d 591 (Tex. 2000). Note: The Staff Leasing Services Act was amended in 2013 and is now the Professional Employer Organization Act. Tex. Lab. Code ch. 91.

Statutory employment. In *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 444 (Tex. 2009), the court stated: "We conclude that Entergy qualifies under the Act's definition as a 'general contractor' and, as a statutory employer, is entitled to assert the exclusive remedy defense. Tex. Lab. Code § 408.001."

Caveat. The Workers' Compensation Act contains its own definitions of various terms, such as "course and scope of employment," "employee," and "independent contractor." See Tex. Lab. Code §§ 401.011(12), 401.012, 406.121(2). If such terms are relevant to determining employment as a defense under the Act, the practitioner is advised to consult the Act's definitions to determine whether the instructions found in this chapter need to be modified to track the relevant statutory definition.

PJC 10.6 Scope of Employment

QUESTION _____

On the occasion in question, was *Don Davis* acting in the scope of *his* employment?

An employee is acting in the scope of his employment if he is acting in the furtherance of the business of his employer.

Answer “Yes” or “No.”

Answer: _____

COMMENT

When to use. PJC 10.6 inquires whether an alleged employee was acting in the scope of his employment. Under the principle of respondeat superior, the master is liable for a servant’s torts only if the servant was acting within the scope of his employment. *See Leadon v. Kimbrough Bros. Lumber Co.*, 484 S.W.2d 567 (Tex. 1972); *Robertson Tank Lines v. Van Cleave*, 468 S.W.2d 354 (Tex. 1971); *J.C. Penney Co. v. Oberpriller*, 170 S.W.2d 607 (Tex. 1943); *Parmlee v. Texas & New Orleans Railroad*, 381 S.W.2d 90 (Tex. Civ. App.—Tyler 1964, writ ref’d n.r.e.).

When to instruct on scope of authority. Generally, vicarious liability is imposed only for authorized action in the furtherance of an employer’s business. The element of general authority, however, is not included in PJC 10.6 because it is usually undisputed. If it is disputed, the phrase “and within the scope of the general authority given him by his employer” should be added at the end of the definition. *See Broaddus v. Long*, 138 S.W.2d 1057 (Tex. 1940).

Defense to respondeat superior liability under Dramshop Act or common law. See PJC 5.6.

PJC 10.7 Deviation

An employee is not acting within the scope of his employment if he departs from the furtherance of the employer's business for a purpose of his own not connected with his employment and has not returned to the place of departure or to a place he is required to be in the performance of his duties.

COMMENT

When to use—given after definition of “scope.” PJC 10.7 should be used if there is evidence that a person alleged to be an employee has deviated from the furtherance of the employer's business and is not acting within the scope of his employment. See *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 757 (Tex. 2007). Deviation is an inferential rebuttal to the claim that the employee was acting in the scope of employment, as submitted in PJC 10.6. *City of Houston v. Wormley*, 623 S.W.2d 692 (Tex. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.). For the elements of “deviation,” see *Texas & Pacific Railway v. Hagenloh*, 247 S.W.2d 236 (Tex. 1952); *Robert R. Walker, Inc. v. Burgdorf*, 244 S.W.2d 506 (Tex. 1951). PJC 10.7 should be given immediately after the PJC 10.6 definition of “scope of employment.”

When to instruct on resuming performance of duties. If the employee has returned to the place of departure or to a place he is required to be in the performance of his duties, he still may not have returned to the scope of his employment. In such a case, the phrase “and resumes the performance of his duties” should be added at the end of the instruction.

PJC 10.8 Independent Contractor

A person is not acting as an employee if he is acting as an “independent contractor.” An independent contractor is a person who, in pursuit of an independent business, undertakes to do specific work for another person, using his own means and methods without submitting himself to the control of such other person with respect to the details of the work, and who represents the will of such other person only as to the result of his work and not as to the means by which it is accomplished.

COMMENT

When to use—given after definition of “employee.” PJC 10.8 should be used if there is evidence that an alleged employee was actually an independent contractor. The contention that a person is an independent contractor is an inferential rebuttal to the existence of an employee relationship. PJC 10.8 should be given immediately after the definition of “employee” in PJC 10.1.

Source of definition. For the definition of “independent contractor,” see *Industrial Indemnity Exchange v. Southard*, 160 S.W.2d 905, 907 (Tex. 1942); see also *Texas A&M University v. Bishop*, 156 S.W.3d 580, 584–85 (Tex. 2005). For cases approving this definition in a charge submission, see *Centurion Planning Corp. v. Seabrook Venture II*, 176 S.W.3d 498, 511–12 (Tex. App.—Houston [1st Dist.] 2004, no pet.), and *Weidner v. Sanchez*, 14 S.W.3d 353, 376 (Tex. App.—Houston [14th Dist.] 2000, no pet.). See also PJC 10.1 Comment.

Control. “[I]n the employment context, it is the right of control that commonly justifies imposing liability on the employer for the actions of the employee. Indeed, it is the absence of that right of control that commonly distinguishes between an employee and an independent contractor and negates vicarious liability for the actions of the latter.” *St. Joseph Hospital v. Wolff*, 94 S.W.3d 513, 542 (Tex. 2002). The general rule for independent contractors thus rests on certain tests: (1) the independent nature of his business; (2) his obligation to furnish necessary tools, supplies, and material to perform the job; (3) his right to control the progress of the work, except as to final results; (4) the time for which he is employed; and (5) the method of payment, whether by time or by the job. See *Industrial Indemnity Exchange*, 160 S.W.2d at 907; see also *Texas A&M University*, 156 S.W.3d at 584–85 (recognizing same tests as “factors” to consider in determining status). These tests are not necessarily concurrent with each other; nor is any one in itself controlling. *Industrial Indemnity Exchange*, 160 S.W.2d at 907. It is therefore unclear whether these “factors” or “tests” are necessarily subsumed within the above instruction or whether one or more of them might appropriately be the subject of further instruction to the jury.

Dispute about contract excluding right of control. If there is a dispute about the conclusiveness of a written contract excluding right of control, see PJC 10.9.

PJC 10.9 Independent Contractor by Written Agreement

A written contract expressly excluding any right of control over the details of the work is conclusive as to *Don Davis's* status as an independent contractor unless—

1. it was a subterfuge from the beginning; or
2. it was persistently ignored; or
3. it was modified by subsequent express or implied agreement of the parties.

COMMENT

When to use—given after definition of “independent contractor.” PJC 10.9 should be given if a written contract tends to establish an independent contractor relationship but evidence is introduced that, in practice, actual control was persistently exercised. See *Newspapers, Inc. v. Love*, 380 S.W.2d 582 (Tex. 1964); *Elder v. Aetna Casualty & Surety Co.*, 236 S.W.2d 611 (Tex. 1951). If this question is raised by the evidence, this instruction should be given immediately after the definition of “independent contractor” in PJC 10.8. For cases involving a property owner’s liability to contractors, subcontractors, or their employees under chapter 95 of the Texas Civil Practice and Remedies Code, see the current edition of State Bar of Texas, *Texas Pattern Jury Charges—Malpractice, Premises & Products* PJC 66.14.

PJC 10.10 Respondeat Superior—Nonemployee

QUESTION _____

On the occasion in question, was *Tim Thomas* operating the vehicle in the furtherance of a mission for the benefit of *Don Davis* and subject to control by *Don Davis* as to the details of the mission?

Answer “Yes” or “No.”

Answer: _____

COMMENT

When to use. PJC 10.10 should be given if the respondeat superior doctrine is raised in a case not involving an ordinary employee. The key elements are (1) benefit to the defendant and (2) right of control by the defendant. *English v. Dhane*, 294 S.W.2d 709 (Tex. 1956); *Bertrand v. Mutual Motor Co.*, 38 S.W.2d 417 (Tex. Civ. App.—Eastland 1931, writ ref’d); see also *St. Joseph Hospital v. Wolff*, 94 S.W.3d 513, 537 & nn.71–72 (Tex. 2002).

Omit “subject to control as to details.” If the right to control the details of the mission is undisputed, the phrase “and subject to control by *Don Davis* as to the details of the mission” may be omitted.

Liability for child’s operation of motor vehicle. As to liability arising from a child’s operation of a vehicle on behalf of his parent, see *de Anda v. Blake*, 562 S.W.2d 497 (Tex. Civ. App.—San Antonio 1978, no writ); *Smith v. Cox*, 446 S.W.2d 52 (Tex. Civ. App.—Corpus Christi 1969, writ ref’d n.r.e.); and *Campbell v. Swinney*, 328 S.W.2d 330 (Tex. Civ. App.—Dallas 1959, writ ref’d n.r.e.).

PJC 10.11 Joint Enterprise

QUESTION _____

On the occasion in question, were *Paul Payne* and *Tim Thomas* engaged in a joint enterprise?

A “joint enterprise” exists if the persons concerned have (1) an agreement, either express or implied, with respect to the enterprise or endeavor; and (2) a common purpose; and (3) a community of pecuniary interest in [*the common purpose of the enterprise*], among the members [*of the group*]; and (4) an equal right to a voice in the direction of the enterprise, which gives an equal right of control.

Answer “Yes” or “No.”

Answer: _____

COMMENT

When to use. “Joint enterprise” liability makes each party thereto the agent of the other and thereby holds each responsible for the negligent act of the other. *Texas Department of Transportation v. Able*, 35 S.W.3d 608, 613 (Tex. 2000); *Shoemaker v. Estate of Whistler*, 513 S.W.2d 10, 14 (Tex. 1974). In *Shoemaker* the court adopted the formulation of joint enterprise as stated in the *Restatement (Second) of Torts* § 491 cmt. c (1965):

The elements which are essential to a joint enterprise are commonly stated to be four: (1) an agreement, express or implied, among the members of the group; (2) a common purpose to be carried out by the group; (3) a community of pecuniary interest in that purpose, among the members; and (4) an equal right to a voice in the direction of the enterprise, which gives an equal right of control.

Shoemaker, 513 S.W.2d at 16–17. Before *Shoemaker*, Texas cases had applied a broad interpretation of the doctrine of joint enterprise. In analyzing distinctions between partnership, joint venture, and joint enterprise, the court noted that “in interpreting joint enterprise, some courts have retained the business character of joint venture as a requirement, while others have manifested a broader view of the doctrine.” *Shoemaker*, 513 S.W.2d at 16. *Shoemaker* limited the application of joint enterprise to cases in which there is a business or pecuniary purpose to the enterprise. *Shoemaker*, 513 S.W.2d at 17. See also *Able*, 35 S.W.3d at 613–14.

In the past joint enterprise was often applied in automobile cases to impute the negligence of the driver of the vehicle to a passenger. W. Page Keeton et al., *Prosser and*

Keeton on the Law of Torts § 72, at 517 (5th ed. 1984). *Shoemaker* relied heavily on *Prosser and Keeton*, which distinguishes joint enterprise from joint venture and explains joint enterprise as follows:

Except in comparatively rare instances, its application has been in the field of automobile law, where it has meant that the negligence of the driver of the vehicle is to be imputed to a passenger riding in it. In relatively few cases, the passenger has been charged with liability as a defendant to a third person “Joint enterprise” is thus of importance chiefly as a defendant’s doctrine, imputing the negligence of another to the plaintiff.

Shoemaker, 513 S.W.2d at 14.

More recent cases, however, have expanded the use of joint enterprise beyond automotive law. See *Able*, 35 S.W.3d 608; *Blount v. Bordens, Inc.*, 910 S.W.2d 931 (Tex. 1995); *Triplex Communications, Inc. v. Riley*, 900 S.W.2d 716 (Tex. 1995).

Element (3) revised. In 2002, the Supreme Court of Texas held (among other things) in a plurality opinion that (1) the third element in earlier versions of PJC 10.11 was incomplete and erroneous; (2) since *Shoemaker*, the third element is and has been whether there is a “community of pecuniary interest in [the common purpose of the enterprise], among the members [of the group]”; (3) a “common business or pecuniary interest” does not have the same meaning; (4) a community of pecuniary interest means an interest shared “without special or distinguishing characteristics” (repeatedly citing *Ely v. General Motors Corp.*, 927 S.W.2d 774, 779 (Tex. App.—Texarkana 1996, writ denied)); and (5) because St. Joseph properly objected to the charge, sufficiency of the evidence should be reviewed under the *Restatement* definition of “joint enterprise” adopted in *Shoemaker*. *St. Joseph Hospital v. Wolff*, 94 S.W.3d 513, 525–34 (Tex. 2002), *rev’g* 999 S.W.2d 579 (Tex. App.—Austin 1999).

Distinguished from joint venture. Joint enterprise differs from the relationship contemplated under “joint venture” law. A joint venture is contractual and “must be based upon an agreement, either express or implied.” *Coastal Plains Development Corp. v. Micrea, Inc.*, 572 S.W.2d 285, 287 (Tex. 1978). A joint venture must be based on an agreement that has all the following elements:

1. a community of interest in the venture,
2. an agreement to share profits,
3. an express agreement to share losses, and
4. a mutual right of control or management of the venture.

Ayco Development Corp. v. G.E.T. Service Co., 616 S.W.2d 184, 186 (Tex. 1981); *Coastal Plains*, 572 S.W.2d at 287; *Taylor v. GWR Operating Co.*, 820 S.W.2d 908, 911 (Tex. App.—Houston [1st Dist.] 1991, writ denied). The absence of any one of these elements precludes a finding of a joint venture as a matter of law. *State v. Hous-*

ton Lighting & Power Co., 609 S.W.2d 263, 268 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.); *see also Coastal Plains*, 572 S.W.2d at 288.

**PJC 10.12 Negligent Entrustment—Reckless, Incompetent,
or Unlicensed Driver**

As to *Edna Entrustor*, “negligence” means entrusting a vehicle to a *reckless* driver if the entrustor knew or should have known that the driver was *reckless*. Such negligence is a proximate cause of a collision if the negligence of the driver to whom the vehicle was entrusted is a proximate cause of the collision.

QUESTION _____

Did the negligence, if any, of the persons named below proximately cause the occurrence in question?

Answer “Yes” or “No” for each of the following:

Answer the question as to *Edna Entrustor* only if you have answered “Yes” as to *David Driver*.

1. *David Driver* _____
2. *Edna Entrustor* _____
3. *Paul Payne* _____

COMMENT

When to use. PJC 10.12 submits the common-law doctrine of negligent entrustment to a reckless driver. In an appropriate case, the words *incompetent*, *reckless* or *incompetent*, or *unlicensed* should be substituted for *reckless*. Negligent entrustment requires (1) entrustment of a vehicle by the owner (2) to an unlicensed, incompetent, or reckless driver (3) that the owner knew or should have known to be unlicensed, incompetent, or reckless; and (4) the driver’s negligence on the occasion in question (5) proximately caused the accident. *Williams v. Steves Industries, Inc.*, 699 S.W.2d 570 (Tex. 1985), *superseded by statute on other grounds as stated in Transportation Insurance Co. v. Moriel*, 879 S.W.2d 10, 20 n.11 (Tex. 1994); *Mundy v. Pirie-Slaughter Motor Co.*, 206 S.W.2d 587 (Tex. 1947); *Hanson v. Green*, 339 S.W.2d 381 (Tex. Civ. App.—Texarkana 1960, writ ref’d); *see also* Walter Dunham, Jr., *Doctrine of Negligent Entrustment to Reckless or Incompetent Driver*, 25 Tex. B.J. 123 (1962); Note, *The Doctrine of Negligent Entrustment in Texas*, 20 Sw. L.J. 202 (1966). Note that PJC 10.12 consists of two parts—an instruction, to be given immediately after the definition of “negligence,” and a broad-form question.

Statutory standard. “A person may not authorize or knowingly permit a motor vehicle owned by or under the control of the person to be operated on a highway by any person in violation of this chapter.” Tex. Transp. Code § 521.458(b).

The Committee believes that this standard is comprehended within the common-law standard for negligent entrustment, and thus no instruction is necessary. See PJC 5.1 comment, “Two types of negligence per se standards.”

Proximate cause of entrustor. Negligent entrustment is considered a proximate cause of the collision if the risk that caused the entrustment to be negligent caused the accident at issue. *TXI Transportation Co. v. Hughes*, 306 S.W.3d 230, 240–41 (Tex. 2010) (neither driver’s status as illegal alien nor fact that he had used fake Social Security number to obtain his commercial driver’s license was proximate cause of accident). Concerning whether the presumption of proximate cause set out in the second sentence of this instruction should apply in a double-entrustment case, see *Schneider v. Esperanza Transmission Co.*, 744 S.W.2d 595 (Tex. 1987) (where risk that caused entrustment to be negligent did not cause collision, entrustment was not proximate cause of collision).

If only entrustor is sued. If only the entrustor is sued, the driver’s conduct would not be inquired about, and the predicating instruction, “Answer the question as to *Edna Entrustor* only if you have answered ‘Yes’ as to *David Driver*,” should be omitted. It is sufficient that the instruction state that if the driver’s negligence proximately caused the collision, the entrustor’s negligence is considered the proximate cause of the collision.

Caveat when both entrustor and trustee are joined. Whether the entrustor should be submitted in the comparative causation question is uncertain. See *Bedford v. Moore*, 166 S.W.3d 454 (Tex. App.—Fort Worth 2005, no pet.); *Rosell v. Central West Motor Stages, Inc.*, 89 S.W.3d 643 (Tex. App.—Dallas 2002, pet. denied); *Loom Craft Carpet Mills, Inc. v. Gorrell*, 823 S.W.2d 431 (Tex. App.—Texarkana 1992, no writ). Also see Justice Jefferson’s dissent in *F.F.P. Operating Partners, L.P. v. Duenez*, 237 S.W.3d 680, 694 (Tex. 2007).

Modify “negligence” definition to refer only to parties other than entrustor. The basic definition of “negligence,” PJC 2.1, which precedes this instruction, should be modified by adding the phrase “when used with respect to the conduct of [*include names of parties other than the entrustor’s*]” after the first word, “negligence,” to inform the jury that the more specific definition of negligence in PJC 10.12 applies only to the entrustor. See PJC 2.1 comment, “Modify if ‘ordinary care’ not applicable to all.”

Employer required to investigate. An employer is required to investigate a driver’s driving record with the Department of Public Safety and to verify that he has a valid license before entrusting a vehicle to him to transport persons or property. Tex. Transp. Code § 521.459(a); see *North Houston Pole Line Corp. v. McAllister*, 667 S.W.2d 829, 835 (Tex. App.—Houston [14th Dist.] 1983, no writ) (former article 6687b, section 37, imposed “duty to know”).

If unlicensed entrustee entrusts to another unlicensed driver. For circumstances in which an unlicensed driver to whom the owner entrusted his vehicle permitted another unlicensed driver to operate it, see *Hanson*, 339 S.W.2d 381.

PJC 10.13 Negligent Entrustment—Defective Vehicle

As to *Edna Entrustor*, “negligence” means entrusting a vehicle to another if the entrustor knew or should have known that the vehicle was defective.

QUESTION _____

Did the negligence, if any, of those named below proximately cause the occurrence in question?

Answer “Yes” or “No” for each of the following:

- 1. *David Driver* _____
- 2. *Edna Entrustor* _____
- 3. *Paul Payne* _____

COMMENT

When to use. PJC 10.13 submits the common-law doctrine of negligent entrustment of a defective vehicle. See *Russell Construction Co. v. Ponder*, 186 S.W.2d 233 (Tex. 1945); *Sturtevant v. Pagel*, 130 S.W.2d 1017 (Tex. 1939). Like PJC 10.12, PJC 10.13 consists of two parts, an instruction and a question. This instruction should be given immediately after the definition of “negligence.”

Owner must be proximate cause of collision. Unlike the doctrine of negligent entrustment to a reckless, incompetent, or unlicensed driver (see PJC 10.12), the entrustor of a defective vehicle must be found to be the proximate cause of the collision.

If only owner is sued. If only the vehicle’s owner (*Edna Entrustor*) is sued, the negligence of the driver (*David Driver*) should not be submitted to the jury.

Modify “negligence” definition to refer only to parties other than entrustor. The basic definition of “negligence,” PJC 2.1, which precedes this instruction, should be modified by adding the phrase “when used with respect to the conduct of [*include names of parties other than the entrustor’s*]” after the first word, “negligence,” to inform the jury that the more specific definition of negligence in PJC 10.13 applies only to the entrustor. See PJC 2.1 comment, “Modify if ‘ordinary care’ not applicable to all.”

PJC 10.14 Imputing Gross Negligence or Malice to a Corporation**PJC 10.14A Imputing Gross Negligence to a Corporation—
Causes of Action Accruing before September 1, 1995**

If, in answer to Question _____ [*applicable liability question*], you found that the negligence of *ABC Corporation* proximately caused the occurrence, then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Was such negligence of *ABC Corporation* “gross negligence”?

[Define “gross negligence” as set out in PJC 4.2A.]

You are further instructed that *ABC Corporation* may be grossly negligent because of an act by *Don Davis* if, but only if—

[Insert one or more of the following grounds as supported by the evidence.]

1. *ABC Corporation* authorized the doing and the manner of the act, or
2. *Don Davis* was unfit and *ABC Corporation* was reckless in employing him, or
3. *Don Davis* was employed [*as a vice-principal*] [*in a managerial capacity*] and was acting in the scope of employment, or
4. *ABC Corporation* or a [*vice-principal*] [*manager*] of *ABC Corporation* ratified or approved the act.

Answer “Yes” or “No.”

Answer: _____

**PJC 10.14B Imputing Malice to a Corporation—Causes of Action
Accruing on or after September 1, 1995, and Filed
before September 1, 2003**

If you answered “Yes” to Question _____ [*applicable liability question*], and you inserted a sum of money in answer to Question _____ [*applicable*

damages question], then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Do you find by clear and convincing evidence that the harm to *Paul Payne* resulted from malice attributable to *ABC Corporation*?

“Clear and convincing evidence” means the measure or degree of proof that produces a firm belief or conviction of the truth of the allegations sought to be established.

“Malice” means—

1. a specific intent by *Don Davis* to cause substantial injury to *Paul Payne*; or
2. an act or omission by *Don Davis*,
 - a. which when viewed objectively from the standpoint of *Don Davis* 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 *Don Davis* has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.

You are further instructed that malice may be attributable to *ABC Corporation* because of an act by *Don Davis* if, but only if—

[Insert one or more of the following grounds as supported by the evidence.]

1. *ABC Corporation* authorized the doing and the manner of the act, or
2. *Don Davis* was unfit and *ABC Corporation* was reckless in employing him, or
3. *Don Davis* was employed [as a vice-principal] [in a managerial capacity] and was acting in the scope of employment, or
4. *ABC Corporation* or a [vice-principal] [manager] of *ABC Corporation* ratified or approved the act.

Answer “Yes” or “No.”

Answer: _____

**PJC 10.14C Imputing Gross Negligence to a Corporation—
Actions Filed on or after September 1, 2003**

Answer the following question regarding *ABC Corporation* only if you unanimously answered “Yes” to Question _____ [*applicable liability question*] regarding *ABC Corporation*. Otherwise, do not answer the following question regarding *ABC Corporation*.

To answer “Yes” to [*any part of*] the following question, your answer must be unanimous. You may answer “No” to [*any part of*] the following question only upon a vote of ten or more jurors. Otherwise, you must not answer [*that part of*] the following question.

QUESTION _____

Do you find by clear and convincing evidence that the harm to *Paul Payne* resulted from gross negligence attributable to *ABC Corporation*?

“Clear and convincing evidence” means the measure or degree of proof that produces a firm belief or conviction of the truth of the allegations sought to be established.

“Gross negligence” means an act or omission by *Don Davis*,

1. which when viewed objectively from the standpoint of *Don Davis* at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and
2. of which *Don Davis* has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.

You are further instructed that *ABC Corporation* may be grossly negligent because of an act by *Don Davis* if, but only if—

[*Insert one or more of the following grounds as supported by the evidence.*]

1. *ABC Corporation* authorized the doing and the manner of the act, or
2. *Don Davis* was unfit and *ABC Corporation* was reckless in employing him, or
3. *Don Davis* was employed [*as a vice-principal*] [*in a managerial capacity*] and was acting in the scope of employment, or

4. *ABC Corporation* or a [vice-principal] [manager] of *ABC Corporation* ratified or approved the act.

[Include one or more of the following definitions if the grounds include an element in which the term “vice-principal,” “manager,” or “managerial capacity” is used. Only the applicable elements of vice-principal, manager, or managerial capacity should be included in the definitions as submitted to the jury.]

A person is a “vice-principal” if—

1. that person is a corporate officer; or
2. that person has authority to employ, direct, and discharge an employee of *ABC Corporation*; or
3. that person is engaged in the performance of nondelegable or absolute duties of *ABC Corporation*; or
4. *ABC Corporation* has confided to that person the management of the whole or a department or division of the business of *ABC Corporation*.

A person is a manager or is employed in a managerial capacity if—

1. that person has authority to employ, direct, and discharge an employee of *ABC Corporation*; or
2. *ABC Corporation* has confided to that person the management of the whole or a department or division of the business of *ABC Corporation*.

Answer “Yes” or “No.”

Answer: _____

COMMENT

When to use. PJC 10.14 may be used if a plaintiff seeks to impute the gross negligence or malice of a defendant employee to his corporate employer. The grounds listed in this instruction are alternatives, and any of the listed grounds that are not applicable to or supported by sufficient evidence in the case should be omitted. Regarding broad-form submission, see Introduction 4(a). If imputation is not required, see PJC 4.2.

Source of instruction. The supreme court adopted the doctrine set out in *Restatement of Torts* § 909 (1979) in *King v. McGuff*, 234 S.W.2d 403 (Tex. 1950); see also *Fisher v. Carrousel Motor Hotel, Inc.*, 424 S.W.2d 627 (Tex. 1967). Section 909 sets

out four distinct reasons to impute the gross negligence or malice of an employee to a corporate employer. As the court in *Fisher* set out:

The rule in Texas is that a principal or master is liable for exemplary or punitive damages because of the acts of his agent, but only if:

- (a) the principal authorized the doing and the manner of the act, or
- (b) the agent was unfit and the principal was reckless in employing him, or
- (c) the agent was employed in a managerial capacity and was acting in the scope of employment, or
- (d) the employer or a manager of the employer ratified or approved the act.

Fisher, 424 S.W.2d at 630; see also *Bennett v. Reynolds*, 315 S.W.3d 867, 883–84 (Tex. 2010). In *Fort Worth Elevators Co.*, the court held that the gross negligence of a “vice-principal” could be imputed to a corporation and listed the elements of “vice-principal” as set out in the definitions in PJC 10.14C. *Fort Worth Elevators Co. v. Russell*, 70 S.W.2d 397, 406 (Tex. 1934), disapproved on other grounds by *Wright v. Gifford-Hill & Co.*, 725 S.W.2d 712, 714 (Tex. 1987). The court also discussed “absolute or nondelegable duties” for which “the corporation itself remains responsible for the manner of their performance.” *Fort Worth Elevators Co.*, 70 S.W.2d at 401.

Definition of nondelegable or absolute duties. If the evidence on vice-principal requires the submission of the element that includes the term “nondelegable or absolute duties,” further definitions may be necessary.

Nondelegable and absolute duties of a corporation are (1) the duty to provide rules and regulations for the safety of employees and to warn them as to the hazards of their positions or employment, (2) the duty to furnish reasonably safe machinery or instrumentalities with which its employees are to labor, (3) the duty to furnish its employees with a reasonably safe place to work, and (4) the duty to exercise ordinary care to select careful and competent coemployees. *Central Ready Mix Concrete Co. v. Islas*, 228 S.W.3d 649, 652 n.10 (Tex. 2007); *Fort Worth Elevators Co.*, 70 S.W.2d at 401.

Caveat. The decision to define nondelegable or absolute duties may need to be balanced against the consideration that this definition may constitute an impermissible comment on the weight of the evidence. In any event, only those elements of the definition raised by the evidence should be submitted.

Punitive damages based on criminal act by another person. Subject to certain exceptions, a court may not award exemplary damages against a defendant because of the harmful criminal act of another. See Tex. Civ. Prac. & Rem. Code § 41.005(a), (b). For causes of action accruing on or after September 1, 1995, an employer may be liable for punitive damages arising out of a criminal act by an employee 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.

Tex. Civ. Prac. & Rem. Code § 41.005(c). *See also Bennett*, 315 S.W.3d at 883–84.

Malice as a ground for exemplary damages in actions filed on or after September 1, 2003. Malice is also a ground for recovery of exemplary damages. *See* Tex. Civ. Prac. & Rem. Code § 41.003(a)(3).

Source of definitions of “gross negligence” and “malice.” *See* PJC 4.2 and Comment.

Unanimity instructions. PJC 10.14C is for use in all cases filed on or after September 1, 2003. Tex. R. Civ. P. 226a. Please note that in a case with only one defendant, the *any part of* language may be unnecessary.



CHAPTER 11	TRESPASS	
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PJC 11.1 Trespass Actions Generally—When to Apply (Comment)

Definitions. “Trespass” means an entry on the property of another without having consent of the owner. The term “trespass” is used frequently within different contexts. This chapter deals with civil trespass. Another volume addresses oil-and-gas-related trespass. See the current edition of State Bar of Texas, *Texas Pattern Jury Charges—Oil & Gas*.

In a civil trespass action, unauthorized entry on the property of another without having consent of the property owner constitutes trespass. Trespass can also occur by causing or permitting a thing to cross the property boundary of another without that owner’s consent. In the context of oil and gas, a defendant’s conduct is affected by factors such as oil production and the mineral estate, and there are different types of defenses and damages recoverable. Texas law also includes criminal trespass. That offense is subject to an action brought by a prosecuting entity for violations of specific ordinances and laws. Criminal trespass is not addressed in this volume and remains within the purview of criminal law and specific criminal jury charges. See the appendix to this volume for more information about the *Texas Criminal Pattern Jury Charges* series.

Practitioners should apply this chapter if the claim involves an entry on the property of another without having consent of the owner and does not involve oil and gas. For other types of trespass, consult the following:

1. If the claim involves the removal of or interference with an oil and gas lease or its production, see chapters 302 and 313 in the current edition of State Bar of Texas, *Texas Pattern Jury Charges—Oil & Gas*.
2. If the claim involves the legal duties owed to a “trespasser” by a landowner, see PJC 66.9 in the current edition of State Bar of Texas, *Texas Pattern Jury Charges—Malpractice, Premises & Products*.
3. If the alleged conduct involves a crime or is being prosecuted under a Texas criminal statute, use the applicable definition from the Texas Penal Code or applicable statute. See also the current edition of State Bar of Texas, *Texas Criminal Pattern Jury Charges—Crimes against Persons & Property*.
4. If the alleged conduct involves a nuisance, the practitioner should consult the nuisance instructions in chapter 12 of this volume.

PJC 11.2 Trespass to Real Property—Basic Question

QUESTION _____

Did *Don Davis* trespass on *Paul Payne*'s property?

“Trespass” means an entry on the property of another without having consent or authorization of the owner. To constitute trespass, entry upon another’s property need not be in person, but may be made by causing or permitting a thing to cross the boundary of the property.

Answer “Yes” or “No.”

Answer: _____

COMMENT

When to use. PJC 11.2 should be used for civil trespass claims. See PJC 11.1 on when to use this question as opposed to other causes of action that sound in trespass.

Source of definition. Trespass to real property is an unauthorized entry onto the land of another, and may occur when one enters—or causes something to enter—another’s property. PJC 11.2 is derived from *Environmental Processing Systems, L.C. v. FPL Farming, Ltd.*, 457 S.W.3d 414, 425 (Tex. 2015), and *Barnes v. Mathis*, 353 S.W.3d 760, 764 (Tex. 2011) (per curiam); see *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1, 11–12 nn. 29, 36 (Tex. 2008) (stating that “every unauthorized entry upon land of another is a trespass even if no damage is done or injury is slight”); see also *Gregg v. Delhi-Taylor Oil Corp.*, 344 S.W.2d 411, 416 (Tex. 1961) (entry on another’s land need not be in person but may be made by causing or permitting a thing to cross the boundary at issue).

Elements of trespass. The three elements of a trespass action can be characterized as follows: (1) entry; (2) onto the property of another; and (3) without the property owner’s consent or authorization. *Environmental Processing Systems, L.C.*, 457 S.W.3d at 419. The burden is on the plaintiff to prove lack of consent. *Environmental Processing Systems, L.C.*, 457 S.W.3d at 419.

Intent is objectively measured. The plaintiff need only prove interference with the right of possession of real property; the only relevant intent is that of the actor to enter the property. *Trinity Universal Insurance Co. v. Cowan*, 945 S.W.2d 819, 827 (Tex. 1997). The actor’s subjective intent or awareness of the property’s ownership is irrelevant. *Trinity Universal Insurance Co.*, 945 S.W.2d at 819.

State-issued permit not a defense. A state-issued permit does not shield the permit holder from civil tort liability for trespass. *FPL Farming, Ltd. v. Environmental Processing Systems, L.C.*, 351 S.W.3d 306, 310–11, 314 (Tex. 2011).

Liability for pollution trespass. The mere migration of airborne particulates across one's property can constitute an actionable trespass. *See Coastal Oil & Gas Corp.*, 268 S.W.3d at 21–22. However, claims for trespass concerning air particulates and emissions may be considered a toxic tort claim requiring *Havner*-like requirements for proof. *See Cerny v. Marathon Oil Corp.*, 480 S.W.3d 612, 621–22 (Tex. App.—San Antonio 2015, pet. filed) (discussing *Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706 (Tex. 1997)). Such claims may also be affected by the Texas Civil Practice and Remedies Code, which limits liability for trespass by an “air contaminant” not produced by a natural process. *See* Tex. Civ. Prac. & Rem. Code § 75.002(h). The Committee expresses no opinion about whether *Havner* standards would apply to trespass claims.

Trespass related to oil and gas and production damages. Trespass in the context of oil and gas law, including distinct measures of damages, is treated in the current edition of State Bar of Texas, *Texas Pattern Jury Charges—Oil & Gas* chs. 302 & 313.

Criminal trespass. Trespass in a criminal action involves different requirements and elements. Practitioners should refer to the current edition of State Bar of Texas, *Texas Criminal Pattern Jury Charges—Crimes against Persons & Property* and applicable sections of the Texas Penal Code.

Trespass and nuisance not exclusive. The same act may constitute both a nuisance and a trespass, because the trespass may interfere with a property owner's right to enjoy his or her property with or without substantial interference. *See Allen v. Virginia Hill Water Supply Corp.*, 609 S.W.2d 633, 636 (Tex. App.—Tyler 1980, no writ).

Trespass to try title. Trespass and trespass to try title are not mutually exclusive and can be brought as separate claims in the same action. *Coinmach Corp. v. Aspenwood Apartment Corp.*, 417 S.W.3d 909, 927 (Tex. 2013). An action for trespass to try title involves a determination of which party has superior title to a piece of property. *Coinmach Corp.*, 417 S.W.3d at 921; Tex. Prop. Code § 22.001. Damages available in a trespass-to-try-title action include lost rents and profits, damages for use and occupation of the premises, and damages for any special injury to the property. *See Coinmach Corp.*, 417 S.W.3d at 921.

**PJC 11.3 Damages Recoverable from Trespass to Real Property
(Comment)**

Both property damages and personal injury damages are recoverable in an action for trespass to real property.

The types of property damages recoverable in a trespass action depend on whether the injury to the property is permanent or temporary. Whether damages are available for future or only past injuries is determined by whether the injury is permanent or temporary. *Schneider National Carriers, Inc. v. Bates*, 147 S.W.3d 264, 275–76 (Tex. 2004).

The concepts of permanent and temporary injuries are mutually exclusive, and damages for both may not be recovered in the same action. *Schneider National Carriers, Inc.*, 147 S.W.3d at 275–76. For an exception to the general rule that damages for permanent and temporary injuries may not be recovered in the same action, see *Parkway Co. v. Woodruff*, 901 S.W.2d 434, 441 (Tex. 1995), and *Ludt v. McCollum*, 762 S.W.2d 575, 576 (Tex. 1988) (per curiam). An injury to real property is considered permanent if (1) the property cannot be repaired, fixed, or restored, or (2) even though the injury can be repaired, fixed, or restored, it is substantially certain that the injury will repeatedly, continually, and regularly recur, such that future injury can be reasonably evaluated. *Gilbert Wheeler, Inc. v. Enbridge Pipelines (East Texas), L.P.*, 449 S.W.3d 474, 480 (Tex. 2014). An injury to real property is considered temporary if (1) the property can be repaired, fixed, or restored and (2) any anticipated recurrence would be only occasional, irregular, intermittent, and not reasonably predictable, such that future injury could not be estimated with reasonable certainty. *Gilbert Wheeler, Inc.*, 449 S.W.3d at 480. Generally, the proper measure of damages in cases involving temporary injuries is the cost of restoration (or replacement) plus loss of use while restoration and repairs are ongoing. *Gilbert Wheeler, Inc.*, 449 S.W.3d at 481. Loss of fair market value is the proper measure of damages in a case involving permanent injury. *Gilbert Wheeler, Inc.*, 449 S.W.3d at 481. Application of the temporary-versus-permanent distinction in cases involving injury to real property is not limited to causes of action that sound in tort rather than contract. *Gilbert Wheeler, Inc.*, 449 S.W.3d at 479.

Whether a physical injury to real property is permanent or temporary is a question of law to be decided by the court. *Gilbert Wheeler, Inc.*, 449 S.W.3d at 481. However, questions regarding the facts that underlie the court's legal determination, including the frequency, extent, and duration of the injury and the resulting amount of damages, must be resolved by the jury on proper request. *Gilbert Wheeler, Inc.*, 449 S.W.3d at 481. If the cost of repairing a temporary injury so disproportionately exceeds the resulting diminution in the property's market value that restoration is no longer economically feasible, the temporary injury is deemed permanent as a matter of law and damages are awarded for loss in fair market value. *Gilbert Wheeler, Inc.*, 449 S.W.3d at 481.

In addition to compensation for permanent or temporary injury to real property, and in addition to the value of minerals produced in connection with a trespass (see the current edition of State Bar of Texas, *Texas Pattern Jury Charges—Oil & Gas* PJC 302.4, 313.3, and 313.6–313.8), a plaintiff asserting physical injury to real property may also be entitled to recover for personal injuries and harm to personal property. *Schneider National Carriers, Inc.*, 147 S.W.3d at 276 n.53; *Vestal v. Gulf Oil Corp.*, 235 S.W.2d 440, 441–42 (Tex. 1951); *Vann v. Bowie Sewerage Co.*, 90 S.W.2d 561, 563 (Tex. Comm’n App. 1936); *City of Uvalde v. Crow*, 713 S.W.2d 154, 158–59 (Tex. App.—Texarkana 1986, writ ref’d n.r.e.).

The types of personal injury damages that are recoverable in a trespass action depend on whether a trespass was committed negligently, intentionally, or maliciously. For example, because mental anguish and punitive damages are recoverable if a trespass was intentional, a separate question on whether the property damage at issue was caused intentionally may be needed. *Coinmach Corp. v. Aspenwood Apartment Corp.*, 417 S.W.3d 909, 922 (Tex. 2013); *City of Tyler v. Likes*, 962 S.W.2d 489, 497 (Tex. 1997). Trespass cases may include claims of both negligent as well as intentional conduct.

PJC 11.4 Intentional Trespass—Question and Instruction

QUESTION _____

Was *Don Davis*'s trespass intentional?

“Intentional” means that *Don Davis* acted with intent with respect to the nature of *his* conduct or to a result of *his* conduct when it was the conscious objective or desire to engage in the conduct or the result.

Answer “Yes” or “No.”

Answer: _____

COMMENT

When to use. Please note that PJC 11.4 should not be used unless there has been an affirmative finding of trespass.

PJC 11.5 Permanent vs. Temporary Injury (Frequency and Duration)—Questions

QUESTION _____

Is the property capable of being repaired, fixed, or restored?

Answer “Yes” or “No.”

Answer: _____

QUESTION _____

If you answered the above question “Yes,” then answer the following question. Otherwise, do not answer the following question.

Is the injury—

1. of such a character as to recur repeatedly, continually, and regularly, such that future injury can be reasonably evaluated?

or—

2. of such a character that any anticipated recurrence would be only occasional, irregular, intermittent, and not reasonably predictable, such that future injury could not be estimated with reasonable certainty?

Answer “1” or “2.”

Answer: _____

COMMENT

When to use. PJC 11.5 is appropriate when an injury to real property has been established and the frequency, extent, or duration of the injury is disputed and must be resolved before the court may classify the injury as either permanent or temporary as a matter of law. *Gilbert Wheeler, Inc. v. Enbridge Pipelines (East Texas), L.P.*, 449 S.W.3d 474, 478 (Tex. 2014) (quoting *Schneider National Carriers, Inc. v. Bates*, 147 S.W.3d 264 (Tex. 2004)). When the facts are disputed and must be resolved to correctly evaluate the nature of the injury, the court, upon proper request, must present the issue to the jury. *Gilbert Wheeler, Inc.*, 449 S.W.3d at 480. Please note that PJC 11.5 should be predicated on an affirmative finding of trespass.

Economic feasibility exception. Whether a physical injury to real property is permanent or temporary is a question of law to be decided by the court. *Gilbert Wheeler, Inc.*, 449 S.W.3d at 481. However, questions regarding the facts that underlie

the court's legal determination, including the frequency, extent, and duration of the injury and the resulting amount of damages, must be resolved by the jury upon proper request. *Gilbert Wheeler, Inc.*, 449 S.W.3d at 481. If the cost of repairing a temporary injury so disproportionately exceeds the resulting diminution in the property's market value that restoration is no longer economically feasible, the temporary injury is deemed permanent as a matter of law and damages are awarded for loss in fair market value. *Gilbert Wheeler, Inc.*, 449 S.W.3d at 481.

PJC 11.6 Cost to Repair, Fix, or Restore (Temporary Injury to Property)—Question and Instructions

QUESTION _____

If you answered “Yes” to Question _____ [*question finding temporary injury*], then answer the following question. Otherwise, do not answer the following question.

What sum of money, if paid now in cash, would fairly and reasonably compensate *Paul Payne* for the property damage, if any, resulting from the trespass?

Consider the elements of damages listed below and none other. Consider each element separately. Do not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any. Do not include interest on any amount of damages you find. Answer element 4 only if you found the trespass was intentional.

Answer separately in dollars and cents for damages, if any.

1. The reasonable and necessary costs to repair, fix, or restore *Paul Payne*’s property to the condition immediately preceding the injury.

Answer: _____

2. The reasonable and necessary costs to compensate *Paul Payne* for *his* loss of use of the property that was sustained in the past.

Answer: _____

3. The amount that, in reasonable probability, will be sustained in the future for *Paul Payne*’s loss of the use of the property until the property can be repaired, fixed, or restored.

Answer: _____

4. The amount necessary to compensate *Paul Payne* for mental anguish.

Answer: _____

COMMENT

When to use. PJC 11.6 submits the measure of damages recoverable for temporary injury to property. See *Gilbert Wheeler, Inc. v. Enbridge Pipelines (East Texas), L.P.*, 449 S.W.3d 474, 481 (Tex. 2014); *Schneider National Carriers, Inc. v. Bates*, 147 S.W.3d 264, 276 (Tex. 2004).

Mental anguish add-on. Mental anguish damages should be submitted as part of PJC 11.6 only when the trespass has been found to be intentional. This is because mental anguish damages are recoverable in actions for trespass to real property, but Texas courts have required a showing of deliberate and willful trespass and actual property damage before awarding damages for emotional distress or mental anguish. *City of Tyler v. Likes*, 962 S.W.2d 489, 497–500 (Tex. 1997).

Source of question and instructions. PJC 11.6 is derived from *Coinmach Corp. v. Aspenwood Apartment Corp.*, 417 S.W.3d 909, 921 (Tex. 2013), and *Schneider National Carriers, Inc.*, 147 S.W.3d at 276.

Stigma damages. For a discussion of whether stigma damages are available in cases involving temporary injury to real property, i.e., damages representing the market's perception of a decrease in a property's value that may continue to exist after an injury to real property has been fully repaired or remediated, see *Houston Unlimited, Inc. v. Mel Acres Ranch*, 443 S.W.3d 820, 824 (Tex. 2014) (describing this effect as "damage to the reputation of the realty" from a prior injury).

Prejudgment interest. Instructing the jury not to add interest is suggested because prejudgment interest, if recoverable, will be calculated by the court at the time of judgment. If interest paid on an obligation is claimed as an element of damages, it may be necessary to modify the instruction on interest.

Economic feasibility exception. If the cost to restore the property exceeds the diminution in the property's market value to such a disproportionately high degree that the repairs are no longer economically feasible, the injury may be deemed permanent as a matter of law. *Gilbert Wheeler, Inc.*, 449 S.W.3d at 481. Therefore, the Committee recommends that questions concerning both market value *and* cost to restore be submitted to the jury. It is unclear whether disproportionality between cost to restore and diminution in value is always a matter of law or whether, in some circumstances, it may be a fact question. In any event, upon the court's determination of the nature of the injury, only the appropriate calculation of damages (i.e., repair costs or diminution in value) should be considered. See *Gilbert Wheeler, Inc.*, 449 S.W.3d at 481. *But see Ludt v. McCollum*, 762 S.W.2d 575, 576 (Tex. 1988) (per curiam) (in DTPA case, plaintiff should be permitted to recover repairs and permanent reduction in postrepair value to real property).

PJC 11.7 Diminution in Market Value (Permanent Injury to Property)—Questions and Instructions

QUESTION _____

What sum of money, if paid now in cash, would fairly and reasonably compensate *Paul Payne* for the property damage, if any, resulting from the trespass?

Consider only the difference in market value of *Paul Payne*'s land resulting from the trespass. "Market value" is the price a willing seller not obligated to sell can obtain from a willing buyer not obligated to buy. The difference in market value is the decrease in market value in the time immediately before and after the act or omission occurred.

Do not include interest on any amount of damages you find. Answer in dollars and cents for damages, if any.

Answer: _____

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate *Paul Payne* for the mental anguish resulting from the trespass?

Answer in dollars and cents for damages, if any.

Answer: _____

COMMENT

When to use. PJC 11.7 submits the measure of damages recoverable for permanent injury and should be conditioned on a "Yes" answer to prior liability questions.

Source of questions and instructions. PJC 11.7 is derived from *Gilbert Wheeler, Inc. v. Enbridge Pipelines (East Texas), L.P.*, 449 S.W.3d 474 (Tex. 2014), and *Schneider National Carriers, Inc. v. Bates*, 147 S.W.3d 264, 276 (Tex. 2004).

Mental anguish add-on. Mental anguish damages should be submitted as part of PJC 11.7 only when the trespass has been found to be intentional. This is because mental anguish damages are recoverable in actions for trespass to real property, but Texas courts have required a showing of deliberate and willful trespass and actual property damage before awarding damages for emotional distress or mental anguish. *City of Tyler v. Likes*, 962 S.W.2d 489, 497–500 (Tex. 1997).

Intrinsic value exception. If the reduction in market value caused by a permanent injury is "essentially nominal," the plaintiff may be able to recover the damaged

property's "intrinsic value." *Gilbert Wheeler, Inc.*, 449 S.W.3d at 482–83 (confirming intrinsic value exception is valid and extending *Porras v. Craig*, 675 S.W.2d 503, 506 (Tex. 1984)). In such a circumstance, an additional question will be required. *Gilbert Wheeler, Inc.*, 449 S.W.3d at 482. The Committee recommends the following language:

If you found that there was no diminishment of the property's fair market value, or so little diminishment of that value that the loss is essentially nominal, what amount, if any, should be awarded to *Paul Payne* for the intrinsic value of *his* damaged property, that is, the ornamental and utilitarian value of the property?

Elements considered separately. *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 770 (Tex. 2002), provides an instruction for cases involving undefined or potentially overlapping categories of damages. In those cases, the following language, adapted from *Golden Eagle Archery, Inc.*, should be substituted for the instruction to consider each element separately:

Consider the elements of damages listed below and none other. Do not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any.

Prejudgment interest. Instructing the jury not to add interest is suggested because prejudgment interest, if recoverable, will be calculated by the court at the time of judgment. If interest paid on an obligation is claimed as an element of damages, it may be necessary to modify the instruction on interest.

**PJC 11.8 Personal Injury Damages Resulting from Trespass—
Question and Instructions**

QUESTION _____

What sum of money, if paid now in cash, would fairly and reasonably compensate *Paul Payne* for the damages, if any, resulting from the trespass?

Consider the elements of damages listed below and none other. Consider each element separately. Do not reduce the amounts, if any, in your answers because of the negligence, if any, of *Paul Payne*. Any recovery will be determined by the court when it applies the law to your answers at the time of judgment.

Answer separately, in dollars and cents, for damages, if any.

- 1. Physical pain [*and mental anguish*] sustained in the past.

Answer: _____

- 2. Physical pain [*and mental anguish*] that, in reasonable probability, *Paul Payne* will sustain in the future.

Answer: _____

- 3. Loss of earning capacity sustained in the past.

Answer: _____

- 4. Loss of earning capacity that, in reasonable probability, *Paul Payne* will sustain in the future.

Answer: _____

- 5. Disfigurement sustained in the past.

Answer: _____

- 6. Disfigurement that, in reasonable probability, *Paul Payne* will sustain in the future.

Answer: _____

- 7. Physical impairment sustained in the past.

Answer: _____

8. Physical impairment that, in reasonable probability, *Paul Payne* will sustain in the future.

Answer: _____

9. *Medical care expenses* incurred in the past.

Answer: _____

10. *Medical care expenses* that, in reasonable probability, *Paul Payne* will incur in the future.

Answer: _____

COMMENT

Damages. To determine what damages, if any, are recoverable for a trespass, the type of conduct or nature of activity that causes the entry on the property must be identified. *See Coinmach Corp. v. Aspenwood Apartment Corp.*, 417 S.W.3d 909, 920–23 (Tex. 2013). Generally, one who invades or trespasses on the property rights of another, while acting in the good-faith and honest belief that he had the legal right to do so, is regarded as an innocent trespasser and liable only for the actual damages sustained. *Coinmach Corp.*, 417 S.W.3d at 920–23. The measure of damages in a trespass case is the sum necessary to make the plaintiff whole, and the recovery of actual damages for temporary injury in a trespass is limited to the amount necessary to place the plaintiff in the position he would have been in but for the trespass, including the cost of restoration or repair of the land to its former condition, the loss of use of the land, and the loss of expected profits from use of the land. *Coinmach Corp.*, 417 S.W.3d at 920–23.

Types of personal injury damages available. The types of damages listed above are derived from PJC 28.3, which is the basic general damages question to be used in the usual personal injury case. PJC 11.8 separately submits past and future damages. *See* Tex. Fin. Code § 304.1045. The “do not compensate twice” instruction is adapted from *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 770 (Tex. 2003).

Mental anguish damages available for intentional trespass. Mental anguish damages are recoverable when the trespass is intentional. *City of Tyler v. Likes*, 962 S.W.2d 489, 497–500 (Tex. 1997). Texas courts have required a showing of deliberate and willful trespass and actual property damage before awarding damages for emotional distress or mental anguish. *Likes*, 962 S.W.2d at 497–500. The appropriate question can be found in PJC 11.4.

Caveat on submitting physical pain and mental anguish together. To avoid concerns about improperly mixing valid and invalid elements of damages (*see Harris*

County v. Smith, 96 S.W.3d 230, 234 (Tex. 2002)), when the sufficiency of the evidence to support either physical pain or mental anguish is in question, separate submission of those items may avoid the need for a new trial if a sufficiency challenge is upheld on appeal. See *Katy Springs & Manufacturing, Inc. v. Favalora*, 476 S.W.3d 579, 597–99, 610–11 (Tex. App.—Houston [14th Dist.] 2015, pet. denied) (although challenge to separate submission was waived, separate awards allowed modification of judgment, rather than remand for new trial, where evidence of future mental anguish was legally insufficient). The Texas Supreme Court has yet to decide the issue.

Reasonable expenses and necessary medical care. If there is a question whether medical expenses are reasonable or medical care is necessary, the following should be substituted for elements 9 and 10:

9. Reasonable expenses of necessary *medical care* incurred in the past.

Answer: _____

10. Reasonable expenses of necessary *medical care* that, in reasonable probability, *Paul Payne* will incur in the future.

Answer: _____

Medical care expenses may also be replaced by the specific items (e.g., *physicians' fees, dental fees, chiropractic fees, hospital bills, medicine expenses, nursing services' fees*) raised by the evidence. In an appropriate case, the phrase *health-care expenses* may replace *medical care expenses*.

**PJC 11.9 Personal Injury Damages Resulting from Trespass
Committed with Malice—Questions and Instructions**

QUESTION _____

If you answered “Yes” to Question _____ [11.2], then answer the following question. Otherwise, do not answer the following question.

Do you find by clear and convincing evidence that *Don Davis*’s trespass was committed with malice?

“Clear and convincing evidence” means the measure or degree of proof that produces a firm belief or conviction of the truth of the allegations sought to be established.

“Malice” means—

1. a specific intent by *Don Davis* to cause substantial injury to *Paul Payne*; or
2. an act or omission by *Don Davis*,
 - a. which when viewed objectively from the standpoint of *Don Davis* 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 *Don Davis* has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.

Answer “Yes” or “No.”

Answer: _____

QUESTION _____

If you answered the above question “Yes,” then answer the following question. Otherwise, do not answer the following question.

You are instructed that you must unanimously agree on the amount of any award of exemplary damages.

What sum of money, if any, should be assessed against *Don Davis* and awarded to *Paul Payne* as exemplary damages for the conduct found in response to Question _____ [11.9]?

“Exemplary damages” means an amount that you may in your discretion award as an example to others and as a penalty or by way of punishment, in addition to any amount that you may have found as actual damages.

Factors to consider in awarding exemplary damages, if any, are—

1. The nature of the wrong.
2. The character of the conduct involved.
3. The degree of culpability of the wrongdoer.
4. The situation and sensibilities of the party concerned.
5. The extent to which such conduct offends a public sense of justice and propriety.
6. The net worth of *Don Davis*.

Answer in dollars and cents, if any.

Answer: _____

COMMENT

Exemplary damages available only if malice is found. Exemplary damages are recoverable when the harm results from malice. *See* Tex. Civ. Prac. & Rem. Code § 41.003(a). To obtain exemplary damages in a trespass action, the plaintiff must prove by clear and convincing evidence that the defendant intended to harm the plaintiff. *See Coinmach Corp. v. Aspenwood Apartment Corp.*, 417 S.W.3d 909, 922 (Tex. 2013) (citing *Wilen v. Falkenstein*, 191 S.W.3d 791, 800–801 (Tex. App.—Fort Worth 2006, pet. denied)).

Bifurcation. No predicated instruction is necessary if the court has granted a timely motion to bifurcate trial of the amount of punitive damages. *See* Tex. Civ. Prac. & Rem. Code § 41.009. If in the first phase of the trial the jury finds facts establishing a predicate for an award of exemplary damages, then a separate phase two jury charge should be prepared. In such a phase two jury charge, PJC 28.7A, PJC 28.7B, or PJC 28.7C (as appropriate) should be submitted with both PJC 1.3 and PJC 1.4 instructions.



CHAPTER 12	NUISANCE ACTIONS	
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PJC 12.1 Nuisance Actions Generally—When to Apply (Comment)

Definitions. A “nuisance” is a condition that substantially interferes with the use and enjoyment of land by causing unreasonable discomfort or annoyance to a person of ordinary sensibilities attempting to use and enjoy it. *Crosstex North Texas Pipeline, L.P. v. Gardiner*, 505 S.W.3d 580, 600–01 (Tex. 2016) (confirming definition of nuisance); *Barnes v. Mathis*, 353 S.W.3d 760, 763 (Tex. 2011) (per curiam); *Schneider National Carriers, Inc. v. Bates*, 147 S.W.3d 264, 269 (Tex. 2004). Whether a defendant may be held liable for causing a nuisance depends on the culpability of the defendant’s conduct, in addition to proof that the interference is a nuisance. *Crosstex*, 505 S.W.3d at 604. It “generally presents fact issues for the jury to decide.” *Crosstex*, 505 S.W.3d at 591. The term “nuisance” has been used frequently in different contexts. This PJC therefore clarifies the distinctions within the law in the context of private and public nuisances.

In private nuisance, a defendant’s conduct substantially interferes with the use and enjoyment of real property owned by an individual or small group of persons. “It may, for example, cause physical damage to the plaintiffs’ property, economic harm to the property’s market value, harm to the plaintiffs’ health, or psychological harm to the plaintiffs’ ‘peace of mind’ in the use and enjoyment of their property.” *Crosstex*, 505 S.W.3d at 596.

In public nuisance, a defendant’s conduct unreasonably interferes with a right common to the public at large by affecting the public health or public order. See *Crosstex*, 505 S.W.3d at 591 n.3.

A claim for attractive nuisance is not a type of common-law nuisance. Rather, it is a legal basis for premises liability and therefore remains within the purview of premises liability pattern jury charges. Similarly, a criminal nuisance is not a common-law nuisance and thus remains within the purview of criminal pattern jury charges. See the appendix to this volume for more information about the *Texas Criminal Pattern Jury Charges* series.

Practitioners should apply PJC 12.2–12.6 as follows:

1. If the claim involves a right to use and enjoy privately owned land, use PJC 12.2 (“Private Nuisance”).
2. If the claim involves a common public right, use PJC 12.3 (“Public Nuisance”). PJC 12.2 and 12.3 may be used if the claim invokes both private and public nuisance.
3. If the claim involves children injured while trespassing on a defendant’s property, use PJC 66.10 (“Premises Liability—Attractive Nuisance”) in the current edition of State Bar of Texas, *Texas Pattern Jury Charges—Malpractice, Premises & Products*.

4. If the alleged conduct involves a crime or is being prosecuted under a Texas criminal statute, use the applicable definition from the Texas Penal Code or applicable statute. See also the latest edition of State Bar of Texas, *Texas Criminal Pattern Jury Charges—Crimes against Persons & Property*.

5. If the alleged conduct involves a trespass, the charge should refer to trespass separately from nuisance. See chapter 11 in this volume.

Pleading specific culpability. Nuisance actions involve three levels of culpability: (1) intentional conduct, (2) negligent conduct, or (3) conduct that is abnormal and out of place in its surroundings. See *Crosstex*, 505 S.W.3d at 602; *City of Tyler v. Likes*, 962 S.W.2d 489, 503 (Tex. 1997). A “defendant can be liable for causing a nuisance if the defendant intentionally causes it, negligently causes it, or—in limited circumstances—causes it by engaging in abnormally dangerous or ultra-hazardous activities.” *Crosstex*, 505 S.W.3d at 588. If the defendant is a governmental entity, the plaintiff must show intentional nuisance. *City of San Antonio v. Pollock*, 284 S.W.3d 809, 820–21 (Tex. 2009).

PJC 12.2 Private Nuisance**PJC 12.2A Private Nuisance—Intentional**

QUESTION _____

Did *Don Davis* intentionally create a private nuisance?

A private nuisance is a condition that substantially interferes with the use and enjoyment of *Paul Payne*'s land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities attempting to use and enjoy it.

“Intentionally” means that *Don Davis* acted for the purpose of causing the interference or knew that the interference would result or was substantially certain to result from *his* conduct.

Answer “Yes” or “No.”

Answer: _____

PJC 12.2B Private Nuisance—Negligent

QUESTION _____

Did *Don Davis* negligently create a private nuisance?

A private nuisance is a condition that substantially interferes with the use and enjoyment of *Paul Payne*'s land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities attempting to use and enjoy it.

“Negligently” means that *Don Davis* failed to use ordinary care, that is, failed to do that which a person of ordinary prudence would have done under the same or similar circumstances or did that which a person of ordinary prudence would not have done under the same or similar circumstances.

“Ordinary care” means that degree of care that would be used by a person of ordinary prudence under the same or similar circumstances.

Answer “Yes” or “No.”

Answer: _____

PJC 12.2C Private Nuisance—Strict Liability

QUESTION _____

Did *Don Davis* create a private nuisance by abnormal and out-of-place conduct?

A private nuisance is a condition that substantially interferes with the use and enjoyment of *Paul Payne's* land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities attempting to use and enjoy it.

“Abnormal and out-of-place conduct” means conduct that—

1. was out of place in its surroundings; and
2. was an abnormally dangerous activity or involved an abnormally dangerous substance; and
3. created a high degree of risk of serious injury.

Answer “Yes” or “No.”

Answer: _____

COMMENT

When to use. PJC 12.2 is appropriate in cases involving private nuisance. The grounds listed in PJC 12.2A–12.2C are alternatives, and any of the listed grounds that are not raised by the pleadings or supported by sufficient evidence should be omitted. In private nuisance cases, the jury decides factual disputes regarding the frequency, extent, and duration of the conditions causing the nuisance. *Crosstex North Texas Pipeline, L.P. v. Gardiner*, 505 S.W.3d 580, 609 (Tex. 2016); *Schneider National Carriers, Inc. v. Bates*, 147 S.W.3d 264, 275 (Tex. 2004); *see also Barnes v. Mathis*, 353 S.W.3d 760, 763–64 (Tex. 2011) (per curiam). The question should be phrased based on the pleadings, evidence, and specific allegations.

Source of definition and culpability levels. “Nuisance” generally means a condition that substantially interferes with the use and enjoyment of land by causing unreasonable discomfort or annoyance to a person of ordinary sensibilities attempting to use and enjoy it. *Crosstex*, 505 S.W.3d at 600, 606; *Barnes*, 353 S.W.3d at 763; *Schneider National Carriers, Inc.*, 147 S.W.3d at 269; *Holubec v. Brandenberger*, 111 S.W.3d 32, 37 (Tex. 2003). Whether a defendant may be held liable for causing a nuisance depends on the culpability of the defendant’s conduct, in addition to proof that the interference is a nuisance. There must be some level of culpability on behalf of the defendant. Nuisance cannot be premised on mere accidental interference with the use and enjoyment of land but only on such interferences as are intentional and unreason-

able or result from negligent, reckless, or abnormally dangerous conduct. Texas courts have broken actionable nuisance into three classifications: negligent, intentional, and abnormally dangerous conduct that is also out of place in its surroundings. *Crosstex*, 505 S.W.3d at 588, 604 (retaining the three categories); *City of Tyler v. Likes*, 962 S.W.2d 489, 503 (Tex. 1997).

Damages. See PJC 12.5 and 12.6, as applicable.

Instruction regarding usefulness. A “defendant’s liability for creating a nuisance does not depend on a showing that the defendant acted or used its property illegally or unlawfully.” *Crosstex*, 505 S.W.3d at 601. The court may further instruct the jury that if a nuisance exists, it shall not be excused by the fact that it arises from lawful or useful conduct. See *City of Uvalde v. Crow*, 713 S.W.2d 154, 157 (Tex. App.—Texarkana 1986, writ ref’d n.r.e.) (affirming jury charge submission). A state-issued permit does not shield the permit holder from civil tort liability for the authorized activities. *FPL Farming, Ltd. v. Environmental Processing Systems, L.C.*, 351 S.W.3d 306, 310–11, 314 (Tex. 2011). Furthermore, even if a commercial enterprise holds a valid permit to conduct a particular business, the manner in which it performs its approved activity may give rise to an action for nuisance. *C.C. Carlton Industries, Ltd. v. Blanchard*, 311 S.W.3d 654, 660 (Tex. App.—Austin 2010, pet. denied). When appropriate, the following sentence may be added to the jury submission:

You are further instructed that a nuisance, if it exists, is not excused by the fact that it arises from the conduct of an operation that is in itself lawful or useful.

When injunction sought, judge makes determination. When the plaintiff seeks injunctive relief, the court, not the jury, makes a determination of reasonableness based on a balancing of the equities. *Crosstex*, 505 S.W.3d at 610; *Schneider National Carriers, Inc.*, 147 S.W.3d at 286–87. The judge may make such a determination before submitting the nuisance question to the jury. *Schneider National Carriers, Inc.*, 147 S.W.3d at 289.

Standing in private nuisance actions. A private nuisance may be asserted by those with property rights and privileges with respect to the use and enjoyment of the land affected, including possessors of the land. *Hot Rod Hill Motor Park v. Triolo*, 293 S.W.3d 788, 791 (Tex. App.—Waco 2009, pet. denied). Minor plaintiffs have no standing to assert nuisance claims based on damage to real property if they did not own the properties when the nuisance began. *In re Premcor Refining Group, Inc.*, 262 S.W.3d 475, 480 (Tex. App.—Beaumont 2008, no pet.) (per curiam). Standing, however, is a matter of law for the court to decide and should not be submitted to the jury. See *Douglas v. Delp*, 987 S.W.2d 879, 882–83 (Tex. 1999); *West v. Brenntag Southwest, Inc.*, 168 S.W.3d 327, 335 (Tex. App.—Texarkana 2005, pet. denied).

PJC 12.3 Public Nuisance**PJC 12.3A Public Nuisance—Intentional**

Don Davis creates a “public nuisance” if *his* conduct unreasonably interferes with a public right or public interest.

“Unreasonable interference” means that *Don Davis’s* conduct must be a significant interference with the public’s safety or health, and the conduct must adversely affect all or a considerable part of the community.

QUESTION _____

Did *Don Davis* intentionally create a public nuisance?

“Intentionally” means that *Don Davis* acted for the purpose of causing the interference or knew that the interference would result or was substantially certain to result from *his* conduct.

Answer “Yes” or “No.”

Answer: _____

PJC 12.3B Public Nuisance—Negligent

Don Davis creates a “public nuisance” if *his* conduct unreasonably interferes with a public right or public interest.

“Unreasonable interference” means that *Don Davis’s* conduct must be a significant interference with the public’s safety or health, and the conduct must adversely affect all or a considerable part of the community.

QUESTION _____

Did *Don Davis* negligently create a public nuisance?

“Negligently” means that *Don Davis* failed to use ordinary care, that is, failed to do that which a person of ordinary prudence would have done under the same or similar circumstances or did that which a person of ordinary prudence would not have done under the same or similar circumstances.

“Ordinary care” means that degree of care that would be used by a person of ordinary prudence under the same or similar circumstances.

Answer “Yes” or “No.”

Answer: _____

PJC 12.3C Public Nuisance—Abnormally Dangerous Conduct

Don Davis creates a “public nuisance” if *his* conduct unreasonably interferes with a public right or public interest.

“Unreasonable interference” means that *Don Davis’s* conduct must be a significant interference with the public’s safety or health, and the conduct must adversely affect all or a considerable part of the community.

QUESTION _____

Did *Don Davis* create a public nuisance by abnormal and out-of-place conduct?

“Abnormal and out-of-place conduct” means conduct that—

- 1. was out of place in its surroundings; and
- 2. was an abnormally dangerous activity or involved an abnormally dangerous substance; and
- 3. created a high degree of risk of serious injury.

Answer “Yes” or “No.”

Answer: _____

COMMENT

When to use. PJC 12.3 is appropriate when a claim for public nuisance is made. The grounds listed in PJC 12.3A–12.3C are alternatives, and any of the listed grounds that are not raised by the pleadings or supported by sufficient evidence should be omitted. A nuisance may be intentional or negligent or arise from conduct otherwise culpable as abnormally dangerous and out of place in its surroundings. The question submitted should be based on the trial pleadings, evidence, and allegations. *Watson v. Brazos Electric Power Cooperative*, 918 S.W.2d 639, 644–45 (Tex. App.—Waco 1996, writ denied) (per curiam) (pleadings and evidence must support submission).

Source of definition and culpability levels. Public nuisance actions involve an unreasonable interference with a right common to the general public. *Crosstex North Texas Pipeline, L.P. v Gardiner*, 505 S.W.3d 580, 591 n.3 (Tex. 2016); *Jamail v. Stoneledge Condominium Owners Ass’n*, 970 S.W.2d 673, 676 (Tex. App.—Austin

1998, no pet.); *Walker v. Texas Electric Service Co.*, 499 S.W.2d 20, 26–27 (Tex. Civ. App.—Fort Worth 1973, no writ); see also *McKee v. City of Mt. Pleasant*, 328 S.W.2d 224, 229 (Tex. Civ. App.—Texarkana 1959) (describing historical definition of public nuisance).

Use of other definitions. “Public nuisance” is defined differently in statutes and municipal ordinances. Statutory definitions are narrow and specific to certain activities. If an action is brought under such statutes, the charge should be modified to include the specific statutory definition.

Effect of statutes. Statutorily prescribed conduct may determine the reasonableness of a defendant’s conduct. For example, with respect to contamination, the Texas Water Code determines whether “unreasonable” levels of contaminants are present in certain bodies of water. See *Ronald Holland’s A-Plus Transmission & Automotive, Inc. v. E-Z Mart Stores, Inc.*, 184 S.W.3d 749, 758 (Tex. App.—San Antonio 2005, no pet.) (noting an unreasonable level of contamination). Statutes dealing with statutorily defined “public nuisances” or “common nuisances” provide that private citizens may bring a lawsuit to abate certain enumerated nuisances. See Tex. Civ. Prac. & Rem. Code §§ 125.0015, 125.061–.063. For example, a person who maintains a place and knowingly tolerates certain activities on the premises and fails to abate those activities is deemed to maintain a common nuisance for any such activities including, but not limited to, the following: improperly discharging a firearm in public, engaging in illegal gambling, or compelling or engaging in prostitution. See Tex. Civ. Prac. & Rem. Code § 125.0015. Practitioners are encouraged to review the Texas Penal Code, the Texas Civil Practice and Remedies Code, and the Texas Health and Safety Code for provisions that may be applicable to the facts at issue.

Statutory nuisance not necessarily common-law nuisance. The Texas legislature has outlined specific conditions that constitute a nuisance under various statutes. A “nuisance per se” is an act, occupation, or structure that is a nuisance at all times and under any circumstances, regardless of location or surroundings. *City of Dallas v. Jennings*, 142 S.W.3d 310, 316 n.3 (Tex. 2004). A “nuisance in fact” is an act, occupation, or structure that becomes a nuisance by reason of its circumstances or surroundings. *Jennings*, 142 S.W.3d at 316 n.3. However, violation of a statute or ordinance is not sufficient to prove a common-law nuisance without additional evidence. *Luensmann v. Zimmer-Zampese & Associates, Inc.*, 103 S.W.3d 594, 598 (Tex. App.—San Antonio 2003, no pet.).

Damages. See PJC 12.5 and 12.6, as applicable.

Instruction regarding usefulness. A “defendant’s liability for creating a nuisance does not depend on a showing that the defendant acted or used its property illegally or unlawfully.” *Crosstex*, 505 S.W.3d at 601. The court may further instruct the jury that if a nuisance exists, it shall not be excused by the fact that it arises from lawful or useful conduct. See *City of Uvalde v. Crow*, 713 S.W.2d 154, 157 (Tex. App.—

Texarkana 1986, writ ref'd n.r.e.) (affirming jury charge submission). A state-issued permit does not shield the permit holder from civil tort liability for the authorized activities. *FPL Farming, Ltd. v. Environmental Processing Systems, L.C.*, 351 S.W.3d 306, 310–11, 314 (Tex. 2011). Furthermore, even if a commercial enterprise holds a valid permit to conduct a particular business, the manner in which it performs its approved activity may give rise to an action for nuisance. *C.C. Carlton Industries, Ltd. v. Blanchard*, 311 S.W.3d 654, 660 (Tex. App.—Austin 2010, pet. denied). When appropriate, the following sentence may be added to the jury submission:

You are further instructed that a nuisance, if it exists, is not excused by the fact that it arises from the conduct of an operation that is in itself lawful or useful.

When injunction sought, judge makes determination. When the plaintiff seeks injunctive relief the court, not the jury, makes a determination of reasonableness based on a balancing of the equities. *Crosstex*, 505 S.W.3d at 610; *Schneider National Carriers, Inc. v. Bates*, 147 S.W.3d 264, 286–87 (Tex. 2004).

Standing for private individuals alleging public nuisance actions. Typically, a city or state attorney's office brings a public nuisance action. A private citizen must establish standing to bring a public nuisance action. To establish standing, the plaintiff must have suffered harm different in kind from the public at large. *Jamail*, 970 S.W.2d at 676; *Quanah Acme & Pacific Railway Co. v. Swearingen*, 4 S.W.2d 136, 139 (Tex. Civ. App.—Amarillo 1927, writ ref'd). Standing, however, is a matter of law for the court to decide and should not be submitted to the jury. *See Douglas v. Delp*, 987 S.W.2d 879, 882–83 (Tex. 1999) (courts may not address merits of case unless standing is present because it is part of subject-matter jurisdiction); *West v. Brenntag Southwest, Inc.*, 168 S.W.3d 327, 334 (Tex. App.—Texarkana 2005, pet. denied) (standing is question of law subject to de novo review); *see also American Electric Power Co. v. Connecticut*, 564 U.S. 410, 419 (2011) (discussing Article III standing as matter of law in nuisance case).

PJC 12.4 Nature of Nuisance—Permanent or Temporary

QUESTION _____

If you answered “Yes” to Question _____ [*applicable liability question*], then answer the following question. Otherwise, do not answer the following question.

Is the property capable of being repaired, fixed or restored?

Answer “Yes” or “No.”

Answer: _____

QUESTION _____

If you answered the above question “Yes,” then answer the following question. Otherwise, do not answer the following question.

Is the injury—

1. of such a character as to recur repeatedly, continually, and regularly, such that future injury can be reasonably evaluated?

or—

2. of such a character that any anticipated recurrence would be only occasional, irregular, intermittent, and not reasonably predictable, such that future injury could not be estimated with reasonable certainty?

Answer “1” or “2.”

Answer: _____

COMMENT

When to use. PJC 12.4 is appropriate when the nature of a nuisance is in dispute and the frequency, extent, or duration of the nuisance is disputed and must be resolved before the court may classify the nuisance as either permanent or temporary as a matter of law. *Schneider National Carriers, Inc. v. Bates*, 147 S.W.3d 264, 270–75 (Tex. 2004); see *Gilbert Wheeler, Inc. v. Enbridge Pipelines (East Texas), L.P.*, 449 S.W.3d 474, 478–80 (Tex. 2014) (when facts “are disputed and must be resolved to correctly evaluate the nature of the injury, the court, upon proper request, must present the issue to the jury”).

Consequences of classification. Categorizing a nuisance as permanent or temporary affects (1) whether damages are available for future or only past injuries, (2)

whether one or a series of suits is required, and (3) whether claims accrue (and thus limitations begin) with the first or each subsequent injury. *Schneider National Carriers, Inc.*, 147 S.W.3d at 275. The distinction between temporary and permanent nuisances also determines the damages that may be recovered. See *Crosstex North Texas Pipeline, L.P. v. Gardiner*, 505 S.W.3d 580, 609–12 (Tex. 2016); *Schneider National Carriers, Inc.*, 147 S.W.3d at 275; *Gilbert Wheeler, Inc.*, 449 S.W.3d at 478 n.1; *West v. Breentag Southwest, Inc.*, 168 S.W.3d 327, 336 n.9 (Tex. App.—Texarkana 2005, pet. denied). See PJC 12.5 and 12.6.

Date of accrual of nuisance. The jury is allowed to separately determine the date on which the nuisance began. See *Natural Gas Pipeline Co. of America v. Justiss*, 397 S.W.3d 150, 155 (Tex. 2012). In such a circumstance, the Committee recommends the following language be added:

On what date did the nuisance begin?

Answer with a date in the blank below.

Answer: _____

PJC 12.5 Damages from Permanent Nuisance

QUESTION _____

[Following a court determination that the nuisance was permanent.]

What sum of money, if paid now in cash, would fairly and reasonably compensate *Paul Payne* for the damages, if any, resulting from the permanent nuisance?

Consider the elements of damages listed below and none other. Consider each element separately. Do not reduce the amounts, if any, in your answers because of the negligence, if any, of *Paul Payne*. Any recovery will be determined by the court when it applies the law to your answers at the time of judgment. In determining damages resulting from the nuisance, you may consider the proximity, duration, and intensity of the nuisance.

Answer separately, in dollars and cents, for damages, if any.

1. Loss of market value, including lost rents and profits, if any.

Consider the difference in value of *Paul Payne*'s property immediately before and after the nuisance, if any. "Market value" means the amount that would be paid in cash by a willing buyer who desires to buy, but is not required to buy, to a willing seller who desires to sell, but is under no necessity of selling.

Answer: _____

2. Personal injury sustained in the past.

Answer: _____

3. Personal injury that, in reasonable probability, *Paul Payne* will sustain in the future.

Answer: _____

COMMENT

Damages for nuisance include property and personal injury damages. A plaintiff may recover in a nuisance action for property damage and personal injuries. See *Crosstex North Texas Pipeline, L.P. v. Gardiner*, 505 S.W.3d 580, 596 (Tex. 2016); *Schneider National Carriers, Inc. v. Bates*, 147 S.W.3d 264, 275–80 (Tex. 2004). The following types of damages may be recoverable when they arise from a nuisance:

“physical damage to the plaintiffs’ property, economic harm to the property’s market value, harm to the plaintiffs’ health, or psychological harm to the plaintiffs’ ‘peace of mind’ in the use and enjoyment of their property.” *Crosstex*, 505 S.W.3d at 596. Only those elements for which evidence is introduced should be submitted.

Property damages recoverable by those with property interest: loss of market value or cost of repairs. When a nuisance is permanent, the claimant may recover lost market value. The value should be ascertained at the date of trial and should be the market value of the property for any use to which it might be appropriated. The jury is permitted to consider all the uses to which the property is reasonably adaptable and for which it is, or in all reasonable probability will become, available within the foreseeable future. However, a jury may not consider purely speculative uses. *Crosstex*, 505 S.W.3d at 610–11.

When the nuisance is temporary, the claimant may recover only damages that have accrued up to the institution of the suit or to the time of the trial. Such damages are calculated as loss of rental value, or use value, or possibly the cost of restoring the land. *Crosstex*, 505 S.W.3d at 610.

When the damage results from an ongoing condition rather than a single event that results in a permanent nuisance, courts apply a more flexible rule; the proper comparison is the market value of the property with and without the nuisance. *Crosstex*, 505 S.W.3d at 611–12. Persons whose property interests were invaded may bring a private nuisance action. Persons with property interests include owners, renters, and easement owners. See *Schneider National Carriers, Inc.*, 147 S.W.3d at 268 n.2 (tenants at time of injury maintain standing).

Current owners, past owners, and tenants can recover damages. A current owner can seek damages for personal injury and injury to real property. *Crosstex*, 505 S.W.3d at 596. A past owner can sue for property damages if the injury occurred while the plaintiff owned the land, damages resulted from a permanent nuisance, and the plaintiff did not assign the right to sue to a later purchaser. See *Vann v. Bowie Sewerage Co.*, 90 S.W.2d 561, 562–63 (Tex. 1936); *Lay v. Aetna Insurance Co.*, 599 S.W.2d 684, 686 (Tex. Civ. App.—Austin 1980, writ ref’d n.r.e.). A tenant may seek nuisance damages for personal injury. *Schneider National Carriers, Inc.*, 147 S.W.3d at 268 n.2; *Faulkenbury v. Wells*, 68 S.W. 327, 329 (Tex. Civ. App.—Dallas 1902, no writ). An easement owner can seek an injunction to stop a nuisance. See, e.g., *Freedman v. Briarcroft Property Owners, Inc.*, 776 S.W.2d 212, 215 (Tex. App.—Houston [14th Dist.] 1989, writ denied) (property owners association had standing to sue to enforce restrictions).

Loss of market value. Loss of market value or diminution in value is a figure that reflects all property damages, including lost rents expected in the future. *Crosstex*, 505 S.W.3d at 610 (citing *Schneider National Carriers, Inc.*, 147 S.W.3d at 276). Jurors make a reasonable estimate of the long-term impact of a nuisance based on competent

evidence. *Schneider National Carriers, Inc.*, 147 S.W.3d at 277. However, a decrease in market value does not necessarily mean there is a nuisance, nor does an increase mean there is not a nuisance. *Schneider National Carriers, Inc.*, 147 S.W.3d at 277.

Cost of repairs. Cost of repairs cannot be obtained for the same damage when market value is already assessed or included. *See C.C. Carlton Industries, Ltd. v. Blanchard*, 311 S.W.3d 654, 662–63 (Tex. App.—Austin 2010, pet. denied). Repair costs can be separately divided into jury questions specific to each property damaged. *See C.C. Carlton Industries, Ltd.*, 311 S.W.3d at 662–63.

Generally no double recovery allowed. Texas law does not generally permit double recovery for loss of market value and cost of repairs. *Schneider National Carriers, Inc.*, 147 S.W.3d at 276. However, a dual recovery of diminution in value and cost of repairs is allowed if the issue is submitted to the jury and if the property will suffer a reduction in market value once repairs have been completed or has suffered a loss of market value even though repairs were completed. *See Ludt v. McCollum*, 762 S.W.2d 575, 576 (Tex. 1988) (per curiam); *Royce Homes v. Humphrey*, 244 S.W.3d 570, 582 (Tex. App.—Beaumont 2008, pet. denied). In such cases the above question should be modified to include a finding on the cost to repair. Additionally, “stigma” damages, which represent the market’s perception of a decrease in property value that may continue to exist after an injury to real property has been fully repaired or remediated, may also be recoverable in certain circumstances. *See Houston Unlimited, Inc. v. Mel Acres Ranch*, 443 S.W.3d 820, 824 (Tex. 2014) (describing effect of “damage to the reputation of the realty”).

Personal injury damages recoverable. While many nuisance actions are based on property damages, a plaintiff may also recover personal injury damages caused by a nuisance. *Crosstex*, 505 S.W.3d at 596. This could be considered physical harm or something that assaults the senses. *See City of Tyler v. Likes*, 962 S.W.2d 489, 503–04 (Tex. 1997). Personal injury damages can be enumerated based on the basic question at PJC 28.3. Use only the elements of damage that apply to the damages sought in the case.

Mental anguish damages not recoverable in negligence-based nuisance actions. In a nuisance action based on negligence, mental anguish damages are not recoverable. *See Likes*, 962 S.W.2d at 494–96; *see also Kane v. Cameron International Corp.*, 331 S.W.3d 145, 148–50 (Tex. App.—Houston [14th Dist.] 2011, no pet.) (noting that Texas law does not recognize fear-of-dreaded-disease claims in nuisance absent showing capability of harm).

Annoyance and discomfiture. The Texas Supreme Court has noted that “considerable authority” exists for the proposition that a nuisance that impairs the comfortable enjoyment of real property may give rise to damages for “annoyance and discomfiture.” *Crosstex*, 505 S.W.3d at 610 n.21. However, because no such damages were

sought in *Crosstex*, the court did not decide the scope of these damages or determine if they are available for either temporary nuisance, permanent nuisance, or both.

Higher level of culpability required to obtain damages against governmental entities. If the defendant is a governmental entity, intentional conduct is a prerequisite in order to recover damages. *City of San Antonio v. Pollock*, 284 S.W.3d 809, 820–21 (Tex. 2009). When intentional conduct is required to recover for damages, the mere possibility of damage resulting from conduct is not evidence of intent. *Pollock*, 284 S.W.3d at 821.

Prejudgment interest recoverable. Prejudgment interest is recoverable on property damages. Tex. Fin. Code § 304.102.

Statutory nuisance damages distinguished. Texas statutes also permit distinct remedies for statutory nuisances separate from common-law nuisances. For example, a person affected by a statutory health code violation may bring suit for an injunction and receive court costs and reasonable attorney’s fees. See Tex. Health & Safety Code § 343.013(b). Examples include storing refuse that is not contained in a closed receptacle and maintaining a building that is unsafe. See Tex. Health & Safety Code § 343.011.

Claims relating to air particulates and emissions may be considered a toxic tort claim requiring *Havner*-like requirements for proof. See *Cerny v. Marathon Oil Corp.*, 480 S.W.3d 612, 621–22 (Tex. App.—San Antonio 2015, pet. denied); *Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706 (Tex. 1997). Such claims may also be affected by the Texas Civil Practice and Remedies Code, which limits liability for an “air contaminant” not produced by a natural process. See Tex. Civ. Prac. & Rem. Code § 75.002(h). The Committee expresses no opinion about whether *Havner* standards would apply to nuisance claims.

Abatement affects damages. Abatement of a nuisance may necessitate changes to a jury submission regarding damages. *Schneider National Carriers, Inc.*, 147 S.W.3d at 288–89. Past and future damages may be separated with only past damages recoverable for a nuisance if there is abatement. *Schneider National Carriers, Inc.*, 147 S.W.3d at 289. When a plaintiff seeks a temporary injunction, a trial court may make the determination whether to abate the nuisance before a jury finds it exists. *Schneider National Carriers, Inc.*, 147 S.W.3d at 289–90. However, if the jury determines that no nuisance has occurred, a trial court does not maintain discretion to issue a permanent injunction based on nuisance. See *Hanson Aggregates West, Inc. v. Ford*, 338 S.W.3d 39, 45–48 (Tex. App.—Austin 2011, pet. denied).

Determination of permanent vs. temporary injury. Similar to determining whether a nuisance is permanent or temporary, the court also determines if an injury to real property is permanent or temporary. *Gilbert Wheeler, Inc. v. Enbridge Pipelines (East Texas), L.P.*, 449 S.W.3d 474, 480–81 (Tex. 2014). For specific questions regard-

ing a permanent injury to real property versus a temporary injury to real property, practitioners may use the instructions found in chapter 11, “Trespass,” in this volume.

Economic feasibility exception. If the cost of repairing a temporary injury so disproportionately exceeds the resulting diminution in the property’s market value that restoration is no longer economically feasible, the temporary injury is deemed permanent as a matter of law and damages are awarded for loss in fair market value. *Gilbert Wheeler, Inc.*, 449 S.W.3d at 481. Therefore, in the case of a temporary nuisance, the Committee recommends that questions concerning both market value *and* cost to repair be submitted to the jury. See PJC 12.6. It is unclear whether disproportionality between cost to restore and diminution in value is always a matter of law or whether, in some circumstances, it may be a fact question. In any event, upon the court’s determination of the nature of the injury, only the appropriate calculation of damages—i.e., repair costs or diminution in value—should be considered. See *Gilbert Wheeler, Inc.*, 449 S.W.3d at 481.

Intrinsic value exception. If the reduction in market value caused by a permanent injury is “essentially nominal,” the plaintiff may be able to recover the damaged property’s “intrinsic value.” *Gilbert Wheeler, Inc.*, 449 S.W.3d at 482–83 (confirming intrinsic value exception is valid and extending *Porras v. Craig*, 675 S.W.2d 503, 506 (Tex. 1984)). In such a circumstance, an additional question will be required. *Gilbert Wheeler, Inc.*, 449 S.W.3d at 482. The Committee recommends the following language be used:

If you found that there was no diminishment of the property’s fair market value, or so little diminishment of that value that the loss is essentially nominal, what amount, if any, should be awarded to *Paul Payne* for the intrinsic value of *his* damaged property, that is, the ornamental and utilitarian value of the property?

Elements considered separately. *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 770 (Tex. 2002), provides an instruction for cases involving undefined or potentially overlapping categories of damages. In those cases, the following language should be substituted for the instruction to consider each element separately:

Consider the following elements of damages, if any, and none other. You shall not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any.

PJC 12.6 Damages from Temporary Nuisance

QUESTION _____

[Following a court determination that the nuisance was temporary.]

What sum of money, if paid now in cash, would fairly and reasonably compensate *Paul Payne* for the damages, if any, resulting from the temporary nuisance?

Consider the elements of damages listed below and none other. Consider each element separately. Do not reduce the amount, if any, in your answers because of the negligence, if any, of *Paul Payne*. Any recovery will be determined by the court when it applies the law to your answers at the time of judgment. In determining damages resulting from the nuisance, you may consider the proximity, duration, and intensity of the nuisance.

Answer separately, in dollars and cents, for damages, if any.

1. Loss of use and enjoyment that has already occurred, as measured by—

loss of rental value.

Answer: _____

[or]

loss of use value.

Answer: _____

[or]

the reasonable cost to restore the property to the condition it was in immediately before the occurrence in question.

Answer: _____

2. Personal injury sustained in the past.

Answer: _____

COMMENT

Damages for nuisance include property and personal injury damages. A plaintiff may recover in a nuisance action for property damage and personal injuries.

See *Crosstex North Texas Pipeline, L.P. v. Gardiner*, 505 S.W.3d 580, 596 (Tex. 2016); *Schneider National Carriers, Inc. v. Bates*, 147 S.W.3d 264, 275–80 (Tex. 2004). The following types of damages may be recoverable when they arise from a nuisance: “physical damage to the plaintiffs’ property, economic harm to the property’s market value, harm to the plaintiffs’ health, or psychological harm to the plaintiffs’ ‘peace of mind’ in the use and enjoyment of their property.” *Crosstex*, 505 S.W.3d at 596. Only those elements for which evidence is introduced should be submitted.

Property damages recoverable by those with property interest: loss of market value or cost of repairs. When a nuisance is permanent, the claimant may recover lost market value. The value should be ascertained at the date of trial and should be the market value of the property for any use to which it might be appropriated. The jury is permitted to consider all the uses to which the property is reasonably adaptable and for which it is, or in all reasonable probability will become, available within the foreseeable future. However, a jury may not consider purely speculative uses. *Crosstex*, 505 S.W.3d at 610–11.

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Statutory nuisance damages distinguished. Texas statutes also permit distinct remedies for statutory nuisances separate from common-law nuisances. For example, a person affected by a statutory health code violation may bring suit for an injunction and receive court costs and reasonable attorney’s fees. See Tex. Health & Safety Code § 343.013(b). Examples include storing refuse that is not contained in a closed receptacle and maintaining a building that is unsafe. See Tex. Health & Safety Code § 343.011.

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Abatement affects damages. Abatement of a nuisance may necessitate changes to a jury submission regarding damages. *Schneider National Carriers, Inc.*, 147 S.W.3d at 288–89. Past and future damages may be separated with only past damages recoverable for a nuisance if there is abatement. *Schneider National Carriers, Inc.*, 147 S.W.3d at 289. When a plaintiff seeks a temporary injunction, a trial court may make the determination whether to abate the nuisance before a jury finds it exists. *Schneider National Carriers, Inc.*, 147 S.W.3d at 289–90. However, if the jury determines that no nuisance has occurred, a trial court does not maintain discretion to issue a permanent injunction based on nuisance. See *Hanson Aggregates West, Inc. v. Ford*, 338 S.W.3d 39, 45–48 (Tex. App.—Austin 2011, pet. denied).

Determination of permanent vs. temporary injury. Similar to determining whether a nuisance is permanent or temporary, the court also determines if an injury to real property is permanent or temporary. *Gilbert Wheeler, Inc. v. Enbridge Pipelines (East Texas), L.P.*, 449 S.W.3d 474, 480–81 (Tex. 2014). For specific questions regarding a permanent injury to real property versus a temporary injury to real property, practitioners may use the instructions found in chapter 11, “Trespass,” in this volume.

Economic feasibility exception. If the cost of repairing a temporary injury so disproportionately exceeds the resulting diminution in the property’s market value that restoration is no longer economically feasible, the temporary injury is deemed permanent as a matter of law and damages are awarded for loss in fair market value. *Gilbert Wheeler, Inc.*, 449 S.W.3d at 481. Therefore, in the case of a temporary nuisance, the Committee recommends that questions concerning both market value *and* cost to repair be submitted to the jury. It is unclear whether disproportionality between cost to restore and diminution in value is always a matter of law or whether, in some circumstances, it may be a fact question. In any event, upon the court’s determination of the nature of the injury, only the appropriate calculation of damages—i.e., repair costs or diminution in value—should be considered. *See Gilbert Wheeler, Inc.*, 449 S.W.3d at 481.

Intrinsic value exception. If the reduction in market value caused by a permanent injury is “essentially nominal,” the plaintiff may be able to recover the damaged property’s “intrinsic value.” *Gilbert Wheeler, Inc.*, 449 S.W.3d at 482–83 (confirming intrinsic value exception is valid and extending *Porras v. Craig*, 675 S.W.2d 503, 506 (Tex. 1984)). In such a circumstance, an additional question will be required. *Gilbert Wheeler, Inc.*, 449 S.W.3d at 482. The Committee recommends the following language be used:

If you found that there was no diminishment of the property’s fair market value, or so little diminishment of that value that the loss is essentially nominal, what amount, if any, should be awarded to *Paul Payne* for the intrinsic value of *his* damaged property, that is, the ornamental and utilitarian value of the property?

Elements considered separately. *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 770 (Tex. 2002), provides an instruction for cases involving undefined or potentially overlapping categories of damages. In those cases, the following language should be substituted for the instruction to consider each element separately:

Consider the following elements of damages, if any, and none other. You shall not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any.



CHAPTER 13	ANIMAL INJURY	
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PJC 13.1 Owner or Possessor of Animal

QUESTION _____

On the occasion in question, did *Don Davis* own or possess [*describe animal in question*]?

Answer “Yes” or “No.”

Answer: _____

COMMENT

When to use. PJC 13.1 should be submitted if there is a dispute about whether the defendant had control over the animal in question. A defendant may be liable for injuries caused by an animal owned or possessed by the defendant at the time of the occasion in question. *See Marshall v. Ranne*, 511 S.W.2d 255, 259 (Tex. 1974) (identifying status as owner or possessor of animal as first element of negligence claim); *see also Allen v. Albin*, 97 S.W.3d 655, 659 (Tex. App.—Waco 2002, no pet.) (setting forth elements for strict liability and negligence claims and including status as owner or possessor of animal as first element of each claim).

Domesticated or wild animal. If the defendant owned or possessed the animal in question on the occasion in question, the court must determine whether the animal is domesticated or wild. *See, e.g., Powers v. Palacios*, 794 S.W.2d 493, 497 (Tex. App.—Corpus Christi 1990), *rev'd on other grounds*, 813 S.W.2d 489 (Tex. 1991); *Pate v. Yeager*, 552 S.W.2d 513, 515–17 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.). An animal is wild if it belongs to a category that has not been generally domesticated and that is likely, unless restrained, to cause personal injury. *See Pate*, 552 S.W.2d at 515; *see also Restatement (Third) of Torts* § 22(b) (2010). If the court determines that the animal is domesticated, PJC 13.2 should be submitted; if it finds the animal wild, PJC 13.5 should be submitted. The Committee recognizes that the determination whether an animal is domesticated or wild could give rise to a fact issue. Although the court is to resolve the issue, it might be proper to submit an advisory question to the jury. *See, e.g., Transcontinental Insurance Co. v. Crump*, 330 S.W.3d 211, 227–32 (Tex. 2010) (party has right to submit jury question on reasonableness and necessity of claimant’s attorney’s fees when fact question exists, despite statutory language providing that court “shall apportion and award” fees).

Premises liability. Additional consideration should be given to whether a premises liability standard might apply based on the location and circumstances of the underlying incident. *See, e.g., Labaj v. Vanhouten*, 322 S.W.3d 416 (Tex. App.—Amarillo 2010, pet. denied). A party might also choose to submit the case on several theories of liability, including premises liability. *See, e.g., Pfeffer v. Simon*, No. 05-02-

01130-CV, 2003 WL 1545084 (Tex. App.—Dallas Mar. 26, 2003, no pet.) (mem. op.) (plaintiffs sued for strict liability, negligence, and premises liability for dog-bite injuries arising from plaintiff's visit to defendants' home). For submission of the case under a premises liability theory, see the current edition of State Bar of Texas, *Texas Pattern Jury Charges—Malpractice, Premises & Products* ch. 66.

PJC 13.2 Dangerous Propensity of Domesticated Animal

QUESTION _____

On the occasion in question, did [*describe animal in question*] have dangerous propensities abnormal to its class?

Answer “Yes” or “No.”

Answer: _____

COMMENT

When to use. If the court determines that the animal in question is domesticated, PJC 13.2 should be used if there is a dispute whether it has dangerous propensities abnormal to its class. See *Marshall v. Ranne*, 511 S.W.2d 255, 258–59 (Tex. 1974), in which the court explains that claims for damages caused by vicious animals are governed by principles of strict liability, and claims for damages caused by nonvicious animals are governed by negligence principles. Although the court used the term “vicious,” it did not define the term. However, it did state that the *Restatement (First) of Torts* § 509 (1938) correctly states the liability standard (*see Marshall*, 511 S.W.2d at 258), and that provision implicitly defines “vicious” as having “dangerous propensities abnormal to its class.” Note that the *Restatement (Third) of Torts* (2010) uses the phrase “dangerous propensities abnormal to its class” in lieu of “vicious.”

PJC 13.3 Abnormally Dangerous Domesticated Animal

QUESTION _____

On the occasion in question, were [*describe animal in question*]'s dangerous propensities a producing cause of *Paul Payne's* injuries?

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 13.3 should be used when the animal in question is found to have abnormally dangerous propensities that allegedly caused the injuries. *See Marshall v. Ranne*, 511 S.W.2d 255, 258–59 (Tex. 1974) (suits for damages caused by vicious animals are governed by principles of strict liability).

Conditioning instruction. A party may choose to submit the issues under both strict liability and negligence liability standards regardless of the jury's finding regarding the alleged dangerous propensities of the animal in question. In such circumstances, no conditioning instruction would be submitted as part of either PJC 13.3 or PJC 13.4. However, if a party prefers that the jury make a single liability finding, the following instruction may be submitted as a predicate to PJC 13.3:

If, in answer to Question _____ [*question regarding dangerous propensities*], you found that [*describe animal in question*] had dangerous propensities abnormal to its class, then answer the following question. Otherwise, do not answer the following question.

Producing cause. PJC 13.3 should be submitted with the definition of producing cause:

"Producing cause" means a cause that was a substantial factor in bringing about the [*injury*] [*occurrence*], and without which the [*injury*] [*occurrence*] would not have occurred. There may be more than one producing cause.

See the current edition of State Bar of Texas, *Texas Pattern Jury Charges—Malpractice, Premises & Products* PJC 70.1.

Plaintiff's negligence/assumption of risk. The plaintiff's conduct in relation to the animal in question might be subject to a comparative responsibility allocation. *But see Marshall*, 511 S.W.2d at 258 (negligence in failing to discover dangerous animal or take precautions against possible harm will not reduce plaintiff's recovery, but voluntary assumption of risk of harm might be valid defense to liability); *see also Moore*

v. McKay, 55 S.W.2d 865, 866 (Tex. Civ. App.—El Paso 1932, no writ). The Committee notes that *Marshall* predates Texas's adoption of comparative responsibility and takes no position on the remaining viability of the court's holding in this respect.

PJC 13.4 Domesticated Animal That Is Not Abnormally Dangerous

QUESTION _____

On the occasion in question, did the negligence, if any, of any of those named below proximately cause *Paul Payne's* injuries?

Answer "Yes" or "No" for each of the following:

1. *Don Davis* _____
2. *Paul Payne* _____

COMMENT

When to use. PJC 13.4 should be given when the domesticated animal that caused the injuries did not have dangerous propensities abnormal to its class. *See Marshall v. Ranne*, 511 S.W.2d 255, 259 (Tex. 1974) (possessor of nonvicious animal may be liable for negligent handling of animal).

Conditioning instruction. A party may choose to submit the issues under both strict liability and negligence liability standards regardless of the jury's finding regarding the alleged dangerous propensities of the animal in question. In such circumstances, no conditioning instruction would be submitted as part of either PJC 13.3 or PJC 13.4. However, if a party prefers that the jury make a single liability finding, the following instruction may be submitted as a predicate to PJC 13.4:

If, in answer to Question _____ [*question regarding dangerous propensities*], you found that [*describe animal in question*] had dangerous propensities abnormal to its class, then answer the following question. Otherwise, do not answer the following question.

Negligence and proximate cause. This question should be submitted with the definitions of negligence, PJC 2.1, and proximate cause, PJC 2.4.

Plaintiff's negligence/assumption of risk. The plaintiff's conduct in relation to the animal in question might be subject to a comparative responsibility allocation. *But see Marshall*, 511 S.W.2d at 258 (negligence in failing to discover dangerous animal or take precautions against possible harm will not reduce plaintiff's recovery, but voluntary assumption of risk of harm might be valid defense to liability); *see also Moore v. McKay*, 55 S.W.2d 865, 866 (Tex. Civ. App.—El Paso 1932, no writ). The Committee notes that *Marshall* predates Texas's adoption of comparative responsibility and takes no position on the remaining viability of the court's holding in this respect.

PJC 13.5 Wild Animal

QUESTION _____

On the occasion in question, was a dangerous propensity of [*describe animal in question*] a producing cause of *Paul Payne's* injuries?

In order to find that a dangerous propensity of [*describe animal in question*] was a producing cause of *Paul Payne's* injuries, you must find that the dangerous propensity was characteristic of its class of wild animals.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 13.5 should be given if the court determines that the animal in question is a wild animal. *See, e.g., Powers v. Palacios*, 794 S.W.2d 493, 497 (Tex. App.—Corpus Christi 1990), *rev'd on other grounds*, 813 S.W.2d 489 (Tex. 1991); *Pate v. Yeager*, 552 S.W.2d 513, 515–17 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.). An animal is wild if it belongs to a category that has not been generally domesticated and that is likely, unless restrained, to cause personal injury. *Restatement (Third) of Torts* § 22(b) (2010); *see also Powers*, 794 S.W.2d at 497 (citing *Black's Law Dictionary* definitions for distinguishing between wild and domesticated animals). If the court determines that the animal is wild, the defendant is strictly liable for injuries caused by the animal. *See Marshall v. Ranne*, 511 S.W.2d 255 (Tex. 1974); *see also Nicholson v. Smith*, 986 S.W.2d 54 (Tex. App.—San Antonio 1999, no pet.) (discussing rule of strict liability for acts of wild animals that one has reduced to one's possession or if one has introduced a nonindigenous animal into the area).

Producing cause. PJC 13.5 should be submitted with the definition of producing cause:

"Producing cause" means a cause that was a substantial factor in bringing about the [*injury*] [*occurrence*], and without which the [*injury*] [*occurrence*] would not have occurred. There may be more than one producing cause.

See the current edition of State Bar of Texas, *Texas Pattern Jury Charges—Malpractice, Premises & Products* PJC 70.1.

Plaintiff's negligence/assumption of risk. The plaintiff's conduct in relation to the animal in question might be subject to a comparative responsibility allocation. *But see Marshall*, 511 S.W.2d at 258 (negligence in failing to discover dangerous animal

or take precautions against possible harm will not reduce plaintiff's recovery, but voluntary assumption of risk of harm might be valid defense to liability); *see also Moore v. McKay*, 55 S.W.2d 865, 866 (Tex. Civ. App.—El Paso 1932, no writ). The Committee notes that *Marshall* predates Texas's adoption of comparative responsibility and takes no position on the remaining viability of the court's holding in this respect.

CHAPTER 14 DEFENSES
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PJC 14.1 Limitations—Tolling by Diligence in Service

QUESTION _____

Did *Paul Payne*, or someone acting on *his* behalf, exercise diligence to have *Don Davis* served?

The standard of diligence required is that diligence to procure service which an ordinarily prudent person would have used under the same or similar circumstances. The duty to use diligence continues from the time suit was filed against *Don Davis* on [date] until *Don Davis* was served on [date].

Answer “Yes” or “No.”

Answer: _____

COMMENT

When to use. The above question and instruction should be used when the plaintiff filed a petition within the applicable limitations period but did not serve the defendant until after limitations expired, the defendant has pleaded the affirmative defense of limitations, and the plaintiff has offered evidence of due diligence in effecting service. The court will insert the appropriate dates in the brackets contained in the above instruction.

If the petition is filed within the applicable limitations period, service outside the limitations period may still be valid if the plaintiff exercises due diligence in procuring service on the defendant. *Ashley v. Hawkins*, 293 S.W.3d 175, 179 (Tex. 2009); *Gant v. DeLeon*, 786 S.W.2d 259, 260 (Tex. 1990) (per curiam) (citing *Zale Corp. v. Rosenbaum*, 520 S.W.2d 889, 890) (Tex. 1975) (per curiam)). When service is diligently effected after limitations have expired, the date of service will relate back to the date of filing. *Proulx v. Wells*, 235 S.W.3d 213, 215–16 (Tex. 2007) (per curiam); *Gant*, 786 S.W.2d at 260.

When the defendant has pleaded the affirmative defense of limitations and has shown that service was not timely, the burden shifts to the plaintiff to prove diligence. *Ashley*, 293 S.W.3d at 179; *Proulx*, 235 S.W.3d at 215–16. Whether the plaintiff exercised due diligence in obtaining service on the defendant, so as to allow the date of service to relate back to the date of filing of suit for limitations purposes, is ordinarily a question of fact. *Ashley*, 293 S.W.3d at 179; *Proulx*, 235 S.W.3d at 216; *Mauricio v. Castro*, 287 S.W.3d 476, 479 (Tex. App.—Dallas 2009, no pet. h.).

Source of definition. “Diligence” is determined by asking “whether the plaintiff acted as an ordinarily prudent person would have acted under the same or similar circumstances and was diligent up until the time the defendant was served.” *Proulx*, 235

S.W.3d at 216; see *Zimmerman v. Massoni*, 32 S.W.3d 254, 255–56 (Tex. App.—Austin 2000, pet. denied) (quoting jury question and definition submitting issue of diligence).

Caveat. Once the defendant has affirmatively pleaded the limitations defense and shown that service was effected after limitations expired, it is the plaintiff's burden to present evidence regarding the efforts made to serve the defendant and, also, to explain every lapse in effort or period of delay. *Proulx*, 235 S.W.3d at 216. The relevant inquiry is two-pronged: (1) whether the plaintiff acted as an ordinarily prudent person would have acted under the same or similar circumstances and (2) whether the plaintiff acted diligently up until the time the defendant was served. See *Proulx*, 235 S.W.3d at 216; *Mauricio*, 287 S.W.3d at 479; *Hodge v. Smith*, 856 S.W.2d 212, 215 (Tex. App.—Houston [1st Dist.] 1993, writ denied). In some statutory cases, when the defendant engages in conduct solely calculated to induce the plaintiff to refrain from or postpone filing suit, an extra 180 days may be tacked onto the original limitations period. See PJC 102.23 (DTPA/Insurance Code) in the current edition of State Bar of Texas, *Texas Pattern Jury Charges—Business, Consumer, Insurance & Employment*. The Committee expresses no opinion about whether the same standard of diligence applies to the joinder of responsible third parties.

CHAPTER 15	WORKERS' COMPENSATION—BURDEN OF PROOF ON JUDICIAL REVIEW	
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Note

Chapters 15 through 27 are a section of pattern jury charges for workers' compensation cases. Previous editions of the workers' compensation PJC volume (*see, e.g.,* Comm. on Pattern Jury Charges, State Bar of Tex., *2 Texas Pattern Jury Charges—Workers' Compensation* (2d ed. 1989)) were based on an earlier version of the workers' compensation act. *See* Tex. Rev. Civ. Stat. art. 8306, *repealed by* Acts 1989, 71st Leg., 2d C.S., ch.1, § 16.01, 1989 Tex. Gen. Laws 114. The legislature repealed that version of the act when it reformed the workers' compensation system in 1989. These reforms created a new regulatory agency, benefits structure, and dispute resolution process. *See generally* *Texas Mutual Insurance Co. v. Ruttiger*, 381 S.W.3d 430 (Tex. 2012); *Texas Workers' Compensation Commission v. Garcia*, 893 S.W.2d 504, 510–16 (Tex. 1995) (discussing changes). The changes were subsequently codified in title 5 of the Texas Labor Code. Act of May 22, 1993, 73d Leg., R.S., ch. 269, § 1, 1993 Tex. Gen. Laws 987, 1173. Statutory references in this volume are to the Texas Labor Code.

Injuries occurring before January 1, 1991 (the effective date of the reform bill), are commonly referred to as “old-law cases.” Injuries occurring on or after January 1, 1991, are commonly referred to as “new-law cases.” The legal principles found in many old-law cases remain applicable to new-law cases. However, as the supreme court has observed, “Old-law cases can be useful in understanding the new act, but their relevance to any particular provision requires a careful comparison of the old and new law.” *Insurance Co. of State of Pennsylvania v. Muro*, 347 S.W.3d 268, 273 (Tex. 2011).

Use of statutory language. The supreme court has held that when liability is asserted based on a provision of a statute or regulation, jury submission should follow the statutory language as closely as possible but may be altered somewhat to conform to the evidence of the case. *Spencer v. Eagle Star Insurance Co. of America*, 876 S.W.2d 154, 157 (Tex. 1994); *Brown v. American Transfer & Storage Co.*, 601 S.W.2d

931, 937 (Tex. 1980). Material terms, however, should not be omitted or substituted. *See Transport Insurance Co. v. Faircloth*, 898 S.W.2d 269, 273 (Tex. 1995) (construing DTPA section 17.46(b)(23), renumbered in 2001 as DTPA § 17.46(b)(24)). Where it has been possible to do so in this volume, the Committee has attempted to track the language of the Texas Workers' Compensation Act or rules adopted by the Division of Workers' Compensation of the Texas Department of Insurance (DWC, formerly TWCC).

PJC 15.1 Burden of Proof (Comment)

An aggrieved party may appeal a final decision of the appeals panel of the Division of Workers' Compensation of the Texas Department of Insurance (DWC, formerly TWCC). Tex. Lab. Code § 410.251; Tex. Gov't Code §§ 2001.171–178. Issues that the appeals panel has decided may be tried to the court or to a jury, and the appealing party bears the burden of proof by a preponderance of the evidence. Tex. Lab. Code §§ 410.303–304; *Morales v. Liberty Mutual Insurance Co.*, 241 S.W.3d 514, 516 (Tex. 2007).

If the dispute involves compensability or eligibility for or the amount of income or death benefits, the trial court reviews any appealed issues under a modified de novo standard. *Rodriguez v. Service Lloyds Insurance Co.*, 997 S.W.2d 248, 253 (Tex. 1999); see also *Texas Workers' Compensation Commission v. Garcia*, 893 S.W.2d 504, 515 (Tex. 1995).

Traditionally, the claimant carries the burden of proof to validate his claim. Even on judicial review, when the claimant has the burden of proof, most courts are able to draw on other areas of law to reach an equitable construction of jury questions. New for courts and litigants is the drafting of questions when the carrier has appealed and the claimant has become the defendant. A strict reading of the Texas Labor Code indicates that the carrier must prove a negative, such as proving that the claimant did not have a disability. See *Transcontinental Insurance Co. v. Crump*, 330 S.W.3d 211, 226 (Tex. 2010).

While some claimants' attorneys have avoided this type of construction, thinking that it might confuse a jury, it should be emphasized that the successful claimant who is now a defendant in the appeal has an absolute right to require the carrier to disprove the appeals panel findings. See Tex. Lab. Code § 410.303; *Crump*, 330 S.W.3d at 226; *Morales*, 241 S.W.3d at 516.

Therefore, in a suit for judicial review, the placement of the burden of proof is determined by who the "aggrieved" (see Tex. Lab. Code § 410.251) and appealing party is shown to be in the pleadings. In a case in which each party has appealed separately from adverse determinations by the DWC, each party will bear the burden of proof on the issue from which it has appealed.

To that end, the Committee has recommended two versions of many of the questions in this volume: one in which the burden of proof has been placed on the employee as the appealing party, and the other in which the burden of proof has been placed on the carrier as the appealing party. In occasional cases, each party may bear the burden of proof to establish the answer for which it advocates. See PJC 23.9.

PJC 15.2 Consideration of Appeals Panel Decision (Comment)

In a jury trial, the court, before submitting the case to the jury, shall inform the jury in the court's instructions, charge, or questions to the jury of the appeals panel decision on each of the disputed issues. Tex. Lab. Code § 410.304(a). The fact finder may consider, but is not bound by, the appeals panel decision. *Morales v. Liberty Mutual Insurance Co.*, 241 S.W.3d 514, 516 (Tex. 2007); *see also Texas Workers' Compensation Commission v. Garcia*, 893 S.W.2d 504, 515 (Tex. 1995).

If the appeals panel does not issue a decision in accordance with Tex. Lab. Code § 410.204, the decision of the hearing officer becomes final and is the final decision of the appeals panel. Tex. Lab. Code § 410.204(c).

The following are examples of possible instructions informing the jury of the appeals panel decision.

Sample A

The Texas Department of Insurance, Division of Workers' Compensation, determined that *Paul Payne* suffered disability from *January 24, 2013 through July 9, 2013*.

Sample B

The Texas Department of Insurance, Division of Workers' Compensation, determined that *Paul Payne* did not suffer the total and permanent loss of use of *his right and left hands at or above the wrists* and also determined that *Paul Payne* did not suffer the total and permanent loss of use of *his right and left feet at or above the ankles*.

**PJC 15.3 Weight to Be Given Opinion of Designated Doctor
(Comment)**

A designated doctor is one who has been appointed by mutual agreement of the parties or by the Division of Workers' Compensation of the Texas Department of Insurance (DWC, formerly TWCC) to recommend a resolution of a dispute about the medical condition of an injured employee. Tex. Lab. Code § 401.011(15).

The Texas Workers' Compensation Act provides that the report of the designated doctor has presumptive weight unless the preponderance of the other medical evidence is to the contrary. Tex. Lab. Code § 408.1225(c). However, the supreme court has written that the opinion of the designated doctor on judicial review is accorded no special weight. *Texas Workers' Compensation Commission v. Garcia*, 893 S.W.2d 504, 515 (Tex. 1995); see also *Financial Insurance Co. v. Ragsdale*, 166 S.W.3d 922, 928 (Tex. App.—El Paso 2005, no pet.). Accordingly, the Committee recommends that no instruction be given to the jury regarding the weight to be given the opinion of a designated doctor.



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PJC 16.1 Employee—Question**PJC 16.1A Employee—Question—When Claimant Appeals**

QUESTION _____

Was *Paul Payne* an employee of *ABC Company* at the time of *his* injury?

“Employee” means a person in the service of another under a contract of hire, whether express or implied, or oral or written.

Answer “Yes” or “No.”

Answer: _____

PJC 16.1B Employee—Question—When Carrier Appeals

QUESTION _____

Was *Paul Payne* not an employee of *ABC Company* at the time of *his* injury?

[Insert PJC 16.1A definition of “employee.”]

Answer “Yes” or “No.”

Answer: _____

COMMENT

When to use. PJC 16.1 is required if there is a dispute about whether the worker is an employee of the subscribing employer. It may be submitted when the question involves the nature of the employment relationship between the injured party and the alleged employer. *See, e.g., Morales v. Liberty Mutual Insurance Co.*, 241 S.W.3d 514, 519 (Tex. 2007).

Burden of proof. The burden of proof should be placed appropriately in accordance with the decision of the appeals panel. *See* PJC 15.1.

Source of definition. *See* Tex. Lab. Code § 401.012. The definition of “employee” differs from that in PJC 10.1 because this chapter uses the statutory definition. However, case law might support using the definition in PJC 10.1 when right to control is in issue.

Control of details of work. The right of control over the details of the work is the determinative test of whether the worker is an employee and can qualify for compen-

sation under the Texas Labor Code or is an independent contractor. *Turnbough v. United Pacific Insurance Co.*, 666 S.W.2d 489, 492 (Tex. 1984) (worker originally hired as independent contractor was employee; withholding for workers' compensation was some evidence); *Continental Insurance Co. v. Wolford*, 526 S.W.2d 539, 541 (Tex. 1975) (bricklayer furnishing helper and equipment and paid on a per-brick basis was independent contractor; right of control, not right to terminate, is dispositive); *Hartford Accident & Indemnity Co. v. Hooten*, 531 S.W.2d 365, 367 (Tex. Civ. App.—San Antonio 1975, writ ref'd n.r.e.) (nurse's aide privately employed but helping with other patients in nursing home in return for meals not an employee); *Allstate Insurance Co. v. Scott*, 511 S.W.2d 412, 414 (Tex. Civ. App.—El Paso 1974, writ ref'd n.r.e.) (exercise of control of details of work and acquiescence therein almost at time of accident was sufficient evidence of control); *Goodnight v. Zurich Insurance Co.*, 416 S.W.2d 626, 630 (Tex. App.—Dallas 1967, writ ref'd n.r.e.) (applying factors from *Anchor Casualty Co. v. Hartsfield*, 390 S.W.2d 469 (Tex. 1965)).

Independent contractor. If the evidence suggests the worker may be an independent contractor rather than an employee, see PJC 16.2.

Evidence of more than one injury. If there is evidence of more than one injury, the date of the injury inquired about should be included in the question.

Temporary direction. If the worker has been temporarily ordered or directed to perform tasks that are different from his ordinary duties or that are unusual or extraordinary, see PJC 17.3.

PJC 16.2 Independent Contractor—Question**PJC 16.2A Independent Contractor—Question—When Claimant Appeals**

QUESTION _____

Was *Paul Payne* not an independent contractor of *ABC Company* at the time of *his* injury?

“Independent contractor” means a person who contracts to perform work or provide a service for the benefit of another and who ordinarily—

1. acts as the employer of any employee of the contractor by paying wages, directing activities, and performing other similar functions characteristic of an employer-employee relationship;
2. is free to determine the manner in which the work or service is performed, including the hours of labor of or method of payment to any employee;
3. is required to furnish or to have employees, if any, furnish necessary tools, supplies, or materials to perform the work or service; and
4. possesses the skills required for the specific work or service.

Answer “Yes” or “No.”

Answer: _____

PJC 16.2B Independent Contractor—Question—When Carrier Appeals

QUESTION _____

Was *Paul Payne* an independent contractor of *ABC Company* at the time of *his* injury?

[Insert PJC 16.2A definition of “independent contractor.”]

Answer “Yes” or “No.”

Answer: _____

COMMENT

When to use. If the question is whether the worker is an employee of the subscribing employer, PJC 16.1 should be used. If the question is whether the worker is an independent contractor, PJC 16.2 should be used. In cases involving employee/independent contractor disputes outside of the workers' compensation context, see PJC 10.5, 10.8, and 10.9.

Burden of proof. The burden of proof should be placed appropriately in accordance with the decision of the appeals panel. See PJC 15.1.

Source of definitions. See Tex. Lab. Code § 406.121(2). The definition of "independent contractor" differs from that in PJC 10.8, which is based on case law. Concerning the definition or characteristics of an "independent contractor" as distinguished from an "employee," see *Thompson v. Travelers Indemnity Co. of Rhode Island*, 789 S.W.2d 277 (Tex. 1990); *Anchor Casualty Co. v. Hartsfield*, 390 S.W.2d 469 (Tex. 1965); and *Newspapers, Inc. v. Love*, 380 S.W.2d 582 (Tex. 1964).

Control of details of work. The right of control over the details of the work is the determinative test of whether the worker is an employee and can qualify for compensation under the Texas Labor Code or is an independent contractor. *Turnbough v. United Pacific Insurance Co.*, 666 S.W.2d 489, 492 (Tex. 1984) (worker originally hired as independent contractor was employee; withholding for workers' compensation was some evidence); *Continental Insurance Co. v. Wolford*, 526 S.W.2d 539, 541 (Tex. 1975) (bricklayer furnishing helper and equipment and paid on a per-brick basis was independent contractor; right of control, not right to terminate, is dispositive); *Anchor Casualty Co.*, 390 S.W.2d at 471 (that work required special skill, that worker furnished his own tools, that he was doing a particular job according to predetermined plans, that he had no set work hours, that he was paid by the job, and that he was not on the payroll or on the Social Security and income tax withholding rolls established that he was not an employee); *Hartford Accident & Indemnity Co. v. Hooten*, 531 S.W.2d 365, 367 (Tex. Civ. App.—San Antonio 1975, writ ref'd n.r.e.) (nurse's aide privately employed but helping with other patients in nursing home in return for meals not employee); *Allstate Insurance Co. v. Scott*, 511 S.W.2d 412, 414 (Tex. Civ. App.—El Paso 1974, writ ref'd n.r.e.) (exercise of control of details of work and acquiescence therein almost at time of accident was sufficient evidence of control).

Independent contractor by written agreement. If there was a written contract establishing an independent contractor relationship between the worker and the alleged employer but there is evidence that, in practice, actual control by the alleged employer over the work was persistently exercised, the following instruction should be submitted immediately after the definition of "independent contractor":

A written contract expressly excluding any right of control over the details of the work is conclusive as to *Paul Payne's* status as an independent contractor unless it was a subterfuge from the beginning

or was persistently ignored or was modified by subsequent express or implied agreement of the parties.

See Newspapers, Inc., 380 S.W.2d 582; *Elder v. Aetna Casualty & Surety Co.*, 236 S.W.2d 611 (Tex. 1951); *Travelers Insurance Co. v. Ray*, 262 S.W.2d 801 (Tex. Civ. App.—Eastland 1953, writ ref'd).

Evidence of more than one injury. If there is evidence of more than one injury, the date of the injury inquired about should be included in the question.

PJC 16.3 Borrowed Employee—Question**PJC 16.3A Borrowed Employee—Question—When Claimant Appeals**

QUESTION _____

Was *Paul Payne* a borrowed employee of *XYZ Company* while loading the truck?

One who would otherwise be in the general employment of one employer is a “borrowed employee” of another employer if such other employer or his agents have the right to direct and control the details of the particular work inquired about.

Answer “Yes” or “No.”

Answer: _____

PJC 16.3B Borrowed Employee—Question—When Carrier Appeals

QUESTION _____

Was *Paul Payne* not a borrowed employee of *XYZ Company* while loading the truck?

[Insert PJC 16.3A definition of “borrowed employee.”]

Answer “Yes” or “No.”

Answer: _____

COMMENT

When to use. PJC 16.3 should be used to submit disputes about the worker’s status as a “borrowed employee” (also called “loaned employee” or “special employee”). For cases in which a party seeks to impose or rebut vicarious liability for the conduct of an employee or borrowed employee outside of the workers’ compensation context, see PJC 10.2–10.4.

Burden of proof. The burden of proof should be placed appropriately in accordance with the decision of the appeals panel. See PJC 15.1.

Source of definition. A contract regarding workers' compensation coverage may moot the issue of borrowed employee status for the purposes of determining liability for benefits. *See, e.g., Wingfoot Enterprises v. Alvarado*, 111 S.W.3d 134, 135–36 (Tex. 2003). Absent an agreement regarding workers' compensation coverage, the right of control over the details of the work is the determinative test of whether responsibility for the injury rests with the original employer or the employer to whom the employee was loaned. *Highlands Underwriters Insurance Co. v. Martinez*, 441 S.W.2d 666, 667 (Tex. Civ. App.—Waco 1969, writ ref'd n.r.e.); *see also J.A. Robinson Sons, Inc. v. Wigart*, 431 S.W.2d 327, 330 (Tex. 1968), *overruled on other grounds by Sanchez v. Schindler*, 651 S.W.2d 249, 251 (Tex. 1983); *Texas Property & Casualty Guaranty Ass'n v. National American Insurance Co.*, 208 S.W.3d 523, 542–44 (Tex. App.—Austin 2006, pet. denied); *Home Indemnity Co. v. Draper*, 504 S.W.2d 570, 577–79 (Tex. Civ. App.—Houston [1st Dist.] 1973, writ ref'd n.r.e.).

PJC 16.4 Excluded Employment—Question**PJC 16.4A Excluded Employment—Question—When Claimant Appeals**

QUESTION _____

Was *Paul Payne* not performing services as a *domestic worker* at the time of such injury?

A “domestic worker” is a person who is primarily employed in and about the maintenance of a home itself. Such a person is a household worker working in or around a house for the upkeep thereof and for the care, comfort, and convenience of the occupants.

Answer “Yes” or “No.”

Answer: _____

PJC 16.4B Excluded Employment—Question—When Carrier Appeals

QUESTION _____

Was *Paul Payne* performing services as a *domestic worker* at the time of such injury?

[Insert PJC 16.4A definition of “domestic worker.”]

Answer “Yes” or “No.”

Answer: _____

COMMENT

When to use. A contract of employment may provide for services in two capacities, one that is covered by workers’ compensation and one that is not. If it is disputed whether the worker is covered, the question is in which capacity he was working at the time of the injury. *Hardware Dealers’ Mutual Fire Insurance Co. v. King*, 426 S.W.2d 215, 217–18 (Tex. 1968); *Aetna Casualty & Surety Co. v. Estate of Thomas*, 547 S.W.2d 694, 696–97 (Tex. Civ. App.—Tyler 1977, writ ref’d n.r.e.).

Burden of proof. The burden of proof should be placed appropriately in accordance with the decision of the appeals panel. See PJC 15.1.

Source of instruction and definition. PJC 16.4 is based on Tex. Lab. Code § 406.091, which excludes from coverage persons employed as domestic workers or casual workers engaged in employment incidental to a personal residence, persons covered by a method of compensation established under federal law, and certain farm or ranch employees. See *Robertson v. Home State County Mutual Insurance Co.*, 348 S.W.3d 273, 280 (Tex. App.—Fort Worth 2011, pet. denied) (the term “‘domestic employees’ can be given a definite and certain legal meaning: persons engaged in employment incidental to a personal residence”).

Casual employee. If it is disputed whether the worker was a casual employee, the phrase *casual employee* should be substituted for *domestic worker* in the above question, and the instruction and definition should be replaced with the following:

A person who is a casual employee engaged in employment incidental to a personal residence is not considered an employee under the Texas Workers' Compensation Act.

Farm and ranch employees. If the employee is a farm and ranch employee, see Tex. Lab. Code §§ 406.161–.165.

Evidence of more than one injury. If there is evidence of more than one injury, the date of the injury inquired about should be included in the question.

Temporary direction. If the evidence raises the question whether the worker was temporarily performing excluded services under the direction or orders of his supervisor, the additional instruction at PJC 17.3 should be included.

Status as employee disputed. If the worker's status as an employee is disputed, PJC 16.4 should be conditioned on the answer to PJC 16.1 or 16.2, as applicable.

PJC 16.5 Employer with More Than One Business—Question

QUESTION _____

Was *Paul Payne* performing services for *ABC Company* in its *automobile repair business* at the time of the injury?

An employee cannot be performing services for more than one business at the time of the injury.

Answer “Yes” or “No.”

Answer: _____

COMMENT

When to use. PJC 16.5 should be used if the employer operates two or more separate and distinct businesses, one that is covered by workers' compensation and one that is not, and if the worker has been shown in answer to PJC 16.1 to be an employee of that employer. The inquiry is whether the worker at the time of injury was performing services in the business not found to be the employer by the appeals panel.

If there is a dispute about whether the employer's businesses are separate and distinct and only one of the businesses is covered by workers' compensation, the following question should be submitted in addition to PJC 16.5:

At the time of any injury to *Paul Payne*, did *ABC Company* operate its *automobile repair business* separately and distinctly from its *mercantile business*?

Burden of proof. The burden of proof should be placed appropriately in accordance with the decision of the appeals panel. See PJC 15.1.

Source of questions. An employer cannot cover some of his employees with workers' compensation insurance and leave others uncovered in the same general business or enterprise. *Port Elevator-Brownsville, L.L.C. v. Casados*, 358 S.W.3d 238, 241–42 (Tex. 2012); *Barron v. Standard Accident Insurance Co.*, 53 S.W.2d 769, 770 (Tex. 1932). If he has two or more separate and distinct businesses, however, he may obtain coverage for one business but not for the others. *Pacific Indemnity Co. v. Jones*, 327 S.W.2d 441, 443 (Tex. 1959); see also *Texas Workers' Compensation Insurance Fund v. DEL Industrial, Inc.*, 35 S.W.3d 591, 595 (Tex. 2000); *Bradley v. Phillips Chemical Co.*, 484 F. Supp. 2d 604, 615 (S.D. Tex. 2007). Whether the businesses are in fact separate and distinct may be a question of fact. *Maryland Casualty Co. v. Sullivan*, 334 S.W.2d 783 (Tex. 1960). In light of these authorities, one or more of the above questions may be appropriate.

Evidence of more than one injury. If there is evidence of more than one injury, the date of the injury inquired about should be included in the question.

Status as employee disputed. If the worker's status as an employee is disputed, PJC 16.5 should be conditioned on the answer to PJC 16.1 or 16.2, as applicable.

PJC 16.6 Out-of-State Employment and Injury—Question**PJC 16.6A Out-of-State Employment and Injury—Question—When Claimant Appeals**

QUESTION _____

Did *Paul Payne* have significant contacts with Texas at the time of *his* injury?

An employee has significant contacts with Texas if the employee was hired or recruited in this state and the employee—

1. was injured not later than one year after the date of hire, or
2. has worked in Texas for at least ten working days during the twelve months preceding the date of injury.

Answer “Yes” or “No.”

Answer: _____

PJC 16.6B Out-of-State Employment and Injury—Question—When Carrier Appeals

QUESTION _____

Did *Paul Payne* lack significant contacts with Texas at the time of *his* injury?

[Insert PJC 16.6A instruction on “significant contacts.”]

Answer “Yes” or “No.”

Answer: _____

COMMENT

When to use. PJC 16.6 applies to all out-of-state injuries in which a claim is made in Texas for workers' compensation benefits and the worker has not elected to receive benefits from another state. A worker injured in another state can recover in Texas under workers' compensation laws if he was hired or recruited in Texas and (1) was injured not later than one year after the date of hire or (2) has worked in Texas for at least ten working days during the twelve months preceding the date of injury. Tex.

Lab. Code § 406.071. Note that these are alternative conditions, and either will suffice to entitle the worker to compensation provided that the injury shall have occurred within one year from the date he left Texas. *See American States Insurance Co. v. Garza*, 657 S.W.2d 522 (Tex. App.—Corpus Christi 1983, no writ).

Burden of proof. The burden of proof should be placed appropriately in accordance with the decision of the appeals panel. See PJC 15.1.

Source of question. PJC 16.6 is based on Tex. Lab. Code § 406.071.

**PJC 16.7 Subcontracting to Avoid Compensation Liability—
Question****PJC 16.7A Subcontracting to Avoid Compensation Liability—
Question—When Claimant Appeals**

QUESTION _____

Did *ABC Company* subcontract the whole or any part of its work to *XYZ Company* with the intent to avoid any liability as an employer under the Texas Workers' Compensation Act?

Answer "Yes" or "No."

Answer: _____

**PJC 16.7B Subcontracting to Avoid Compensation Liability—
Question—When Carrier Appeals**

QUESTION _____

Did *ABC Company* not subcontract the whole or any part of its work to *XYZ Company* with the intent to avoid any liability as an employer under the Texas Workers' Compensation Act?

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 16.7 assumes that the worker was an employee of an independent contractor (*XYZ Company*) to whom the subscriber (*ABC Company*) had subcontracted some or all of its work. An affirmative finding on this question would establish coverage by the subscriber's compensation carrier, notwithstanding the independent contract. See *Traders & General Insurance Co. v. Frozen Food Express*, 255 S.W.2d 378 (Tex. Civ. App.—Austin 1953, writ ref'd n.r.e.); *Texas Employers' Insurance Ass'n v. Harper*, 249 S.W.2d 677 (Tex. Civ. App.—Dallas 1952, writ ref'd n.r.e.); *United States Fidelity & Guaranty Co. v. Hall*, 224 S.W.2d 268 (Tex. Civ. App.—Austin 1949, writ dism'd); see also *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 439 (Tex. 2009).

Burden of proof. The burden of proof should be placed appropriately in accordance with the decision of the appeals panel. See PJC 15.1.

Source of question. PJC 16.7 is based on Tex. Lab. Code § 406.124.

Subletting to plaintiff as subcontractor. Labor Code section 406.124, by its terms, applies only when an injury is sustained by “any employee of such subcontractor.” See *Houston Fire & Casualty Insurance Co. v. Farm Air Service, Inc.*, 325 S.W.2d 860, 865 (Tex. Civ. App.—Austin 1959, writ ref’d n.r.e.).

Employee of subcontractor. For a question on “employee,” see PJC 16.1.

Caveat: written contract to provide benefits. Tex. Lab. Code § 406.123 allows a prime contractor to provide, through written contract, the subcontractor and its employees with workers’ compensation benefits, with such subcontractor and its employees becoming by statute the employees of the prime contractor. See *Entergy Gulf States, Inc.*, 282 S.W.3d at 436.



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PJC 17.1 Injury in Course and Scope of Employment—Question**PJC 17.1A Injury in Course and Scope of Employment—Question—
When Claimant Appeals**

QUESTION _____

Did *Paul Payne* receive an injury in the course and scope of *his* employment with *ABC Company* on *October 12, 2012*?

“Injury” means damage or harm to the physical structure of the body and such diseases or infections as naturally result from such damage or harm.

“Injury” also includes any incitement, acceleration, or aggravation of any disease, infirmity, or condition, previously or subsequently existing, by reason of such damage or harm.

“Injury” also includes any damage or harm arising out of the medical or surgical treatment instituted to cure or relieve the effects of the injury.

“Injury” also includes any mental or nervous disorder that impairs the use or control of the physical structure of the body.

“Injury in the course and scope of employment” means any injury suffered while engaged in an activity of any kind or character that has to do with and originates in the work, business, trade, or profession of the employer and that is performed by an employee while engaged in or about the furtherance of the affairs or business of his employer, whether on the employer’s premises or elsewhere.

Answer “Yes” or “No.”

Answer: _____

**PJC 17.1B Injury in Course and Scope of Employment—Question—
When Carrier Appeals**

QUESTION _____

Did *Paul Payne* fail to receive an injury in the course and scope of *his* employment with *ABC Company* on *October 12, 2012*?

[Insert PJC 17.1A definitions of “injury.”]

Answer “Yes” or “No.”

Answer: _____

COMMENT

When to use. PJC 17.1 should be used if there is a dispute about whether the injury was received in the course and scope of employment. PJC 17.1 may be conditioned on the answer to PJC 16.1 if applicable. If injury is undisputed, and the only issue is whether it originated in the course and scope of employment, the definitions of “injury” may be omitted. Only the parts of the definitions raised by the evidence should be submitted. If there is evidence that the employee was engaged in recreational, social, or athletic activities at the time of injury, the instruction at PJC 17.5 should be included.

Burden of proof. The burden of proof should be placed appropriately in accordance with the decision of the appeals panel. See PJC 15.1.

Source of question and definitions. The definitions of “injury” and “course and scope of employment” are found in the Code. See Tex. Lab. Code § 401.011(12), (26).

For the language dealing with incitement, acceleration, or aggravation, see *McCartney v. Aetna Casualty & Surety Co.*, 362 S.W.2d 838, 839 (Tex. 1962); *State Office of Risk Management v. Adkins*, 347 S.W.3d 394, 399 (Tex. App.—Dallas 2011, no pet.); *State Office of Risk Management v. Escalante*, 162 S.W.3d 619, 624 (Tex. App.—El Paso 2005, pet. dism'd); and *Gill v. Transamerica Insurance Co.*, 417 S.W.2d 720, 723 (Tex. Civ. App.—Dallas 1967, no writ).

For the language dealing with medical or surgical treatment, see *Home Insurance Co. v. Gillum*, 680 S.W.2d 844, 850–51 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.), and *Hartford Accident & Indemnity Co. v. Thurmond*, 527 S.W.2d 180, 190 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.). See also Texas Workers' Compensation Appeal No. 92538 (Nov. 25, 1992).

For the language dealing with a mental or nervous disorder, see *Bailey v. American General Insurance Co.*, 279 S.W.2d 315, 318–19 (Tex. 1955). See also Texas Workers' Compensation Appeal Nos. 950749 (June 21, 1995); 030056 (Feb. 12, 2003); 060176 (Mar. 30, 2006). If a mental or nervous disorder is not accompanied by or does not follow a physical injury, to avoid confusion with the occupational disease theory of recovery, the injury should be shown to have resulted from an undesigned and unexpected event and be traceable to a definite time, place, and cause. *Transportation Insurance Co. v. Maksyn*, 580 S.W.2d 334, 336–38 (Tex. 1979); see also *GTE Southwest v. Bruce*, 998 S.W.2d 605, 609–11 (Tex. 1999); *University of Texas System v. Schieffer*, 588 S.W.2d 602, 605–07 (Tex. Civ. App.—Austin 1979, writ ref'd n.r.e.).

Note that a “mental or emotional injury that arises principally from a legitimate personnel action, including a transfer, promotion, demotion, or termination, is not a compensable injury.” Tex. Lab. Code § 408.006(b); see *Baker v. Cook Children's Physician Network*, No. 02-07-00174-CV, 2008 WL 553712 (Tex. App.—Fort Worth Feb. 28, 2008) (not designated for publication).

Date of injury. If there is a dispute about the exact date of the injury, the words “or about” should be inserted before the date of injury in the question.

Employer's premises. The phrase “whether on the employer's premises or elsewhere” in the last paragraph of the definition may be omitted if not applicable.

Employee injured while traveling. If the injury occurred while the employee was traveling, the appropriate travel instructions should be added after the definitions of “injury.” See PJC 17.7 and 17.8.

Twenty-four-hour or “on call” employee. For a discussion of a twenty-four-hour or “on call” employee, see *Gulf Insurance Co. v. Johnson*, 616 S.W.2d 320 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ dismissed by agreement).

Temporary direction. If there is evidence that the employee was temporarily directed or instructed by his employer to perform services outside the usual course and scope of the employer's business, see PJC 17.3.

Status as employee disputed. If the worker's status as an employee is disputed, PJC 17.1 should be conditioned on the answer to PJC 16.1 or 16.2, as applicable.

Exclusions from course of employment. For exclusions from course of employment, see chapter 18 in this volume.

PJC 17.2 Heart Attack—Injury—Question

PJC 17.2A Heart Attack—Injury—Question—When Claimant Appeals

QUESTION _____

Did *Paul Payne* sustain a compensable injury in the form of a heart attack?

A heart attack is a compensable injury only if—

1. the attack can be identified as occurring at a definite time and place and caused by a specific event occurring within the course and scope of the employee's employment; and
2. the preponderance of the medical evidence indicates that work, rather than the natural progression of a preexisting heart condition or disease, was a substantial contributing factor of the attack; and
3. the attack was not triggered solely by emotional or mental stress factors, unless it was precipitated by a sudden stimulus.

Answer "Yes" or "No."

Answer: _____

PJC 17.2B Heart Attack—Injury—Question—When Carrier Appeals

QUESTION _____

Did *Paul Payne* not sustain a compensable injury in the form of a heart attack?

[Insert PJC 17.2A instruction on "heart attack."]

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 17.2 should be used if there is a dispute about whether the claimant sustained a compensable heart attack. Only the parts of the definition raised by the evidence should be submitted.

Burden of proof. The burden of proof should be placed appropriately in accordance with the decision of the appeals panel. See PJC 15.1.

Source of question and instruction. See Tex. Lab. Code § 408.008. Note that both the work-related event and any preexisting condition can be substantial contributing factors. *Barnes v. United Parcel Service, Inc.*, 395 S.W.3d 165, 171 (Tex. App.—Houston [1st Dist.] 2012, pet. denied); *Transcontinental Insurance Co. v. Smith*, 135 S.W.3d 831, 837 (Tex. App.—San Antonio 2004, no pet.). However, a heart attack is compensable only when the preponderance of the medical evidence establishes that the work was the greater factor. *Transcontinental Insurance Co.*, 135 S.W.3d at 837.

First responder. If the worker is a first responder, see Tex. Gov't Code § 607.056.

**PJC 17.3 Not in Regular Course and Scope of Employment, or
Temporary Direction—Instruction**

An employee who is temporarily directed by his employer to perform services outside the usual course and scope of the employer's business is in the course and scope of employment while performing services according to such directions.

COMMENT

When to use. If temporary direction is raised by the evidence, PJC 17.3 should be added to the question and definition in PJC 17.1.

Source of instruction. See Tex. Lab. Code § 401.012(b)(1). For a discussion of the temporary direction doctrine, see *Biggs v. United States Fire Insurance Co.*, 611 S.W.2d 624 (Tex. 1981) (employee injured while performing personal errands at direction of another employee was covered under temporary direction doctrine, based on apparent authority of supervising employee).

PJC 17.4 Personal Comfort—Instruction

An act reasonably necessary to the health, comfort, and convenience of an employee, occurring where his employment requires him to be, is not a departure from the course of employment.

COMMENT

When to use. If there is a question whether the employee's injury occurred while he was engaged in an act necessary to his health, comfort, or convenience, and whether it occurred where his employment required him to be, PJC 17.4 should be added to question and instruction in PJC 17.1. If there is a question whether the employee was injured while engaged in recreation or travel, the additional instructions at PJC 17.5 or 17.7 and 17.8 should be submitted.

Source of instruction. See *Yeldell v. Holiday Hills Retirement & Nursing Center, Inc.*, 701 S.W.2d 243 (Tex. 1985); *Janak v. Texas Employers' Insurance Ass'n*, 381 S.W.2d 176 (Tex. 1964); see also *Lujan v. Houston General Insurance Co.*, 756 S.W.2d 295 (Tex. 1988); *Texas Mutual Insurance Co. v. Jerrols*, 385 S.W.3d 619 (Tex. App.—Houston [14th Dist.] 2012, no pet.).

PJC 17.5 **Employee Injured While Engaged in Recreational, Social,
or Athletic Activities—Instruction**

An injury occurring while the worker is engaged in recreational, social, or athletic activities is in the course of employment only if participation in such activities is expressly or impliedly required by the employment or is a reasonable expectancy of the employment.

COMMENT

When to use. If there is evidence that the worker was engaged in recreational, social, or athletic activities at the time of the injury, PJC 17.5 should be added to the question and definition in PJC 17.1.

Source of instruction. See Tex. Lab. Code § 406.032(1)(D).

PJC 17.6 Employee Injured While Traveling (Comment)

Historically, the Texas Workers' Compensation Act has not required that an employee be injured on the employer's premises. *See* Tex. Lab. Code § 401.011(12). Cases applying the Act have concluded that work-required travel may be in the course of employment, but not, as a general rule, travel between home and work. *SeaBright Insurance Co. v. Lopez*, 465 S.W.3d 637, 642 (Tex. 2015); *Leordeanu v. American Protection Insurance Co.*, 330 S.W.3d 239, 241–42 (Tex. 2010).

If the employee has been injured while traveling, PJC 17.1 should be used. If the injury occurred while the employee was traveling to and from work, see the additional instruction at PJC 17.7. If the travel has both a personal and a business purpose, see PJC 17.8.

**PJC 17.7 Employee Injured While Traveling to or from Work—
Instruction**

Course and scope of employment does not include transportation to and from the place of employment unless—

1. the transportation is furnished as a part of the contract of employment or is paid for by the employer, or
2. the means of the transportation are under the control of the employer, or
3. the employee is directed in the employee's employment to proceed from one place to another place.

COMMENT

When to use. If the worker was injured while traveling to or from work at a “fixed” place of employment, PJC 17.7 should be used in addition to PJC 17.1. *See Evans v. Illinois Employers Insurance of Wausau*, 790 S.W.2d 302 (Tex. 1990); *Texas Mutual Insurance Co. v. Jerrols*, 385 S.W.3d 619 (Tex. App.—Houston [14th Dist.] 2012, no pet.). Any part of the above instruction not raised by the evidence should be omitted.

When not to use—dual-purpose doctrine. The dual-purpose doctrine applies to travel other than travel to and from work. *See Leordeanu v. American Protection Insurance Co.*, 330 S.W.3d 239 (Tex. 2010). If the dual-purpose doctrine applies, PJC 17.8 should be submitted.

Source of instruction. *See* Tex. Lab. Code § 401.011(12)(A).

Transportation furnished as part of employment contract or paid for by employer. In *SeaBright Insurance Co. v. Lopez*, 465 S.W.3d 637 (Tex. 2015), the employee was found to be within the course and scope of employment when he was assigned to a remote work location and the employer provided the vehicle, paid him per diem, and expected him to stay in a motel. In *United States Fire Insurance Co. v. Eberstein*, 711 S.W.2d 355 (Tex. App.—Dallas 1986, writ ref'd n.r.e.), the “gratuitous furnishing of a motor vehicle” did not bring the employee within the course and scope of employment. For “portal to portal time,” see *Smith v. Dallas County Hospital District*, 687 S.W.2d 69 (Tex. App.—Dallas 1985, writ ref'd n.r.e.); *Texas Employers' Insurance Ass'n v. Adams*, 555 S.W.2d 525 (Tex. Civ. App.—Amarillo 1977, writ ref'd n.r.e.); and *Texas Employers' Insurance Ass'n v. Byrd*, 540 S.W.2d 460 (Tex. Civ. App.—El Paso 1976, writ ref'd n.r.e.). *See also Texas Property & Casualty Insurance Guaranty Ass'n v. Brooks*, 269 S.W.3d 645 (Tex. App.—Austin 2008, no pet.).

Transportation or travel directed by employer. See *SeaBright*, 465 S.W.3d 637 *Evans*, 790 S.W.2d 302; *Freeman v. Texas Compensation Insurance Co.*, 603 S.W.2d 186 (Tex. 1980); *Smith*, 687 S.W.2d 69; *United States Fire Insurance Co. v. Brown*, 654 S.W.2d 566 (Tex. App.—Waco 1983, no writ). See also *Newsom v. Ballinger I.S.D.*, No. 03-07-0022-CV, 2007 WL 2066185 (Tex. App.—Austin July 17, 2007) (not designated for publication).

Fixed place of employment. An employee can have more than one fixed place of employment, and that fixed place of employment can change according to the nature of his work. See *Evans*, 790 S.W.2d 304; *Bissett v. Texas Employers' Insurance Ass'n*, 704 S.W.2d 335, 338 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.).

Transportation pursuant to express or implied requirements of employment. See the judicial construction of former Tex. Rev. Civ. Stat. art. 8309, § 1b (now Tex. Lab. Code § 401.011(12)), in *Meyer v. Western Fire Insurance Co.*, 425 S.W.2d 628 (Tex. 1968), cited in *Aguirre v. Vasquez*, 225 S.W.3d 744, 751 (Tex. App.—Houston [14th Dist.] 2007, no pet.); and *Janak v. Texas Employers' Insurance Ass'n*, 381 S.W.2d 176 (Tex. 1964), cited in *Brooks*, 269 S.W.3d at 656. See also *SeaBright*, 465 S.W.3d at 642.

Access doctrine. An employee who is injured during the ingress to or egress from work may be in the course of employment under the “access doctrine.” See *Collins v. Indemnity Insurance Co.*, No. 04-09-00671-CV, 2011 WL 1631590 (Tex. App.—San Antonio Apr. 27, 2011) (not designated for publication). See *Standard Fire Insurance Co. v. Rodriguez*, 645 S.W.2d 534, 537–38 (Tex. App.—San Antonio 1982, writ ref'd n.r.e.), for application of the access doctrine in a multistoried building. See *Turner v. Texas Employers' Insurance Ass'n*, 715 S.W.2d 52 (Tex. App.—Dallas 1986, writ ref'd n.r.e.), for the requirement that the injury must have been received within a reasonable margin of time and space of the place where the work was required. In such cases, the following instruction may be given:

An injury occurring while the employee is traveling to or from work is in the course of employment only if the employee is injured at a place where the employer has evidenced an intention that a particular route or area be used by the employee in going to or from work and where the route or area is owned by the employer or is so closely related to the employer's premises as to be fairly treated as a part of the employer's premises.

**PJC 17.8 Employee Injured While Traveling with Dual Purpose—
Instruction**

Travel by an employee in furtherance of the affairs or business of the employer is in the course of employment if such travel is also in furtherance of personal or private affairs of the employee only if—

1. the travel to the place of occurrence of the injury would have been made even had there been no personal or private affairs of the employee to be furthered by the trip, and
2. the travel would not have been made had there been no affairs or business of the employer to be furthered by the travel.

COMMENT

When to use. If the worker's injury occurred while he was traveling with the dual purpose of personal and business-related activities, PJC 17.8 should be added to the question and definition in PJC 17.1. PJC 17.8 should be used in dual-purpose travel cases when the employee is not traveling to and from the place of employment. See *Leordeanu v. American Protection Insurance Co.*, 330 S.W.3d 239, 248 (Tex. 2010). If there is no mixture of personal and business purposes, no submission of the dual-purpose instruction is permissible. *Johnson v. Pacific Employers Indemnity Co.*, 439 S.W.2d 824, 827 (Tex. 1969).

Source of instruction. PJC 17.8 is based on Tex. Lab. Code § 401.011(12)(B). The dual-purpose rule was discussed extensively in *Leordeanu*, 330 S.W.3d 239.

If an employee's travel in furtherance of the employer's business is mixed with the employee's personal reasons, the employee must meet the dual-purpose test set forth in Tex. Lab. Code § 401.011(12)(B). For cases discussing the dual-purpose doctrine, see *St. Paul Fire & Marine Insurance Co. v. Confer*, 956 S.W.2d 825 (Tex. App.—San Antonio 1997, writ denied); *Johnson*, 439 S.W.2d 824; and *Meyer v. Western Fire Insurance Co.*, 425 S.W.2d 628 (Tex. 1968).

CHAPTER 18 WORKERS' COMPENSATION—DEFENSES AND EXCEPTIONS

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PJC 18.1 Act of God—Question**PJC 18.1A Act of God—Question—When Claimant Appeals**

QUESTION 1

Was *Paul Payne*'s injury not caused by an "act of God"?

An injury is caused by an "act of God" if it is caused directly and exclusively by the violence of nature, without human intervention or cause.

Answer "Yes" or "No."

Answer: _____

If you answered "No" to Question 1, then answer Question 2. Otherwise, do not answer Question 2.

QUESTION 2

Was *Paul Payne* injured in the course and scope of *his* employment?

An injury caused by an act of God is not in the course and scope of employment unless the employee is engaged at the time in the performance of duties subjecting him to a greater hazard from the act of God than ordinarily applies to the general public.

Answer "Yes" or "No."

Answer: _____

PJC 18.1B Act of God—Question—When Carrier Appeals

QUESTION 1

Was *Paul Payne*'s injury caused by an "act of God"?

[Insert PJC 18.1A definition of "act of God."]

Answer "Yes" or "No."

Answer: _____

If you answered "Yes" to Question 1, then answer Question 2. Otherwise, do not answer Question 2.

QUESTION 2

Was *Paul Payne* not injured in the course and scope of *his* employment?

[Insert PJC 18.1A instruction on “greater hazard.”]

Answer “Yes” or “No.”

Answer: _____

COMMENT

When to use. PJC 18.1 should be used if the evidence raises the issue of injury resulting from an “act of God.” See *Transport Insurance Co. v. Liggins*, 625 S.W.2d 780 (Tex. App.—Fort Worth 1981, writ ref’d n.r.e.); Texas Workers’ Compensation Appeal Nos. 950020 (Feb. 17, 1995); 950034 (Feb. 17, 1995). For “act of God” as an inferential rebuttal to “proximate cause” in a negligence case, see PJC 3.5.

Burden of proof. The burden of proof should be placed appropriately in accordance with the decision of the appeals panel. See PJC 15.1.

Source of question. Under Tex. Lab. Code § 406.032(1)(E), a carrier is not liable for compensation if the injury arose out of an act of God unless the employment exposes the employee to a greater risk of injury from an act of God than ordinarily applies to the general public. The act of God exception to compensability stands on a different footing than the inferential rebuttal instruction for act of God. Compare PJC 3.5.

Specific force or condition. Because there may be an evidentiary question whether a particular force or condition constitutes an act of God, the Committee recommends that the specific force or condition not be specified in the jury instructions. See *Mid-Continent Casualty Co. v. Whatley*, 742 S.W.2d 475 (Tex. App.—Dallas 1987, no writ).

Extreme weather temperature. The courts treat injuries caused by excessive heat (e.g., heatstroke, sunstroke, heat exhaustion) as an “act of God” in that the employee must establish that he was engaged in duties that subjected him to a greater hazard from heat “than ordinarily applies to the general public.” Tex. Lab. Code § 406.032(1)(E); see *Weicher v. Insurance Co. of North America*, 434 S.W.2d 104, 106–07 (Tex. 1968); *Commercial Standard Insurance Co. v. Allred*, 413 S.W.2d 910, 914 (Tex. 1967); *Traders & General Insurance Co. v. Ross*, 263 S.W.2d 673 (Tex. Civ. App.—Galveston 1953, writ ref’d n.r.e.). See also Texas Workers’ Compensation Appeal Nos. 950020 (Feb. 17, 1995); 002641 (Dec. 22, 2000). The same reasoning should apply to injuries caused by excessive cold (e.g., frostbite).

Insect sting not act of God. An insect sting is not an act of God. *Standard Fire Insurance Co. v. Cuellar*, 468 S.W.2d 880 (Tex. Civ. App.—San Antonio 1971, writ ref'd n.r.e.); *but see Texas Workers' Compensation Fund v. Simon*, 980 S.W.2d 730 (Tex. App.—San Antonio 1998, no pet.).

PJC 18.2 Intoxication—Question**PJC 18.2A Intoxication—Question—When Claimant Appeals**

QUESTION _____

Did *Paul Payne*'s injury occur while *he* was not in a state of intoxication?

"Intoxication" means the state of—

1. having an alcohol concentration of .08 percent; or
2. not having the normal use of mental or physical faculties resulting from the voluntary introduction into the body of *cocaine*.

Answer "Yes" or "No."

Answer: _____

PJC 18.2B Intoxication—Question—When Carrier Appeals

QUESTION _____

Did *Paul Payne*'s injury occur while *he* was in a state of intoxication?

[*Insert PJC 18.2A definition of "intoxication."*]

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. If the evidence raises intoxication as a statutory exclusion from coverage, PJC 18.2 should be submitted. *See Sanchez v. State Office of Risk Management*, 234 S.W.3d 96 (Tex. App.—El Paso 2007, no pet.). Only the parts of the definition raised by the evidence should be submitted. When there is evidence that the employee ingested a specific substance, such as cocaine, the instruction in element 2 should refer specifically to that substance.

Burden of proof. The burden of proof should be placed appropriately in accordance with the decision of the appeals panel. *See* PJC 15.1.

Source of question. PJC 18.2 is based on the "intoxication" exception of Tex. Lab. Code § 406.032(1)(A), as defined in Tex. Lab. Code § 401.013.

Presumption of intoxication. Tex. Lab. Code § 401.013(c) provides that on the voluntary introduction into the body of certain substances there is a rebuttable presumption that a person is intoxicated and does not have the normal use of mental or physical faculties. The Committee expresses no opinion regarding the effect of this presumption on the burden of proof in a suit for judicial review.

Intoxication is complete defense. Intoxication at the time of injury is a complete defense, because the worker's injury is statutorily excluded from coverage. No question should be submitted inquiring whether the intoxication contributed to the injury. *Texas Indemnity Insurance Co. v. Dill*, 42 S.W.2d 1059 (Tex. Civ. App.—Eastland 1931), *aff'd*, 63 S.W.2d 1016 (Tex. Comm'n App. 1933, judgm't adopted).

PJC 18.3 Self-Inflicted Injury—Question**PJC 18.3A Self-Inflicted Injury—Question—When Claimant Appeals**

QUESTION _____

Was *Paul Payne's* injury not caused by *his* willful attempt to injure *himself*?

Answer "Yes" or "No."

Answer: _____

PJC 18.3B Self-Inflicted Injury—Question—When Carrier Appeals

QUESTION _____

Was *Paul Payne's* injury caused by *his* willful attempt to injure *himself*?

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. If the evidence raises self-inflicted injury, PJC 18.3 should be submitted. See *Gregory v. Texas Employers' Insurance Ass'n*, 530 S.W.2d 105 (Tex. 1975); *Saunders v. Texas Employers' Insurance Ass'n*, 526 S.W.2d 515 (Tex. 1975); Texas Workers' Compensation Appeal No. 012660 (Dec. 3, 2001).

Burden of proof. The burden of proof should be placed appropriately in accordance with the decision of the appeals panel. See PJC 15.1.

Source of question. PJC 18.3 is based on the "self-inflicted injury" exception of Tex. Lab. Code § 406.032(1)(B), which provides that the carrier is not liable if the injury "was caused by the employee's wilful attempt to injure himself."

PJC 18.4 Injury Followed by Self-Inflicted Death—Question**PJC 18.4A Injury Followed by Self-Inflicted Death—Question—
When Claimant Appeals**

QUESTION _____

Was *Paul Payne's* injury on *January 1, 2012*, a producing cause of *his* death?

The work injury is a “producing cause” of the worker’s death if the effects of his injury were a substantial factor in a mental derangement that dominates the worker and impairs his ability to resist a suicidal impulse, and without which the death would not have occurred. Otherwise, the injury is not a producing cause of the worker’s death.

Answer “Yes” or “No.”

Answer: _____

**PJC 18.4B Injury Followed by Self-Inflicted Death—Question—
When Carrier Appeals**

QUESTION _____

Was *Paul Payne's* injury on *January 1, 2012*, not a producing cause of *his* death?

[Insert PJC 18.4A instruction on “producing cause” of death.]

Answer “Yes” or “No.”

Answer: _____

COMMENT

When to use. PJC 18.4 should be conditioned on an affirmative finding on “injury” or “course and scope of employment” or on “injury and course and scope of employment” if there is a question on either or both of those issues.

Burden of proof. The burden of proof should be placed appropriately in accordance with the decision of the appeals panel. See PJC 15.1.

Source of instruction. The instruction following the question is in conformity with *Saunders v. Texas Employers' Insurance Ass'n*, 526 S.W.2d 515, 517–18 (Tex. 1975). See also *Commerce & Industrial Insurance Co. v. Ferguson-Stewart*, No. 13-10-00554-CV, 2012 WL 1656537 (Tex. App.—Corpus Christi May 10, 2012) (not designated for publication).

Date of injury. If there is a dispute about the exact date of injury, the words “or about” should be inserted before the date of injury in the question.

PJC 18.5 Intentional Act of Another Person—Question**PJC 18.5A Intentional Act of Another Person—Question—When Claimant Appeals**

QUESTION _____

Was *Paul Payne*'s injury not caused by the act of another person intended to injure *Paul Payne* because of a personal reason but rather directed at *him* as an employee or because of the employment?

Answer "Yes" or "No."

Answer: _____

PJC 18.5B Intentional Act of Another Person—Question—When Carrier Appeals

QUESTION _____

Was *Paul Payne*'s injury caused by the act of another person intended to injure *Paul Payne* because of a personal reason and not directed at *him* as an employee or because of the employment?

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. If the evidence raises this statutory exclusion from coverage, PJC 18.5 should be submitted. See *Nasser v. Security Insurance Co.*, 724 S.W.2d 17 (Tex. 1987); *Liberty Mutual Insurance Co. v. Hopkins*, 422 S.W.2d 203 (Tex. Civ. App.—Beaumont 1967, writ ref'd n.r.e.); see also *Walls Regional Hospital v. Bomar*, 9 S.W.3d 805 (Tex. 1999); Texas Workers' Compensation Appeal Nos. 962472 (Jan. 17, 1997); 971539 (Sept. 23, 1997).

Burden of proof. The burden of proof should be placed appropriately in accordance with the decision of the appeals panel. See PJC 15.1.

Source of question. PJC 18.5 is based on the "third person's intentional act" exception of Tex. Lab. Code § 406.032(1)(C), which provides that a carrier is not liable if the injury "arose out of an act of a third person intended to injure the employee

because of a personal reason and not directed at the employee as an employee or because of the employment.”

Reasons personal to the employee. The prior statute used the phrase “because of reasons personal to him,” which has been interpreted by the courts to mean “because of reasons personal to the employee.” *Bomar*, 9 S.W.3d 805; *Vivier v. Lumbermen's Indemnity Exchange*, 250 S.W. 417 (Tex. Comm'n App. 1923, judgment adopted); *Southern Surety Co. v. Shook*, 44 S.W.2d 425 (Tex. Civ. App.—Eastland 1931, writ refused); *see also Nasser*, 724 S.W.2d 17.

PJC 18.6 Employee's Intention to Injure Another—Question**PJC 18.6A Employee's Intention to Injure Another—Question—
When Claimant Appeals**

QUESTION _____

Was *Paul Payne's* injury not caused by *his* willful attempt to unlawfully injure another person?

Answer "Yes" or "No."

Answer: _____

**PJC 18.6B Employee's Intention to Injure Another—Question—
When Carrier Appeals**

QUESTION _____

Was *Paul Payne's* injury caused by *his* willful attempt to unlawfully injure another person?

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. If the evidence raises this statutory exclusion from coverage, PJC 18.6 should be submitted. See *Federal Underwriters Exchange v. Samuel*, 160 S.W.2d 61 (Tex. 1942); *Liberty Mutual Insurance Co. v. Hopkins*, 422 S.W.2d 203, 207–08 (Tex. Civ. App.—Beaumont 1967, writ ref'd n.r.e.); see also *Walls Regional Hospital v. Bomar*, 9 S.W.3d 805 (Tex. 1999); Texas Workers' Compensation Appeal Nos. 962472 (Jan. 17, 1997); 971539 (Sept. 23, 1997).

Burden of proof. The burden of proof should be placed appropriately in accordance with the decision of the appeals panel. See PJC 15.1.

Source of question. PJC 18.6 is based on the "employee's intention to injure another" exception of Tex. Lab. Code § 406.032(1)(B), which provides that there is no liability if the injury "was caused by the employee's wilful attempt to . . . unlawfully injure another person."

PJC 18.7 Horseplay—Question**PJC 18.7A Horseplay—Question—When Claimant Appeals**

QUESTION _____

Was *Paul Payne* not engaged in horseplay that was a producing cause of *his* injury?

If the employee voluntarily turns aside from the duties of his employment and willingly engages or participates in an act of practical joking, or other play, the employee is engaging in horseplay.

Answer “Yes” or “No.”

Answer: _____

PJC 18.7B Horseplay—Question—When Carrier Appeals

QUESTION _____

Was *Paul Payne* engaged in horseplay that was a producing cause of *his* injury?

[Insert PJC 18.7A definition of “horseplay.”]

Answer “Yes” or “No.”

Answer: _____

COMMENT

When to use. If the evidence raises the “horseplay” exception to coverage, PJC 18.7 may be submitted. See *Vasquez v. Six Flags Houston, Inc.*, 120 S.W.3d 445 (Tex. App.—Texarkana 2003, no pet.); *Anchor Casualty Co. v. Patterson*, 239 S.W.2d 904, 908 (Tex. Civ. App.—Eastland 1951, writ ref’d n.r.e.); cf. *Liberty Mutual Insurance Co. v. Hopkins*, 422 S.W.2d 203, 207–08 (Tex. Civ. App.—Beaumont 1967, writ ref’d n.r.e.) (employee injured in fight); *Maryland Casualty Co. v. Smithson*, 341 S.W.2d 951, 955–56 (Tex. Civ. App.—Dallas 1960, writ ref’d n.r.e.) (employee injured while traveling).

Burden of proof. The burden of proof should be placed appropriately in accordance with the decision of the appeals panel. See PJC 15.1.

Source of question. PJC 18.7 is derived from Tex. Lab. Code § 406.032(2). If the worker knowingly and willingly engaged in horseplay, he departed from the course of his employment, and any injury received as a result of such activity is not compensable. *Patterson*, 239 S.W.2d at 906; *but see Texas Employers' Insurance Ass'n v. Brogdon*, 321 S.W.2d 323, 326 (Tex. Civ. App.—Fort Worth 1959, writ ref'd n.r.e.) (employee injured by another's horseplay entitled to compensation).

PJC 18.8 Injurious Practices of Employees of Texas A&M University System or Its Institutions, the University of Texas System or Its Institutions, or the Texas Department of Transportation—Question

PJC 18.8A Injurious Practices of Employees of Texas A&M University System or Its Institutions, the University of Texas System or Its Institutions, or the Texas Department of Transportation—Question—When Claimant Appeals

QUESTION _____

Did *Paul Payne* not persist in an injurious practice that tended to imperil or retard *his* recovery and that contributed to *his* incapacity?

To “persist in an injurious practice,” a worker must have continued in an act or course of action after having been advised or having knowledge that the act or course of action should be discontinued and that persisting in such act or course of action would imperil or retard his recovery, or a worker must have refused to submit to medical, surgical, chiropractic, or the remedial treatment recognized by the state as reasonably essential to promote the employee’s recovery.

Answer “Yes” or “No.”

Answer: _____

PJC 18.8B Injurious Practices of Employees of Texas A&M University System or Its Institutions, the University of Texas System or Its Institutions, or the Texas Department of Transportation—Question—When Carrier Appeals

QUESTION 1

Did *Paul Payne* persist in an injurious practice that tended to imperil or retard *his* recovery and that contributed to *his* incapacity?

[Insert PJC 18.8A definition of “persist in injurious practice.”]

Answer “Yes” or “No.”

Answer: _____

If you answered “Yes” to Question 1, then answer Question 2. Otherwise, do not answer Question 2.

QUESTION 2

Find the dates during which *Paul Payne*'s persisting in such injurious practice contributed to *his* incapacity.

Answer by giving the beginning and ending dates.

Beginning date: _____

Ending date: _____

If you answered “Yes” to Question 1, then answer Question 3. Otherwise, do not answer Question 3.

QUESTION 3

Find the percentage that *Paul Payne*'s persisting in such injurious practice contributed to *his* incapacity.

Answer: _____%

COMMENT

When to use. PJC 18.8 should be used if an employee of the Texas A&M University System or its Institutions, the University of Texas System or its Institutions, or the Texas Department of Transportation persisted in, after being advised to desist from, any injurious practice that imperiled or retarded the employee's recovery and contributed to the employee's incapacity. A finding that the employee did persist in engaging in injurious practices should be followed by a question inquiring about the dates during which such persistence contributed to the employee's incapacity as well as a question asking the jury to find the percentage that such persistence in injurious practices contributed to the incapacity.

Burden of proof. The burden of proof should be placed appropriately in accordance with the decision of the appeals panel. See PJC 15.1.

Source of questions. PJC 18.8 is derived from the Tex. Lab. Code § 502.067, which provides—

- (a) The commissioner of workers' compensation may order or direct the system or the institution to reduce or suspend the compensation of an injured employee who:

- (1) persists in insanitary or injurious practices that tend to imperil or retard the employee's recovery; or
- (2) refuses to submit to medical, surgical, chiropractic, or other remedial treatment recognized by the state that is reasonably essential to promote the employee's recovery.

(b) Compensation may not be reduced or suspended under this section without reasonable notice to the employee and an opportunity to be heard.

See also Tex. Labor Code §§ 503.067, 505.057. A request and refusal to desist from the injurious practice must be pleaded and proved before the defense is available, and the burden of proof on these issues is on the appealing party. *Fidelity & Casualty Co. of New York v. Shubert*, 646 S.W.2d 270, 275 (Tex. App.—Tyler 1983, writ ref'd n.r.e.); *Argonaut Underwriters Insurance Co. v. Byerly*, 329 S.W.2d 937, 943 (Tex. Civ. App.—Beaumont 1959, writ ref'd n.r.e.); *Texas Employers' Insurance Ass'n v. Roberts*, 281 S.W.2d 104, 108 (Tex. Civ. App.—Fort Worth 1955, no writ).

For the injurious-practice defense to prevail, the employee must have been advised that persistence in the injurious practice would retard or imperil his recovery. *Commercial Insurance Co. of Newark, New Jersey v. Smith*, 596 S.W.2d 661, 666 (Tex. Civ. App.—Fort Worth 1980, writ ref'd n.r.e.); *Aetna Casualty & Surety Co. v. Shreve*, 551 S.W.2d 79, 84 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ); *Utica Mutual Insurance Co. v. Ritchie*, 500 S.W.2d 879, 884 (Tex. Civ. App.—Houston [1st Dist.] 1973, no writ); *Millers Mutual Fire Insurance Co. v. Gilbert*, 462 S.W.2d 112, 118 (Tex. Civ. App.—Beaumont 1970, writ ref'd n.r.e.).

The Committee has no opinion on whether this defense is available to carriers and employers other than those listed in the paragraph above entitled "When to use."

PJC 18.9 Election of Remedies—Question**PJC 18.9A Election of Remedies—Question—When Claimant Appeals**

QUESTION _____

Did *Paul Payne* establish that *his* acceptance of *group health insurance benefits* was not an election?

An “election” occurs when one successfully exercises an informed choice between two or more remedies, rights, or states of facts that are so inconsistent as to constitute manifest injustice. An “informed choice” means a choice made with a full and clear understanding of the problems, facts, and remedies essential to the exercise of any knowledgeable and intelligent choice.

Answer “Yes” or “No.”

Answer: _____

PJC 18.9B Election of Remedies—Question—When Carrier Appeals

QUESTION _____

Did *the insurance carrier* establish that *Paul Payne’s* acceptance of *group health insurance benefits* was an election?

[Insert PJC 18.9A instruction on “election.”]

Answer “Yes” or “No.”

Answer: _____

COMMENT

When to use. PJC 18.9 should be used if there is evidence that the worker previously chose to receive compensation from a source other than the insurance carrier and now seeks to recover for the same loss from the insurance carrier.

Caveat. The supreme court has specifically left open the issue of whether Tex. Lab. Code § 409.009 abrogates the election-of-remedies doctrine. *Valley Forge Insurance Co. v. Austin*, 105 S.W.3d 609 (Tex. 2003).

Burden of proof. The burden of proof should be placed appropriately in accordance with the decision of the appeals panel. See PJC 15.1.

Source of question and definitions. PJC 18.9 is based on *Medina v. Herrera*, 927 S.W.2d 597, 600 (Tex. 1996), and *Bocanegra v. Aetna Life Insurance Co.*, 605 S.W.2d 848, 851–52 (Tex. 1980); see also *United States Fire Insurance Co. v. Pettyjohn*, 816 S.W.2d 839 (Tex. App.—Fort Worth 1991, no writ); *Smith v. Home Indemnity Co.*, 683 S.W.2d 559 (Tex. App.—Fort Worth 1985, no writ).

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PJC 19.1 Occupational Disease—Question**PJC 19.1A Occupational Disease—Question—When Claimant Appeals**

QUESTION _____

Did *Paul Payne* sustain an occupational disease arising out of and in the course of *his* employment with *ABC Company*?

An “occupational disease” is a disease arising out of and in the course of employment that causes damage or harm to the physical structure of the body.

An “occupational disease” includes damage or harm to the physical structure of the body occurring as the result of repetitious, physically traumatic activities that occur over time and arise out of and in the course and scope of employment.

An “occupational disease” includes a disease or infection that naturally results from the work-related disease.

An “occupational disease” does not include an ordinary disease of life to which the general public is exposed outside of employment, unless that disease is an incident to a compensable injury or occupational disease.

Answer “Yes” or “No.”

Answer: _____

PJC 19.1B Occupational Disease—Question—When Carrier Appeals

QUESTION _____

Did *Paul Payne* not sustain an occupational disease arising out of and in the course of *his* employment with *ABC Company*?

[Insert PJC 19.1A instructions on “occupational disease.”]

Answer “Yes” or “No.”

Answer: _____

COMMENT

When to use. PJC 19.1 submits the “occupational disease” theory of recovery in combination with the course-of-employment question. For submission of the accidental injury theory of recovery, see PJC 17.1.

PJC 19.1 should be used if the evidence disputes the existence of an occupational disease occurring in the course of employment. Note, however, that the second paragraph of the definition, dealing with repetitive, physically traumatic activities, should be submitted only if the evidence shows the worker’s occupational disease resulted from such activities. Otherwise, the second paragraph of the definition should be omitted.

Burden of proof. The burden of proof should be placed appropriately in accordance with the decision of the appeals panel. See PJC 15.1.

Source of question and instruction. PJC 19.1 is based on Tex. Lab. Code § 401.011(12), (26), (34), (36).

Injury theory vs. occupational disease theory. Despite the inclusion of occupational disease in the statutory definition of injury (Tex. Lab. Code § 401.011(26)), the traditional distinction between the accidental injury theory of recovery and the occupational disease theory of recovery continues. The term “injury” is “an undesigned, untoward event that is traceable to a definite time, place, and cause. In other words, it is a result of an accident.” *Transportation Insurance Co. v. Maksyn*, 580 S.W.2d 334, 336 (Tex. 1979); accord *Brown v. Texas Employers' Insurance Ass'n*, 635 S.W.2d 415, 416 (Tex. 1982). An occupational disease, however, is gradual in development, and the time, place, and cause of the disease cannot necessarily be definitely ascertained. *Texas Employers' Insurance Ass'n v. Etheredge*, 272 S.W.2d 869 (Tex. 1954); *Aetna Casualty & Surety Co. v. Shreve*, 551 S.W.2d 79, 81 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ); see also *Fire & Casualty Insurance Co. v. Miranda*, 293 S.W.3d 620 (Tex. App.—San Antonio 2009, no pet.).

Types of occupational disease. The Labor Code identifies two types of occupational disease: classic occupational disease and damage or harm to the physical structure of the body as a result of “repetitive trauma injury.” Tex. Lab. Code § 401.011(34). A classic occupational disease is described in the first paragraph of the definition in PJC 19.1 and includes such diseases as anthrax, asbestosis, silicosis, and psittacosis, all of which are gradual in developing, so that the time, place, and cause cannot necessarily be ascertained. *Etheredge*, 272 S.W.2d 869; *Shreve*, 551 S.W.2d at 81. Repetitive trauma injury is covered in the second paragraph of the definition in PJC 19.1, but if there is no evidence of repetitive, physically traumatic activities, this part of the definition should be omitted. The legislative history of the word “physical” in the phrase “repetitive, physically traumatic activities” has been judicially determined to indicate an intent to exclude repetitive mental traumatic activities from compensability as an occupational disease. *Maksyn*, 580 S.W.2d at 337–38 (discussing

former Tex. Rev. Civ. Stat. art. 8306, § 20); *see also* *Brown*, 635 S.W.2d 415 (plaintiff could not recover for heart attack due to mental stress, because such stress was not traceable to a definite time, place, and cause). The rule in both cases now appears to have been expressly adopted or approved by the legislature. *See* Tex. Lab. Code §§ 408.006, 408.008(1). Note that mental stimuli may result in a compensable injury under the accidental injury theory of recovery. *Brown*, 635 S.W.2d at 415; *Bailey v. American General Insurance Co.*, 279 S.W.2d 315 (Tex. 1955); *Aetna Insurance Co. v. Hart*, 315 S.W.2d 169 (Tex. Civ. App.—Houston 1958, writ ref'd n.r.e.). *See* PJC 19.1 Comment.

For examples of claims for classic occupational disease, *see* *Marts v. Transportation Insurance Co.*, 111 S.W.3d 699 (Tex. App.—Fort Worth 2003, pet. denied), and *Texas Workers' Compensation Insurance Fund v. Lopez*, 21 S.W.3d 358 (Tex. App.—San Antonio 2000, pet. denied.). For claims for repetitive trauma injury, *see* *Saenz v. Insurance Co. of State of Pennsylvania*, 66 S.W.3d 444 (Tex. App.—Waco 2001, no pet.), and Texas Workers' Compensation Appeal Nos. 960929 (June 28, 1996), 972321 (Dec. 29, 1997).

Ordinary diseases of life. Ordinary diseases of life, covered in the fourth paragraph of the definition in PJC 19.1, are excluded from compensable occupational diseases because an ordinary disease of life, or the hazards thereof, is not indigenous to an employee's work or is not present in an increased degree in the employee's work. *Schaefer v. Texas Employers' Insurance Ass'n*, 612 S.W.2d 199, 205 (Tex. 1980); *Home Insurance Co. v. Davis*, 642 S.W.2d 268, 269 (Tex. App.—Texarkana 1982, no writ); *Aetna Casualty & Surety Co. v. Burris*, 600 S.W.2d 402, 406–07 (Tex. Civ. App.—Tyler 1980, writ ref'd n.r.e.). *See also* *Zurich American Insurance Co. v. Gill*, 173 S.W.3d 878 (Tex. App.—Fort Worth 2005, pet. denied); Texas Workers' Compensation Appeal No. 93885 (Nov. 15, 1993).

Caveat: aggravation, acceleration, or incitement. Submission of aggravation, acceleration, or incitement of an occupational disease, in the Committee's opinion, is troublesome. Cases supporting the inclusion of the aggravation feature include *United States Fidelity & Guaranty Co. v. Bearden*, 700 S.W.2d 247 (Tex. App.—Tyler 1985, no writ); *Leal v. Employers Mutual Liability Insurance Co.*, 605 S.W.2d 328 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ); *City of Bridgeport v. Barnes*, 591 S.W.2d 939, 940–41 (Tex. Civ. App.—Fort Worth 1979, writ ref'd n.r.e.); *Lubbock Independent School District v. Bradley*, 579 S.W.2d 78, 81–82 (Tex. Civ. App.—Amarillo 1979, writ ref'd n.r.e.); *Teague v. Charter Oak Fire Insurance Co.*, 548 S.W.2d 957 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.); and *Standard Fire Insurance Co. v. Ratcliff*, 537 S.W.2d 355, 359–60 (Tex. Civ. App.—Waco 1976, no writ). Cases rejecting the aggravation submission include *Texas Employers' Insurance Ass'n v. Schaefer*, 598 S.W.2d 924, 928 (Tex. Civ. App.—Eastland), *aff'd on other grounds*, 612 S.W.2d 199 (Tex. 1980); and *Davis*, 642 S.W.2d at 269.

A possible submission of the aggravation, acceleration, or incitement feature would be to add to the first paragraph of the definition in PJC 19.1 (or in the case of repetitive, physically traumatic activities, to the second paragraph) the following:

An “occupational disease” includes the aggravation, acceleration, or incitement of any disease, infirmity, or condition previously or subsequently existing by reason of any such damage or harm.

See Bearden, 700 S.W.2d at 249; *Leal*, 605 S.W.2d at 328–29; *Ratcliff*, 537 S.W.2d at 359.

Mental trauma. The legislative intent of Tex. Lab. Code § 408.006 has been judicially interpreted to exclude mental trauma or mental stimuli occurring gradually over an extended period as a compensable occupational disease. *GTE Southwest v. Bruce*, 998 S.W.2d 605, 611 (Tex. 1999); *see also Maksyn*, 580 S.W.2d at 337–38. Under the “accidental injury” theory of recovery, however, mental trauma or mental stimuli traceable to a definite time, place, and cause can result in a compensable injury. *State Office of Risk Management v. Foutz*, 279 S.W.3d 826, 832 (Tex. App.—Eastland 2009, no pet.); *Travelers Insurance Co. v. Garcia*, 417 S.W.2d 630, 632 (Tex. Civ. App.—El Paso 1967, writ ref’d n.r.e.). *See* PJC 17.1.

PJC 19.2 Date of Injury for Occupational Disease—Question

QUESTION _____

Is the date of injury for *Paul Payne's occupational disease* with *ABC Company* not *January 1, 2012*?

The date of injury is the date that *Paul Payne* knew or should have known that the *occupational disease* may be related to *his* employment.

Answer "Yes" or "No."

Answer: _____.

If you answered the above question "Yes," then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

What is the date of injury for *Paul Payne's occupational disease* with *ABC Company*?

Answer by including month, day, and year.

Answer: _____.

COMMENT

When to use. PJC 19.2 should be used if there is a dispute about the date of injury in an occupational disease case. In most cases, the date of injury question will follow the question on occupational disease in PJC 19.1.

Burden of proof. The burden of proof should be placed appropriately in accordance with the decision of the appeals panel. See PJC 15.1. Thus, the appealing party (whether claimant or carrier) bears the burden to disprove the decision of the Division of Workers' Compensation of the Texas Department of Insurance (DWC) on a date of injury dispute. See Tex. Lab. Code § 410.303. Accordingly, the second question in PJC 19.2 should be conditioned on a determination that the date selected by the DWC is incorrect. The first question in PJC 19.2 should, therefore, include the date of injury found by the DWC.

Source of question and instructions. PJC 19.2 is derived from Tex. Lab. Code § 408.007. See also Tex. Lab. Code § 401.011(12) regarding course of employment.

Name of occupational disease. In an occupational disease case, the name of the disease inquired about (e.g., carpal tunnel syndrome) should replace the words *occupational disease*.

PJC 19.3 Last Injurious Exposure—Question

PJC 19.3A Last Injurious Exposure—Question—When Claimant Appeals

QUESTION _____

Was *Paul Payne* last injuriously exposed to the hazards of the *occupational disease* while *he* was in the employment of *ABC Company*?

“Injuriously exposed” means that the worker suffered damage or harm to the physical structure of the body.

Answer “Yes” or “No.”

Answer: _____

PJC 19.3B Last Injurious Exposure—Question—When Carrier Appeals

QUESTION _____

Was *Paul Payne* not last injuriously exposed to the hazards of the *occupational disease* while *he* was in the employment of *ABC Company*?

[Insert PJC 19.3A definition of “injuriously exposed.”]

Answer “Yes” or “No.”

Answer: _____

COMMENT

When to use. PJC 19.3 should be used if there is evidence that the claimant may have been exposed to the hazards of an occupational disease while employed by more than one employer. See *Texas Employers' Insurance Ass'n v. Etheredge*, 272 S.W.2d 869 (Tex. 1954); *U.S. Fire Insurance Co. v. Ramos*, 863 S.W.2d 534 (Tex. App.—El Paso, 1993, writ denied).

Burden of proof. The burden of proof should be placed appropriately in accordance with the decision of the appeals panel. See PJC 15.1.

Source of question and instruction. PJC 19.3 is based on Tex. Lab. Code §§ 406.031(b), 409.001(c).



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PJC 20.1 Waiver—Question**PJC 20.1A Waiver—Question—When Claimant Appeals**

QUESTION _____

Did *ABC Insurance Carrier* fail to contest the compensability of *Paul Payne's* injury on or before the sixtieth day after the date on which *ABC Insurance Carrier* received first written notice of the injury?

Under Texas Administrative Code section 124.2, an insurance carrier contests the compensability of an injury by filing a Plain Language Notice 1 (PLN01) with the Texas Department of Insurance, Division of Workers' Compensation.

Written notice of injury means the insurance carrier's earliest receipt of the Employer's First Report of Injury (Form DWC-001), written notification provided by the Division of Workers' Compensation, or any other written communication regardless of source that fairly informs the carrier of the name of the injured employee, the identity of the employer, the approximate date of the injury, and information that claims the injury is work related.

Answer "Yes" or "No."

Answer: _____

PJC 20.1B Waiver—Question—When Carrier Appeals

QUESTION _____

Did *ABC Insurance Carrier* contest the compensability of *Paul Payne's* injury on or before the sixtieth day after the date on which *ABC Insurance Carrier* received first written notice of the injury?

[Insert PJC 20.1A instructions on contesting compensability and written notice of injury.]

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 20.1 should be used when the pleadings and evidence present a question whether the insurance carrier waived its right to contest the compensability of the claim.

Burden of proof. The burden of proof should be placed appropriately in accordance with the decision of the appeals panel. See PJC 15.1.

Source of question and definitions. PJC 20.1 is based on Tex. Lab. Code § 409.021(c), which provides:

If an insurance carrier does not contest the compensability of an injury on or before the 60th day after the date on which the insurance carrier is notified of the injury, the insurance carrier waives its right to contest compensability. The initiation of payments by an insurance carrier does not affect the right of the insurance carrier to continue to investigate or deny the compensability of an injury during the 60-day period.

The insurance carrier's notice must be in writing. Tex. Lab. Code § 409.021(a). The Division of Workers' Compensation of the Texas Department of Insurance (DWC) has defined written notice of injury by rule. 28 Tex. Admin. Code § 124.1(a). The carrier's refusal to pay benefits is conveyed on a plain-language notice. See Tex. Lab. Code § 409.013; 28 Tex. Admin. Code §§ 124.2, 124.3. The forms referred to, PLN01 and DWC-001, may be located by a search of the DWC's website at www.tdi.texas.gov/forms/form20.html.

Extent-of-injury disputes. The sixty-day deadline contained in Tex. Lab. Code § 409.021(c) applies only to compensability; it does not apply to disputes of extent of injury. *State Office of Risk Management v. Lawton*, 295 S.W.3d 646 (Tex. 2009).

PJC 20.2 Notice to Employer of Injury—Question**PJC 20.2A Notice to Employer of Injury—Question—When Claimant Appeals**

QUESTION _____

Did *ABC Company* have notice of *the injury* within thirty days *after its occurrence*?

Notice to or actual knowledge on the part of the employer or of any supervisor or manager for the employer is “notice” to the employer.

Answer “Yes” or “No.”

Answer: _____

PJC 20.2B Notice to Employer of Injury—Question—When Carrier Appeals

QUESTION _____

Did *ABC Company* lack notice of *the injury* within thirty days *after its occurrence*?

[Insert PJC 20.2A instruction on “notice.”]

Answer “Yes” or “No.”

Answer: _____

COMMENT

When to use. PJC 20.2 should be used if there is a dispute about whether the worker gave timely notice of his injury to either his employer or the carrier.

Burden of proof. The burden of proof should be placed appropriately in accordance with the decision of the appeals panel. See PJC 15.1.

Source of question and instruction. PJC 20.2 is based on Tex. Lab. Code §§ 409.001, 409.002.

Evidence of more than one injury. If there is evidence of more than one injury, the date of the injury inquired about should be included in the question.

Employer's actual knowledge of injury. Failure to notify an employer relieves the employer and the employer's insurance carrier of liability unless the employer, a person eligible to receive notice, or the employer's insurance carrier has actual knowledge of the employee's injury. Tex. Lab. Code § 409.002. Therefore, when the employer has actual knowledge of the injury within thirty days, no further notice is required. *Casualty Reciprocal Exchange v. Berry*, 90 S.W.2d 595, 597 (Tex. Civ. App.—Texarkana 1935, writ ref'd); *Ocean Accident & Guarantee Corp. v. Nance*, 25 S.W.2d 665 (Tex. Civ. App.—San Antonio 1930, no writ). See also *American Casualty Co. of Reading, Pennsylvania v. Martin*, 97 S.W.3d 679 (Tex. App.—Dallas 2003, no pet.); Texas Workers' Compensation Appeal No. 92038 (Mar. 20, 1992) (actual knowledge found); Texas Workers' Compensation Appeal Nos. 971072 (July 24, 1997); 040802 (June 4, 2002) (actual knowledge not found).

Notice to carrier. Failure to notify an employer relieves the employer and the employer's insurance carrier of liability unless the employer, a person eligible to receive notice, or the employer's insurance carrier has actual knowledge of the employee's injury. Tex. Lab. Code § 409.002. Therefore, notice to the insurance carrier meets the statutory requirement. If timely notice to the carrier is disputed, the name of the carrier should replace *ABC Company* in the question and the words "or insurance carrier" should be inserted after "the employer" at the end of the instruction. See *DeAnda v. Home Insurance Co.*, 618 S.W.2d 529, 532 (Tex. 1980).

Notice to particular individual. If there is evidence of notice to a particular agent of the employer, that individual's name should replace *ABC Company* in the question and the instruction may be omitted.

Occupational disease. If the injury is an occupational disease, for purposes of notice to the employer the name of the employer should be that of the person who employed the employee on the date of the last injurious exposure. See PJC 19.3. Also, the name of the disease inquired about (e.g., carpal tunnel syndrome) should replace the words *the injury*, and the phrase *after the date that Paul Payne knew or should have known that the injury may be related to the employment* must replace the phrase *after its occurrence* in the question. If there is a dispute about the date of injury in an occupational disease case, the question should be preceded by the following question and an answer blank:

What is the date that *Paul Payne* knew or should have known that *the injury* may be related to *his* employment?

See Tex. Lab. Code § 409.001(a)(2).

PJC 20.3 Good Cause for Delay in Notifying Employer—Question**PJC 20.3A Good Cause for Delay in Notifying Employer—
Question—When Claimant Appeals**

If you answered “No” to Question _____ [20.2A], then answer Question _____ [20.3A]. Otherwise, do not answer Question _____ [20.3A].

QUESTION _____

Did *Paul Payne* have good cause for delay in reporting *his injury* to *ABC Company*?

A person has “good cause” for delay in notifying the *employer* when he has prosecuted his claim with the diligence an ordinarily prudent person would have used under the same or similar circumstances.

The good cause must have arisen within thirty days *of the date of the injury* and continued until *the injury* was reported, must have been believed and relied on by the claimant, and must have caused the delayed reporting.

Answer “Yes” or “No.”

Answer: _____

**PJC 20.3B Good Cause for Delay in Notifying Employer—
Question—When Carrier Appeals**

If you answered “Yes” to Question _____ [20.2B], then answer Question _____ [20.3B]. Otherwise, do not answer Question _____ [20.3B].

QUESTION _____

Did *Paul Payne* lack good cause for delay in reporting *his injury* to *ABC Company*?

[Insert PJC 20.3A instruction on “good cause.”]

Answer “Yes” or “No.”

Answer: _____

COMMENT

When to use. PJC 20.3 should be used if neither the employer nor the carrier was notified of the claimant's injury within thirty days from the date of injury and the plaintiff has pleaded and offered evidence on the issue of "good cause" for failing to report the injury within thirty days. PJC 20.3A should be used when the claimant is attempting to overcome a Division finding that the employee did not have good cause for failing to provide notice. PJC 20.3B should be used when the carrier is attempting to overcome a Division finding that the employee did have good cause for failing to provide notice.

Burden of proof. The burden of proof should be placed appropriately in accordance with the decision of the appeals panel. See PJC 15.1.

Source of question and instructions. Failure to notify an employer relieves the employer and the employer's insurance carrier of liability unless good cause exists for failure to provide notice in a timely manner or the employer or the carrier does not contest the claim. Tex. Lab. Code § 409.002(2).

Ultimate question is worker's belief. The ultimate question in a good-cause issue is the worker's belief. The worker may have believed that his injury was trivial (*see Liberty Mutual Insurance Co. v. Stanley*, 534 S.W.2d 191, 192 (Tex. Civ. App.—Texarkana 1976, writ ref'd n.r.e.)), that his claim had been filed by his employer (*see Texas Employers' Insurance Ass'n v. Thomas*, 517 S.W.2d 832, 837 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.)), or that his disability was due to other causes (*see Davis v. Texas Employers' Insurance Ass'n*, 516 S.W.2d 452, 453–54 (Tex. Civ. App.—El Paso 1974, no writ)). *See also Safford v. Cigna Insurance Co.*, 983 S.W.2d 317 (Tex. App.—Fort Worth 1998, pet. denied); *Butler v. Federated Mutual Insurance Co.*, 871 S.W.2d 950 (Tex. App.—Fort Worth 1994, writ denied).

Evidence of more than one injury. If there is evidence of more than one injury, the date of the injury inquired about should be included in the question.

Occupational disease. In an occupational disease case, the name of the disease inquired about (e.g., carpal tunnel syndrome) may replace the words *the injury*. In such cases, the phrase *after the date that Paul Payne knew or should have known that the injury may be related to the employment* must replace the phrase *of the date of the injury* in the second instruction following the question.

Good cause must extend to time of reporting. Good cause must arise within thirty days of the date of injury and must continue until the time of reporting. *See Continental Casualty Co. v. Cook*, 515 S.W.2d 261 (Tex. 1974); *Texas Casualty Insurance Co. v. Beaseley*, 391 S.W.2d 33 (Tex. 1965). The thirty-day time period for reporting the injury does not "restart" on the date good cause ends. Texas Workers' Compensation Appeal No. 93711 (Sept. 10, 1993).

Minority or incompetent. Tex. Lab. Code § 409.007 provides that a failure to file a claim for death benefits is excused by a claimant's minority and incompetence. There is no similar statutory provision to excuse the failure to report an injury in a timely fashion. *But see Petroleum Casualty Co. v. Canales*, 499 S.W.2d 734 (Tex. Civ. App.—Houston [1st Dist.] 1973, writ ref'd n.r.e.) (disqualification of minority constitutes good cause for failure to report claim within time provided for in statute).

PJC 20.4 Claim for Compensation to the Division—Question**PJC 20.4A Claim for Compensation to the Division—Question—
When Claimant Appeals**

QUESTION _____

Did *Paul Payne* file a claim with the Texas Department of Insurance, Division of Workers' Compensation, within one year of the date of *his* injury?

Answer "Yes" or "No."

Answer: _____

**PJC 20.4B Claim for Compensation to the Division—Question—
When Carrier Appeals**

QUESTION _____

Did *Paul Payne* fail to file a claim with the Texas Department of Insurance, Division of Workers' Compensation, within one year of the date of *his* injury?

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 20.4 should be used if there is a dispute about whether the worker filed a claim with the Division of Workers' Compensation of the Texas Department of Insurance (DWC) and the carrier has disputed the claim.

Burden of proof. The burden of proof should be placed appropriately in accordance with the decision of the appeals panel. See PJC 15.1.

Source of question and instruction. PJC 20.4 is based on Tex. Lab. Code §§ 409.003, 409.004.

Evidence of more than one injury. If there is evidence of more than one injury, the date of the injury inquired about should be included in the question.

Failure to file employer's first report of injury. If an employer or the employer's insurance carrier has been given notice or has knowledge of an injury to or the death of an employee and the employer or insurance carrier fails, neglects, or refuses to file the report required under Tex. Lab. Code § 409.005, the period for filing a claim for compensation under sections 409.003 and 409.007 does not begin to run

against the claim of an injured employee or a legal beneficiary until the day on which the report required under section 409.005 has been furnished. Tex. Lab. Code § 409.008.

Death benefit claims. A person must file a claim for death benefits with the division not later than the first anniversary of the date of the employee's death. A separate claim must be filed for each legal beneficiary unless the claim expressly includes or is made on behalf of another person. *See* Tex. Lab. Code § 409.007.

Notice to DWC. A claim for compensation must be filed within one year except for good cause shown. Normally this claim is filed on DWC forms. Note, however, that there is no formality required in making claims for compensation to the DWC. *See Johnson v. American General Insurance Co.*, 464 S.W.2d 83, 84 (Tex. 1971). A treating doctor's medical report to the Industrial Accident Board was held to constitute sufficient notice to the board to satisfy the claimant's obligation to file a claim under the former law. *See Cadengo v. Compass Insurance Co.*, 721 S.W.2d 415 (Tex. App.—Corpus Christi 1986, no writ).

PJC 20.5 Good Cause for Delay in Filing Claim—Question**PJC 20.5A Good Cause for Delay in Filing Claim—Question—When Claimant Appeals**

If you answered “No” to Question _____ [20.4A], then answer Question _____ [20.5A]. Otherwise, do not answer Question _____ [20.5A].

QUESTION _____

Did *Paul Payne* have good cause for delay in filing a claim with the Texas Department of Insurance, Division of Workers' Compensation?

A person has “good cause” for delay in filing a claim with the Texas Department of Insurance, Division of Workers' Compensation, when he has prosecuted his claim with the diligence an ordinarily prudent person would have used under the same or similar circumstances.

The good cause must have arisen within one year *of the date of the injury* and continued until the claim was filed, must have been believed and relied on by the claimant, and must have caused the delayed filing.

Answer “Yes” or “No.”

Answer: _____

PJC 20.5B Good Cause for Delay in Filing Claim—Question—When Carrier Appeals

If you answered “Yes” to Question _____ [20.4B], then answer Question _____ [20.5B]. Otherwise, do not answer Question _____ [20.5B].

QUESTION _____

Did *Paul Payne* not have good cause for delay in filing a claim with the Texas Department of Insurance, Division of Workers' Compensation?

[Insert PJC 20.5A instructions on “good cause.”]

Answer “Yes” or “No.”

Answer: _____

COMMENT

When to use. PJC 20.5 should be used if no claim was filed with the Division of Workers' Compensation of the Texas Department of Insurance (DWC) within one year of the date of injury, the pleadings and evidence raise a dispute about whether the worker had good cause for failing to file the claim with the DWC, and the carrier has contested the claim. PJC 20.5A should be used when the claimant is attempting to overcome a Division finding that the employee did not have good cause for failing to timely file a claim for compensation. PJC 20.5B should be used when the carrier is attempting to overcome a Division finding that the employee did have good cause for failing to timely file a claim for compensation.

Burden of proof. The burden of proof should be placed appropriately in accordance with the decision of the appeals panel. See PJC 15.1.

Source of question and instructions. Failure to file a claim for compensation with the DWC relieves the employer and the employer's insurance carrier of liability unless good cause exists for the failure to file a claim in a timely manner or the employer or the employer's insurance carrier does not contest the claim. Tex. Lab. Code § 409.004.

Ultimate question is worker's belief. The ultimate question in a good-cause issue is the worker's belief. The worker may have believed that his injury was trivial (*see Liberty Mutual Insurance Co. v. Stanley*, 534 S.W.2d 191, 192 (Tex. Civ. App.—Texarkana 1976, writ ref'd n.r.e.)), that his claim had been filed by his employer (*see Texas Employers' Insurance Ass'n v. Thomas*, 517 S.W.2d 832, 837 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.)), or that his disability was due to other causes (*see Davis v. Texas Employers' Insurance Ass'n*, 516 S.W.2d 452, 453–54 (Tex. Civ. App.—El Paso 1974, no writ)).

Evidence of more than one injury. If there is evidence of more than one injury, the date of the injury inquired about should be included in the question.

Good cause must extend to time of filing. In *Travelers Insurance Co. v. Echols*, 508 S.W.2d 422, 425 (Tex. Civ. App.—Texarkana 1974, no writ), the court stated that the ultimate question in a case involving good cause for delay in filing a claim is the claimant's belief, which in that case was the belief that the claim had been filed by the adjuster for the defendant. Good cause must arise within one year of the date of injury and must continue until the time of filing. *See Continental Casualty Co. v. Cook*, 515 S.W.2d 261 (Tex. 1974); *Texas Casualty Insurance Co. v. Beaseley*, 391 S.W.2d 33 (Tex. 1965).

Occupational disease. In an occupational disease case, the phrase *after the date that Paul Payne knew or should have known that the injury may be related to the employment* must replace the phrase *of the date of the injury* in the second instruction following the question.

Minority or incompetent. Failure to file a claim for death benefits in the time required bars the claim unless the person is a minor or incompetent. *See* Tex. Lab. Code § 409.007; *see also* *Petroleum Casualty Co. v. Canales*, 499 S.W.2d 734 (Tex. Civ. App.—Houston [1st Dist.] 1973, writ ref'd n.r.e.) (disqualification of minority constitutes good cause for failure to file claim within time provided for in statute); *Texas Employers' Insurance Ass'n v. Beckman*, 207 S.W.2d 183 (Tex. Civ. App.—Austin 1947, writ ref'd n.r.e.) (evidence supported finding that worker's incapacity prevented timely filing claim).

CHAPTER 21	WORKERS' COMPENSATION—EXTENT-OF-INJURY DISPUTES	
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PJC 21.1 Extent of Injury—Question**PJC 21.1A Extent of Injury—Question—When Claimant Appeals**

QUESTION _____

Does *Paul Payne*'s compensable injury extend to and include the following conditions:

[Insert applicable injury or diagnosis 1, 2, and 3 below.]

Answer "Yes" or "No."

[Injury or diagnosis 1]?

Answer: _____

[Injury or diagnosis 2]?

Answer: _____

[Injury or diagnosis 3]?

Answer: _____

PJC 21.1B Extent of Injury—Question—When Carrier Appeals

QUESTION _____

Does *Paul Payne*'s compensable injury not extend to and include the following conditions:

[Insert applicable injury or diagnosis 1, 2, and 3 below.]

Answer "Yes" or "No."

[Injury or diagnosis 1]?

Answer: _____

[Injury or diagnosis 2]?

Answer: _____

[Injury or diagnosis 3]?

Answer: _____

COMMENT

When to use. PJC 21.1 should be used when a party has appealed from a decision of the Division of Workers' Compensation of the Texas Department of Insurance (DWC) that concludes that the injured worker's compensable injury does or does not extend to and include another compensable injury.

Limitation on trial court's jurisdiction. The court's jurisdiction is limited to the issues decided by the appeals panel and on which judicial review has been sought. Tex. Lab. Code § 410.302(b). Accordingly, the trial court possesses jurisdiction over and should submit questions regarding only the extent-of-injury issues that were decided by the DWC and that have been appealed by an aggrieved party. *See American Motorists Insurance Co. v. Fodge*, 63 S.W.3d 801, 804 (Tex. 2001).

Burden of proof. The burden of proof should be placed appropriately in accordance with the decision of the appeals panel. See PJC 15.1.

Source of questions and instructions. Under the prior workers' compensation law, an injury to one body part or system could extend to and affect another body part or system and thereby amplify the benefits otherwise due an injured worker. *See Texas Employers' Insurance Ass'n v. Wilson*, 522 S.W.2d 192, 194 (Tex. 1975); *Travelers Insurance Co. v. Marmolejo*, 383 S.W.2d 380, 381–82 (Tex. 1964). In a case under the current law (Tex. Lab. Code § 408.161), the court held that an injury may be direct or indirect, but that if the injury is indirect it "must extend to and impair the statutory body part." *See Insurance Co. of State of Pennsylvania v. Muro*, 347 S.W.3d 268, 276 (Tex. 2011).

Necessary definitions. Certain definitions may be necessary and should be submitted with these questions, for example, "injury" (see PJC 17.1), "course and scope of employment" (see PJC 17.1), "producing cause" (see PJC 23.10), and "total loss of use" (see PJC 25.2).

Specification of particular injury or diagnosis recommended. Although the Workers' Compensation Act does not require a specific finding for the part of the body affected by the extension of the injury, the Committee recommends specificity regarding the disputed issue as framed by the DWC because a party may not raise an issue in the trial court that was not raised before a DWC appeals panel. Tex. Lab. Code § 410.302(b); *State Office of Risk Management v. Martinez*, 539 S.W.3d 266, 269 (Tex. 2017); *Alexander v. Lockheed Martin Corp.*, 188 S.W.3d 348, 353 (Tex. App.—Fort Worth 2006, pet. denied). If evidence supports extension to more than one part of the body, each injury or diagnosis claimed should be submitted disjunctively and the jury should be instructed to answer separately for each.

Caveat. Any question regarding extension of the compensable injury must be worded in the conjunctive. Specifically, the question is whether the injury extended to and affected other parts of the body. *Texas Employers' Insurance Ass'n v. Shannon*,

462 S.W.2d 559, 562 (Tex. 1970) (citing *Marmolejo*, 383 S.W.2d 380). It is error to inquire whether the injury extended to *or* affected other parts of the body. *Shannon*, 462 S.W.2d at 562 (Tex. 1970).

Instructions on pain and other subjective complaints. In *Texas Employers' Insurance Ass'n v. Espinosa*, 367 S.W.2d 667, 669 (Tex. 1963), the supreme court held that "mere proof" of pain, headaches, and dizziness following an injury to the eye, without evidence causally linking those symptoms to a source other than an injury to the eye, is legally insufficient to show an extension of a specific injury to other parts of the body.



CHAPTER 22	WORKERS' COMPENSATION—AVERAGE WEEKLY WAGE	
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PJC 22.1 Average Weekly Wage—Question

QUESTION _____

Was *Paul Payne*'s average weekly wage not [*insert weekly wage found by DWC*]?

Answer "Yes" or "No."

Answer: _____

If you answered the above question "Yes," then answer the following question. Otherwise do not answer the following question.

QUESTION _____

What was *Paul Payne*'s average weekly wage?

Answer in dollars and cents.

Answer: _____

COMMENT

When to use. PJC 22.1 may be submitted when a party appeals a decision of the Division of Workers' Compensation of the Texas Department of Insurance (DWC) involving an average weekly wage dispute.

Burden of proof. The burden of proof should be placed appropriately in accordance with the decision of the appeals panel. See PJC 15.1. The court should insert the DWC's decision regarding the average weekly wage in the first question above. The second question should be conditioned on a finding that the average weekly wage is not the average weekly wage found by the DWC.

Source of question. PJC 22.1 is based on Tex. Lab. Code § 408.041 and 28 Tex. Admin. Code § 128.3(g).

PJC 22.2 Wages—Definition for Average Weekly Wage

“Wages” means gross wages and includes all forms of remuneration payable for a given period to an employee for personal services. The term includes the market value of board, lodging, laundry, fuel, and any other advantage that can be estimated in money that the employee receives from the employer as part of the employee’s remuneration. The term does not include payments made by an employer to reimburse the employee for the use of the employee’s equipment, for paying helpers, for reimbursing actual expenses related to employment such as travel-related expenses (e.g., meals, lodging, transportation, parking, tolls, and porters), or for reimbursing mileage up to the state rate for mileage. The term also does not include any nonpecuniary wages continued by the employer after the compensable injury. However, if the employer discontinues providing nonpecuniary wages, the discontinued nonpecuniary wages shall be included in the average weekly wage.

COMMENT

When to use. PJC 22.2 should be used with PJC 22.1 when a party appeals a decision of the Division of Workers’ Compensation of the Texas Department of Insurance (DWC) regarding the average weekly wage. Any specified item not raised by the evidence should be omitted. When appropriate, the words “wage or salary” may be substituted for “wages.”

Source of definition. PJC 22.2 is based on Tex. Lab. Code § 401.011(43) and 28 Tex. Admin. Code § 128.1(c). Note that the amounts estimated as reimbursement for the use of an employee’s equipment should not be included in calculating the employee’s average weekly wage. 28 Tex. Admin. Code § 128.1(c)(1); *Texas Mutual Insurance Co. v. Cruz*, 307 S.W.3d 925, 931 (Tex. App.—Eastland 2010, pet. denied).

PJC 22.3 Average Weekly Wage—Definition

“Average weekly wage” means the sum of the wages paid in the thirteen consecutive weeks immediately preceding an injury divided by thirteen. If an employee has worked for thirteen weeks or more prior to the date of injury, or if the wage at the time of injury has not been fixed or cannot be determined, the wages paid to the employee for thirteen weeks immediately preceding the injury are added together and divided by thirteen to produce the average weekly wage. If an employee has worked for less than thirteen weeks prior to the date of injury, the wages paid to that employee are not considered. Instead the wages used for the average weekly wage calculation are those paid by the employer to a similar employee who performs similar services, but who earned wages for at least thirteen weeks. If there is no similar employee at the employer’s business, the average weekly wage is based on the wages paid to a similar employee who performed similar services in the same vicinity, for at least thirteen weeks. When a similar employee is identified, the wages paid to that person for the thirteen weeks immediately preceding the injury are added together and divided by thirteen. The quotient is the average weekly wage. If it would be improper to use the wages of the employee or the wages of a similar employee due to the irregularity of the employment or because the employee has lost time from work, without remuneration, during the thirteen weeks immediately preceding the injury due to illness, weather, or other cause beyond the control of the employee, the employee’s average weekly wage may be determined by any method that is fair, just, and reasonable to all parties.

COMMENT

When to use. PJC 22.3 should be used with PJC 22.1 when a party appeals a decision of the Division of Workers’ Compensation of the Texas Department of Insurance (DWC) involving an average weekly wage dispute.

This definition of average weekly wage applies to cases in which the claimant earned wages during the thirteen weeks immediately preceding the compensable injury; or when there is evidence of a similar employee who earned wages during the thirteen weeks immediately preceding the compensable injury; or when there is evidence to support a just and fair determination of the average weekly wage. Any of the specified items in the definition that are not raised by the evidence should be omitted.

Source of definition. PJC 22.3 is based on Tex. Lab. Code § 408.041 and 28 Tex. Admin. Code § 128.3(d)–(g).

Employees with multiple employment. PJC 22.3 should not be used in cases involving employees with multiple employment. For a definition of average weekly wage for those employees, see Tex. Lab. Code § 408.042 and 28 Tex. Admin. Code § 128.1(h).

Part-time employees. PJC 22.3 should not be used in cases involving part-time employees. For a definition of average weekly wage for part-time employees, see Tex. Lab. Code § 408.042 and 28 Tex. Admin. Code § 128.4.

Seasonal employees. PJC 22.3 should not be used for seasonal employees. For a definition of average weekly wage for those employees, see Tex. Lab. Code § 408.043 and 28 Tex. Admin. Code § 128.5.

Minors, apprentices, trainees, or students. PJC 22.3 should not be used for employees who are minors, apprentices, trainees, or students. For a definition of average weekly wage for those employees, see Tex. Lab. Code § 408.044 and 28 Tex. Admin. Code § 128.6.

School district employees. PJC 22.3 should not be used for employees of school districts. For a definition of average weekly wage for those employees, see Tex. Lab. Code § 408.0446 and 28 Tex. Admin. Code § 128.7.

PJC 22.4 Nonpecuniary Wages—Definition

“Nonpecuniary wages” are wages paid to an employee in a form other than money.

COMMENT

When to use. PJC 22.4 may be used with PJC 22.1 when there is a question whether all or part of any remuneration used to calculate the average weekly wage is nonpecuniary in nature.

Source of definition. PJC 22.4 is based on 28 Tex. Admin. Code § 126.1, which lists examples of both pecuniary and nonpecuniary wages. See also Tex. Lab. Code § 408.045, which prohibits the inclusion of nonpecuniary wages in the computation of average weekly wage.

PJC 22.5 Similar Employees—Definition

A “similar employee” is one with training, experience, skills, and wages that are comparable to those of the injured employee. Age, gender, and race shall not be considered.

COMMENT

When to use. PJC 22.5 may be used with PJC 22.1 when there is a question whether the average weekly wage should be based on the wages of a similar employee rather than on the wages of the claimant.

Source of definition. PJC 22.5 is based on Tex. Lab. Code § 408.046 and 28 Tex. Admin. Code § 128.3(f).

PJC 22.6 Similar Services—Definition

“Similar services” are tasks performed or services rendered that are comparable in nature to, and in the same class as, those performed by the injured employee and that are comparable in the number of hours normally worked.

COMMENT

When to use. PJC 22.6 may be used with PJC 22.1 when there is a question whether the wages of a similar employee were received while performing similar services.

Source of definition. PJC 22.6 is based on Tex. Lab. Code § 408.046 and 28 Tex. Admin. Code § 128.3(f).



CHAPTER 23	WORKERS' COMPENSATION—DISABILITY, MAXIMUM MEDICAL IMPROVEMENT, AND IMPAIRMENT	
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PJC 23.1 Producing Cause of Disability—Question

**PJC 23.1A Producing Cause of Disability—Question—When
Claimant Appeals**

QUESTION _____

Was *Paul Payne*'s compensable injury a producing cause of disability between [date] and [date]?

“Producing cause” means a cause that is a substantial factor in bringing about disability, and without which the disability would not have occurred. There may be more than one producing cause.

“Disability” means the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wages.

Answer “Yes” or “No.”

Answer: _____

**PJC 23.1B Producing Cause of Disability—Question—When Carrier
Appeals**

QUESTION _____

Was *Paul Payne*'s compensable injury not a producing cause of disability between [date] and [date]?

[Insert PJC 23.1A definitions of “producing cause” and “disability.”]

Answer “Yes” or “No.”

Answer: _____

COMMENT

When to use. PJC 23.1 may be used when a party appeals a decision of the Division of Workers' Compensation of the Texas Department of Insurance (DWC) about the existence or duration of an injured worker's disability.

Burden of proof. The burden of proof should be placed appropriately in accordance with the decision of the appeals panel. See PJC 15.1.

Source of question and instructions. “‘Disability’ simply means ‘the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage,’ and thus results from any reduction in wage earning capacity.” *Texas Workers’ Compensation Commission v. Garcia*, 893 S.W.2d 504, 513 (Tex. 1995) (quoting Tex. Lab. Code § 401.011(16)). See PJC 23.10 regarding the definition of “producing cause” and PJC 23.11 regarding “disability.”

The concept of “disability” is used to measure or determine the monetary loss suffered by an injured worker as the result of a compensable claim. An injured worker’s entitlement to temporary income benefits as a result of any disability begins on the day after the date of injury and ends no later than the date that the employee reaches maximum medical improvement. See *Garcia*, 893 S.W.2d at 513. Disability disputes at the agency level are adjudicated retroactively from the date of the contested case hearing. The DWC usually frames the disability issue to cover a specific period of time that is in dispute. The dates used in this question should mirror the dates used by the DWC to frame the disputed issue.

PJC 23.2 Duration of Disability—Question

If you answered “Yes” to Question _____ [23.1A], then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

What is the duration of *Paul Payne*'s disability between [date] and [date]?

Beginning date: _____

Ending date: _____

COMMENT

When to use. PJC 23.2 should be used in any case involving a disability dispute in which there has been a finding that disability exists. It should be conditioned on an affirmative answer to PJC 23.1A.

The dates reflected in this question should mirror the dates reflected in those used to submit PJC 23.1A. If the evidence suggests intermittent periods of disability, the answer blanks should be modified as appropriate.

Burden of proof. The burden of proof should be placed appropriately in accordance with the decision of the appeals panel. See PJC 15.1.

Source of question and instructions. “‘Disability’ simply means ‘the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage,’ and thus results from any reduction in wage earning capacity.” *Texas Workers’ Compensation Commission v. Garcia*, 893 S.W.2d 504, 513 (Tex. 1995) (quoting Tex. Lab. Code § 401.011(16)). See PJC 23.11 regarding the definition of “disability.”

PJC 23.3 Wages Earned During Disability—Question

If you answered “Yes” to Question _____ [23.1A], then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Find the wages earned, if any, by *Paul Payne* for each week between [date] and [date].

Week one: _____

Week two: _____

Week three: _____

Week four: _____

COMMENT

When to use. PJC 23.3 should be used in any case involving a disability dispute in which there is evidence of postinjury earnings during the period in question. It should be conditioned on a “Yes” answer to PJC 23.1A. If there is no evidence of postinjury earnings, or if the evidence conclusively establishes the claimant’s weekly earnings during each week in dispute, the question need not be submitted.

The dates in this question should mirror those in PJC 23.1A. The answer column should list as many weeks as are described in the Division of Workers’ Compensation of the Texas Department of Insurance’s (DWC’s) disputed issue.

Burden of proof. The burden of proof should be placed appropriately in accordance with the decision of the appeals panel. See PJC 15.1.

Source of question and instructions. “‘Disability’ simply means ‘the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage,’ and thus results from any reduction in wage earning capacity.” *Texas Workers’ Compensation Commission v. Garcia*, 893 S.W.2d 504, 513 (Tex. 1995) (quoting Tex. Lab. Code § 401.011(16)).

PJC 23.4 Bona Fide Position of Employment—Question**PJC 23.4A Bona Fide Position of Employment—Question—When
Claimant Appeals**

QUESTION _____

Was *Paul Payne* not offered a bona fide position of employment?

A “bona fide position of employment” is a position of employment that an employee is reasonably capable of performing, given the physical condition of the employee and the geographic accessibility of the position to the employee.

Answer “Yes” or “No.”

Answer: _____

**PJC 23.4B Bona Fide Position of Employment—Question—When
Carrier Appeals**

QUESTION _____

Was *Paul Payne* offered a bona fide position of employment?

[Insert PJC 23.4A definition of “bona fide position of employment.”]

Answer “Yes” or “No.”

Answer: _____

COMMENT

When to use. PJC 23.4 should be used when a party appeals a decision of the Division of Workers' Compensation of the Texas Department of Insurance (DWC) that the injured worker was or was not offered a bona fide position of employment. See PJC 23.13 regarding the definition of “bona fide position of employment.”

Burden of proof. The burden of proof should be placed appropriately in accordance with the decision of the appeals panel. See PJC 15.1.

Source of question and instructions. For purposes of calculating the amount of temporary income benefits owed to an injured worker, the Code provides that “if an employee is offered a bona fide position of employment that the employee is reasonably capable of performing, given the physical condition of the employee and the geographic accessibility of the position to the employee, the employee’s weekly earnings

after the injury are equal to the weekly wage for the position offered to the employee.” Tex. Lab. Code § 408.103(e). See also Tex. Lab. Code § 408.144(c), which contains a substantially identical provision for supplemental income benefits cases.

The former law, article 8306, section 12a, provided that “[i]f the injured employee refuses employment reasonably suited to his incapacity and physical condition procured for him in the locality where injured or at a place agreeable to him, he shall not be entitled to compensation during the period of such refusal, unless in opinion of the board such refusal is justifiable.” See *Texas Employers' Insurance Ass'n v. McNorton*, 92 S.W.2d 562, 568–69 (Tex. Civ. App.—Dallas 1936), *opinion adopted*, 122 S.W.2d 1043 (Tex. Comm'n App. 1939). The current law does not speak in terms of “refusal” of employment or whether such refusal is “justified.” See Tex. Lab. Code § 408.103(e). Accordingly, no inquiry about whether the offer of employment was refused, or whether such refusal was justifiable, should be made.

**PJC 23.5 Date Bona Fide Position of Employment Offer
Received—Question**

If you answered “Yes” to Question _____ [23.4B], then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

What is the date that *Paul Payne* was offered the bona fide position of employment?

Answer by month, day, and year.

Answer: _____

COMMENT

When to use. PJC 23.5 should be used when a carrier appeals a decision of the Division of Workers' Compensation of the Texas Department of Insurance (DWC) that the injured worker was not offered a bona fide position of employment. PJC 23.5 should be conditioned on a negative answer to PJC 23.4A or an affirmative answer to PJC 23.4B.

Burden of proof. The burden of proof should be placed appropriately in accordance with the decision of the appeals panel. See PJC 15.1.

Source of question and instructions. For purposes of calculating the amount of temporary income benefits owed an injured worker, the Code provides that “if an employee is offered a bona fide position of employment that the employee is reasonably capable of performing, given the physical condition of the employee and the geographic accessibility of the position to the employee, the employee’s weekly earnings after the injury are equal to the weekly wage for the position offered to the employee.” Tex. Lab. Code § 408.103(e). See also Tex. Lab. Code § 408.144(c), which contains a similar provision for supplemental income benefits cases.

**PJC 23.6 Weekly Earnings Offered through Bona Fide Position of
Employment—Question**

If you answered “Yes” to Question _____ [23.4B], then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

What are the weekly earnings that *Paul Payne* was offered pursuant to the bona fide position of employment?

Weekly earnings offered: _____

COMMENT

When to use. PJC 23.6 should be used when a party appeals a decision of the Division of Workers' Compensation of the Texas Department of Insurance (DWC) that the injured worker was not offered a bona fide position of employment or when there is a dispute over the wages offered to the worker. PJC 23.6 should be conditioned on an affirmative answer to PJC 23.4B. PJC 23.6 may be submitted without a conditioning instruction if the DWC's decision that the claimant was offered a bona fide position of employment has become final or if it is undisputed that a bona fide position was offered but there is a dispute about the amount of weekly earnings offered.

Burden of proof. The burden of proof should be placed appropriately in accordance with the decision of the appeals panel. See PJC 15.1.

Source of question and instructions. For purposes of calculating the amount of temporary income benefits owed to an injured worker, the Code provides that “if an employee is offered a bona fide position of employment that the employee is reasonably capable of performing, given the physical condition of the employee and the geographic accessibility of the position to the employee, the employee's weekly earnings after the injury are equal to the weekly wage for the position offered to the employee.” Tex. Lab. Code § 408.103(e). See also Tex. Lab. Code § 408.144(c), which contains a similar provision for supplemental income benefits cases.

Variable weekly earnings or multiple offers. PJC 23.6 should be modified to permit responses on a per-week basis if the evidence indicates that the weekly wages offered varied from week to week or from offer to offer.

PJC 23.7 Negating Division's Finding of Maximum Medical Improvement; Seeking Determination of Not at Maximum Medical Improvement—Question

QUESTION _____

Has *Paul Payne* not reached maximum medical improvement?

“Maximum medical improvement” means the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated.

Answer “Yes” or “No.”

Answer: _____

COMMENT

When to use. PJC 23.7 should be used when a party appeals a decision of the Division of Workers' Compensation of the Texas Department of Insurance (DWC) that the injured worker is at maximum medical improvement and seeks to persuade the jury that the employee has not yet reached maximum medical improvement. For cases in which a party appeals a decision that the worker has reached maximum medical improvement with a particular impairment rating, and seeks to persuade the jury to adopt a different date of maximum medical improvement and impairment rating, PJC 23.8 or 23.9 should be used. See PJC 23.14 regarding the definition of “maximum medical improvement.”

Burden of proof. The party who appeals a decision that the injured worker is not at maximum medical improvement may be either the claimant or the carrier, depending on the facts of each individual case. The burden of proof should be placed appropriately in accordance with the decision of the appeals panel. See PJC 15.1.

Source of question and instructions. “Maximum medical improvement” is the point when further material recovery or lasting improvement can no longer be reasonably anticipated or two years after income benefits begin to accrue, whichever is sooner. Tex. Lab. Code § 401.011(30); *Texas Workers' Compensation Commission v. Garcia*, 893 S.W.2d 504, 513 (Tex. 1995).

Caveat. While the Code requires that the trial court adopt a specific impairment rating—see Tex. Lab. Code § 410.306—there is no similar requirement with regard to the maximum medical improvement date of a claimant. However, the supreme court has noted that “[a]ny dispute that challenges an impairment rating’s finality necessarily implicates the date of maximum medical improvement and the amount paid as temporary income benefits.” *Rodriguez v. Service Lloyds Insurance Co.*, 997 S.W.2d 248,

254 (Tex. 1999); *see also Fireman's Fund Insurance Co. v. Weeks*, 259 S.W.3d 335, 343 (Tex. App.—El Paso 2008, pet. denied) (observing that DWC has noted that “concepts of MMI and IR are somewhat inextricably intertwined, and an IR cannot be assessed until MMI is reached”). DWC Rule 131.1(b)(2) states, “MMI must be certified before an impairment rating is assigned and the impairment rating must be assigned for the injured employee’s condition on the date of MMI.” DWC Rule 131.1(c)(3) states, “Assignment of an impairment rating for the current compensable injury shall be based on the injured employee’s condition on the MMI date considering the medical record and the certifying examination.”

PJC 23.8 Negating Division's Finding of Maximum Medical Improvement and Impairment Rating; Seeking Alternate Certification—Question

QUESTION _____

Did *Paul Payne* not reach maximum medical improvement on [*date*] with an impairment rating of [*impairment rating*]?

“Maximum medical improvement” means the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated.

Answer “Yes” or “No.”

Answer: _____

COMMENT

When to use. PJC 23.8 should be used when a party appeals a decision of the Division of Workers' Compensation of the Texas Department of Insurance (DWC) that the injured worker is at maximum medical improvement and has an impairment rating and when that party seeks a determination that the injured worker has a single alternative date of maximum medical improvement and impairment rating. For cases in which multiple alternative impairment ratings are in evidence, PJC 23.9 should be used. For cases in which a party seeks a decision that the injured worker has not reached maximum medical improvement, PJC 23.7 should be used. See PJC 23.14 regarding the definition of “maximum medical improvement.”

Burden of proof. The party who appeals a decision that the injured worker is not at maximum medical improvement may be either the claimant or the carrier, depending on the facts of each individual case. The burden of proof should be placed appropriately in accordance with the decision of the appeals panel. See PJC 15.1.

Source of question and instructions. “Maximum medical improvement” is the point when further material recovery or lasting improvement can no longer be reasonably anticipated or two years after income benefits begin to accrue, whichever is sooner. Tex. Lab. Code § 401.011(30); *Texas Workers' Compensation Commission v. Garcia*, 893 S.W.2d 504, 513 (Tex. 1995).

Caveat. While the Code requires that the trial court adopt a specific impairment rating—see Tex. Lab. Code § 410.306—there is no similar requirement with regard to the maximum medical improvement date of a claimant. However, the supreme court has noted that “[a]ny dispute that challenges an impairment rating’s finality necessarily implicates the date of maximum medical improvement and the amount paid as tem-

porary income benefits.” *Rodriguez v. Service Lloyds Insurance Co.*, 997 S.W.2d 248, 254 (Tex. 1999); *see also Fireman’s Fund Insurance Co. v. Weeks*, 259 S.W.3d 335, 343 (Tex. App.—El Paso 2008, pet. denied) (observing that DWC has noted that “concepts of MMI and IR are somewhat inextricably intertwined, and an IR cannot be assessed until MMI is reached”). DWC Rule 131.1(b)(2) states, “MMI must be certified before an impairment rating is assigned and the impairment rating must be assigned for the injured employee’s condition on the date of MMI.” DWC Rule 131.1(c)(3) states, “Assignment of an impairment rating for the current compensable injury shall be based on the injured employee’s condition on the MMI date considering the medical record and the certifying examination.”

PJC 23.9 Maximum Medical Improvement and Impairment Rating (Multiple Alternative Impairment Ratings)—Question

If you answered “Yes” to Question _____ [23.8], then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Find *Paul Payne*'s date of maximum medical improvement and impairment rating from the following certification options. Answer by including month, day, and year.

[*Certification option 1*]:

[*Certification option 2*]:

[*Certification option 3*]:

Answer: _____

COMMENT

When to use. PJC 23.9 should be used when a party appeals a decision of the Division of Workers' Compensation of the Texas Department of Insurance (DWC) that involves the issues of maximum medical improvement and impairment rating, the jury has answered the question presented in PJC 23.8 in favor of the appealing party, and the evidence presents more than one alternative impairment rating. The jury should be permitted to find alternative certifications of maximum medical improvement and impairment only when the appealing party has secured a finding that negates a DWC determination that the claimant reached maximum medical improvement with a specific impairment rating.

Burden of proof. The burden of proof should be placed appropriately in accordance with the decision of the appeals panel. See PJC 15.1.

Source of question and instructions. An employee receives impairment income benefits according to the employee's impairment rating, which is the percentage of the whole body's permanent impairment. See Tex. Lab. Code §§ 401.011(24), 408.124. To determine the impairment rating, an examining doctor evaluates the permanent effect of the employee's injury under statutory guidelines. See Tex. Lab. Code § 408.124. The doctor expresses the rating as a percentage of permanent impairment to the whole body. See Tex. Lab. Code §§ 401.011(24), 408.124. The greater this percentage, the greater the amount of impairment income benefits the employee receives. See *Texas Workers' Compensation Commission v. Garcia*, 893 S.W.2d 504, 514 (Tex. 1995).

The impairment rating may also qualify an injured worker for supplemental income benefits, which provide long-term disability compensation. *See* Tex. Lab. Code § 408.142; *see also Garcia*, 893 S.W.2d at 514.

A doctor will not certify an impairment rating until the employee reaches “maximum medical improvement,” the point at which the employee’s injury will not materially improve with additional rest or treatment. *See Rodriguez v. Service Lloyds Insurance Co.*, 997 S.W.2d 248, 253 (Tex. 1999); Tex. Lab. Code § 408.121.

“Maximum medical improvement” is the point when further material recovery or lasting improvement can no longer be reasonably anticipated or two years after income benefits begin to accrue, whichever is sooner. Tex. Lab. Code § 401.011(30); *Garcia*, 893 S.W.2d at 513.

Tex. Lab. Code § 410.306(c) provides that “[e]xcept as provided by Section 410.307, evidence of extent of impairment shall be limited to that presented to the division. The court or jury, in its determination of the extent of impairment, shall adopt one of the impairment ratings under Subchapter G, Chapter 408.”

PJC 23.10 Producing Cause—Definition

“Producing cause” means a cause that is a substantial factor in bringing about an injury, and without which the injury would not have occurred. There may be more than one producing cause.

COMMENT

When to use. PJC 23.10 may be used in accidental injury, repetitious trauma, or occupational disease cases in which an injury is alleged to produce entitlement to benefits. See generally PJC 23.1 and chapter 25 in this volume.

Source of definition. “Though the Texas Workers’ Compensation Act does not use the phrase ‘producing cause,’ this has been the standard for proving causation in workers’ compensation claims for more than eighty years.” *Transcontinental Insurance Co. v. Crump*, 330 S.W.3d 211, 221 (Tex. 2010).

The *Crump* court observed that the element common to both proximate cause and producing cause is actual causation in fact, which requires proof that an act or omission was a substantial factor in bringing about injury that would not otherwise have occurred. Relying on *Ford Motor Co. v. Ledesma*, 242 S.W.3d 32 (Tex. 2007), a products liability case, the court held that producing cause and cause in fact are conceptually identical:

Defining producing cause as being a substantial factor in bringing about an injury, and without which the injury would not have occurred, is easily understood and conveys the essential components of producing cause that (1) the cause must be a substantial cause of the event in issue and (2) it must be a but-for cause, namely one without which the event would not have occurred.

Crump, 330 S.W.3d at 223 (quoting *Ledesma*, 242 S.W.3d at 46). The court concluded that “the producing cause inquiry in workers’ compensation cases is conceptually no different from the cause in fact inquiry in negligence cases and the producing cause inquiry in other substantive contexts.” *Crump*, 330 S.W.3d at 223.

PJC 23.11 Disability—Definition

“Disability” means the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage.

COMMENT

When to use. PJC 23.11 may be used in any case in which the injured worker and the insurance carrier disagree about the employee’s entitlement to temporary income benefits. A compensably injured employee is entitled to temporary income benefits when he has a disability and has not reached maximum medical impairment. See PJC 23.1 and 23.2 for questions on disability.

Source of definition. Concepts of “impairment” and “disability” are not interchangeable under the Workers’ Compensation Act. “Impairment” means “any anatomic or functional abnormality or loss existing after maximum medical improvement that results from a compensable injury and is reasonably presumed to be permanent.” Tex. Lab. Code § 401.011(23); *Insurance Co. of State of Pennsylvania v. Muro*, 347 S.W.3d 268, 275 (Tex. 2011). “Disability” means “the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage.” Tex. Lab. Code § 401.011(16); *Muro*, 347 S.W.3d at 275.

PJC 23.12 Wages—Definition for Disability, Maximum Medical Improvement, and Impairment

“Wages” includes all forms of remuneration payable for a given period to an employee for personal services. The term includes the market value of board, lodging, laundry, fuel, and any other advantage that can be estimated in money that the employee receives from the employer as part of the employee’s remuneration.

COMMENT

When to use. PJC 23.12 may be used when a party disputes whether the injured worker has received remuneration following a compensable injury that may affect his entitlement to, or the amount of, temporary income benefits or supplemental income benefits. See PJC 23.3 for a question on wages earned during disability.

Source of definition. The Labor Code defines “wages” as set out in PJC 23.12. Tex. Lab. Code § 401.011(43). The Administrative Code further defines the term. 28 Tex. Admin. Code § 128.1. See *Texas Mutual Insurance Co. v. Cruz*, 307 S.W.3d 925, 930 (Tex. App.—Eastland 2010, pet. denied), for further discussion.

PJC 23.13 Bona Fide Position of Employment—Definition

A “bona fide position of employment” is a position of employment that an employee is reasonably capable of performing, given the physical condition of the employee and the geographic accessibility of the position to the employee.

COMMENT

When to use. PJC 23.13 should be used when a party appeals a decision of the Division of Workers' Compensation of the Texas Department of Insurance (DWC) that concludes that the injured worker was or was not offered a bona fide position of employment. The Code requires that a bona fide offer of employment must be in writing, accompanied by a Work Status Report, and contain the location at which the employee will be working; the schedule the employee will be working; the wages that the employee will be paid; a description of the physical and time requirements that the position will entail; and a statement that the employer will only assign tasks consistent with the employee's physical abilities, knowledge, and skills and will provide training if necessary. 28 Tex. Admin. Code § 129.6. See PJC 23.4 for a question on bona fide position of employment.

Source of definition. For purposes of calculating the amount of temporary income benefits owed to an injured worker, the Code provides that “if an employee is offered a bona fide position of employment that the employee is reasonably capable of performing, given the physical condition of the employee and the geographic accessibility of the position to the employee, the employee's weekly earnings after the injury are equal to the weekly wage for the position offered to the employee.” Tex. Lab. Code § 408.103(e). See also Tex. Lab. Code § 408.144(c), which contains a similar provision for supplemental income benefits cases.

PJC 23.14 Maximum Medical Improvement—Definition

“Maximum medical improvement” means the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated.

COMMENT

When to use. PJC 23.14 may be used when a party disputes whether the injured worker has reached maximum medical improvement and may be evaluated for an impairment rating. For questions on maximum medical improvement, see PJC 23.7–23.9.

Source of definition. The date of maximum medical improvement is fixed when an examining doctor certifies that no further material recovery or lasting improvement can reasonably be anticipated. *Rodriguez v. Service Lloyds Insurance Co.*, 997 S.W.2d 248, 253 (Tex. 1999); Tex. Lab. Code §§ 401.011(30), 408.123.

PJC 23.15 **Impairment—Definition**

“Impairment” means any anatomic or functional abnormality or loss existing after maximum medical improvement that results from a compensable injury and is reasonably presumed to be permanent.

COMMENT

When to use. PJC 23.15 may be used when a party has appealed a decision of the Division of Workers' Compensation of the Texas Department of Insurance (DWC) involving the validity, existence, or percentage of an injured worker's impairment rating. See PJC 23.8 and 23.9 for questions on impairment rating.

Source of definition. Concepts of “impairment” and “disability” are not interchangeable under the Workers' Compensation Act. “Impairment” means “any anatomic or functional abnormality or loss existing after maximum medical improvement that results from a compensable injury and is reasonably presumed to be permanent.” Tex. Lab. Code § 401.011(23); *Insurance Co. of State of Pennsylvania v. Muro*, 347 S.W.3d 268, 275 (Tex. 2011). “Disability” means “the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage.” Tex. Lab. Code § 401.011(16); *Muro*, 347 S.W.3d at 275.

PJC 23.16 Impairment Rating—Definition

“Impairment rating” means the percentage of permanent impairment of the whole body resulting from a compensable injury.

COMMENT

When to use. PJC 23.16 may be used when a party appeals a decision of the Division of Workers' Compensation of the Texas Department of Insurance (DWC) about the validity, existence, or percentage of an injured worker's impairment rating. See PJC 23.8 and 23.9 for questions on impairment rating.

Source of definition. An employee receives impairment income benefits according to the employee's impairment rating, which is the percentage of the whole body's permanent impairment. See Tex. Lab. Code §§ 401.011(24), 408.124. To determine the impairment rating, an examining doctor evaluates the permanent effect of the employee's injury under statutory guidelines. See Tex. Lab. Code § 408.124. The doctor expresses the rating as a percentage of permanent impairment to the whole body. See Tex. Lab. Code §§ 401.011(24), 408.124. The greater this percentage, the greater the amount of impairment income benefits the employee receives. See *Texas Workers' Compensation Commission v. Garcia*, 893 S.W.2d 504, 514 (Tex. 1995).

The impairment rating may also qualify an injured worker for supplemental income benefits, which provide long-term disability compensation. See Tex. Lab. Code § 408.142; see also *Garcia*, 893 S.W.2d at 514.

A doctor will not certify an impairment rating until the employee reaches “maximum medical improvement,” the point at which the employee's injury will not materially improve with additional rest or treatment. *Rodriguez v. Service Lloyds Insurance Co.*, 997 S.W.2d 248, 253 (Tex. 1999); Tex. Lab. Code § 408.121.



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PJC 24.1 Supplemental Income Benefits Entitlement (Comment)

Supplemental income benefits (SIBs) provide long-term disability compensation. They become payable upon termination of the impairment benefits if the claimant has an impairment rating of 15 percent or more and has not returned to work or has returned to work and is earning less than 80 percent of his preinjury average weekly wage as a direct result of the impairment. Tex. Lab. Code § 408.142; *see also Texas Workers' Compensation Commission v. Garcia*, 893 S.W.2d 504, 514 (Tex. 1995).

Other criteria for entitlement to SIBs are that the claimant has not elected to commute a portion of the impairment income benefit under Tex. Lab. Code § 408.128 and has demonstrated an active effort to obtain employment in accordance with Tex. Lab. Code § 408.1415. Tex. Lab. Code § 408.142(a). Tex. Lab. Code § 408.1415 directs the Commissioner of Workers' Compensation of the Texas Department of Insurance (DWC) to adopt compliance standards that define an active job search effort. To satisfy this obligation, the commissioner adopted 28 Tex. Admin. Code § 130.102 (Rule 130.102). That rule applies whether the award of SIBs is made by the DWC or by the court. *See* Tex. Lab. Code § 408.141. Accordingly, some of the questions and definitions in this chapter are derived from Rule 130.102.

SIBs are adjudicated and paid on a quarterly basis. An employee's entitlement to SIBs is determined retrospectively and paid prospectively. An employee's active job search must take place during each week of the qualifying period for the quarter in dispute. The qualifying period is a thirteen-week period that begins fifteen weeks before the thirteen-week SIBs quarter in dispute starts. The last two weeks of the fifteen-week period is the "filing period," during which the employee documents his efforts, completes an application, and files that application with the insurance carrier.

The DWC, rather than the court, will calculate the applicable beginning and ending dates for each disputed SIBs qualifying period or quarter.

The statute and rules produce a scheme under which the jury must evaluate an employee's job search efforts during each thirteen-week qualifying period in order to qualify for benefit payments during each subsequent thirteen-week compensable quarter. Questions, definitions, and instructions should use the beginning and ending dates determined by the DWC for questions concerning an employee's efforts during each qualifying period for any particular disputed SIBs quarter.

PJC 24.2 **Reduced Earnings as Direct Result of Impairment—
Question**

PJC 24.2A **Reduced Earnings as Direct Result of Impairment—
Question—When Claimant Appeals**

QUESTION _____

Did *Paul Payne* earn less than 80 percent of his average weekly wage between [date] and [date] as a direct result of his impairment from the compensable injury?

Answer “Yes” or “No.”

Answer: _____

PJC 24.2B **Reduced Earnings as Direct Result of Impairment—
Question—When Carrier Appeals**

QUESTION _____

Did *Paul Payne* not earn less than 80 percent of his average weekly wage between [date] and [date] as a direct result of his impairment from the compensable injury?

Answer “Yes” or “No.”

Answer: _____

COMMENT

When to use. PJC 24.2 should be used when a party appeals a decision of the Division of Workers' Compensation of the Texas Department of Insurance (DWC) that the injured worker did or did not earn less than 80 percent of his average weekly wage during a supplemental income benefits (SIBs) qualifying period as a direct result of his impairment from the compensable injury. The dates used in PJC 24.2 should reflect the dates of the SIBs qualifying period in dispute, as determined by the Division's decision and order. See PJC 24.3 for an accompanying instruction.

Burden of proof. The burden of proof should be placed appropriately in accordance with the decision of the appeals panel. See PJC 15.1.

Source of questions and instructions. PJC 24.2 is derived from Tex. Lab. Code § 408.142 and 28 Tex. Admin. Code § 130.102(b), (c).

**PJC 24.3 Reduced Earnings as Direct Result of Impairment—
Instruction**

An injured employee has earned less than 80 percent of the injured employee's average weekly wage as a direct result of the impairment from the compensable injury if the impairment from the compensable injury is a producing cause of the reduced earnings.

COMMENT

When to use. PJC 24.3 should accompany PJC 24.2 if there is a question whether the injured employee has earned less than 80 percent of his preinjury average weekly wage during the applicable qualifying period as a direct result of the impairment from the compensable injury.

Source of instruction. PJC 24.3 is derived from 28 Tex. Admin. Code § 130.102(c).

PJC 24.4 **WORKERS' COMPENSATION—SUPPLEMENTAL INCOME BENEFITS**

PJC 24.4 **Active Effort to Obtain Employment—Question**

PJC 24.4A **Active Effort to Obtain Employment—Question—When
Claimant Appeals**

QUESTION _____

Did *Paul Payne* demonstrate an active effort to obtain employment each week between [date] and [date]?

Answer “Yes” or “No.”

Answer: _____

PJC 24.4B **Active Effort to Obtain Employment—Question—When
Carrier Appeals**

QUESTION _____

Did *Paul Payne* fail to demonstrate an active effort to obtain employment each week between [date] and [date]?

Answer “Yes” or “No.”

Answer: _____

COMMENT

When to use. PJC 24.4 should be used to appeal a decision of the Division of Worker’s Compensation of the Texas Department of Insurance (DWC) that the injured worker did or did not make an active effort to obtain employment each week of the qualifying period. The dates used in PJC 24.4 should reflect the dates of the supplemental income benefits qualifying period in dispute, as determined by the Division’s decision and order.

Burden of proof. The burden of proof should be placed appropriately in accordance with the decision of the appeals panel. See PJC 15.1.

Source of question. PJC 24.4 is derived from Tex. Lab. Code §§ 408.1415, 408.142 and 28 Tex. Admin. Code § 130.102(c), (d).

PJC 24.5 Active Effort to Obtain Employment—Instruction

An injured employee has demonstrated an active effort to obtain employment when he has met at least one of the following work search requirements each week during the entire qualifying period:

1. He has returned to work in a position that is commensurate with the injured employee's ability to work;
2. He has actively participated in a vocational rehabilitation program;
3. He has actively participated in work search efforts conducted through the Texas Workforce Commission;
4. He has performed active work search efforts documented by job applications;
5. He has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor that specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work; or
6. He has not met at least one of the work search requirements in any week during the qualifying period but had reasonable grounds for failing to comply with that work search requirement.

An injured employee shall provide documentation sufficient to establish that he or she has actively participated in a vocational rehabilitation program during the qualifying period.

An injured employee shall provide documentation sufficient to establish that he or she has, each week during the qualifying period, made [*number*] job applications or work search contacts.

COMMENT

When to use. PJC 24.5 should be submitted in conjunction with PJC 24.4 if there is a question whether the injured employee has demonstrated an active effort to obtain employment during the applicable qualifying period. Only the elements applicable to the particular case should be included.

The instructions on documentation requirements regarding vocational rehabilitation and work search requirements should also be included as appropriate. The number of weekly job applications or work source contacts is consistent with the number of such contacts established by the Texas Workforce Commission for receipt of unemploy-

ment benefits in the injured employee's county of residence. *See* 28 Tex. Admin. Code § 130.102(f).

Source of instruction. PJC 24.5 is derived from 28 Tex. Admin. Code § 130.102(d), (e), (f).

PJC 24.6 Refusal of Vocational Rehabilitation Services—Question**PJC 24.6A Refusal of Vocational Rehabilitation Services—
Question—When Claimant Appeals**

QUESTION _____

Did *Paul Payne* accept vocational rehabilitation services or cooperate with vocational rehabilitation services provided between [date] and [date]?

Answer “Yes” or “No.”

Answer: _____

**PJC 24.6B Refusal of Vocational Rehabilitation Services—
Question—When Carrier Appeals**

QUESTION _____

Did *Paul Payne* refuse vocational rehabilitation services or refuse to cooperate with vocational rehabilitation services provided at any time between [date] and [date]?

Answer “Yes” or “No.”

Answer: _____

COMMENT

When to use. PJC 24.6 should be used when a party appeals a decision of the Division of Workers' Compensation of the Texas Department of Insurance (DWC) that the injured worker did or did not refuse the services of or refuse to cooperate with services provided by the Texas Department of Assistive and Rehabilitation Services or by a private provider of vocational rehabilitation services. The dates used in PJC 24.6 should reflect the dates of the supplemental income benefits (SIBs) qualifying period in dispute, as determined by the Division's decision and order.

Burden of proof. The burden of proof should be placed appropriately in accordance with the decision of the appeals panel. See PJC 15.1.

Source of questions and instructions. An injured employee, in a vocational rehabilitation program as defined in 28 Tex. Admin. Code § 130.101(8), who refuses vocational rehabilitation services or refuses to cooperate with services provided at any

time during a qualifying period is not entitled to SIBs for the related quarter. *See* Tex. Lab. Code § 408.150; 28 Tex. Admin. Code § 130.106(c).

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PJC 25.1 Injury Causing Total Loss of Use—Question**PJC 25.1A Injury Causing Total Loss of Use—Question—When Claimant Appeals**

QUESTION _____

Did *Paul Payne* suffer an injury to his [*insert applicable body part*] that was a producing cause of the total loss of use of his [*insert applicable body part*]?

“Producing cause” means a cause that is a substantial factor in bringing about an injury, and without which the injury would not have occurred. There may be more than one producing cause.

“Total loss of use” of a member of the body exists whenever by reason of injury such member no longer possesses any substantial utility as a member of the body or the condition of the injured member is such that the worker cannot get and keep employment requiring the use of such member.

Answer “Yes” or “No.”

Answer: _____

PJC 25.1B Injury Causing Total Loss of Use—Question—When Carrier Appeals

QUESTION _____

Did *Paul Payne* not suffer an injury to his [*insert applicable body part*] that was a producing cause of the total loss of use of his [*insert applicable body part*]?

[*Insert PJC 25.1A definitions of “producing cause” and “total loss of use.”*]

Answer “Yes” or “No.”

Answer: _____

COMMENT

When to use. PJC 25.1 should be used if there is a dispute about the existence of an injury to the enumerated members found in Tex. Lab. Code § 408.161(a)(2)–(5) or

a dispute about the nature or extent of the worker's total loss of use from any of those enumerated members.

Limitation on trial court's jurisdiction. The court's jurisdiction is limited to the issues decided by the appeals panel and on which judicial review has been sought. Tex. Lab. Code § 410.302(b). Accordingly, the trial court possesses jurisdiction over and should submit questions regarding only the extent-of-injury issues that were decided by the DWC and that have been appealed by an aggrieved party. See *Texas Mutual Insurance Co. v. Ruttiger*, 381 S.W.3d 430, 436–37 (Tex. 2012).

Burden of proof. The burden of proof should be placed appropriately in accordance with the decision of the appeals panel. See PJC 15.1.

Producing cause. Regarding the definition of “producing cause,” see PJC 23.10.

Total loss of use. Regarding the definition of “total loss of use,” see *Dallas National Insurance Co. v. De La Cruz*, 470 S.W.3d 56, 58 (Tex. 2015); *Insurance Co. of State of Pennsylvania v. Muro*, 347 S.W.3d 268 (Tex. 2011) (citing *Travelers Insurance Co. v. Seabolt*, 361 S.W.2d 204, 206 (Tex. 1962)). Under *Seabolt*, it is preferable to use the phrase “total loss of use” rather than merely “loss of use” in the question. *Seabolt*, 361 S.W.2d at 205.

In *Muro*, the supreme court recognized that the legislature has limited the award of lifetime income benefits to the specific injuries and body parts enumerated in Tex. Lab. Code § 408.161 and that nothing in the statute authorizes the substitution of other injuries or body parts for those enumerated. *Muro*, 347 S.W.3d at 276. While the injury to the statutory body part may be direct or indirect, the injury must extend to and impair the statutory body part itself to implicate section 408.161. *Muro*, 347 S.W.3d at 276.

Submission in single question. The submission of total incapacity and producing cause in a single question has been approved. *Consolidated Underwriters v. Whittaker*, 413 S.W.2d 709, 714–15 (Tex. Civ. App.—Tyler 1967, writ ref'd n.r.e.). Submission of total loss of use and producing cause in one question should also be proper.

**PJC 25.2 Producing Cause of Total Loss of Use of Two Members—
Question**

**PJC 25.2A Producing Cause of Total Loss of Use of Two Members—
Question—When Claimant Appeals**

QUESTION _____

Is the compensable injury a producing cause of any total loss of use of *Paul Payne's* [*insert first applicable body part*]?

[Insert PJC 25.1A definitions of "producing cause" and "total loss of use."]

Answer "Yes" or "No."

Answer: _____

QUESTION _____

Is the compensable injury a producing cause of any total loss of use of *Paul Payne's* [*insert second applicable body part*]?

[Insert PJC 25.1A definitions of "producing cause" and "total loss of use."]

Answer "Yes" or "No."

Answer: _____

**PJC 25.2B Producing Cause of Total Loss of Use of Two Members—
Question—When Carrier Appeals**

QUESTION _____

Is the compensable injury not a producing cause of any total loss of use of *Paul Payne's* [*insert first applicable body part*]?

[Insert PJC 25.1A definitions of "producing cause" and "total loss of use."]

Answer "Yes" or "No."

Answer: _____

QUESTION _____

Is the compensable injury not a producing cause of any total loss of use of *Paul Payne's* [insert second applicable body part]?

[Insert PJC 25.1A definitions of "producing cause" and "total loss of use."]

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 25.2 should be used in a lifetime income benefits case when the existence of an injury described in Tex. Lab. Code § 408.161(a)(2)–(5) is not in dispute but there is a question whether such an injury was a producing cause of a total loss of use of the member. The question should track the statutory language depending on whether the injury results in total loss of use of both hands at or above the wrist, both feet at or above the ankle, or one hand at or above the wrist and one foot at or above the ankle. See Tex. Lab. Code § 408.161(a)(2)–(4).

Limitation on trial court's jurisdiction. The court's jurisdiction is limited to the issues decided by the appeals panel and on which judicial review has been sought. Tex. Lab. Code § 410.302(b). Accordingly, the trial court possesses jurisdiction over and should submit questions regarding only the extent-of-injury issues that were decided by the DWC and that have been appealed by an aggrieved party. See *Texas Mutual Insurance Co. v. Ruttiger*, 381 S.W.3d 430, 436–37 (Tex. 2012).

Combined submission. When the dispute is not whether total loss of use exists to both members but rather whether the injury was a producing cause of such loss of use, the following question may be submitted:

Is the compensable injury a producing cause of any total loss of use of *Paul Payne's* [insert first applicable body part] and *Paul Payne's* [insert second applicable body part]?

The question should track the statutory language as noted in the comment above entitled "When to use." See Tex. Lab. Code § 408.161(a)(2)–(4).

Burden of proof. The burden of proof should be placed appropriately in accordance with the decision of the appeals panel. See PJC 15.1.

Producing cause. Regarding the definition of "producing cause," see PJC 23.10.

Total loss of use. Regarding the definition of "total loss of use," see PJC 25.1.

PJC 25.3 Duration of Total Loss of Use—Question

If you answered “Yes” to Question [25.2A], then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

What is the duration of such total loss of use?

[*first body part*] [*second body part*]

Beginning date: _____

Ending date or “Permanent”: _____

COMMENT

When to use. PJC 25.3 should be used if there is a dispute about the beginning date or the permanence of an injury found to have produced a total loss of use of any of the members enumerated in Tex. Lab. Code § 408.161(a)(2)–(5). If the evidence indicates a different beginning or ending date for each member alleged to have resulted in total loss of use, separate questions should be posed for each such member.

Burden of proof. The burden of proof should be placed appropriately in accordance with the decision of the appeals panel. See PJC 15.1.

Source of question and instructions. Tex. Lab. Code § 408.161(a)(2)–(5) refers to the loss of certain enumerated members. Such losses, by their nature, are permanent. Tex. Lab. Code § 408.161(b) provides that the total and permanent loss of use of a body part is the loss of that body part. Thus, a claim for lifetime income benefits under a total loss of use theory requires a finding (or conclusive evidence) that any such total loss of use be permanent. *Region XIX Service Center v. Banda*, 343 S.W.3d 480, 485 (Tex. App.—El Paso 2011, pet. denied).

The Code states that “[a]n employee is entitled to timely and accurate income benefits as provided by this chapter” and further requires that income benefits be paid weekly without action by the commissioner. Tex. Lab. Code § 408.081(a), (b). Lifetime income benefits are to be paid when the permanent loss of use of certain body parts occurs. Tex. Lab. Code § 408.161. Thus, when viewed in context, the statute requires that carriers begin paying benefits to employees once eligibility is established. There is no restriction on when such eligibility may be established. Rather, the statute contemplates that whenever a compensable injury leads to a qualifying permanent loss of use, eligibility occurs and the employee becomes entitled to permanent lifetime income benefits. Tex. Lab. Code § 408.161(a); *Liberty Mutual Insurance Co. v. Adcock*, 412 S.W.3d 492 (Tex. 2013). See also *Mid-Century Insurance Co. v. Texas*

Workers' Compensation Commission, 187 S.W.3d 754, 759 (Tex. App.—Austin 2006, no pet.), in which the court stated:

The legislature specifically reserved [lifetime income benefits] for seven enumerated categories of injurious conditions that include both immediately qualifying injuries and those evolving or deteriorating over time. It further provided that LIBs are payable “for” those conditions . . . [and] become payable if and when an employee becomes eligible to receive them Once an employee is adjudicated eligible to receive LIBs, . . . LIBs should be paid retroactively to the date the employee first became eligible.

Mid-Century Insurance Co., 187 S.W.3d at 759.

PJC 25.4 Total and Permanent Loss of Vision—Question**PJC 25.4A Total and Permanent Loss of Vision—Question—When
Claimant Appeals**

QUESTION _____

Did *Paul Payne* suffer an injury that is a producing cause of the total loss of sight in both eyes?

[Insert PJC 25.1A definitions of “producing cause” and “total loss of use.”]

Answer “Yes” or “No.”

Answer: _____

**PJC 25.4B Total and Permanent Loss of Vision—Question—When
Carrier Appeals**

QUESTION _____

Did *Paul Payne* not suffer an injury that is a producing cause of the total loss of sight in both eyes?

[Insert PJC 25.1A definitions of “producing cause” and “total loss of use.”]

Answer “Yes” or “No.”

Answer: _____

COMMENT

When to use. PJC 25.4 should be used if there is a dispute about the nature or extent of a bilateral eye injury. *See* Tex. Lab. Code § 408.161(a)(1). If there is a dispute about the existence of an injury to the worker’s eyes, PJC 25.4 should be adjusted to determine whether such an injury exists. *See Dallas National Insurance Co. v. De La Cruz*, 470 S.W.3d 56, 58 (Tex. 2015); *Insurance Co. of State of Pennsylvania v. Muro*, 347 S.W.3d 268 (Tex. 2011).

Burden of proof. The burden of proof should be placed appropriately in accordance with the decision of the appeals panel. *See* PJC 15.1.

Duration of total loss of sight. If the evidence does not conclusively establish the beginning date or duration of loss of sight, PJC 25.4 should be modified to obtain such findings.

Submission in single question. The submission of total incapacity and producing cause in a single question has been approved. *Consolidated Underwriters v. Whittaker*, 413 S.W.2d 709, 714–15 (Tex. Civ. App.—Tyler 1967, writ ref'd n.r.e.). Submission of injury and producing cause in one question should also be proper.

PJC 25.5 Spinal Injury Resulting in Paralysis—Question**PJC 25.5A Spinal Injury Resulting in Paralysis—Question—When Claimant Appeals**

QUESTION _____

Did *Paul Payne* suffer an injury to the spine that is a producing cause of permanent and complete paralysis of *his* [*insert first applicable body part*]?

[*Insert PJC 25.1A definition of “producing cause.”*]

Answer “Yes” or “No.”

Answer: _____

QUESTION _____

Did *Paul Payne* suffer an injury to the spine that is a producing cause of permanent and complete paralysis of *his* [*insert second applicable body part*]?

[*Insert PJC 25.1A definition of “producing cause.”*]

Answer “Yes” or “No.”

Answer: _____

PJC 25.5B Spinal Injury Resulting in Paralysis—Question—When Carrier Appeals

QUESTION _____

Did *Paul Payne* not suffer an injury to the spine that is a producing cause of permanent and complete paralysis of *his* [*insert first applicable body part*]?

[*Insert PJC 25.1A definition of “producing cause.”*]

Answer “Yes” or “No.”

Answer: _____

QUESTION _____

Did *Paul Payne* not suffer an injury to the spine that is a producing cause of permanent and complete paralysis of *his* [*insert second applicable body part*]?

[*Insert PJC 25.1A definition of "producing cause."*]

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 25.5 should be used if there is a dispute about the existence, nature, or extent of an injury to the spine that results in permanent and complete paralysis of both arms, both legs, or one arm and one leg. The questions should track the statutory language depending on whether the injury results in paralysis of both arms, both legs, or one arm and one leg. *See* Tex. Lab. Code § 408.161(a)(5).

Burden of proof. The burden of proof should be placed appropriately in accordance with the decision of the appeals panel. *See* PJC 15.1.

Beginning date of permanent and complete paralysis. If the evidence does not conclusively establish the beginning date of permanent and complete paralysis, PJC 25.5 should be modified to obtain such findings.

Submission in single question. The submission of total incapacity and producing cause in a single question has been approved. *Consolidated Underwriters v. Whittaker*, 413 S.W.2d 709, 714–15 (Tex. Civ. App.—Tyler 1967, writ ref'd n.r.e.). Submission of injury and producing cause in one question should also be proper.

PJC 25.6 Incurable Insanity or Imbecility—Question**PJC 25.6A Incurable Insanity or Imbecility—Question—When Claimant Appeals**

QUESTION _____

Did *Paul Payne* suffer a physically traumatic injury to the brain that is a producing cause of incurable insanity or imbecility?

[Insert PJC 25.1A definition of “producing cause.”]

Answer “Yes” or “No.”

Answer: _____

PJC 25.6B Incurable Insanity or Imbecility—Question—When Carrier Appeals

QUESTION _____

Did *Paul Payne* not suffer a physically traumatic injury to the brain that is a producing cause of incurable insanity or imbecility?

[Insert PJC 25.1A definition of “producing cause.”]

Answer “Yes” or “No.”

Answer: _____

COMMENT

When to use. PJC 25.6 should be used if there is a dispute about the existence, nature, or extent of a physically traumatic injury to the brain that results in incurable insanity or imbecility. See Tex. Lab. Code § 408.161(a)(6).

Burden of proof. The burden of proof should be placed appropriately in accordance with the decision of the appeals panel. See PJC 15.1.

Beginning date of incurable insanity or imbecility. If the evidence does not conclusively establish the beginning date of incurable insanity or imbecility, PJC 25.6 should be modified to obtain such findings.

Submission in single question. The submission of total incapacity and producing cause in a single question has been approved. *Consolidated Underwriters v. Whittaker*, 413 S.W.2d 709, 714–15 (Tex. Civ. App.—Tyler 1967, writ ref'd n.r.e.). Submission of injury and producing cause in one question should also be proper.

PJC 25.7 Burns to the Body—Question**PJC 25.7A Burns to the Body—Question—When Claimant Appeals**

QUESTION _____

Did *Paul Payne* suffer an injury that is a producing cause of third-degree burns that cover at least 40 percent of his body and require grafting?

[Insert PJC 25.1A definition of “producing cause.”]

Answer “Yes” or “No.”

Answer: _____

PJC 25.7B Burns to the Body—Question—When Carrier Appeals

QUESTION _____

Did *Paul Payne* not suffer an injury that is a producing cause of third-degree burns that cover at least 40 percent of his body and require grafting?

[Insert PJC 25.1A definition of “producing cause.”]

Answer “Yes” or “No.”

Answer: _____

COMMENT

When to use. PJC 25.7 should be used if there is a dispute about the existence, nature, or extent of an injury that results in third-degree burns that cover at least 40 percent of the claimant’s body and require grafting or third-degree burns covering the majority of either both hands or one hand and the face. The question should track the statutory language. *See* Tex. Lab. Code § 408.161(a)(7).

Burden of proof. The burden of proof should be placed appropriately in accordance with the decision of the appeals panel. *See* PJC 15.1.

Beginning date of the requisite burns. If the evidence does not conclusively establish the beginning date of the requisite burns, PJC 25.7 should be modified to obtain such findings.

Submission in single question. The submission of total incapacity and producing cause in a single question has been approved. *Consolidated Underwriters v. Whittaker*,

413 S.W.2d 709, 714-15 (Tex. Civ. App.—Tyler 1967, writ ref'd n.r.e.). Submission of injury and producing cause in one question should also be proper.

CHAPTER 26 WORKERS' COMPENSATION—DEATH BENEFITS

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**PJC 26.1 Death—Injury in Course and Scope of Employment
Producing Death—Question****PJC 26.1A Death—Injury in Course and Scope of Employment
Producing Death—Question—When Claimant Appeals**

QUESTION _____

Did *Paul Payne* in the course and scope of his employment on January 1, 2012, receive an injury that was a producing cause of *his* death?

“Injury” means damage or harm to the physical structure of the body and such diseases or infections as naturally result from such damage or harm.

“Injury” also includes any incitement, acceleration, or aggravation of any disease, infirmity, or condition, previously or subsequently existing, by reason of such damage or harm.

“Injury” also includes any damage or harm arising out of the medical or surgical treatment instituted to cure or relieve the effects of the injury.

“Injury” also includes any mental or nervous disorder that impairs the use or control of the physical structure of the body.

“Injury in the course and scope of employment” means any injury suffered while engaged in an activity of any kind or character that has to do with and originates in the work, business, trade, or profession of the employer, and that is performed by an employee while engaged in or about the furtherance of the affairs or business of his employer, whether on the employer’s premises or elsewhere.

“Producing cause” means a cause from an injury or condition that is a substantial factor in bringing about death, and without which the death would not have occurred. There may be more than one producing cause.

Answer “Yes” or “No.”

Answer: _____

**PJC 26.1B Death—Injury in Course and Scope of Employment
Producing Death—Question—When Carrier Appeals**

QUESTION _____

Did *Paul Payne* in the course and scope of his employment on January 1, 2012, not receive an injury that was a producing cause of his death?

[Insert PJC 26.1A definitions of “injury” and “producing cause.”]

Answer “Yes” or “No.”

Answer: _____

COMMENT

When to use. PJC 26.1 may be submitted when a party appeals a decision of the Division of Workers' Compensation of the Texas Department of Insurance (DWC) involving a dispute over whether a compensable injury has resulted in the injured employee's death. This question submits several elements in one inquiry as provided for in Tex. R. Civ. P. 277. Any elements of the question or definitions not in issue should be omitted.

If the injury is not partly physical but instead solely mental, then in addition to the definition covering mental or nervous disorder the following definition should be submitted:

“Physical structure of the body” means the entire body and mind functioning together.

See *GTE Southwest v. Bruce*, 998 S.W.2d 605 (Tex. 1999); *Bailey v. American General Insurance Co.*, 279 S.W.2d 315, 319 (Tex. 1955). Moreover, if the mental or nervous disorder is not accompanied by or does not follow a physical injury, then (in order to avoid the noncompensability of an occupational disease caused by repetitive *mental* traumatic activities) the following additional question should be submitted:

Did the injury result from an undesigned, unexpected event that was traceable to a definite time, place, and cause?

See *GTE Southwest*, 998 S.W.2d at 609–11; *Transportation Insurance Co. v. Maksyn*, 580 S.W.2d 334, 338 (Tex. 1979).

Burden of proof. The burden of proof should be placed appropriately in accordance with the decision of the appeals panel. See PJC 15.1.

Source of question. The question is based on Tex. Lab. Code §§ 406.031, 401.011(12).

Source of definitions. For the definition of “producing cause,” see PJC 23.10. For the definitions of “injury” and “injury in the course and scope of employment,” see PJC 17.1.

Course and scope of employment. To be compensable, the injury resulting in death must be in the course and scope of employment. If there is a question whether the deceased was an employee, an appropriate question should be submitted. See chapter 16 in this volume.

Evidence of more than one injury. If there is evidence of more than one injury, the date of the injury inquired about should be included in the question.

Date of injury. If there is a question about the exact date of injury, the words “or about” should be inserted after the word “on” in the question.

PJC 26.2 Death—Eligible Spouse—Question**PJC 26.2A Death—Eligible Spouse—Question—When Claimant Appeals**

QUESTION _____

Was *Mary Payne* an eligible spouse of *Paul Payne* at the time of *Paul Payne's* death?

“Eligible spouse” means the surviving spouse of a deceased employee unless the spouse abandoned the employee for longer than the year immediately preceding the death without good cause.

“Abandonment” occurs if one spouse voluntarily leaves the bed and board of the other spouse with the intention not to return and live as husband and wife and perform his or her marital obligations toward the other spouse.

An “eligible spouse” includes a party to an informal marriage.

An “informal marriage” is established by evidence that a man and woman agreed to be married and after the agreement they lived together in Texas as husband and wife and there represented to others that they were married.

Answer “Yes” or “No.”

Answer: _____

PJC 26.2B Death—Eligible Spouse—Question—When Carrier Appeals

QUESTION _____

Was *Mary Payne* not an eligible spouse of *Paul Payne* at the time of *Paul Payne's* death?

[Insert PJC 26.2A definitions of “eligible spouse,” “abandonment,” and “informal marriage.”]

Answer “Yes” or “No.”

Answer: _____

COMMENT

When to use. PJC 26.2 may be submitted when a party appeals a decision of the Division of Workers' Compensation of the Texas Department of Insurance (DWC) involving a dispute over whether a party to the proceedings is an eligible spouse. An eligible spouse includes a party to an informal marriage. *See* Tex. Fam. Code § 2.401(2). If the evidence raises a fact question regarding the existence of an informal marriage, the definition regarding informal marriage should be included. Any element of the definitions not in issue should be omitted.

Burden of proof. The burden of proof should be placed appropriately in accordance with the decision of the appeals panel. *See* PJC 15.1.

Source of question. PJC 26.2 is based on Tex. Lab. Code § 408.182.

Source of definitions. *See* Tex. Lab. Code § 408.182; Tex. Fam. Code § 2.401; *Foreman v. Security Insurance Co. of Hartford*, 15 S.W.3d 214, 215–16 (Tex. App.—Texarkana 2000, no pet.). *See also Jackson v. Jackson*, 470 S.W.2d 276, 279 (Tex. Civ. App.—Fort Worth 1971, writ ref'd n.r.e.), regarding abandonment.

PJC 26.3 Death—Eligible Child—Question**PJC 26.3A Death—Eligible Child—Question—When Claimant Appeals**

QUESTION _____

Was *Paul Payne, Jr.* an eligible child of *Paul Payne* at the time of *Paul Payne's* death?

“Eligible child” means a child of the deceased employee if the child is—

1. a minor;
2. enrolled as a full-time student in an accredited educational institution and is less than twenty-five years of age; or
3. a dependent of the deceased employee at the time of the employee's death.

An “eligible child” includes an adoptive child and a dependent stepchild.

A “dependent” of the deceased employee is an individual who receives a regular or recurring economic benefit that contributes substantially to the individual's welfare and livelihood.

If an economic benefit was provided in the form of goods and services, the value shall be the market value of the same or similar goods and services in the same vicinity.

“Full-time student” means a person enrolled in at least the minimum course load required to qualify as full-time at the particular educational institution and in the particular course of study.

“Accredited educational institution” means an institution that provides a recognized course or courses of instruction and leads to the conference of a diploma, degree, or other recognized certification of completion at the conclusion of the course of study. An accredited educational institution includes, but is not limited to, a high school, a college or university, and a trade school.

Answer “Yes” or “No.”

Answer: _____

PJC 26.3B Death—Eligible Child—Question—When Carrier Appeals

QUESTION _____

Was *Paul Payne, Jr.* not an eligible child of *Paul Payne* at the time of *Paul Payne's* death?

[Insert PJC 26.3A definitions of "eligible child," "dependent," "full-time student," and "accredited educational institution."]

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 26.3 may be submitted when a party appeals a decision of the Division of Workers' Compensation of the Texas Department of Insurance (DWC) involving a dispute over whether a party to the proceedings is an eligible child. Any element of the definitions not in issue should be omitted.

Burden of proof. The burden of proof should be placed appropriately in accordance with the decision of the appeals panel. See PJC 15.1.

Source of question. PJC 26.3 is based on Tex. Lab. Code § 408.182.

Source of definitions. See Tex. Lab. Code §§ 408.182, 401.011(14); 28 Tex. Admin. Code §§ 132.2, 132.4, 132.15.

PJC 26.4 Death—Eligible Grandchild—Question**PJC 26.4A Death—Eligible Grandchild—Question—When
Claimant Appeals**

QUESTION _____

Was *Charlie Payne* an eligible grandchild of *Paul Payne* at the time of *Paul Payne's* death?

“Eligible grandchild” means a grandchild of the deceased employee who is a dependent of the deceased employee and whose parent is not an eligible child.

A “dependent” of the deceased employee is an individual who receives a regular or recurring economic benefit that contributes substantially to the individual’s welfare and livelihood.

If an economic benefit was provided in the form of goods and services, the value shall be the market value of the same or similar goods and services in the same vicinity.

Answer “Yes” or “No.”

Answer: _____

**PJC 26.4B Death—Eligible Grandchild—Question—When Carrier
Appeals**

QUESTION _____

Was *Charlie Payne* not an eligible grandchild of *Paul Payne* at the time of *Paul Payne's* death?

[Insert PJC 26.4 definitions of “eligible grandchild” and “dependent.”]

Answer “Yes” or “No.”

Answer: _____

COMMENT

When to use. PJC 26.4 may be submitted when a party appeals a decision of the Division of Workers’ Compensation of the Texas Department of Insurance (DWC)

involving a dispute over whether a party to the proceedings is an eligible grandchild. Any element of the definitions not in issue should be omitted.

Burden of proof. The burden of proof should be placed appropriately in accordance with the decision of the appeals panel. See PJC 15.1.

Source of question. PJC 26.4 is based on Tex. Lab. Code § 408.182.

Source of definitions. See Tex. Lab. Code §§ 408.182, 401.011(14); 28 Tex. Admin. Code §§ 132.2, 132.5.

Eligible siblings or grandparents. If there is no eligible spouse and there are no eligible children or grandchildren, the death benefits shall be paid in equal shares to surviving dependents of the deceased employee who are parents, stepparents, siblings, or grandparents of the deceased. Tex. Lab. Code § 408.182. PJC 26.4 may be modified for such cases accordingly.

PJC 26.5 Death—Eligible Parent—Question**PJC 26.5A Death—Eligible Parent—Question—When Claimant Appeals**

QUESTION 1

Was *Frank Payne* an eligible parent of *Paul Payne* at the time of *Paul Payne's* death?

“Eligible parent” means the mother or father of a deceased employee, including an adoptive parent or a stepparent. The term does not include a parent whose parental rights have been terminated.

Answer “Yes” or “No.”

Answer: _____

If you answered “Yes” to Question 1, then answer Question 2. Otherwise, do not answer Question 2.

QUESTION 2

Was *Frank Payne* a dependent of *Paul Payne* at the time of *Paul Payne's* death?

A “dependent” of the deceased employee is an individual who receives a regular or recurring economic benefit that contributes substantially to the individual's welfare and livelihood.

If an economic benefit was provided in the form of goods and services, the value shall be the market value of the same or similar goods and services in the same vicinity.

Answer “Yes” or “No.”

Answer: _____

PJC 26.5B Death—Eligible Parent—Question—When Carrier Appeals

QUESTION _____

Was *Frank Payne* not an eligible parent of *Paul Payne* at the time of *Paul Payne's* death?

[Insert PJC 26.5A definition of "eligible parent."]

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 26.5 may be submitted when a party appeals a decision of the Division of Workers' Compensation of the Texas Department of Insurance (DWC) involving a dispute over whether a party to the proceedings is an eligible parent. An eligible parent who is not dependent on the decedent on the date of the decedent's death is entitled to receive death benefits, but in a reduced amount. Question 2 of PJC 26.5 should be conditionally submitted when this issue is presented. Any element of the definitions not in issue should be omitted.

Burden of proof. The burden of proof should be placed appropriately in accordance with the decision of the appeals panel. See PJC 15.1.

Source of question. PJC 26.5 is based on Tex. Lab. Code § 408.182.

Source of definitions. See Tex. Lab. Code §§ 408.182, 401.011(14); 28 Tex. Admin. Code §§ 132.2, 132.6.

Caveat: nondependent parents. Tex. Lab. Code § 408.182(d-1) allows nondependent parents to recover death benefits not to exceed 104 weeks if there is no eligible spouse, no eligible child, no eligible grandchildren, and there are no surviving dependents of the deceased employee who are parents, siblings, or grandparents of the deceased.

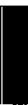


CHAPTER 27

WORKERS' COMPENSATION—ATTORNEY'S FEES

PJC 27.1

Claimant's Attorney's Fees—Question 377



PJC 27.1 Claimant's Attorney's Fees—Question**QUESTION _____**

Find the reasonable and necessary attorney's fees incurred by *Paul Payne* as a result of the insurance carrier's appeal from the decision of the Texas Department of Insurance, Division of Workers' Compensation.

1. For representation in the trial court:

Answer: _____

2. For representation through appeal to the court of appeals:

Answer: _____

3. For representation at the petition for review stage in the Supreme Court of Texas:

Answer: _____

4. For representation at the merits briefing stage in the Supreme Court of Texas:

Answer: _____

5. For representation through oral argument and the completion of proceedings in the Supreme Court of Texas:

Answer: _____

COMMENT

When to use. PJC 27.1 should be used if the insurance carrier sought judicial review of a final decision of the appeals panel regarding compensability or eligibility for, or the amount of, income or death benefits and the claimant offers evidence of the reasonableness and necessity of such fees. Only the applicable elements should be submitted.

Burden of proof. The burden of proof should be placed on the plaintiff. *See* Tex. Lab. Code § 408.221; *Transcontinental Insurance Co. v. Crump*, 330 S.W.3d 211, 231–32 (Tex. 2010).

Source of question and instruction. PJC 27.1 is based on Tex. Lab. Code § 408.221 and *Crump*, 330 S.W.3d at 231–32. In *Crump*, the court held that a carrier is entitled to submit the disputed issue of the reasonableness and necessity of a claim-

ant's attorney's fees to a jury, which will consider the factors contained in Tex. Lab. Code § 408.221(d). If the claimant prevails only on some issues, after the verdict is announced the court will apportion the fees according to the factors in subsection (d) and will award reasonable and necessary attorney's fees to the claimant's attorney only for those issues on which the claimant prevails. *Crump*, 330 S.W.3d at 231. If the claimant totally prevails, the verdict as to the amount for which the carrier is liable is then subject only to the court's approval based on the factors in subsection (d). *Crump*, 330 S.W.3d at 231. Regardless of whether the claimant partially or totally prevails, the jury's verdict as to the fee amount "must be approved by the . . . court." *Crump*, 330 S.W.3d at 232 (citing Tex. Lab. Code § 408.221(a)). When a claimant pays his attorney's fees out of his benefits recovery, the amount approved by the court is solely within its discretion based on the attorney's time and expenses according to written evidence presented to the court and according to subsection (d)'s factors. *Crump*, 330 S.W.3d at 232.

Factors to consider. Tex. Lab. Code § 408.221(d) states that in approving an attorney's fee seven factors should be considered. In an appropriate case, the following instruction may be used, but only the factors that are relevant in the particular case should be included:

Factors to consider in determining a reasonable fee include—

1. the time and labor required;
2. the novelty and difficulty of the questions involved;
3. the skill required to perform the legal services properly;
4. the fee customarily charged in the locality for similar legal services;
5. the amount involved in the controversy;
6. the benefits to the claimant that the attorney is responsible for securing; and
7. the experience and ability of the attorney performing the services.

Stages of representation. Depending on the evidence in a particular case, the court may submit a different number of elements and change the descriptions of the stages of representation.

Conditional appellate fees. Any prospective award of appellate attorney's fees may be conditionally determined by the trial court. *Old Republic Insurance Co. v. Warren*, 33 S.W.3d 428, 435 (Tex. App.—Fort Worth 2000, pet. denied).

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**PJC 28.1 Personal Injury Damages—Instruction Conditioning
Damages Questions on Liability**

Answer Question _____ [*the damages question*] if you answered “Yes” for *Don Davis* to Question _____ [*the liability question*] and answered:

1. “No” for *Paul Payne* to Question _____ [*the liability question*], or
2. 50 percent or less for *Paul Payne* to Question _____ [*the percentage causation question*].

Otherwise, do not answer Question _____ [*the damages question*].

COMMENT

When to use. PJC 28.1 may be used to condition answers to personal injury damages questions on a finding of liability as permitted by Tex. R. Civ. P. 277. See *H.E. Butt Grocery Co. v. Bilotto*, 985 S.W.2d 22 (Tex. 1998).

Multiple plaintiffs. For multiple plaintiffs, the instruction should precede the cluster of damages questions for each plaintiff.

Multiple defendants. For multiple defendants, *Don Davis* should be replaced with *any of the defendants*.

Products liability cases. In products liability causes of action accruing before September 1, 1995, the phrase *50 percent* should be replaced with *60 percent*.

**PJC 28.2 Personal Injury Damages—Instruction on Whether
Compensatory Damages Are Subject to Income Taxes—
Actions Filed on or after September 1, 2003**

You are instructed that any monetary recovery for [*list each element of economic or noneconomic damages that is subject to taxation*] is subject to [*federal or state*] income taxes. Any recovery for [*list each element of economic or noneconomic damages that is not subject to taxation*] is not subject to [*federal or state*] income taxes.

COMMENT

When to use. PJC 28.2 should be submitted with the damages question in any action filed on or after September 1, 2003, in which a claimant seeks recovery for loss of earnings, loss of earning capacity, loss of contributions of a pecuniary value, or loss of inheritance. Whether an element of damages is taxable depends on the substantive tax law pertaining to each cause of action.

Source of instruction. See Tex. Civ. Prac. & Rem. Code § 18.091(b).

PJC 28.3 Personal Injury Damages—Basic Question

QUESTION _____

What sum of money, if paid now in cash, would fairly and reasonably compensate *Paul Payne* for *his* injuries, if any, that resulted from the occurrence in question?

Consider the elements of damages listed below and none other. Consider each element separately. Do not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any. Do not include interest on any amount of damages you find.

Answer separately, in dollars and cents, for damages, if any. Do not reduce the amounts, if any, in your answers because of the negligence, if any, of *Paul Payne*. Any recovery will be determined by the court when it applies the law to your answers at the time of judgment.

1. Physical pain and mental anguish sustained in the past.

Answer: _____

2. Physical pain and mental anguish that, in reasonable probability, *Paul Payne* will sustain in the future.

Answer: _____

3. Loss of earning capacity sustained in the past.

Answer: _____

4. Loss of earning capacity that, in reasonable probability, *Paul Payne* will sustain in the future.

Answer: _____

5. Disfigurement sustained in the past.

Answer: _____

6. Disfigurement that, in reasonable probability, *Paul Payne* will sustain in the future.

Answer: _____

7. Physical impairment sustained in the past.

Answer: _____

8. Physical impairment that, in reasonable probability, *Paul Payne* will sustain in the future.

Answer: _____

9. *Medical care expenses* incurred in the past.

Answer: _____

10. *Medical care expenses* that, in reasonable probability, *Paul Payne* will incur in the future.

Answer: _____

COMMENT

When to use. PJC 28.3 is the basic general damages question to be used in the usual personal injury case. The above question separately submits past and future damages. *See* Tex. Fin. Code § 304.1045. The “do not compensate twice” instruction is adapted from *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 770 (Tex. 2003).

Separate answer for each element. For actions filed on or after September 1, 2003, the Code requires economic damages to be determined “separately from the amount of other compensatory damages.” Tex. Civ. Prac. & Rem. Code § 41.008(a). Also, separate submission of elements may be called for in the following instances.

Insufficient evidence. Broad-form submission of multiple elements of damages may lead to harmful error if there is a proper objection raising insufficiency of the evidence to support one or more of the elements submitted. *Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2002). If there is any question about the sufficiency of the evidence to support one or more of the elements, the Committee recommends that the elements of damages be separately submitted to the jury as above.

Community property. Separate answers may also be required if someone other than the injured party is entitled to part of the recovery. For example, certain elements of personal injury damages are community property. Tex. Fam. Code § 3.001(3); *see also Graham v. Franco*, 488 S.W.2d 390 (Tex. 1972).

Exemplary damages. For actions accruing on or after September 1, 1995, and filed before September 1, 2003, if exemplary damages are sought in addition to compensatory damages, it is necessary to obtain separate answers for economic and non-

economic damages. "Economic damages" means "compensatory damages for pecuniary loss; the term does not include exemplary damages or damages for physical pain and mental anguish, loss of consortium, disfigurement, physical impairment, or loss of companionship and society." See Acts 1995, 74th Leg., R.S., ch. 19, § 1 (S.B. 25), eff. Sept. 1, 1995.

Broad-form submission of elements. Where separate answers are not required, the following broad-form submission may be appropriate.

QUESTION _____

What sum of money, if paid now in cash, would fairly and reasonably compensate *Paul Payne* for *his* injuries, if any, that resulted from the occurrence in question?

Consider the elements of damages listed below and none other. Consider each element separately. Do not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any. Do not include interest on any amount of damages you find.

1. Physical pain and mental anguish.
2. Loss of earning capacity.
3. Disfigurement.
4. Physical impairment.
5. *Medical care expenses.*

Do not reduce the amounts, if any, in your answers because of the negligence, if any, of *Paul Payne*. Any recovery will be determined by the court when it applies the law to your answers at the time of judgment.

Answer in dollars and cents for damages, if any, that—
were sustained in the past;

Answer: _____

in reasonable probability will be sustained in the future.

Answer: _____

One element only. Only those elements for which evidence is introduced should be submitted. If only one element is submitted, the question should read—

What sum of money, if paid now in cash, would fairly and reasonably compensate *Paul Payne* for *medical care expenses*, if any, resulting from the occurrence in question?

The phrase *medical care expenses* may be replaced by any applicable element.

No evidence of physical pain. If there is no evidence of physical pain but there is evidence of compensable mental anguish, element 1 should submit only “mental anguish.” See *St. Elizabeth Hospital v. Garrard*, 730 S.W.2d 649 (Tex. 1987), *overruled on other grounds by Boyles v. Kerr*, 855 S.W.2d 593, 595–96 (Tex. 1993).

Caveat on submitting physical pain and mental anguish together. To avoid concerns about improperly mixing valid and invalid elements of damages (see *Harris County*, 96 S.W.3d at 234), when the sufficiency of the evidence to support either physical pain or mental anguish is in question, separate submission of those items may avoid the need for a new trial if a sufficiency challenge is upheld on appeal. See *Katy Springs & Manufacturing, Inc. v. Favalora*, 476 S.W.3d 579, 597–99, 610–11 (Tex. App.—Houston [14th Dist.] 2015, pet. denied) (although challenge to separate submission was waived, separate awards allowed modification of judgment, rather than remand for new trial, where evidence of future mental anguish was legally insufficient). The Texas Supreme Court has yet to decide the issue.

Medical care expenses in actions filed on or after September 1, 2003. For actions filed on or after September 1, 2003, recovery of medical or health-care expenses is governed by section 41.0105 of the Texas Civil Practice and Remedies Code. This statute provides, “In addition to any other limitation under law, recovery of medical or health care expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant.” Tex. Civ. Prac. & Rem. Code § 41.0105. See also *Haygood v. De Escabedo*, 356 S.W.3d 390 (Tex. 2011) (interpreting section 41.0105).

Reasonable expenses and necessary medical care. If there is a question whether medical expenses are reasonable or medical care is necessary, the following should be substituted for elements 9 and 10:

9. Reasonable expenses of necessary *medical care* incurred in the past.

Answer: _____

10. Reasonable expenses of necessary *medical care* that, in reasonable probability, *Paul Payne* will incur in the future.

Answer: _____

Medical care expenses may also be replaced by the specific items (e.g., *physicians' fees, dental fees, chiropractic fees, hospital bills, medicine expenses, nursing services' fees*) raised by the evidence. In an appropriate case, the phrase *health-care expenses* may replace *medical care expenses*.

Existence of injury. Under *Texas & Pacific Railway v. Van Zandt*, 317 S.W.2d 528 (Tex. 1958), a separate question was required on the existence of injury if a genuine dispute was raised by the evidence. Now, given the preference for broad-form submission, *Lemos v. Montez*, 680 S.W.2d 798 (Tex. 1984), the Committee believes that a separate question is no longer necessary. The issue, if raised, would be subsumed under the damages question, which includes the phrase "if any." Further, if there is doubt whether the injury resulted from the occurrence in question or from another cause, an exclusionary instruction may be appropriate. See PJC 28.8 (for other condition), 28.9 (for preexisting condition), and 28.10 (for failure to mitigate).

Bystander injury. This question may be used to submit a bystander's injury in appropriate cases. *But see Edinburg Hospital Authority v. Trevino*, 941 S.W.2d 76 (Tex. 1997).

Physical impairment and lost earning capacity. If both physical impairment and lost earning capacity are included, the instruction in the second paragraph of the question will avoid a possible double recovery. *See Golden Eagle Archery, Inc.*, 116 S.W.3d at 770 (quoting *French v. Grigsby*, 567 S.W.2d 604, 608 (Tex. Civ. App.—Beaumont), writ ref'd n.r.e. per curiam, 571 S.W.2d 867 (Tex. 1978)).

Physical impairment and disfigurement. For the difference between physical impairment and cosmetic disfigurement, see *Texas Farm Products v. Leva*, 535 S.W.2d 953 (Tex. Civ. App.—Tyler 1976, no writ). See also *Golden Eagle Archery, Inc.*, 116 S.W.3d at 772, for a discussion of physical impairment.

Loss of earning capacity. The proper measure of damages in a personal injury case is loss of earning capacity, rather than loss of earnings in the past. *Dallas Railway & Terminal v. Guthrie*, 210 S.W.2d 550 (Tex. 1948); *T.J. Allen Distributing Co. v. Leatherwood*, 648 S.W.2d 773 (Tex. App.—Beaumont 1983, writ ref'd n.r.e.). However, loss of earnings has been allowed in some cases. *See Home Interiors & Gifts v. Veliz*, 695 S.W.2d 35 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.); *Carr v. Galvan*, 650 S.W.2d 864 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.). For loss of earning capacity if the plaintiff is self-employed, see *King v. Skelly*, 452 S.W.2d 691 (Tex. 1970), and *Bonney v. San Antonio Transit Co.*, 325 S.W.2d 117 (Tex. 1959).

Future medical care. If the need for future medical care is established by the evidence, it may be considered even if there is no evidence of the exact dollar amount of the future care. *Hughett v. Dwyre*, 624 S.W.2d 401 (Tex. App.—Amarillo 1981, writ ref'd n.r.e.); *City of Houston v. Moore*, 389 S.W.2d 545 (Tex. Civ. App.—Houston 1965, writ ref'd n.r.e.).

Instruction not to reduce amounts because of plaintiff's negligence. If the plaintiff's negligence is also in question, the exclusionary instruction given in this PJC immediately before the answer blanks is proper. *See* Tex. Civ. Prac. & Rem. Code § 33.001; Tex. R. Civ. P. 277. This instruction should be omitted if there is no claim of the plaintiff's negligence. Also, if an exclusionary instruction for failure to mitigate damages is required, this instruction should be modified. *See* PJC 28.10.

PJC 28.4 Personal Injury Damages—Injury of Spouse

QUESTION _____

What sum of money, if paid now in cash, would fairly and reasonably compensate *Mary Payne* for injuries, if any, to *her husband, Paul Payne*, that resulted from the occurrence in question?

Consider the elements of damages listed below and none other. Consider each element separately. Do not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any. Do not include interest on any amount of damages you find.

Answer separately, in dollars and cents, for damages, if any. Do not reduce the amounts, if any, in your answers because of the negligence, if any, of *Paul Payne*. Any recovery will be determined by the court when it applies the law to your answers at the time of judgment.

1. Loss of household services sustained in the past.

“Household services” means the performance of household and domestic duties by a spouse to the marriage.

Answer: _____

2. Loss of household services that, in reasonable probability, *Mary Payne* will sustain in the future.

Answer: _____

3. Loss of consortium sustained in the past.

“Consortium” means the mutual right of the husband and wife to that affection, solace, comfort, companionship, society, assistance, sexual relations, emotional support, love, and felicity necessary to a successful marriage.

Answer: _____

4. Loss of consortium that, in reasonable probability, *Mary Payne* will sustain in the future.

Answer: _____

COMMENT

When to use. PJC 28.4 should be used to submit questions on damages arising out of injury to a party's spouse. The above question separately submits past and future damages. See Tex. Fin. Code § 304.1045. The "do not compensate twice" instruction is adapted from *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 770 (Tex. 2003).

Loss of consortium. A spouse has a cause of action for loss of consortium as a result of physical injuries caused to the other spouse by the negligence of a third party. *Browning-Ferris Industries, Inc. v. Lieck*, 881 S.W.2d 288 (Tex. 1994); *Whittlesey v. Miller*, 572 S.W.2d 665 (Tex. 1978); see also *Reed Tool Co. v. Copelin*, 610 S.W.2d 736 (Tex. 1980). An action for loss of consortium in favor of the deprived spouse against an intentional tortfeasor-employer of the impaired spouse has been recognized. *Copelin*, 610 S.W.2d 736.

Loss of household services. A spouse has a cause of action for loss of services of the other spouse, which is separate from any cause of action for loss of consortium. *Whittlesey*, 572 S.W.2d at 666 & n.2. "Services" generally means the performance by a spouse of household and domestic duties. *Whittlesey*, 572 S.W.2d at 666 n.2. These damages result from a physical injury to the spouse caused by the negligence of a third party. See, e.g., *EDCO Production, Inc. v. Hernandez*, 794 S.W.2d 69, 77 (Tex. App.—San Antonio 1990, writ denied).

Separate property. A recovery for loss of services and loss of consortium is the separate property of the spouse claiming the loss. *Whittlesey*, 572 S.W.2d at 669.

Derivative damages subject to reduction because of negligence of injured spouse. Because a claim for loss of services and consortium is derived from the injured spouse's claim, the recovery by the noninjured spouse will be reduced by the percentage of contributory negligence that caused the occurrence attributable to the injured spouse. See *Copelin*, 610 S.W.2d at 738–39.

Separate answer for each element. For actions filed on or after September 1, 2003, the Code requires economic damages to be determined "separately from the amount of other compensatory damages." Tex. Civ. Prac. & Rem. Code § 41.008(a). Also, separate submission of elements may be called for in the following instances.

Insufficient evidence. Broad-form submission of multiple elements of damages may lead to harmful error if there is a proper objection raising insufficiency of the evidence to support one or more of the elements submitted. *Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2002). If there is any question about the sufficiency of the evidence to support one or more of the elements, the Committee recommends that the elements of damages be separately submitted to the jury as above.

Exemplary damages. For actions accruing on or after September 1, 1995, and filed before September 1, 2003, if exemplary damages are sought in addition to com-

pensatory damages, it is necessary to obtain separate answers for economic and non-economic damages. "Economic damages" means "compensatory damages for pecuniary loss; the term does not include exemplary damages or damages for physical pain and mental anguish, loss of consortium, disfigurement, physical impairment, or loss of companionship and society." *See* Acts 1995, 74th Leg., R.S., ch. 19, § 1 (S.B. 25), eff. Sept. 1, 1995.

Broad-form submission of elements. For an example of a broad-form submission of damages elements, see PJC 28.3 comment, "Broad-form submission of elements."

Instruction not to reduce amounts because of negligence of injured spouse. If the negligence of the injured spouse is also in question, the exclusionary instruction given in this PJC immediately before the answer blanks is proper. *See* Tex. Civ. Prac. & Rem. Code § 33.001; Tex. R. Civ. P. 277. This instruction should be omitted if there is no claim of the injured spouse's negligence. Also, if an exclusionary instruction for failure to mitigate damages is required, this instruction should be modified. *See* PJC 28.10.

PJC 28.5 Personal Injury Damages—Injury of Minor Child

QUESTION _____

What sum of money, if paid now in cash, would provide fair and reasonable compensation for *Paul Payne, Jr.*'s injuries, if any, that resulted from the occurrence in question?

Consider the elements of damages listed below and none other. Consider each element separately. Do not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any. Do not include interest on any amount of damages you find.

Answer separately, in dollars and cents, for damages, if any. Do not reduce the amounts, if any, in your answers because of the negligence, if any, of *Paul Payne, Jr.* Any recovery will be determined by the court when it applies the law to your answers at the time of judgment.

1. Physical pain and mental anguish sustained in the past.

Answer: _____

2. Physical pain and mental anguish that, in reasonable probability, *Paul Payne, Jr.* will sustain in the future.

Answer: _____

3. Loss of earning capacity sustained in the past.

Answer: _____

4. Loss of earning capacity that, in reasonable probability, will be sustained in the future from the time of trial until *Paul Payne, Jr.* reaches the age of eighteen years.

Answer: _____

5. Loss of earning capacity that, in reasonable probability, will be sustained in the future after *Paul Payne, Jr.* reaches the age of eighteen years.

Answer: _____

6. Disfigurement sustained in the past.

Answer: _____

7. Disfigurement that, in reasonable probability, *Paul Payne, Jr.* will sustain in the future.

Answer: _____

8. Physical impairment sustained in the past.

Answer: _____

9. Physical impairment that, in reasonable probability, *Paul Payne, Jr.* will sustain in the future.

Answer: _____

10. *Medical care expenses* incurred in the past on behalf of *Paul Payne, Jr.*

Answer: _____

11. *Medical care expenses* that, in reasonable probability, will be incurred on behalf of *Paul Payne, Jr.* in the future from the time of trial until *Paul Payne, Jr.* reaches the age of eighteen years.

Answer: _____

12. *Medical care expenses* that, in reasonable probability, *Paul Payne, Jr.* will incur after *he* reaches the age of eighteen years.

Answer: _____

COMMENT

When to use. PJC 28.5 should be used to submit questions on damages arising out of injuries to a minor child. The above question separately submits past and future damages. See Tex. Fin. Code § 304.1045. The “do not compensate twice” instruction is adapted from *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 770 (Tex. 2003).

Notice of change to prior versions. This question differs from prior versions as well as from most other damages questions in that it does not ask the jury to determine the amount that would “compensate *Paul Payne, Jr.* for *his* injuries, if any.” Because PJC 28.5 includes elements of damages (e.g., loss of earning capacity and medical care expenses incurred before the age of majority) that reflect injuries to the minor, but that are not recoverable by the minor, the Committee felt that a revision was necessary to remove any reference to the person being compensated. Rather, a more accurate

question, given the potentially differing rights to recovery, is one that asks the jury to value the injuries themselves without regard to who is to be compensated for those injuries.

Question assumes child under eighteen. The form of PJC 28.5 assumes the minor has not reached the age of eighteen years by the time of trial. If he has, elements 4, 5, 11, and 12 must be changed to inquire about (1) damages in the past up to the age of eighteen, (2) damages from the time the minor reaches the age of eighteen to the time of trial, and (3) damages from trial into the future.

Caveat on submitting physical pain and mental anguish together. To avoid concerns about improperly mixing valid and invalid elements of damages (*see Harris County v. Smith*, 96 S.W.3d 230, 234 (Tex. 2002)), when the sufficiency of the evidence to support either physical pain or mental anguish is in question, separate submission of those items may avoid the need for a new trial if a sufficiency challenge is upheld on appeal. *See Katy Springs & Manufacturing, Inc. v. Favalora*, 476 S.W.3d 579, 597–99, 610–11 (Tex. App.—Houston [14th Dist.] 2015, pet. denied) (although challenge to separate submission was waived, separate awards allowed modification of judgment, rather than remand for new trial, where evidence of future mental anguish was legally insufficient). The Texas Supreme Court has yet to decide the issue.

Medical care expenses in actions filed on or after September 1, 2003. For actions filed on or after September 1, 2003, recovery of medical or health-care expenses is governed by section 41.0105 of the Texas Civil Practice and Remedies Code. This statute provides, “In addition to any other limitation under law, recovery of medical or health care expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant.” Tex. Civ. Prac. & Rem. Code § 41.0105. *See also Haygood v. De Escabedo*, 356 S.W.3d 390 (Tex. 2011) (interpreting section 41.0105).

Medical expenses, lost earnings recoverable only by parents. Because the right to recover medical costs incurred on behalf of an unemancipated minor and loss of an unemancipated minor’s earnings belong to the parents or the minor’s estate, the elements of future loss of earning capacity and future medical expenses should be separated further to distinguish between those damages incurred before and after the child reaches the age of eighteen. Tex. Fam. Code § 151.001(5); *Sax v. Votteler*, 648 S.W.2d 661, 666 (Tex. 1983). *See* PJC 28.6 for submission of the parents’ loss of services of a minor child. There may be times when the minor may recover medical expenses up to age eighteen. *See Sax*, 648 S.W.2d at 666.

Separate answer for each element. For actions filed on or after September 1, 2003, the Code requires economic damages to be determined “separately from the amount of other compensatory damages.” Tex. Civ. Prac. & Rem. Code § 41.008(a). Also, separate submission of elements may be called for in the following instances.

Insufficient evidence. Broad-form submission of multiple elements of damages may lead to harmful error if there is a proper objection raising insufficiency of the evidence to support one or more of the elements submitted. *Harris County*, 96 S.W.3d 230. If there is any question about the sufficiency of the evidence to support one or more of the elements, the Committee recommends that the elements of damages be separately submitted to the jury as above.

Exemplary damages. For actions accruing on or after September 1, 1995, and filed before September 1, 2003, if exemplary damages are sought in addition to compensatory damages, it is necessary to obtain separate answers for economic and non-economic damages. “Economic damages” means “compensatory damages for pecuniary loss; the term does not include exemplary damages or damages for physical pain and mental anguish, loss of consortium, disfigurement, physical impairment, or loss of companionship and society.” See Acts 1995, 74th Leg., R.S., ch. 19, § 1 (S.B. 25), eff. Sept. 1, 1995.

Broad-form submission of elements. For an example of a broad-form submission of damages elements, see PJC 28.3 comment, “Broad-form submission of elements.”

Instruction not to reduce amounts because of plaintiff’s negligence. If the plaintiff’s negligence is also in question, the exclusionary instruction given in this PJC immediately before the elements of damages is proper. See Tex. Civ. Prac. & Rem. Code § 33.001; Tex. R. Civ. P. 277. This instruction should be omitted if there is no claim of the plaintiff’s negligence. Also, if an exclusionary instruction for failure to mitigate damages is required, this instruction should be modified. See PJC 28.10.

Scope of comments to PJC 28.5. The comments to PJC 28.5 address only those issues particular to the submission of personal injury damages of a minor child. For additional issues that may arise with respect to the submission of personal injury damages generally, see PJC 28.3.

**PJC 28.6 Personal Injury Damages—Parents' Loss of Services of
Minor Child**

QUESTION _____

What sum of money, if paid now in cash, would fairly and reasonably compensate *Paul Payne* and *Mary Payne* for their loss, if any, of *Paul Payne, Jr.*'s services, as a result of the occurrence in question?

Do not include interest on any amount of damages you find.

Answer in dollars and cents for damages, if any, that—

were sustained in the past;

Answer: _____

in reasonable probability will be sustained in the future until age eighteen.

Answer: _____

COMMENT

When to use. PJC 28.6 submits the question for damages for the parents' loss of services of a minor child. The parents' right to the child's services and earnings is codified in Tex. Fam. Code § 151.001(5).

Texas law permits a parent to recover damages for the loss of services of a minor child. The following types of services are examples from the case law: running errands, doing yard work, washing dishes, sweeping floors, mopping, dusting, washing windows, making minor repairs, cutting hay, feeding animals, washing laundry, performing farmwork, shining shoes, ironing clothes, caddying, harvesting watermelons, and generally helping around the house. *See, e.g., Green v. Hale*, 590 S.W.2d 231, 235–36 (Tex. Civ. App.—Tyler 1979, no writ); *Gonzalez v. Hansen*, 505 S.W.2d 613, 615 (Tex. Civ. App.—San Antonio 1974, no writ).

“The monetary value of a child's lost services is not akin to and cannot be measured with the mathematical precision of lost wages.” *Pojar v. Cifre*, 199 S.W.3d 317, 347 (Tex. App.—Corpus Christi 2006, pet. denied). But the plaintiff must present some evidence of the performance and value of lost services and must also establish that the injury at issue precludes performance of such services. *Pojar*, 199 S.W.3d at 347; *Gonzalez*, 505 S.W.2d at 615.

See PJC 28.5 for the elements of personal injury damages to a minor child. The above question separately submits past and future damages. *See* Tex. Fin. Code § 304.1045.

No parents' recovery of "consortium-type" damages in injury cases. The supreme court has declined to recognize a claim for "consortium-type" damages from injury not resulting in death to a minor child. *See Roberts v. Williamson*, 111 S.W.3d 113, 120 (Tex. 2003).

PJC 28.7 Personal Injury Damages—Exemplary Damages**PJC 28.7A Personal Injury Damages—Exemplary Damages—
Causes of Action Accruing before September 1, 1995**

If you answered “Yes” to Question _____ [4.2 or other question authorizing potential recovery of punitive damages], then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

What sum of money, if any, should be assessed against *Don Davis* and awarded to *Paul Payne* as exemplary damages for the conduct found in response to Question _____ [question authorizing potential recovery of punitive damages]?

“Exemplary damages” means an amount that you may in your discretion award as an example to others and as a penalty or by way of punishment, in addition to any amount that you may have found as actual damages.

Factors to consider in awarding exemplary damages, if any, are—

1. The nature of the wrong.
2. The character of the conduct involved.
3. The degree of culpability of the wrongdoer.
4. The situation and sensibilities of the parties concerned.
5. The extent to which such conduct offends a public sense of justice and propriety.

Answer in dollars and cents, if any.

Answer: _____

**PJC 28.7B Personal Injury Damages—Exemplary Damages—
Causes of Action Accruing on or after September 1, 1995,
and Filed before September 1, 2003**

If you answered “Yes” to Question _____ [4.2 or other question authorizing potential recovery of punitive damages], then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

What sum of money, if any, should be assessed against *Don Davis* and awarded to *Paul Payne* as exemplary damages for the conduct found in response to Question _____ [question authorizing potential recovery of punitive damages]?

“Exemplary damages” means any damages awarded as a penalty or by way of punishment. Exemplary damages includes punitive damages.

In determining the amount of exemplary damages you shall consider evidence, if any, relating to—

1. The nature of the wrong.
2. The character of the conduct involved.
3. The degree of culpability of the wrongdoer.
4. The situation and sensibilities of the parties concerned.
5. The extent to which such conduct offends a public sense of justice and propriety.
6. The net worth of *Don Davis*.

Answer in dollars and cents, if any.

Answer: _____

**PJC 28.7C Personal Injury Damages—Exemplary Damages—
Actions Filed on or after September 1, 2003**

Answer the following question regarding *Don Davis* only if you unanimously answered “Yes” to Question _____ [4.2 or other question authorizing potential recovery of punitive damages] regarding *Don Davis*. Otherwise, do not answer the following question regarding *Don Davis*.

QUESTION _____

You are instructed that you must unanimously agree on the amount of any award of exemplary damages.

What sum of money, if any, should be assessed against *Don Davis* and awarded to *Paul Payne* as exemplary damages for the conduct found in response to Question _____ [question authorizing potential recovery of punitive damages]?

“Exemplary damages” means any damages awarded as a penalty or by way of punishment but not for compensatory purposes. Exemplary damages includes punitive damages.

Factors to consider in awarding exemplary damages, if any, are—

1. The nature of the wrong.
2. The character of the conduct involved.
3. The degree of culpability of the wrongdoer.
4. The situation and sensibilities of the parties concerned.
5. The extent to which such conduct offends a public sense of justice and propriety.
6. The net worth of *Don Davis*.

Answer in dollars and cents, if any.

Answer: _____

COMMENT

When to use. PJC 28.7A should be used to submit the question for exemplary damages for personal injury in causes of action accruing before September 1, 1995. PJC 28.7B should be used for causes of action accruing on or after September 1, 1995, and filed before September 1, 2003. For actions filed on or after September 1, 2003, PJC 28.7C should be used.

Conditioned on finding of gross negligence or malice. PJC 28.7 must be conditioned on an affirmative finding to a question on gross negligence, malice, or other finding justifying exemplary damages. *See* Acts 1987, 70th Leg., 1st C.S., ch. 2, § 2.12 (S.B. 5), eff. Sept. 2, 1987, *amended by* Acts 1995, 74th Leg., R.S., ch. 19, § 1 (S.B. 25), eff. Sept. 1, 1995; Tex. Civ. Prac. & Rem. Code §§ 41.001(7), (11), 41.003(a), (d).

Bifurcation. No predicated instruction is necessary if the court has granted a timely motion to bifurcate trial of the amount of punitive damages. *See* Tex. Civ. Prac. & Rem. Code § 41.009. If in the first phase of the trial the jury finds facts establishing a predicate for an award of exemplary damages, then a separate phase two jury charge should be prepared. In such a phase two jury charge, PJC 28.7A, 28.7B, or 28.7C (as appropriate) should be submitted with both PJC 1.3 and 1.4 instructions.

Multiple defendants. There should be a separate question and answer blank for each defendant against whom exemplary damages are sought. Tex. Civ. Prac. & Rem. Code § 41.006.

Multiple plaintiffs. For multiple plaintiffs, a separate finding on the amount of exemplary damages awarded to each is appropriate. Tex. Civ. Prac. & Rem. Code § 71.010. For an example of submission of apportionment in a single question, see PJC 29.8.

Prejudgment interest not recoverable. Prejudgment interest on exemplary damages is not recoverable. Tex. Civ. Prac. & Rem. Code § 41.007.

Limits on conduct to be considered. A defendant's lawful out-of-state conduct may be probative on some issues in a punitive damages case in certain circumstances. *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 422 (2003). When such evidence is admitted, "[a] jury must be instructed . . . that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." *Campbell*, 538 U.S. at 422.

Evidence that the defendant's conduct caused harm to persons who are not before the court may also be probative of the reprehensibility of the defendant's conduct. *Philip Morris USA v. Williams*, 549 U.S. 346, 355–57 (2007). But when this type of evidence is admitted, the jury should be instructed that it may not punish a defendant for the harm the defendant's conduct allegedly caused to other persons who are not parties to the litigation. *Williams*, 549 U.S. at 357.

Neither *Campbell* nor *Williams* specifies whether the requirement of an instruction means a limiting instruction at the time the evidence is offered, an instruction in the jury charge, or both.

[The following paragraphs apply only to PJC 28.7A]

Source of definition and instructions. The definition of exemplary damages in PJC 28.7A is derived from *Carnation Co. v. Borner*, 610 S.W.2d 450, 454 (Tex. 1980). The "factors to consider" instructions are derived from *Alamo National Bank v. Kraus*, 616 S.W.2d 908, 910 (Tex. 1981), and approved in a note in *Transportation Insurance Co. v. Moriel*, 879 S.W.2d 10, 29 n.26 (Tex. 1994), *superseded on other grounds by statute as stated in U-Haul International, Inc. v. Waldrip*, 380 S.W.3d 118, 140 (Tex. 2012). Additional factors that have been considered by Texas courts in reviewing the propriety of an exemplary damages award include (1) compensation for inconvenience and attorney's fees, *Hofer v. Lavender*, 679 S.W.2d 470, 474 (Tex. 1984); (2) the net worth of the wrongdoer, *Moriel*, 879 S.W.2d at 29–30; *Lunsford v. Morris*, 746 S.W.2d 471 (Tex. 1988), *disapproved of by Walker v. Packer*, 827 S.W.2d 833 (Tex. 1992); (3) the frequency of the wrongs committed, *State Farm Mutual Automobile Insurance Co. v. Zubiate*, 808 S.W.2d 590, 604 (Tex. App.—El Paso 1991, writ denied), *disapproved on other grounds by Saenz v. Fidelity & Guaranty Insurance Underwriters*, 925 S.W.2d 607 (Tex. 1996); *see also Moriel*, 879 S.W.2d at 27 n.22; and (4) the size of the award needed to deter similar wrongs in the future, *Zubiate*, 808 S.W.2d at 604; *see also Moriel*, 879 S.W.2d at 27 n.22. If attorney's fees are sought under another theory

of recovery, they should not be included in the “factors to consider” instruction; otherwise, there exists the potential of a double recovery on this element.

These factors are included in response to Texas and U.S. Supreme Court decisions establishing that the discretion of the trier of fact to award punitive damages must be exercised within reasonable constraints. *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993); *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991); see also *Moriel*, 879 S.W.2d at 27 n.22 (multifactor jury instruction meets constitutional requirements).

[The following paragraphs apply only to PJC 28.7B and 28.7C.]

Source of definitions and instructions. The definitions of exemplary damages in PJC 28.7B and 28.7C are derived from Tex. Civ. Prac. & Rem. Code §§ 41.001(5), 41.011(a). The factors to consider are from Tex. Civ. Prac. & Rem. Code § 41.011(a). PJC 28.7C is for use in all cases filed on or after September 1, 2003. Tex. R. Civ. P. 226a.

Limitation on amount of recovery. For causes of action accruing on or after September 1, 1995, exemplary damages awarded against a defendant ordinarily 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.

Tex. Civ. Prac. & Rem. Code § 41.008(b). These limitations will not apply in favor of a defendant found to have “knowingly” or “intentionally” committed conduct described as a felony in specified sections of the Texas Penal Code. See Tex. Civ. Prac. & Rem. Code § 41.008(c), (d).

PJC 28.8 Personal Injury Damages—Exclusionary Instruction for Other Condition

Do not include any amount for any condition *that did not result from* the occurrence in question.

COMMENT

When to use—after question, before elements of damages. PJC 28.8 should be given if there is evidence that the plaintiff suffers from another physical infirmity not caused or aggravated by the occurrence in question and if the injuries flowing from the prior existing infirmity and those flowing from the defendant's negligence are closely connected and intermingled to the extent that the jury might become confused. *See Yellow Cab & Baggage Co. v. Green*, 277 S.W.2d 92 (Tex. 1955); *Dallas Railway & Terminal v. Ector*, 116 S.W.2d 683 (Tex. 1938). A tortfeasor is not liable for damages not of such general character as might reasonably have been anticipated. *See Hoke v. Poser*, 384 S.W.2d 335 (Tex. 1964); *Carey v. Pure Distributing Corp.*, 124 S.W.2d 847 (Tex. 1939). If applicable, this instruction should be given after the question and before the elements of damages (PJC 28.3–28.5, 29.3–29.6, and 30.3).

When not to use—if liability question uses “injury.” If the liability question in PJC 4.1 is submitted with the term “injury,” PJC 28.8 should not be submitted.

Aggravation of preexisting condition. If there is evidence that the occurrence in question aggravated a preexisting condition, PJC 28.9 should be given in lieu of PJC 28.8.

Substitution of *existing before*. The phrase *existing before* may be substituted for the phrase *that did not result from* if it would add clarity in the individual case.

Addition of “arising after the occurrence in question.” If there is evidence that a condition arose after the original occurrence, the phrase “arising after the occurrence in question” may be added after the words “for any condition” for added clarity.

Alternative exclusionary instruction for specific condition. If it would add clarity in the individual case, an instruction not to consider specific, named, preexisting bodily conditions would be proper, if requested, in lieu of the above instruction. *Tyler Mirror & Glass Co. v. Simpkins*, 407 S.W.2d 807 (Tex. Civ. App.—Tyler 1966, writ ref'd n.r.e.). Such an instruction should specify all preexisting conditions raised by the evidence.

PJC 28.9 Personal Injury Damages—Exclusionary Instruction for Preexisting Condition That Is Aggravated

Do not include any amount for any condition existing before the occurrence in question, except to the extent, if any, that such other condition was aggravated by any injuries that resulted from the occurrence in question.

COMMENT

When to use—after question, before elements of damages. PJC 28.9 should be given if there is evidence that the plaintiff was suffering from a prior physical infirmity that was aggravated by the occurrence in question. *See Dallas Railway & Terminal v. Ector*, 116 S.W.2d 683 (Tex. 1938); *Armellini Express Lines of Florida v. Ansley*, 605 S.W.2d 297 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.), *disapproved on other grounds by Pope v. Moore*, 711 S.W.2d 622 (Tex. 1986); *see also Yellow Cab & Baggage Co. v. Green*, 277 S.W.2d 92 (Tex. 1955). If applicable, this instruction should be given after the question and before the elements of damages (PJC 28.3–28.5, 29.3–29.6, and 30.3).

When not to use—if liability question uses “injury.” If the liability question in PJC 4.1 is submitted with the term “injury,” PJC 28.9 should not be submitted.

Discussion of standards. For discussion of the standards governing submission of this instruction, see James B. Sales, *Limitations on Recovery of Damages in Personal Injury Actions*, 18 S. Tex. L.J. 217, 238–46 (1977).

PJC 28.10 Personal Injury Damages—Exclusionary Instruction for Failure to Mitigate

Do not include any amount for any condition resulting from the failure, if any, of *Paul Payne* to have acted as a person of ordinary prudence would have done under the same or similar circumstances in caring for and treating *his* injuries, if any, that resulted from the occurrence in question.

COMMENT

When to use—after question, before elements of damages. PJC 28.10 should be given if there is evidence that the plaintiff, through want of care, aggravated or failed to mitigate the effects of his injuries resulting from the occurrence in question. *Moulton v. Alamo Ambulance Service*, 414 S.W.2d 444 (Tex. 1967); *City of Fort Worth v. Satterwhite*, 329 S.W.2d 899 (Tex. Civ. App.—Fort Worth 1959, no writ); cf. *Armellini Express Lines of Florida v. Ansley*, 605 S.W.2d 297, 309 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.) (evidence failed to show plaintiff was negligent in gaining weight after car accident and did not support submission of instruction for failure to mitigate), *disapproved on other grounds by Pope v. Moore*, 711 S.W.2d 622 (Tex. 1986).

PJC 28.10 may be used under circumstances such as those described in *Moulton*—

in which there is evidence of negligence on the part of the plaintiff in failing to consult a doctor, in failing to consult a doctor as soon as a reasonable prudent person would, in failing to follow a doctor's advice, or simply in failing properly to care for and treat injuries which do not require the attention of a doctor.

Moulton, 414 S.W.2d at 450. If applicable, the instruction should be given after the question and before the elements of damages (PJC 28.3–28.5, 29.3–29.6, and 30.3).

If liability question uses “injury.” If the liability question in PJC 4.1 is submitted with the term “injury,” PJC 4.3 should be modified to instruct the jury not to include failure to mitigate in the percentage of the injury attributable to the plaintiff. See PJC 4.3.

Modify instruction not to reduce amounts because of plaintiff's negligence. If PJC 28.10 is given, the instruction not to reduce amounts because of the negligence of the plaintiff, injured spouse, or decedent, which appears in PJC 28.3–28.5, 29.3–29.6, 30.3, and 31.3–31.4, should be modified to read—

Do not reduce the amounts in your answers because of the negligence, if any, that you have attributed to *Paul Payne* in Questions _____ [*the negligence question*] and _____ [*the percentage causa-*

tion question]. Any recovery will be determined by the court when it applies the law to your answers at the time of judgment.

Discussion of standards. For discussion of the standards governing submission of this instruction, see James B. Sales, *Limitations on Recovery of Damages in Personal Injury Actions*, 18 S. Tex. L.J. 217, 246–53 (1977).

**PJC 28.11 Personal Injury Damages—Child’s Loss of Consortium—
Question about Parent’s Injury**

If you answered “Yes” to Question[s] _____ [question(s) establishing the liability of one or more defendants], then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Was the physical injury to *Paul Payne* a serious, permanent, and disabling injury?

Answer “Yes” or “No.”

Answer: _____

COMMENT

When to use. PJC 28.11 is to be used in conjunction with PJC 28.12 to submit a cause of action for loss of parental consortium. See *Reagan v. Vaughn*, 804 S.W.2d 463 (Tex. 1991). On rehearing, the court addressed the question whether there must be a separate finding on the nature of the injury or whether an instruction would suffice. It held that when the facts are disputed “there must be a threshold finding by the finder of fact that the injury to the parent was a serious, permanent, and disabling injury before the finder of fact determines the consortium damage issue.” *Reagan*, 804 S.W.2d at 468.

Use of “physical injury.” The term “physical injury” is used because “the plaintiff must show that the defendant physically injured the child’s parent in a manner that would subject the defendant to liability.” *Reagan*, 804 S.W.2d at 467. The Committee expresses no opinion on whether a nonphysical injury could be “serious, permanent, and disabling.”

**PJC 28.12 Personal Injury Damages—Child’s Loss of Consortium—
Damages Question**

If you answered “Yes” to Question _____ [28.11], then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

What sum of money, if paid now in cash, would fairly and reasonably compensate *Polly Payne* for the loss, if any, of parental consortium that resulted from the physical injury to *Paul Payne*?

“Parental consortium” means the positive benefits flowing from the parent’s love, affection, protection, emotional support, services, companionship, care, and society.

In considering your answer to this question, you may consider only the following factors: the severity of the injury to the parent and its actual effect on the parent-child relationship, the child’s age, the nature of the child’s relationship with the parent, the child’s emotional and physical characteristics, and whether other consortium-giving relationships are available to the child.

Do not include interest on any amount of damages you find. Do not reduce the amounts, if any, in your answer because of the negligence, if any, of *Paul Payne*. Any recovery will be determined by the court when it applies the law to your answers at the time of judgment.

Answer in dollars and cents for damages, if any, that—
were sustained in the past;

Answer: _____

in reasonable probability will be sustained in the future.

Answer: _____

COMMENT

When to use. PJC 28.12 should be used in conjunction with PJC 28.11 to submit a cause of action for loss of parental consortium. See *Reagan v. Vaughn*, 804 S.W.2d 463 (Tex. 1991). The above question separately submits past and future damages. See Tex. Fin. Code § 304.1045.

Definition of “consortium”; factors to consider. The definition of “parental consortium” and the instruction on what factors the jury may consider are from *Reagan*, 804 S.W.2d at 467. Although the Committee has suggested a limiting instruction, the court left open the possibility of other factors. Depending on the facts of the case, other factors may be added to those listed above, and some of those listed above may be deleted.

Derivative damages subject to reduction because of negligence of injured parent. Because a claim for loss of parental consortium, like that for loss of spousal consortium, is derivative, any percentage of contributory negligence attributable to the parent will reduce the amount of the child’s recovery. *Reagan*, 804 S.W.2d at 468.

Instruction not to reduce amounts because of negligence of injured parent. If the negligence of the injured parent is also in question, the exclusionary instruction given in this PJC before the answer blanks is proper. *See* Tex. Civ. Prac. & Rem. Code § 33.001; Tex. R. Civ. P. 277. This instruction should be omitted if there is no claim of the injured parent’s negligence. Also, if an exclusionary instruction for failure to mitigate damages is required, this instruction should be modified. *See* PJC 28.10.

Mental anguish damages not included. A claim for loss of consortium does not include a claim for negligent infliction of mental anguish. In *Reagan* the court specifically noted that recovery for mental anguish that is not based on the wrongful death statute requires proof that the plaintiff was “among other things, located at or near the scene of the accident, and that the mental anguish resulted from a direct emotional impact upon the plaintiff from the sensory and contemporaneous observance of the incident, as contrasted with learning of the accident from others after the occurrence.” *Reagan*, 804 S.W.2d at 467. *See* PJC 28.3 comment, “Bystander injury.”



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PJC 29.1 Wrongful Death Damages—Instruction Conditioning Damages Questions on Liability

Answer Question _____ [*the damages question*] if you answered “Yes” for *Don Davis* to Question _____ [*the liability question*] and answered:

1. “No” for *Paul Payne* to Question _____ [*the liability question*], or
2. 50 percent or less for *Paul Payne* to Question _____ [*the percentage causation question*].

Otherwise, do not answer Question _____ [*the damages question*].

COMMENT

When to use. PJC 29.1 may be used to condition answers to wrongful death damages questions on a finding of liability as permitted by Tex. R. Civ. P. 277. See *H.E. Butt Grocery Co. v. Bilotto*, 985 S.W.2d 22 (Tex. 1998).

Multiple plaintiffs. For multiple plaintiffs, the instruction should precede the cluster of damages questions for each plaintiff.

Multiple defendants. For multiple defendants, *Don Davis* should be replaced with *any of the defendants*.

Products liability cases. In products liability causes of action accruing before September 1, 1995, the phrase *50 percent* should be replaced with *60 percent*.

PJC 29.2 Wrongful Death Damages—Instruction on Whether Compensatory Damages Are Subject to Income Taxes—Actions Filed on or after September 1, 2003

You are instructed that any monetary recovery for [*list each element of economic or noneconomic damages that is subject to taxation*] is subject to [*federal or state*] income taxes. Any recovery for [*list each element of economic or noneconomic damages that is not subject to taxation*] is not subject to [*federal or state*] income taxes.

COMMENT

When to use. PJC 29.2 should be submitted with the damages question in any action filed on or after September 1, 2003, in which a claimant seeks recovery for loss of earnings, loss of earning capacity, loss of contributions of a pecuniary value, or loss of inheritance. Whether an element of damages is taxable depends on the substantive tax law pertaining to each cause of action.

Source of instruction. See Tex. Civ. Prac. & Rem. Code § 18.091(b).

PJC 29.3 Wrongful Death Damages—Claim of Surviving Spouse

QUESTION _____

What sum of money, if paid now in cash, would fairly and reasonably compensate *Mary Payne* for her damages, if any, resulting from the death of *Paul Payne*?

Consider the elements of damages listed below and none other. Consider each element separately. Do not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any. Do not include interest on any amount of damages you find.

Answer separately, in dollars and cents, for damages, if any. Do not reduce the amounts, if any, in your answers because of the negligence, if any, of *Paul Payne*. Any recovery will be determined by the court when it applies the law to your answers at the time of judgment.

1. Pecuniary loss sustained in the past.

“Pecuniary loss” means the loss of the care, maintenance, support, services, advice, counsel, and reasonable contributions of a pecuniary value, *excluding loss of inheritance*, that *Mary Payne*, in reasonable probability, would have received from *Paul Payne* had he lived.

Answer: _____

2. Pecuniary loss that, in reasonable probability, will be sustained in the future.

Answer: _____

3. Loss of companionship and society sustained in the past.

“Loss of companionship and society” means the loss of the positive benefits flowing from the love, comfort, companionship, and society that *Mary Payne*, in reasonable probability, would have received from *Paul Payne* had he lived.

Answer: _____

4. Loss of companionship and society that, in reasonable probability, will be sustained in the future.

Answer: _____

5. Mental anguish sustained in the past.

“Mental anguish” means the emotional pain, torment, and suffering experienced by *Mary Payne* because of the death of *Paul Payne*.

Answer: _____

6. Mental anguish that, in reasonable probability, will be sustained in the future.

Answer: _____

In determining damages for elements 3, 4, 5, and 6, you may consider the relationship between *Mary Payne* and *Paul Payne*, their living arrangements, any extended absences from one another, the harmony of their family relations, and their common interests and activities.

7. Loss of inheritance.

“Loss of inheritance” means the loss of the present value of the assets that the deceased, in reasonable probability, would have added to the estate and left at natural death to *Mary Payne*.

Answer: _____

COMMENT

When to use. PJC 29.3 submits the claim of the surviving spouse for the death of his or her spouse in a wrongful death action under Tex. Civ. Prac. & Rem. Code §§ 71.001–.012. *Estate of Clifton v. Southern Pacific Transportation Co.*, 709 S.W.2d 636 (Tex. 1986); *see also Moore v. Lillebo*, 722 S.W.2d 683 (Tex. 1986) (definition of “mental anguish” and instruction on mental anguish and loss of companionship and society). The above question separately submits past and future damages. *See* Tex. Fin. Code § 304.1045. The “do not compensate twice” instruction is adapted from *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 770 (Tex. 2003).

Loss of inheritance. Element 7 should be included in the question if there is a claim for loss of inheritance. *Yowell v. Piper Aircraft Corp.*, 703 S.W.2d 630 (Tex. 1986). The definition is substantially as it was stated in *Yowell* at 633. There may be instances in which additional definitions and instructions are appropriate because, under the laws of intestacy, whether property is left to a surviving spouse could depend on whether the property is separate or community, on whether the property is real or personal, and on which other family members survive the decedent. *See* comments below. *See also Columbia Medical Center of Las Colinas, Inc. v. Hogue*, 271 S.W.3d 238, 254–55 (Tex. 2008), regarding proof requirements for loss of inheritance dam-

ages, and *C&H Nationwide, Inc. v. Thompson*, 903 S.W.2d 315, 323 (Tex. 2005) (“[T]he willingness of the law to accommodate some indeterminacy in assessing damages does not mean there are no limits.”), *abrogated on other grounds by Battaglia v. Alexander*, 177 S.W.3d 893, 909 (Tex. 2005).

Loss of community estate. The Committee believes that the rationale of *Yowell* also supports a recovery for loss of what would have been a surviving spouse’s enhanced community estate. Because the survivor’s enhanced community-half technically would not have been an inheritance, there is a question whether it is covered by the definition of loss of inheritance. As a practical matter, the *Yowell* definition of loss of inheritance may adequately embrace loss of an enhanced community-half if it is undisputed that the surviving spouse would have been the beneficiary of all additions to the estate either through inheritance or an enhanced community-half, in which event the dispute would be limited to the amount of the additions.

If there is a dispute whether the surviving spouse would have inherited all the decedent’s estate, the *Yowell* definition may not be adequate to protect the surviving spouse’s absolute right to recover for the loss of his or her enhanced community-half. In that event the Committee recommends that the following instruction be inserted between the definition of loss of inheritance and the instruction to answer in dollars and cents:

By operation of law, one-half of a decedent’s community-property additions to the estate would be left to a surviving spouse as the surviving spouse’s own share of community property. Property that a decedent would have acquired during marriage would be community property except for items acquired by gift or inheritance.

The descriptions of community property are taken from the Texas Family Code. Tex. Fam. Code § 3.002. Of course, appropriate instructions and definitions of this kind may vary depending on the facts of the case.

The roles of a will and the law of intestacy. It would seem that in certain cases the jury could not properly answer the loss-of-inheritance question without information concerning the law of wills and intestate succession. The number of variables makes it virtually impossible to arrive at a standard instruction that takes every aspect of this problem into account.

Alternative terminology. Problems with a complicated submission of the loss-of-inheritance damages element might be avoided by using other terminology. For example, if there is no factual dispute regarding to whom additions to the estate would pass from the deceased, the jury inquiry could be limited to the amount of the additions. If necessary, the laws of inheritance then could be applied to determine the amount of a particular claimant’s recovery, with the following definition substituted for element 7:

7. Loss of addition to the estate.

“Loss of addition to the estate” means the loss of the present value of assets that *Paul Payne*, in reasonable probability, would have added to the estate existing at the end of *his* natural life.

Prejudgment interest not recoverable on loss of inheritance. Prejudgment interest is not recoverable for element 7, loss of inheritance. *Yowell*, 703 S.W.2d at 636.

Loss of inheritance and pecuniary loss. If element 7 is not submitted, the phrase *excluding loss of inheritance* should be omitted from the definition following element 1. See *Moore*, 722 S.W.2d 683.

Remarriage does not diminish recovery. Evidence of a spouse’s ceremonial remarriage is admissible. Tex. Civ. Prac. & Rem. Code § 71.005. However, the economic circumstances of a new marriage are not admissible to diminish damages that are recoverable. See *Richardson v. Holmes*, 525 S.W.2d 293 (Tex. Civ. App.—Beaumont 1975, writ ref’d n.r.e.). The U.S. Court of Appeals for the Fifth Circuit has held that a person is entitled to an instruction that remarriage is not a factor to consider in assessing damages. *Conway v. Chemical Leaman Tank Lines*, 525 F.2d 927 (5th Cir. 1976); see also *Bailey v. Southern Pacific Transportation Co.*, 613 F.2d 1385 (5th Cir. 1980).

Separate answer for each element. For actions filed on or after September 1, 2003, the Code requires economic damages to be determined “separately from the amount of other compensatory damages.” Tex. Civ. Prac. & Rem. Code § 41.008(a). Also, separate submission of elements may be called for in the following instances.

Insufficient evidence. Broad-form submission of multiple elements of damages may lead to harmful error if there is a proper objection raising insufficiency of the evidence to support one or more of the elements submitted. *Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2002). If there is any question about the sufficiency of the evidence to support one or more of the elements, the Committee recommends that the elements of damages be separately submitted to the jury as above.

Exemplary damages. For actions accruing on or after September 1, 1995, and filed before September 1, 2003, if exemplary damages are sought in addition to compensatory damages, it is necessary to obtain separate answers for economic and non-economic damages. “Economic damages” means “compensatory damages for pecuniary loss; the term does not include exemplary damages or damages for physical pain and mental anguish, loss of consortium, disfigurement, physical impairment, or loss of companionship and society.” See Acts 1995, 74th Leg., R.S., ch. 19, § 1 (S.B. 25), eff. Sept. 1, 1995.

Broad-form submission of elements. When separate answers are not required, the following broad-form question may be appropriate.

QUESTION _____

What sum of money, if paid now in cash, would fairly and reasonably compensate *Mary Payne* for *her* damages, if any, resulting from the death of *Paul Payne*?

Consider the elements of damages listed below and none other. Consider each element separately. Do not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any. Do not include interest on any amount of damages you find.

Do not reduce the amounts, if any, in your answers because of the negligence, if any, of *Paul Payne*. Any recovery will be determined by the court when it applies the law to your answers at the time of judgment.

1. Pecuniary loss.

“Pecuniary loss” means the loss of the care, maintenance, support, services, advice, counsel, and reasonable contributions of a pecuniary value, *excluding loss of inheritance*, that *Mary Payne*, in reasonable probability, would have received from *Paul Payne* had *he* lived.

2. Loss of companionship and society.

“Loss of companionship and society” means the loss of the positive benefits flowing from the love, comfort, companionship, and society that *Mary Payne*, in reasonable probability, would have received from *Paul Payne* had *he* lived.

3. Mental anguish.

“Mental anguish” means the emotional pain, torment, and suffering experienced by *Mary Payne* because of the death of *Paul Payne*.

In determining damages for elements 2 and 3, you may consider the relationship between *Mary Payne* and *Paul Payne*, their living arrangements, any extended absences from one another, the harmony of their family relations, and their common interests and activities. You are reminded that elements 2 and 3, like the other elements of damages, are separate, and, in awarding damages for one element, you shall not include damages for the other.

Answer, with respect to the elements listed above, in dollars and cents for damages, if any, that—

were sustained in the past;

Answer: _____

in reasonable probability will be sustained in the future.

Answer: _____

4. Loss of inheritance.

“Loss of inheritance” means the loss of the present value of the assets that the deceased, in reasonable probability, would have added to the estate and left at natural death to *Mary Payne*.

Answer in dollars and cents for damages, if any.

Answer: _____

Instruction not to reduce amounts because of decedent’s negligence. If the decedent’s negligence is also in question, the exclusionary instruction given in this PJC immediately before the elements of damages is proper. *See* Tex. Civ. Prac. & Rem. Code § 33.001; Tex. R. Civ. P. 277. This instruction should be omitted if there is no claim of the decedent’s negligence. Also, if an exclusionary instruction for failure to mitigate damages is required, this instruction should be modified. *See* PJC 28.10.

PJC 29.4 Wrongful Death Damages—Claim of Surviving Child

QUESTION _____

What sum of money, if paid now in cash, would fairly and reasonably compensate *Paul Payne, Jr.* for *his* damages, if any, resulting from the death of *Mary Payne*?

Consider the elements of damages listed below and none other. Consider each element separately. Do not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any. Do not include interest on any amount of damages you find.

Answer separately, in dollars and cents, for damages, if any. Do not reduce the amounts, if any, in your answers because of the negligence, if any, of *Mary Payne*. Any recovery will be determined by the court when it applies the law to your answers at the time of judgment.

1. Pecuniary loss sustained in the past.

“Pecuniary loss” means the loss of the care, maintenance, support, services, advice, counsel, and reasonable contributions of a pecuniary value, *excluding loss of inheritance*, that *Paul Payne, Jr.*, in reasonable probability, would have received from *Mary Payne* had *she* lived.

Answer: _____

2. Pecuniary loss that, in reasonable probability, *Paul Payne, Jr.* will sustain in the future.

Answer: _____

3. Loss of companionship and society sustained in the past.

“Loss of companionship and society” means the loss of the positive benefits flowing from the love, comfort, companionship, and society that *Paul Payne, Jr.*, in reasonable probability, would have received from *Mary Payne* had *she* lived.

Answer: _____

4. Loss of companionship and society that, in reasonable probability, *Paul Payne, Jr.* will sustain in the future.

Answer: _____

5. Mental anguish sustained in the past.

“Mental anguish” means the emotional pain, torment, and suffering experienced by *Paul Payne, Jr.* because of the death of *Mary Payne*.

Answer: _____

6. Mental anguish that, in reasonable probability, *Paul Payne, Jr.* will sustain in the future.

Answer: _____

In determining damages for elements 3, 4, 5, and 6, you may consider the relationship between *Paul Payne, Jr.* and *Mary Payne*, their living arrangements, any extended absences from one another, the harmony of their family relations, and their common interests and activities.

7. Loss of inheritance.

“Loss of inheritance” means the loss of the present value of the assets that the deceased, in reasonable probability, would have added to the estate and left at natural death to *Paul Payne, Jr.*

Answer: _____

COMMENT

When to use. PJC 29.4 submits the claim of a surviving child (adult or minor) for the death of a parent in a wrongful death action under Tex. Civ. Prac. & Rem. Code §§ 71.001–.012. *Moore v. Lillebo*, 722 S.W.2d 683 (Tex. 1986); *Sanchez v. Schindler*, 651 S.W.2d 249 (Tex. 1983). The above question separately submits past and future damages. See Tex. Fin. Code § 304.1045. The “do not compensate twice” instruction is adapted from *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 770 (Tex. 2003).

If surviving child born after parent’s death. If the surviving child is born after the parent’s death, the instruction following element 5 should not be given. Also in that case, the phrase “for the period of time from *his* birth to today” should be added at the end of the phrase “sustained in the past” in the answer form.

Loss of inheritance. Element 7 should be included in the question if there is a claim for loss of inheritance. *Yowell v. Piper Aircraft Corp.*, 703 S.W.2d 630 (Tex. 1986). The definition is substantially as it was stated in *Yowell* at 633. There may be instances in which additional definitions and instructions are appropriate because, under the laws of intestacy, whether property is left to a surviving child could depend

on whether the property is separate or community, on whether the property is real or personal, and on which other family members survive the decedent. See comments below.

Claim of surviving spouse and community property. The Committee believes that the rationale of *Yowell* may support a recovery for loss of what would have been a surviving spouse's enhanced community estate. Thus, claims by both a child and a surviving spouse may require an instruction to protect the surviving spouse's absolute right to recover for the loss of his or her enhanced community-half. See PJC 29.3 comment, "Loss of community estate."

The roles of a will and the law of intestacy. It would seem that in certain cases the jury could not properly answer the loss-of-inheritance question without information concerning the law of wills and intestate succession. The number of variables makes it virtually impossible to arrive at a standard instruction that takes every aspect of this problem into account.

Alternative terminology. Problems with a complicated submission of the loss-of-inheritance damages element might be avoided by using other terminology. For example, if there is no factual dispute regarding to whom additions to the estate would pass from the deceased, the jury inquiry could be limited to the amount of the additions. If necessary, the laws of inheritance then could be applied to determine the amount of a particular claimant's recovery, with the following definition substituted for element 7:

7. Loss of addition to the estate.

"Loss of addition to the estate" means the loss of the present value of assets that *Mary Payne*, in reasonable probability, would have added to the estate existing at the end of *her* natural life.

Prejudgment interest not recoverable on loss of inheritance. Prejudgment interest is not recoverable for element 7, loss of inheritance. *Yowell*, 703 S.W.2d at 636.

Loss of inheritance and pecuniary loss. If element 7 is not submitted, the phrase *excluding loss of inheritance* should be omitted from the definition following element 1. See *Moore*, 722 S.W.2d 683.

Separate answer for each element. For actions filed on or after September 1, 2003, the Code requires economic damages to be determined "separately from the amount of other compensatory damages." Tex. Civ. Prac. & Rem. Code § 41.008(a). Also, separate submission of elements may be called for in the following instances.

Insufficient evidence. Broad-form submission of multiple elements of damages may lead to harmful error if there is a proper objection raising insufficiency of the evidence to support one or more of the elements submitted. *Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2002). If there is any question about the sufficiency of the evidence to support one or more of the elements, the Committee recommends that the elements of damages be separately submitted to the jury as above.

Exemplary damages. For actions accruing on or after September 1, 1995, and filed before September 1, 2003, if exemplary damages are sought in addition to compensatory damages, it is necessary to obtain separate answers for economic and non-economic damages. “Economic damages” means “compensatory damages for pecuniary loss; the term does not include exemplary damages or damages for physical pain and mental anguish, loss of consortium, disfigurement, physical impairment, or loss of companionship and society.” See Acts 1995, 74th Leg., R.S., ch. 19, § 1 (S.B. 25), eff. Sept. 1, 1995.

Broad-form submission of elements. For an example of a broad-form submission of damages elements, see PJC 29.3 comment, “Broad-form submission of elements.”

Instruction not to reduce amounts because of decedent’s negligence. If the decedent’s negligence is also in question, the instruction not to reduce amounts because of the decedent’s negligence is proper. See Tex. Civ. Prac. & Rem. Code § 33.001; Tex. R. Civ. P. 277. This instruction should be omitted if there is no claim of the decedent’s negligence. Also, if an exclusionary instruction for failure to mitigate damages is required, this instruction should be modified. See PJC 28.10.

PJC 29.5 Wrongful Death Damages—Claim of Surviving Parents of Minor Child

QUESTION _____

What sum of money, if paid now in cash, would fairly and reasonably compensate *Paul Payne* and *Mary Payne* for their damages, if any, resulting from the death of *Paul Payne, Jr.*?

Consider the elements of damages listed below and none other. Consider each element separately. Do not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any. Do not include interest on any amount of damages you find.

Answer separately, in dollars and cents, for damages, if any. Do not reduce the amounts, if any, in your answers because of the negligence, if any, of *Paul Payne, Jr.* Any recovery will be determined by the court when it applies the law to your answers at the time of judgment.

1. Pecuniary loss sustained in the past by

Paul Payne Answer: _____

Mary Payne Answer: _____

“Pecuniary loss” means the loss of the care, maintenance, support, services, advice, counsel, and reasonable contributions of a pecuniary value that *Paul Payne* and *Mary Payne*, in reasonable probability, would have received from *Paul Payne, Jr.* had he lived.

2. Pecuniary loss that, in reasonable probability, will be sustained in the future by

Paul Payne Answer: _____

Mary Payne Answer: _____

3. Loss of companionship and society sustained in the past by

Paul Payne Answer: _____

Mary Payne Answer: _____

“Loss of companionship and society” means the loss of the positive benefits flowing from the love, comfort, companionship, and society that *Paul Payne* and *Mary Payne*, in reasonable probability, would have received from *Paul Payne, Jr.* had he lived.

4. Loss of companionship and society that, in reasonable probability, will be sustained in the future by

Paul Payne Answer: _____

Mary Payne Answer: _____

5. Mental anguish sustained in the past by

Paul Payne Answer: _____

Mary Payne Answer: _____

“Mental anguish” means the emotional pain, torment, and suffering experienced by *Paul Payne* and *Mary Payne* because of the death of *Paul Payne, Jr.*

6. Mental anguish that, in reasonable probability, will be sustained in the future by

Paul Payne Answer: _____

Mary Payne Answer: _____

In determining damages for elements 3, 4, 5, and 6, you may consider the relationship between *Paul Payne, Jr.* and his parents, their living arrangements, any extended absences from one another, the harmony of their family relations, and their common interests and activities.

COMMENT

When to use. PJC 29.5 submits the claim of the surviving parents for the death of their minor child in a wrongful death action under Tex. Civ. Prac. & Rem. Code §§ 71.001–.012. *Moore v. Lillebo*, 722 S.W.2d 683 (Tex. 1986); *Sanchez v. Schindler*, 651 S.W.2d 249 (Tex. 1983). The above question separately submits past and future damages. See Tex. Fin. Code § 304.1045. The “do not compensate twice” instruction is adapted from *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 770 (Tex. 2003).

Earnings of minor child. The earnings of a minor child are subject to the “joint management, control, and disposition of the parents.” Tex. Fam. Code § 3.103. The Committee expresses no opinion on whether pecuniary loss under elements 1 and 2 should be awarded jointly to the parents or to each parent separately, unless the parents are separated or divorced. See Tex. Civ. Prac. & Rem. Code § 71.010(b).

Loss of inheritance. In the unlikely event that there is a valid claim for loss of inheritance in this situation, see PJC 29.3 and 29.4 comments, “Loss of inheritance.”

Separate answer for each element. For actions filed on or after September 1, 2003, the Code requires economic damages to be determined “separately from the amount of other compensatory damages.” Tex. Civ. Prac. & Rem. Code § 41.008(a). Also, broad-form submission of multiple elements of damages may lead to harmful error if there is a proper objection raising insufficiency of the evidence to support one or more of the elements submitted. *Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2002). If there is any question about the sufficiency of the evidence to support one or more of the elements, the Committee recommends that the elements of damages be separately submitted to the jury as above.

Broad-form submission of elements. For an example of a broad-form submission of damages elements, see PJC 29.3 comment, “Broad-form submission of elements.”

Instruction not to reduce amounts because of decedent’s negligence. If the decedent’s negligence is also in question, the exclusionary instruction given in this PJC immediately before the answer blanks is proper. *See* Tex. Civ. Prac. & Rem. Code § 33.001; Tex. R. Civ. P. 277. This instruction should be omitted if there is no claim of the decedent’s negligence. Also, if an exclusionary instruction for failure to mitigate damages is required, this instruction should be modified. *See* PJC 28.10.

PJC 29.6 Wrongful Death Damages—Claim of Surviving Parents of Adult Child

QUESTION _____

What sum of money, if paid now in cash, would fairly and reasonably compensate *Paul Payne* and *Mary Payne* for their damages, if any, resulting from the death of *Paul Payne, Jr.*?

Consider the elements of damages listed below and none other. Consider each element separately. Do not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any. Do not include interest on any amount of damages you find.

Answer separately, in dollars and cents, for damages, if any. Do not reduce the amounts, if any, in your answers because of the negligence, if any, of *Paul Payne, Jr.* Any recovery will be determined by the court when it applies the law to your answers at the time of judgment.

1. Pecuniary loss sustained in the past by

Paul Payne Answer: _____

Mary Payne Answer: _____

“Pecuniary loss” means the loss of the care, maintenance, support, services, advice, counsel, and reasonable contributions of a pecuniary value that *Paul Payne* and *Mary Payne*, in reasonable probability, would have received from *Paul Payne, Jr.* had he lived.

2. Pecuniary loss that, in reasonable probability, will be sustained in the future by

Paul Payne Answer: _____

Mary Payne Answer: _____

3. Loss of companionship and society sustained in the past by

Paul Payne Answer: _____

Mary Payne Answer: _____

“Loss of companionship and society” means the loss of the positive benefits flowing from the love, comfort, companionship, and society that *Paul Payne* and *Mary Payne*, in reasonable probability, would have received from *Paul Payne, Jr.* had he lived.

4. Loss of companionship and society that, in reasonable probability, will be sustained in the future by

Paul Payne Answer: _____

Mary Payne Answer: _____

5. Mental anguish sustained in the past by

Paul Payne Answer: _____

Mary Payne Answer: _____

“Mental anguish” means the emotional pain, torment, and suffering experienced by *Paul Payne* and *Mary Payne* because of the death of *Paul Payne, Jr.*

6. Mental anguish that, in reasonable probability, will be sustained in the future by

Paul Payne Answer: _____

Mary Payne Answer: _____

In determining damages for elements 3, 4, 5, and 6, you may consider the relationship between *Paul Payne, Jr.* and *his* parents, their living arrangements, any extended absences from one another, the harmony of their family relations, and their common interests and activities.

COMMENT

When to use. PJC 29.6 submits the claim of the surviving parents for the death of their adult child in a wrongful death action under Tex. Civ. Prac. & Rem. Code §§ 71.001–.012. *Moore v. Lillebo*, 722 S.W.2d 683 (Tex. 1986); *Sanchez v. Schindler*, 651 S.W.2d 249 (Tex. 1983). The above question separately submits past and future damages. See Tex. Fin. Code § 304.1045. The “do not compensate twice” instruction is adapted from *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 770 (Tex. 2003).

Loss of inheritance. In the unlikely event that there is a valid claim for loss of inheritance in this situation, see PJC 29.3 and 29.4 comments, “Loss of inheritance.”

Separate answer for each element. For actions filed on or after September 1, 2003, the Code requires economic damages to be determined “separately from the amount of other compensatory damages.” Tex. Civ. Prac. & Rem. Code § 41.008(a). Also, broad-form submission of multiple elements of damages may lead to harmful error if there is a proper objection raising insufficiency of the evidence to support one or more of the elements submitted. *Harris County v. Smith*, 96 S.W.3d 230 (Tex.

2002). If there is any question about the sufficiency of the evidence to support one or more of the elements, the Committee recommends that the elements of damages be separately submitted as above.

Broad-form submission of elements. For an example of a broad-form submission of damages elements, see PJC 29.3 comment, “Broad-form submission of elements.”

Instruction not to reduce amounts because of decedent’s negligence. If the decedent’s negligence is also in question, the exclusionary instruction given in this PJC immediately before the answer blanks is proper. *See* Tex. Civ. Prac. & Rem. Code § 33.001; Tex. R. Civ. P. 277. This instruction should be omitted if there is no claim of the decedent’s negligence. Also, if an exclusionary instruction for failure to mitigate damages is required, this instruction should be modified. *See* PJC 28.10.

PJC 29.7 Wrongful Death Damages—Exemplary Damages**PJC 29.7A Wrongful Death Damages—Exemplary Damages—
Causes of Action Accruing before September 1, 1995**

If you answered “Yes” to Question _____ [4.2 or other question authorizing potential recovery of punitive damages], then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

What sum of money, if any, should be assessed against *Don Davis* and awarded to *Paul Payne* as exemplary damages for the death of *Mary Payne*?

“Exemplary damages” means an amount that you may in your discretion award as an example to others and as a penalty or by way of punishment, in addition to any amount that you may have found as actual damages.

Factors to consider in awarding exemplary damages, if any, are—

1. The nature of the wrong.
2. The character of the conduct involved.
3. The degree of culpability of the wrongdoer.
4. The situation and sensibilities of the parties concerned.
5. The extent to which such conduct offends a public sense of justice and propriety.

Answer in dollars and cents, if any.

Answer: _____

**PJC 29.7B Wrongful Death Damages—Exemplary Damages—
Causes of Action Accruing on or after September 1, 1995,
and Filed before September 1, 2003**

If you answered “Yes” to Question _____ [4.2 or other question authorizing potential recovery of punitive damages], then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

What sum of money, if any, should be assessed against *Don Davis* and awarded to *Paul Payne* as exemplary damages for the death of *Mary Payne*?

“Exemplary damages” means any damages awarded as a penalty or by way of punishment. Exemplary damages includes punitive damages.

In determining the amount of exemplary damages, you shall consider evidence, if any, relating to—

1. The nature of the wrong.
2. The character of the conduct involved.
3. The degree of culpability of the wrongdoer.
4. The situation and sensibilities of the parties concerned.
5. The extent to which such conduct offends a public sense of justice and propriety.
6. The net worth of *Don Davis*.

Answer in dollars and cents, if any.

Answer: _____

**PJC 29.7C Wrongful Death Damages—Exemplary Damages—
Actions Filed on or after September 1, 2003**

Answer the following question regarding *Don Davis* only if you unanimously answered “Yes” to Question _____ [4.2 or other question authorizing potential recovery of punitive damages] regarding *Don Davis*. Otherwise, do not answer the following question regarding *Don Davis*.

QUESTION _____

You are instructed that you must unanimously agree on the amount of any award of exemplary damages.

What sum of money, if any, should be assessed against *Don Davis* and awarded to *Paul Payne* as exemplary damages for the conduct found in response to Question _____ [4.2 or other question authorizing potential recovery of punitive damages]?

“Exemplary damages” means any damages awarded as a penalty or by way of punishment but not for compensatory purposes. Exemplary damages includes punitive damages.

Factors to consider in awarding exemplary damages, if any, are—

1. The nature of the wrong.
2. The character of the conduct involved.
3. The degree of culpability of the wrongdoer.
4. The situation and sensibilities of the parties concerned.
5. The extent to which such conduct offends a public sense of justice and propriety.
6. The net worth of *Don Davis*.

Answer in dollars and cents, if any.

Answer: _____

COMMENT

When to use. PJC 29.7A should be used to submit the question of exemplary damages for wrongful death for causes of action accruing before September 1, 1995. PJC 29.7B submits the question for causes of action accruing on or after September 1, 1995, and filed before September 1, 2003. For actions filed on or after September 1, 2003, PJC 29.7C should be used.

Conditioned on finding of gross negligence or malice. PJC 29.7 must be conditioned on an affirmative finding to a question on gross negligence, malice, or other finding justifying exemplary damages. *See* Acts 1987, 70th Leg., 1st C.S., ch. 2, § 2.12 (S.B. 5), eff. Sept. 2, 1987, *amended by* Acts 1995, 74th Leg., R.S., ch. 19, § 1 (S.B. 25), eff. Sept. 1, 1995; Tex. Civ. Prac. & Rem. Code §§ 41.001(7), (11), 41.003(a), (d).

Bifurcation. No predicated instruction is necessary if the court has granted a timely motion to bifurcate trial of the amount of punitive damages. *See Transportation Insurance Co. v. Moriel*, 879 S.W.2d 10, 29–30 (Tex. 1994); Tex. Civ. Prac. & Rem. Code § 41.009. If in the first phase of the trial the jury finds facts establishing a predicate for an award of exemplary damages, then a separate phase two jury charge should be prepared. In such a phase two jury charge, PJC 29.7A, 29.7B, or 29.7C (as appropriate) should be submitted with both PJC 1.3 and 1.4 instructions.

Exemplary damages for wrongful death under Texas Constitution. Exemplary damages in cases of “homicide, through wilful act, or omission, or gross neglect” are authorized by article XVI, section 26, of the Texas Constitution. Only the survivors

enumerated in the constitutional provision (“surviving husband, widow, heirs of his or her body”) may recover. *General Chemical Corp. v. De La Lastra*, 852 S.W.2d 916, 923 (Tex. 1993) (parents of deceased child may not recover exemplary damages), *disapproved of on other grounds by Vogler v. Blackmore*, 352 F.3d 150 (5th Cir. 2003). A separate answer is recommended with respect to each constitutionally designated survivor. For the pattern question for apportionment of exemplary damages, see PJC 29.8.

Actual damages in suit against employer covered by Workers’ Compensation Act no longer required. Formerly, in a suit maintained by a survivor for exemplary damages against an employer covered by the Workers’ Compensation Act, Tex. Lab. Code § 408.001, an additional question on the amount of actual damages was advisable. To recover exemplary damages, the plaintiff had to show himself *entitled* to recover actual damages, which he would have recovered but for the Act. *Fort Worth Elevators Co. v. Russell*, 70 S.W.2d 397, 409 (Tex. 1934), *disapproved by Wright v. Gifford-Hill & Co.*, 725 S.W.2d 712, 714 (Tex. 1987). An additional rationale was to permit an evaluation of the reasonableness of the ratio between the actual and exemplary damages. *Tony Gullo Motors v. Chapa*, 212 S.W.3d 299, 308 (Tex. 2006); *see Alamo National Bank v. Kraus*, 616 S.W.2d 908 (Tex. 1981). Under *Wright*, 725 S.W.2d 712, a plaintiff no longer needs to secure a finding on actual damages in this situation. *But see* Tex. Civ. Prac. & Rem. Code § 41.002 (after 1995 and 1997 amendments, death actions against workers’ compensation subscribers no longer specifically excluded from application of chapter 41); *Hall v. Diamond Shamrock Refining Co.*, 82 S.W.3d 5 (Tex. App.—San Antonio 2001), *rev’d on other grounds*, 168 S.W.3d 164 (Tex. 2005).

Exemplary damages under survival statute. Exemplary damages on behalf of a decedent are recoverable by the estate under the survival statute. Tex. Civ. Prac. & Rem. Code § 71.021; *Hofer v. Lavender*, 679 S.W.2d 470 (Tex. 1984); *Castleberry v. Goolsby Building Corp.*, 617 S.W.2d 665 (Tex. 1981). See PJC 30.4.

Multiple defendants. There should be a separate question and answer blank for each defendant against whom exemplary damages are sought. *See* Tex. Civ. Prac. & Rem. Code § 41.006.

Multiple plaintiffs. For multiple plaintiffs, a separate finding on the amount of exemplary damages awarded to each is appropriate. *See* Tex. Civ. Prac. & Rem. Code § 71.010. For an example of submission of apportionment in a single question, see PJC 29.8.

Prejudgment interest not recoverable. Prejudgment interest on exemplary damages is not recoverable. Tex. Civ. Prac. & Rem. Code § 41.007.

Limits on conduct to be considered. A defendant’s lawful out-of-state conduct may be probative on some issues in a punitive damages case in certain circumstances. *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 422 (2003). When such evidence is admitted, “[a] jury must be instructed . . . that it may not use

evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred.” *Campbell*, 538 U.S. at 422.

Evidence that the defendant’s conduct caused harm to persons who are not before the court may also be probative of the reprehensibility of the defendant’s conduct. *Philip Morris USA v. Williams*, 549 U.S. 346, 355–57 (2007). But when this type of evidence is admitted, the jury should be instructed that it may not punish a defendant for the harm the defendant’s conduct allegedly caused to other persons who are not parties to the litigation. *Williams*, 549 U.S. at 357.

Neither *Campbell* nor *Williams* specifies whether the requirement of an instruction means a limiting instruction at the time the evidence is offered, an instruction in the jury charge, or both.

[The following paragraphs apply only to PJC 29.7A.]

Sources of definition and instructions. The definition of exemplary damages in PJC 29.7A is derived from *Carnation Co. v. Borner*, 610 S.W.2d 450, 454 (Tex. 1980). The “factors to consider” instructions are derived from *Kraus*, 616 S.W.2d at 910, and approved in a note in *Moriel*, 879 S.W.2d at 29 n.26. Additional factors that have been considered by Texas courts in reviewing the propriety of an exemplary damages award include (1) compensation for inconvenience and attorney’s fees, *Hofer*, 679 S.W.2d at 474; (2) the net worth of the wrongdoer, *Moriel*, 879 S.W.2d at 29–30; *Lunsford v. Morris*, 746 S.W.2d 471 (Tex. 1988), *disapproved of by Walker v. Packer*, 827 S.W.2d 833 (Tex. 1992); (3) the frequency of the wrongs committed, *State Farm Mutual Automobile Insurance Co. v. Zubiate*, 808 S.W.2d 590, 604 (Tex. App.—El Paso 1991, writ denied), *disapproved on other grounds by Saenz v. Fidelity & Guaranty Insurance Underwriters*, 925 S.W.2d 607 (Tex. 1996); *see also Moriel*, 879 S.W.2d at 27 n.22; and (4) the size of the award needed to deter similar wrongs in the future, *Zubiate*, 808 S.W.2d at 604; *see also Moriel*, 879 S.W.2d at 27 n.22. If attorney’s fees are sought under another theory of recovery, they should not be included in the “factors to consider” instruction; otherwise, there exists the potential of a double recovery on this element.

These factors are included in response to Texas and U.S. Supreme Court decisions establishing that the discretion of the trier of fact to award punitive damages must be exercised within reasonable constraints. *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993); *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991); *see also Moriel*, 879 S.W.2d at 27 n.22 (multifactor jury instruction meets constitutional requirements).

[The following paragraphs apply only to PJC 29.7B and 29.7C.]

Sources of definitions and instructions. The definitions of exemplary damages in PJC 29.7B and 29.7C are derived from Tex. Civ. Prac. & Rem. Code §§ 41.001(5),

41.011(a). The factors to consider are from Tex. Civ. Prac. & Rem. Code § 41.011(a). PJC 29.7C is for use in all cases filed on or after September 1, 2003. Tex. R. Civ. P. 226a.

Limitation on amount of recovery. For causes of action accruing on or after September 1, 1995, exemplary damages awarded against a defendant ordinarily 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.

Tex. Civ. Prac. & Rem. Code § 41.008(b). These limitations will not apply in favor of a defendant found to have “knowingly” or “intentionally” committed conduct described as a felony in specified sections of the Texas Penal Code. *See* Tex. Civ. Prac. & Rem. Code § 41.008(c), (d).

PJC 29.8 Wrongful Death Damages—Apportionment of Exemplary Damages

If, in your answer to Question _____ [29.7], you entered any amount of exemplary damages, then answer Question _____ [29.8]. Otherwise, do not answer Question _____ [29.8].

QUESTION _____

How do you apportion the exemplary damages between *Mary Payne* and *Paul Payne, Jr.*?

Answer by stating a percentage for each person named below. The percentages you find must total 100 percent.

- | | | |
|---------------------------|-------|-------|
| 1. <i>Mary Payne</i> | _____ | % |
| 2. <i>Paul Payne, Jr.</i> | _____ | % |
| Total | _____ | 100 % |

COMMENT

When to use. For multiple plaintiffs, a separate finding of the amount of exemplary damages awarded to each is appropriate. Tex. Civ. Prac. & Rem. Code §§ 71.009, 71.010. PJC 29.8 is a submission of apportionment in a single question.



CHAPTER 30	SURVIVAL DAMAGES	
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PJC 30.1 Survival Damages—Instruction Conditioning Damages Questions on Liability

Answer Question _____ [*the damages question*] if you answered “Yes” for *Don Davis* to Question _____ [*the liability question*] and answered:

1. “No” for *Paul Payne* to Question _____ [*the liability question*], or
2. 50 percent or less for *Paul Payne* to Question _____ [*the percentage causation question*].

Otherwise, do not answer Question _____ [*the damages question*].

COMMENT

When to use. PJC 30.1 may be used to condition answers to survival damages questions on a finding of liability as permitted by Tex. R. Civ. P. 277. See *H.E. Butt Grocery Co. v. Bilotto*, 985 S.W.2d 22 (Tex. 1998).

Multiple plaintiffs. For multiple plaintiffs, the instruction should precede the cluster of damages questions for each plaintiff.

Multiple defendants. For multiple defendants, *Don Davis* should be replaced with *any of the defendants*.

Products liability cases. In products liability causes of action accruing before September 1, 1995, the phrase *50 percent* should be replaced with *60 percent*.

**PJC 30.2 Survival Damages—Instruction on Whether
Compensatory Damages Are Subject to Income Taxes—
Actions Filed on or after September 1, 2003**

You are instructed that any monetary recovery for *[list each element of economic or noneconomic damages that is subject to taxation]* is subject to *[federal or state]* income taxes. Any recovery for *[list each element of economic or noneconomic damages that is not subject to taxation]* is not subject to *[federal or state]* income taxes.

COMMENT

When to use. PJC 30.2 should be submitted with the damages question in any action filed on or after September 1, 2003, in which a claimant seeks recovery for loss of earnings, loss of earning capacity, loss of contributions of a pecuniary value, or loss of inheritance. Whether an element of damages is taxable depends on the substantive tax law pertaining to each cause of action.

Source of instruction. See Tex. Civ. Prac. & Rem. Code § 18.091(b).

PJC 30.3 Survival Damages—Compensatory Damages

QUESTION _____

What sum of money would have fairly and reasonably compensated *Paul Payne* for—

1. Pain and mental anguish.

“Pain and mental anguish” means the conscious physical pain and emotional pain, torment, and suffering experienced by *Paul Payne* before *his* death as a result of the occurrence in question.

Answer in dollars and cents for damages, if any.

Answer: _____

2. Medical expenses.

“Medical expenses” means the reasonable expense of the necessary *medical and hospital care* received by *Paul Payne* for treatment of injuries sustained by *him* as a result of the occurrence in question.

Answer in dollars and cents for damages, if any.

Answer: _____

3. Funeral and burial expenses.

“Funeral and burial expenses” means the reasonable amount of expenses for funeral and burial for *Paul Payne* reasonably suitable to *his* station in life.

Answer in dollars and cents for damages, if any.

Answer: _____

Do not reduce the amount, if any, in your answers because of the negligence, if any, of *Paul Payne*. Any recovery will be determined by the court when it applies the law to your answers at the time of judgment.

COMMENT

When to use. PJC 30.3 submits the damages question for the decedent’s conscious pain and suffering, medical expenses, and/or funeral and burial expenses in a survival action brought under Tex. Civ. Prac. & Rem. Code § 71.021. *See Bedgood v.*

Madalin, 600 S.W.2d 773 (Tex. 1980); *Missouri Pacific Railroad v. Dawson*, 662 S.W.2d 740 (Tex. App.—Corpus Christi 1983, writ ref'd n.r.e.); *Mitchell v. Akers*, 401 S.W.2d 907 (Tex. Civ. App.—Dallas 1966, writ ref'd n.r.e.).

Elements may be included or omitted. PJC 30.3 is intended to include all elements of damages that accrued to the decedent from the time of injury until death. If there is evidence of any other element, it should be included, and if there is no evidence of any stated element, it should be omitted.

Caveat on submitting physical pain and mental anguish together. To avoid concerns about improperly mixing valid and invalid elements of damages (*see Harris County v. Smith*, 96 S.W.3d 230, 234 (Tex. 2002)), when the sufficiency of the evidence to support either physical pain or mental anguish is in question, separate submission of those items may avoid the need for a new trial if a sufficiency challenge is upheld on appeal. *See Katy Springs & Manufacturing, Inc. v. Favalora*, 476 S.W.3d 579, 597–99, 610–11 (Tex. App.—Houston [14th Dist.] 2015, pet. denied) (although challenge to separate submission was waived, separate awards allowed modification of judgment, rather than remand for new trial, where evidence of future mental anguish was legally insufficient). The Texas Supreme Court has yet to decide the issue.

Nature of medical, funeral, and burial claims allowed. Damages claimed for the decedent's medical, funeral, and burial expenses are properly the subject of a survival action brought by the personal representative under Tex. Civ. Prac. & Rem. Code § 71.021. *See Austin Nursing Center, Inc. v. Lovato*, 171 S.W.3d 845, 849–50 (Tex. 2005); *Tarrant County Hospital District v. Jones*, 664 S.W.2d 191 (Tex. App.—Fort Worth 1984, no writ). However, these damages have also been permitted in a suit for wrongful death under Tex. Civ. Prac. & Rem. Code §§ 71.001–.012, provided that double recovery is not allowed. *Landers*, 369 S.W.2d at 35; *Murray v. Templeton*, 576 S.W.2d 138 (Tex. Civ. App.—Texarkana 1978, no writ). In such instances, element 2 should be reworded to cover only those expenses actually paid or incurred. *See Tex. Civ. Prac. & Rem. Code § 41.0105*. If expenses are contested, the reasonableness of the medical, funeral, and burial expenses must be proved. *Folsom Investments, Inc. v. Troutz*, 632 S.W.2d 872 (Tex. App.—Fort Worth 1982, writ ref'd n.r.e.). Also, funeral and burial expenses must be “reasonably suitable” to the decedent's “station in life.” *See Texas & New Orleans Railroad v. Landrum*, 264 S.W.2d 530, 539 (Tex. Civ. App.—Beaumont 1954, writ ref'd n.r.e.).

Medical care—specific items. The phrase *medical and hospital care* in element 2 may be replaced with a list of specific items (e.g., *physicians' fees, hospital bills, medicines, nursing services*) raised by the evidence.

Separate answer for each element. For actions filed on or after September 1, 2003, the Code requires economic damages to be determined “separately from the

amount of other compensatory damages.” Tex. Civ. Prac. & Rem. Code § 41.008(a). Also, separate submission of elements may be called for in the following instances.

Insufficient evidence. Broad-form submission of multiple elements of damages may lead to harmful error if there is a proper objection raising insufficiency of the evidence to support one or more of the elements submitted. *Harris County*, 96 S.W.3d 230. If there is any question about the sufficiency of the evidence to support one or more of the elements, the Committee recommends that the elements of damages be separately submitted to the jury as above.

Exemplary damages. For actions accruing on or after September 1, 1995, and filed before September 1, 2003, if exemplary damages are sought in addition to compensatory damages, it is necessary to obtain separate answers for economic and non-economic damages. “Economic damages” means “compensatory damages for pecuniary loss; the term does not include exemplary damages or damages for physical pain and mental anguish, loss of consortium, disfigurement, physical impairment, or loss of companionship and society.” See Acts 1995, 74th Leg., R.S., ch. 19, § 1 (S.B. 25), eff. Sept. 1, 1995.

Broad-form submission of elements. When separate answers are not required, the following broad-form submission may be appropriate.

QUESTION _____

What sum of money would have fairly and reasonably compensated *Paul Payne* for—

1. Pain and mental anguish.

“Pain and mental anguish” means the conscious physical pain and emotional pain, torment, and suffering experienced by *Paul Payne* before *his* death as a result of the occurrence in question.

2. Medical expenses.

“Medical expenses” means the reasonable expense of the necessary *medical and hospital care* received by *Paul Payne* for treatment of injuries sustained by *him* as a result of the occurrence in question.

3. Funeral and burial expenses.

“Funeral and burial expenses” means the reasonable amount of expenses for funeral and burial for *Paul Payne* reasonably suitable to *his* station in life.

Do not reduce the amount, if any, in your answer because of the negligence, if any, of *Paul Payne*. Any recovery will be determined

by the court when it applies the law to your answers at the time of judgment.

Answer in dollars and cents for damages, if any.

Answer: _____

Instruction not to reduce amounts because of decedent's negligence. If the decedent's negligence is also in question, the exclusionary instruction given in this PJC is proper. *See* Tex. Civ. Prac. & Rem. Code § 33.001; Tex. R. Civ. P. 277. This instruction should be omitted if there is no claim of the decedent's negligence. Also, if an exclusionary instruction for failure to mitigate damages is required, this instruction should be modified. *See* PJC 28.10.

Prejudgment interest. Prejudgment interest is recoverable on survival damages. Tex. Fin. Code § 304.102.

PJC 30.4 Survival Damages—Exemplary Damages**PJC 30.4A Survival Damages—Exemplary Damages—Causes of Action Accruing before September 1, 1995**

If you answered “Yes” to Question _____ [4.2 or other question authorizing potential recovery of punitive damages], then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

What sum of money, if any, should be assessed against *Don Davis* and awarded to *Paul Payne* as exemplary damages for the death of *Mary Payne*?

“Exemplary damages” means an amount that you may in your discretion award as an example to others and as a penalty or by way of punishment, in addition to any amount that you may have found as actual damages.

Factors to consider in awarding exemplary damages, if any, are—

1. The nature of the wrong.
2. The character of the conduct involved.
3. The degree of culpability of the wrongdoer.
4. The situation and sensibilities of the parties concerned.
5. The extent to which such conduct offends a public sense of justice and propriety.

Answer in dollars and cents, if any.

Answer: _____

PJC 30.4B Survival Damages—Exemplary Damages—Causes of Action Accruing on or after September 1, 1995, and Filed before September 1, 2003

If you answered “Yes” to Question _____ [4.2 or other question authorizing potential recovery of punitive damages], then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

What sum of money, if any, should be assessed against *Don Davis* and awarded to *Paul Payne* as exemplary damages for the death of *Mary Payne*?

“Exemplary damages” means any damages awarded as a penalty or by way of punishment. Exemplary damages includes punitive damages.

In determining the amount of exemplary damages, you shall consider evidence, if any, relating to—

1. The nature of the wrong.
2. The character of the conduct involved.
3. The degree of culpability of the wrongdoer.
4. The situation and sensibilities of the parties concerned.
5. The extent to which such conduct offends a public sense of justice and propriety.
6. The net worth of *Don Davis*.

Answer in dollars and cents, if any.

Answer: _____

PJC 30.4C Survival Damages—Exemplary Damages—Actions Filed on or after September 1, 2003

Answer the following question regarding *Don Davis* only if you unanimously answered “Yes” to Question _____ [4.2 or other question authorizing potential recovery of punitive damages] regarding *Don Davis*. Otherwise, do not answer the following question regarding *Don Davis*.

QUESTION _____

You are instructed that you must unanimously agree on the amount of any award of exemplary damages.

What sum of money, if any, should be assessed against *Don Davis* and awarded to *Paul Payne* as exemplary damages for the conduct found in response to Question _____ [4.2 or other question authorizing potential recovery of punitive damages]?

“Exemplary damages” means any damages awarded as a penalty or by way of punishment but not for compensatory purposes. Exemplary damages includes punitive damages.

Factors to consider in awarding exemplary damages, if any, are—

1. The nature of the wrong.
2. The character of the conduct involved.
3. The degree of culpability of the wrongdoer.
4. The situation and sensibilities of the parties concerned.
5. The extent to which such conduct offends a public sense of justice and propriety.
6. The net worth of *Don Davis*.

Answer in dollars and cents, if any.

Answer: _____

COMMENT

When to use. PJC 30.4 submits the question of exemplary damages in a survival action. Exemplary damages on behalf of a decedent are recoverable by the estate under the survival statute. Tex. Civ. Prac. & Rem. Code § 71.021; *Hofer v. Lavender*, 679 S.W.2d 470 (Tex. 1984); *Castleberry v. Goolsby Building Corp.*, 617 S.W.2d 665 (Tex. 1981). The above submission assumes that *Paul Payne* is acting as representative of the estate.

Conditioned on finding of gross negligence or malice. PJC 30.4 must be conditioned on an affirmative finding to a question on gross negligence, malice, or other finding justifying exemplary damages. See Acts 1987, 70th Leg., 1st C.S., ch. 2, § 2.12 (S.B. 5), eff. Sept. 2, 1987, amended by Acts 1995, 74th Leg., R.S., ch. 19, § 1 (S.B. 25), eff. Sept. 1, 1995; Tex. Civ. Prac. & Rem. Code §§ 41.001(7), (11), 41.003(a), (d).

Bifurcation. No predicated instruction is necessary if the court has granted a timely motion to bifurcate trial of the amount of punitive damages. See *Transportation Insurance Co. v. Moriel*, 879 S.W.2d 10, 29–30 (Tex. 1994); Tex. Civ. Prac. & Rem. Code § 41.009. If in the first phase of the trial the jury finds facts establishing a predicate for an award of exemplary damages, then a separate phase two jury charge should be prepared. In such a phase two jury charge, PJC 30.4A, 30.4B, or 30.4C (as appropriate) should be submitted with both PJC 1.3 and 1.4 instructions.

Actual damages in suit against employer covered by Workers’ Compensation Act no longer required. Formerly, in a suit maintained by a survivor for exemplary

damages against an employer covered by the Workers' Compensation Act, Tex. Lab. Code § 408.001, an additional question on the amount of actual damages was advisable. To recover exemplary damages, the plaintiff had to show himself *entitled* to recover actual damages, which he would have recovered but for the Act. *Fort Worth Elevators Co. v. Russell*, 70 S.W.2d 397, 409 (Tex. 1934), *disapproved by Wright v. Gifford-Hill & Co.*, 725 S.W.2d 712, 714 (Tex. 1987). An additional rationale was to permit an evaluation of the reasonableness of the ratio between the actual and exemplary damages. *Tony Gullo Motors v. Chapa*, 212 S.W.3d 299, 308 (Tex. 2006); *see Alamo National Bank v. Kraus*, 616 S.W.2d 908 (Tex. 1981). Under *Wright*, 725 S.W.2d 712, a plaintiff no longer needs to secure a finding on actual damages in this situation. *But see* Tex. Civ. Prac. & Rem. Code § 41.002 (after 1995 and 1997 amendments, death actions against workers' compensation subscribers no longer specifically excluded from application of chapter 41); *Hall v. Diamond Shamrock Refining Co.*, 82 S.W.3d 5 (Tex. App.—San Antonio 2001), *rev'd on other grounds*, 168 S.W.3d 164 (Tex. 2005).

Multiple defendants. There should be a separate question and answer blank for each defendant against whom exemplary damages are sought. Tex. Civ. Prac. & Rem. Code § 41.006.

Multiple plaintiffs. For multiple plaintiffs, a separate finding on the amount of exemplary damages awarded to each is appropriate. *See* Tex. Civ. Prac. & Rem. Code § 71.010. For an example of submission of apportionment in a single question, see PJC 29.8.

Prejudgment interest not recoverable. Prejudgment interest on exemplary damages is not recoverable. Tex. Civ. Prac. & Rem. Code § 41.007.

Limits on conduct to be considered. A defendant's lawful out-of-state conduct may be probative on some issues in a punitive damages case in certain circumstances. *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 422 (2003). When such evidence is admitted, "[a] jury must be instructed . . . that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." *Campbell*, 538 U.S. at 422.

Evidence that the defendant's conduct caused harm to persons who are not before the court may also be probative of the reprehensibility of the defendant's conduct. *Philip Morris USA v. Williams*, 549 U.S. 346, 355–57 (2007). But when this type of evidence is admitted, the jury should be instructed that it may not punish a defendant for the harm the defendant's conduct allegedly caused to other persons who are not parties to the litigation. *Williams*, 549 U.S. at 357.

Neither *Campbell* nor *Williams* specifies whether the requirement of an instruction means a limiting instruction at the time the evidence is offered, an instruction in the jury charge, or both.

[The following paragraphs apply only to PJC 30.4A.]

Source of definition and instructions. The definition of exemplary damages in PJC 30.4A is derived from *Carnation Co. v. Borner*, 610 S.W.2d 450, 454 (Tex. 1980). The “factors to consider” instructions are derived from *Kraus*, 616 S.W.2d at 910, and approved in a note in *Moriel*, 879 S.W.2d at 29 n.26. Additional factors that have been considered by Texas courts in reviewing the propriety of an exemplary damages award include (1) compensation for inconvenience and attorney’s fees, *Hofer*, 679 S.W.2d at 474; (2) the net worth of the wrongdoer, *Moriel*, 879 S.W.2d at 29–30; *Lunsford v. Morris*, 746 S.W.2d 471 (Tex. 1988), *disapproved of by Walker v. Packer*, 827 S.W.2d 833 (Tex. 1992); (3) the frequency of the wrongs committed, *State Farm Mutual Automobile Insurance Co. v. Zubiate*, 808 S.W.2d 590, 604 (Tex. App.—El Paso 1991, writ denied), *disapproved on other grounds by Saenz v. Fidelity & Guaranty Insurance Underwriters*, 925 S.W.2d 607 (Tex. 1996); *see also Moriel*, 879 S.W.2d at 27 n.22; and (4) the size of the award needed to deter similar wrongs in the future, *Zubiate*, 808 S.W.2d at 604; *see also Moriel*, 879 S.W.2d at 27 n.22. If attorney’s fees are sought under another theory of recovery, they should not be included in the “factors to consider” instruction; otherwise, there exists the potential of a double recovery on this element.

These factors are included in response to Texas and U.S. Supreme Court decisions establishing that the discretion of the trier of fact to award punitive damages must be exercised within reasonable constraints. *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993); *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991); *see also Moriel*, 879 S.W.2d at 27 n.22 (multifactor jury instruction meets constitutional requirements).

[The following paragraphs apply only to PJC 30.4B and 30.4C.]

Source of definitions and instructions. The definitions of exemplary damages in PJC 30.4B and 30.4C are derived from Tex. Civ. Prac. & Rem. Code §§ 41.001(5), 41.011(a). The factors to consider are from Tex. Civ. Prac. & Rem. Code § 41.011(a). PJC 30.4C is for use in all cases filed on or after September 1, 2003. Tex. R. Civ. P. 226a.

Limitation on amount of recovery. For causes of action accruing on or after September 1, 1995, exemplary damages awarded against a defendant ordinarily 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.

Tex. Civ. Prac. & Rem. Code § 41.008(b). These limitations will not apply in favor of a defendant found to have “knowingly” or “intentionally” committed conduct described as a felony in specified sections of the Texas Penal Code. *See* Tex. Civ. Prac. & Rem. Code § 41.008(c), (d).

CHAPTER 31	PROPERTY DAMAGES	
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**PJC 31.1 Property Damages—Instruction Conditioning Damages
Questions on Liability**

Answer Question _____ [*the damages question*] if you answered “Yes” for *Don Davis* to Question _____ [*the liability question*] and answered:

1. “No” for *Paul Payne* to Question _____ [*the liability question*], or
2. 50 percent or less for *Paul Payne* to Question _____ [*the percentage causation question*].

Otherwise, do not answer Question _____ [*the damages question*].

COMMENT

When to use. PJC 31.1 may be used to condition answers to property damages questions on a finding of liability as permitted by Tex. R. Civ. P. 277. See *H.E. Butt Grocery Co. v. Bilotto*, 985 S.W.2d 22 (Tex. 1998).

Multiple plaintiffs. For multiple plaintiffs, the instruction should precede the cluster of damages questions for each plaintiff.

Multiple defendants. For multiple defendants, *Don Davis* should be replaced with *any of the defendants*.

Products liability cases. In products liability causes of action accruing before September 1, 1995, the phrase *50 percent* should be replaced with *60 percent*.

**PJC 31.2 Property Damages—Instruction on Whether
Compensatory Damages Are Subject to Income Taxes—
Actions Filed on or after September 1, 2003**

You are instructed that any monetary recovery for *[list each element of economic or noneconomic damages that is subject to taxation]* is subject to *[federal or state]* income taxes. Any recovery for *[list each element of economic or noneconomic damages that is not subject to taxation]* is not subject to *[federal or state]* income taxes.

COMMENT

When to use. PJC 31.2 should be submitted with the damages question in any action filed on or after September 1, 2003, in which a claimant seeks recovery for loss of earnings, loss of earning capacity, loss of contributions of a pecuniary value, or loss of inheritance. Whether an element of damages is taxable depends on the substantive tax law pertaining to each cause of action.

Source of instruction. See Tex. Civ. Prac. & Rem. Code § 18.091(b).

PJC 31.3 Property Damages—Total Destruction of Property

QUESTION _____

What sum of money, if paid now in cash, would fairly and reasonably compensate *Paul Payne* for damages, if any, to *his personal property* resulting from the occurrence in question?

Consider the elements of damages listed below and none other. Consider each element separately. Do not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any. Do not include interest on any amount of damages you find.

Do not reduce the amounts, if any, in your answers because of the negligence, if any, of *Paul Payne*. Any recovery will be determined by the court when it applies the law to your answers at the time of judgment.

1. Market value.

Consider the market value in *Clay County, Texas*, of *Paul Payne's* property immediately before the occurrence in question.

“Market value” means the amount that would be paid in cash by a willing buyer who desires to buy, but is not required to buy, to a willing seller who desires to sell, but is under no necessity of selling.

Answer in dollars and cents for damages, if any.

Answer: _____

2. Loss of use of property.

Consider the reasonable value of the loss of use of the property during the time reasonably needed to replace the property, caused by the occurrence in question.

Answer in dollars and cents for damages, if any.

Answer: _____

COMMENT

When to use. PJC 31.3 submits the measure of direct damages for the total destruction of personal property based on the market value before the occurrence. This is the usual measure for damages for the total destruction of personal property. *J&D*

Towing, LLC v. American Alternative Insurance Corp., 478 S.W.3d 649, 676 (Tex. 2016). It also submits consequential damages for loss of use. *J&D Towing*, 478 S.W.3d at 676.

Total destruction. “Total destruction” or “total loss” occurs when the damages are so extensive that repair would not be economically feasible. *J&D Towing*, 478 S.W.3d at 657 n.30.

Identification of personal property. The words *personal property* may be replaced by the specific type of personal property at issue, for example, *vehicle*.

Name of county. The county referred to should be the county in which the damage occurred. *J&D Towing*, 478 S.W.3d at 657; *Thomas v. Oldham*, 895 S.W.2d 352, 359 (Tex. 1995).

Instruction not to reduce amounts because of plaintiff’s negligence. If the plaintiff’s negligence is also in question, the exclusionary instruction given in this PJC immediately before the answer blanks is proper. *See* Tex. Civ. Prac. & Rem. Code § 33.001; Tex. R. Civ. P. 277. This instruction should be omitted if there is no claim of the plaintiff’s negligence.

Prejudgment interest recoverable. Prejudgment interest is recoverable on property damages. Tex. Fin. Code § 304.102; *see also J&D Towing*, 478 S.W.3d at 677 n.199 (prejudgment interest is statutorily required on judgment that includes compensation for both fair market value and loss-of-use damages).

PJC 31.4 Property Damages—Partial Destruction of Property**PJC 31.4A Property Damages—Partial Destruction of Property—
Difference in Market Value Only**

QUESTION _____

What is the difference in the market value in *Clay County, Texas*, of *Paul Payne's personal property* immediately before and immediately after the occurrence in question?

“Market value” means the amount that would be paid in cash by a willing buyer who desires to buy, but is not required to buy, to a willing seller who desires to sell, but is under no necessity of selling.

Do not reduce the amount, if any, in your answer because of the negligence, if any, of *Paul Payne*. Any recovery will be determined by the court when it applies the law to your answer at the time of judgment.

Answer in dollars and cents for damages, if any.

Answer: _____

**PJC 31.4B Property Damages—Partial Destruction of Property—
Cost of Repairs**

QUESTION _____

What sum of money, if paid now in cash, would fairly and reasonably compensate *Paul Payne* for damages, if any, to *his personal property* resulting from the occurrence in question?

Consider the elements of damages listed below and none other. Consider each element separately. Do not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any. Do not include interest on any amount of damages you find.

Do not reduce the amounts, if any, in your answers because of the negligence, if any, of *Paul Payne*. Any recovery will be determined by the court when it applies the law to your answers at the time of judgment.

1. Cost of repairs.

Consider the reasonable cost in *Clay County, Texas*, to restore the *personal property* to the condition it was in immediately before the occurrence in question.

Answer in dollars and cents for damages, if any.

Answer: _____

2. Loss of use of property.

Consider the reasonable value of the use of the same class of *personal property* in question for the period of time reasonably required to repair the damage, if any, caused by the occurrence in question.

Answer in dollars and cents for damages, if any.

Answer: _____

COMMENT

When to use. PJC 31.4 submits the measure of damages for the partial destruction of personal property. PJC 31.4A submits the usual measure for direct damages for the partial destruction of personal property, which is the difference in the market value immediately before and immediately after the injury to the property at the place where the damage was occasioned. *J&D Towing, LLC v. American Alternative Insurance Corp.*, 478 S.W.3d 649, 656 (Tex. 2016). Alternatively, PJC 31.4B may be used where it would be economical and reasonable to repair the property and the owner of the injured property seeks to recover the reasonable costs of such replacements and repairs as are necessary to restore the damaged article to its condition immediately before the occurrence. *J&D Towing*, 478 S.W.3d at 656. PJC 31.4B also submits consequential damages for loss of use during the time it takes to repair the property. *J&D Towing*, 478 S.W.3d at 656 (whether owner recovers direct damages under the general rule or otherwise, owner may recover loss-of-use damages). To prove loss of use of property, it is not necessary to rent a replacement or show any amount actually expended for a replacement. See *Luna v. North Star Dodge Sales, Inc.*, 667 S.W.2d 115, 118 (Tex. 1984).

Diminution of property value. If the repairs do not completely restore the former value of the property, the plaintiff may also recover the difference between the value before the occurrence and the value after repairs. See *J&D Towing*, 478 S.W.3d at 656 n.28; *Houston Unlimited, Inc. v. Mel Acres Ranch*, 443 S.W.3d 820 (Tex. 2014). PJC 31.4B may then be submitted with an additional element as follows:

3. Difference in market value.

Consider the difference, if any, in the market value in *Clay* County, Texas, of the *personal property* in question immediately before the occurrence in question and immediately after the necessary repairs were made to the *personal property*.

“Market value” means the amount that would be paid in cash by a willing buyer who desires to buy, but is not required to buy, to a willing seller who desires to sell, but is under no necessity of selling.

Answer in dollars and cents for damages, if any.

Answer: _____

Identification of personal property. The words *personal property* may be replaced by the specific type of personal property at issue, for example, *vehicle*.

Name of county. The county referred to should be the county in which the damage occurred. *J&D Towing*, 478 S.W.3d at 657; *Thomas v. Oldham*, 895 S.W.2d 352, 359 (Tex. 1995). Determination of the reasonable cost of repairs in the county in which the damage occurred would not require that repairs actually be made in that county if such repairs would be unavailable there. *See Pasadena State Bank v. Isaac*, 228 S.W.2d 127, 129 (Tex. 1950).

Instruction not to reduce amounts because of plaintiff’s negligence. If the plaintiff’s negligence is also in question, the exclusionary instruction given in this PJC immediately before the answer blanks is proper. *See* Tex. Civ. Prac. & Rem. Code § 33.001; Tex. R. Civ. P. 277. This instruction should be omitted if there is no claim of the plaintiff’s negligence.

Separate answer for each element. Broad-form submission of multiple elements of damages may lead to harmful error if there is a proper objection raising insufficiency of the evidence to support one or more of the elements submitted. *Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2002). If there is any question about the sufficiency of the evidence to support one or more of the elements, the Committee recommends that the elements of damages be separately submitted as above.

Prejudgment interest recoverable. Prejudgment interest is recoverable on property damages. Tex. Fin. Code § 304.102; *see also J&D Towing*, 478 S.W.3d at 677 n.199 (prejudgment interest is statutorily required on judgment that includes compensation for both fair market value and loss-of-use damages).



CHAPTER 32	PRESERVATION OF CHARGE ERROR	
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PJC 32.1 Preservation of Charge Error (Comment)

The purpose of this Comment is to make practitioners aware of the need to preserve their complaints about the jury charge for appellate review and to inform them of general considerations when attempting to perfect those complaints. It is not intended as an in-depth analysis of the topic.

Basic rules for preserving charge error.

Objections and requests. Errors in the charge consist of (1) defective questions, instructions, and definitions actually submitted (that is, definitions, instructions, and questions that, while included in the charge, are nevertheless incorrectly submitted); and (2) questions, instructions, and definitions that are omitted entirely. Objections are required to preserve error as to any defect in the charge. In addition, a written request for a substantially correct question, instruction, or definition is required to preserve error for certain omissions.

- Defective question, definition, or instruction: *Objection*

Affirmative errors in the jury charge must be preserved by objection, regardless of which party has the burden of proof for the submission. Tex. R. Civ. P. 274. Therefore, if the jury charge contains a *defective* question, definition, or instruction, an objection pointing out the error will preserve error for review.

- Omitted definition or instruction: *Objection and request*

If the omission concerns a definition or an instruction, error must be preserved by an objection and a request for a substantially correct definition or instruction. Tex. R. Civ. P. 274, 278. For this type of omission, it does not matter which party has the burden of proof. Therefore, a request must be tendered even if the erroneously omitted definition or instruction is in the opponent's claim or defense.

- Omitted question, Party's burden: *Objection and request*;
Opponent's burden: *Objection*

If the omission concerns a question relied on by the party complaining of the judgment, error must be preserved by an objection and a request for a substantially correct question. Tex. R. Civ. P. 274, 278. If the omission concerns a question relied on by the opponent, an objection alone will preserve error for review. Tex. R. Civ. P. 278. To determine whether error preservation is required for an opponent's omission, consider that, if no element of an independent ground of recovery or defense is submitted in the charge or is requested, the ground is waived. Tex. R. Civ. P. 279.

- Uncertainty about whether the error constitutes an omission or a defect:
Objection and request

If there is uncertainty whether an error in the charge constitutes an affirmative error or an omission, the practitioner should both request and object to ensure the error is preserved. *See State Department of Highways & Public Transportation v. Payne*, 838 S.W.2d 235, 239–40 (Tex. 1992).

Timing and form of objections and requests.

- Objections, requests, and rulings must be made—
 1. before the reading of the charge to the jury, Tex. R. Civ. P. 272; or
 2. by an earlier deadline set by the trial court, *King Fisher Marine Service, L.P. v. Tamez*, 443 S.W.3d 838, 843 (Tex. 2014) (providing that such a deadline must “afford[] the parties a ‘reasonable time’ to inspect and object to the charge”).
- Objections must—
 1. be made in writing or dictated to the court reporter in the presence of the court and opposing counsel, Tex. R. Civ. P. 272; and
 2. specifically point out the error and the grounds of complaint, Tex. R. Civ. P. 274.
- Requests must—
 1. be made separate and apart from any objections to the charge, Tex. R. Civ. P. 273;
 2. be in writing and tendered to the court, Tex. R. Civ. P. 278; and
 3. be in substantially correct wording, Tex. R. Civ. P. 278, which does not mean that the request be absolutely correct, nor does it mean that the request be merely sufficient to call the matter to the attention of the court, but instead means that the request is substantively correct and not affirmatively incorrect. *Placencio v. Allied Industrial International, Inc.*, 724 S.W.2d 20, 21 (Tex. 1987).

Rulings on objections and requests.

- Rulings on objections may be oral or in writing. Tex. R. Civ. P. 272.
- Rulings on requests must be in writing and must indicate whether the court refused, granted, or granted but modified the request. Tex. R. Civ. P. 276.

Submitting wrong theory. “[Where] the wrong theory of recovery was submitted and the correct theory of recovery was omitted entirely, the defendant has no obligation to object.” *See United Scaffolding, Inc. v. Levine*, 537 S.W.3d 463, 481

(Tex. 2017). The court held that error had been preserved by raising the argument in the trial court in a motion for judgment notwithstanding the verdict. *Levine*, 537 S.W.3d at 482; *see also* Tex. R. Civ. P. 279.

Common mistakes that may result in waiver of charge error.

- Failing to submit requests in writing (oral or dictated requests will not preserve error).
- Failing to make requests separately from objections to the charge (generally it is safe to present a party's requests at the beginning of the formal charge conference, but separate from a party's objections).
- Offering requests "en masse," that is, tendering a complete charge or obscuring a proper request among unfounded or meritless requests (submit each question, definition, or instruction separately, and submit only those important to the outcome of the trial).
- Failing to file with the clerk all requests that the court has marked "refused" (a prudent practice is to also keep a copy for one's own file).
- Failing to make objections to the court's charge on the record.
- Failing to make objections to the court's charge before the reading of the charge to the jury or by an earlier deadline set by the trial court.
- Making objections on the record while the jury is deliberating even if by agreement and with court approval.
- Adopting by reference objections to other portions of the court's charge.
- Dictating objections to the court reporter in the judge's absence (the judge and opposing counsel should be present).
- Relying on or adopting another party's objections to the court's charge without obtaining court approval to do so beforehand (as a general rule, each party must make its own objections).
- Relying on a pretrial ruling. *See Wackenhut Corp. v. Gutierrez*, 453 S.W.3d 917, 919–20, 920 n.3 (Tex. 2015) (per curiam).
- Failing to assert at trial the same grounds for charge error urged on appeal (grounds not distinctly pointed out to the trial court cannot be raised for the first time on appeal).
- Failing to obtain a ruling on an objection or request.

Principle of error preservation. In *State Department of Highways & Public Transportation v. Payne*, the supreme court stated:

There should be but one test for determining if a party has preserved error in the jury charge, and that is whether the party made the trial court aware of the complaint, timely and plainly, and obtained a ruling. The more specific requirements of the rules should be applied, while they remain, to serve rather than defeat this principle.

Payne, 838 S.W.2d at 241. The goal is to apply the charge rules “in a common sense manner to serve the purposes of the rules, rather than in a technical manner which defeats them.” *Alaniz v. Jones & Neuse, Inc.*, 907 S.W.2d 450, 452 (Tex. 1995) (per curiam). The keys to error preservation are (1) when in doubt about how to preserve, both object and request; and (2) in either case, clarity is essential: make your arguments timely and plainly enough that the trial court is aware of the claimed error, and get a ruling on the record. *See, e.g., Wackenhut*, 453 S.W.3d at 919–20.

PJC 32.2 Broad-Form Issues and the *Casteel* Doctrine (Comment)

In *Crown Life Insurance Co. v. Casteel*, 22 S.W.3d 378 (Tex. 2000), the supreme court held that inclusion of a legally invalid theory in a broad-form liability question taints the question and requires a new trial. *Casteel*, 22 S.W.3d at 388–89. The court has since extended this rule to legal sufficiency challenges to an element of a broad-form damages question, see *Harris County v. Smith*, 96 S.W.3d 230, 235–36 (Tex. 2002), and to complaints about inclusion of an invalid liability theory in a comparative responsibility finding, see *Romero v. KPH Consolidation, Inc.*, 166 S.W.3d 212, 226–28 (Tex. 2005).

The supreme court has recently clarified that harmful error must be presumed, as in *Casteel*, when an appellate court cannot determine whether the jury found liability on an improper basis because a necessary limiting instruction was not submitted despite a timely request or objection. *Benge v. Williams*, 548 S.W.3d 466, 475–76 (Tex. 2018) (reiterating this proposition and stating that “we have twice held that when the question allows a finding of liability based on evidence that cannot support recovery, the same presumption-of-harm rule [from *Casteel*] must be applied”); see *Texas Commission on Human Rights v. Morrison*, 381 S.W.3d 533, 535 (Tex. 2012) (per curiam); *Columbia Rio Grande Healthcare, L.P. v. Hawley*, 284 S.W.3d 851, 863 (Tex. 2009).

When a broad-form submission is infeasible under the *Casteel* doctrine and a granulated submission would cure the alleged charge defect, a specific objection to the broad-form nature of the charge question is necessary to preserve error. *Thota v. Young*, 366 S.W.3d 678, 690–91 (Tex. 2012) (citing *In re A.V.*, 113 S.W.3d 355, 363 (Tex. 2003); *In re B.L.D.*, 113 S.W.3d 340, 349–50 (Tex. 2003)). But when a broad-form submission is infeasible under the *Casteel* doctrine and a granulated submission would still be erroneous because there is no evidence to support the submission of a separate question, a specific and timely no-evidence objection is sufficient to preserve error without a further objection to the broad-form nature of the charge. *Thota*, 366 S.W.3d at 690–91.

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Following are the tables of contents of the other volumes in the *Texas Pattern Jury Charges* series. These tables represent the 2018 editions of these volumes, which were the current editions when this book was published. Other topics may be added in future editions.

The practitioner may also be interested in the *Texas Criminal Pattern Jury Charges* series. Please visit <http://texasbarbooks.net/texas-pattern-jury-charges/> for more information.

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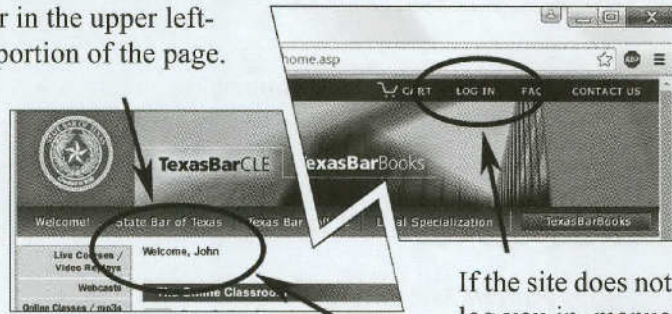
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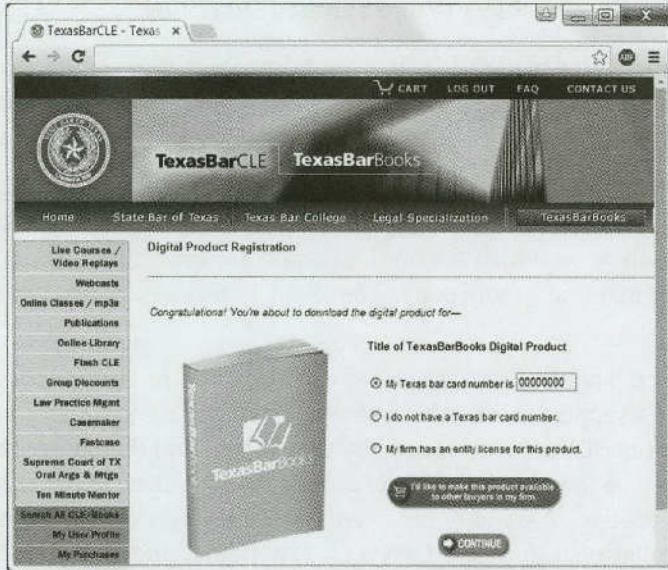


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