TEXAS PATTERN JURY CHARGES

2012

- GENERAL NEGLIGENCE
- INTENTIONAL PERSONAL TORTS

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General Negligence • Intentional Personal Torts

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

Austin 2012

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The use of the masculine gender throughout this publication is purely for literary convenience and should, of course, be understood to include the feminine gender as well.

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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.
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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 2012 EDITION

Year after year, as a result of the continuing evolvement of Texas law in terms of both supreme court decisions and legislative enactments, the pattern jury charges Committees are faced with an important task. Once again, with the assurance that comes from a job well done, our Committee is pleased to offer this volume.

The Committee for *Texas Pattern Jury Charges—General Negligence & Intentional Personal Torts* has worked diligently to identify and respond to changes in the law. We are also pleased to offer new chapters relating to nuisance and preservation of charge error. The pattern jury charges volumes have a well-earned reputation for scholarship. This volume represents the collective efforts of some of the most able minds in Texas, and it is with great confidence that we offer it to our readers.

We thank the members of the Committee, representing both sides of the bar yet reflecting a nonpartisan desire for excellence, who have dedicated thousands of hours to these efforts. It is our hope that this year's edition will again prove useful to the bench and bar, and, as always, we invite comments for improvements to future editions.

—Brock C. Akers, *Chair*

CHANGES IN THE 2012 EDITION

The 2012 edition of *Texas Pattern Jury Charges—General Negligence & Intentional Personal Torts* includes the following changes from the 2010 edition:

1. Admonitory instructions—
   a. Revised instructions to jury panel before voir dire examination and Comment (1.1)
   b. Revised instructions to jury after jury selection (1.2)
   c. Revised charge of the court and Comment (1.3)
   d. Revised additional instruction on bifurcated trial and Comment (1.4)
   e. Revised instructions to jury after verdict and Comment (1.5)
   f. Revised instructions to jury if permitted to separate and Comment (1.6)
   g. Revised instruction if jury disagrees about testimony (1.7)
   h. Revised instruction on privilege—no adverse inference (1.10)
   i. Deleted instruction on jurors' note-taking (previously 1.11; topic now covered in 1.2 and 1.3)
   j. Deleted instruction on jurors' use of electronic technology (1.13; topic now covered in 1.1–1.3)
   k. Renumbered PJC 1.12 to 1.11
2. Broad-form submission—
   a. Revised Comment, "When broad-form questions not feasible" (4.1)
   b. Included discussion in preservation of charge error Comment (19.1)
3. Gross negligence imputed to corporation—Revised Comment (10.14)
4. Nuisance—Added new chapter (ch. 12)
5. Medical care—Revised Comment (15.3, 15.5)
6. Loss of household services—Revised Comment (15.4)
7. Preservation of charge error—Added new chapter (ch. 19)

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 and intentional personal torts. 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." 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. 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).

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*, 680 S.W.2d at 801. 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, the *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. DOWNLOADING AND INSTALLING THE DIGITAL PRODUCT

The complimentary downloadable version of *Texas Pattern Jury Charges—General Negligence & Intentional Personal Torts* (2012 edition) contains the entire text of the printed book. To download the digital product—

1. go to **http://www.texasbarcle.com/pjc-negligence-2012**,
2. log in to TexasBarCLE's Web site, and
3. download the version of the digital product you want.

Use of the digital product 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 product download Web pages. By downloading the digital product, 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. The Committee expects to publish updates as needed to reflect changes and new developments in the law.

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.

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 *Transportation Insurance Co. v. Moriel*, 879 S.W.2d 10, 29–30 (Tex. 1994), or Tex. Civ. Prac. & Rem. Code § 41.009. 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.

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.

PJC 1.10 Privilege—No Adverse Inference

[Brackets indicate instructive text.]

You are instructed that you may not draw an adverse inference from [*name of party*]'s claim of [*privilege asserted*] privilege.

COMMENT

When to use. On request by any party against whom the jury might draw an adverse inference from a claim of privilege, the court shall instruct the jury that no inference may be drawn therefrom. Tex. R. Evid. 513(d). The court is not required by rule 513(d) to submit such an instruction regarding the privilege against self-incrimination. Tex. R. Evid. 513(c), (d); *see also Wilz v. Flournoy*, 228 S.W.3d 674 (Tex. 2007).

Scope of assertion of privilege. The Committee expresses no opinion as to the propriety of such an instruction on the assertion of a privilege by a nonparty witness.

PJC 1.11 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 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); Note, 28 Texas L. Rev. 452 (1950).

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 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 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.

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.

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 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.

"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 occurrence in question and thereby becomes the immediate cause of such 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 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 inferen-

tial 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 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 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 person 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 dism'd judgm't cor.).

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 3.3 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).

Discussion of emergency doctrine. For a discussion of the emergency doctrine, see E. Wayne Thode, *Imminent Peril and Emergency in Texas*, 40 Texas L. Rev. 441 (1962).

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.

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 [*occurrence*] [*injury*] [*occurrence or injury*] 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 "occurrence" or "injury." The use of "occurrence" or "injury" in this question, as well as in PJC 4.3, could affect a case in which there is evidence of the plaintiff's negligence that is "injury-causing" or "injury-enhancing" but not "occurrence-causing": for example, carrying gasoline in an unprotected container, which exploded in the crash, greatly increasing the plaintiff's injuries (preaccident negligence), or failing to follow doctor's orders during recovery, thereby aggravating the injuries (postaccident negligence). In such a case the jury should not consider this negligence in answering PJC 4.1 and 4.3 if "occurrence" is used, while it should consider the negligence if "injury" is used. In a case involving a death, the word "death" may be used instead of "injury."

The passage of the proportionate responsibility statute (Tex. Civ. Prac. & Rem. Code ch. 33) in 1987 further complicated the issue. For suits filed after September 1, 1987, section 33.003 requires a finding of "percentage of responsibility" in pure negligence cases as well as in "mixed" cases involving claims of negligence and strict liability and/or warranty. "Percentage of responsibility" is defined 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." Tex. Civ. Prac. & Rem. Code § 33.011(4) (emphasis added). The definition does not use the term "occurrence"; however, nothing in the legislative history indicates that the "occurrence/injury" issue was being addressed in the choice of words used in the definition.

The above distinctions between the plaintiff's injury-causing negligence (whether preaccident or postaccident) and occurrence-causing negligence affect the decision of whether such conduct should be submitted as part of the question on the plaintiff's contributory negligence or as an exclusionary instruction to the damages questions.

The Committee is unable to determine whether the legislature, by using "injury" in section 33.011(4), intended to abolish the distinction between "occurrence-causing" and "injury-causing" contributory negligence and mandate the use of "injury" to the preclusion, at any time, of "occurrence." Thus the alternatives *occurrence*, *injury*, and *occurrence or injury* appear in brackets to indicate that if evidence of the plaintiff's nonoccurrence-producing negligence makes the choice important, the decision is to be made by the court in light of the precedents discussed above and other relevant law.

When not to submit exclusionary instruction. If PJC 4.1 is submitted with the term *injury*, the exclusionary instruction in PJC 15.8, 15.9, or 15.10 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 [*occurrence*] [*injury*] [*occurrence or injury*], 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 _____ [*15.3 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.

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 "occurrence," "injury," or "occurrence or injury." 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. Tex. Civ. Prac. & Rem. Code §§ 41.001(7), (11), 41.003(a), (d), 41.004(a). The unanimity instructions come from the supreme court's January 27, 2005, order under Tex. R. Civ. P. 226a effective February 1, 2005, in all cases filed on or after September 1, 2003.

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 [*occurrence*] [*injury*] [*occurrence or injury*]. 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 [*occurrence*] [*injury*] [*occurrence or injury*], find the percentage of responsibility attributable to each:

1.	*Don Davis*	_____%
2.	*Paul Payne*	_____%
3.	*Sam Settlor*	_____%
4.	*Responsible Ray*	_____%
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 "occurrence," "injury," or "occurrence or injury" 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.

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 [*occurrence*] [*injury*] [*occurrence or injury*], 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 entrustee 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 [*occurrence*] [*injury*] [*occurrence or injury*]. 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 [*occurrence*] [*injury*] [*occurrence or injury*] to *Paul Payne*, find the percentage of responsibility, if any, attributable as between or among—

1.	*Don Davis*	_____%
2.	*Connie Contributor*	_____%
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 "occurrence," "injury," or "occurrence or injury" 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.

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 (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 5.2–5.4.

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. 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."

PJC 5.4 Negligence Per Se—Complex Standard

"Negligence," when used with respect to the conduct of the *defendant-railroad, means* a train's failure to sound a horn or whistle at least 1,320 feet from a crossing or its failure to continuously ring a bell from that distance up to the crossing.

"Negligence," when used with respect to the conduct of the *plaintiff-motorist, means* a failure to stop within 50 feet, but not less than 15 feet, from the nearest rail—

1. when the railroad engine approaching within approximately 1,500 feet of the highway crossing emits a signal audible from such distance and the engine by reason of its speed or nearness to such crossing is an immediate hazard; or

2. when an approaching train is plainly visible and is in hazardous proximity to such crossing.

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. *ABC Railway* _____

2. *Paul Payne* _____

COMMENT

When to use. Even if a negligence per se standard is lengthy or complex, or 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. In this example, the plaintiff and the defendant alleged violations of different statutory standards by the other. The definition combines the two standards, Tex. Transp. Code §§ 471.006, 545.251, to inform the jury that a violation of either statute is negligence.

Like PJC 5.1–5.3, PJC 5.4 consists of two parts—a definition and a question. The statutory definition of "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 of negligence. Also in that case, the word *means* in the definition should be replaced with *also means*.

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 (Tex. 1993),

guests from ages eighteen to twenty, *Smith v. Merritt*, 940 S.W.2d 602, 609 (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.

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. Keever*, 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.).

[Chapters 7–9 are reserved for expansion.]

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); *Continental Insurance Co. v. Wolford*, 526 S.W.2d 539 (Tex. 1975); *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); *Hilgenberg v. Elam*, 198 S.W.2d 94, 95–96 (Tex. 1946); *Restatement (Second) of Agency* § 227 (1958).

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); *Hilgenberg v. Elam*, 198 S.W.2d 94, 95–96 (Tex. 1946); *Restatement (Second) of Agency* § 227 (1958).

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); *Hilgenberg v. Elam*, 198 S.W.2d 94, 95–96 (Tex. 1946); *Restatement (Second) of Agency* § 227 (1958).

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).

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. 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 [lst 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 not conclusive if it was a subterfuge from the beginning or was persistently ignored or was modified by subsequent express or implied agreement of the parties; otherwise such a written contract is conclusive.

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.

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.

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); *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 entrustee 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—

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—

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—

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 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). PJC 10.14 is not designed for use when the plaintiff seeks to establish corporate liability for exemplary damages based on corporate policies or the nondelegable duties of the corporation.

Source of instruction. The supreme court adopted the doctrine set out in *Restatement (Second) 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 Hammerly Oaks, Inc. v. Edwards*, 958 S.W.2d 387, 391 (Tex. 1997); *Ramos v. Frito-Lay, Inc.*, 784 S.W.2d 667, 668–69 (Tex. 1990); *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). 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 below. *Fort Worth Elevators Co.*, 70 S.W.2d at 406. 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 vice-principal. One or more of the following definitions should be used if the grounds include an element in which the term "vice-principal" is used.

Only the applicable elements of vice-principal should be included in the definition as submitted to the jury.

The term "vice-principal" means:

1. A corporate officer.

2. A person who has authority to employ, direct, and discharge an employee of *ABC Corporation.*

3. A person engaged in the performance of nondelegable or absolute duties of *ABC Corporation.*

4. A person to whom *ABC Corporation* has confided the management of the whole or a department or division of the business of *ABC Corporation.*

See Fort Worth Elevators Co., 70 S.W.2d at 406.

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 vice-principal 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. *See 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 v. Reynolds*, 315 S.W.3d 867, 883–84 (Tex. 2010).

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. The unanimity instructions in PJC 10.14C come from the supreme court's January 27, 2005, order under Tex. R. Civ. P. 226a effective February 1, 2005, in all cases filed on or after September 1, 2003.

Comparative charge language. See also the current editions of State Bar of Texas, *Texas Pattern Jury Charges—Malpractice, Premises & Products* PJC 85.2 and *Texas Pattern Jury Charges—Business, Consumer, Insurance & Employment* PJC 115.39 for comparative questions and comments in malpractice and business submissions.

[Chapter 11 is reserved for expansion.]

PJC 12.1 Nuisance Actions Generally—When to Apply (Comment)

Definitions. "Nuisance" 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. *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). 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 a private nuisance action, a defendant's conduct substantially interferes with the use and enjoyment of real property owned by an individual or small group of persons. In a public nuisance action, a defendant's conduct unreasonably interferes with a right common to the public at large by affecting the public health or public order. 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.

Practitioners should apply PJC 12.2–12.5 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 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. In both private and public nuisance actions, proximate cause must be submitted to the jury as in PJC 12.5.

4. If the claim involves children injured while trespassing on a defendant's property, use PJC 66.10 ("Attractive Nuisance") in the current edition of State Bar of Texas, *Texas Pattern Jury Charges—Malpractice, Premises & Products*.

5. If the alleged conduct is a crime under a Texas criminal statute, use the applicable definition from the Texas Penal Code or applicable statute.

6. If the alleged conduct involves a trespass, the charge should refer to trespass separately from nuisance.

Pleading specific culpability. Nuisance actions involve three levels of culpability: (1) negligent conduct, (2) intentional conduct, or (3) conduct that is abnormal and out of place in its surroundings. *City of Tyler v. Likes*, 962 S.W.2d 489, 503 (Tex. 1997); *Bible Baptist Church v. City of Cleburne*, 848 S.W.2d 826, 829 (Tex. App.—Waco 1993, writ denied). 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 Conduct

Don Davis creates a "private nuisance" if *his* conduct substantially interferes with *Paul Payne*'s use and enjoyment of *his* land.

"Substantial interference" means that *Don Davis*'s conduct must cause unreasonable discomfort or annoyance to a person of ordinary sensibilities attempting to use and enjoy the person's land. It is more than a slight inconvenience or petty annoyance.

QUESTION _____

Did *Don Davis* intentionally create a private nuisance?

"Intentionally" 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: _____

PJC 12.2B Private Nuisance—Negligent Conduct

Don Davis creates a "private nuisance" if *his* conduct substantially interferes with *Paul Payne*'s use and enjoyment of *his* land.

"Substantial interference" means that *Don Davis*'s conduct must cause unreasonable discomfort or annoyance to a person of ordinary sensibilities attempting to use and enjoy the person's land. It is more than a slight inconvenience or petty annoyance.

QUESTION _____

Did *Don Davis* negligently create a private 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 12.2C Private Nuisance—Abnormal and Out of Place in Its Surroundings

Don Davis creates a "private nuisance" if *his* conduct substantially interferes with *Paul Payne*'s use and enjoyment of *his* land.

"Substantial interference" means that *Don Davis*'s conduct must cause unreasonable discomfort or annoyance to a person of ordinary sensibilities attempting to use and enjoy the person's land. It is more than a slight inconvenience or petty annoyance.

QUESTION _____

Was *Don Davis*'s conduct abnormal and out of place in its surroundings such as to constitute a private nuisance?

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. *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); *Hanson Aggregates West, Inc. v. Ford*, 338 S.W.3d 39, 41 (Tex. App.—Austin 2011, pet. denied); *Beere v. Duren*, 985 S.W.2d 243, 245 (Tex. App.—Beaumont 1999, pet. denied); *Lacy Feed Co. v. Parrish*, 517 S.W.2d 845, 850–51 (Tex. Civ. App.—Waco 1974, writ ref'd n.r.e.); *Columbian Carbon Co. v. Tholen*, 199 S.W.2d 825, 826–27 (Tex. Civ. App.—Galveston 1947, writ ref'd). 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. *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); *see also Warwick Towers Council of Co-Owners v. Park Warwick, L.P.*, 298 S.W.3d 436, 446–47 (Tex. App.—Houston [14th Dist.] 2009). Texas courts have broken actionable nuisance into three classifications: negligent, intentional, and abnormal or out of place in its surroundings. *City of Tyler v. Likes*, 962 S.W.2d 489, 503 (Tex. 1997); *Pool v. River Bend Ranch, LLC*, 346 S.W.3d 853, 857 (Tex. App.—Tyler 2011, pet. denied); *C.C. Carlton Industries, Ltd. v. Blanchard*, 311 S.W.3d 654, 659–60 (Tex. App.—Austin 2010, pet. denied); *Bible Baptist Church v. City of Cleburne*, 848 S.W.2d 826, 829 (Tex. App.—Waco 1993, writ denied). In the context of nuisance actions under PJC 12.2C, there is no definition for "abnormal and out of place," nor is there any general definition found in any Texas Supreme Court cases.

Elements of private nuisance. The four elements of a private nuisance action can be characterized as follows: (1) the plaintiff had an interest in the land; (2) the defendant interfered with or invaded the plaintiff's interest by conduct that was negligent, intentional, or abnormal and out of place in its surroundings; (3) the defendant's conduct resulted in a condition that substantially interfered with the plaintiff's use and enjoyment of his land; and (4) the nuisance caused injury to the plaintiff. *See Likes*, 962 S.W.2d at 503–04; *Burditt v. Swenson*, 17 Tex. 489, 502 (1856); *Aguilar v. Trujillo*, 162 S.W.3d 839, 850–51 (Tex. App.—El Paso 2005, pet. denied); *see also Schneider National Carriers, Inc.*, 147 S.W.3d at 275. These elements do not need to be submitted to the jury in separate questions.

Damages. See PJC 12.5.

Instruction regarding usefulness. 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.*, 311 S.W.3d at 660. 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. *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.

Proximate cause required for all culpability levels. Under all forms of nuisance, proximate cause should be submitted to the jury. See PJC 12.5.

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 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* intentionally create a public nuisance?

"Intentionally" 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: _____

PJC 12.3B Public Nuisance—Negligent 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* 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—Abnormal and Out of Place in Its Surroundings

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 _____

Was *Don Davis*'s conduct abnormal and out of place in its surroundings such as to constitute a public nuisance?

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 abnormal 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) (describing actionable nuisance).

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. *Schneider National Carriers, Inc. v. Bates*, 147 S.W.3d 264, 269 (Tex. 2004); *see also Barnes v. Mathis*, 353 S.W.3d 760, 763–64 (Tex. 2011) (per curiam); *Holubec v. Brandenberger*, 111 S.W.3d 32, 37 (Tex. 2003). Actionable nuisance is classified as conduct that is negligent, intentional, or abnormal and out of place in its surroundings. *City of Tyler v. Likes*, 962 S.W.2d 489, 503 (Tex. 1997); *Pool v. River Bend Ranch, LLC*, 346 S.W.3d 853, 857 (Tex. App.—Tyler 2011, pet. denied); *C.C. Carlton Industries, Ltd. v. Blanchard*, 311 S.W.3d 654, 659–60 (Tex. App.—Austin 2010, pet. denied); *Bible*

Baptist Church v. City of Cleburne, 848 S.W.2d 826, 829 (Tex. App.—Waco 1993, writ denied). Public nuisance actions involve an unreasonable interference with a right common to the general public. *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, 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). The interference must also adversely affect all or a considerable part of the community. *See Soap Corp. of America v. Balis*, 223 S.W.2d 957, 960 (Tex. Civ. App.—Fort Worth 1949, writ ref'd n.r.e.). In the context of nuisance actions under PJC 12.3C, there is no definition for "abnormal and out of place," nor is there any general definition found in any Texas Supreme Court cases.

Use of other definitions. "Public nuisance" is defined differently in statutes and municipal ordinances. Statutory definitions are narrow and specific to certain activities. If 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.

Instruction regarding usefulness. 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.*, 311 S.W.3d at 660. 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. *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.

Proximate cause required for all culpability levels. Under all forms of nuisance, proximate cause should also be submitted to the jury. See PJC 12.5.

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 & P. Ry. 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*, 131 S. Ct. 2527, 2534 (2011) (discussing Article III standing as matter of law in nuisance case).

PJC 12.4 Nature of Nuisance—Permanent or Temporary

If you answered "Yes" to Question _____ [*12.2 or 12.3*], then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Was the nuisance caused by *Don Davis* permanent or temporary?

A nuisance is "permanent" if it involves activity that will continue indefinitely and results in an injury that is constant and continuous.

A nuisance is "temporary" if it is occasional, intermittent, or recurrent, such that it is uncertain that any future injury will occur or that it will occur only at long intervals.

To determine if the nuisance is permanent or temporary, you may consider—

1. whether the nuisance is regular and constant (permanent) or irregular and intermittent (temporary); and

2. whether the nuisance is likely to continue in the future (permanent); and

3. whether the nuisance results in permanent injury to real property (permanent).

Answer "Permanent" or "Temporary."

Answer: _____

COMMENT

Permanent or temporary nuisance. If the nature of a nuisance is in dispute, categorizing a nuisance as permanent or temporary is a question for the jury. *Schneider National Carriers, Inc. v. Bates*, 147 S.W.3d 264, 286 (Tex. 2004).

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 Schneider National Carriers, Inc.*, 147 S.W.3d at 275; *West v. Breentag Southwest, Inc.*, 168 S.W.3d 327, 336 n.9 (Tex. App.—Texarkana 2005, pet. denied). See PJC 12.5.

PJC 12.5 Damages in Nuisance Actions

QUESTION _____

What sum of money, if paid now in cash, would fairly and reasonably compensate *Paul Payne* for the damages, if any, that were proximately caused by the nuisance?

The nuisance "proximately caused" *Paul Payne*'s damages if the condition created by *Don Davis* was a substantial factor in bringing about the damages, and without which condition such damages 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 damages might reasonably result therefrom.

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 a nuisance, you may consider the proximity, duration, and intensity of the nuisance.

1. Loss of market value.

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 in dollars and cents for damages, if any.

Answer: _____

2. Cost of repairs.

Consider the reasonable cost in *Clay* County, Texas, to restore the property to the condition it was in immediately before the occurrence in question.

Answer in dollars and cents for damages, if any.

Answer: _____

QUESTION _____

If you found that *Don Davis* caused a permanent nuisance, what sum of money, if paid now in cash, would fairly and reasonably compensate *Paul Payne* for the damages, if any, proximately caused by the nuisance?

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

1. Damages for property damage sustained in the past [*cost of repairs or market value; see Comment*].

Answer: _____

2. Damages for property damage that, in reasonable probability, *Paul Payne* will sustain in the future [*cost of repairs or market value; see Comment*].

Answer: _____

3. Damages for personal injury sustained in the past.

Answer: _____

4. Damages for personal injury that, in reasonable probability, *Paul Payne* will sustain in the future.

Answer: _____

5. Damages for mental anguish sustained in the past.

Answer: _____

6. Damages for mental anguish that, in reasonable probability, *Paul Payne* will sustain in the future.

Answer: _____

QUESTION _____

If you found that *Don Davis* caused a temporary nuisance, what sum of money, if paid now in cash, would fairly and reasonably compensate *Paul Payne* for the damages, if any, proximately caused by the nuisance?

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

1. Damages for property damage sustained in the past [*cost of repairs or market value; see Comment*].

Answer: _____

2. Damages for personal injury sustained in the past.

Answer: _____

3. Damages for mental anguish sustained in the past.

Answer: _____

COMMENT

When to use. PJC 12.5 should be used in all nuisance actions. The nature of the nuisance determines the available remedies. In a temporary nuisance action, a plaintiff may recover only for lost use and enjoyment that has already accrued. *Schneider National Carriers, Inc. v. Bates*, 147 S.W.3d 264, 276 (Tex. 2004). Future damages for temporary nuisance are not recoverable. *Schneider National Carriers, Inc.*, 147 S.W.3d at 276. If a nuisance is permanent, the owner may recover for lost market value, a figure that reflects all losses from the injury, including lost rents expected in the future. *Schneider National Carriers, Inc.*, 147 S.W.3d at 276. The two claims are mutually exclusive; a landowner cannot recover both in the same action. *Schneider National Carriers, Inc.*, 147 S.W.3d at 276.

Damages for nuisance include property and personal injury damages. A plaintiff may recover in a nuisance action for property damage, personal injuries, and mental anguish. *See Schneider National Carriers, Inc.*, 147 S.W.3d at 275–80. The following types of damages may be recoverable when they arise from a nuisance: (1) physical harm to property, such as by encroachment of a damaging substance; (2) physical harm to a person on his property from an assault on his senses or by other personal injury; and (3) emotional harm to a person from the deprivation of the enjoyment of his property through fear, apprehension, or loss of peace of mind. *Kane v. Cameron International Corp.*, 331 S.W.3d 145, 147–48 (Tex. App.—Houston [14th Dist.] 2011, no pet.).

Property damages recoverable by those with property interest: loss of market value or cost of repairs. 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. *City of Uvalde v. Crow*, 713 S.W.2d 154, 158–59 (Tex. App.—Texarkana 1986, writ ref'd n.r.e.). 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. *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.

Name of county. The county referred to should be the county in which the damage occurred. Determination of the reasonable cost of repairs in the county where the damage occurred would not require that repairs actually be made in that county if such repairs would be unavailable there.

Generally no double recovery allowed. Texas law does not generally permit double recovery for loss of market value and cost of repairs. *Parkway v. Woodruff*, 901 S.W.2d 434, 441 (Tex. 1995); *Southern County Mutual Insurance Co. v. First Bank & Trust of Groves*, 750 S.W.2d 170, 173–74 (Tex. 1988). When the prevailing party fails to elect between alternative measures of damages, the court should render the judgment affording the greatest recovery. *See, e.g., Kish v. Van Note*, 692 S.W.2d 463, 468 (Tex. 1985) (rendering judgment for each separate element of damages in order to give plaintiffs complete compensation for their losses). 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, 575–76 (Tex. App.—Beaumont 2008, pet. denied).

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. *Schneider National Carriers, Inc.*, 147 S.W.3d at 268 n.2. 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 15.3. 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, 503–04; *see also Kane*, 331 S.W.3d at 148–50 (noting that Texas law does not recognize fear-of-dreaded-disease claims in nuisance absent showing capability of harm); *Hanson Aggregates West, Inc. v. Ford*, 338 S.W.3d 39, 48 (Tex. App.—Austin 2011, pet. denied) (holding that no injunction for nuisance could be sustained based on a negligent-infliction cause of action because no such tort is recognized in Texas).

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). Where 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(c), (d). 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.

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.*, 338 S.W.3d at 45–48.

[Chapter 13 is reserved for expansion.]

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.

PJC 15.1 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 15.1 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 15.2 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 15.2 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 15.3 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 15.3 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).

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 15.8 (for other condition), 15.9 (for preexisting condition), and 15.10 (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 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 15.10.

PJC 15.4 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 15.4 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 15.3 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 15.10.

PJC 15.5 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 15.5 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 15.5 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 15.5 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.

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 15.6 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 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 15.3 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 15.10.

Scope of comments to PJC 15.5. The comments to PJC 15.5 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 15.3.

PJC 15.6 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 15.6 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 15.5 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 15.7 Personal Injury Damages—Exemplary Damages

PJC 15.7A 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 15.7B 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 15.7C 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 15.7A should be used to submit the question for exemplary damages for personal injury in causes of action accruing before September 1, 1995. PJC 15.7B 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 15.7C should be used.

Conditioned on finding of gross negligence or malice. PJC 15.7 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 predicating 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 15.7A, 15.7B, or 15.7C (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 16.8. .

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 15.7A.]

Source of definition and instructions. The definition of exemplary damages in PJC 15.7A 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 *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 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), *overruled on other grounds 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 con-

sider" 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 15.7B and 15.7C.]

Source of definitions and instructions. The definitions of exemplary damages in PJC 15.7B and 15.7C 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). The unanimity instructions in PJC 15.7C come from the supreme court's January 27, 2005, order under Tex. R. Civ. P. 226a effective February 1, 2005, in all cases filed on or after September 1, 2003.

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 15.8 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 15.8 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 15.3–15.5, 16.3–16.6, and 17.3).

When not to use—if liability question uses "injury." If the liability question in PJC 4.1 is submitted with the term "injury," PJC 15.8 should not be submitted.

Aggravation of preexisting condition. If there is evidence that the occurrence in question aggravated a preexisting condition, PJC 15.9 should be given in lieu of PJC 15.8.

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 15.9 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 15.9 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 15.3–15.5, 16.3–16.6, and 17.3).

When not to use—if liability question uses "injury." If the liability question in PJC 4.1 is submitted with the term "injury," PJC 15.9 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 15.10 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 15.10 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 15.10 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 15.3–15.5, 16.3–16.6, and 17.3).

When not to use—if liability question uses "injury." If the liability question in PJC 4.1 is submitted with the term "injury," PJC 15.10 should not be submitted.

Modify instruction not to reduce amounts because of plaintiff's negligence. If PJC 15.10 is given, the instruction not to reduce amounts because of the negligence of the plaintiff, injured spouse, or decedent, which appears in PJC 15.3–15.5, 16.3–16.6, 17.3, and 18.3–18.4, 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 15.11 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 15.11 is to be used in conjunction with PJC 15.12 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 15.12 Personal Injury Damages—Child's Loss of Consortium—Damages Question

If you answered "Yes" to Question _____ [*15.11*], 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 15.12 should be used in conjunction with PJC 15.11 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 15.10.

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 15.3 comment, "Bystander injury."

PJC 16.1 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 16.1 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 16.2 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 16.2 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 16.3 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 16.3 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.

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 noneconomic 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 15.10.

PJC 16.4 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 16.4 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 16.3 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 16.3 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 15.10.

PJC 16.5 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 16.5 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 16.3 and 16.4 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 16.3 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 15.10.

PJC 16.6 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 16.6 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 16.3 and 16.4 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 16.3 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 15.10.

PJC 16.7 Wrongful Death Damages—Exemplary Damages

PJC 16.7A 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 16.7B 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 16.7C 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 16.7A should be used to submit the question of exemplary damages for wrongful death for causes of action accruing before September 1, 1995. PJC 16.7B 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 16.7C should be used.

Conditioned on finding of gross negligence or malice. PJC 16.7 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 predicating 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 16.7A, 16.7B, or 16.7C (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. *Scoggins v. Southwestern Electric Service Co.*, 434 S.W.2d 376 (Tex. Civ. App.—Tyler 1968, writ ref'd n.r.e.) (parents of deceased child may not recover exemplary damages). A separate answer is recommended with respect to each constitutionally designated survivor. For the pattern question for apportionment of exemplary damages, see PJC 16.8.

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. *Russell*, 70 S.W.2d 397; *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 worker's 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 17.4.

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 16.8.

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 16.7A.]

Sources of definition and instructions. The definition of exemplary damages in PJC 16.7A 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), *overruled on other grounds 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 16.7B and 16.7C.]

Sources of definitions and instructions. The definitions of exemplary damages in PJC 16.7B and 16.7C 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). The unanimity instructions in PJC 16.7C come from the supreme court's January 27, 2005, order under Tex. R. Civ. P. 226a effective February 1, 2005, in all cases filed on or after September 1, 2003.

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 16.8 Wrongful Death Damages—Apportionment of Exemplary Damages

If, in your answer to Question _____ [*16.7*], you entered any amount of exemplary damages, then answer Question _____ [*16.8*]. Otherwise, do not answer Question _____ [*16.8*].

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.	*Mary Payne*	_____%
2.	*Paul Payne, Jr.*	_____%
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 16.8 is a submission of apportionment in a single question.

PJC 17.1 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 17.1 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 17.2 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 17.2 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 17.3 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 17.3 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 17.3 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.

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 Landers v. B.F. Goodrich Co.*, 369 S.W.2d 33 (Tex. 1963); *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 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 noneconomic 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 15.10.

Prejudgment interest. Prejudgment interest is recoverable on survival damages. Tex. Fin. Code § 304.102.

PJC 17.4 Survival Damages—Exemplary Damages

PJC 17.4A 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 17.4B 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 17.4C 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 17.4 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 17.4 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 predicating 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 17.4A, 17.4B, or 17.4C (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. *Russell*, 70 S.W.2d 397; *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 worker's 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 16.8.

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 17.4A.]

Source of definition and instructions. The definition of exemplary damages in PJC 17.4A 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), *overruled on other grounds 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 17.4B and 17.4C.]

Source of definitions and instructions. The definitions of exemplary damages in PJC 17.4B and 17.4C 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). The unanimity instructions in PJC 17.4C come from the supreme court's January 27, 2005, order under Tex. R. Civ. P. 226a effective February 1, 2005, in all cases filed on or after September 1, 2003.

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 18.1 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 18.1 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 18.2 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 18.2 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 18.3 Property Damages—Market Value before and after Occurrence

QUESTION _____

What is the difference in the market value in *Clay* County, Texas, of the vehicle driven by *Paul Payne* 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 answers at the time of judgment.

Answer in dollars and cents for damages, if any.

Answer: _____

COMMENT

When to use. PJC 18.3 submits the measure of damages to personal property based on the difference in market value before and after the occurrence. This is the usual measure for damages to personal property. *See Pasadena State Bank v. Isaac*, 228 S.W.2d 127 (Tex. 1950).

Name of county. The county referred to should be the county in which the damage occurred. *Thomas v. Oldham*, 895 S.W.2d 352, 359 (Tex. 1995).

Alternate submission in PJC 18.4. When damaged personal property is susceptible of repair, the owner may elect to recover the reasonable cost of such repairs as are necessary to restore the property to its condition immediately before the accident. *Isaac*, 228 S.W.2d 127; *Merrill v. Tropoli*, 414 S.W.2d 474 (Tex. Civ. App.—Waco 1967, no writ). He may also recover the value of the use of the property during the time reasonably required to effect repairs or restoration. *Chicago, Rock Island & Gulf Railway v. Zumwalt*, 239 S.W. 912 (Tex. Comm'n App. 1922, judgm't adopted). See PJC 18.4.

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 blank 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.

PJC 18.4 Property Damages—Cost of Repairs and Loss of Use of Vehicle

QUESTION _____

What sum of money, if paid now in cash, would fairly and reasonably compensate *Paul Payne* for *his* damages, if any, for the repairs to and loss of use of *his* vehicle 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 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.

1. Cost of repairs.

Consider the reasonable cost in *Clay* County, Texas, to restore the vehicle 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 vehicle.

Consider the reasonable value of the use of a vehicle in the same class as the vehicle in question for the period of time 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 18.4 is an alternative to PJC 18.3. It submits a measure of personal property damages based on the cost of repairs and the value of the lost use. When damaged personal property is susceptible of repair, the owner may elect to recover the reasonable cost of such repairs as are necessary to restore the property to its condition immediately before the accident. *Pasadena State Bank v. Isaac*, 228

S.W.2d 127 (Tex. 1950); *Merrill v. Tropoli*, 414 S.W.2d 474 (Tex. Civ. App.—Waco 1967, no writ). He may also recover the value of the use of the property during the time reasonably required to effect repairs or restoration. *Chicago, Rock Island & Gulf Railway v. Zumwalt*, 239 S.W. 912 (Tex. Comm'n App. 1922, judgm't adopted). To prove loss of use, it is not necessary to rent a replacement vehicle or show any amount actually expended for alternate transportation. *Luna v. North Star Dodge Sales, Inc.*, 667 S.W.2d 115 (Tex. 1984).

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 Hodges v. Alford*, 194 S.W.2d 293 (Tex. Civ. App.—Eastland 1946, no writ). PJC 18.4 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 vehicle in question immediately before the occurrence in question and immediately after the necessary repairs were made to the vehicle.
>
> "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.

Name of county. The county referred to should be the county in which the damage occurred. Determination of the reasonable cost of repairs in the county where the damage occurred would not require that repairs actually be made in that county if such repairs would be unavailable there.

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 to the jury as above.

Prejudgment interest recoverable. Prejudgment interest is recoverable on property damages. Tex. Fin. Code § 304.102.

PJC 19.1 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 before the charge is read to the jury. Tex. R. Civ. P. 272.
- 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 one that is merely sufficient to call the matter to the attention of the court will suffice. It means one that in substance and in the main is correct, *and that is 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.

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 before it is read to the jury (agreements to put objections on the record while the jury is deliberating, even with court approval, will not preserve error).
- 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 that is the subject of a question, definition, or instruction to preserve charge error.
- 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.

Preservation of charge error post-*Payne*. In its 1992 opinion in *State Department of Highways & Public Transportation v. Payne*, the supreme court declined to revise the rules governing the jury charge but 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 after *Payne* 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). However, in practice, *Payne* generated what amounts to an ad hoc system wherein courts decide preservation issues relating to charge error on a case-by-case basis. The keys to error preservation post-*Payne* now seem to be (1) when in doubt about how to preserve, do both (object and request); and (2) in either case, clarity is essential:

make your arguments timely and plainly enough that the trial court knows how to cure the claimed error, and get a ruling on the record. *See, e.g., Wackenhut Corrections Corp. v. de la Rosa*, 305 S.W.3d 594, 610–18 & 611 n.16 (Tex. App.—Corpus Christi 2009, no pet.).

Broad-form issues. 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. 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 (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 (Tex. 2005).

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.

APPENDIX

Following are the tables of contents of the other volumes in the *Texas Pattern Jury Charges* series. These tables represent the 2012 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.

Contents of *TEXAS PATTERN JURY CHARGES—MALPRACTICE, PREMISES & PRODUCTS* (2012 Ed.)

PJC 72.3	Question and Instructions—Capital Murder as a Ground for Joint and Several Liability (Tex. Civ. Prac. & Rem. Code § 33.013(b)(2)(B))
PJC 72.4	Question and Instructions—Aggravated Kidnapping as a Ground for Joint and Several Liability (Tex. Civ. Prac. & Rem. Code § 33.013(b)(2)(C))
PJC 72.5	Question and Instructions—Aggravated Assault as a Ground for Joint and Several Liability (Tex. Civ. Prac. & Rem. Code § 33.013(b)(2)(D))
PJC 72.6	Question and Instructions—Sexual Assault as a Ground for Joint and Several Liability (Tex. Civ. Prac. & Rem. Code § 33.013(b)(2)(E))
PJC 72.7	Question and Instructions—Aggravated Sexual Assault as a Ground for Joint and Several Liability (Tex. Civ. Prac. & Rem. Code § 33.013(b)(2)(F))
PJC 72.8	Injury to Child, Elderly Individual, or Disabled Individual as a Ground for Joint and Several Liability
PJC 72.9	Question and Instructions—Forgery as a Ground for Joint and Several Liability (Tex. Civ. Prac. & Rem. Code § 33.013(b)(2)(H))
PJC 72.10	Question and Instructions—Commercial Bribery as a Ground for Joint and Several Liability (Tex. Civ. Prac. & Rem. Code § 33.013(b)(2)(I))
PJC 72.11	Question and Instructions—Misapplication of Fiduciary Property or Property of Financial Institution as a Ground for Joint and Several Liability (Tex. Civ. Prac. & Rem. Code § 33.013(b)(2)(J))
PJC 72.12	Question and Instructions—Securing Execution of Document by Deception as a Ground for Joint and Several Liability (Tex. Civ. Prac. & Rem. Code § 33.013(b)(2)(K))
PJC 72.13	Question and Instructions—Fraudulent Destruction, Removal, Alteration, or Concealment of Writing as a Ground for Joint and Several Liability (Tex. Civ. Prac. & Rem. Code § 33.013(b)(2)(L))

[Chapters 73–79 are reserved for expansion.]

CHAPTER 80 PERSONAL INJURY DAMAGES

Contents of
***TEXAS PATTERN JURY CHARGES—BUSINESS, CONSUMER, INSURANCE & EMPLOYMENT* (2012 Ed.)**

Contents of
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Texas Alcoholic Beverage Code

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Texas Family Code

Texas Finance Code

Texas Health & Safety Code

Texas Labor Code

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Q

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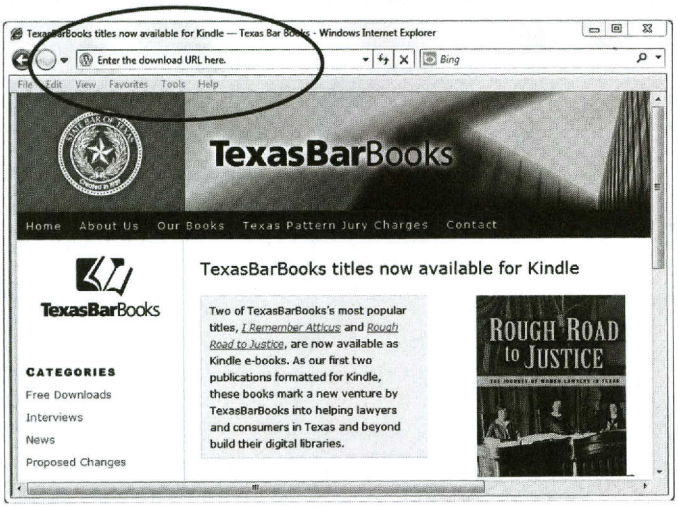

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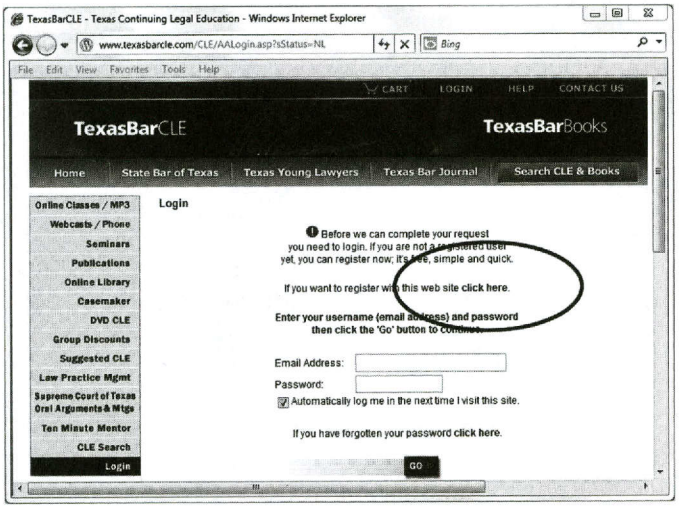

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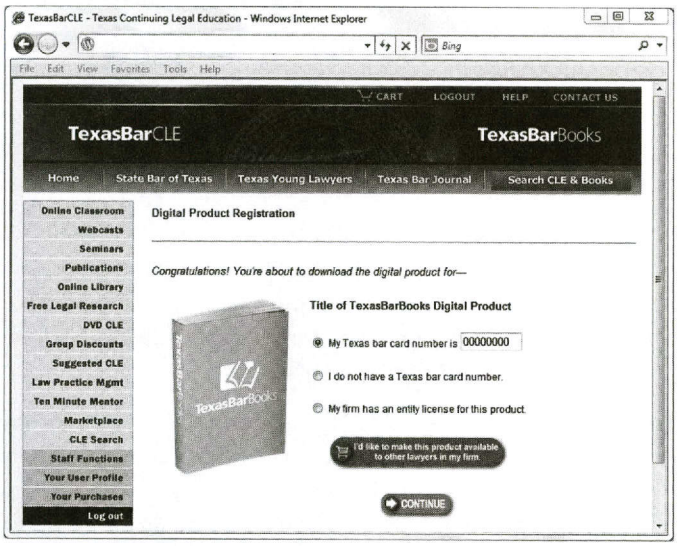

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